

6 June 2008

Amnesty International

IDP Action

International Federation for Human Rights

Refugees International

Internally Displaced Persons in Africa need a strong Convention

Our organisations call upon the African Union (AU) to revise and swiftly adopt its draft *Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa*.

We believe that the adoption of a legally-binding Convention on the issue of internal displacement would send an important signal to the rest of the world about the seriousness with which Africa, home to around half of the global total of internally displaced persons (IDPs), considers the issue. But important changes first need to be made to the draft to ensure that it can become an effective instrument for protecting and assisting IDPs.

Our detailed analysis of the text has been submitted to the Group of Experts who this week met in Addis Ababa, Ethiopia, to review the latest draft of the Convention. Among the most pressing points that we raise are for the AU to:

- Amend references to displacement stemming from 'lack of development', which would blur the conventional boundary – the element of coercion to the act of moving – between IDPs and internal migrants and at a stroke dramatically multiply the number of those considered as IDPs in Africa. Instead, the Convention should narrow the concept of displacement due to 'lack of development' to cases of displacement caused by discriminatory policies which result in violations of the economic and social rights of particular groups or those living in particular geographic areas.

- Strengthen the Convention's line on non-discrimination throughout the draft and through the addition of a clause specifically asserting the basic principle that IDPs "*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*".

- Outline in more detail the responsibilities of states for monitoring and ensuring adherence to the Convention. States should provide adequate resources to enable implementation of the Convention at national level and submit public reports to the African Commission on Human and Peoples' Rights on the measures they undertake.

Our organisations consider that, as it stands, there are elements of the draft Convention that are vague or inconsistent with other international human rights standards. A legally-binding framework would make a huge difference to the issue of internal displacement, one of the greatest challenges Africa faces, making it all the more important and urgent that the AU and its members act to make the Convention as strong as possible.

Background

There are approximately 12 million IDPs in Africa, of a global total of around 25 million. Unlike refugees, who fall under the protection of international instruments such as the Organisation of African Unity *Convention Governing the Special Aspects of Refugee Problems in Africa* and the United Nations (UN) Convention relating to the Status of Refugees, and who have a specialist UN agency to assist them, there are no comparable standards or mechanisms to safeguard the rights of IDPs. Their own state is often unable or unwilling to assist and protect them and the international community is often unable or unwilling to intervene.

In 2006, the AU initiated a process to adopt a Convention focused specifically on the rights of IDPs. To date a draft text has been discussed among a Group of Experts, drawn from AU member states and including representatives of various UN agencies. From 2-6 June, the Group of Experts met for the final time to review the draft Convention text. After they have submitted their recommendations to the AU, it will be for member states to consider and approve the Convention at a Special Summit scheduled for later this year.

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Les personnes déplacées internes en Afrique ont besoin d'une forte Convention

Nos organisations appellent l'Union africaine à réviser et adopter dans les plus brefs délais le projet de Convention sur la protection et l'assistance des personnes déplacées internes (IDPs) en Afrique.

Elles considèrent que l'adoption d'une Convention contraignante sur la question des personnes déplacées internes est un signal fort adressé au reste du monde et montre combien l'Afrique, qui concentre près de la moitié du nombre total d'IDPs, attache une extrême importance à ce problème. Néanmoins, quelques modifications devraient être apportées au projet aux fins d'assurer une protection et une assistance plus efficace aux IDPs.

Nos organisations ont soumis une analyse détaillée du projet au Groupe d'experts, réuni cette semaine à Addis Abeba, Ethiopie, qui est chargé de revoir une dernière fois le projet de Convention. Parmi les points soulevés les plus importants, nos organisations demandent à l'Union africaine :

- d'amender les références au déplacement dû au "manque de développement", concept trop vague qui rendrait imprécis le champ d'application de la Convention -concernant l'acte de coercition à l'origine du déplacement, ajoutant à la confusion entre les IDPs et les migrants internes, et ainsi augmentant très sensiblement le nombre d'IDPs en Afrique. La Convention devrait cerner le concept de "manque de développement" aux cas de déplacements liés à des politiques discriminatoires portant violation des droits économiques et sociaux de groupes particuliers ou de personnes vivant dans des zones géographiques précises.

- Renforcer l'ensemble du texte de la Convention en matière de non discrimination en ajoutant notamment une disposition spécifique précisant le principe fondamental que "les IDPs jouissent, en toute égalité, des mêmes droits et libertés garantis à tous citoyens par le droit international et national. Ces personnes ne peuvent être, en aucun droit, discriminées, au motif qu'elles sont déplacées internes".

- Préciser les obligations des Etats et les moyens du contrôle du respect de la Convention. Les Etats doivent s'engager à fournir les ressources nécessaires à la mise en oeuvre au niveau national des dispositions de la Convention et à faire rapport à la Commission africaine des droits de l'Homme et des peuples des mesures prises en ce sens.

Nos organisations considèrent, qu'en l'état, le projet de Convention comportent des éléments vagues ou contraires aux instruments internationaux de protection des droits de l'Homme. Considérant l'importance d'un instrument contraignant sur la question des IDPs, un des plus

grand défis auquel fait face l'Afrique, il est essentiel et urgent que l'Union africaine et ses membres agissent pour rendre le texte le plus fort possible.

Contexte

Il y a environ 12 millions de IDPs en Afrique, sur un total estimé à près de 25 millions dans le monde. Contrairement aux réfugiés qui bénéficient d'une protection particulière garantie par des instruments internationaux tels la Convention de l'OUA régissant les aspects propres aux problèmes des réfugiés en Afrique et la Convention des Nations unies sur les réfugiés, et qui ont une agence spécifique des Nations unies pour leur assistance, les IDPs ne disposent pas de mécanismes comparables de protection. Les Etats n'ont souvent ni la capacité ni la volonté de les assister et la communauté internationale n'a souvent ni la capacité, ni la volonté d'intervenir. En 2006, l'Union africaine a initié le processus d'adoption d'une Convention spécifique sur les droits des IDPs. A ce jour, le projet de Convention a été discuté au sein d'un Comité d'experts nommé par les Etats membres et comprenant des représentants de différentes agences des Nations unies. Du 2 au 6 juin 2008, le Groupe d'experts se réunit une ultime fois pour revoir le texte et faire ses recommandations à l'Union africaine. La Convention devrait être adoptée à l'occasion d'un Sommet extraordinaire de l'Union africaine avant la fin de l'année.

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The African Union Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa

NGO commentary

Endorsed by

- Amnesty International
- Fédération Internationale des Droits de l'Homme*
- IDP Action
- Institute for Human Rights and Development in Africa
- Lawyers for Human Rights, South Africa
- Refugees International

Introduction

The decision of the African Union (AU) at a Ministerial Conference held in Burkina Faso in 2006 to initiate a process to develop and adopt a legally-binding framework on the rights of internally displaced persons (IDPs) is one which many international non-governmental organisations (NGOs) applaud¹. An AU Convention on the rights of IDPs would be the first binding international instrument of its kind and would send an important signal to the rest of the world about the seriousness with which Africa, home to around half of the global total of IDPs, considers the issue. The desire for a Convention on the issue of internal displacement was also a key demand of the NGOs meeting at a Forum prior to the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) in Brazzaville in November 2007. In a Resolution on Migration and Human Rights – endorsed by the ACHPR – NGOs recommended to the AU that it “*adopt legally binding instruments for the protection of the rights of migrants, notably a Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa, based on the Guiding Principles on Internal Displacement*”.

Reflecting their support for a legally-binding Convention on the rights of IDPs, a group of international NGOs has together reviewed the draft text and offers the following comments in a spirit of seeking to help make the Convention as effective an instrument as possible for protecting the rights of IDPs.

1. The definition of IDPs

a. displacement as a result of 'large-scale development projects' (article 1g)

In principle, this is a valuable addition to the concept and definition of internal displacement².

¹ See, for example, the public statement, *Tenth anniversary of the Guiding principles on internal displacement: Time for African Union leaders to adopt an AU Convention to protect IDPs*; www.idpaction.org/adopt.php; 11 February 2008.

² Both the World Bank and the Organisation for Economic Cooperation and Development recognise that “*development projects that displace people involuntarily generally give rise to severe economic, social and environmental problems: production systems are dismantled, productive assets and income sources are lost, and people are relocated to environments where their social and productive skills may be less applicable and the competition for resources greater. Involuntary resettlement thus may cause severe long-term hardship, impoverishment and environmental damage unless appropriate measures are carefully planned and carried out*”; World Bank Operational Directive 4.30, June 1990 and Organisation for Economic Cooperation and Development *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects*, 1991.

However any definition of states' obligations related to evictions and displacement associated with development projects – not just those considered 'large-scale' – should be consistent with existing international human rights law and standards, including the prohibition of forced evictions. In this regard, a careful review of these provisions to ensure consistency with the *Basic Principles and Guidelines on Development-Based Evictions* would be important³.

The related articles 4.3 and 8 provide the caveat that displacement as a result of development projects may on occasion be justifiable by a “*compelling and overriding public interest*”. Article 8 does include some key safeguards before a project can be approved, such as the need to “*explore all feasible alternatives to a particular development project in order to avoid displacement altogether*” (article 8.3) and the need to seek “*the free and informed consent of the persons involved, or with their participation through appropriate mechanisms in the decisions and procedures relating to their displacement*” (article 8.2). But the concern is that the definition of a 'compelling and overriding public interest' is unclear and open to interpretation and that elements of article 8 remain inconsistent with existing international law and standards on evictions. The language used in article 8 should ensure that any development projects which could result in displacement are subject to public and parliamentary scrutiny and transparent processes to demonstrate their value, as well as alternatives to displacement being properly explored. Any development-induced evictions would be *necessary* only when carried out in exceptional circumstances and lawfully, including in full accordance with relevant provisions of international human rights and humanitarian law.

Proposal

- the initial definitional article (1g) should refer simply to 'the effects of development projects';
- the caveat about development-induced displacement being justifiable in cases of a 'compelling and overriding public interest' (article 4, as well as article 8) should be clarified by an additional clause that indicates that evictions are to be permitted only in exceptional circumstances and in full accordance with international human rights law and standards;
- article 8 should be reviewed to ensure that it is fully consistent with international law on housing and land rights and the prohibition of forced evictions. In particular, it should reflect the procedural safeguards to prevent forced evictions, the obligations of states to undertake evictions only as consistent with international law and the duty to ensure full and effective remedies and reparation, including adequate resettlement, to those subjected to evictions⁴.

b. displacement due to 'lack of development' (article 1g)

In the absence of a definition or threshold for 'lack of development', this could be taken to mean that many of those moving, for example, from rural areas to cities to seek an improved livelihood would count as IDPs, dramatically multiplying the number considered IDPs in Africa. The conventional boundary between IDPs and internal migrants – the element of coercion to the act of moving – would be blurred by including 'lack of development' within a definition of internal displacement.

It is also questionable whether the act of moving within a country for this reason adds to the responsibilities that states have to respect, protect and fulfil individuals' (economic and social)

³ In 2007, the UN Special Rapporteur on the right to adequate housing, Miloon Kothari, submitted to the Human Rights Council and the General Assembly, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18. The Basic Principles are based on existing international law and standards and clarify human rights obligations related to evictions in the context of development projects.

⁴ For example, states have an obligation to provide at least a comparable standard of living to the situation of those displaced prior to the project that lead to their displacement. Reference in article 8.6 to ensuring that those displaced because of development projects are provided with “*alternative and habitable areas of relocation and residence...*” does not capture this sense of a comparable standard of living and access to resources.

rights. The African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights define states' responsibilities to ensure (the progressive realization of) the right to health, education etc. of their citizens. Where a trigger for displacement such as "*inability to realise economic, social and cultural rights*" (article 4.3h) could be said to apply equally to the whole population, rather than those in a particular geographic location or a particular group among the population, this could not be a trigger for "*arbitrary displacement*". States responsibilities in relation to the economic, social and cultural rights (ESC rights) of its population apply to those who move within the country and those who do not. The act of moving because of 'lack of development' is not triggered by an event or circumstance which results in new responsibilities on states. This is in contrast to situations of violence or natural disaster, for example, where additional obligations (to provide security and humanitarian assistance) arise because of a particular, new event or circumstance.

However, where a lack of development is caused by directly or indirectly discriminatory policies that have the effect of denying or limiting access to ESC rights to part or the whole of the population in a certain geographical area, this could coerce individuals or groups into moving to another part of the country in order to escape the discriminatory policies; in such cases, the individuals or groups should be regarded as IDPs. There is growing recognition in refugee law that violations of ESC rights can constitute serious harm and be the basis of a valid refugee claim. Where the ESC rights of individuals have been violated due to discriminatory policies and they have been forced into displacement as a result, but have not crossed an international border, they may be considered as IDPs.

Proposal

- references to displacement stemming from 'lack of development' should be amended, as they are too general and would apply to many other situations where people migrate internally, but should not be considered to be IDPs. Instead, the Convention should address displacement caused by discriminatory policies resulting in a lack of development and violations of ESC rights of particular groups or those living in particular geographic areas.

2, Objectives and General Obligations

a. the scope of 'arbitrary displacement'

In article 2 – and throughout the draft – references to "*arbitrary displacement*" should be understood to include forced evictions. As the draft stands, the only reference to forced evictions comes in article 9.5, in the specific context of people being expelled from areas where they have settled spontaneously.

Proposal

- an additional clause to the General Obligations (article 3) should reference obligations to prohibit and prevent forced evictions. States' obligations to prohibit arbitrary displacement given in article 4.3 should also include 'displacement caused by forced evictions'.

b. recognition of IDPs' specific needs

Explicit recognition should be made to the fact that the rights and guarantees to which IDPs are entitled emanate from their peculiar vulnerability and special needs.

Proposal

- an additional sentence should be added to article 2.2: "The rights to which IDPs are entitled stem from their peculiar vulnerability and special needs. Except where provided for differently by this Convention, its provisions apply to internal displacement regardless of its causes".

c. anti-discrimination clause

The draft Convention lacks an assertion of the basic principle – which is given in the Guiding Principles – that IDPs “*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*”.

Proposal

- a new first clause of the article on General Obligations should mirror the Guiding Principle text, along the lines of 'States parties undertake to ensure that IDPs shall enjoy, in full equality, the same rights and freedoms....';
- further to this, the Convention's line on non-discrimination could be made stronger and more consistent. The list of grounds for discrimination given in article 3.1.c should be lengthened to bring it into line with Guiding Principle 4, which specify their opposition to “*discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria*”.

3, Non-state actors

The General Obligations in article 3 indicate that states are responsible for preventing non-state actor abuses within their jurisdiction. Articles 8 and 9 add a positive responsibility on non-state actors to themselves fulfil the rights of the displaced in certain instances and situate the role of the state as being to ensure that “*public or private actors*” fulfil certain responsibilities, such as to “*provide alternative and habitable areas of relocation and residence...or to fully compensate them*” (article 8.6) and to “*fulfil the economic, social and cultural rights of persons likely to be displaced by lack of development*” (article 9.2). If it is widely recognized non-state actors have the duty to *respect* human rights, however, it is the primary responsibility of the state to *ensure respect for* and *fulfil* human rights.

There are various instances, such as in article 6.1.3, where the responsibilities of states and non-state actors are treated as equal, with introductory references to “*states, armed groups and other relevant actors shall...*”. Armed groups do have important responsibilities, but these are not the same as those of states (and to treat them as such may serve to lend legitimacy to the activities of armed groups).

Proposal

- apply the formulation given in article 3i and 3j – i.e. that states ensure non-state actors do not act in ways likely to lead to displacement – throughout the rest of the Convention;
- define the responsibilities of armed groups in a separate article (i.e. article 5b) and avoid references elsewhere which imply the responsibilities of states and armed groups are the same.

4, The provision of humanitarian assistance

Article 10 employs a language of 'basic needs' as well as that of human rights. The latter should be the sole reference point for this article and the Convention as a whole.

Article 10.7 seems to propose an unnecessary safeguard against humanitarian assistance being used to interfere in a state's affairs. It risks allowing a state to reject humanitarian assistance on

spurious grounds. The strong and positive interpretation of states' responsibilities to enable humanitarian aid given in article 10.11 captures very well the humanitarian principles and standards that should govern the provision of aid by humanitarian actors.

Proposal

- rather than referring to "*meeting the basic needs of food, water, health care, shelter and sanitation*", article 10.1 should be framed in terms of the duty of "*ensuring at the very least, minimum essential levels of rights health, education and to adequate food, water, sanitation and housing*". Likewise, article 10.8 should be refined to refer to the ESC rights of IDPs, particularly the right to an adequate standard of living, including adequate housing, food, clean and safe water and sanitation, as well as the right to health and education, through the provision of, at least, minimum essential levels of those rights;
- clauses such as the latter one in article 10.7, which may be construed as limiting the unimpeded access of humanitarian actors, should be removed;
- reference should be added in article 5.8 to states' obligations to prosecute those responsible for attacks on humanitarian personnel.

5, Return, reparations and 'durable solutions'

Article 11 refers to the identification and delivery of 'durable solutions' without precisely defining what is meant; nor does it define what states' responsibilities towards IDPs are in ensuring that these 'durable solutions' are implemented in a timely manner.

Proposal

- the Convention should, in line with the Guiding Principles and the policy statements of international organisations, use the language of 'return, resettlement, reintegration', rather than, for example, 'reinsertion';
- article 11.4 – intended to deal with the restitution of housing, land and property – should be consistent with the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons⁵;
- the *Inter-Agency Standing Committee Benchmarks for Durable Solutions for Internally Displaced Persons* should be referenced and the key elements incorporated into the text of the Convention;
- a further clause could be added to article 11 indicating that special provisions should be made for the protection and assistance of vulnerable groups such as pregnant women, young children, the old and the disabled;
- article 12.1 should be made broader than the issue of reparations: "*States Parties shall establish a national legal framework to provide internally displaced persons who have become victims of arbitrary displacement as referred to in Article 4, paragraph 2 of this Convention, of genocide, crimes against humanity or war crimes or serious violations of their human rights as protected by this Convention with **appropriate remedies including reparations***". This or a following clause should specify that state parties should ensure that such remedies are determined and approved by a competent legal institution.

⁵ *Housing and property restitution in the context of the return of refugees and internally displaced persons*, final report of the Special Rapporteur, Paulo Sérgio Pinheiro, Principles on housing and property restitution for refugees and displaced persons, submitted to the UN Human Rights Council in 2005; UN Doc. E/CN.4/Sub.2/2005/17.

6, Involving IDPs in decisions affecting their security and welfare

Articles 8.2 (the need for people's consent before development projects), 10.3 (participation in decisions relating to protection and assistance) and 11.3 (participation in decisions relating to the process of finding 'durable solutions') all valuably indicate the importance of developing measures with the input of IDPs themselves. However, there is a risk that those representing IDP communities may not fully reflect the make-up of those communities nor adequately communicate the needs and perspectives of, for example, women or minority groups.

Proposal

- there should be explicit reference to the need to enable women, minorities and others who may not have representation to participate fully in planning for return or resettlement and other decisions relating to the security and welfare of the displaced or the potentially displaced;
- thus amended, references to the participation of IDPs could be added to the articles dealing with the responsibilities of the High Commissioner of the African Union for Internally Displaced Persons. The preambular text could also establish this as a principle running through the whole Convention.

7, Monitoring and enforcement

Article 14 proposes the creation of a new post of High Commissioner of the African Union for Internally Displaced Persons and it is hoped that the important symbolic value of such a mechanism can be converted into active and effective advocacy for the rights of IDPs in Africa. The obligations of states in regard of monitoring and enforcement should logically also be itemised here.

Proposal

- as well as adding reference to the need for the new High Commissioner to engage directly with IDPs, its engagement with the African Commission on Human and People's Rights should be systematic, rather than something done when "*he or she may deem fit*";
- the High Commissioner should work to a principle of making public his or her assessments and engagement with states, notably through an annual report which should be presented before the AU Heads of State and Government Conference;
- the obligations of states should be detailed, including to:
 - ensure implementation at national level, including by providing adequate resources to enable such implementation;
 - report to the African Commission on Human and People's Rights on measures undertaken, as per article 62 of the African Charter on Human and People's Rights;
- a new clause should make provision for a role for the African Court on Human and People's Rights, in line with other recent legal instruments such as the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*⁶.

8, Additional points

- the language of article 4.5 should be altered to make it consistent with the Declaration on the Rights of Indigenous Peoples. In particular, the current wording about attachment to land "*due to [a peoples'] particular culture*" seems ambiguous and potentially open to abuse. The text could be refined in line with article 25 of the Declaration on the Rights of Indigenous Peoples⁷.

⁶ i.e. article 27 – "*The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol*".

⁷ i.e. "*States Parties shall respect, protect and fulfil the right of those peoples with a distinctive spiritual relationship*

•article 5 (4) risks implying that IDPs can seek protection from other states or even from armed groups and as such could be used as a justification for military intervention. The right to “*peacefully request or seek protection*” should be clearly explained so as not to leave room for abuse or misinterpretation, that is reference should be limited to seeking protection from international organizations (UN agencies such as UNHCR for example).

with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources to right to maintain and strengthen their and to uphold their responsibilities to future generations in this regard”.

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- Renforcer l'ensemble du texte de la Convention en matière de non discrimination en ajoutant notamment une disposition spécifique précisant le principe fondamental que "les IDPs jouissent, en toute égalité, des mêmes droits et libertés garantis à tous citoyens par le droit international et national. Ces personnes ne peuvent être, en aucun droit, discriminées, au motif qu'elles sont déplacées internes".

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