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COMPARISON OF THE KAMPALA CONVENTION AND THE IDP PROTOCOL OF THE GREAT LAKES PACT

A briefing note by the International Refugee Rights Initiative¹
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Background

The **Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa** – the Kampala Convention – was adopted by the African Union (AU) Heads of State Special Summit in Kampala, Uganda, on 23 October 2009. It is the first independent legally binding regional instrument in the world to impose on states the obligation to protect and assist IDPs.

The Convention entered into force on 6 December 2012, after having been ratified by 15 African countries.² Since then, on-going efforts to ensure additional ratifications have brought Angola, Malawi, Mali and Rwanda on board.

The **Protocol on the Protection and Assistance to Internally Displaced Persons** – the IDP Protocol – was signed as part of the Pact on Security, Stability and Development in the Great Lakes Region by the Heads of State and Government of eleven member states³ on 15 December 2006, under the auspices of the International Conference on the Great Lakes Region (ICGLR). All member states have ratified the Pact, of which the IDP Protocol is a part.

There is a striking similarity between the African Union's **Convention for the Protection and Assistance of Internally Displaced Persons in Africa** (Kampala Convention) and the **Protocol on the Protection and Assistance of Internally Displaced Persons** (IDP Protocol) of the International Conference on the Great Lakes Region (ICGLR). Indeed, the strong similarity in the titles of the two documents reflects their common vision and parallel purpose. This paper is designed to highlight the similarities and differences between the Convention and the Protocol in order to help legal scholars, NGOs and policy makers to utilise both instruments. It is also hoped that by pointing out the similarities between the two instruments, this may encourage ICGLR states that have not yet ratified the Kampala Convention to do so in view of the similarities in purpose and content.

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² Those 15 ratifications were: Benin, Burkina Faso, Central African Republic, Chad, Gabon, Gambia, Guinea-Bissau, Lesotho, Nigeria, Niger, Sierra Leone, Swaziland, Togo, Uganda and Zambia.

³ The ICGLR member states are Angola, Burundi, Central African Republic (CAR), Democratic Republic of Congo (DRC), Kenya, Republic of Congo, Rwanda, South Sudan, Sudan, Uganda, Tanzania, Zambia. South Sudan formally applied for membership of ICGLR on 08.09.2012 during the 3rd Extraordinary Summit of ICGLR Heads of State.

The Content of the Two Legal Instruments

Responsibility for Providing Protection to Internally Displaced Persons

Both documents are in agreement as to the primary duty and responsibility of the State for providing protection and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind. (IDP Protocol, Article 3 (3) and 4, and Kampala Convention Article 5(1)).

Definition of Internally Displaced Persons

Both documents have a similar definition of internally displaced persons as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” (See the Kampala Convention Article 1k and the IDP Protocol, Article 1(4). This definition is taken directly from the *UN Guiding Principles on Internal Displacement*.) However, the IDP Protocol is distinct in that, in a separate but adjacent definitional clause, it includes those who have been displaced by large scale development – “Internally Displaced Persons also means persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of large scale development projects...” (Article 1(5)). The AU Convention does not include those displaced by large scale development projects in the definition but has a specific section, Article 10, on “Displacement Induced by Projects.” This section, however, focuses on the prevention of displacement, the exploration of feasible alternatives and the carrying out of a prior socio-economic and environmental impact assessment of proposed development projects. This is discussed further below.

The UN Guiding Principles on Internal Displacement

In its Preamble, the Kampala Convention recognises the *UN Guiding Principles on Internal Displacement*, mentioning “the inherent rights of internally displaced persons as provided for and protected in international human rights and humanitarian law and as set out in the 1998 United Nations Guiding Principles on Internal Displacement, which are recognized as an important international framework for the protection of internally displaced persons.” The Protocol gives the Guiding Principles more prominence with a key objective being the establishment of a Great Lakes legal framework for ensuring the adoption and implementation of the *UN Guiding Principles on Internal Displacement* by Member States, Article 2(1). In fact, one of the objectives of the Protocol is to provide a legal basis for the domestication of the Guiding Principles into national legislation by member states - Article 2(3) and Article 6.

Member states of the ICGLR also commit to using the “*Annotations of the Guiding Principles on Internal Displacement*” as an authoritative source for interpreting the application of the same – Article 6(2). The IDP Protocol is the first binding multilateral instrument in the world dedicated to the implementation of the internationally recognised Guiding Principles on Internal Displacement. “The Guiding Principles reflect and are consistent with international human rights law and international humanitarian law and to a large extent thus codify and make explicit guarantees protecting internally displaced persons that are inherent in these bodies of law.”⁴ The centrality of the Guiding Principles to the IDP Protocol is reflected in the fact that they are annexed to the Protocol which draws much on them in terms of substance.

In the Kampala Convention, the Guiding Principles are explicitly referred to only once, in the Preamble, while in the IDP Protocol, they are mentioned about twenty times. However, just like the IDP Protocol, the Kampala

⁴ Walter Kalin, “Preface to the Second Edition of the Annotations to the UN Guiding Principles on Internal Displacement,” Brookings Institution, 2008.

Convention builds on international humanitarian law and international human rights law, as well as the UN Guiding Principles on Internal Displacement.

Obligations and Responsibilities for Protection

The Convention is arranged mainly in terms of obligations relating to states parties, international and humanitarian organisations and the African Union, while categorically stating in the Preamble that states parties have the “primary responsibility and commitment to respect, protect and fulfil the rights to which internally displaced persons are entitled, without discrimination of any kind.”

On the other hand, the Protocol focuses almost exclusively on member states as far as responsibility to protect is concerned, particularly in Article 3, “Responsibility to Protect Internally Displaced Persons” and in Article 4, “Scope of Protection” as well as in Articles 5 and 6. It is clear that the Protocol underlines the protection function of member states, who bear the primary responsibility for internally displaced persons. The Guiding Principles also recognise the primary responsibility of states, or “national authorities”, for the protection and humanitarian assistance of internally displaced persons – Principle 3. In Article 4, the Protocol commits member states to protect internally displaced persons in general and as reflected in the Guiding Principles in particular. It evokes respect and compliance to Security Council Resolution 1296 applicable to the protection of the civilian population during armed conflict as well as Security Council Resolution 1325 applicable to the protection of women and their role during armed conflict, including their participation in decision-making and administration of programmes.

Humanitarian Access and Assistance

Although the primary responsibility for the protection and assistance of IDPs lies with the state, both documents hold governments responsible for allowing humanitarian access and assistance where necessary. The IDP Protocol says that “Member States shall facilitate rapid and unimpeded humanitarian access and assistance to internally displaced persons” (Article 3(6)). Similarly, the Kampala Convention commits states parties to “ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel” (Article 3(j)). These guarantees are strong in the Guiding Principles, which also have a whole section, Section IV - Principles Relating to Humanitarian Assistance – dedicated to these issues. The particularly relevant provisions of the Guiding Principles state the following:

- Principle 3(1) - “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”
- Principle 24(1) - “All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.”
- Principle 26 – “Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence. “

Importantly, according to the Protocol, where Governments of Member States “lack the capacity to protect and assist internally displaced persons, such Governments shall accept and respect the obligation of the organs of the international community to provide protection and assistance to internally displaced persons.” (Article 3(10)). It is significant in this respect that the IDP protocol would seem to go further than the Guiding Principles, which refer only to the right of the international community to offer assistance, by placing a positive responsibility on states where they “lack the capacity to protect and assist” (Article 3(10)).

The Kampala Convention goes further in terms of guarantees in the area of humanitarian assistance. Unlike the Protocol, it refers to the Sphere Standards⁵ for monitoring and evaluating the effectiveness and impact of

⁵ Humanitarian Charter and Minimum Standards in Disaster Response

humanitarian assistance (Article 9(2)(m)). According to the Kampala Convention, states parties shall assess or facilitate the assessment of the needs and vulnerabilities of internally displaced persons and of host communities (Article 5(5)) in cooperation with international organisations or agencies; the states parties shall cooperate with each other upon the request of the concerned state party or the Conference of States Parties in protecting and assisting internally displaced persons; they shall respect the mandates of Article 2(2); and states parties shall respect the mandates of the African Union and the United Nations, as well as the roles of international humanitarian organisations in providing protection and assistance to internally displaced persons, in accordance with international law (Article 3(3)). In case of inadequate resources to respond to a particular disaster, states are to cooperate in seeking the assistance of international organisations and humanitarian agencies, civil society organisations and other relevant actors. Such organisations may offer their services to all those in need (Article 5(6)). States parties shall:

- take necessary steps to effectively organise, relief action that is humanitarian, and impartial in character, and to guarantee security. States parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons
- enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organisations and other relevant actors, to provide protection and assistance to internally displaced persons.
- have the right to prescribe the technical arrangements under which such passage is permitted (Article 5(7));
- uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors (Article 5(8)); and
- put in place measures for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to internally displaced persons in accordance with relevant practice, including the Sphere Standards (Article 9(2)(m)).

Communities with Special Attachment to Land

The Kampala Convention is similar to the IDP Protocol in seeking to protect “communities with special attachment to, and dependency on, land due to their particular culture and protection against displacement, except in compelling and overriding public interests.” (Article 4.5). The IDP Protocol equally provides special protection for displaced populations, communities, pastoralists and other groups, with a special dependence on and attachment to their lands, consistently with the provisions of the International Covenant on Civil and Political Rights 1966, the African Charter on Human and Peoples’ Rights 1981 and the UN Guiding Principles. (Article 4(1)(c)).

Genocide, War Crimes and Crimes against Humanity

According to the Convention, acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity are punishable by law. The Protocol does not explicitly mention genocide, crimes against humanity and war crimes, but these are strongly implicit in the Protocol since it builds on, and annexes, the Guiding Principles which criminalise them in Principle 1. The Principles go further than the Kampala Convention in providing for protection of internally displaced persons in particular against genocide, murder, “summary and arbitrary executions, enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.” (Principle 10).

Protection of IDPs and Addressing Root Causes

In its Preamble, the Convention reaffirms the commitment of the member states of the African Union to the shared common vision of providing durable solutions to situations of internally displaced persons by establishing an appropriate legal framework for their protection and assistance. In the same section, the Convention also expresses determination to “to adopt measures aimed at preventing and putting an end to the phenomenon of internal displacement by eradicating the root causes, especially persistent and recurrent conflicts, as well as

addressing displacement caused by natural disasters..” It expresses determination to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance as well as with durable solutions.

Similarly, in its Preamble, the IDP Protocol expresses deep concern about the continuing magnitude of the phenomenon of internal displacement and recognises the necessity “to eliminate the root causes”. In Article 2 (4), Member States are committed “to prevent and eliminate root causes of displacement” while Article 3 (1) “undertake[s] to prevent arbitrary displacement and to eliminate the causes.” In Article 2(2), the Protocol aims to ensure legal protection by member states of the physical safety and material needs of internally displaced persons in accordance with the Guiding Principles in Article 2(2).

The Convention talks about putting an end to the phenomenon of internal displacement by “eradicating the root causes”, especially persistent and recurrent conflicts (Preamble) while the IDP Protocol commits member states to “prevent and eliminate the root causes” of displacement (Article 2 (4)).

Prohibition and Prevention of Arbitrary Displacement

Some of the provisions on prohibition and prevention of arbitrary displacement are directly related to those on displacement induced by projects.

The Kampala Convention contains the right to protection from arbitrary displacement. In Article 3(a), states parties commit “to refrain from, prohibit and prevent arbitrary displacement of populations”, while the IDP Protocol commits Member States in Article 3(1) “to prevent arbitrary displacement and to eliminate the root causes of displacement.” Article 5(2) commits member states “to avoid arbitrary displacement” and to “take all measures necessary to minimize displacement and to mitigate the adverse effects of development induced displacement.” The relevant provisions of the IDP Protocol are reinforced by the attached UN Guiding Principles which go further than the Kampala Convention in the definition of specific prohibitions. Principle 5 of the UN Guiding Principles states that “all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.”

The whole of Principle 6 of the Guiding Principles is dedicated to protection against, and prohibition of, arbitrary displacement. Article 4(4)(a) of the Kampala Convention extends the scope of prohibition to “practices aimed at/ or resulting in altering the ethnic, religious or racial composition of the affected population” and qualified situations of armed conflict, large scale development projects and disasters. Article 4(4) (a) to (h) actually defines a broad scope of categories of displacement that the Convention covers.

In Section 3(4) and 3(5) of the non-binding Model Legislation attached to the IDP Protocol, arbitrary displacement is prohibited and those implementing large scale development projects are made responsible for covering the costs of relocation and compensation.

Displacement Induced by Projects

In its section on “Displacement Induced by Projects” (Article 10), the Convention commits states parties to “as much as possible ... prevent displacement caused by projects carried out by public or private actors.” (Article 10(1)) Additionally, feasible alternatives should be explored with full information and consultation of potential evictees, having done a prior “socio-economic and environmental impact assessment” of the project. Article 12 of the Convention is entitled “Compensation” and is related to Article 10 in that it commits states parties to establish “just and fair legal frameworks” to manage issues of property, compensation and other forms of reparations for internally displaced persons, for “damage incurred as a result of displacement”, even in cases of natural disasters. Although this section is brief and seemingly not as comprehensive as the parallel one in the IDP Protocol, it is important in terms of highlighting underlying legal guarantees, “in accordance with international standards.”

In the “Development-Induced Displacement” sub-section of the IDP Protocol, provisions are more extensive and tighter than in the Kampala Convention. The IDP Protocol goes further to require that such development induced displacement shall be justified by “compelling and overriding public interest and development.” Member States are required to provide full information on the reasons and procedures concerning the displacement, compensation and relocation where applicable. It also provides for a gendered approach to participation in the planning and management of relocation, return, re-integration and resettlement of internally displaced persons. The IDP Protocol also commits member states to return and reintegrate, or resettle the displaced persons and populations as outlined in Section V of the Guiding Principles. A strong clause in the IDP Protocol commits member states to “obtain, as far as possible, the free and informed consent of those to be displaced prior to undertaking displacement”, going further than the Guiding Principles which inspired it where the consent must simply be “sought” – Principle 7(3)(c). Although the AU Protocol also requires full information and consultation it does not include the specific language on consent.

Responsibilities of Non-State Actors (including Armed Groups)

A major part of the Convention is the provision for the respective “obligations, responsibilities and roles of **armed groups, non-state actors** and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons” (Article 2(e)).

Non-state actors, including multinational companies and private military or security companies, shall be called to account concerning acts of arbitrary displacement or complicity in such acts. Furthermore, states parties are to ensure the accountability of non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement. (Articles 3(h) and (i)).

The IDP Protocol does not refer to **armed groups** except in relation to separation from the civilian population and other issues. In Article 3, the IDP Protocol states that Member States shall “safeguard and maintain the civilian and humanitarian character of the protection and location of internally displaced persons in accordance with international guidelines on the separation of **armed elements**.” Linked to this, Principle 13(2) of the Guiding Principles states that internally displaced persons shall be protected against discriminatory practices of **recruitment into any armed forces or groups** as a result of their displacement. In particular, any cruel, inhumane or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Individual Criminal Responsibility for Acts of Arbitrary Displacement

Both instruments are in agreement on individual criminal responsibility for acts of arbitrary displacement although the IDP Protocol does not mention this directly. Article 3(g) of the Kampala Convention says that states parties undertake to “ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law.” The UN Guiding Principles, which are annexed to the IDP Protocol, in Principle 1(2), refers to “individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.”

Conclusion

As noted throughout the paper, the ICGLR Protocol on IDPs and the Kampala Convention, as one might anticipate, are strikingly similar. States in the region that have already committed themselves to the ICGLR protocol should further show their commitment to IDPs by ratifying the Kampala Convention. The ICGLR currently consists of twelve states and only five of these have ratified the Convention. If all of the remaining ICGLR member states immediately ratified the Kampala Convention, there would be seven new ratifications. These states could further

encourage the ICGLR co-opted countries⁶ to ratify the Convention. Although these states are not bound by the Pact, they participated in the negotiations and would be expected to be broadly supportive of the framework. It is hoped that for those who have already done so, this paper may assist states in understanding the differences between the two and assist states in designing national legislation which is compatible with both instruments.

At the same time, it is important to remember that ratification is only the first step on the road to realizing rights. In order for protections found at the international level to become effective on the ground, states must ensure that international standards relating to the protection of IDPs are integrated into national laws and policies. In addition, structures must be created to ensure that government agencies and other concerned actors act in accordance with the law. Civil society has a particularly strong role to play in this regard, as a crucial monitor of the real conditions experienced by the displaced and by acting as a watchdog ensuring that the government is held accountable to the standards set out in both international and domestic law.

⁶ In addition to the twelve member states, the ICGLR has the following co-opted countries: Botswana, Egypt, Ethiopia, Malawi, Mozambique, Namibia and Zimbabwe. Of these countries, only Malawi has ratified the Kampala Convention.