

RESEARCH ARTICLE

Breathing Life into the Kampala Convention: Towards Workable Enforcement Mechanisms

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Abstract

The Kampala Convention is a global first, yet, over a decade since it came into force, Africa hosts more than half of the world's internally displaced persons (IDPs). This article explores how the Kampala Convention could mitigate internal displacement by asking which of the enforcement mechanisms in the convention would work best to protect and advance durable solutions for IDPs in Africa. The convention adopts a state obligation model and contains judicial and non-judicial enforcement mechanisms. Evaluation of these mechanisms reveals some flaws, including the unclear mandate of the Conference of States, an inoperative African Court and private actors lacking *locus standi*. The article argues that some amendments to the convention are necessary to foster enforcement. Literature on internal displacement in Africa from an enforcement perspective is limited, so this article makes a significant contribution.

Keywords: Africa; enforcement; internal displacement; internally displaced persons; Kampala Convention

Introduction

Over the past 30 years, a global crisis has been building with acute humanitarian consequences: the displacement of persons within state borders. While internally displaced persons (IDPs) are found on every continent, the majority are in Africa. By the end of 2021, there were about 27.2 million IDPs in sub-Saharan Africa, representing almost half of the global total.¹ The highest concentrations of new displacements² in sub-Saharan Africa in 2021 were in the Democratic Republic of Congo (DRC), Ethiopia, Nigeria, South Sudan, Somalia and Burkina Faso.³

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1 The internal displacements leading to this figure were caused by conflict, violence and disasters. See “GRID 2022: Children and youth in internal displacement” (April 2022, Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC)) at 30, available at: https://www.internal-displacement.org/sites/default/files/publications/documents/IDMC_GRID_2022_LR.pdf (last accessed 17 July 2023).

2 The 2019 Global Report on Internal Displacement (GRID) defines “new displacement” as “new instances of internal displacement” occurring in the year. Therefore, new displacement figures include persons who have been displaced more than once. New displacement is distinguishable from the number of IDPs, which “corresponds to the total number of people living in internal displacement”. Consequently, the number of new displacements does not equal the number of IDPs. See *2019 Global Report on Internal Displacement* (May 2019, IDMC and NRC) at 123, available at: <http://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf> (last accessed 17 July 2023). See also “Global trends: Forced displacement in 2020” (UNHCR), available at: <https://www.unhcr.org/60b638e37.pdf> (last accessed 17 July 2023).

3 “GRID 2022”, above at note 1 at 29.

The exodus of displaced persons within the borders of their homeland did not catch international attention until the 1980s, after 1.2 million IDPs were recorded in 11 countries in 1982.⁴ The number increased to 4 million in 1986.⁵ Hitherto, the international community had focused on refugees rather than IDPs. In 1951, the UN adopted its Convention relating to the Status of Refugees (Refugee Convention), which remains relevant to protecting international refugees.⁶ The Refugee Convention entered into force in April 1954 and has since had only one amending Protocol: the 1967 Protocol Relating to the Status of Refugees.⁷ The UN also established an agency, the UN High Commissioner for Refugees (UNHCR), which is dedicated to the protection of international refugees and the functions of which are outlined in the 1950 Statute of the Office of the UNHCR. However, the UNHCR's role has evolved to include protecting and assisting IDPs through the inter-agency cluster arrangement since 2005. In 1969, the Organization of African Unity (OAU), now the African Union (AU), adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), making the AU the first regional organization to adopt a binding instrument that addressed matters relating to refugees.⁸ In Africa, the number of IDPs is almost four times higher than the number of refugees on the continent.⁹ Some commentators believe that the growing forced migration and displacement figures could likely be influenced by the continued attention given to refugees instead of IDPs in Africa and the rest of the world.¹⁰

It was not until the early 1990s, when the number of IDPs increased to a total of over 20 million in about 40 countries, that the international response to internal displacement took a more significant turn.¹¹ The increasing numbers led to differences in the treatment and assistance given to refugees who crossed state borders and to IDPs who remain within state borders. Delayed international intervention in the face of a mounting internal displacement crisis could be attributed partly to the localized nature of internal displacement, which places primary responsibility for protecting and assisting IDPs on national and local governments and state authorities. Nevertheless, intervention by the international community became increasingly necessary to safeguard the protection of IDPs, especially during conflict and violence.

In 1992, the UN secretary-general's first representative on IDPs, Francis Deng, conducted research under the mandate of the former UN Human Rights Commission to ascertain how international human rights and humanitarian law applied to IDPs.¹² His research led to the 1998 UN

4 R Cohen and FM Deng "Exodus within borders: The uprooted who never left home" (1998) 77/4 *Foreign Affairs* 12. See N Geissler "The international protection of internally displaced persons" (1999) 11 *International Journal of Refugee Law* 451; and P Orchard "Protection of internally displaced persons: Soft law as a norm-generating mechanism" (2010) 36/2 *Review of International Studies* 281.

5 Cohen and Deng "Exodus within borders", *ibid.*

6 Convention and Protocol Relating to the Status of Refugees with an Introductory Note by the Office of the UN High Commissioner for Refugees, available at: <<https://www.unhcr.org/ph/wp-content/uploads/sites/28/2017/03/3.3-1967-Protocol-relating-to-the-status-of-refugees.pdf>> (last accessed 17 July 2023).

7 *Ibid.*

8 *Making the Kampala Convention Work for IDPs: Guide for Civil Society on Supporting the Ratification and Implementation of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (2010, AU ECOSOC, IDMC and NRC).

9 By the end of 2020, there were 6.5 million refugees and 24.1 million IDPs in Africa: "Global trends", above at note 2 at 15 and 22.

10 Orchard "Protection of internally displaced persons", above at note 4.

11 The increased visibility of internal displacement issues in the 1990s is mainly responsible for the increasing number of IDPs globally: R Cohen "Exodus within borders: The growing crisis of internal displacement" (31 May 2001) *Brookings.edu*, available at: <<https://www.brookings.edu/on-the-record/exodus-within-borders-the-growing-crisis-of-internal-displacement/>> (last accessed 25 June 2023). See also "Guiding principles on internal displacement" (IDMC), available at: <<http://www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement/>> (last accessed 17 July 2023).

12 Cohen and Deng "Exodus within borders", above at note 4. R Cohen "International protection for internally displaced persons" (1994) 26 *Studies in Transnational Legal Policy* 17. AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017, Routledge) at 40.

Guiding Principles on Internal Displacement (GPs).¹³ The GPs, anchored in international human rights and humanitarian laws, were intended to direct national governments, local authorities and other humanitarian agencies in protecting IDPs and assisting with their needs.¹⁴ However, the growing internal displacement crisis, particularly in Africa, required a more forceful apparatus. It would be meaningless if a well-crafted instrument designed to address a global crisis such as internal displacement lacked binding force. Accordingly, based on the urgent need to ease the malaise of internal displacement in Africa, the AU broke new grounds to become the first regional organization to adopt the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The Kampala Convention is a global first. It was adopted by the AU in October 2009 at a special summit in Kampala, Uganda and entered into force in December 2012.¹⁵ It is the first regional, binding convention that comprehensively addresses all phases of internal displacement: protection, assistance and durable solutions. It reiterates and brings together, in a single legal instrument, existing international humanitarian and human rights principles, standards and norms in a way that deals with the niceties of internal displacement in Africa and reinforces protection for IDPs. The convention recognizes the importance of the GPs as an international framework for protecting IDPs. Thus, its text was greatly influenced by the GPs.¹⁶ The convention complements the GPs (which use the “rights of IDPs” approach to address internal displacement) by adopting a “state obligation” approach.¹⁷ It marks the transition from soft law to hard law models.¹⁸

13 See Deng's first study: “UN Commission on Human Rights, Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the commission. Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms, E/CN.4/1993/35, 21 January 1993, annex, comprehensive study prepared by Mr Francis M Deng, representative of the secretary-general on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73”. See more in: “Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the commission: Human rights, mass exoduses and displaced persons” (UN Commission on Human Rights); reports of the representative of the secretary-general, Mr Francis M Deng, submitted pursuant to Commission on Human Rights res 1995/57, “Compilation and analysis of legal norms”, E/CN.4/1996/52/Add.2 (5 December 1995); “Report of the representative of the secretary-general, Mr Francis M Deng, submitted under commission res 1997/39, addendum, Guiding Principles on Internal Displacement” (11 February 1998, UN Commission on Human Rights), E/CN.4/1998/53/Add.2.

14 Foreword to the GPs by under-secretary-general for humanitarian affairs, Sergio Vieira de Mello.

15 “List of countries which have signed, ratified / acceded to the African Convention for the Protection and Assistance of Internally Displaced Persons in Africa” (June 2020, AU), available at: <<https://au.int/sites/default/files/treaties/36846-sl-AFRICAN%20UNION%20CONVENTION%20FOR%20THE%20PROTECTION%20AND%20ASSISTANCE%20OF%20INTERNALLY%20DISPLACED%20PERSONS%20IN%20AFRICA%20%28KAMPALA%20CONVENTION%29.pdf>> (last accessed 25 June 2023). See also M Asplet and M Bradley “Introductory note to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)” (2013) 52/1 *International Legal Materials* 397; AM Abebe “The African Convention on Internally Displaced Persons: Its codification, background, scope, and enforcement challenges” (2010) 29/3 *Refugee Survey Quarterly* 28. Although the convention's coming into force was celebrated on 6 December 2012, the day that the 15th instrument of ratification was deposited, it entered into force on 4 January 2013, which was 30 days after the 15th deposit per art 17(1) of the convention: JOM Okello “In lieu of a travaux préparatoires: A commentary on the Kampala Convention for IDPs” (2019) 31 *International Journal of Refugee Law* 349. The AU declared 2019 the “Year of refugees, returnees and internally displaced persons: Towards durable solutions to forced displacement in Africa”. The year also marked the 50th anniversary of the 1969 OAU Refugee Convention and the 10th anniversary of the Kampala Convention: “The African Union's theme for 2019” (UNHCR), available at: <<https://www.unhcr.org/the-african-unions-theme-for-2019.html>> (last accessed 25 June 2023).

16 Kampala Convention, preamble. FM Deng and R Adeola “The normative influence of the UN Guiding Principles on the Kampala Convention in the protection of internally displaced persons in Africa” (2021) 65/S1 *Journal of African Law* 59.

17 Abebe *The Emerging Law*, above at note 12; W Kidane “Managing forced displacement by law in Africa: The role of the new African Union IDPS convention” (2011) 44/1 *Vanderbilt Journal of Transnational Law* 1.

18 Kidane, *ibid.* S Ojeda “The Kampala Convention on internally displaced persons: Some international humanitarian law aspects” (2010) 29/3 *Refugee Survey Quarterly* 58.

Adopting the Kampala Convention in 2009 was a welcome move but only a first step, considering the complexities associated with internal displacement and the need for effective enforcement of the convention.¹⁹ The convention's provisions are framed as duties of state and non-state actors, thus raising enforcement issues with the actions and inactions of these duty-bearers in fulfilling their obligations. Despite the convention's legal significance, effective enforcement remains a challenge. The key judicial body established by the convention, the African Court of Justice and Human Rights (African Court), is yet to exist. The convention provides a cocktail of judicial and non-judicial enforcement mechanisms that principally impose responsibility on state parties. Compliance with the convention is monitored by the Conference of States Parties (CSP)²⁰ whose mandate and mode of operation are not specified. The lack of specificity in the CSP's mandate denies its enforcement powers any robustness. Emerging disputes among state parties on the interpretation and application of the Kampala Convention are to be settled first through direct consultation between the parties, before a referral to the African Court if an amicable settlement is not reached.²¹ However, due to the territorial nature of internal displacement matters, it is hardly conceivable how disputes will arise among state parties that induce one state to bring an action against another in the African Court. Instead, it is more likely for private actors, such as individuals and non-governmental organizations (NGOs), to institute actions against defaulting states. Yet, the convention's enforcement architecture does not provide for private litigants. There is also a track record of backlog and late state reporting to the African Commission on Human and Peoples' Rights (ACHPR) under article 62 of the African Charter on Human and Peoples' Rights (African Charter), which stifles effective compliance monitoring.²²

This enforcement challenge is not a new phenomenon in international law. Scholars have suggested that one reason for it is the lack of enforceable procedures that makes international law heavily reliant on the goodwill of states (due to the principle of sovereignty), hence it not being considered "real" law.²³ Some scholars also argue that states, which are often the primary actors in international law, are sometimes complicit in breaches and violations, leading to partially functioning enforcement.²⁴ In some cases, states are not sufficiently incentivized to compel other states to comply with the law.²⁵ These reasons render the enforcement impasse in international law expected. Nonetheless, the value of exploring more effective ways to enforce international instruments, given their potential for impact, cannot be underestimated. This is why this article critically assesses enforcement options in the Kampala Convention to determine what is workable. It is necessary to enforce state obligations in the Kampala Convention to realize the convention's objectives, including increased state accountability for internal displacement. Enforcement will also contribute to effective implementation and practical gains for IDPs.

Against this background, this article determines which of the enforcement mechanisms provided in the Kampala Convention has the best potential in practice to protect and advance durable solutions for IDPs in Africa.²⁶ The study is anchored in a critical doctrinal analysis focusing on

19 In this article, "enforcement" means compelling compliance or obedience with the law. It uses enforcement broadly to comprise a wide spectrum of mechanisms for compelling obedience. ME O'Connell "Enforcement and the success of international environmental law" (1995) 4/3 *Indiana Journal of Global Legal Studies* 47; J Brunnée "Enforcement mechanisms in international law and international environmental law" (2005) 1 *Environmental Law Network International Review* 1.

20 Kampala Convention, art 14.

21 *Id.*, art 22.

22 See the detailed discussion below.

23 EK Proukaki *The Problem of Enforcement in International Law: Countermeasures, The Non-Injured State and the Idea of International Community* (2010, Routledge).

24 J Trahan "Reflections on the difficulties of enforcing international justice" (2009) 30/4 *University of Pennsylvania Journal of International Law* 1187; HH Koh "How is international human rights law enforced?" (1998) 74/3 *Indiana Law Journal* 1397.

25 Trahan, *ibid* and Koh, *ibid*.

26 The discussions in this article are limited to the regional mechanisms specified in the Kampala Convention. The role of other regional, sub-regional and national bodies not mentioned in the convention is beyond the scope of the article.

international legal documents, existing literature and other legal sources. Although extensive work has examined various issues of internal displacement in Africa in the past decade,²⁷ there is not much research from an enforcement perspective. This study adds to the limited research in that area. The findings of this study offer workable options for enforcing the Kampala Convention to ensure adequate protection for IDPs in Africa.

The next section of this article discusses the journey leading to the adoption of the Kampala Convention. National, regional and international efforts made before the Kampala Convention are considered to put later discussions on the convention into proper perspective. The core of the article follows, with a critical examination of the convention's enforcement architecture that identifies flaws. The final section concludes with recommendations.

Regulating the exodus within borders: From guiding principles to binding laws

In Africa, the journey towards transforming the GPs to binding laws began in 2004 when six African states²⁸ proposed that the OAU Refugee Convention should be amended to provide for IDPs. This proposal was opposed because including IDPs in the OAU Refugee Convention would drastically lower the benchmark for refugee protection in that convention. Instead, there was a counterproposal for a specific instrument to regulate IDPs.²⁹ The idea of an international instrument specific to IDPs was accepted, leading to a series of meetings that eventually resulted in the Kampala Convention.

The guiding principles on internal displacement

Before the introduction of the GPs, there were laws that addressed protecting and assisting the internally displaced. However, these laws were flawed by not fully addressing the discrimination, hardship and deprivation that IDPs suffer.³⁰ The GPs were prepared as a normative charter to remedy these deficiencies.³¹

The GPs cover the entire internal displacement cycle: protection, assistance and durable solutions. The GPs identify rights and guarantee the protection of persons from forced displacement,³² protect and assist persons during displacement,³³ and secure sheltered return, resettlement and reintegration after displacement.³⁴ They also protect from diverse forms of arbitrary displacement, including displacement due to armed conflict, practices based on divisive policies, violence, disasters and large-scale development projects.³⁵ This diversity is captured in the GPs' definition of IDPs.³⁶

27 See, for example, Abebe *The Emerging Law*, above at note 12; Okello "In lieu of a travaux préparatoires", above at note 15; Ojeda "The Kampala Convention", above at note 18; Kidane "Managing forced displacement", above at note 17; C Beyani "Recent developments: The elaboration of a legal framework for the protection of internally displaced persons in Africa" (2006) 50/2 *Journal of African Law* 187; Abebe "The African Convention", above at note 15; R Adeola "The Kampala Convention and the protection of persons internally displaced by harmful practices" (2021) 65/S1 *Journal of African Law* 101.

28 Botswana, Zambia, Uganda, Sierra Leone, Namibia and Liberia. Abebe "The African Convention", above at note 15.

29 Okello "In lieu of a travaux préparatoires", above at note 15.

30 "Introductory note to the Guiding Principles by the representative of the secretary-general on internally displaced persons, Mr Francis M Deng". Existing laws included provisions in the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and other international covenants relevant to protecting IDPs. See more on such laws in the "Compilation and analysis of legal norms", above at note 13.

31 Beyani "Recent developments", above at note 27.

32 The 1998 UN Guiding Principles on Internal Displacement, sec II.

33 *Id.*, sec III.

34 *Id.*, para 1.

35 *Id.*, principle 6(2).

36 *Id.*, principle 1(1).

States are the primary duty-bearers in internal displacement matters. The state is responsible for protecting and assisting IDPs within its jurisdiction.³⁷ National authorities are urged to explore all possible alternatives to avoid displacement.³⁸ These authorities have a specific duty to protect from displacement indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on or attachment to their lands.³⁹ However, where preventing displacement is not feasible, the national authorities must minimize displacement and its adverse effects.⁴⁰ IDPs' rights to life, dignity, liberty and security are not to be violated during displacement.⁴¹ State authorities are also responsible for ensuring that IDPs return safely to their homes or voluntarily resettle in another part of the state and that all returned or resettled IDPs are appropriately reintegrated into society.⁴²

Notwithstanding the remarkable influence of the GPs, they were not intended to have binding force. The principles were intended to serve as a model for applying universal rights to IDPs and as a benchmark for assisting states in their international responsibilities.⁴³ Some African states initially resisted recognizing the GPs because they considered the principles to be a product of the UN Secretariat, which needed to reflect more state inputs.⁴⁴ Eventually, however, all African states acknowledged the GPs. Nevertheless, concerns about internal displacement in Africa and the absence of specific binding laws led to the development of national and regional laws, and the subsequent adoption of the Kampala Convention.⁴⁵

National and regional initiatives before the Kampala Convention

African states have been among the first to enact national laws and policies on internal displacement. Before the adoption of the Kampala Convention, there were pockets of legal frameworks for regulating displaced populations at domestic and regional levels. This legislation included laws in Africa that were based on the GPs. In 2000, Angola became the first African country to develop national laws to protect IDPs based on the GPs. Burundi followed in 2001, Sierra Leone in 2002, Liberia and Uganda in 2004, Sudan in 2009, Kenya in 2012 and Somalia in 2014.⁴⁶ Other African states, including Mali, Nigeria, the Central African Republic and the DRC, are developing normative frameworks on internal displacement. Different African states have used various approaches to address internal displacement. Some, such as Angola and Liberia, have only adopted laws that address displacement or specific phases of displacement; some, such as Zambia, Burundi, Somalia and Uganda, have only adopted policies that speak to internal displacement. Some, such as Sudan, have both laws and policies on internal displacement; while other states such as Kenya have enacted laws on internal displacement and are developing supporting policies.⁴⁷

At the sub-regional level, legislative initiatives led to the signing of the Pact on Security, Stability and Development in the Great Lakes Region⁴⁸ in December 2006, which entered into force in June 2008. The Great Lakes Protocols were the first sub-regional binding legal instruments

37 Id, principle 3.

38 Id, principle 7(1).

39 Id, principle 9.

40 Id, principle 7(1).

41 Id, principle 8.

42 Id, principle 28.

43 *Making the Kampala Convention Work*, above at note 8.

44 Okello "In lieu of a travaux préparatoires", above at note 15.

45 See Abebe *The Emerging Law*, above at note 12 for more on the background to the Kampala Convention.

46 *Making the Kampala Convention Work*, above at note 8. "Regulatory frameworks on internal displacement: Global, regional and national developments" (November 2016, UNHCR, IDMC and NRC), available at: <<http://www.internal-displacement.org/sites/default/files/publications/documents/UNHCR-GPC-Reg-Framework-IDP.pdf>> (last accessed 17 July 2023).

47 "Regulatory Frameworks", *ibid*.

48 The Great Lakes region comprises 12 African countries: Central African Republic, Congo, DRC, Burundi, Angola, Zambia, Tanzania, Rwanda, Kenya, Uganda, Sudan and South Sudan.

on IDPs.⁴⁹ Two of the ten protocols linked to the pact are related to internal displacement: Protocol on the Protection and Assistance to Internally Displaced Persons (IDP Protocol) and Protocol on the Property Rights of Returning Populations. The IDP Protocol was the first multilateral instrument in the world that required member states to adopt and implement the GPs to protect IDPs. The IDP Protocol also obligated members to integrate the GPs into national legislation.⁵⁰

The Kampala Convention

As a binding international instrument on internal displacement, the Kampala Convention is the first of its kind globally. 40 of the 55 African states have signed the convention, while 28 have ratified it.⁵¹ Somalia was the most recent state to deposit its ratification with the AU in March 2020.⁵² In December 2018, Niger became the first country to incorporate the Kampala Convention into national legislation:⁵³ a move consistent with article 3(2) of the convention, which urges state parties to incorporate it into domestic law. The convention also requires state parties to designate an authority where necessary to coordinate all activities to protect and assist IDPs, and to work together with other relevant international organizations, agencies or civil society organizations (CSOs).⁵⁴

The AU did not only adopt the Kampala Convention at its special summit in 2009; it also adopted the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (Kampala Declaration) and the Recommendations of the African Union Ministers in Charge of Forced Displacement Matters (Ministers' Recommendations). Neither of these two supplementary documents has a binding effect. The two documents are more or less an African version of the GPs as they signify the official stance of African states on internal displacement and guide African states to navigate internal displacement issues regardless of whether they have ratified the Kampala Convention.⁵⁵

The Kampala Convention also draws substantially on the GPs. For example, it replicates the definition of IDPs in the GPs.⁵⁶ The definition in the Kampala Convention is broadly constructed so that it is not limited to citizens but also includes foreigners who are displaced in the country of their habitual residence. While non-nationals enjoy the protection of their rights under the Kampala Convention, the enjoyment of certain rights, such as the right to vote, applies to citizens only.⁵⁷ The categories of arbitrary displacement in the Kampala Convention are consistent with those in the GPs.⁵⁸

In addition to establishing a legal framework for preventing, protecting and assisting IDPs in Africa, the Kampala Convention imposes responsibilities on state parties to prevent internal displacement and protect and assist their displaced populations. It also sets out the roles and obligations of other stakeholders, including non-state actors such as CSOs, armed groups, international organizations and the AU.⁵⁹

The obligation for states to protect from internal displacement involves developing and implementing early warning systems in potential displacement areas, disaster risk reduction strategies

49 Abebe *The Emerging Law*, above at note 12 at 86.

50 Ibid. *Making the Kampala Convention Work*, above at note 8. See more on the background and content of the Great Lakes Protocols in Beyani "Recent developments", above at note 27.

51 "List of countries", above at note 15.

52 Ibid. In January 2020, Mozambique deposited its ratification, while Ethiopia ratified it in February 2020.

53 "Niger becomes first African country to adopt national law for protection and assistance of internally displaced people" (UNHCR press release, 7 December 2018), available at: <<https://www.unhcr.org/afr/news/press/2018/12/5c0a29eb4/niger-beomces-first-african-country-to-adopt-national-law-for-protection.html>> (last accessed 25 June 2023).

54 Kampala Convention, art 3(2)(b).

55 AU Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, 2009. See R Adeola "The African Union model law on internally displaced persons: A critique" in O Shyllon (ed) *Model Law on Access to Information for Africa and Other Regional Instruments: Soft Law and Human Rights in Africa* (2018, PULP) 234.

56 Kampala Convention, art 1(k).

57 *Making the Kampala Convention Work*, above at note 8. Kampala Convention, art 9(2)(1).

58 Id, art 4(4).

59 Id, arts 2, 6, 7 and 8.

and other measures necessary for managing disasters and providing immediate protection and assistance to IDPs in emergencies.⁶⁰ States are also to use the law to protect from internal displacement by enacting laws that sanction engagement in arbitrary acts of displacement amounting to genocide, war crimes and crimes against humanity.⁶¹ State parties may join forces with international organizations, humanitarian agencies or CSOs where necessary to fulfil this obligation.⁶²

State parties are responsible for ensuring there is no discrimination in the provision of protection and humanitarian assistance to IDPs.⁶³ In executing this responsibility, state parties are to cooperate where a concerned state party or the CSP calls for it.⁶⁴ Collaboration with relevant international agencies is also necessary to enable state parties to assess or facilitate the assessment of the needs and vulnerabilities of IDPs and host communities,⁶⁵ and to provide sufficient protection and assistance to IDPs where the state's available resources are inadequate.⁶⁶ State parties shall organize humanitarian and impartial relief action, and allow the swift and unimpeded passage of all relief consignments, equipment and personnel to IDPs.⁶⁷ State parties shall respect the rights of IDPs peacefully to request protection and assistance.⁶⁸ It is also the responsibility of state parties to ensure that armed groups comply with their obligation not to violate IDPs' rights under any circumstances.⁶⁹

During internal displacement, state parties owe a duty to IDPs to protect their rights irrespective of the cause of their displacement.⁷⁰ Their duty is two-fold: positive (where state parties offer IDPs services) and negative (where state parties refrain from carrying out certain activities against IDPs). State parties execute their negative duties by refraining from or preventing, *inter alia*: discrimination based on a person's internal displacement status; genocide, crimes against humanity, war crimes and other violations of international humanitarian law against IDPs; arbitrary killing, detention and abduction; sexual and gender-based violence; and starvation.⁷¹

State parties' positive duties include providing safety and security to IDPs, as well as humanitarian assistance, including food, water, shelter, medical and health care services, sanitation and education.⁷² They are also to provide special protection to IDPs with special needs, including separated and unaccompanied children, expectant mothers, the elderly, female heads of households, mothers with young children and persons with disabilities or communicable diseases.⁷³ State parties are to guarantee IDPs' freedom of movement and choice of residence unless the restriction is necessary and justified.⁷⁴ The Kampala Convention mandates state parties to create mechanisms that will: facilitate tracing and reuniting separated families during displacement; protect individual, collective and cultural property that is left behind within their jurisdiction by IDPs; guard against environmental degradation of areas where IDPs are located; and allow IDPs to participate in decisions relating to their protection and assistance.⁷⁵

60 *Id.*, art 4(2).

61 *Id.*, art 4(6).

62 *Id.*, art 4(3).

63 *Id.*, art 5(1).

64 *Id.*, art 5(2).

65 *Id.*, art 5(5).

66 *Id.*, art 5(6).

67 *Id.*, art 5(7) and (10).

68 *Id.*, art 5(9).

69 *Id.*, art 7.

70 *Id.*, art 9(1).

71 *Ibid.*

72 *Id.*, art 9.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

Ultimately, state parties must provide durable solutions to internal displacement by providing suitable conditions for the sustainable return, local integration or relocation of IDPs.⁷⁶ State parties are to consult IDPs in providing a solution; IDPs should be aware of their options and be allowed to decide whether to return, integrate or relocate.⁷⁷ State parties are to provide effective compensation to persons affected by displacement.⁷⁸ There is a need for state parties to establish dispute-resolving mechanisms to handle disputes relating to IDPs' property. Where necessary, state parties are to cooperate with the AU and other international organizations or humanitarian agencies to provide durable solutions.⁷⁹

Without doubt, the Kampala Convention commits to providing lasting solutions to internal displacement by making state parties primarily responsible. In all cases of internal displacement, state parties are to uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors.⁸⁰ Judging by the gravity of internal displacement on the continent and the enormity of state parties' obligations under the Kampala Convention, a robust enforcement structure is crucial to the effective administration of state compliance. This article now examines the enforcement architecture of the Kampala Convention.

The enforcement architecture of the Kampala Convention

The Kampala Convention will only be effective if it is adequately enforced. The inherent compelling power in the convention can be triggered to hold state parties accountable through proper enforcement. Effective enforcement is a bridge between the promising provisions of the convention and their efficient implementation. It is necessary to assess the enforcement architecture of the Kampala Convention to bridge that gap. There is a blend of judicial and non-judicial enforcement mechanisms under the Kampala Convention. State parties are the target of these mechanisms. The enforcement mechanisms under the convention are not flawless. This part of the article, therefore, evaluates the enforcement structures under the Kampala Convention, identifies deficiencies and recommends ways to rectify them.

Non-judicial enforcement mechanisms

Article 14 of the Kampala Convention provides for three forms of non-judicial enforcement mechanisms: the CSP; biennial state reporting to the ACHPR; and the African Peer Review Mechanism (APRM). Below is an appraisal of these enforcement mechanisms and an assessment of their impact on alleviating the internal displacement crisis.

Conference of States Parties

Under the Kampala Convention, the CSP is tasked with monitoring state parties' compliance with the convention's provisions.⁸¹ The CSP is intended to serve as the umbrella under which state parties to the convention enhance their capacity for cooperation and mutual support. The AU convenes and facilitates regular meetings of the CSP.⁸² The CSP also serves as a forum for settling disputes.⁸³ Differences are to be settled by consensus or by a two-thirds majority of state parties present and voting.⁸⁴

76 Id, art 11(1).

77 Id, art 11(2).

78 Id, art 12.

79 Id, art 11.

80 Id, art 5(8).

81 Id, art 14.

82 Ibid.

83 Id, art 22(2).

84 Ibid.

The brevity of the Kampala Convention's provisions on the CSP leaves much to be desired. It is unclear exactly what the scope of its mandate is⁸⁵ and how the CSP is expected to carry out its duty. This uncertainty creates a structural flaw that undermines the successful enforcement of the Kampala Convention.

It has been argued that state parties did not intend to create a binding agency when the CSP was established.⁸⁶ This intention may have been partly influenced by similar apprehension that put off the creation by the UN of a new and specialized agency for IDPs.⁸⁷ The apprehensions are two-fold: first is the duplication of an institutional mandate and its attendant drawbacks, in that assigning responsibility for IDPs to a new agency is inept and likely to lead to marginal enforcement of the binding instrument; and second is the issue of sovereignty, in that creating an independent IDP agency may potentially interfere with domestic matters of sovereign states.⁸⁸

Although these apprehensions are logical, the peculiar nature and gravity of internal displacement in Africa chips away at them. Regarding institutional mandate duplicity, the new agency's mandate could be limited while respecting the sovereignty of state parties. Thus, a new agency could be set up as a specialized independent agency that acts on the authority of an existing agency such as the ACHPR. The ACHPR is recommended because it is one of the agencies that monitors compliance under the Kampala Convention.⁸⁹ Alternatively, future judicial interpretation of the scope of the CSP's mandate could be broadly construed to include delegating its duties to an existing agency to monitor compliance.⁹⁰ As discussed, both arrangements can address concerns about institutional duplication by ensuring a coordinated and thorough compliance monitoring mechanism.

Regarding state sovereignty and potential interference by an independent agency, sovereignty does not lessen a state's international law obligations under the Kampala Convention. Boutros Boutros-Ghali, a former UN secretary-general, believed that absolute and exclusive sovereignty has become extinct due to the mismatch between that ideal and reality.⁹¹ Kofi Annan, Boutros-Ghali's successor, also added that sovereignty should not be used as a barrier to practical actions that seek to address problems that transcend borders or secure human dignity.⁹² A state party to the Kampala Convention should only be able to assert the privilege of sovereignty where its actions are consistent with its responsibilities to protect and assist IDPs. A state party's failure to fulfil its responsibilities under the convention legitimizes all necessary interventions under the convention, whether by a judicial or non-judicial body.

The CSP met for the first time in April 2017, about four years after the Kampala Convention came into force. The first meeting was held in Harare, Zimbabwe, where the CSP adopted the Harare Plan of Action, the first action plan for implementing the Kampala Convention.⁹³ The meeting gave the CSP the first opportunity to engage with matters of implementing the convention and

85 Kidane "Managing forced displacement", above at note 17, arguing that the mandate of the CSP is to monitor the implementation of the "objectives" of the Kampala Convention but not necessarily its provisions.

86 Ibid. See also Cohen and Deng "Exodus within borders", above at note 4.

87 Kidane, *ibid.*

88 Ibid.

89 Kampala Convention, art 14(4). Although the commission's special rapporteur has contributed significantly to promoting and implementing IDPs' rights, this individual agency could be strengthened by expanding it into a body of experts or working group, as has been suggested: Abebe *The Emerging Law*, above at note 12 at 229. As this article suggests, the expanded agency would serve as the specialized independent agency under the commission.

90 Kidane "Managing forced displacement", above at note 17.

91 TG Weiss "Whither international efforts for internally displaced persons" (1999) 36/3 *Journal of Peace Research* 36.

92 Ibid.

93 The Plan of Action had five objectives, including establishing a framework for solidarity, cooperation and promotion of durable solutions between state parties: "Plan of action for the implementation of the Kampala Convention adopted by conference of states parties" (AU press release, 6 April 2017), available at: <<https://au.int/pt/node/32325>> (last accessed 25 June 2023).

protecting IDPs. Apart from the Harare action plan, the meeting also led to other positive outcomes, including recommendations on terms of reference and rules of procedure for the CSP, monitoring compliance and reporting mechanisms. At this first meeting, a bureau for the CSP was also elected, comprising a chairperson, three vice-chairpersons and a rapporteur.⁹⁴ At the time of writing, the CSP is yet to meet again,⁹⁵ and there is no record of it exercising its mandate of monitoring compliance with the Kampala Convention or settling disputes.

Having outlined the current state of the CSP's engagement with internal displacement issues, flaws and possible operational options, this article next considers the second compliance monitoring alternative under the convention.

Biennial state reporting to the African Commission

State party reporting to the ACHPR is the second non-judicial enforcement mechanism under the Kampala Convention. Article 14(4) of the convention provides, “[s]tates [p]arties shall, when presenting their reports under Article 62 of the African Charter on Human and Peoples’ Rights ... indicate the legislative and other measures that have been taken to give effect to this Convention”. Article 62 of the African Charter states, “[e]very state shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effects [sic] to the rights and freedoms recognized and guaranteed by the present Charter”.

The ACHPR was established under article 30 of the African Charter. Article 62 of the African Charter tasks the ACHPR to receive and examine the biennial state reports. The primary purpose of the state reporting system is to create a framework for constructive dialogue between the ACHPR and African states. State reporting has the following benefits: monitoring implementation of the African Charter; assisting with identifying problems and difficulties that states face that obstruct the effective implementation of the African Charter and finding adequate remedies; and sharing information on common experiences, both good and bad, among states.⁹⁶

States are to send their reports to the AU General Secretariat, which informs the ACHPR of their receipt and furnishes the ACHPR with copies. In practice, most states submit their reports directly to the ACHPR.⁹⁷ When the secretariat receives a report, it prepares questions to ask the state's representatives. The questions are not limited to the reports. The questions are forwarded to the state and the ACHPR six weeks before the session at which the report will be reviewed. The state sends a representative to respond to the questions at the session.⁹⁸ The secretariat also contacts the commissioner assigned to the country, who will be the rapporteur to lead the session. The ACHPR sessions are open to all participants, but only the commissioner may ask questions, not limited to those prepared by the secretariat. There is no time limit for presentations by state representatives. After the question and answer session, the rapporteur recaps, before the chairman wraps up the discussion.⁹⁹ After the session, the ACHPR sends a follow-up letter to the relevant state,

94 “1st meeting of the conference of states parties to the Kampala Convention” (AU press release, 3 April 2017), available at: <<https://au.int/en/newsevents/20170403/1st-meeting-conference-states-parties-kampala-convention>> (last accessed 25 June 2023).

95 In 2019, the AU held a continental consultative meeting on the Kampala Convention and decided, inter alia, to schedule a second meeting: “The Kampala Convention: Key recommendations ten years on” (December 2019, International Committee of the Red Cross), available at: <<https://www.icrc.org/en/publication/4415-kampala-convention-key-recommendations-ten-years>> (last accessed 25 June 2023).

96 “State reporting procedures and guidelines” (AU), available at: <<https://achpr.au.int/en/states/reporting-procedures>> (last accessed 17 July 2023).

97 Ibid.

98 A state is not actually required to send a representative under rule 83 of the Rules of Procedure of the African Commission (2010). Where a state does not send a representative, the African Commission will proceed to consider the state's report and deliver its comments: *ibid.*

99 Ibid.

summarizing the review and indicating any questions that were not satisfactorily answered. The state must respond with additional information where necessary by the deadline given by the ACHPR. The ACHPR may forward the reports and comments on the reports to the AU's Assembly of Heads of State (the Assembly).¹⁰⁰

Although all but one African states¹⁰¹ have ratified the African Charter, records show that submission of the biennial state reports is yet to be regular and forthcoming.¹⁰² At the time of writing only two states, Kenya and Eswatini, had submitted their reports.¹⁰³ Six states have submitted no reports to the ACHPR since ratifying the African Charter, including Somalia and South Sudan,¹⁰⁴ which is among the five African states with the heaviest concentrations of new displacement.¹⁰⁵ Thirty states, representing 54.5 per cent, have three or more overdue reports, including Ethiopia and DRC, which were also among the five African states with the highest concentrations of new displacements in 2021.¹⁰⁶ Sixteen states, representing 29.1 per cent, are late by one or two reports. Cape Verde tops the list of defaulting states, with a backlog of 15 reports yet to be submitted.¹⁰⁷

The delay in states submitting reports could be due to the vast scope of the reports, covering all the rights and freedoms guaranteed in the African Charter. Where the ACHPR's task is to review multiple human rights issues concurrently, it is almost impossible to give ample time to each of the human rights concerns. Consequently, matters related to internal displacement may not receive adequate attention among many other human rights issues that the ACHPR considers. From the delays and backlog of states' reports, relying on the ACHPR to monitor state compliance with the Kampala Convention will not yield the desired outcomes. Delays in states submitting their reports, or refusals to submit them, defeat the purpose of monitoring compliance envisioned under the Kampala Convention.

Bearing in mind the poor state reporting culture, biennial state reporting to the ACHPR does not represent a reliable monitoring mechanism that is complementary to the CSP. Also, although the ACHPR special rapporteur on refugees, IDPs and migrants played a key role in the events leading to the Kampala Convention, no specific roles were assigned to the rapporteur in the convention.¹⁰⁸ Thus, neither the ACHPR nor its special rapporteur can efficiently monitor compliance with the Kampala Convention.

African Peer Review Mechanism

The final non-judicial compliance monitoring mechanism under the Kampala Convention is captured as follows: “[s]tates [p]arties shall, when presenting their reports under ... the African Peer Review Mechanism indicate the legislative and other measures that have been taken to give effect to this Convention”.¹⁰⁹ The APRM idea was formed in 2002 and the APRM was established in 2003.¹¹⁰ It is a specialized AU agency set up as part of the implementation strategies of the New Partnership for Africa's Development (NEPAD).¹¹¹ The APRM serves as an instrument for sharing

100 Rules of Procedure of the African Commission, rule 86(2).

101 Morocco has not ratified the African Charter.

102 The ACHPR sends reminders to states that fail to submit periodic reports every three months. It indicates the submission status of each state in its annual report to the Assembly: “State reporting procedures”, above at note 96.

103 “States reporting status” (AU), available at: <<https://achpr.au.int/en/states-reporting-status>> (last accessed 25 June 2023).

104 Ibid. Morocco has not submitted any reports because it has not yet ratified the charter.

105 Ibid.

106 Ibid.

107 Ibid.

108 Abebe *The Emerging Law*, above at note 12. Abebe “The African Convention”, above at note 15.

109 Kampala Convention, art 14(4).

110 “African Peer Review Mechanism (APRM)”, available at: <<https://au.int/en/organs/aprm>> (last accessed 25 June 2023).

111 NEPAD is the most recent endeavour by African leaders to plug Africa into sustainable development and good governance with an alliance of peace, stability and security. The NEPAD project is run by a Heads of State and Government

and exchanging experiences, ideas and best practices, finding shortcomings and evaluating the capacity-building needs of member states. It fosters policies and practices that ultimately lead to political stability, economic progression and integration, and sustainable development.¹¹²

The APRM is a voluntary arrangement by African states that provides a platform for member states to engage in systematic review and assessment in governance and socio-economic development. Member states participate in national dialogues on issues raised and build consensus on the way forward. All three branches of government, the private sector, civil society and the media are self-monitored within the APRM.¹¹³

There are four types of peer review: base review (the first and immediate review for every state that becomes a member of the APRM); periodic review (every four years); requested review (requested by a member state falling outside the mandated review structure); and emergency review (a review commissioned by the African Peer Review (APR) Forum at the early stages of an impending political or economic crisis).¹¹⁴

A peer review is completed in five stages. The first involves initial consultations between the state under review and the APR Secretariat¹¹⁵ based on the Memorandum of Understanding with the APR Forum (MoU) and synopsis of the review process. The state under review provides the APR Secretariat with all necessary documentation, such as laws, treaty ratifications, budgets and development plans to enable the latter to prepare a background assessment document. The state under review also fills out the APR self-assessment questionnaire, collects contributions from civil society, and prepares a draft paper that outlines the state's issues and a National Program of Action (NPoA) indicating the steps and due dates for how the state intends to comply with the codes and standards of the APRM, the AU Charter and UN obligations. The state's review team also drafts a report highlighting the central issues to be determined in the second stage. In the second stage, the review mission visits the state under review to consult critical stakeholders for about three weeks. The third stage involves the APR state review team drafting a report on the state under review. The fourth stage is the peer review, where the APR Forum discusses recommendations with the leaders of the state under review, based on the APR Panel's report on the review team's findings. Finally, the report on the reviewed state is published within six months after peer review and is tabled in sub-regional institutions¹¹⁶ before being made public.¹¹⁷

After peer review, the APR Secretariat follows up on the reviewed state to ensure that any commitments are being realized. Annual progress reports are submitted to the APR Forum. The NPoA is split into short-term, medium-term and long-term goals and is monitored continually by the National Governance Commission / National Governing Council¹¹⁸ or a minor federation of state and non-state representatives.

The diversity of the APRM's peer reviews makes the APRM a desirable agency to monitor compliance with the Kampala Convention. Concerning internal displacement, the base review, for

Implementation Committee, comprising 20 members. Four members are selected from each of the five African sub-regions: East Africa, West Africa, Southern Africa, North Africa and Central Africa: KR Hope Sr "Toward good governance and sustainable development: The African peer review mechanism" (2005) 18/2 *International Journal of Policy, Administration and Institutions* 283.

112 "African Peer Review Mechanism", above at note 110.

113 Ibid. R Kanbur "The African Peer Review Mechanism (APRM): An assessment of concept and design" (2004) 31/2 *Politikon* 157.

114 Ibid. The APR Forum is the highest decision-making body within the APRM. It is a committee of participating heads of state and government.

115 The APR Secretariat provides technical, coordinating and administrative support services.

116 These include the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the AU Peace and Security Council and the Economic, Social and Cultural Council of the AU.

117 "African Peer Review Mechanism", above at note 110.

118 This is one of the APRM's governing bodies, with oversight responsibility relating to implementing the APRM process at the member state level.

example, will be appropriate for ensuring that new state parties are in good standing under the Kampala Convention. Also, the emergency review will be a timely intervention to prevent or manage internal displacement appropriately. The author recommends that base and emergency reviews be incorporated into the modus operandi of the CSP when its mandate is drafted.

Although the structure and operation of the APRM have the potential to address issues of internal displacement effectively, the APRM has had, and continues to have, its limitations. While the APRM recorded 17 successful review reports, it failed to follow up on reviewed states in the first decade of its existence.¹¹⁹ The implication was that most states did not implement their NPoA. The affected states were not confronted with early warnings by the APRM on potential political crises, such as Kenya's electoral violence and xenophobic attacks in South Africa. Between 2013 and 2016, the APRM reviewed no African state. The three-year hiatus was due to several factors, including allegations of financial mismanagement, non-payment of dues by member states and the absence of a permanent chief executive officer.¹²⁰ In 2016, the APRM was revived after the newly appointed chief executive officer launched the "Three Rs" strategic plan for 2016–20, which covered the reinvigoration, restoration and renewal of the APRM. Consequently, the APRM has resumed conducting reviews, yet challenges persist. For example, although states' review reports should be published within six months after peer review, the review reports of Chad, Djibouti and Senegal, all reviewed in January 2017, are yet to be published.¹²¹ Also, periodic reviews, envisioned to be conducted every four years, are yet to materialize. Kenya's second review took place 11 years after the first, and Uganda's took place after nine years.¹²²

Only 38 out of 55 African states have signed the MoU.¹²³ The remaining 17 states are, therefore, not subject to review by the APRM. The implication is that the APRM cannot intervene in internal displacement matters in those 17 non-member countries, even if they are parties to the Kampala Convention. It is quite unsettling to note that, out of these 17 non-member countries, three are among the five states in sub-Saharan Africa with the highest number of new displacements: DRC, South Sudan and Somalia.¹²⁴ New displacements in these three non-member countries were about 4.4 million, representing 40.4 per cent of all new displacements in sub-Saharan Africa in 2020.¹²⁵ This statistic further limits the promising potential of the APRM as an effective compliance monitoring tool under the Kampala Convention.

Additionally, the broad scope of matters that the APRM reviews makes its ability to assess state parties' internal displacement obligations questionable in respect of rigour and quality. Again, the four-year interval between periodic reviews is rather long, considering that internal displacement matters are usually time-bound. However, since the APRM is currently grappling with expediting periodic review, reducing the four-year interval may be best reserved for the long term. In the interim, the emergency review mechanism can handle any internal displacement crisis between periodic reviews.

Summary

This section of the article has examined the non-judicial enforcement mechanisms under the Kampala Convention by looking at their structure, merits and demerits and how they engage, have engaged and could engage better with addressing internal displacement issues. The discussion revealed that the CSP (the central monitoring agency of the Kampala Convention) has no specified

119 S Grudz and Y Turianskyi "The African Peer Review Mechanism at 15: Achievements and aspirations" (2018) *SAIIA Policy Briefing* 170.

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*

123 "African Peer Review Mechanism", above at note 110.

124 "GRID 2022", above at note 1 at 29.

125 *Ibid.*

mandate or specific means for carrying out its mandate; its *modus operandi* is currently speculative. The CSP has only met once since its creation and is yet to function to protect IDPs actively. The scope of biennial state reporting to the ACHPR is spread too thinly. Thus, little attention may be given to internal displacement. Also, the ACHPR's success depends on states submitting their reports on time, but the records show that most states frequently falter, impeding the work of the African Commission. While the Kampala Convention only makes a single cursory mention of the ACHPR special rapporteur, whose mandate includes IDPs, it is silent on the rapporteur's role. The APRM, although a promising mechanism, is also limited in terms of the number of signatory states, overarching mandate and poor follow-up practices.

These limitations point back to this article's central research question: of the (non-judicial) enforcement mechanisms available, which has the best potential in practice to work to protect and advance durable solutions for IDPs in Africa? There is no simple answer. Reflecting on the pros and cons of each of the three mechanisms reveals that durable solutions for IDPs will be better advanced if the CSP accelerates its preparations to set up a clearly defined mandate, roles and *modus operandi*. Also, a specialized agency will enhance compliance more than a generalized one.¹²⁶ This article now evaluates the judicial enforcement mechanisms under the Kampala Convention.

Judicial enforcement mechanisms

Article 22(1) of the Kampala Convention states, “[a]ny dispute or differences arising between the States Parties with regard to the interpretation or application of this Convention shall be settled amicably through direct consultations between the States Parties concerned. *In 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 [(African Court)]*”.¹²⁷ While the Kampala Convention allows for judicial enforcement, the African Court is not the first resort. However, it is subject to a failed amicable settlement between state parties, even for cases involving interpretation of the Kampala Convention.

The African Court is a continental court established on 1 July 2008 when the Protocol on the Statute of the African Court of Justice and Human Rights (2008 Protocol) was adopted.¹²⁸ In June 2014, the 2008 Protocol was amended. The amended protocol (Malabo Protocol) changed the name of the African Court of Justice and Human Rights to the African Court of Justice and Human and Peoples' Rights. Some of the amendments in the Malabo Protocol substantively affect the enforcement of the Kampala Convention. These are discussed below.

The African Court

The African Court is a merger of the African Court of Justice and the African Court of Human and Peoples' Rights.¹²⁹ It is not yet operative because the 2008 Protocol is yet to secure the required deposit of ratification instruments by 15 member states.¹³⁰ By the end of 2022, 13 years after its adoption, 33 out of 55 African states had signed the 2008 Protocol. However, only eight had ratified and deposited it: Libya in June 2009, Mali in August 2009, Burkina Faso in August 2010, Benin in July 2012, Congo in August 2012, Liberia in March 2017, Gambia in February 2019 and Angola in May 2020.¹³¹

126 See the discussion on specialized agency under CSP above. The anticipated AU Humanitarian Agency could also play the role of the proposed specialized agency.

127 Emphasis added.

128 The 2008 Protocol is available at: <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>> (last accessed 25 June 2023).

129 2008 Protocol, art 1.

130 Id, art 9.

131 These deposit dates differ slightly from the ratification dates: Libya in May 2009, Mali in August 2009, Burkina Faso in June 2010, Congo in December 2011, Benin in June 2012, Liberia in February 2014, Gambia in July 2018 and Angola in February 2020: “List of countries”, above at note 15.

The slow rate at which the Protocol of the Court of Justice of the African Union (2003 Protocol)¹³² entered into force, and past failures of other treaties to enter into force, makes the uncertainty about when the African Court will start operating disquieting. The African Court of Justice (ACJ) was to become operational one month after the 15th ratification of the 2003 Protocol.¹³³ However, it took five years for the 15th country, Algeria, to ratify the 2003 Protocol in January 2008, by which time the ACJ had become defunct as the 2008 Protocol had been adopted.¹³⁴ Therefore, the ACJ never became a reality. Over the 50 years since the AU came into existence, about ten conventions have been adopted but not entered into force because they did not attain the minimum number of ratifications required.¹³⁵ It is, therefore, not surprising that, to remedy incidents of failed conventions, the AU instituted an annual signing week in December, which prioritized signing the 2008 Protocol.¹³⁶

Initially, the African Court was structured with two sections: a General Affairs section to hear all international law disputes except human rights issues; and a Human and Peoples' Rights section to hear human rights matters.¹³⁷ The Malabo Protocol introduced a third section on International Criminal Law,¹³⁸ to hear all international crime cases.¹³⁹ Internal displacement matters must be submitted to the Human and Peoples' Rights section of the African Court.

Locus Standi before the African Court

Under the Kampala Convention, only states have *locus standi* [the right to initiate legal proceedings] on internal displacement issues before the African Court, which is understandable because of the nationalized nature of internal displacement.¹⁴⁰ Similarly, the 2008 Protocol makes state parties one of the entities eligible to submit cases to the African Court.¹⁴¹ Thus, even if the Kampala Convention had not made states eligible entities before the court, the 2008 Protocol would have catered for that. However, there is a slight difference in state parties' eligibility in both instruments, as discussed below.

Although the "state versus state" litigation structure under the Kampala Convention may be theoretically sound, there is a glitch in practice. In cross-border displacements, state parties have never referred disputes on interpreting and applying the Refugee Convention and its protocol to the International Court of Justice.¹⁴² Thus, based on the territorial nature of internal displacement, it is unlikely that a state party, state A, will submit a case against another state party, state B, for failing to protect and assist IDPs within state B's territory. Instead, it is more likely that private actors, particularly individuals and NGOs, will institute actions against defaulting states.

Whereas the Kampala Convention is silent on the *locus standi* of private actors, there is a way out of this legal and procedural cul-de-sac. The African Court has jurisdiction in the interpretation,

132 The 2003 Protocol is one of the two merged statutes that created the 2008 Protocol.

133 2003 Protocol, art 60.

134 GJ Naldi and KD Magliveras "The African Court of Justice and Human Rights: A judicial curate's egg" (2012) 9 *International Organizations Law Review* 383.

135 Ibid. For example, the African Maritime Transport Charter of 1994 has yet to enter into force, although it was revised in 2010.

136 Executive Council Decision on the Status of Signature and Ratification of OAU/AU Treaties (EX.CL/Dec.495 (XV)), para 3. Executive Council Decision on the Status of Signature and Ratification of OAU/AU Treaties (EX.CL/Dec.705 (XXI)), para 8.

137 2008 protocol, arts 16 and 17.

138 The section is subdivided into: a pre-trial chamber, a trial chamber and an appellate chamber.

139 2008 protocol, arts 16, 17 and 28A.

140 Kampala Convention, art 22(1).

141 2008 protocol, art 29(1)(a).

142 A Skordas "The missing link in migration governance: An advisory opinion by the International Court of Justice" (11 May 2018) *EJIL: Talk*, available at: <<https://www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/>> (last accessed 17 July 2023).

application and validity of all legal instruments adopted within the AU framework and other human rights instruments ratified by the state parties concerned,¹⁴³ including the Kampala Convention. Therefore, entities eligible to submit cases under articles 29 and 30 of the 2008 Protocol may pursue an action under the Kampala Convention. The eligible entities are: state parties to the 2008 protocol; the Assembly, Parliament and other AU organs authorized by the Assembly; a staff member of the AU on appeal, in a dispute and within limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union; the ACHPR; the African Committee of Experts on the Rights and Welfare of the Child; African intergovernmental organizations accredited to the AU or its organs; African national human rights institutions; and individuals or relevant NGOs accredited to the AU or its organs, subject to the provisions of article 8 of the 2008 Protocol.¹⁴⁴ The Malabo Protocol expanded the list of eligible entities to include the AU's Peace and Security Council and the Office of the Prosecutor.¹⁴⁵ Consequently, the 2008 Protocol provides a window for individuals and relevant NGOs to refer disputes under the Kampala Convention, but their eligibility is limited.

The 2008 Protocol limits eligible states in a way that will create an impasse once it enters into force. While state parties to the Kampala Convention may settle disputes in the African Court,¹⁴⁶ only state parties to the 2008 Protocol are eligible to submit cases to the African Court. Accordingly, a state party that has ratified the Kampala Convention would have to ratify the 2008 Protocol before bringing a case before the African Court. To put it differently, once 15 countries ratify the 2008 Protocol, the African Court will have jurisdiction over only those 15 states. To get around this impasse, some alternatives may be considered. First, the Kampala Convention could be amended to require state parties that ratify the convention to accede to the African Court under the 2008 Protocol concurrently or within a specified period. A second alternative would be to amend the 2008 Protocol to expand eligible state parties to include signatories to the specific instrument(s) under which an action is brought before the African Court, as opposed to the existing eligibility that only covers signatory states to the protocol. Naldi and Magliveras recommend amending the 2008 Protocol so that the African Court will automatically have jurisdiction over all AU member states, since the court is intended to be the principal judicial body of the union.¹⁴⁷ They further propose that, to enforce this automatic jurisdiction, state parties that withdraw from the African Court's jurisdiction would automatically lose their AU membership.¹⁴⁸ These proposals, although theoretical, offer viable solutions to the imminent challenge that the 2008 Protocol will introduce when it enters into force.

Of the private actors mentioned in the 2008 Protocol, individuals and NGOs face the most restrictions. Initially, the 2008 Protocol considered individuals and NGOs accredited to the AU or its organs to be eligible entities so they could bring cases under the Kampala Convention to the African Court. However, individuals and NGOs face tighter restraints under the Malabo Protocol. Article 16 of the Malabo Protocol has amended article 30(f) of the 2008 Protocol as follows: "... *African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only about a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly.* The Court shall not receive any case or application involving a State Party which has not made

143 2008 Protocol, art 28.

144 *Id.*, arts 29 and 30.

145 Malabo Protocol, art 15.

146 Kampala Convention, art 22.

147 Naldi and Magliveras "The African Court of Justice", above at note 134.

148 *Ibid.* Naldi and Magliveras make this submission on the assumption that AU member states will be hesitant to lose their membership for fear of a hostile response both nationally and internationally. Alternatively, Naldi and Magliveras suggest that the automatic jurisdiction could be timebound so that member states can opt out after a certain period.

a Declaration per Article 9(3) of this Protocol".¹⁴⁹ By changing "individuals" to "African individuals" and "NGOs" to "African NGOs", the Malabo Protocol has excluded internally displaced foreigners in their resident country and foreign NGOs that may be well-resourced to assist individuals in instituting actions. Thus, while the Kampala Convention broadly applies to all IDPs regardless of their citizenship, the Malabo Protocol is limited to Africans. Even for African individuals and NGOs, another layer of restriction leads to further exclusion: persons whose country of citizenship has not made a declaration accepting the competence of the African Court to receive such cases are not eligible entities. Relying on the 2008 and Malabo Protocols to give individuals *locus standi* before the African Court is restrictive. Therefore, the Kampala Convention needs to be amended to include individuals and NGOs as eligible entities without the "Africanized" restriction as in the Malabo Protocol. The Malabo Protocol should also be amended to remove similar restrictions.

Summary

Despite the African Court's indeterminate status, the AU again set the pace by creating the first-ever internationalized court, which is not comparable to any other judicial body in a universal or regional organization.¹⁵⁰ The African Court has jurisdiction in human rights matters, international law disputes and international crimes in separate sections with different sets of judges sitting on corresponding cases.¹⁵¹ While the entry into force of this pan-African judicial body hangs in the balance, violations of IDPs' rights may be sent to the African Court on Human and Peoples' Rights (Human Rights Court), which has been operating actively. It came as no surprise, therefore, when in January 2009 the AU Executive Council encouraged member states to continue ratifying the 1998 Protocol (which set up the Human Rights Court) but was silent about the 2008 Protocol.¹⁵² Subsequently, in 2014, the Malabo Protocol amended the terms of office of the judges of the Human Rights Court such that their term terminates once the 2008 Protocol comes into force and new judges for the African Court have been sworn in.¹⁵³ When that transition occurs, cases pending before the Human Rights Court will be continued at the relevant section of the African Court.¹⁵⁴

This discussion of the enforcement architecture of the Kampala Convention has examined both judicial and non-judicial mechanisms. This article has criticized the various mechanisms, identified flaws and considered possible solutions. The lucid theme is that a robust enforcement structure is necessary to strengthen the sanctity of the Kampala Convention. The article now concludes by highlighting the workable enforcement mechanisms going forward.

The way forward

This article set out to identify which of the enforcement mechanisms provided in the Kampala Convention has the best potential in practice to work to protect and advance durable solutions for IDPs in Africa. In answering this question, the article assessed both judicial and non-judicial enforcement mechanisms specified in the Kampala Convention. While some mechanisms are theoretically sound, they may not be practical in improving durable solutions for IDPs. The following guidelines would help enhance enforcement of the Kampala Convention.

149 Emphasis added.

150 Naldi and Magliveras "The African Court of Justice", above at note 134.

151 Although other international and regional courts, such as the International Court of Justice and European Court of Justice, may entertain human rights issues while other regional human rights courts, such as the Inter-American Court of Human Rights and the European Court of Human Rights, may also handle international law issues, this is parenthetical to their primary scope of competence: Naldi and Magliveras, *ibid*.

152 Executive Council Decision on the Activity Report of the African Court on Human and Peoples' Rights (EX.CL/Dec.483 (XIV)), para 5.

153 Malabo Protocol, art 4.

154 *Id*, art 6.

First, the CSP's mandate and modus operandi should be specified. In outlining its mode of operation, reviews could be incorporated, such as base and emergency reviews under the APRM. The ACHPR and APRM have a wide range of mandates, making it quite impracticable for them to focus effectively on internal displacement, among other human rights issues. A specialized body to handle internal displacement issues, such as the CSP or an agent of the CSP, would better advance the Kampala Convention's objectives.

Secondly, the African Court should have exclusive jurisdiction in interpreting the Kampala Convention, instead of the current arrangement that allows disputing parties to self-interpret. Conferring exclusive jurisdiction in interpretation on the African Court would promote certainty of the law and uniformity in its application, which is key to guaranteeing IDPs' rights.

Thirdly, the following would help prevent states' eligibility from reaching a stalemate when the 2008 Protocol (as amended) becomes operative: amending the Kampala Convention to require state parties that ratify the convention to accede to the African Court either concurrently or within a specified time; or amending the 2008 Protocol to expand the eligibility of states before the African Court to include state parties to the specific instrument(s) under which actions are instituted, not only state parties to the protocol itself. Another viable option is Naldi and Magliveras' recommendation to amend the 2008 Protocol to confer on the African Court automatic jurisdiction over all AU member states, since the court is intended to be the AU's principal judicial body.

Fourthly, the Kampala Convention needs to be amended to make non-state actors, especially individuals and NGOs, eligible litigants. Similarly, eligibility restrictions on individuals and NGOs in the Malabo Protocol should be removed. Fifthly, the AU should vigorously campaign for the speedy ratification of the 2008 and Malabo Protocols to strengthen enforcement of the Kampala Convention.

Apart from the enforcement mechanisms specified in the Kampala Convention, other institutions play complementary enforcement roles, including the Committee on the Rights and Welfare of the Child in Africa, the AU Peace and Security Council and the anticipated AU Humanitarian Agency.¹⁵⁵ Their supporting role was outside the scope of this article and is recommended for further study.

Finally, breathing life into the Kampala Convention relies heavily on domestic interventions, in addition to the measures discussed. The convention recognizes this need by requiring states to promote and strengthen national measures to prevent, mitigate, prohibit and eliminate internal displacement and provide durable solutions to IDPs.¹⁵⁶ These measures include domesticating the convention, designating bodies for coordinating internal displacement activities, providing funds, cooperating with relevant international organizations and CSOs, registering IDPs, simplifying IDPs' property-related dispute procedures, and adopting displacement policies at national and local level.¹⁵⁷ Implementing the recommendations made in this article would contribute substantially to enforcing the Kampala Convention.

Competing interests. None.

155 The AU is in the final stages of creating a humanitarian agency to facilitate humanitarian assistance during conflicts and disasters. See more in "Concept note: African humanitarian agency (AfHA)" (May 2020, AU), available at: <https://au.int/sites/default/files/newsevents/conceptnotes/38500-cn-pa26405_e_original.pdf> (last accessed 25 June 2023).

156 Kampala Convention, art 2(a).

157 *Id.*, art 3(2). Abebe *The Emerging Law*, above at note 12.