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Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention

Won Kidane

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Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention

Won Kidane*

ABSTRACT

This Article provides a critical appraisal of the newly adopted African IDPs Convention. In particular, it offers a detailed analysis of the Convention's transformation of the UN Guiding Principles into legally binding rules for the management of the phenomenon of internal displacement in Africa. By definition, internally displaced persons (IDPs) are persons who have not crossed international frontiers and are citizens of the state within which they find themselves. Although their conditions may be similar to refugees, who are necessarily aliens to the host community, their legal status is not analogous. At the most basic level, there is no doctrinal agreement on whether "IDP" is a legal status at all. This has created a fundamental doctrinal dilemma. The Article analyzes the merits of the arguments for and against according IDPs a distinctive legal status analogous to refugees. It also provides a detailed discussion of the important provisions that define the rights and responsibilities of IDPs and the various state and non-state actors during the

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three most important phases—before displacement, during displacement, and after return.

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I. INTRODUCTION

International law relating to forced displacement developed in the context of refugee status.¹ Refugee law accords a distinct and

1. The most important sources of international refugee law are the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter UN Refugees Convention] (eliminating the geographic and temporal limitations of the Convention's application); U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (extending the UN Refugees Convention's protection to people made refugees due to events occurring after January 1, 1951); Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (Dec. 14, 1950) [hereinafter Statute of the UNHCR]; and Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter African Refugee Convention]; GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 15–32 (3d ed. 2007) (detailing how the term “refugee” has evolved through the years, thereby extending the availability of protections in international law). Other leading resources on the law of refugee status and asylum include: DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* (3d ed. 1999 & Supp. 2002); 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1972); 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER*

recognizable legal status to an individual who is outside of her country of origin or habitual residence if the receiving authorities determine that she meets an individualized legal definition.² As forced migration grew in size and complexity,³ the inability of this individualistic legal regime to meaningfully address the problem became increasingly clear.⁴ Over the last several decades, a series of UN General Assembly resolutions authorized the UN High Commissioner for Refugees (UNHCR) to provide assistance to large groups of “refugees” on the basis of *prima facie* group status determination rather than case-by-case adjudication.⁵ Gradually,

INTERNATIONAL LAW (2005) [hereinafter HATHAWAY, RIGHTS OF REFUGEES]; JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (1991) [hereinafter HATHAWAY, REFUGEE STATUS]; DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY (2007); KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH (3d ed. 2007).

2. See UN Refugees Convention, *supra* note 1, art. 1(A)(2) (defining a refugee as someone outside the refugee’s country and unable or unwilling to return because of a well-founded fear of persecution on account of race, religion, nationality, political opinion, or belongingness in a particular social group). The Statute of the UNHCR also defines a refugee in similar terms. Statute of the UNCHR, *supra* note 1, art. 6(A)(ii) (defining a refugee as someone outside the refugee’s own country, unable or unwilling to return for reasons other than personal convenience).

3. When the UN High Commissioner for Refugees (UNHCR) agency was created in 1950 to deal with the aftermath of WWII, it was given a three-year mandate and a budget of \$300,000. *History of UNHCR*, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Jan. 5, 2011). Sixty years later, it now assists more than 34 million persons of concern in 118 countries with a budget of more than \$2 billion. *Id.* Most of the beneficiaries do not meet the definition of a refugee under the Refugee Convention or the Statute of the UNHCR. See *id.* (noting the Commissioner’s increasingly important role in helping internally displaced persons).

4. One of the earliest indications of the inadequacy of the individualistic definition to address world refugee problems came in 1957. The status of large numbers of mainland Chinese in Hong Kong was controverted as a result of the existence of two Chinas because either one of them could have legitimately assumed the role of protection. See GOODWIN-GILL & MCADAM, *supra* note 1, at 24 (citing EDWARD I. HAMBRO, THE PROBLEM OF CHINESE REFUGEES IN HONG KONG: REPORT SUBMITTED TO THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (1955)) (allowing the Commissioner to use his discretion since the refugees “technically” were not refugees under the Statute of the UNHCR as they were still within their own country). To avoid the legal quagmire, the UN General Assembly authorized the Commissioner to “use his good offices to encourage arrangements for contributions.” See G.A. Res. 1167, U.N. GAOR, 12th Sess., Supp. No. 11, U.N. Doc. A/3585/Rev.1, at 20 (Nov. 26, 1957) (granting power to the Commissioner to take action in response to the Chinese refugee problem in Hong Kong). This was considered to be an “effective [and] pragmatic solution” to the problem. GOODWIN-GILL & MCADAM, *supra* note 1, at 24.

5. See GOODWIN-GILL & MCADAM, *supra* note 1, at 26 (explaining that, while it might be difficult to establish a “well-founded fear” on an individual basis, a group approach, focused on the lack of protection, will avoid the shortcomings of a legal definition). See also *History of UNHCR*, *supra* note 3 (detailing how the role of the UNHCR has evolved through the years). To address this problem in the African

protection and assistance extended to include persons who are displaced within their own countries and find themselves in refugee-like situations.⁶ Although most Internally Displaced Persons (IDPs) share similar factual circumstances with refugees, the international legal regime for the protection of refugees is not readily adaptable to their situation because of some serious doctrinal hurdles—mainly sovereignty.⁷

When the exigencies of internal displacement began to demand serious international attention, the community of nations, acting through the UN, opted to adopt the nonbinding Guiding Principles on Internal Displacement⁸ (the UN Guiding Principles), rather than

context, the African Organization of Unity (commonly referred to as the African Union) adopted the African Refugee Convention, which adopts the *prima facie* group status approach. See African Refugee Convention, *supra* note 1, art. 1(2).

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Id.

6. See *IDPs—Policy and Guiding Documents*, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c149.html> (last visited Jan. 5, 2011) (commenting on the evolution of the role of the UNHCR in regards to internally displaced persons).

7. “The problem is sovereignty,” said former UN High Commissioner for Refugees, Sadako Ogata, when she was asked why her agency, the UNHCR, had not been able to lend more help to IDPs. UNHCR, STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 160 (2006) (citing DAVID A. KORN, EXODUS WITHIN BORDERS: AN INTRODUCTION TO THE CRISIS OF INTERNAL DISPLACEMENT 49 (1999)); see also James C. Hathaway, *Forced Migration Studies: Could We Agree Just to ‘Date?’*, 20 J. REFUGEE STUD. 349, 353 (2007) (“Despite the often attenuated nature of sovereign power today, it remains the case that a clear guarantee of rights can only be made to persons who are outside of their own country.” (emphasis omitted)). For a critique of Professor Hathaway’s main thesis, see *infra* Part III.

8. See Comm’n on Human Rights, Rep. of the Special Representative of the Secretary-General, Francis M. Deng, submitted pursuant to Commission Resolution 1997/39 on the Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/add2 (Feb. 11, 1998) [hereinafter Guiding Principles], available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1998.53.Add.2.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1998.53.Add.2.En?OpenDocument) (adopting the Guiding Principles on Internal Displacement). The Secretary General of the UN appointed Dr. Francis Deng as his Special Representative on Internally Displaced Persons in 1992. The consultative process, which took more than a decade, yielded the Guiding Principles that were adopted by about 190 states as “an important international framework” for the protection of IDPs in 2005. See Roberta Cohen & Francis M. Deng, *The Genesis and the Challenges*, FOREIGN MIGRATION REV., Dec. 2008, at 4–5, <http://www.fmreview.org/FMRpdfs/GP10/GP10.pdf> (explaining that the states adopted the World Summit Outcome document, which recognizes the importance of the Guiding Principles). One of the main drafters of the Principles and author of the *Annotations*, Professor Walter Kälin, notes that although the Principles do not constitute a binding instrument, they are consistent with existing international

confront the doctrinal problem and adopt a legally binding instrument. The African Union Convention for the Protection and Assistance of Internally Displaced Persons⁹ (the AU Convention) is a unique and bold measure designed to convert the nonbinding UN Guiding Principles into a binding legal instrument that defines rights and responsibilities.¹⁰ The AU Convention is the first legally binding continental instrument¹¹ that effectively transforms the operational IDP category into a definite legal status.¹²

law. He also acknowledges that they are not a mere restatement of existing law. WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS (2000). The Annotations are also available at *The Guiding Principles on Internal Displacement*, THE BROOKINGS INST., http://www.brookings.edu/projects/idp/gp_page.aspx (last visited Jan. 5, 2011).

9. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Oct. 23, 2009 [hereinafter AU Convention], http://www.africa-union.org/root/AR/index/Convention%20on%20IDPs%20_Eng_%20-%20Final.pdf.

10. The AU Convention is almost completely based on the UN Guiding Principles on Internal Displacement. See *id.* p.mbl. (recognizing the importance of the Guiding Principles for the protection of IDPs).

11. To be precise, the first legally binding multilateral treaty is a sub-regional instrument adopted by eleven countries of the Great Lakes region. See Int'l Conference on the Great Lakes Region, Protocol on the Protection and Assistance of Internally Displaced Persons, Nov. 30, 2006, http://www.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol.pdf (committing to following the Guiding Principles, but also acknowledging that "there is no specific coherent international or regional legal regime and institution mandated to provide protection and assistance to internally displaced persons").

12. Professor Walter Kälin, in his *Annotations of the Guiding Principles*, notes that "[b]ecoming displaced within one's own country of origin or country of habitual residence does not confer special legal status in the same sense as, say, becoming a refugee does." KÄLIN, *supra* note 8, at 2. He adds that paragraph 2 of the Guiding Principles, which purports to identify IDPs, is not a legal definition, but rather it is a mere description of an operational category. *Id.* at 2–3. As evidence of this supposition, he cites to the fact that the term "internally displaced persons" is placed in the introductory section of the Guiding Principles rather than under the definition of terms in the main body. *Id.* He concludes by saying that "the Guiding Principles seek to highlight the descriptive and non-legal nature of the term 'internally displaced persons.' Internally displaced persons need not and cannot be granted a special legal status comparable to refugee status." *Id.* The AU Convention clears up this confusion by providing a legal definition of IDPs. It provides that:

Internally Displaced Persons 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 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.

AU Convention, *supra* note 9, art. 1(k). This definition is taken from the Guiding Principles in its entirety and converted into a legal definition. See Guiding Principles, *supra* note 8, Intro. ¶ 2 (using identical language to define an IDP).

Like the UN Guiding Principles, the AU Convention's substantive provisions are predicated on three main sources of international law: human rights law,¹³ humanitarian law,¹⁴ and

13. The principal human rights instrument that the AU Convention draws from is the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. Most of its provisions are believed to have risen to the level of customary international law. See, e.g., Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 9 (1988) (explaining that various specific rights in the UDHR have acquired the status of customary international law, thereby imposing additional legal obligations). The UDHR has been translated into 375 languages; all of the translations and other UDHR materials are available online. *Universal Declaration of Human Rights: Introduction*, UN HUMAN RIGHTS—OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx> (last visited Jan. 5, 2011). Other important sources of human rights law include the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

14. The term "international humanitarian law," or *jus in bello*, represents in its current usage all rules of international law designed to govern the treatment of persons, civilian or military, active, inactive, sick, or wounded in armed conflict. Hans-Peter Gasser writes that international humanitarian law is not "a cohesive body of law, but a category of separate legal . . . proscriptions . . ." M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 441 (1996) (citing Hans-Peter Gasser, *International Humanitarian Law, Introduction* to HANS HAUG, *HUMANITY FOR ALL* 1, 3 (1993)). Most rules of current importance are contained in the four Geneva Conventions of 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 31–83, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, arts. 85–133, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relevant to the Treatment of Prisoners of War arts. 135–285, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 287–417, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The two Additional Protocols of 1977 also bear mentioning: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 3–608, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), arts. 1–28, June 8, 1977, 1125 U.N.T.S. 609. International humanitarian law also comprises a set of rules formerly known as the Laws of War contained in the Hague Conventions of 1907. The Hague Conventions are reprinted in ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS IN THE LAWS OF WAR* 87–94 (3d ed. 2000). More recent instruments include the Inhumane Weapons Convention of 1980. UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, arts. 137–255, Apr. 10, 1981, 1342 U.N.T.S. 137.

This set of rules is distinct from the body of rules governing the legitimacy of the resort to force, often referred to as the *jus ad bellum*, which is essentially based on paragraph 4 of Article 2 as well as Articles 39–51 (Chapter VII) of the United Nations Charter. Cf. U.N. Charter art. 2, para. 4, 39–51 (providing the treaty requirements for when a nation may justifiably engage in war); see generally INT'L COMM. OF THE RED

refugee law.¹⁵ 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.

This Article critically appraises the AU Convention's transformation of the UN Guiding Principles into legally binding rules to manage IDPs in Africa. It is divided into five parts. The AU Convention's rights-based approach emphasizes the causes of displacement and the categories of displaced persons. As such, Part II summarizes the most common causes of displacement and the various categories of displaced persons in Africa. By definition, internally displaced persons are persons who have not crossed international borders and are citizens of the state within which they find themselves.¹⁶ Although their conditions may be similar to refugees, who are necessarily aliens to the host community,¹⁷ their legal status is not analogous. At the most basic level, there is no doctrinal agreement on whether "IDP" is a legal status at all. Part III tackles this fundamental doctrinal dilemma. Part IV discusses in detail the important provisions that define the rights and responsibilities of IDPs and various states and non-state actors before displacement, during displacement, and after return. Part IV also compares the AU Convention and the UN Guiding Principles. Part V concludes by providing a general assessment of the nature and significance of the AU Convention.

CROSS [ICRC], PUB. No. 0365, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1988) (providing a synthesis of the international legal framework contained in the Geneva Conventions and its protocols regarding the rules of international humanitarian law during armed conflicts); FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (Int'l Comm. of the Red Cross 2001) (1987) (discussing the principal rules of humanitarian law with a focus on the rules governing weapons and the field of international criminal law); George H. Aldrich, *The Law of War on Land*, 94 AM. J. INT'L L. 42, 42-63 (2000) (explaining how the different conventions apply to combat scenarios).

15. See *supra* note 1 (listing the most important sources in international refugee law).

16. See AU Convention, *supra* note 9, art. 1(k) (characterizing IDPs as persons not having crossed an "internationally recognized State border").

17. See UN Refugees Convention, *supra* note 1, art. 1(A)(1)-(2) (conditioning refugee status on "being outside the country of his former habitual residence").

II. CAUSES OF DISPLACEMENT AND CATEGORIES OF DISPLACED PERSONS IN AFRICA

Understanding the root causes of African displacement is essential in assessing the legal solution that the AU Convention envisages. This section briefly surveys the causes of displacement in the major displacement regions of Africa and outlines the various categories of displaced persons.

A. Causes of Displacement

The UNHCR estimates that, as of the end of 2008, there were about 42 million forcibly displaced individuals around the world.¹⁸ This figure includes 15.2 million refugees,¹⁹ 827,000 asylum seekers,²⁰ and 26 million IDPs.²¹ The causes of internal and external displacement and the patterns of movement are complex and often related. This section identifies the important causes and highlights the complexity of the phenomenon of forced displacement and the difficulty it poses for legal classification.

1. Armed Conflict and Human Rights Violations

i. In General

Armed conflict and human rights violations are the most commonly known causes of displacement.²² The UNHCR's 2008 Global Trends Report indicates that half of the world's refugees today were forced out of their homes because of armed conflict linked to the

18. See UNHCR, 2008 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 2 (2009), <http://www.unhcr.org/4a375c426.html>.

19. UNHCR's usage of the term "refugee" is not limited to those who meet the individualistic definition under the Refugee Convention. This issue is discussed in some detail *infra* Part II.b.iii.

20. Doctrinally this is a key category. It represents a subset of refugees who meet the individualistic criteria under the Refugee Convention or the Statute of the UNHCR. Issues surrounding this category are discussed in some detail *infra* Part II.b.iv.

21. UNHCR, *supra* note 18, at 2.

22. See UNHCR, *supra* note 7, at 9–10 (explaining that human rights violations and war continue to cause internal displacement among hundreds of thousands of people every year). During this decade, although about thirteen displacement-inducing Cold War-era conflicts were contained, six armed conflicts emerged or resurfaced, some of them linked to the "global war on terror." *Id.* at 10.

“war on terror.”²³ With 1.8 million refugees, Pakistan is currently host to the largest number of refugees in the world.²⁴ It is followed by Syria with 1.1 million and Iran with 980,000 refugees.²⁵ Nearly all of these refugees come from either Iraq or Afghanistan, and they represent almost half of the refugees under the protection of the UNHCR worldwide.²⁶ Iraq, one of the largest refugee-creating countries, with an estimated 1.9 million of its citizens in neighboring countries,²⁷ also hosts 2.4 million IDPs who were driven from their homes due to the same causes.²⁸

In Africa, at least half of the countries and 20 percent of the continent’s population have been affected by frequent armed conflict.²⁹ Although, with the exception of the 1998–2000 Ethiopia–Eritrea border war, it is difficult to classify the nature of these conflicts, almost all could be classified as unconventional or low-tech factional conflicts that often target civilian populations.³⁰ Almost all African countries have been implicated in serious human rights violations.³¹

Although the number of African refugees has decreased in the last seven years as a result of the conclusion of several long-standing armed conflicts, there are still 2.1 million refugees across the continent.³² The countries that remain most affected by displacement include the Central African Republic (the CAR), Chad, the Democratic Republic of the Congo (the DRC), Somalia, and Sudan.³³ The pattern of internal displacement mirrors the pattern of refugee

23. See UNHCR, *supra* note 18, at 2 (“Afghan and Iraqi refugees account for almost half of all refugees under UNHCR’s responsibility worldwide.”).

24. *Id.*

25. *Id.*

26. See *id.* at 9 (noting that 96 percent of Afghan refugees were located in Pakistan and Iran, while the majority of Iraqi refugees sought refuge in neighboring countries as well).

27. *Id.* at 2.

28. See *id.* at 19 (providing that almost 1.4 million Iraqis have been displaced as a consequence of the war).

29. Int’l Fed’n of Red Cross and Red Crescent Societies [IFRC], Humanitarian Trends and Red Cross and Red Crescent Future Priorities in Africa 11 (2004) (unpublished manuscript), available at <http://www.docstoc.com/docs/52285580/Humanitarian-Trends-and-Red-CrossCrescent-Future-Priorities-in-Africa>.

30. Cf. *id.* (discussing the ways in which “[t]he British Government has categorized [such] conflicts over the last decade”).

31. See 2008 Country Reports on Human Rights Practices—Africa, U.S. DEPT OF STATE, <http://www.state.gov/g/drl/rls/hrrpt/2008/af/index.htm> (last visited Jan. 5, 2011) (providing reports submitted to Congress by the State Department “regarding the status of internationally recognized human rights” in countries in Africa).

32. This is because of successful repatriation of refugees to Burundi (95,400), Southern Sudan (90,100), the Democratic Republic of the Congo (54,000), and Angola (13,100). UNHCR, *supra* note 18, at 8.

33. See *id.* (noting that renewed armed conflict and human rights violations led to an outflow of more than 200,000 people from these countries).

outflow.³⁴ The number of IDPs under the care of the UNHCR in Africa is estimated to be roughly 14.4 million, about double the number of refugees that the UNHCR cares for worldwide.³⁵

At the request of the UN, the Geneva-based Internal Displacement Monitoring Center (IDMC) meticulously maintains data on conflict-induced internal displacement in fifty-two countries.³⁶ IDMC data shows that 11.6 million IDPs reside in Africa—nearly half of the world's IDP population.³⁷ The data also shows that displacement is not static. For example, in 2008, nearly 4.6 million people were displaced in twenty-four countries as a result of new armed conflicts, while roughly 2.6 million IDPs returned to their homes.³⁸ Uganda, the DRC, Sudan, Kenya, and the Philippines experienced large-scale returns of 200,000 IDPs or more.³⁹ Most notably, all of these countries, with the exception of Uganda, experienced large-scale refugee outflow at the same time they were welcoming returnees.⁴⁰

According to the UNHCR, large-scale voluntary repatriation of refugees is commonly accompanied by large-scale refugee outflow.⁴¹ For example, in 2004, as 10,300 Somali refugees voluntarily returned home, more Somali refugees fled to Kenya, Tanzania, and Yemen.⁴² During the same year, while approximately 21,000 Liberian refugees returned to Liberia from Côte d'Ivoire, another group of about 87,000

34. See UNHCR, *supra* note 7, at 14 (noting that many countries were experiencing additional refugee displacements, but at the same time refugees were returning home); see also discussion *infra* Part II.1.ii (analyzing the in-and-out flows of refugees for several African countries).

35. The total IDP population is about 26 million, however, UNHCR currently provides protection and assistance to about half of this population. See UNHCR, *supra* note 18, at 19 (noting that out of 26 million IDPs, the UNHCR had only been able to provide assistance to around 14.4 million).

36. Comprehensive data and other IDP-related information is available on the official website of the IDMC. See IDMC, <http://www.internal-displacement.org> (last visited Jan. 5, 2011). The request from the UN is noted at the "About Us" tab. *About Us*, IDMC, [http://www.internal-displacement.org/8025708F004BD0DA/\(httpSectionHomepages\)/\\$first?OpenDocument&count=1000](http://www.internal-displacement.org/8025708F004BD0DA/(httpSectionHomepages)/$first?OpenDocument&count=1000) (last visited Jan. 5, 2011).

37. IDMC, INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENT IN 2008, at 29 (2009), [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/82DA6A2DE4C7BA41C12575A90041E6A8/\\$file/IDMC_Internal_Displacement_Global_Overview_2008.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/82DA6A2DE4C7BA41C12575A90041E6A8/$file/IDMC_Internal_Displacement_Global_Overview_2008.pdf).

38. See *id.* at 9 (listing the total number of IDPs at 26 million, out of which 11.6 million reside in Africa).

39. *Id.*

40. See *id.* at 8 (listing the DRC, Sudan, and Kenya among the countries with at least 200,000 newly displaced people in 2008, while the corresponding number for Uganda falls somewhere between 80,000 and 200,000).

41. See UNHCR, *supra* note 7, at 14 ("In a number of countries, new refugee displacements were taking place at the same time as large-scale voluntary repatriations.")

42. *Id.*

new refugees fled to Côte d'Ivoire.⁴³ Significantly, while Côte d'Ivoire was repatriating some Liberian refugees and receiving other Liberian refugees, about 22,200 of its own citizens sought refuge in Liberia and Guinea.⁴⁴

It is thus quite possible, and in fact most likely, that an individual could be an IDP today, a refugee tomorrow, and an IDP again the day after, depending on how quickly the circumstances force them to move. The difficulty of classifying forcibly displaced persons into distinct legal categories is often complicated by the absence of recognizable boundaries and the fact that the conflicts that cause the displacement do not "correspond to the state or judicial boundaries."⁴⁵ The late Sir Ian Brownlie, who is perhaps the utmost authority on African colonial boundaries, wrote:

In the majority of instances African frontiers divide tribes or language groups. The better known examples include the division of the Masai between Kenya and Tanzania and the Ewa between Togo and Ghana. Boundary making in the period of European expansion in Africa took place in circumstances which generally militated against reference to tribal or ethnological considerations. Political bargaining involved the construction of parcels of territory upon broad principles evidenced geographically by liberal resort to straight lines and general features such as drainage basins and watersheds. Within a framework of overall political bargaining, the accidents of prior exploration and military penetration were often to determine delimitation as between Britain, France and Germany.⁴⁶

The motives behind these boundary-making tactics are complicated and irrelevant to the present inquiry. It is important, however, to understand the complexity involved in defining the boundaries and, as such, in defining nationality for the purpose of rights-based legal classification. Although Sir Brownlie noted that the Europeans mostly failed to consider ethnography when they delimited African boundaries, he also emphasized the difficulty that the Europeans faced wherever they tried to do so: "The determination of the principles of association by means of which a group can be designated as a tribe, people or nation may be a matter of notorious difficulty . . . [and] in certain situations the sorting out of groups may

43. *Id.*

44. *Id.*

45. For a good discussion of the conflict situations in the African Great Lakes region, see CTR. ON INT'L COOPERATION, REGIONAL CONFLICT FORMATION IN THE GREAT LAKES REGION OF AFRICA: STRUCTURE, DYNAMICS AND CHALLENGES FOR POLICY 5 (Barnett R. Rubin et al. eds., 2001), http://www.cic.nyu.edu/peacebuilding/oldpdfs/RCF_NAIROBI.pdf (summarizing the regional conflicts in the Great Lakes region and how a revised model could increase the likelihood of bettering conflict management).

46. See IAN BROWNLIE, AFRICAN BOUNDARIES, A LEGAL AND DIPLOMATIC ENCYCLOPEDIA 6 (1979). Brownlie does not fail to acknowledge that tribal or ethnographic considerations were taken into account in certain areas. See *id.* at 6-7.

be difficult and perhaps impossible.”⁴⁷ He then justified the decision of the Organization of African Unity (now the African Union) to keep the colonial boundaries:

The short point is that disturbance of a not very obvious ‘rational’ status quo makes no sense if there is no rational substitute to be found. Arbitrariness often exists because the facts are confused and lack definition. Hence the policy of the OAU favoring the colonial status quo (as a general principle) has a great deal of good sense behind it.⁴⁸

These artificial boundaries⁴⁹ became a constant source of conflict in some parts of Africa while remaining largely irrelevant in other areas. For example, the long-standing conflict in the Great Lakes region of Africa is virtually unconstrained by any real or imaginary national frontiers. Conflicts experts state that, at its peak, the conflict in that region involved not only Rwanda, Uganda, Burundi, and the DRC—states that are geographically considered to belong to the Great Lakes region—but also Angola, the CAR, Chad, Congo, Namibia, Sudan, Tanzania, and Zimbabwe.⁵⁰ According to New York University’s Center on International Cooperation, contemporary armed conflicts are “neither ‘local,’ ‘civil,’ nor ‘intra-state’ as is widely held, and can transgress national boundaries.”⁵¹ They are largely influenced by

regional and global political, military, economic, and social networks. Global factors, like the policies of external states, corporations, and development and financial institutions, can aggravate regional conflict processes, such as the cross-border migration of refugees, civilians, and armed groups. Covert alliances and illegal trade networks linked to global markets can exacerbate the interaction of global and regional forces, especially when states are weak or illegitimate and citizenship is contested.⁵²

Moreover, about 54 percent of the typical displaced population in Africa consists of children under the age of eighteen, and some of these children are born in displacement camps with uncertain citizenship status.⁵³ Under these circumstances, keeping track of the

47. *Id.* at 7.

48. *Id.*

49. Most of the boundaries were drawn at the Berlin Conference of 1884–1885. See, e.g., IEUAN L.I. GRIFFITHS, *THE AFRICAN INHERITANCE* 34–45 (1995) (detailing “The European Partition of Africa” beginning in 1884); THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA 1876–1912*, at 239–55 (1991) (describing the process of dividing the African continent between the dominant colonial powers).

50. CTR. ON INT’L COOPERATION, *supra* note 45, at 6.

51. *Id.* at 5.

52. *Id.* (emphasis omitted).

53. See *id.*; see also UNHCR, *supra* note 7, at 20, 22, (explaining that 54 percent of African displaced persons are children, and 36 percent of the UNHCR’s population of concern resides in camps or centers). By contrast, the number of refugee

citizenship and legal status of persons who move within and across these fluid boundaries could be a very difficult task.

ii. Closer Look at the Conflict-Related Causes in Selected African Countries

This section discusses the conflict and human rights-related causes and the patterns of displacement in several African countries with substantial numbers of IDPs and refugees.

a. The Central African Republic

The CAR gained its independence from French colonial rule in 1960.⁵⁴ Landlocked in the center of Africa, it shares boundaries with Chad, Sudan, the DRC, Congo, and Cameroon. It is rich in diamonds, uranium, and other minerals.⁵⁵ With 60 percent of the total population of about 4.5 million living in outlying areas,⁵⁶ the country has not been able to overcome its colonial past and form a stable and accountable government.⁵⁷ The reasons for this failure are not limited to its own internal problems.⁵⁸

The UNHCR's most recent statistics show that it cares for 225,319 persons in the CAR.⁵⁹ This number includes 197,000 IDPs, 27,047 refugees, and 1,219 asylum seekers. Some of the refugees are from neighboring countries including 5,000 refugees from Sudan, 1,600 from Chad, and 24,300 from the DRC.⁶⁰

children in Europe is about 25 percent of the total population, showing the selectivity of the asylum systems in industrialized nations. *Id.* at 21–22.

54. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: CENTRAL AFRICAN REPUBLIC, <https://www.cia.gov/library/publications/the-world-factbook/geos/ct.html> (last updated Dec. 14, 2010).

55. *Id.*

56. *See id.* (providing that out of a population of 4,844,927 (est. July 2010), the urban population was 39 percent (est. 2008)).

57. *See id.* (“The government still does not fully control the countryside, where pockets of lawlessness persist.”).

58. *See Background Note: Central African Republic*, U.S. DEPT OF STATE (Dec. 28, 2010), <http://www.state.gov/r/pa/ei/bgn/4007.htm> (explaining how the country's colonial past and the presence of ethnicities continue to pose challenges for achieving peace and stability in the CAR). The regional nature of the CAR's problems is discussed in the subsections below. *Compare* discussion *supra* Part II.A.1.i, and *infra* Part II.A.1.ii.b–h (explaining how the regional nature of conflicts in the Great Lakes region causes disruption to spread from one country to another).

59. *See 2011 UNHCR Country Operations Profile: Central African Republic*, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c156> (last visited Jan. 5, 2011) [hereinafter *CAR Profile*] (providing that the current population of concern residing in the CAR equals 225,319 as of January 2010).

60. *Id.*

The internal and cross-border movement of persons are regional phenomena linked to transnational conflicts, and they are often said to be mutually reinforcing.⁶¹ For example, a recent displacement of 16,000 people, some of whom crossed into Chad, was caused by fighting between government forces and rebel groups and an attack by the Ugandan Lord's Resistance Army, which crossed into the CAR and attacked areas not controlled by the government.⁶²

According to the IDMC, despite the presence of peacekeeping forces in the CAR, IDPs have suffered a wide range of violations, ranging from robbery to rape and killings, by all sorts of actors, including government forces, internal and foreign rebel groups, and bandits.⁶³ As will be shown below, some of the same groups of IDPs and refugees are also found in the same conditions in the CAR's neighboring countries.⁶⁴

b. Chad

Chad gained its independence from French colonial rule in 1960 and has experienced constant unrest ever since in the form of civil warfare and invasions from neighboring countries.⁶⁵ More than 75 percent of Chad's total population of 10.3 million reside in rural outlying areas.⁶⁶ Over 80 percent of its labor force is involved in agriculture, which is severely affected by climate change.⁶⁷ There are more than 200 ethnic groups, and the country's ethnic diversity exacerbates conflict situations.⁶⁸

The IDMC estimates the number of IDPs in Chad to be 180,000.⁶⁹ The latest figures from the UNHCR indicate that it hosts 170,531 IDPs and around 338,495 refugees, which includes 262,900

61. See generally CTR. ON INT'L COOPERATION, *supra* note 45, at 5 (describing the mutually reinforcing nature of the conflicts in the Great Lakes region).

62. CAR Profile, *supra* note 59.

63. IDMC, *supra* note 37, at 38. In addition to the UN peacekeeping forces, European Union forces monitor the border between the CAR and Chad "with a Security Council mandate to protect refugees and IDPs affected by the spill-over of violence from Darfur". *Id.* at 38.

64. See discussion *infra* Part II.A.1-4 (elaborating on major causes that contribute to internal displacement such as violence, wars, and human rights violations in the neighboring countries).

65. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: CHAD, <https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html> (last updated Dec. 22, 2010).

66. *Id.* (providing that out of a population of 10,543,464 (est. July 2010), 27 percent reside in urban areas (est. 2008)).

67. Background Note: Chad, U.S. DEPT OF STATE (Dec. 6, 2010), <http://www.state.gov/r/pa/ei/bgn/37992.htm>.

68. *Id.* (noting the presence of Darfur refugees).

69. IDMC, *supra* note 37, at 39.

from Sudan and 73,500 from the CAR.⁷⁰ The IDMC concludes that the major causes of internal displacement in Chad are internal and international armed conflict, generalized violence, and human rights violations.⁷¹ More than 3,000 European Union troops deployed in eastern Chad now provide protection to IDPs and Sudanese refugees.⁷² The militarization of IDPs sites and gross violations of the human rights of IDPs and refugees are common.⁷³

c. Côte d'Ivoire

Côte d'Ivoire was one of the most prosperous West African states from 1960, the year it gained independence from French colonial rule, until December 1999, when its first-ever military *coup* overthrew the government and installed a military junta.⁷⁴ Since then, a combination rebel uprising and civil war has threatened the country's peace and stability, giving rise to serious social and economic problems.⁷⁵ In 2002, a failed *coup* divided the country into two segments and caused massive internal and external population displacements.⁷⁶

In 2004, the United Nations deployed about 6,200 UN peacekeeping forces in Côte d'Ivoire.⁷⁷ Despite the presence of this large force, ethnic conflict and associated problems have made repatriation of the displaced population difficult.⁷⁸ The effect of the ethnic conflict is not limited to the displacement of the local population. It has also displaced migrant workers from neighboring states.⁷⁹ According to the IDMC, about 621,000 people are still internally displaced.⁸⁰

70. 2011 UNHCR Country Operations Profile: Chad, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c226> (last visited Jan. 5, 2011) [hereinafter *Chad Profile*].

71. IDMC, *supra* note 37, at 39.

72. *Id.*

73. *Id.*

74. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: CÔTE D'IVOIRE, <https://www.cia.gov/library/publications/the-world-factbook/geos/iv.html> (last updated Dec. 28, 2010).

75. *Id.*

76. *Background Note: Côte d'Ivoire*, U.S. DEPT OF STATE (July 16, 2010), <http://www.state.gov/r/pa/ei/bgn/2846.htm>.

77. *Year in Review 2004*, UN PEACE OPERATIONS, <http://www.un.org/en/peacekeeping/publications/yir/2004/ch2.htm#unoci> (last visited Jan. 5, 2011).

78. *Background Note: Côte d'Ivoire*, *supra* note 76.

79. CENT. INTELLIGENCE AGENCY, *supra* note 74. Hopefully, this will not be permanent; a "March 2007 peace deal between Ivoirian rebels and the government brought significant numbers of rebels out of hiding in neighboring states." *Id.*

80. The 2007 Ouagadougou Peace Agreement gave IDPs real hope for an end to their displacement.

d. Democratic Republic of the Congo

The DRC, formerly known as Zaire, was established as a Belgian colony in 1908, gaining its independence in 1960. Its neighbors include Angola, Burundi, the CAR, Sudan, Uganda, Rwanda, Tanzania, and Zambia.⁸¹ Almost all of these countries have experienced political instability and displacement, but the conditions in the DRC have been particularly bad: it has seen at least three military *coups* and years of civil and regional wars.⁸²

The IDMC estimates the number of IDPs in the DRC to be approximately 1.4 million; they were displaced largely by internal and international armed conflict, generalized violence, and human rights violations.⁸³ The UNHCR provides care for 185,809 refugees and 2,052,677 IDPs in the DRC.⁸⁴ The UN Emergency Relief Coordinator described the situation in the North Kivu Province as of November 2008: “Congolese civilians found themselves in the worst of all worlds: subject to attacks, displacement, sexual violence and forced recruitment perpetrated by advancing rebel forces; and to acts of violence, rape and looting carried out by members of the official Congolese armed forces and Mai Mai and other militias.”⁸⁵

All of the armed groups fighting in the region, including DRC government soldiers, are reported to have frequently attacked civilians to seize food and belongings or punish people for perceived or

However the lack of comprehensive figures on subsequent return movements . . . does not allow for a clear indication of the number still displaced. In 2006, the national statistical institute ENSEA estimated that there were some 709,000 IDPs in southern regions. Up to the end of 2008, around 70,000 registered IDPs returned to western Côte d’Ivoire and 18,000 civil servants were redeployed in the north, and so at the end of 2008 an estimated 621,000 IDPs remained. However, this figure does not include those newly displaced [persons] who did not return within the year [or] people displaced within the north.

IDMC, *supra* note 37, at 40.

81. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: DEMOCRATIC REPUBLIC OF THE CONGO, <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last updated Dec. 22, 2010).

82. *See id.* (discussing the various power struggles that have occurred).

83. IDMC, *supra* note 37, at 41.

84. 2011 UNHCR Country Operations Profile: Democratic Republic of the Congo, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c366> (last visited Jan. 5, 2011) [hereinafter *Congo Profile*].

85. Mr. John Holmes, Under-Secretary-General for Humanitarian Affairs, Statement to the United Nations Security Council on Protection of Civilians in Armed Conflict (Jan. 14, 2009), [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EDIS-7NBNZR-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EDIS-7NBNZR-full_report.pdf/$File/full_report.pdf).

real allegiance to other groups.⁸⁶ Armed non-state actors have abducted children to fight.⁸⁷ Children (especially children separated from their families), female-headed households, and pregnant women are particularly vulnerable.⁸⁸

e. Ethiopia

Ethiopia is unique among African countries because of its lack of colonial history, with the exception of a brief Italian occupation from 1936 to 1941.⁸⁹ In 1974, a military junta deposed the centuries-old monarchy and set up a military dictatorship, causing severe social unrest and economic problems.⁹⁰ Although that regime was overthrown in 1991,⁹¹ resulting in the repatriation of Ethiopian refugees from other countries, a border war with neighboring Eritrea⁹² caused significant displacement in the late 1990s.⁹³

The IDMC estimates the number of IDPs to be 200,000–300,000, caused mostly by internal and external armed conflict, generalized violence, and human rights violations.⁹⁴ According to the UNHCR, Ethiopia is currently home to 110,000 refugees, most of them from Somalia.⁹⁵ In the eastern part of Ethiopia, where refugees and IDPs

86. See generally UN Org. Mission in the Dem. Rep. Congo & Office of the High Comm'r for Human Rights, Consolidated Investigation Report of the United Nations Joint Human Rights Office Following Widespread Looting and Grave Violations of Human Rights by the Congolese National Armed Forces in Goma and Kanyabayonga in October and November 2008 (Sept. 7, 2009), http://www.ohchr.org/Documents/Countries/Goma_KanyabayongaRapport_Septembre_2009.pdf (discussing various incidences of human rights violations, including attacks, by national armed forces in Goma and Kanyabayonga).

87. COALITION TO STOP THE USE OF CHILD SOLDIERS, THE USE OF CHILDREN AS SOLDIERS IN AFRICA: A COUNTRY ANALYSIS OF CHILD RECRUITMENT AND PARTICIPATION IN ARMED CONFLICT (2000), available at <http://www.reliefweb.int/library/documents/chilsold.htm>.

88. See *Congo Profile*, *supra* note 84.

89. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: ETHIOPIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last updated Dec. 8, 2010).

90. *Id.*

91. *Id.*

92. James C. McKinley, Jr., *Eritrea–Ethiopia War: Unwanted but Unchecked*, N.Y. TIMES, June 12, 1998, at A3.

93. See CENT. INTELLIGENCE AGENCY, *supra* note 89 (noting that there are 200,000 IDPs as a result of events including “the border war with Eritrea from 1998–2000”).

94. IDMC, *supra* note 37, at 42; 2010 UNHCR Country Operations Profile: Ethiopia, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483986> (last visited Jan. 5, 2011) [hereinafter *Ethiopia Profile*].

95. See *Ethiopia Profile*, *supra* note 94 (noting that “[t]he recent escalation of the crisis in Somalia drove a significant number of refugees into Ethiopia” and discussing the increasing numbers of refugees from Somalia and elsewhere).

live side by side, it is often difficult to distinguish between refugees and IDPs because the ethnic and linguistic backgrounds of the local Somali population and the refugees from mainland Somalia are identical.⁹⁶

f. Kenya

Kenya has a population of about 40 million people and shares boundaries with Ethiopia, Tanzania, Somalia, Uganda, and Sudan.⁹⁷ The country gained its independence from British rule in 1963 and has a problematic political and security history.⁹⁸ The IDMC estimates the number of Kenyan IDPs to be 300,000–600,000, caused by generalized violence and human rights violations.⁹⁹ Most recently, an estimated 500,000 Kenyans were displaced in the wake of the country's disputed December 2007 elections.¹⁰⁰

Kenya hosts 358,928 refugees, mainly from Somalia, Ethiopia, and Southern Sudan.¹⁰¹ The ethnic Somali refugees in Kenya come from Somalia.¹⁰² They have the same ethnic, linguistic, and religious backgrounds as some Kenyan IDPs.¹⁰³

g. Somalia

Somalia has been rightly classified as a failed state since 1991, and it remains one of the most unstable countries in the world.¹⁰⁴

96. Cf. *Assessment for Somalis in Ethiopia*, MINORITIES AT RISK PROJECT (Dec. 31, 2003), <http://www.unhcr.org/refworld/country,,MARP,,ETH,,469f3a7a1e,0.html> (noting that the Somalis “are linguistically and culturally distinct from the dominant Tigreans (and Amharans from pre-1991”).

97. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: KENYA*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last updated Dec. 7, 2010).

98. See *id.* (discussing Kenya's political and ethnic struggles).

99. IDMC, *supra* note 37, at 43.

100. *Id.*

101. *Id.*; 2011 UNHCR Country Operations Profile: Kenya, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16> (last visited Jan. 5, 2011) [hereinafter *Kenya Profile*].

102. See *Kenya Profile*, *supra* note 101 (“The majority of the 404,000 refugees and asylum-seekers in Kenya are from Somalia, with the rest mostly from Ethiopia and Sudan.”).

103. See *Assessment for Somalis in Kenya*, MINORITIES AT RISK PROJECT (Dec. 31, 2006), <http://www.cidcm.umd.edu/mar/assessment.asp?groupId=50106> (describing the ethnic groups found in Kenya's population).

104. Jeffrey Gettleman, *The Most Dangerous Place in the World*, FOREIGN POLICY, Feb. 16, 2009, available at http://www.foreignpolicy.com/articles/2009/02/16/the_most_dangerous_place_in_the_world?pagefull.

Somalia is located in eastern Africa and is bordered by Ethiopia, Djibouti, and Kenya.¹⁰⁵

Internal and external displacement is a daily occurrence in Somalia. Groups of Somalis could be refugees in Kenya today, back in Somalia as IDPs next week, and refugees again in eastern Ethiopia shortly thereafter. The pattern of movement depends on the security and military situations on the ground, which tend to change rapidly. Currently, there are an estimated 1.55 million IDPs in Somalia,¹⁰⁶ and there are thousands of Somali refugees in neighboring countries.¹⁰⁷

h. Sudan

Sudan gained its independence from the British in 1956.¹⁰⁸ It has been embroiled in two serious and prolonged civil wars for much of its post-independence existence. The North–South civil war and related famine displaced more than four million people and caused the death of more than two million people.¹⁰⁹ The Darfur conflict, which broke out in 2003, caused untold misery and displaced millions of people.¹¹⁰

The IDMC estimates the number of IDPs in Sudan to be 4.9 million,¹¹¹ including 2.7 million in Darfur, 1.2 million in Khartoum and the northern states, 420,000 in the eastern states, 356,000 in transitional areas, and 187,000 in Southern Sudan.¹¹² Sudan also hosts 181,605 refugees.¹¹³ The UNHCR cares for them alongside at

105. *Id.*; *Background Note: Somalia*, U.S. DEP'T OF STATE (May 14, 2010), <http://www.state.gov/r/pa/ei/bgn/2863.htm>.

106. 2011 UNHCR Country Operations Profile: Somalia, UNHCR–THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/exia/vtx/page?page=49e483ad6> (last visited Jan. 5, 2011) [hereinafter *Somalia Profile*]. IDMC data puts the number of Somali IDPs at 1.3 million. IDMC, *supra* note 37, at 45. The variation is understandable given rapidly changing migratory patterns.

107. *Somalia Profile*, *supra* note 106.

108. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: SUDAN, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last updated Dec. 27, 2010).

109. *See* IDMC, *supra* note 37, at 46 (noting that “[b]y the end of 2008, 4.9 million people in Sudan were displaced by the numerous conflicts which had afflicted the country for over two decades”).

110. *See id.* at 46–47 (describing the Darfur conflict).

111. *Id.* at 46. This figure makes up the single largest internally displaced population in the world and represents 12.4 percent of Sudan’s total population. *Id.*

112. *Id.*

113. HOME OFFICE, UK BORDER AGENCY, COUNTRY OF ORIGIN BORDER INFORMATION REPORT: SUDAN ¶ 32.01 (2010), available at [rds.homeoffice.gov.uk/rds/pdfs/10/sudan-260510.doc](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260510/sudan-260510.doc).

least 1,034,140 IDPs.¹¹⁴ Some of the refugees in Sudan are from Chad, which, in turn, cares for at least 262,900 Sudanese refugees.¹¹⁵ As of the time of writing, UN peacekeeping troops are struggling to stabilize the situation.¹¹⁶

2. Environmental and Natural Disasters

According to the International Federation of Red Cross and Red Crescent Societies, about two billion people were affected by natural disasters in the last decade, which is a three-fold rise from the previous decade and roughly five times the number of people affected by conflicts.¹¹⁷ The negative effects of climate change are expected to cause the movement of 50 to 200 million people in the next several decades, which will be one of the most serious challenges of this century.¹¹⁸ Although some of the migration is likely to be voluntary, most will be coerced by conditions linked to environmental degradation and disaster.¹¹⁹ These environmental causes are expected to be exceptionally severe in Africa.¹²⁰ In fact, it is not uncommon for environmental causes to be coupled with conflict and other causes of migration, further complicating the problem.¹²¹

114. 2011 UNHCR Country Operations Profile: Sudan, UNHCR—THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483b76> (last visited Jan. 5, 2011).

115. *Chad Profile*, *supra* note 70.

116. *See Military Chiefs of UN Peacekeeping Forces in Africa Call for More Troops, Equipment*, UN NEWS CENTRE, Aug. 6, 2009, <http://www.un.org/apps/news/story.asp?NewsID=31703> (discussing peacekeeping efforts in Sudan).

117. *See* UNHCR, THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 27 (2006), <http://www.unhcr.org/4a4dc1a89.html> (citing IFRC data). For the latest IFRC data, see IFRC, 2008 ANNUAL REPORT 4–9 (2009), <http://www.ifrc.org/Docs/pubs/who/ar2008-en.pdf>.

118. Walter Kälin, Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, Speech to Committee on Migration, Refugees and Population of the Parliamentary Assembly, Council of Europe: Climate Change, Natural Disaster, and Internal Displacement (June 24, 2009), *available at* http://www.brookings.edu/speeches/2009/0624_internal_displacement_kalin.aspx (citing Eur. Parl. Ass., *Environmentally Induced Migration and Displacement: A 21st-Century Challenge*, 9th Sess., Res. No. 1655 (2009)).

119. *Id.*

120. *See generally* IFRC, WORLD DISASTERS REPORT 2009 (2009), <http://www.ifrc.org/Docs/pubs/disasters/wdr2009/WDR2009-full.pdf> (providing a comprehensive review of the worldwide trends).

121. For example, when the 2004 tsunami hit the Indonesian province of Aceh, there were about 300,000 IDPs who had left their homes because of conflict. The tsunami displaced about a half a million more. *See* UNHCR, *supra* note 7, at 28 (“[R]elief efforts were complicated by the fluid and complex displacement that resulted from the combination of political causes and the immediate devastation of the tsunami.”).

Those who move across international boundaries as a result of natural disaster or climate change are not likely to be recognized as refugees, as they do not meet the individualized refugee definition of the UN Refugee Convention.¹²² However, the AU Convention's definition is arguably broad enough to accommodate such people as refugees.¹²³ Irrespective of the issues relating to legal status, environmental factors will undoubtedly continue to cause the displacement of millions of people.¹²⁴

3. Trafficking and Smuggling

The U.S. Department of State report on human trafficking notes that "the common denominator of trafficking scenarios is the use of force, fraud, or coercion, to exploit a person for profit."¹²⁵ Labor and sexual exploitation are the most common forms of abuse, and the State Department calls the phenomenon "modern day slavery."¹²⁶ The report explains that trafficking for labor exploitation takes the form of "the traditional chattel slavery, forced labor and debt bondage," whereas trafficking for sexual exploitation often involves abuse within the commercial sex industry.¹²⁷ According to the International Labor Organization, there are currently around 12.3 million trafficked adults and children in the world, affecting almost every country.¹²⁸ Some trafficked persons are taken across international boundaries.¹²⁹

The UNHCR acknowledges that trafficking and smuggling are not always involuntary.¹³⁰ It notes that, although the exploitative and coercive nature of trafficking is obvious, some asylum seekers and other economic migrants use traffickers and smugglers to gain entry into developed countries.¹³¹

Intercontinental trafficking from Africa affects women more than men because women are often recruited to work as domestic servants

122. Cf. UN Refugees Convention, *supra* note 1, art. 1(A) (defining the term refugee and referring specifically to "fear of persecution").

123. See African Refugee Convention, *supra* note 1, art. 1(2) (including displacement as a result of "events seriously disturbing public order").

124. As of yet, there is no one agency exclusively tracking environmentally-induced displacements. Unfortunately, IDMC's data are limited to conflict-induced displacement. See generally IDMC, *supra* note 37.

125. U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2009), <http://www.state.gov/documents/organization/123357.pdf>.

126. *Id.*

127. *Id.*

128. *Id.* at 8 (citing the International Labor Organization (ILO)).

129. *Id.*

130. See UNHCR, *supra* note 7, at 25 (discussing groups that are vulnerable to trafficking and noting that "smuggling is not a form of forced migration per se").

131. *Id.*

and caretakers in the Middle East, Europe, and North America.¹³² In contrast, trafficking within the continent of Africa affects young boys more than any other demographic because they are targeted for child soldiering.¹³³

4. Development

Studies suggest that more people are displaced as a result of development projects than armed conflict.¹³⁴ Examples of displacement-inducing projects include dams; urban infrastructure projects such as electrification, roads, highways, and canals; and projects linked to the extractive industry.¹³⁵ A World Bank study identified eight distinct predicaments facing populations displaced as a result of development: homelessness, landlessness, joblessness, marginalization, food insecurity, increased morbidity and mortality, loss of access to common property, and social disintegration.¹³⁶ The same study highlights that indigenous people and marginalized ethnic minorities are disproportionately impacted by development.¹³⁷ For example, in India the Adivasi (tribal people) make up 40–50 percent of the total number of displaced persons, even though they constitute only 8 percent of the total population.¹³⁸ The UNHCR expresses a similar concern: “Poor, indigenous and marginalized groups are frequently displaced without consultation to make way for grand national projects. Not only are the rights of such people ignored, they are rarely offered resettlement or adequate compensation.”¹³⁹ The World Bank calls the phenomenon of development-induced displacement “involuntary resettlement” and attempts to mitigate the grave consequences of projects it finances.¹⁴⁰

132. U.S. DEP'T OF STATE, *supra* note 125, at 18.

133. *See id.* at 19–21 (describing the practice of abducting children to be used as soldiers).

134. IDMC, TRAINING ON THE PROTECTION OF IDPS: DEVELOPMENT-INDUCED DISPLACEMENT 1, [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/C753862FA2CF8B7CC1257115004752ED/\\$file/Protection from module handout development displacement.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/C753862FA2CF8B7CC1257115004752ED/$file/Protection%20from%20development%20displacement.pdf).

135. *Id.*

136. *Id.* (citing Michael M. Cernea, *Why Economic Analysis Is Essential to Resettlement: A Sociologist's View*, in *THE ECONOMICS OF INVOLUNTARY RESETTLEMENT: QUESTIONS AND CHALLENGES* 5, 17–18 (Michael Cernea ed., 1999)).

137. *Id.* at 2.

138. *Id.*

139. UNHCR, *supra* note 7, at 154.

140. For comprehensive information on the Bank's efforts, see *Involuntary Resettlement*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINVRES/0,,menuPK:410241~pagePK:149018~piPK:149093~theSitePK:410235,00.html> (last visited Jan. 5, 2011) (discussing involuntary resettlement and the World Bank Involuntary Resettlement team, the purpose of

B. *The Operational Categories of Forced Migrants*

The need-based operational categories are simpler than the citizenship-based juridical categories. Although the legal categories do not necessarily correspond to the need-based categories, it is important to understand the need-based categories to assess the validity of the legal regimes that purport to provide protection to the various classes of displaced persons. The operational categories may be understood in a continuum ranging from non-displaced vulnerable populations to populations that are in the process of reintegration after returning from displacement. This section briefly discusses eight different categories in this continuum.

1. Non-Displaced Vulnerable Populations

Varying levels of vulnerabilities affect various categories of persons who live in conflict-prone areas. The displaced are not necessarily the most vulnerable. According to the UNHCR, in areas where long-term conflicts exist, such as in Uganda and Burundi, “the dominant trend is one of short-term, short distance, repetitive dislocation rather than large-scale displacement into camps. It is often extremely difficult to distinguish between displaced and non-displaced populations.”¹⁴¹ For example, in Colombia, rebel groups often forcibly prevent displacement to benefit from supplies shipped to the civilians.¹⁴² These forces also use the civilian population as a source of recruits and cover.¹⁴³ These populations are likely to flee every time they get the opportunity, but, until then, they remain vulnerable.

Another example of vulnerable non-displaced persons is the segment of the community that is too weak to flee because of old age, ailment, or disability. The UNHCR estimates that right after the Afghanistan war began, there were more non-displaced vulnerable Afghans than Afghan IDPs and refugees combined.¹⁴⁴ The protection and assistance needs of this category of persons are the same as, if not greater than, IDPs, refugees, or some other categories.

which is to “identify, plan, implement, and monitor involuntary resettlement to minimize displacement and restore incomes”).

141. UNHCR, *supra* note 7, at 14.

142. *Id.*

143. *Id.*

144. *Id.*

2. IDPs

The operational meaning of the IDP category is more or less the same as the legal definition under the AU Convention. The IDP category includes persons who were forced to flee their homes but remain sheltered within the boundaries of their country of citizenship or habitual residence.¹⁴⁵ They often flee their homes for the same reasons as refugees and forced migrants.¹⁴⁶ They may be trapped between fighting forces and are often subject to attacks by either their own governments or rebel forces.¹⁴⁷ Numerically, there are more than two times as many IDPs as compared to refugees.¹⁴⁸ The UNHCR attests that IDPs are “frequently in a more desperate situation than refugees.”¹⁴⁹

3. Refugees

Operationally, there are two categories of refugees: refugees who meet the requirements of the individualistic definition of the 1951 Refugee Convention¹⁵⁰ and refugees who the UNHCR considers *prima facie* refugees in circumstances of mass exodus.¹⁵¹ In both instances, refugees must cross an international boundary.¹⁵²

UNHCR statistics suggest that there are 15.2 million refugees worldwide, excluding asylum seekers, a distinct category discussed in the next subsection.¹⁵³ About four-fifths (8.8 million) of all

145. AU Convention, *supra* note 9, art. 1(k); Guiding Principles, *supra* note 8.

146. UNHCR, *supra* note 7, at 153.

147. *See id.* at 153–56 (observing that IDPs are exposed to different threats than refugees, threats that are often more grave and frequently result in higher mortality rates).

148. *Id.* at 153.

149. *Id.*

150. The UN Refugees Convention classifies one as a refugee who has a

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

UN Refugees Convention, *supra* note 1, art. 1(A)(2).

151. *Cf.* African Refugee Convention, *supra* note 1, art. 1(2) (defining a refugee in broader terms, including those displaced as a result of armed conflict); *History of UNHCR*, *supra* note 3 (indicating that the outpouring of Hungarian refugees in 1956 demonstrated the necessity of the UNHCR).

152. UN Refugees Convention, *supra* note 1, art. 1(A)(2); African Refugee Convention, *supra* note 1, art. 1(2).

153. UNHCR, *supra* note 18, at 2.

refugees are in developing countries.¹⁵⁴ While about half of all refugees live in urban centers worldwide, about seven in ten live in camps in sub-Saharan Africa.¹⁵⁵ Between 75 and 91 percent of refugees remain within their region of origin.¹⁵⁶ For example, according to the UNHCR data, a refugee from Somalia has an 85 percent chance of being sheltered in Ethiopia, Kenya, Djibouti, Eritrea, or Sudan.

4. Asylum Seekers

People who lodge individual applications to be recognized as “convention refugees” are considered asylum seekers.¹⁵⁷ According to the UNHCR, in 2008, about 839,000 individual asylum applications were filed with states or UNHCR offices around the world.¹⁵⁸ This is a fraction of the general refugee population under UNHCR care.¹⁵⁹

The demographic data is worth emphasizing. According to the UNHCR, the vast majority of children seek refuge in poor countries.¹⁶⁰ Children under the age of eighteen constitute 54 percent of refugees in Africa, 46 percent in Asia, and 25 percent in Europe.¹⁶¹ The UNHCR concludes that “[t]he low number of refugee children reaching industrialized countries may be partly the result of age-selective asylum migration, including the ‘secondary’ movements of asylum seekers from poor refugee-hosting regions to richer countries.”¹⁶² Although not as significant as the age disparity, the gender disparity is also notable: women constitute 50 percent of African refugees but only 41 percent of North American refugees.¹⁶³ This statistic suggests that those who are likely to be asylum seekers in developed countries are more likely to be adult males who have better means to move from place to place.¹⁶⁴

154. *Id.*

155. *Id.*

156. *Id.* at 7.

157. “Convention refugee” is a term the UNHCR uses to refer to refugees who meet the individualistic refugee definition of the 1951 Refugee Convention. *Id.* at 5 n.9, 14 (noting that individuals are refugees as soon as these criteria are met, regardless of whether asylum has been granted).

158. *Id.* at 14.

159. *See id.* at 2 (noting that worldwide there are 827,000 asylum seekers compared to 15.2 million refugees).

160. UNHCR, *supra* note 7, at 20.

161. *Id.* at 20–22.

162. *Id.* at 22.

163. *Id.*

164. *See* Jacqueline Bhabha, *Demography and Rights: Women, Children and Access to Asylum*, 16 INT’L J. REFUGEE L. 227, 235 (2004) (positing that women in developed countries are less likely to migrate due to a combination of formal and informal structures urging against a self perception as an autonomous migrant).

Jacqueline Bhabha, Director of Harvard's Committee on Human Rights Studies, suggests that:

It is likely that both institutional and individual factors are at play in different ways for each population. In the case of women, reduced access to the formal and informal structures that facilitate migration (state agencies, travel agencies, smugglers, family funding), together with dependent family status, resource inadequacy, personal history and social positioning, which militate against a self-perception as an autonomous asylum seeker, are likely to be powerful impediments to individual flight.¹⁶⁵

Although there is no specific data on the demographics of the UNHCR's adjudication of individual asylum claims, it is reasonable to assume that those with better means are likely to live in cities, as opposed to refugee camps, and to lodge individual asylum claims. In light of this premise, it is fair to conclude that asylum seekers tend to come from the privileged segment of the general refugee population. At a minimum, they get the opportunity to be heard on an individual or family basis. This is not to understate the challenges that asylum seekers face. Although they seem to have better opportunities to be heard, they do not have any guarantees that they will succeed. In fact, the trend in developed countries reflects the difficulty that asylum seekers face in accessing the system and prevailing. Since 2001, the number of asylum applicants has declined by 30 percent in Germany, 33 percent in the United Kingdom, 26 percent in North America, and 28 percent in Australia and New Zealand.¹⁶⁶

5. Stateless Persons

Stateless persons are persons who are not considered to be citizens of any country.¹⁶⁷ There are an estimated 9 to 11 million stateless persons today.¹⁶⁸ Stateless persons are almost always disenfranchised and have limited or no civil, political, or economic rights, even within their countries of habitual residence. They are affected by displacement like any other population, but their status as IDPs, asylum seekers, or refugees is obviously more complicated because of their lack of citizenship.¹⁶⁹

Refugee status could also create statelessness if the host country does not consider the children born in its territories to be its citizens

165. *Id.*

166. UNHCR, *supra* note 7, at 15.

167. See Convention for the Reduction of Statelessness, art. 1, Aug. 30, 1961, 989 U.N.T.S. 175 (making provisions to reduce the possibility of statelessness through the granting of citizenship).

168. UNHCR, *supra* note 7, at 26.

169. See *id.* at 26–27 (observing deprivations of rights resulting from lack of citizenship and examining rectification efforts in Sri Lanka, Ukraine, and Macedonia).

and the state of the parents' nationality does not consider those born outside that state to be its citizens. This situation raises some serious problems when the parents are repatriated to their home state.¹⁷⁰ Although the 1961 Convention for the Reduction of Statelessness makes provisions to minimize these kinds of circumstances by obligating states to make laws that avoid the denial of citizenship to those who would otherwise become stateless, it has only been ratified by fifty-seven states.¹⁷¹

According to the UNHCR, examples of protracted situations of statelessness include the Biharis in Bangladesh; the Bidoons in Kuwait, the United Arab Emirates, Iraq, and Saudi Arabia; some Kurds in Syria; and the Muslim population of Myanmar.¹⁷² Significant numbers of stateless persons also live in Brunei, Cambodia, Malaysia, and Vietnam.¹⁷³

The UNHCR notes that statelessness is not well understood in many countries and, as such, gathering accurate statistical data is very difficult.¹⁷⁴ Stateless persons usually live in "a precarious situation on the margins of society and are subject to discrimination."¹⁷⁵ With only fifty-four states reporting data on stateless populations, the UNHCR acknowledges that it does not fully understand the scope of the problem.¹⁷⁶ The data in the UNHCR's Statistical Yearbook is telling. In Africa, for example, only two countries reported their stateless populations.¹⁷⁷ Egypt reported sixty-four stateless individuals, and Kenya reported 100,000.¹⁷⁸ The great majority of displaced persons in Africa do not submit individual applications for refugee status or other forms of subsidiary protection and assistance because they receive UNHCR protection and assistance on *prima facie* bases.¹⁷⁹ Therefore, the relevance of

170. *Id.*; see also Convention for the Reduction of Statelessness, *supra* note 167, art. 1 (discussing when contracting states will grant nationality).

171. UNHCR, *supra* note 7, at 26.

172. *Id.* at 27.

173. *Id.*

174. UNHCR STATISTICAL YEARBOOK 2007, at 31 (2008), <http://www.unhcr.org/4981c3252.html>.

175. *Id.*

176. See *id.* at 31–32 (explaining the discrepancy between country-specific displaced persons figures and worldwide estimates as the result of official reporting by too few countries).

177. See UNHCR STATISTICAL YEARBOOK 2008, ANNEX: COUNTRY DATA SHEETS 65–68 (2009), <http://www.unhcr.org/4bcc5c9f9.pdf> (providing population data from various countries for groups of individuals including refugees and stateless persons as of end-2008).

178. *Id.*

179. See *History of UNHCR*, *supra* note 3 (noting that UNHCR has expanded its coverage of the stateless to support those denied basic rights for want of citizenship).

citizenship status to most displaced populations in Africa seems minimal at best.

6. Secondary Migrants

Secondary migrants are migrants who move to a secondary location from any place of primary displacement.¹⁸⁰ They move for a variety of reasons, including seeking better protection in developed countries. In that sense, this category is analogous to the asylum seeker category and the demographics probably share the characteristics discussed in the previous section. They could also be trafficked or smuggled.¹⁸¹

Another example of secondary movement is resettlement. Resettlement is an opportunity offered to those who meet the individualistic definition of the Refugee Convention. The United States, Canada, and Australia take about 90 percent of all secondary migrants through their resettlement programs.¹⁸² Apart from the refugee definition, a state's decision to resettle particular groups of refugees is based on a combination of geopolitical, foreign policy, and humanitarian considerations.¹⁸³ The most vulnerable are not necessarily the ones who benefit, as shown by the following true story of a Somali refugee:

Sahra Dirie is a refugee from Somalia. She fled her country with her husband and their children when civil war broke out in 1991. They sought refuge in neighboring Kenya, where they were placed in the Garisa refugee camp. There they lived in a tent and relied on handouts from international humanitarian organizations to survive. The camp was dirty, disease ridden and violent. The Kenyan police who patrolled the camp beat and raped its inhabitants with impunity.

This horrifying fact became all too real for Sahra when a Kenyan police officer raped her in 2002. In Somalia, being the victim of rape brings shame upon a woman and renders her a disgrace to her family. Sahra did not tell anyone except her sister in the United States what happened to her. She believes her husband suspected it, however, because he abandoned her and the family shortly after the rape. At the

180. See UNHCR, *supra* note 7, at 24 (noting secondary migration as leading to a more complex mixture of migratory motives).

181. *Id.* at 24.

182. *Id.* at 190 n.18. The remaining 10 percent are primarily divided among Norway, Sweden, New Zealand, Finland, Denmark, the Netherlands, and Ireland. *Id.*

183. See Heidi H. Boas, *The New Face of America's Refugees: African Refugee Resettlement to the United States*, 21 GEO. IMMIGR. L.J. 431, 441-47 (2007) (noting four important considerations for the increase in the number of refugees resettled in the United States: (1) the end of the Cold War, (2) the influence of nongovernmental organizations, (3) the leadership of the congressional black caucus, and (4) humanitarian consideration as exemplified by the resettlement of the Somali Bantus and the lost boys of Sudan).

time he left, Sahra was pregnant, and she believes it was the result of the rape.

Sahra was left with her six other children and only her elderly mother to help her care and provide for them. A few months later, Sahra's mother received word that she had been approved for resettlement in the United States. After Sahra gave birth, she went to the resettlement interview with her mother, believing that she would be accompanying her mother to the United States. The representative informed them that Sahra, because she was over twenty-one years of age, did not qualify to join her mother. Moreover, Sahra had never registered as a refugee with the camp authorities and thus had not been identified as an applicant for resettlement in her own right.

Sahra's mother received final approval on her application for refugee resettlement. She was ill and had little choice but to leave Kenya for the United States. Sahra was left alone with her children in the refugee camp.

After her mother's departure, Sahra lost hope in the refugee system. She took her children to live in a shantytown on the outskirts of the camp in an effort to escape violence and despair. Humanitarian groups worked to secure a new resettlement interview for Sahra based on a different category of resettlement reserved for at-risk women and children. By the time the humanitarian groups managed to secure a new interview in early 2004, however, camp officials could not locate Sahra and her children. Their fate is unknown.

The conditions in Sahra's refugee camp are similar to those found in refugee camps all over the world and are partly to blame for her ordeal. Violence, poverty and disease are common in refugee camps and affect the entire refugee population. Women and children, particularly unaccompanied children and women who are single heads of households, are even more susceptible to camp conditions and to a broader range of violent acts and persecution because of their age or sex. Due to cultural traditions and camp logistics, women are also less likely to have a voice in camp management or, in the case of children as well as women, even to be registered as refugees. This lack of visibility increases the risk that women and children refugees, even more so than the rest of the refugee population, will suffer severe abuse and be deprived of refugee benefits.

The nature of the U.S. Refugee Resettlement Program also played a significant role in the outcome of Sahra's case. U.S. national security concerns and shifting policy priorities combine with corrupt practices on the part of resettlement applicants and aid workers to create a labyrinthine resettlement process that often seems illogical and inefficient. As a result, individuals like Sahra, who have not committed fraud, do not present national security risks, and are a high priority for humanitarian assistance, nevertheless slip through the gaping cracks that undermine the system.¹⁸⁴

184. Marisa Silenzi Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in the Post-September 11 World*, 17 YALE J.L. & FEMINISM 459, 460-63 (2005). Cianciarulo proposes a nonimmigrant visa for this category of most vulnerable refugees who are not likely to benefit from the regular procedures. *Id.* at 499-500.

7. Voluntary Returnees

Voluntary repatriation is often considered a durable solution to displacement.¹⁸⁵ Many displaced persons return to their homes when the circumstances that compelled their flight no longer exist.¹⁸⁶ According to the UN Office for the Coordination of Humanitarian Affairs, however,

[i]t is very difficult to get accurate figures for IDPs because populations are constantly fluctuating or inaccessible: some IDPs may be returning home while others are fleeing, others may periodically return to IDP camps to take advantage of humanitarian aid; some return home temporarily but come back to their place of displacement, or move elsewhere.¹⁸⁷

The same pattern exists in cross-continental refugee mobility. A number of asylum countries encourage refugees to return.¹⁸⁸ Frequently, refugees return prematurely and flee to the same or other places again. For example, according to a recent UNHCR study, Denmark repatriated 306 Iraqi refugees to Iraq with an option to return to Denmark within twelve months.¹⁸⁹ Of the 306 refugees, 73 exercised their option to return to Denmark.¹⁹⁰ The study identifies a complicated set of common political, security, and economic hardships faced by repatriated refugees.¹⁹¹ For example, as a result of their prolonged absence, some returnees assume an outsider status in their original homes, often to the point that reintegration becomes very difficult or even impossible.¹⁹² In Africa, the consequences can be even more dramatic. Returnees often find

185. *Returnees*, UNHCR—The UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c1ca.html> (last visited Jan. 5, 2011).

186. *See id.* (“For many people forced from their homes, a voluntary return home in safety and dignity marks the successful end to the trauma.”).

187. *Main Challenges, Access, Identification, and Protection*, OFFICE FOR THE COORDINATION OF HUMANITARIAN AFF. [OCHA], <http://ochaonline.un.org/News/InFocus/InternallyDisplacedPeopleIDPs/MainChallenges/tabid/5140/language/en-US/Default.aspx> (last visited Jan. 5, 2011).

188. *See* INT’L ORG. FOR MIGRATION, RETURN MIGRATION: POLICIES & PRACTICES IN EUROPE, 7 (2004), http://www.ch.iom.int/fileadmin/media/pdf/publikationen/return_migration.pdf (noting the assisted voluntary return programs of several European countries). For a discussion of Denmark’s general policy of encouraging return, repatriation, and reintegration to achieve a durable solution, see Maria Helene et al., *Circular Repatriation: The Unsuccessful Return and Reintegration of Iraqis with Refugees Status in Denmark* 1 (UNHCR, Policy Dev. & Evaluation Serv., Research Paper No. 165, 2008), <http://www.unhcr.org/48eb34c72.html>.

189. Helene et al., *supra* note 188, at 1.

190. *Id.*

191. *See id.* at 20 (providing ten factors representative of particular theoretical motivations underpinning failed repatriation).

192. *Id.* at 6–7.

their homes burned, their personal property destroyed, and their farmland infested with landmines.¹⁹³

8. Mixed Migrants

The UNHCR neatly summarizes the phenomenon of mixed migration in the following terms:

Modern migratory patterns make it increasingly difficult to distinguish between the various groups on the move. Population flows are not homogenous but of a mixed, composite character. The immediate causes of forced displacement may be identified as serious human rights violations or armed conflict. But these causes often overlap with, or may themselves be provoked or aggravated by, economic marginalization and poverty, environmental degradation, population pressure and poor governance.

Asylum seekers and refugees may use the same modes of travel as undocumented migrants and resort to, or be exploited by, smugglers and traffickers. In some cases, refugees may use these channels to leave one country of asylum and move to another to escape insecurity or economic hardship. On the other hand, persons who do not qualify for international protection may resort to claiming asylum in the hope of being allowed to stay abroad.¹⁹⁴

The overlap in the motives for the movement of persons creates challenges in the classification of the various categories of migrants.¹⁹⁵

Attempting to regulate the extraordinarily complex phenomenon of migration—and forced migration in particular—is a daunting task indeed. The community of nations attempted to regulate a small portion of the phenomenon by law when the UN adopted the Refugee Convention. The following Parts assess the validity of the African Union's attempt to extend a similar legal regime to the IDPs category and its interaction with the existing regime of refugee law.

III. THE RIGHTS-BASED APPROACH TO MANAGING DISPLACEMENT: THE DOCTRINAL DILEMMA

Internally displaced, externally displaced, or not displaced, “all human beings are” supposed to be “born free and equal in dignity and rights.”¹⁹⁶ Humans “are endowed with reason and conscience and

193. See, e.g., Press Release, UNHCR, Eritrea: Border Area Devastated (Oct. 3, 2000), available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae6b8264&query=returnees%20landmines> (discussing the decimation of many Eritrean villages at the hands of Ethiopian troops).

194. UNHCR, *supra* note 7, at 24.

195. *Id.*

196. UDHR, *supra* note 13, art. 1.

should act towards one another in a spirit of brotherhood.”¹⁹⁷ Moreover, “everyone” is supposed to be entitled to all the rights and freedoms set forth under the Universal Declaration of Human Rights (UDHR).¹⁹⁸ These rights include due process and equal protection of the law¹⁹⁹ without regard to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁰⁰

Although most provisions of the UDHR, including the nondiscrimination provisions, are arguably binding on all states as expressions of customary international law,²⁰¹ other binding international human rights treaties leave room for the discriminatory treatment of non-nationals.²⁰² Although as persons, refugees are entitled to the full range of human rights applicable to all persons under international human rights law, as “aliens,” their rights may be curtailed. They may not even be allowed to enter the country of refuge.²⁰³ Even if they successfully enter, the authorities of the state where they seek refuge must first recognize them as meeting the requirements under their laws.²⁰⁴ Even then, the displaced person’s rights are limited to those guaranteed by international refugee law and enshrined in the domestic laws of the receiving country.²⁰⁵

Professor Hathaway writes:

[T]he inadequacy of international human rights law as a response to the vulnerabilities of refugees is in part a function of its inattention to the concerns of aliens generally. Inapplicable assumptions and outright exclusions reflect the orientation of international human rights law to

197. *Id.* art. 1.

198. *Id.* art. 2.

199. *Id.* arts. 7, 10.

200. *Id.* art. 2.

201. Buergenthal, *supra* note 13, at 9.

202. *See, e.g.*, ICESCR, *supra* note 13, art. 2(3) (allowing developing countries to treat non-nationals differently). Compare ICCPR, *supra* note 13, art. 25 (“Every citizen”), with ICCPR, *supra* note 13, art. 26 (granting political participation rights to every citizen as distinct from ensuring that “all persons” have equal protection under the law).

203. *See, e.g.*, *Sale v. Haitian Councils Center*, 509 U.S. 155, 182–83 (1993) (holding that the principle of non-refoulement or non-return under Article 33 of the Refugee Convention does not prohibit a state from gathering refugees headed towards its shores and returning them without screening them for refugee status).

204. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. §§ 1101, 1157–58 (2006) (setting forth the procedures for the recognition of refugees and asylum seekers in accordance with the Refugee Convention).

205. *See* HATHAWAY, RIGHTS OF REFUGEES, *supra* note 1, at 110 (noting that stateless refugees have limited access to the protections afforded by international human rights conventions because stateless refugees, as non-nationals, lack a state that will advocate their rights).

meeting the needs of most of the world's population, who are citizens of their state of residence.²⁰⁶

The early response of the UN was to deny the existence of a difference between citizens and non-citizens for the purposes of international human rights norms because the general nondiscrimination laws were meant to apply without regard to any particular identifying characteristics.²⁰⁷ However, as Hathaway notes, the binding international human rights treaties do not address the vulnerabilities of aliens.²⁰⁸ The UN's effort to catalog the rights of aliens in a binding instrument has not become a reality.²⁰⁹ Alienage remains a handicap to the enjoyment of the full range of human rights.

In that sense, it would appear that citizens are advantaged and non-citizens are disadvantaged. Refugee law attempts to mitigate this problem for the benefit of refugees.²¹⁰ Ironically, however, under certain circumstances, the protection that refugee law provides to non-citizens may be attractive to certain displaced citizens because they find themselves in refugee-like situations. However, according to these IDPs a legal status analogous to refugee status is problematic because refugee law is essentially "formulated to serve as a back-up to the protection one expects from the State of which an individual is a national."²¹¹ If a person is presumably under the protection of his or her own state, ordinary human rights laws may be invoked without the need for a distinct legal status or standing.²¹² However, the reality for millions of IDPs around the world is that the states of their nationality are unable or unwilling to provide the required protection. The question is thus whether according these IDPs a separate international legal status analogous to refugee status is doctrinally and functionally sound.

This Part weighs the arguments of the most outspoken protagonists on both sides. Professor James Hathaway's point of view is a good representative of the arguments for distinct treatment of the

206. *Id.* at 147.

207. *Id.*

208. *Id.* at 148-49.

209. *Id.* It is important to note, however, that in 1985 the UN adopted the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, Annex, U.N. Doc. A/RES/40/144 (Dec. 13, 1985).

210. HATHAWAY, RIGHTS OF REFUGEES, *supra* note 1, at 149-50.

211. *See id.* at 4 (quoting *Canada v. Ward*, [1993] 2 S.C.R. 689 (Can.)).

212. *See* UDHR, *supra* note 13, art. 2 (stipulating that UDHR guarantees apply to all persons without distinction on discriminatory bases); Buergenthal, *supra* note 13, at 9 (arguing that the UDHR is a part of customary international law, and thus provides recourse to its provisions where one has legal protections generally).

IDP and refugee categories.²¹³ Roberta Cohen, from the Brookings Institute, maintains a holistic approach.²¹⁴ The following discussion describes and evaluates the exchanges between these two strong voices.

A. *Hathaway v. Cohen*

Writing metaphorically, Hathaway argues that marrying refugee law studies to forced migration studies is not in the best interest of the refugee partner, and he proposes a “dating” arrangement.²¹⁵ There are two important reasons for his opposition to the marriage. First:

[S]ubsuming refugee studies into the broader framework of forced migration studies may result in a failure to take account of the specificity of the refugee’s circumstances which are defined not just by movement to avoid the risk of harm, but by the underlying social disfranchisement coupled with the unqualified ability of the international community to respond to their needs.²¹⁶

Second, such a marriage may encourage a focus on the phenomenon of forced displacement rather than “on the personal predicaments, needs, challenges, and rights of refugees themselves.”²¹⁷ Hathaway illustrates the first concern by reference to the emerging IDP category and the second by referring to the notion of a durable solution to the phenomenon of forced migration in general.²¹⁸

Hathaway fears that reformulating the refugee category as a manifestation of the broader problem of forced migration could erode the rights-based refugee jurisprudence that he has contributed to significantly.²¹⁹ Merging the various categories of migrants under one umbrella carries the risk of undermining the specific rights that states owe to refugees.²²⁰ In other words, he does not want refugees

213. Katy Long, *Early Repatriation Policy: Russian Refugee Return 1922–1924*, 22 J. REFUGEE STUD. 133, 134 (2009) (referring to Hathaway as sparking debate in the field of forced migration studies).

214. See generally Roberta Cohen, *Response to Hathaway*, 20 J. REFUGEE STUD. 370 (2007) (arguing that analysis of the needs of both IDPs and refugees must fundamentally seek to secure rights, rather than dispute primacy).

215. Hathaway, *supra* note 7, at 349.

216. *Id.*

217. *Id.*

218. *Id.*

219. See *id.* at 350 (arguing that refugee rights are threatened by the incorporation of refugees within the broader forced migration phenomenon because it results in conceptual blurring and refocuses the debate from individual rights to systemic management). His main contributions include: HATHAWAY, RIGHTS OF REFUGEES, *supra* note 1; JOHN C. HATHAWAY, RECONCEIVING INTERNATIONAL REFUGEE LAW (1997); HATHAWAY, REFUGEE STATUS, *supra* note 1.

220. Hathaway, *supra* note 7, at 351.

to be considered “no more than (forced) migrants.”²²¹ Although he acknowledges that “the labels may be arbitrarily conceived and fail to reflect true substantive differences,” he cannot resist the temptation of saying that refugees are more deserving or even “doubly deserving” of protection.²²² He believes that refugees deserve more protection because they are at substantial risk of harm on account of who they are or what they believe—characteristics that they cannot change or must not be required to change.²²³ He further argues that the distinct treatment of refugees makes more sense because the international community can “guarantee a remedy,” as refugees are by definition outside of the country where they are persecuted.²²⁴ In other words, being a refugee “means being a person who deserves protection and being a person who can, in practical terms, be guaranteed the substitute or surrogate protection of the international community.”²²⁵

Hathaway provides specific examples in which deemphasizing the unique status of refugees affected outcomes. One of his examples relates to UNHCR’s involvement in the provision of assistance to would-be refugees inside the former Yugoslavia.²²⁶ Acknowledging that Western European countries exerted every effort to discourage the influx of refugees into their territories, he blames the UNHCR for being “co-opted” to proclaim the IDPs’ “right to remain” within their country.²²⁷ He further argues that the “right to remain” policy might have contributed to the Srebrenica massacre.²²⁸ For Hathaway, “[t]here is little doubt that the sudden interest in IDPs was, at least in a larger measure, a strategy designed to deflect scrutiny of the refusal of states to live up to their responsibilities to refugees.”²²⁹

At a more technical level, Hathaway believes that IDPs are more like non-displaced persons who face human rights violations in their own country than refugees who are aliens in the country of refuge.²³⁰ To support this argument, he quotes a statement by the UN Assistant High Commissioner for Refugees:

221. *Id.* at 352.

222. *See id.* at 351–52 (stating that, although labels may be arbitrary, refugees should be afforded additional protection because of their specific characteristics).

223. *See id.* at 352.

224. *Id.* at 353.

225. *Id.* He adds, “Despite the often attenuated nature of sovereign power today, it remains the case that a clear guarantee of rights can only be made to persons who are outside of their own country.” *Id.*

226. *See id.* at 356 (discussing the UNHCR’s role in constraining refugees’ ability to leave the conflict area).

227. *Id.*

228. *See id.* (noting that enforcement of the “duty to remain” contributed to the massacre in Srebrenica).

229. *See id.* at 357.

230. *Id.* at 358.

The question being asked is whether it is artificial, in a complex emergency, to make a distinction between persons actually displaced and the border population of the country, who may be just as vulnerable. This is illustrated well, perhaps, by the situation in the eastern provinces of the Democratic Republic of Congo (DRC). It is exceedingly difficult to distinguish between IDPs and the population at large. Humanitarian assistance is lacking; the population as a whole faces constant harassment by armed elements; sexual and gender violence is rife; there is no rule of law; and corruption is everywhere endemic and rampant. In these circumstances, should international responsibility begin and end with IDPs only?²³¹

For Hathaway, the only factual circumstance that makes IDPs look more like refugees than non-displaced vulnerable populations is the loss of property.²³² And yet, he says, “it is doubtful that this single qualitative difference from the predicament of non-displaced human rights victims (and parallel to the situation of refugees) is a sufficient basis to carve out a scholarly, legal, or operational niche for the internally displaced (much less to justify the merged ‘forced migrant’ category).”²³³

Dismissing the UN Guiding Principles on IDPs as a mere restatement of existing law²³⁴ and affirming that “there is a sound principled basis not to lump refugees in with all forced migrants, much less with migrants generally,”²³⁵ Hathaway arrives at a very provocative conclusion:

The fact that neither new law nor new institutions have evolved despite the massive investment in reorienting away from refugees and towards forced migration in general should give us a pause. . . . My own view is that the paucity of concrete progress in achieving rights and remedies to forced migration suggests the non-viability of the forced migration label. It groups together two sets of persons—refugees and the internally displaced—who in fact share little other than the shared symptoms of involuntary movement.²³⁶

Hathaway’s arguments do not impress Cohen. First and foremost, she accuses him of neglecting the literature pertaining to the IDPs category,²³⁷ as well as attempting to “turn the clock back to

231. *Id.* at 359–60.

232. *See id.* at 360 (noting the risk of property loss born by both refugees and IDPs).

233. *Id.* at 362.

234. *See id.* at 358–59 (stating that the Guiding Principles add basically nothing to the existing body of law).

235. *Id.* at 353.

236. *Id.* at 359.

237. *See* Cohen, *supra* note 214, at 372. In her own words: “His dismissal of the Guiding Principles for having added ‘virtually nothing to the pre-existing corpus of already binding international human rights law’ suggests that he has not read the *Compilation and Analysis of Legal Norms* that preceded the drafting of the Guiding Principles or the *Annotations* to the Principles.” Interestingly, Hathaway cites to

an earlier time when only refugees, or individuals who flee across borders from persecution, could expect attention from the international community.”²³⁸ She then attempts to refute each of his arguments.

For Cohen, the 1951 definition of a refugee is almost obsolete because today’s reality is that most refugees are driven out of their homes by armed conflict and generalized violence rather than individualized persecution.²³⁹ Therefore, disparate treatment, on the basis of political boundaries, of displaced persons who face similar violations seems senseless to her.²⁴⁰ To highlight the policy confusion that disparate treatment might cause, she poses a question once asked by Hilary Benn, the UK’s former Secretary of State for International Development: “Is it really sensible that we have different systems for dealing with people fleeing their homes dependent on whether they happen to have crossed an international border?”²⁴¹

She uses the circumstances in West Darfur and Chad to illustrate her point of view.²⁴² The UNHCR beneficiaries in West Darfur include internally displaced Sudanese and refugees from Chad.²⁴³ The composition just across the border is more or less the same: refugees from Sudan and IDPs from Chad.²⁴⁴ Cohen argues that any legal regime that treats these individuals differently is simply not sensible,²⁴⁵ and she extends this argument to suggest that refugees are not necessarily more deserving of protection because IDPs often face similar persecution and discrimination.²⁴⁶ In other words, there is nothing that inherently shields IDPs from facing the same type of persecution as refugees who managed to flee across an international boundary.

Cohen rejects Hathaway’s comparison of IDPs to mere “internal human rights” victims or vulnerable populations, and she argues that

Cohen’s 2002 speech for this exact same proposition. See Hathaway, *supra* note 7, at 358–59 (citing Roberta Cohen, Speech to the Brookings Institution: The Guiding Principles: How do they Support IDP Response Strategies? (Oct. 9, 2001) [hereinafter Cohen Speech], available at http://www.brookings.edu/speeches/2001/1109humanrights_cohen.aspx.) Cohen’s specific words were: “What is unique about the Principles is that in addition to restating provisions of existing law, they tailor the provisions of the law to the specific needs of the internally displaced.” Cohen Speech, *supra*.

238. Cohen, *supra* note 214, at 370.

239. *Id.*

240. *Id.*

241. *Id.*

242. See *id.* (illustrating UN assistance for Chadian refugees in Darfur).

243. *Id.*

244. *Id.*

245. *Id.* at 371.

246. See *id.* at 371–72 (arguing that IDPs face the same challenges as refugees and should receive similar protections).

IDPs are more like refugees.²⁴⁷ She lists a number of peculiar vulnerabilities that warrant peculiar attention.²⁴⁸ Many IDPs live in camps just like refugees and face the prospect of internal refoulement, meaning they risk being returned to places where they could face harm.²⁴⁹ IDPs also lose their homes and other property, including land; become disconnected from their communities and livelihoods; and face inherent vulnerabilities linked to their living conditions.²⁵⁰ Cohen notes that, just like refugees, IDPs face a higher mortality rate, a higher exposure to sexual violence, increased malnutrition problems, and less access to education and jobs.²⁵¹

These arguments, of course, force Cohen to directly confront Hathaway's most important argument, the argument that the international community is unable to provide protection to citizens of sovereign states inside their own territories but has an "unqualified ability" to provide assistance to refugees as a matter of international law.²⁵² Cohen almost concedes the "unqualified ability" argument, but she attempts to refute it by relying on policy analysis rather than on legal authority:

While it is true that the international community may not have the same 'unqualified ability' to come to [IDPs] aid as it does in the case of refugees, counter-insurgency or ethnic cleansing campaigns carried out by governments or non-state actors often require an international response. So too do situations in which IDPs are perishing in camps, deprived of the necessities of life and basic security.²⁵³

She relies on the UN Guiding Principles, which state that the "international community *has an important role to play* in addressing the protection and assistance needs of IDPs."²⁵⁴

As discussed above, Hathaway suspects a sinister motive on the part of powerful states in readily embracing the merger of the refugee category into the IDPs category.²⁵⁵ Although Cohen agrees that such a motive might have played a role in certain states' decisions, she is not convinced that it is the principal motivation behind the push to merge the refugee and IDP categories.²⁵⁶ She argues that the principal motivation is a legitimate and sincere recognition of the reality: an increasing number of IDPs and a changing notion of

247. See *id.* at 374 (demonstrating similarities between IDPs and refugees).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 371.

253. *Id.*

254. *Id.* (emphasis added). The arguments of Cohen and Hathaway on this issue are critiqued in the following section.

255. *Id.* at 373.

256. *Id.*

sovereignty.²⁵⁷ Cohen notes that the inhospitality to refugees has independent causes linked to the end of the Cold War and a lack of political advantage, as well as security and cost concerns.²⁵⁸

Finally, Cohen addresses Hathaway's argument that the lack of new IDP-focused laws and institutions is a function of the doctrinal nonviability of merging the IDP category with the refugee category.²⁵⁹ She argues that this assertion is factually inaccurate and analytically flawed.²⁶⁰ It is factually inaccurate because new rules have evolved and a number of institutions have been specifically mandated over the years.²⁶¹ It is analytically flawed because 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.²⁶² 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.²⁶³ Although Cohen eventually concedes that these rules have not become binding as general international law because of the obvious concerns over sovereignty, she points to instances where the Guiding Principles have been made binding at regional and national levels.²⁶⁴

Cohen also notes that IDPs, as a distinct category, were put under the competence of several institutions, including the UN Emergency Relief Coordinator.²⁶⁵ A special Internal Displacement Unit was also created, followed by an Internal Displacement Division.²⁶⁶ In 2007, the UN adopted the "cluster approach," which assigns specific duties to various UN agencies depending on the

257. *See id.* at 371–72 (stating that "there were many other important and legitimate reasons why IDPs came onto the international agenda"). She notes that growth in the number of IDPs from 1.2 million in the 1980s to approximately 25 million in 1995 was an important factor that attracted greater attention to the issue of displaced peoples. *Id.* at 372.

258. *Id.*

259. *Id.* at 373.

260. *Id.*

261. *Id.* at 372–73.

262. *Id.* at 373.

263. *Id.* at 372.

264. *See id.* at 372–73 (citing Jessica Whyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 HUM. RTS. BRIEF 7, 8 (2006)) (pointing to the African Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons, and noting that at the national level, the Guiding Principles have been incorporated into the national laws of Angola, Burundi, Colombia, Georgia, Liberia, Peru, the Philippines, Sri Lanka, Turkey, and Uganda).

265. Cohen, *supra* note 214, at 374.

266. *Id.*

phase of displacement.²⁶⁷ Under this approach, while the UNHCR would have the principal responsibility for the management of displacement camps and emergency shelters, the UN Development Programme would be responsible for reintegration efforts after return.²⁶⁸ Other agencies are assigned to specific needs such as health and sanitation.²⁶⁹ This approach is more or less the same as the UN's approach to refugee situations, where a number of UN agencies and NGOs assume varying responsibilities, from camp management to providing food.²⁷⁰

Having made these observations, Cohen ends on a strong note:

Academics and some practitioners may continue to insist on the primacy of the refugee category and deny legitimacy to that of internal displacement, but their arguments are bound to be seen as ever more irrelevant to the challenges of a new century.

Above all, 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.²⁷¹

B. *Reflection on Hathaway v. Cohen*

The difference between Hathaway and Cohen is more fundamental than their specific arguments suggest. In fact, they come from different paradigms. Hathaway seems to compare the circumstances of an Iranian dissident seeking asylum in Arlington, Virginia, to the circumstances of a Hurricane Katrina victim sheltered in Atlanta, Georgia,²⁷² while Cohen's model compares a Sudanese refugee in Chad with a Sudanese IDP right across the unmarked, imaginary, colonial boundary between Chad and Sudan.²⁷³ Because they are talking about two different circumstances, their dispute is almost false. In other words, they could be reconciled if they only give their respective arguments a geographic focus. To explore this further and to link it to the AU's new initiative, it is important to look at the points of contention in more detail. Hathaway's arguments and Cohen's responses could

267. *Id.* at 373.

268. *Id.* at 374.

269. *Id.* at 373.

270. *Id.*

271. *Id.* at 375.

272. See Hathaway, *supra* note 7, at 366 (stating that "[i]nternal forced migrants will be in flight for many of the same reasons as refugees" in the broader context of de-emphasizing the issue of asylum destination).

273. See generally Cohen, *supra* note 214 (concentrating primarily on nationality, irrespective of potential clashes or unrealistic aspects of asylum locale).

ultimately be reduced into four categories: (1) humanitarian considerations of deservingness; (2) sovereignty as a barrier to the international community's ability to protect; (3) political pragmatism; and (4) doctrinal viability.

1. Humanitarianism

Who is more deserving of protection, refugees or IDPs, and why? It is impossible to answer this question categorically, without taking the circumstances of each individual case into account. Yet, because Hathaway could not resist the temptation of saying refugees are more deserving than IDPs across the board, Cohen, who does not pick sides, readily wins this argument. Hathaway's argument on this point is, in fact, circular and too legalistic to make humanitarian sense. He argues that refugees are doubly deserving of protection because the risk they face is profound and it is caused by characteristics that they cannot change, such as race and nationality, or by characteristics, such as religion and political opinion, that are so fundamental to their identity that they must not be required to change.²⁷⁴ In terms of the magnitude of the risk, there is no reasonable ground to think that the risk faced by refugees is more profound just because refugees managed to cross international frontiers. It depends on the circumstances. It is possible that IDPs in certain circumstances may be at a greater danger than refugees who actually manage to escape the country. Consider a conflict situation in which displaced civilians are trapped between government forces and rebel forces. Frequently, these civilians become collateral damage.

Hathaway's characteristics argument is circular: the protected characteristics—race, religion, nationality, political opinion, or social group—are considered more important because refugee law says they are more important.²⁷⁵ The political process that incorporated these characteristics into refugee law is a product of its time and is essentially Eurocentric.²⁷⁶ It does not necessarily follow that all of these characteristics, from a purely humanitarian perspective, are more valuable than other characteristics—such as extreme poverty, disability, or lack of political opinion—that are not recognized grounds for protection under refugee law. Therefore, there is a fundamental flaw in Hathaway's argument that refugees are more

274. Hathaway, *supra* note 7, at 352.

275. See UN Refugees Convention, *supra* note 1, art. 1(A)(2) (defining "refugee").

276. See 1 GRAHL-MADSEN, *supra* note 1, at 102–16 (detailing the drafting history of the definition).

deserving of protection because they are persecuted because of characteristics recognized by refugee law.

Cohen did not need to go to West Darfur and Chad to demonstrate that persons who qualify for refugee status are not necessarily more deserving. Refugee law jurisprudence in the developed world is full of cases where individuals who are clearly more deserving of protection on humanitarian grounds are denied asylum because they do not fall under any of the five enumerated grounds.²⁷⁷ Fidelity to these five grounds leads some of the highest judicial authorities to arrive at decisions that seem almost frivolous.

For example, in the U.S. Supreme Court case *INA v. Elias-Zacarias*, the asylum seeker was a native of Guatemala.²⁷⁸ He sought asylum on the basis of the future likelihood of persecution on account of his political opinion.²⁷⁹ The record describes his claim in the following terms:

[A]round the end of January in 1987, two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there. . . . [T]he guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them. [Elias-Zacarias] did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the end of March [1987] . . . because he was afraid that the guerrillas would return.²⁸⁰

The Court considered whether Elias-Zacarias held a political opinion within the meaning of the refugee definition:

Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.²⁸¹

277. See, e.g., *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (vacating the Ninth Circuit's finding that disabled children deserved protection as belonging to a particular social group); *In re A-T*, 24 I. & N. Dec. 296, 302–04 (B.I.A. 2007) (holding that young women opposed to arranged marriage do not constitute a social group, but the decision was later reversed on different grounds).

278. 502 U.S. 478, 479 (1992).

279. *Id.* at 479–80.

280. *Id.* at 480.

281. *Id.* at 482.

As a result, he was found not to be a refugee.²⁸² If Elias-Zacarias, who was eighteen then, had said that he hated the guerrillas because they killed people and that he also hated the government because it killed people, the Court might have qualified him for refugee status. Justice Scalia, who wrote the opinion for the majority, simply read the law the way it was written; he did not consider it his job to select deserving individuals for protection.²⁸³ However, neither Justice Scalia nor Hathaway would likely win a policy debate on whether, refugee law aside, Elias-Zacarias deserved protection.

Perhaps a more pertinent example is the Supreme Court's decision in *Sale v. Haitian Centers Council*,²⁸⁴ decided just a year after *Elias-Zacarias*.²⁸⁵ The principal issue in *Sale* was whether a state may gather fleeing refugees from the high seas and return them without violating the basic refugee-law principle of non-refoulement or non-return.²⁸⁶

The facts of this case are simple: when the number of desperate Haitian refugees fleeing persecution and violence onboard unseaworthy boats increased in the early 1990s, President George H. W. Bush authorized the U.S. Coast Guard to interdict and return the refugees to Haiti, where it was known that their life or freedom would be threatened.²⁸⁷ The Government argued that the interdiction program did not violate the non-refoulement principle.²⁸⁸ By the time the case reached the Supreme Court, President Clinton was in office, but his Attorney General, Janet Reno, maintained the same position.²⁸⁹

The Supreme Court agreed with her.²⁹⁰ Writing for the majority, Justice Stevens said, "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be

282. *Id.* at 481.

283. *Id.* at 479.

284. 509 U.S. 155 (1993).

285. *Elias-Zacarias*, 502 U.S. 478.

286. See 509 U.S. at 158-59 (noting that the principle of non-refoulement is contained in Article 33(1) of the Refugees Convention); UN Refugees Convention, *supra* note 1, art. 33(1) ("No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

287. *Sale*, 509 U.S. at 158.

288. *Id.* at 160.

289. Brief for Petitioner at 1, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (No. 92-344).

290. See *Sale*, 509 U.S. at 155-88 (providing a detailed discussion of the principle of non-return in light of relevant provisions of the Immigration and Nationality Act as well as the Refugee Convention).

found in a judicial remedy.”²⁹¹ Justice Stevens explained that this is because the word “return” does not apply to refugees who have not managed to reach U.S. territory.²⁹² Therefore, those who manage to elude the Coast Guard and reach the United States may apply for asylum. However, like Justice Scalia in the *Elias-Zacarias* case, Justice Stevens read the law as written; he readily acknowledged that he could not win a policy debate on grounds of humanitarianism or deservingness.²⁹³

The returned Haitians were denied refugee status while those who eluded the Coast Guard might have been granted refugee status, but there is no reason to think that those who eluded the Coast Guard are more deserving of refugee protection than those who are caught and returned. Similarly, there is no reason that displaced persons who are able to convince a judge because of excellent representation are more deserving than those who appear pro se and get deported for failing to qualify for asylum.²⁹⁴

In the face of this kind of complexity, Hathaway’s argument that refugees are more deserving than non-refugee forced migrants is fundamentally flawed. As indicated earlier, it is impossible to say that certain groups are more deserving without considering the specific circumstances of each case. Some refugees may be more deserving than other refugees or IDPs, and some IDPs may be more deserving than other IDPs or refugees. Thus, deservingness cannot provide a solid doctrinal foundation for the distinct treatment of refugees and IDPs.

2. Sovereignty

Hathaway readily wins the sovereignty argument, but it suffers from the same kind of circularity as his deservingness argument. Consider Cohen’s argument first. In response to Hathaway’s argument that the international community has the “unqualified

291. *Id.* at 188.

292. *Id.* at 173–77.

293. *Id.* at 188; *see also* *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (requiring *Elias-Zacarias* to demonstrate that he had “a well-founded” fear or persecution because of his political opinion “rather than because of his refusal to fight”).

294. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295 (2007) (demonstrating that the disparity in asylum grant rates is well documented: refugees from the same country facing the same circumstances have significantly varied success rates in the United States, and grant rates depend on such factors as the presence of representation and the race, gender, and prior work experience of the adjudicating officer or the judge); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and Limits of Consistency*, 60 *STAN. L. REV.* 413 (2007) (providing a commentary on the study at the center of the Ramji-Nogales piece).

ability” to provide protection to refugees but not to IDPs who are within the sovereign authority of their own state, Cohen is limited to citing grave circumstances where the international community may be allowed to intervene.²⁹⁵ Although she cites instances of Chapter VII humanitarian intervention by the UN Security Council,²⁹⁶ she fails to develop the argument fully,²⁹⁷ perhaps because the jurisprudence does not completely support her position. Writing about the state of international law on humanitarian intervention, Professor Louis Henkin points out that:

Serious efforts to develop “some form of collective intervention” began soon after the end of the Cold War, when it ceased to be hopeless to pursue collective intervention by authority of the UN Security Council. In 1991 and 1992, the Security Council authorized military intervention for humanitarian purposes in Iraq and Somalia. In principle, those interventions were not justified as “humanitarian” (a term that does not appear in the UN Charter); the theory supporting such actions was that some internal wars, at least when accompanied by war crimes, and massive human rights violations and other crimes against humanity even if unrelated to war, may threaten international peace and security and therefore were within the jurisdiction and were the responsibility of the Security Council under Chapters VI and VII of the Charter. Of course, under Article 27(3) of the Charter, a Security Council resolution to authorize intervention, like other “nonprocedural” matters, was subject to veto by any permanent member. Thus, by the sum (or product) of law and politics, humanitarian intervention by any state was prohibited; humanitarian intervention was permissible if authorized by the Security Council, but a single permanent member could prevent such authorization.²⁹⁸

Although the Security Council intervened with arguable success in Somalia and Iraq, it did not even attempt to intervene in the face of ongoing genocide in the former Yugoslavia.²⁹⁹ Its inaction in Kosovo prompted NATO to act without Security Council authorization.³⁰⁰ Although Professor Henkin does not hesitate to say that NATO’s

295. Cohen, *supra* note 214, at 372.

296. Article 42, paragraph 1 of the UN Charter allows the Security Council to intervene through the use of force:

Should the Security Council consider that measures provided for in Article 41 [other measures not involving the use of force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. Charter art. 42, para. 1.

297. Cohen, *supra* note 214, at 371.

298. Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT’L L. 824, 825 (1999).

299. *Id.* at 825 n.4.

300. *Id.*

action in Kosovo was illegal on a technical level under the UN Charter, he proposes an amendment to the UN Charter to facilitate collective intervention in circumstances of aggression or gross human rights violations.³⁰¹

Therefore, consistent with Professor Hathaway's argument, the law and practice of the UN suggest that humanitarian intervention for the protection of IDPs is not a viable option at this time. However, Hathaway's argument has fundamental problems that Cohen does not raise. First, his argument that the international community has an "unqualified ability" to protect refugees³⁰² is both factually and doctrinally false.

The argument is factually false because the international community cannot do any more to protect refugees from rights violations in the state that receives refugees than it can do to protect IDPs in their home state. Violating the rights of refugees or failing to recognize refugees may violate an international obligation under the Refugee Convention, but states determine asylum eligibility based on their own domestic laws.³⁰³ If their domestic laws are inconsistent with the Refugee Convention, the Convention merely becomes one more violated human rights instrument.

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

301. *Id.* at 828.

Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the UN Charter. The sometimes-compelling need for humanitarian intervention (as at Kosovo), like the compelling need for responding to interstate aggression (as against Iraq over Kuwait), brings home again the need for responsible reaction to gross violations of the Charter, or to massive violations of human rights, by responsible forces acting in the common interest. We need Article 43 agreements for standby forces responsible to the Security Council, but neither action by the Security Council under Article 42, nor collective intervention as by NATO at Kosovo, can serve without some modification in the law and the practice of the veto. The NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step toward a change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council. That may be a desirable change, perhaps even an inevitable change. And it might be achieved without formal amendment of the Charter (which is virtually impossible to effect), by a "gentlemen's agreement" among the permanent members, or by wise self-restraint and acquiescence. That, some might suggest, is what the law ought to be, and proponents of a "living Charter" would support an interpretation of the law and an adaptation of UN procedures that rendered them what they ought to be. That might be the lesson of Kosovo.

Id.

302. Hathaway, *supra* note 7, at 353.

303. For an analysis that fails to take into account domestic consideration of asylum eligibility, see Henkin, *supra* note 298, at 828.

cannot protect refugees in the same state.³⁰⁴ One might be tempted to suggest that the UNHCR, in its capacity as a monitoring body, could come to the aid of the refugees. In reality, the UNHCR's capacity to help is no greater than the capacity of any other UN Charter-based or treaty-based human right monitoring body.³⁰⁵

The "unqualified ability" argument is doctrinally false because sovereignty, as a shield against the international community's intervention, could be invoked easily by states that abuse refugees.³⁰⁶ Doctrinally, there is nothing that would prevent a state that violates the rights of its own citizens and hides behind its sovereignty from doing the same when it violates the rights of refugees in its territory. In practical terms, the violating state is unlikely to be deterred by its accession to the Refugee Convention. If anything, the state has significantly less responsibility to refugees than to its own citizens. In reality, the international community has no option but to witness outrageous manipulations of the law, as exemplified by the *Sale* case, or more outright violations, all in the name of sovereignty.

A simple question exemplifies this problem: how is the international community's ability to protect Chadian refugees encamped in Western Darfur better than its ability to protect Sudanese IDPs in the same camp? The simple answer is that it is not better. The Sudanese government could invoke its sovereignty to disallow access to refugees and IDPs alike.³⁰⁷ A decision on humanitarian intervention, which is often dictated by the gravity of the violations, is not likely to be significantly impacted by whether

304. See Won Kidane, *An Injury to the Citizen, a Pleasure to the State: Peculiar Challenges to the Enforcement of International Refugee Law*, 6 CHI.-KENT J. INT'L & COMP. L. 116 (2006) (discussing that in terms of enforcement there are less options in the refugee context). A refugee by definition is a person who has severed his connections with his state of nationality or habitual residence. *Id.* As such, his state is unlikely to seek redress against the state of refuge if the refugee suffers violations there. *Id.*

305. See *Human Rights Bodies*, UN HUMAN RIGHTS—OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRbodies/Pages/HumanRightsBodies.aspx> (last visited Jan. 5, 2011) (listing the various organs, their functions, and their similar capacities).

306. *Contra, e.g.*, Henkin, *supra* note 298, at 828 (arguing for the effectiveness of state action).

307. *Contra id.* at 824–25.

[T]he principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect a conclusion that the "sovereignty" of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity.

Id.

the victims are refugees, IDPs, or another category of persons.³⁰⁸ It is thus fair to conclude that the international community's ability to provide protection to one but not to the other is doctrinally untenable.

In addition, it could plausibly be argued that internal displacement is, in fact, a "symptom of state dysfunction" undermining the claim of full sovereignty over a maladministered territory and population.³⁰⁹ In Africa, for example, claims for autonomy and self-determination do not necessarily correspond to recognized international boundaries because the boundaries were demarcated without considering the ethnic and other demographic characteristics of the people directly involved.³¹⁰ This may explain why challenges to central authority are frequent in Africa, the continent most affected by internal displacement.³¹¹ These uncertainties threaten control over territory, the central attribute of sovereignty.³¹² A state's claim of sovereignty over a territory that it does not control cannot be as strong as its claim over territories that it does control. Internal displacement is often a "physical manifestation of political challenges to the authority of the state. . . . It not only stems from weak or failed states, but also contributes to the phenomenon as it alters the ethnic and political balance in the country."³¹³ Accordingly, sovereignty cannot be an insurmountable doctrinal obstacle to defining the legal status of IDPs under international law.

3. Political Pragmatism

Hathaway's concern over the political pragmatism of merging IDP and refugee law seems to be twofold.³¹⁴ First, he is concerned about the increasing recognition of the IDP category and whether durable solutions associated with it will incentivize states to close their borders under the pretense of helping IDPs, thus escaping

308. *Cf. id.* at 827 (failing to consider that, although it might be argued that cross-border movement is more appropriate as a measure of disturbance of international peace and security for the purpose of the Security Council's decision to invoke its Chapter VII intervention powers, a serious IDPs crisis could easily provide the justification).

309. CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 209 (2004).

310. *See generally* Cohen, *supra* note 214, at 372–73 (noting that, at the national level, the Guiding Principles of the African Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons have been incorporated into the national laws of Angola, Burundi, Colombia, Georgia, Liberia, Peru, the Philippines, Sri Lanka, Turkey, and Uganda, extending autonomy beyond borders).

311. PHUONG, *supra* note 309, at 210.

312. *Id.* at 211.

313. *Id.*

314. Hathaway, *supra* note 7, at 358.

criticism for their humanitarian record.³¹⁵ As discussed above, he illustrates this concern by reference to Western Europe's response to the collapse of the former Yugoslavia.³¹⁶ Second, he seems concerned that a shift of attention from refugees to IDPs is a lose-lose proposition, simply because states will be more willing to help if the burden is smaller.³¹⁷ In other words, if states are asked to assist IDPs in addition to refugees, instead of helping both groups, they might think that the burden is just too much to carry and abandon their efforts all together.

Cohen's response to the first concern is that the recent inhospitality to refugees has its own independent sources that are not likely to be exasperated or mitigated by increasing attention to IDPs.³¹⁸ On the second point, Cohen seems to think that the proposition is win-win.³¹⁹ She asserts that each person with humanitarian needs would be entitled to protection without regard to their location and nationality, and that the political reality is different from the legal reality because humanitarian attention is given to problems based on their gravity.³²⁰ She argues that the reality on the ground prompted the perceived shift in attention to IDPs.³²¹ In other words, states are more likely to help when the actual need is greater, regardless of the legal status.

Cohen seems to have the better argument on the political pragmatism point. First, the IDP train cannot be stopped; attempting to stop the train is less pragmatic than riding in it. Second, the history of refugee law suggests that the admission and recognition of refugees is more dependent on the political reality of the time than humanitarian considerations.³²² The fact that IDPs are recognized as a legal category for protection somewhere around the world is not likely to affect the decision of an immigration judge adjudicating an asylum claim in a developed country. Said differently, judges are not likely to be stricter on asylum adjudication just because they have heard that there is a new group of people with legal status analogous to refugees.

Ultimately, on the issue of political pragmatism, Hathaway's position could be characterized as pessimistic and Cohen's position could be characterized as optimistic. Hathaway is a pessimist because he seems to think that if states add this class of persons to

315. *Id.*

316. *Id.* at 359.

317. *Id.*

318. Cohen, *supra* note 214, at 372.

319. *Id.* at 373.

320. *Id.*

321. *Id.* at 371-72.

322. *Id.* at 372.

the refugee category, refugees would lose their distinct identity and become a part of a larger group of hopeless human rights victims.³²³ His argument seems motivated by his desire to save at least some people from neglect.³²⁴ His selection criterion is the Refugee Convention's definition of a refugee.³²⁵ Cohen is optimistic because she seems to think that all displaced persons could ultimately be helped if the right set of rules and institutions are put in place.³²⁶ When pessimism and optimism compete, the winner can only be determined by time.

4. Doctrinal Viability

For Hathaway, neither new binding rules nor new institutions have been established because the IDP legal category is not doctrinally viable.³²⁷ His "view is that the paucity of concrete progress in achieving rights and remedies to forced migration suggests the non-viability of the forced migration label. It groups together two sets of persons—refugees and the internally displaced—who in fact share little other than the shared symptoms of involuntary movement."³²⁸ His doctrinal viability argument goes further and suggests that IDPs cannot have a legal status separate from the general population facing similar human rights violations.³²⁹ For him, dislocation within one's own country is not a legally significant event warranting the development of norms akin to refugee law for the benefit of IDPs.³³⁰

Cohen seems to think that dislocation within one's own country could be a legally significant factor because it raises the dislocated person's vulnerability to human rights violations.³³¹ Moreover, she believes that there is no principled reason not to allow the development of normative mechanisms akin to refugee law to resolve this predicament.³³²

Hathaway and Cohen are not alone in their respective positions. They are representatives of two competing camps with extraordinary voices. One other example from each camp is worth reciting. In

323. Hathaway, *supra* note 7, at 353.

324. *See id.* (discussing the importance of refugee autonomy in the refugee protection process).

325. UN Refugees Convention, *supra* note 1, art. 1(A)(2).

326. Cohen, *supra* note 214, at 372.

327. Hathaway, *supra* note 7, at 359–60.

328. *Id.* at 359.

329. *Id.* at 360.

330. *Id.* at 361.

331. Cohen, *supra* note 214, at 372.

332. *Id.* at 373.

support of the distinct treatment of refugees and IDPs, leading international refugee law expert Guy Goodwin-Gill writes:

There are practical, political, and principled reasons for distancing UNHCR from the problems of the internally displaced. It is the very status of the refugee as a refugee in international law that opens the statutory, legal door to the protection of his or her rights. In a society of independent, sovereign nation-states, internationally relevant judicial facts, such as cross-border movement, still retain their importance. And other consequences will likely flow. For one, the distinctive quality enjoyed by the refugee as a subject entitled to international protection will be erased. Rights, duties, and responsibilities will be eradicated, and the refugee left once more unprotected in an era of uncontrolled and uncontrollable discretion.³³³

Cohen's camp is reinforced by T. Alexander Aleinikoff, who recently transitioned from the academy to become the Deputy High Commissioner of the UNHCR. In 1993, he expressed his opinion in the following terms:

The international "refugee" model starts with a person outside his or her state of origin. This notion, of course, represents the traditional (and now outdated) view that international law could offer protection only to someone beyond the territorial borders—and therefore outside the "sovereignty" of her home country. But it is not at all clear what distinguishes classic refugees from persons who have fled to safety within their country, a group of people usually described as the "internally displaced." Nor is the distinction clear—at least in human rights terms—between those two categories of persons who, unable to flee serious harm, suffer at home.³³⁴

According to Professor Aleinikoff, "[u]nder [a] coerced migration model, the key is flight from harm. As such, it should embrace the internally displaced as well as the border crossers. . . . [It] directly addresses the multifaceted nature of the phenomena . . . [and] it identifies loss of community as the fundamental harm."³³⁵ Having noted the extraordinary amount of scholarly attention paid to the definition of a refugee, particularly the "on account of" prong of the definition, he argues that "[b]y focusing our attention on helping a small number of the world's involuntarily displaced obtain this potent form of relief [refugee status], we miss opportunities to propose and analyze policies that might benefit millions more."³³⁶

333. Guy Goodwin-Gill, *UNHCR and Internal Displacement: Stepping Into a Legal Minefield*, 2000 *World Refugee Survey*, in MARTIN ET AL., *supra* note 1, at 25, 26–31.

334. T. Alexander Aleinikoff, *From "Refugee Law" to the "Law of Coerced Migration"*, 9 AM U. J. INT'L L & POL'Y 25, 27 (1994).

335. *Id.*

336. *Id.* He adds that the privileging of refugee status tends to depreciate the legitimate claims for relief of other coerced migrants, whose attempts to flee serious harm are frequently referred to as irregular movements or mass flows. Everyday

Although, as shown by the AU Convention, the world seems to be moving towards Cohen's camp at an accelerated speed, the doctrinal and practical issues raised by Hathaway's camp are not likely to fade into the background any time soon. They require proper examination and principled responses.³³⁷ The following Part examines the important provisions of the AU Convention in light of the doctrinal and practical issues discussed at length in this and previous sections.

IV. RIGHTS AND RESPONSIBILITIES UNDER THE AU CONVENTION

The AU Convention transforms what had remained "soft law" for more than a decade into "hard law," defining rights and responsibilities.³³⁸ It treats IDPs as subjects of rights instead of just victims of circumstances.³³⁹ As a corollary to these rights, it places specific obligations on states and non-state actors.³⁴⁰ This Part critically appraises the nature of these rights and responsibilities and the manners of their enforcement envisaged under the Convention.

language reflects these differences: the term "displaced persons" invokes less urgency, less of a sense of concern, than "refugees." *Id.* at 28. A collection of essays edited by Aleinikoff shed more light on the state of international law in the areas of migration. See generally T. ALEXANDER ALIENIKOFF & VINCENT CHETAIL, *MIGRATION AND INTERNATIONAL LEGAL NORMS* (2003).

337. For some important scholarly contributions to this doctrinal solution, see generally ROBERTA COHEN & FRANCIS M. DENG, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT* (1998); Maria Stavropoulou, *Displacement and Human Rights: Reflections on UN Practice*, 20 HUM. RTS. Q. 515 (1998). For a good collection of essays on the topic, see also HUMAN RIGHTS AND FORCED DISPLACEMENT (Anne F. Bayefsky & Joan Fitzpatrick eds., 2000). Another set of instructive essays, essentially disregarding the supposed distinction between refugees, IDPs, and other victims of human rights violations, is also available in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS: A GUIDE TO INTERNATIONAL MECHANISMS AND PROCEDURES (Joan Fitzpatrick ed., 2002).

338. See Chaloka Beyani, *The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law Into Hard Law*, 102 AM. SOC'Y INT'L L. PROC. 194, 195 (2008) (noting the prospective hardening effect of the Draft Convention).

339. See *id.* at 194.

[T]hese Guidelines represent the use of soft law as a means of constructing a coherent framework of reference in which disparate aspects of hard international law deriving from international humanitarian law, human rights, and refugee law by analogy, are brought to bear on the protection of internally displaced persons in international law.

Id.

340. See AU Convention, *supra* note 9, arts. 3–13 (placing duties on states parties and international institutions).

A. Background on the African Collective Rights Paradigm

In its simplest form, a right can be seen as a legal relationship between at least two persons that gives rise to an enforceable claim of action or forbearance by one against the other.³⁴¹ In this kind of legal relationship, disobedience subjects the disobeying party to penalty and the victim to redress.³⁴²

However, the conception of human rights is more complicated than this notion of an enforceable claim. Dean Makau Mutua characterizes the Western conception of human rights as the reflection of the Lockean theory of contractual transfer of individual autonomy to a public authority in exchange for the protection of individual rights and freedoms.³⁴³ Furthermore, Dean Mutua argues that the Western notion of individual rights has a particular historical context linked to the rise of the nation-state in Europe.³⁴⁴ Individual rights were meant to be a guarantee against the nation-state, which was allowed to monopolize all instruments of coercion.³⁴⁵

In Africa, the relationships between individuals, groups, and states did not evolve in the same way as in Europe and did not result from the natural evolution of the various ethno-political communities.³⁴⁶ Mutua writes that “[c]ommunities that lived independently of each other were coerced to live together under newly-created colonial states. Most of these new citizens lacked any institutional or nationalistic bond to the colonial state.”³⁴⁷ He also notes that the forced “unnatural” conglomeration of distinct communities greatly contributed to the instability of the modern African state:

This disconnection, between the people and the modern African state, is not merely a function of the loss of independence or self-governance over pre-colonial political and social structure and radical imposition of new territorial bounds with unfamiliar citizenry. It is above all a crisis of cultural and philosophical identity: the delegitimation of values,

341. See Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 167 (1919) (outlining several varieties of rights).

342. *Id.*

343. See Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 342 (1995).

344. *Id.*

345. *Id.* at 342.

346. *Id.* at 342–43. For a more comprehensive discussion of this issue, see generally OLÚFÉMI TÁJWÒ, *HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA* 158–233 (2010).

347. Mutua, *supra* note 343, at 343.

notions, and philosophies about the individual, society, and nature developed over centuries.³⁴⁸

Mutua's claims up to this point are not seriously disputed, but he also concludes that the contemporary Eurocentric articulation of human rights that sees the individual alone as the bearer of rights and responsibilities is necessarily incomplete in addressing injustice in Africa.³⁴⁹ This contention is not without controversy, but it seems to underpin the African conception of collective rights.³⁵⁰

The African conception of collective rights is best described by John Mbiti as "I am because we are, and because we are therefore I am."³⁵¹ The prevailing contemporary approaches to human rights in Africa reflect this notion of collectivity.³⁵² The principal African human rights instrument, the African Charter on Human and Peoples' Rights, recognizes the peoples' or collective rights and emphasizes economic, social, and cultural rights as preconditions for the enjoyment of civil and political rights.³⁵³ This approach has been

348. *Id.*

349. *Id.* at 344.

350. Interestingly, one of the strong voices that tends to disagree with this conclusion is Francis Deng. He writes: "To arrogate the concept to only certain groups, cultures, or civilizations is to aggravate divisiveness on the issue, to encourage defensiveness or unwarranted self-justification on the part of the excluded, and to impede progress toward a universal consensus on human rights." Francis M. Deng, *A Cultural Approach to Human Rights Among the Dinka*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 261, 261 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990).

351. JOHN MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 141 (2d ed. 1990).

352. See Mutua, *supra* note 343, at 363 (discussing the unity between social values and conceptions of individual rights in both pre- and post-colonial African legal structures).

353. See African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 245, 21 I.L.M. 58 (1982) [hereinafter *Banjul Charter*].

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights . . . considering that . . . the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Id. While Articles 1–18 of the Charter enumerate the rights of "[e]very individual" in familiar terms, Articles 19–23 set forth the rights of "[a]ll [p]eoples," the most significant being the right to self-determination provided under Article 20. *Id.* arts. 1–23. It reads, "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." *Id.* art. 20. The African Charter's approach to human and peoples' rights, and the right to self-determination in particular, has been a source of significant scholarly interest. See, e.g., El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atu, *Human Rights in Africa—A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819 (1996) (advocating the right to self-determination as a

described as a mix of tradition and modernity.³⁵⁴ It unifies the three generations of human rights: liberal rights (civil and political), egalitarian rights (socioeconomic and cultural), and solidarity rights (collective rights).³⁵⁵ The AU Convention is squarely predicated on and derives its legitimacy from these African notions of human and peoples' rights. The following sections provide a detailed analysis of the specific rights and duties set forth under the Convention.

B. Perspectives on the AU Convention

Unlike the UN Guiding Principles, which approach displacement from the perspective of the IDPs,³⁵⁶ the AU Convention approaches the problem from the perspective of the obligations of states and non-state actors.³⁵⁷ In other words, while the Guiding Principles define the rights of the IDPs, with few exceptions, the Convention does not define rights but provides for the obligations of the states and non-state actors not to violate rights presumed to exist independently.³⁵⁸

The difference in the two approaches is best exemplified by their respective statements on arbitrary displacement. Principle 1 of the UN Guiding Principles provides that "[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced."³⁵⁹

The AU Convention restates the same principle in two ways: first, as the obligation of states, declaring that "States Parties shall[] refrain from, prohibit and prevent arbitrary displacement of

feasible solution to the problem of unstable and undemocratic governance). Collective rights in the sense of self-determination and, more particularly, in the sense of the right to secession, are a subject of great controversy because the definition of the "self" is problematic. For a good analysis of this issue and an argument in favor of common historical reference as a fundamental component of secessionist acts, see generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991), and a follow-up piece, Lea Brilmayer, *Commentaries on Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991): *Secession and Self-Determination: One Decade Later*, 25 YALE J. INT'L L. 283 (2000).

354. Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 109 (2004).

355. *Id.* at 112.

356. See KALIN, *supra* note 8, at 2.

357. See AU Convention, *supra* note 9, arts. 3–13 (generally placing obligations for compliance upon states parties and other international institutions).

358. See, e.g., *id.* arts. 3–14 (generally defining particular obligations of institutional actors).

359. Guiding Principles, *supra* note 8, princ. 1.

populations,”³⁶⁰ and second, as the right of IDPs, asserting that “[a]ll persons have a right to be protected against arbitrary displacement.”³⁶¹ The latter provision is the only provision in the Convention that frames a right in a positive manner. All the other provisions are framed in the form of the states’ obligations rather than as the rights of individuals.³⁶² The framing of rights and obligations in this manner is a significant departure from common human rights treaty language, where the rights are often framed either in the form of a negative right, as in the right to be free of government interference, or in the form of a positive right, such as an entitlement to certain benefits. Although the distinction between positive and negative rights is a subject of immense philosophical controversy³⁶³ and largely outside the scope of this Article, it is important to note some of the philosophical underpinnings of the distinction because the Convention conspicuously has taken a unique approach, with the hope of overcoming some of the doctrinal problems noted in the previous sections.

A notable legal theorist, Charles Fried, describes the distinction between negative rights and positive rights in the following terms: “[a] positive right is a claim to something . . . while a negative right is a right that something not be done to one.”³⁶⁴ Another notable theorist, Gerald MacCallum, dismisses the importance of the distinction and argues that all rights and duties could fit into this scenario: “X is (is not) free from Y to do (not do, to become, not become) Z.”³⁶⁵ Defined in negative-rights terms, it means that X, the possessor of the right, can do Z (e.g., free speech) without the interference of Y (which might be the government). Defined in positive-rights terms, it could mean that X, possessor of the right, is free from the lack of medical care, and may enjoy such right without the interference of Y.³⁶⁶

Understood this way, the difference between the approaches of the UN Guiding Principles and the AU Convention—the definition of

360. AU Convention, *supra* note 9, art. 3(1)(a).

361. *Id.* art. 4(4).

362. *Cf. id.* arts. 3–18 (stating treaty provisions in terms of obligations of states parties, international organizations, and other institutional actors).

363. Compare Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863–78 (2000) (arguing that important theoretical distinctions between positive and negative rights remain), with Jeanne M. Woods, *Justiciable Social Rights As a Critique of the Liberal Paradigm*, 38 TEX. INT’L L.J. 763, 764–65 (2003) (“The negative rights/positive rights distinction poses a false dichotomy; all human rights potentially contain both positive and negative dimensions.”).

364. CHARLES FRIED, *RIGHT AND WRONG* 110 (1978).

365. Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 314 (1967).

366. *Id.* at 320.

a right versus the definition of duties—may seem unimportant.³⁶⁷ The discussion of the specific provisions in the following sections sheds light on why the contracting states might have chosen to frame the AU Convention's provisions differently than the UN Guiding Principles.

C. *Who Is an IDP? Or Who Are IDPs?*

Walter Kälin, the author of the *Annotations to the Guiding Principles on Internal Displacement*, explicitly states that the UN Guiding Principles do not provide a legal definition of IDPs—the paragraph that identifies IDPs is merely descriptive.³⁶⁸ The fact that the description is placed in the introduction indicates that it is not intended to be a legal definition.³⁶⁹ The AU Convention transforms the UN Guiding Principles' "description" into a legal definition of IDPs by placing it under the section of definitions of terms. It defines IDPs as

persons or groups of persons who have been forced or obliged to flee or 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 disaster, and who have not crossed an internationally recognized State border.³⁷⁰

The Convention does not define an individual IDP. The legal status of an individual member of the group is unclear. It is important to note that the UN Guiding Principles approach the problem of internal displacement from the perspective of the rights of the displaced, but refrain from providing a legal definition. The AU Convention, in contrast, approaches the problem from the perspective of states and other non-state actors, but provides a legal definition of the beneficiaries. With this feature noted, these issues are explored further in light of some specific provisions in the following sections.

D. *The Right Not to Be Displaced or the Duty Not to Displace*

The right not to be displaced or the duty not to displace is the cornerstone of the rights-based regime that the AU Convention

367. Some argue that all rights are necessarily positive because no matter how they are framed, they all require government action for their enforcement. See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 43 (1999).

368. KÄLIN, *supra* note 8, at 2–3.

369. *Id.*

370. AU Convention, *supra* note 9, art. 1(k).

establishes.³⁷¹ Although numerous human rights and humanitarian law instruments recognize this right indirectly,³⁷² it gained its finest expression in the UN Guiding Principles,³⁷³ and the AU Convention adopted its description of this right.³⁷⁴ The right not to be displaced has never been recognized as an absolute right. First, the prohibition pertains only to “arbitrary” displacement, meaning displacement that is unjust, unpredictable, and unreasonable.³⁷⁵ Displacement may be allowed as a last resort when no other meaningful alternatives are available.³⁷⁶ Professor Manfred Nowak’s commentary on the International Covenant on Civil and Political Rights states:

[T]he expression ‘arbitrary’ suggests a violation by State organs. In evaluating whether the interference . . . by a State enforcement organ represents a violation . . . it must especially be reviewed whether, in addition to conformity with national law, the specific act of enforcement had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of rule of law and, in particular, whether it was reasonable (proportional) in relation to the purpose to be achieved.³⁷⁷

The AU Convention’s approach to this particular right significantly departs from the approach of the UN Guiding Principles. As indicated above, the AU Convention frames the right both as an individual right and as a state responsibility: “All persons have a right to be protected against arbitrary displacement,”³⁷⁸ and “States Parties shall refrain from, prohibit, and prevent arbitrary

371. See *id.* art. 4(1), (4) (placing blanket affirmative obligations on states while also explicitly creating negative rights in individuals).

372. These instruments include the UDHR, *supra* note 13, art. 12 (protection from arbitrary interference with a person’s privacy or home); Geneva Convention IV, *supra* note 14, arts. 49, 147 (prohibition against deportation of civilians in situations of armed conflict); ICCPR, *supra* note 13, arts. 12(1), 17 (freedom of movement); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (I.L.O. No. 169), art. 16, June 27, 1989, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169] (prohibiting the forcible displacement of indigenous people); Banjul Charter, *supra* note 353, art. 12(1) (granting the freedom of movement and prohibiting mass expulsion).

373. Cf. Cohen, *supra* note 214, at 372 (noting that the Guiding Principles are not only specifically tailored to the needs of IDPs, but they “fill grey areas and gaps in the law”).

374. Compare Guiding Principles, *supra* note 8, princs. 5–6 (offering “Principles Related to Protection from Displacement”), with AU Convention, *supra* note 9, arts. 3–4 (incorporating much of the same language).

375. Professor Nowak says that the term “arbitrary” implies that the action contains “elements of injustice, unpredictability and unreasonableness.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 291 (1993).

376. KÁLIN, *supra* note 8, at 15.

377. *Id.* at 15–16 (quoting NOWAK, *supra* note 375, at 291).

378. AU Convention, *supra* note 9, art. 4(4).

displacement of populations.”³⁷⁹ The duty also extends to the prevention of “political, social, cultural and economic exclusion and marginalization that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion.”³⁸⁰ The UN Guiding Principles use clearer terminology: “Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”³⁸¹

There are notable differences in the specific examples that each instrument provides. Under the UN Guiding Principles, the prohibition against arbitrary displacement relates, among other things, to “cases of large-scale development projects, which are not justified by compelling and overriding public interests.”³⁸² The AU Convention’s provision that contains the right to be protected from arbitrary displacement does not cite development-related displacement as one of the examples.³⁸³ Instead, the Convention dedicated an entire provision to it.³⁸⁴ Interestingly, however, this provision is qualitatively inferior. Titled “Displacement induced by Projects,” it reads in full:

States parties, *as much as possible*, shall prevent displacement caused by projects . . . [and] shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects . . . [and] shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.³⁸⁵

Where the UN Guiding Principles, consistent with international human rights law, require “compelling and overriding public interest,”³⁸⁶ the Convention uses the glaringly permissive “*as much as possible*” language.³⁸⁷ Although the AU’s concern over the serious dilemma between development and displacement is understandable, this low threshold appears qualitatively insufficient to guarantee protection against arbitrary displacement of indigenous and other underrepresented populations who are often the victims of this

379. *Id.* art. 3(1)(a).

380. *Id.* art. 3(1)(b).

381. Guiding Principles, *supra* note 8, princ. 6.

382. *Id.* princ. 6(2)(c).

383. AU Convention, *supra* note 9, art. 3.

384. *Id.* art. 10.

385. *Id.* (emphasis added).

386. Guiding Principles, *supra* note 8, princ. 6(2)(c).

387. AU Convention, *supra* note 9, art. 10(1).

phenomenon.³⁸⁸ Unmistakably, this provision is a remarkable regression from the UN Guiding Principles.

As a corollary to the right not to be displaced, the states' obligations under the AU Convention include promoting respect for international human rights and humanitarian law,³⁸⁹ devising early warning systems,³⁹⁰ and preventing "political, social, cultural and economic exclusion and marginalization, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion."³⁹¹ The latter two provisions are not contained in the UN Guiding Principles. The marginalization provision is interesting because it somewhat resembles the definition of a refugee under the Refugee Convention.³⁹² This raises important issues of enforcement, discussed in Part IV.C.

E. Rights and Responsibilities During Displacement

Unlike the UN Guiding Principles, the AU Convention does not frame any of the IDPs' rights during displacement from the perspective of the IDPs.³⁹³ Instead, all of the provisions are framed from the perspective of the obligations of the states and non-state actors.³⁹⁴

Comparing the framing of the nondiscrimination provisions is instructive. Principle 1 of the UN Guiding Principles states: "Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced."³⁹⁵ The AU Convention states the same principle: "States parties shall protect the rights of internally displaced persons . . . by refraining from, and preventing . . . discrimination

388. For a study highlighting that indigenous people and marginalized ethnic minorities are disproportionately impacted by development, see *supra* note 136 and accompanying text.

389. AU Convention, *supra* note 9, art. 4(1).

390. *Id.* art. 4(2).

391. *Id.* art. 3(1)(b).

392. *Cf.* UN Refugees Convention, *supra* note 1, art. 1 (defining a refugee as someone outside the refugee's country and unable or unwilling to return because of a well-founded fear of persecution on account of race, religion, nationality, political opinion, or belongingness in a particular social group).

393. Compare Guiding Principles, *supra* note 8, princ. 1 ("Internally displaced persons . . . shall enjoy the same rights and freedoms . . ."), with AU Convention, *supra* note 9, art. 9 ("States parties shall protect the rights of internally displaced persons . . .").

394. AU Convention, *supra* note 9, arts. 5–13.

395. Guiding Principles, *supra* note 8, princ. 1.

against such persons in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons.”³⁹⁶

Although these two provisions appear to be substantively the same, procedurally an aggrieved party may have to present his or her claim in two different ways. Under the UN Guiding Principles, a claim for violation may be presented in the affirmative—that the right not to be discriminated against has been violated. In this formulation, the claimant’s responsibility would be to prove that the right has been violated. Under the AU Convention, the claim must be framed as the state’s failure to protect, which, in terms of procedure and evidence, may be more difficult to prove. Moreover, it complicates the remedy because if it is a failure by the state to honor its international obligations then the remedy is international, i.e., the state may be required to correct its laws or otherwise comply with its obligations. However, if the finding is a violation of individual rights, the remedy could be as simple as compensation. Although the reason for the AU’s change in formulation seems unclear, it is probable that the drafters thought that it would be more agreeable to most states.

The AU Convention is also less generous with socioeconomic rights and entitlements: “States Parties shall [p]rovide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care, and other health services, sanitation, education, and any other necessary social services.”³⁹⁷ The UN Guiding Principles frame the same rights in the following broad and clear language: “All internally displaced persons have a right to an adequate standard of living.”³⁹⁸ The minimum acceptable standard requires “competent authorities [to] provide internally displaced persons with and ensure safe access to: (a) Essential food and potable water; (b) Basic shelter and housing; (3) Appropriate clothing; and (d) Essential medical services and sanitation.”³⁹⁹ Furthermore, the Guiding Principles explicitly state that “[e]very human being has the right to education.”⁴⁰⁰ In addition, the concerned authorities shall ensure that displaced children in particular “receive education which shall be free and compulsory at the primary level,”⁴⁰¹ and “[e]ducation should respect their cultural identity, language and religion.”⁴⁰²

396. AU Convention, *supra* note 9, art. 9(1)(a).

397. *Id.* art. (9)(2)(b).

398. Guiding Principles, *supra* note 8, princ. 18(1).

399. *Id.* princ. 18(2).

400. *Id.* princ. 23(1).

401. *Id.* princ. 23(2).

402. *Id.*

The formulations of some important provisions of the UN Guiding Principles and AU Convention contain qualitative differences. For example, although both instruments recognize the right not to be forcibly returned to a place where harm may be faced within the same country, the AU Convention relegates the right to seek asylum in other countries to the savings clause: "No provision in this Convention shall be interpreted as affecting or undermining the right of internally displaced persons to seek and be granted asylum."⁴⁰³ The UN Guiding Principles, by contrast, explicitly provide for asylum:

Internally displaced persons have: (a) The right to seek safety in another part of the country; (b) The right to leave the country; (c) The right to seek asylum in another country; and (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.⁴⁰⁴

Although the AU Convention states the principle of internal non-refoulement in similar terms,⁴⁰⁵ it expressly permits restrictions to the freedom of movement of IDPs in the interest of public safety and health.⁴⁰⁶

Another qualitative difference pertains to the prohibition against recruitment of displaced persons, including children, for military service. With respect to children, the UN Guiding Principles categorically provide that "[i]n no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities."⁴⁰⁷ With respect to all other IDPs, the UN Guiding Principles provide, "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, inhuman or degrading practices that compel compliance or punish

403. AU Convention, *supra* note 9, art. 20(1).

404. Guiding Principles, *supra* note 8, princ. 15.

405. See AU Convention, *supra* note 9, art. 9(2)(e) ("Respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk . . .").

406. Compare AU Convention, *supra* note 9, art. 9(2)(f) ("Guarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security, public order and public health . . ."), with Guiding Principles, *supra* note 8, princ. 14 ("1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence. 2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.").

407. Guiding Principles, *supra* note 8, princ. 13(1).

non-compliance with recruitment are prohibited in all circumstances.”⁴⁰⁸

The AU Convention addresses the issue of recruitment in three different provisions. With respect to children, the AU Convention provides that states parties shall refrain from and prevent “the recruitment of children and their use in hostilities.”⁴⁰⁹ Although this provision presumably applies both to states and non-state actors, the AU Convention’s prohibition of recruitment of adult IDPs for military service relates only to non-state armed groups.⁴¹⁰ Therefore, the prohibition is not as categorical as the prohibition that the UN Guiding Principles provides.

Finally, although the formulation is different and notably awkward, the AU Convention, like the UN Guiding Principles, recognizes the rights of IDPs to be protected from genocide, crimes against humanity, war crimes, and other violations of human rights and humanitarian law, including arbitrary detention and cruel and inhumane treatments, sexual, and other gender-based violence, and starvation.⁴¹¹

F. *Rights and Responsibilities During Return and Reintegration*

Under existing international human rights law, the right of return is formulated in the context of return to one’s country from abroad.⁴¹² Under international humanitarian law, the right is formulated in the context of evacuation during occupation: Article 49 of Geneva Convention IV states that such evacuees “shall be transferred back to their homes as soon as hostilities in the area in

408. *Id.* princ. 13(2).

409. AU Convention, *supra* note 9, art. 9(1)(d).

410. *See id.* art. 7(5)(e)–(f) (prohibiting only “armed groups” from recruitment of adult IDPs for military service).

411. *Id.* art. 9(b)–(e); Guiding Principles, *supra* note 8, princs. 10–12.

412. *See* KALIN, *supra* note 8, at 69 (noting that “[h]uman rights law recognizes the right of an individual, outside of his or her national territory, to return to his or her country” but that “there is no general rule in present international law that affirms the right of internally displaced persons to return to their original place of residence or to move to another safe place of their choice within their own country”); *see, e.g.*, UDHR, *supra* note 13, art. 13(2) (“Everyone has the right to freedom of movement and residence within the borders of each state.”); ICCPR, *supra* note 13, art. 12(4) (“No one shall be arbitrarily deprived of the right to enter his own country.”); African Charter on Human and Peoples’ Rights, art. 12(2), June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 [hereinafter ACHPR] (“Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”). The only notable exception is ILO Convention No. 169, Article 16(3), which provides for the right of indigenous people to return to their traditional lands within the same country. ILO Convention 169, *supra* note 372, art. 16(3).

question have ceased.”⁴¹³ Because the articulation of this right is limited to these circumstances, the UN Guiding Principles do not go so far as to say that IDPs have the right to return to their homes,⁴¹⁴ but rather that “[c]ompetent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence.”⁴¹⁵

The AU Convention contains more elaborate (and perhaps qualitatively superior) provisions relating to return. Although, unlike the UN Guiding Principles, the AU Convention does not expressly recognize the right of IDPs to voluntarily return, it obligates states to “seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.”⁴¹⁶ More importantly, it significantly enhances the UN Guiding Principles’ consultation provision, which states that “[s]pecial efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”⁴¹⁷ The AU Convention states the same principle more clearly, declaring that “States Parties shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting with them on these and other options and ensuring their participation in finding a sustainable solution.”⁴¹⁸ However, even this formulation falls short of a full and explicit recognition of the right to return home from internal displacement.

The right to property upon return is by far the most contentious subject. Under international human rights law, the right to property is always subject to certain public interest restrictions.⁴¹⁹ It may not, however, be arbitrarily deprived.⁴²⁰ When IDPs return home, the

413. Geneva Convention IV, *supra* note 14, art. 49; KÄLIN, *supra* note 8, at 69.

414. See *supra* note 412 and accompanying text (noting that the right to return is framed in the context of evacuees being transferred back to their homes at the end of hostilities). The right to return under international human rights law is a subject of some discussion. For a commentary examining the right to return by persons displaced from New Orleans as a result of Hurricane Katrina, see Lolita Buckner Innis, *A Domestic Right to Return? Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 364–71 (2007).

415. Guiding Principles, *supra* note 8, princ. 28.

416. AU Convention, *supra* note 9, art. 11(1).

417. Guiding Principles, *supra* note 8, princ. 28(2).

418. AU Convention, *supra* note 9, art. 11(2).

419. See, e.g., UDHR, *supra* note 13, art. 17 (stating that “[e]veryone has the right to own property” and that “[n]o one shall be arbitrarily deprived of his property”).

420. See, e.g., *id.* art. 17(2) (“No one shall be arbitrarily deprived of his property.”).

most serious problem they face is the loss or destruction of their property.⁴²¹ It may not always be possible to determine the party responsible for the loss or destruction. The UN Guiding Principles do not properly confront these issues. The only paragraph dedicated to the issue of recovery and reparations reads: "Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were disposed of upon their displacement."⁴²² With respect to compensation or reparation, the same paragraph requires that "[w]hen recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."⁴²³

The AU Convention dedicates more elaborate provisions for the issues of recovery, compensation, and reparations. The provisions envision at least five distinct scenarios: (1) the property is available but ownership is disputed;⁴²⁴ (2) the property is land and it is dispossessed;⁴²⁵ (3) the property is not identified, but there is a general economic loss associated with the displacement;⁴²⁶ (4) the property is identified but had been lost or damaged;⁴²⁷ and (5) the property is not identified but there is a general economic loss associated with displacement caused by natural disaster.⁴²⁸

In the first scenario, the obligations of the state are limited to establishing "appropriate mechanisms providing for simplified procedures, where necessary, for resolving disputes relating to the property."⁴²⁹ These simplified procedures are presumably subject to due process considerations under international human rights law.⁴³⁰

The second scenario addresses circumstances where displaced communities with dependency and attachment to land have been dispossessed of their land. This may include indigenous people. The AU Convention does not provide a categorical statement that the land shall be returned to them, but it contains a permissive provision:

421. See generally Walter Kälin, *Internal Displacement and the Protection of Property*, 1 SWISS HUM. RTS. BOOK 175 (2006) (analyzing the risk of property left behind by IDPs and refugees and their inability to recover it).

422. Guiding Principles, *supra* note 8, princ. 29(2).

423. *Id.* The Guiding Principles state the right to property more clearly under Principle 21, but the recovery and reparations provisions under Principle 29 are more restrictive.

424. AU Convention, *supra* note 9, art. 11(4).

425. *Id.* art. 11(5).

426. *Id.* art. 12(1).

427. *Id.* art. 12(2).

428. *Id.* art. 12(3).

429. *Id.* art. 11(4).

430. ICCPR, *supra* note 13, arts. 9, 14, 15.

“States Parties shall make all appropriate measures, *whenever possible*, to restore the lands of communities with special dependency and attachment to such lands upon the communities’ return, reintegration, and reinsertion.”⁴³¹

The third scenario is perhaps the most common. Displacement almost always causes economic loss, which is often difficult to assess.⁴³² The AU Convention does not directly recognize a right to be compensated for these kinds of general economic loss, but it states in ambiguous terms that the “States Parties shall provide persons affected by displacement with effective remedies.”⁴³³ The nature of these remedies is not clarified anywhere.

The fourth scenario identifies what may be the second most likely occurrence: the damage of property in situations where there is little or no possibility that the party responsible for the damage could be held responsible. In those circumstances, the AU Convention obligates states to “establish an effective legal framework to provide just and fair compensation and other forms of reparations, *where appropriate*, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards.”⁴³⁴ Although the words “where appropriate” add an element of discretion, at least the formulation of the reparations prong seems better than the UN Guiding Principles’ formulation, in which the obligation of the state is limited to providing or assisting the IDPs with obtaining compensation.⁴³⁵

The fifth scenario is very specific, not only as to the cause of the loss or damage, but also as to the fault of the party responsible. It envisages a situation whereby natural disaster is responsible for the displacement, but the state failed to provide the appropriate protection and assistance: “A State Party shall be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disaster.”⁴³⁶ Since this is essentially a fault-based remedy, this provision may be invoked for material as well as moral damages.⁴³⁷

431. AU Convention, *supra* note 9, art. 11(5) (emphasis added).

432. See generally GUIDANCE ON PROFILING INTERNALLY DISPLACED PERSONS (IDMC & UN Office for the Coordination of Human Affairs eds. 2008), ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1092270 (highlighting the difficult process by which data on IDPs is collected and the issues that arise in the process).

433. AU Convention, *supra* note 9, art. 12(1).

434. *Id.* art. 12(2) (emphasis added).

435. Guiding Principles, *supra* note 8, princ. 29(2).

436. *Id.* art. 12(3).

437. The issue of compensation or reparations is not entirely unprecedented. In the Miskito case, the Inter-American Commission on Human Rights has recommended the payment of appropriate compensation for returning IDPs. Inter-Am. C.H.R., *Report*

G. Rights and Responsibilities of Non-State Actors

One of the unique characteristics of the AU Convention is its assignment of rights and responsibilities to international organizations, nongovernmental organizations (NGOs) or humanitarian agencies, and armed groups. Before the AU Convention's provisions are examined, it is important to look at the UN Guiding Principles, which provide the basis for the Convention's approach to this issue.

The UN Guiding Principles define the rights and responsibilities of international organizations and NGOs in the context of humanitarian assistance and emphasize the right of access.⁴³⁸ Perhaps the most important principle states that "[i]nternational humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced."⁴³⁹ It further provides that "such an offer shall not be regarded as an unfriendly act or interference in a State's internal affairs and shall be construed in good faith."⁴⁴⁰ And, most importantly, it emphasizes that "consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance."⁴⁴¹ The UN Guiding Principles emphasize the same principle in the context of return and reintegration by stating that "[a]ll authorities concerned shall grant

on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/ser. L/V/II.62, doc. 10 rev. 3 (1983), OEA/ser. L/V/II.62, doc. 26 (1984). There are numerous other examples of reparations, particularly when the loss of property is a result of human rights violations. See, e.g., *Kurt v Turkey*, App. No. 24276/94, 27 Eur. Comm'n H.R. Rep. 373 (1998) (awarding compensation for loss of property to surviving relatives). Most importantly, the World Bank requires that states receiving World Bank funds compensate persons displaced as a result of development projects. *Involuntary Resettlement*, *supra* note 140.

438. See Guiding Principles, *supra* note 8, princs. 24–27, 30.

All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination. . . . International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. . . . Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. . . . International humanitarian organizations . . . should respect relevant international standards and codes of conduct. . . . All authorities concerned shall grant and facilitate . . . rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

Id.

439. *Id.* princ. 25.

440. *Id.*

441. *Id.*

and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandate, rapid and unimpeded access to internally displaced persons to assist in their return and reintegration.”⁴⁴²

In addition, the UN Guiding Principles state that non-state actors must carry out their duties “in accordance with the principles of humanity and impartiality and without discrimination.”⁴⁴³ They are also required to respect “relevant international standards and codes of conduct.”⁴⁴⁴

With a view to incorporating and readopting some of these principles, the AU Convention contains several provisions that correspond to the rights and responsibilities of different categories of non-state actors, mainly international organizations and humanitarian agencies, the African Union, and armed groups.⁴⁴⁵

1. International Organizations and Humanitarian Agencies

Unlike the UN Guiding Principles, which emphasize the rights of international humanitarian organizations to have access to IDPs, the AU Convention clearly emphasizes the obligations of these organizations rather than their rights.⁴⁴⁶ Although the AU Convention dedicates no independent provision to the rights of these organizations, it does create an independent provision for their obligations.⁴⁴⁷ The obligations are stated in clear terms: “International organizations and humanitarian agencies shall discharge their obligations under this Convention in conformity with international law and the laws of the country in which they operate.”⁴⁴⁸ Consistent with the UN Guiding Principles, the same provision requires these organizations to respect the rights of the IDPs and also adhere to the principles of neutrality, impartiality, and independence.⁴⁴⁹

The rights of these organizations are recognized in scattered provisions of the AU Convention, but consistent with the other

442. *Id.* princ. 30.

443. *Id.* princ. 24(1).

444. *Id.* princ. 27(1).

445. AU Convention, *supra* note 9, art. 6. Apart from these non-state actors, the Convention obligates states parties to “[e]nsure the accountability of non-State actors . . . including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts.” *Id.* art. 3(1)(h).

446. *Id.* art. 6 (outlining the obligations relating to international organizations and humanitarian agencies); Guiding Principles, *supra* note 8, princ. 25.

447. AU Convention, *supra* note 9, art. 6.

448. *Id.* art. 6(1).

449. *Id.* art. 6(2)–(3).

provisions, these rights are formulated from the perspective of the obligations of states. The AU Convention first states that the primary responsibility of providing protection and assistance to IDPs rests on the state, but the state may seek assistance from other states and from international organizations.⁴⁵⁰ Additionally, it requires that “States Parties shall respect the mandate of the AU and the UN, as well as the role of international humanitarian organizations in providing protection and assistance to internally displaced persons, in accordance with international law.”⁴⁵¹

The AU Convention does not give such organizations and agencies a new mandate, but it recognizes their existing mandates. Examples of existing mandates may include the mandate given to the UNHCR by the UN General Assembly⁴⁵² and the mandate given to the International Committee of the Red Cross by the Geneva Conventions.⁴⁵³ Perhaps most importantly, the AU Convention obligates states to provide a “rapid and unimpeded passage of all relief consignments, equipment and personnel,” subject only to “technical arrangements” under which the state may permit such access.⁴⁵⁴ The permissible scope of these “technical arrangements” is unclear, especially because of the lack of a provision that directly recognizes the rights of the organizations to have unimpeded access, which the UN Guiding Principles clearly recognize.⁴⁵⁵

Although the AU Convention does not redefine the mandates of the UN and other international organizations and agencies, it dedicates an entire provision to the definition of the mandate of the AU, as discussed in the following section.

450. *Id.* art. 5(1)–(2).

451. *Id.* art. 5(3). It further provides that if the state is unable to provide protection and assistance, the state must seek help from international organizations and humanitarian agencies and that such organizations and agencies “may offer services to all those in need.” *Id.* art. 5(6).

452. Exec. Comm. of High Commissioner’s Programme, UNHCR’s Role in Support of Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy, U.N. Doc. EC/58/SC/CRP.18 (June 4, 2007), <http://www.unhcr.org/46641fff2.html> (providing a comprehensive review of how the UNHCR is implementing a policy to address the issue of IDPs).

453. ICRC, *Internally Displaced Persons: The Mandate and Role of the International Committee of the Red Cross*, INT’L REV. OF THE RED CROSS, NO. 838 (2000), <http://www.icrc.org/eng/resources/documents/misc/57jqhr.htm>.

454. AU Convention, *supra* note 9, art. 5(7).

455. See Guiding Principles, *supra* note 8, princ. 25 (ensuring right of international humanitarian organizations to offer their services in support of the internally displaced).

2. African Union

Article 8 of the AU Convention is fully dedicated to the AU's rights and obligations. It begins by restating the basic principle contained in the Constitutive Act: "The African Union shall have the right to intervene in a Member State . . . in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."⁴⁵⁶ Presumably, if these kinds of atrocities affect IDPs, the AU can invoke this particular provision in addition to the provision of the Constitutive Act that allows such intervention.⁴⁵⁷

The AU Convention does not include any other provisions that grant the AU rights. Interestingly, however, it includes several provisions that obligate the AU to take some concrete, affirmative steps. For example, the AU Convention obligates the AU to strengthen its own institutional framework and capacity for the benefit of IDPs, to coordinate and mobilize resources, to cooperate with affected states, to share information with the concerned human rights organs, and to cooperate with other agencies in addressing the problem of internal displacement.⁴⁵⁸

It is important to note that these provisions purport to impose some specific affirmative duties on an entity that is not a state, and that is therefore not a party to the AU Convention. They are thus different from the other provisions that affect international organizations or humanitarian agencies because those provisions are framed in the context of the obligations of the states. For example, the most notable of these provisions reads: "States Parties shall respect the mandates of the African Union and the United Nations . . .," not that these organizations "shall" perform such and such duties.⁴⁵⁹ It is not clear why the drafters included provisions that directly obligate the AU when it is not a party to the agreement. It is also unclear how this provision may be enforced. At the most basic level, however, it is clear that the contracting parties envisioned a situation whereby the AU takes a leading and proactive role in coordinating humanitarian efforts in cases of large-scale displacement.⁴⁶⁰

456. Compare AU Convention, *supra* note 9, art. 8(1), with Constitutive Act of the African Union, art. 4(h), July 11, 2000, 2158 U.N.T.S. 3 [hereinafter AU Constitutive Act] (stating "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity").

457. AU Constitutive Act, *supra* note 456, art. 4(h).

458. AU Convention, *supra* note 9, art. 8(3)(a)–(f).

459. *Id.* art. 5(3).

460. See *id.* art. 8(3)(a)–(f) ("The African Union shall . . . [s]trengthen the institutional framework and capacity of the African Union with respect to protection

3. Armed Groups

The AU Convention defines “Armed Groups” as “dissident armed forces or other organized armed groups that are distinct from the armed forces of the state.”⁴⁶¹ Although it makes reference to armed groups in many sections,⁴⁶² it does not directly prescribe conduct or omission on their part. In fact, the AU Convention, in at least two provisions, provides that the fact that armed groups are referenced must not be interpreted as giving them any recognition.⁴⁶³

Concerned with the possibility of a party interpreting the Convention as recognizing these groups, the provision that directly addresses armed groups does so in the context of criminal responsibility: “Members of Armed Groups shall be held criminally responsible for their acts which violate the rights of internally displaced persons under international and national laws.”⁴⁶⁴ Presumably, this suggests the corresponding duty of the state to hold armed groups accountable for their actions.

In other provisions, the AU Convention obligates the states to “prohibit” armed groups from engaging in arbitrary displacement, hampering protection and assistance, disturbing safety, restricting freedom of movement, recruiting children and others into their military forces, attacking them, or otherwise violating their rights.⁴⁶⁵ Although the nature of the immediate action commanded by the term “prohibit” is not clear, it is fair to assume that the Convention envisions contracting states proscribing these actions in their laws and punishing the abridgement of those laws. Although the repeated disclaimer on recognition makes it seem as though the Convention prescribes certain rules of conduct for armed groups, all of the provisions that reference them obligate the contracting states to hold them responsible.⁴⁶⁶

and assistance to internally displaced persons[, and] [c]oordinate the mobilization of resources for protection and assistance to internally displaced persons . . .”).

461. *Id.* art. 1(e).

462. *E.g.*, *id.* arts. 1(e), (n), 2(e), 5(11), 4(5), 7(1), 9(2)(g), 15(2).

463. *See id.* art. 7(2) (“Nothing in this Convention shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”); *id.* art. 15(2) (“State Parties agree that nothing in this Convention shall be construed as affording legal status or legitimizing armed groups and that its provisions are without prejudice to the individual criminal responsibility of their members under domestic or international criminal law.”).

464. *Id.* art. 7(4).

465. *Id.* art. 7(5)(a)–(i).

466. *See id.* arts. 7(4)–(5), 15(2) (stipulating that armed groups will be criminally responsible for their acts, outlining prohibitions on armed groups, and noting that the Convention does not afford legal status to or legitimize armed groups).

H. Enforcement

These are wonderful principles, but how can they be enforced? The UN Guiding Principles do not purport to be binding on their own, and they are considered to be restatements of existing international norms.⁴⁶⁷ As such, their implementation is admittedly left to the concerned actors.⁴⁶⁸ To the extent that the UN Guiding Principles are expressions of existing norms, domestic remedies may be invoked where they are available. If the domestic laws and the available remedies are not sufficient or are inconsistent with the UN Guiding Principles, there is no additional or peculiar enforcement option except to resort to the relevant UN⁴⁶⁹ or regional human rights-enforcement mechanisms on a case-by-case basis.⁴⁷⁰ For example, in at least two cases in the Inter-American Human Rights system, the Inter-American Court of Human Rights used the UN Guiding Principles as tools for the interpretation of the “right to movement” provision of the Inter-American Human Rights Convention.⁴⁷¹

A brief discussion of one of these cases provides a good context for the challenges of enforcement of the AU Convention. Before this case is discussed, however, it is important to note that the Inter-

467. See Guiding Principles, *supra* note 8, Intro. ¶ 10 (“The Principles are intended to provide guidance to the Representative in carrying out his mandate; to States when faced with the phenomenon of displacement; to all other authorities, groups and persons in their relations with internally displaced persons; and to intergovernmental and nongovernmental organizations when addressing internal displacement.” (emphasis added)).

468. See *id.* (identifying the rules as permissive, not mandatory, thus leaving enforcement to those actors materially affected by incorporated norms).

469. The UN’s human rights enforcement mechanisms, unlike its humanitarian and development mechanisms, are admittedly very weak. In fact, they are deliberately kept that way because of the members’ sensitivities about their own human rights records. See COHEN & DENG, *supra* note 337, at 280–81 (noting a lack of self-interest to create the political will necessary to address such human rights problems).

470. On a practical level, several states have already enacted legislation incorporating the Guiding Principles into their domestic laws, including the creation of some national institutions. See generally, Walter Kälin, *The Future of the Guiding Principles on Internal Displacement*, FORCED MIGRATION REV., Dec. 2006, at 5 (describing some of the national-level efforts); Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 HUM. RTS. BRIEF 7 (2006) (briefly describing the developing trend in domesticating the Guiding Principles). For a more thorough treatment of the challenges of domestic application of the Guiding Principles from various perspectives, see INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES (Walter Kälin et al. eds., 2010).

471. See *Moiwana Community v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 145, ¶¶ 104–21 (Feb. 8, 2006) (relying on the guidelines to “illuminate the reach and content of Article 22 of the Convention”); *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 37 (Sept. 15, 2005) (relying on the Guiding Principles to “define the content and scope of Article 22 of the Convention”).

American Court of Human Rights (IACHR) has jurisdiction to adjudicate claims of human rights violations under the American Convention on Human Rights (ACHR).⁴⁷² Procedurally, cases may only be referred to the court by a state party or the Inter-American Commission on Human Rights,⁴⁷³ which is sometimes referred to as the gatekeeper.⁴⁷⁴ Although an individual person or group of persons may file a petition with the Commission claiming violations of the ACHR,⁴⁷⁵ only the Commission may refer a case to the court.⁴⁷⁶ In addition to other conventional remedies, the court may award fair compensation to victims of human rights violations.⁴⁷⁷ The court's judgments are required to be executed just like the judgments of the domestic courts of the contracting parties.⁴⁷⁸

To some extent, this Inter-American system corresponds with the European system of human rights.⁴⁷⁹ However, with Protocol 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁸⁰ the European system took the next natural step by allowing individuals to file cases directly with the European Court of Human Rights without the need for the involvement of the European Human Rights Commission.⁴⁸¹

472. American Convention on Human Rights, arts. 52–69, July 18, 1978, 144 U.N.T.S. 123, O.A.S.T.S. No. 36 [hereinafter ACHR]. For the details of the procedures involved, see generally J.M. PASQUALICCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2003).

473. ACHR, *supra* note 472, art. 61.

474. See e.g., Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 103 (2008) (explaining that the ACHR requires contentious cases be processed by the Commission).

475. ACHR, *supra* note 472, art. 44.

476. See *id.* arts. 48–51, 61 (outlining the procedures the Commission must follow before a case can be presented to the court and obligating all cases to be put through the Commission's procedures); see also Neuman, *supra* note 474, at 103 (describing the Commission's retained power to refuse to allow a case to be heard by the court).

477. ACHR, *supra* note 472, art. 63.

478. *Id.* art. 68.

479. See Neuman, *supra* note 474, at 102–03 (“[T]he drafters of the ACHR substantially modeled the Court and its relationship with the Inter-American Commission on Human Rights on the structure of the European human rights system . . .”).

480. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Oct. 9, 1993, Europ. T.S. No. 155. It is important to note, however, that even in the Inter-American system, although individuals cannot be parties to the litigation that the Commission prosecutes before the court, the individual victims may continue to participate in the proceedings. For a good discussion of the jurisdiction of the Inter-American Court of Human Rights, see Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 245 (1982) (concluding that the court's ability to discharge its mission will depend heavily on how the Commission utilizes it).

481. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, Europ. T.S. 5.

In *Case of "Mapiripán Massacre" v. Colombia*, the IACHR interpreted Article 22 of the ACHR, which guarantees freedom of movement, to include the right not to be displaced.⁴⁸² The controversy that led the Inter-American Human Rights Commission to file this case involved allegations of torture and the murder of approximately forty-nine Colombians by armed groups with government complicity, as well as the forcible displacement of survivors.⁴⁸³ The court found that the state of Colombia was responsible for the killings and the displacement of at least some of the victims.⁴⁸⁴ Most importantly, the court awarded the victims of internal displacement pecuniary damages ranging from \$5,000 to \$20,000.⁴⁸⁵

As a binding regional human rights instrument, the AU Convention's enforcement must be considered within the context of the African human rights enforcement regime. Unlike the European and Inter-American human rights regimes, the African human rights enforcement regime was an afterthought, and it has undergone significant evolution since the time of the creation of the Organization of African Unity (OAU), the precursor of the AU. In the early 1960s, the protection of human rights was not as preeminent as the principles of sovereignty and noninterference because the OAU's principal mission was to promote and safeguard independence.⁴⁸⁶ In 1981, the OAU adopted the African Charter on Human and Peoples' Rights (ACHPR).⁴⁸⁷ The Charter established the African Human Rights Commission (AHC) to "promote human and peoples' rights and ensure their protection in Africa."⁴⁸⁸ Not being a judicial organ with authority to receive individual complaints, the Commission remained a subject of severe criticism.⁴⁸⁹ Serious efforts to create a judicial organ led, in 1998, to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an

482. *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 170–171 (Sept. 15, 2005).

483. *Mapiripán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 134, at ¶ 2.

484. *Id.* ¶ 189.

485. *Id.* ¶¶ 256–74.

486. See, e.g., Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplicity?*, 28 BROOK. J. INT'L L. 811, 819 (2003) ("This sovereignty principle, together with the non-interference principle—the reserve domain—became the identity symbol of the [OAU].").

487. ACHPR, *supra* note 412. For an assessment of the Charter, see, e.g., U.O. Umozuike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 907 (1983) ("The Charter breaks new ground by including individual duties in an international instrument.").

488. ACHPR, *supra* note 412, art. 30.

489. See, e.g., Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, 3 YALE HUM. RTS & DEV. L.J. 45, 64 (2000) (calling the Commission "a toothless bulldog").

African Court on Human and Peoples' Rights (Human Rights Court Protocol).⁴⁹⁰ As concerns over gaining and maintaining political independence began to overcome economic concerns, the push to create an organization with a renewed mission gained momentum and culminated, in 2001, with the creation of the AU as a political, social, and economic organization.⁴⁹¹ The Human Rights Court Protocol entered into force in January 2004, three years after the AU's creation.⁴⁹²

The status of the Human Rights Court was initially unclear because the AU Constitutive Act provided for the creation of a judicial organ called the African Court of Justice (ACJ).⁴⁹³ To clarify this confusion and streamline the working of the judicial organs, the Assembly of Heads of State and Government decided to merge the ACJ with the ACHPR and create the African Court of Justice and Human Rights.⁴⁹⁴ In July 2008, the African Union Summit adopted the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR), creating a unified court system for the adjudication of all cases, including human rights claims.⁴⁹⁵ It could be concluded that by the time the AU Convention is in force and ready for enforcement, the ACJHR will be the principal judicial organ. Therefore, the enforcement of the AU Convention must be looked at in the context of the ACJHR.

1. Non-Judicial Enforcement

The AU Convention establishes "a Conference of States Parties . . . to monitor and review the implementation of the *objectives* of this Convention."⁴⁹⁶ The AU Convention does not properly define the mandate of the "Conference," except by noting that it shall

490. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force on Jan. 25, 2004) [hereinafter Human Rights Court Protocol], <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>.

491. AU Constitutive Act, *supra* note 456, art. 4.

492. See *supra* note 490 (listing the date the Human Rights Court Protocol went into force).

493. AU Constitutive Act, *supra* note 456, art. 18(a).

494. See Int'l Ctr. for the Protection of Human Rights, *African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights*, INTERRIGHTS.ORG, <http://www.interights.org/AfricanSingleProtocolAdopted/index.htm> (last visited Jan. 5, 2011) (announcing the intended merger of the ACHPR and the ACJ).

495. Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008 [hereinafter ACJHR Protocol], <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

496. AU Convention, *supra* note 9, art. 14(1) (emphasis added).

monitor the implementation of the objectives, not necessarily the terms or provisions of the Convention. The objectives of the AU Convention are set forth under Article 2 and include both the establishment of a legal framework for the prevention of internal displacement and the protection and assistance of displaced persons when displacement occurs.⁴⁹⁷ Viewed in this light, the implementation of the objectives could mean the implementation of not only the spirit but also the letter of the provisions of the AU Convention. However, the AU Convention does not give any meaningful guidance as to how the Conference of States may carry out its mission of monitoring compliance. The other subsections of the same provision suggest that the drafters have envisioned a situation where the contracting states consult with the Conference of States prior to reporting their legislative and other actions to the AU under Article 62 of the African Charter.⁴⁹⁸

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 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.⁴⁹⁹ 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,⁵⁰⁰ and states are often wary of assigning a legal mandate to an international agency to intervene in their domestic affairs. As Roberta Cohen and Francis Deng note, utilizing existing agencies such as the UNHCR is more effective; they can involve themselves in the protection of IDPs

497. *Id.* art. 2(a)–(e).

498. *See id.* art. 14(4) (imposing an obligation on states parties to indicate legislative measures taken to give effect to the Convention when they present reports under Article 62 of the ACHPR); ACHPR, *supra* note 412, art. 62.

499. COHEN & DENG, *supra* note 337, at 168–69.

500. *See* AU Convention, *supra* note 9, art. 1(k).

“Internally Displaced Persons” 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 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.

Id.

“without drawing too much attention” because they are already there for a different purpose.⁵⁰¹

Although this concern over sovereignty is understandable, an independent agency could be established with a limited mandate to monitor the implementation of provisions of the AU Convention and coordinate the humanitarian efforts of existing international organizations and other humanitarian agencies. The creation of this kind of agency would be appropriate despite sovereignty concerns, because a binding agreement without an effective enforcement mechanism is ultimately inconsequential.⁵⁰² It is important to note, however, that the mandate given to the Conference of States could be broadly interpreted to allow the Conference to delegate its power to an agency for monitoring implementation, including assisting IDPs in seeking an international judicial remedy within the context of the regional human rights enforcement mechanism.⁵⁰³ This leads to the discussion of the judicial enforcement mechanism that the AU Convention envisions.

2. Judicial Enforcement

The AU Convention contains a distinct provision for the settlement of disputes: “Any dispute or difference arising between the States Parties with regard to the interpretation or application of this Convention shall be settled amicably through direct consultations between Parties concerned.”⁵⁰⁴ In addition, “[i]n the event of failure to settle the dispute or differences, either State may refer the dispute to the African Court of Justice and Human Rights.”⁵⁰⁵ Although the “settlement of disputes” provision is limited to disputes between contracting states, non-state actors may also be parties to a dispute for the enforcement of the Convention, as explored below.

i. State v. State

The dispute settlement provision properly covers the possibility of a state-to-state dispute. Although these disputes would fall within

501. *Id.* at 169.

502. *See supra* note 469 and accompanying text (noting the frustrations of enforcing an agreement purposefully weakened by the trepidations of participating states).

503. *See* AU Convention, *supra* note 9, art. 14(a) (“States Parties agree to establish a Conference of States Parties to this Convention to monitor and review the implementation of the objectives of this Convention.”).

504. *Id.* art. 22(1).

505. *Id.* Subsection (2) gives the Conference of States authority to resolve disputes by a two-thirds majority vote of those states present and voting until the ACJHR is established. *Id.* art. 22(2).

the jurisdiction of the ACJHR even without this provision,⁵⁰⁶ it expressly gives the ACJHR jurisdiction to adjudicate claims of one state against another on the interpretation and application of the AU Convention.⁵⁰⁷

Given the nature of the AU Convention, however, it is difficult to imagine circumstances that would compel a state party to institute an action against another. The AU Convention recognizes that each state party has the primary responsibility to protect and assist IDPs,⁵⁰⁸ and it obligates states to seek assistance when they are incapable of doing so.⁵⁰⁹ Therefore, disputes are most likely to arise from the disregard of these duties. Theoretically, any of the contracting parties may bring an action against the defaulting state seeking compliance.⁵¹⁰ However, such a claim would need to be framed as “state A broke its promise to state B by not protecting or assisting its own citizens.” Although theoretically possible, this type of claim would be unusual.⁵¹¹ The following subsection explores some of the more probable cases.

ii. Non-State Actor v. State

The AU Convention itself does not contain any provisions regarding the possibility of non-state actors bringing actions before the ACJHR. However, the Statute of the ACJHR allows some non-state actors to institute actions.⁵¹² These non-state actors include the Assembly of the African Union, the Parliament and other organs authorized by the Assembly, the African Commission on Human and Peoples’ Rights, accredited African intergovernmental organizations,

506. See Statute of the African Court of Justice and Human Rights, art. 28(b), July 1, 2008, 48 I.L.M. 317 (2008) [hereinafter ACJHR Statute] (granting jurisdiction to the court to interpret all treaties made under the auspices of the AU).

507. AU Convention, *supra* note 9, art. 22(1).

508. *Id.* art. 5(4).

509. *Id.* art. 6.

510. See *id.* art. 22(1) (granting the right to either state party involved in a dispute to refer the case to the ACJHR).

511. The enforcement of refugee law faces a similar practical difficulty. If, for example, a state violates its non-refoulement obligation and sends a refugee back to her country, the country of origin that receives the refugee back is not likely to sue the sending state for violating its international treaty obligations because that state will naturally be pleased to get that refugee back. For some discussion of this difficulty, see Won Kidane, *An Injury to the Citizen, a Pleasure to the State: Peculiar Challenges to the Enforcement of International Refugee Law*, 6 CHI.-KENT J. INT’L & COMP. L. 116, 116–17 (2006) (“If [a] refugee is injured in a country where he sought refuge, then the country of origin that would have sought redress under normal diplomatic and consular situations certainly would be unwilling or even might be pleased to see such injury occur.”).

512. ACJHR Statute, *supra* note 506, arts. 29–30.

and African national human rights institutions.⁵¹³ To the extent they meet all other requirements for establishing a cause of action, these entities' access to the Court is unrestricted.⁵¹⁴ Nonetheless, NGOs and individuals, the two non-state actors who are most likely to seek a remedy from the ACJHR, do not have direct and unlimited access: under the Statute of the ACJHR, states have the option to grant or deny access to NGOs and individuals.⁵¹⁵ A state that wishes to allow access must expressly do so at the time of ratification or accession.⁵¹⁶

Any number of allegations of violations could give rise to controversies needing adjudication by the ACJHR. For example, a group of IDPs could claim arbitrary displacement in violation of Article 4(4) of the Convention⁵¹⁷ or failure to mandate environmental impact assessment in the case of large-scale development projects under Article 10(3).⁵¹⁸ If the state denies these allegations, the ability of the IDPs to seek a judicial remedy from the ACJHR depends on whether the particular state decided to grant access to individuals or NGOs.⁵¹⁹ If the state made that choice, IDPs, on their own or represented by NGOs, could bring an action under Article 30(f) of the Statute of the Court.⁵²⁰

If the respondent state opts not to recognize the Court's jurisdiction to accept individual or NGO petitions, the claimants would have to explore a more indirect and uncertain path to access the Court. The most natural indirect access they could seek would be through the African Commission on Human and Peoples' Rights, which has direct access to the Court.⁵²¹ However, the Commission must exhaust all other procedures within its mandate before it can bring an action before the ACJHR.⁵²² Although the Commission's procedures for handling complaints and addressing violations are

513. *Id.*

514. *Id.*

515. *Id.* art. 30(f); ACJHR Protocol, *supra* note 495, art. 8(3).

516. *See supra* note 515. These two provisions refer to each other and permit a state to acquiesce to the jurisdiction of the court for NGOs and individuals.

517. *See* AU Convention, *supra* note 9, art. 4(4) ("All persons have a right to be protected against arbitrary displacement.").

518. *See id.* art. 10(3) ("States parties shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.").

519. *See infra* notes 520–21 and accompanying text (listing relevant treaty provisions).

520. *See* ACJHR Statute, *supra* note 506, art. 30(f) (listing individuals or NGOs accredited by the AU as eligible to bring an action in the court subject to certain conditions). This assumes that they have exhausted all domestic remedies.

521. *Id.* art. 30(b).

522. *See* ACHPR, *supra* note 412, arts. 45–59 (detailing the procedure a state party to the treaty and the Commission must go through when there is a potential violation of the Charter).

lengthy and even frustrating, it is an option aggrieved IDPs could explore.⁵²³

Another possibility, admittedly theoretical, is for the Conference of States to present a claim on behalf of the IDPs. One of the entities to which the Statute of the ACJHR grants unconditional access is “African Intergovernmental Organizations accredited by the Union or its Organs.”⁵²⁴ The Conference of States Parties, established by the AU Convention to monitor compliance, could qualify as an intergovernmental organization so long as it gets the required accreditation.⁵²⁵ In fact, for the AU Convention to be meaningfully implemented, this entity’s access to the Court seems essential.

Whether the claim is presented by individuals, NGOs, the Commission, or the Conference of States Parties, if the IDPs prevail, the Court has the jurisdiction to order a variety of remedies, including compensation for violations of rights.⁵²⁶ Although the judgment of the Court is final and binding,⁵²⁷ execution of the judgment against an unwilling state could be a long process. Under the Court’s Statute, if a state refuses to execute the Court’s judgment, the “Court shall refer the matter to the Assembly” of the AU.⁵²⁸ The Assembly would then decide on what measures it must take to ensure execution of the Court’s judgment.⁵²⁹ These measures may include sanctions under Article 23(2) of the Constitutive Act of the AU.⁵³⁰

523. The Commission is required to comply with all the reporting and other procedures set forth under Articles 45–59 of the Charter before it can bring an action. This is admittedly a very long and frustrating process. It is important to note, however, that the Commission does have a *Special Rapporteur for Refugees, Asylum Seekers, Migrants and Internally Displaced Persons* who could seek a remedy short of judicial remedy. For the mandate and works of the existing Rapporteur, see *Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa*, AFR. COMM’N ON HUM. AND PEOPLE’S RTS., http://www.achpr.org/english/_info/index_rdp_en.html (last visited Jan. 5, 2011).

524. ACJHR Statute, *supra* note 506, art. 30(d).

525. Such entities must be authorized by Article 30, but no formal criteria for accreditation exists.

526. ACJHR Statute, *supra* note 506, art. 45.

527. *Id.* art. 46(1).

528. *Id.* art. 46(4).

529. *Id.*

530. *Id.* art. 46(5).

Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

AU Constitutive Act, *supra* note 456, art. 23(2).

V. CONCLUSION

This Article analyzed several important issues raised by the AU's novel IDPs Convention. Based on the above in-depth analysis of the issues, it offers the following conclusions.

- (1) The unique and bold measure of hardening what was deliberately left as soft law by the international community is duly justified because the nature and magnitude of the forced migration of persons in Africa is a product of its troubled history.
- (2) The new legal status that the AU Convention assigns to a group of persons called IDPs is doctrinally viable and consistent with Africa's long-standing emphasis on collective rights as well as the steady, albeit cautious, movement towards recognition of more rights and adoption of more contemporary notions of sovereignty.
- (3) Humanitarian considerations of deservingness are fact specific. Categorically, IDPs cannot be said to be less deserving than refugees. Some IDPs may be more deserving of protection and assistance than some refugees, and vice versa. Moreover, sovereignty as a barrier to international protection and assistance functions in exactly the same way in the case of IDPs and refugees. After all, refugees are persons who move from one sovereign nation to another. There is nothing inherent in the crossing of an international boundary that guarantees international protection. In fact, the refugee-receiving sovereign may have more excuses to discriminate against and violate rights of refugees on the basis of their alien status. Therefore, considerations of deservingness and sovereignty cannot undermine the validity of a legally recognized IDP category.
- (4) The AU Convention does not in any way undermine the protection and assistance that might be due to refugees. As the case studies in this Article show, the factual circumstances of IDPs and refugees in almost all parts of Africa are almost always identical. It is often difficult to determine who has crossed an international boundary and who has not, given the nature of the boundaries and the ever-changing nature of migratory patterns. Any attempt to predicate protection and assistance on the fact of crossing an international boundary in the African context

thus seems arbitrary. Under these circumstances, the legal recognition of the special protection needs of IDPs is a step forward, not backward.

- (5) The substantive provisions of the AU Convention are, by and large, predicated on the UN Guiding Principles. Unlike the UN Guiding Principles, however, the AU Convention approaches the rights from the perspective of the carrier of the corresponding obligations—the state—rather than from the perspective of the right-holders—the individuals. This formulation undermines the clarity that the AU Convention seeks to offer, but it may be a byproduct of an effort to convert soft law into hard law. The confusion that this formulation might create will hopefully be clarified through judicial interpretation as enforcement is sought and jurisprudence is developed.
- (6) The formulation of some provisions of the AU Convention is disappointing. First, Article 6 provides for the obligations of international organizations and humanitarian agencies.⁵³¹ Unlike the UN Guiding Principles, however, it does not provide for their rights.⁵³² Second, Article 10 provides for the obligations of states to prevent development-induced displacement.⁵³³ With respect to the exceptions, however, it substitutes the UN Guiding Principles' standard of "compelling and overriding public interest"⁵³⁴ with the glaringly permissive language of "States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors."⁵³⁵ Finally, Article 14 provides for mechanisms of monitoring compliance.⁵³⁶ While it purports to establish a Conference of States that would monitor compliance, it neither clearly defines the mandate of that Conference nor provides for an independent agency for the coordination of the protection and assistance of IDPs and the monitoring of compliance.⁵³⁷ These are shortcomings that an

531. AU Convention, *supra* note 9, art. 6.

532. *See, e.g.*, Guiding Principles, *supra* note 8, princ. 25(2) ("International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced.").

533. AU Convention, *supra* note 9, art. 10.

534. Guiding Principles, *supra* note 8, princ. 6(c).

535. AU Convention, *supra* note 9, art. 10(1).

536. *Id.* art. 14.

537. Although the hesitation to mandate an international agency to intervene in an IDPs situation, which is essentially a domestic affair, is understandable, the

amendment could rectify whenever the political will is garnered.

- (7) 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.
- (8) Given some of the recent positive developments in the African human rights enforcement regime, several enforcement options could be envisioned. The most effective enforcement mechanism is individual access to judicial remedy. Unfortunately, however, this mechanism is nonexistent as of the writing of this Article, because no state has accepted the ACJHR's jurisdiction to entertain submissions from individuals and NGOs.⁵³⁸ For the AU Convention to have meaningful impact, the contracting states must consider accepting the court's jurisdiction to accept individual and NGO complaints when they ratify or accede to the ACJHR Protocol.
- (9) Finally, it is important to emphasize that this regional effort is a remarkable step forward that could help manage forced displacement. As Professor Gerald Neuman suggests, even if the UN Guiding Principles were binding, and even if the rights were recognized and understood in identical terms, regional systems have significant advantages for several reasons.⁵³⁹ First, the states are more likely to have directly contributed to the formulation of the instrument and are consequently more likely to understand their responsibilities.⁵⁴⁰ Second, the states are more likely to trust a regional enforcement mechanism than "more distant global institutions."⁵⁴¹ Third, regional norms and institutions are more likely to

agency's mandate could be restricted to intervention in serious IDPs situations. After all, states sometimes even allow armed peacekeepers to intervene in grave circumstances.

538. See *African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights*, INT'L CTR. FOR THE LEG. PROTECTION OF HUMAN RIGHTS, <http://www.interights.org/AfricanSingleProtocolAdopted/index.htm> (last visited on Jan. 5, 2011).

539. See Neuman, *supra* note 474, at 106 (listing several reasons).

540. *Id.*

541. *Id.*

account for historical and cultural backgrounds.⁵⁴² Finally, states within the same region are more likely to face similar socioeconomic and political issues, and as such, they may be more trusting of those facing similar realities.⁵⁴³ For these and similar reasons, if implemented in good faith, the AU Convention is likely to be more effective than prior universal efforts in addressing the phenomenon of forced displacement in Africa. Therefore, it is an effort that must be lauded, and all members of the AU must be encouraged to ratify and effectively implement this important and groundbreaking Convention. Other regions facing similar problems must consider adopting a similar measure.

542. *Id.*

543. *Id.*
