Department of Law
Spring Term 2014

Master’s Thesis in Public International Law
30 ECTS

Avoiding the Arbitrary
Development, displacement and the Kampala Convention

Author: Amanda Kron
Supervisor: Professor Iain Cameron
# Table of Contents

## PART I: INTRODUCTORY REMARKS

1.1 Introduction .................................................................................................................. 6

1.2 Research Question and Methodology ......................................................................... 11

## PART 2: SETTING THE SCENE: THE POLITICAL AND LEGAL FRAMEWORK

2.1 Sovereignty as Responsibility: Internal Displacement as an International Issue ................................................................................................................................. 13

2.2 Fragmentation of International Law, Especially Regarding DIDR/DFDR Issues .......................................................................................................................... 15

2.3 Definitions of Arbitrary Displacement ........................................................................ 15

2.4 Refugees and Internally Displaced Persons: Ensuring Protection for All Displaced Persons .............................................................................................................. 20

2.5 Regional and Voluntary Standards and Solutions ..................................................... 23

## PART 3: LEGAL ANALYSIS OF ARTICLE 10 OF THE KAMPALA ON DISPLACEMENT INDUCED BY PROJECTS

3.1 Development Projects .................................................................................................. 25

3.2 Who are IDPs? Defining the Scope of Article 10 ......................................................... 27

3.3 Public Actors and State Responsibility ....................................................................... 29

3.4 Private Actors .............................................................................................................. 31

3.5 “Full Information and Consultations of Persons Likely to Be Displaced” and Feasible Alternatives ........................................................................................................ 34

3.5.1 Consultation rights ................................................................................................. 34

3.5.2 Feasible alternatives .............................................................................................. 37

3.6 From “Compelling and Overriding Public Interest” to “Prevent […] as Much as Possible”: Proportionality, Necessity and Margins of Appreciation ........................................ 38

3.6.1 Necessity and proportionality ............................................................................... 41

3.6.2 The requirements of article 10 ............................................................................ 42

## PART 4: NARROWING THE GAP: HUMANITARIAN AID AND DEVELOPMENT

4.1 The Gap Between Humanitarian Actors and Development Actors ......................... 46

4.2 Narrowing the Gap: Monitoring, Difficulties and Lessons Learned ......................... 48
PART 5: REALIZING ARTICLE 10: IMPLEMENTATION AND SUGGESTIONS FOR ENSURING COMPLIANCE

5.1 HOPES AND CHALLENGES

5.2 THE IMPORTANCE OF MONITORING

5.2.1 The African Court of Justice

5.2.2 Collecting data: The role of the civil society

5.3 ENCOURAGING CHANGE: LESSONS LEARNED FROM THE INTERNATIONAL INVESTMENT REGIME AND THE COTONOU AGREEMENT

5.3.1 International investment agreements and human rights

5.3.2 The Cotonou agreement

PART 6: CONCLUSIONS
List of acronyms

ACP _________ African, Pacific and Caribbean
AU ___________ African Union
BIT __________ Bilateral Investment Treaty
CESCR __________ Committee on Economic, Social and Cultural Rights
DIDR __________ Development-induced displacement and resettlement
DFDR __________ Development-forced displacement and resettlement
EU ____________ European Union
FPIC __________ Free, prior and informed consent
IASC __________ Inter-Agency Standing Committee
ICCPR __________ International Convention on Civil and Political Rights
ICJ ____________ International Court of Justice
IDMC __________ Internal Displacement Monitoring Centre
IDP ____________ Internally displaced person
IIA ____________ International Investment Agreement
ILA ____________ International Law Association
ILC ____________ International Law Commission
JIPS __________ Joint IDP Profiling Service
NGO ____________ Non-governmental organisation
SRaSG __________ Special Rapporteur to the Secretary-General
SRSG ____________ Special Representative to the Secretary-General
UDHR __________ Universal Declaration of Human Rights
UNCTAD ________ United Nations Conference on Trade and Development
UNCITRAL ______ United Nations Commission on International Trade Law
UN - HABITAT ___ United Nations Human Settlement Programme
UNHCR __________ United Nations High Commissioner for Refugees
VCLT ____________ Vienna Convention on the Law of Treaties
Part I: Introductory remarks

1.1 Introduction

“If you are to suffer, you should suffer in the interest of the country.”

These were the words of then prime minister of India, Jawaharlal Nehru, spoken to the villagers that were displaced by the Hirakud Dam in 1948. As their lands were taken from them, Nehru assured them that this would be for the greater good. In 2012, more than 60 years later, about 10,000 persons had still not been resettled.

Development-induced displacement and resettlement (DIDR), or as it is also known, development-forced displacement and resettlement (DFDR), forces around ten million people to leave their homes and shelters each year. The overwhelming majority of these individuals stay within the boundaries of their nation State, and become internally displaced persons (IDPs), refugees within their own country. This is not surprising, considering those displaced internally by conflict alone in 2012 were predicted to be around 28 million people worldwide, twice as many as the estimated worldwide refugee population.

Recent years have seen the United Nations devoting greater attention to development-induced displacement, for example by instituting the Special Rapporteur on Adequate Housing, and by adopting a set of guidelines regarding forced displacement at the Human

---

3 Robinson, Courtland, Risks and Rights: The Causes, Consequences, and Challenges of Development-induced Displacement, The Brookings Institution – SAIS Project on Internal Displacement, 2003, p 3 [Robinson]. However, it is difficult to know for certain due to the lack of data and statistics on development-induced displacement, see IFRC 2012, p. 148. McDowell, Christopher and Morrell, Gareth, Displacement beyond conflict. Challenges for the 21st century, Berghahn Books 2011 [McDowell & Morrell] remark that both figures which have been mentioned as estimates for the number of persons displaced by development projects (10 and 15 million persons being displaced per year) are likely conservative estimates and add that according to “best available current data”, the number likely stands at 15 million persons per year, see p. 171.
4 UNU-EHS and UNHCR, Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa, June 2012, pp. 12 - 13. See also Oleschak, Rekha, The International Law of Development-Induced Displacement (PhD Diss.), University of St. Gallen, Graduate School of Business Administration, Economics, Law and Social Sciences, Dissertation No. 3471 [Oleschak], p. 61: “most of the time, ‘development-displacees’ remain within the border of their countries.”
6 Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, established by UN Commission on Human Rights, Resolution 2000/9, Question of the realization in all countries of the economic, social and cultural rights, 17 April 2000, UN Doc. E/CN.4/2000.
Rights Council session in 2007. These developments have caused international legal scholars Grant Dawson and Sonia Farber to argue that we are now at a “potential turning point in the ‘dominant understanding of the role of the state’ and an opportunity for states and non-state actors to rethink development-forced displacement.”

Currently, the rights of individuals and communities to decide how they want to use their land can be weighed against “the greater good”, which is often read as the will of governments and private actors proposing development projects such as dams, mines, conservation areas and other alternative uses of the land. The utility of the land is being discussed, as some people claim that it is “under-utilized” under the traditional usage scheme. This argument for intensified land use has become particularly pressing in the light of food security issues arising from the threat of desertification and soil degradation due to climate change. However, as Guardian journalist and author Fred Pearce has articulated it, it is worth noting that the world food production at present stands at more than enough to feed the world, and thus, the issue of food security regards the distribution of the food more than a need for increased production. Additionally, land tenure is often needed to prove one's rights and ownership over the land even if most international standards on the topic do not actually require such tenure.

The sovereignty of governments and the responsibility of those governments for the individuals and/or communities that live on their territories have long been discussed within the field of internal displacement. Balancing the need for development with the

---

9 IFRC 2012, p. 146.
10 Ibid.
right not to be impacted negatively by specific development projects is not always easy, as
development is desperately needed for many reasons in poor parts of the world; e.g. to
secure the fiscal stability of the State to ensure a functional legal system and accountability
of public officials, to ensure that hospitals, courthouses and schools are built, to ensure
jobs for a growing population, among other things. On the other hand, development needs
to be carried out in a way that is on behalf of and with the co-operation of the beneficiaries
it is trying to assist. It has been persuasively argued that the implementation of rules on
internal displacement is actually in the long-term interest of the State and private actors,
even if not always in the short-term interest.\textsuperscript{14}

The issue of development-induced displacement is of particular importance in Africa,
since the continent has been overburdened by displacement due to the increasing number
of large-scale development projects within a largely non-existent or weak legal framework
in many States.\textsuperscript{15} To provide some sense of proportion, 70\% of large-scale land
acquisitions are estimated to take place on the African continent.\textsuperscript{16}

This thesis will discuss both \textit{substance} – which projects that can be considered of public
value, and where must the line be drawn on the appropriation of land – and \textit{procedure} – how
to best inform and consult with the inhabitants prior to undertaking development projects
in an attempt to create a good dialogue and a way forward for both parties. The procedural
aspect is especially crucial in preventing forced displacement as it allows the people living
in the affected area to become informed rights-bearers rather than ever-marginalized
victims of rights abuses, and for these individuals to view themselves as such. At their best,
these procedures inform the public discussion for the better.\textsuperscript{17}

While the global population of internally displaced persons is now estimated to be at
least twice the size of that of refugees, internal displacement remains an under-researched
area of international law and politics.\textsuperscript{18} Furthermore, the situation of individuals displaced
by development projects is an even further under-researched area.\textsuperscript{19} It is perhaps telling
that the State of the World’s Refugees Report by the United Nations High Commissioner

\textsuperscript{14} Brookings-LSE Project on Internal Displacement, \textit{Taking Stock of Internal Displacement: Twenty Years On},
\textsuperscript{15} Dawson \& Farber, p. 138.
\textsuperscript{16} IFRC 2012, p. 163.
\textsuperscript{17} Kälin, Walter and Schrepfer, Nina, \textit{Internal displacement and the Kampala Convention: an Opportunity for development
actors}, Internal Displacement Monitoring Centre, 20 November 2012, p. 51 [Kälin \& Schrepfer].
\textsuperscript{18} Koser, Khalid, \textit{Climate Change and Internal Displacement: Challenges to the Normative Framework}, pp.
289 - 305 in Piguot, Etienne, Pécoud, Antoine and de Guicheneire, Paul (eds.), \textit{Migration and Climate Change},
UNESCO 2011, p. 289.
\textsuperscript{19} Kälin \& Schrepfer, p. 11. See also Olechak, p. 3, IFRC 2012, p. 148 (regarding lack of data and statistics). See
also Cernea, Michael M, Development-induced and conflict-induced IDPs: Bridging the research divide,
for Refugees (UNHCR) in 2006 only devoted one paragraph out of more than 220 pages to displacement caused by development projects, noting that “though displacement has many causes, it is those uprooted by conflict and human rights violations who generally arouse the most concern.”

It is worth mentioning in this context that development-induced displacement may entail multiple human rights violations as well, specifically violations of procedural rights and rights to housing, land and property.

On the 6th of December 2012, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention or the Convention) entered into force, thereby becoming the first international and regional legally binding instrument on the rights of internally displaced persons. Building on the 1998 Guiding Principles on Internal Displacement (the Guiding Principles), the Convention binds together different legal sources and frameworks in order to create a more cohesive and unified framework. This cohesiveness made the Special Rapporteur on Internally Displaced Persons note that “the unique ‘added value’ of this Convention stems from how comprehensive it is and the manner in which it addresses many of the key challenges of our times, and indeed, of Africa.”

The evolution towards greater coherence and cohesiveness is particularly relevant and visible in the context of article 10 of the Convention, which deals with development-induced displacement. Part of the unification and cohesiveness promoted by the Convention is the further crystallisation of the right not to be displaced, which has been developed in distinct legal instruments over the last few decades. In doing so, the

---


21 See e.g. Robinson, p. 4: “In these instances, and they are manifold, development-induced displacement constitutes a violation of human rights and humanitarian law and calls for a response from the international community.” See also Global Protection Cluster, Handbook for the Protection of Internally Displaced Persons, June 2010, p. 138 [GPC IDP Handbook].

22 See e.g. Internal Displacement Monitoring Centre and The Economic, Social and Cultural Council (ECOSOCC) of the African Union, Making the Kampala Convention work for IDPs. Guide for civil society on supporting the ratification and implementation of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa, July 2010 [Civil society guide], p. 5 and Phuong, pp. 32 - 33: “What is important in the case of displacement caused by natural disasters and development-induced displacement is that they can involve human rights violations and these two situations should therefore be examined as well.”

23 Statement by the UN Special Rapporteur on the human rights of internally displaced persons Chaloka Beyani to mark the coming into force of the Kampala Convention, An international model emerges today in Africa to address the plight of millions of internally displaced persons, Geneva, 6 December 2012 [Beyani Statement 2012].

24 Kidane, pp. 58 - 59: “The right not to be displaced or the duty not to displace is the cornerstone of the rights-based regime that the AU Convention establishes. Although numerous human rights and humanitarian law instruments recognize this right indirectly, it gained its finest expression in the UN Guiding Principles, and the AU Convention adopted its description of this right.” See also Civil society guide, p. 13: “By reinforcing these norms and bringing them together into one instrument, it offers a unique legal framework to address the specificities of internal displacement on the African continent.” See also Morel, Michèle, Stavropoulou, Maria and Durieux, Jean-François, The History and the Status of the Right not to be Arbitrarily Displaced, Forced Migration Review 41 (2012) at p. 6 [Stavropoulou et al 2012].
Convention also provides a tool for narrowing the gap between humanitarian actors and development actors working with IDPs. In their contribution to the World Disasters Report, published by the International Federation of the Red Cross, Elizabeth Ferris et al draw attention to the particular importance of narrowing this gap in the context of development-induced displacement.\(^{25}\) As the displacement of individuals and communities tends to create resistance among the local communities, especially in relation to housing, land, and property rights, the lack of good consultative process in the process of development can in turn trigger a humanitarian crisis.\(^{26}\) In addition, the case of the Fukushima disaster and other toxic spills such as the tragedy in Bhopal points to the fact that there are at times close linkages between development projects, private actor involvement and man-made disasters.\(^{27}\) From an African context, the tragedy of the Ogoni people in Nigeria having their lands and waters polluted by a consortium of oil companies supported by military aid from the junta government in place at the time comes to mind.\(^{28}\)

\(^{25}\)IFRC 2012, p. 151.

\(^{26}\)Ibid. See also United Nations High Commissioner for Refugees, Concept Paper: High Commissioner’s Dialogue on Protection Challenges 11-12 December 2013, Protecting the Internally Displaced: Persisting Challenges and Fresh Thinking, p. 2: “Issues such as rule of law, transitional justice, security sector reform, gender equality, livelihood restoration, environmental sustainability, housing, land and property issues – key factors in most IDP situations and particularly relevant to resolving them – are also developmental issues.” As regards the risk for a humanitarian crisis, see also Cohen 2010, p. 36: “A complex mix of motivations produced the broader international approach that seeks to protect and assist people uprooted within their own countries. The growing number of IDPs was a key consideration as was the risk that conflict and displacement in one country could spill over borders and disrupt regional and international stability.”

\(^{27}\) IFRC 2012, p. 151. See also Koppel Maldonado, Julie, “A New Path Forward: Researching and Reflecting on Forced Displacement and Resettlement” in Journal of Refugee Studies 25: 2 (2012), p. 210: “Correa also emphasized that it is important to address the human-created factors that have shaped these so-called natural disasters, which are really socially driven; such factors include rapid urbanization, the link between poverty and vulnerability, immense environmental degradation from deforestation and the loss of natural drainage systems in urban areas. These considerations are especially significant as natural disasters, and extreme events are predicted to increase and become worse in a changing global climate.”

1.2 Research Question and Methodology

Research Question:

In this thesis, I will be investigating the following: What can the newly adopted African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) mean for the rights of persons internally displaced by development projects? In addition, what are the potentials for its implementation and how could such implementation best be ensured?

Article 10 of the Kampala Convention deals with the prevention of development-induced displacement. Thus, I will be looking solely at the preventive phase, notably the emerging right not to be arbitrarily displaced. I will not be discussing what has been coined as the two other phases of displacement: finding solutions during displacement and creating durable solutions after displacement, such as compensation or restitution.  

Sadly, most individuals who are displaced are worse off than they were before, either because they are not assisted at all (such as in the case with the Hurakad dam above), or because the compensation is either insufficient, or land so scarce, that they will not find a plot of suitable land regardless. Former Special Representative to the Secretary-General (SRSG) Francis M. Deng also underlines in his compilation and analysis of legal norms on internal displacement that “it must be stressed that, conceptually, a clear distinction has to be made between legal questions related to the causes and the prevention of displacement and guarantees relevant to those who already have been displaced.” For these reasons, I find it most interesting and important to focus on how displacement can be avoided in the first place.

29 These three phases were created as a part of the structure of the Guiding Principles, and then used again within the context of the Kampala Convention, see Morel, Michèle, *The Right not to be Displaced in International Law*, (PhD Diss.), Ghent University Faculty of Law, Department of Public International Law, Academic year 2012-2013 [Morel dissertation], p. 296 as well as Stavropoulou, Maria, The Kampala Convention and protection from arbitrary displacement, *Forced Migration Review* 56 (2010), p. 63 [Stavropoulou 2010].


In my analysis of the Kampala Convention, I will use the sources of international law as stipulated by article 38 of the Statute of the International Court of Justice. In my interpretation of the obligations put forward by the Convention, I will use the rules of treaty interpretation from the Vienna Convention on the Law of Treaties, which have been deemed to serve as customary international law. To address the obligation of States not to violate treaty obligations, I will also draw upon the Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC Draft Articles) to supplement my analysis.

My main focus will be on the use of international human rights law, since the right not to be displaced has primarily found its roots in this context. While international humanitarian law will be referred to in this thesis, it will only be discussed in the context of providing a legal source to the right not to be arbitrarily displaced by development projects, and the effects that development projects can have on the application of and interpretation of humanitarian law. The same logic applies to international environmental law. I will not be focusing on the obligation of actors proposing projects to undertake social and environmental assessments prior to such projects, as such obligations has been analysed in great depth elsewhere, and since the technical details of such assessments are not necessary for the purposes and scope of this thesis.

As I was fortunate enough to be interning at the Swedish Permanent Mission to the United Nations in Geneva during the fall of 2013, I attended the UNHCR High Commissioners Dialogue on Protection Challenges with the theme of internal displacement in December of 2013. While in Geneva, I also met with representatives from organisations such as the Internal Displacement Monitoring Centre (IDMC) and the UNHCR.

Very few formal preparatory works exist to the Kampala Convention, and I will therefore be basing my analysis on other sources, such as the previous drafts of the convention and reports from the negotiations. Large parts of the Convention draw upon the Guiding Principles on Internal Displacement, and the background documents to the principles, such as the legal annotations, will therefore be relevant. The annotations to the Guiding Principles were developed in order to provide “an in depth understanding of the

32 Article 38 of the ICJ Statute has been to serve as the main provision on the sources of international law, see e.g. Harris, David, Cases and Materials on International Law, 7th ed., Thomson Reuters 2010, p. 15 [Harris].
Principles for the legal community and all others seeking to strengthen international law so that it might better protect displaced persons”.

To celebrate the ten-year anniversary of the Guiding Principles a revised version was created in 2008. These annotations are not binding in nature, but rather “indicate the legal sources that provide the basis of these Principles”. They nonetheless remain helpful for interpretation purposes, not least due to the fact that they have been developed by the two former Special Representatives to the Secretary-General, one of the most important authorities in this field.

Doctrine along with comments from different stakeholders in the process such as organisations from the civil society will also be used extensively. As has been noted above, the use of statements and reports of the Special Rapporteurs will reflect the particular standing that these actors have had in the field of internal displacement.

In this thesis, I will be arguing based on the hypothesis that: By connecting different legal frameworks and different sources of law from human rights law, environmental law, refugee law and humanitarian law, article 10 of the Kampala Convention is contributing to narrowing the gap between development actors and humanitarian actors, improving access to and recognition of rights of those internally displaced, in particular the right not to be arbitrary displaced by development projects. I will also be looking into implementation hopes and challenges, as well as presenting proposals as to ensure that the rights of those at risk of being internally displaced by development projects are upheld.

**Part 2: Setting the scene: the political and legal framework**

2.1 Sovereignty as responsibility: internal displacement as an international issue

“...The explosion of civil wars emanating from and following the Cold War brought into view millions of persons inside their own countries who were uprooted from their homes and in need of international protection and assistance. […]"

---

36 *Legal annotations*, p. 1.
38 Ibid.
When first counted in 1982, 1.2 million IDPs could be found in 11 countries; by 1995, the number had surged to 20 to 25 million.”

Francis Deng and Roberta Cohen released their study *Masses in Flight: The Global Crisis of Internal Displacement* in 1998 against the backdrop of the steadily growing number of persons displaced within the border of their own States. In the report, they launched the concept of “sovereignty as responsibility”; that the rights of the State were linked to and dependent on the primary responsibility that States had to protect the rights of those on their territory. If States could not live up to this responsibility, the international community was to hold such States accountable for their behaviour. This concept was present throughout the creation of the Guiding Principles, and went on to become the foundation for the later concept “responsibility to protect”, also known as R2P. Thus, while the primary responsibility for internally displaced persons was to be borne by the State in question, it was also important to maintain the rights and protection needs of those internally displaced on the international agenda.

In the Outcome Document of the 2005 World Summit the present States acknowledged the Guiding Principles as an important framework on internal displacement. Just one year later, the Great Lakes Protocol on the Protection and Assistance of Internally Displaced Persons (the Great Lakes Protocol) became the first sub-regional multilateral agreement to acknowledge the importance of the Guiding Principles by obliging their Member States to transform these principles into binding law. A few years later, in 2009, the leaders of the Member States of the African Union agreed upon the text of the Kampala Convention, the first regional and multilateral legally binding agreement on internal displacement, making

---

39 Cohen 2010, p. 35.
40 Deng, Francis M. and Cohen, Roberta, *Masses in Flight: The Global Crisis of Internal Displacement*, The Brookings Institution 1998 [Deng & Cohen 1998], p. 7: [This] study emphasizes that the concept of sovereignty cannot be dissociated from responsibility: that is to say, a state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens”.
42 See e.g. Mooney, Erin, *The Guiding Principles and the Responsibility to Protect*, *Forced Migration Review* Special Edition: Ten Years of the Guiding Principles, December 2008, p. 12: “In fact, the intellectual roots of R2P run deep, extending to and very much inspired by international approaches to IDP protection introduced a decade earlier. In particular, the concept of ‘sovereignty as responsibility’, which is at the core of R2P, has a pedigree traceable to the earliest days of IDP protection advocacy.”
43 United Nations General Assembly (UNGA), Resolution 60/1, 2005 World Summit Outcome, 24 October 2005, UN Doc. A/RES/60/1, para. 132.
the soft law regulations of the Guiding Principles into binding hard law obligations for the State parties.

2.2 Fragmentation of international law, especially regarding DIDR issues

The fragmentation of international law has been discussed extensively within the legal literature for at least twenty years.\(^{45}\) The fragmented approach to DIDR has been considered to be problematic, as voiced here by Penz, Drydyk and Bose: “Norms to protect those vulnerable to victimization by development through displacement need to be given a firmer basis in international law. While such norms are scattered throughout international human-rights law and some legal tools to realize them are available, but mostly in soft law […] ‘DIDR […] remains a relatively undeveloped area of international law’ (Barutciski, 2006: 94) [emphasis added].”\(^ {46}\) De Wet is of a similar opinion when he argues that if “an international alliance of funding and other organisations (such as UN groupings) could be formed, that spoke with one voice about displacement and resettlement, and that underwrote an independent and international monitoring mechanism (which could include inspection panels), it could provide the political and economic leverage necessary to ensure the consistent adoption and implementation of internationally accepted guidelines – in the private sector as well [emphasis added].”\(^ {47}\)

2.3 Definitions of arbitrary displacement

As Rekha Oleschak has noted, a number of different terminologies have been used to describe displacement stemming from development projects within different normative frameworks, such as forced evictions, involuntary or coerced displacement, population transfers and internal displacement.\(^ {48}\) She herself proposes a definition on development-

---

\(^{45}\) A very good oversight of the issue can be found in Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 [Report ILC 2006]. At para 7, Koskenniemi notes that: “It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also lead to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.” While this issue is complex and important, I will not be delve into it further here, due to constraints in space and since it is not necessary for the purposes of this thesis.

\(^{46}\) *Penz, Drydyk & Bose*, p. 256.


\(^{48}\) *Oleschak*, p. 9.
induced displacement that can be either forced or voluntary. As article 3 of the Kampala Convention obligates State parties to refrain from, prohibit and prevent “arbitrary displacement” of populations, as well as to ensure the accountability of non-State actors doing the same, this is the term that I will be using in my interpretation of article 10. The same phrasing comes back in article 4 (4) of the Convention, which contains a non-exhaustive list of what actions can constitute such arbitrary displacement. Relevant to situations of development-induced displacement are mainly d): displacement caused by […] violations of human rights, e): displacement as a result of harmful practices [e.g. toxic waste], f): forced evacuations as well as the saving clause in h): displacement caused by any act, event, factor or phenomenon of comparable gravity to the other examples which has not deemed to be justified under international law. In fact, the Kampala Convention is the first internationally legally binding document to recognize the right not to be arbitrarily displaced.

Within article 10 and the related articles on the prevention of development-induced displacement thus lies an assumption that while some transfers of populations may be legitimate under international law, “arbitrary displacement” is a prohibited practice, and it might therefore be worthwhile to briefly address the definition of this phenomena. As the same wording is used in Guiding Principle 6 (c), I will also look to the interpretation of this principle in my analysis of arbitrary displacement. Arbitrary displacement has been defined as consisting of three main aspects: the removal of individuals, forcibly, in a way which is not conforming with international law. Forced evictions can be seen as a subset or different kind of arbitrary displacement, which is encompassing many of the other forms of forced movement. Chaudhry fittingly describes such evictions as being part of the same process as arbitrary displacement. As the phenomena of forced evictions can therefore be seen as partly overlapping with arbitrary displacement, I will use some of the general comments and similar materials pertaining to forced evictions during my discussion on arbitrary displacement.

---

51 See e.g. Legal annotations, p. 27.
52 See article 33 (1) VCLT regarding interpretation via the wording and general meaning of words used.
54 Morel dissertation, p. 50: "Furthermore, one term seems to encompass all other terms: displacement (or, forced migration)."
55 Chaudhry, p. 603.
a) Removal of individuals

This aspect doesn’t require too much additional explanation, but it can perhaps be noted that dams and similar development projects often entail this aspect, especially in more densely populated countries such as India, Rwanda or Burundi, and particularly in the case of large-scale projects that require extensive areas of land for its purpose.

b) Forcibly

As a second aspect, the displacement must have been forced, as opposed to voluntary migration due to e.g. economic reasons.

Some authors within the academic community have raised difficulties with distinguishing between forced and voluntary migration, and argued that phenomena such as climate change is contributing to further blurring the lines between these two definitions. Walter Kälin, former SRSG on IDPs, writes in a United Nations University Policy Brief from June 2013 that “[w]hile the distinction between forced and voluntary movements is important, they often cannot be clearly distinguished in real life, but rather constitute two poles of a continuum, with a particularly grey area in the middle, where elements of choice and coercion mingle”. Kälin concludes that if it is not feasible, permissible, or can be reasonably required of a person to return to his or her place of origin, the movement can be categorized as forced. This argument is echoed by Vikram Kolmannskog of the Norwegian Refugee Council, who notes that “[r]egardless of whether people initially moved voluntarily, they can also be considered displaced if the land later has become so degraded that they cannot return”. In Kolmannskog’s line of reasoning, we can thus see a similar idea to that of permissibility, feasibility and reasonably required return which Kälin develops. Elizabeth Ferris of the Brookings Institution also takes note of the difficulty to distinguish between forced and voluntary migration, and writes that “[i]n practice, as many have noted, the distinction between voluntary and forced movement is often hard to define and conceptualize, particularly in the context of climate change.”


57 Ibid, p. 43.


Nonetheless, and as several authors within academia note, the distinction between forced and voluntary migration remains important, e.g. in order to grant protection to persons fleeing an oppression which does not only stem from poverty, but whose rights have also been actively violated by their respective States.\textsuperscript{60} While this essay does not delve into to the specifics of compensation rights and processes for persons who have already been internally displaced, the forcible nature of their displacement can been seen as a main reason for granting these individuals and communities compensation.

c) Not conforming with international law

Lastly, the displacement is characterized by not conforming to international legal standards. This requirement is echoed by the Basic Principles and Guidelines on Development-Based Evictions and Displacement (also referred to by Kälin in his legal annotations) that demand that the implementation of development projects must be “carried out in accordance with international human rights law”.\textsuperscript{61} In his legal annotations to Guiding Principle 4 regarding the right to be protected from arbitrary displacement, Kälin notes that while forced displacement may at times be acceptable, “exceptions from protection against displacement are restricted to cases of an ultima ratio which shall be resorted to only if there are no other alternatives.”\textsuperscript{62} He observes that the term ‘arbitrary’ “implies that the acts in question contain “elements of injustice, unpredictability and unreasonableness” […] particularly because they are not in conformity with domestic law, pursue purposes that are not legitimate in light of the requirements of international human rights and humanitarian law, are not based on objective and serious reasons, or are not necessary to achieve legitimate goals, i.e., lack proportionality (id.).”\textsuperscript{63} I will return to the criteria of proportionality when discussing the specific requirements of article 10 of the Kampala Convention below.


\textsuperscript{62} Legal annotations, p. 30.

\textsuperscript{63} Ibid.
International legal standards on this topic are scattered throughout the human rights normative framework. I will limit my discussion here to the rights which have been most frequently mentioned in the discussions by leading authorities on the Kampala Convention: the right to freedom of movement and residence, the right to property, the right to adequate housing, and the right to freedom from arbitrary interference in one’s home. As “international law is yet to evolve in order to legally recognize the right to land as a human right” I will not be discussing the prospects of such a right here.

As regards the right to freedom of movement and choice of residence, article 12 of the International Convention on Civil and Political Rights (ICCPR) states that everyone “lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

The right to property is not included in the ICCPR, but can be found in articles 14 and 21 of the 1981 African Charter on Human and Peoples’ Rights (the Banjul Charter) as well as article 17 of the Universal Declaration of Human Rights (UDHR). Legal recognition of property rights has been deemed crucial to preventing, and finding solutions to, internal displacement.

Regarding the right to adequate housing, UDHR article 25 stipulates that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing […]”. A similar provision can be found in ICESCR article 11, which provides that “an adequate standard of living for himself and his family, including adequate food, clothing and housing […]”. The former UN Commission on Human Rights (now Human Rights Council) has also issued two resolutions declaring that ”the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing.”

In the African context, the African Commission on Human and Peoples’ Rights (the Commission) filed what has been termed “a landmark” decision against Nigeria in 2001, where the State was found guilty of breaching several articles of the Banjul Charter by

---

64 Oleschak, who also brings in environmental and other international legal frameworks, see e.g. page 8. See also GPC IDP Handbook, p. 138.
65 See e.g. Deng 1998, para. 10: "this prohibition [of arbitrary displacement] is only implicit in certain provisions, in particular those pertaining to freedom of movement and choice of residence, freedom from arbitrary interference in one’s home, and the right to housing." Housing, land property rights have been deemed to be especially important for those internally displaced, see e.g. Kälin & Schrepfer, pp. 18 - 19 and Chaudhry, pp. 607 - 608.
66 See Chaudhry, p. 607.
contributing to contaminating water, soil and air as well as destroying the homes and livelihoods of people living on these lands. The right to adequate housing, which is implicitly protected by the Banjul Charter, was deemed to have been breached by the actions of the Nigerian government at the time.

As regards the right to privacy and freedom of interference from one’s home, article 17 of ICCPR provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence […]” and that “[e]veryone has the right to the protection of the law against such interference or attacks.” The right to freedom of interference from one’s home is particularly important in the context of internal displacement. As part of an amicus curiae before the US courts in the case of Doe v Unocal in 2000, a number of international law scholars remarked that “forced relocation is a particularly egregious violation of international law because it implicates a variety of fundamental human rights including […] the right to be free from arbitrary interference with one’s privacy, family and home [emphasis added].”

In addition, it should be noted that by entering into force on December 6th, 2012, the Kampala Convention is now part of creating such international and regional legal standards by means of its article 10 along with the rest of the Convention. If States were to violate these provisions, that would render the displacement arbitrary and such States would be guilty of breaching international law under the ILC Draft Articles, which will be discussed in greater depth later on in this thesis.

2.4 Refugees and internally displaced persons: ensuring protection for all displaced persons

As internally displaced remain within their own country, they are not protected by refugee law, which only grants protection to individuals who have crossed an internationally

69 African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001), Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria [SERAC/CESR v Nigeria]. See also generally Coomans. The case has been termed a "landmark" decision by the GPC IDP Handbook, p. 39.

70 SERAC/CESR v Nigeria, para. 63: “The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions." See also Coomans at p. 755: "Although not provided for in the text of the Charter, the Commission recognises a right to housing or shelter as being implicitly part of the treaty, being the result of the combination of Articles 14 (property), 16 (health) and 18 (family rights)."


72 See e.g. page 31 of this thesis.
recognized State border. Catherine Phuong is concerned that a definition of IDPs could be, but must not be, to the detriment of asylum seekers. This fear is reiterated by the Global Protection Cluster’s handbook on IDPs, which indicates that humanitarian actors must be cautious whilst assisting in the relocation of persons:

“Depending on the context, assisting in the relocation or evacuation of civilians within a country in conflict might have the effect of eroding the principle of access to asylum outside the country, at least temporarily. The right to seek asylum should remain an option for all individuals or groups both before and after a relocation or evacuation movement. Steps should be taken to provide information on this alternative both to the civilian population and parties to the conflict. The fact that asylum-seekers may have been internally displaced, even if due to a humanitarian evacuation, should not negatively affect their claim for asylum.”

The question of whether the protection of internally displaced persons might be detrimental to the protection of refugees has been further elaborated by James Hathaway and Roberta Cohen, who have differing opinions on the matter. While Hathaway generally believes that the protection of refugees must not be effected negatively by the protection of IDPs, Cohen sees these two protection regimes as equally important, and believes that they add to one another rather than subtract. As Kidane notes, the argumentation provided by Cohen seems most convincing in that she manages to show how refugees should not be seen as more deserving than IDPs since these two groups frequently find themselves in similar situations.

These discussions on how the situations of internally displaced on the one hand and refugees on the other could effect one another had arisen earlier, as former High Commissioner for Refugees Sagado Ogata advocated for a “right to remain” as a complementary right to the right to leave one’s country. Stavropoulou, Morel and Durieux remark that this was a controversial choice:

---

73 See article 1 (A) 2 of the Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, referring to a refugee as someone "outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country [emphasis added]."
74 See e.g. Phuong, p. 27: "protection for internally displaced persons must not undermine the institution of asylum."
76 Hathaway, James and Cohen, Roberta cited by Kidane at pp. 35 - 41.
77 Ibid, p. 50.
78 Ibid, p. 38 and 42.
“Not everyone was impressed with the promotion of a right not to be displaced or a right to remain. Opponents seemed particularly upset with Ogata’s ‘right to remain’, which they saw as duplicating existing human rights law and, more importantly, endangering the right to seek asylum. Proponents, on the other hand, noted that clarity and comprehensiveness in the law on displacement were both desirable and much needed.”

Stavropoulou et al agrees with the concept of such a right to remain and notes that “these two human rights [i.e. the right to leave and the right to remain] can be considered as being fully complementary, offering a choice (at least in theory) to potential victims of displacement: to stay or to move.”

The discussions regarding the rights of IDPs and refugees relate to the international legal status of IDPs, as described by Kidane (see further on in the text under the heading “Who are IDPs”). What Phuong is investigating is “arguments for situating the two groups within a single legal status [emphasis added].” Here I fully agree with Phuong that however similar their plight may be, refugees and internally displaced persons cannot be given the same legal status, because they require protection that is different in nature [emphasis added].”

IDPs and refugees belong to different groups, which has been reflected in UNHCRs dealing with them for the last few years, and it does not seem beneficial for either group to be continuously grouped together in one legal definition as they have specific and different needs. However, the protection needs of these two groups can at times be overlapping (such as when refugees from Chad and IDPs from Sudan find themselves in the same camp in Sudan, which is the example that Cohen provides) and should in such situations be granted equal protection. In addition, it does not seem plausible that the improved protection of one group should necessarily lead to the detriment of the other. Similarly, while human rights can be balanced against each other (see e.g. the ICCPR and accompanying Siracusa principles noting that limitation of a right might be acceptable in order not to violate another set of rights), few would argue that one right should simply not be granted protection as the other right should prevail altogether.

As the definition of IDPs in the Kampala Convention is now well established and made into a part of a binding normative framework, there no longer appears to be a need for a

79 Stavropoulou et al 2012, p. 5.
80 Ibid.
81 Phuong, p. 16.
82 Ibid, p. 25.
discussion on the plausibility of a synthesis of the refugee and IDP definitions, as has been suggested previously by Luke Lee.\textsuperscript{84}

While the prospect of greater regional security and fewer refugees to host in their own countries as less people need to flee across State borders might lead to a number of countries desiring improved normative standards for internally displaced persons, that should not lead to the detriment of protection standards for neither refugees nor IDPs. The main debate should not be to determine whether it is preferable that persons are fleeing within or outside their countries, but rather that they do not need to flee at all.\textsuperscript{85} Cohen notes that first and foremost, “it is important not to fight over who should have priority but to respond to the legitimate protection and assistance needs of both refugees and IDPs with specific instruments that are most likely to achieve the goal of ensuring that they can regain and secure the enjoyment of their rights and their human dignity.”\textsuperscript{86}

Similarly, the International Law Association notes in a report on the protection of displaced persons that the “depth and magnitude of IDP problems deserve a much more focused, centralized and comprehensive response from the international community. Hence, an international organization, such as UNHCR, could be designated, or a new one established, to assume the responsibility of protecting and assisting all displaced persons – both refugees and IDPs [emphasis added].”\textsuperscript{87}

It seems that the questions and concerns stemming from the importance of ensuring protection for all categories of forced migrants mainly relate to the availability of resources. If there were more resources available for organisations such as UNHCR, they would not be accused of potentially “borrowing” money from their core mandate (i.e. refugees) to cover for the protection of IDPs as well.

2.5 Regional and voluntary standards and solutions

Regional solutions such as the Kampala Convention will likely be increasingly useful, as these initiatives can take the specific regional context into consideration.\textsuperscript{88} In addition, the

\textsuperscript{84} Mentioned in Phuong, p. 24.

\textsuperscript{85} Cf. also Kidane at pp. 47 - 48: “States that do not respect the rights of their own citizens are arguably more likely to violate the rights of refugees in their territory. If the international community cannot protect IDPs, it cannot protect refugees in the same State.”

\textsuperscript{86} Cohen cited in Kidane, p. 41.

\textsuperscript{87} International Law Association, Committee on Internally Displaced Persons, Report and Draft Declaration for Consideration at the 2000 Conference, March 2000, paras. 5 - 6 [ILA Report]

\textsuperscript{88} GPC IDP Handbook, p. 27. See also Kidane, p. 84: “As Professor Gerald Neuman suggest, even if the UN Guiding Principles were binding, and even if the rights were recognized and understood in identical terms,
time saved by not having to negotiate globally on issues that differ from context to context should not be underestimated, especially given that the Kampala Convention obtained the number of ratifications necessary to enter into force only three years after its adoption.

The voluntary guidelines established by development actors such as the World Bank are important initiatives that should be recognized as such.\textsuperscript{89} However, these norms can at times be weakened if governments choose to work with private banks instead, in order not to be subject to regulations and potential criticisms. In order to prevent this development, a number of private actors and other stakeholders came together and created initiatives such as the Equator principles.\textsuperscript{90}

At present, these initiatives are in turn at risk of being undercut by China, which is expanding its business on the African continent.\textsuperscript{91} China has a questionable record, both on human rights and the environment, and it does not seem likely that they would impose any rigorous standards on the projects that they are financing.\textsuperscript{92} The situation at hand then gives rise to a difficulty that has been described quite tellingly by Penz, Drydyk and Bose.\textsuperscript{93} The authors argue that “international competitiveness is in relation to other countries, and those other countries may not have the same commitment regarding displacement or, more generally, protection of their citizens against harm. This raises the free-rider problem where one or more agents, whether business competitors or states, are willing to behave ethically, but their competitors are not. […] In the extreme case, this could undo the original good intentions of all the others. It certainly creates strong pressures to compromise the ethical responsibilities.”\textsuperscript{94} A similar argument was presented by de Wet in 2006: “if they [international banks] insist on borrower countries scrupulously obeying their guidelines,

---

\textsuperscript{89} See e.g. the World Bank, Operational Policy 4.12 \textit{Involuntary resettlement}, Revised April 2013.


\textsuperscript{91} Cf. Terminski, Bogumil, \textit{Development-induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges}, Geneva, May 2013, p. 16: “in recent years we have observed a growing number of dam projects in Africa, often using Chinese capital.” [Terminski].

\textsuperscript{92} See e.g. Sceats, Sonya and Breslin, Shaun, \textit{China and the International Human Rights System}, Chatham House, October 2012 at p. 43: “There are concerns also that China’s overseas investment activities are undermining the business and human rights agenda forged in response to the negative impact on human rights, particularly in the developing world, of powerful (mainly Western) transnational corporations. Chinese companies investing abroad pursuant to the ‘Go Out’ policy have largely operated outside this agenda, including the various innovative frameworks it has spawned.”

\textsuperscript{93} Penz, Dydyk \& Bose, p. 255.

\textsuperscript{94} Ibid.
such countries may turn to sources of funding that are not bound by such guidelines and have less scruples."  

It has been suggested that other regions could follow the example of the Kampala Convention by creating similar initiatives. The 1951 Convention Relating to the Status of Refugees (the Refugee Convention) was originally created as a solution for post-war Europe that other States later adhered to, and it might thus be argued that a similar solution could be found regarding internal displacement. However, as article 1 (r) of the Kampala Convention defines State parties as African States, a similar solution to that of the Refugee Convention would prove difficult unless the Convention was amended as to allow for external non-African parties to accede to the treaty. In addition, as we have seen above, it seems that regional treaties have a number of benefits which might make it wiser to develop additional regional treaties instead, based on the provisions of the Kampala Convention when considered adequate.

Part 3: Legal Analysis of Article 10 of the Kampala Convention on Displacement Induced by Projects

3.1 Development projects

Projects that may lead to displacement include dams, urban infrastructure projects and transportation such as roads, energy projects such as mines and oil extraction, parks and forest reserves, population redistribution schemes and agricultural expansion. The largest displacement situations have mainly stemmed from projects relating to dams and

---

95 de Wet 2006, p. 7.
96 Beyani Statement 2012.
97 See Phuong, p. 17: “Until 1967, when the Protocol deleted the temporal and geographical limitations, the application of the Convention was restricted to persons fleeing events occurring in Europe before 1 January 1951. The 1951 Convention was a deliberately restrictive instrument, because states wished the granting of refugee status to remain exceptional.”
98 Article 10 (1) States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors; (2) States Parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects; (3) States Parties shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.
99 A number of the categories borrowed from Robinson, p. 11.
It has also been noted that the effects of mining projects on internal displacement remain somewhat under-researched.

It is important to point out that the Kampala Convention, unlike the Guiding Principles and the Great Lakes Protocol, does not limit the scope of its provisions on development-induced displacement to “large-scale” development projects. Thus, all potential development projects fall within the boundaries of article 10 of the Convention.

There are numerous examples from the African context that show the grave consequences that poorly planned and implemented development projects can bring. The Lesotho Water Highlands Project, for example, is a joint multi-dam scheme project between Lesotho and South Africa. The project is intended to provide hydroelectricity to the citizens of Lesotho while at the same time benefiting the South African industrial centre of Guateng Province. In 2003, it was the largest infrastructure project ever undertaken on the African continent. The project has been fraught by corruption as well as potential large-scale displacement. In a World Bank Office Report cited by Hoover of the International Rivers Network as well as Courtland Robinson of the Brookings Institution, representatives of the bank write that the “results on the social side […] are clearly distressing.”

However, development projects can also be used as important factors in influencing government strategies and attitudes. When the World Bank learned that the Forestry Department of Cote d’Ivoire had been regaining control over project-affected forests by using paramilitary forces, the Bank withdrew their funding to the project. In addition, the Bank assisted the Forestry Department in creating a new resettlement plan which altered the total amount of displaced persons from 200 000 to 40 000. This process provides a

---

100 See e.g. Robinson, p. 10.
101 Terminski, p. 22: “causes of DIDR that are less often discussed in the literature, such as mining and urbanization processes”.
102 A fact which has also been noted by IDMC in Progress and prospects, p. 25.
103 Robinson, p. 18.
104 Ibid.
105 Ibid regarding displacement. Regarding corruption, see e.g. European Investment Bank, Lesotho Highlands Water Project, 26 November 2002: “As early as 1994 and on their own initiative, the Project Authorities took swift action: after a Management Audit had found initially comparatively minor issues, the CEO was suspended. Further detailed investigations followed which found irregularities in the course of implementing Phase 1A; these concerned notably the discovery of deposits on private bank accounts in Europe and South Africa. The findings prompted a series of legal steps, including the opening of court cases in 1999 against a number of companies and individuals. The proceedings are ongoing; one person is currently in jail.” See also McDowell and Morrell, p. 72.
107 Ibid., p. 23.
108 Ibid.
promising example of how guidelines on displacement and practical implementation of these can alter as a consequence of changes in funding as well as attitudes over time.

Throughout these discussions, it is vital to remember that development projects are often much needed and at times much desired by the local population, and have the potential to create important job opportunities for that same population, along with stable access to e.g. energy, water and other resources. Nonetheless, these projects must be pursued in a manner which is respectful of human rights and international law, which will eventually be to the benefit of all parties and stakeholders. As expressed by Courtland Robinson: “[d]evelopment is a right but it also carries risks to human life, livelihood, and dignity which must be avoided if it is to deserve the name.”\textsuperscript{109} This is further underscored by the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993, which noted “[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”\textsuperscript{110}

3.2 Who are IDPs? : Defining the scope of article 10

After briefly discussing the structures of development projects, we will now turn to the normative characteristics of the persons or group of persons who have been displaced. In this context, it should first be noted that the Kampala Convention mainly creates obligations for States whereas the Guiding Principles granted rights to internally displaced persons.\textsuperscript{111}

In order to determine which individuals benefit from the protection from displacement stemming from development projects, article 10 has to be read together with article 1 of the Kampala Convention. According to article 1 (k) of the Convention, internally displaced persons for the purpose of the Convention means “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence […] and who have not crossed an internationally recognized State border.” As this article follows the wording of paragraph 2 of the Introduction to the Guiding Principles, the legal annotations to the Guiding Principles can be a useful basis for interpretation of the article.

It can initially be noted that the Convention applies to citizens and non-citizens alike, as long as they have had their place of habitual residence within the affected country and are

\textsuperscript{109} Robinson, p. 59.
\textsuperscript{111} The exception to this can be found in article 4 of the Kampala Convention, which states that all peoples have a right to be protected from arbitrary displacement.
 currently displaced within that same country.\textsuperscript{112} In addition, the article includes persons or groups of persons who have fled their \textit{place of habitual residence}. It is thus not necessary that these persons or communities had property rights or other forms of land tenure over the land which they were living on. The mere fact that they habitually lived there is enough to grant protection in accordance with article 10 and article 1 (k) combined. This marks an important step forward, as many displaced persons do not have formal property rights over the spaces where they had been living previously.\textsuperscript{113} It also serves to aid the non-discriminatory function of the Convention which is mentioned in the preamble as well as in articles 3 (1) d, 5 (1), 9 (1) a and 9 (2) a, and follows from article 2 of the Banjul Charter, as the definition of IDPs in the Kampala Convention “provides for equal treatment of all internally displaced people, whether displaced by armed conflict, generalised violence, human rights violations, disasters or development projects.”\textsuperscript{114} A similar provision on non-discrimination can be found in article 7 of the UDHR.

In the process of the adoption of and the establishment of the legal annotations to the Guiding Principles, Kälin repeatedly emphasized that the definition of internally displaced persons was not a legal definition. This was further underscored by keeping the definition of internally displaced persons in the introduction to the Guiding Principles, themselves not binding (even though Deng expressed a hope for some of the provisions which filled previous gaps in international law to evolve into customary international law).\textsuperscript{115} However, as the Kampala Convention uses the same definition in one of its articles within a legally binding context, it might be argued that a legally binding definition for the purposes of that treaty has been established. Kidane reads the treaty in such a manner and argues that the Convention “provides a legal definition of the beneficiaries.”\textsuperscript{116} Birganie, however, disagrees and claims that the definition still has to be regarded as merely descriptive.\textsuperscript{117}

\begin{flushright}
\textsuperscript{112} Which has also been noted by \textit{Civil society guide}, p. 13.
\textsuperscript{113} This has also been acknowledged by the \textit{GPC IDP Handbook}, which notes that ”[r]ights to property are not limited to private ownership but include a range of formal and/or informal rights and entitlements relating to access to, use of, control over and/or transfer of property”, p. 302. See also \textit{Progress and prospects}, p. 25: In most of rural Africa, people do not have property deeds. Rather they have only customary access to land, which is not always recognised by law.”
\textsuperscript{114} \textit{Civil society guide}, p. 13
\textsuperscript{115} \textit{Legal annotations}, p. 4: “It is important to stress that the notion of who is an internally displaced person contained in paragraph 2 is not a legal definition.” Deng, Preface to the First Edition, in \textit{Legal annotations}, p xiii: “It is my hope that in time they may attain the status of customary international law”.
\textsuperscript{116} \textit{Kidane}, p. 58. See also the same author at p. 8: “While the UN Guiding Principles are limited to restating and readopting rights and responsibilities and identifying gaps in the law, the AU Convention goes further, creating a new international legal status and establishing new rights and responsibilities. In so doing, it defies conventional classifications and directly confronts the serious doctrinal dilemma that the UN has avoided for so long.”
\end{flushright}
3.3 Public actors and state responsibility

States are bound by treaties and must perform their obligations according to the treaty in good faith: an obligation which is also known as the principle of *pacta sunt servanda*. The principle, which applies to every treaty in force,\(^\text{118}\) is described by the Oxford Dictionary of Law as “the bedrock of customary international law” and Grotius placed it at the centre of international law in his *De Jure Belli ac Pacis*.\(^\text{119}\) In 1969, the principle was codified as article 26 in the Vienna Convention on the Law of Treaties. Regarding the Vienna Convention, the International Court of Justice observed in the *Gabčíkovo-Nagymaros Project* case: “[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.”\(^\text{120}\) In accordance with article 38 (1) b of the ICJ Statute, the Court shall apply “international custom, as evidence of a general practice accepted as law”. The concept of customary international norms was clarified further by the court in the *North Sea Continental Shelf* cases, and deemed to consist of two elements: State practice (sometimes called *usus*) and *opinio juris*, the approval of any given State to be bound by the norm in question.\(^\text{121}\) About a decade previously, in the *Asylum* case, custom had been described by the court as “constant and uniform usage, accepted as law”.\(^\text{122}\)

The reason for respecting the principle of *pacta sunt servanda* has also been succinctly phrased by Hugh Thirlway: “if an agreement does not have to be respected, is there any point in making it?”\(^\text{123}\)

According to the very first line of article 10 of the Kampala Convention, State parties shall “prevent displacement caused by projects carried out by public […] actors”. This responsibility follows from and further clarifies the responsibility in article 3 (1) a of the Convention which stipulates that State parties shall “refrain from, prohibit and prevent

---


arbitrary displacement of populations”. State parties are defined in article 1 (r) as African States that have acceded to or ratified the Convention.

“States” under international law are generally recognized in accordance with the criteria in the 1933 Montevideo Convention: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States.124 Whereas the interpretation of treaties in force follow the general rules of the Vienna Convention of the Law of Treaties, the responsibility of States deals with matters such as violating the obligations set forth in such an international treaty, as defined in the following remarks by the International Court of Justice: “an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of state responsibility.”125

The responsibility of the State does not limit itself to public entities as such, but can also entail persons who are working for the State. In their General Comment 7, the Committee on Economic, Social and Cultural Rights (CESCR) states that “[t]he State must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions [emphasis added].”126

In 2001, the International Law Commission (ILC) finalized their Draft Articles on Responsibility of States for Internationally Wrongful Acts.127 These articles clarify that actors can be held accountable if they are acting on orders from the State (article 8 ILC Draft Articles), if they are “in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority” (article 9 ILC Draft Articles) and if they succeed

124 International Conference of American States, Montevideo Convention on Rights and Duties of States, 26 December 1933, article 1. The criteria under the Montevideo Convention are generally regarded as part of customary international law, see Harris, p. 92.
125 Gabčíkovo-Nagymaros Project, para. 47: “Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of state responsibility.”
126 Committee on Economic, Social and Cultural Rights, General Comment No. 7, The right to adequate housing (Art 11.1.1): forced evictions, 20 May 1997, Sixteenth session, UN Doc. E/1998/22, annex IV [CESCR General Comment 7], para. 9. On the standing of such general comments, see generally Simma, Bruno, Foreign Investment Arbitration: A Place for Human Rights? International and Comparative Law Quarterly 60 (2011) [Simma], p. 588: “These Comments do not constitute an authentic interpretation of ‘their’ treaties (this would be up to the States parties acting in agreement, but this they never do), but the reading of treaty rights and obligations by the supervisory bodies enjoys considerable authority.”
the current government (article 10 ILC Draft Articles). If the behaviour amounts to a crime under international criminal law, such as war crimes or genocide, they shall be held directly and individually accountable, without the need of a linkage to the State.128 Forcible displacement without grounds was prohibited as such a crime under international law in 1998 at the time of the creation of the Rome Statute.129

Courtland Robinson builds on the arguments made by the International Law Commission in his claim that private entities, such as corporations, that take on core functions of governments are ultimately subject to the same duties as the government and thus, “when a state contracts out to private companies the design, implementation or monitoring of projects involving involuntary resettlement, a case can be made that these companies then acquire responsibilities for ensuring compliance with the relevant international human rights standards and development policies and procedures.”130

The second paragraph of article 3 of the Kampala Convention goes on to define through which means States shall ensure that these obligations are upheld, e.g. by designating a responsible authority or body for coordinating activities as well as providing necessary funds for protection and assistance of internally displaced persons. I will return to the topic of how States can implement these obligations later on whilst writing about States’ possibilities of living up to these provisions by integrating provisions on internal displacement in their respective bilateral investment treaties.131

3.4 Private actors

After discussing the responsibility of States and public actors under international law in relation to the provisions of the Kampala Convention, we will now proceed to determine in what ways the actions of private or non-State actors can lead to responsibility under international law, and for whom. Dawson and Farber argue that development-induced displacement poses a number of challenges in this regard, such as whether the State or the private corporations should be held responsible for the displacement caused by projects, and whether the direct or indirect responsibility of the State should incur different

129 Ibid, articles 5 and 7.
131 See pp. 57 - 61 of this thesis.
consequences. In a report from 2011, UN-Habitat has also taken note of the particular difficulty of determining the “obligations of private sector actors under international law with respect to forced eviction[s]”. In fact, the report highlights the responsibility of private sector actors regarding displacement and evictions as one of the areas that require more extensive research.

We have already discussed how States are obliged to ensure that State agencies as well as actors that are exercising State power are not contributing to arbitrary displacement. According to article 3 (h) of the Convention, State parties have an additional obligation to ensure the accountability of non-State actors concerned, such as multinational corporations and private security companies, “for acts of arbitrary displacement or complicity in such acts”. The responsibility of States to ensure that the acts of these entities are complying with the rules of the Convention is further underscored by the following paragraph, which stipulates that State parties are obliged to “ensure the accountability of non-State actors involved in the exploitation and exploration of economic and natural resources leading to displacement”. These provisions could be used to ensure further implementation of and adherence to the Convention by way of linking the obligation contained therein to create similar provisions in bilateral investment treaties. I will discuss these ideas and concepts further on in this essay under the heading of implementation challenges and potential ways forward.

Thus, the State can be held responsible for the actions of a third party acting within its jurisdiction even if this third party does not exercise public powers, but can these third parties themselves be held responsible for their actions in violation of the Kampala Convention? Article 2 (e) of the Convention proceeds to define one of the objectives of the Convention to “provide for the respective obligations, responsibilities and roles of […] non-state actors.” In article 1 (n) of the Convention, non-state actors are defined as "private actors who are not public officials of the State […] and whose acts cannot be officially attributed to the State”. The phrasing can be compared to the report of the Human Rights Commission Expert seminar on the practice of forced evictions, which notes that the primary responsibility of ensuring protection from and prevention of forced

132 Dawson & Farber, p. 126.
134 Ibid.
135 See page 57 - 61 of this thesis.
evictions lies with States. The report goes on to clarify that this responsibility on behalf of the State concerned “does not, however, relieve other entities from obligations in this regard, in particular Occupying Powers, international financial and other institutions and organizations, transnational corporations and individual parties, including public and private landlords or landowners.” As has been noted above during the discussion on public actors, if the behaviour of a person amounts to a crime under international criminal law, such as war crimes or genocide, they shall be held directly and individually accountable, without the need of a linkage to the State.

Renowned scholar and former judge of the International Court of Justice Rosalyn Higgins has argued that the division between subjects and objects in international law is not useful, as international law instead should be viewed as a process including a variety of participants. This line of argument has been taken up by Andrew Clapham, who argues that the “existence of a regime focused on non-state actors need not undermine an existing regime for holding states accountable.” Clapham rebuts what he finds to be the two main arguments against widening the scope of international law to apply to non-state actors, namely legitimacy (i.e. that e.g. armed groups would be legitimized as an entity under international law) and dilution (i.e. that the protection would be weakened with these new actors brought in to the responsibility regime), and notes that these can be overcome by seeing rights as rights of individuals and not solely as duties of the State. In that manner, a legal or physical person violating these rights is not automatically seen as an equivalent to the State.

Clapham believes that legal responsibility for corporations under the international human rights regime is “nearer than is usually imagined.” In any event, it is clear that the Kampala Convention “is more specific on individual accountability issues and the accountability of non-state actors, in particular multinational companies and private

---

137 Ibid.
138 Rome Statute, article 25.
139 Higgins, Rosalyn, Problems and process. International Law and How We Use It, Oxford University Press 1994, p. 50: “not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful and closer to perceived reality to return to the view of international law as a particular decision making process. Within that process (which is a dynamic and not a static one) there is a variety of participants, making claims across state lines, with the object of maximizing various values”.
141 Clapham, Andrew, Non-State Actors. Rethinking the Role of Non-State Actors under International Law, Public Lecture, UN Audiovisual Library of International Law [Clapham Audio].
142 Clapham Audio.
143 Clapham 2006, p. 270.
military or security companies.\textsuperscript{144}

3.5 “Full information and consultations of persons likely to be displaced” and feasible alternatives

According to paragraph 2 of article 10 of the Kampala Convention, State parties are obliged to ensure that “feasible alternatives” to the project are explored, with “full information and consultation” of persons who are likely to be displaced by such projects.

3.5.1 Consultation rights

The right to information and consultation has a background in both human rights and environmental rights. For example, the right to free, prior and informed consent (FPIC) can be found in human right instruments such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), as well as environmental treaties such as the Convention on Biological Diversity (CBD) and a number of the guidelines created by international financial institutions (IFIs).\textsuperscript{145} Guiding Principle 7 (3) c regarding situations of displacement other than during emergency stages of armed conflicts and disasters, thereby including development projects in its scope, refers to the concept (“[t]he free and informed consent of those to be displaced shall be sought”). Similarly, former SRSG Deng remarked in his analysis of the normative framework on internal displacement that persons to be displaced “should have access to adequate information regarding their displacement, the procedures of compensation and relocation, effective remedies and, where appropriate, compensation for loss of land or other assets. Efforts should be made to obtain the free and informed consent of those to be displaced”, and I will therefore discuss the concept briefly in the following.\textsuperscript{146}

\textit{a) Free, prior and informed consent}

The notion of free, prior and informed consent, which is a quite recent addition to the international legal principles relating to the rights of indigenous peoples, reached a wider audience when it was built into the UNDRIP, which contains the concept in several of its

\textsuperscript{144} Stavropoulou 2010, p. 63.
\textsuperscript{145} See e.g. International Finance Corporation, \textit{Performance Standard 7: Indigenous Peoples}, January 1 2012, Objectives: “To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present”
\textsuperscript{146} Deng 1998, para. 12.
articles. Prior to the adoption of this declaration, the CERD committee has also recommended that States should seek to obtain the free, prior informed consent of indigenous peoples. ¹⁴⁷

In addition, there are other international legal instruments acknowledging the importance of FPIC, such as ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169). ILO 169, which was adopted in 1989, is still regarded as the main treaty on the subject of indigenous rights, even though the convention has as of yet only been ratified by twenty-two countries. Article 6 of the treaty affirms the right of indigenous peoples to participate freely in decision-making, to consultation and to develop their own institutions and initiatives necessary for this purpose. As Barelli points out, the importance of the article “is confirmed by the fact that the rights to consultation and participation have been described as the cornerstone of ILO 169 by the monitoring body of the convention.”¹⁴⁸ The importance of ILO 169 for FPIC is also emphasized by the Committee on Economic, Social and Cultural Rights in their recommendation that State parties should “consult and seek the consent of the indigenous peoples concerned prior to the implementation of […] projects and on any public policy affecting them, in accordance with ILO Convention No. 169 [emphasis added].”¹⁴⁹ Interestingly, Kälin refers to article 16 of the ILO 169 Convention, regarding relocation of indigenous peoples from their lands, in his legal annotations to the Guiding Principles as an example of one of the existing guarantees making up a right not to be arbitrarily displaced.

The Convention on Biological Diversity was adopted in 1992. Article 8 (j) of the CBD deals with the matter of consultation and participation of indigenous peoples in relation to traditional knowledge. In addition, the Nagoya Protocol on Access and Benefit Sharing, adopted in 2010, contains a number of provisions calling for the prior informed consent of the Party providing natural resources and ensuring that “appropriate, effective and proportionate legislative, administrative or policy measures” are taken to ensure this consent (articles 6, 13, 15 and 16).

¹⁴⁷ Committee on the Elimination of Racial Discrimination, General Recommendation No. 23, Indigenous peoples, 18 August 1997, Fifty-first session, UN Doc. A/52/18, annex V, para. 4 (d) calls on States parties to ‘ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent’.
FPIC is inextricably tied to the notion of self-determination, which is precisely stated by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in the following paragraphs:

“As mentioned above, the right to free, prior and informed consent is embedded in the right to self-determination. The procedural requirements for consultations and free, prior and informed consent respectively are similar. Nevertheless, the right of free, prior and informed consent needs to be understood in the context of indigenous peoples’ right to self-determination because it is an integral element of that right.

The duty of the State to obtain indigenous peoples’ free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples’ rights.”

The need to view FPIC as based on communication and consultation processes is further emphasized by United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN REDD+) in their 2011 guide on the subject: “FPIC needs to be understood as a right that requires the project developer to undertake an ongoing process of communication, with consent sought at key stages in the process.”

b) The requirements of article 10

Article 10 of the Kampala Convention requires full and informed consultation of persons likely to be displaced by projects. Building on the requirements from the Guiding Principles, Chaudhry argues that this consultation should include informing the population

---

150 Report of the Expert Mechanism on the Rights of Indigenous Peoples, Final report of the study on indigenous peoples and the right to participate in decision-making, 17 August 2011, UN Doc. A/HRC//18/42, Annex: Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making, paras. 20-21. See also GIZ and RECOFTC, Free, Prior, and Informed Consent in REDD+, Principles and Approaches for Policy and Project Development, February 2011, p. 11 [REDD+ guide]: “The right of indigenous peoples to give or withhold their consent to developments that affect their territory is part of their collective right to self-determination, which includes the right to determine what type of process of consultation and decision making is appropriate for them [emphasis added].”

151 REDD+ guide, p. 11.
of the planned project one year in advance, in their local language, as well as making sure that all affected persons are allowed to ask questions and propose alternatives, including e.g. women.152

According to the Inter-Agency Standing Committee’s (IASC) Handbook on internal displacement, authorities should “[c]onvene consultations with leaders of (potential) displaced groups prior to resettlement, ensuring representation of women and all important segments of the displaced community to ensure that resettlement is fully informed.”153 Additionally, it is important to “[i]dentify and help eliminate potential conflicts between communities by convening consultations between internally displaced persons and populations residing in areas of resettlement, considering the needs of the resident as well as relocated populations in program design and taking steps to prevent stigmatization or resentment.”154

3.5.2 Feasible alternatives

Before embarking upon a development project causing displacement, feasible alternatives to the proposal leading to displacement shall have been undertaken by the stakeholders in accordance with the second sentence of article 10. This obligation is mirrored by principle 7 (1) of the Guiding Principles. The requirement to exhaust all other possibilities underscores that displacement should be a measure of last resort.155

A similar provision can be found in the 1992 Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects by the Organisation for Economic Co-operation and Development (OECD), which explains that “[i]nvoluntary population displacement should be avoided or minimized whenever feasible by exploring all viable alternative project designs. In every case, the alternative to refrain from carrying out the project (the ‘non-action’ alternative) should seriously be considered, and people’s needs and environmental protection must be given due weight in the decision-making process.”156

Lastly, it has also been noted that alternative options to proposed projects should be explored and exhausted including exploring other locations, alternative technologies and

152 Chaudhry, pp. 624 - 625. See also Basic Principles and Guidelines on DBED, para. 38: “All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider.”
154 Robinson, p. 57.
155 Legal annotations, p. 30. See also Kidane, p. 59.
the possibility of micro-projects (i.e. smaller projects that would still deliver similar benefits). 157

Development projects as a cause for displacement differ from other causes such as natural disasters and conflicts in that such projects are planned and foreseen, a factor which should be used to further avoid the arbitrary displacement of persons due to such projects. 158 The obligation to ensure the full and informed consultation as well as exploring feasible alternatives is part of the procedural standards that must be adhered to in order to make the displacement lawful. 159 In addition, these consultations have several benefits, as noted by McDowell and Morrell:

“The benefits of involving those at potential risk from a project are threefold: firstly, it is essential to fully assess the extent and personalisation of the risks that may arise from the project in order to make a better judgment on the justification for the project; secondly, if people are consulted early, have the justification for the project explained to them and are given assurances about future compensation they may move voluntarily (UNOCHA 2004); and, finally, planning and consultation provides the best mitigation against human rights violations during displacement and resettlement (Kälin 2005).” 160

Furthermore, well-organized consultations also provides corporations and other stakeholders with records of such consultations that can function as evidence that the communities and other stakeholders have indeed been heard. As evidence that the resettlement has thus not been forced but informed and in accordance with normative standards, such consultations may very well lie in the interest of developers as well as communities.

3.6 From “compelling and overriding public interest” to “prevent […] as much as possible”: proportionality, necessity and margins of appreciation

After discussing the actors and actions leading to displacement that the State can be held responsible for, we will now turn to investigating in which situations and to what extent the State can be held responsible for such displacement.

157 Chaudhry, p. 624, Basic Principles and Guidelines on DBED, para. 38.
159 Cf. Deng 1998 at para. 12: “Where these guarantees are absent, displacement would be arbitrary and therefore unlawful.”
160 McDowell & Morrell, p. 68.
The right not to be arbitrarily displaced finds its sources, as we have seen above, in numerous legal frameworks. However, there are limitations to these rights, and conversely violations of rights constituting displacement that can be acceptable under international law. When the behaviour of States is deemed to be acceptable and thus not in violation of these rights, the displacement is no longer categorized as “arbitrary” as it is conforming with international law (see above for the definition of arbitrary displacement).  

For example, the right to own property under international law is not absolute. While article 17 of the UDHR grants everyone a right to own property and to not be arbitrarily deprived of such property, article 29 (2) of the same treaty stipulates that “in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” The Banjul Charter, which acknowledges a right to property in its article 14, requiring that “[t]he right to property shall be guaranteed” also concedes that this right may “be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The right to freedom of movement and to choose one’s own residence within a country can also be limited by public interests. While article 12 (1) of the International Convention on Civil and Political Rights (ICCPR) gives every person legally present on the territory of any of the State parties the right to liberty of movement, and freedom to choose his residence within that territory, the third paragraph of that same article limits the right by stipulating that “[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” Thus, there is a possibility for States who are parties to the convention to limit the right to freedom of movement and residence if any of the prerequisites in the third paragraph of article 12 can be used as justification. The limitation of the right to freedom of movement and choice of residence is also explicitly mentioned by Walter Kälin in his legal annotations to the Guiding Principles, where he concedes that the wording in principle 6 (c) “corresponds to the limitations on the right to freedom of movement and of residence set forth by the human rights provisions”, and thus “subparagraph (c) fully reflects international human

---

161 See page 15 of this thesis.
 Indeed, the limitations of the duty of States to respect article 12 ICCPR have been further elaborated upon by the Siracusa Principles, noting e.g. that “[a]ll limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.”

The right to adequate housing as expressed by article 25 of the UDHR can similarly be limited by article 29 of that same declaration. Article 11 of ICESCR regarding the same right can be limited in accordance with article 4 of the treaty, which provides “States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

Lastly, the right to privacy in article 17 of ICCPR can be derogated from in accordance with article 4 ICCPR in times of public emergencies.

At times, States may argue that the meagre resources at their disposal make it impossible for them to fulfill their obligations under international law. However, the Vienna Programme of Action has clearly stated that the need for development and lack thereof may not be used as a reason to disregard human rights completely. On this note, it is also interesting to note that forced evictions (relevant to this argument presuming that we, as has been noted above, define them as part of the same process as arbitrary displacement) have been targeted specifically on this matter by then Commission on Human Rights who noted that "States should secure by all appropriate means, including the provision of security of tenure, the maximum degree of effective protection against the practice of forced evictions for all persons under their jurisdiction. [...] These obligations are of an immediate nature and are not qualified by resource-related considerations [emphasis added]."

The Guiding Principles similarly qualified the responsibility of States to prevent arbitrary displacement due to development projects. Principle 6 of the Guiding Principles states that “[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence [...] in cases of

---

162 Legal annotations, p. 33.
163 Siracusa Principles, para. 5.
164 Vienna Declaration, Part I, para. 10: "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."
large-scale development projects that are not justified by compelling and overriding public interests.” The formulation is similar to that of article 1 of the first protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“no one shall be deprived of his possessions except in the public interest”), and indeed that of Chapter 2, Article 15 of the Swedish Constitution (Regeringsformen), which requires a compelling public interest (angeläget allmänt intresse) for expropriation of privately owned land to be justifiable. In his legal annotations to the Guiding Principles, Kälin defines the process of determining the existence of a “compelling and overriding public interest” as ensuring that the requirements of necessity and proportionality have been met. While discussing the normative framework constituting the backdrop to the Guiding Principles, former SRSG Deng noted in 1998 that “the feasibility, necessity and proportionality of the project to the goals to be achieved must be examined and provision for the compensation, resettlement and rehabilitation of the displaced must be made prior to its commencement.” The feasibility of projects has already been discussed above under the heading of consultation rights and feasible alternatives, and I will therefore confine my discussion here to the elements of necessity and proportionality.

3.6.1 Necessity and proportionality

In his report on the normative framework on internal displacement in 1998, Deng remarked that “[a]n analysis of international law reveals limitations on the permissibility of forced displacement. It may be undertaken only in the specific circumstances provided for, with due regard for the principles of necessity and proportionality, and should last no longer than the exigencies of the situation [emphasis added].”

The requirements of necessity and proportionality as the ultimate limit of what States can and cannot derogate from relate back to the criteria of arbitrarily as part of the right not to be arbitrarily displaced. As Kälin and Künzli notes, the Human Rights Committee, which monitors the implementation of the ICCPR, “treats as ‘arbitrary’ all cases of interference with a right that are not reasonable or proportionate in the circumstances or, in other words, that are not proportional to the end sought and are not necessary in the

---

166 Legal annotations, pp. 32 - 33.
168 Deng 1998, para. 11.
circumstances of a given case.” Furthermore, in his legal annotations to Guiding Principle 4, regarding the right to be protected from arbitrary displacement, Kälin notes that while forced displacement may at times be acceptable, “exceptions from protection against displacement are restricted to cases of an *ultima ratio* which shall be resorted to only if there are no other alternatives.” He notes that the term ‘arbitrary’ “implies that the acts in question contain “elements of injustice, unpredictability and unreasonableness” (Nowak, CCPR Commentary, Article 17, para.12), particularly because they are not in conformity with domestic law, pursue purposes that are not legitimate in light of the requirements of international human rights and humanitarian law, are not based on objective and serious reasons, or are not necessary to achieve legitimate goals, i.e., lack proportionality (id.).

In addition, the Basic Principles and Guidelines on Development-Based Evictions and Displacement stress that any eviction in the context of the implementation of a development project “must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation”.

The requirements of proportionality and necessity as a part of the Guiding Principles correspond to limitations on the right to freedom of movement in ICCPR. These limitations have been further defined and clarified in the context of the Siracusa Principles, as have been mentioned above. As Deng observes, the Siracusa Principles define a limitation as “necessary” if it “(a) is based on one of the grounds justifying limitations recognized by the relevant article ..., (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim.” In addition, Kälin goes on to note that “human rights norms guaranteeing liberty of movement and freedom to choose one’s residence allow for restrictions only if the measures meet the criteria of necessity and proportionality.”

3.6.2 The requirements of article 10

---

170 Legal annotations, p. 30.
171 Ibid.
172 Basic Principles and Guidelines on DBED, para. 21.
173 Legal annotations, pp. 32 - 33.
174 Compilation and analysis of legal norms, para. 31.
175 Legal annotations, p. 36.
Article 10 of the Kampala Convention obligates States to prevent arbitrary displacement by development projects “as much as possible”. Thus, there are occasions on which displacement may be deemed to be acceptable. As there are very few preparatory works to the Kampala Convention, the interpretation of which limits can be placed on the responsibility of States to prevent displacement due to projects will be analysed article in accordance with the ordinary meaning of the words. The interpretation will thus partly rely on VCLT article 31 (1), which together with the rest of the articles regarding interpretation in the convention has been deemed to form part of the body of customary international law. Additionally, as the Kampala Convention uses much of the same phrases and wording as in the Guiding Principles, the background documents for these Principles will be used quite extensively.

Addis Barega Birganie, legal expert at the Ministry of Foreign Affairs of Ethiopia, writes in the Human Rights Law Review regarding the term “large-scale development projects”, that “Member States felt that, although the term would prohibit large-scale development projects […], it would not include small and medium-scale projects […], leaving them permissible despite the fact that they too can cause displacement.” In this context, it is interesting to note that, as Courtland Robinson rightly observes, medium-scale and smaller development projects could be said to fall under the scope of the Guiding Principle 6, as the list contained therein is not exhaustive (“in particular”, something also noted by Kälin in legal annotations). While articles 3 and 4 of the Kampala Convention still includes a non-exhaustive list of what may constitute arbitrary displacement that States are obliged to prevent and all peoples have the right to be protected from, article 10 provides a more specific definition of arbitrary displacement due to development projects, which would make it important to ensure that displacement stemming from smaller or medium-sized projects is also prevented by the precise text of the Convention. As has been noted by the World Disasters Report of 2012, these projects are often not captured in statistics and are generally less well documented, despite potentially having severe impacts on the local population.

176 Kasikili/Sedudu Island, para. 18.
177 See VCLT article 31 (3) c regarding interpretation of treaties in the context of international law applicable in the relations between the parties.
178 Birganie, p. 189.
179 Robinson, p. 7, Legal annotations, p. 4.
180 IFRC 2012, p. 160. See also McDowell & Morrell, p. 93: “Less is known about smaller-scale private operations whether they be domestic or transnational. However they potentially pose even greater risks to people as they remain hidden from the public eye.”
As has been observed previously, the Kampala Convention uses the same phrasing on forbidden arbitrary displacement as that in the Guiding Principles. Furthermore, the rights on which the right not to be arbitrarily displaced are based uphold the criteria of proportionality and necessity, which would make it seem probable that they still hold true for obligations put forward in the Kampala Convention. The Committee on Internally Displaced Persons of the International Law Association builds upon the requirements of international law in their Draft Declaration on Internal Displacement, noting in a similar provision to that of article 10 of the Kampala Convention that arbitrary displacement should be avoided “to the fullest extent possible”, a phrasing which they note “indicates that the right to freedom of movement may be subject to limitations.”\(^{181}\) Furthermore, these limitations are to be restricted “under the principle of proportionality.”\(^{182}\) In addition, the present Special Rapporteur to the Secretary-General (SRaSG) on IDPs, whose words carry a certain weight not only due to his current position but also considering the fact that he was the legal expert responsible for drafting the Kampala Convention on behalf of the African Union prior to taking up his present position, has remarked that “[t]he requirement here [in article 10 of the Kampala Convention] is that non-state actors have to lead by those obligations in the first place, so that displacement is the measure of last resort on account of development induced displacement. There’s the spirit of the guiding principles which requires that any displacement based on development project must be in the public interest and must also be sufficiently overwhelming and compelling on that basis.”\(^{183}\) In this context, it might also be interesting to note that according to article 15 of the Kampala Convention, its provisions apply to all situations of internal displacement regardless of its cause except where expressly stated. Accordingly, the full right not to be arbitrarily displaced in as expressed in article 4 would cover displacement due to development projects as well.

It thus seems that the demands of necessity and proportionality still remain for the Kampala Convention, and that the phrasing “as much as possible” contains an incentive similar to that which underlined the Guiding Principles.

\(^{181}\) *ILA Report*, Article 4, Commentary, para. 2. This formulation was kept in the later Declaration of the Association, see International Law Association, Declaration of International Law Principles on Internally Displaced Persons, 29 July 2000, Article 4.

\(^{182}\) Ibid.

Kidane is nonetheless dissatisfied with the formulation of article 10 and argues that the wording is inferior to that of the Guiding Principles.\(^{184}\) The article might be seen as weakened if compared to the Guiding Principles or the Great Lakes Protocol along with earlier drafts of the Convention.\(^{185}\) However, to state that the phrasing would be “glaringly permissive” seems overly pessimistic when compared to what I have just noted about plausible interpretations of the article in light of its legal sources and history.\(^{186}\) Just as Kidane notes that the legal and academic views on internal displacement seems to be moving into a more optimistic direction, represented by Roberta Cohen in that she aims to create a normative system where all displaced persons could be protected (whereas Hathaway is termed pessimistic in that he thinks the protection of IDPs would mean “risking” the protection of refugees, see above during the discussion on the protection of refugees as compared to that of IDPs), I would continue along this optimistic line by arguing that the language of article 10 can be less permissive depending on its interpretation and implementation.\(^{187}\) Besides being applicable to all development projects, and thus avoiding the term “large-scale”, which inevitably would have required further distinction, it gives monitoring agencies, NGOs and other actors an opportunity to assist in interpreting the text in a fashion which guarantees the greatest respect of the rights of those who risk being displaced.\(^{188}\) Such progress however requires that the interpretation and implementation of the Convention is expedient, and that the monitoring of the Convention is upheld. Such monitoring is crucial for the realization of the rights therein, including securing access to judicial remedies for claimants.\(^{189}\)

It has been argued that the proportionality measure in article 10 of the Kampala Convention could have been stronger considering the wide margin of appreciation that is granted to States as to determine what lies in the “public interest”.\(^{190}\) On the other hand, article 10 of the Kampala Convention covers a much wider range of projects by not limiting its scope to “large-scale development projects” as in Guiding Principle 6.\(^{191}\) The wide-ranging nature of article 10 (2) nonetheless points to the problem of weighing the

\(^{184}\) Kidane, p. 60.


\(^{186}\) Kidane, p. 60.

\(^{187}\) Ibid, p. 50: “Ultimately […] Hathaway’s position could be characterized as pessimistic and Cohen’s position could be characterized as optimistic.”

\(^{188}\) That the article is applicable to all development projects is a fact that has previously been noted by the Progress and prospects, p. 25.

\(^{189}\) Cfr Kidane noting the need to have access to the African Court of Justice for proper monitoring, e.g. at p. 81.

\(^{190}\) See e.g. Kidane, p. 60.

\(^{191}\) Progress and prospects, p. 25.
pros and cons of adjusting and combining different legal frameworks in order to find the
lowest common denominator and thereby ensuring better implementation of the norms. If
the concepts become too broad or vague, they might be easier for States to agree to and to
ratify, but might also have less of an actual impact. As the interpretation will be more
important due to the broad language in which the Convention is written, it will be
important to maintain a rights-based interpretation of the text. Thus, it will be crucial to
maintain a stringent interpretation and implementation of the article, with a particular focus
on ensuring the right not to be arbitrarily displaced and that this right should only be
derogated from when it is deemed to be proportionate and necessary, after a proper
balancing of interests and after feasible alternatives have been presented to and discussed
with the local residents. Later on, I will look at one of the most important aspects of
ensuring that the legal analysis is given a true impact: the monitoring and implementation
of the Convention, which will be discussed in further depth in that context.192

Part 4: Narrowing the Gap: Humanitarian Aid and Development

4.1 The gap between humanitarian actors and development actors

In the field, the fragmentation of the legal and political frameworks has been particularly
visible in what has been termed the “humanitarian-development gap”.193 Both development
and humanitarian perspectives are needed in order to ensure the greatest possible
outcomes for the people that are at risk of displacement.194 A stronger collaboration
between these actors could also lead to a more efficient allocation of resources and avoid
the duplication of efforts.195 As Ferris notes in her contribution to the World Disasters
Report, humanitarian actors could contribute with more experience on the protection

192 See pp. 50 - 57 of this thesis.
193 See e.g. Crisp, Jeff, Mind the gap! UNHCR, humanitarian assistance and the development process, New
Issues in Refugee Research, Working Paper No. 43, UNHCR, May 2001 and subsequently Deschamp, Bryan and
Lohse, Sebastian, Still minding the gap? A review of efforts to link relief and development in situations of
the gap].
194 See e.g. Still minding the gap?, p. 1: “The international community has become more sensitized to
development challenges posed by conflict and displacement”.
195 Cf. UNHCR Briefing Paper, Informal Consultative Meeting on UNHCR’s Implementation of the IASC
Transformative Agenda, 1 February 2013, para. 17: “UNHCR recognizes the importance of effective and well-
supported coordination, and will continue to strengthen the capacity of those clusters under its responsibility.
It further recognizes that partnerships - both with UN agencies and NGOs - are vital to an effectively-
coordinated humanitarian response.”
aspect as applicable to the situation of individuals affected by development-induced displacement.\(^{196}\) Development actors could in turn contribute with their vast knowledge and experience on durable solutions for those displaced by disasters.\(^{197}\)

As has been observed previously, the Convention in many ways builds on and continues the work of the Guiding Principles which brought together human rights, international humanitarian law and refugee law by analogy.\(^{198}\) By making the principles legally binding, the Convention is avoiding some of the most obvious implementation hurdles and setting a stronger precedent for other regions to follow.\(^{199}\) As has been noted above, this bridging of different legal systems is particularly apparent in article 10 of the Kampala Convention:

Firstly, housing, land and property rights are often at the forefront of internal displacement. In this context, proportionality measures as regards expropriation and property issues are especially important, a fact that was highlighted by the Guiding Principles.\(^{200}\) While parts of the article derive its legal sources primarily from human rights, concepts such as expropriation are often featured in environmental legislation and urban planning as well.

Additionally, the focus on consultation rights and environmental and social assessments shows a combination and transformation of norms from human rights soft law documents such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIPS) with environmental law norms from e.g. the Convention on Biological Diversity and the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters into a common legally binding framework.

---

\(^{196}\) IFRC 2012, p. 156.
\(^{197}\) Ibid, p. 155.
\(^{198}\) See e.g. Cohen 2013, p. 6: “In 1994, High Commissioner for Refugees, Sadako Ogata, told the Commission on Human Rights: I believe the Commission in its work to strengthen the protection of the internally displaced must seek to bring about a convergence of refugee law, international human rights law and international humanitarian law… [E]ach has a useful contribution to make to the protection of the internally displaced…. It is only through such convergence that the lacuna in the law can be addressed (Ogata 1994).” See also Kidane, p. 40: “the UN Guiding Principles do more than merely restate preexisting rules: they correct at least seventeen areas of insufficient protection for IDPs and fill about eight gaps in international human rights and humanitarian law. Among these new substantive rights are the right not to be forcibly displaced or forcibly returned to the area of danger, the right to restitution or compensation for property lost because of displacement, special guarantees for displaced women and children, and rules against internment of IDPs [emphasis added].”

\(^{199}\) Oleschak, p. 132. See also Beyani, Chaloka, Recent Developments: The Elaboration of a Legal Framework for the Protection of Internally Displaced Persons in Africa, Journal of African Law 50 (2006) [Beyani 2006], p. 197: "Perhaps the developments in Africa will inspire an international resolve to formulate and adopt such an instrument, if not for the world as a whole, then at least for regions such as Asia and Latin America where the problem of the protection of internally displaced persons poses similar challenges."

\(^{200}\) Legal annotations, pp. 32 - 33.
4.2 Narrowing the gap: Monitoring, difficulties and lessons learned

However, narrowing the gap between humanitarian actors and development actors is not easy as there are large differences in the principles and ethics that shape these areas. Hugo Slim has recently portrayed how the connecting of humanitarian actors and development actors will be a difficult task, partly because of the different legal sources and ideologies behind development and humanitarian agencies.\(^{201}\) In addition to the political and ethical differences of the two systems, they also strive for different goals through different processes. While development is continuously focused on developing stronger rights and more progress, humanitarian principles are seeking stability and foreseeability in situations which are going to be difficult despite relief efforts.\(^{202}\) In addition, the funding sources and subsequent demands from donors have differed greatly in the past, and are still quite divided.\(^{203}\) The differences are particularly visible in the often difficult transition phase from relief to development, as highlighted in the report *Still minding the gap?*\(^{204}\)

It has been argued that humanitarian agencies are generally the ones that lose out in attempts to narrow the gap, in that working too closely to development and/or with governmental actors means risking the fundamental humanitarian principle of neutrality.\(^{205}\)

---


\(^{202}\) Ibid, p. 7.


\(^{204}\) *Still minding the gap*, para. 157: “The overall impression of this study covering the last 12 years is that there still remains a fundamental gap between policy and praxis. There has been considerable progress in relation to policy and in the appreciation of the disruptive nature of displacement on development (as recently reflected in the 2011 World Bank’s Development report); but in regard to practice, principally reflected in the availability and predictability of funding to bridge the humanitarian – development gap, the very issue that led to the launch of the Brookings Process in 2001, things have not changed much for the better as is evident in the 2011 Monitoring Survey of International Engagement in Fragile States: Can’t We Do Better?” See also Organisation for Economic Co-operation and Development, A new way forward: transition compacts, in *International Support to Post-Conflict Transition: Rethinking Policy, Changing Practice*, OECD Publishing 2012: “The evidence presented in previous chapters is clear: there is a need for serious and significant reform to allow faster, more flexible and predictable financing to implement a more coherent and prioritised strategy, even where the legitimacy of a government and its institutions might be in question. Similarly, the countries that have emerged from conflict are also clearly asking donors and the international community to come together to nurture their state capacities and help to build peaceful and resilient states and societies through broad consultation and engagement [emphasis added].” See also Poole, Lydia, *Who pays? Who profits? The costs and impacts of forced migration*, pp. 174 - 211 in Zetter, Roger (ed.), *World Disasters Report 2012: Focus on forced migration and displacement*, International Federation of the Red Cross and Red Crescent Societies 2012, pp. 200 - 201 regarding difficulties in overcoming the funding gap.

\(^{205}\) Slim, pp. 10 - 11. See also *GPC IDP Handbook*, p. 440: “While being involved in evacuation and providing humanitarian assistance, humanitarian workers may no longer be viewed by warring factions or the population as being impartial and neutral and, consequently, may become the target of attacks. It is essential that information on the principles of neutrality and impartiality of humanitarian action be widely disseminated among the population and the relevant national actors. Obtaining reliable guarantees for the safety and security of humanitarian actors by the warring factions should also be a priority.”
humanitarian access to affected areas at the present time or in the future, and poses a security risk for those working for humanitarian organisations. The danger is particularly apparent in that mistrust might lead to attacks on humanitarian actors, a phenomenon which unfortunately seems to be increasing.²⁰⁶

It appears that greater certainty regarding the guardian or guardians of DIDR/DFDR is needed. Having one or fewer actors managing and ensuring a closer collaboration between the actors working on the issue could ensure a more focused implementation and communication of the rights. UN-Habitat has been suggested as such a potential guardian by Ferris in the World Disaster Report, as UN-Habitat has been involved in the Inter-Agency Standing Committee, the principal inter-agency forum for coordination on issues of humanitarian action, and has also been an important part of the work on humanitarian challenges in urban response.²⁰⁷ The development banks, such as the World Bank, are not likely to be the best suited guardians in this regard, since “many of the flaws in resettlement programmes only become clear ex post facto, by which time the money loaned to finance the project has already been distributed and can no longer be used as leverage to ensure compliance.”²⁰⁸ Stavropoulou, Morel and Durieux have suggested that a specific Committee on the Protection from Arbitrary Displacement group could be mandated to monitor internal displacement.²⁰⁹ Kidane, building upon the arguments presented by Roberta Cohen and Francis Deng, argues persuasively however that existing agencies such as UNHCR would likely be most effective as they are already involved in protection matters and therefore would not cause as much disruption.²¹⁰ UNHCR were also suggested as a suitable guardian by the International Law Association in their report on the topic of internal displacement.²¹¹ Currently, UNHCR are dealing with IDPs upon requests from affected States.²¹² Regardless of which actor may serve as guardian of issues relating to those internally displaced, it will also be important to involve the Inter-Agency Standing

²⁰⁶ Cf. attacks against the Kabul office of the International Organization for Migration (IOM), see IOM Press Briefing Notes, IOM staff wounded in Kabul attack, 25 May 2013, as well as the attack against the International Committee of the Red Cross (ICRC) office in Jalalabad, see ICRC News Release, Afghanistan: ICRC strongly condemns attack on its Jalalabad office, 29 May 2013.
²⁰⁷ IFRC 2012, p. 165.
²⁰⁸ Dawson & Farber, p. 144.
²¹⁰ Kidane, pp. 77 - 78.
²¹² Robinson, p. 45. However, cf. Mayer, Benoit, Governing International Climate-Change Induced Migration, pp. 28 - 46 in Elliott, Lorraine (ed.), Climate Change, Migration and Human Security in Southeast Asia, RSIS Monograph No. 24, S. Rajaratnam School of International Studies 2012 [Mayer], p. 41: “The mandate of the UNHCR, for instance, has not generally extended toward internally displaced persons beyond those who would have been refugees if they had crossed international borders”.

Committee, and build upon the knowledge and experience that has been developed within this context.\textsuperscript{213}

Part 5: Realizing Article 10: Implementation and suggestions for ensuring compliance

5.1 Hopes and challenges

“The formulation of international or regional standards for protection and assistance for IDPs reflects the good intentions of individuals and groups and states seeking to alleviate human suffering and to promote a human rights culture. These good intentions are often defeated by political imperatives or founder due to lack of an effective strategy of engagement with the powers that be.”\textsuperscript{214}

While the implementation of international treaties has not always been prompt,\textsuperscript{215} there are many reasons for States to want to ensure that displaced individuals living on their territory are dealt with in a good manner. For one, States signing on to the Kampala Convention creates regional pressure on those States that have not yet ratified the Convention.\textsuperscript{216} The mere fact that, at the time of writing, 37 out of the 53 Member States of African Union have already become signatories to the Kampala Convention even though it is not even five years old seems promising for its implementation. The reputational concerns are echoed by Kälin and Schrepfer, who argue that the decision of governments to improve protection and assistance of IDPs is influenced by mainly five factors: “reputational concerns; the diffusion of concepts regarding protection of IDPs; the way in which a government perceives IDPs in terms of their political role; opportunity structures created by international and domestic instruments protecting the rights of IDPs; and the existence or absence of national and international accountability mechanisms.”\textsuperscript{217}

\textsuperscript{213}GPC IDP Handbook, p. 43.
\textsuperscript{214}Kamungi, Prisca, Beyond good intentions: implementing the Kampala Convention, Forced Migration Review 34 (2010), p. 54.
\textsuperscript{215}See e.g. Ojeda, Stephane, The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects, Refugee Survey Quarterly, 29:3 (2010), p. 66: “The crucial challenge now is of course the same one facing IHL in general, i.e. ensuring that, once the Convention is signed and ratified by as many States as possible, it is actually implemented and respected.”
\textsuperscript{217}Kälin & Schrepfer, p. 21.
Secondly, if people are displaced and forced to find their livelihoods elsewhere without access to (continuously scarcer) land, they tend to relocate to cities.\(^{218}\) Avoiding rapid and unplanned urbanization means more potential to develop stable and durable solutions for the entire country without overstretching the capacities of these often already overcrowded cities.

Preventing internal displacement is also a question of national security, as those internally displaced could become refugees in another State or further increase tensions within already strained host communities.\(^{219}\) For example, IDMC note in their report on the Kampala Convention one year after it has entered into force that:

> “Host communities are usually less visible, less accessible and tend to be neglected by humanitarians, but they often have only limited resources and coping mechanisms themselves and are significantly strained by the arrival of IDPs. Hosting IDPs can quickly make poverty worse and cause frustrations, resentment, discrimination and exploitation.”\(^{220}\)

In this context, it might be interesting to briefly mention the Great Renaissance Dam currently being developed in Ethiopia.\(^{221}\) According to the International Rivers Network, the construction of the dam is likely to displace at least 20 000 people.\(^{222}\) As the dam will be drawing water from the Nile, the construction has fuelled tension between Ethiopia, Egypt and Sudan regarding access to the water.\(^{223}\) Thus, to assess the environmental and social impacts of a project prior to its implementation, as stipulated by article 10 of the Kampala Convention, can be important also in terms of avoiding disputes with neighbouring States and other security concerns. Benoit Mayer has argued convincingly that security is likely one of the concerns that will be most important to States.\(^{224}\) Nonetheless, Elliott argues that it is important to keep in mind that these security issues at heart often relate to the environmental and other crises that take place even before these persons decide to move.

\(^{218}\) Cf. Terminski, p. 13: “Further relationships, which are difficult to delimit precisely, may combine economic development with displacement caused by long-term environmental change. A usual consequence of development projects is progressive land degradation in their vicinity. Creation of large dams significantly affects the landscape, ecology, and animal populations. […] The environmental costs of development projects therefore lead to a significant decline in the living conditions of many communities and the subsequent de facto forced migration from rural to urban areas [emphasis added].”


\(^{220}\) Progress and prospects, p. 18.

\(^{221}\) Ethiopian Electrical Power Corporation, About Grand Ethiopian Renaissance Dam.


\(^{223}\) Hussein, Hassen, Egypt and Ethiopia spar over the Nile, Al-Jazeera America, 6 February 2014.

\(^{224}\) Mayer, p. 37.
The main security policy should therefore focus not only on the national security of States per se, or on that of the developed world, but also on those vulnerable lives, livelihoods, lands and homes that are affected by climate change and displacement.225

The argument regarding national security might also be extended to refugee flows. If camps for internally displaced persons become overcrowded and the hospitality of host communities overstretched, it would seem probable that some of these displaced individuals would be forced to move a second time, thus at times becoming refugees or migrants in a neighbouring State. As has been mentioned above during the discussion on refugees and internally displaced persons, the protection of either group should not be to the detriment of the other. If less people are forced to flee within the borders of their country, it seems plausible that secondary displacement across the border would also be reduced.

Implementation of the Convention may also be easier due to its regional scope and character. Kidane, referring to Gerald Neuman, sees numerous benefits with regional treaties. Within the context of a regional treaty, States are more likely to have contributed to the different definitions and formulations contained therein, and thus are more likely to understand their duties under the treaty.226 In addition, the greater proximity as regards socioeconomic and political issues also enables a greater sense of trust between the States in question, and makes States more likely to trust a regional enforcement mechanism such as the Conference of the Parties or the African Court of Justice rather than “more distant global institutions”.227 Furthermore, regional “norms and institutions are more likely to account for historical and cultural backgrounds”.228

To a certain extent, implementation might also be facilitated due to the fact that Africa is the leading continent on this issue, with the first-ever international regional multilateral binding treaty on internal displacement. Thus, African leaders knowing that the world has it eyes on the continent might ensure better and faster implementation of the Convention. Lastly, the concept of sovereignty as responsibility, which has been discussed above, will make implementation easier if States adhere to it.

A wise way of moving forward with the implementation of the Convention would thus be to focus on linking the articles to these important imperatives for the affected States, in

226 Kidane, p. 84.
228 Kidane, pp. 84 - 85.
order to ensure a stable implementation of the legal framework. On a hopeful note, Kidane argues in this regard that there "are no more obstacles to the enforcement of the provisions of the AU Convention than there are to the enforcement of any of the other human rights and humanitarian law treaties. Rather, the clarity that the AU Convention adds to the obligations of states makes enforcement that much easier and that much more probable [emphasis added]."\textsuperscript{229} Additionally, it remains important that the human rights aspect of the provisions of the Convention is maintained, as well as to continuously disseminate materials regarding forced and internal displacement, such as e.g. the recent IPU-UNHCR Handbook as well as the Brookings - IDMC Handbook and the Global Protection Cluster’s Handbook.\textsuperscript{230}

5.2 The importance of monitoring

The Kampala Convention itself creates two means of monitoring the implementation of State parties: through a Conference of State Parties (the Conference, see article 14 (1) of the Convention) and by obliging State parties to report on their progress with respect to the Kampala Convention under their existing duty to report annually to the Commission under article 62 of the Banjul Charter, which has been ratified by all AU Member States (see article 14 (2) of the Convention).\textsuperscript{231}

To rely on the monitoring of the Conference can be and has been criticized for being overly vague.\textsuperscript{232} For example, the Convention does not specify how often the Conference of the Parties should meet and what their particular terms of reference should look like. However, as has been suggested by Kidane, the Conference could clarify the monitoring obligations under the Convention by delegating some of its powers to a new institution with a more specific mandate.\textsuperscript{233} Such a new institution could be met by the same concerns as those creating a scepticism towards a specific monitoring institution or organization on an international level: i.e. that such a solution might mean duplication of efforts, increased costs as well as creating dependency by the States upon such an organization.\textsuperscript{234} As has

\textsuperscript{229} Kidane, p. 84.
\textsuperscript{230} Regarding dissemination of materials, see e.g. ILA Report, Introduction, para. 7.
\textsuperscript{233} Kidane, p. 78.
\textsuperscript{234} Kidane, p. 77: “The contracting states obviously did not want to create a robust enforcement mechanism. Although they could have created an independent and specialized agency with a special mandate of
been noted above, the protection of IDPs is primarily the responsibility of the State. Nonetheless, this responsibility can be executed by an organization dealing with the issue more specifically, as long as that organization is monitored and held accountable by the State. Furthermore, even though “the primary responsibility under existing international law for assisting and protecting IDPs as part of the permanent population of a country lies with national governments, the authorities concerned all too often lack the capacity to assume responsibility without proper funding.” If States or the African Union as a whole were given assistance in funding such an institution, e.g. via aid in accordance with the Cotonou agreement, which will be discussed later on in this thesis, the protection of internally displaced persons could be rendered more efficient.

5.2.1 The African Court of Justice

In the case of a dispute between State parties, the Kampala Convention obligates these States to take the matter to arbitration, and, if no solution can be found, to present the case to the African Court of Justice. However, situations of States taking each other to courts for violations of human rights law are few. States are usually not willing to risk relationships with surrounding States by calling out such violations, with the risk of these countries responding in kind.

While individuals and NGOs do not have standing before the court unless accredited to the African Union or its organs, African national human rights institutions can take cases to the court, as well as the African Union itself and the African Commission on Human and Peoples’ Rights (the Commission). As the Commission would already be receiving monitoring implementation and compliance, they chose not to do so. Some of the concerns that prevented the creation of a new UN agency for IDPs may have contributed to the decision. These concerns have both a practical and theoretical dimension. The practical fears include duplicating existing capacities, raising costs, and encouraging dependency. The theoretical concern is perhaps more relevant, and it returns to the issue of sovereignty. IDPs, by definition, are within the jurisdiction of their own states”.

Cf. in this context Kidane, p. 70, who notes that the Kampala Convention also acknowledges that States may seek assistance from other States and international organisations.

Kälin & Schrepfer, p. 25.

Article 22 of the Kampala Convention.

Kidane, p. 79.

See African Union, Statute of the African Court of Justice and Human Rights, July 1, 2008, 48 I.L.M. 317 (2008) [ACJHR Statute], article 30. Article 28 of the Statute grants the Court jurisdiction to interpret all treaties created by the AU. Regarding NHRIs, see IPU Handbook p. 94: “NHRIs serve essential monitoring and oversight functions, which should be provided for as part of an IDP law by mandating them to monitor and regularly report on the implementation of the law. Their independence allows them greater access to information to understand the extent to which rights are actually enjoyed by IDPs, and what they may face. Where properly mandated, funded and capacitated, NHRIs are versatile bodies that can support the intent of parliament by holding actors accountable for their responsibilities under the law and drawing attention of duty bearers to violations of rights of IDPs, ineffective implementation of the IDP law or gaps in the response to internal displacement.”
the reports from State parties on the current situation of IDPs on their territories in accordance with article 14 (2) of the Convention, entrusting the Commission with the monitoring of the Convention might seem like a promising solution. In addition, the Commission is likely a more independent body than States. However, this independency has been called into question by Hansungule, as we will see below. Additionally, Kidane notes that the route to the Commission might prove difficult, as the path to ensure that the Commission takes on a case can be long and frustrating. This is underscored by Hansungule, who note that “[i]n practice, the greatest nightmare to most victims is how to exhaust local remedies in order to reach the Commission.” Unless local remedies are unavailable or unduly prolonged, they must be pursued and exhausted prior to taking a case to the Commission. Such local and domestic remedies must be available, effective and sufficient. These criteria have been elaborated upon by the Commission in Sir Dawda K. Jawara v. The Gambia.

“A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.”

As an alternative, it has been suggested that the Conference could take cases that it found to be in violation of provisions in the Kampala Convention to the African Court of Justice. Kidane suggests that the Conference could have their own standing before the African Court as they could qualify as an African Intergovernmental Organization and thereby have a right to present their cases to the Court. Nonetheless, it seems that the same problems as those characterizing inter-state conflicts might arise in such situations. For example, the Conference of the Parties would have to be independent and with a clear enough mandate to really take these cases to the Court without fear of retributions et cetera. The Commission has also been struggling with difficulties of ensuring independence as many former commissioners go on to take on positions in governments. One way to increase

---

240 Kidane, pp. 80 - 81.
242 Organisation mondiale contre la Torture & 2 others v. Rwanda, Communications Nos. 48/90, 50/91, 89/93, para 17. etc, as cited in Yusuf et al at p 447, footnote 58.
244 See ACJHR Statute, article 30 (d) and Kidane, p. 81.
the independence of the Commission and the Conference could be to put these persons in temporary quarantine from such political positions, thereby working to ensure that there are fewer ties between the political governance of any given State and the independent monitoring of the Commission and the Conference, respectively.

If the Court files their decision in a given case but the execution of the Court’s judgement is lacking, the case can be referred to the Parliamentary Assembly of the African Union. The economic and political sanctions that the assembly can adopt in accordance with article 46 (5) of the Statute of the African Court of Justice and article 23 (2) of the Constitutive Act of the African Union would probably be enough to instil change as regards countries not desiring to oblige with the requirements of the Court’s judgement.

5.2.2 Collecting data: The role of the civil society

In order to monitor the situation of internally displaced persons, it is crucial to have timely and reliable data on how many IDPs are affected and where they are located. While there is no “overarching organization collecting or collating statistics on the numbers of people displaced by natural disasters, development interventions, situations of political instability that do not reach the threshold of armed conflict, or as a result of climate change”, such data has been and is being collected and analysed by different actors such as IDMC and the Joint IDP Profiling Service (JIPS). The main difficulty besides securing access to areas in order to collect data is to strike a reasonable balance between ensuring that the data is timely and that it is reliable. The capacity of civil society to collect such data may prove even more crucial as States often display a “lack of capacity to collect and analyze the kind of information about the displacement situation that is necessary for any adequate response.” This current lack of capacity might nonetheless be improved in the future, as

246 Article 46 (4) of the ACJHR Statute.
248 McDowell & Morrell, p. 37.
249 Interestingly, these two actors are explicitly mentioned in the latest General Assembly resolution on the situation of those internally displaced, see UN General Assembly, Resolution 68/180, Protection of and assistance to internally displaced persons, 18 December 2013, UN Doc. A/RES/68/180 in the following paragraphs:
25. Recognizes the need to collect reliable disaggregated data, including data disaggregated by age and sex, on internally displaced persons in order to improve policy, programming and response to internal displacement and, in this respect, the relevance of the inter-agency Joint Internally Displaced Person Profiling Service and the global database on internally displaced persons maintained by the Internal Displacement Monitoring Centre;
27. Encourages Governments, members of the Inter-Agency Standing Committee, United Nations humanitarian coordinators and country teams to ensure the provision of reliable data on internal displacement situations, collaborating with the Internal Displacement Monitoring Centre, requesting the support of the Joint Internally Displaced Person Profiling Service and providing financial resources, as appropriate in these respects;”
article 13 of the Kampala Convention requires States to register and provide documentation for IDPs on their territory.

Among other suggestions to ensure greater monitoring and implementation of the right not to be displaced can be noted the establishment of a new Committee on the Protection of Arbitrary Displacement to monitor and enforce the right not to be displaced. 251 However, as we have seen above during the discussion on humanitarian and development actors, it seems more plausible that an already existing institution with working knowledge on similar issues, such as UNHCR, would be better suited to guard the protection of IDPs. UNHCR are already cluster lead on conflict-induced IDPs since the transformation of the humanitarian system in 2005. 252

5.3 Encouraging change: lessons learned from the international investment regime and the Cotonou agreement

5.3.1 International investment agreements and human rights

“Discussions concerning the inter-relationship between international economic law and human rights as well as international environmental law have made it clear that these areas can no longer be separated.” 253

“[F]ormal investment regimes such [as…] the rapidly proliferating bilateral investment treaties (BITs), urgently require further examination as to their sustainability implications.” 254

As has been noted earlier on in the text, the answerability of non-state actors such as private security companies and multinational corporations is one of the areas where the Kampala Convention goes further than the Guiding Principles. 255 The provisions obliging the State parties to ensure the accountability of such non-state actors not to arbitrarily displace persons could be linked to similar provisions in bilateral investment treaties in order to ensure further implementation of and adherence to the Convention. Integrating provisions on internal displacement in their respective bilateral investment treaties would also facilitate for State parties to live up to their responsibilities under the second paragraph of article 3 of the Kampala Convention regarding the means States shall adopt to ensure

252 See e.g. Morris, Tim, UNHCR, IDPs and clusters, Forced Migration Review 25 (2006), p. 54.
255 See at p. 32 of this thesis. See also e.g. Stavropoulou 2010, p. 63.
that the obligations of the Convention are upheld, e.g. by designating a responsible authority or body coordinating activities as well as provide necessary funds for protection and assistance of internally displaced persons.

In recent years, the world has witnessed a growing number of bilateral investment treaties. It has even been noted that they “are designed to set standards applicable in international law.” Just as the majority of these agreements contain a provision of expropriation, they could similarly contain a paragraph on internal displacement when relating to the African context. Furthermore, using the international investment regime to further the objectives of sustainable development and human rights has been discussed thoroughly over the last few years. In her doctoral dissertation of 2012, Åsa Romson applied principles of sustainable development to international investment law and found that the two regimes could further the motives of each other by being combined in a more comprehensive manner. Similarly, Ashfaq Khalfan note that these two areas have been becoming increasingly intersected, which calls for “a serious and measured assessment of the rules governing State laws and policies in this area”. Former judge at the International Court of Justice Bruno Simma has also witnessed this turn of events, and makes the following observation:

“In a 2007 Report, UNCTAD observes an innovative trend in the ‘new generation’ of renegotiated or recently concluded IIAs [International Investment Agreements], where States are ‘stri[king] a balance between maintaining a comprehensive definition of investment . . . [and] address[ing] a broader range of issues . . . The protection of health, safety, the environment and the promotion of internationally-recognized labour rights are areas where new IIAs include specific language aimed at making it clear that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of other key public

---

256 See e.g. Shaw, Malcolm, *International Law*, 6th ed., Cambridge University Press 2008, p. 838: “Indeed, there has been a remarkable expansion in the number of such bilateral investment treaties.”


258 See United Nations Conference on Trade and Development (UNCTAD), *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, UN 2012, p. 5: “Through IIAs, States have established a guarantee for foreign investors against the expropriation of their investments without compensation. Today virtually all bilateral investment treaties (BITs) contain an expropriation provision.”

259 See e.g. Romson, Åsa, *Environmental Policy Space and International Investment Law* (PhD Diss.), Department of Law, Stockholm University, Acta Universitatis Stockholmiensis, 2012 [Romson], p. 30: “how can investment treaties both respect and enhance policy space for environmental regulation?” and p. 37: “Broadening and deepening of the understanding of the complexity of environmental law in the context of investment protection is a prerequisite for any attempt to truly integrate environmental respect into this area of international economic law.”

An argumentation to enhance the role of human rights law in international investments is usually based on article 31 (3) c of the Vienna Convention on the Law of Treaties regarding the interpretation of a convention in the light of other treaties constituting the international legal context of any given treaty. Simma has argued persuasively that international human rights law would qualify under what he terms the three-pronged test under article 31 (3) c, namely that there is a “rule” which is “relevant” and “applicable in the relation between the parties.” As the right not to be arbitrarily displaced is now a legally binding human right within the African context, it needs to be considered when concluding and interpreting IIAs with African States. Thus, it would seem more efficient to conclude BITs that would be complying with human rights requirements under the Kampala Convention from the beginning. Ensuring public participation in the process of concluding or reviewing BITs would also partly remedy the concern that these treaties are concluded without the transparency and public participation, which is generally the norm for other legislation governing such important areas.

While integrating human rights standards in IIAs might seem like a promising solution, the development of human rights standards within the context of international investment agreements has been slow. In fact, the way in which States have had the most success in using human rights standards within the international investment regime is “in arguing that human rights are an interpretative aid to guide vague treaty and contract standards, as for example the BIT obligation on the host State to provide fair and equitable treatment.”

---

261 Simma, p. 581.
263 Simma, p. 585.
264 Cf. Jacob, Marc, International Investment Agreements and Human Rights. INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010. Duisburg: Institute for Development and Peace, University of Duisburg-Essen, p. 22: “Another potential concern is the fact that, despite the ultimately far-reaching impact of major international investments (e.g. power plants, water and sewage infrastructure, landfills, mining pits etc.), the BITs providing the basic legal framework for such large-scale projects have traditionally been negotiated and concluded outside the public sphere. This acute participation deficit of concerned sectors of society and NGOs is of course not uncommon when it comes to international treaties. One curt answer to this is that the citizens’ consent can be indirectly derived from their respective governments’ participation in the treaty-making process.”
266 See e.g. de Brabandere, Eric, Human Rights Considerations in International Investment Arbitration, Grotius Centre Working Paper 2013/001-IEL, p. 25: “An analysis of case law shows that investment tribunals have been confronted with human considerations but have been relatively reluctant to engage in human rights discussions.”
In this context, it might be interesting to discuss the case of *Biwater v Tanzania*, as it illustrates the difficulties that States have had in using human right arguments before the arbitrators as well as possible openings for enhancing the human rights discourse within the international investment law regime, and as Tanzania has ratified the Kampala Convention. Tanzania argued that the British company Biwater company had not been fulfilling their duties in accordance with their mutual contract and thus regained possession over property that had been leased to the investor under the terms of the contract, arguing before the arbitrators that “[w]ater and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so.” Biwater on their part argued that the repossession amounted to expropriation. The three arbitrators from the International Centre for Settlement of Investment Disputes found that the acts undertaken by the State amounted to expropriation. However, the arbitrators also found that certain rights and obligations characterized the investment environment in question, thereby acknowledging that Tanzania was bound by its human rights obligations as well.

As has been concluded earlier, since the wording of article 10 is vague, it needs to be interpreted in a way that furthers a rights-based approach and interpretation. If investment treaties were to contain clauses on avoiding arbitrary displacement, this would also create state practice on the matter which could strengthen such a human rights interpretation of the provisions. Since the Kampala Convention extends its scope to actions of public actors and private actors, it is of great importance that States ensure that actions violating the Convention would ensure accountability, i.e. by being proactive in their response to displacement. Bilateral investment treaties could be such a way of creating rules regulating such third parties and their sources of income. In accordance with article 1 of the ILC Draft Articles, every wrongful act by a State incurs state responsibility. Thus, it is in the State’s interest that private companies do not act irresponsibly under international law, as the State can be held accountable if such corporations act contrary to the norms of the Kampala Convention.

Accordingly, in Simma’s words, at its best the creation of better international investment agreements can ensure a greater respect for human rights as well as investor protection, and the “rule of law and respect for human rights in tandem with investor protection can

---

267 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award* (24 July 2008), paras. 436 and 434 [*Biwater*].

268 *Ibid*, para. 485. See also at para. 515: “no necessity or impending public purpose to justify the Government’s intervention in the way that took place.”

269 *Ibid*, para. 601. For further aspects of this interpretation, see *SD & World Investment Law*, p. 76.
thus form a sort of virtuous circle in improving welfare.”

5.3.2 The Cotonou agreement

In order to enhance the implementation of the Convention, it would also be possible to view the obligations from the Kampala Convention as a part of the Cotonou agreement between the European Union (the EU) and African, Caribbean and Pacific countries (the ACP Group). The agreement, which builds on the previous Lomé conventions between the same parties, establishes criteria for aid between the State Parties. According to article 95 of the agreement, it may be revised every five years until 2020, with the next possible revision coming up in 2015.

As Kälin and Schrepfer observes, “a state may accept international human rights norms [...] when a state seeks foreign assistance from a country that imposes human rights conditionality on the receipt of aid.” The important role that financial assistance can play was also witnessed in the aftermath of the conflict in former Yugoslavia, where the commitments of the Dayton Peace Accords ensured funds were made available by the international community to rebuild the property that had been destroyed in the conflict, thereby facilitating return for those who so desired. However, there is a valid concern that displaced persons should not be left to suffer due to the actions of their government. Nonetheless, threats of reduced or altered aid could be a factor in enhancing the enjoyment of rights of the local population, such as in Sri Lanka in 2009, where alterations in aid may have “influenced the decision of the Sri Lankan government [...] to release IDPs from closed internment camps earlier than planned”.

In addition, organisations from the civil society can still be granted aid and work for the right of IDPs based on the Kampala Convention even if the assistance to the government is altered.

Article 9 of the Cotonou agreement underlines the importance of human rights for the parties, observing that “[t]he respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and

270 Simma, p. 576.
271 Cotonou agreement, O.J. L 287, 04 November 2010.
272 Kälin & Schrepfer, p. 21.
273 Ibid.: “Access to funding and other international support may also be an incentive for ratification of international legal instruments in favor of IDPs. The funding aspect is also highly relevant in the context of peace agreements and peacebuilding. For example, clear commitments in the Dayton Peace Accords resulted in very substantial resources being made available to Bosnia and Herzegovina to rebuild destroyed houses as a prerequisite for return.”
274 See e.g. Kälin & Schrepfer, p. 22: “In the context of internal displacement, coercion arguably does not play an important role because threats such as withholding humanitarian aid in the event of non-compliance with international norms are rare in view of the risk of inflicting further harm on already victimized IDPs.”
275 Kälin & Schrepfer, footnote 116.
international policies of the Parties and constitute the essential elements of this Agreement.” This article was revised in the 2005 edition of the Cotonou agreement in order to ensure a “strengthening [of] the political dimension by placing greater emphasis on effective dialogue and results.” The political dialogue and consultation between the parties as established in articles 8 and 96 of the agreement also envisages the suspension of aid as a measure of last resort if the obligations of the agreement are not being upheld.

Furthermore, and as we have seen throughout this thesis, private actors are often involved in development projects leading to displacement. Therefore, it is important that non-state actors are given a broad definition in article 6 of the Cotonou agreement. The Kampala Convention could be understood as forming a part of the human rights context as mentioned in preamble 14 or article 9 of the Agreement. While important criticism can be raised regarding the difficulties with conditioning aid as to fit better with the donor’s political agenda, it is worth noting that the standards and obligations stemming from the Kampala Convention have been developed by the receiving States themselves.

Thus, both of these suggestions could be vital in creating economic and political motivation for States parties to ensure that their agents as well as private actors for whom they are responsible follow the rules stipulated by the Kampala Convention. Additionally, it should be mentioned that using a normative framework that has been created in and for the African context removes potential doubts of importing and imposing European or Western norms of human rights upon African States.

However, it should be noted that these proposals, while they could potentially have an important impact, also have their limits. As has been noted above, certain Chinese investors as well as Saudi and Indian businessmen have capital of their own without needing the World Bank or other IFIs to grant them loans that could then be tied to certain criteria stemming from the Kampala Convention. Investors having a poor record as regards human rights and the environment are not likely to embrace rigorous standards, and could thereby work against the imperatives of the Kampala Convention. That said, creating an expectation by the rights holders in any given country that their rights will be upheld might make it necessary for those governing that country to legitimize their rule by acknowledging these rights and holding public and private investors accountable for their actions.


277 Ibid, p. 231.
Part 6: Conclusions

“The many existing fragments of law relating to arbitrary displacement have a common thread running through them, revealing a human right not to be displaced.”

As we have seen, internally displaced persons have been affected by development projects throughout modern history. While the norms of international law are often applicable to those affected, they are scattered across various legal regimes, resulting in gaps in protection for those displaced by projects. Thus, a more comprehensive international framework has been deemed necessary.

Indeed, according to the legal annotations to the Guiding Principles, the very purpose of former SRSG Deng in developing the framework on internal displacement was to “defin[e] explicitly what is now only implicit in international law”.

The Kampala Convention serves this purpose by establishing a unified and legally binding right not to be arbitrarily internally displaced within one’s own country, and applying this right to development projects. By bringing together norms from different legal regimes into one single legally binding document, the right not to be arbitrarily displaced has been strengthened and might also become easier to monitor. Maria Stavropoulou similarly adheres to this line of argumentation when she argues that “[t]hat it is derived from or implied by other, well-established human rights – in particular the right to freedom of movement and residence, the right to private life and the right to adequate housing – is beyond dispute. Nonetheless, the ‘naming effect’, i.e. restating and clarifying a legal norm in a legally binding or otherwise authoritative instrument, thereby defining explicitly what is implicit in international law, is likely to significantly strengthen existing protection.”

Kidane perhaps expresses it most eloquently in his discussion on the added value of the Convention:

“The right not to be displaced or the duty not to displace is the cornerstone of the rights-based regime that the AU Convention establishes. Although numerous human rights and

---

278 Stavropoulou et al 2012, p. 5.
279 Oleschak, pp. 4 - 5.
280 Legal annotations, p. 27.
281 Cfr. Civil society guide, p. 13: “By reinforcing these norms and bringing them together into one instrument, it offers a unique legal framework to address the specificities of internal displacement on the African continent.”
humanitarian law instruments recognize this right indirectly, it gained its finest expression in the UN Guiding Principles, and the AU Convention adopted its description of this right. The right not to be displaced has never been recognized as an absolute right.”

Similarly, in her doctoral dissertation of 2013, Michèle Morel notes that “[n]one of the general human rights instruments on the international and regional level – the ICCPR, ICESCR, ECHR, ACHR and the ACHPR – contains a provision explicitly recognizing the right to be protected from arbitrary displacement. The only legally binding, hard law recognition of the right not to be displaced can be found in a specific human rights instrument adopted at the regional level in 2009: the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the African Union.”

Thus, the drafters of the Kampala Convention took a previous soft norm and made it into binding hard law, making this one of the main achievements of the Kampala Convention. Furthermore, having an African normative standard on human rights of the internally displaced might lead to a greater sense of ownership of such human rights by African countries and citizens therein, and a better understanding of the importance of such rights. The Kampala Convention cannot be viewed as a foreign or Western element that is being implanted or imposed upon the African context. To have created an African solution to the problem of internal displacement on the continent seems vitally important given that a significant proportion of the world’s internally displaced persons are living in African countries, and since 70 % of large-scale land acquisitions are taking place on the continent.

It is hoped that the implementation of the Kampala Convention will also mean progress on the common work done by all actors, development and humanitarian alike, by unifying and clarifying these different international standards and accountabilities. However, while the convention is a remarkable step forward, and while numerous factors such as the advantages of a regional order points to a more succinct implementation than have previously been witnessed in the context of international law, challenges for that implementation still remain, and I have therefore suggested a number of ways of ensuring greater adherence to the Convention.

283 Kidane, pp. 58 - 59.
284 Morel dissertation, p. 128.
285 IFRC 2012, p. 163.
286 Kidane, p. 84.
Monitoring of the Convention will be crucial, particularly to ensure that the Convention is not disappearing from the international radar now that the treaty has received enough ratifications to enter into force. In order to monitor the Convention in the best manner possible, ensuring access to reliable data will be a keystone of the observations, especially as there is currently a lack of statistics on those displaced by development projects, which makes it difficult to know for certain to what extent people have been displaced, and therefore also how best to respond to these situations.287 By having access to better data, humanitarian actors and development actors might also find better ways of obtaining a fruitful division of labour more easily. In the securing of reliable and fast data, JIPS and IDMC will likely have crucial functions. As a further measure to ensure greater monitoring of the obligations of States, Kidane and others have suggested a number of different paths for individual claims to get access to the African Court of Justice.

In her doctoral dissertation of 2012, Åsa Romson argues that the aims of sustainable development could be ensured to a greater extent by designing International Investment Agreements (IIAs) with maximum space for environmental law and policy as well as having investors commit to sustainable development and enhancing environmental governance in host States.288 The argument is echoed by that of Ashfaq Khalfan, writing in his preface in “Sustainable Development and World Investment Law” that the “increasing intersections between international investment and the protection of human rights calls for a serious and measured assessment in this area.”289 In this context, the interpretation of VCLT 31 (3) c is mentioned as a possibility to ensure that the different legal frameworks are harmonized as far as possible.290 A similar solution to that presented by Romson could be created regarding internal displacement within the context of investment instruments concluded by African States, e.g. by adding a paragraph similar to article 10 on the importance of ensuring that populations are not arbitrarily displaced in the planning and creation of development projects, as well as ensuring that feasible alternatives are explored and that stakeholders are consulted with in the process. Such a solution would facilitate for State parties to live up to their obligations under particularly articles 3 and 4 of the Kampala

288Romson, pp. 345 - 346.
289SD & World Investment Law, p. 53.
290SD & World Investment Law, pp. 54 - 55, Report ILC 2006, para. 14 (3): “When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31-33 having to do with the interpretation of treaties.”
Convention regarding the responsibility of the State to ensure the accountability of third parties such as corporations and foreign investors.

Lastly, we have also seen how the Cotonou agreement regarding aid between the ACP Group and the EU could be used in order to leverage the rights of those internally displaced on the African continent.

Hopefully, a greater adherence to a unified right not to be arbitrarily displaced within one’s own country and its corollary duty not to displace can lead to sustainable and fruitful development projects to the benefit for both local residents, States and corporations.
Part 7. Bibliography

Literature

a) Books and articles


Cordonier Segger, Marie-Claire, Gehring, Markus W., and Newcombe, Andrew (eds.), *Sustainable Development and World Investment Law*, Kluwer Law International 2010


Koser, Khalid, Climate Change and Internal Displacement: Challenges to the Normative Framework in Piguet, Etienne, Pécout, Antoine and de Guichtenoire, Paul (eds.), *Migration and Climate Change*, UNESCO 2011


Morel, Michèle, *The Right not to be Displaced in International Law*, (PhD Diss.), Ghent University Faculty of Law, Department of Public International Law, Academic year 2012-2013


Oleschak, Rekha, *The International Law of Development-Induced Displacement*, (PhD Diss.), University of St. Gallen, Graduate School of Business Administration, Economics, Law and Social Sciences, Dissertation no. 3471, 2009

Penz, Peter, Dydyk, Jay and Bose, Pablo S., *Displacement by development*, Cambridge University Press 2011

Phuong, Catherine, *The international protection of internally displaced persons*, Cambridge University Press 2004


Romson, Åsa, *Environmental Policy Space and International Investment Law* (PhD Diss.), Department of Law, Stockholm University, Acta Universitatis Stockholmiensis, 2012


Simma, Bruno, *Foreign Investment Arbitration: A Place for Human Rights? International and Comparative Law Quarterly* 60 (2011), DOI: 10.1017/S0020589311000224


http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8833/Bogumil%20Terminski,
%20development-
Induced%20Displacement%20and%20Resettlement.%20Theoretical%20frameworks%20and%20current%20challenges.pdf?sequence=1 on the 21st of November 2013

b) Reports


Scatts, Sonya and Breslin, Shaun, China and the International Human Rights System, Chatham House, October 2012


Warner, Koko et al, Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa, June 2012, UNU-EHS and UNHCR

Warner, Koko et al, Changing climate, moving people: framing migration, displacement and planned relocation, UNU-EHS/Nansen Policy Brief, No. 8 June 2013


c) UN Reports


71


Report of the Secretary-general, *Climate Change and Its Possible Security Implications*, 11 September 2009, UN Doc. A/64/350


UN General Assembly (UNGA), *Climate change and its possible security implications: report of the Secretary-General*, 11 September 2009, UN Doc. A/64/350


**d) News and press releases**


Cases

a) International Centre for the Settlement of Investment Disputes


b) International Court of Justice


c) African Commission of Human and Peoples’ Rights


Treaties, declarations, resolutions and general comments

a) Treaties


b) Declarations and resolutions


UNGA, Resolution 60/1, *2005 World Summit Outcome*, 16 September 2005, UN Doc. A/RES/60/1


UNGA, Resolution 68/180, *Protection of and assistance to internally displaced persons*, 18 December 2013, UN Doc. A/RES/68/180


d) Recommendations and general comments


National legislation

a) *Sweden*

SFS 1974:152 *Regeringsform*

Other materials


*Cotonou agreement*, O.J. L 287, 04 November 2010


UNHCR Concept Paper: High Commissioner’s Dialogue on Protection Challenges 11-12 December 2013, Protecting the Internally Displaced: Persisting Challenges and Fresh Thinking