

The Kampala Convention and protection from arbitrary displacement

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The Kampala Convention breaks new ground in elevating the right to be protected from arbitrary displacement to a binding legal norm.

A striking feature of the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)¹ is that it goes beyond the scope that its title implies in that it also contains the right to protection from arbitrary displacement. This includes both internal displacement and displacement across international borders. The Convention, whether inadvertently or not, thus complements the 1951 Convention on the Status of Refugees.

Article 1 of the Kampala Convention defines both ‘internal displacement’ and ‘arbitrary displacement’ but these two terms overlap only partially and may differ in nature. Internal displacement, according to the Convention, may be the result either

of arbitrary displacement as defined in Article 4, or of other causes of involuntary movement (for instance, a natural disaster), where the persons remain within internationally recognised state borders. It is then the situation in which such persons find themselves which triggers the application of all other provisions of the Convention, rather than a ‘human right’. Arbitrary displacement, on the other hand, is defined in Article 3 of the Convention in traditional human rights terms, putting the onus on States Parties to refrain from, prohibit and prevent arbitrary displacement of populations, and adding details in respect of causes of such displacement by the state itself or non-state actors.

Article 4 proclaims that “all persons have a right to be protected

against arbitrary displacement”. It requests states to respect their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid conditions that might lead to arbitrary displacement and provides for a continent-wide early warning system.

The prohibited categories of arbitrary displacement include the following:

- displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population
- individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law

- displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict
- displacement caused by generalised violence or violations of human rights
- forced evacuations in cases of natural or human-made disasters or other causes if the evacuations are not required for the safety and health of those affected
- displacement used as a collective punishment.

Article 4 goes on to make special provision for communities with special attachment to, and dependency on, land (such as indigenous people or pastoralists). It concludes by calling on AU Member States to declare acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity offences punishable by law.

The Kampala Convention has been heavily influenced by a 'soft' instrument of international law, namely, the Guiding Principles on Internal Displacement, which are today considered by many as international customary law.² The Kampala Convention follows the same three-phase approach as the Guiding Principles. The first part deals with protection from arbitrary displacement, the second with the rights of the displaced during their displacement and the last with the identification of solutions for the internally displaced.

A comparison between the Kampala Convention and the Guiding Principles as regards the right to be protected from arbitrary displacement reveals a number of differences. The Convention is more specific on individual accountability issues and the accountability of non-state actors, in particular multinational companies and private military or security companies. It has a more analytical approach as regards displacement in the context of armed conflict and also places more emphasis on displacement resulting from the exploitation of economic and natural resources and

development projects. Furthermore, it calls for the establishment of disaster preparedness and management measures to help prevent or mitigate displacement.

In the development of the Guiding Principles, the legal analysis concerning protection from arbitrary displacement³ contained a review of the international legal context, including all principles related to violence and threats affecting life and personal security, discrimination, implantation of settlers, evictions and loss of land and housing, negative impact of development projects, damage to the environment and the obligations of non-state actors. It also included a comprehensive examination of all principles relating to freedom of movement and choice of residence, protection from interference with one's home, the right to housing, the prohibition of forced movements in emergencies including in situations of armed conflict, and the prohibition of genocide.

This legal analysis concluded that an explicit prohibition of arbitrary displacement was contained only in international humanitarian law and in the law relating to indigenous peoples. In human rights law, by contrast, this prohibition was only implicit in various provisions, in particular the right to freedom of movement and choice of residence, freedom from arbitrary interference with one's home and the right to housing. These rights, however, did not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they did not spell out the circumstances under which displacement was permissible. Therefore, the analysis suggested that "it is necessary to define explicitly what is at present inherent in international law – a right to be protected against arbitrary displacement. In particular, this should specify the impermissible grounds and conditions of displacement, and the minimum procedural guarantees that should be complied with should displacement occur." This is what Guiding Principles 5 to 9 set out to do.

In the earliest debates on the question of whether a right not to be

displaced or a right to remain should exist or not, some scholars argued that such a right would provide governments of developed countries weary of refugees with a pretext for increased efforts to contain them in their countries of origin. The Guiding Principles foresaw this and explicitly provided that nothing in them should compromise obligations under international refugee law.

The Kampala Convention has elevated the right to be protected from arbitrary displacement contained in the Guiding Principles to a binding legal norm. While it is only a regional instrument, it is nevertheless indicative that States have recognised this right because there was a legal gap that needed to be filled. International human rights and humanitarian agencies and NGOs have a new advocacy tool to help them address the causes of displacement. Respect for and implementation of this young right would go a long way to reducing refugee flows and internal displacement.

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1. <http://tinyurl.com/KampalaConvention>. See also <http://www.fmreview.org/urban-displacement/FMR34/53-55.pdf>

2. <http://www.idpguidingprinciples.org/>. See also <http://www.fmreview.org/GuidingPrinciples10.htm>

3. <http://tinyurl.com/Arbitrary-displacement-legal>

Making the Kampala Convention work for IDPs

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<http://www.internal-displacement.org/publications/au-guide>