

A critical analysis of State responsibility to internally displaced children in Africa

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DECLARATION

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December 2018

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SUMMARY

The issue of international forced migration has received much international attention of late, but the problem begins much closer to home. Internal displacement is a type of forced migration, which occurs within a State's boundaries. Internally displaced persons ("IDPs") outnumber refugees at least two to one. Africa is a continent with the largest number of IDPs. Another daunting reality is that a least half of all IDPs in children. Therefore, internally displaced children in Africa are a group of children that warrant special consideration.

Internally displaced children can be described as persons under the age of 18 years who are forced to leave their place of habitual residence but do not cross an international border. For this reason, the State in which they are displaced has the primary responsibility for their protection and assistance. Situations of internal displacement present several risks to the physical security, basic needs, social, economic and cultural rights and the civil and political rights of internally displaced children. This thesis, therefore, examines the legal obligations that States have to internally displaced children. As a supplementary research question, it will examine the most effective means to hold States accountable for their obligations to internally displaced children.

To determine the obligations that State have to internally displaced children this thesis includes a critical analysis of the key instruments that govern children's rights law and the law on internal displacement that are applicable to internally displaced children in Africa. The instruments critically analysed in this thesis are the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the United Nations Guiding Principles on Internal Displacement, the International Conference on the Great Lakes Region's Protocol on the Protection and Assistance of Internally Displaced Persons and the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention). A children's rights perspective is the theoretical lens that used to critically analyse these instruments. The critical of the analysis of the key instruments demonstrates that the law, in theory, responds to the majority of the risks, rights and needs of internally displaced children.

To address the secondary research question, the thesis examines the principle of accountability, the concept of sovereignty as responsibility, accountability mechanisms, the role of non-governmental organisations and practical steps for that facilitate State compliance with their obligations. Case studies of Uganda, the Central African Republic, Nigeria and Sudan provide context to the study and provide an opportunity to examine the steps for the practical implementation of State obligations to internally displaced children,

which supports accountability. The thesis concludes with recommendations and framework from a children's rights perspective that have the potential to improve the protection and assistance of internally displaced children and encourage States to comply with their obligations to this group of children. The recommendations and framework combine the theoretical aspects provided by a critical analysis of the law with practical steps that operationalise accountability with a focus on internally displaced children.

OPSOMMING

Internasionale gedwonge migrasie geniet baie aandag en die realiteit daarvan manifesteer aan die tuisfront. Interne verplasing is 'n tipe gedwonge migrasie wat plaasvind binne die grense van 'n bepaalde land. Intern verplaasde persone (IVP'e) oorskadu vlugtelinge in 'n verhouding van ten minste twee tot een. Afrika is die kontinent met die grootste getal IVP'e. 'n Verdere uitdagende realiteit is die feit dat ten minste die helfte van alle IVP'e kinders is. Gevolglik word intern verplaasde kinders in Afrika beskou as 'n groep wat spesiale aandag behoort te geniet.

Intern verplaasde kinders kan beskryf word as persone jonger as 18 jaar wie gedwing word om hul gewone plek van verblyf te verlaat, maar wie nie internasionale grense oorstek nie. Derhalwe het die land waarin hulle verplaas word die primêre verantwoordelikheid om hulle te beskerm en om bystand te verleen. Interne verplasing stel verskeie risikos daar wat betref intern verplaasde kinders se liggaamlike sekuriteit, basiese behoeftes, sosiale, ekonomiese en kulturele regte, sowel as siviele en politieke regte. Gevolglik ondersoek hierdie tesis die regsverpligtinge van 'n Staat ten opsigte van intern verplaasde kinders. 'n Aanvullende navorsingsvraag behels 'n ondersoek na die mees effektiewe manier waarop State verantwoordelik gehou kan word vir hul verpligtinge teenoor intern verplaasde kinders.

Ten einde die Staat se verpligtinge teenoor intern verplaasde kinders te identifiseer, word die hoofinstrumente van toepassing op kinderregte en die reg aangaande die interne verplasing van kinders in Afrika, krities geanaliseer. Die instrumente wat krities analiseer word in hierdie verhandeling sluit in *the Convention on the Rights of the Child*, *the African Charter on the Rights and Welfare of the Child*, *the United Nations Guiding Principles on Internal Displacement*, *the International Conference on the Great Lakes Region's Protocol on the Protection and Assistance of Internally Displaced Persons* and *the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)*. 'n Kinderregte perspektief word as teoretiese lens gebruik ten einde hierdie instrumente krities te analiseer. Hierdie kritiese analise dui daarop dat die reg, in beginsel, meeste van die risikos, regte en behoeftes van intern verplaasde kinders aanspreek.

Ten einde die tweede navorsingsvraag te beantwoord, ondersoek die verhandeling die beginsel van aanspreeklikheid, soewereiniteit as verantwoordelikheid, aanspreeklikheidsmeganismes, die rol van nie-regerings organisasies en praktiese stappe wat die nakoming van die Staat se verpligtinge fasiliteer. Gevallestudies, gemik op Uganda, die Sentraal-Afrikaanse Republiek, Nigeria en die Sudan verskaf konteks tot die studie, sowel as 'n

uiteensetting van die stappe wat geneem behoort te word ten einde die praktiese implementering van die Staat se verpligtinge teenoor intern verplaasde kinders te verseker. Die verhandeling sluit af met aanbevelings en 'n raamwerk, gebaseer op 'n kinderregte benadering, wat die moontlikheid bied tot meer omvangryke beskerming en ondersteuning van intern verplaasde kinders en wat State aanmoedig om hul verpligtinge teenoor hierdie groep kinders na te kom. Die aanbevelings en raamwerk kombineer die teoretiese beginsels soos uiteengesit deur die kritiese regsanalise, gepaardgaande met die praktiese stappe wat gefokus is op intern verplaasde kinders en wat aanspreeklikheid operasionaliseer.

CONFERENCE PRESENTATION

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In closing, I have been consistently encouraged by the following truth: “Unless the Lord builds the house the builders labor in vain” (Psalm 127:1a). Therefore, I would like to honour my Lord and Saviour, Jesus Christ, for all that is good in my life, He has built.

LIST OF ABBREVIATIONS

1924 Declaration	League of Nations Declaration of the Rights of the Child
1959 Declaration	United Nations Declaration of the Rights of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights 1981
ACRWC	African Charter on the Rights and Welfare of the Child 1990
African Commission <i>Annotations</i>	African Commission on Human and Peoples' Rights <i>Guiding Principles on Internal Displacement: Annotations</i>
ASR	Articles on States Responsibility or Responsibility of States for Internationally Wrongful Acts 2001
AU	African Union
BID	Best interests determination
Brookings-Bern National Responsibility Framework	The Brookings Institution and University of Bern's Project on Internal Displacement Framework for National Responsibility
CAR	Central African Republic
CAR Draft IDP Law	Portant protection et assistance aux personnes déplacée à l'Intérieur de la Republic Centrafricaine Loi No 15 Draft
CAR Draft IDP National Policy	Politique nationale sur la protection et l'assistance aux personnes déplacées internes en Centrafrique Draft
CCAR	Coordinating Committee on Assistance and Protection of Refugees, Returnees and Internally Displaced Persons
CEDAW	Convention on the Elimination of Discrimination Against Women
<i>Compilation and Analysis</i>	<i>Compilation and Analysis of Legal Norms</i>
Constitutive Act	Constitutive Act of the African Union
CPA	Comprehensive Peace Agreement between the Government of the Republic the Sudan and the Sudan People's Liberation Movement/ Sudan People's Liberation Army
CRC	United Nations Convention on the Rights of the Child
CRC Committee	United Nations Committee on the Rights of the Child
Dar-es-Salaam Declaration	Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region 2004
DDPD	Doha Peace Agreement for Peace in Darfur 2011
DDR	Disaster Risk Reduction
DDRRR	Disarmament, Demobilisation, Rehabilitation, Repatriations and Reinstallation
DRA	Darfur Regional Authority

Draft Nigeria IDP Policy	National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012
DRC	Democratic Republic of Congo
FACA	Central African Armed Forces
Guiding Principles	United Nations Guiding Principles on Internal Displacement 1998
HAC	Humanitarian Aid Commission (Sudan)
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICGLR	International Conference on the Great Lakes Region
ICGLR Democracy Protocol	ICGLR Protocol on Democracy and Good Governance 2006
ICGLR Genocide	ICGLR Protocol for the Prevention and Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 2006
ICGLR IDP Protocol	Protocol on the Protection and Assistance to Internally Displaced Persons 2006
ICGLR Property Protocol	ICGLR Protocol on the Property of Returning Persons 2006
ICGLR Sexual Violence Protocol	ICGLR Protocol on the Protection and Suppression of Sexual Violence against Women and Children 2006
IDMC	Internal Displacement Monitoring Centre
IDPs	Internally displaced persons
IGOs	Intergovernmental organisations
ILC	International Law Commission
IOM	International Organisation for Migration
JEM	Justice Equality Movement
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009
LOIs	List of Issues
LRA	Lord's Resistance Army
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women
NEMA	National Emergency Management Agency (Nigeria)
NGOs	Non-governmental organisations
Nigeria IDP Bill	The Rights of Internally Displaced Persons (IDPs) Bill 2016 (Nigeria)
NSA	Non-State actors
OAU	Organisation of African Unity

OAU Charter	Charter of the Organisation of African Unity
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
Ouagadougou Declaration	Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa 2006
Pact	Pact on Security, Stability and Development for the Great Lakes Region 2006
Peninsula Principles	Peninsula Principles on Climate Displacement within States 2013
SEMA	State Emergency Management Agency (Nigeria)
SLAM/A	Sudan Liberation Movement/ Army
Sudan IDP Policy	National Policy for Internally Displaced Persons (IDPs) 2009 (Sudan)
TNCs	Transnational corporations
Uganda IDP Policy	National Policy for Internally Displaced Persons 2004 (Uganda)
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNDP	United Nations Development Programme
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UPDF	Ugandan Peoples Defence Forces

TABLE OF CONTENTS

DECLARATION	I
SUMMARY	II
OPSOMMING	IV
CONFERENCE PRESENTATION	VI
ACKNOWLEDGEMENTS	VII
LIST OF ABBREVIATIONS	IX
TABLE OF CONTENTS	XII
CHAPTER 1: INTRODUCTION.....	1
1 1 BACKGROUND TO THE STUDY	1
1 1 1 <i>Internally displaced children and the law</i>	1
1 1 2 <i>The development of the law on internal displacement</i>	3
1 1 3 <i>The intersection of children’s rights law and the law on internal displacement</i>	6
1 1 4 <i>The role of the State</i>	7
1 2 RESEARCH QUESTIONS	10
1 3 RESEARCH PROBLEM STATEMENT AND HYPOTHESES	11
1 3 1 <i>Research problem statement</i>	11
1 3 2 <i>Hypotheses</i>	11
1 4 RESEARCH AIM AND OBJECTIVES.....	12
1 5 THEORY AND METHODOLOGY.....	13
1 5 1 <i>A children’s rights perspective</i>	13
1 5 2 <i>“Rights and needs”</i>	15
1 5 3 <i>Legal instruments to be analysed</i>	15
1 5 4 <i>The principle of accountability</i>	16
1 5 5 <i>Case studies</i>	17
1 5 6 <i>Summary of theory and methodology</i>	18
1 6 THE SIGNIFICANCE OF THE RESEARCH PROJECT	18
1 7 THE SCOPE OF THE RESEARCH PROJECT	19
1 8 OVERVIEW OF CHAPTERS	20
CHAPTER 2: DEVELOPING A CHILDREN’S RIGHTS PERSPECTIVE.....	23

2 1	INTRODUCTION	23
2 2	CHILD, CHILDHOOD AND THE LAW	23
2 2 1	<i>Children and childhood</i>	24
2 2 2	<i>The law and its conceptualisation of children</i>	28
2 3	THE STANDARD FOR CHILDREN’S RIGHTS	31
2 3 1	<i>An international perspective: The United Nations Convention on the Rights of the Child</i>	31
2 3 2	<i>A regional perspective: The African Charter on the Rights and Welfare of the Child</i>	35
2 3 3	<i>The role of States with respect to children</i>	39
2 4	A CHILDREN’S RIGHTS PERSPECTIVE AS A THEORETICAL TOOL	44
2 4 1	<i>A critical discussion of rights-based approaches</i>	44
2 4 2	<i>Defining a children’s rights perspective</i>	48
2 4 2 1	General principles of a rights-based approach.....	48
a	Accountability.....	49
b	Interdependence and indivisibility	51
c	Universality	52
2 4 2 2	General principles of children’s rights.....	52
a	Non-discrimination	53
b	Best interests of the child.....	54
c	Life, survival and development	55
d	Participation	56
2 4 3	<i>Summary of a children’s rights perspective</i>	57
CHAPTER 3: A CLOSER LOOK AT INTERNAL DISPLACEMENT: CAUSES, RISKS, RIGHTS AND NEEDS		58
3 1	INTRODUCTION	58
3 2	UNPACKING THE DEFINITION OF INTERNAL DISPLACEMENT	59
3 2 1	<i>The internal element: Migration within international borders</i>	59
	Figure 3 1 Forced Migration continuum	60
3 2 2	<i>The coercive element: Causes of internal displacement</i>	64
	Figure 3 2 "Voluntary to forced migration continuum"	65
3 2 2 1	Conflict and generalised violence.....	67
3 2 2 2	Disasters	70
3 2 3	<i>Issues related to internal displacement</i>	73

3 2 3 1	Climate change	73
3 2 3 2	Protracted displacements.....	74
3 2 4	<i>Concluding discussion on the definition of internal displacement.....</i>	77
3 3	RISKS, RIGHTS AND NEEDS	78
3 3 1	<i>Risks</i>	80
3 3 1 1	Risks to physical security	80
3 3 1 2	Risks to satisfying basic needs	83
3 3 1 3	Risks to social, economic and cultural rights.....	84
3 3 1 4	Risks to civil and political rights.....	86
3 3 1 5	Summary of risks	87
3 3 2	<i>Rights and needs</i>	87
3 3 2 1	Rights to physical security.....	88
3 3 2 2	Rights to basic needs.....	89
3 3 2 3	Social, economic and cultural rights.....	90
3 3 2 4	Civil and political rights.....	92
3 3 2 5	Summary of rights and needs	93
4 1	INTRODUCTION.....	95
4 2	DEVELOPMENT OF THE LAW ON INTERNAL DISPLACEMENT	95
4 2 1	<i>Development of the Guiding Principles</i>	97
4 2 2	<i>Development of the law on internal displacement in Africa</i>	102
4 2 2 1	International Conference on the Great Lakes Region	104
4 2 2 2	The African Union and the Kampala Convention	107
4 3	CRITICAL ANALYSIS OF THE LAW ON INTERNATIONAL DISPLACEMENT	111
4 3 1	<i>Critical analysis of the Guiding Principles.....</i>	114
4 3 1 1	Risks to physical security	115
4 3 1 2	Risks to satisfying basic needs	118
4 3 1 3	Risks to social, economic and cultural rights.....	119
4 3 1 4	Risks to civil and political rights.....	121
4 3 2	<i>Critical analysis of the ICGLR IDP Protocol.....</i>	123
4 3 2 1	Risks to physical security	125
4 3 2 2	Risks to satisfying basic needs	129
4 3 2 3	Risks to social, economic and cultural rights.....	129
4 3 2 4	Risks to civil and political rights.....	132
4 3 3	<i>Critical analysis of the Kampala Convention</i>	134
4 3 3 1	Risks to physical security	137

4 3 3 2	Risks to satisfying basic needs	140
4 3 3 3	Risks to social, economic and cultural rights.....	141
4 3 3 4	Risks to civil and political rights.....	143
4 4	SUMMARY OF THE CRITICAL ANALYSIS	146
4 4 1	<i>Risks to physical security</i>	146
4 4 2	<i>Risks to satisfying basic needs</i>	148
4 4 3	<i>Risks to social, economic and cultural rights</i>	149
4 4 4	<i>Risks to civil and political rights</i>	150
4 4 5	<i>Overall assessment</i>	151

CHAPTER 5: AN ANALYSIS OF THE PRINCIPLE OF ACCOUNTABILITY AND ACCOUNTABILITY MECHANISMS 154

5 1	INTRODUCTION.....	154
5 2	ACCOUNTABILITY.....	156
5 2 1	<i>Definition of accountability</i>	156
5 2 2	<i>Characteristics of accountability</i>	156
5 2 3	<i>Classifications of accountability</i>	162
5 2 4	<i>Pacta sunt servanda</i>	164
5 2 5	<i>International Law Commission's Articles on State Responsibility</i>	165
5 2 6	<i>Summary of discussion of the principle of accountability</i>	168
5 3	STATES, SOVEREIGNTY AND SOVEREIGNTY AS RESPONSIBILITY.....	168
5 3 1	<i>Sovereignty as responsibility</i>	170
5 3 2	<i>The evolution of the concept of sovereignty</i>	171
5 3 3	<i>Sovereignty as responsibility in the African context</i>	175
5 3 4	<i>Sovereignty as responsibility and the principle of accountability</i>	177
5 4	ACCOUNTABILITY MECHANISMS.....	179
5 5	NON-GOVERNMENTAL ORGANISATIONS AND THE ACCOUNTABILITY PROCESS.....	194
5 6	INTEGRATING PRINCIPLES, THEORETICAL MODELS, MECHANISMS AND PRACTICAL SOLUTIONS.....	201
5 7	CONCLUSIONS REGARDING STATE ACCOUNTABILITY AND STATE COMPLIANCE	207

CHAPTER 6: A COMPARATIVE ANALYSIS OF CASE STUDIES OF AFRICAN STATES..... 209

6 1	INTRODUCTION.....	209
6 2	UGANDA	210
6 2 1	<i>Night Commuting</i>	210

6 2 2	<i>Drivers and Triggers</i>	213
6 2 3	<i>Analysis of domestic legislation and policy</i>	215
6 2 4	<i>Practical steps for implementation</i>	218
6 3	THE CENTRAL AFRICAN REPUBLIC	221
6 3 1	<i>Access to education</i>	221
6 3 2	<i>Drivers and triggers</i>	223
6 3 3	<i>Analysis of domestic legislation and policy</i>	225
6 3 4	<i>Practical steps for implementation</i>	226
6 4	NIGERIA.....	229
6 4 1	<i>Internally displaced children in detention</i>	229
6 4 2	<i>Drivers and triggers</i>	232
6 4 3	<i>Analysis of domestic legislation and policy</i>	234
6 4 4	<i>Practical steps for implementation</i>	239
6 5	SUDAN	243
6 5 1	<i>Sexual violence in Sudan</i>	243
6 5 2	<i>Drivers and triggers</i>	245
6 5 3	<i>Analysis of domestic legislation and policy</i>	248
6 5 4	<i>Practical steps for implementation</i>	254
6 6	SUMMARY OF THE FINDINGS OF THE CASES STUDIES	257
	CHAPTER 7: CONCLUSION	259
7 1	INTRODUCTION.....	259
7 2	ASSESSING THE HYPOTHESIS	259
7 3	RESPONSE TO THE RESEARCH QUESTIONS	261
7 3 1	<i>Legal obligations of States to internally displaced children</i>	261
7 3 2	<i>Accountability</i>	262
7 3 3	<i>Summary of findings</i>	263
7 4	RECOMMENDATIONS.....	264
7 5	FRAMEWORK.....	266
7 6	CONCLUDING REMARKS	269
	BIBLIOGRAHY	272
	INDEX OF CASE LAW	287
	INDEX OF LEGISLATION	288
	ADDENDUM A	316

TABLE 1 AFRICAN STATES CHILD LAW AND INTERNAL DISPLACEMENT LAW RATIFICATIONS	
STATUS	316
ADDENDUM B	320
TABLE 2 CASE STUDY STATES INFORMATION	320

CHAPTER 1: INTRODUCTION

1 1 Background to the study

1 1 1 Internally displaced children and the law

Internal displacement is a domestic issue of global concern, which impacts the lives of many children.¹ At the end of 2017, there were approximately 40 million people displaced by conflict and violence worldwide.² In the same year, there were approximately 18.8 million persons newly displaced by disasters.³ Regionally, the continent of Africa stands out as having the greatest number of internally displaced persons (“IDPs”).⁴ Internal displacement has a substantial impact on children as it is estimated that at least half of all IDPs are children.⁵ Internally displaced children can be described as persons under the age of eighteen who are forced to leave their place of habitual residence for reasons such as conflict, violence, disasters and violations of human rights without crossing an internationally recognised border.⁶ Therefore, internal displacement can be described as a type of forced migration.

By virtue of being displaced, internally displaced children experience challenges in almost every aspect of their lives. Internal displacement creates challenges for children to satisfy their basic needs, such as obtaining food, potable water and adequate housing.⁷ During

¹ J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1; UNHCR “Framework for the Protection of Children” (2012).

² IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 1.

³ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) v.

⁴ It is estimated that at the end of 2016 there were 12.2 million IDPs displaced by conflict and violence in Africa. See IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 26. See also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, 6 December 2012) (“Kampala Convention”) Preamble para 1; IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 8.

⁵ J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1; UNHCR “Framework for the Protection of Children” (2012) 7.

⁶ This definition was adapted from the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (“CRC”) art 1; United Nations Guiding Principles on Internal Displacement (11 February 1998) E/CN4/1998/53/Add2 annex (“Guiding Principles”) Introduction: Scope and Purpose para 2; African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, 6 December 2012) (“Kampala Convention”) art 1(h),(k).

⁷ CRC Preamble para 9; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 4.

migration, children are often separated from their families.⁸ Once displaced, children find it challenging to access education due to documentation and residency requirements.⁹ Due to a lack of protection, internally displaced children are vulnerable to all manner of abuse and exploitation, including, prostitution and trafficking.¹⁰ In situations of conflict, proximity to conflict zones make internally displaced children vulnerable to recruitment, injury and death.¹¹ These challenges or risks can be classified into one or more of the four categories: physical security, basic needs, social, economic and cultural rights and civil and political rights.¹² In addition, some displacements may become protracted, which means that it is possible for children to spend most if not all of their childhoods in displacement.¹³ Protracted displacements, as a result, prolong the vulnerabilities encountered by internally displaced children. Internal displacement negatively impacts the development of children, and traumatic experiences cause negative psychological consequences.¹⁴ For these reasons, internally displaced children are part of the group of children that the United Nations Convention on the Rights of the Child (“CRC”) describes as “children living in exceptionally difficult conditions”.¹⁵

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- ⁸ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; ED Mooney “Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection” (2010) 2 *Global Responsibility to Protect* 60-85 62. One example is the children of a forced migrant from Chechnya’s children who were refused readmission into school in as he was no longer in possession of his migrant’s card. See *Case of Timishev v Russia* Application nos. 55762/00 and 55974/00 (ECtHR 12 December 2005) paras 22-25.
- ⁹ E Mooney & J Wyndham “The Right to Education in Situations of Internal Displacement (2010) 41 *Stud Transnat’l Legal Pol’y* 247-290 247, 257-263.
- ¹⁰ J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1-2, 4; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23; UNHCR “Framework for the Protection of Children” (2012) 7 See also *Forced Migration Review Displaced Children and Adolescents: Challenges and Opportunities* (2002) 15.
- ¹¹ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 68.
- ¹² These categories are adapted from the Secretary-General’s Special Representative on Human Rights of Internally Displaced Persons report with respect to assisting IDPs in the context of natural disasters. See United Nations Human Rights Council “Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters” (23 January 2006) A/HRC/4/38/Add.1 para 13.
- ¹³ UNHCR “Framework for the Protection of Children” (2012) 7; IDMC “Global Overview 2015: People Displaced by Conflict and Violence” (May 2015) 63-70.
- ¹⁴ UNHCR “Framework for the Protection of Children” (2012) 7; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; United Nations Economic and Social Council “Analytical Report of the Secretary-General on Internally Displaced Persons” (14 February 1992) E/CN.4/1992/23 15 para 57.
- ¹⁵ CRC Preamble; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 4.

The law has a role to play in responding to the circumstances of internally displaced children. It is recognised in international human rights law and international humanitarian law that all children require some type of special consideration.¹⁶ The CRC further specifies that children in difficult circumstances ought to receive “special consideration”.¹⁷ The African Committee of Experts on the Rights and Welfare of the Children (“ACERWC”) also confirms that “where the word “special” is used in the African Charter on the Rights and Welfare of the Child (“ACRWC”),¹⁸ it is in the context of children who find themselves in a disadvantaged and vulnerable situation”.¹⁹ Therefore, internally displaced children are a group of children that children’s rights law confirms require special consideration.

Beyond the recognition of the exceptional circumstances of internally displaced children, children’s rights law prescribes specific human rights that are applicable to all children, including internally displaced children. These rights are set out in the CRC and its regional counterpart, the ACRWC.²⁰ The ACRWC also provides internally displaced children with specific rights.²¹ In addition to children’s rights law, there are international and regional instruments that are applicable to the situation of internally displaced children in Africa.

1 1 2 The development of the law on internal displacement

Internal displacement came to international attention in the late 1980s and early 1990s when there was an increase in displacement within State borders due to the proliferation of internal conflicts at the end of the Cold War.²² The United Nations estimated that there were

¹⁶ See for example Geneva Convention Relative to the Protection of Civilians in Time of War (IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS arts 38(5), 50; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 23 January 1979) 1125 UNTS 609 art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 10(3); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 24; CRC Preamble para 9; Guiding Principles prin 4(2).

¹⁷ CRC Preamble.

¹⁸ (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/153/Rev. 2.

¹⁹ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 63

²⁰ Therefore, for the purpose of this research children’s rights law refers to the provision of the CRC and the ACRWC.

²¹ ACRWC arts 23(4), 25(2)(b).

²² United Nations Commission on Human Rights “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” (21 January 1993) E/CN.4/1993/353-5; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation” in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 82-83.

approximately 24 million IDPs with the majority of these individuals being women and children.²³

In 1984, the Organisation of African Unity (“OAU”) requested an international meeting to address the issue of mass displacements in States in Southern Africa such as Angola and Mozambique due to conflict, and South Africa due to its apartheid policies.²⁴ The International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa was held in 1988, and one of the outcomes of the Conference was the appointment of Francis M. Deng as Special Representative on Internally Displaced by then United Nations Secretary-General, Boutros Boutros-Ghali and the drafting of the United Nations Guiding Principles on Internal Displacement (“Guiding Principles”).²⁵

Prior to the drafting of the Guiding Principles, Deng conducting a comprehensive study of the law applicable to IDPs, including human rights law, humanitarian law and refugee law by analogy.²⁶ The study, entitled the *Compilation and Analysis of Legal Norms*, provided two primary conclusions. First, it found that many of the rights and needs of IDPs were covered by provisions of binding international human rights and humanitarian law, but that these provisions were dispersed among many sources of law and did not make specific reference to IDPs.²⁷ Second, the study concluded that there were gaps in the law with respect to the protection of IDPs.²⁸ The results of this study formed the basis for the creation of the Guiding

²³ This is in contrast with 17 million refugees at the time. See United Nations Economic and Social Council “Analytical Report of the Secretary-General on Internally Displaced Persons” (14 February 1992) E/CN.4/1992/23 para 5.

²⁴ African Union Resolution on the Situation on Refugees in Africa (27 February 1984 to 5 March 1984) CM/Res.939 (XL) *African Union Peace and Security* <<http://www.peaceau.org/uploads/cm-res-939-xl-e.pdf>> (accessed 25-07-2017) para 5; R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98. <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 90.

²⁵ See United Nations Commission on Human Rights Resolution 1992/73 (5 March 1992) E/CN.4/RES/1992/73 paras 2, 5; United Nations Economic and Social Council Decision 1992/243 (20 July 1992) E/1992/103; United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2; R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 89-92.

²⁶ See United Nations Commission on Human Rights Resolution 1992/73 (5 March 1992) E/CN.4/RES/1992/73 paras 2, 5; United Nations Economic and Social Council Decision 1992/243 (20 July 1992) E/1992/103; United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2.

²⁷ United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2 para 410.

²⁸ Paras 410-416.

Principles in 1998.²⁹ The Guiding Principles are a set of non-binding principles that specifically address the rights and needs of IDPs at all stages of displacement.³⁰

These Guiding Principles have influenced the creation of binding regional instruments in Africa. The Member States of the regional and sub-regional organisations in Africa determined that there was a need to create a binding legal framework to respond to the problem of internal displacement on the continent.³¹ At the sub-regional level, the International Conference on the Great Lakes Region (“ICGLR”) adopted the Pact for the Security, Stability and Development in the Great Lakes Region (“Pact”)³² to respond to the issues of conflict, instability, poverty and violations of human rights in the region, including internal displacement.³³ The Pact is comprised of ten protocols and four programmes of action.³⁴ There are two protocols that specifically contemplate IDPs, namely the Protocol on the Protection and Assistance to Internally Displaced Persons (“ICGLR IDP Protocol”)³⁵ and the Protocol on the Property Rights of Returning Persons (“ICGLR Property Protocol”).³⁶ The Pact came into force on 21 June 2008.³⁷

A major achievement at the regional level is the African Union’s (“AU”) decision to create a binding legal framework on internal displacement applicable to the entire region.³⁸ The

²⁹ United Nations Commission on Human Rights “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39” (11 February 1998) E/CN.4/1998/53/Add.2 para 8.

³⁰ See Guiding Principles.

³¹ Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons (6 June 2006) AU/MIN/HARDP/Decl.I *African Union* <[https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20\(IX\)%20_E.PDF](https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20(IX)%20_E.PDF)> (accessed 28-08-2018); C Beyani “Recent Developments: The Elaboration of Legal Frameworks for the Protection of a Legal Framework for the Protection of Internally Displaced Persons in Africa” (2006) 50 *Journal of African Law* 187-197; C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <<http://eprints.lse.ac.uk/2429>> (accessed 13-07-2017); AM Abebe “The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges” (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017).

³² (adopted 15 December 2006, entered into force 21 June 2008, amended November 2012).

³³ Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) *ICGLR* <http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf> (accessed 28-08-2018) arts 1-2; Pact Preamble.

³⁴ Pact arts 5-20.

³⁵ (adopted 15 December 2006, entered into force 21 June 2008).

³⁶ (adopted 15 December 2006, entered into force 21 June 2008). See also Pact arts 12-13.

³⁷ ICGLR “The Pact” <<http://www.icglr.org/index.php/en/the-pact>> (accessed 12-07-2018); NORAD “The International Conference on the Great Lakes Region (ICGLR) – Review of Norwegian Support to the ICGLR Secretariat” (June 2009) Norwegian Agency for Development Cooperation 4-5.

³⁸ African Union Executive Council Decision on Meeting of Experts on the Review of OAU/AU Treaties EX CL/Dec 129 (V) (25 June-3 July 2004) (Doc EX/CL95 (V)) para 4(i); African Union Executive Council Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa EX CL/Dec 423(XIII) (24-28 June 2008) (Doc EX CL413 (XIII)) para 7; D Kigozi “Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact” (January 2014) International Refugee Rights Initiative *ReliefWeb*

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (“Kampala Convention”) came into force on 6 December 2012.³⁹ The adoption of the Kampala Convention was motivated by the instability and vulnerability caused by internal displacement in Africa as well as the need for a binding legal framework to respond to this problem.⁴⁰

The Guiding Principles, the ICGLR IDP Protocol, ICGLR Property Protocol and the Kampala Convention are the primary legal instruments that specifically address the issue of internal displacement.⁴¹ The development of the law on internal displacement has formulated rights with a view to the specific needs of IDPs.⁴² The provisions of these instruments focus on the prevention of arbitrary displacement, the protection and assistance of IDPs, and creating durable solutions.⁴³ These instruments also recognise internally displaced children as a group of IDPs that require special consideration.⁴⁴

1 1 3 The intersection of children’s rights law and the law on internal displacement

Children’s rights and the law on internal displacement are both applicable in a legal response to the situation of internally displaced children. Children’s rights at its core are about balancing the vulnerabilities of children with their evolving capacities.⁴⁵ Taking this approach, children’s rights can be used to empower internally displaced children by recognising that despite their vulnerabilities, which may be exacerbated by the difficult circumstances that they encounter, they are bearers of rights.⁴⁶ The law on internal displacement provides internally displaced children with rights that are tailor-made to address the problem of internal displacement and generally recognise that they are a group of IDPs with special needs. This combination of children’s rights and the law on internal

<https://reliefweb.int/sites/reliefweb.int/files/resources/COMPARISON%20OF%20THE%20KAMPALA%20CONVENTION%20AND%20THE.pdf> (accessed 31-08-2018) 1.

³⁹ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention) https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf (accessed 24-07-2017).

⁴⁰ Kampala Convention Preamble.

⁴¹ The Peninsula Principle on Climate Displacement within States (18 August 2013) are a set of non-binding principles that address displacement due to climate change.

⁴² Cohen notes that the Guiding Principles were developed from a needs-based perspective. R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 463.

⁴³ Guiding Principles prin 3, 6, 10-27; ICGLR IDP Protocol art 3-4; Kampala Convention art 2(a), 3-9.

⁴⁴ Guiding Principles prins 4(2), 11(2)(b), 13(1), 17(3), 23(2); Kampala Convention arts 1(h), 7(5)(e),(f), 9(1)(d), 9(2)(c), 13(4); ICGLR IDP Protocol Preamble para 4, art 4(1)(d), 4(1)(d)(f).

⁴⁵ J Tobin “Understanding Children’s Rights: A Vision Beyond Vulnerability” (2015) 84 *Nordic Journal of International Law* 155-182 175-176.

⁴⁶ S Human “The Theory of Children’s Rights” in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 150-165 151-152.

displacement provides internally displaced children with a full package of rights that can respond to their specific risks, rights and needs. Furthermore, conceptualising children as bearers of rights functions to create actors, referred to as duty-bearers that have an obligation to provide these rights and gives children the standing to hold duty-bearers accountable for their obligations.⁴⁷ In the case of internal displacement, States are the key duty-bearers.

1 1 4 The role of the State

In children's rights law, States are important duty-bearers. The CRC and the ACRWC outline a number of obligations that States have to children.⁴⁸ An overarching requirement in children's rights law is for States to "undertake all appropriate legislative, administrative, and other measures for the implementation of [...] rights".⁴⁹ States also have obligations to support parents in discharging their obligations.⁵⁰ The Committee on the Rights of the Child ("CRC Committee") emphasises that States must understand that the implementation of children's rights is the act of States complying with their legal obligations to children rather than an act of charity.⁵¹ In the law on internal displacement States have the primary responsibility for the protection and assistance of IDPs.⁵² While the complexity of internal displacement requires that non-State actors such as humanitarian organisations, multinational corporations and armed groups have a role to play in the protection and assistance of IDPs, the majority of these duties are placed upon States.⁵³ Overall, it can be said that States are the primary duty-bearers with respect to internally displaced children.

One justification for asserting that States are the primary duty-bearers to internally displaced children is that they have accepted these obligations. Pursuant to the legal principle *pacta sunt servanda*, States are required to discharge obligations that they have agreed to in good faith.⁵⁴ For example, in *Social and Economic Rights Act Center (SERAC) and Another v Nigeria*,⁵⁵ the African Commission on Human and Peoples' Rights ("African Commission") found that the government of Nigeria failed to meet the minimum standards

⁴⁷ J Raz *The Morality of Freedom* (1986) 166-168; J Tobin "Justifying Children's Rights" (2013) 21 *Int'l J Child Rts* 395-441 409.

⁴⁸ See CRC arts 6, 24, 27, 28, 32, 34, 36, 38, 39 and ACRWC arts 5, 11, 14, 15, 16, 22.

⁴⁹ CRC art 4. See also ACRWC art 1(1).

⁵⁰ CRC arts 18(2), 23(4), 27(3); ACRWC arts 20(2); 25(2).

⁵¹ CRC Committee "General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11.

⁵² Guiding Principles prin 3; Kampala Convention art 5(1); ICGLR IDP Protocol art 3(3).

⁵³ See Kampala Convention arts 1(n), 6,7; ICGLR IDP Protocol art 3(10).

⁵⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26. For a discussion of this principle in the context of accountability see Chapter 5 part 5 2 4.

⁵⁵ Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001).

set out in the African Charter on Human and Peoples' Rights ("ACHPR") due to the attacks, which led to the internal displacement of thousands of people in the Ogoni villages perpetrated by the Nigerian army.⁵⁶ There is also a positive duty on the part of States to take actions that fulfil their obligations.⁵⁷ The European Court of Human Rights, in the *Case of Budayeva and Others v Russia*,⁵⁸ found that States can be held accountable for their failure to be prepared for the foreseeable outcomes of natural disasters.⁵⁹ The Court found that Russia's failure to take steps to mitigate the effects of a deadly mudslide not only caused displacement but violated the applicants' right to life.⁶⁰ States are not held to unreasonable standards. Both the African Commission and the ACERWC have recognised that situations of conflict can negatively impact States' ability to comply with their obligations, but emergency situations do not enable States to derogate from their obligations.⁶¹ Overall, the jurisprudence points to a positive obligation on the part of States to act and even take preventative measures to ensure their compliance.

Another reason that States are accorded the primary responsibility for the protection and assistance of internally displaced children is the key consideration of jurisdiction. Internally displaced children remain within the territory of the State; therefore, they remain under the jurisdiction of the State.⁶² This obligation also applies in situations where States are not directly responsible for the violation of rights. The African Commission has stated that "if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation".⁶³ For instance, the African Commission found that Mauritania and Sudan were responsible for attacks and

⁵⁶ Para 68.

⁵⁷ See *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) para 20; *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 57.

⁵⁸ Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008).

⁵⁹ The European Court of Human rights in the *Case of Budayeva and Others v Russia* found that Russia violated the Applicants' right to life for failure to take measures to prepare for the effects of expected mudslides. See *Case of Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008) paras 128-129.

⁶⁰ Paras 147-160.

⁶¹ *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) para 21; *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 69; *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 36.

⁶² L Henkin *How Nations Behave* 2 ed (1979) 17. For example, the African Commission has found that Nigeria was responsible for forced evictions caused by the Nigerian Army. See *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001).

⁶³ *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) para 20.

forced displacements of its citizens perpetrated by armed groups.⁶⁴ The violation was the failure of the States to protect their citizens from internal displacement as well as other violations of their rights. The Inter-American Court of Human Rights came to a similar conclusion when it found that Columbia caused internal displacement through failing to provide protection to its citizens from attacks by a paramilitary group.⁶⁵ It has also been found that States are responsible for events which occur in territory under their control, even though it is outside of their borders. For example, the International Court of Justice found that Uganda was responsible for violations of international humanitarian and human rights law in the territory of the Democratic Republic of Congo (“DRC”) that was under the control of the Uganda People’s Defence Force (“UPDF”).⁶⁶

An issue that is closely related to the jurisdiction of States is sovereignty. It is generally accepted that other actors should not interfere in the affairs of a sovereign State.⁶⁷ In situations of internal displacement, however, this norm of non-intervention has been challenged by the concept of “sovereignty as responsibility”.⁶⁸ The premise of this concept is that States have the primary duty to provide assistance and protection to IDPs within their borders, but if States are unable to respond to the needs of IDPs, then they ought to seek assistance from the international community.⁶⁹ The status of a sovereign State is linked to upholding its obligations to care for the needs of its inhabitants.⁷⁰ Cohen and Deng take the position even further by asserting that if States are unwilling or unable to care for the needs of IDPs and have not sought international assistance to meet these needs, then the

⁶⁴ *Sudan Human Rights Organisation and Another Communication nos 279/03, 296/05* (2009) AHRLR 153 (ACHPR 2009) paras 157-168, 186-190, 228-229; *Malawi African Association and Others v Mauritania* Communication nos 54/91, 61/91, 96/93, 98//93, 164/97, 196/97, 210/98 (2000) AHRLR 149 (ACHPR 2000) paras 17, 29.

⁶⁵ *Case of the “Mapiripán Massacre” v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 134 (15 September 2005) paras 50, 167-189.

⁶⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 paras 217-220.

⁶⁷ L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 2. See also A James *Sovereign Statehood: The Basis of International Society* (1986) 3-5; Chapter 5 part 5 3 2.

⁶⁸ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 275-276; R Cohen “Developing an International System for Internally Displaced Persons” (2006) 7 *International Studies Perspectives* 87-101 90-91; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation” in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 87-93; L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 173-175.

⁶⁹ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7.

⁷⁰ International assistance generally will be needed when the States has inadequate resources to provide for the protection and assistance to IDPs. See R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7.

international community has a right to intervene.⁷¹ Sovereignty as responsibility is derived from the idea that a State's sovereignty is linked to its compliance with its obligations.⁷²

Using sovereignty as responsibility as a point of departure shifts the focus to State accountability. In the context of internal displacement, States as duty-bearers entails that they are accountable for their legal obligations to internally displaced children. As the primary duty-bearers to internally displaced children, States become actors with immense importance. The accountability of States for their legal obligations to internally displaced children is an issue which directly affects the well-being of this group of children and determines whether their rights and needs are met. Non-binding instruments and weak enforcement mechanisms present challenges in encouraging State accountability.⁷³ Nevertheless, addressing the issue of State obligations and accountability to internally displaced children is critical as internal displacement continues to be a global problem that negatively affects children.

1 2 Research questions

This thesis has one primary research question. It will answer the following question: what are the legal obligations of States in view of international and regional sources of law in respect of the rights and needs of internally displaced children? A secondary research question that supports the primary research question is: what are most effective measures that can be used to hold States accountable for these obligations? Both research questions will be addressed in this study. The primary research question requires a critical analysis of how the law provides for the specific rights and needs of internally displaced children by way of the obligations that States have as the primary duty-bearers in this context. The secondary research question requires an analysis of the principle of accountability and the mechanisms in place which hold States accountable to fulfil their obligations.

⁷¹ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7, 277; R Cohen "Reconciling R2P with IDP Protection" (2010) 2 *Global Responsibility to Protect* 15-37 20.

⁷² The concept of sovereignty as responsibility provided the foundation for the Guiding Principles. See R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7, 277; R Cohen "Reconciling R2P with IDP Protection" (2010) 2 *Global Responsibility to Protect* 15-37 20.

⁷³ For example, the Guiding Principles are non-binding and the Kampala Convention has been criticised for having weak enforcement mechanisms. See R Cohen "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting" (2004) 10 *Global Governance* 459-480 465; W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) vii; L Groth "Engendering Protection: An Analysis of the 2009 Kampala Convention and its Provisions for Internally Displaced Women" (2011) 23 *Int'l J Refugee L* 221-251 251 (footnote omitted); LC Bailey "Out of Africa: Toward Regional Solutions for Internal Displacement" (2014) 39 *Brooklyn Journal of International Law* 353-402 379-380 (footnotes omitted).

1 3 Research problem statement and hypotheses

1 3 1 Research problem statement

It is well established that States have the primary responsibility to respond to the rights and needs of internally displaced children.⁷⁴ The obligations that States have to internally displaced children are dispersed amongst various legal instruments, primarily those with respect to children's rights and the law on internal displacement. Children's rights law provides specific rights for children but overall it does not focus on the unique circumstances of internally displaced children.⁷⁵ The law on internal displacement recognises children as a particularly vulnerable group of IDPs, but it is asserted that it does not fully incorporate a children's rights perspective due to its focus on protection in general.⁷⁶ The short-comings in both areas of the law present a challenge for the effective protection and assistance of internally displaced children. It is submitted that in order to hold States accountable for their legal obligations to internally displaced children, requires a framework that incorporates a children's rights perspective and specifically considers the rights and needs of internally displaced children.

1 3 2 Hypotheses

Based on the research question and research problem statement, there are four assumptions guiding the research of this thesis. First, despite providing numerous general rights and protections to all children, international children's rights law provides little to no reference to internally displaced children as a particular group of children requiring special consideration. Second, it is postulated that the law on internal displacement focuses primarily on the protection of children and misses an opportunity to fully embrace a children's rights perspective, which conceptualises children as bearers of rights rather than objects of protection. Third, there are larger factors such as climate change that increase incidents of disaster as well as conflict-induced displacement and will have increasingly adverse effects on internally displaced children. Fourth, the thesis will work from the premise that the most effective method to hold States accountable for their obligations to internally displaced children will be the ratification of international and regional law in addition to the domestic

⁷⁴ Guiding Principles prin 3(1); Kampala Convention art 5(1). See also discussion in part 1 1 4.

⁷⁵ For instance, the CRC mentions refugee children but not internally displaced children. See CRC art 22. In contrast, the ACRWC mentions internally displaced children twice. See ACRWC arts 23(4), 25(2).

⁷⁶ The Guiding Principles and the Kampala Convention focus on protecting children, but do not necessarily recognise their evolving capacities and autonomy. See Guiding Principles prins 4(2), 11(b), 13(1), 17(3), 23; Kampala Convention arts 1(h),7(5)(e), 7(5)(f),9(1)(d), 9(2)(c), 13(4).

implementation of binding and non-binding obligations. These assumptions will be tested throughout the study.

1 4 Research aim and objectives

The overall aim of this thesis is to use the law to improve the protection and assistance of internally displaced children by injecting a children's rights perspective into the law with respect to internal displacement and by developing a framework that encourages States to comply with their legal obligations to internally displaced children. In order to achieve this aim, this thesis will endeavour to meet six objectives.

First, the rights and needs of internally displaced children will be identified. Internal displacement creates particular vulnerabilities and these vulnerabilities are more pronounced for children.⁷⁷ A clear understanding of the vulnerabilities of internally displaced children is the starting point for the assessment of what is needed to improve their protection and assistance.

Second, it will establish to what extent the CRC and the ACRWC respond to the rights and needs of children at various stages of internal displacement.⁷⁸ Children's rights law provides for the rights and needs of all children, but the focus of the analysis of the CRC and ACRWC will be how these legal instruments respond to the particular rights and needs of internally displaced children.

Third, this thesis will establish to what extent the law with respect to internal displacement responds to the rights and needs of internally displaced children and incorporates a children's rights perspective. This task will be accomplished by conducting an analysis of specific provisions of the law on internal displacement by using the children's rights perspective as a theoretical lens.

⁷⁷ For a discussion of the risks encountered by internally displaced children see Chapter 3 part 3 3 1. See also ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 61-62; United Nations Economic and Social Council "Analytical Report of the Secretary-General on Internally Displaced Persons" (14 February 1992) E/CN.4/1992/23 para 40; UNHCR "Framework for the Protection of Children" (2012) 7.

⁷⁸ The number of States that have ratified both the CRC and the ACRWC, and in particular the CRC establishes that the CRC is a normative framework to the particular rights and needs of internally displaced children. See See United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 07-07-2017); African Union "List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child" <https://www.au.int/web/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf> (accessed 07-07-2017); Chapter 2 part 2 3.

Fourth, the obligations of States for responding to the rights and needs of internally displaced children, and the mechanisms for implementation and accountability will be identified. This objective will provide a point of departure for understanding what obligations States have to internally displaced children and what tools are already established to promote State compliance.

Fifth, to the extent that is relevant, recommendations will be provided on how to improve the protection and assistance of internally displaced children and fill any gaps or ameliorate any weaknesses in the international, regional and domestic law. The results of the analysis of the law and of the identification of State obligations will provide a basis for any such recommendations.

Sixth, this thesis will develop a framework that synthesises the legal rights and protections afforded to internally displaced children that are particularly applicable to States in Africa. The creation of the framework directly corresponds to the primary aim of this thesis as it injects a children's rights perspective into the law. The framework is a tool that can be used to improve the protection and assistance of internally displaced children by ensuring the applicable law is interpreted and implemented in a manner consistent with children's rights law and by encouraging State accountability.

1 5 Theory and methodology

1 5 1 A children's rights perspective

The theoretical lens that will form the basis for the analysis is a children's rights perspective.⁷⁹ It is based on the four general principles of the CRC, namely, non-discrimination, the best interests of the child, the right to life survival and development, and the right to be heard.⁸⁰ This perspective entails a holistic rights-based approach to the interpretation and implementation of children's rights which employs a CRC-framework. Employing a children's rights perspective provides what Van Bueren calls a "coherent child-centred approach".⁸¹ It is a perspective that is unique as it reconciles the dichotomy between vulnerability and evolving capacities. As a rights-based perspective, a children's rights perspective also includes the principles of accountability, universality and interdependence and indivisibility.⁸² The rationale for using a children's rights perspective to critically analyse

⁷⁹ This perspective will be discussed in further detail in Chapter 2 part 2 4.

⁸⁰ CRC Committee "General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 12.

⁸¹ G Van Bueren *International Law on the Rights of the Child* (1998) 19.

⁸² J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 281-85; J Tobin "Understanding a Human Rights Based

the law applicable to internally displaced children is to determine to what extent the law complies with the children's rights standards and conceptualises children as bearers of rights.

Using a children's rights perspective to critically analyse the obligations of States to internally displaced children brings together two approaches that are transformative, namely, children's rights law and a rights-based approach. The law's current conceptualisation of children at an international and regional level is one of children as bearers of rights – active participants in the realisation of their rights.⁸³ In the same way that the addition of participation has been transformational to the conceptualisation of children and their rights, the rights-based approach has transformed the way the implementation of human rights obligations is understood. Tobin captures the overall rationale for using a rights-based approach when he writes,

“[u]ltimately the fundamental aim of a rights-based approach is to transform the way in which states (and indeed all other actors that impact on the enjoyment of children's rights) perform their role by demanding that every issue is examined and responded to through a human rights lens.”⁸⁴

A rights-based approach brings about a focus on accountability with respect to the process of fulfilling obligations as well as the outcome. Combining these two transformative approaches, a children's rights perspective creates an approach that empowers children and promotes State accountability that is based on international legal standards. A children's rights perspective grounds the analysis in international legal standards and it provides an avenue to operationalise the notion of children as bearers of rights and the principle that States are accountable for their legal obligations to children.

Furthermore, this thesis will examine the rights and needs of a particular group of children, specifically, internally displaced children, which, at times are overlooked or incorporated into other groups of children that are afforded special attention. The law on internal displacement mentions children, but it is yet to be determined if these legal instruments incorporate an approach that is in line with international and regional children's rights standards. Van Bueren aptly states,

Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98.

⁸³ See Chapter 2 part 2 3.

⁸⁴ J Tobin “Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98 82.

“[h]owever, merely because an international instrument is capable of being applied to children does not mean that it incorporates a coherent child-centred approach setting out all the rights necessary to ensure the basic dignity of children.”⁸⁵

A response to the problem of internal displacement ultimately necessitates action; therefore, a theoretical framework, which focuses on implementation, is an appropriate tool for analysis of the law. The use of a children’s rights perspective also requires that the law applicable to internally displaced children is interpreted and implemented in a manner consistent with the standards set out in children’s rights law. The overarching aim will be to assess to what extent a children’s rights perspective is incorporated in the legal instruments and determine if the instruments conceptualise children in a manner consistent with this perspective.

1 5 2 “Rights and needs”

Utilising a children’s rights perspective draws attention to the fact that internally displaced children have specific rights and needs and require special consideration. The phrase “rights and needs” has and will be used throughout this thesis. This phrase emphasises that internally displaced children are bearers of rights, have particular needs and require special consideration in order to realise their rights. It is asserted that a children’s rights perspective incorporates rights as well as needs. The analysis of the law applicable to internally displaced children can be strengthened by having a clear understanding of the rights and needs of this group of children.

1 5 3 Legal instruments to be analysed

The critical analysis in this thesis will focus on the key legal instruments in the areas of children’s rights law and the law on internal displacement. The analysis of children’s rights law will focus on the CRC and the ACRWC. The CRC and the ACRWC were selected as they are binding international and regional legal instruments on children’s rights applicable in Africa.⁸⁶ There are a limited number of instruments that specifically focus on internal displacement. The analysis of the law with respect to internal displacement will focus on the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention. The Guiding Principles was the first legal framework to provide specific rights and protections to IDPs

⁸⁵ G Van Bueren *International Law on the Rights of the Child* (1998) 19.

⁸⁶ United Nations Treaty Collection “Convention on the Rights of the Child” <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 01-06-2018); African Union “List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child” <https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf> (accessed 01-06-2018).

and it has been referenced in domestic and regional legal frameworks on internal displacement.⁸⁷ The ICGLR IDP Protocol is only applicable to the Member States and their interactions with each other, but it is a binding legal instrument that responds to the problem of internal displacement in Africa.⁸⁸ The Kampala Convention was selected as it is the only binding legal framework applicable to an entire region.⁸⁹ In summary, the critical analysis will focus on the five legal instruments discussed above as they are specifically applicable children's rights and internal displacement.

1 5 4 The principle of accountability

The principle of accountability, in addition to being a principle of a children's rights perspective. It provides the benchmark to assess the efforts of States to respond to the rights and needs of internally displaced children. Accountability requires that States are answerable for their efforts to comply with their obligations.⁹⁰ As duty-bearers, States are accountable to the bearers of rights, which in the context of this study are internally displaced children. Pursuant to this principle, States have the duty to respect, protect and fulfil their obligations.⁹¹ The duty to respect requires States to respect bearers of rights and their rights.⁹² The duty to protect requires States to take actions which are effective to implement

⁸⁷ For example, Sudan and Uganda refer to the Guiding Principles in their national policies on internal displacement. See (Sudan) National Policy for Internally Displaced Persons (IDPs) (2009) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Sudan_IDPPolicy.pdf> (accessed 31-08-2018); (Uganda) National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018). See also IDMC "IDP Laws and Policies: A Mapping Tool" <<http://www.internal-displacement.org/law-and-policy>> (accessed 04-11-2016). The Kampala Convention and the Great Lakes Protocol make reference to the Guiding Principles as a standard for the assistance and protection for IDPs. See Kampala Convention Preamble para 10; ICGLR IDP Protocol Preamble, arts 1-2, 4(1)(c), 5(7), 6.

⁸⁸ Pact arts 1(1)(d), 4, 12; ICGLR "The Pact" <<http://www.icglr.org/index.php/en/the-pact>> (accessed 10-11-2016); D Kigozi "Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact" (January 2014) International Refugee Rights Initiative *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/COMPARISON%20OF%20THE%20KAMPALA%20CONVENTION%20AND%20THE.pdf>> (accessed 31-08-2018) 1.

⁸⁹ D Kigozi "Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact" (January 2014) International Refugee Rights Initiative *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/COMPARISON%20OF%20THE%20KAMPALA%20CONVENTION%20AND%20THE.pdf>> (accessed 31-08-2018) 1.

⁹⁰ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 28; Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11.

⁹¹ The African Commission also include the duty to promote. See *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) paras 44-47; J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283.

⁹² *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 45.

their obligations and protect bearers of rights.⁹³ The duty to fulfil, linked to the duty to protect requires positive efforts on the part of States to enable “the actual realisation of the rights”.⁹⁴

1 5 5 Case studies

Case studies will be used to provide a context to the study, address the extent to which States can be held accountable for their obligations to internally displaced children and facilitate the application of the findings provided by this research in other States in Africa. The case studies will include a discussion of the drivers and triggers of internal displacement, actual examples of State responses to internal displacement in the form of legislation and policy, and challenges encountered by internally displaced children in the selected States. The cases studies will also provide a method to examine how States interact with the principle of accountability.

The States selected for case studies in this thesis were selected based on four criteria. First, the selection was limited to States located on the continent of Africa in order to provide examples that are representative of the scope of this study. Second, the State must have a population of IDPs in order to be relevant and provide context to the study. Third, to be selected the State must have ratified at least one instrument in children’s rights law and the law on internal displacement respectively. This requirement ensures that the selected States are bound by the international and regional standards applicable to the protection and assistance of internally displaced children. Fourth, the States were selected from a variety of regions across the continent in order to provide examples from the different regions in Africa. It should be noted that States from northern and southern Africa were not included in the case studies as the majority of instances of internal displacement in Africa are concentrated in the western, central and eastern regions of Africa.⁹⁵ The selection process also considered the causes of displacements, numbers of IDPs, ratification status of the core internal displacement and children’s rights legal instruments, and the presence or absence of domestic legislation or policy on internal displacement.⁹⁶ Based on the above-noted considerations, the following States were selected: Uganda, the Central African Republic (“CAR”), Nigeria and Sudan.⁹⁷

⁹³ Para 46.

⁹⁴ Para 47.

⁹⁵ Also, except for Angola, the States in the northern and southern region of Africa did not meet the remaining selection criteria. See Addendum A Table 1 African States Child Law and Internal Displacement Law Ratifications Status.

⁹⁶ See Addendum A Table 1 African States Child Law and Internal Displacement Law Ratifications Status.

⁹⁷ See Chapter 6; Addendum B Table 2 Case Study States Information.

1 5 6 Summary of theory and methodology

In summary, the principal theoretical lens that will be utilised in this thesis is a children's rights perspective. The analysis will focus on the key legal instruments in the law with respect to children's rights and internal displacement. The principle of accountability will address the extent to which States can be held accountable for their obligations to internally displaced children and the case studies will provide context for the study.

1 6 The significance of the research project

Forced migration generally is an issue of concern. Presently, there is a great deal of global attention on forced migrants, particularly refugees and asylum seekers.⁹⁸ Furthermore, refugees and asylum seekers are often internally displaced prior to leaving their country of habitual residence.⁹⁹ IDPs, in contrast, outnumber refugees two to one.¹⁰⁰ This reality makes it even more imperative to establish a framework to assist States with fulfilling their obligations to internally displaced children. This thesis seeks to bring attention to the situation of IDPs, specifically, internally displaced children.

In addition, the high number of internally displaced children in Africa, the potential presented by the Kampala Convention and the protracted nature of internal displacement also support the importance of this research. Internally displaced children in Africa represent the majority of IDPs.¹⁰¹ The research is important as it draws attention to and provides a basis for further academic study with regard to a particular group of children that are only specifically contemplated in a limited number of provisions in existing legal instruments.¹⁰² Furthermore, the Kampala Convention is a noteworthy achievement for the continent of Africa, as it creates a regional legal framework for the protection and assistance of IDPs but, without the injection of a children's rights perspective, this legal framework may not

⁹⁸ For example, the conflict in Syria and other parts of the Middle East that have resulted in a massive influx of refugees and asylum-seekers to Europe. See for example A Bilak "Missing the Heart of the Problem: Why Ignoring Internal Displacement Undermines the Purpose of the UN Summit on Migrants and Refugees" (16-09-2016) *Thomas Reuter Foundation News* <<http://news.trust.org/item/20160916104048-x43fd/>> (accessed (27-03-2017)).

⁹⁹ United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons" (28 April 2016) A/HRC/32/335para 45-47.

¹⁰⁰ IDMC "GRID 2016: Global Report on Internal Displacement" (May 2016) 8.

¹⁰¹ Children make comprise the majority of IDPs and Africa is the continent with the greatest number of IDPs. See J Kunder "The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1; UNHCR "Framework for the Protection of Children" (2012) 7; IDMC "GRID 2016: Global Report on Internal Displacement" (May 2016) 8.

¹⁰² The ACRWC only mentions internally displaced children twice and the Kampala Convention mentions children six instances. See ACRWC arts 23(4), 25(2)(b); Kampala Convention arts 1(h), 7(5)(e), 7(5)(f), 9(1)(d), 9(2)(c), 13(4).

adequately respond to rights and needs of internally displaced children. The analysis that will be undertaken by this thesis can influence the manner in which it is interpreted and implemented to ensure that children and their specific rights and needs are highlighted. Internal displacement is not a passing phenomenon; it can last for several years and span the entirety of childhoods.¹⁰³ The longevity of this problem creates the need for the applicable legal frameworks to specifically consider the rights and needs of internally displaced children. Also, there is a need for a mechanism or a framework to facilitate the accountability of States as the principle duty-bearers to internally displaced children.

1 7 The scope of the research project

The scope of this thesis is limited with regard to the subgroups of internally displaced children considered in the study, the region of consideration, the causes of internal displacement, and the actors considered.

Internally displaced children have a great deal in common, but the children which make up this group are not homogenous. There are subgroups of internally displaced children that have specific challenges such as children with disabilities and children from indigenous communities.¹⁰⁴ In order to thoroughly address the needs of internally displaced children in general, the analysis must focus on this group as a whole. Therefore, these subgroups of internally displaced children will not be addressed in detail in this thesis. However, factors such a gender and various stages of childhood such as adolescence will be specifically highlighted where relevant.

This thesis will limit its focus to the continent of Africa. This decision was motivated by the high number of internally displaced children on the continent. Also, some of the core legal instruments are only applicable to States in Africa.¹⁰⁵

¹⁰³ UNHCR “Framework for the Protection of Children” (2012) 7; IDMC “Global Overview 2015: People Displaced by Conflict and Violence” (May 2015) 63-70.

¹⁰⁴ Also, there are additional provisions and legal frameworks applicable to children with disabilities and children from indigenous communities. Examples of international legal instruments applicable to children with disabilities and children from indigenous communities include: the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 art 7; Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2518 UNTS 283; United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) A/Res/61/295; International Labour Organization Indigenous and Tribal Peoples Convention, 1989 C169 (adopted 27 June 1989, entered into force 5 September 1991). The international and regional legal instruments that will be analysed by this thesis make special mention of persons with disabilities, persons from indigenous communities or communities with a special attachment to the land. See CRC art 23, 30; ACRWC art 13; Guiding Principles prins 4, 9; Kampala Convention arts 4(5), 9(2)(c).

¹⁰⁵ These include the ACRWC, ICGLR IDP Protocol and the Kampala Convention.

This thesis will limit its scope of investigation to internal displacement induced by conflict and generalised violence, and disasters. The literature outlines three situations that cover most causes of internal displacement, namely, disasters and violence or disturbances not rising to the level of internal armed conflict; internal armed conflict; and, conflict between States.¹⁰⁶ The principal causes of internal displacement can, therefore, be broadly classified as conflict and disasters. Another cause of internal displacement recognised by the various legal instruments is development projects.¹⁰⁷ This topic will not be included in the scope of this research as development-induced internal displacement differs from conflicts and disasters due to the level of pre-planning and calculated State involvement in such projects.¹⁰⁸

Finally, the nature of the research question lends itself to a critical theoretical analysis of the relevant law and literature. Where quantitative and qualitative data is required, the research outputs from the two primary international organisations able to collect data from and about IDPs, the Internal Displacement Monitoring Centre (“IDMC”), and the United Nations High Commission for Refugees (“UNHCR”), will be used in this study.¹⁰⁹

1 8 Overview of chapters

In light of the research question, aim and objectives and the scope of this study, this thesis will be divided into a number of chapters. Each chapter will contribute to developing a response to the research question and achieving the aim and objectives of this thesis.

Chapter two will develop the primary theoretical lens of this analysis, the concept that is described as a children’s rights perspective. This chapter will include a discussion of the historical progression and the rationale for the approach taken in children’s rights law. A definition will be provided for a children’s rights perspective. This chapter will conclude with a justification for the application of this approach to the interpretation and implementation of the law applicable to children generally and within the context of internal displacement.

Chapter three will further examine internal displacement, its causes, risks to internally displaced children, and their rights and needs. The aim of this chapter is to examine the main causes of internal displacement, namely, conflict and disasters. This chapter will

¹⁰⁶ United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2 para 27.

¹⁰⁷ Guiding Principles prin 6(2)(c); Kampala Convention art 10; ICGLR IDP Protocol arts 1(5), 5.

¹⁰⁸ Guiding Principles prin 6(2)(c); ICGLR IDP Protocol art 5; Kampala Convention art 10.

¹⁰⁹ IDMC “About IDMC” <<http://internal-displacement.org/about-us/>> (accessed 10-11-2016); UNHCR “Who We Help” <<http://www.unhcr.org/who-we-help.html>> (accessed 10-11-2016). It should be noted that obtaining access to IDP populations and collecting data from and about IDPs is beyond the scope of this thesis. Also, this type of research exceeds the time and resource constraints placed on this project.

include a brief discussion of the larger factors such as climate change and protracted displacement, which increase and prolong instances of internal displacement. The discussion will focus on how these factors relate to internally displaced children. Chapter three will conclude by identifying the risks, rights and needs of internally displaced children according to four categories, namely, physical security, basic needs, social, economic and cultural rights and civil and political rights.

The focus of the fourth chapter will be the critical analysis of the key legal instruments on the law on internal displacement. This chapter will include a discussion of the development of the law on internal displacement internationally as well as regionally in Africa. The core of this chapter will critically analyse the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention from a children's rights perspective according to the four categories of risks, rights and needs of internally displaced children introduced in chapter three. Chapter four will conclude by comparing the results of the analysis and highlight of any gaps or weaknesses in the legal instruments.

Chapter five will focus on the principle of accountability. It will include a discussion of the definition, characteristics and classifications of accountability. The concept of sovereignty as responsibility will be discussed in further detail in this chapter as it incorporates the principle of accountability in the context of internal displacement. Chapter five will also include an analysis of the accountability mechanisms found in international and regional human rights instruments. It will include a discussion of the role of non-governmental organisations ("NGOs") in supporting State compliance with their obligations to internally displaced children. Chapter five will conclude by examining a number of practical steps that States can take to implement their obligations to internally displaced children.

The sixth chapter will provide a comparative analysis of Uganda, the CAR, Nigeria and Sudan in the form of case studies. In this chapter, there will be a brief overview of the drivers and triggers of internal displacement and the domestic legislation and policy on internal displacement. Each case study will examine how the selected States engage with the principle of accountability through the accountability process, accountability mechanisms, theories of compliance and practical steps for implementing their obligations to internally displaced children. Chapter six will conclude by synthesising the findings regarding the engagement of the selected States with the principle of accountability.

The seventh and final chapter will synthesise the conclusions from the other chapters to answer the research question and provide recommendations. It will also develop a

framework that will encourage State compliance with their obligations to internally displaced children. This chapter will conclude by discussing the larger themes in the study.

CHAPTER 2: DEVELOPING A CHILDREN'S RIGHTS PERSPECTIVE

2 1 Introduction

The theoretical lens that will be used in this thesis is a children's rights perspective. As outlined in the previous chapter, a children's rights perspective is a rights-based approach that uses the United Nations Convention on the Rights of the Child ("CRC") as its normative framework. This CRC- framework balances the evolving capacities and vulnerabilities of children while using the content of the CRC and its general principles as the normative standard for assessing laws and policies applicable to children. For the purposes of this thesis, the laws and policies applicable to internally displaced children in Africa will be the focus of the analysis.¹

This chapter will outline what a children's rights perspective is in the context of this thesis. This process will involve a discussion of the progression of children's rights, a critical examination of rights-based approaches, and an examination of the key principles of the children's rights perspective that will be employed in this thesis. Before discussing this theoretical framework in detail, it is necessary to understand the concepts of the child and childhood and how they have been and are currently conceptualised by the law. This discussion is relevant to this thesis as children and the legal obligations that States owe to internally displaced children are the focus of this research.

2 2 Child, childhood and the law

The way in which children have been conceptualised provides some indication of the level to which their rights have developed. It is submitted that the legal conceptualisation of children has evolved from defining children as objects to subjects. As subjects, children and their rights have developed from welfare rights to rights that balance vulnerability with evolving capacities. The aim of this section is to provide a brief sketch of how children have been conceptualised over time and juxtapose Western and African conceptualisations of the child and childhood generally, to lay the foundation for examining how the law conceptualises children in an African context.

¹ See Chapter 1 section 1 5 3. For an analysis of specific instruments see Chapter 3 part 3 3 2; Chapter 4.

2.2.1 Children and childhood

On the surface, defining who is a child may appear to be quite simple. The philosopher Jean-Jacques Rousseau, for example, said, “a child is a child”.² Despite its apparent simplicity, determining if an individual is a child largely depends on the context. An individual who is considered a child in one State, society or community may be an adult in another. The conceptualisation of the child and the corresponding stage of childhood is in fact not so simple; it is complex and multifaceted.

A child can generally be described as an individual who is not yet an adult and is thus defined from the perspective which can be described as “adult-centric”.³ Fionda describes childhood “as a biological or psychological phase of life somewhere between infancy and adulthood”.⁴ From a psychological perspective, Spender and John explain that childhood can be understood from a developmental perspective, which is described as:

“psychological processes—such as cognitive capacity; memory; language skills; information processing; self esteem and other emotional factors.”⁵

Children move through these processes at their own pace.⁶ Nevertheless, their incomplete development provides a basis to understand children as vulnerable and in need of care and protection.⁷ Therefore, notions of dependence and vulnerability are bound up in the conceptualisation of the child and childhood.⁸

The child and childhood have been conceptualised in a variety of ways, depending on the context. The understanding of the child and childhood in religious, economic, and cultural and social contexts has influenced the law’s conceptualisation of the child,

² JJ Rousseau *Emile or Education* (1911) B Foxley (trans) as cited in D Archard *Children: Rights and Childhood* 2 ed (2004) 12.

³ J Wall “Human Rights in Light of Childhood” (2008) 16 *Int’l J Child Rts* 523-543 530. Also, there is a notion of children as “beings and becomings”. See A James, C Jenks & A Prout *Theorizing Childhood* (1998) 207; E Uprichard “Children as ‘Being and Becomings’: Children, Childhood and Temporality” (2008) 22 *Children & Society* 303-13.

⁴ J Fionda “Legal Concepts of Childhood: An Introduction” in J Fionda (ed) *Legal Concepts of Childhood* (2001) 3-17 3.

⁵ Q Spender & A John “Psychological and Psychiatric Perspectives” in J Fionda (ed) *Legal Concepts of Childhood* (2001) 57-74 58.

⁶ 58.

⁷ For example, see CRC Preamble.

⁸ MDA Freeman “The Limits of Children’s Rights” in MDA Freeman & P Veerman (eds) *Ideologies on Children’s Rights* (1992) 29-46 29; J Tobin “Understanding Children’s Rights: A Vision Beyond Vulnerability” (2015) 84 *Nordic Journal of International Law* 155-182.

and at other times the law has moved beyond them.⁹ Before exploring this line of reasoning further, some of the conceptualisations of the child and childhood in various contexts will be discussed.

Examples of the conceptualisation of the child in a religious context can be found in some of the well-known belief systems. In Christianity, the Bible describes the child as a blessing, but it clearly emphasises the need to train and discipline a child.¹⁰ In Islam, children are gifts from Allah and children are entitled to a good upbringing, which includes discipline.¹¹ In various religious contexts, it is therefore observed that children are considered as gifts that require training and discipline in order to come to full fruition.

From an economic perspective, children have the potential to either increase or decrease economic output by virtue of their labour or inability to provide labour. Depending upon the particular period in time, children have been understood as both economic assets and burdens.¹²

Culture also shapes the way in which the child and childhood are understood. As the focus of this thesis is on the continent of Africa, it is helpful to examine how African culture, in general, conceptualises the child and childhood. In contrast with Western societies, there is a consensus that African culture is more communal in nature.¹³ In a family setting, it can be said that what is best for the entire family, often including the

⁹ For example, the influence of culture on African customary law. See discussion below. See also C Himonga “Implementing the right of the Child in African Legal Systems: The *Mtheubu* Journey in Search of Justice” (2001) 9 *Int’l J Child Rts* 89-122 90, 95-97. See the House of Lord’s decision in *Gillick v West Norfolk and Wisbech AHA* [1986] 1 FLR 229, [1986] AC 112, [1985] UKHL 7 demonstrates that the Court was ready recognise a greater capacity of children.

¹⁰ For example, see *The Holy Bible* New International Version (1984) Psalm 127: 3, Proverbs 13:24, 17:6, 19:18, 22: 6, 15, 23: 13-14, 24, 29:15, 17.

¹¹ See *Qur’an* 4:1, 6:151, 16: 58-59 Anonymous “The Noble Qur’an” <<https://quran.com/>> (accessed 10-07-2017); Al-Azhar University & UNICEF *Children in Islam: Their Care, Upbringing and Protection* (2005) 10, 55, 106.

¹² For example, in 19th Century Germany a child was not truly accepted in the family until she or he was deemed economically useful. See R Lee “Family and Modernisation” *The Peasant Family and Social Change in Nineteenth Century Bavaria* in RJ Evans & WR Lee (eds) *The German Family: Essays on the Social History of the Family in Nineteenth and Twentieth-Century Germany* (1981) 84-119 96. Also, in Western European States the economic utility of having many children decreased as the labour intensive agricultural activities decreased. See G Van Bueren *International Law on the Rights of the Child* (1998) xxi.

¹³ African Commission on Human and Peoples’ Rights “General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)” (4-18 November 2015) para 3. See also C Himonga “African Customary Law and Children’s Rights: Intersections and Domains in a New Era” in J Sloth-Nielsen (ed) *Children’s Rights in Africa, A Legal Perspective* (2008) 73-90 81-82.

extended family, will take precedence over individual desires.¹⁴ A key duty associated in the context of an African family is the duty of a child to take care of her parents in their old age.¹⁵

Generally, in African societies, childhood is defined by a number of stages. At each stage, a child is expected to be able to carry out various tasks.¹⁶ Childhood ends with the completion of a particular set of tasks such as initiation, a rite of passage or marriage.¹⁷ Circumcision is an important aspect of many such rites.¹⁸ For example, even in today's context, an Xhosa male who is uncircumcised, despite having attained the age of majority will be considered as a child in the eyes of his community until he is circumcised.¹⁹ There are also different requirements for males and females with respect to becoming adults. Traditionally, a male is considered an adult when he is married and has his own homestead.²⁰ A female, in contrast, does not attain a status that demands respect until she bears children.²¹ Thus, gender differences relegate females to extended childhoods.²² Overall, in the African context, a person does not cease to be a child when he or she attains a particular age.

In contrast, age can be said to be the determining factor for defining who is and is not a child in Western societies. Childhood in the Western context can be idyllically described as a time of innocence and ignorance, a time of make-belief and play.²³ There is also the notion that children in Western societies are coddled in comparison

¹⁴ S Harris-Short "Listening to the 'Other'? The *Convention on the Rights of the Child*" (2001) 2 *Mel J Int'l L* 304-350 322; T Bennett *Customary Law in South Africa* (2004) 295-296.

¹⁵ A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 339.

¹⁶ T Bennett *Customary Law in South Africa* (2004) 298, T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 73-77.

¹⁷ A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 337.

¹⁸ T Bennett *Customary Law in South Africa* (2004) 300.

¹⁹ The entire initiation ritual transitions a male from boyhood (*ubukhwenkwe*) to manhood (*ubudoda*). See G Meintjes *Manhood at a Price: Socio-Medical Perspectives on Xhosa Traditional Circumcision* (1998) 7; T Dold & M Cocks *Voices from the Forest Celebrating Nature and Culture in Xhosaland* (2012) 93; L Vincent "'Boys will be Boys': Traditional Xhosa Male Circumcision, HIV and Sexual Socialisation in Contemporary South Africa" (2008) 10 *Culture, Health & Sexuality*: 431-446 441.

²⁰ T Bennett *Customary Law in South Africa* (2004) 302.

²¹ 302.

²² A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 339-340.

²³ See MDA Freeman "The Limit of Children's Rights" in MDA Freeman & P Veerman (eds) *The Ideologies of Children's Rights* (1992) 29-46 29 30.

to their African counterparts.²⁴ However, this modern Western conceptualisation of the child and childhood did not always exist. deMause paints a dark picture of childhood when he writes:

“The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care and the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused.”²⁵

Reflecting on the findings of his study, Ariès takes the position that in the 16th and 17th centuries that the modern conception of childhood did not yet exist.²⁶ He states that once weaned, children quickly entered the adult world.²⁷ Also, Ariès notes that children were either viewed as objects to be coddled or, particularly, by the clergy, objects in need of protection and training.²⁸ Archard offers an alternative way of understanding childhood in terms of boundaries, dimensions and divisions.²⁹ The boundary marks the endpoint of this stage of life.³⁰ The dimensions outline the various perspectives on childhood such as juridical, metaphysical or political.³¹ Finally, the divisions are the manner in which childhood is subdivided, such as describing a child as an infant, adolescent or youth.³² This approach can be adapted to a number of circumstances rather than prescribe a particular conception of the child and childhood.

Childhood is a socially constructed stage of life, but as Freeman notes there are different definitions of this stage, which continue to evolve.³³ What is clear about the overall conceptualisation of the child and childhood is that it can change depending on the context. The importance of this preliminary discussion for this study is to lay the foundation for examining legal responses to these religious, economic, cultural and

²⁴ See T Bennett *Customary Law in South Africa* (2004) 296. However, in reality this may not be the case. For example, children in Western States also experience “poverty, exploitation and hardship” See MDA Freeman “The Limit of Children’s Rights” in MDA Freeman & P Veerman (eds) *The Ideologies of Children’s Rights* (1992) 29-46 29 31.

²⁵ L deMause “The Evolution of Childhood” in L deMause (ed) *The History of Childhood* (1974) 1-74 1.

²⁶ P Ariès *Centuries of Childhood A Social History of Family Life* (1962) R Baldick (trans) 128. It should be noted that this study has been criticised. See MDA Freeman *The Rights and Wrongs of Children* (1983) 12-13; D Archard *Children: Rights and Childhood 2 ed* (2004) 21-22.

²⁷ P Ariès *Centuries of Childhood A Social History of Family Life* (1962) R Baldick (trans) 128.

²⁸ 132-133.

²⁹ D Archard *Children: Rights and Childhood 2 ed* (2004) 31.

³⁰ 31.

³¹ 32.

³² 33. It has been noted that the use of these terms has been quite imprecise. See G Van Bueren *International Law on the Rights of the Child* (1998) 32; Van Bueren (ed) *International Documents on Children 2 ed* (1998) xix.

³³ M Freeman “The Child in Family Law” in J Fionda (ed) *Legal Concepts of Childhood* (2001) 183-201 183.

social notions of the child and childhood. The dynamic nature of the definition of a child has paved the way for a progression in the law's conceptualisation of the child. The next section will examine the legal conceptualisation of the child in an African context.

2 2 2 The law and its conceptualisation of children

Building upon these various understandings of the child and childhood, it is clear that the law's conceptualisation of children has evolved over time. Children were first conceptualised as objects, then as objects of protection, and finally to persons with some measure of capacity.³⁴

In the African context, the current legal conceptualisation of the child has been influenced by many sources. African cultural heritage, including African customary law, is a source that has helped to shape the current legal conceptualisation of the child. African customary law, for example, has been defined in South Africa by the Recognition of Customary Marriages Act 120 of 1998 as:

“[C]ustoms and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of the peoples”.³⁵

Therefore, African customary law incorporates the various aspects of the culture of different African peoples.³⁶ As such, culture is fundamental in the conceptualisation of the child and childhood in African societies. Due to the impact of colonialism, Western law has also influenced the conceptualisation of the child in the African context.³⁷ The

³⁴ For example, in Roman law a child born of a valid marriage was essentially the property of his or her father. The principle of *patria potestas* gave the father or *paterfamilias*, ultimate control over his children. See SP Scott (trans) *The Civil Law 1* (2013) Law of the Twelve Tables Rules of Ulpian Title XI 232-235; SP Scott (trans) *The Civil Law 1* (2013) Law of the Twelve Tables Table IV Law I 64-65; SP Scott (trans) *The Civil Law 2* (2013) The Enactments of Justinian Title IX 13-19. See also WA Hunter *A Systematic and Historical Exposition of Roman Law in Order of a Code* 2 ed (1885) 189-192; WA Hunter & FH Lawson *Introduction to Roman Law* 9 ed (1955) 30-33. For a discussion regarding the welfare focus on the Declarations that preceded the CRC see part 2 3. For example, in the United Kingdom the House of Lords found that a child's capacity was not linked to a fixed age, but rather her understanding and intelligence. See *Gillick v West Norfolk and Wisbech AHA* [1986] 1 FLR 229, [1986] AC 112, [1985] UKHL 7. The development of the international and regional children's rights instruments will be discussed in part 2 3.

³⁵ Recognition of Customary Marriages Act s 1(ii).

³⁶ African customary law is by no means homogenous, but like the common law and civil law which have a myriad of variations can be described as legal system.

³⁷ In most African States, customary law operates alongside another legal system whether based on the common, law civil law or another system. See C Himonga "Implementing the right of the Child in African Legal Systems: The *Mtheubu* Journey in Search of Justice" (2001) 9 *Int'l J Child Rts* 89-122 95. For example, South Africa can be classified as a mixed legal system as incorporates the Roman-Dutch law and the common law as well as customary law. See K Zweigert & H Kötz *An Introduction to Comparative Law* (1998) 231-235.

legal understanding of the child in the African context is broadly an intersection of African culture, customary law and Western law.³⁸

There are several key elements, which can be observed in the legal conceptualisation of the African child. African customary law incorporates the principle of parental authority.³⁹ Another defining feature of the conceptualisation of the African child is the notion that a child has duties.⁴⁰ A child is fed, clothed and educated, but one day she will be required to pay forward the benefits that she has received by assisting other family members.⁴¹ South Africa's Children's Act 38 of 2005 also states that children have responsibilities to their families, communities and State that are age appropriate.⁴² These duties also correspond to the concept of *ubuntu*, which can be described as an African worldview of group solidarity.⁴³ Especially when resources are limited, the survival of the community requires all of its members to work together, including children.⁴⁴ Children and their role are understood from this communal ethic, which prescribes that the well-being of both the individual and the group are inter-related and mutually reinforced.⁴⁵ This African cultural worldview, therefore, permeates the way in which children are understood, even in the legal context.

³⁸ C Himonga "Implementing the right of the Child in African Legal Systems: The *Mtheubu* Journey in Search of Justice" (2001) 9 *Int'l J Child Rts* 89-122 90. See also A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 336.

³⁹ Bennett states that "[c]hildren are expected to be obedient and submissive". See T Bennett *Customary Law in South Africa* (2004) Lansdowne: Juta and Company 295.

⁴⁰ Duties for children were also included at a regional level. See Article 31 of the African Charter on the Rights and Welfare of the Child outlines duties of the African child. See part 2 3 for a further discussion of Article 31 duties. See also J Sloth-Nielsen & BD Mezmur "A Dutiful Child: The Implications of Article 31 of the African Children's Charter" (2008) 52 *J Afr L* 159-189.

⁴¹ W Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" in Ncube W (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 11-27 18-19; TW Bennett *Customary Law in South Africa* (2004) 297. As noted earlier, one fundamental duty of an 'adult' child is to care for her elderly parents. See part 2 2 1. See also A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 338-339.

⁴² Children's Act 2005 s16.

⁴³ C Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in J Sloth-Nielsen (ed) *Children's Rights in Africa, A Legal Perspective* (2008) 73-90 81. For a discussion of the concept of *ubuntu* see Y Mokgoro "Ubuntu and the Law of South Africa" (1998) 4 *Buffalo Human Rights Law Review* 15-24 15-17.

⁴⁴ This is one explanation for assigning duties to children in the African context. C Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in J Sloth-Nielsen (ed) *Children's Rights in Africa, A Legal Perspective* (2008) 73-90 81.

⁴⁵ Y Mokgoro "Ubuntu and the Law of South Africa" (1998) 4 *Buffalo Human Rights Law Review* 15-24 15-16; C Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in J Sloth-Nielsen (ed) *Children's Rights in Africa, A Legal Perspective* (2008) 73-90 81.

Furthermore, the law's conceptualisation of the child in the African context demonstrates that it is difficult to separate the cultural understanding of the child and childhood from the legal context.

An additional challenge is reconciling the conceptualisation of African children with the influence of Western law. Armstrong and others indicate that importing Western legal concepts can be confusing when there is a different legal understanding of childhood in an African context.⁴⁶ The development of children's rights law at the international level is an example of this. Ideally, international standards are to be universally applicable, but the domestication and internalisation of these standards can prove challenging when there are differing conceptualisations of the key subject, which in the context of children's rights law are children. In contrast, regional instruments can be used as a tool to import the international legal standards in a way that considers the cultural worldview that is prevalent in the States in the region.

At the international and regional levels, the key instruments with respect to children's rights applicable to States in Africa are the CRC and the African Charter on the Rights and Welfare of the Child ("ACRWC"). These instruments incorporate Western legal notions but include or at least make room for African cultural values.⁴⁷ In addition to the influence of culture on the conceptualisation of African children, the development of the CRC and ACRWC demonstrate the progressive conceptualisation of children as subjects rather than as objects. Both instruments recognise the evolving capacities of children.⁴⁸ The conceptualisation of children as bearers of rights at the international and regional level also places distinct obligations on States regarding the realisation of these rights. There is a direct relationship between children and the State as bearers of rights and duty-bearers respectively. In the context of internal displacement, the relationship between the State and the child is of great importance as States have the primary obligation for the protection and assistance of internally

⁴⁶ Armstrong *et al* explain that under traditional law women could be considered as children perpetually and trying to reconcile this legal concept with Western legal standards could be confusing. See A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *Int'l J Child Rts* 333- 368 340.

⁴⁷ The ACRWC includes African cultural values. See ACRWC Preamble. The CRC's definition of the child makes room for other cultural and definitions of the child by allow the age of the child to be determined by applicable law. See CRC art 1. See also G Van Bueren *International Law on the Rights of the Child* (1998) 34-35.

⁴⁸ CRC art 5; ACRWC 9(2).

displaced children.⁴⁹ Therefore, it is worthwhile to examine the development of these key instruments in children's rights law in order to understand how children have progressed from objects to bearers of rights in international law and how humankind's aspirations of goodwill developed into legal obligations accepted by States.⁵⁰

2 3 The standard for children's rights

In terms of the law and the human rights of children, at the apex, are the CRC at the international level, and the ACRWC at the regional level. In other words, due to the near universal ratification of both legal instruments, they set the standard for children's rights.⁵¹ The development of these instruments provides context for understanding how the law conceptualises children and their rights. Also, the legal conceptualisation of children and their rights at an international and regional level form the normative framework for a children's rights perspective. In what follows, the development of the two legal instruments will be discussed.⁵²

2 3 1 An international perspective: The United Nations Convention on the Rights of the Child

The CRC is the international standard with respect to children's rights.⁵³ Drafted from the perspective that protection, prevention, provision and participation, are all important aspects of children's rights, the CRC represents a departure from how children were previously understood by the law.⁵⁴ The CRC solidified the notion that children are bearers of rights rather than merely objects of protection.⁵⁵ Van Beuren

⁴⁹ Guiding Principles prin 3; Kampala Convention art 5(1); Great Lakes IDP Protocol art 3(3)

⁵⁰ See League of Nations Declaration of the Rights of the Child (26 September 1924) Preamble.

⁵¹ The CRC has been ratified by all State with the exception of the United States of America and the ACRWC has been ratified by 48 of the 55 States that are members of the African Union. See United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 01-06-2018); African Union "List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child" <https://www.au.int/web/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf> (accessed 01-06-2018). See also G Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) 202-213 202.

⁵² For a detailed analysis of the CRC and the ACRWC with respect to the rights and needs of internally displaced children see Chapter 3 part 3 3 2.

⁵³ G Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) 202-213 202.

⁵⁴ G Van Bueren "The UN Convention on the Rights of the Child" (1990-1991) 3 *J Child L* 63-66 63; A McGillivray "Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada" (2011) 19 *Int'l J Child Rts* 21-54 24.

⁵⁵ S Human "The Theory of Children's Rights" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 150-165 151-152. See also A McGillivray "Children's Rights, Paternal Power and

states that when the CRC “entered into force [it] led to the international community examining the international law on children from a children’s rights perspective”.⁵⁶ Prior to its inception, there were a number of other legal instruments that paved the way for the creation of the CRC and conceptualisation of children and their rights.

The legal instruments that allowed for this transition of the conceptualisation of children are the 1924 and 1959 Declarations on the Rights of the Child.⁵⁷ The language of the 1924 Declaration on the Rights of the Child is aspirational in nature, especially in the Preamble where it is “[recognised] that mankind owes to the child the best that it has to give”.⁵⁸ Van Bueren also describes the 1924 Declaration as taking a welfare approach as it provided for the economic, social and psychological needs of children.⁵⁹ Despite the welfare approach, the 1924 Declaration introduced the idea of children’s rights to the international arena.⁶⁰ The 1959 Declaration on the Rights of the Child was adopted after the Universal Declaration of Human Rights as it was agreed that “the special needs of the child justified a separate declaration.”⁶¹ While there was still a welfare focus, the 1959 Declaration mentions the rights and freedoms of children, highlights that States have obligations to children, and identifies the best interests of the child as a guiding principle.⁶² The welfare focus of both Declarations indicates that at that time, children were still conceptualised by the law as objects of protection rather than as bearers of rights; there was a focus on the special needs of children rather than their agency.

Another noteworthy change in the language used in the 1959 Declaration is its reference to States. The 1924 Declaration used the term ‘mankind’ when referring to the duty-bearers whereas the 1959 Declaration identifies that States are obligated to recognise the rights of children.⁶³ Therefore, the 1959 Declaration identifies States as the primary duty-bearers to children. This shift in language is important in the context

Fiduciary Duty: From Roman Law to the Supreme Court of Canada” (2011) 19 *Int’l J Child Rts* 21-54 24.

⁵⁶ Van Bueren (ed) *International Documents on Children* 2 ed (1998) xvi.

⁵⁷ League of Nations Declaration of the Rights of the Child (26 September 1924) (“1924 Declaration”); United Nations Declaration of the Rights of the Child (20 November 1959) UNGA Res 1386(XIV) (“1959 Declaration”).

⁵⁸ 1924 Declaration Preamble.

⁵⁹ Van Bueren *International Law on the Rights of the Child* (1998) 8.

⁶⁰ 8.

⁶¹ 10.

⁶² 1959 Declaration Preamble, prin 7.

⁶³ See 1924 Declaration Preamble; 1959 Declaration Preamble.

of this thesis as it demonstrates that the law has evolved towards recognising that States, also have specific obligations to children, not just humankind, their parents or guardians.⁶⁴

Overall, the two Declarations indicate a welfarist approach and by extension indicate a conceptualisation of children as objects of protection. However, both Declarations advanced the human rights of children by bringing international attention to the need to provide children with specific rights.⁶⁵

When the United Nations declared 1979 as the International Year of the Child, this created the impetus for the creation of what would eventually become the CRC ten years later.⁶⁶ Van Bueren outlines five additional reasons that led to the creation of the CRC, but in terms of the topic of this discussion, there is one reason that stands out – a fundamental change in the attitudes of States towards children.⁶⁷ The change was supported by domestic legislation.⁶⁸ As a United Nations treaty, the CRC created an internationally applicable and binding legal instrument. Children's rights were elevated from gestures of goodwill to legally binding obligations.⁶⁹

There are a number of observations that can be made about the CRC that are relevant to the conceptualisation of children and their rights. The CRC provides for children's civil, political and cultural rights, as well as their social and economic rights. Children, for instance, have a right to freedom of expression, freedom of thought, conscience and religion, freedom of assembly, and a right to participate in their religion or culture.⁷⁰ In addition, children have the right to the highest attainable standard of health, to benefit from social security, an adequate standard of living, to education,

⁶⁴ Specific obligations for States were later created by the CRC.

⁶⁵ See Van Bueren *International Law on the Rights of the Child* (1998) 6-12.

⁶⁶ United Nations General Assembly Resolution 31/169 (21 December 1976); G Van Bueren *International Law on the Rights of the Child* (1998) 13.

⁶⁷ The five reasons can be summarised as follows: 1. There was a fundamental change in States' attitudes towards children. 2. There was an international trend to confer specific rights to particular groups such as women and refugees. 3. It was recognised that children required a higher level of protection due to their vulnerability. 4. It was recognised that in order to effectively apply children's rights necessitated different principles of interpretation. 5. There were many bilateral and multilateral treaties with regard to the protection of children and their rights; therefore, there was a need for a creation of a uniform standard. See G Van Bueren *International Law on the Rights of the Child* (1998) 13-14.

⁶⁸ G Van Bueren *International Law on the Rights of the Child* (1998) 13.

⁶⁹ Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11.

⁷⁰ CRC arts 13-15, 31(2).

and a right to leisure and play.⁷¹ The CRC, therefore, provides children with a full package of rights. In addition to providing children with rights and freedoms, the CRC focuses on some groups of children with special needs such as refugee children, children with disabilities and children from indigenous communities or cultural minorities.⁷² As a legal document, the CRC conceptualises children in a manner that is more balanced than its predecessors. The CRC acknowledges that children for a number of reasons are in need of special protection, yet it emphasises that children have the right to participation and that children have evolving capacities.⁷³

In terms of participation, vulnerability and evolving capacities, there are two further points that support crediting the CRC with providing a more balanced conceptualisation of children. First, the addition of participation as one of the “four ps”⁷⁴ transformed children into bearers of rights as it provided them with a role to play in the realisation of their rights.⁷⁵ Second, the CRC balances the recognition of children as a group of human beings that are vulnerable with the recognition that childhood is not static and the notion that the capacities of children evolve over time.⁷⁶ Here, vulnerability is balanced with evolving capacities. When examining how the CRC addresses children and their rights, it is clear that this instrument provides children with a full spectrum of rights that are enforceable, and that children have an active role

⁷¹ CRC arts 24(1), 26(1), 27(1), 28(1), 31(1).

⁷² CRC arts 22, 23, 30. As noted earlier, the CRC regrettably omits internally displaced children.

⁷³ CRC Preamble para 9. It should be noted that participation not only includes the right to be heard, but it also includes freedom of express, freedom of thought, conscience and religion, freedom of assembly. See CRC arts 12-15; J Tobin “Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 290; A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013) 39-41. Regarding evolving capacities see CRC art 5; A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013) 41-42; J Tobin “Understanding Children’s Rights: A Vision Beyond Vulnerability” (2015) 84 *Nordic Journal of International Law* 155-182 157, 174.

⁷⁴ See G Van Bueren “The UN Convention on the Rights of the Child” (1990-1991) 3 *J Child L* 63-66 63; JA Robinson “An Introduction to the International law on the Rights of the Child Relating to the Parent-Child-Relationship” (2002) 13 *Stell LR* 309-320 312. The literature also makes reference to three ps of children’s rights, namely, provision, protection and participation. See T Hammarberg “The UN Convention on the Rights of the Child – and How to Make it Work” (1990) 12 *Human Rights Quarterly* 97-105 100; A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013) 6.

⁷⁵ A McGillivray “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada” (2011) 19 *Int’l J Child Rts* 21-54 43; A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013) 7.

⁷⁶ CRC art 5; A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013) 41-42; J Tobin “Understanding Children’s Rights: A Vision Beyond Vulnerability” (2015) 84 *Nordic Journal of International Law* 155-182 157, 174.

to play in the realisation of their rights.⁷⁷ The implementation of the CRC at a domestic level according to the CRC Committee requires "[t]he development of a children's rights perspective throughout Government, parliament and the judiciary".⁷⁸ This approach is consistent with the four general principles of the CRC, namely, non-discrimination, the best interests of the child, the right to life, survival and development, and the right to be heard.⁷⁹ Overall, the CRC provides a conceptualisation of children as active participants – bearers of rights.

2 3 2 A regional perspective: The African Charter on the Rights and Welfare of the Child

While the CRC can be credited with transforming children into bearers of rights, the ACRWC incorporates elements that are particularly relevant to African children as individuals and as a group. The creation of the ACRWC was also influenced by the United Nations declaring 1979 the Year of the Child. During that year, the then Organisation of African Unity ("OAU"), adopted the Declaration on the Rights and Welfare of the Child.⁸⁰ A closer examination of the Declaration reveals how children were conceptualised at that time in the African context. The first point to note is that the Declaration acknowledges the influence of the welfare focus of the 1959 Declaration.⁸¹ The welfare focus of the Declaration on the Rights and Welfare of the African Child is specifically outlined in the Preamble where the following is stated:

"[d]etermined to implement at national, sub-regional and regional levels together with the national and international organisations the programmes undertaken to promote child

⁷⁷ States' obligations under the CRC are binding and it can be said that the CRC is widely accepted by States as it has near universal ratification. See Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11. See also United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 07-07-2017). A discussion of accountability and the mechanisms which encourage States to comply with their obligations to internally displaced children see Chapter 5. See also MDA Freeman "The Limit of Children's Rights" in MDA Freeman & P Veerman (eds) *The Ideologies of Children's Rights* (1992 29-46 29 39).

⁷⁸ Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 12.

⁷⁹ Para 12. These principles will be discussed in further detail in part 2 4 2 2.

⁸⁰ (17-20 July 1979) AHG/ST.4(XVI) Rev.1 ("Declaration on the Rights and Welfare of the Child") *African Union* <https://au.int/sites/default/files/decisions/9526-assembly_en_17_20_july_1979_assembly_heads_state_government_sixteenth_ordinary_session.pdf> (accessed 28-08-2018); F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 392.

⁸¹ Declaration on the Rights and Welfare of the African Child Preamble para 2, art 2.

welfare by providing facilities in the fields of education, medical care, nutrition and other basic services.”⁸²

Furthermore, any notions of child participation are absent, rather there is a call for advocacy on behalf of children.⁸³ This language provides a clear indication that at the time the Declaration was adopted, children were conceptualised by the law as objects of protection rather than as bearers of rights. There are two other points raised by the review of the 1979 Declaration that are relevant with respect to the development of children’s rights in Africa. First, African culture was incorporated into the law. For instance, the Declaration describes children as “inheritors and keepers of African cultural heritage”.⁸⁴ The Declaration also states that the welfare of children cannot be separated from the welfare of the family, which emphasises a communal worldview.⁸⁵ Second, the Declaration specifically mentions refugee and internally displaced children as a group of children requiring “[p]articular attention”.⁸⁶ A review of the text of the 1979 Declaration, therefore, indicates a concern for child welfare, which supports the argument that children were conceptualised as objects of protection rather than as bearers of rights.

The adoption of the ACRWC, in contrast, demonstrates a progression regarding how the law conceptualises children and their rights at a regional level. The ACRWC incorporates aspects of the 1979 Declaration, yet the provisions of the Charter provide an indication that the law at a regional level began to consider children as active participants in the realisation of their rights.

The ACRWC also builds upon the CRC while incorporating an African cultural perspective.⁸⁷ It has been said that the ACRWC was also a response to the limited involvement of African States in the drafting of the CRC.⁸⁸ One of the highlights of the

⁸² Declaration on the Rights and Welfare of the African Child 1 Preamble para 4.

⁸³ Art 1.

⁸⁴ Preamble para 6.

⁸⁵ Preamble para 7. African societies have been contrasted from Western societies by emphasising the communal and relational aspects of these societies. See A Armstrong, M Chuulu, C Himonga, P Letuka, K Mokobi, W Ncube, T Nhlapo, B Rwezaura & P Vilakazi “Towards a Cultural Understanding of the Interplay between Children’s and Women’s Rights: An Eastern and Southern African Perspective” (1995) 3 *Int’l J Child Rts* 333- 368 336.

⁸⁶ Declaration of the Rights and Welfare of the African Child art 12.

⁸⁷ ACRWC Preamble para 6; T Kaime “The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account” (2009) 3 *Afr J Leg Stud* 120-136 121, 131.

⁸⁸ F Viljoen “Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” (1998) 31 *The Comparative and International Law Journal of Southern Africa* 199- 212 200.

ACRWC is that it addresses at least 10 issues that are inadequately addressed or not included in the CRC.⁸⁹ With respect to this thesis, one important addition is the provision of special protection for internally displaced children.⁹⁰ Kaime credits the inclusion of these provisions within the ACRWC with strengthening the protection of children.⁹¹ Therefore, the Charter builds upon the provisions of the CRC, by providing additional protections that are particularly relevant to African children.⁹²

The inclusion of participation in the ACRWC is one indication that it conceptualises children as bearers of rights. Article 7 of the Charter provides every child who is capable, with the freedom to express his or her views "in all matters".⁹³ The language of this provision provides children with a wide right of participation that is not limited to involvement in judicial proceedings or in matters that concern them. This language can be contrasted with Article 12 of the CRC, which provides that a child has the right to express his or her views "in all matters affecting the child".⁹⁴ Child participation pursuant to Article 12 of the CRC therefore, is limited to matters that concern or affect the child. A provision in the ACRWC that is similar to Article 12 of the CRC is Article 4(2). It provides children who are capable of communicating and who are affected by judicial or administrative proceedings with the right to express their views.⁹⁵ The context of Article 4(2) of the ACRWC is limited to proceedings whereas Article 7 of the ACRWC does not limit the context of its application.⁹⁶ What is clear from the examination of the provisions of the ACRWC is that participation is an important feature of this regional instrument.

Similar to the CRC, there are fundamental principles that are integral to the interpretation and implementation of the ACRWC. However, there appears to be different positions on what these fundamental principles are. Viljoen states that non-

⁸⁹ F Viljoen "The African Charter on the Rights and Welfare of the Child" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 214-231 218-219 (footnote omitted).

⁹⁰ See ACRWC art 23(4); F Viljoen "The African Charter on the Rights and Welfare of the Child" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 214-231 218-219 (footnote omitted).

⁹¹ T Kaime "From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child" (2004) 16 *Int'l J Refugee L* 336-348 338.

⁹² In addition to providing for special protection for internally displaced children, the ACRWC also requires the abolishment of particular harmful cultural practices such as child marriage. See ACRWC arts 21(2), 23(4).

⁹³ ACRWC art 7.

⁹⁴ CRC art 12.

⁹⁵ ACRWC art 4(2).

⁹⁶ ACRWC arts 4(2), 7. Also, the CRC limits the scope of Article 12 as specifically provides for participation in the context of judicial and administrative proceedings as well. See CRC art 12(2).

discrimination, the best interests of the child and the primacy of the Charter over culture are the ACRWC's "anchoring principles".⁹⁷ Olowu states that the ACRWC shares the same general principles as the CRC.⁹⁸ Kaime indicates that these principles are non-discrimination, the best interests of the child and participation.⁹⁹ Sloth-Nielsen and Mezmur state that non-discrimination, the best interests of the child, and the right to life, survival and development are the three general principles of the ACRWC.¹⁰⁰ The African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") settled the issue by stating that the four fundamental principles of the Charter are non-discrimination, the best interest of the child, the right to survival, protection and development and the right to participation.¹⁰¹ These fundamental principles are consistent with the general principles of the CRC. The inclusion of participation in the principles that underpin the Charter signals that children are considered as actors rather than objects. The ACRWC also incorporates another unique element that finds its roots in African culture and also indicates that children are considered as active participants; namely, the inclusion of duties.

Article 31 of the ACRWC outlines specific duties for children.¹⁰² The inclusion of duties for children is controversial, and it has been asserted that duties provide an avenue for the mistreatment of children.¹⁰³ Another perspective expressed by others is that the inclusion of duties resonates with the African cultural perspective of the ACRWC and recognises that duties complement the rights of children.¹⁰⁴ Duties can be viewed as a means of equipping children for adulthood and as a recognition of their

⁹⁷ F Viljoen "The African Charter on the Rights and Welfare of the Child" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 214-231 219.

⁹⁸ D Olowu "Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child" (2002) 10 *Intl J Child Rts* 127-136 129.

⁹⁹ T Kaime "From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child" (2004) 16 *Int'l J Refugee L* 336-348 338-339.

¹⁰⁰ J Sloth-Nielsen & BD Mezmur "A Dutiful Child: The Implications of Article 31 of the African Children's Charter" (2008) 52 *J Afr L* 159-189 172.

¹⁰¹ ACRWC arts 3, 4(1), (2), 5; ACERWC "General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"" (2013) 8-9.

¹⁰² The CRC does not place duties upon children. However, other relevant actors, such as States and parents and guardians have duties pursuant to the ACRWC as well. The Charter provides States with duties throughout, but it specifically charges States Parties recognise and steps to implement the rights and freedoms of the Charter. See ACRWC arts 1(1), 20.

¹⁰³ F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 393-394; G Van Bueren *International Law on the Rights of the Child* (1998) 76-77.

¹⁰⁴ See J Sloth-Nielsen & BD Mezmur "A Dutiful Child: The Implications of Article 31 of the African Children's Charter" (2008) 52 *J Afr L* 159-189; F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 393-394.

evolving capacities.¹⁰⁵ Also, the duties prescribed by the Charter are limited by the child's age and ability.¹⁰⁶ Furthermore, the duties must be interpreted in light of the Charter's other provisions and other human rights law, which would mitigate the potential for abuse.¹⁰⁷ Essentially, the inclusion of duties in the ACRWC underscores that children are active participants in the realisation of their rights. Sloth-Nielsen and Mezmur state,

“[t]he child's right to participate [...] has long be regarded as a key to the rights-based philosophy of children's rights that replaced the welfarist protectionism, in terms of which children were viewed as objects, rather than subjects of human rights.”¹⁰⁸

For children to be given duties is a recognition that children are no longer merely objects of protection. Therefore, the inclusion of duties in the ACRWC is a clear indication that the law at a regional level underscores the capacity of children.

An examination of children's rights law at an international and regional level reveals a transformation in how children are conceptualised by the law. Understanding the law's conceptualisation of children is important as it can influence the manner that the law is implemented.

In order for the conceptualisation of children as bearers of rights to be put into practice, this approach must be adopted by individual States at the domestic level. The next section will briefly discuss the relationship between the child and the State, and the importance of conceptualising children as bearers of rights in the context of this relationship.

2 3 3 The role of States with respect to children

In the context of children's rights, the principal actors are children, their parents or guardians and the State. In terms of the parent-child relationship, the State may intervene when parents fail to discharge their duties, or if there is a conflict between the rights of the child and the rights of the parents.¹⁰⁹ Another interaction that a child

¹⁰⁵ J Sloth-Nielsen & BD Mezmur “A Dutiful Child: The Implications of Article 31 of the African Children's Charter” (2008) 52 *J Afr L* 159-189 171.

¹⁰⁶ ACRWC art 31; J Sloth-Nielsen & BD Mezmur “A Dutiful Child: The Implications of Article 31 of the African Children's Charter” (2008) 52 *J Afr L* 159-189 171.

¹⁰⁷ ACRWC arts 31, 46; F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 394; J Sloth-Nielsen & BD Mezmur “A Dutiful Child: The Implications of Article 31 of the African Children's Charter” (2008) 52 *J Afr L* 159-189 172.

¹⁰⁸ 170.

¹⁰⁹ See M Minow “Rights for the Next Generation: A Feminist Approach to Children's Rights” (1986) 9 *Harv Women's LJ* 1-24 18-21. For example, in *Gillick* the right to the child to receive information

may have with the State is when she is in conflict with the law.¹¹⁰ There are also instances where the State is the primary duty-bearer.¹¹¹ It is this relationship between the child and the State that will be the focus of this thesis.

The law's conceptualisation of children is important as it affects how States discharge their legal obligations towards children. Coming from a welfare approach and conceptualising children as objects of protection allows States to treat their obligations to children as acts of charity rather than binding obligations. These obligations become something that States ought to do, but there may be challenges to hold them accountable.¹¹² For instance, as objects of protection children are passive rather than active participants. This conceptualisation does not provide a space for children and their representatives to hold States accountable. When children are conceptualised as bearers of rights, children can actively participate in the realisation of their rights, which enables them to hold States accountable for their obligations.¹¹³

Focusing on children as objects of protection encourages a focus on their vulnerability. Tobin states that a focus on the vulnerability of children creates the space to justify unhelpful (however, well-meaning) interventions.¹¹⁴ His position is that vulnerability ought to be balanced with the evolving capacities and participation of children.¹¹⁵ Freeman supports this point when he states,

about contraceptives and the right of the parent to be informed of the information provided to her or his child was conflict. See *Gillick v West Norfolk and Wisbech AHA* [1986] 1 FLR 229, [1986] AC 112, [1985] UKHL 7. See also M Minow "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 *Harv Women's LJ* 1-24 18-21.

¹¹⁰ For example, when a child charged is with a criminal offence. See M Minow "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 *Harv Women's LJ* 1-24 21-23.

¹¹¹ For example, States have the primary obligation to provide for the rights and needs of internally displaced children. See Guiding Principles prin 3; Kampala Convention art 5(1); ICGLR IDP Protocol art 3(3). See also discussion in Chapter 1 part 1 1 4.

¹¹² At the international level members of the international community could encourage States to uphold their obligations. The new communications procedure does allow violations of rights to be brought directly to the attention of the Committee on the Right of the Child. See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered force 14 April 2014) 2983 UNTS art 5. See also Chapter 5 for a discussion with respect to State obligations and accountability.

¹¹³ For a discussion of accountability see Chapter 5 part 5 2.

¹¹⁴ J Tobin "Understanding Children's Rights: A Vision beyond Vulnerability" (2015) 84 *Nordic Journal of International Law* 155-182 157, 169. See also KH Federle "Looking Ahead: An Empowerment Perspective on the Rights of Children" (1995) 68 *Temple L Rev* 1585-1605 1598.

¹¹⁵ J Tobin "Understanding Children's Rights: A Vision Beyond Vulnerability" (2015) 84 *Nordic Journal of International Law* 155-182 175-176.

“[t]o take children’s rights seriously requires us to take seriously both protection of children and recognition of their autonomy.”¹¹⁶

Therefore, it is important to understand that even though children are vulnerable, their capacity will increase, and their participation is necessary. Capacity, however, has been used as a means of limiting the actions of children.¹¹⁷

Federle contributes to moving the discussion of children’s rights beyond capacity through focusing on the issue of power. Defining children as bearers of rights shifts the dialogue from capacity to power.¹¹⁸ Federle explains that “rights flow downhill towards the powerless”.¹¹⁹ In terms of this perspective, the purpose of rights is to give power to the powerless. Children are afforded rights because as vulnerable and at times marginalised members of society, they need to be empowered.¹²⁰ Rights, in Federle’s view, give power by challenging the systems of power that are in place and by requiring that bearers of rights are not treated in an overprotective manner.¹²¹ Her “empowerment rights perspective [...] takes a rights-based approach to remedying the powerlessness of children by according rights to those who are disempowered”.¹²²

¹¹⁶ MDA Freeman “The Limit of Children’s Rights” in MDA Freeman & P Veerman (eds) *The Ideologies of Children’s Rights* (1992) 29-46 37.

¹¹⁷ A detailed analysis of the capacity and the theories of children’s rights is beyond the scope of this study. The different approaches such as the as the interest theory, the will theory, the social interest theory will therefore not be discussed. For a discussion of these theories see J Fienberg (ed) *Rights, Justice, and the Bounds of Liberty Essays in Social Philosophy* (1980) 143-148; N McCormick *Legal Right and Social Democracy* (1982) 154-166; HLA Hart “Are There Any Natural Rights?” in J Waldron (ed) *Theories of Rights* (1984) 77-90; J Raz *the Morality of Freedom* (1986) 165-192; O O’Neil “Children’s Rights and Children’s Live” (1988) 98 *Ethics* 445-463; BC Hafen & JO Hafen “Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child” (1996) 37 *Harvard International Law Journal* 449-492; R Goodin & D Gibson “Rights, You and Old” (1997) 17 *Oxford Journal of Legal Studies* 185-203; S Human “the Theory of Children’s Rights” in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 150-165; J Fortin *Children’s Rights and the Developing Law* 2 ed (2003); J Tobin “Justifying Children’s Rights” (2013) 21 *Int’l J Child Rts* 395-441.

¹¹⁸ KH Federle “Do Rights Still Flow Downhill?” (2017) 25 *Int’l J Child Rts* 273-284 282-283.

¹¹⁹ KH Federle “Rights Flow Downhill” (1994) 2 *Int’l J Child Rts* 343-368 365. Lim and Roche are troubled by what they describe as Federle’s simplistic and universal conceptualisation of power. See H Lim & J Roche “Feminism and Children’s Rights” in J Bridgeman & D Monk (eds) *Feminist Perspectives on Child Law* (2000) 227-250 238-241. However, Federle’s concept of power explains the importance of rights to children. See MDA Freeman “The Limit of Children’s Rights” in MDA Freeman & P Veerman (eds) *The Ideologies of Children’s Rights* (1992) 29-46 29-31.

¹²⁰ See KH Federle “Rights Flow Downhill” (1994) 2 *Int’l J Child Rts* 343-368; KH Federle “Looking Ahead: An Empowerment Perspective on the Rights of Children” (1995) 68 *Temple L Rev* 1585-1605; KH Federle “Do Rights Still Flow Downhill?” (2017) 25 *Int’l J Child Rts* 273-284.

¹²¹ KH Federle “Rights Flow Downhill” (1994) 2 *Int’l J Child Rts* 343-368 368; KH Federle “Looking Ahead: An Empowerment Perspective on the Rights of Children” (1995) 68 *Temple L Rev* 1585-1605 1597.

¹²² KH Federle “Looking Ahead: An Empowerment Perspective on the Rights of Children” (1995) 68 *Temple L Rev* 1585-1605 1586; KH Federle “Do Rights Still Flow Downhill?” (2017) 25 *Int’l J Child Rts* 273-284 282-283.

Therefore, a conceptualisation of children that incorporates the language of rights can be used to shift the balance of power.

Rights as a means of empowerment also speak to the notion of dignity. International human rights law also incorporates the dignity. The Preamble of the Universal Declaration of Human Rights states that dignity is inherent in all human beings and the CRC incorporates the same language in its Preamble.¹²³ It is noteworthy that the Preamble of the CRC refers to dignity in its Preamble three times, in terms of an inherent right, a motivation to work towards a better standard of life and part of the spirit in which children ought to be raised.¹²⁴ Reflecting on the way in which the CRC incorporates the notion of dignity, not only does it prescribe that children have an inherent right to dignity, but dignity provides the basis improve the lives of children and ought to direct the development of children. Therefore, dignity contributes rationale for the application of children's rights. The ACRWC states that since children are still developing they are in need of "legal protection in conditions of freedom, dignity and security".¹²⁵ The ACRWC also supports the notion that the human rights of children ought to be applied in a manner that is dignified. In addition, the CRC and the ACRWC require that children with disabilities are treated with dignity and that all children are treated with dignity during punishment and when in conflict with the law.¹²⁶ Human rights law and children's rights law specifically recognise dignity as an important principle that provides justification for rights and dictates the way that children ought to be treated.¹²⁷ What is important for this discussion, and the overall study is

¹²³ Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A Preamble; CRC Preamble.

¹²⁴ CRC Preamble.

¹²⁵ ACRWC Preamble.

¹²⁶ The CRC mentions dignity with respect to reintegration of children that were victims of exploitation or involved in armed conflict. The ACRWC also mentions dignity in its description of a harmful cultural practice. See CRC arts 23(1), 28(2), 37(c), 39, 40(1); ACRWC arts 11(5), 13(1), 17(1), 20(1)(c), 21(1).

¹²⁷ Schroeder and others acknowledge that there are challenges with using dignity as a foundation for human rights law. However, a discussion of the challenges of employing dignity as both a foundation for human rights law and as a right go beyond the scope of this study. For further reading on this subject see J Feinberg "The Nature and Value of Rights" in J Feinberg *Rights Justice and the Bounds of Liberty Essays in Social Philosophy* (1980) 143-155 153; J Gardner "Simply in Virtue of Being Human: The Whos and Whys of Human Rights (2007) 2 *Journal of Ethics and Social Philosophy* i-22 21-22; J Waldron "Dignity, Rank, and Rights" (21-23 April 2009) *The Tanner Lectures on Human Values* University of California Berkeley <https://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf> (accessed 07-05-2018) 211-215; D Schroeder "Dignity: One, Two, Three, Four, Five, Still Counting" (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 118-125 123-124; D Schroeder "Human Rights and Human Dignity An Appeal to Separate the Conjoined Twins" (2012) 15 *Ethic Theory Moral Prac* 323-335.

understanding that the notion of dignity supports the conceptualisation of children as bearers of rights.

Rights provide the ability of the rights-holder to make a claim for a corresponding duty to be fulfilled. Feinberg discusses that there is a link between the act of claiming a right and dignity. He states:

“Indeed, respect for persons (that is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called “human dignity” may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims. Not all of this can be packed into a definition of “rights”; but there are *facts* about the possession of rights that argue well their supreme moral importance.”¹²⁸

Feinberg’s discussion of rights, claims and dignity supports the importance of using the language of rights and classifying children as bearers of rights.¹²⁹ The ability to make a claim for rights not only empowers children, it confers dignity upon them, which Feinberg states is “respect for their rights”.¹³⁰ Schroeder provides several definitions of the concept of dignity.¹³¹ Her definition of Kantian dignity is particularly applicable to a discussion of children’s rights. Derived from Immanuel Kant’s writing on dignity, Schroeder explains that this type of dignity is an inviolable possession of all human beings to be treated as ends and not just means.¹³² Simply put, Kantian dignity confers respect for the inner worth of human beings. Thus, human beings are to be treated in a manner that acknowledges this inner worth. Schroeder explains that all human beings possess Kantian dignity due to “their capacity for moral self-regulation”.¹³³ Children are included in this definition as they are developing this capacity.¹³⁴ This

¹²⁸ J Feinberg “The Nature and Value of Rights” in J Feinberg *Rights Justice and the Bounds of Liberty Essays in Social Philosophy* (1980) 143-155 151 (emphasis in the original).

¹²⁹ However, Feinberg does not subscribe to the notion that human needs, many of which would be classified as social and economic rights, ought to be classified as rights. He takes the position that valid claims engage a duty on a part of another person. However, in this thesis, it will be established that the rights and needs of internally displaced children entail duties on the part of States. Therefore, these rights and needs could be classified as valid claims. See J Feinberg “The Nature and Value of Rights” in J Feinberg *Rights Justice and the Bounds of Liberty Essays in Social Philosophy* (1980) 143-155 153; Chapter 3 part 3 3 2.

¹³⁰ J Feinberg “The Nature and Value of Rights” in J Feinberg *Rights Justice and the Bounds of Liberty Essays in Social Philosophy* (1980) 143-155 151.

¹³¹ See D Schroeder “Dignity: One, Two, Three, Four, Five, Still Counting” (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 118-125 120.

¹³² 120.

¹³³ 121. See I Kant *The Metaphysics of Morals* (1996) Gregor M (trans and ed) 186-187, 209.

¹³⁴ D Schroeder “Dignity: One, Two, Three, Four, Five, Still Counting” (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 118-125 121.

capacity is the justification for this type of inviolable dignity.¹³⁵ Dignity as the ability to claim rights, as a possession that is inviolable and inherent to children is another justification for States to approach children and implement their obligations to children from the perspective of children as bearers of rights. The next step is to critically discuss rights-based approaches in order to provide a basis for using a children's rights perspective (which is a rights-based approach), to analyse the legal obligations that States have to internally displaced children.

2 4 A children's rights perspective as a theoretical tool

2 4 1 A critical discussion of rights-based approaches

A rights-based approach can be defined as an approach that incorporates international human rights standards as a normative framework.¹³⁶ The premise is that there must be a holistic approach to the implementation of human rights.¹³⁷ Rights-based approaches were introduced in the context of development as there was a realisation that human rights and development were inextricably linked.¹³⁸ Tobin explains that the United Nations General Assembly's adoption of the Declaration on the Right to Development 1986 and the Vienna Declaration and Programme of Action in 1993 brought together development and human rights.¹³⁹ It was recognised that merely focusing on economic development or human rights was inadequate.¹⁴⁰ The Declaration on the Right to Development 1986 states that:

¹³⁵ Schroeder also explains that Christian dignity is also inviolable. This type of dignity is inviolable as human beings are understood to be created in the image of God. D Schroeder "Dignity: One, Two, Three, Four, Five, Still Counting" (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 118-125 121.

¹³⁶ LH Piron "Rights-based Approaches and Bilateral Agencies: More than a Metaphor" (2005) 36 *IDS Bulletin* 19- 30 21-26; J Tobin J "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 275

¹³⁷ 'D Olowu "Human Development Challenges in Africa: A Rights-Based Approach" (2004) 5 *San Diego International Law Journal* 179-224 197.

¹³⁸ P Uvin *Human Rights and Development* (2004) 123; Declaration on the Right to Development (4 December 1986) A/RES/41/128 Preamble, art 2; Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23 paras 10, 72.

¹³⁹ Declaration on the Right to Development (4 December 1986) A/RES/41/128; Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23; J Tobin "Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations" in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98 62 (references omitted).

¹⁴⁰ J Tobin "Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations" in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98 62 (references omitted).

“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”¹⁴¹

This Declaration outlines that participation is a key aspect of development and the realisation of human rights.¹⁴² The Vienna Declaration and Programme of Action acknowledges the Declaration on the Right to Development 1986 and specifically recognises the Declaration’s conceptualisation of development is an integral aspect of human rights.¹⁴³ Furthermore, it called for action to be taken within the United Nations to implement the Declaration on the Right to Development 1986.¹⁴⁴ The approach of incorporating human rights in development began in earnest with a 1997 directive from the then United Nations Secretary-General, Kofi Annan, to mainstream human rights throughout the programming undertaken by United Nations bodies.¹⁴⁵ It is interesting to note that the United Nations Children’s Fund (“UNICEF”) was the first United Nations body to mainstream human rights into its programming in 1998.¹⁴⁶

Presently, the language of human rights mainstreaming has now been replaced by rights-based approaches.¹⁴⁷ A rights-based approach uses international human rights law as the standard for implementing, monitoring and evaluating initiatives.¹⁴⁸ The advent of rights-based approaches provides a normative framework with international support as international human rights standards have been endorsed by States and other actors. For this reason, a rights-based approach is based upon legal standards and in theory should enjoy broad-based support, particularly from States.

¹⁴¹ Declaration on the Right to Development (4 December 1986) A/RES/41/128art 2(1).

¹⁴² Art 8(1),(2).

¹⁴³ Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23 para 10.

¹⁴⁴ Para 72.

¹⁴⁵ United Nations General Assembly “Renewing the United Nations: A Programme for Reform” (14 July 1997) A/51/950 paras 78, 196; J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 278-9.

¹⁴⁶ This is an example of the importance placed on children’s rights. UNICEF “Guidelines for Human Rights-Based Programming Approach A Human Rights Approach for Children and Women: What It Is, and Some Changes It Will Bring” (21 April 1998) CF/EXD/1998-04 <<http://www.refworld.org/docid/3f82adbb1.html>> (accessed 27-12-17); J Tobin Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98 62 (references omitted).

¹⁴⁷ LH Piron “Rights-based Approaches and Bilateral Agencies: More than a Metaphor” (2005) 36 *IDS Bulletin* 19- 30 21.

¹⁴⁸ D Olowu “Human Development Challenges in Africa: A Rights-Based Approach” (2004) 5 *San Diego International Law Journal* 179-224 192; P Uvin *Human Rights and Development* (2004) 129-131.

There are a number of positive elements of a rights-based approach that support its application generally and in the realm of children's rights. There are four features of a rights-based approach, which demonstrate that it is a useful tool to analyse and implement human rights obligations. First, its normative framework is grounded in legal standards.¹⁴⁹ With respect to children's rights, the CRC and the ACRWC form the normative framework for children's rights. The addition of other policies and norms is possible, but the standards must be in accordance with the particular area of implementation. For instance, with respect to children's rights, the General Comments of the CRC Committee and the ACERWC could be included as both bodies are mandated to assist with the interpretation and application of the respective legal instruments.¹⁵⁰ Second, a rights-based approach promotes accountability. The language of rights transforms the actions undertaken by States and other actors from acts of charity to legal obligations.¹⁵¹ Third, there is a focus on implementation. Previously, initiatives focused on outcomes, but a rights-based approach focuses on the process of implementation.¹⁵² Fourth, a rights-based approach shifts the narrative from aid to empowerment. A rights-based approach empowers bearers of rights to be involved in the process of the realisation of their rights (participation) and it changes the balance of power by requiring duty-bearers to include bearers of rights in the process.¹⁵³ A rights-based approach is a positive contribution to the implementation of human rights as it is an approach that is grounded in legal standards, promotes accountability, focuses on the process of implementation and empowers bearers of rights.

Despite the positive aspects of a rights-based approach, it is not without its flaws. A major concern is that this approach lacks clarity. Pratt critically describes a rights-

¹⁴⁹ D Olowu "Human Development Challenges in Africa: A Rights-Based Approach" (2004) 5 *San Diego International Law Journal* 79-224 192-193. See also LH Piron "Rights-based Approaches and Bilateral Agencies: More than a Metaphor" (2005) 36 *IDS Bulletin* 19-30 23.

¹⁵⁰ CRC arts 43, 45; ACRWC art 42.

¹⁵¹ Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11; J Tobin J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 278.

¹⁵² U Jonsson *Human Rights Approach to Development Programming* (2003) 20; P Uvin *Human Rights and Development* (2004) 123, 137.

¹⁵³ This can be in terms of capacity development "to both claim their rights and fulfil their duties". See U Jonsson *Human Rights Approach to Development Programming* (2003) 30-32. See also LH Piron "Rights-based Approaches and Bilateral Agencies: More than a Metaphor" (2005) 36 *IDS Bulletin* 19-30 22.

based approach as “no more than a metaphor; a concept that catalyses a set of values into a phrase that many people can adopt and adapt”.¹⁵⁴ What is problematic is that agencies and various actors can label their particular approach as a rights-based approach, but there may not be consistency between these approaches. Rights-based approaches can also be criticised as being overly simplistic.¹⁵⁵ Tobin explains that many of the how-to guides fail to take into consideration the social, economic and political context in which rights-based approaches must be applied.¹⁵⁶ Another criticism of this approach is that there are many barriers to its application including politics, resource constraints, cultural contexts and a need for implementing organisations to change their institutional culture.¹⁵⁷ The last criticism is that a rights-based approach is actually imposing Western values on other States.¹⁵⁸ Despite international human rights law being widely accepted, it is not universally accepted. Not all States have ratified the various instruments. Some States have made reservations with respect to the instruments, and the instruments may not have been incorporated into domestic legislation or are in conflict with the domestic cultural and social values.¹⁵⁹

One perspective is to view a rights-based approach as just another Trojan horse used to impose Western values, but another point of view is to understand it as a legitimate approach grounded in international legal standards. At least in the context of children’s rights law in Africa, it can be argued that the legal standards set by the CRC and the ACRWC are widely accepted by States in Africa.¹⁶⁰ Even though there

¹⁵⁴ B Pratt “Rights or Values” (2003) 23 *ONTRAC* 1-2 2. Prion addresses this criticism in her article. See LH Piron “Rights-based Approaches and Bilateral Agencies: More than a Metaphor” (2005) 36 *IDS Bulletin* 19-30.

¹⁵⁵ J Tobin “Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98 76.

¹⁵⁶ 76.

¹⁵⁷ J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 276.

¹⁵⁸ B Pratt “Rights or Values” (2003) 23 *ONTRAC* 1-2 1; J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 294.

¹⁵⁹ C Himonga “Implementing the Rights of the Child in African Legal Systems: The *Mthembu* Journey in Search of Justice” (2001) 9 *Int’l J Child Rts* 89-122 90-91; ‘D Olowu “Human Development Challenges in Africa: A Rights-Based Approach” (2004) 5 *San Diego International Law Journal* 179-224 192-193.

¹⁶⁰ United Nations Treaty Collection “Convention on the Rights of the Child” <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 22-06-2016); African Union “List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child”

are still challenges with implementation, the large number of ratifications lends support to the position that there is a consensus amongst the majority of States on human rights standards applicable to children. In fact, the existence of the ACRWC as previously discussed provides a legal standard that incorporates African cultural values.

Furthermore, the criticisms of the rights-based approach do not outweigh its effectiveness as a means for analysing and implementing human rights obligations. Olowu also highlights that an advantage of a rights-based approach is “defining the benefits of the rights-holder(s) and [...] identifying the obligations of the duty-bearers”.¹⁶¹ It must also be emphasised that a rights-based approach as previously discussed promotes accountability.¹⁶² Its grounding in legal standards lends credibility and consistency to this approach. A rights-based approach can be applied to a specific issue or context. It can be transformed into a children’s rights perspective by incorporating the legal standards specifically applicable to children as its normative foundation.¹⁶³ The principles that underpin a rights-based approach in the context of children’s rights will be the focus of the next portion of the discussion.

2 4 2 Defining a children’s rights perspective

The theoretical framework for this thesis is a children’s rights perspective, which finds its foundations in a rights-based approach. The principles of a children’s rights perspective include the general principles of a rights-based approach as well as principles that are foundational to children’s rights.

2 4 2 1 *General principles of a rights-based approach*

There are some differences with respect to the general principles that are incorporated into a rights-based approach, but accountability has been recognised as an essential principle of this approach.¹⁶⁴ UNICEF has outlined three general

<http://www.au.int/en/sites/default/files/treaties/7773-sl-welfare_of_the_child_0.pdf> (accessed 22-06-2016).

¹⁶¹ D Olowu “Human Development Challenges in Africa: A Rights-Based Approach” (2004) 5 *San Diego International Law Journal* 179-224 203.

¹⁶² 199.

¹⁶³ See U Jonsson *Human Rights Approach to Development Programming* (2003) 17; J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306.

¹⁶⁴ For example, Piron and Tobin outline some principles of the right-based approaches which differ. Piron states that the three principles of rights-based approaches are equality/ non-discrimination, participation (empowerment) and accountability. Tobin states that the three principles of rights-

principles of rights-based approaches with respect to the CRC and the Convention on the Elimination of Discrimination Against Women (“CEDAW”) namely, accountability, indivisibility and interdependence, and universality.¹⁶⁵ Tobin adopts these principles in addition to the four general principles of the CRC when developing a rights-based approach to evaluating a child’s right to health.¹⁶⁶ This thesis will follow Tobin's lead and incorporate the three general principles in addition to the four general principles of the CRC.¹⁶⁷ Also, this thesis will incorporate a particular focus on the principle of accountability with respect to the three general principles of a rights-based approach. The focus on accountability is due to the central research question, which in essence entails determining to what extent States can be held accountable for fulfilling their legal obligations to internally displaced children. Each of the general principles will be discussed briefly in light of how each of them relates to internally displaced children.

a Accountability

Accountability is the central component of a rights-based approach as its normative foundation is the legal obligations prescribed by international human rights standards.¹⁶⁸ Also, it is important to view accountability as an organising principle of a rights-based approach as the ability of duty-bearers to uphold their obligations is integral to the realisation of the rights of internally displaced children. Tobin explains that there is “a tripartite relationship of accountability between parents, the State and the international community”.¹⁶⁹ These actors are the principle duty-bearers. States

based approaches are indivisibility/ interdependence, accountability and universality. See LH Piron “Rights-based Approaches and Bilateral Agencies: More than a Metaphor” (2005) 36 *IDS Bulletin* 19- 30 26; J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 281-85.

¹⁶⁵ UNICEF “Human Rights for Women and Children: How UNICEF Helps Make Them a Reality” (1999) 5-7 <https://www.unicef.org/publications/files/pub_humanrights_children_en.pdf> (accessed 31-01-2017); J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 281-85.

¹⁶⁶ J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 281-85.

¹⁶⁷ Tobin has applied developed a rights-based framework and applied in the context of children’s right to health. See J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 281-85; J Tobin “Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations” in A Invernizzi & J Williams (eds) *The Human rights of Children: From Visions of Implementation* (2011) 62-98.

¹⁶⁸ It should be noted that many of these obligations are the responsibility of States. See discussion in Chapter 1 part 1 1 4.

¹⁶⁹ J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 283. See also M Minow “Rights for the Next Generation: A Feminist Approach to Children’s Rights” (1986) 9 *Harv Women’s L J* 1-24 3; G Van Bueren *International Law on the Rights of the Child* (1998) 76.

are the primary duty-bearers as they are the actors, which accept these obligations.¹⁷⁰ Accountability as a key principle emphasises that the duty-bearers are legally required to fulfil their obligations to the bearers of rights.¹⁷¹

Tobin explains that there are three separate duties with respect to accountability in the context of children's health. These duties entail obligations to respect, to protect and fulfil.¹⁷² These specific duties can also be applied within the context of internal displacement. The duty to respect could be interpreted to mean that internally displaced children must be treated as bearers of rights, even though in particularly difficult circumstances the default position may be to treat them as objects of protection. The duty to protect highlights the need to protect internally displaced children during all stages of displacement, especially the duty to prevent internal displacement where possible. The duty to fulfil emphasises the requirement that obligations owed to internally displaced children must be fulfilled despite the fact that internal displacement creates situations where it may be challenging to do so. The three specific duties help to explain how the principle of accountability can be applied in a rights-based approach. Also, the emphasis on the tripartite relationship allows for sharing of responsibilities and resources in order for duty-bearers to comply with their obligations; and in so doing, inadequate resources cannot be used as a justification for failure to comply with obligations.¹⁷³ Incorporating the principle of accountability into a rights-based approach underscores the importance of examining methods of

¹⁷⁰ *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) paras 20-21; *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 47. Also, States for the most part negotiate and ratify treaties; therefore, they accept the obligations prescribed by these instruments. See J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283; Chapter 5 part 5 2 4.

¹⁷¹ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 28; Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 11.

¹⁷² J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283; *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) paras 44-47.

¹⁷³ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 282 284-5; Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 paras 7, 60. The notion of sharing responsibilities and resources compliments the concept of sovereignty as responsibility. See Chapter 1 part 1 1 4. This concept will be discussed in greater detail in Chapter 5 part 5 3.

compliance. Mechanisms for encouraging accountability make it clear that the activities undertaken by duty-bearers are not acts of charity but legal obligations.¹⁷⁴

b Interdependence and indivisibility

The focus on the legal obligations of duty-bearers is further developed by the principles of interdependence and indivisibility. These principles support a holistic view of rights. This means that one right cannot be separated from the others.¹⁷⁵ Situations of internal displacement create challenges for the realisation of rights. For instance, internally displaced children are vulnerable to forced recruitment into hostilities.¹⁷⁶ Therefore, this vulnerability makes it more difficult to comply with the obligations to protect children from exploitation and forced recruitment.¹⁷⁷ Tobin explains that the principles of interdependence and indivisibility challenge the notion that some rights are more important than others.¹⁷⁸ In the context of internal displacement, particular rights may be prioritised based on the stage of displacement. While IDPs are fleeing from situations of conflict, rights that focus on protection should take priority, but during phases of displacement when safety concerns have stabilised, rights such as the right to education should not be overlooked. This balancing of rights is a practical response to the circumstances, but circumstances should not be used as justification to fail to comply with obligations. The principles of interdependence and indivisibility focus attention on the fact that internally displaced children are entitled to a full package of rights. Also, this holistic view of rights underscores that all rights are important.

¹⁷⁴ Committee on the Rights of the Child “General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)” (27 November 2003) CRC/GC/2003/5 para 11. For a discussion of accountability mechanisms see Chapter 5 part 5 4.

¹⁷⁵ J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 281.

¹⁷⁶ J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1-2, 4; R Cohen & FM *Deng Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23; UNHCR “Framework for the Protection of Children” (2012) 7 See also *Forced Migration Review Displaced Children and Adolescents: Challenges and Opportunities* (2002) Issue 15. See also discussion in Chapter 3 part 3 3 1 1.

¹⁷⁷ ACRWC art 22(2); CRC art 38(2),(3); Kampala Convention art 7(5)(e),(f), 9(1)(d); Guiding Principles prin 13.

¹⁷⁸ For example, the divide between civil and political rights and, social, economic rights. See J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 282.

c **Universality**

Universality means that rights are applicable under all circumstances.¹⁷⁹ This principle is particularly important in the context of internal displacement as it also reinforces the notion that difficult circumstances cannot be used as a justification for failure to comply with obligations.¹⁸⁰ This principle also highlights the importance of addressing the individual needs of each child rather than taking a generalist approach.¹⁸¹ In terms of responding to the needs of individuals, the principle of universality encourages duty-bearers to examine the specific circumstances of the particular child in order to address her rights and needs.

The general principles of the rights-based approach sharpen the focus on issues that can be overlooked, but that are important to the realisation of rights. Therefore, it is of critical importance to note that the theme of accountability runs through all three of the general principles as there is a focus on the fulfilment of duties. As a rights-based approach, a children's rights perspective incorporates the principles of accountability, interdependence and indivisibility and universality in addition to the four general principles for the implementation of children's rights law. These general principles will be examined as they relate to the problem of internal displacement.

2 4 2 2 *General principles of children's rights*

There are four general principles that underpin the CRC and the ACRWC.¹⁸² These principles are non-discrimination, the best interests of the child, the right to life, survival and development, and participation. These principles do not take precedence over the other rights, but they, like the principles of a rights-based approach, serve as organising principles for the implementation of children's rights.

¹⁷⁹ 285.

¹⁸⁰ For example, emergency circumstances cannot be used as grounds to derogate from obligations in the context of human rights in Africa. See *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) paras 20-21. See also *Case of Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008) paras 128-137.

¹⁸¹ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 285.

¹⁸² See discussion in part 2 3. The writer is aware of the proposal by Lundy and Hanson to rethink the general principles of the CRC. The writer agrees with the addition of Article 5, evolving capacities, but disagrees with the removal of Article 6. However, the current general principles of the CRC remain unchanged and a full discussion of this proposal is beyond the scope of this study. See K Hanson & L Lundy "Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child" (2017) 25 *Int'l J Child Rts* 285-306.

a Non-discrimination

The aim of non-discrimination is to prevent differential treatment that is prejudicial and to enhance the enjoyment of rights and freedoms.¹⁸³ The prohibited grounds for discrimination are “race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status”.¹⁸⁴ Internal displacement is not a prohibited ground for discrimination *per se*, but internal displacement could be recognised as another status as the circumstances created by internal displacement produce particular vulnerabilities.¹⁸⁵ In this regard, it also should be emphasised that children who are internally displaced should not be discriminated against by virtue of their displacement. The CRC Committee explains that,

“[t]his non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures.”¹⁸⁶

In other words, States must recognise that in order for internally displaced children to realise their rights, they require treatment that takes their special needs into consideration.¹⁸⁷ The CRC Committee clearly indicates that States have a positive obligation to identify these groups. In this thesis, the position is taken that by virtue of the increased vulnerabilities brought on by displacement, internally displaced children are one such group that requires special consideration. The United Nations Human Rights Committee also calls upon States to be proactive and to take steps “to diminish

¹⁸³ United Nations Human Rights Committee “General Comment 18 Non-Discrimination (1989)” in United National Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (12 May 2003) HRI/GEN/1/Rev 6 146-149; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* Communication no 293/04 (2009) AHRLR 268 (ACHPR 2009) para 91; *The Nubian Community in Kenya v Kenya* Communication no 317/2006 (ACHPR 19-28 February 2015) para 123.

¹⁸⁴ CRC art 2(1). See also ACRWC art 3.

¹⁸⁵ The Kampala Convention does prohibit internal displacement being used as a ground for discrimination. See Kampala Convention art 9(1)(a); Guiding Principles prin 1.

¹⁸⁶ Committee on the Rights of the Child “General Comment No. 5 (2003) General Measures of the Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)” (27 November 2003) CRC/GC/2003/5 para 12. See also United Nations Human Rights Committee “General Comment 18 Non-Discrimination (1989)” in United National Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (12 May 2003) HRI/GEN/1/Rev 6 146-149 148-149 paras 8,10,13; *The Nubian Community in Kenya v Kenya* Communication no 317/2006 (ACHPR 19-28 February 2015) paras 123-126.

¹⁸⁷ See *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 64. The vulnerabilities of internally displaced children will be discussed in Chapter 3 part 3 3 1.

or eliminate conditions which cause or help to perpetuate discrimination”.¹⁸⁸ In summary, the principle of non-discrimination is about ensuring equal access to the realisation of rights, not necessarily equal treatment.¹⁸⁹

b Best interests of the child

The best interest of the child principle is a foundational principle of children’s rights law. This principle predates the CRC as it was included in the 1959 Declaration on the Rights of the Child.¹⁹⁰ The CRC Committee supports the notion of the inclusion of children’s rights principles, particularly the best interests of the child principle in a rights-based approach when it states,

“[t]he full application of the concept of the child’s best interests requires the development of a rights-based approach engaging all actors, to secure the holistic, physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.”¹⁹¹

The best interests of the child principle has also been harshly criticised.¹⁹² One of the criticisms is that this principle furnishes decision-makers with the ability to input their opinions as being the best interests of the child.¹⁹³ However, when implemented correctly, the abuse of this principle can be mitigated. The CRC Committee explains that the implementation of the best interest of the child is a two-part process, which includes a best interests assessment and a best interests determination.¹⁹⁴ The assessment identifies specific elements that ought to be taken into consideration when making the determination. These elements include, but are not limited to, the views

¹⁸⁸ United Nations Human Rights Committee “General Comment 18 Non-Discrimination” (1989) in United National Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (12 May 2003) HRI/GEN/1/Rev 6 146-149 148 para 10.

¹⁸⁹ Committee on the Rights of the Child “General Comment No. 5 (2003) General Measures of the Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)” (27 November 2003) CRC/GC/2003/5 para 12.

¹⁹⁰ The best interests of the child was identified as a guiding principle. See 1959 Declaration prin 7.

¹⁹¹ CRC Committee “General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para. 1)” (29 May 2013) CRC/C/GC/14 para 5.

¹⁹² This especially in its application at the domestic level in terms of custody and access. See RH Mnookin “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39 *Law & Contemporary Problems* 226-293; J Elster “Solomonic Judgments: Against the Best Interests of the Child” (1987) 54 *The University of Chicago Law Review* 1-45; S Parker “The Best Interests of the Child—Principles and Problems” in P Alston (ed) *The Bests Interests of the Child: Reconciling Culture and Human Rights* (1994) 26-41.

¹⁹³ CRC Committee “General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para. 1)” (29 May 2013) CRC/C/GC/14 para 34.

¹⁹⁴ Paras 47-84.

expressed by the child, the identity of the child, the upkeep of the family environment and relationships, the protection of the child, situations of vulnerability, and the rights to health and education.¹⁹⁵ The best interest determination then uses the elements identified by the assessment in a “formal process with strict procedural safeguards designed to determine the child’s best interests”.¹⁹⁶ Employing the process set out by the CRC Committee reduces the opportunities to abuse this principle as it requires all decision-makers to justify their decision in accordance with specific elements and follow procedural safeguards. The best interests of the child principle is meant to be adaptable to an infinite number of situations; therefore, in the context of internal displacement, it will be the elements selected for the assessment that will reflect the particular circumstances of internally displaced children.

c Life, survival and development

A child’s right to life, survival and development is important with respect to the rights and needs of internally displaced children as displacement creates situations of increased vulnerability and mortal danger.¹⁹⁷ The African Commission on Human and Peoples’ Rights outlines that the right to life is a fundamental right which requires “a broad interpretation of States’ responsibilities to protect life”.¹⁹⁸ This broad view of life, survival and development includes taking preventative measures and providing humanitarian assistance, especially in emergencies.¹⁹⁹ Also, in an effort to protect children, the right to development ought not to be forgotten as being part of this fundamental right.²⁰⁰ Development is meant “as a holistic concept [...] [which includes] the child’s physical, mental, spiritual, moral, psychological and social development”.²⁰¹ Therefore, development includes the right to health and education. Efforts to sustain life should not overshadow these needs. The focus on the different aspects of this right may also depend upon the stage of displacement.²⁰² This group of rights as foundational principle serves two functions. It underscores the need to have a holistic

¹⁹⁵ Paras 48-77.

¹⁹⁶ Para 47.

¹⁹⁷ See Chapter 3 part 3 3 1.

¹⁹⁸ African Commission on Human and Peoples’ Rights “General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)” (4-18 November 2015) paras 3, 41-43.

¹⁹⁹ Paras 41-43.

²⁰⁰ Committee on the Rights of the Child “General Comment No. 5 (2003) General Measures of the Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)” (27 November 2003) CRC/GC/2003/5 para 12.

²⁰¹ Para 12.

²⁰² See discussion regarding the principle of universality above at part 2 4 2 1 3.

view of rights and it emphasises that there is a need to balance all of the rights to which children are entitled, from protection to participation.

d Participation

Participation is integral to a rights-based approach as well as children's rights; therefore, it is a necessary element of a children's rights perspective.²⁰³ The principle of participation is indeed a transformative principle in terms of the law's conceptualisation of children and their rights.²⁰⁴ The importance of participation to the conceptualisation of children as bearers of rights can be found in the requirement to give children an active role and a voice in decisions concerning them, and the recognition that children have evolving capacities. As bearers of rights, children are active participants in the realisation of their rights. The recognition of evolving capacities requires increased involvement and that due weight is given to the views expressed by the child. In terms of implementation, it may mean the creation of child-sensitive mechanisms for participation. The CRC Committee explains that participation is a "means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights".²⁰⁵ Participation is not simply a box that is checked as completed, rather it is a mechanism that is built into the implementation procedure. Therefore, one of the key issues of importance in the application of participation is that it is not "tokenistic".²⁰⁶ Lundy's model of child participation is instructive in this regard as she advocates for decision-makers to focus on giving the child space to participate, facilitating their voice in participation, ensuring that children are heard by the appropriate audience and that children's views are employed where appropriate.²⁰⁷ In summary, participation as a right and as a fundamental principle in a children's rights perspective firmly entrenches children as key actors in the realisation of their rights.

²⁰³ J Sloth-Nielsen & BD Mezmur "A Dutiful Child: The Implications of Article 31 of the African Children's Charter" (2008) 52 *J Afr L* 159-189 170.

²⁰⁴ See discussion regarding the law's conceptualisation of children at part 2 2 2.

²⁰⁵ Committee on the Rights of the Child "General Comment No. 5 (2003) General Measures of the Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)" (27 November 2003) CRC/GC/2003/5 para 12.

²⁰⁶ Para 12.

²⁰⁷ L Lundy "'Voice' is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927-942 933. For a further discussion on a child's right to participation See A Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013).

The failure of an instrument to conceptualise children as bearers of rights is a strong indication that it does not take a children's rights perspective.

2.4.3 Summary of a children's rights perspective

The theoretical framework that will be employed in this thesis to critically analyse the legal instruments applicable to internally displaced children is a children's rights perspective. It is a rights-based perspective that employs the fundamental principles of children's rights. As such, the children's rights perspective for the purposes of this thesis incorporates the following seven principles:

- i. Accountability
- ii. Interdependence and indivisibility
- iii. Universality
- iv. Non-discrimination
- v. Best interests of the child
- vi. Life, survival and development
- vii. Participation

The legal instruments that will be analysed in this thesis will be evaluated using these principles. Using a children's rights perspective in this analysis will ensure that foundational principles of human rights and children's rights provide the standard for evaluating the law with respect to State obligations to internally displaced children.

Prior to the analysis, however, it is necessary to have a clear understanding of the problem of internal displacement and its impact on children. The causes of internal displacement, the risks which internal displacement poses to children and the specific rights and needs of internally displaced children will be the focus of the next chapter

CHAPTER 3: A CLOSER LOOK AT INTERNAL DISPLACEMENT: CAUSES, RISKS, RIGHTS AND NEEDS

“There can be little if any doubt that internally displaced persons suffer from severe problems that do not confront individuals under normal conditions”.¹

“Children suffer the most”.²

3 1 Introduction

Internal displacement is a complex and multifaceted problem.³ Before analysing the law on internal displacement as it applies to internally displaced children, it is important to clarify what constitutes internal displacement and to identify the specific rights and needs of internally displaced children. Therefore, the purpose of this chapter is to provide a further examination of the definition of internal displacement and examine how the problem of internal displacement affects the rights and needs of internally displaced children. To achieve this purpose, this chapter will be divided into two main parts. The first part will unpack the two key elements of the definition of internal displacement. For migration to be classified as internal displacement, the movement must occur within an internationally recognised State border, and it must be forced.⁴ Simply put, there must be an internal element and a coercive element. The internal element of internal displacement will be discussed in relation to the other types of forced migration. Thereafter, the discussion of the coercive element of the definition will focus on the two primary causes of internal displacement, namely, conflicts and generalised violence, and disasters.⁵ In order to provide a comprehensive understanding of internal displacement, the discussion will also include two issues that are related to the problem of internal displacement, namely, climate change and protracted displacements. The discussion will reveal that climate change increases instances of internal displacement and protracted displacements make internal displacement a long-term problem, which has consequences for children who are internally displaced. In the second part of this chapter, the rights and needs of internally displaced

¹ United Nations Commission on Human Rights “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” (21 January 1993) E/CN.4/1993/35 para 72.

² DA Korn *Exodus within Borders* (1999) 14.

³ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23.

⁴ R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 466; W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 2-4.

⁵ United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2 para 27.

children in relation to the risks that internal displacement poses to them will be outlined. The risks, rights and needs identified in this chapter will be the focus of the critical analysis of the law on internal displacement in the next chapter.

3 2 Unpacking the definition of internal displacement

The definitions of IDPs and internal displacement identify two main elements, an internal element and a coercive element. The Kampala Convention defines IDPs as:

“[P]ersons who have been *forced or obliged to flee* or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have *not crossed an internationally recognized State border*.”(Emphasis added).⁶

The Convention goes on to define internal displacement as:

“Involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders.”⁷

Combined, the two elements demonstrate that internal displacement is a type of forced movement that occurs within State borders and by extension, internal displacement is a type of forced migration.⁸ The next section will examine the internal element by positioning internal displacement and internally displaced children within the broader context of forced migration.

3 2 1 The internal element: Migration within international borders

A simple way to understand the various types of forced migration is on a continuum.⁹ Children who are classified as internally displaced have migrated within an internationally recognised State border. If these children were to cross an international border they could be classified as refugees, asylum seekers or migrants, depending on the reason for their movement.¹⁰ The reasons for the movement and where the movement occurs form the basis

⁶ Kampala Convention art 1(k) Emphasis added. See also Guiding Principles Introduction para 2. It should be noted that the Guiding Principles’ definition is a ‘descriptive definition’. See W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 3. For the ICGLR’s definitions of IDPs see ICGLR IDP Protocol art 1(4),(5).

⁷ Kampala Convention art 1(l).

⁸ The UNHCR explains that forced migration is not a legal term, but a term to describe a variety of displacement or involuntary movement. See UNHCR “‘Refugees’ and ‘Migrants’ – Frequently Asked Questions (FAQs)” (16-03-2016) <<http://www.unhcr.org/afr/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html>> (accessed 10-08-2017).

⁹ Kidane outlines the idea that forced migration can be understood as being on a continuum. See W Kidane “Managing Forced Displacement Law in Africa: The Role of the New African Union IDPs Convention” (2011) 44 *Vand J Transnat’l L* 1-85 24.

¹⁰ Refugees are defined pursuant to the Convention and the Protocol. See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1; Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606

for the differentiation between the types of migration or the classification of the people migrating. The internal movement of internally displaced children in part differentiates them from refugees, asylum seekers, and migrants that move cross-borders.

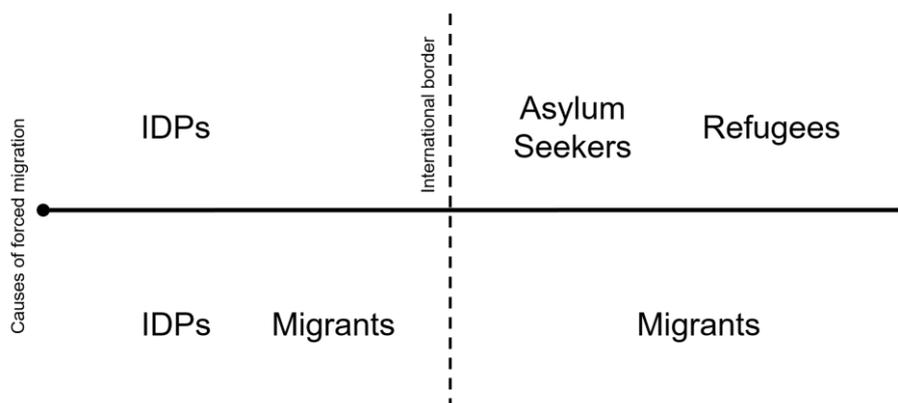


Figure 3.1 Forced Migration continuum¹¹

While it is clear that the internal migration of IDPs separates them from other groups on the forced migration continuum, the question arises if the internal element is of real significance. There is also a question with respect to the practical importance of differentiating between people who are all in need of protection and assistance based on where they migrated from and where they migrated to or why. The International Committee of the Red Cross takes the approach of addressing the needs of all vulnerable groups within their mandate and it does not concede that IDPs are automatically more vulnerable than other groups.¹² In a legal context, however, the internal element is important as it identifies the duty-bearers that have legal obligations to provide protection and assistance to internally displaced children.

UNTS 267 art 1(2). With regard to refugees in the African context see OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art 1. Asylum seekers are persons who have left their country of habitual residence in order to seek asylum pursuant to the Refugee Convention but have yet to obtain legal status as refugees. W Kidane "Managing Forced Displacement Law in Africa: The Role of the New African Union IDPs Convention" (2011) 44 *Vand J Transnat'l L* 1-85 26-27. There is no legal definition for migrants, but migrants can be described as persons that have crossed an international border for reasons other than seeking refugee based on a well-founded fear, such as economic or environmental reasons. Betts describes migrants that are in need of protection and assistance as "vulnerable irregular migrants" See A Betts "Soft Law and the Protection of Vulnerable Migrants" (2009-2010) 24 *Georgetown Immigration Law Journal* 533-552 549.

¹¹ Kidane outlines the idea that forced migration can be understood as being on a continuum. See W Kidane "Managing Forced Displacement Law in Africa: The Role of the New African Union IDPs Convention" (2011) 44 *Vand J Transnat'l L* 1-85 24. Please note that this figure was created by CE Fawole 15 June 2017 to assist with the drafting of part 3.2.1. The Internal Displacement Monitoring Centre (IDMC) also has a figure entitled the "Displacement Continuum" dated November 2017. See IDMC "The Displacement Continuum Research Agenda and Call for Partners" (November 2017) 3.

¹² J Kellenberger "The ICRC's Response to Internal Displacement: Strengths, Challenges and Constraints" (2009) 91 *International Review of the Red Cross* 475-490 476-478.

The importance of the internal element is further underscored by the difference between the protection afforded to IDPs and refugees. There are IDPs that, but for crossing an international border, would meet the definition of a refugee.¹³ However, Phuong explains, the cross-border element is important as the nature of the protection offered to refugees differs from that of IDPs.¹⁴ Refugees are in need of the “*surrogate protection*”¹⁵ of the international community whereas IDPs receive “*complementary protection*”.¹⁶ Since IDPs remain within the jurisdiction of the State of their habitual residence, their protection and assistance needs are the primary obligation of that State.¹⁷ Therefore, the internal element of internal displacement is important as it defines the jurisdiction, the obligations and the type of protection afforded to IDPs.

The internal element clearly demonstrates that internal displacement is a domestic problem, but there are a number of reasons that internal displacement is a problem of international concern. First, no State is immune to internal displacement. There are factors that make States more vulnerable to instances of internal displacement,¹⁸ but internal displacement occurs in all regions in the world.¹⁹ Even States with very high levels of development can experience internal displacement. For instance, in 2005, Hurricane Katrina immediately displaced over one million people in the state of Louisiana in the United States of America.²⁰ Second, internal displacement can be a precursor to cross-border migration.

¹³ Refugees are defined pursuant to the Convention and the Protocol. See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1; Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 art 1(2). With regard to refugees in the African context see OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art 1.

¹⁴ C Phuong “Internally Displaced Persons and Refugees: Conceptual Difference and Similarities” (2000) 18 *Neth Q Hum Rts* 215-229 224; C Phuong *The International Protection of Internally Displaced Persons* (2004) 25.

¹⁵ Refugees must seek protection from the international community as they can no longer obtain protection from the State from which they are fleeing. See C Phuong “Internally Displaced Persons and Refugees: Conceptual Difference and Similarities” (2000) 18 *Neth Q Hum Rts* 215-229 224; C Phuong *The International Protection of Internally Displaced Persons* (2004) 25.

¹⁶ Complementary protection is protection that is provided to the extent the State is unable to provide protection. Phuong describes it a parallel to the protection of the States. See C Phuong “Internally Displaced Persons and Refugees: Conceptual Difference and Similarities” (2000) 18 *Neth Q Hum Rts* 215-229 224; C Phuong *The International Protection of Internally Displaced Persons* (2004) 25.

¹⁷ 25. See also Guiding Principles prin 3; Kampala Convention art 5(1); ICGLR IDP Protocol art 3(3).

¹⁸ These factors can be described as drivers of internal displacement. See Chapter 1 part 1 1 3 and Chapter 3 part 3 2 2.

¹⁹ The Internal Displacement Monitoring Centre (IDMC) reports instances of internal displacement in all regions in the world. See for example IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016).

²⁰ A Plyer “Facts for Features: Katrina Impact” (26-05-2016) The Data Center <<http://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/>> (accessed 13-02-2017). The United States of America is consistently ranked as being a State with a very high level of human development by the United Nations Development Programme (“UNDP”). See UNDP “Human Development Report 2015: Work for Human Development” (2015) 47. In 2012, there were approximately

One example of this phenomenon in the current global context is the situation in Syria where there are both large numbers of IDPs and large numbers of people fleeing the State to seek asylum.²¹ Third, internal displacement is a violation of international human rights law and where applicable international humanitarian law.²² Violations of international law make of internal displacement an issue of global concern.²³ Fourth, despite having the primary responsibility for the protection and assistance of IDPs, resource constraints make it necessary in many instances for States to collaborate with other actors in order to uphold their obligations.²⁴ Therefore, internal displacement is simultaneously a domestic problem and an issue that is of international concern.

The internal element of internal displacement introduces a number of challenges to the protection and assistance of IDPs, including internally displaced children. The internal element of internal displacement raises issues of sovereignty and non-intervention, particularly in situations where States have an interest in limiting outside interference.²⁵ However, the concept of sovereignty as responsibility creates an avenue for assistance from the international community.²⁶ Another challenge with respect to the internal element of

776,000 people were displaced by Hurricane Sandy in the state of New Jersey in the United States as well. See IDMC “Global Estimates 2012: People Displaced by Disasters” (May 2013) 29, 43.

²¹ IDMC “Syria: Forsaken IDPs Adrift Inside a Fragmenting State” (21 October 2014) 1. See also, United Nations General Assembly *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Syrian Arab Republic* (05-04-2016) A/HRC/32/35/Add.2 United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Syrian Arab Republic” (5 April 2016) A/HRC/32/35/Add.2 para 10.

²² Internal displacement violates the right to freedom of movement. See the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered force 23 March 1976 999 UNTS 171 art 12(1). Arbitrary displacement is prohibited. See Guiding Principles prin 6; Kampala Convention art 4. Also, The Rome Statute classifies forced population transfer as a war crime. See Rome Statute of the International Court of Justice (adopted 17 July 1998, entered force 1 July 2002) 2187 UNTS 3 art 8(2)(b)(viii). The Geneva Conventions prohibit forcible transfers, including displacement and forcible transfer of protected persons is considered a grave breach. See Geneva Convention Relative to the Protection of Civilians in Time of War (IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 arts 49, 147.

²³ Kunder notes that the human rights aspect of the problem of internal displacement makes it a problem of global concern. See J Kunder *The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations* (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 5.

²⁴ This could include international and regional bodies, international organisations, non-governmental organisations, corporations and other groups. See also United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Syrian Arab Republic” (5 April 2016) A/HRC/32/35/Add.2 para 78.

²⁵ Sovereignty has been used a barrier to outside interference with respect to instances of internal displacement. See R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 6-7.

²⁶ 6-7. The concept of sovereignty as responsibility will be discussed in Chapter 5 part 5 3 1.

internal displacement is that despite their large numbers, IDPs can still be described as “invisible”.²⁷ IDPs blend in with the local population.

Furthermore, there is a distinct possibility that the plight of IDPs will be overlooked.²⁸ An example of the IDPs being overlooked at the international level is the United Nations New York Declaration for Refugees and Migrants 2016.²⁹ This Declaration demonstrates a missed opportunity to highlight the situation of IDPs.³⁰ The Declaration only specifically mentions IDPs twice and it provides specific guidelines for the treatment of refugees and migrants, but not for IDPs.³¹ In an open letter, leaders of organisations that work specifically with IDPs recognise the New York Declaration as an important development; however, these leaders also advocate for greater recognition of the situation of IDPs.³² In contrast, several months before the New York Declaration was drafted, the then United Nations Secretary-General, Ban Kim Moon, called on States to reduce the number of IDPs by half by 2030 as part of the 2016 Agenda for Humanity.³³ It can be argued that failing to include IDPs in the New York Declaration is inconsistent with the 2016 Agenda for Humanity goal. While the creation of additional guidelines is not the only mechanism to reduce the number of IDPs, recognising IDPs as a group of persons that require international concern in addition to refugees and migrants reinforces the importance of the 2016 Agenda for Humanity goal.

²⁷ United Nations Office for the Coordination of Humanitarian Affairs (OCHA) “The Invisible Majority: Helping Internally Displaced Persons” An Open Letter by OCHA, UNDP, IRC, NRC and the Special Rapporteur on the Human Rights of Internally Displaced Persons” (22-09-2016) <<https://medium.com/@UNOCHA/internally-displaced-people-df55fbd84e30#.2fmxmhqz>> (accessed 27-03-2017).

²⁸ United Nations Office for the Coordination of Humanitarian Affairs (OCHA) “The Invisible Majority: Helping Internally Displaced Persons” An Open Letter by OCHA, UNDP, IRC, NRC and the Special Rapporteur on the Human Rights of Internally Displaced Persons” (22-09-2016) <<https://medium.com/@UNOCHA/internally-displaced-people-df55fbd84e30#.2fmxmhqz>> (accessed 27-03-2017).

²⁹ New York Declaration for Refugees and Migrants (3 October 2016) A/RES/71/1.

³⁰ A Bilak “Missing the Heart of the Problem: Why Ignoring Internal Displacement Undermines the Purpose of the UN Summit on Migrants and Refugees” (16-09-2016) *Thomson Reuters Foundation News* <<http://news.trust.org/item/20160916104048-x43fd/>> (accessed 27-03-2017). However, the New York Declaration did highlight the needs of children impacted by forced migration.

³¹ See New York Declaration for Refugees and Migrants (3 October 2016) A/RES/71/1 paras 3, 20, Comprehensive Refugee Response Framework (3 October 2016) A/RES/71/1 Annex I; Towards a Global Compact for Safe, Orderly and Regular Migration (3 October 2016) A/RES/71/1 Annex II.

³² United Nations Office for the Coordination of Humanitarian Affairs (OCHA) “The Invisible Majority: Helping Internally Displaced Persons” An Open Letter by OCHA, UNDP, IRC, NRC and the Special Rapporteur on the Human Rights of Internally Displaced Persons” (22-09-2016) <<https://medium.com/@UNOCHA/internally-displaced-people-df55fbd84e30#.2fmxmhqz>> (accessed 27-03-2017).

³³ The core responsibility specifically linked to this issue to “Leave no one behind”. See United Nations General Assembly “One Humanity: Shared Responsibility Report of the Secretary-General for the World Humanitarian Summit” (2 February 2016) A/70/709 paras 81-85; United Nations General Assembly “Agenda for Humanity” (2 February 2016) A/70/709 annex Core responsibility three, part A.

The limited inclusion of IDPs in the New York Declaration is an example of the invisibility of IDPs.

While the internal element of internal displacement poses challenges for IDPs, it also clearly identifies States as the primary duty-bearers to internally displaced children. The other necessary element of internal displacement is forced movement. The coercive element of the definition presents an opportunity to examine the main causes of internal displacement and related issues.

3 2 2 The coercive element: Causes of internal displacement

The other key element in the definition of internal displacement is forced movement; there must be some form of coercion.³⁴ At times, it is difficult to determine when movement is voluntary and when movement is forced. Understanding the coercive element of internal displacement as also being on a continuum is helpful. The Internal Displacement Monitoring Centre (“IDMC”) calls this the “voluntary to forced migration continuum”.³⁵ There is a point at which movement is predominantly voluntary, such as moving to another area in search of more favourable economic opportunities. There are other times when the movement is predominantly forced, such as fleeing one’s home to avoid the dangers of a flood. The point at which movement becomes predominantly forced is described as the “tipping point”.³⁶ It is not always simple to discern this point. The tipping point may occur at different times depending on the people involved, their circumstances and the impetus for movement. The tipping point could occur when there is a sudden mass migration in the event of a natural disaster, but it also could mean that there is an increase in migration out of a particular area prone to gang violence that is above the usual level of migration.³⁷ An indicator that the tipping point has been reached is “where abnormal movement patterns indicate the breakdown of normal coping strategies under severely stressed conditions”.³⁸ The reason for the migration also has an impact on the tipping point. For instance, it may take longer to reach the tipping point in the case of slow-onset natural disasters.³⁹ In addition to understanding that the coercive element of internal displacement as a range rather than an isolated event, it is necessary to examine the factors that create the conditions for forced migration to occur.

³⁴ Kampala Convention art 1(I); AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017) 155.

³⁵ IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 52-53.

³⁶ 53.

³⁷ 53.

³⁸ 53.

³⁹ 52.

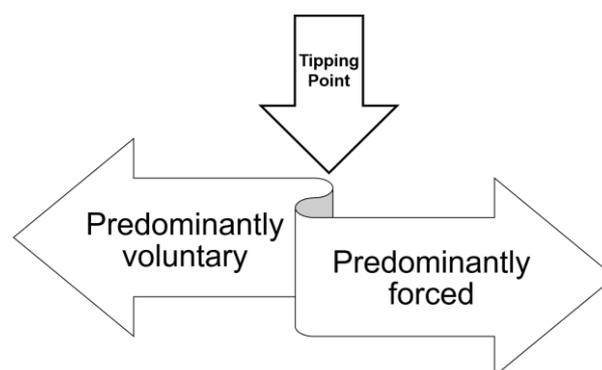


Figure 3 2 "Voluntary to forced migration continuum" ⁴⁰

The coercive element of internal displacement can also be explained in terms of drivers and triggers of displacement. Drivers are the underlying factors that contribute to internal displacement.⁴¹ In the context of Africa, Deng describes these underlying factors as “acute problems associated with nation building”.⁴² Drivers can be political instability, resource constraints, tensions between groups and lack of participation in the political system or economy by a particular group.⁴³ Drivers can also be described as the root causes or push factors.⁴⁴ These factors create circumstances that may lead to events which trigger displacement. For example, political instability and tensions between groups can lead to conflict, which can displace people from their homes. Poverty can also be classified as a driver as it limits the ability of populations to withstand threats.⁴⁵ For example, people living in informal settlements may be more easily displaced by disasters due to the instability of their homes. Drivers may explain why some States have been continually plagued by internal displacement.⁴⁶ The indefinite number of drivers makes an in-depth analysis of the

⁴⁰ CE Fawole created this visual representation of this concept. See IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 52-53.

⁴¹ IDMC “Understanding the Root Causes of Displacement: Towards a Comprehensive Approach to Prevention and Solutions” (8 December 2015) 2.

⁴² R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 40.

⁴³ 40; IDMC “Understanding the Root Causes of Displacement: Towards a Comprehensive Approach to Prevention and Solutions” (8 December 2015) 2.

⁴⁴ IDMC “Understanding the Root Causes of Displacement: Towards a Comprehensive Approach to Prevention and Solutions” (8 December 2015) 2.

⁴⁵ United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons” (3 August 2016) A/71/279 para 42.

⁴⁶ One example is Sudan, which has been plagued by high levels of internal displacement in part due to an internal conflict that has been ongoing since 1956 due to political tensions between the central and outer regions of the country regarding power, wealth and recognition of diversity. See United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 paras 13-14. For a case study completed in the late 1990s see HR Ruiz “The Sudan: Cradle of Displacement” in R Cohen & FM Deng (eds) *The Forsaken People: Case Studies of the Internally Displaced* (1998) 139-174.

drivers beyond the scope of this thesis.⁴⁷ However, it is important to understand that there are multiple interrelated factors that contribute to movement becoming predominately forced.⁴⁸ Triggers, in contrast, can be described as the proximate causes of internal displacement.⁴⁹ These causes can be said to immediately precede the displacement.

A further examination of the causes of internal displacement reveals that there are events or incidents that are recognised to trigger displacement. The definition of IDPs lists some causes of internal displacement, which include conflict and generalised violence, violations of human rights and disasters.⁵⁰ Most situations of internal displacement are caused by conflict and generalised violence or disasters and these causes will be the focus of the discussion.⁵¹ However, violations of human rights ought not to be overlooked as a cause of internal displacement as the definition of IDPs identifies violations of human rights as a separate cause of internal displacement.⁵² It can be argued that violations of human rights are a consistent element with respect to internal displacement. Rather than examining violations of human rights as a separate cause of internal displacement, they will be explored as a recurring theme within the context of the other causes of internal displacement.

Before examining the two main causes of internal displacement, it is also important to note that the causes of internal displacement are not limited to those listed in the definition. The use of the phrase “in particular”,⁵³ indicates that there may be other causes of internal displacement.⁵⁴ Both the Guiding Principles and the Kampala Convention specifically recognise another cause of internal displacement, namely, large-scale development projects.⁵⁵ As noted in chapter one, development-induced displacement was specifically limited from the scope of this thesis.⁵⁶ Development projects are intended to improve the living conditions for at least a portion of the population and they are planned for. It is true that populations may be evacuated prior to a conflict or a disaster as a means of protection, mitigation or disaster risk reduction (“DRR”). In contrast, internal displacement due to large-

⁴⁷ The focus of this thesis is on the analysis of the law on internal displacement; however, the drivers relevant to the case studies will be outlined. See Chapter 6.

⁴⁸ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23.

⁴⁹ Black’s Law Dictionary defines proximate cause as “[a] cause that directly produces an event and without which the event would not have occurred”. GA Garner (ed) *Black’s Law Dictionary* 10 ed (2009) 265-266.

⁵⁰ Kampala Convention art 1(k); Guiding Principles Introduction para 2.

⁵¹ United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2 para 27. See generally IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018).

⁵² See Kampala Convention art 1(k); Guiding Principles Introduction para 2.

⁵³ See Kampala Convention art 1(k); Guiding Principles Introduction para 2.

⁵⁴ R Cohen “Developing an International System for Internally Displaced Persons” (2006) 7 *International Studies Perspectives* 87-101 93.

⁵⁵ See Guiding Principles prin 6(2)(c); Kampala Convention art 10.

⁵⁶ As discussed in Chapter 1 part 1 7.

scale development projects ought to occur as a last resort and include consultations and other safeguards.⁵⁷ States and other relevant authorities must approve these projects. Furthermore, development projects, in theory, are advancing the right to development, but this right to development may come at the expense of the group displaced.⁵⁸ For all of these reasons, development-induced displacement differs from the other causes of internal displacement, and how this cause of internal displacement relates to children requires specific study apart from the other causes of internal displacement.⁵⁹

The rationale for examining specific causes of internal displacement, namely conflict and generalised violence, and disasters is that it provides an opportunity to determine if specific causes of displacement give rise to specific risks to internally displaced children. For instance, one question that will be investigated is if children internally displaced by conflict are at greater risk of forced recruitment into hostilities than other internally displaced children.⁶⁰ Even if a specific cause of internal displacement does not give rise to particular risks to internally displaced children, examining specific causes can highlight the risks that internal displacement poses to children overall.⁶¹ Therefore, the first cause of internal displacement that will be examined in further detail is conflict and generalised violence.

3 2 2 1 *Conflict and generalised violence*

Conflict and generalised violence combined are the leading cause of internal displacement worldwide. The IDMC reported that at the end of 2015 the highest number of IDPs displaced by conflict and generalised violence ever were recorded.⁶² As a cause of internal displacement, conflict can be understood as international armed conflict and internal armed conflict pursuant to the definitions in the Geneva Conventions as well as conflict and

⁵⁷ Guiding Principles prins 6(2)(c), 7-9; Kampala Convention art 10. See for example the United Nations Basic Principles and Guidelines for Development-Based Evictions and Displacement A/HRC/4/18 annex 1 *United Nations Office of the High Commissioner for Human Rights* <https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf> (accessed 29-08-2018); United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (21 March 2011) A/HRC/17/31 annex.

⁵⁸ P Penz, J Drydyk & PS Bose *Displaced by Development: Ethics, Rights and Responsibilities* (2011) 1-6, 41-58.

⁵⁹ The impact of development-induced displacement on children is a subject for further study. See Chapter 7 part 7 5.

⁶⁰ See also part 3 3 1 for a discussion of the risks that internal displacement poses to children.

⁶¹ The risks that internal displacement poses to children is relevant for identifying their rights and needs as well as assess to what extent the law responds to those rights and needs. See part 3 3 for discussion of the risks, rights and needs with respect to internal displacement. For an analysis of the law on internal displacement from a children’s rights perspective see Chapter 4.

⁶² As previously noted the number of IDPs displaced by conflict and generalised violence at the end of 2015 was approximately 40.8 million. See IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 7-8. At the end of the 2017 the IDMC estimated that there is still 40 million IDPs. See IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) v.

violence not rising to the level of an international or an internal armed conflict.⁶³ An early perception of internal displacement was of civilians fleeing *en masse* due to armed conflict.⁶⁴ The movement was to avoid adverse consequences of being caught up in a conflict such as capture, injury and death. In today's context mass displacements continue to occur due to conflict for the same reasons.⁶⁵

In addition to creating situations of danger, internal displacement caused by conflict indicates that there are violations of human rights. In fact, forced displacement is a violation of international humanitarian law and human rights law.⁶⁶ Some of the violations of human rights occur as a result of States failing to uphold their obligations. There are examples of internal displacement due to conflict having elements of State action or inaction as well as violations of human rights. A State may be the author of the displacement due to its policies. For example, between 1986 and 1992 black Mauritians were displaced from their homes and some were expelled to Senegal.⁶⁷ The African Commission on Human and Peoples' Rights found that Mauritania breached this group's right to freedom of movement pursuant to article 12(1) of the African Charter on Human and Peoples' Rights.⁶⁸ The State may also choose to relocate its citizens due to conflict. A study conducted in Uganda found that most IDPs attributed their displacement due to relocation by the Ugandan Peoples Defence Forces ("UPDF") rather than attacks by the Lord's Resistance Army ("LRA").⁶⁹ In this case,

⁶³ See Geneva Convention Relative to the Protection of Civilians in Time of War (IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 arts 2-3; United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 para 27.

⁶⁴ One proposed definition of IDPs required there to be mass forced migration. See United Nations Economic and Social Council "Analytical Report of the Secretary-General on Internally Displaced Persons" (14 February 1992) E/CN.4/1992/23 para 17.

⁶⁵ For example, the situation in Syria. See United Nations General Assembly "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Syrian Arab Republic" (5 April 2016) A/HRC/32/35/Add.2 1. In Africa, there are several States with large numbers of IDPs in part indicating large displacements. African States with over 1 million IDPs due to conflict and generalised violence at the end of 2015 include the DRC, Nigeria, Somalia, South Sudan, Sudan. IDMC "GRID 2016: Global Report on Internal Displacement" (May 2016)96-103.

⁶⁶ See Geneva Convention Relative to the Protection of Civilians in Time of War (IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 arts 49, 147; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 23 January 1979) 1125 UNTS 609 art 17; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered force 23 March 1976 999 UNTS 171 art 12(1); Rome Statute of the International Court of Justice (adopted 17 July 1998, entered force 1 July 2002) 2187 UNTS 3 arts 7(1)(d),(2)(d), 8(2)(b)(viii); Kampala Convention arts 3; 4(4),(6).

⁶⁷ *Malawi African Association and Others v Mauritania* Communication nos 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98 (2000) AHRLR 149 (ACHPR 2000) paras 1, 19, 126.

⁶⁸ Para 126. See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 12(1).

⁶⁹ Human Rights Watch "Abducted and Abused: Renewed Conflict in Northern Uganda" (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 60-63; Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38; IDMC "Internal Displacement: Global Overview of Trends and Developments in 2010" (March 2011) 55.

the internal armed conflict prompted the State to initiate forced relocation. It should be noted that in this instance the relocation was forced as many IDPs interviewed indicated that they resented being taken from their homes, especially when they received inadequate protection and assistance when they were relocated to camps.⁷⁰ Displacement due to conflict may also occur when a State fails to protect its population from attacks from armed groups. The *Case of the “Mapiripán Massacre” v Columbia*,⁷¹ illustrates this point as the Inter-American Court of Human Rights found that the State of Columbia failed to protect the inhabitants of Mapiripán from an attack of a paramilitary group.⁷² The Court found that the State’s failure violated its obligation to protect children, violated the inhabitants’ right to freedom of movement as the attack caused internal displacement and a number of other grave human rights violations.⁷³ In summary, the States in the examples referenced above acted in a way that violated the human rights of the IDPs, their inaction led to violations of human rights or a combination of the both. Therefore, violations of human rights and conflict can be linked as causes of internal displacement.

Generalised violence, similar to conflict, can also be explained in relation to human rights and State obligations.⁷⁴ Discussing generalised violence separately from conflict is necessary as it incorporates other aspects that are often overlooked. The concept of generalised violence includes conflicts that do not rise to the level of international or internal armed conflict. This cause of internal displacement also includes criminal violence such as gang violence. For instance, people are forced to leave a particular area due to threats, gang violence, extortion, having their children recruited as drug traffickers or to avoid anticipated dangers.⁷⁵ In contrast with armed conflict, displacement induced by generalised violence is

⁷⁰ Also, the common response of IDPs interviewed was that displacement was not a means of protection and even it was even viewed by some as punishment due to the State’s inability to protect IDP camps from attacks and the poor conditions in camps. See Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38-40.

⁷¹ (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 134 (15 September 2005).

⁷² *Case of the “Mapiripán Massacre” v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 134 (15 September 2005) paras 96-143.

⁷³ These include execution, torture, forced disappearance and kidnapping. See *Case of the “Mapiripán Massacre” v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 134 (15 September 2005) paras 147-189.

⁷⁴ International humanitarian law would not apply.

⁷⁵ Internal displacement due to generalised violence has been found to be a problem in Mexico and Central America. See S Albuja “Criminal Violence and Displacement in Mexico” (2014) 45 *Forced Migration Review* 28-31; ACAPS “Other Situations of Violence in Northern Triangle of Central America: Invisible Borders, Vicious Spirals, and the Normalisation of Terror (May 2014) <http://reliefweb.int/sites/reliefweb.int/files/resources/other_situations_of_violence_in_the_northern_triangle_of_central_america_executive_summary_may_2014.pdf> (accessed 27-04-2017); IDMC “New Humanitarian Frontiers: Addressing Criminal Violence in Mexico and Central America” (October 2015); IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 45.

more difficult to capture. Often these IDPs migrate discretely and in small numbers as not to call attention to themselves.⁷⁶ Thus, internal displacement due to criminal violence is difficult to measure.⁷⁷ In connecting criminal violence to human rights, it can be argued that criminal violence, which leads to internal displacement indicates that the State has failed its obligation to provide adequate protection to its inhabitants in a particular area.⁷⁸ Displacement by trafficking or smuggling is related to criminal violence and could be a form of internal displacement if it is forced and occurs within an internationally recognised border.⁷⁹ What is also relevant for this present study is that once internally displaced, children are more vulnerable to both internal and cross-border trafficking and smuggling.⁸⁰

Conflict and generalised violence are clearly coercive. The discussion with regard to conflict and generalised violence has served to highlight the link between this cause of internal displacement and human rights violations and bring attention to criminal violence as a coercive force that falls within the classification of conflict and generalised violence. Disasters are another coercive force, which cause internal displacement and it will be the next topic of discussion.

3 2 2 2 *Disasters*

Events like floods or earthquakes force people from their homes in order to preserve their lives and well-being. The definition of internal displacement includes both natural and human-made disasters.⁸¹ The United Nations Office for Disaster Risk Reduction defines a disaster as:

“A serious disruption of the functioning of a community or a society at any scale due to hazardous events intersecting with conditions of exposure, vulnerability and capacity,

⁷⁶ IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 46.

⁷⁷ 46.

⁷⁸ There is the right to life, survival and development. See CRC art 6; ACRWC art 5(2). See also ICCPR 6(1).

⁷⁹ Some people are willingly smuggled. See W Kidane “Managing Forced Displacement Law in Africa: The Role of the New African Union IDPs Convention” (2011) 44 *Vand J Transnat'l L* 1-85 22 (footnote omitted).

⁸⁰ See part 3 3 1 1 for the discussion on the risk to the physical security of internally displaced children. See also UNHCR “Framework for the Protection of Children” (2012) 7; J Kunder *The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations* (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1-2; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23. See also *Forced Migration Review* Displaced Children and Adolescents: Challenges and Opportunities (2002) 15.

⁸¹ See Kampala Convention art 1(k). See also Guiding Principles Introduction para 2.

leading to one or more of the following: human, material, economic and environmental losses and impacts.”⁸²

Natural disasters can be explained as events caused by hazards or extreme weather events which occur in the natural environment.⁸³ Some examples of natural disasters include floods, earthquakes and tsunamis. By extension, human-made disasters are disasters, which do not occur as a result of hazards naturally occurring in the environment. The 1986 nuclear accident at Chernobyl is a well-known example of a human-made disaster.⁸⁴ A more recent example occurred in 2011 when there were a meltdown and radiation leaks at the Fukushima Daiichi nuclear power station in Japan.⁸⁵ Approximately 470,000 people were evacuated from their homes as a result of this disaster.⁸⁶ It should be noted that the meltdown and the radiation leaks were precipitated by a severe earthquake and a tsunami.⁸⁷ Yet the internal displacement occurred due to a human-made disaster as the disruption came from a nuclear power station rather than from the natural environment. This example also demonstrates the interaction between natural and human-made disasters.

Disasters may occur suddenly as in the case of a flood or slowly as in the case of a drought.⁸⁸ With respect to sudden-onset disasters, the coercive force is clear. Rapid movement is required to avoid the negative impacts of the disaster. Migration due to slow-onset disasters, in contrast, may be spread over a longer period of time.⁸⁹ The IDMC indicates that with slow-onset disasters like drought, the coercive effect is indirect as the deterioration of conditions occurs over time until the migration is necessary to ensure survival.⁹⁰

Human rights and State obligations also require consideration in the context of internal displacement caused by disasters. Children displaced by disasters of any kind are still entitled to their human rights.⁹¹ It can be argued when disasters occur, particularly sudden-

⁸² United Nations Office for Disaster Risk Reduction “Terminology” <<http://www.unisdr.org/we/inform/terminology#letter-d>> (accessed 04-04-2017).

⁸³ See IDMC “Global Estimates 2015: People Displaced by Disasters” (July 2015)13.

⁸⁴ 67.

⁸⁵ 67.

⁸⁶ Japan Reconstruction Agency “Current Status of Reconstruction and Challenges” (March 2015) <http://www.reconstruction.go.jp/english/topics/Progress_to_date/pdf/201503_Current_Status_of_Reconstruction_and_Challenges.pdf> (accessed 04-04-2017); IDMC “Global Estimates 2015: People Displaced by Disasters” (July 2015)67.

⁸⁷ IDMC “Global Estimates 2015: People Displaced by Disasters” (July 2015) 67.

⁸⁸ See United Nations Office for Disaster Risk Reduction “Terminology” <<http://www.unisdr.org/we/inform/terminology#letter-d>> (accessed 04-04-2017).

IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 52.

⁹⁰ 50.

⁹¹ The human rights of internally displaced children will be discussed in part 3 3 2. For a summary of the rights and guidelines with respect to the protection and treatment of persons displaced by natural disasters see the Inter-Agency Standing Committee “IASC Operational Guidelines on the Protection of

onset natural disasters, the obligations of a State ought to be limited as the State did not cause the disaster and it most certainly cannot control the disaster. However, a State still has obligations to uphold the human rights of inhabitants within its jurisdiction. In addition to the human rights that inhabitants have during any situation, these obligations include DRR and mitigating the negative impacts of the disaster on its inhabitants.⁹²

*The Case of Budayeva and Others v Russia*⁹³ illustrates how that lack of disaster preparedness on the part of the State can lead to violations of human rights. The municipal authority failed to repair a mud-retention dam to prevent mudslides and implement an early warning system to warn the inhabitants of the mudslides.⁹⁴ This failure led to the destruction of homes, which displaced the inhabitants of the town of Tyrnyauz, and caused injuries and the loss of life.⁹⁵ The European Court of Human Rights found that Russia failed to uphold the right to life of the inhabitants of Tyrnyauz by failing to put in place measures that would preserve their lives, especially since the mudslides were a recurrent hazard.⁹⁶ It found that States have a positive obligation to protect the lives of its inhabitants, even in dangerous situations such as natural disasters.⁹⁷ The Court found that there was a causal link between the lack of preparedness of the State and the violation of the right to life.⁹⁸ The decision is noteworthy as it emphasises the positive obligation of States to take action to preserve the lives of its inhabitants even in dangerous situations. However, the Court made it clear that especially in cases of natural disasters, when placing this burden upon a State the probability and recurrence of the disasters should be taken into consideration.⁹⁹ Similar to conflict, disasters as a cause of internal displacement requires consideration of the human rights of internally displaced children and States' obligations towards them. Another issue that is related to causes of internal displacement and represents a larger issue that affects the human rights of internally displaced children, is the issue of climate change.

Persons in Situations of Natural Disasters" (January 2011) The Brookings-Bern Project on Internal Displacement.

⁹² The Kampala Convention requires States parties to take steps to protect their inhabitants from international displacement due to disasters by requiring them to create early warning systems, DRR strategies and other emergency preparations. See Kampala Convention art 4(2).

⁹³ *Case of Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008).

⁹⁴ Paras 16-25, 146.

⁹⁵ Paras 26-38.

⁹⁶ Paras 158-160.

⁹⁷ Paras 128-137.

⁹⁸ Para 158. However, the Court did not find the same causal link regarding the enjoyment of personal property in this context. See paras 174-176.

⁹⁹ Paras 130-131, 135-137.

3 2 3 Issues related to internal displacement

3 2 3 1 *Climate change*

The coercive element of disasters as a cause of internal displacement can be exacerbated by climate change.¹⁰⁰ Climate change can be described as a driver of internal displacement as it is an underlying cause that contributes to conditions that lead to internal displacements such as an increase in extreme weather events and natural disasters.¹⁰¹ Climate change is defined as:

“[A] change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over time periods.”¹⁰²

This alteration in the natural environment damages ecosystems, negatively affects the economy and social systems and may be detrimental to the health and well-being of human beings.¹⁰³ In addition to being linked to disasters and extreme weather events, climate change can contribute to conflict as it can lead to the reduction of resources.¹⁰⁴ The adverse impacts of climate change disproportionately affect children due to their level of physical and mental development, and there are large numbers of children affected by climate change.¹⁰⁵ This is especially true of Africa as a continent that is prone to the effects of climate change

¹⁰⁰ United Nations General Assembly “Protection and Assistance to Internally Displaced Persons: Note by Secretary-General” (9 August 2011) A/66/285 para 19; Intergovernmental Panel on Climate Change “Summary for Policy Makers” in CB Field, V Barros, TF Stocker, D Qin, DJ Dokken, KL Ebi, MD Mastrandrea, KJ Mach, GK Plattner, SK Allen, M Tignor & PM Midgley PM (eds) *Managing the Risks of Extreme Events and Disaster to Advance Climate Change Adaption A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (2012) Cambridge University Press: Cambridge UK and New York NY 1-19 14.

¹⁰¹ 14; S Sanz-Caballero “Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child” (2013) 13 *Ethics Sci Environ Polit* 1-14 5.

¹⁰² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 1(2).

¹⁰³ These negative impacts are called “adverse effects of climate change”. See United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 1(1).

¹⁰⁴ WR Adano & F Daudi “Links Between Climate Change, Conflict and Governance in Africa” (May 2012) *Paper 234* Institute for Security Studies <https://www.issafrica.org/uploads/Paper_234.pdf> (accessed 27-04-2017). See also United Nations General Assembly “Protection and Assistance to Internally Displaced Persons: Note by Secretary-General” (9 August 2011) A/66/285 para 29; United Nations Security Council “Security Council, in Statement, Says ‘Contextual Information’ on Possible Security Implications of Climate Change Important When Climate Impacts Drive Conflict” Press Release (20-07-2011) SC/10302 <<https://www.un.org/press/en/2011/sc10332.doc.htm>> (accessed 04-05-2018).

¹⁰⁵ S Bartlett “Climate Change and Urban Children” Impacts and Implications for Adaptation in Low-and Middle-Income Countries” (2008) 20 *Environment & Urbanization* 501-519 501-502; International Save the Children Alliance “In the Face of Disaster: Children and Climate Change” (2008)2; S Sanz-Caballero “Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child” (2013) 13 *Ethics Sci Environ Polit* 1-14 5; ED Gibbons “Climate Change, Children’s Right, and the Pursuit of Intergenerational Climate Justice” (2014) 16 *Health and Human Rights Journal* 19-31.

due to a combination of drought, dependence upon agriculture and food insecurity.¹⁰⁶ When discussing the causes of internal displacement it is important to include a discussion with respect to climate change, as it is “an impact multiplier and accelerator”.¹⁰⁷

Climate change is not just an environmental issue; it also affects human rights.¹⁰⁸ There are specific rights that are adversely affected by climate change such as the right to life, health, food, water and adequate housing.¹⁰⁹ Based upon the Guiding Principles, the Peninsula Principles on Climate Displacement within States 2013 (“Peninsula Principles”), recognise individuals who are internally displaced due to climate change and provide a normative framework that is specifically applicable to climate displaced persons.¹¹⁰ The creation of the Peninsula Principles confirms that a specific framework that is applicable to climate displaced persons is necessary for the realisation of their rights.¹¹¹ In summary, climate change can be described as a larger issue, which is relevant to the coercive element in the definition of internal displacement. Another issue that is integral to understanding the definition of internal displacement is determining when internal displacement comes to an end.

3.2.3.2 *Protracted displacements*

Internal displacement may be divided into three phases, pre, during and post.¹¹² Protracted displacements occur when IDPs are unable to progress to the final stage, which includes return, resettlement or relocation.¹¹³ There is no a set amount of time required in order for a displacement to be classified as protracted, but the IDMC indicates that internal

¹⁰⁶ Save the Children UK “Legacy of Disasters: The Impact of Climate Change on Children” (April 2007) 3, 7; United Nations General Assembly “Protection and Assistance to Internally Displaced Persons: Note by Secretary-General” (9 August 2011) A/66/285 para 30.

¹⁰⁷ UNHCR “Summary of Deliberations on Climate Change and Displacement” (April 2011) para 2.

¹⁰⁸ As climate change specifically relates to children’s rights, the issue of inter-generational justice is relevant. It entails the concept of distributive justice, which views the rights of each generation as “equal over time”. With regard to climate change, the current generation must not act in a way that prejudices the rights of the future generations to a habitable environment. See L Stone & K Lofts “Climate Change, Child Rights and Intergenerational Justice: Lessons from Research and Practice” (November 2009) 13 *IDS in Focus Policy Briefing* Institute for Development Studies <<http://www.ids.ac.uk/files/dmfile/IF13.2.pdf>> (accessed 04-08-2018). See also D Goodman & S Iltus “Climate Change and Children: A Human Security Challenge” (November 2008) UNICEF Innocenti Research Centre 6.

¹⁰⁹ There are also rights that are impacted by internally displacement. See art CRC arts 6, 24(1),(2), 27(1); United Nations Human Rights Council “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights” (15 January 2009) A/HRC/10/61 paras 20-38.

¹¹⁰ The Peninsula Principles defines persons displaced by climate change as climate displaced persons. See Peninsula Principle on Climate Displacement within States (18 August 2013) Preamble, prin 2(a),(b),(c). Also, the Nansen Principles 2011 address displacement related to climate change and environmental factors. Nansen Principles (5-7 June 2011).

¹¹¹ Peninsula Principle on Climate Displacement within States (18 August 2013) prin 1.

¹¹² The Guiding Principles are divided into three part that correspond to each of the three phases. See Guiding Principles.

¹¹³ See Guiding Principles prins 28-30; Kampala Convention art 11.

displacement may become protracted when the displacement lasts for longer than one year.¹¹⁴ IDPs have been displaced for as long as 26 years.¹¹⁵ Some internally displaced children may spend their entire childhoods in displacement.¹¹⁶ In the best case scenario, IDPs are able to return to their homes soon after the cause of their displacement comes to an end. For example, in 2016, approximately 80,000 people were forced to leave their homes in Fort McMurray, Canada due to wildfires, but many were able to return approximately 29 days later.¹¹⁷ In contrast, the IDMC reports that the number of IDPs in Africa as a region has remained consistent at approximately 12 million for the past ten years and this can be attributed to protracted displacements.¹¹⁸ Related to the issue of protracted displacements are multiple and cyclical displacements. Some IDPs may be displaced multiple times when fleeing conflict.¹¹⁹ Other IDPs are displaced annually during flood season; this type of displacement can be described as cyclical.¹²⁰

Protracted displacements create challenges for IDPs, host communities and the environment. Children living in displacement for long periods of time experience negative impacts with respect to education, culture and their general safety.¹²¹ IDPs do not always live in camps. IDPs may flee to other communities, which are called host communities. An influx of IDPs invariably strains the resources available in host communities, especially when IDPs remain for extended periods. At times, there is resentment and hostility towards IDP populations due to this strain on resources which can lead to conflict over the use of resources as well as environmental degradation.¹²² However, the Kampala Convention

¹¹⁴ In order to determine if a displacement is protracted it is necessary to look at the specific circumstances of the displacement. See IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 29.

¹¹⁵ 29.

¹¹⁶ UNHCR “Framework for the Protection of Children” (2012) 7.

¹¹⁷ The Globe and Mail “The Fort McMurray Fire: What’s Happening Now, and What You’ve Missed” (05-01-2017) <<http://www.theglobeandmail.com/news/alberta/the-fort-mcmurray-disaster-read-the-latest-weekend/article29930041/>> (accessed 06-04-2017); J Jones & J Giovannetti “Returning Home, Fort McMurray Evacuees Face Long Road to Recovery” (01-06-2016) *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/thousands-of-fort-mcmurray-fire-evacuees-return-home/article30237992/>> (accessed 06-04-2017).

¹¹⁸ IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 29; IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 26. The most recent IDMC report provides the number of new displacements rather than the number of total displacements. At the end of 2017 there were 5.5 million new displacement due to conflict and violence in Sub-Saharan African at the end of 2017. See IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 17.

¹¹⁹ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 68; IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 68.

¹²⁰ For example, people in Kenya are displaced annually due to floods. See IDMC “Unfinished Business: Kenya’s Efforts to Address Displacement and Land Issues in Coast Regions” (July 2014) 9, 13.

¹²¹ See part 3.3.1 for a discussion with respect to the risks that internal displacement poses to children. See also R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26.

¹²² See United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26

requires States also to provide for the needs of host communities in addition to IDPs.¹²³ Putting in place measures to assist host communities is a means to augment the strain on the community's resources and reduce hostility towards IDPs in the community.

Furthermore, the existence of protracted displacement indicates that there are challenges to terminating situations of internal displacement and that IDPs are not able to obtain durable solutions. Determining when displacement has come to an end can also be challenging. Mooney offers three criteria to determine if displacement has terminated, namely, caused-based, solutions-based and needs based.¹²⁴ Cause-based criteria include determining that displacement has come to an end when the cause of the displacement is no longer present.¹²⁵ In the case of the Fort McMurray IDPs, the wildfires were quenched. Mooney explains that there are challenges with the caused-based criteria as it may lead to IDPs prematurely returning home when the cause of displacement has not been sufficiently addressed, as in the case of a conflict.¹²⁶ The solution-based criteria determine that internal displacement has come to an end when IDPs have either returned home or have resettled in another area of the State.¹²⁷ Return and resettlement bring about other issues, including safety and compensation, which means that IDPs may still have needs as a result of their displacement.¹²⁸ The needs-based criteria determine that displacement has come to an end when IDPs no longer have specific needs due to their displacement.¹²⁹

The three criteria, particularly the needs-based criteria, relate to the concept of durable solutions. A durable solution is said to be reached when IDPs no longer have any specific needs related to their displacement and do not experience discrimination in realising their human rights as a result of being displaced.¹³⁰ The following eight factors indicate that a

August 1996) A/51/306 para 81; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23, 25; IDMC "Unfinished Business: Kenya's Efforts to Address Displacement and Land Issues in Coast Regions" (July 2014) 11. For example, there have been tensions between IDPs and host communities in Nigeria. See United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 para 46.

¹²³ Kampala Convention art 3(2)(c), 5(5), 9(2).

¹²⁴ E Mooney "Bringing the End into sight for Internally Displaced Persons" (2003) 17 *Forced Migration Review* 5-7.

¹²⁵ 5-6.

¹²⁶ 5-6.

¹²⁷ 6.

¹²⁸ 6. See Guiding Principles prins 28-29; Kampala Convention art 1; ICGLR Protocol on the Property Rights of Returning Persons. See also Principles on Housing and Property Restitution of Refugees and Displaced Persons 2005 (Pinheiro Principles) (28 June 2005) E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1.

¹²⁹ E Mooney "Bringing the End into sight for Internally Displaced Persons" (2003) 17 *Forced Migration Review* 6-7.

¹³⁰ Inter-Agency Standing Committee "IASC Framework on Durable Solutions for Internally Displaced Persons" (April 2010) The Brookings Institution-University of Bern Project on Internal Displacement 5.

durable solution has been reached: “[S]afety and security, [an] adequate standard of living, access to livelihoods, restoration of housing, land and property, access to documentation, family reunification, participation in public affairs, and access to effective remedies and justice”.¹³¹ Achieving a genuine durable solution is a long-term process and requires a holistic view of the situation of the IDPs.¹³² IDPs can, therefore, find themselves in situations of protracted displacement due to barriers to achieving a durable solution.

The existence of protracted displacements demonstrates the strain that prolonged situations of internal displacement place upon internally displaced children, host communities and the environment. With protracted displacements being the norm rather than the exception, especially in Africa, it highlights the importance of understanding the needs of internally displaced children and the challenges in realising their rights.¹³³ Therefore, protracted displacement underscores the importance of human rights and holistic solutions to internal displacement.

3 2 4 Concluding discussion on the definition of internal displacement

The focus of the discussion on the two primary causes of internal displacement is by no means meant to disregard the reality that internal displacement is in fact caused by many overlapping causes.¹³⁴ The first part of the discussion examined the internal element of the definition of internal displacement. The internal element not only helps to locate IDPs on the continuum of forced migration, it also determines the type of protection to which internally displaced children are entitled. The internal element highlights challenges encountered by IDPs and the issues that are relevant to understanding internal displacement as both a domestic issue and a problem of international concern. The discussion with respect to the coercive element of the definition of internal displacement explained that predominately forced movement can also be understood as being on a continuum. The discussion anchored human rights violations and State obligations within the coercive element of internal displacement. Human rights violations can be said to be a ubiquitous element – where there is internal displacement, it can be argued there are violations of human rights.¹³⁵

¹³¹ United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons” (3 August 2016) A/71/279 para 48.

¹³² Inter-Agency Standing Committee “IASC Framework on Durable Solutions for Internally Displaced Persons” (April 2010) The Brookings Institution-University of Bern Project on Internal Displacement 7.

¹³³ The CRC and the ACRWC apply without discrimination to all children regardless of their circumstances. See CRC art 2; ACRWC art 3.

¹³⁴ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23.

¹³⁵ ED Mooney “Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection” (2010) 2 *Global Responsibility to Protect* 60-85 61.

Linking human rights and State obligations to causes of internal displacement lay the foundation for understanding the risks that internal displacement poses to children and their particular rights and needs. The discussion with respect to the issues of climate change and protracted displacements provided a better overall understanding of internal displacement and its challenges and demonstrated how these issues can affect the human rights of internally displaced children. In the next part of this chapter, the risks that internally displaced children experience will be identified and linked to the needs that these risks create and to the rights in the CRC and ACRWC that address these risks and needs.

3 3 Risks, rights and needs

The notion that internally displaced children have particular rights and needs is premised on the fact that IDPs, including internally displaced children, encounter difficulties or risks simply by virtue of being displaced.¹³⁶ The act of being uprooted from one's family, community and habitual way of life creates instability. Displacement removes the protections that are in place under normal circumstances.¹³⁷ These difficulties or risks touch and concern all aspects of the lives of internally displaced children, from their basic needs to their civil and political rights. It is not that internally displaced children have additional rights, rather that internal displacement creates conditions whereby it is more difficult for internally displaced children to meet their needs and realise their rights. The risks experienced by internally displaced children affect their rights and needs. The concepts of risks, rights and needs are connected.

In this part of the discussion, the rights and needs that are of particular importance to internally displaced children will be identified. These rights and needs are based on the risks experienced by internally displaced children. Therefore, the discussion will first outline the risks that internal displacement poses to children and then link these risks to particular rights and needs as set out in the CRC and ACRWC. This discussion will provide the foundation for the critical analysis of the law on internal displacement from a children's rights perspective.¹³⁸

¹³⁶ United Nations Commission on Human Rights "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" (21 January 1993) E/CN.4/1993/35 para 72.

¹³⁷ Para 72; ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 Global Responsibility to Protect 60-85 62.

¹³⁸ See Chapter 4.

In order to link the risks that internal displacement poses to children with their rights and needs, the risks, rights and needs will be divided into four categories: physical security; basic needs; economic, social and cultural rights; and, civil and political rights.¹³⁹ The four categories were chosen based on the four categories of protection needs outlined by Kälin when he was the Secretary-General's Special Representative on the Human Rights of Internally Displaced Persons, and these categories capture the risks, rights and needs in a holistic manner.¹⁴⁰ The situations of emergency and danger that are associated with internal displacement may encourage a focus on protection and survival needs with the exclusions of other rights.¹⁴¹ However, outside of an emergency phase of displacement, access to education, for example, ought to be given as much priority as protection and basic needs. It should be noted that the categories are not meant to be a rigid system of classification but are a tool to better understand the risks that internal displacement poses to children and link them to their rights and needs. Some of the risks, rights and needs may fit into more than one category or be relevant in many categories.¹⁴²

Furthermore, Mubangizi provides support for categorising the risks, rights and needs of internally displaced children in a holistic manner as he argues that universality, interdependence and indivisibility must be taken into consideration in any classification of human rights.¹⁴³ The principle of universality emphasises that human rights are applicable in all situations; therefore, situations of emergency do not negate the social, economic, political or civil rights of internally displaced children.¹⁴⁴ Also, the principle of interdependence means that the full realisation of one right depends upon the realisation of

¹³⁹ These categories are adapted from the Secretary-General's Special Representative on Human Rights of Internally Displaced Persons report with respect to assisting IDPs in the context of natural disasters. See United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13. Kunder also uses similar categories of protection: protection from physical and psychosocial harm; preservation of identity and culture; and provision of basic needs. See J Kunder *The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations* (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 17.

¹⁴⁰ United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13.

¹⁴¹ Para 13.

¹⁴² For example, the best interests of the child principle is relevant in all four categories as it make be taken into consideration with respect to every situation concern a child. See CRC art 3(1); ACRWC art 4(1).

¹⁴³ J Mubangizi "Toward a New Approach to the Classification of Human Rights with Specific Reference to the African Context" (2004) 4 *AHRLJ* 93-107 96-98. For a discussion of these three principles see Chapter 2 part 2 4 2 1.

¹⁴⁴ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 285.

other rights.¹⁴⁵ For example, in order to effectively protect a child from abuse, it is necessary to hear her views as a way of learning what she has experienced, is afraid of or perceives as threats. The indivisibility of rights underscores that one right is not more important than another.¹⁴⁶ Therefore, the next step in this process is to identify the particular risks that internal displacement poses children using the four categories.

3 3 1 Risks

Internal displacement poses several risks to the children. The major factor that contributes to the overall risks created by situations of internal displacement is the removal of habitual systems of protection.¹⁴⁷ Children experience the negative impacts of internal displacement even more acutely than adults due to their dependence on these systems of protection.¹⁴⁸ The risks that internal displacement poses to children affects all aspects of their lives; therefore, these risks must be understood in a holistic manner. While an emphasis on physical security may be especially prudent during the emergency stages of displacement, internal displacement creates risks to children's basic needs, social, economic and cultural rights, and civil and political rights. However, the discussion will begin with the most obvious risk that internal displacement poses to children, namely, risks to physical security.

3 3 1 1 *Risks to physical security*

Risks to physical security are threats to the life, physical security and integrity of internally displaced children.¹⁴⁹ Both conflict and disasters threaten the life and health of internally displaced children. There are threats to physical security within IDPs camps whether is it

¹⁴⁵ 282.

¹⁴⁶ 282. This is not to say that in the emergency phase of displacement that some rights may not take priority over others. See United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13.

¹⁴⁷ ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁴⁸ 62.

¹⁴⁹ United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13. Regarding risks to the physical security of children in the context of international migration see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & CRC Committee Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration" (16 November 2017) CMW/C/GC/3-CRC/C/GC/22 ; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & CRC Committee "Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return" (17 November 2017) CMW/C/GC/4-CRC/C/GC/23.

violence or sexual abuse due to lack of security within the camps, or targeting of IDPs camps by armed forces.¹⁵⁰ Internally displaced children are vulnerable to forced labour, trafficking, sexual abuse and harmful cultural practices such as forced early marriage.¹⁵¹ Internally displaced children can be easily trafficked and sold into slavery, especially when they have been separated from their parents or not accompanied by family members.¹⁵² The issue of “survival sex”¹⁵³ is relevant to a discussion of risks to the physical security of internally displaced children. Often occurring in camps, survival sex is trading sexual favours in exchange for basic necessities or other privileges.¹⁵⁴ Vulnerability to harmful cultural practices is a reality for internally displaced children since these practices are more easily imposed upon them due to their lack of protection, especially children separated from their families.¹⁵⁵

Separation from families is another notable risk experienced by internally displaced children.¹⁵⁶ This group of internally displaced children have been recognised as especially

¹⁵⁰ Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38-39 (footnotes omitted); R Bandyopadhyay & C Das “Rights and Protection Regime for Internally Displaced Women and Children: Towards the Formation of a Metaframework” (2013) 3 *Kathmandu Sch L Rev* 166-186 179-180. For example, the LRA targeted IDPs camps in Uganda. See Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38 (footnotes omitted).

¹⁵¹ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 4. See R Bandyopadhyay & C Das “Rights and Protection Regime for Internally Displaced Women and Children: Towards the Formation of a Metaframework” (2013) 3 *Kathmandu Sch L Rev* 166-186 171-172, 180.

¹⁵² ED Mooney “Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection” (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁵³ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 78; CW Warf, LF Clark, M Desai, SJ Rabinovitz, G Agahi, R Calvo & J Hoffman “Coming of Age on the Streets: Survival Sex Among Homeless Young Women in Hollywood” (2013) 36 *Journal of Adolescence* 1205-1213 1201, 1206.

¹⁵⁴ The practice of survival sex often negatively impacts women and girls. See United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 78; IDMC “Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram” (9 December 2014)10; IDMC “Somalia: Over a Million IDPs Need Support for Local Solutions” (18 March 2015) 6.

¹⁵⁵ As noted above, internally displaced children who are separated from their families lack the means of protection, which a family offers and makes them vulnerable to other risks to their physical security. See ED Mooney “Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection” (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁵⁶ 62. The CRC Committee defines separated children as children separated from their parents or legal guardians and unaccompanied children as children who are not under the care of any family member. See CRC Committee “General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin” (01 September 2005) CRC/GC/2005/6 paras 7-8.

vulnerable due to threats to their physical security.¹⁵⁷ In contrast, it has been found that due to various stressors, incidents of domestic violence increase during internal displacement.¹⁵⁸ It is both ironic and unfortunate that some internally displaced children are vulnerable to risks to their physical security due separation from their families while others are at risk due to remaining with their families.

In addition to a removal of usual systems of protection, children internally displaced by conflicts are particularly vulnerable to forced recruitment due to proximity to conflict zones.¹⁵⁹ The phenomenon of “night commuters”¹⁶⁰ in Uganda is an example of internally displaced children being at risk of forced recruitment.¹⁶¹ Every night, children with or without their parents travelled to the cities to avoid being abducted and forced into the ranks of the LRA.¹⁶² As forced recruits, internally displaced children experience the dangers of being child soldiers or children associated with armed conflict, such mortality, injury, forced marriage, sexual abuse, physical abuse, psychological trauma and the stigma of being associated with an armed group.¹⁶³ Furthermore, the notion of forced recruitment can be extended to the context of internal displacement due to criminal violence where children are coerced to become members of gangs. Gang membership may be a means of survival for children displaced to urban setting such as informal settlements, but it may also put their

¹⁵⁷ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 26; ED Mooney “Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection” (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁵⁸ United Nations Human Right Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Framework, on Durable Solutions for Internally Displaced Persons” (9 March 2010) A/HRC/13/21/Add.4 para 89.

¹⁵⁹ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 68; J McKnight “Child Soldiers in Africa; A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration” (2010) 18 *Africa J Int'l Comp L* 113-142 114.

¹⁶⁰ United Nations Commission on Human Rights “Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda” (3 March 2004) E/CN.4/2004/77/Add.1 8 para 5; (Uganda) National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018) xii.

¹⁶¹ Night commuters also represent a form of cyclical displacement. It should be noted that not all night commuters were internally displaced children. See Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 39.

¹⁶² United Nations “Consolidated Appeals Process (CAP): Humanitarian Appeal 2005 for Uganda” (11 November 2004) Relief Web <<http://reliefweb.int/report/uganda/consolidated-appeals-process-cap-humanitarian-appeal-2005-uganda>> (accessed 31-03-2017) as cited in Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 39.

¹⁶³ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 paras 36-57; Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles) (February 2007).

lives at risk.¹⁶⁴ An additional risk that is related to physical security is the psychological trauma that accompanies threats to physical security. Internally displaced children have witnessed, experienced or, especially in the case of child soldiers, have carried out horrific acts, which lead to psychological trauma.¹⁶⁵ The number of risks identified in this category demonstrates that internal displacement does pose several risks to the physical security of children, but internally displaced children also encounter risks that may be classified under the category of basic needs.

3 3 1 2 *Risks to satisfying basic needs*

Risks to basic needs in this context mean that internal displacement threatens or prevents access to necessities for survival.¹⁶⁶ Basic needs can be summarised as food, potable water, adequate housing and access to health care.¹⁶⁷ Whether displaced to camps or in urban settings, internal displacement forces children from their homes and thereby disrupts their habitual way of life. Internal displacement also makes it more difficult for children to have their basic needs met as States may have inadequate resources or the conditions caused by internal displacement.¹⁶⁸ Without a source of income, it is difficult for IDPs to provide their families with food, water and shelter. Both conflict and disasters may limit the supply of food and water. Limited access to food, water and shelter make internally displaced children vulnerable to malnutrition and illness.¹⁶⁹ Particularly in instances of

¹⁶⁴ For example, a review of child deaths in the Western Cape of South Africa found that the most prevalent cause of child murders was conflict with peers or gang violence. S Mathews, L Martin, C Scott, D Coetzee & L Lake "Every Child Counts: Lessons Learned from the South African Child Death Review Pilot" (July 2015) Children's Institute, University of Cape Town <http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2015/Every-child-counts_July2015.pdf> (accessed 10-08-2017); G Nicolson "Analysis: The Gruesome Truth About Child Deaths in South Africa" (13-04-2015) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2015-07-13-analysis-the-gruesome-truth-about-child-deaths-in-south-africa/#.WYw381EjGUk>> (accessed 10-08-2017).

¹⁶⁵ J Kunder The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf> > (accessed 30-08-2018) 2.

¹⁶⁶ United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13.

¹⁶⁷ Para 13; J Kunder The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf> > (accessed 30-08-2018) 17.

¹⁶⁸ J Kunder The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf> > (accessed 30-08-2018) 8.

¹⁶⁹ United Nations General Assembly "Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157" (26 August 1996) A/51/306 paras 68, 79; P Slama, P Spiegel & R Brennan "No Less Vulnerable: The

disaster and climate-induced displacement, children are at risk of illness such as diarrhoea, malaria and Dengue fever.¹⁷⁰ Malnutrition and disease also negatively affect the development of children.¹⁷¹ Also, internally displaced children are at least temporarily homeless as they have been forced from their homes. States may have inadequate resources, or due to the conditions caused by the conflict or disasters, be limited in their ability to provide for the basic needs of IDPs.¹⁷² Internally displaced children with disabilities may experience challenges when trying to meet their basic needs.¹⁷³ Another group that can be highlighted is children internally displaced in urban settings as this group may be invisible to authorities and may not receive assistance.¹⁷⁴ Access to health care may be also limited due resource constraints and accessibility of the locations of IDPs. The risks created by internal displacement go beyond security and basic needs, internal displacement also creates risks to social, economic and cultural rights.

3 3 1 3 *Risks to social, economic and cultural rights*

Risks encountered by internally displaced children that fall into the category of risks to social, economic and cultural rights include access to education, poverty, difficulties with regard to labour, issues regarding property loss and compensation, and the lack of ability to practice their culture. Access to education is a challenge for internally displaced children for a number of reasons. The causes of displacement may have destroyed school buildings,

Internally Displaced in Humanitarian Emergencies" (2001) 357/9266 *The Lancet* 1430-31 as cited in ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁷⁰ United Nations General Assembly "Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157" (26 August 1996) A/51/306 para 79; Save the Children UK "Legacy of Disasters: The Impact of Climate Change on Children" (April 2007) 9.

¹⁷¹ United Nations General Assembly "Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157" (26 August 1996) A/51/306 paras 155-157. Malnutrition was found to be prevalent amongst IDP populations. See P Salama, P Spiegel & R Brennan "No Less Vulnerable: The Internally Displaced in Humanitarian Emergencies" (2001) 357.9266 *The Lancet* 1430-1431.

¹⁷² It may be difficult to access the areas where the IDPs are located. See United Nations General Assembly "Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157" (26 August 1996) A/51/306 para 82; ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁷³ Children with disabilities are to be given special consideration See CRC art 23; ACRWC art 11; Guiding Principles prin 4(2).

¹⁷⁴ J Kunder The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 1.

injured or killed teachers, and school buildings may be used as emergency shelters.¹⁷⁵ Also, internally displaced children in host communities may not be able to satisfy the requirements for registration, such as identity documents, providing proof of residence or paying fees.¹⁷⁶

Internal displacement causes economic risks to children. The destabilising effects of internal displacement often lead to poverty. It is true that people living in poverty are more vulnerable to the negative impacts of internal displacement, but it is also common for the economic status of IDPs to deteriorate due to their displacement.¹⁷⁷ Loss of their homes, sources of income, and support networks lead to a “downwards spiral of vulnerability”¹⁷⁸ that often results in poverty.¹⁷⁹ An economic risk relevant to internally displaced children is the issue of labour. In an effort to provide for their basic needs, children may be forced into work or be forced to work in conditions that are unsafe.¹⁸⁰ Internal displacement creates child-headed households and these children along with IDPs as a whole, experience difficulties in claiming property that they have ownership rights to or to receive compensation for that property.¹⁸¹

Internal displacement also creates risks to the exercise of cultural rights. In situations of emergency and danger, the exercise of culture may not be viewed as a priority, but culture has been recognised as an important element in the development of children.¹⁸² Internal displacement breaks up families and communities and interrupts habitual ways of life; therefore, it creates challenges for children to learn and practice their cultures. Children from

¹⁷⁵ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 186; E Mooney & J Wyndham “The Right to Education in Situations of Internal Displacement” (2010) 41 *Stud Transnat'l Legal Pol'y* 247-290 258-259.

¹⁷⁶ For example, IDP children were not permitted to register for school because their father was no longer in possession of his migrant card. See *Case of Timishev v Russia* Application nos. 55762/00 and 55974/00 (ECtHR 12 December 2005). See also United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 82; IDMC “Getting on the List: The Registration of Children Born to IDPs” (15 May 2015) 4.

¹⁷⁷ United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani” (1 April 2015) A/HRC/29/34 para 19; United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons” (3 August 2016) A/71/279 para 42.

¹⁷⁸ United Nations General Assembly “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons” (3 August 2016) A/71/279 para 42.

¹⁷⁹ Para 42.

¹⁸⁰ Forced labour is also considered under the category of physical security as it presents a direct risk to the physical security of internally displaced children. However, the right to work is an economic need, but due their situation of vulnerability, internally displaced children experience risks related to work even when it is voluntary.

¹⁸¹ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) A/51/306 para 89.

¹⁸² UNHCR “Refugee Children: Guidelines on Protection and Care” (1994) 29.

indigenous communities or communities with a special attachment to their land are particularly at risk of losing their culture due to internal displacement since many of their cultural practices require the use of the land.¹⁸³ An IDP in a camp in Uganda expressed his remorse that children from his ethnic group would lose their culture as they were growing up in camps rather than in their communities with their usual way of life.¹⁸⁴ Therefore, it is clear that internally displaced children experience a number of risks to their social, economic and cultural rights. In addition, internally displaced children experience challenges that may be categorised as risks to civil and political rights.

3.3.1.4 *Risks to civil and political rights*

Risks that internal displacement poses to the civil and political rights of children include obtaining identity documents, access to justice and participation. During displacement identity documents may be lost.¹⁸⁵ In addition, parents who do not have adequate identity documents experience difficulties registering the births of their children.¹⁸⁶ Where there is a negative stigma attached to internal displacement, IDPs may be reluctant to identify themselves to authorities; therefore, they may choose not to replace their identity documents or register the births of their children.¹⁸⁷ A child whose birth is not registered is at risk of becoming stateless since she does not have official documentation confirming her name and nationality.¹⁸⁸ IDPs, even children, may need to access the justice system to address issues that arise as a result of their displacement, such as discrimination, and, loss of property or tenure and compensation. Therefore, internal displacement may create circumstances where children may have to assert their legal rights through the justice system.

Participation is a fundamental right in children's rights law and fits within the category of civil and political rights.¹⁸⁹ Even under normal circumstances, children experience

¹⁸³ This attachment to land has been recognized by the Guiding Principles. See Guiding Principles prin 9; Kampala Convention art 4(5).

¹⁸⁴ Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 39 (footnote omitted).

¹⁸⁵ IDMC "Getting on the List: The Registration of Children Born to IDPs" (15 May 2015) 5; E Mooney & J Wyndham "The Right to Education in Situations of Internal Displacement" (2010) 41 *Stud Transnat'l Legal Pol'y* 247-290 259-260.

¹⁸⁶ IDMC "Getting on the List: The Registration of Children Born to IDPs" (15 May 2015)4-7.

¹⁸⁷ 7. Regarding stigmatisation see ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹⁸⁸ IDMC "Getting on the List: The Registration of Children Born to IDPs" (15 May 2015) 3-4. See also J Todres "Birth Registration: An Essential First Step Towards Ensuring the Rights of All Children" (2003) 10 *Hum Rts Brief* 32-35 33.

¹⁸⁹ ICCPR art 19; CRC art 12; ACRWC arts 4(2), 7. See CRC Committee "General Comment No. 12 (2009) The Right to be Heard" (20 July 2009) CRC/C/GC/12 para 2; United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons,

challenges exercising their right to be heard.¹⁹⁰ Adult IDPs have reported that they experienced challenges expressing and having their views taken into consideration with respect to decisions concerning them.¹⁹¹ Therefore, it can be argued that internally displaced children are at risk of not being able to express their views on matters concerning them, especially in light of the challenges encountered by adult IDPs.

3 3 1 5 *Summary of risks*

Exploring the various categories of risks experienced by internally displaced children confirms that the problem of internal displacement has negative effects on all aspects of the lives of children. Throughout the discussion, there have been instances where particular risks have been linked to causes of internal displacement. During situations of conflict, a child may be at greater risk of forced recruitment into hostilities and dangers associated with conflict.¹⁹² Disasters or the negative impacts of climate change may create particular risks for children such as risks of contracting particular illnesses.¹⁹³ Aside from these examples, the core of the risks associated with internal displacement cannot be specifically linked to a particular cause *per se*. The risks are by and large created by the actual act of displacement regardless of the cause. To conclude the discussion with respect to the risks, rights and needs of internally displaced children, it is necessary to link the risks to the particular needs of internally displaced children and their rights as set out in children's rights law. The specific rights will be gleaned from the applicable provisions of the CRC and ACRWC.

3 3 2 Rights and needs

Using the language of rights and needs highlights that not only do internally displaced children have particular needs due to their circumstances but that they are bearers of rights. Approaching the problem of internal displacement from a children's rights perspective requires an emphasis on rights in addition to needs.¹⁹⁴ The discussion with respect to the risks that internal displacement poses to children highlighted that many of the rights to which all children are entitled to are threatened during situations of internal displacement. The rights provided by the CRC and ACRWC apply to all children regardless of their situations.¹⁹⁵

Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13.

¹⁹⁰ CRC Committee "General Comment No. 12 (2009) The Right to be Heard" (20 July 2009) CRC/C/GC/12 para 4.

¹⁹¹ United Nations General Assembly "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons" (3 August 2016) A/71/279 para 70.

¹⁹² See part 3 3 1 1.

¹⁹³ See part 3 3 1 2.

¹⁹⁴ See discussion in Chapter 1 part 1 5 2.

¹⁹⁵ CRC Preamble para 3, art 2(1); ACRWC Preamble para 1, art 3.

Even where internally displaced children are not specifically mentioned, the rights prescribed by these legal instruments apply.¹⁹⁶ However, it is clear from both instruments that children in particularly difficult situations ought to be given “special consideration”.¹⁹⁷ Therefore, to demonstrate a clear link between the risks, and rights and needs, the rights and needs of internally displaced children pursuant to the CRC and ACRWC will be outlined with respect to the categories of the rights to physical security, rights to basic needs, social, economic and cultural rights, and civil and political rights.¹⁹⁸

3 3 2 1 *Rights to physical security*

The causes of internal displacement, as well as the instability resulting from displacement, create risks to the physical security of internally displaced children. Children’s rights law creates rights for all children with respect to the protection of their physical security that is applicable to internally displaced children. Every child has the right to life, survival and development.¹⁹⁹ The rights outlined in the CRC and ACRWC place a positive obligation upon States to take measures to provide for the protection of children as well as their development.²⁰⁰ The CRC indicates that development should be construed holistically, which includes physical, mental, physiological and social development.²⁰¹ In terms of physical security, the right to life, survival and development addresses the risks that arise from the causes of displacement as well as the overall risks to children’s physical security due to domestic violence, trafficking and forced recruitment. It also addresses the psychological trauma that accompanies risks to physical security.

Furthermore, the CRC and ACRWC provide rights that protect internally displaced children from specific forms of abuse and exploitation. The CRC requires the abolishment of harmful cultural practices, and protection from economic exploitation, the use, sale or trafficking of illicit narcotics, sexual abuse and exploitation, sale and trafficking, and all other forms of abuse or exploitation and torture.²⁰² The ACRWC calls for the abolishment of harmful cultural practices and specifically mentions child marriage.²⁰³ It provides protection

¹⁹⁶ However, as noted earlier, the ACRWC does especially mention internally displaced children. See ACRWC arts 23(4), 25(2)(b).

¹⁹⁷ ACRWC Preamble para 3, CRC Preamble para 10.

¹⁹⁸ See Chapter 4.

¹⁹⁹ CRC art 6; ACRWC art 5.

²⁰⁰ CRC art 6; ACRWC art 5(2).

²⁰¹ CRC Committee “General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)” (27 November 2003) CRC/GC/2003/5 para 12.

²⁰² CRC arts 24(3), 32-37. See also Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

²⁰³ ACRWC art 21, (2).

against economic exploitation, torture and abuse, sexual abuse and exploitation, use, sale and trafficking of illicit narcotics, and the sale and trafficking of children.²⁰⁴ With respect to domestic violence, both the CRC and ACRWC enable the removal of a child from her family pursuant to the best interests of the child principle.²⁰⁵ The rights outlined thus far address the risks of forced labour, trafficking, sexual abuse, harmful cultural practices, forced early marriage, domestic violence and involvement in criminal activities.²⁰⁶

With respect to the vulnerability of separated and unaccompanied children, the CRC requires States to provide special protection and assistance.²⁰⁷ The ACRWC specifically mentions internally displaced children, and it requires States to provide for their protection and assistance, to make attempts to trace their parents and to make efforts to reunite children that have been separated from their families.²⁰⁸ Therefore, the rights provided by the CRC and ACRWC address the risk of family separation in the context of internal displacement.

Both the CRC and ACRWC address the risk of forced recruitment into hostilities by prohibiting the direct participation of hostilities.²⁰⁹ The CRC permits children of the age of 15 and older to take part in hostilities with giving preference to the participation of the oldest children first.²¹⁰ In contrast, the ACRWC does not permit the participation of any child in hostilities.²¹¹ Despite providing more permissive standards with regard to participation in hostilities, the CRC does provide for the recovery and reintegration of children involved in armed conflicts as well as any other forms of abuse or exploitation.²¹² In summary, the CRC and ACRWC provide general as well as specific rights that address the risks to the physical security of internally displaced children.

3 3 2 2 *Rights to basic needs*

It is necessary for internally displaced children to have their basic needs met in order to survive. The CRC and ACRWC provide a number of rights with respect to the

²⁰⁴ ACRWC arts 15, 16, 27-39.

²⁰⁵ CRC art 19; ACRWC art 19(1). The ACRWC also requires any domestic discipline to be carried out "with humanity". See ACRWC art 20(1)(c).

²⁰⁶ With respect to criminal violence the right to the extent that crimes include such practices as the drug trafficking, human trafficking, forced labour and sexual exploitation.

²⁰⁷ CRC art 20(1).

²⁰⁸ ACRWC arts 23, 25(2)(b).

²⁰⁹ CRC 38; ACRWC art 22.

²¹⁰ CRC art 38(3) See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

²¹¹ ACRWC art 22.

²¹² CRC art 39.

provision of the basic needs of internally displaced children. The most basic right is the right to survival and development.²¹³ There are also other rights that address the provision of basic needs. The CRC provides that every child has a right to an adequate standard of living, which allows for her holistic development.²¹⁴ This right can be extended to cover basic needs such as food, water and shelter, which are placed at risk by internal displacement. The CRC and ACRWC both recognise that the obligation to provide for the basic needs of children lies first with parents or legal guardians.²¹⁵ However, States are to provide assistance to parents with the provision of these needs, especially with respect to nutrition, housing, clothing, health and education.²¹⁶ During situations of displacement, these provisions are especially relevant as internal displacement creates challenges for IDPs to satisfy their basic needs.²¹⁷ Children also have the right to the highest attainable standard of health.²¹⁸ Health includes the provision of nutrition and safe drinking water, which combats malnutrition and disease.²¹⁹ The CRC and ACRWC also give rights to children with disabilities to receive special care and to be treated with dignity.²²⁰ Special consideration of children with disabilities is relevant in the context of internal displacement as internally displaced children with disabilities are recognised as a group that has special needs.²²¹ Internally displaced children with disabilities, therefore, may require special consideration in order to meet their basic needs as well as realise their other rights.

3 3 2 3 *Social, economic and cultural rights*

There is a need to address the risks that internal displacement poses to the social, economic and cultural rights of internally displaced children. The CRC and ACRWC provide

²¹³ CRC art 6(1); ACRWC art 5(2).

²¹⁴ CRC art 27(1).

²¹⁵ CRC art 27(2); ACRWC art 20(1)(b).

²¹⁶ CRC art 27(3); ACRWC art 20(2).

²¹⁷ See discussion at part 3 3 1 2. See also ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62 (footnotes omitted).

²¹⁸ CRC art 24; ACRWC art 14.

²¹⁹ CRC art 24(2)(c); ACRWC art 14(2)(c).

²²⁰ CRC art 23; ACRWC art 13.

²²¹ See Guiding Principles prin 4(2); United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 para 47; United Nations Commission on Human Rights "Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39" (11 February 1998) E/CN.4/1998/53/Add.2 para 1. See also J Kunder "The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations" (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018) 2.

a number of rights, which address these risks. Children have the right to education.²²² Both the CRC and ACRWC provide that the right to education should also be directed to the holistic development of the child.²²³ Pursuant to Article 11(3)(e) of the ACRWC, States are “to ensure equal access to education for all sections of the community”.²²⁴ The CRC and ACRWC not only give internally displaced children the right to access education, these instruments provide guidelines with respect to the aims of the education and recognise there must be equal access to education across communities. One notable obligation placed on States with respect to education is the requirement to encourage regular attendance at school and to reduce drop-out rates.²²⁵ Therefore, the risk to access to education created by internal displacement is met by a right to education under children’s rights law.

Children’s right law responds to the risks that internal displacement creates with respect to economic rights. The risk of poverty is addressed in part by the rights with respect to basic needs addressed above, but the CRC also provides the right for children to benefit from social security.²²⁶ The CRC and ACRWC also protect children from economic exploitation.²²⁷ In the event that children enter the labour force, there are minimum requirements with respect to the age for employment, hours of work and conditions.²²⁸ The CRC not only provides protection from work that may be hazardous, it also protects children against work that may interfere with their education.²²⁹ Situations of internal displacement create unique circumstances with respect to issues of property ownership, especially land, and compensation. IDPs are forced to leave their homes and property, it may appear as if the property has been abandoned and other people may take possession of the property. When the IDPs return home, they may find their property in the possession of others. The property loss and compensation issues that arise from such circumstances may be common within the context of internal displacement. Also, issues regarding property ownership for internally displaced children would generally only arise in the context of child-headed households. The risks associated with reclaiming property or obtaining compensation for the property are not addressed by either the CRC or the ACRWC.

²²² CRC 28; ACRWC art 11.

²²³ CRC art 29; ACRWC art 11(2).

²²⁴ ACRWC art 11(3)(e).

²²⁵ CRC art 28(1)(e); ACRWC art 11(3)(d).

²²⁶ CRC art 26.

²²⁷ CRC art 32; ACRWC art 15. Rights that protect internally displaced children from economic exploitation is also discussion with respect to rights to physical security. See part 3 3 2 1.

²²⁸ CRC art 32(2); ACRWC art 15(2).

²²⁹ This is an example of one right reinforcing another, or simply the interdependence of rights. See CRC art 32(1).

In contrast, the exercise of culture is addressed by both the CRC and ACRWC. Internally displaced children are at risk of losing their culture as they do not have an opportunity to practice it. While the CRC and ACRWC guard against harmful cultural practices, they provide children with the right to engage in their culture.²³⁰ The CRC recognises that children belonging to minorities or indigenous communities must also be given the right to practice their culture, language and religion.²³¹

3 3 2 4 *Civil and political rights*

The risks to the civil and political rights included difficulties with respect to birth registration, identity documents, access to the justice system and participation. Children's rights law responds to the challenge of birth registration and obtaining identity documents by requiring children to be registered immediately after birth and by providing children with a right to an identity, including a name and a nationality.²³² Access to the justice system is not specifically addressed by the CRC or ACRWC, rather these instruments provide rights and protections for children who are in conflict with the law, including the rights of children when in detention.²³³ The Optional Protocol to the Convention on the Rights of the Child on Communication Procedures 2011 enables children to send communications with respect to violations of the CRC or its Optional Protocols,²³⁴ but access to justice for internally displaced children is an issue that can be dealt with under the domestic law. Furthermore, the right not to be discriminated against could provide the grounds for internally displaced children to challenge discriminatory treatment, which arises as a result of their status as IDPs.²³⁵ Participation, in contrast, is a fundamental principle in children's rights law; therefore, internally displaced children are afforded the right to be heard in all matters concerning them.²³⁶ There are also what the United Nations Children's Fund ("UNICEF")

²³⁰ CRC arts 24(3), 31; ACRWC arts 12, 21.

²³¹ CRC art 30. It is acknowledged that freedom of religion is generally classified as a civil and political right. See ICCPR art 18. However, there is a great deal of overlap between the practice of culture and religion. See T Picontó-Novales "Religious Freedom and Protection of the Right to Life in Minors" A Case Study" in M Maclean & J Eekelaar (eds) *Managing Family Justice in Diverse Societies* (2013) 137-151 144; T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 33; CE Cobler *Children's Rights and Culture in Conflict: Using the Best Interests of the Child Principle to Evaluate Male Circumcision and Female Genital Mutilation* Unpublished LLM Major Paper Stellenbosch University (2014) 5.

²³² CRC arts 7-8; ACRWC art 6.

²³³ CRC arts 37, 40; ACRWC art 17.

²³⁴ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 5.

²³⁵ CRC art 2; ACRWC art 3.

²³⁶ CRC art 12; ACRWC art 4(2); CRC Committee "General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 12.

terms a “cluster of participation articles”,²³⁷ which together provide a foundation for children’s right to participation.²³⁸

3 3 2 5 Summary of rights and needs

In summary, the CRC and ACRWC provide rights in all of the categories where internally displaced children experience risks. Rights with respect to property loss and compensation and access to the justice system are not specifically addressed in the CRC and ACRWC; however, violations of these rights may be challenged on grounds of non-discrimination.²³⁹ The particular issue of property loss and compensation is an issue that is specific to situations of internal displacement only relevant to child-headed households; therefore, it is not unusual that this issue is not addressed in children’s rights law.

The best interests of the child principle did not feature prominently in the discussion on risks, rights and needs. This principle, in addition to being a general principle of children’s rights law, is applicable with respect to every category of risks, rights and needs as it must be considered in all matters concerning children.²⁴⁰ The best interests of the child principle requires that children’s rights and needs are brought to the forefront in every situation, including internal displacement.²⁴¹ For this reason, the best interests of the child can be considered as an overarching right that responds to the risks and needs created by internal displacement.

Finally, the aim of this discussion was to link the risks caused by internal displacement to rights as outlined in children’s rights law. This exercise has identified the rights that are particularly relevant to internally displaced children in addition to challenges to the realisation of these rights. It is true that the risks to internally displaced children cannot be adequately addressed by merely quoting a provision of the CRC or ACRWC; there must be implementation. However, the identification of the rights and needs of internally displaced children in relation to the risks that they experience demonstrates how children’s rights law

²³⁷ UNICEF *State of the World’s Children 2003* (2002) New York: UNICEF 24-25.

²³⁸ CRC arts 5, 9, 12-17, 21-23, 29 See UNICEF *State of the World’s Children 2003* (2002) New York: UNICEF 24-25. Tobin mentions Articles 12-15. See J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 290.

²³⁹ Such as discrimination on the grounds of status as an IDP.

²⁴⁰ CRC Committee “General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)” (27 November 2003) CRC/GC/2003/5 para 12; CRC Committee “General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para. 1)” (29 May 2013) CRC/C/GC/14 para 1; CRC art 3(1); ACRWC art 4(1). See also CRC Committee “General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para. 1)” (29 May 2013) CRC/C/GC/14 paras 17-24.

²⁴¹ CRC Committee “General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para. 1)” (29 May 2013) CRC/C/GC/14 para 32-40.

addresses the risks that internal displacement poses to children. In addition, it lays the foundation for the critical analysis of how the law on internal displacement addresses the risks that internally displaced children encounter. In the next chapter, the approach to the law on internal displacement at the international and regional level will be outlined, and the law will be critically analysed from a children's rights perspective using the four categories of risks, rights and needs identified in this chapter.

CHAPTER 4: A CRITICAL ANALYSIS OF THE LAW ON INTERNALLY DISPLACEMENT

4 1 Introduction

The purpose of this chapter is to critically analyse the law on internal displacement using a children's rights perspective. The key instruments on internal displacement applicable to States in Africa will be analysed, namely, the United Nations Guiding Principles on Internal Displacement 1998 ("Guiding Principles"), the International Conference on the Great Lakes Region's ("ICGLR") Protocol on the Protection and Assistance to Internally Displaced Persons 2006 ("ICGLR IDP Protocol") and the African Union Convention for the Protection and Assistance of Internally Displaced Persons 2009 ("Kampala Convention"). The analysis will examine to what extent these instruments incorporate a children's rights perspective, conceptualise children as bearers of rights and address the particular risks, rights and needs of internally displaced children. The analysis will also highlight the obligations that States have to internally displaced children. Therefore, the discussion in this chapter will help answer one component of the central research question, which aims to determine the obligations that States have to internally displaced children.

The majority of this chapter will focus on the critical analysis of the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention; however, to lay the foundation for a comprehensive understanding of these legal instruments, the development of each instrument will be discussed. Thereafter, the children's rights perspective and the particular risks that internal displacement poses to children will be outlined before moving onto the critical analysis. The results of the analysis will be discussed, and the chapter will conclude by outlining the obligations that States have to internally displaced children pursuant to the law on internal displacement. Therefore, the next topic to be discussed will be the development of the law on internal displacement.

4 2 Development of the law on internal displacement

The law on internal displacement has developed to varying degrees at the international, regional and domestic levels.¹ This area of law has had the benefit of

¹ The development of the law at the domestic level will be addressed in the case studies. See Chapter 6.

international humanitarian and human rights law as well as refugee law by analogy.² At the international level, the law on internal displacement is largely governed by soft law instruments. The Guiding Principles laid the foundation for a legal framework specifically applicable to IDPs, but they are non-binding.³ There are other international instruments that are specific to internal displacement, but these too can be classified as soft law.⁴ Guzman and Meyer describe soft law as “things that fall short of international law”.⁵ The premise behind soft law is to use non-binding frameworks to influence State behaviour and create legal norms.⁶ Often, the hope is that soft law will pave the way for a binding convention.⁷

In this instance, the law on internal displacement, 20 years since the development of the Guiding Principles, still is only influenced by soft law instruments at the international level. Some see the creation of an international treaty as a necessary step, and others argue that this is a fruitless pursuit.⁸ In contrast, the law on internal

² See United Nations Economic and Social Council “Compilation and Analysis of Legal Norms” (05 December 1995) E/CN.4/1996/52/Add.2 para 7; United Nations Economic and Social Council “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39 Introductory Note to the Guiding Principles” (11 February 1998) E/CN.4/1998/53/Add.2 para 9.

³ See FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 93.

⁴ See for example Principles on Housing and Property Restitution of Refugees and Displaced Persons 2005 (Pinheiro Principles) (28 June 2005) E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1; United Nations Basic Principles and Guidelines for Development-Based Evictions and Displacement A/HRC/4/18 annex 1 *United Nations Office of the High Commissioner for Human Rights* <https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf> (accessed 29-08-2018); United Nations Operational Guidelines on Human Rights in Natural Disasters (23 January 2006) A/HRC/4/38/Add.1 annex; United Nations Framework on Durable Solutions for Internally Displaced Persons (9 March 2010) A/HRC/13/21/Add.4; Peninsula Principle on Climate Displacement within States (18 August 2013).

⁵ AT Guzman & TL Meyer “International Soft Law” (2010) 2 *J Legal Analysis* 171-225 172. Guzman and Meyer also explain that soft law can be understood “as a continuum ... running between fully binding treaties and fully political positions”. AT Guzman & TL Meyer “International Soft Law” (2010) 2 *J Legal Analysis* 171-225 173

⁶ FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 75.

⁷ 75. Silska notes that a binding international instrument on internal displacement is still being awaited. See Silska M “Protection of Internally Displaced Persons: An International Legal Obligation?” (2015) 34 *Polish Yearbook of International Law* 249-271 255.

⁸ See Silska M “Protection of Internally Displaced Persons: An International Legal Obligation?” (2015) 34 *Polish Yearbook of International Law* 249-271 255. Cohen qualifies her support for an international convention by requiring that should be clear international consensus in favour of creating such an instrument. See R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 476. Writing with reference to African States, and prior to the adoption of the ICGLR IDP Protocol and the Kampala Convention, Lomo states that there is adequate protection for IDPs under the current

displacement in Africa at the regional and sub-regional levels has undergone what has been termed a “hardening of the soft law”.⁹ The creation of the ICGLR IDP Protocol and the Kampala Convention solidified the importance of addressing the problem of internal displacement in Africa through binding legal obligations. In order to better understand reasons for the different approaches to the law on internal displacement at the international and regional levels, the development of the Guiding Principles and the ICGLR IDP Protocol and Kampala Convention will be considered in turn.

4 2 1 Development of the Guiding Principles

The large numbers of internally displaced persons in the late 1980s and 1990s worldwide prompted an international response to the issue of internal displacement.¹⁰ It is worth noting that the impetus that led to the eventual creation of the Guiding Principles began in Africa.¹¹ In response to the conflicts in Angola and Mozambique as well as the mass displacements in South Africa due to the government’s apartheid policies, the Organisation of African Unity (“OAU”) requested an international meeting to discuss the issue of mass displacements in Africa in 1984.¹² The meeting took place in 1988 as the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa. The Plan of Action called upon the Secretary-General of the United Nations to study the problem of internal displacement and

regime, but what is lacking is the political will to implement these standards. See AZ Lomo “The Struggle for Protection of Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work” (2000) 18 *Berkley J Int’l L* 268-284.

⁹ W Kälin “Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement” (2008) 102 *Am Soc’y Int’l L Proc* 187-201.

¹⁰ United Nations Commission on Human Rights “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” (21 January 1993) E/CN.4/1993/35 3-5; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 82-83; R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 89-92.

¹¹ R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 89-92.

¹² African Union Resolution on the Situation on Refugees in Africa (27 February 1984 to 5 March 1984) CM/Res.939 (XL) *African Union Peace and Security* <<http://www.peaceau.org/uploads/cm-res-939-xl-e.pdf>> (accessed 25-07-2017) para 5; R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 90.

engage in consultations.¹³ Addressing this action item led to the appointment of Francis M. Deng as the Secretary-General's Special Representative on Internally Displaced Persons in 1992.¹⁴

Deng's work began with studying the problem of internal displacement. His initial study suggested there was a need to compile the existing law applicable within the context of internal displacement into a set of non-binding principles.¹⁵ He assembled a team of legal experts to study international human rights law, international humanitarian law and refugee law by analogy in order to determine to what extent the existing law addressed the needs of IDPs.¹⁶ The two-part study, the *Compilation and Analysis of Legal Norms* ("Compilation and Analysis"), revealed that there were a number of provisions applicable to IDPs, but it also found that there were protection gaps.¹⁷ The *Compilation and Analysis* made two primary conclusions. First, the specific needs of IDPs were not addressed by the law.¹⁸ Second, even where there was a general norm, there was not a specific right that would ensure its applicability to IDPs.¹⁹ The recommendation was to remedy the protection gaps by creating an international instrument.²⁰ However, Cohen explains that at that time, the late 1990s, there were three reasons that an international convention addressing the plight of IDPs was not viable. The first reason was that States were not receptive to the idea of a

¹³ Oslo Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in South Africa (19 October 1988) A/43/717 annex <<http://www.refworld.org/docid/3ae68f410.html>> (accessed 15 July 2017) para 21. See also "The Right no to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement" (2016) 16 *African Human Rights Law Journal* 83-98 90. The Secretary-General did undertake a study of the problem of internal displacement. See United Nations Economic and Social Council "Analytical Report of the Secretary-General on Internally Displaced Persons" (14 February 1992) E/CN.4/1992/23.

¹⁴ United Nations Commission on Human Rights Resolution 1992/73 (5 March 1992) E/CN.4/RES/1992/73 paras 2, 5; United Nations Economic and Social Council Decision 1992/243 (20 July 1992) E/1992/103.

¹⁵ United Nations Commission on Human Rights "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" (21 January 1993) E/CN.4/1993/35 paras 270, 283

¹⁶ United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 para 2.

¹⁷ See United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2; United Nations Economic and Social Council "Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement" (11 February 1998) E/CN.4/1998/53/Add.1.

¹⁸ United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 para 411.

¹⁹ For example, there was a right to non-discrimination, but necessarily a right to non-discrimination on the basis of being an IDP. See United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 para 411.

²⁰ Para 411.

convention due to the sensitive nature of internal displacement and issues of sovereignty.²¹ Next, there was an immediate need for a legal response to the problem of internal displacement and the process of treaty making could take a long time.²² Lastly, international human rights and international humanitarian law that protected IDPs already existed, but there was a need to consolidate the law in one place and restate it in a way that responded to the specific needs of IDPs.²³ For these reasons, it was determined that the way forward was to draft a non-binding legal framework in the form of the Guiding Principles.²⁴

The Guiding Principles were also drafted in light of two important factors, namely, the specific needs of IDPs and the concept of sovereignty as responsibility. The Guiding Principles were to fill a gap in the protection of IDPs by creating a set of principles that took into consideration their specific needs.²⁵ Cohen notes that the principles were drafted using a needs-based approach.²⁶ Therefore, the Guiding Principles used existing international humanitarian and human rights law and refugee law by analogy but restated and adapted the law in a way applicable to IDPs.²⁷ The concept of sovereignty as responsibility became the foundation for the Guiding Principles as it was recognised that States have the primary obligation for the

²¹ R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 464.

²² 464.

²³ 465.

²⁴ United Nations Commission on Human Rights “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” (21 January 1993) E/CN.4/1993/35 para 283; R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 464-465.

²⁵ United Nations Economic and Social Council “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39 Introductory Note to the Guiding Principles” (11 February 1998) E/CN.4/1998/53/Add.2 para 9.

²⁶ R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 463. However, it should be noted that a rights-based approach ought to be used to obtaining durable solutions for IDPs. See United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Framework on Durable Solutions for Internally Displaced Persons” (9 March 2010) A/HRC/13/21/Add.4 para 22. Also, the current United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons and her predecessor have taken a rights-based approach to their mandate. See United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani” (04 April 2014) A/HRC/26/33 para 2; United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons” (18 April 2017) A/HRC/35/27 para 24.

²⁷ ED Mooney “Principles of Protection for Internally Displaced Persons” (2000) 38 *International Migration* 81-101 85; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 93.

protection and assistance of IDPs.²⁸ Linking State sovereignty to ensuring the protection of persons within its borders in addition to requiring States to accept assistance from the international community in instances where they are unable to fulfil this obligation correlates with the objective of the protection of IDPs. The emphasis on responsibility shifted the focus from preventing intervention to complying with obligations. These factors influenced the approach to drafting the content of the Guiding Principles. It can be argued that the focus on sovereignty as responsibility, in particular, indicates a focus on States by the Guiding Principles.²⁹

However, States were largely left out of the drafting process, which differed from the usual process for drafting a declaration or convention.³⁰ The legal experts, who assisted with the drafting of the *Compilation and Analysis*, led by Walter Kälin, drafted the Guiding Principles in conjunction with consultations with interested members of United Nations bodies, and non-governmental organisations (“NGOs”).³¹ Cohen notes that even though they were non-binding, “the Guiding Principles quickly gained substantial international acceptance and authority”.³² The Guiding Principles were endorsed by United Nations bodies and are used by States and NGOs for the creation of domestic laws and for guiding their interactions with IDPs.³³ More recently, in 2016,

²⁸ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 275; R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 466; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 93. For a discussion of the concept of sovereignty as responsibility see also Chapter 1 part 1 1 4; Chapter 5 part 5 3.

²⁹ It should be noted that focusing on the specific needs of IDPs also indicates as State focus as States are primarily responsible for meeting such needs i.e. protection, basic needs, education etc.

³⁰ One reason a declaration was not chosen was that it was feared it would give States the opportunity to renegotiate principles that were already settled in international law. See FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 93.

³¹ United Nations Commission on Human Rights “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39” (11 February 1998) E/CN.4/1998/53/Add.2 para 12; R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 465, 468; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 92-93, 97. It should be noted that Walter Kälin went on to be the second Special Representative on the Human Rights of Internally Displaced Persons. See. United Nations Human Rights Office of the High Commissioner “Mr. Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons” <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/WalterKalin.aspx>> (accessed 20-07-2017).

³² R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 459.

³³ For example, the Guiding Principles were adopted by the Inter-Agency Standing Committee and taken note of by the Commission on Human Rights and General Assembly. The General Assembly

the United Nations Human Rights Council confirmed again its “recognition of the Guiding Principles ... as an important international framework for the protection and assistance of internally displaced persons”.³⁴ To be sure, the Guiding Principles wield great influence. Abebe describes the Guiding Principles as:

“the most authoritative normative standards on internal displacement. They bring together in a comprehensive and systematic fashion the most salient rules of international law, [...] relevant to the protection of IDPs whose status under international law has never been sufficiently clarified.”³⁵

Despite growing evidence of State practice of incorporating the Guiding Principles in domestic legislation,³⁶ the status of the Guiding Principles as customary

also took note of the Guiding Principles at the 2005 World Summit. See United Nations Commission on Human Rights Resolution 1999/47 (27 April 1999) E/CN.4/RES/199/47; United Nations General Assembly Resolution 54/167 (25 February 2000) A/RES/54/167 paras 6,8; United Nations General Assembly Resolution 60/1 2005 World Summit Outcome (24 October 2005) A/RES/60/1 para 132. See also FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 94-95. See also R Cohen “Developing an International Systems for Internally Displaced Persons” (2006) 7 *International Studies Perspectives* 87-101 93; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in JI Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 96-97. For example, the CAR, Nigeria, Sudan and Uganda refer to the Guiding Principles in their national policies and draft legislation and policies on internal displacement. See *Portant protection et assistance aux personnes déplacée à l’Intérieur de la Republic Centrafricaine Loi No 15 Draft IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/car/DRAFT_Loi-Nationale-PDI-en-RCA.pdf> (accessed 04-09-2018); *Politique nationale sur la protection et l’assistance aux personnes Déplacées internes en Centrafrique Draft* (July 2015) *IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/car/DRAFT_Politique-Nationale-PDI-en-RCA.pdf> (accessed 04-11-2016); *Rights of Internally Displaced Persons (IDPs) Bill, 2016 HB 532 Federal Republic of Nigeria National Assembly* <<https://nass.gov.ng/document/bills>> (accessed 12-06-2018); *National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012 IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/nigeria/2012-nigeria-draft-IDP-policy.pdf> (accessed 09-08-2018); *National Policy for Internally Displaced Persons (IDPs) (2009) The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Sudan_IDPPolicy.pdf> (accessed 31-08-2018); *Doha Document for Peace in Darfur (DDPD) (finalised 31 May 2011, signed 14 July 2011) IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/sudan/DDPD-English.pdf> (accessed 04-11-2016); *National Policy for Internally Displaced Persons (August 2004) The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018) See also IDMC “IDP Laws and Policies: A Mapping Tool” <<http://www.internal-displacement.org/law-and-policy>> (accessed 04-11-2016).

³⁴ United Nations Human Rights Council Resolution 32/11 (18 July 2016) A/HRC/RES/32/11 para 14.

³⁵ AM Abebe “Special Rapporteurs as Law Makers: The Developments and the Evolution of the Normative Framework for Protecting and Assisting Internally Displaced Persons” (2011) 15 *The International Journal of Human Rights* 286-298 286-287. See also C Beyani “Recent Developments: The Elaboration of Legal Frameworks for the Protection of a Legal Framework for the Protection of Internally Displaced Persons in Africa” (2006) 50 *Journal of African Law* 187-197 192.

³⁶ See IDMC “IDP Laws and Policies: A Mapping Tool” <<http://www.internal-displacement.org/law-and-policy>> (accessed 04-11-2016). See also Addendum A Table 1 African States Child Law and

international law remains unclear.³⁷ Also, their wide acceptance and influence have yet to lead to the creation of a binding international convention.³⁸ Nonetheless, the Guiding Principles have laid the foundation for the creation of two binding instruments at the regional level in Africa, namely, the ICGLR IDP Protocol and the Kampala Convention.³⁹ The response to the problem of internal displacement in Africa and the development of these instruments will be discussed next.

4 2 2 Development of the law on internal displacement in Africa

In contrast to international developments, Africa, as a region, responded to the issue of internal displacement much earlier. The African Union (“AU”) and its predecessor the OAU responded to the issue of internal displacement in a variety of ways over the years. In fact, the AU has a historical commitment to addressing “the general problem of displacement in Africa”.⁴⁰ In 1968, the OAU created the Coordinating Committee on Assistance and Protection of Refugees, Returnees and Internally Displaced Persons (“CCAR”) to coordinate educational programs for refugees fleeing apartheid in South Africa, but in 2001, its mandate was expanded to beyond this particular group.⁴¹ There were a number of international meetings dedicated to discussing the problem of forced migration in the region. The International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa in 1988 not only succeeded in bringing the problem of internal displacement to international attention,⁴² it also demonstrated that the Member States of the OAU were concerned enough about this issue to request this meeting.⁴³ The OAU and UNHCR

Internal Displacement Law Ratifications Status; Addendum B Table 2 Case Study States Information.

³⁷ See PL Schmidt “The Process and the Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment” (2004) 35 *Georgetown Journal of International Law* 483-519.

³⁸ Silska M “Protection of Internally Displaced Persons: An International Legal Obligation?” (2015) 34 *Polish Yearbook of International Law* 249-271 255.

³⁹ Members of the ICGLR are to adopt the Guiding Principles. See ICGLR IDP Protocol Preamble, art 6. The Kampala Convention recognises the Guiding Principles. See Kampala Convention Preamble. See also C Beyani “Recent Developments the Elaboration of a Legal Framework for the Protection of Internally Displaced Persons in Africa (2006) 50 *Journal of African Law* 187-197 192-194.

⁴⁰ C Beyani “Recent Developments: The Elaboration of Legal Frameworks for the Protection of a Legal Framework for the Protection of Internally Displaced Persons in Africa” (2006) 50 *Journal of African Law* 187-197 189.

⁴¹ AM Abebe “Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa” (2009) 22 *Journal of Refugee Studies* 155-176 160-161.

⁴² See discussion in part 4 2 1.

⁴³ United Nations General Assembly Resolution 43/116 (08 December 1988) A/RES/43/116 para 10.

convened a Symposium on Refugees and Forced Population Displacements in Africa in Addis Ababa Ethiopia the 8th to 10th of September 1994.⁴⁴ The Symposium commemorated the 25th anniversary of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁴⁵ However, this meeting also recognised that internal displacement was a serious problem in the region and that it was imperative to provide protection and assistance to IDPs as the current system was woefully lacking.⁴⁶ Various sub-regional bodies met to discuss internal displacement and understand the problem in light of their particular context.⁴⁷ A further recognition of IDPs in Africa can be demonstrated by the ACRWC's specific reference to internally displaced children, and as noted earlier it became the first instrument to do so.⁴⁸ Furthermore, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women 2003 ("Maputo Protocol"), calls for the protection of displaced women and the increased participation of displaced women.⁴⁹ Also, the

⁴⁴ OAU/ UNHCR "The Addis Ababa Document on Refugees and Forced Population Displacements in Africa" (1995) 7 *Int'l J Refugee L* 302-320.

⁴⁵ 302.

⁴⁶ 312. Also, Abebe makes note of a number of other Declarations that recognise the problem of internal displacement in Africa. For example, the Khartoum Declaration of the OAU Ministerial Meeting on Refugees and Internally Displaced Persons in Africa (13-14 December 1998) *Institute for Security Studies (ISS) Africa* <https://issafrica.s3.amazonaws.com/site/uploads/KHARTOUM_DECLARSON_REFUGEES.PDF> (accessed 25-07-2017) para 9; Kigali Declaration (8 May 2003) African Commission on Human and Peoples' Rights <<http://www.achpr.org/instruments/kigali/>> (accessed 25-07-2017) para 11; Declaration on Gender Equality in Africa 2004 (6-8 July 2004) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/instruments/declaration-on-gender-equality-in-africa/>> (accessed 25-07-2017) Preamble; Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons (6 June 2006) AU/MIN/HARDP/Decl.I *African Union* <[https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20\(IX\)%20_E.PDF](https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20(IX)%20_E.PDF)> (accessed 28-08-2018) are all examples of Declarations that have recognised internal displacement. See AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 164-165.

⁴⁷ For example, the First Regional Conference on Internal Displacement in West Africa held in Abuja, Nigeria 26-28 April 2006. See United Nations Human Rights Council "Implementation of General Assembly Resolution 60/51 of 15 March 2006 Entitled "Human Rights Council" Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum First Regional Conference on Internal Displacement in West Africa (Abuja–26-28 April 2006)" (20 February 2007) A/HRC/4/38/Add.4. Also, there was the Ministerial Conference on Refugees, Returnees and Internally Displaced Persons (IDPs) in the IGAD Region 20-21 in Nairobi, Kenya. See UNHCR/ Intergovernmental Authority on Development (IGAD) "Report of the Ministerial Conference on Refugees, Returnees and Internally Displaced Persons (IDPs) in the IGAD Region" (20-21 February 2006) *UNHRC* <<http://www.unhcr.org/partners/partners/4404579e4/report-ministerial-conference-refugees-returnees-internally-displaced-persons.html>> (accessed 24-07-2017).

⁴⁸ ACRWC arts 23, 25(2)(b); AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 165 (footnote omitted).

⁴⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) arts 10(2)(b), 11. See AM Abebe

African Commission on Human and Peoples' Rights ("African Commission") has heard communications regarding forced displacement and the resulting violations of human rights.⁵⁰ The Commission also appointed a Special Rapporteur on Refugees, Asylum Seekers, Migrant and Internally Displaced Persons.⁵¹ In addition to the initiatives of the AU, there have been other responses to the issue of internal displacement in Africa. The individual States have responded by creating domestic laws and policies regarding the protection and assistance of IDPs.⁵² The various meetings, declarations, bodies, legal instruments and decisions demonstrate that over the years there has a trend towards the greater recognition of IDPs in the region. However, these initiatives can be characterised as *ad hoc*⁵³ since these efforts were not necessarily coordinated or systematic. The development of the two binding legal instruments with respect to internal displacement in Africa indicates a shift towards a comprehensive response to this issue. ICGLR's coordinated response to internal displacement in the form of the development ICGLR IDP Protocol is one such instrument.

4 2 2 1 *International Conference on the Great Lakes Region*

At the sub-regional level, the Member States of the ICGLR decided to respond to the problem of internal displacement in a manner relevant to the challenges in their territories.⁵⁴ The ICGLR took a unique approach to the drafting of a legal instrument

"Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 164.

⁵⁰ See for example, *Malawi African Association and Others v Mauritania* Communication nos 54/91, 61/91, 96/93, 98//93, 164/97, 196/97, 210/98 (2000) AHRLR 149 (ACHPR 2000); *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001); *Sudan Human Rights Organisation and Another* Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009). See also M Zard, C Beyani & CA Odinkalu "Refugees and the African Commission on Human and Peoples' Rights" (2003) 16 *Forced Migration Review* 33-35; AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 161.

⁵¹ African Commission on Human and Peoples' Rights Resolution on the Protection of Human Rights Defenders in Africa Resolution 69 (4 June 2004) para 1; AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 162.

⁵² Some African States with domestic laws or policies on internal displacement include Angola, Burundi, Kenya, Liberia, Sierra Leone, Somalia, Sudan and Uganda. See AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 160; Internal Displacement Monitoring Centre (IDMC) "IDP Law and Policies: A Mapping Tool" <<http://www.internal-displacement.org/law-and-policy>> (accessed 06-10-2016).

⁵³ AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 163.

⁵⁴ Namely, in the context of post-conflict and regionally instability. See Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) ICGLR

to provide for the security, safety, stability and peace of the Great Lakes Region. Under the Pact on Security, Stability and Development for the Great Lakes Region 2006 (“Pact”), there are ten Protocols and four Programmes of Action that are a complete package.⁵⁵ This means that the Member States cannot pick and choose which Protocols they wish to ratify.⁵⁶

The creation of the Pact began with the Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region 2004 (“Dar-es-Salaam Declaration”).⁵⁷ The Heads of State of States in the Great Lakes in Region in Africa recognised that the region had been continually plagued by conflicts, insecurity, violence and violations of human rights.⁵⁸ The Declaration initiated this region’s response to address these issues. It specifically recognises IDPs and the need to incorporate the Guiding Principles into regional and national frameworks.⁵⁹ The Declaration refers to the United Nations Security Council Resolution 1325 (2000), which recognises the adverse impact that armed conflicts have on IDPs and children.⁶⁰ The Declaration also recognises the need to address the root causes of displacement and create durable solutions, to put in place early warning systems, and the need to address the recruitment and the participation of children in the armed forces.⁶¹ Finally, the Declaration calls for the immediate implementation, which was done by way of the Pact.⁶²

http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf (accessed 28-08-2018) arts 1-2.

⁵⁵ In addition to the ICGLR IDP Protocol there are six other Protocols four Programmes of Action. See Pact arts 5-14, 17- 20.

⁵⁶ The Pact operates on the principle of non-selectivity and there are no resolutions permitted. See Pact art 31. See also C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <http://eprints.lse.ac.uk/2429> (accessed 13-07-2017) 3.

⁵⁷ Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) *ICGLR* http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf (accessed 28-08-2018).

⁵⁸ Arts 1-2.

⁵⁹ Arts 8, 27, 35, 58.

⁶⁰ Art 35. See also United Nations Security Council Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000) Preamble.

⁶¹ Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) *ICGLR* http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf (accessed 28-08-2018) arts 61, 65, 66.

⁶² Art 82; C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <http://eprints.lse.ac.uk/2429> (accessed 13-07-2017) 1.

The Pact is a legally binding instrument.⁶³ Chaloka Beyani, the legal expert retained to draft the Pact and Protocols, emphasised that political ownership was a key part of the drafting process.⁶⁴ The various Protocols and Programmes of Action were drafted separately and they synthesised into an “integrated legal framework”.⁶⁵ Despite the approach of drafting the Protocols and Programmes of the Pact as “mutually reinforcing”,⁶⁶ the focus of the discussion will be on the ICGLR IDP Protocol.⁶⁷ Although the Member States of the ICGLR felt that the Guiding Principles were influential, it was necessary for their regional response to create a legally binding instrument in order to have its provisions implemented.⁶⁸ One reason for this decision was that several of the other Member States have or currently are plagued by incidences of internal displacement and it warrants the attention of a Protocol in the Pact.⁶⁹ The ICGLR IDP Protocol relies heavily upon the Guiding Principles and requires the Member States to incorporate the Principles into their domestic legislation.⁷⁰ The ICGLR IDP Protocol will be critically analysed below, but it is

⁶³ C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <<http://eprints.lse.ac.uk/2429>> (accessed 13-07-2017) 4.

⁶⁴ C Beyani “The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law” in W Kälin “Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement” (2008) 102 *Am Soc’y Int’l L Proc* 187-201 195; C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <<http://eprints.lse.ac.uk/2429>> (accessed 13-07-2017) 2. It should be noted that Chaloka Beyani was the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons 2010 to 2016. See United Nations Human Rights Office of the High Commissioner “Chaloka Beyani” <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/ChalokaBeyani.aspx>> (accessed 04-08-2107).

⁶⁵ C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <<http://eprints.lse.ac.uk/2429>> (accessed 13-07-2017) 2.

⁶⁶ 3-4.

⁶⁷ There will be reference to the other Protocols in the analysis where relevant.

⁶⁸ Initially there were 11 Member States, but the Pact was amended in November 2012 to include South Sudan. The twelve Member States of the Pact are: Angola, Burundi, CAR, Republic of Congo, DRC, Kenya, Rwanda, South Sudan, Sudan, Tanzania, Uganda and Zambia. See Pact art 1(b), (d). C Beyani “The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law” in W Kälin “Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement” (2008) 102 *Am Soc’y Int’l L Proc* 187-201 195.

⁶⁹ For instance, all the Member States with the exception of Zambia reported in the IDMC’s 2017 report on Internal Displacement as having IDPs due to conflict and/or disasters. Also, the DRC, South Sudan and Sudan have IDP populations in excess of one million. See IDMC “Global Report on Internal Displacement 2017” (May 2017). 113-116.

⁷⁰ ICGLR IDP Protocol art 6.

important to note that this instrument was developed in a manner that differed from the Guiding Principles as the drafting process was initiated by and included States.⁷¹

In addition, the decision to create a legally binding instrument indicates a willingness of States to break with the soft law approach to the problem of internal displacement.⁷² While it is not clear yet if the hard law approach is the solution to the problem, it is clear that at least in Africa, States are ready for and want hard law to address internal displacement. This willingness is evidenced by the ICGLR IDP Protocol as well as the Kampala Convention. The development of the Kampala Convention will be discussed next.

4 2 2 2 *The African Union and the Kampala Convention*

Despite the myriad of responses to the issue of internal displacement, Africa still lacked a legal framework applicable to the entire region. The AU decided in 2004 and reaffirmed its decision in 2008 to create a legal instrument specifically governing the protection and assistance of IDPs for the region.⁷³ The Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa 2006 (“Ouagadougou Declaration”) clearly recognised a *lacuna* in the law on internal displacement in the region when it stated that there is a “legal vacuum in the protection and assistance of internally displaced persons in Africa as a result of the absence of a binding legal regime”.⁷⁴ The Declaration also recognised that women

⁷¹ C Beyani “Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region” (2007) London: LSE Research Online <<http://eprints.lse.ac.uk/2429>> (accessed 13-07-2017) 2-3.

⁷² See ⁷² C Beyani “The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law” in W Kälin “Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement” (2008) 102 *Am Soc’y Int’l L Proc* 187-201 195. Abebe notes that the hard law response to internal displacement in Africa was not preceded by a discussion as to whether a binding instrument would be the solution to this problem in the region. Lomo would most likely concur as he takes the position that there is adequate hard law in the form of international humanitarian and human rights law to protect IDPs. He views political will and implementation as the primary challenges. See AM Abebe “Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa” (2009) 22 *Journal of Refugee Studies* 155-176 171-172; AZ Lomo “The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work” (2000) 18 *Berkeley J Int’l L* 268-284 268-269, 283-284.

⁷³ African Union Executive Council Decision on Meeting of Experts on the Review of OAU/AU Treaties EX CL/Dec 129 (V) (25 June-3 July 2004) (Doc EX/CL95 (V)) para 4(i); African Union Executive Council Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa EX CL/Dec 423(XIII) (24-28 June 2008) (Doc EX CL413 (XIII)) para 7.

⁷⁴ Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons (6 June 2006) AU/MIN/HARDP/Decl.I *African Union* <[https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20\(IX\)%20_E.PDF](https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20(IX)%20_E.PDF)> (accessed 28-08-2018) 1.

and children comprised the majority of IDPs.⁷⁵ Therefore, the regional response to internal displacement in Africa culminated in the adoption of the Kampala Convention on 23 October 2009 and its coming into force on 6 December 2012.⁷⁶ To date 27 of the 55 Member States of the AU have ratified the Kampala Convention.⁷⁷ However, States with IDP populations in excess of one million, such as the DRC, Somalia, South Sudan and Sudan are not States Parties to the Convention.⁷⁸

The development of the Kampala Convention has been preceded by a number of Ministerial Meetings and Declarations.⁷⁹ However, this discussion will focus on the three key reasons that provided the conditions favourable for the drafting and adoption of the Kampala Convention. First, the Constitutive Act of the African Union 2000 (“Constitutive Act”) demonstrates a transition to a “pro-active interventionist mindset”.⁸⁰ Article 4(h) of the Act permits the AU to intervene in Member States “in

⁷⁵ 1.

⁷⁶ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention) <https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf> (accessed 05-09-2018).

⁷⁷ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention) <https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf> (accessed 05-09-2018)

⁷⁸ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention) <https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf> (accessed 05-09-2018); IDMC “Global Report on Internal Displacement 2017” (May 2017) 113-116. However, with the exception Somalia all of these States are Members of the Pact and bound by the ICGLR IDP Protocol. See Pact art 1(d).

⁷⁹ Abebe outlines the development of the Kampala Convention in detail. See AM Abebe “The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges” (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 31-41. See also, C Beyani “Recent Developments: The Elaboration of Legal Frameworks for the Protection of a Legal Framework for the Protection of Internally Displaced Persons in Africa” (2006) 50 *Journal of African Law* 187-197 Also one key meeting was the AU Ministerial Conference on Returnees and Displaced Persons in Africa 1-2 June 2006 in Ouagadougou, Burkina Faso. See African Union “Ministerial Conference on Refugees, Returnees and Displaced Persons in Africa 1-2 June 2006 Ouagadougou, Burkina Faso: Report of the Ministerial Conference (1-2 June 2006) AU/MIN/HARD/Rpt EX/CL259 (IX) Annex I *African Union* <[https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20\(IX\)%20_E.PDF](https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20(IX)%20_E.PDF)> (accessed 28-08-2018).

⁸⁰ C Beyani “The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law” in W Kälin “Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement” (2008) 102 *Am Soc’y Int’l L Proc* 187-201 198. See also, C Beyani “Recent Developments: The Elaboration of Legal Frameworks for the Protection of a Legal Framework for the Protection of Internally Displaced Persons in Africa” (2006) 50 *Journal of African Law* 187-197 190; AM Abebe “Legal and Institutional Dimensions of

respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”.⁸¹ The AU, in contrast with its predecessor focused on the importance of human rights.⁸² This change in mindset provided a climate where protecting and assisting IDPs in the region became a priority.⁸³ Based on this shift in the mindset of the Member States of the AU, concerns regarding State sovereignty reduced compared to addressing the plight of IDPs in the region. Second, the States in the region recognised that the international humanitarian response to problems in Africa was inadequate.⁸⁴ Essentially, Africa would have to take steps to respond to the problem of internal displacement as a region. Third, the Member States recognised the link between internal displacement and the region’s “intractable conflicts”.⁸⁵ These three reasons demonstrate that the political climate amongst the Member States of the AU was primed for a legal framework to respond to the problem of internal displacement. Furthermore, these reasons coupled with States’ recognition that a binding convention was necessary to provide adequate protection and assistance to IDPs, paved the way for the Kampala Convention.

The drafting of the Kampala Convention included a number of meetings. Abebe provides a detailed explanation of the process; however, his critique of the drafting process is that it was not preceded by a comprehensive legal study of the issue in the context of the region similar to that of the *Composition and Analysis*, which he asserts would have benefited the development of the Kampala Convention.⁸⁶ The highlights

Protecting and Assisting Internally Displaced Persons in Africa” (2009) 22 *Journal of Refugee Studies* 155-176 160.

⁸¹ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 art 4(h).

⁸² AM Abebe “Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa” (2009) 22 *Journal of Refugee Studies* 155-176 160.

⁸³ 160 (reference omitted).

⁸⁴ See discussion in Chapter 3 part 3 2 1. Abebe cites the example of the international community’s inept response to the Rwandan genocide. See AM Abebe “Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa” (2009) 22 *Journal of Refugee Studies* 155-176 160.

⁸⁵ 160. See also Grand Bay (Mauritius) Declaration and Plan of Action (16 April 1999) African Commission on Human and Peoples’ Rights <<http://www.achpr.org/instruments/grandbay/>> (accessed 25-04-2017) para 9.

⁸⁶ Abebe provides six reasons why the Kampala Convention would have benefitted from comprehensive legal study prior to its development in order to: “(1) allow an assessment to be made on existing regional jurisprudence on forced displacement and scrutinize the advisability of adopting a binding legal instrument on internal displacement; (2) address the issue of whether the new legal instrument should be made a part of existing legal instruments or form a separate legal text; (3) identify the specific gaps that the new legal framework intends to fill; (4) address numerous general procedural and substantive issues which would have otherwise consumed the time and the resources of the drafting organ; (5) identify some of the essential elements of the new

of the process will be outlined to provide context to the development of the Kampala Convention.

The process began with the drafting of the Annotated Outline by the legal expert retained by the AU to draft the Convention; which enumerated the key issues to be addressed by the Convention under twelve topics.⁸⁷ The draft Convention was drafted according to the Annotated Outline. The draft Convention was reviewed by the Consultative Group, which is a group of AU's partner organisation, which had the function of "providing technical expertise during the drafting process".⁸⁸ The Consultative Group suggested that the draft Convention include a broad definition of IDPs, cover all causes of internal displacement, provide details of the human rights of IDPs and incorporate provisions that addressed the needs of host communities.⁸⁹ The process resulted in the adoption of a comprehensive instrument that addresses all phases of internal displacement as well a broad range of causes of displacement.⁹⁰ As a next step, there was a meeting where the provisions of the draft Convention were

framework; and (6) provide a survey of existing national legal frameworks and institutional mechanisms." See AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 33-41; AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017) 99.

⁸⁷ African Union "Annotated Outline of a Draft Legal Framework for the Protection and Assistance of Internally Displaced Persons in Africa" AU/EXP/HARDP/2(V-ii) as cited in AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017). The twelve topics are as follows: "(1) definitions; (2) objective; (3) principles; (4) prohibition of arbitrary displacement; (5) responsibility for the protection and assistance, and solutions; (6) protection during displacement; (7) protection and assistance in areas of displacement; (8) development induced displacement and displaced induced by lack of development; (9) provision of humanitarian assistance; (10) promotion of return; (11) reparations; and (12) monitoring and enforcement mechanism". See AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 35.

⁸⁸ See AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 36. See also, African Union "Ministerial Conference on Refugees, Returnees and Displaced Persons in Africa 1-2 June 2006 Ouagadougou, Burkina Faso: Report of the Ministerial Conference (1-2 June 2006) AU/MIN/HARD/Rpt EX/CL259 (IX) Annex I *African Union* <[https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20\(IX\)%20_E.PDF](https://archive.au.int/collect/oaucounc/import/English/EX%20CL%20259%20(IX)%20_E.PDF)> (accessed 28-08-2018) para 21.

⁸⁹ See AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 37.

⁹⁰ See Kampala Convention.

negotiated and revised.⁹¹ The emphasis during this process was to create an instrument that would be easily adopted and implemented by the Member States.⁹² The final step in the process was the African Union Special Summit on Refugees, Returnees and Internally Displaced Person in Africa, 19-30 October 2009, where the Kampala Declaration on Refugees, Returnees and Internally Displaced Person in Africa 2009 adopted the Kampala Convention.⁹³ The Convention is significant as it incorporated the Guiding Principles into a binding legal instrument that is applicable to an entire region.⁹⁴

The law on internal displacement in Africa has progressed from a soft law to a hard law approach. It is encouraging that there are influential international standards with respect to the protection and assistance of IDPs, in the form of the Guiding Principles, as well as binding law in the form of the ICGLR IDP Protocol and the Kampala Convention.⁹⁵ What is yet to be determined is the extent to which each of these instruments addresses the rights and needs of internally displaced children. Therefore, the provisions of each of these three instruments will be critically analysed from a children's rights perspective.

4 3 Critical analysis of the law on international displacement

As outlined in chapter 2, the children's rights perspective that will be employed in this thesis incorporates principles of a rights-based approach as well as general principles in children's rights law.⁹⁶ These principles are as follows:

⁹¹ AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 37-39.

⁹² 39-40

⁹³ African Union Kampala Declaration on Refugees, Returnees and Internally Displaced Person in Africa (23 October 2009) Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1 *Refworld* <<http://www.refworld.org/docid/4af0623d2.html>> (accessed 28 August 2018) para 28. See also AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 39-40.

⁹⁴ Kampala Convention Preamble, art 2(b); A Solomon "African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Introductory Note by Andrew Solomon" (2010) 49 *International Legal Materials* 83-100 83; AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 42-43.

⁹⁵ AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 36.

⁹⁶ See Chapter 2 part 2 4.

- i. Accountability
- ii. Interdependence and indivisibility
- iii. Universality
- iv. Non-discrimination
- v. Best interests of the child
- vi. Life, survival and development
- vii. Participation

These principles will be assessed with respect to the risks, rights and needs of internally displaced children as outlined in the previous chapter.⁹⁷ The four categories of risks, rights and needs that will be assessed for each instrument are physical security; basic needs; economic, social and cultural rights; and, civil and political rights.⁹⁸ Some principles will be considered in one or more of the categories if there is more than one category to which the particular principle is applicable.

The category of physical security includes risks to the physical and mental well-being of internally displaced children and violates their right to and need for protection. These risks generally pose an immediate risk to children internally displaced by conflict, violence or disasters. Risks to physical security include separation from families, violence, various forms of abuse and exploitation, forced labour, forced recruitment into hostilities and psychological trauma.⁹⁹ The principle of life, survival and development is at the core of addressing risks to physical security. This principle places a positive obligation upon States to ensure the protection and development of a child and must be addressed in a holistic manner.¹⁰⁰ The best interests of the child principle is also applicable to risks to physical security, especially regarding family separate and reunification. The measures are taken to reunite internally displaced children with their families as it is an important decision concerning their physical security and ought to incorporate an assessment of their best interests.¹⁰¹

⁹⁷ See Chapter 3 part 3 3.

⁹⁸ United Nations Human Rights Council "Report of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin Addendum Operational Guidelines on Human Rights in Natural Disasters" (23 January 2006) A/HRC/4/38/Add.1 para 13. See discussion in Chapter 3 part 3 3.

⁹⁹ See discussion in Chapter 3 part 3 3 1 1.

¹⁰⁰ CRC art 6; ACRWC art 5(2); CRC Committee "General Comment No. 5 (2003) General Measures to Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6)" (27 November 2003) CRC/GC/2003/5 para 12

¹⁰¹ See discussion in Chapter 3 part 3 3 1 1 and part 3 3 2 1.

The next category of basic needs includes risks, rights and needs that touch and concern the survival of internally displaced children. Basic needs include adequate food and potable water, shelter and healthcare.¹⁰² All human beings must meet their basic needs in order to survive, but internal displacement creates challenges to meet these needs.¹⁰³ Therefore, the manner in which the instruments address the basic needs of internally displaced children presents another opportunity to examine to what extent they incorporate the principle of life, survival and development. When trying to satisfy their basic needs, internally displaced children may also experience discrimination, particularly due to their status as IDPs. Therefore, this category also presents an opportunity to examine if the instruments incorporate the principle of non-discrimination.

The category of social, economic and cultural rights encompasses risks, rights and needs that go beyond immediate protection and survival needs. Issues that may be classified in this category include access to education, poverty, property rights and the ability to practice one's culture.¹⁰⁴ Similar to basic needs, internally displaced children are at risk of experiencing discrimination when attempting to exercise their social, economic and cultural rights. The principles of interdependence and indivisibility are also relevant in this context as there is a tendency to focus on protection rights during internal displacement; however, protection cannot be the only focus as one group of rights is not more important than another group of rights, and one group of rights is needed to support the other. The principle of universality further supports this position as the rights of the child are applicable in all circumstances.

Finally, the category of civil and political rights addresses the risks, rights and needs of internally displaced children that safeguard their legal rights and their interactions with the State. Risks that internally displaced children encounter with respect to their civil and political rights include difficulties obtaining identity documents, access to justice and participation.¹⁰⁵ The manner in which the principle of participation is incorporated by the instruments will demonstrate how internally displaced children are conceptualised by the law, as objects or as bearers of rights. The principle of

¹⁰² See discussion in Chapter 3 part 3 3 1 2.

¹⁰³ See discussion in Chapter 3 part 3 3 1 2.

¹⁰⁴ See discussion in Chapter 3 part 3 3 1 3.

¹⁰⁵ See discussion in Chapter 3 part 3 3 1 4.

accountability provides an opportunity to examine what mechanisms are in place to ensure that duty-bearers comply with their obligations to internally displaced children.

In summary, the critical analysis of the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention will begin with a brief overview of the instrument and then proceed to examine the specific provisions the instrument using the four categories of risks, rights and needs of internally displaced children. The principles of a children's rights perspective will be examined in relation to the four categories discussed above. The critical analysis of the law on internal displacement will begin with the Guiding Principles.

4 3 1 Critical analysis of the Guiding Principles

The Guiding Principles are a set of 30 principles which are divided into five sections.¹⁰⁶ The Principles are preceded by an introductory section which outlines the scope and purpose of the Principles as well as providing a descriptive definition of IDPs.¹⁰⁷ The central purpose of the Guiding Principles is to address the specific needs of IDPs at all stages of displacement.¹⁰⁸ The first section outlines some general provisions, which includes emphasising that States have the primary responsibility to provide protection and assistance to IDPs.¹⁰⁹ This section also recognises that children, in addition to other vulnerable groups, require care and protection, which takes into consideration their special needs.¹¹⁰ Sections two through to five address the issues of protection from displacement, protection during displacement, principles for humanitarian assistance and return, resettlement and reintegration.¹¹¹

The focus on the needs of IDPs is evidenced by the introduction as well as the *Compilation and Analysis*, which is essentially the *travaux préparatoires* of the Guiding Principles.¹¹² Also, the Guiding Principles frame the majority of its provisions from the

¹⁰⁶ See Guiding Principles.

¹⁰⁷ Guiding Principles Introduction: Scope and Purpose paras 1-4; W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 3.

¹⁰⁸ The aim is to prevent forced displacement and address the needs of IDPs during displacement and when displacement comes to an end. See Guiding Principles Introduction: Scope and Purpose para 1.

¹⁰⁹ Guiding Principles prin 3.

¹¹⁰ Guiding Principles prin 4(2).

¹¹¹ See Guiding Principles.

¹¹² Guiding Principles Introduction: Scope and Purpose para 1; United Nations Economic and Social Council "Compilation and Analysis of Legal Norms" (05 December 1995) E/CN.4/1996/52/Add.2 paras 47-358; AM Abebe "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges" (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 33. This

perspective of IDPs.¹¹³ Despite its focus on the rights and needs of IDPs, the Guiding Principles also emphasise that States are the primary duty-bearers with respect to IDPs and incorporate the principles of sovereignty as responsibility.¹¹⁴ The aim of the Principles is to “address the specific needs of internally displaced persons worldwide”.¹¹⁵ Lastly, the Guiding Principles approach the problem of internal displacement from a broader perspective and take into consideration the various needs of IDPs in States all over the world rather than from one specific region. For this reason, issues that are of particular importance to IDPs in a particular region, may not feature as prominently in the Guiding Principles due to its broader perspective. In contrast, a review of the of the ICGLR IDP Protocol and the Kampala Convention reveals a focus on particular issues that impact IDPs in the African context, such as a focus on host communities and burden sharing.¹¹⁶

The Guiding Principles make specific reference to children, particularly in Section III which addresses protections during displacement.¹¹⁷ The mere mention of children may not, however, be enough to indicate that the Guiding Principles take a children’s rights perspective.

4 3 1 1 *Risks to physical security*

The Guiding Principles address the risks that internal displacement poses to children’s physical security in several ways. The Principles aim to prevent internal displacement which is the first threat to a child’s physical safety in this context.¹¹⁸ States are obligated to prevent circumstances that may lead to displacement and all persons have a right to be protected from arbitrary displacement.¹¹⁹ Kälin notes in *Guiding Principles on Internal Displacement: Annotations* (“*Annotations*”) that the prevention of arbitrary displacement necessitates States to comply with the obligations

approach is the needs-based approach. See R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 463.

¹¹³ The Guiding Principles focus on the rights and needs of individuals by referring to IDPs or using the phrase “every human being”. See for example Guiding Principles prins 6, 10-12, 14.

¹¹⁴ Guiding Principles prins 3(1), 25.

¹¹⁵ Guiding Principles Introduction: Scope and Purpose para 1.

¹¹⁶ See discussion in parts 4 3 2 and 4 3 3.

¹¹⁷ The Guiding Principles also make reference to ‘girls’ and ‘adolescents’. See Guiding Principles pins 4(2), 12(1), 17(3), 23(2).

¹¹⁸ Guiding Principles Introduction: Scope and Purpose para 1.

¹¹⁹ This includes exploring feasible alternative to displacement. See Guiding Principles arts 5-7.

under international law.¹²⁰ Arbitrary displacement in the context of conflict and disasters entails removing a child from his or her place of habitual residence that is not necessary for her or his security, health and safety, or necessary for military operations.¹²¹ In the event that displacement is deemed to be necessary, there are a number of safeguards that States must implement. One requirement is that displacement must be carried out in a manner which protects a person's "rights to dignity, liberty and security".¹²² Therefore, the Guiding Principles respond to the initial risk to a child's right to life and survival, which is protection from arbitrary displacement.

A review of the Guiding Principles also reveals that they provide protection during instances of internal displacement. One primary risk that children encounter during internal displacement is separation from their families.¹²³ With respect to the risk of family separation, the Guiding Principles specifically considers children. Principle 17 outlines that in situations where children are involved, family reunification ought to be expedited.¹²⁴ However, recalling the discussion in chapter 3, increased instances of domestic violence during situations of internal displacement should be a call for pause.¹²⁵ In instances of family reunification, it would be prudent to assess if returning the child to her or his family is in her or his best interests. This assessment could include incorporating a best interests determination ("BID").¹²⁶ The *Annotations* cite Article 23(2) of the ACRWC and indicate that family reunification necessitates State co-operation with international organisations that protect and assist refugees, which could include the UNHCR.¹²⁷ Article 23(4) makes it clear that this provision also applies to internally displaced children.¹²⁸ Article 25 of the ACRWC specifically addresses family reunification after separation due to displacement as a result of

¹²⁰ W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 25.

¹²¹ Guiding Principles art 6(2)(b)(c). For a discussion on the definition of arbitrary displacement in light of the Guiding Principles see R Adeola "The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement" (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 93-97.

¹²² Guiding principles art 8.

¹²³ See ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62.

¹²⁴ Guiding Principles prin 17(3).

¹²⁵ See discussion in Chapter 3 part 3 3 1 1.

¹²⁶ This approach has been employed by the UNHCR when reuniting separated and unaccompanied children with their families. See UNHCR "Framework for the Protection of Children" (2012) 7, 21-22. See also UNHCR "Field Handbook for the Implementation of UNHCR BID Guidelines" (2011).

¹²⁷ See ACRWC art 23(2); W Kälin *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 79-80.

¹²⁸ ACRWC art 23(4).

armed conflict or disasters, and States are instructed to “take all necessary measures”.¹²⁹ Based on the provisions of the ACRWC and the principle of interdependence, it can be argued that inclusion of the best interests of the child is necessary when providing solutions to family separation involving children. The Guiding Principles are correct in prioritising expedience as it can provide a means of protection for children in the context of internal displacement.¹³⁰ What is missing is consideration of a key principle of children’s rights law, namely, the best interests of the child. The inclusion of this principle may reduce the speed of reunification, but it can safeguard children from being placed in situations that may threaten their physical security.

Violence and various forms of abuse and exploitation constitute another threat to the physical safety of internally displaced children. The Guiding Principles provide a number of rights and protections that address violence, abuse and exploitation. Principle 10 provides a right to life.¹³¹ Article 11 outlines treatment that IDPs are to be protected from. Unacceptable treatment includes “[r]ape, mutilation, torture...gender specific violence, [and] forced prostitution”.¹³² Also, sexual slavery, sale into marriage, and any form of violence that has the purpose of instilling fear in IDPs.¹³³ The Guiding Principles prohibit the “forced labour of children”.¹³⁴ The *Annotations* indicate that forced labour of children includes drug trafficking, sexual exploitation and trafficking.¹³⁵ There are no exceptions to protection from such treatment.¹³⁶ Principles 10 and 11 indicate comprehensive protection of forms of abuse and exploitation of children which coincides with the numerous protections of the CRC and the ACRWC.¹³⁷ The Guiding Principles’ references to mutilation and sale into marriage provide protection from harmful practices, which are prohibited by the CRC and ACRWC.¹³⁸ In addition to physical harm, the issue of psychological trauma is a risk that is encountered by internally displaced children as a result of their displacement.¹³⁹ The Guiding

¹²⁹ ACRWC art 25(2)(b).

¹³⁰ See discussion in Chapter 3 part 3 3 1 1.

¹³¹ Guiding Principles prin 10.

¹³² Guiding Principles prin 11(2)(a).

¹³³ Guiding Principles prin 11(2)(b),(c).

¹³⁴ Guiding Principle prin 11(2)(b).

¹³⁵ W Kälän *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 57.

¹³⁶ W Kälän *Guiding Principles on Internal Displacement: Annotations* Revised Edition (2008) 54.

¹³⁷ CRC arts 32-37; ACRWC arts. 15, 16(2), 27-29. See discussion in Chapter 3 part 3 3 2 1.

¹³⁸ Guiding Principles prin 11(2)(b)(c); CRC art 24(3); ACRWC art 21.

¹³⁹ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution

Principles address this risk by first providing everyone with the right to “mental and moral integrity”.¹⁴⁰ Second, the Guiding Principles provide access to psychological and social services where necessary.¹⁴¹

Another notable risk to internally displaced children, especially in the context of armed conflict, is forced recruitment. The Guiding Principles do not permit the recruitment of children or their participation in hostilities and there are no exceptions to this prohibition. However, it should be noted that Kälin states that there was not an age included in Principle 13 as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000 was still being negotiated.¹⁴² He suggests using the standard for child recruitment that is outlined in the CRC, which is age 15.¹⁴³ In contrast, it can be argued that the Guiding Principles prohibits child recruitment regardless of age for two reasons. First, as there is no mention of age, it is reasonable to interpret the provision as being applicable to all children regardless of their age. Second, there are no exceptions to this prohibition as this provision states “[i]n no circumstances shall displaced children be recruited”.¹⁴⁴ This reading of Principle 13 of the Guiding Principles indicates that it is more in line with the standard of the ACRWC, which prohibits recruitment or participation of any child regardless of his or her age.¹⁴⁵ Regardless of the standard used to interpret Principle 13, it is clear that the drafters of the Guiding Principles identified recruitment as a risk to internally displaced children and provides adequate protection in light of this risk.

4.3.1.2 *Risks to satisfying basic needs*

The Guiding Principles also provide for the basic needs of internally displaced children by setting a minimum standard for the provision of these needs. Principle 18 requires States to provide IDPs with food, water, shelter, suitable clothing and health

48/157” (26 August 1996) A/51/306 paras 36-57; J Kunder “The Needs of Internally Displaced Women and Children: Guiding Principles and Considerations” (September 1998) Office of Emergency Programmes Working Paper Series UNICEF *ReliefWeb* <<https://reliefweb.int/sites/reliefweb.int/files/resources/2E33B9CFFB3B8F7BC1256C7C004EFCAA-UNICEF.pdf>> (accessed 30-08-2018)2.

¹⁴⁰ Guiding Principles prin 11(1).

¹⁴¹ Guiding Principles prin 19(1).

¹⁴² W Kälin *Guiding Principles on Internal Displacement: Annotations Revised Edition* (2008) 63.

¹⁴³ CRC art 38; W Kälin *Guiding Principles on Internal Displacement: Annotations Revised Edition* (2008) 63.

¹⁴⁴ Guiding Principles prin 13(1).

¹⁴⁵ ACRWC art 22.

care.¹⁴⁶ Persons who are sick, wounded or have disabilities are to have access to medical care without delay.¹⁴⁷ Healthcare focused on sexual and reproductive health is provided, which is especially relevant for women, girls and babies.¹⁴⁸ In addition to requiring that States meet the basic needs of IDPs, the Guiding Principles also provide for access to humanitarian aid. If States are unwilling or unable to provide protection and assistance to IDPs they are not to arbitrarily withhold consent for humanitarian aid.¹⁴⁹ IDPs also have the right to request humanitarian assistance and cannot be penalised for doing so.¹⁵⁰ The Guiding Principles' provision of basic needs demonstrates again support for the principle of life, survival and development and underscores the rights of internally displaced children to have their basic needs met. Furthermore, the Guiding Principles prohibit discrimination with respect to the provision of humanitarian aid.¹⁵¹ The Guiding Principles outline a number of prohibited grounds for discrimination including age.¹⁵² This principle can be used to protect internally displaced children as it can be argued that internally displaced children are not to be discriminated against due to their age. Therefore, the Guiding Principles whether intentionally or not, provide a foundation to argue that internally displaced children ought not to be discriminated against because they are children – persons under the age of majority.¹⁵³ Overall, the Guiding Principles provide for the basic needs of internally displaced children and incorporate principles of the right to life, survival and development and non-discrimination.

4.3.1.3 *Risks to social, economic and cultural rights*

The Guiding Principles respond to the various risks to the social, economic and cultural rights of internally displaced children. In terms of protection from poverty, the Guiding Principles as discussed above, provide for the basic needs of internally displaced children. The Guiding Principles also provide a general right to an adequate standard of living, which is consistent with the standard set out by the CRC.¹⁵⁴ With

¹⁴⁶ Guiding Principles prin 18(2)(a)-(d).

¹⁴⁷ Guiding Principles prin 19 (1).

¹⁴⁸ Guiding Principles prin 19(2).

¹⁴⁹ Guiding Principles 25(2). This requirement relates to the concept of sovereignty as responsibility. For a discussion of this concept see Chapter 1 part 1 1 4; Chapter 5 part 5 3.

¹⁵⁰ Guiding Principles prin 3(2).

¹⁵¹ Guiding Principles prin 24.

¹⁵² Guiding Principles 4(1).

¹⁵³ It may be that the ground of age was included to protect older persons.

¹⁵⁴ Guiding Principles prin 18(1); CRC art 27(1).

respect to economic rights, the Guiding Principles provide IDPs with the right to engage in economic activities and recover property that was left behind as a result of displacement.¹⁵⁵

The Principles provide for a general right to education for IDPs,¹⁵⁶ but also incorporate rights that specifically take into consideration the rights and needs of children. Children who are displaced are to be provided with access to free and compulsory primary education.¹⁵⁷ Women and girls are to have full and equal participation in educational programs.¹⁵⁸ Educational training is also to be made available to women and adolescents.¹⁵⁹ The Guiding Principles' provisions regarding education specifically prioritise children and take into account that girl children often experience barriers with respect to access to education.¹⁶⁰ The right to education pursuant to the Guiding Principles also incorporates the right to culture. Principle 23 outlines that the provision of education ought to take into consideration the culture, language and religion of the IDPs.¹⁶¹ However, the mention of culture in the context of education is the only reference to culture in the Guiding Principles.¹⁶²

In addition to providing internally displaced children with many of their social, economic and cultural rights the Guiding Principles include the principles of non-discrimination, interdependence and indivisibility and universality specifically in its provision with respect to education. By providing access to education that mitigates barriers of displacement, gender and age, the Guiding Principles pre-empt the discrimination that internally displaced children may experience when attempting to access education. Rights outlined in Principle 23 also surpass the minimum standard to provide access to education to include concerns of culture, language and religion. The consideration of these other rights demonstrates that the drafters of the Guiding Principles recognised the principles of interdependence and indivisibility. Linking the

¹⁵⁵ Guiding Principles prins 22(1)(b), 29(2).

¹⁵⁶ Guiding Principles prin 23 (1).

¹⁵⁷ Guiding Principles prin 23(2).

¹⁵⁸ Guiding Principles pirn 23(3).

¹⁵⁹ Guiding Principles prin 23(4).

¹⁶⁰ See L Mwambene "Implementing the Girl Child's Right to Education in Selected Countries in Africa" in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 219-238 220-224.

¹⁶¹ Guiding principles prin 23(2).

¹⁶² Only the obligation of States to take particular care to protect indigenous communities and other communities with a special attachment to their lands from displacement can be attributed to a recognition of culture. See Guiding Principles prin 9.

right to education with a child's right to practice his or her culture demonstrates that these rights are conceptualised as interrelated in the Guiding Principles and that one right is not more important than another. Furthermore, the provision of education in the context of internal displacement demonstrates that this right is applicable regardless of the circumstances; therefore, the provision of access to education pursuant to the Guiding Principles also incorporates the principle of universality. In summary, the Guiding Principles' treatment of the access to education incorporates key principles of a children's rights perspective.

4 3 1 4 *Risks to civil and political rights*

One risk that internally displaced children encounter with respect to civil and political rights is the registration of births and obtaining identity documents. States are required by Principle 20 to facilitate the issuance of these documents and to refrain from placing any unreasonable conditions to obtain these documents.¹⁶³ Therefore, the Guiding Principles respond to this risk to the civil and political rights of internally displaced children.

Another risk that internally displaced children encounter is the ability to access the justice system. The Guiding Principles state that every person to be equal before the law. Also, in instances where internally displaced children need to take steps to recover property, they have legal rights. Principle 29 requires States to assist with the recovery of such property.¹⁶⁴ This Principle also provides IDPs with full and equal access to public affairs and equal access to public services.¹⁶⁵ The rights provided with respect to access to the justice system do not specifically recognise the rights and needs of internally displaced children. However, it should be noted that many civil and political rights are limited to adults, and children often have assistance from their parents, guardians or designated professionals to access the justice system to assist them.¹⁶⁶ These reasons can explain the lack of child-specific provisions in the Guiding Principles.

In contrast, a civil and political right that ought not to be limited by age and that is fundamental to children's rights law is participation. An instrument which takes a

¹⁶³ Guiding Principles prin 20(2).

¹⁶⁴ Guiding Principles prin 29(2).

¹⁶⁵ Guiding Principles prin 29(1).

¹⁶⁶ One example is a guardian *ad litem*.

children's rights perspective ought to provide children with the participation rights. IDPs are given participation rights pursuant to the Principles.¹⁶⁷ When planning for return, relocation or reintegration, the Guiding Principles require that "[s]pecial efforts should be made to ensure the *full participation* of internally displaced persons".¹⁶⁸ The term 'full participation' could be used to require the inclusion of internally displaced children. Unfortunately, the Guiding Principles fail to specifically recognise the right of internally displaced children to be heard. The Guiding Principles only identify women as a particular group of IDPs that ought to be involved in decisions with respect to planning and relocation.¹⁶⁹ The failure of the Guiding Principles to accord specific participation rights to internally displaced children, a group that the Principles recognises as particularly vulnerable, does not adequately address the threat that internal displacement poses to the participation rights of children. The Guiding Principles' omission is a missed opportunity to ensure that internally displaced children are able to participate in decisions that directly impact them. Based on the lack of specific participation rights for children, the Guiding Principles' inclusion of the principle of participation can be classified as weak.

The principle of accountability is also another principle that is not adequately incorporated into the Guiding Principles. The lack of accountability in the Principles, however, is more a function of the decision to create a set of non-binding principles to provide guidance to States and other actors in the context of internal displacement.¹⁷⁰ In other words, the Guiding Principles do not have mechanisms to ensure accountability as it is a soft law instrument. The absence of these mechanisms makes it challenging to incorporate the principle of accountability, but there are some examples of this principle. One example of accountability in the Guiding Principles is the ability of IDPs to request a judicial review of decisions to displace persons that are not in situations of emergency.¹⁷¹ Another example is the ability of IDPs to request protection and assistance from authorities without redress.¹⁷² This Principle gives IDPs the right to require States to comply with their obligation to provide protection and

¹⁶⁷ Guiding Principles prins 22(1)(a),(c), 28(2).

¹⁶⁸ Guiding Principles prin 28(2). Emphasis added.

¹⁶⁹ This is in the context of relocation in non-emergency situations. See Guiding Principles prin 7(3)(d).

¹⁷⁰ See Guiding Principles Introduction: Scope and Purpose para 3.

¹⁷¹ Guiding Principles 7(3)(f).

¹⁷² Guiding Principles prin 3(2).

assistance. These examples demonstrate that the principle of accountability has been included in the Guiding Principles in a minor way. Overall, the Guiding Principles addresses the risks to civil and political rights of internally displaced children and the principles of participation and accountability to a limited extent.

4 3 2 Critical analysis of the ICGLR IDP Protocol

The ICGLR IDP Protocol is a relatively brief instrument comprising of a Preamble and seven articles.¹⁷³ Annexed to the Protocol are the Guiding Principles as well as model legislation. This instrument strongly focuses on compliance with the principles as set out by the Guiding Principles and their domestication.¹⁷⁴ The other key objectives of the Protocol are to provide for the physical safety and the material needs of IDPs.¹⁷⁵ The aforementioned objectives indicate that the Protocol is drafted from the perspective of States that have been plagued by armed conflict and economic challenges. Indeed the Dar-es-Salaam Declaration, the document which served as the impetus for the Pact and the ICGLR IDP Protocol respectively recognises the issues of armed conflict, violence, and “economic stagnation and poverty aggravation”¹⁷⁶ as a profound concern for States in the region.¹⁷⁷ One objective of the Protocol that is influenced by these regional problems is the objective to address the root causes of internal displacement.¹⁷⁸ The Protocol also addresses an issue that is relevant in an African context, namely host communities.¹⁷⁹ The recognition of host communities is important in the context of Africa, as the areas where IDPs flee may also be under-resourced. The addition of more people will likely place a strain on the available resources and can lead to conflict.¹⁸⁰ In such circumstances, it is imperative to recognise that the communities that host IDPs also require assistance. Therefore,

¹⁷³ See ICGLR IDP Protocol.

¹⁷⁴ ICGLR IDP Protocol Preamble, arts 2, 6.

¹⁷⁵ ICGLR IDP Protocol art 2(2).

¹⁷⁶ Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) *ICGLR* <http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf> (accessed 28-08-2018) para 2.

¹⁷⁷ Preamble para 2.

¹⁷⁸ ICGLR IDP Protocol art 2(4).

¹⁷⁹ ICGLR IDP Protocol art 4(1)(e).

¹⁸⁰ United Nations General Assembly “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157” (26 August 1996) *A/51/306* para 81; R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 23, 25; IDMC “Unfinished Business: Kenya’s Efforts to Address Displacement and Land Issues in Coast Regions” (July 2014) 11.

these concerns have shaped the perspective of the Member States to the Pact and the ICGLR IDP Protocol.

Article 4 outlines an additional focus of the Protocol, which builds upon the concerns with respect to armed conflict. This article addresses the scope of protection offered by the Protocol. One noteworthy aspect of this Article is that it specifically incorporates two Security Council Resolutions, Resolution 1296 and Resolution 1325.¹⁸¹ Beyani notes that the inclusion of these Security Council Resolutions is important as it emphasises that they are legally binding. Even though Security Council Resolutions have the force of law, he states that including them in the Protocol is a means to support compliance with their provisions.¹⁸² Resolution 1325 was also mentioned in the Dar-es-Salaam Declaration and it takes note of the adverse impact that armed conflicts have on IDPs and children.¹⁸³ Security Resolution 1296, which was adopted in the same year as Security Council Resolution 1325, raises concern with respect to the disproportionate impact of armed conflict on civilians and particularly recognises the hardships encountered by children and IDPs in such situations.¹⁸⁴ Security Council Resolution 1296 requires that the needs of civilians in armed conflict be addressed on a case-by-case basis.¹⁸⁵ There is also a requirement to take into consideration and address the special needs of women and children as well as other vulnerable groups, which would include IDPs.¹⁸⁶ Not only does the specific inclusion of this Resolution indicate a focus on protection, it also indicates that the special needs of particularly vulnerable groups ought to be given consideration when providing protection and assistance. This approach mirrors the approach of the Guiding Principles, which seeks

¹⁸¹ ICGLR IDP Protocol art 4(1)(b). United Nations Security Council Resolution 1296 (2000) (19 April 2000) S/RES/1296(2000); United Nations Security Council Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000).

¹⁸² C Beyani "The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law" in W Kälin "Hardening of the Soft Law: Implementation of the Guiding Principles on Internal Displacement" (2008) 102 *Am Soc'y Int'l L Proc* 187-201 196. See also Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) art 25.

¹⁸³ Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (19-20 November 2004) *ICGLR* <http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf> (accessed 28-08-2018) art 35. See also United Nations Security Council Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000) Preamble.

¹⁸⁴ United Nations Security Council Resolution 1296 (2000) (19 April 2000) S/RES/1296(2000); United Nations Security Council Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000).

¹⁸⁵ United Nations Security Council Resolution 1296 (2000) (19 April 2000) S/RES/1296(2000) para 1.

¹⁸⁶ Paras 9-10.

to address the specific needs of IDPs and recognises particularly vulnerable groups.¹⁸⁷ Resolution 1296 calls for compliance with international humanitarian law, human rights law and refugee law and indicates that IDPs and other vulnerable groups are entitled to protection under these laws.¹⁸⁸ This requirement supports compliance with the Guiding Principles as these are the sources of law upon which the Principles base their provisions.¹⁸⁹

Article 4 also provides for special protection of internally displaced children.¹⁹⁰ It should be noted that this is the only instance that the Protocol specifically mentions children. However, the inclusion of United Security Resolutions 1296 and 1325 has incorporated binding international law that essentially brings the special needs of children in the context of conflict and displacement to the fore.

In summary, a review of the approach of the Protocol thus far indicates that there is an emphasis on the Guiding Principles, protection and safety, provision of basic needs, and a recognition that vulnerable groups, such as children, have special needs in the context of armed conflict. However, further examination is required to determine if the ICGLR IDP Protocol takes a children's rights perspective. The specific provisions of the ICGLR IDP Protocol will be critically analysed with respect to the categories of risks, rights and needs that are especially relevant to internally displaced children.

4 3 2 1 *Risks to physical security*

The ICGLR IDP Protocol provides protection to internally displaced children and addresses some of the risks to their physical security. One objective of the Protocol is to provide a legal basis for Member States to ensure the protection of the physical security of IDPs.¹⁹¹ Another objective of the Protocol is to prevent internal displacement by tackling its root causes.¹⁹² Preventing displacement is one method to ensure that children's physical safety is not placed at risk. Similar to the Guiding Principles, the ICGLR IDP Protocol obligates Member States to prevent arbitrary displacement in addition to working to eradicate the root causes of displacement.¹⁹³

¹⁸⁷ See Guiding Principles Introduction: Scope and Purpose para 1, prin 4(2).

¹⁸⁸ United Nations Security Council Resolution 1296 (2000) (19 April 2000) S/RES/1296(2000) Preamble, para 3.

¹⁸⁹ See Guiding Principles Introduction: Scope and Purpose para 3.

¹⁹⁰ ICGLR IDP Protocol art 4(1)(d).

¹⁹¹ ICGLR IDP Protocol art 2(2).

¹⁹² ICGLR IDP Protocol art 2(4).

¹⁹³ ICGLR IDP Protocol art 3(1).

This includes mitigating the adverse impacts of disasters and taking the primary responsibility for the protection and physical security of IDPs during all stages of displacement.¹⁹⁴ Member States are to provide special protection to children as well as other vulnerable groups.¹⁹⁵ Therefore, the ICGLR IDP Protocol provides general protection for the physical safety of internally displaced children.

The Protocol also responds to the risk of family separation by providing for family reunification.¹⁹⁶ What is unique about this particular provision of the Protocol is that Member States are to provide special protection to families of mixed ethnicities where needed.¹⁹⁷ This provision recognises families consisting of members from different ethnic groups may not be viewed as belonging together. This provision is progressive and responds to issues of discrimination based on ethnicity in a region where there have been tensions along ethnic lines.¹⁹⁸ However, it does not provide any additional details on how family reunification is to be facilitated. Similar to the Guiding Principles, the ICGLR IDP Protocol does not consider the use of the best interests of the child principle in the context of family reunification.¹⁹⁹ In contrast, it can be argued that family reunification is generally in a child's best interests and that while not specifically mentioned, the best interests of the child is incorporated in this manner.

Beyond these protections, the Protocol does not protect internally displaced children from a number of specific risks such as various forms of abuse and exploitation and recruitment into hostilities even though these are significant risks to children who have been internally displaced. For example, the Protocol is silent on the issues of violence and sexual exploitation; however, these risks are covered by the ICGLR's Protocol on the Protection and Suppression of Sexual Violence against Women and Children 2006 ("ICGLR Sexual Violence Protocol").²⁰⁰ This particular Protocol recognises rape, sexual violence, sexual exploitation, trafficking, torture,

¹⁹⁴ ICGLR IDP Protocol art 3(2),(3).

¹⁹⁵ ICGLR IDP Protocol art 4(1)(d).

¹⁹⁶ ICGLR IDP Protocol art 4(1)(h).

¹⁹⁷ ICGLR IDP Protocol art 4(1)(h).

¹⁹⁸ For example, in Kenya the post-election violence in 2007/2008 which violent clashes along ethnic lines and lead to internal displacement. See Commission of Inquiry into Post-Election Violence "Report of the Commission of Inquiry into Post-Election Violence "Waki Report"" (2008) Relief Web <http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf> (accessed 28-07-2017); J Gettleman "Ethnic Violence in Rift Valley is Tearing Kenya Apart" (27-07-2008) *The New York Times* <<http://www.nytimes.com/2008/01/27/world/africa/27kenya.html> > (accessed 28-07-2017).

¹⁹⁹ See part 4 3 1 1.

²⁰⁰ (adopted 15 December 2006, entered into force 21 June 2008).

harmful practices and forced labour (in the context of forced prostitution) in its definition of crimes against humanity, genocide, sexual violence, trafficking and war crimes.²⁰¹ It also recognises harmful practices by including mutilation in the definition of sexual violence.²⁰² The aim of the ICGLR Sexual Violence Protocol is to improve prosecution and punishment of sexual violence in the region.²⁰³ This objective can be applied in instances of internal displacement. The ICGLR Sexual Violence Protocol also addresses the issue of psychological trauma by providing that counselling and social assistance is available to victims of sexual violence and related crimes.²⁰⁴ Again, this provision can be implemented in the context of internal displacement in the region. In terms of a children's rights perspective, this Protocol requires Member States to implement the CRC.²⁰⁵ While the ICGLR IDP Protocol does not address issues of abuse and exploitation, the ICGLR Sexual Violence Protocol provides adequate protection with respect to these risks. The protection offered by the ICGLR Sexual Violence Protocol is available to internally displaced children in the Great Lakes Region and can provide effective protection as the Member States are bound by all of the Protocols in the Pact.²⁰⁶

There is no mention of forced recruitment in the ICGLR IDP Protocol, but Member States are obligated to domesticate the Guiding Principles. Therefore, it can be argued that the Protocol addresses the issue of forced recruitment by way of the Guiding Principles.²⁰⁷ Furthermore, the issue of child recruitment is covered by the ICGLR's Protocol for the Prevention and the Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 2006 ("ICGLR Genocide Protocol").²⁰⁸ The ICGLR Genocide Protocol makes a strong statement with respect to the child recruitment that demonstrates a commitment to eradicating this problem in the region. The Protocol states that the Member States of the Pact are:

"Determined to put an end to the recruitment of children in national armed forces or in any other armed group or to their participation in any way in hostilities especially as

²⁰¹ See ICGLR Sexual Violence Protocol art 1(1),(2),(5),(6),(7).

²⁰² ICGLR Sexual Violence Protocol art 1(5)(d).

²⁰³ ICGLR Sexual Violence Protocol art 2(2).

²⁰⁴ ICGLR Sexual Violence Protocol art 2(4).

²⁰⁵ ICGLR Sexual Violence Protocol art 3(5).

²⁰⁶ Pact art 31(1).

²⁰⁷ ICGLR IDP Protocol art 6, annex Guiding Principles.

²⁰⁸ adopted 15 December 2006, entered into force 21 June 2008).

reinforcements, to fight illegal labour, trafficking in women and children and the prostitution of women and children in conflict zones of the Great Lakes Region.”²⁰⁹

This statement demonstrates a firm commitment to protecting children from recruitment and the dangers often associated with it. Also, the ICGLR’s Protocol on Democracy and Good Governance 2006 (“ICGLR Democracy Protocol”)²¹⁰ requires Member States to prohibit the enlistment of children under the age of 15 in the army as well as their direct participation in conflict.²¹¹ Both the ICGLR Genocide Protocol and the ICGLR Democracy Protocol specifically recognise the ACRWC and the CRC, which is at least an indication that children’s rights were considered in these Protocols.²¹² The ICGLR Genocide Protocol also tasks the Committee established under the Convention, to initiate national programs of Disarmament, Demobilisation, Rehabilitation, Repatriations and Reinstallation (“DDRRR”) of former child soldiers.²¹³ This provision demonstrates a focus on the needs of children and also is reminiscent of the standard set out in the CRC which provides for reintegration of children who have been involved in armed conflicts.²¹⁴ It also protects internally displaced children from forced recruitment as the provisions of the ICGLR Genocide Protocol are applicable to internally displaced children in the region.²¹⁵

Therefore, an analysis of the ICGLR IDP Protocol reveals that it provides protection for the physical security of internally displaced children of a general nature, and, considering the Protocol as part of the Pact as a whole, there is comprehensive protection of the physical security of internally displaced children. Furthermore, the inclusion of the ACRWC, CRC, and DDRRR not only indicates a focus on protecting the life and ensuring the survival of internally displaced children, it also demonstrates an intention to support their development even after they have undergone traumatic experiences. The principle of the best interests of the child features less prominently, as it is not explicitly mentioned, but providing for the reunification of families is one protection that can be said to be generally in a child’s best interests. The failure to

²⁰⁹ ICGLR Genocide Protocol Preamble.

²¹⁰ adopted 15 December 2006, entered into force 21 June 2008).

²¹¹ ICGLR Democracy Protocol art 45(3). This standard is similar to that of the CRC. See CRC art 38; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

²¹² ICGLR Genocide Protocol Preamble, art 1(b),(c); ICGLR Democracy Protocol arts 1(a),(b), 45(1).

²¹³ ICGLR Genocide Protocol arts 26, 38(2)(g).

²¹⁴ CRC art 39. See also discussion in Chapter 3 part 3 3 2 2.

²¹⁵ Pact art 31(1).

employ the principle further as with the Guiding Principles is a missed opportunity to focus on the rights and needs of internally displaced children.

4 3 2 2 *Risks to satisfying basic needs*

The ICGLR IDP Protocol provides for the basic needs of internally displaced children. Member States are to provide for the material needs of IDPs.²¹⁶ Article 4 requires that Member States provide for the hygiene, food, water and shelter of all IDPs with giving attention to the special needs of children.²¹⁷ The supply of basic needs must also be carried out in a place of safety.²¹⁸ Member States are required to allow for “rapid and unimpeded humanitarian access and assistance”.²¹⁹ These provisions demonstrate that the Protocol incorporates the principle of life, survival and development as they provide for the basic needs required for survival as well as protection. The Protocol encourages Member States to register and create a national database of IDPs.²²⁰ This tool can be used to identify IDPs and facilitate their assistance. Also, the registration process can help States determine how many IDPs are children. This information can be used to address their specific needs as required by Article 4. However, it should be noted that IDPs are sometimes reluctant to identify themselves or register for fear of reprisals or stigmatisation.²²¹ The Pact as a whole prohibits discrimination, but the ICGLR IDP Protocol itself fails to incorporate the principle of non-discrimination in the context of internal displacement as is done by the Guiding Principles and the Kampala Convention.²²² However, the ICGLR IDP Protocol does provide for the basic needs of IDPs in a way that focuses on the principle of life, survival and development.

4 3 2 3 *Risks to social, economic and cultural rights*

The ICGLR IDP Protocol offers limited social, economic and cultural rights to internally displaced children. For example, Article 4 gives IDPs the right to an adequate standard of living.²²³ Other than this general provision, rights with respect to social,

²¹⁶ ICGLR IDP Protocol art 2(2).

²¹⁷ ICGLR IDP Protocol art 4(1)(f).

²¹⁸ ICGLR IDP Protocol art 4(1)(f).

²¹⁹ ICGLR IDP Protocol art 3(6).

²²⁰ ICGLR IDP Protocol art 3(4).

²²¹ IDMC “Getting on the List: The Registration of Children Born to IDPs” (15 May 2015) 1.

²²² The ICGLR Genocide Protocol prohibits discrimination and provides measures to combat prejudice. See ICGLR Genocide Protocol arts 1(k), 2-7. See also Guiding Principles prin 4(1); Kampala Convention arts 3(1)(d), 5(1), 9(1)(a).

²²³ ICGLR IDP Protocol art (1)(f).

economic and cultural rights in the Protocol are lacking. However, looking at the entire Pact, there are other Protocols which can be read with the ICGLR IDP Protocol to provide more comprehensive social, economic and cultural rights for internally displaced children. In terms of the right to education, the ICGLR Democracy Protocol requires Member States to guarantee children access to education.²²⁴ This Protocol incorporates the principle of non-discrimination by prohibiting discrimination on all grounds in education at all levels. It also requires that in the prevention of discrimination that “particular attention [be given] to the education of the girl-child”.²²⁵ In terms of education, there is the provision of the general right to education, guaranteed access for children, non-discrimination and particular attention given to girl children. These provisions indicate a focus on children as well as the principle of non-discrimination. The ICGLR Democracy Protocol also includes the principles of interdependence and indivisibility as it recognises the importance that education, culture and religion have together as a whole for Member States.²²⁶ This Protocol requires respect for cultural diversity and religious tolerance.²²⁷ The clear linkages between these rights in this Protocol demonstrates that the realisations of these rights depend upon one another and that one right is not considered more important than another. These provisions can respond to the risks that internally displaced children experience in accessing education as well as exercising their culture and religion. In terms of universality, there is no specific qualification on the right to education in the Protocols. The fact that education is not mentioned in the ICGLR IDP Protocol does not mean this right is not applicable in the context of internal displacement as all the Pacts in the Protocol are applicable and they are intended to be mutually reinforcing.²²⁸ However, the principle of universality with respect to the right to education during situations of internal displacement is not clear due to the fact that the various rights are dispersed in several Protocols and that the ICGLR IDP Protocol does not specifically mention the right to education. This omission is problematic as it does not model the Guiding Principles, relies heavily on the application of all the other Protocols by the Members States and necessitates the domestication of the Guiding

²²⁴ ICGLR Democracy Protocol art 45(2).

²²⁵ ICGLR Democracy Protocol art 31.

²²⁶ ICGLR Democracy Protocol art 30(1).

²²⁷ ICGLR Democracy Protocol arts 33-34.

²²⁸ Pact art 31.

Principles.²²⁹ To ensure internally displaced children have access to education, the ICGLR IDP Protocol ought to have specifically included this right.

The ICGLR IDP Protocol does not address economic rights, rather the ICGLR Protocol on the Property of Returning Persons 2006 (“ICGLR Property Protocol”)²³⁰ was drafted to deal with this particular issue property rights of IDPs and other returning persons. This Protocol specifically considers property rights in the context of internal displacement. What is noteworthy about this Protocol is its focus on the rights of children both generally and specifically. First, this Protocol requires Member States to implement the CRC.²³¹ Second, this Protocol provides for the protection of the property of children who have returned from displacement, including orphans.²³² Article 6 provides internally displaced children with protection against disinheritance and dispossession of their family property and prohibits discrimination “between girls and boys, orphans, children born out of wedlock, and adopted children”.²³³ This inclusive language demonstrates comprehensive protection of the right of all internally displaced children to their family property. Another provision that demonstrates a specific focus on children is the requirement of Member States to guarantee the:

“[a]herence to the best interests of the child as the overriding principle applicable to all returning children who are orphaned or have lost both parents while in displacement or refuge.”²³⁴

This provision requires the use of the best interests of the child principle. The best interests of the child principle in this instance is applied to situations where the property rights of internally displaced children, who are without parents, are at risk. The ICGLR Property Protocol uses this principle as a means to bring the rights and needs of internally displaced children to the forefront in instances where there will not likely be adults to advocate for their rights and where they will be the persons with the primary or only right to the property in question. The ICGLR Property Protocol not only specifically recognises the rights and needs of internally displaced children, it also

²²⁹ ICGLR IDP Protocol art 6.

²³⁰ (adopted 15 December 2006, entered into force 21 June 2008).

²³¹ ICGLR Property Protocol art 3.

²³² ICGLR Property Protocol art 6.

²³³ ICGLR Property art 6(1), (a).

²³⁴ ICGLR Property Protocol art 6(1)(f).

employs key principles in children's rights law, namely non-discrimination and the best interests of the child.

On its own, the ICGLR IDP Protocol does not adequately address the social, economic and cultural rights of internally displaced children, but the Pact as whole addresses this category of rights and also incorporates principles of a children's perspective. The ICGLR Democracy Protocol provides access to education, and the recognition of culture and religion in a way that incorporates the principles of non-discrimination, interdependence and indivisibility, and universality. The ICGLR Property Protocol provides comprehensive protection for the property rights of internally displaced children and incorporates the principles of non-discrimination and the best interests of the child.

4.3.2.4 *Risks to civil and political rights*

The ICGLR IDP Protocol includes very few civil and political rights. One civil and political right that is provided by this Protocol is the right to participation. IDPs are to participate in the decision-making and the administration of initiatives for their protection and assistance.²³⁵ Special efforts are to be taken to ensure the participation of women in this process.²³⁶ This Protocol also requires the participation of IDPs in the development of national legislation which domesticates the Guiding Principles.²³⁷ The ICGLR IDP Protocol, while providing a right of IDPs to participate in decisions and projects which directly affect them, fails to incorporate provisions that ensure the participation of internally displaced children. In contrast, the ICGLR Democracy Protocol requires community participation in economic and social initiatives, as well as youth engagement and empowerment.²³⁸ The inclusions of youth at least covers some persons who are also classified as children.²³⁹

The ICGLR IDP Protocol does not address the need to replace lost identity documents. Instead, it requires Member States to register IDPs and create a national

²³⁵ ICGLR IDP Protocol art 4(1)(b).

²³⁶ The Protocol refers to the United Nations Security Council Resolution 1325. See ICGLR IDP Protocol art 4(1)(b); United Nations Security Council Resolution 1325 (2000) (31 October 2000) S/RES/1325 (2000) Preamble, para 2.

²³⁷ ICGLR IDP Protocol art 6(5).

²³⁸ ICGLR Democracy Protocol arts 29, 46.

²³⁹ Youth are defined as persons between 15 and 35 years of age. See African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009) 3.

database.²⁴⁰ It is not specifically stated, but the process of registration could also be used as an opportunity to assist IDPs to obtain identity documentation.

The ICGLR IDP Protocol is also silent regarding access to justice. However, the ICGLR Democracy Protocol includes a number of provisions that encourage access to justice. This Protocol requires Member States to recognise the importance of the rule of law, to create the national and regional mechanisms to protect human rights, to provide access to the justice system, and to develop mechanisms which protect the rights of vulnerable groups such as IDPs.²⁴¹ In addition to access to justice rights that are applicable to any context, it is noteworthy that the ICGLR Democracy Protocol incorporates protection of the rights of IDPs.

The majority of the mechanisms which encourage the accountability of Member States of the ICGLR are outlined in the Pact. There are a number of Regional Follow-up Mechanisms described in the Pact that are designed to facilitate and monitor the implementation of the Pact, Protocols and Programmes of Action, which include “the Summit of Heads of State and Government, the Regional Inter-Ministerial Committee, the Conference Secretariat, the National Coordination Mechanisms and the Collaboration Mechanism”.²⁴² The Summit is to occur every two years and its function is to direct the implementation of the Pact.²⁴³ The Regional Inter-Ministerial Committee meets twice a year and its function is to monitor the implementation of the Pact.²⁴⁴ The Conference Secretariat has the function of implementing the decisions of the Summit and the Inter-Ministerial Conference and it has the power to seek technical assistance from the African Union, the United Nations and other partners.²⁴⁵ Each Member State is required to create a National Coordination Mechanism for the implementation of the Pact domestically.²⁴⁶ The Inter-Ministerial Conference is tasked with constituting a Collaborative Mechanism, which will engage member States and other regional bodies in the implementation of the Pact.²⁴⁷ In addition to these bodies, the Pact allows for an Ad-hoc Group of Experts to be established to provide a report on specific problems

²⁴⁰ ICGLR IDP Protocol art 3(4).

²⁴¹ ICGLR Democracy Protocol arts 37, 39, 40, 47(b).

²⁴² Pact art 22.

²⁴³ Pact art 23(2),(3).

²⁴⁴ Pact art 24(1),(3).

²⁴⁵ Pact 26(2)(a),(3).

²⁴⁶ Pact art 27(1).

²⁴⁷ Pact art 27(2).

with regard to the implementation of the Pact.²⁴⁸ The Pact includes a number of mechanisms that are designed to implement the Pact and facilitate the compliance of Member States with their obligations pursuant to the Pact. The ICGLR IDP Protocol also incorporates a mechanism which encourages Member States to comply with their obligations to IDPs. Article 4 of the Protocol requires the creation of a regional mechanism which monitors the protection of IDPs.²⁴⁹ The effectiveness of these mechanisms will depend upon their implementation and the response of Member States, but the inclusion of individual, collective, domestic and regional mechanisms demonstrates a strong commitment to accountability.

In summary, the ICGLR IDP Protocol provides very limited protection with respect to the risks to the political and civil rights of internally displaced children. Specifically, in terms of participation, it fails to make special provision to include children. The ICGLR Democracy Protocol provides more coverage in terms of civil and political rights and read with the ICGLR IDP Protocol, it affords greater provision for the rights of internally displaced children in this context. Finally, the Pact incorporates several individual and collective measures that are designed to ensure that Member States are accountable for their obligations pursuant to the Pact. Overall, the inclusion of the principle of accountability is much more comprehensive as compared to the principle of participation in the ICGLR Pact and Protocols.

4 3 3 Critical analysis of the Kampala Convention

The Kampala Convention is a regional human rights treaty comprised of 22 articles. It recognises the Guiding Principles as well as ACRWC and other relevant United Nations treaties.²⁵⁰ As opposed to organising the articles in terms of the stage of internal displacement, the Kampala Convention organises its provisions in accordance with the situation or actor.²⁵¹ For example, there is a specific article which deals with

²⁴⁸ Pact art 25.

²⁴⁹ ICGLR IDP Protocol art 4(1)(j).

²⁵⁰ Kampala Convention Preamble. It can be argued that the CRC is among the other treaties due to its near universal ratification among the States in Africa. See United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 07-07-2017).

²⁵¹ This is the approach taken by the Guiding Principles. See part 4 3 1. However, it should be noted that there is an Article of the Convention that obligations with regard to protection from displacement, and protection and assistance during displacement. See Kampala Convention arts 4, 9.

the protection and assistance of IDPs in the context of armed conflict.²⁵² Also, Article 8 outlines the particular obligations of the African Union.²⁵³ In addition to creating a regional legal framework with respect to internal displacement, other key objectives of the Convention are to address the root causes of internal displacement and outline the responsibilities of various actors in this context.²⁵⁴ The objective of outlining responsibilities has also influenced the manner in which the provisions of the Convention were drafted. A general review of the Kampala Convention indicates that it differs in its articulation of the principles gleaned from the Guiding Principles. For instance, the Convention frames its provisions from the perspective of States whereas the Guiding Principles are generally framed from the perspective of the rights of IDPs.²⁵⁵ The focus on States demonstrates that the Kampala Convention incorporates the foundational principle of the Guiding Principles, namely, sovereignty as responsibility. Even though the Kampala Convention recognises that there are non-State actors that owe obligations to IDPs, the Convention takes the position that States have the primary responsibility to respond to the rights and needs of IDPs.²⁵⁶ The fact that the Convention requires States Parties to keep non-State actors accountable for their obligations is also an indication of the focus on States and their obligations in this instrument.²⁵⁷

The Convention also includes issues that are particularly relevant in an African context. Similar to the ICGLR IDP Protocol, the Kampala Convention provides for assistance to be given to host communities.²⁵⁸ To address economic challenges encountered by IDPs, the Convention seeks to “[p]romote self-reliance and

²⁵² Kampala Convention art 7.

²⁵³ Kampala Convention art 8.

²⁵⁴ Kampala Convention art 2.

²⁵⁵ For example, Articles 3-5, 9 of the Kampala Convention specifically address different obligations of States Parties. See Kampala Convention arts 3-5, 9. The Guiding Principles focus on the rights and needs of individuals by referring to IDPs or using the phrase “every human being”. See for example Guiding Principles prins 6, 10-12, 14. See also, W Kidane “Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention” (2011) 44 *Vand J Transnat'l L* 1-85 56, 61-62; AM Abebe “The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges” (2010) 29 *Refugee Survey Quarterly* 28-57 SSRN <<https://ssrn.com/abstract=1713296>> (accessed 24-07-2017) 43; AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017) 165 (footnote omitted).

²⁵⁶ The non-State actors recognised by the Convention include humanitarian agencies, the African Union, armed groups and corporations. See Kampala Convention arts 1(n), 5(1), 6-8.

²⁵⁷ Kampala Convention arts 3(1)(h),(i), 5(11).

²⁵⁸ Kampala Convention Preamble, arts 3(2)(c), 5(5).

sustainable livelihoods”.²⁵⁹ The inclusion of harmful practices is another example of the Convention taking an African perspective with respect to internal displacement. The issue of harmful practices also referred to as traditional practices or harmful cultural practices, is an issue particularly relevant to children in Africa, as their right to culture and their right to protected from harmful cultural practices at times come into conflict.²⁶⁰ The Convention recognises displacement due to harmful practices as a form of arbitrary displacement, and States Parties are obligated to prevent harmful practices in the context of displacement.²⁶¹ Due to limited resources in the region, burden sharing is another issue that is particularly relevant in the region. In the event that States Parties have insufficient resources to protect and assist IDPs, they are to seek assistance from humanitarian agencies and other organisations.²⁶² Overall, the Kampala Convention addresses the issue of internal displacement from a regional perspective as it takes the issues relevant to the region into consideration.

As noted above, the Kampala Convention recognises the ACRWC. The recognition of the ACRWC is noteworthy as it the first binding instrument to recognise internally displaced children, it is an African human rights instrument and at least demonstrates that children were considered to some extent in the Convention. In terms of specific mention of children, the Kampala Convention mentions children six times.²⁶³ While the specific provisions will be examined during the remainder of the analysis, it should be highlighted that the Kampala Convention differs in its mention of children as compared to the Guiding Principles and the ICGLR IDP Protocol. When outlining the vulnerable groups of IDPs that require recognition of their special needs, the Kampala Convention only mentions “separated and unaccompanied children”.²⁶⁴ In contrast, the Guiding Principles recognises “children, especially unaccompanied minors”²⁶⁵ and the ICGLR

²⁵⁹ Kampala Convention art 3(1)(k).

²⁶⁰ On example is the practice of female genital mutilation (FGM), which is a cultural practice that is still adhered to in many States in Africa. Due to the physical, psychological, emotional and social harm caused by the practice, it has also been recognised as a harmful cultural practice. See CRC art 24(3), ACRWC art 21(1). See also J Tobin “the International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does it Mean and Require of States” (2009) 9 *Hum Rts L Rev* 373-396, CE Cobbler *Children’s Rights and Culture in Conflict: Using the Best Interests of the Child Principle to Evaluate Male Circumcision and Female Genital Mutilation* Unpublished LLM Major Paper Stellenbosch University (2014).

²⁶¹ Kampala Convention arts 4(4)(e), 9(1)(d).

²⁶² Kampala Convention art 5(6).

²⁶³ Kampala Convention arts 1(h), 7(5)(e), 7(5)(f), 9(1)(d), 9(2)(c), 13(4).

²⁶⁴ Kampala Convention art 9(2)(c).

²⁶⁵ Guiding Principles prin 4(2).

IDP Protocol simply recognises children as requiring special protection.²⁶⁶ The wording chosen by the drafters of the Kampala Convention fails to recognise that all internally displaced children have special needs. It is true that separated and accompanied children are particularly vulnerable as they are without the protection of their parents or family members.²⁶⁷ However, it has been recognised that the negative impacts of internal displacement are acute for children whether unaccompanied or not.²⁶⁸

In order to determine to what extent the Kampala Convention takes a children's rights perspective, it is necessary to examine how its provisions address the specific risks that internal displacement poses to children. The critical analysis of the Kampala Convention will, therefore, begin with an examination of how the Convention addresses the risks to the physical security of internally displaced children.

4 3 3 1 *Risks to physical security*

A review of the Kampala Convention reveals that it provides comprehensive protection against the risks to the physical security of internally displaced children. Similar to the Guiding Principles and the ICGLR, the Convention provides physical protection by first preventing instances of internal displacement. States Parties are to work towards root cause and durable solutions.²⁶⁹ The Convention requires States Parties to prevent arbitrary displacement and prevent political, social, cultural and economic exclusion, which could lead to displacement.²⁷⁰ States Parties are to take proactive measures by complying with their obligations under international law to avoid situations which lead to arbitrary displacement, and to create early warning systems and disaster risk reduction ("DRR") mechanisms.²⁷¹ The Kampala Convention also provides wide-ranging protection against arbitrary displacements such as displacement due to racial discrimination, armed conflict, violations of international humanitarian law, generalised violence and human rights and harmful practices.²⁷²

²⁶⁶ ICGLR IDP Protocol art 4(1)(e).

²⁶⁷ ED Mooney "Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2 *Global Responsibility to Protect* 60-85 62. See also discussion in Chapter 3 part 3 3 1.

²⁶⁸ See discussion in Chapter 3 part 3 3 1. See also discussion of United Nations Security Council Resolution 1296 (2000) (19 April 2000) S/RES/1296(2000) part 4 3 2.

²⁶⁹ Kampala Convention art 2(a).

²⁷⁰ Kampala Convention art 3(1)(a),(b).

²⁷¹ Kampala Convention art 4(1),(2).

²⁷² Kampala Convention art 4(4)(a)-(e).

The Convention's mention of arbitrary displacement due to generalised violence and violations of human rights is noteworthy as this is a particular cause of internal displacement and is often overlooked as it is difficult to identify and measure.²⁷³ The Kampala Convention also provides specific protection for persons who are displaced by disasters including climate change.²⁷⁴ These provisions indicate a clear understanding of the causes of internal displacement and the risks that they pose to internally displaced children.²⁷⁵

The Kampala Convention also provides protection with respect to specific threats to the physical security of internally displaced children. Article 9 of the Convention requires that there should be “the establishment of specialized mechanisms to trace and reunify families separated during displacement”.²⁷⁶ The Kampala Convention provides a means to respond to the risk of separation from families that is a significant risk for internally displaced children. However, this provision represents a missed opportunity to incorporate the best interests of child principle into an area of protection where it is imperative to ensure that a child is not moved from one situation of vulnerability to another, as is also the case with the Guiding Principles and ICGLR IDP Protocol.²⁷⁷ What is encouraging is that similar to the provision in the Guiding Principles, the provision in the Kampala Convention leaves room for the best interests of the child during the implementation phase. More specifically, the mention of specialised mechanisms to assist with family reunification allows for the application of the best interests of the children principle by using a BID when reunifying internally displaced children with their families.²⁷⁸

The Kampala Convention also provides protection against various forms of abuse and exploitation such as arbitrary killing, summary execution, torture, sexual abuse and exploitation, trafficking, forced prostitution, harmful practices and forced labour.²⁷⁹ This prohibition applies to both States Parties and members of armed groups.²⁸⁰ Also,

²⁷³ IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 45-46. See also discussion in Chapter 3 part 3 2 2 2.

²⁷⁴ Kampala Convention art 5(4).

²⁷⁵ See discussion in Chapter 3 part 3 2 2 2 and part 3 2 3 1.

²⁷⁶ Kampala Convention art 9(2)(h).

²⁷⁷ See discussion in part 4 3 1 1.

²⁷⁸ See discussion in part 4 3 1 1.

²⁷⁹ Kampala Convention arts 7(5)(f), 9(1)(c),(d).

²⁸⁰ Kampala Convention arts 7(5), 9.

the Convention requires States Parties to provide psycho-social support to victims.²⁸¹ This provision responds to the risk of psychological trauma experienced by internally displaced children.

The Kampala Convention specifically protects internally displaced children from forced recruitment. The first indication of this is that every time that forced recruitment is mentioned in the Convention, children are also mentioned.²⁸² The second indication of the Convention's strong protection against forced recruitment is that this prohibition is applied to armed groups as well as States. The provision applicable to States merely uses the term 'recruitment' rather than forced recruitment.²⁸³ This means that States are not permitted to recruit children even if the children wish to enlist voluntarily. This provision follows the standard set by the ACRWC, which prohibits the recruitment of children regardless of their age.²⁸⁴ The Convention's provisions with respect to recruitment are examples of specific protection of children.

In terms of special protection of children, the Kampala Convention provides special protection to a sub-group of internally displaced children. Article 9(2)(c), the Article which provides that special protection must be provided to separated and unaccompanied children, and not necessarily all children, was criticised above in the general overview of the Convention.²⁸⁵ Compared to the Guiding Principles and the ICGRL IDP Protocol it still is a missed opportunity to recognise that all internally displaced children have special needs.²⁸⁶ When looking at the specific context of protection, there can be an argument made for the inclusion of only separated and unaccompanied children. Objectively assessing the level of vulnerability, it fair to say that children who are separated and unaccompanied are more vulnerable as they do not have the support and protection of their families. It may be that the drafters of the Kampala Convention took this position. There also is a basis for recognising the most vulnerable groups as is done by the other instruments.²⁸⁷ However, the position that continues to be taken in this thesis is that making a distinction between separated and

²⁸¹ Kampala Convention art 9(2)(d).

²⁸² Kampala Convention arts 7(5)(e),(f), 9(1)(d).

²⁸³ Kampala Convention art 9(1)(d).

²⁸⁴ ACRWC art 22.

²⁸⁵ See Kampala Convention art 9(2)(c). See also part 4 3 3.

²⁸⁶ Guiding Principles prin 4(2); ICGLR IDP Protocol art 4(1)(d).

²⁸⁷ In addition to the Guiding Principles and the ICGLR IDP Protocol above, the CRC recognises the special needs of refugee children and the ACRWC recognises the special needs of refugee and internally displaced children. See CRC art 22; ACRWC art 23.

unaccompanied internally displaced children and other internally displaced children is counterproductive to the protection and assistance of all internally displaced children as all children in this group are negatively impacted by the risks associated with internal displacement. Despite this distinction, it is clear that overall the Kampala Convention provides strong protection for the physical security of internally displaced children and in this way, it incorporates the children's rights principles, which gives every child the right to life, survival and development and the best interest of the child principle to a lesser extent.

4 3 3 2 *Risks to satisfying basic needs*

The Kampala Convention incorporates mechanisms that respond to the basic needs of IDPs. Article 5(1) prescribes that States Parties have the primary responsibility for the protection assistance of IDPs. States Parties are required to provide food, water, shelter, medical care and sanitation, which is described as "adequate humanitarian assistance".²⁸⁸ Also, States Parties are to prevent starvation of IDPs.²⁸⁹ The delivery of assistance can be done with the support of international organisations, humanitarian agencies and civil society agencies.²⁹⁰ The Kampala Convention places an obligation upon humanitarian agencies to protect and assist IDPs.²⁹¹ States Parties are to ensure that such assistance adheres to the principles of humanity, neutrality and independence of these actors.²⁹² States Parties must also respect the right of IDPs to seek protection and assistance without reprisal.²⁹³ This provision is similar to the protection provided in the Guiding Principles, but it is framed from the perspective of States as opposed to IDPs.²⁹⁴ Similar to the ICGLR IDP Protocol, the Kampala Convention requires that humanitarian assistance be "rapid and unimpeded".²⁹⁵ Armed groups are prohibited from interfering in the humanitarian assistance given to IDPs.²⁹⁶ Thus, the Kampala Convention offers a means for the

²⁸⁸ Kampala Convention art 9(2)(b).

²⁸⁹ Kampala Convention art 9(1)(b).

²⁹⁰ Kampala Convention arts 5(6), 9(3).

²⁹¹ Kampala Convention art 6(2).

²⁹² Kampala Convention art 5(8).

²⁹³ Kampala Convention art 5(9).

²⁹⁴ See Kampala Convention art 5(9); Guiding Principles prin 3(2). See previous discussion regarding the Kampala Convention's framing of its provisions from the perspective of States as opposed to IDPs in part 4 3 3.

²⁹⁵ Kampala Convention art 5(7). See ICGLR IDP Protocol art 3(6).

²⁹⁶ Kampala Convention art 7(5)(g),(h).

basic needs of IDPs to be met. The provision of these needs contributes to the life, survival and development of internally displaced children.

In addition to having the primary duty to provide protection and assistance to IDPs, State Parties pursuant to the Kampala Convention must comply with this obligation in accordance with the principle of non-discrimination.²⁹⁷ Furthermore, States Parties are to ensure that IDPs are not discriminated against on the grounds that they are internally displaced.²⁹⁸ In addition to this specific focus on the principle of non-discrimination, States Parties are also obligated to uphold the human rights of IDPs.²⁹⁹ The provisions of the Kampala Convention overall demonstrate provision for the basic needs of internally displaced children as well as the specific incorporation of the principle of non-discrimination.

4 3 3 3 *Risks to social, economic and cultural rights*

The Kampala Convention addresses the risks to the social, economic and cultural rights of internally displaced children through its provision of education, living standards, and property rights. The Convention's treatment of the right to education is very basic in comparison to the Guiding Principles and the Pact. Article 9 simply provides for the right to education as part of "adequate humanitarian assistance".³⁰⁰ The Kampala Convention requires that if IDPs are unable to obtain necessary documents, this cannot be a barrier to their realisation of their human rights.³⁰¹ Since internally displaced children have a right to education, the Kampala Convention protects their access to education even if they do not possess adequate documentation. This provision recognises the principles of non-discrimination as it does not permit internal displacement as a basis to exclude children from education. The principles of interdependence and indivisibility are incorporated in this context as the right to identity documentation and the right to education are acknowledged as being linked. Lastly, the principle of universality is recognised as technical requirements such as identity documents cannot be used as a means to prevent internally displaced children from realising their rights, which is, in this case, the right to education.

²⁹⁷ Kampala Convention art 5(1).

²⁹⁸ Kampala Convention art 9(1)(a).

²⁹⁹ Kampala Convention art 3 (1)(d).

³⁰⁰ Kampala Convention art 9(2)(c).

³⁰¹ Kampala Convention art 13(3).

The Kampala Convention is limited in its protection of culture. Culture is not linked to education as it is in the Guiding Principles and the ICGLR Democracy Protocol.³⁰² The Convention protects cultural rights in the pre-displacement phase by requiring States Parties to prevent cultural exclusion that could lead to internal displacement.³⁰³ During displacement, States Parties must protect cultural property that has been left behind during displacement.³⁰⁴ The Kampala Convention's provisions with respect to culture also demonstrate that there is a focus on State obligations rather than on the rights of IDPs. States are to prevent cultural exclusion and protect cultural property. The obligation on States Parties to prevent harmful practices is another example of protection from acts that may be done in the name of culture.³⁰⁵ Therefore, its limited inclusion of culture demonstrates that the Convention fails to provide IDPs with the right to culture or to recognise that culture is linked to the effective realisation of other rights such as the right to education.³⁰⁶

In terms of economic rights, the Convention does provide rights with respect to an adequate standard of living and property rights. States Parties and armed groups are to ensure that IDPs are able to live in "satisfactory conditions".³⁰⁷ Also, States Parties are to encourage IDPs self-reliance and sustainable livelihoods amongst IDPs; however, this is less relevant for internally displaced children.³⁰⁸ With respect to property, the Convention requires that simplified procedures be followed for resolving property disputes.³⁰⁹ Article 12 also provides for general compensation for those impacted by internal displacement including reparations for the failure of States Parties to assist persons who are displaced by natural disasters.³¹⁰ Overall, the Kampala Convention provides for the economic needs of IDPs, but these rights are outlined very briefly. Also, the economic rights do not specifically recognise internally displaced children.

³⁰² See discussions in part 4 3 1 3 and part 4 3 2 3.

³⁰³ Kampala Convention art 3(1)(b).

³⁰⁴ Kampala Convention art 9(2)(i).

³⁰⁵ Kampala Convention art 9(1)(d).

³⁰⁶ In contrast, the Guiding Principles recognise the importance of culture regarding the provision of education. See part 4 3 1 3.

³⁰⁷ Kampala Convention art (7)(5)(c), 9(2)(a),(b).

³⁰⁸ Kampala Convention art 3(1)(k).

³⁰⁹ Kampala Convention art 11(4).

³¹⁰ Kampala Convention art 12.

In summary, the social, economic and cultural rights outlined in the Kampala Convention address some rights relevant to internally displaced children such as access to education and an adequate standard of living. In the context of education, the Convention did incorporate the principles of non-discrimination, interdependence and indivisibility, and universality to an extent. Furthermore, the issue of culture is framed in terms of protection and prevention, rather than as a right that internally displaced children possess. Internally displaced children in terms of economic rights also can have access to property restitution mechanisms and compensation where relevant. However, similar to an analysis of the Kampala Convention's treatment of social, economic and cultural rights from a feminist perspective, its recognition of the particular rights and needs of internally displaced children is also lacking, especially when compared to the Guiding Principles and the Protocols of the Pact.³¹¹

4 3 3 4 *Risks to civil and political rights*

The Kampala Convention provides a number of civil and political rights in the context of internal displacement. Article 9 provides IDPs with the general right to exercise the civil and political rights such as public participation, voting and election to public office; however, the particular rights are of limited utility to internally displaced children as children are not permitted to vote or hold public office.³¹² There are other civil and political rights that are relevant to internally displaced children and these rights include the right to obtain identity documents, access to the justice system with respect to property disputes and participation. As noted earlier, the Convention provides that unreasonable requirements must not be put in place with respect to the replacement of identity documentation.³¹³ Also, the Kampala Convention specifically recognises separated and unaccompanied children in this context by providing these children with the right to have documentation issued in their own names.³¹⁴ This provision improves upon the similar provision in the Guiding Principles which only requires that women and men have the right to have documentation issued in their own names.³¹⁵ The provision enables children who are separated from or who no longer have families to obtain documents that are necessary for the realisation of who

³¹¹ See L Groth "Engendering Protection: An Analysis of the 2009 Kampala Convention and its Provisions for Internally Displaced Women" (2009) 23 *Int'l J Refugee L* 221-251 242-244.

³¹² Kampala Convention art 9(2)(l).

³¹³ Kampala Convention art 13(3). See part 4 3 3 3.

³¹⁴ Kampala Convention art 13(4).

³¹⁵ Guiding Principles prin 20(3).

their other rights.³¹⁶ Access to justice is provided with respect to the resolution of property disputes. States Parties are to put in place simplified procedures, which will allow for access to justice for IDPs.³¹⁷ There is no specialised provision for internally displaced children, but resolving property disputes for children is generally only an issue when separated or unaccompanied. The general provision in Article 9 can be used to argue special consideration of these children to assist them in resolving property related disputes.³¹⁸ The principle of participation is incorporated in a general manner in the Convention. IDPs are to be consulted and participate in decisions with respect to their protection and assistance, and solutions regarding the return, relocation or reintegration.³¹⁹ Similar to the Guiding Principles and the ICGLR IDP Protocol, the participation of internally displaced children is not specifically incorporated into the Convention. Overall, a review of the civil and political rights provided in the Kampala Convention demonstrates that there are general provisions that protect internally displaced children. Only separated and unaccompanied children are recognised as requiring special consideration in the context of obtaining documentation.

The Convention also includes mechanisms to ensure States Parties are accountable for their obligations to IDPs. Article 14 states that the monitoring and compliance mechanisms include the Conference of States Parties, reports pursuant to Article 62 of the African Charter on Human and Peoples' Rights 1981 ("ACHPR") and the African Peer Review Mechanism.³²⁰ The Conference of States Parties is comprised of the States that are Parties to the Convention.³²¹ The function of the Conference States Parties is to monitor the implementation of the Convention. The first meeting of this body took place on 5 April 2017 in Harare, Zimbabwe, where it adopted its first Plan of Action.³²² The African Union reported that one of the outcomes of this meeting were decisions and recommendations with respect to monitoring,

³¹⁶ See discussion on access to education in part 4 3 3 3.

³¹⁷ Kampala Convention art 11(4).

³¹⁸ See Kampala Convention art 9 (2)(c).

³¹⁹ Kampala Convention arts 9(2)(k), 11(2).

³²⁰ Kampala Convention art 14.

³²¹ Kampala Convention art 14(1).

³²² African Union "Plan of Action for the Implementation of the Kampala Convention adopted by the Conference of States Parties" (05-04-2017) Press Release No 051/2017 <https://au.int/sites/default/files/pressreleases/32341-pr-pr_051_-_kampala_convention.pdf> (accessed 02 August 2017); African Union "1st Meeting of the Conference of the States Parties to the Kampala Convention" (03-04-2017) <<https://au.int/en/newsevents/20170403/1st-meeting-conference-states-parties-kampala-convention>> (accessed 28-06-2018).

reporting and implementation of the Convention.³²³ States Parties are required to cooperate with the requests of the Conference of States Parties with respect to the protection of IDPs.³²⁴ States Parties are to include their efforts to the Convention in their reports with respect to the implementation of the ACHPR.³²⁵ Where applicable States Parties can also make use of the African Peer Review Mechanism, which is a specialised agency of the AU that supports the self-monitoring of participating States.³²⁶ While there are mechanisms in place to promote accountability they are largely self-regulating, and with the exception of the Conference of States Parties, the accountability mechanisms are borrowed from other parts of the AU. Therefore, monitoring and enforcement mechanisms of the Kampala Convention can be described as weak.³²⁷

There are three other examples of the inclusions of accountability in the Convention. First, IDPs have the right to request that States Parties provide them with protection and assistance without fear of reprisal. These request could be made at the domestic level and then brought at a regional level.³²⁸ Second, States Parties are obligated to ensure that the non-State actors comply with their obligations pursuant to the Convention.³²⁹ Third, the AU has the power pursuant to Article 4(h) of the Constitutive Act of the African Union 2000 to intervene in situations where there are war crimes, genocide and crimes against humanity.³³⁰ It should be noted that this power has never been used and it is unclear if the Member States of the AU are willing to exercise this

³²³ African Union “Plan of Action for the Implementation of the Kampala Convention adopted by the Conference of States Parties” (05-04-2017) Press Release No 051/2017 <https://au.int/sites/default/files/pressreleases/32341-pr-pr_051_-_kampala_convention.pdf> (accessed 02 August 2017).

³²⁴ Kampala Convention art 5(2).

³²⁵ Kampala Convention art 14(4); ACHPR art 62.

³²⁶ Statute of the African Peer Review Mechanism 2016 art 4.

³²⁷ FZ Giustiniani “New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa” (2010-2011) 39 *Denv J Intl’ L & Pol’y* 347-370 370.

³²⁸ For example, the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights if applicable or the Committee on the Rights and Welfare of the Child. See ACHPR art 56; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 9 June 1998, entered into force 25 June 2004) art 3; ACRWC arts 44-45. However, it may be challenging for IDPs, especially internally displaced children to take such action.

³²⁹ Kampala Convention art 3(1)(h),(i).

³³⁰ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 art 4(h); Kampala Convention art 8(1).

power.³³¹ Therefore, the other provisions that promote accountability in the Convention may be limited in their efficacy.

4 4 Summary of the critical analysis

Determining if a legal instrument takes a children's rights perspective is a multifaceted process. A review of the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention reveals that the four categories of risks, rights and needs of internally displaced children were addressed to different degrees, and the seven principles of the children's rights perspective were also incorporated to varying degrees in different ways by the three instruments.

4 4 1 Risks to physical security

The analysis of the legal instruments with respect to the category of physical security reveals that there is a strong protection focus. This focus is evidenced by the provisions in each of the instruments that provide for the prevention of internal displacement and the protection of internally displaced children from the various risks to their physical security. All the instruments include provisions that require States to prevent displacement, especially arbitrary displacement. The Kampala Convention provides comprehensive protection from arbitrary displacement that includes "displacement due to racial discrimination, armed conflict, violations of international humanitarian law, generalised violence and human rights and harmful practices".³³² Therefore, the analysis reveals that there is a clear intent to prevent internal displacement before it occurs.

The instruments also demonstrate a focus on protection by recognising internally displaced children as a vulnerable group of IDPs with special needs. What is noteworthy is that the Guiding Principles and the ICGLR IDP Protocol recognise all internally displaced children as a vulnerable group with special needs, but the Kampala Convention only recognises separated and unaccompanied children as a group of IDPs with special needs. While it is true that separated and unaccompanied children are a vulnerable group of IDPs, the position taken in this thesis is that the Kampala Convention missed an opportunity to acknowledge that all internally

³³¹ LC Bailey "Out of Africa: Toward Regional Solutions for Internal Displacement" (2014) 39 *Brooklyn Journal of International Law* 353-402 379-380.

³³² See part 4 3 3 1.

displaced children have special needs and to address the risks experienced by all internally displaced children.

Related to the issue of separated and unaccompanied children, the risk of family separation is addressed by all the instruments. The emphasis in the provisions is on expediting family reunification when children are involved. This emphasis contributes to the protection of the physical security of internally displaced children as a family environment is one aspect that contributes to their safety and security. The provision in the ICGLR IDP Protocol is unique as it provides for special protection of families of mixed ethnicities.³³³ This provision highlights the need to protect members of families of more than one ethnicity, including children, from discrimination that impacts on their reunification. Reducing unnecessary barriers to family reunification is beneficial and contributes to the protection of internally displaced children. In addition, the Kampala Convention requires “the establishment of specialized mechanisms, to trace and reunify families”.³³⁴ As previously discussed, the specialised mechanisms leave room for the application of the best interests of the child principle; however, the Convention does not specifically mention this principle.³³⁵

The instruments also include provisions that respond to risks to physical security such as abuse, exploitation and recruitment. The Guiding Principles and the Kampala Convention specifically prohibit the forms of abuse and exploitation such as sexual violence and exploitation, torture, forced marriage, trafficking, forced labour.³³⁶ The Kampala Convention demonstrates an awareness that children in Africa, including internally displaced children, are at risk of harmful practices by specifically including protection from harmful practices. Both instruments also acknowledge that harm can have mental or psychological aspects and provide for supports to address this form of trauma. Protecting internally displaced children from recruitment into hostilities is a risk that is addressed by both the Guiding Principles and the Kampala Convention. It is clear that child recruitment was an issue of concern for the drafters of the Kampala Convention as the provision prohibit both States Parties and armed groups from recruiting or allowing any internally displaced child to take part in hostilities.³³⁷ This

³³³ ICGLR IDP Protocol art 4(1)(h). See discussion in part 4 3 2 1.

³³⁴ Kampala Convention art 9(2)(h).

³³⁵ See discussion in part 4 3 3 1.

³³⁶ See discussions in part 4 3 1 1 and part 4 3 3 1.

³³⁷ See Kampala Convention arts 7(5)(e),(f), 9(1)(d). See discussion in part 4 3 3 1.

standard is consistent with the standard set out in the ACRWC.³³⁸ In contrast, the ICGLR IDP does not specifically provide IDPs with protection from abuse, exploitation and recruitment; however, the ICGLR Genocide Protocol, Democracy Protocol and Sexual Violence Protocol address these concerns.³³⁹ The Pact must be read as a whole to provide comprehensive protection for internally displaced children from abuse and exploitation.

Overall, the instruments include provisions that address the risks to physical security encountered by internally displaced children. The analysis of the provisions of the instruments with respect to the risks under the category of physical security demonstrates that the life, survival and development as a right as well as a principle in a children's rights perspective have been included in a comprehensive manner. The best interests of the child principles could have been included with respect to the issue of family reunification, but none of the instruments explicitly incorporated this principle.

4 4 2 Risks to satisfying basic needs

The analysis of the instruments also reveals that the instruments incorporate provisions that address the basic needs of internally displaced children. All the instruments require States to provide internally displaced children with food, water, shelter, clothing and access to health care. Also, in the event that States are unable to provide assistance, all of the instruments provide for unimpeded access to humanitarian aid. The ICGLR IDP Protocol requires Member States to create national databases and register IDPs. If the databases collect information about the number of internally displaced children, States can use this information to improve their response to this group of IDPs and the provision for their needs. In addition to providing for the basic needs of IDPs, the Kampala Convention requires States Parties to prevent starvation amongst IDPs which is noteworthy as malnutrition and starvation are risks that negatively affect internally displaced children.³⁴⁰ The clear response of the

³³⁸ ACRWC art 22.

³³⁹ See discussion in part 4 3 2 1.

³⁴⁰ Kampala Convention art 9(1)(b). See discussion Chapter 3 part 3 3 1 2. Also, food insecurity and malnutrition are acute risks encountered by internally displaced children in Nigeria, Sudan and South Sudan. See United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 paras 32, 35-36; OCHA 2017 *Humanitarian Needs Overview Sudan* (2016) OCHA "2017 Humanitarian Needs Overview: Sudan" (December 2016) 26.

instruments to the risk to the basic needs of internally displaced children demonstrates that the instruments incorporate the right to life, survival and development.

Non-discrimination is the other principle examined in the category of basic needs. The Guiding Principles and the Kampala Convention incorporate the principles of non-discrimination. The Guiding Principles includes age as a prohibited ground for discrimination and this inclusion supports the position that internally displaced children ought to be discriminated on based on their status as minors. The Kampala Convention prohibits discrimination on basis that a person is an IDP. This provision also ought not to prevent discrimination against internally displaced children due to their displacement. This provision could be useful to provide internally displaced children with other rights such as access to education, where living in a specified area or having an address may be a barrier to access to education.³⁴¹ Both the Guiding Principles and the Kampala Convention prohibit discrimination against IDPs regarding the provision of humanitarian aid. These provisions respond to the requirement to provide for the basic needs of IDPs. In contrast, the ICGLR IDP Protocol is silent on the issues of non-discrimination, but it is addressed in the ICGLR Genocide Protocol.

The instruments require for States to provide for the basic needs of internally displaced children. The provisions demonstrate that there is a strong focus on providing for the life, survival and development of internally displaced children. The principle of non-discrimination is incorporated in the Guiding Principles and the Kampala Convention that can be implemented in a way that addresses the particular risks, rights and needs of internally displaced children.

4 4 3 Risks to social, economic and cultural rights

In the category of social, economic and cultural rights, all the instruments provide internally displaced children with the right to an adequate standard of living. However, the way the risks, rights and needs and principles of non-discrimination, interdependence and indivisibility, and universality were incorporated in the instruments varied. Other than providing for internally displaced children with the right to an adequate standard of living, the ICGLR IDP Protocol does not respond to the rights and needs of internally displaced children in the category of social, economic and cultural rights. The other Protocols in the Pact such as the ICGLR Democracy Protocol

³⁴¹ See Chapter 3 part 3 3 1 3.

and the ICGLR Property Protocol fill the gap by including the right to education and principle of non-discrimination respectively.³⁴²

In contrast, the Guiding Principles and the Kampala Convention address the issue of property recovery, which is a right that is relevant for internally displaced children. What is most noteworthy is the way that both instruments provide internally displaced children with the right to education. The Guiding Principles provide internally displaced children with comprehensive rights to access education that are consistent with the standards set out in the CRC and the ACRWC.³⁴³ Principle 23 of the Guiding Principles requires that culture, religion and language are to be taken into consideration regarding the provision of education to internally displaced children.³⁴⁴ Also, special consideration is given to girl children regarding access to education. The Kampala Convention provides that the inability to provide documentation does not act as a barrier for internally displaced children to access education.³⁴⁵ Furthermore, the analysis reveals that both instruments incorporate the principles of non-discrimination, interdependence and indivisibility and universality with respect to their provisions on education.

4 4 4 Risks to civil and political rights

The instruments responded to some of the civil and political rights of internally displaced children. The Guiding Principles and the Kampala Convention provide internally displaced children with the right to have documents issued in their own names. These provisions respond to the risk of lost documents which is a risk of displacement as well as the need for children born in displacement to obtain a name and identity. The Kampala Convention includes special consideration to be given to separated and unaccompanied children in replacing documentation. The ICGLR IDP Protocol is silent on the issuance and replacement of identity documents. The Guiding Principles and the Kampala Convention also provide for access to the justice system in terms of the recovery of property. The ICGLR Property Protocol addresses the issue of property and does take into consideration the context of internal displacement. Access to justice is also addressed in the Pact by the ICGLR Democracy Protocol.

³⁴² See discussion in part 4 3 2 3.

³⁴³ See discussion in part 4 3 1 3.

³⁴⁴ Guiding Principles prin 23.

³⁴⁵ See discussion in part 4 3 3 3.

All the instruments incorporate the principle of participation in a general manner. IDPs are to be consulted and be given the opportunity to participate in matters relating to the protection and assistance. Special consideration is given to ensure the participation of women, but there is no special consideration to ensure or encourage the participation of internally displaced children in any of the instruments.³⁴⁶ Overall, the analysis reveals that the inclusion of the principle of participation is limited.

The principle of accountability also does not feature prominently in the instruments. All the instruments recognise that States have the primary obligation to provide for the protection and assistance of internally displaced children. This duty is not necessarily supported by accountability mechanisms. The Guiding Principles do not provide accountability mechanisms as it is a soft law instrument. The Pact, which is the overarching framework for the ICGLR IDP Protocol and the Kampala Convention include accountability mechanisms that are self-regulating and focus on the participation of States.³⁴⁷ IDPs are not given an avenue to hold States accountable for the obligations outlined in these instruments. The principle of accountability is acknowledged through the inclusion of rights and corresponding duties on the part of internally displaced children and States respectively; however, the mechanisms to implement this principle are limited to the participation of States and is not inclusive of internally displaced children.

4 4 5 Overall assessment

In summary, the Guiding Principles, ICGLR IDP Protocol and the Kampala Convention respond to the risks, rights and needs of internally displaced children in the four categories in a variety of ways. The analysis reveals that there is a clear focus on protection, which is appropriate in the context of situations of internal displacement.

Regarding the incorporation of the principles in children's rights perspective, the right to life, survival and development was clearly incorporated into all the instruments in a comprehensive manner. The inclusion of this principle again supports the position that these instruments focus on protection. The best interest of the child could be incorporated during the implementation of the provision of these instruments, but no

³⁴⁶ See Guiding Principles prins 22(1)(a), 28(2); ICGLR IDP Protocol art 4(1)(b); Kampala Convention arts 9(2)(k), 11(2).

³⁴⁷ See a brief discussion of the accountability mechanisms in part 3 3 2 4 and part 3 3 3 4. Accountability mechanisms will be addressed in greater detail in Chapter 5. See Chapter 5 4.

instrument, save the ICGLR Property Protocol mentioned this principle. The Guiding Principles and the Kampala Convention incorporated the principle of non-discrimination regarding the provision of basic needs. Also, both instruments included the principles of interdependence and indivisibility and universality through their provisions on education. The ICGLR IDP Protocol due to the manner in which the Pact was drafted does not incorporate the principles of non-discrimination, interdependence and indivisibility and universality itself, but these principles are incorporated in other Protocols in the Pact. All the instruments incorporate the participation of IDPs in a general manner, but there was no special consideration of internally displaced children. In terms of the principle of accountability, the Guiding Principles was limited in its incorporation of this principle and the Pact and the Kampala Convention incorporate accountability mechanisms that are overall more accessible to States.

Therefore, the analysis of the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention from a children's rights perspective demonstrates three points. First, the majority of the principles of a children's rights perspective have been incorporated into the instruments. Second, the instruments incorporate the principles of participation and accountability, principles that require the active participation of internally displaced children in a limited matter. Regarding participation, this principle is incorporated in a general manner and does not specifically acknowledge that internally displaced children require special consideration as is the case for other groups.³⁴⁸ In terms of accountability, many of the accountability mechanisms are only accessible to States; therefore, making it challenging for internally displaced children to engage with the principle of accountability.³⁴⁹ Third, the analysis of the law on internal displacement from a children's rights perspective demonstrates that overall these instruments on the law do not consistently take a children's rights perspective. This conclusion is disappointing given that internally displaced children comprise the majority of IDPs and all of the instruments were adopted after the CRC and the ACRWC.

³⁴⁸ For example, women. See Guiding Principles prins 7(3)(d), 18(3); ICGLR IDP Protocol art 5(6). The Kampala Convention provides for the rights of participation in general terms for all IDPs. See Kampala Convention arts 9(2)(k), 11(2).

³⁴⁹ This topic will be addressed in greater detail in Chapter 5. See Chapter 5 part 5 4.

Furthermore, the long-term and protracted nature of many situations of internal displacement warrants that the law on internal displacement takes a children's rights perspective. Outside of the emergency phase of displacement, it is important to conceptualise children as bearers of rights as children do face the possibility of living in situations of internal displacement for the duration of their childhoods.³⁵⁰ Situations of internal displacement require States to take the special needs of internally displaced children into consideration, but it does not, pursuant to the principle of universality, permit States neglect the specific rights that they have as children.

The context of internal displacement warrants a focus on prevention, protection and provision. However, there are instances and phases within displacement where the participation of children is appropriate. Participation of internally displaced children is especially necessary when they are separated or unaccompanied and do not have the support of parents and guardians to provide for their rights and needs. Also, the meaningful participation of internally displaced children allows the decisions of States to benefit from the input of the group these decisions are meant to assist. The evolving capacities of internally displaced children are always relevant as the capacities of internally displaced children is one factor that determines the amount and type of protection and assistance that they require.

Finally, conceptualising internally displaced children as bearers of rights is imperative in terms of the principle of accountability and State compliance with their obligations to internally displaced children. The legal standards set out in children's rights law and the law internal displacement will not adequately respond to the risks, rights and needs of internally displaced children unless they are implemented. Conceptualising children as bearers of rights gives them standing to require that States as duty-bearers comply with their obligations and accountability denotes that States are responsible to respect, protect and fulfil their obligations. The principle of accountability will be discussed in depth in the next chapter.

³⁵⁰ See discussion in Chapter 3 part 3 2 3 2.

CHAPTER 5: AN ANALYSIS OF THE PRINCIPLE OF ACCOUNTABILITY AND ACCOUNTABILITY MECHANISMS

5 1 Introduction

The focus of this chapter will be to analyse the scope of States' accountability to internally displaced children by examining the principles and mechanisms which encourage States to comply with their obligations to internally displaced children. A children's rights perspective will be used to synthesise theoretical knowledge with practical application in order to respond to challenges with respect to State compliance. To address the theoretical and practical aspects of accountability compliance and implementation, the discussion will be divided into five parts.

The first part of the discussion will examine the principle of accountability. In addition to being one of the principles of a children's rights perspective, accountability functions as a tool to encourage States to comply with their obligations to internally displaced children. Therefore, this discussion will be devoted to examining the many dimensions of the principle of accountability.

The second part of the discussion will continue to focus on the principle of accountability as it specifically relates to the problem of internal displacement by examining the concept of sovereignty as responsibility. This concept requires that in order for a State to be considered to be sovereign, it must fulfil its obligations to its inhabitants and in the event that a State is unwilling or unable to do so, the international community is required to fulfil these obligations.¹ As a key element in the law on internal displacement, sovereignty as responsibility redefines the notion of sovereignty to provide a basis for holding States accountable for their obligations to internally displaced children.²

The third part of the discussion will focus on various mechanisms that are used to facilitate the accountability of States. The accountability mechanisms that will be included in the discussion are diplomatic and political, reporting, monitoring and

¹ See FM Deng "Frontier of Sovereignty A Framework of Protection, Assistance and Development for the Internally Displaced" (1995) 8 *Leiden Journal of International Law* 249-286; FM Deng "From 'Sovereignty as Responsibility' to the Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353-370.

² R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7, 277; R Cohen "Reconciling R2P with IDP Protection" (2010) 2 *Global Responsibility to Protect* 15-37 20.

evaluation bodies, investigation, technical assistance, expert reporting and complaints procedures.³ The effectiveness of the mechanisms incorporated in the legal instruments analysed in this thesis will be evaluated.

The fourth part of the discussion will consider the role of non-governmental organisations (“NGOs”) in the accountability process.⁴ NGOs can encourage State compliance by way of fact-finding, technical assistance, criticism and advocacy as well as being “norm entrepreneurs”.⁵ The effectiveness of NGOs acting in this capacity will be evaluated with a specific focus on the support provided to internally displaced children.

The fifth and final part of the discussion will synthesise the theoretical with the practical. The 12 steps outlined by the Brookings Institution and the University of Bern Project on Internal Displacement will be used as a basis for the discussion, as it contains practical steps that States can follow in order to comply with their obligations.⁶ The aim of this exercise is to synthesise the theoretical models and concepts with activities, which facilitate implementation in a manner that employs a children’s rights perspective. The results of integrating the theoretical with practical steps from a children’s rights perspective will identify the necessary elements of a way forward to encourage States to comply with their obligations to internally displaced children.

The expected outcome of the discussion in this chapter will entail an evaluation of theoretical and practical aspects of State accountability and compliance from a children’s rights perspective in a context of internally displaced children. This

³ See G Van Bueren *The International Law on the Rights of the Child* (1998) 378. See also S Parmentier “The Significant of Mechanisms to Monitor Human Right at the International Level” in A Weyts (ed) *Understanding Children’s Rights: Collected Papers Presented at the Seventh International Interdisciplinary Course on Children’s Rights, Ghent University (Belgium) November-December 2004* (2005) 235-268 244-262.

⁴ See for example, D Weissbrodt “The Contribution of International Nongovernmental Organizations to the Protection of Human Rights” in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438.

⁵ See D Weissbrodt “The Contribution of International Nongovernmental Organizations to the Protection of Human Rights” in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438; S Parmentier “The Significant of Mechanisms to Monitor Human Right at the International Level” in A Weyts (ed) *Understanding Children’s Rights: Collected Papers Presented at the Seventh International Interdisciplinary Course on Children’s Rights, Ghent University (Belgium) November-December 2004* (2005) 235-268 241-242. Norm entrepreneurs are actors identified in the transnational legal process that support creation and interpretation of norms. See HH Koh “How is International Human Rights Law Enforced?” (1998-1999) 74 *Ind L J* 1397-1417 1409-1410.

⁶ See The Brookings Institution-University of Bern Project on Internal Displacement “Addressing Internal Displacement: A Framework for National Responsibility” (April 2005) 5-6.

information will be used to ascertain the scope of State accountability and identify the most effective means to hold States accountable for their obligations to internally displaced children.

5 2 Accountability

5 2 1 Definition of accountability

A simple way to understand “accountability is [as] a tool to control power”.⁷ With respect to human rights, accountability functions to “[put] a check on power”.⁸ Therefore, accountability exists where the party that exercises power must justify the manner in which it uses its power. Within the context of this thesis, accountability, specifically State accountability to internally displaced children, is described as the process by which States fulfil their legal obligations to internally displaced children and are answerable for their actions or inactions regarding these obligations. States as duty-bearers are answerable to internally displaced children and their advocates as well as to the international community. Accountability is also a tool to improve State compliance with their obligations to internally displaced children.⁹ This conceptualisation of the principle of accountability adopted in this thesis is supported by the various characteristics of this principle, the different classifications of accountability, the legal principle of *pacta sunt servanda* and the International Law Commission’s (“ILC”) Articles on State Responsibility (“ASR”).¹⁰ These four topics will be discussed in turn.

5 2 2 Characteristics of accountability

Accountability is a principle that at its core is relational.¹¹ There is a party that must discharge a duty and there is a party to which a duty is owed. In the context of this thesis, these parties are the duty-bearers and bearers of rights. Others writing about

⁷ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law Procedures and Principles* (2016) 42.

⁸ 13.

⁹ Vandenbogaerde explains that accountability can function in an *ex ante* sense whereby it can be used a tool for learning and improvement. See A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law Procedures and Principles* (2016) 28.

¹⁰ Also referred to as the Responsibility of States for Internationally Wrongful Acts (12 December 2001) UNGA Res 56/83 annex.

¹¹ RO Keohane “The Concept of Accountability in World Politics and the Use of Force” (2003) 24 *Michigan Journal of International Law* 1122-1142 1124. See also RW Grant & RO Keohane “Accountability and Abuses of Power in World Politics” (2005) 99 *American Political Science Review* 29-43 41 29; M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 450.

accountability, in general, describe the parties in the relationship as power wielders and accountability holders.¹²

Specifically looking at children's rights, the tripartite relationship between parents, the State and the international community must nuance the conceptualisation of the accountability relationship.¹³ Not only can parents, States and the international community be classified as duty-bearers, there may be instances where these actors must support children as bearers of rights in the accountability process.¹⁴ For instance, when a parent takes an action which violates a child's right, the State has a role in sanctioning the parent. This need for support may also occur in the context of internal displacement. When a State fails to discharge its obligations with respect to internally displaced children, the international community, as well as other actors, may need to support this group of children in order to hold the State accountable.¹⁵ When other actors support the bearers of rights by taking their place in the accountability process, Rubenstein describes this as "surrogate accountability".¹⁶ The principle of accountability, therefore, engages the relationship between duty-bearers and bearers of rights.

The principle of accountability as previously discussed in the context of a children's rights perspective also incorporates three duties.¹⁷ These duties are the duty to respect, the duty to protect and the duty to fulfil and will be referred to as the three duties of accountability.¹⁸ States must respect the obligations they have to internally displaced children as binding legal obligations and respect the status of internally

¹² RW Grant & RO Keohane "Accountability and Abuses of Power in World Politics" (2005) 99 *American Political Science Review* 29-43 41 29-30; J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 618.

¹³ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283.

¹⁴ As duty-bearers, these actors may need to cooperate in order to respond to the rights and needs of internally displaced children. See also J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 284-5.

¹⁵ This is an example of where sovereignty as responsibility may be triggered. This concept will be discussed in greater detail in part 5 3 2. The role of other actors, specifically NGOs, in the accountability process will be discussed in part 5 5.

¹⁶ J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 623-625. See also part 5 5 2.

¹⁷ See discussion in Chapter 2 part 2 4 2 1 a. Also, the ACERWC have the discussed the standard of due diligence on the part of States which requires States to prevent, investigate, prosecute and punish violations of human rights. See *Minority Rights Group International and Others v Mauritania* Communication no 007/Com/003/2015 (ACERWC 15 December 2017) paras 52-54, 58.

¹⁸ J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283. See also Chapter 2 part 2 4 2 1 a.

displaced children as bearers of rights; protect internally displaced children during all phases of displacement; and, fulfil their obligations to internally displaced children by providing for their rights and needs. In order for States to be accountable for their obligations to internally displaced children, they must satisfy all three of these duties. Satisfying these duties underscores the importance of implementation and compliance and links these concepts to the principle of accountability.

Therefore, accountability, compliance, and implementation are all inter-related. Compliance for the purposes of this discussion can be described as fulfilling obligations. It relates to accountability in that it can also be described as satisfying the three duties of accountability. For instance, States can be said to be in compliance with their obligations to internally displaced children if they respect internally displaced children as bearers of rights, endeavour to protect them from internal displacement and its adverse impacts and fulfil their specific obligations to internally displaced children pursuant to children's rights law and the law on internal displacement. Compliance in part may also be defined in terms of implementation as States that implement their obligations to internally displaced children can be said to be complying with their obligations. Implementation also demonstrates links to accountability and compliance and can be described as the operationalisation of the obligations of States. Specific processes are put in place to fulfil and comply with obligations. In terms of the three duties of accountability, implementation provides an opportunity to respect internally displaced children as bearers of rights, take concrete steps to protect them and fulfil the States' legal obligations. With regard to compliance, implementation is the evidence of a State's compliance with its obligations. The three concepts of accountability, compliance and implementation support the premise that States are required to act in accordance with their obligations to internally displaced children.¹⁹

¹⁹ However, these concepts do not explain how and why States choose to act in accordance with their obligations. The question of how States respond to their obligations may be addressed by the mechanisms that encourage State compliance. See part 5.4. The question of why States comply with their obligations is in part explained by theoretical models of compliance. While it is acknowledged that there are several theoretical models with regard to State compliance, a thorough discussion and their inclusions of these models goes beyond the scope of this study. For further reading on theoretical models of compliance please see the following: A Chayes & A Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) as cited in Koh HH "Transnational Legal Process" (1996) 75 *Neb L Rev* 181-207; HH Koh "Transnational Legal Process" (1996) 75 *Neb L Rev* 181-207; Franck TM *Fairness in International Law and Institutions* (1995); HH Koh "Why Do Nations Obey International Law?" (1996-1997) 106 *Yale L J* 2599-2659; HH Koh "How is International Human Rights Law Enforced?" (1998-1999) 74 *Ind L J* 1397-1417; O Hathaway "The Cost of Commitment" (2003) 55 *Stan L Rev* 1821-1862; R

Another way to conceptualise the principle of accountability is in terms of three elements. The three elements of accountability are standards, information and sanctions.²⁰ Vandenbogaerde states that these three elements must be present in order to “be considered a genuine accountability process”.²¹ Each of these elements will be discussed in relation to the duty-bearer and bearer of rights relationship between States and internally displaced children.

Standards as an element of the accountability process outline the duties or provide the norms or obligations with which actors must comply.²² In the context of this thesis, the standards are the legal obligations that States have regarding the rights and needs of internally displaced children.²³ Rubenstein notes that standards not only must be accepted by the duty-bearers, but bearers of rights must be in support of the standards.²⁴ States, by becoming parties to the treaties, demonstrate that they have freely consented to be bound by these obligations. One concern regarding internally displaced children accepting these standards is that they may not be fully aware of the State’s obligations. This concern highlights the necessity of supporting internally displaced children in the accountability process by making them aware of their rights. Another challenge with standards is that it presupposes that the duty-bearer has the power or capacity to discharge its obligations. Vandenbogaerde states that human

Goodman & D Jinks “How to Influence States: Socialization and International Human Rights Law” (2004) 54 *Duke L J* 621-704; O Hathaway “Do Human Rights Treaties Make a Difference?” (2002) 111 *Yale L J* 1935-2042; AM Slaughter *A New World Order* (2004); JL Goldsmith & EA Posner *The Limits of International Law* (2005); HH Koh “Internalization through Socialization” (2005) 54 *Duke L J* 975-982; EA Posner “International Law and the Disaggregated State” (2005) 32 *Fla S U L Rev* 797-842; A Geisinger & MA Stein “A Theory of Expressive International Law” (2007) 60 *Vand L Rev* 75, 77-132; A Geisinger & MA Stein “Rational Choice, Reputation, and Human Rights Treaties” (2008) 106 *Mich L Rev* 1129-1142; AT Guzman *How International Law Works: A Rational Choice Theory* (2008).

²⁰ RW Grant & RO Keohane “Accountability and Abuses of Power in World Politics” (2005) 99 *American Political Science Review* 29-43 41; J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 618; A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 26. Bovens also outlines three stages of accountability, namely, providing information about conduct, the opportunity to question the conduction and the potential to face consequences based if the conduct does not meet the standard. See A Schedler “Conceptualizing Accountability” in A Schedler, L Diamond & MF Plattner (eds) *The Self-Restraining State Power and Accountability in New Democracies* (1999) 13-28 21; M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 451-452.

²¹ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 43.

²² J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 618-619; A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 27.

²³ See the discussion in Chapter 3 part 3 3 and Chapter 4 part 4 3.

²⁴ J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 619.

rights law conceptualises the State as being capable of implementing its obligations.²⁵ However, there may be circumstances such as conflicts, disaster or economic factors which diminish a State's capacity to discharge its obligations.²⁶ These challenges highlight the importance of the tripartite relationship, the need for international co-operation, burden and resource sharing as well as complementary protection, especially in the context of internal displacement.²⁷ What these concepts have in common is that the lack of capacity or resources is not a justification for States to fail to discharge their duties, rather they must co-operate with other actors in order meet the required standards.

The information element in the accountability process enables the duty-bearer to outline how it has discharged its duties. Indeed, much of the information may come from the duty-bearer.²⁸ In the context of this thesis, information, for example, could be obtained from a State reporting on its efforts implement the Kampala Convention. The information may come from other sources, but the information enables the bearers of rights and the actors supporting them to determine if the duty-bearer has complied with its obligations.²⁹

Finally, sanctions are a crucial element of the accountability process as they are a distinguishing feature.³⁰ For instance, responsibility can be distinguished from accountability as it does not include sanctions for non-performance of a duty.³¹

²⁵ A Vandenberghe *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 12.

²⁶ See *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) paras 68-69; *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) paras 36-38; *Case of Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008) paras 128-137.

²⁷ For a discussion of complementary protection see C Phuong "Internally Displaced Persons and Refugees: Conceptual Difference and Similarities" (2000) 18 *Neth Q Hum Rts* 215-229 224; C Phuong *The International Protection of Internally Displaced Persons* (2004) 25.

²⁸ J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 619; A Vandenberghe *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 27.

²⁹ Reporting and the other mechanisms that support accountability will be discussed in part 5 4.

³⁰ RO Keohane "The Concept of Accountability in World Politics and the Use of Force" (2003) 24 *Michigan Journal of International Law* 1122-1142 1124; J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 619; A Vandenberghe *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 43.

³¹ A Vandenberghe *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 37-38. See also A Schedler "Conceptualizing Accountability" in A Schedler, L Diamond & MF Plattner (eds) *The Self-Restraining State Power and Accountability in New Democracies* (1999) 13-28 19.

Sanctions generally have a negative connotation and are thought of as punishment.³² Bovens advocates for referring to this element of the accountability process as the potential of facing consequences.³³ Sanctions can be considered not merely as a means of punishment, but as a means to change behaviour.³⁴ Accountability applied *ex post* can sanction actions that are contrary to the standards in an effort to encourage the duty-bearers to comply with their obligations going forward. Accountability can function *ex ante* to anticipate and prevent non-compliance.³⁵ Also, sanctions can be used as a tool for learning and improvement; therefore, functioning *ex ante* be “positive sanctions”.³⁶ Regardless of the different ways to conceptualise sanctions as an element of accountability, one major challenge is the ability of internally displaced children, as bearers of rights, to sanction States as duty bearers. Complaints procedures are one method of sanctioning accessible to internally displaced children at the international level.³⁷ However, internally displaced children will often require support to access such an accountability mechanism.³⁸

The three elements of accountability create a process, which engages the relationship between duty-bearers and bearers of rights.³⁹ The elements demonstrate that accountability requires duty-bearers to answer for their failure to discharge their

³² RO Keohane “The Concept of Accountability in World Politics and the Use of Force” (2003) 24 *Michigan Journal of International Law* 1122-1142 1124; J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 619; A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 27.

³³ M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447- 468 451-452.

³⁴ For example, Rubenstein notes that some types of accountability increase rule following. See J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 620.

³⁵ Both Bovens and Vandenbogaerde highlight that accountability can function both *ex ante* and *ex post*. See M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 453-454; A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 28.

³⁶ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 28.

³⁷ As previously discussed internally displaced children may require support access these mechanisms, but they are a tool that can be used to sanction States such processes are available. See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 10; ACRWC art 44.

³⁸ For children complaint procedures may present many obstacles. See R Smith “The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality” (2013) 21 *Int'l J Child Rts* 305-322 306. Complaints procedures and other mechanisms that hold States accountable to internally displaced children will be discussed in greater detail in part 5 4 7.

³⁹ Bovens makes reference to accountability forums. See M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468.

duties as well as anticipate and prevent breaches of their obligations. When examining the elements of the accountability process from the perspective of internally displaced children, it reveals that this process requires other actors to support internally displaced children. Being a bearer of rights alone is insufficient to hold a duty-bearer accountable. Therefore, this discussion of the three elements of accountability highlights the functions and the challenges of accountability when applied to situations involving internally displaced children. Understanding the limits of accountability in both a positive and negative sense will be useful in assessing to what extent States can be held accountable for their obligations to internally displaced children.

5 2 3 Classifications of accountability

In addition to its defining elements, accountability can also be classified in a variety of ways and subdivided into several different types. Accountability may be classified by its scope. Bovens, for example, differentiates between broad or narrow accountability.⁴⁰ Broad accountability incorporates several concepts such as transparency, responsiveness and good governance, but actually differs depending on the specific actors and context.⁴¹ Narrow accountability is described as the “concrete practices of account giving. [...] ‘the obligation to explain and justify conduct’”.⁴² Based on this description, narrow accountability is a process that has the specific aim of requiring a justification for a State’s action or inaction.

The relational quality of accountability has already been established, but vertical and horizontal accountability are defined in terms of the nature of the relationship between the parties. Vertical accountability is present when there is an unequal power dynamic or a hierarchical relationship between the parties.⁴³ An example of such a relationship is the relationship between States and internally displaced children. Vertical accountability can be further subdivided into top-down and bottom-up accountability. Top-down accountability occurs when the actor with the power holds those under its authority accountable for their actions.⁴⁴ An example of this type of accountability is an employer holding an employee accountable for her actions.

⁴⁰ M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 449-450.

⁴¹ 449-450.

⁴² 450.

⁴³ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 30-31.

⁴⁴ 30.

Bottom-up accountability occurs when the actors that are less powerful are given the right to require that the actor with the greater power held accountable for its actions.⁴⁵ This type of accountability is the type of accountability relationship which occurs between internally displaced children and the State.⁴⁶ Horizontal accountability, in contrast, occurs when the actors in the accountability relationship are peers.⁴⁷ A State holding another State accountable for its actions is an example of horizontal accountability.⁴⁸

Accountability can also be classified in terms of the subject matter to which it is applied. Rubenstein outlines various types of accountability including electoral accountability, market-based accountability, civil-society-based accountability, administrative accountability and legal accountability.⁴⁹ She refers to the different types of accountability as “examples of accountability mechanisms”.⁵⁰ This terminology indicates that these different types of accountability describe the manner in which accountability functions in a particular forum. Bovens also outlines a number of types of accountability based on the forum where the process of accountability operates such as political accountability, legal accountability, administrative accountability, professional accountability, and social accountability.⁵¹

Legal accountability is the one the type of accountability identified by these writers that is relevant to this discussion as States are legally accountable for their obligations to internally displaced children. Bovens describes legal accountability as “the most

⁴⁵ 31.

⁴⁶ Vandenbergaeerde states that bottom-up accountability is the type of accountability present in the human rights system in general. See A Vandenbergaeerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 32.

⁴⁷ 30, 33.

⁴⁸ Another type of accountability discussed by Bovens is diagonal accountability, but this type of accountability relates to interactions where actors do not have a direct hierarchical relationship. This type of accountability is of limited relevant to this study. For further reading on this type of accountability see M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 460; A Vandenbergaeerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 33.

⁴⁹ J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 617.

⁵⁰ 617. Keohane also outlines a number of different types of accountability. See RO Keohane “The Concept of Accountability in World Politics and the Use of Force” (2003) 24 *Michigan Journal of International Law* 1122-1142 1131-1135.

⁵¹ There is some overlap between the types of accountability outlined by Rubenstein, Bovens and others. See M Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447-468 455-457 RO Keohane “The Concept of Accountability in World Politics and the Use of Force” (2003) 24 *Michigan Journal of International Law* 1122-1142 1131-1135; J Rubenstein “Accountability in an Unequal World” (2007) 69 *The Journal of Politics* 616-632 617.

unambiguous type of accountability, as the legal scrutiny will be based on detailed legal standards".⁵² The three elements of the accountability process are clearly identifiable in legal accountability. The standards that specifically relate to internally displaced children are the legal obligations that States have to internally displaced children.⁵³ The other elements of accountability are clearly identified in legal accountability. Information is provided with both by reporting requirements and investigative powers outlined in the provisions of treaties.⁵⁴ Also, the process of determining if a State has failed to comply with its obligations as well as sanctions for non-compliance may also be outlined in the provisions of the legal instruments.⁵⁵ The benefit of legal accountability is that the standards not only outline the obligations of the duty-bearers but also outline the requirements and processes for providing information and for instituting sanctions.

5 2 4 *Pacta sunt servanda*

Accountability, specifically legal accountability, is also supported by *pacta sunt servanda*, a key principle in international law. This principle provides the legal basis for State accountability in both public and private law. Article 26 of the Vienna Convention on the Law of Treaties 1969 states that States are required to perform the obligations that they have freely consented to in good faith.⁵⁶ The Vienna Convention on the Law of Treaties 1969 governs treaties, which it defines as written agreements concluded between States.⁵⁷ Article 26 is therefore applicable to the obligations that States have to internally displaced children in the CRC, ACRWC, ICGLR Protocols and the Kampala Convention.

⁵² M Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447-468 456.

⁵³ These legal standards have been discussed in the preceding chapters. See Chapter 3 part 3 3, Chapter 4 part 4 3.

⁵⁴ For example, the legal instruments discussed in this thesis require States Parties to report on their progress with regard to the implementation of their obligations. See CRC arts 44, 45; ACRWC arts 43, 45; Pact arts 24(4), 25(a); Kampala Convention art 14(4).

⁵⁵ Sanctions may also be implemented by the committees established to monitoring and evaluate the implementation of the legal instrument, international or regional courts or decision-making bodies. See CRC art 44(4); Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 10; ACRWC art 44; Pact arts 28, 29; Kampala Convention art 22.

⁵⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26.

⁵⁷ Art 1(a).

The principle of good faith qualifies States' performance of their obligations. Writing with respect to good faith and international obligations, Reinhold aptly states that "good faith acts to give legal value to the expectations that States have in the actions of other States".⁵⁸ In terms of treaty performance, good faith requires States to have regard for "the object and intention of the parties".⁵⁹ Determining if an obligation is performed in good faith is also "context-dependent".⁶⁰ While difficult to provide an exact definition for, one function of the principle of good faith is to assess the process by which States discharge their obligations.⁶¹ Overall, *pacta sunt servanda* stipulates the binding nature of obligations and good faith provides a benchmark to adjudicate a State's performance. Therefore, the principles of *pacta sunt servanda* and good faith applied to the principle of State accountability provide authority for requiring that States comply with their obligations as well as specifies the manner in which they discharge their obligations to internally displaced children.

5 2 5 International Law Commission's Articles on State Responsibility

A further codification of State accountability in international law is the ASR. Article 1 clearly states that a State can be held responsible for an internationally wrongful act.⁶² An international wrongful act is comprised of two parts, specifically, an action that is attributable to the State pursuant to international law and is a breach of the State's international obligation.⁶³ Furthermore, it is international law rather than the internal law which determines if an act is wrongful.⁶⁴ The ASR do not specifically require the international obligation to be prescribed by a treaty.⁶⁵ The ASR are applicable across all areas of international law. Therefore, the ASR provide the standards element of the accountability process. The information step of the process in the ASR is triggered by a State making a claim that a wrongful act has occurred.⁶⁶

⁵⁸ S Reinhold "Good Faith in International Law" (2013) 2 *UCL Journal of Law and Jurisprudence* <<http://discovery.ucl.ac.uk/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf>> (accessed 19-01-2018) 40-63 63.

⁵⁹ 61. See also United Nations "Law of Treaties" *Yearbook of the International Law Commission 1964 Volume II* (1965) A/CN.4/SER.A/1964/Add.1 5-66 7-8.

⁶⁰ Reinhold "Good Faith in International Law" (2013) 2 *UCL Journal of Law and Jurisprudence* <<http://discovery.ucl.ac.uk/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf>> (accessed 19-01-2018) 40-63 61.

⁶¹ 63.

⁶² ASR art 1.

⁶³ ASR art 2.

⁶⁴ ASR art 3.

⁶⁵ ASR art 12; J Crawford *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (2002) 126-128.

⁶⁶ ASR arts 42, 43.

A claim may be brought by the State injured or by a State on behalf of a group of States if the obligation is considered to be owed to the international community.⁶⁷ Crawford in his commentary of the ASR cites the *Case Concerning the Barcelona Traction, Light and Power Company, Limited*⁶⁸ as authority for interpreting that Article 48 of the ASR allows for a State to bring a claim on behalf of the international community.⁶⁹ The International Court of Justice commenting on the obligations are owed to the international community stated:

“Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”⁷⁰

The Court outlined that the obligations to the international community include violations of human rights. Therefore, any State may bring a claim for an internationally wrongful act on behalf of the international community if the wrongful act includes violations of human rights. The ASR do not expressly outline that the State alleged to have committed an internationally wrongful act must provide information, but as a matter of due process, the State would have an opportunity to provide information regarding its conduct. In addition, a State that has committed an internationally wrongful act is still required to fulfil the obligation it has violated.⁷¹ The ASR also provide clear options for sanctions in form of reparations. The reparations include “restitution, compensation and satisfaction”.⁷² The ASR provide a broad codification of State of international responsibility, which contains the elements of accountability, in particular, legal accountability. The ASR is relevant to this study as the second part of the research question focuses on the accountability of States. Also, as members of the international community, States have a role to play in holding others States accountable for violations of human rights.⁷³

⁶⁷ ASR arts 42, 48. See also J Crawford *The International Law Commission’s Articles on State Responsibility Introduction, Text and Commentaries* (2002) 255-260, 276-280.

⁶⁸ (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3.

⁶⁹ J Crawford *The International Law Commission’s Articles on State Responsibility Introduction, Text and Commentaries* (2002) 278 para 9

⁷⁰ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 para 34.

⁷¹ ASR art 29.

⁷² ASR arts 34, 35, 36, 37.

⁷³ The role of the international community will be highlighted in the discussion on the concept of sovereignty as responsibility. See part 5 3 1.

The ASR focus solely on the responsibility of States in international law; however, there are limitations to approaching legal accountability in the international context focusing solely on States. Vandenbogaerde outlines three limitations of this perspective. First, he argues this approach is limited by requiring a formal determination that a State committed an internationally wrongful act and the ordering of sanctions.⁷⁴ It is true that such a process is time-consuming. Also, not every situation may require sanctions.⁷⁵ In such instances, it may be helpful to step away from such a rigid adherence to legal accountability and look to other types of accountability. For instance, public reputational accountability uses the media and other actors to hold an actor accountable for its actions.⁷⁶ Keohane states “reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms”.⁷⁷ The importance of reputation may provide the impetus for compliance much faster than an adjudication process.⁷⁸ Second, Vandenbogaerde states that in the current international context, accountability lies with multiple actors.⁷⁹ Nollkaemper and others have written on shared responsibility, which examines instances where there are multiple States and actors responsible for a particular violation of international law.⁸⁰ Children’s rights law and the law on internal displacement also contemplate that there may be multiple actors that have obligations to internally displaced children.⁸¹ Third, Vandenbogaerde states that allowing States to be the primary actors to hold others accountable is flawed as States are poor accountability holders due to political and economic concerns.⁸² Vandenbogaerde’s

⁷⁴ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 39.

⁷⁵ 39.

⁷⁶ RO Keohane “The Concept of Accountability in World Politics and the Use of Force” (2003) 24 *Michigan Journal of International Law* 1122-1142 1133-1134.

⁷⁷ 1134.

⁷⁸ The power of reputation and compliance is also supported by Guzman’s rational choice theory. See AT Guzman *How International Law Works: A Rational Choice Theory* (2008).

⁷⁹ A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 40.

⁸⁰ See A Nollkaemper & D Jacobs “Shared Responsibility in International Law: A Conceptual Framework” (2013) 34 *Mich J Int’l L* 359-438; A Nollkaemper “Power and Responsibility” SHARES Research Paper 42 (2014), *ACIL* 2014-22.

⁸¹ For example, the tripartite relationship between parent, the State and the international community. See discussion in part 5 2 1; J Tobin “Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children’s Health Needs” (2006) 14 *Int’l J Child Rts* 275-306 283. Also, the Kampala Convention prescribes duties to non-State actors such as armed groups. See Kampala Convention art 7. However, the scope of the research problem in this thesis has been limited to States. See Chapter 1 part 1 7.

⁸² A Vandenbogaerde *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (2016) 41.

concern is valid. One solution is the internalisation of norms.⁸³ In this way, the accountability process is self-imposed or internalised. Also, in children's rights law, there are some accountability mechanisms, which allow individuals and non-State actors to bring complaints against States.⁸⁴

5 2 6 Summary of discussion of the principle of accountability

Understanding accountability in terms of its characteristics, classifications, the principle of *pacta sunt servanda* and the ASR, demonstrates that it is an important tool as it provides a legal basis for State compliance and it provides a process whereby States are answerable for their obligations to internally displaced children. The type of accountability utilised in this thesis can be described as narrow accountability that is both vertical and bottom-up when applied to the relationship between internally displaced children and States, and horizontal when applied to the relationship between States and the international community. It is also best described as legal accountability. Building on the discussion on the principle of accountability, the concept of sovereignty as responsibility, which applies accountability in the context of internal displacement will be discussed next.

5 3 States, sovereignty and sovereignty as responsibility

The concept of sovereignty as responsibility is a foundational principle of the Guiding Principles as it provides a theoretical basis to hold States accountable for their treatment of IDPs.⁸⁵ Ordinarily, any challenges to the actions of States within their borders would be protected by sovereignty. The concept of sovereignty as responsibility posits that the focus of sovereignty is to be on States upholding their

⁸³ Koh HH "How is International Human Rights Law Enforced?" (1998-1999) 74 *Ind L J* 1397-1417.

⁸⁴ For example, the complaints procedures provided by the CRC and ACRWC. See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 10; ACRWC art 44. Also, in Africa, if the complaint falls within the scope of the human rights regime, individuals and non-State actors are permitted to bring complaints to the African Commission on Human and Peoples' Rights; the African Court of Justice and the African court of Justice and Human Rights (when the Protocol comes into force). See ACHRP art 55; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 June 2004) art 5(3); Protocol on the Statute of the African Court of Justice and Human Rights Annex Statute of the African Court of Justice and Human Rights (adopted 1 July 2008); African Union "Protocol on the Statute of the African Court of Justice and Human Rights Status List" <https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf> (accessed 30-01-2018).

⁸⁵ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7, 277; R Cohen "Reconciling R2P with IDP Protection" (2010) 2 *Global Responsibility to Protect* 15-37 20.

obligations to their populations.⁸⁶ In other words, sovereignty is no longer a means to protect States from outside interference; it is a status that is retained by fulfilling prescribed responsibilities.

States are defined as per the Montevideo Convention on the Rights and Duties of States 1933, as entities with:

“(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states”.⁸⁷

Ideally, a State should also have effective control over its territory.⁸⁸ The basis for the effective control requirement is that States can be held responsible for actions that occur within their territory as well as territory that is under their effective control.⁸⁹ In times of conflict, a State may not have effective control over its entire territory, but overall, a State must be able to exercise a degree of control or power over its territory and its inhabitants.⁹⁰ A State’s power or control lends support to its sovereignty. In relation to the principle of accountability, a State’s power makes it a duty-bearer that is answerable for its exercise of power. Also, States, for the purposes of this thesis, are referred to as unitary actors; however, the literature with respect to the disaggregated State is acknowledged.⁹¹ The rationale for this conceptualisation of States is that in international law, States as duty-bearers are a single entity and the obligations are not divided between the various branches of a State’s government.⁹²

Sovereignty can be understood as the ultimate power in a particular territory.⁹³ There are a number of ways to conceptualise sovereignty. Glanville states that

⁸⁶ R Cohen & FM Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 7, 275; FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation” in Levitt JI (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 93.

⁸⁷ Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1; HLA Hart *The Concept of Law* (1961) 216.

⁸⁸ R Higgins *Problems and Process: International Law and How We Use it!* (1994) 43; I Brownlie *Principles of Public International Law* 7 ed (2008) 291.

⁸⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 paras 217-220; D Gierycz “The Responsibility to Protect: A Legal and Rights-based Perspective” (2010) 2 *Global Responsibility to Protect* 250-266 258-259.

⁹⁰ FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 271.

⁹¹ See AM Slaughter *A New World Order* (2004) 12-14, 32-35, 266-271.

⁹² Also, the political system and organisation of government differs from State to State.

⁹³ Previously, the sovereign was a monarch who was above the law. See FH Hinsley *Sovereignty* 2 ed (1986) 215; FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 261.

sovereignty can be described in terms of internal and external dimensions.⁹⁴ Internal sovereignty is the power and control that a State exercises within its borders. External sovereignty is obtained through recognition by other States.⁹⁵ Notably, sovereignty is a social construct with a meaning that is continually evolving.⁹⁶ Glanville aptly states that "[t]here is no essential, unchanging meaning of sovereignty".⁹⁷ The progression of the conceptualisation of sovereignty in relation to internal displacement and sovereignty as responsibility will be examined in the next section.

5 3 1 Sovereignty as responsibility

There are two components of sovereignty as responsibility. First, in order to be a legitimate sovereign, a State must protect and assist its inhabitants.⁹⁸ Second, failure on the part of the State to discharge its duties engages a response from the international community, which in theory provides for State accountability.⁹⁹ Deng explains the concept of sovereignty as responsibility and its rationale when he states:

"The conceptual framework of such a normative code would be to assume that in order to be legitimate, sovereignty must demonstrate responsibility, which means at the very least ensuring a certain level of protection for, and providing [for] the basic needs of the people; that most governments under normal circumstances do in fact discharge that responsibility; that when they cannot do so for reasons of incapacity, they will call upon the international community to assist; but that under those exceptional circumstances when governments fail to discharge this responsibility and masses of its citizens become threatened with severe suffering and maybe death as a result, the international community will in one way or another step in to provide the needed remedy."¹⁰⁰

Deng goes on to explain that one of the fundamental elements of a State's responsibility includes respect for human rights, which "must encompass equitable and effective participation in the political, economic, social and cultural life of the

⁹⁴ L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 18.

⁹⁵ FH Hinsley *Sovereignty* 2 ed (1986) 215; L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 18, 24.

⁹⁶ L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 15. See also WM Reisman "International Law After the Cold War" (1990) 84 *Am J Int'l L* 859-866 866; FM Deng "Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 260.

⁹⁷ L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 15 See also FH Hinsley *Sovereignty* 2 ed (1986) 215-216; A James *Sovereign Statehood: The Basis of International Society* (1986) 7.

⁹⁸ FM Deng "From 'Sovereignty as Responsibility' to the Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353-370 354.

⁹⁹ 354-55.

¹⁰⁰ FM Deng "Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 278.

country, at least as a widely accepted national aspiration".¹⁰¹ Human rights as summarised above are indeed found in children's rights law.¹⁰² Therefore, it can be argued that sovereignty as responsibility encompasses compliance with children's rights law as well. However, this concept also prescribes responsibility on the part of the international community to provide complementary protection and assistance when a State is unable or unwilling to discharge its responsibility.¹⁰³ The overall message to States is that complying with their obligations is the best way to ensure their sovereignty and by extension non-intervention.¹⁰⁴ Sovereignty as responsibility, therefore, balances the concept of sovereignty as ultimate authority with standards in international human rights law. The application of sovereignty in this way encourages compliance with international human rights law norms, which is a means to respond to the numerous violations of human rights such as the problem of internal displacement.

5 3 2 The evolution of the concept of sovereignty

As the architect of the concept of sovereignty as responsibility, Deng provides a rationale for the eventual development of this concept by using a four-phase progression of sovereignty.¹⁰⁵ He discusses the evolution of sovereignty in four overlapping phases: the initial phase, where the sovereign was supreme; the erosion of sovereignty; sovereignty as a defensive mechanism to external intervention; and, the reconciliation of sovereignty with international norms and the increasing number of international conflicts.¹⁰⁶ Deng's four phases of the evolution of sovereignty will be used to guide the examination of how the notion of sovereignty has changed over time.

¹⁰¹ 286.

¹⁰² See generally CRC; ACRWC.

¹⁰³ This complementary role of the international community is clear in the context of the law of internal displacement. See Guiding Principles prin 25(2); Kampala Convention art 5(6). See also C Phuong "Internally Displaced Persons and Refugees: Conceptual Difference and Similarities" (2000) 18 *Neth Q Hum Rts* 215-229 224; C Phuong *The International Protection of Internally Displaced Persons* (2004) 25; FM Deng "From 'Sovereignty as Responsibility' to the Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353-370 354.

¹⁰⁴ FM Deng "From 'Sovereignty as Responsibility' to the Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353-370 364.

¹⁰⁵ See generally FM Deng "Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286.

¹⁰⁶ FM Deng "Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 260-261.

In the first phase, the sovereign was the supreme authority domestically and in its interactions internationally.¹⁰⁷ The concept of sovereignty as ultimate authority is said to have originated during the time of Aristotle.¹⁰⁸ The concept was developed during the Roman Empire.¹⁰⁹ In 1648, the Treaty of Westphalia created the nation-state.¹¹⁰ Sovereign States were independent and not subject to external control.¹¹¹ Sovereignty was also a means of keeping domestic order.¹¹² This ultimate control over its territory can be described as “territorial sovereignty”.¹¹³ Glanville’s explains that a historical study of sovereignty reveals that early notions of this principle also included the “right to wage (just) war, to punish tyrants and rescue the oppressed”.¹¹⁴ Overall, the initial stage of sovereignty can be broadly characterised by the exercise of power and authority.

In the second phase, Deng correlates the erosion of sovereignty with the advent of international human rights law.¹¹⁵ Key events include the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights in 1945 and 1948 respectively.¹¹⁶ Domestically, the people in an increasing number of States

¹⁰⁷ 260-261. See also A James *Sovereign Statehood: The Basis of International Society* (1986) 3.

¹⁰⁸ Hobbes and Bodin are recognised as having contributed to the understanding of sovereignty. See FH Hinsley *Sovereignty* 2 ed (1986) 27-32, 120-125, 141-144; WM Reisman “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Am J Int’l L* 866-876 866-867; L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 34-37, 41-43.

¹⁰⁹ For a further discussion on the development of sovereignty in the Roman Empire and the Middle Ages see FH Hinsley *Sovereignty* 2 ed (1986) 36-125.

¹¹⁰ FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 355.

¹¹¹ HLA Hart *The Concept of Law* (1961) 216-217; A James *Sovereign Statehood: The Basis of International Society* (1986.)

¹¹² 261; A James *Sovereign Statehood: The Basis of International Society* (1986) 4-5. For Rousseau the State was formed for the common good of the people and the Sovereign was the sum of its citizens. While the Sovereign had absolute power, this power would be exercised in the interests of the people since it would be impossible for the Sovereign to hurt itself. See JJ Rousseau *The Social Contract & Discourses* (1913) DGH Cole (trans) 17, 22, 27.

¹¹³ L Henkin *How Nations Behave* 2 ed (1979) 17.

¹¹⁴ Glanville relies upon the argument of theorist Hugo Grotius for this assertion. He ultimately argues that the norm of non-intervention with respect to sovereignty is something that developed much later. See L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 214. See also H Grotius *The Rights of War and Peace* M J van Ittersum (ed) as cited in L Glanville “The Myth of “Traditional” Sovereignty” (2013) 57 *International Studies Quarterly* 79-90 81.

¹¹⁵ FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 264. See also WM Reisman “Humanitarian Intervention and Fledgling Democracies” (1995) 18 *Fordham Int’l L J* 794-805 795.

¹¹⁶ WM Reisman “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Am J Int’l L* 866-876 867-868; FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 264.

gained power and could hold the State accountable for its actions.¹¹⁷ Reisman describes this type of sovereignty as “popular sovereignty”.¹¹⁸ He goes on to state that “[i]n international law, the sovereign had finally been dethroned”.¹¹⁹ The establishment of international human rights standards provided a justification to limit the ultimate authority of the State; therefore, eroding the initial notion of the sovereign State as the supreme authority. In 1949, the opinion of Judge Alvarez of the International Court of Justice in *Corfu Chanel Case*¹²⁰ supported a definition of sovereignty that included rights and responsibilities rather than as an absolute right of States.¹²¹ During this phase, there were a number of global events that challenged the notion of sovereignty as unrestricted power into question and provided a rationale for its limitation.¹²²

The third phase occurred during a period where there was resistance to the erosion of State sovereignty and an assertion of the norm of non-intervention. Deng indicates that this strong response occurred at the end of the Cold War.¹²³ Some States wanted to protect themselves against an external assessment of their compliance with human rights norms or lack thereof.¹²⁴ Glanville asserts that the norm of non-intervention gained traction prior to this time. He uses examples of the post-World War I period and the establishment of the United Nations in the post-World War II period as evidence of the entrenchment of domestic jurisdiction.¹²⁵ Kuwali also recognises that

¹¹⁷ WM Reisman “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Am J Int’l L* 866-876 867-8; FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 264. Article 21(3) of the Universal Declaration of Human Rights states that the will of the people provides the basis for the government. See Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A art 21(3). See WM Reisman “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Am J Int’l L* 866-876 867-268.

¹¹⁸ WM Reisman “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Am J Int’l L* 866-876 867.

¹¹⁹ 268.

¹²⁰ (*United Kingdom v Albania*) (Merits) [1949] ICJ. Rep 4.

¹²¹ Individual Opinion by Judge Alvarez *Corfu Chanel Case (United Kingdom v Albania)* (Merits) [1949] ICJ. Rep 4 43.

¹²² For example, the Nazi regime of WWII. See FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 356-357.

¹²³ FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 273.

¹²⁴ Deng discusses that some States used cultural relativity as a basis to argue that Western standards should not be used to assess their performance and was merely a means to intervene in their internal affairs, and other States reasserted national sovereignty as a barrier from external interference. See FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 273-274.

¹²⁵ For example, Glanville submits that the Charter of the United Nations provides for non-interference in domestic jurisdiction. However, a reading of the Charter also reveals despite respect for sovereignty equality of Member States and territorial integrity, intervention is not precluded

sovereignty as non-intervention was a foundational aspect of the Charter of the United Nations, but he highlights that former United Nations Secretary-Generals Javier Perez de Cuellar and Boutros Boutros-Ghali also championed the notion that sovereignty entailed responsibility.¹²⁶ Regardless of when the phase occurred, the norm of non-intervention is still considered an integral element of sovereignty.¹²⁷ Some writers are of the opinion that weaker and emerging States, including States in Africa, asserted the norm of non-intervention to prevent alleged human rights violations from being used as a pretext for intrusion in their affairs.¹²⁸ This was not an unreasonable fear, especially when reflecting on the history of colonisation and Cold War proxy wars that these States endured.¹²⁹ For instance, the OAU was State-centric in that its focus was on eradicating colonialism, protecting sovereignty and territorial integrity and advocating for the non-intervention in the internal affairs of its Member States by others.¹³⁰ The focus of the OAU was on States rather than on individuals.¹³¹ However, the non-intervention became untenable when mass violations of human rights began to increase.¹³²

Deng describes the final phase as “mediating sovereignty”.¹³³ This phase demonstrates that there was an effort to reconcile the norms of sovereignty and

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- pursuant to Chapter VII, threats to international peace and security. See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) arts 2(4)(7), 39-51; L Glanville “The Myth of “Traditional” Sovereignty” (2013) *International Studies Quarterly* 57 79-90 85.
- ¹²⁶ D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 66.
- ¹²⁷ FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 354.
- ¹²⁸ D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 66.
- ¹²⁹ M Muyangwa & MA Vogt “An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, 1993-2000” (November 2000) International Peace Academy International Peace Institute <https://www.ipinst.org/wp-content/uploads/publications/oau_conflict_1993_2000.pdf> (accessed 28-09-2017) 1; EE Osaghae & P McGowan “African in the Global System, 1600 to Decolonisation” in P McGowan, S Cornelissen & P Nel (eds) *Power, Wealth and Global Equity: An International Relations Textbook for Africa* 3 ed (2006) 203-218 211-218; R Southall “Africa in the Contemporary World” in P McGowan, S Cornelissen & P Nel (eds) *Power, Wealth and Global Equity: An International Relations Textbook for Africa* 3 ed (2006) 219-239 224-227; D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 58-59, 61-62.
- ¹³⁰ Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 arts 2(1)(c),(d), 3(1)-(3).
- ¹³¹ D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 63. The OAU Members were to have regard to for the Universal Declaration of Human Rights. See Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 art 2(1)(e).
- ¹³² D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 64.
- ¹³³ FM Deng “Frontiers of Sovereignty A Framework of Protection, Assistance, and Development for the Internally Displaced (1995) 8 *Leiden Journal of International Law* 249-286 278.

international human rights law with the increasing international conflicts.¹³⁴ In the post-Cold War period, there was a proliferation of internal conflicts.¹³⁵ The challenge was that sovereignty, as a justification for non-intervention was incompatible with established human rights norms and the realities encountered by people who were suffering, including internally displaced children. Therefore, it made sense to entrench responsibility as a necessary element of sovereignty, as it provided a basis for the powers ascribed to States. To be a legitimate sovereign, States had to exercise their power for the benefit of the people and the furtherance of their human rights. It is in this phase that the concept of sovereignty as responsibility was developed.

5 3 3 Sovereignty as responsibility in the African context

Sovereignty as responsibility gained international acceptance through the Guiding Principles and subsequent instruments on internal displacement.¹³⁶ In Africa, there were a number of developments that signalled a greater acceptance of sovereignty as responsibly. First, human rights norms were adopted, and regional human rights norms were developed. For example, the ACHPR and the ACRWC were adopted in 1981 and 1990 respectively.¹³⁷ Furthermore, the Constitutive Act departed from the State-centric approach of the Charter of the Organization of African Unity (“OAU Charter”),¹³⁸ and included respect for the ACHPR in addition to human rights in general.¹³⁹ The development of these and other regional human rights instruments demonstrates the acceptance of States in Africa of the importance of human rights norms. Second, mass atrocities demonstrated that conceptualising sovereignty as non-intervention created human tragedies and destabilised the region. Kuwali, for example, states that the 1992 State failure in Somalia and the 1994 genocide in

¹³⁴ 260, 278.

¹³⁵ The increase in internal conflict in part led to the international recognition of the problem of internal displacement. See FM Deng “Africa’s Internally Displaced and the Development of International Norms: Standards versus Implementation in J Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2008) 65-101 82-83; R Adeola “The Right not to be Arbitrarily Displaced under the United Guiding Principles on Internal Displacement” (2016) 16 *African Human Rights Law Journal* 83-98 <<http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4>> (accessed 18-07-2017) 89-92.

¹³⁶ See ICGLR IDP Protocol Preamble, Kampala Convention Preamble; R Cohen “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” (2004) 10 *Global Governance* 459-480 459. See also Chapter 4 part 4 2 1.

¹³⁷ ACHPR; ACRWC; D Kuwali “The Rationale for Article 4(h)” in D Kuwali & F Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (2014) 13-24 16.

¹³⁸ (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39.

¹³⁹ Constitutive Act arts 3(e),(h), 4(m).

Rwanda laid the foundation for intervention in the context of the AU.¹⁴⁰ Third, there was a recognition that the self-determination and decolonisation that was a focus of African States was actually a violation of sovereignty.¹⁴¹ Deng also credits decolonisation and self-determination as well as the backlash against the apartheid regime in South Africa as events that supported the “erosion of sovereignty as absolute power”.¹⁴² In other words, States recognised that human rights norms such as the right to self-determination actually provided the basis for their independence rather than the concept of sovereignty as non-intervention.¹⁴³ Fourth, the increased power of non-State actors such as armed groups diminished the importance of sovereignty.¹⁴⁴ Fifth, leaders in the region recognised that human rights norms, even though developed by Western States, could be incorporated in the African context. For example, the argument that the individualistic nature of human rights was not applicable in Africa’s communal contexts could be rebuffed by the understanding that the well-being of the greatest number of individuals through the realisation of human rights was actually in the communal best interest.¹⁴⁵ Salim Ahmed Salim, in his capacity as the Secretary-General of the OAU, advocated that African States ought not to become overly preoccupied with borders that were artificial at best and to implement the communal perspective associated with African culture by being their “brother’s keeper”.¹⁴⁶ Finally, sovereignty as responsibly was incorporated into regional human rights law in the ICGLR IDP Protocol and the Kampala Convention.¹⁴⁷

¹⁴⁰ D Kuwali “The Rationale for Article 4(h)” in D Kuwali & F Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (2014) 13-24 13. See also M Kunschak “The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorisation?” (2006) *SAYIL* 195-208 196-197.

¹⁴¹ D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 63.

¹⁴² FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 359. D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 63.

¹⁴³ D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 63.

¹⁴⁴ FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 365; D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011) 64.

¹⁴⁵ FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 357-358.

¹⁴⁶ OAU, Council of Ministers “Report of the OAU Secretary-General on Conflicts in Africa: Proposals for an OAU Mechanism for Conflict Prevention and Resolution (1992) CM/1710 (L. VI) 12-13 as cited in FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 364-365.

¹⁴⁷ Both instruments require States to accept assistance from the international community if they lack the capacity to provide protection and assistance to IDPs. See ICGLR IDP Protocol arts 3(10), 6(4)(d); Kampala Convention arts 4(3), 5(2),(3),(5),(6).

In addition, a principle emerged that justified intervention into the internal affairs of a State in instances of gross human rights violations and threats to human security, called “the responsibility to protect”.¹⁴⁸ The 2005 United Nations World Summit recognised the importance of the Guiding Principles and confirmed that the responsibility to protect required protection “from genocide, war crimes, ethnic cleansing and crimes against humanity”.¹⁴⁹ The United Nations confirmed that diplomatic and humanitarian methods, as well as the use of force, were available to fulfil the responsibility to protect.¹⁵⁰ The principle of the responsibility to protect also gained regional acceptance in Africa. The Constitutive Act while confirming its respect for the sovereign equality of its Member States permits the intervention by the AU in a Member State in circumstances of “war crimes, genocide, and crimes against humanity”.¹⁵¹ This justified intervention pursuant to the responsibility to protect is also included in the Kampala Convention.¹⁵²

5 3 4 Sovereignty as responsibility and the principle of accountability

In the context of the law of internal displacement, sovereignty as responsibility has come full circle. This concept provided the foundation for the Guiding Principles, gained international and regional recognition, laid the foundation for the creation of the responsibility to protect, and is incorporated in the ICGRLR IDP Protocol and Kampala Convention.¹⁵³ Despite the growing international acceptance of this conceptualisation of sovereignty, sovereignty as responsibility is not the complete answer to the increase in human rights violations worldwide, especially and including internal displacement.¹⁵⁴ However, the acceptance of this concept moves the debate forward

¹⁴⁸ International Commission on Intervention and State Sovereignty *The Responsibility to Protect Report of the International Commission on Intervention and State Sovereignty* (2001) 15-18; FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 368; L Glanville *Sovereignty and the Responsibility to Protect: A New History* (2014) 171, 190-195.

¹⁴⁹ United Nations General Assembly Resolution 60/1 2005 World Summit Outcome (24 October 2005) A/RES/60/1 paras 132, 138.

¹⁵⁰ Paras 138-139I. See also Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) arts 41-42.

¹⁵¹ Constitutive Act art 4(a)(h).

¹⁵² Kampala Convention art 8(1).

¹⁵³ See ICGRLR IDP Protocol art 3(10). Both sovereignty as responsibility and the responsibility. See Kampala Convention arts 5(6), 8(1).

¹⁵⁴ FM Deng “From ‘Sovereignty as Responsibility’ to the Responsibility to Protect” (2010) 2 *Global Responsibility to Protect* 353-370 370.

as it is accepted that sovereignty entails a type of responsibility that engages an accountability process.

The three elements of the accountability process are applicable to the concept of sovereignty as responsibility. The standards, information and sanctions can be clearly seen in the application of this concept. First, in sovereignty as responsibility, States are required to provide protection and assistance to its inhabitants. The specifics of this obligation are set out in international law. Both the general and specific obligations are examples of the standards element of the accountability process. Second, in instances where a State failed to discharge its obligations, individual, non-State actors and other States as members of the international community can demand that the State answer for its non-compliance. This process can be initiated through reports and complaints procedures.¹⁵⁵ While not explicitly stated, the concept of sovereignty of responsibility requires that it must be determined if a State fails to comply with its obligations in order to engage the involvement of the international community. Such a determination engages the information element of the accountability process. Third, the concept of sovereignty as responsibility dictates that if a State is unwilling or unable to discharge its obligations, it must accept assistance from the international community. Intervention from the international community is an example of the sanctions elements of the accountability process. Therefore, the three elements of the accountability process are clearly demonstrated in the application of the concept of sovereignty as responsibility.

Similar to the accountability process, Deng recognises that a challenge with sovereignty as responsibility can be found in its enforcement.¹⁵⁶ States as duty-bearers must comply with their obligations and be willing to participate in the accountability process. Also, States as members of the international community must be willing to intervene when necessary. Implementation is indeed a challenge in the accountability process and in the application of sovereignty as responsibility. Therefore, the various mechanisms that promote accountability in international law will be examined in the next section.

¹⁵⁵ For a discussion of these and other accountability mechanisms see part 5.4.

¹⁵⁶ FM Deng "From 'Sovereignty as Responsibility' to the Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353-370 355.

5 4 Accountability mechanisms

The process of accountability as described by this thesis requires States to fulfil their obligations to internally displaced children and to provide an explanation when they have been unable to meet these obligations. Another aim of accountability is to impact State behaviour. The objective is to change the behaviour, which is not compliant with their obligations to internally displaced children and to prevent violations of these obligations. Accountability mechanisms are tools that can be incorporated in or facilitate the accountability process. In other words, there are a variety of mechanisms that can be used to keep States accountable for their actions.

The objective of this section is to outline and evaluate the effectiveness of non-coercive accountability mechanisms. Coercive mechanisms, in contrast, can be described as the use of force and economic sanctions. Coercive mechanisms are not included in this discussion as these mechanisms are used as a last resort when the non-coercive mechanisms have proved ineffective and another means of enforcing the obligation is necessary.¹⁵⁷ Furthermore, the application of coercive mechanisms generally occurs when the State that is in breach of its obligations has chosen not to engage in the accountability process.¹⁵⁸ Before coercive mechanisms are employed, however, there are several other mechanisms that are available to address a State's failure to comply with its obligations, particularly within the context of international treaties. These mechanisms will be generally described as non-coercive accountability mechanisms. Therefore, the discussion will focus on understanding and evaluating the effectiveness of these mechanisms. This information can be applied to improve the effectiveness of non-coercive mechanisms as applied to the relationship between States and internally displaced children. The mechanisms that will be examined are diplomatic and political, reporting, monitoring and evaluation bodies, investigation, technical assistance, expert reporting and complaints procedures.

¹⁵⁷ The United Nations permits the use of force in Chapter VII of its Charter. See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) arts 41-42. The AU has the right to intervene in grave circumstances and Member States can also request intervention of the AU to restore peace and security. Constitutive Act art 4(h), (j). See also D Kuwali *The Responsibility to Protect Implementation of Article 4(h) Intervention* (2011). Also, the AU has the power to impose sanctions on Member States that fail to comply with their obligations. See Constitutive Act art 23.

¹⁵⁸ For example, the United Nations Security Council ordered sanctions against North Korea. See United Nations Security Council Resolution 2375 (2017) (11 September 2017) S/RES/2375 (2017).

5 4 1 Diplomatic and political accountability

Diplomatic and political accountability mechanisms may appear to be outside of the ambit of legal accountability. Diplomacy and politics, while relevant to the application of the law can be said to be something other than law.¹⁵⁹ However, the legal instruments themselves advocate for the use of this type of non-coercive accountability mechanism. For example, the ICGLR Pact requires Member States to settle their disputes peacefully by using diplomatic and political means such as “negotiation, good offices, investigation, mediation, conciliation or any other political means”.¹⁶⁰ Member States are to engage in these processes through the Regional Follow-up Mechanism, which is a body comprised of several other bodies that include the Heads of State and Secretariat.¹⁶¹ Where a dispute cannot be resolved within the bodies created by the Pact, Member States are encouraged to resolve disputes through forums provided by the Charter of the United Nations and the Constitutive Act.¹⁶² States Parties to the Kampala Convention are also required to settle their disputes peacefully.¹⁶³ The settlement of disputes is relevant to accountability as disputes may arise when a State fails to comply with its legal obligations or if there are different positions on the correct way to interpret or implement an obligation.¹⁶⁴

It is submitted that there is potential for diplomatic and political mechanisms to change a State’s behaviour and to resolve disputes quickly as opposed to a formal complaints procedure. Diplomatic and political accountability mechanisms can be described as a form of horizontal accountability as it engages the accountability relationship between peers. This type of mechanism is adopted as one tool to promote accountability in the Pact and the Kampala Convention, whereas the CRC and the ACRWC are silent on this mechanism. The drawback to this mechanism is that it only engages the relationship between States. Internally displaced children as bearers of rights are left out of the accountability process when diplomatic and political mechanisms are employed. Also, determining the effectiveness of diplomatic and

¹⁵⁹ However, international law is not apolitical. See R Brewster “The Limits of Reputational Compliance” (2009) 1 *International Theory* 323-333 329. Guzman explains that international law and international relations are interconnected and that “political payoffs are always relevant”. See AT Guzman *How International Law Works: A Rational Choice Theory* (2008) 216-217.

¹⁶⁰ Pact art 28(2).

¹⁶¹ Pact arts 22(1), 28(2),(3).

¹⁶² Pact 28(4).

¹⁶³ Kampala Convention art 22(1).

¹⁶⁴ See for example Kampala Convention art 22(1).

political accountability mechanisms is difficult as there are too many variable factors, such as the particular States involved in the disputes, their relationship and the political climate, which impact the success of this mechanism.

5 4 2 Reporting

Reporting is an important accountability mechanism as it requires States to provide information with respect to the implementation of their obligations. In the accountability process, it can be an important source for obtaining information. Across the board, the legal instruments in children's rights law and the law on internal displacement require some form of reporting. CRC requires States Parties to submit periodic reports to the CRC Committee outlining their progress and any challenges that they encounter in implementing their obligations.¹⁶⁵ The ACRWC also requires States Parties to submit periodic reports to ACRWC Committee.¹⁶⁶ The Kampala Convention provides that States Parties may include the efforts to implement the Convention in their reports that are required as States Parties to the ACHPR.¹⁶⁷ In contrast, the Pact does not require Member States to provide periodic reports on their progress in implementing the Pact's various Protocols and Programmes of Action. The Pact stipulates that the Regional Inter-Ministerial Committee, the Executive of the ICGLR, to provide reports of this nature to the Summit, which is the highest body of the ICGLR.¹⁶⁸ Member States are represented in the Regional Inter-Ministerial Committee; however, there is no specific requirement for Member States to provide reports.¹⁶⁹

Regardless of the specifics of the reporting requirements, there are three factors that determine the usefulness of the reporting requirements. First, the quality of the reports will determine their value. Reports that are of a low standard or do not accurately represent the State's situation, activities and challenges have limited value. Both the CRC and ACRWC require the reports to have "sufficient information to provide [...] a comprehensive understanding of [...] implementation".¹⁷⁰ Unfortunately, the Kampala Convention and the Pact are silent with respect to the standard of the reports that are to be submitted. Second, the timeliness of the report is critical in terms

¹⁶⁵ CRC art 44.

¹⁶⁶ ACRWC art 43.

¹⁶⁷ ACHPR art 62; Kampala Convention art 14(4).

¹⁶⁸ Pact art 23(1), 24(1),(4)

¹⁶⁹ See Pact art 24.

¹⁷⁰ CRC art 44(2); ACRWC art 43(2)(a)

of accuracy of the information contained in the report and any response to the information contained in the report. The CRC and the ACRWC require reports to be submitted by States Parties within two years of their ratification or accession, and every five or three years thereafter respectively.¹⁷¹ In the response to these reports, the respective Committees may ask for information in the form of a List of Issues (“LOIs”).¹⁷² However, it should be noted that many States are late or fail to submit reports.¹⁷³ The Kampala Convention reports are required every two years.¹⁷⁴ The Pact does not provide a specific time period for reporting.¹⁷⁵ Third, the access to the reports also determines their usefulness. If the reports are widely available, there are a variety of actors including bearers of rights, other States and non-State actors that can study, use and challenge the information contained the reports.¹⁷⁶ Finally, the quality timeliness and dissemination of the reports are all factors that impact the ability of monitoring and evaluation bodies to respond to the information provided in the reports and hold States accountable for their efforts comply with their obligations.

5 4 3 Monitoring and evaluation bodies

Monitoring and evaluation bodies, also referred to as report-receiving bodies or expert committees, take a variety of forms. The CRC and the ACRWC have Committees that are comprised of experts in the area of children’s rights law.¹⁷⁷ The Pact’s report receiving body, the Summit and the Regional Inter-Ministerial Committee, is required to submit reports to the Summit.¹⁷⁸ Reports with respect to the implementation of the Kampala Convention are received by the African Commission as these reports are to be part of the reports submitted with respect to the

¹⁷¹ CRC art 44(1)(a),(b); ACRWC art 43(1)(a),(b).

¹⁷² For example, the CRC Committee first responds to States Party reports with a LOIs. See CRC Committee “List of Issues (LOIs)” <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=18&DocTypeCategoryID=1> (accessed 08-08-2018).

¹⁷³ For example, the CAR has not submitted any reports to the Africa Commission or the ACERWC. See African Commission “State Reporting” <<http://www.achpr.org/states/>> (accessed 08-08-2018); ACERWC “Reporting Calendar” <<http://www.acerwc.org/reporting-calendar/>> (accessed 08-08-2018); CRC Committee “States Parties Reports” <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4> (accessed 08-08-2018).

¹⁷⁴ ACHPR art 62; Kampala Convention art 14(4).

¹⁷⁵ Pact art 24(4).

¹⁷⁶ Also, a report showing little progress in the implementation of a State’s obligations could be a factor that negatively impacts their reputation in the international community. See AT Guzman *How International Law Works: A Rational Choice Theory* (2008) 33.

¹⁷⁷ CRC art 43; ACRWC art 32.

¹⁷⁸ However, there are not separate reports from Member States. See Pact art 24(4).

implementation of the ACHPR.¹⁷⁹ However, the work of monitoring and evaluation bodies extends beyond report receiving to include interpretation of the legal instrument, facilitating the implementation of the legal instrument, providing technical assistance, investigating issues of concern and responding to complaints. In the children's rights law regime, the CRC Committee and the ACRWC Committee are entrusted with all of these functions.¹⁸⁰ The Kampala Convention's monitoring and evaluation body is essentially self-regulating as the Conference of States Parties is responsible for this task.¹⁸¹ The ICGLR Pact also includes Member States in this process, but it has a number of bodies that perform a variety of the monitoring and evaluation functions.¹⁸² In the ICGLR's Regional Follow-up Mechanism, the Summit directs the implementation of the Pact, the Regional Inter-Ministerial Committee creates implementation strategies and monitors and evaluates the implementation of the Pact, the Conference Secretariat implements the decisions of the Summit and Regional Inter-Ministerial Committee, and the National Coordination Mechanisms and the Collaborative Mechanisms also facilitate the implementation of the Pact.¹⁸³ Under the ICGLR there are a number of bodies that work together to monitor and evaluate the implementation of the Pact.

The effectiveness of monitoring and evaluation bodies can be assessed in terms of the powers of the bodies and their composition. For example, the CRC Committee has the power to request more information from States Parties regarding their reports and issue a time limit for responses.¹⁸⁴ This power is only as meaningful as the compliance of the States Parties with the request.¹⁸⁵ However, in the event that a State fails to

¹⁷⁹ Kampala Convention art 14(4); ACHPR arts 45, 62.

¹⁸⁰ CRC art 44; ACRWC arts 44-45; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 1.

¹⁸¹ Aside from receiving reports. See Kampala Convention art 14.

¹⁸² It should be noted that the Conference Secretariat is comprised of individuals working in their individual capacity, but the Pact requires a balanced representation of the nationalities of the Member States in senior position in the Secretariat. See Pact art 26(6).

¹⁸³ This statement merely highlights some of the duties of the bodies in the ICGLR's Regional Follow-up Mechanism. See Pact arts 23(3), 24(3),(4), 26(2), 27.

¹⁸⁴ CRC art 44(4).

¹⁸⁵ States Parties have responded to the CRC Committee's request for additional information. For example, most recently, the Seychelles responded to the Committee's list of issues. See CRC Committee "Replies of the Seychelles to the List of Issues" (15 January 2018) CRC/C/SYC/Q/5-6/Add.1. Also, the CAR did respond to the Committee's request with respect to the provision of health and educational services for refugee and internally displaced children. See CRC Committee "Replies of the Central Africa Republic to the List of Issues" (27 December 2016) CRC/C/CAF/Q/2/Add.1 10-11.

provide additional information, the Committee may include this omission in its report to the United Nations General Assembly.¹⁸⁶ This notation may or may not negatively impact upon the States perceived reputation in the international community, and the effects of this may vary.¹⁸⁷ The ACRWC Committee has investigative powers. In addition to receiving reports, it may investigate the efforts that a States Party has taken to implement its obligations.¹⁸⁸ This power allows the ACRWC Committee to obtain its own information in addition to the information provided by the State. The ACRWC Committee has used its investigative power, reported on the issues and provided recommendations.¹⁸⁹ The additional information enhances the ACRWC Committee's ability to monitor and evaluate the implementation of the ACRWC. The effectiveness of the monitoring and evaluation bodies of the Pact and Kampala Convention also directly relates to their composition. These bodies are comprised primarily of States whereas the CRC and the ACRWC Committees respectively are comprised of members working in their individual capacity.¹⁹⁰ Therefore, bodies are self-regulating, in that there is not an actor outside of the Member States or States Parties respectively performing the function of monitoring and evaluation. Based on the composition of these bodies, a State may be more likely to comply with the requests made by the bodies where they were involved in the process. In terms of accountability, the States are essentially answerable to themselves. As a result, the effectiveness of this particular mechanism due to the composition of the monitoring and evaluation bodies depends primarily on the political will and commitment of the States. To this point, it is important to note that the analysis in chapter 4 highlights that the provisions of the Kampala Convention are drafted from the perspective of States obligations rather than the rights of IDPs.¹⁹¹ The composition of the monitoring and evaluative bodies of the

¹⁸⁶ This is also the case for States that do not submit their art 44 reports. See CRC Committee "Rules of Procedure" (18 March 2015) CRC/C/4/Rev.4 Rule 71(2).

¹⁸⁷ For a discussion of reputational costs See L Henkin *How Nations Behave* 2 ed (1979) 54; AT Guzman *How International Law Works: A Rational Choice Theory* (2008) 33.

¹⁸⁸ ACRWC art 45(1); ACERWC "Guidelines on the Conduct of Investigations by the African Committee of Experts on the Rights and Welfare of the Child" <http://www.acerwc.org/download/acerwc_guidelines_on_the_conduct_of_investigation_missions/?wpdmdl=8668> (accessed 08-08-2018).

¹⁸⁹ The ACERWC investigated the situation regarding the treatment in Tanzania with albinism. See ACERWC "Report on Investigative Mission on the Situation of Children with Albinism in Temporary Shelters–Tanzania" (March 2016).

¹⁹⁰ CRC art 43(2); ACRWC art 33(2).

¹⁹¹ This contrasts with the approach taken by the Guiding Principles. See Chapter 4 part 4 3 3. A review of the ICGLR IDP Protocol also reveals that the provisions are drafted from the perspective of the obligations of Member States. See generally ICGLR IDP Protocol.

Pact and the Kampala Convention make it challenging for internally displaced children and other actors to access these bodies and to hold States accountable pursuant to the obligations in the ICGLR IDP Protocol and the Kampala Convention. However, it does highlight the probability that the other accountability mechanisms such as complaints procedures would be more effective in doing so. In contrast, the composition of the CRC and ARCWC Committees are bodies that are separate from the States Parties that can facilitate the accountability process and provide a point of access for bearers of rights. An independent monitoring and evaluation body may arguably be a more effective accountability mechanism, in particular, when States are unwilling or unable to discharge their obligations.

5 4 4 Investigation

Investigation is usually a mechanism undertaken by the monitoring and evaluation bodies.¹⁹² It provides a tool to obtain additional information to evaluate the progress of a State in the implementation of its obligations and hold the State accountable. Investigation also provides a means to discover information that the States do not report on whether by omission or due to being unaware of a particular situation. Investigative powers can also be contracted to experts. Article 25 of the Pact provides for the nomination of a group of experts on an *ad hoc* basis to provide special reports as well as other functions at the discretion of the Summit.¹⁹³ If necessary experts could be engaged to investigate a particular issue. Also, the African Commission has investigative powers and since the States Parties to the Kampala Convention must submit reports to the African Commission, the Commission's investigative powers are applicable.¹⁹⁴ The African Commission has conducted many investigative missions such as a fact-finding mission to the Darfur region of Sudan in 2004.¹⁹⁵ Also, it should be noted that the AU Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons also has the mandate to investigate situations involving IDPs and the participated in the fact-finding mission to Sudan.¹⁹⁶ The ACRWC appears

¹⁹² For example, the ACRWC Committee's investigative powers. ACRWC art 45.

¹⁹³ Pact art 25.

¹⁹⁴ ACHPR art 46.

¹⁹⁵ See African Commission "Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region" (8 -18 July 2004)" EX.CL/364(XI) Annex III. See also African Commission "Mission Reports" <<http://www.achpr.org/mission-reports/>> (accessed 29-06-2018).

¹⁹⁶ African Union Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa No 72 (07 December 2004)

to be the only instrument that directly provides investigation as an accountability mechanism.¹⁹⁷ Investigation as an effective accountability mechanism must be implemented, there must be access to obtain the necessary information and the information obtained through the investigation must be used to hold the State accountable.

5 4 5 Technical assistance

Technical assistance is a mechanism that facilitates accountability as it clarifies the standards with which a State is required to comply. Simply put, technical assistance contributes to the interpretation and implementation of obligations. Monitoring and evaluation bodies or the technical bodies in the CRC, ACRWC, the Pact and Kampala Convention all provide assistance with respect to the interpretation and implementation of State obligations.¹⁹⁸ The CRC and ACRWC Committees provide detailed commentary regarding the interpretation and implementation of specific provisions of the CRC and ACRWC.¹⁹⁹ This form of technical assistance may be used to prevent violations as well as improve future compliance. Technical assistance can also be obtained from experts outside of the treaty regime or specialised agencies. The CRC and the Pact specifically provide for the use of experts with respect to technical assistance.²⁰⁰ The effectiveness of technical assistance as an accountability mechanism primarily depends upon the accessibility of the information to both duty-bearers and bearers of rights. Access to technical assistance and clarification regarding specific obligations enables States to implement their obligations correctly and internally displaced children or other actors can determine if a State is acting in accordance with its obligations. The CRC and ACRWC Committee make their General

<<http://www.achpr.org/sessions/36th/resolutions/72/>> (accessed 01-02-2018) para 1(3); African Commission "Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region" (8 -18 July 2004)" EX.CL/364(XI) Annex III para 12.

¹⁹⁷ ACRWC art 45. The ACERWC visited the CAR and Uganda to conduct investigative missions. See *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 17; ACERWC "Mission Report of the ACERWC to Assess the Situation of Children Affected by the Conflict in Central African Republic" (December 2014).

¹⁹⁸ CRC art 45(d); ACRWC art 42(a)(ii),(c); Pact art 26; Kampala Convention art 14.

¹⁹⁹ The Committees provide General Comments on specific topics or provisions. See United Nations Human Rights Office of the High Commissioner "Committee on the Rights of the Child" <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>> (accessed 06-02-2018); ACERWC "General Comments" <<http://www.acerwc.org/general-comments/>> (accessed 06-02-2018).

²⁰⁰ CRC art 45(a); Pact art 25. See also part 5 4 3.

Comments widely available for instance.²⁰¹ The ICGLR provides a guide to assist Member States with the domestication of the Pact and Protocols and the ICGLR IDP Protocol also includes model domestic legislation.²⁰² These resources can provide a form of technical assistance. In contrast, the Conference of States Parties of the Kampala Convention has not made any form of technical assistance widely available as of yet.²⁰³ However, the AU Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons and the United Nations Rapporteur on the Human Rights of Internally Displaced Persons have many reports that can provide technical assistance and these reports are widely available.²⁰⁴

5 4 6 Expert reporting

Experts outside of the regime of the legal instrument also support the accountability process. Experts may be engaged to report on a particular issue or provide technical assistance. The CRC, for example, provides that the Committee may request expert advice or technical assistance from specialised agencies that are either within or outside the United Nations system.²⁰⁵ The ACRWC does not provide for the appointment of experts other than the ACRWC Committee. The Pact contemplates the assistance of experts on an *ad hoc* basis to report on areas of implementation that Member States find challenging and other tasks as prescribed by the Summit.²⁰⁶ The

²⁰¹ The General Comments are available on the websites of the respective Committees. See United Nations Human Rights Office of the High Commissioner “Committee on the Rights of the Child” <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>> (accessed 15-02-2018); ACRWC “General Comments” <<http://www.acerwc.org/general-comments/>> (accessed 15-02-2018).

²⁰² See A Samba “Guide for the Domestication of the Protocols of the International Conference of the Great Lakes Region” (June 2012) *ICGLR* <<http://www.icglr.org/images/Publications/final%20domestication%20guide.pdf>> (accessed 06-02-2018), ICGLR “Model Legislation on the Implementation of the Protocol on Protection and Assistance to Internally Displaced Persons” ICGLR Protocol on the Protection and Assistance to Internally Displaced Persons (adopted 15 December 2006, entered into force 21 June 2008) annex.

²⁰³ The first meeting of the Conference of States Parties was just convened on 5 April 2017, while there is a Plan of Action, this document is not widely available as of yet. See African Union “Plan of Action for the Implementation of the Kampala Convention adopted by the Conference of States Parties” (05-04-2017) Press Release No 051/2017 <https://au.int/sites/default/files/pressreleases/32341-pr-pr_051_-_kampala_convention.pdf> (accessed 06-02-2018).

²⁰⁴ See African Union “Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons” <<http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/>> (accessed 06-02-2018); United Nations Human Rights Office of the High Commissioner “Special Rapporteur on the Human Rights of Internally Displaced Persons” <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/IDPersonsIndex.aspx>> (accessed 06-02-2018).

²⁰⁵ CRC art 45(a).

²⁰⁶ Pact art 25.

Kampala Convention does not provide for the use of experts, but as AU treaty on the human rights of IDPs, the African Commission, the AU Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, and the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons are all specialised bodies that can offer relevant expert advice and reports applicable to State obligations to internally displaced children. Evaluating the effectiveness of expert report mechanisms as a tool that supports accountability largely depends on particular circumstances the experts are engaged with and their terms of reference. Having an external expert can provide high-quality information and advice that may take a different approach from experts appointed by the treaty regime such as in the CRC and ACRWC Committees. However, one factor that can determine the effectiveness of using experts is their terms of reference. If experts are constrained and do not have appropriate access, their ability to provide reports with high-quality advice is limited. The African Commission and the United Nations and AU Special Rapporteurs respectively can be especially effective experts to utilise as they have their own mandates that are independent of the particular legal regimes. In other words, the independence of the expert may determine the effectiveness of expert reporting as an accountability mechanism.

5.4.7 Complaint procedures

Complaints procedures provide a mechanism that facilitates all three elements of the accountability process. The standards are used to determine if there has been compliance. The parties to the complaint will have to provide the information to the body hearing the complaints. Lastly, when a determination has been made, the order or recommendations given serve as the sanctions in the accountability process.

Complaints may be heard by monitoring and evaluation bodies or in other forums such as a Courts or quasi-judicial bodies. The CRC Committee and ACRWC Committee hear complaints, often referred to as communications, as these Committees specialise in children's rights, the complaints made be brought by individuals, including children, a group, or brought on their behalf of a child or group of children.²⁰⁷ Being sensitive that complaints related to children, in particular, may be

²⁰⁷ The ACRWC specifies that "[t]he Committee may receive communication, from any person". See ACRWC art 44(1); Optional Protocol to the Convention on the Rights of the Child on a

urgent or cause irreparable harm, both the CRC and ACRWC complaints procedures allow interim or provisional measures to be instituted before the complaint is heard.²⁰⁸ Also, provisions requiring the outcome of the complaint to be provided as expediently as possible demonstrates that timeliness is also a priority in the CRC and ACRWC complaints procedures.²⁰⁹ Both the Pact and the Kampala Convention provide that disputes that cannot be resolved amicably may be brought before the African Court of Justice and the African Court of Justice and Human Rights respectively.²¹⁰ The complaint mechanisms provided by the Pact and Kampala Convention contemplate disputes between States regarding the interpretation and implementation of an obligation. A complaints mechanism that is accessible to individuals and groups, including, internally displaced children, appears to be overlooked with the exception of disputes with respect to property. Both the ICGLR Property Protocol and the Kampala Convention provide for the creation of simplified procedures to resolve property disputes.²¹¹ However, disputes with regard to AU treaties may be brought before the African Court of Human and Peoples' Rights or the African Court of Justice.²¹² What is noteworthy with respect to each of these judicial bodies is that

Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 5(1).

²⁰⁸ See ACERWC "Revised Guidelines for the Consideration of Communications" (October 2014) s VII (1)(i); Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 6.

²⁰⁹ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 10(5); ACERWC "Revised Guidelines for the Consideration of Communications" (October 2014) s XIX(1).

²¹⁰ The African Court of Justice and Human Rights has not been established. However, once it has been established it will replace the African Court on Human and Peoples Rights and the African Court of Justice. Until the African Court of Justice and Human Rights has been established the Conference of States Parties will resolve the matter by a vote. See Pact art 29; Kampala Convention art 22; African Union "List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights" <https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf> (accessed 15-02-2018).

²¹¹ ICGLR Property Protocol art 4(3)(b),(c); Kampala Convention art 12(1),(2).

²¹² Both Courts have jurisdiction to hear cases with respect to treaties adopted under the AU framework, and agreements in which States Parties confer the jurisdiction of the Court such as the Pact. The African Court of Justice and Human Rights has a similar jurisdiction. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 June 2004) art 3; Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 11 February 2009) art 19(1)(b),(e); Protocol on the Statute of the African Court of Justice and Human Rights Annex Statute of the African Court of Justice and Human Rights (adopted 1 July 2008) art 28(b),(c),(f).

individuals are able to submit cases before each of the respective Courts.²¹³ Also, individuals may also bring complaints in the form of communications before the African Commission.²¹⁴ Access to the Courts and African Commission provides internally displaced children with a forum to bring complaints and to hold States accountable for their obligations.

The effectiveness of the complaints procedures as an accountability mechanism can be determined by access to the mechanism and the substantive nature of its outcomes. Access to complaints procedures incorporates access to justice. A concise definition of access to justice is the “reasonable determination and interpretation of legal rights and obligations by courts of law and the opportunity to obtain legal services from qualified professionals”.²¹⁵ Rankin also describes access to justice as the “ability to achieve a substantive legal outcome”.²¹⁶ For a complaints procedures to be an effective accountability mechanism, internally displaced children as well as States, must be able to bring a complaint. The CRC and ACRWC complaints procedures provide a means for internally displaced children to bring a complaint against a State. The Pact and Kampala Convention do not directly prescribe a means of individuals to hold States accountable by way of complaints procedures, but the African Commission and the Courts in the AU system are accessible to individuals, including internally displaced children.

Another challenge to access to complaints procedures is admissibility. In order for the Court or decision-making body to hear the merits of the complaint, the complaint must be admissible. In order for a complaint to be admissible, the party bringing the complaint must have exhausted local remedies.²¹⁷ With respect to the issue of admissibility, the African Commission states:

²¹³ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 9 June 1998, entered into force 25 June 2004) art 5(3); Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 11 February 2009) art 18(1)(d); Protocol on the Statute of the African Court of Justice and Human Rights Annex Statute of the African Court of Justice and Human Rights (adopted 1 July 2008) art 30(6).

²¹⁴ ACHPR arts 55, 56.

²¹⁵ *Christie v British Columbia* 2005 BCCA 631 (CanLII) para 30. See also MB Rankin “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 *Windsor Y B Access Just* 101-138 104.

²¹⁶ MB Rankin “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 *Windsor Y B Access Just* 101-138 104.

²¹⁷ See ACHPR art 56(5); Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983

“A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.”²¹⁸

Admissibility in the African human rights context is an issue that is consistently raised by States responding to a complaint.²¹⁹ At the domestic level, there may be a number of access to justice challenges that parties, in particular internally displaced children, encounter to exhaust available local remedies. These challenges including standing to bring a claim, adequate support, representation and funds, delays, and the evidence to prove their claim may be difficult to obtain, especially as they are bringing a claim against the State. However, this admissibility requirement is limited by allowing complaints to be heard where “it is obvious that this procedure is unduly prolonged or ineffective”.²²⁰ The African Commission supports this limitation when it states “[t]he Commission has stressed that remedies, the availability of which is not evident, cannot be invoked to the detriment of the complainant”.²²¹ In other words, a complaint may be deemed admissible even if local remedies have not been exhausted in circumstances where the local remedy is not effective. Therefore, the complaints procedures provided by the legal instruments examined in this thesis are effective in terms of allowing access to internally displaced children as well as States to bring complaints and have the merits of the complaints heard. What is not clear is the ability of internally displaced children to initiate and participate in complaint procedures. Internally displaced children will require support from other actors, such as their parents, NGOs or other States to bring a complaint.

The effectiveness of complaints procedures is also determined by the outcomes, specifically the ability of the mechanism to provide substantive justice. The outcomes

UNTS art 7(e); ACERWC “Revised Guidelines for the Consideration of Communications” (October 2014)s XI(1)(d).

²¹⁸ *Jawara v Gambia* Communication nos 147/95 and 149/96 (2000) AHRLR 107 (ACHPR 2000) para 32.

²¹⁹ See for example, *Jawara v Gambia* Communication nos 147/95 and 149/96 (2000) AHRLR 107 (ACHPR 2000); *Article 19 v Eritrea* Communication no 275/03 (2007) AHRLR 73 (ACHPR 2007); *Hadi and Others v Sudan* Communication no 368/09 (ACHPR 22 October to 5 November 2013); *The Nubian Community in Kenya v Kenya* Communication no 317/2006 (ACHPR 19-28 February 2015).

²²⁰ See ACERWC “Revised Guidelines for the Consideration of Communications” (October 2014)s XI(1)(d). See also See ACHPR art 56(5); Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 7(e).

²²¹ *Jawara v Gambia* Communication nos 147/95 and 149/96 (2000) AHRLR 107 (ACHPR 2000) para 34.

include orders, recommendations and remedies that can be provided. In the CRC process, the CRC Committee provides its decision on the communication, recommendations and follow up with the State regarding measures it has taken to implement the Committee's recommendations.²²² In the ACRWC complaints process, if a determination is made that a State has violated its obligation, the State is required to report its progress to implement the decisions of the Committee within 180 days from the date it received the Committee's decision.²²³ Also, there is a rapporteur assigned to each complaint to monitor the progress of the States in implementing the decision of the Committee.²²⁴ The ACRWC process provides an effective process for ensuring that the outcome of complaints procedure have an impact and are put into practice. With the exception of complaints brought before the African Commission, the complaints processes provided by the Pact and Kampala Convention provide the parties with an outcome, but the follow-up procedure is left to the States themselves.²²⁵ Overall, the effectiveness of complaint mechanisms is determined by the extent to which States are willing to follow the recommendations made by the monitoring and evaluation bodies.²²⁶

Finally, complaints procedures can facilitate the accountability process by providing a mechanism that requires States as duty-bearers to give an account for the manner in which they have discharged their obligations. Also, complaints procedures provide a forum for internally displaced children as bearers of rights to hold State accountable for alleged violations. One drawback in using complaints procedures is that a violation of an obligation has already allegedly been committed and the harm already suffered. It is an *ex post* mechanism to promote accountability rather than a preventative measure. However, the complaint and recommendations provided can address the issue with implementation and improve the implementation process in the future. Another, unfortunate consequence of complaints procedures is that they can be time-consuming. As discussed, the CRC and ACRWC complaint procedures provide interim remedies where necessary and require that decisions be provided to the

²²² Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS arts 10(5), 11(1).

²²³ ACERWC "Revised Guidelines for the Consideration of Communications" (October 2014) s XXI(1)(i).

²²⁴ S XXI(2).

²²⁵ ACHPR art 53; Pact arts 22-24, 26-27; Kampala Convention art 14.

²²⁶ See AM Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017) 225.

parties as expediently as possible.²²⁷ Overall, complaints procedures provide a forum for the accountability process to operate and with adequate access and outcomes, and these procedures can be an effective accountability mechanism.

5 4 8 Accountability mechanisms as tools in the accountability process

In summary, the accountability mechanisms examined, namely, diplomatic and political, reporting, monitoring and evaluation bodies, investigation, technical assistance, expert reporting and complaints procedures, provide many processes to hold States accountable. In fact, each of the mechanisms facilitates at least one of the three elements of the accountability process (standards, information and sanctions). Diplomatic and political mechanisms incorporate sanctions as they provide a means to influence State behaviour, encourage compliance and even punish non-compliance.²²⁸ Reporting provides information that can be used to correct and improve the interpretation and implementation of obligations. Monitoring and evaluation bodies facilitate all three elements of the accountability process. These bodies clarify standards, collect information and can sanction States. Investigation provides a means of obtaining information. Technical assistance helps to clarify the standards. Expert reporting is also a tool to clarify standards and obtain information. Complaints procedures are another mechanism that incorporates all three elements of the accountability process as the decisions clarify standards, the decision-making process requires States to provide information and the outcomes sanction violations of obligations.

This review of the accountability mechanisms also demonstrates that some mechanisms are more accessible to bearers of rights than others. The CRC and ACRWC accountability mechanisms are generally more mindful of children and are more accessible to internally displaced children. The mechanisms in the Pact and Kampala Convention demonstrate a greater focus on regulating the behaviour through horizontal accountability processes. In terms of the specific mechanisms, internally displaced children as bearers of rights may find it difficult to access diplomatic and political mechanisms and some aspects of the remaining mechanisms, in particular within the process of the Pact and the Kampala Convention. Complaints procedures,

²²⁷ See discussion in part 5 4 7.

²²⁸ For example, damage to a State's reputation in the international community.

while presenting challenges for internally displaced children, are generally accessible as there are many forums to bring a complaint.

However, this examination of the accountability mechanisms also reveals that there is a role for other actors in this process. In a vertical, bottom-up accountability process, bearers of rights, such as internally displaced children, require support from other actors at various stages of the accountability process.²²⁹ Acknowledging the importance of understanding the role of other actors that support internally displaced children in the accountability process, the next part of the discussion will outline the role that non-State actors, specifically NGOs have in the accountability process.

5 5 Non-governmental organisations and the accountability process

NGOs are actors in a variety of forums including international human rights forums. As discussed in previously, internally displaced children are a particularly vulnerable group of children.²³⁰ Despite their vulnerability, internally displaced children are bearers of rights and have a relationship with duty-bearers that is facilitated by the accountability process. While it is important not to focus solely on the vulnerability of internally displaced children, it is necessary to acknowledge that as their capacities continue to evolve, they require support to realise their rights. The accountability process is a means to facilitate the realisation of these rights by providing a forum where States as duty-bearers are answerable for the manner in which they discharge the obligations that they have to internally displaced children. The aim of this discussion to examine how NGOs can support internally displaced children as bearers of rights to engage in the accountability process.

5 5 1 Defining Non-governmental organisations

There are many actors that are relevant with respect to the issue of internal displacement and children's rights.²³¹ Therefore, it is important to distinguish NGOs from other actors. NGOs may be defined firstly by what they are not; they are not

²²⁹ See discussion in part 5 2 2.

²³⁰ See discussion in Chapter 3 part 3 3 1.

²³¹ In addition to States, parents, the international community, armed groups, corporations and international organisations are acknowledged as actors in children's rights law and the law on internal displacement. Also, note that there is a tripartite relationship between parents, the State and the international community. See CRC art 18; ACRWC arts 19-20; Kampala Convention arts 6-8; J Tobin "Beyond the Supermarket Shelf: Using a Rights-based Approach to Address Children's Health Needs" (2006) 14 *Int'l J Child Rts* 275-306 283.

States.²³² NGOs can be categorised as non-State actors (“NSAs”). Within the category of NSAs, there is a multitude of other actors including intergovernmental organisations (“IGOs”), transnational corporations (“TNCs”), and armed groups.²³³ The Kampala Convention defines NSAs as “private actors who are not public officials of the States, including other armed groups [...] and whose acts cannot be officially attributed to the State”.²³⁴ Kamminga contributes to the definition of NGOs by distinguishing NGOs from other actors using five characteristics. Kamminga describes NGOs as (1) not controlled by States; (2) not endeavouring to use force to overthrow the government; (3) not seeking to engage in the political system to form a government; (4) not profit-seeking; and, (5) not seeking to violate the law.²³⁵ In using these attributes, Kamminga distinguishes NGOs from IGOs, liberation movements, political parties, corporations, and criminal organisations.²³⁶

Defining what NGOs are is in part useful in developing a definition for this group of actors but is also helpful to have a positive definition. International law, while referring to NGOs, does not provide a definition for this group of international actors.²³⁷ However, a working definition of NGOs has been developed by scholars in the realm of political science and international relations. Gordenker and Weiss acknowledge the variety of terms used to describe NGOs, but state:

“Some of these refer to highly specialised varieties and many are synonyms for each other. There seems no quarrel, however, with the notion that these organisations consist of

²³² See Alston’s discussion in P Alston “The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 3-36 3.

²³³ Josselin and Wallace provide a comprehensive definition of NSA which is endorsed by Alston. See D Josselin & W Wallace “Non-State Actors in World Politics: A Framework” in D Josselin & W Wallace (eds) *Non-State Actors in World Politics* (2001) 1-37 3-4 (footnote omitted); P Alston “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 3-36 15.

²³⁴ Kampala Convention art 1(n).

²³⁵ MT Kamminga “The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 93-111 96 (footnotes omitted).

²³⁶ 96. See also L Gordenker & TG Weiss “Pluralizing Global Governance: Analytical Approaches and Dimensions” in TG Weiss & L Gordenker (eds) *NGOs, the UN & Global Governance* (1996) 17-47 19.

²³⁷ MT Kamminga “The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 93-111 95. International refers to NGOs. For example, the United Nations Economic and Social Council may consult with NGOs. See Charter of the United Nations 1945 at 71.

lasting, bounded, voluntary relationships among individuals to produce a particular product, using specific techniques.”²³⁸

These writers also offer four dimensions of NGOs as a way to clarify where these actors fit within the global structure and define their internal operations.²³⁹ In terms of function, Gordenker and Weiss explain that NGOs exist to empower the people to keep the government and the economic actors accountable.²⁴⁰ Reflecting upon inputs of various writers, NGOs can be defined as NSAs that are independent of States that exist to empower individuals and take an active role in keeping States and other duty-bearers accountable.

5.5.2 The role of non-governmental organisations in the accountability process

Based on the definition of NGOs, it is clear that these actors have a role in the accountability process. In the context of children’s rights and internal displacement, NGOs are not bearers of rights. The Kampala Convention specifically prescribes duties to IGOs and humanitarian agencies.²⁴¹ As previously discussed, NGOs are distinguished from IGOs but can provide humanitarian assistance.²⁴² However, based on their function, in most instances, NGOs are neither duty-bearers nor bearers of rights. The function of NGOs indicates that their purpose is to support bearers of rights. Weissbrodt supports this point when he states that NGOs act as intermediaries between bearers of rights and the State.²⁴³ Writing specifically with regard to human rights organisations, which could include NGOs focused on the furtherance of human rights, Gaer explains that these organisations focus their efforts on “monitoring and

²³⁸ L Gordenker & TG Weiss “Pluralizing Global Governance: Analytical Approaches and Dimensions” in TG Weiss & L Gordenker (eds) *NGOs, the UN & Global Governance* (1996) 17-47 18.

²³⁹ The dimensions are organisational, governance, strategic and output. While helpful, these dimensions deviate from the scope of this discussion. For further information on this topic see L Gordenker & TG Weiss “NGO Participation in the International Policy Process (1995) 16 *Third World Quarterly* 543-555; 544-550; L Gordenker & TG Weiss “Pluralizing Global Governance: Analytical Approaches and Dimensions” in TG Weiss & L Gordenker (eds) *NGOs, the UN & Global Governance* (1996) 17-47 41-43.

²⁴⁰ L Gordenker & TG Weiss “Pluralizing Global Governance: Analytical Approaches and Dimensions” in TG Weiss & L Gordenker (eds) *NGOs, the UN & Global Governance* (1996) 17-47 19 (footnotes omitted).

²⁴¹ Kampala Convention art 6.

²⁴² For example, NGOs have been increasingly involved in providing aid. See L Gordenker & T Weiss “NGO Participation in the International Policy Process” (1995) 16 *Third World Q* 543-555 554; MT Kamminga “The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 93-111 98.

²⁴³ D Weissbrodt “The Contribution of International Nongovernmental Organizations to the Protection of Human Rights” in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438 413.

reporting of government behaviour on human rights, particularly violations, building pressure and creating international machinery to end the violations and hold governments accountable".²⁴⁴ Therefore, one role of NGOs in the context of children's rights and internal displacement is to support internally displaced children in the accountability process in general, to facilitate accountability mechanisms, to assist bearers of rights in engaging in various accountability mechanisms and to encourage State compliance.

Also, Rubenstein describes a process she calls surrogate accountability that is applicable in this context. Surrogate accountability is different from the standard accountability process in that a third party engages in one or more of the three elements of the accountability process on behalf of bearers of rights.²⁴⁵ To support the standards part of the process, NGOs can raise awareness among internally displaced children and States about the rights of this group of children and the corresponding State obligations. NGOs can support the information process by gathering information and reporting the efforts of States to comply with their obligations. In terms of sanctions, NGOs can be effective in sanctioning the actions or inaction of States through criticism and by raising awareness of instances of non-compliance.²⁴⁶

Another example of surrogate accountability in terms of the overall accountability process is an NGO bringing a complaint on behalf of a group of internally displaced children. In this way, the NGO is facilitating the information and sanctions elements of the accountability process. Unfortunately, the group of internally displaced children may be left out of the process. Rubenstein notes that surrogate accountability is problematic as bearers of rights are generally not able to hold surrogates accountable for the manner in which they provide assistance.²⁴⁷ Surrogate accountability enables the accountability process to function when the bearers of rights are unable to

²⁴⁴ FD Gaer "Reality Check: Human Rights NGOs Confront Governments at the UN" in TG Weiss & L Gordenker (eds) *NGOs, the UN & Global Governance* (1996) 51-66 57.

²⁴⁵ J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 623-624 626.

²⁴⁶ D Weissbrodt "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438 410.

²⁴⁷ 625.

participate in the process. As surrogates, NGOs may not adequately represent the perspective of internally displaced children.²⁴⁸

What is preferable is to have NGOs support internally displaced children in engaging in the accountability process. There is a delicate balance between assistance and acting as a surrogate. Supporting internally displaced children rather than acting as a surrogate is a matter of taking a children's rights perspective. This means acknowledging that internally displaced children are the bearers of rights, ensuring that they have an opportunity to participate in the accountability process, being mindful of their evolving capacities, and providing assistance where their capacity is lacking. To use the example above, this means engaging the group of internally displaced children in the complaints procedure to the extent that is in their best interests. Examining the role that NGOs can play in the accountability process, in general, reveals some challenges, but before examining these challenges further, the role that NGOs in supporting mechanisms of accountability and encouraging State compliance will be discussed first.

NGOs can engage in various accountability processes. For example, NGOs can assist monitoring and evaluation bodies by gathering information, drafting reports and providing technical assistance. NGOs can also support internally displaced children in bringing complaints or bringing complaints on their behalf. For example, the complaints procedures in children's rights law, enable NGOs to submit communications.²⁴⁹ In addition, NGOs can act as *amicus curiae* in these proceedings.²⁵⁰

A review of the role that NGOs can play in the accountability process in general, accountability mechanisms and State compliance demonstrates interconnection between the three areas. Overall, NGOs have a role in mediating the accountability relationship between States and internally displaced children. Despite the supportive

²⁴⁸ See below for a discussion on the effectiveness of NGOs in the accountability process in part 5 5 3.

²⁴⁹ ACRWC art 44(1), Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS art 5.

²⁵⁰ For example, the amicus submission of the Allard K Lowenstein International Human Rights Clinic, Yale School of Law providing the court with submissions with respect to the issues of nationality. See *The Nubian Community in Kenya v Kenya* Communication no 317/2006 (ACHPR 19-28 February 2015) paras 111-117. See also D Shelton "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 *AJIL* 611-642.

role that NGOs can play in this process, it is also important to evaluate the effectiveness of their involvement.

5 5 3 The effectiveness of non-governmental organisations in the accountability process

Even with the most altruistic intentions, it is important that NGOs also support internally displaced children in a manner that is effective in realising their rights and needs. In general, for NGOs to be effective they ought to be credible and independent.²⁵¹ It is also argued that the effectiveness of NGOs ought to be determined by the extent to which they act in a manner which is consistent with a children's rights perspective. While NGOs, in the context of this thesis, are not duty-bearers to internally displaced children, assessing the role of NGOs in the context of internal displacement from a children's rights perspective is justified. As with States, taking a children's rights perspective transforms the way in which NGOs act in relation to internally displaced children.²⁵² It also grounds any criticisms or suggestions in standards prescribed by children's rights law.²⁵³

While awareness of the seven principles of a children's rights perspective is one step that can assist NGOs in acting in a manner that is consistent with children's rights law, there are other factors that NGOs ought to take into consideration while supporting internally displaced children in the accountability process.²⁵⁴ Rubenstein writes specifically regarding surrogates in the accountability process and she provides four suggestions that are consistent with a children's rights perspective. These suggestions can also be applied to NGOs in general, even when they act as surrogates for internally displaced children in the accountability process. The suggestions are as follows: "avoid paternalistic treatment";²⁵⁵ consider the impact of actions on vulnerable

²⁵¹ D Weissbrodt "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438 404, 410-412. See also S Parmentier "The Significant of Mechanisms to Monitor Human Right at the International Level" in A Weyts (ed) *Understanding Children's Rights: Collected Papers Presented at the Seventh International Interdisciplinary Course on Children's Rights, Ghent University (Belgium) November-December 2004* (2005) 235-268 242.

²⁵² J Tobin "Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations" in A Invernizzi & J Williams (eds) *The Human Rights of Children: From Visions of Implementation* (2011) 62-98 82.

²⁵³ See discussion in Chapter 2 part 2 4.

²⁵⁴ For a discussion of the seven principles in a children's right perspective see Chapter 2 part 2 4 2.

²⁵⁵ J Rubenstein "Accountability in an Unequal World" (2007) 69 *The Journal of Politics* 616-632 629 (Emphasis in the original removed).

groups that are not accountability holders (fairness); empower bearers of rights; and, ensure that sanctions do not harm bearers of rights or other vulnerable groups.²⁵⁶

The first suggestion can be interpreted to mean that NGOs must balance internally displaced children's vulnerability with their evolving capacities. Rubenstein states, "perhaps the greatest danger of surrogate accountability is that surrogates will think that they understand accountability holders' interests better than the accountability holders themselves."²⁵⁷ In all their endeavours, NGOs ought to respect that internally displaced children are the bearers of rights and recognise that they have a supportive rather than primary role.

The second suggestion calls on NGOs to act in a manner that is fair, not only to internally displaced children but also to vulnerable groups. For instance, this may include considering the rights and needs of children in host communities as well as internally displaced children and taking actions that are fair to both groups of children. While this suggestion may be challenging, taking this holistic approach is a means to ensure that the work of NGOs is helpful rather than harmful to the overall situation. Also, this suggestion engages all seven of the principles of a children's rights perspective. It introduces an aspect of accountability on the part of NGOs as it calls on them to justify their actions. Having regard for the impact of their actions on other vulnerable groups demonstrates the rights are interdependent and indivisible, and that rights are universal and apply despite the circumstances. Especially when dealing with other groups of vulnerable children, this suggestion requires NGOs to act in a way that does not improperly discriminate between different groups of children, act in the best interests of all children, and take actions that positively impact the life, survival and development of all children involved. Furthermore, to implement this suggestion, NGOs must engage with children impacted by their initiatives and hear their points of view. Without consultation, NGOs, would not be able to accurately determine if their actions are fair to internally displaced children as well as other vulnerable groups of children.

The third suggestion requires NGOs to empower bearers of rights. This call to empower internally displaced children embodies a children's rights perspective. One principle that ought to be put into practice with respect to this suggestion is

²⁵⁶ 629-630.

²⁵⁷ 629.

participation. Therefore, NGOs in engaging can support internally displaced children in the accountability process through engaging the participation of this group of children where appropriate.

The fourth suggestion calls for NGOs to check their desire for activism with the effectiveness of the intervention. NGOs must pause to determine if their intervention in a situation is helpful.²⁵⁸ Simply put, the work of an NGO is effective if it is consistent with a children's rights perspective and ultimately advances the rights and needs of internally displaced children as bearers of rights.

Overall, NGOs have a relevant role in all of the topics discussed so far. The supportive role of NGOs facilitates accountability, compliance and implementation. The final portion of this discussion will integrate the topics discussed with the practical steps that States can take to implement their obligations to internally displaced children.

5 6 Integrating principles, theoretical models, mechanisms and practical solutions

The discussion to this point has focused on the principles and mechanisms. The next step is to bring together all of these topics using a practical framework. The aim of this section is to introduce a practical framework and integrate it with the principle of accountability, the concept of sovereignty as responsibility, accountability mechanisms, theoretical models of compliance, and the role of NGOs all from a children's rights perspective.

The Brookings Institution and University of Bern's Project on Internal Displacement created a Framework for National Responsibility ("Brookings-Bern National Responsibility Framework") and it is the practical framework that will be applied in this discussion. This framework was created to assist States in responding to the problem of internal displacement in a comprehensive manner, thereby enhancing the accountability of States.²⁵⁹ There are 12 steps or benchmarks in this framework and they are as follows:

²⁵⁸ D Weissbrodt "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in (ed) T Meron *Human Rights in International Law: Legal and Policy Issues II* (1984) 403-438 409.

²⁵⁹ See The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005)1.

- “1) Prevent Displacement and Minimize its Adverse Effects
- 2) Raise National Awareness of the Problem
- 3) Collect Data on the Number and Conditions of IDPs
- 4) Support Training on the Rights of IDPs
- 5) Create a Legal Framework for Upholding the Rights of IDPs
- 6) Develop a National Policy of Internal Displacement
- 7) Designate an Institutional Focal Point on IDPs
- 8) Encourage National Human Rights Institutions to Ingrate Internal Displacement into their Work
- 9) Ensure the Participation of IDPs in Decision-Making
- 10) Support Durable Solutions
- 11) Allocate Adequate Resources to the Problem
- 12) Cooperate with the International Community when National Capacity is Insufficient.”²⁶⁰

The steps in this framework cover all phases of internal displacement and allow for the engagement of actors in addition to States such as NGOs.²⁶¹ Most importantly, the Brookings-Bern National Responsibility Framework provides practical actions that States can take to respond to the problem of internal displacement as well as comply with their obligations to internally displaced children. Therefore, the practical steps in the framework support the interlinked concepts of accountability, compliance and implementation.²⁶²

Many of the steps are interrelated and can be further condensed into five headings, which are as follows: prevention and durable solutions; raising awareness and training; participation of internally displaced children; implementation of a legal framework, national policy, data collection and human rights integration; and, institutional focal point, allocation of resources and international cooperation. The remainder of this section will be dedicated to synthesising the topics discussed in this chapter thus far with the steps in the Brookings-Bern National Responsibility Framework. The

²⁶⁰ 5-6.

²⁶¹ 11.

²⁶² See part 5 2 2.

principles of a children's rights perspective and the four categories of risks, rights and needs, will be included in the discussion to ensure that the integration of principles, theory and the practical specifically contemplates the specific rights and needs of internal displacement.

5 6 1 Prevention and durable solutions

There is a clear obligation on States to prevent instances of internal displacement, to minimise its adverse effects and to create durable solutions.²⁶³ Practical steps that States can take includes addressing the root causes of internal displacement, implementing early warning systems and facilitate return or resettlement that is safe, voluntary and dignified.²⁶⁴ These steps are particularly relevant to two categories of rights and needs of internally displaced children, namely, physical security and basic needs. From the discussion of these categories of rights and needs, life, survival and development is a principle in a children's rights perspective that is relevant to prevention and durable solutions as both of these obligations contribute to the realisation of the rights and needs associated with this principle. Internal displacement and protracted displacement threaten children's right to life, survival and development.²⁶⁵ The principles of accountability, *pacta sunt servanda* and good faith dictate that a State that has freely accepted the obligation to prevent internal displacement must comply with this obligation. Monitoring and evaluation bodies and reporting requirements as accountability mechanisms are useful for assessing the efforts that State have made to prevent internal displacement and give them feedback on ways they can improve their efforts bring instances of internal displacement to an end.

5 6 2 Raising awareness and training

Raising awareness includes removing any negative stigma associated with internal displacement and fostering solidarity with the internally displaced amongst the wider population.²⁶⁶ The groups that the Brookings-Bern National Responsibility Framework

²⁶³ ICGLR IDP Protocol art 3; Kampala Convention arts 4, 11. See also discussion in Chapter 4 part 4 3.

²⁶⁴ Guiding Principles prin 28(1); Kampala Convention art 11(1). See discussion in Chapter 3 part 3 2. See also, The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005) 12, 22.

²⁶⁵ See discussion in Chapter 3 part 3 2 3 2.

²⁶⁶ The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005) 13.

suggests should be targeted for training are decision-makers and those providing protection and assistance to internally displaced children.²⁶⁷ While it is important to educate these groups on internal displacement, it is also important to educate internally displaced children on their rights so that they are aware of the standards. Without awareness of the standards required for their protection and assistance, it is difficult for internally displaced children to engage in the accountability process. The step of raising awareness and training, therefore, requires a children's rights perspective, where both the duty-bearer and the bearers of rights are given a space to participate and be heard. Adding the participation of internally displaced children in raising awareness and training will also support the accountability process. NGOs can also support these processes by engaging in awareness-raising campaigns, obtaining and facilitating training on issues relevant to internal displacement to all relevant groups, including internally displaced children.

5 6 3 Participation of internally displaced children

The Brookings-Bern National Responsibility Framework acknowledges that it is common for IDPs to be recipients of protection and assistance, but to be excluded from decision-making processes.²⁶⁸ The participation of internally displaced children in decision-making is not only a legal obligation but it serves a practical purpose.²⁶⁹ The framework indicates that consulting with women and children regarding the layout of camps, for example, can ensure that their particular security concerns are taken into consideration.²⁷⁰ This step clearly engages the principle of participation. However, it is important to ensure that the participation of internally displaced children is not merely tokenistic. In order for States to comply with the obligation to enable internally displacement children to participate in decision-making requires that this step of the framework is implemented from a children's rights perspective. Accountability mechanisms such as complaints procedures and investigative missions provide opportunities for the participation of internally displaced children. States can facilitate visits and meetings between the group conducting the mission and IDP communities,

²⁶⁷ 15.

²⁶⁸ 20.

²⁶⁹ See CRC art 12; ACRWC art 7.

²⁷⁰ The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005) 21.

ensuring that there is a space for child-friendly participation.²⁷¹ Internally displaced children can also participate through complaints procedures but may require the support of NGOs.²⁷² Overall, States and NGOs have a supportive role in facilitating the participation of internally displaced children.²⁷³

5 6 4 Implementation of a legal framework, national policy, data collection and human rights integration

Implementing a national legal framework and policy on internal displacement are steps that will facilitate the domestication of States' obligations to internally displaced children. Creating a legal framework is a method of domesticating State obligations to internally displaced children.²⁷⁴ While a national policy provides a plan of action and designates an institutional focal point for the implementation of protection and assistance of all IDPs, domestic legislation on internal displacement is also necessary.²⁷⁵ Both the legal framework and the policy are mutually reinforcing. The Brookings-Bern National Responsibility Framework advocate for using the Guiding Principles as a tool to direct the development of the legal framework and policies.²⁷⁶ However, it is imperative that the law and policy incorporate a children's rights perspective in order to comply with children's rights law and effectively respond to the rights and needs of internally displaced children. A simple way to incorporate a children's rights perspective is to include the seven principles in both the law and policies.²⁷⁷ Also, data collection and integrating internal displacement into national human rights mechanisms reinforce the legal framework and policy. The purpose of data collection is to obtain a more accurate picture of the various groups such as children, women, the elderly that make up the population and the conditions in which

²⁷¹ Investigative missions that touch and concern internal displacement general include visits to IDPs camps and opportunities to speak with many parties. See for example, United Nations Commission on Human Rights "Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda" (03 March 2004) E/CN.4/2004/77/Add.1 paras 2-7; United Nations Human Rights Council "Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic" (18 January 2011) A/HRC/16/43/Add.4 paras 1-6.

²⁷² See for example, *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013); part 5 5.

²⁷³ Regarding the supportive role of NGOs see part 5 5 2.

²⁷⁴ The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005)16.

²⁷⁵ 17.

²⁷⁶ 16-17.

²⁷⁷ See discussion in Chapter 3 part 3 3 and Chapter 4 part 4 3.

they live, including camps, informal settlements.²⁷⁸ NGOs with expertise in this area can provide technical assistance in data collection.²⁷⁹ The principle of non-discrimination is directly applicable regarding data collection. How a child's willingness or unwillingness to engage in data collection processes ought not to negatively affect his or her rights.²⁸⁰ Integrating internal displacement within the national human rights institutions is a means to acknowledge internal displacement as a human rights issue and solidify legal support for internal displacement as a human right domestically.²⁸¹ Human rights institutions can facilitate accountability mechanisms such as reporting, monitoring and evaluation, technical assistance, and complaints procedures.²⁸² All of these steps represent mutually reinforcing actions that support and have the potential to provide effective protection and assistance to internally displaced children. In order for their potential to be realised, States must take actions to create a domestic legal framework to direct the implementation of their obligations. Also, States must employ qualitative and quantitative means to monitor and evaluate the risks, rights and needs of IDPs and the effects of the domestic legal framework. Together domestic policy and legislation on internal displacement and data collection support the effective implementation of State of obligations to internally displaced children.

5 6 5 Institutional focal point, allocation of resources and international cooperation

Creating an institutional focal point, allocation of resources and allowing international cooperation are all practical steps that support the implementation of State obligations to internally displaced children and raises the level of accountability. An institutional focal point can coordinate the work of governmental actors as well as NSAs such as NGOs regarding implementation.²⁸³ Also, having an institutional focal point creates a particular organisation that can liaise with members of the international community when cooperation is required.²⁸⁴ The allocation of resources provides the necessary funds and other resources to facilitate implementation.²⁸⁵ Furthermore,

²⁷⁸ The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005) 14.

²⁷⁹ 14.

²⁸⁰ 14-15.

²⁸¹ 19.

²⁸² 19-20.

²⁸³ 18.

²⁸⁴ 18.

²⁸⁵ See discussion regarding "IDP Funds" in The Brookings Institution-University of Bern Project on Internal Displacement "Addressing Internal Displacement: A Framework for National Responsibility" (April 2005) 24.

cooperation with the international community enables States to comply with their obligations in the event that the available resources are insufficient. Practical efforts to implement obligations engage the principle of accountability as well as the concept of sovereignty as responsibility.²⁸⁶ States, by implementing their obligations to provide for the rights and needs of internally displaced children and cooperating with the international community where necessary, are exercising their power in a way justifies their position as sovereigns. In terms of a children's rights perspective, the principle of accountability is clearly engaged by the efforts of States to implement their obligations. The process of implementation also responds to the right of internally displaced children to life, survival and development.

5 6 6 Summary of principles, accountability mechanisms and practical solutions

Ideally, a children's rights perspective ought to be applied to the theoretical and the practical. The Brookings-Bern National Responsibility Framework is helpful as it assists State to fulfil the obligations and thereby raises the level of accountability. The preceding discussion demonstrates that integrating the theoretical and the practical from a children's rights perspective at a domestic level requires engaging with the principles of the perspective and applying them in each step.

5 7 Conclusions regarding State accountability and State compliance

The discussion has examined several topics that are related to the issues of accountability, compliance and implementation. Reflecting on the preceding discussion, the most effective means to hold States accountable for their obligations to internally displaced children requires the application of legal accountability. In this thesis, legal accountability is described as the process by which States fulfil their obligations to internally displaced children.²⁸⁷ Accountability includes the three duties (protect, respect and fulfil) and a process (standards, information and sanctions) and is interlinked with compliance and implementation.²⁸⁸ The concept of sovereignty of responsibility directly applies the principle of accountability in the context of internal displacement and it has been recognised and accepted by States in Africa through the AU. The various accountability mechanisms provide tools to implement the elements of the accountability process. This discussion also demonstrates that the most

²⁸⁶ 24.

²⁸⁷ See part 5 2 1.

²⁸⁸ See part 5 2 2.

effective accountability mechanisms are accessible to bearers of their rights and their supporters and are facilitated by actors other than States, such as monitoring and evaluation bodies.²⁸⁹ In addition, NGOs have a complementary role in supporting internally displaced children and States with respect to accountability, compliance and implementation. Finally, the Brookings-Bern National Responsibility Framework provides 12 practical steps that have been integrated with the other topics of discussion to demonstrate the importance of holistically incorporating a children's rights perspective in each aspect of the implementing State obligations to internally displaced children. In summary, the most effective means to hold States accountable for their obligations to internally displaced children are accessible to internally displaced children and include actors that support internally displaced children as well as neutral parties in addition to States.

Overall, the discussion in this chapter has contributed to understanding the scope of State accountability as it relates to the secondary research question. What is left is to examine situations of internal displacement in States in Africa. The next chapter will include an analysis of real situations of internal displacement. In addition, it presents an opportunity to understand the problem of internal displacement and the various responses of States in the region to this problem. Therefore, the next chapter will examine cases studies of Uganda, the CAR, Nigeria and Sudan

²⁸⁹ See part 5 4.

CHAPTER 6: A COMPARATIVE ANALYSIS OF CASE STUDIES OF AFRICAN STATES

6 1 Introduction

The aim of this chapter is to provide context to the overall response to the primary and secondary research questions. This aim will be met by using case studies to examine situations of internal displacement in selected States. The case studies will provide context to the examination of the research question in three ways. First, the case studies will highlight a challenge encountered by internally displaced children in the selected States with respect to the realisation of their rights and needs. Second, the cases studies present an opportunity to examine how and to what extent the States selected discharge their obligations to internally displaced children. Simply put, the case studies will facilitate an investigation of the manner in which States respond to the rights and needs of their internally displaced children and implement their obligations.¹ Third, the case studies provide an opportunity to examine how and to what extent the selected States engage with the principle of accountability in relation to their obligations to internally displaced children. The case studies, therefore, will provide insights to the extent to which selected States implement their obligations to internally displaced children and are held accountable for the manner in which they discharge these obligations.

To achieve the aim of this chapter, the case studies will be divided into four parts. The first part will examine an issue that negatively impacts internally displaced children; therefore, highlighting a specific challenge encountered by internally displaced children in each of the selected States. The second part will outline the various drivers and triggers of internal displacement to provide a broad understanding of the causes of internal displacement in the selected States. The third part will critically analyse the State's policy or legislation on internal displacement according to the four categories of risks, rights and needs of internally displaced children.² This part will contribute to the understanding of how and to what extent States discharge their obligations to internally displaced children. The fourth part will be used to examine the extent to which these States have implemented the 12 steps of the Brookings-Bern National Responsibility Framework as the framework provides practical steps that the States can take to implement their obligations to internally displaced children.³ Practical implementation is important as it operationalises the duty to

¹ The use of the term 'their' emphasises that States are the primary duty-bearers to internally displaced children within their territory.

² See Chapter 3 part 3 3; Chapter 4 part 4 3.

³ See Chapter 5 part 5 6.

fulfil which is one of the three duties of the principle of accountability.⁴ The extent to which the selected States have implemented the 12 steps of the framework is one indication of their level of accountability.

The selection of the States to be included in the case studies was guided by four criteria. First, the scope of this study is focused on the continent of Africa; therefore, in order for the case studies to provide context to the study and highlight the particular dynamics in Africa, the selection of States has been restricted to States in Africa.⁵ Second, the States must have a population of IDPs in order to assess the response of the States to internally displaced children. Third, the States must have ratified at least one binding instrument in children's rights law and the law on internal displacement respectively. The ratification requirement ensures that the States are bound by the obligations in both areas of the law critically analysed in this study. Fourth, the States selected for the case studies must be from a variety of regions on the continent in order to represent situations in the different regions in Africa.⁶ However, it should be noted that while instances of internal displacement occur in all regions of the continent, they are concentrated across eastern, central and western Africa.⁷ In light of the aforementioned criteria, Uganda, the CAR, Nigeria and Sudan have been selected for the cases studies in this chapter.⁸

6 2 Uganda

6 2 1 Night Commuting

The LRA was and is known for abducting children and forcibly recruiting them into its ranks. Abduction by the LRA places the life and physical security of children at risk. UNICEF reported that children who were abducted by the LRA in Uganda were at risk of "physical abuse, sexual exploitation and gender-based violence, including rape".⁹ Girl children were

⁴ See Chapter 5 part 5 2 2.

⁵ See Chapter 1 part 1 7 for discussion regarding the scope of this thesis.

⁶ The States that were selected for the case studies represent the regions of East, Central and West Africa. Sudan is classified by the United Nations Statistics Division as being in north Africa and as being in east Africa by the AU. See United Nations Statistics Division "Geographic Regions" <<https://unstats.un.org/unsd/methodology/m49/>> (accessed 06-03-2018); African Union *African Union Handbook 2018: A Guide for Those Working with and Within the African Union* (2018)16.

⁷ IDMC "2017: Africa Report on Internal Displacement" (December 2017)20.

⁸ Additional explanation for the selection of each State will be provided in the case study. Also, there were no States located in northern Africa that met the criterion and only Angola, which is located in Southern Africa met the criterion. However, at the end of 2016 Angola was only estimated to have only 19,000 IDPs displaced by disasters. See IDMC "GRID 2017: Global Report on Internal Displacement" (May 2017)113. See also Addendum A Table 1 African States Child Law and Internal Displacement Law Ratifications Status.

⁹ UNICEF *State of the World's Children 2005* (2004) 49. See also CRC Committee "Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda" (17 July 2008) CRC/C/OPAC/UGA/1 para 75. See also United Nations Commission

at risk abducted to be “bush wives”.¹⁰ The UN IDP Rapporteur stated that there were very small numbers of UPDF soldiers assigned to protect IDP camps, which led to children in the IDP camps being “at constant risk of being abducted and recruited as child soldiers”.¹¹ The inadequate protection of IDP camps created conditions in which internally displaced children were vulnerable to abduction.

In response to this threat, individuals, usually children, travelled from their homes or IDP camps to shelters, churches and other places in urban areas or to the centre of IDP camps at night to avoid abduction by the LRA.¹² Specifically for internally displaced children in Uganda, the lack of security in IDP camps made it necessary for children to flee to urban centres and away from the outer areas of camps to avoid abduction.¹³ This practice has been described as night-commuting.¹⁴ Individuals that engaged in the practice of night commuting were referred to as “night commuters”.¹⁵ In 2004, it was estimated that

on Human Rights “Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda” (3 March 2004) E/CN.4/2004/77/Add.1 para 27.

- ¹⁰ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 77. See also Human Rights Watch “Abducted and Abused: Renewed Conflict in Northern Uganda” (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018); CRC Committee “Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda” (17 July 2008) CRC/C/OPAC/UGA/1 para 47.
- ¹¹ CRC Committee “Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda” (17 July 2008) CRC/C/OPAC/UGA/1 para 42.
- ¹² UNICEF *State of the World’s Children 2005* (2004) 48; CRC Committee “Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda” (17 July 2008) CRC/C/OPAC/UGA/1 para 74; *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 3; Human Rights Watch “Abducted and Abused: Renewed Conflict in Northern Uganda” (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 18.
- ¹³ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 79. See also Human Rights Watch “Abducted and Abused: Renewed Conflict in Northern Uganda” (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 17, Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38-39.
- ¹⁴ See United Nations Commission on Human Rights “Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda” (03 March 2004) E/CN.4/2004/77/Add.1 para 26; UNICEF *State of the World’s Children 2005* (2004) 48; CRC Committee “Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda” (1 July 2008) CRC/C/OPAC/UGA/1 paras 74-75
- ¹⁵ National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018) xii; United Nations Commission on Human Rights “Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda” (3 March 2004) E/CN.4/2004/77/Add.1 para 5; Human Rights Watch “Abducted and Abused: Renewed Conflict in Northern Uganda” (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 68-69.

approximately 25,000 children districts of Gulu, Kitgum and Pader of northern Uganda that engaged in the practice of night commuting.¹⁶

Night commuting is a form of cyclical displacement.¹⁷ Night commuting incorporates the two elements of the definition of internal displacement.¹⁸ The risk of abduction by the LRA created conditions that forced children, including children who were already internally displaced, to flee on a nightly basis within Uganda. Therefore, all children who were night commuters could be described as being internally displaced.

The practice of night commuting presented many risks to the well-being of internally displaced children. Night commuters, for instance, did not have parental protection and supervision as many parents and guardians remained behind to look after the family's property and belongings.¹⁹ This is one reason why night commuters encountered risks to their physical security and basic needs.²⁰ Specific risks that night commuters encountered included sexual harassment, HIV/AIDS and early pregnancy.²¹ Girl children who were night commuters at times had to engage in survival sex for food and money.²²

The ACERWC also had the opportunity to hold the government of Uganda accountable for the practice of night commuting in its decision in *Hunsungule and Others v Uganda*,²³ when it assessed whether Uganda violated Article 29 of the ACRWC. Article 29(a) requires

¹⁶ United Nations Commission on Human Rights "Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Addendum Profiles in Displacement: Mission to Uganda" (3 March 2004) E/CN.4/2004/77/Add.1 para 26.

¹⁷ See UNICEF *State of the World's Children 2005* (2004) 48; United Nations "Consolidated Appeals Process (CAP): Humanitarian Appeal 2005 for Uganda" (11 November 2004) Relief Web <<http://reliefweb.int/report/uganda/consolidated-appeals-process-cap-humanitarian-appeal-2005-uganda>> (accessed 31-03-2017) as cited in Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 39. See also discussion in Chapter 3 part 3 2 3 2.

¹⁸ The two elements are coerced movement and movement within and international border. See Chapter 3 part 3 2.

¹⁹ Human Rights Watch "Abducted and Abused: Renewed Conflict in Northern Uganda" (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 18.

²⁰ UNICEF *State of the World's Children 2005* (2004) 49; CRC Committee "Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda" (17 July 2008) CRC/C/OPAC/UGA/1 para 75.

²¹ CRC Committee "Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda" (17 July 2008) CRC/C/OPAC/UGA/1 para 75.

²² UNICEF *State of the World's Children 2005* (2004) 49; CRC Committee "Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda" (17 July 2008) CRC/C/OPAC/UGA/1 para 75; Human Rights Watch "Abducted and Abused: Renewed Conflict in Northern Uganda" (July 2003) <<https://www.hrw.org/reports/2003/uganda0703/uganda0703.pdf>> (accessed 21-06-2018) 45.

²³ Communication no 1/2005 (ACERWC 15-19 April 2013).

States to prevent child abduction, by taking “appropriate measures”.²⁴ The ACERWC recognised that abductions in IDPs camps took place and that the risk of abduction by the LRA caused children to engage in the practice of night commuting.²⁵ However, the ACERWC found that the government of Uganda did not violate its obligation pursuant to Article 29 of the ACRWC.²⁶ It took the position that Uganda’s efforts to provide protection were not successful due to the “prevailing conflict and the inhumane methods of operation of the rebels”.²⁷ It is important to note that the ACERWC earlier stated that it would take into consideration “the fact that the ability of a State to fulfil its human rights obligations can be severely undermined by its involvement in hostilities”.²⁸ The ACERWC’s decision acknowledges difficult circumstances in which the government of Uganda endeavoured to discharge its obligation to prevent abduction, which is consistent with decisions of the African Commission and the ACERWC.²⁹ While this position can be challenged by the findings of the UN IDP Rapporteur’s 2003 mission, the ACERWC, based on its assessment of Uganda’s efforts on the findings of its investigative mission, which determined that the measures taken by Uganda were adequate despite being unsuccessful.

Night commuting has come to an end in Uganda due to the increased security and the return or resettlement of the majority of its IDPs.³⁰ While not a current problem, night commuting provides an example of an issue of that impacted internally displaced children in Uganda and an issue that caused the cyclical displacement of its children.

6 2 2 Drivers and Triggers

Uganda is a State that has transitioned from mass internal displacement of a population to a State that is by in large in the return and resettlement phase of displacement. In 2004, mass displacements due to a 20-year conflict between the Ugandan government and the

²⁴ ACRWC art 29(a).

²⁵ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 79.

²⁶ Para 80.

²⁷ Para 80.

²⁸ Para 36.

²⁹ See *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 38. The African Commission and the ACERWC do not want to find fault with States that are actually making efforts to comply with their obligations. See *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 69; *Institute for Human Rights and Development in Africa and Others v Kenya* Communication no Comm/002/2009 (ACERWC 22 March 2011) para 68.

³⁰ See IDMC “Internal Displacement: Global Overview of Trends and Developments in 2010” (March 2011) 39; Anonymous “Uganda Ends Hunt for LRA leader Joseph Kony” (19-04-2017) *BBC News* <<http://www.bbc.com/news/world-africa-39643914>> (accessed 23-05-2018). Also, the UPDF was tasked with the return and resettlement of night commuters. National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018) s 3.1.

Lord's Resistance Army ("LRA") displaced 90 per cent of persons living in northern Uganda and resulted in almost 2 million IDPs.³¹ It was not until 2011 that the number of IDPs displaced by conflict and violence in Uganda reduced to approximately 30,000.³² This substantial reduction in the number of IDPs in Uganda is attributed to six years of improved security that encouraged approximately 1.8 million IDPs to return to their places of habitual residence or resettle in other areas.³³ Since 2011, there have been fluctuations in the number of IDPs in Uganda, but it is no longer plagued by mass internal displacements.³⁴ The most recent estimate of persons displaced in Uganda due to conflict and violence is approximately 24,000.³⁵

The drivers or underlying causes of internal displacement in Uganda can be summarised as political, economic and ethnic factors. Since its independence, there have been numerous struggles for political power.³⁶ There are as Lomo and Hovil state, "deep-rooted divisions between the north and the south".³⁷ These divisions have been exploited by colonisers and political leaders.³⁸ The overall instability was and is sustained by the widely held belief that if one's ethnic group is not in power then one's security could not be guaranteed.³⁹ These issues provide conditions that enable conflicts to reoccur along ethnic lines.

Conflict has been a trigger of internal displacement in Uganda from the 1970s to the present.⁴⁰ The long-term conflict between the Ugandan government and the LRA can be identified as a cause of mass internal displacement in this State. It is also important to note that the government of Uganda contributed to internal displacement due to its policy of removing citizens in the North from their homes and relocating them to camps called "protected villages".⁴¹ The rationale used by the State for the forced relocations was to

³¹ IDMC "Internal Displacement: Global Overview of Trends and Development 2004" (March 2005) 6.

³² IDMC "Global Overview 2011: People Displaced by Conflict and Violence" (April 2012) 40, 53.

³³ IDMC "Internal Displacement: Global Overview of Trends and Developments in 2010" (March 2011) 39.

³⁴ For example, in 2016 the number of IDPs increased to 53,000 due to inter-communal violence. See IDMC "GRID 2017: Global Report on Internal Displacement" (May 2017) 115.

³⁵ There were also 95,000 new displacements due to disasters in 2017. See IDMC "GRID 2018: Global Report on Internal Displacement" (May 2018)96.

³⁶ Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 14. See also National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018)vii-viii.

³⁷ Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 14.

³⁸ 14, 18.

³⁹ 20.

⁴⁰ National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018)vii-viii.

⁴¹ National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-

facilitate the protection of civilians and identification of members of rebel groups.⁴² However, Lomo and Hovil explain that many citizens did not wish to be removed to their homes and be relocated to these camps.⁴³

There are other types of conflict and violence have led to internal displacement in Uganda. In 2016, internally displacement was caused by a conflict between the Baknozo and Bamba ethnic groups due to “local elections and political infighting”.⁴⁴

Disasters such as landslides and floods also trigger internal displacement in Uganda.⁴⁵ In 2017, there were 95,000 new internal displacements due to disasters.⁴⁶ Therefore, internal displacement in Uganda is triggered by the main causes of internal displacement, namely, conflict, violence and disasters.⁴⁷

6 2 3 Analysis of domestic legislation and policy

In 2004, Uganda adopted the National Policy for Internally Displaced Persons 2004 (“Uganda IDP Policy”).⁴⁸ This policy lists the CRC and its Optional Protocols, the ACRWC and the Guiding Principles, as some of its guiding principles.⁴⁹ This inclusion demonstrates an acknowledgement of the importance of children’s rights law as well as the law on internal displacement.

2018) vii; Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38; IDMC “Internal Displacement: Global Overview of Trends and Developments in 2010” (March 2011) 55.

⁴² Z Lomo & L Hovil *Behind the Violence: The War in Northern Uganda* (2004) 38.

⁴³ 39.

⁴⁴ It is estimated that 23,000 people were displaced by this incident. This accounts for the increase from approximately 30,000 IDPs in 2015 to 53,000 in 2016. IDMC “2017: Africa Report on Internal Displacement” (December 2017) 44; IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 124.

⁴⁵ National Policy for Internally Displaced Persons (August 2004) *The Brookings Institution* <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf> (accessed 31-08-2018) viii. Development projects have also displaced individuals in Uganda. Between 8,000 and 40,000 persons were displaced when land was seized to plant trees and off-set carbon emissions. See The Oakland Institute “The Darker Side of Green: Plantation Forestry and Carbon Violence in Uganda” (November 2014) <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Report_DarkerSideofGreen_hirez.pdf > (accessed 04-09-2018) 5, 17; IDMC “2016: Africa Report on Internal Displacement” (December 2016) 23. See also P Carmody & D Taylor “Globalization, Land Grabbing, and the Present-Day Colonial State in Uganda: Ecolonization and Its Impacts” (2016) 25 *Journal of Environment & Development* 100-126.

⁴⁶ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 96.

⁴⁷ See discussion in Chapter 3 part 3 2 2.

⁴⁸ It should be noted that Uganda has also developed other policies relevant to IDPs such as the National Internally Displaced Persons Return, Resettlement and Re-Integration Strategic Plan for Lango and Teso Sub Regions (November 2005) *Refworld* <<http://www.refworld.org/pdfid/5a8435ca4.pdf>> (accessed 04-09-2018); National Policy for Disaster Preparedness and Management (April 2011) *Refworld* <<http://www.refworld.org/docid/5b44c5d04.html>> (accessed 04-09-2018). See also IDMC “IDP Law and Policies: A Mapping Tool” <<http://www.internal-displacement.org/law-and-policy>> (accessed 15-03-2018).

⁴⁹ Uganda IDP Policy 2.

The full range of issues affecting IDPs is addressed in the policy. The provisions of the policy that specifically contemplate internally displaced children are security, family unification; clothing; education and property rights. Each of these issues can be categorised according to the four categories of risk, rights and needs of internally displaced children, namely, physical security, basic needs, social, economic and cultural rights, and civil and political rights.⁵⁰

The Uganda IDP Policy addresses the risks, rights and needs of internally displaced children in the category of physical security in its provisions on security. In this policy, security is an important aspect of responding to the problem of internal displacement.⁵¹ The policy states,

“Security of person and property is one of the fundamental entitlements of internally displaced persons”.⁵²

The policy prohibits children under the age of 18 from participating “in hostilities or any activity of the armed forces”.⁵³ It is also noteworthy that the policy requires that the Ugandan People’s Defence Force (“UPDF”), police and any other agencies providing security to be trained with respect to Guiding Principles, children’s rights law, human rights and humanitarian law.⁵⁴ This requirement highlights the need for members of the State’s security forces to be aware of the legal standards applicable to the protection and assistance of internally displaced children.

Physical security is also addressed in the policy by its provision on family reunification as families can provide protection and support to internally displaced children.⁵⁵ The policy provides that the process ought to be expedited particularly when children are involved.⁵⁶ Expedited family reunification is generally in the best interests of the child.⁵⁷ Also, the policy states that in the event that a child is not able to be reunited with her parents, the State has the responsibility to provide him or her with a suitable home and provide for his or her basic

⁵⁰ ss. 3.1-3.1.7. Please note that the term ‘reunification’ will be used rather than the term ‘unification’ to remain consistent with the terminology in the Guiding Principles, ICGLR IDP Protocol and the Kampala Convention. See Guiding Principles prin 17(3); ICGLR IDP Protocol art 4(1)(h); Kampala Convention art 9(2)(h). See Chapter 3 part 3 3; Chapter 4 part 4 3.

⁵¹ This is because internal displacement presents profound risks to the physical security of internally displaced children. See discussion in Chapter 3 part 3 3 1 1.

⁵² Uganda IDP Policy s 3.1.

⁵³ S 3.1.

⁵⁴ S 3.1.

⁵⁵ See discussion in Chapter 3 part 3 3 1 1.

⁵⁶ Uganda IDP Policy s 3.7(1).

⁵⁷ Guiding Principles prin 18. However, it is prudent to assess that the reunification is in the best interests of the child. See discussion in Chapter 4 part 4 3 1 1.

needs, education and medical care.⁵⁸ The policy, therefore, responds to the risks, rights and needs that internally displaced children encounter when they are separated from their families.

Related to the provision of basic needs, the policy requires that children under the age of five have at least one full set of clothing and personal hygiene items.⁵⁹ The policy also contemplates the provision of “a regular supply of sanitary protection”.⁶⁰ These provisions respond to some of the basic needs of internally displaced children, including girl-children.⁶¹

In the category of economic and cultural rights, the policy addresses the issue of education.⁶² The policy’s approach to the issue of education is aimed at ensuring internally displaced children obtain access to education and meet the same educational standards as children who are not displaced.⁶³ Women and girls are to have “full and equal participation in [...] education programmes”.⁶⁴ The special consideration of girl-children acknowledges that female internally displaced children may encounter additional challenges accessing education. It is commendable that this policy aims to ensure that internally displaced children have access to education.

The acquisition and allocation of land can be classified under the category of social, economic and cultural rights as well as civil and political rights. The access to land is an economic right and the process by which land is acquired and allocated engages civil and political rights.⁶⁵ As previously discussed, disputes with respect to property are relevant to internally displaced children.⁶⁶ The policy requires that special protection is provided to children, regarding the acquisition and allocation of land, especially unaccompanied children.⁶⁷ This provision acknowledges the difficulties that internally displaced children may encounter in acquiring land and exercising their rights in this regard. However, it should be

⁵⁸ Uganda IDP Policy s 3.7(2). This provision is consistent with the standard set in the Guiding Principles. This aspect of the policy also corresponds to obligations outlined in the CRC and ACRWC, which require that the States to support parents in providing for the needs of their children in the event that parents are unable to provide for these needs. See Guiding Principles prin 18(2)(a)-(d); CRC art 18(2); ACRWC art 20(2).

⁵⁹ Uganda IDP Policy s 3.1.0(2)(a).

⁶⁰ S 3.1.0(2)(b).

⁶¹ These provisions are consistent with the requirement to provide for basic needs outlined by the CRC, ACRWC and Guiding Principles. See CRC art 27(3); ACRWC art 20(2)(a); Guiding Principles prin. 18(2)(c).

⁶² See Chapter 3 part 3 3 1 3; Chapter 4 part 4 3.

⁶³ Uganda IDP Policy s 3.1.1(1).

⁶⁴ Uganda IDP Policy s 3.1.1.(2). Also, the CRC, ACRWC and Guiding Principles also require States to provide access to education and have regard for groups of children that may have difficulties accessing education. See CRC arts 28-29; ACRWC art 11; Guiding Principles prin 23.

⁶⁵ For example, engaging in an adjudication process to obtain land.

⁶⁶ See discussion in Chapter 3 part 3 3 2 3.

⁶⁷ Uganda IDP Policy s 3.6.

noted that in its 2017 report on Africa, the IDMC states that children born out of wedlock and orphans encountered difficulties in inheriting and owning land.⁶⁸ This information highlights that there may be a disconnect between the rights and protections provided to internally displaced children regarding the acquisition and allocation of land in the Uganda IDP Policy and its implementation.

Overall, the policy responds to many of the risks, rights and needs of internally displaced children and it includes special consideration of this group of children regarding issues that fit within the categories of physical security, basic needs, social, economic and cultural rights and civil and political rights.

6 2 4 Practical steps for implementation

The discussion in this section will focus on assessing the extent to which the government of Uganda has implemented the 12 steps of the Brookings-Bern National Responsibility Framework.⁶⁹ The government of Uganda's level of implementation is one way to assess its level of accountability.

The first step of the framework requires the State to prevent and minimise internal displacement. The government of Uganda has included the reduction and mitigation of internal displacement in its national policy. One of the objectives of the Uganda IDP Policy is to minimise internal displacement.⁷⁰ The policy goes on to state that the government of Uganda will ensure that its citizens are protected from arbitrary displacement.⁷¹ In addition to preventing displacement unless is necessary for security and safety reasons, the strategy to implement this objective is to "[i]ntegrate into the planning functions of all relevant institutions deterrents to factors that lead to internal displacement".⁷²

The second step of the framework is to raise awareness about internal displacement. The government of Uganda has addressed the issue of raising awareness about internal displacement by focusing on the dissemination of information. The radio, television and newspaper media will be mobilised to inform the public about situations of internal displacement as well as communicate with relevant partners.⁷³ The assistance of national

⁶⁸ IDMC "New Displacement in Uganda Continues Alongside Long-Term Recovery Needs" (23-01-2014) <<http://www.internal-displacement.org/sub-saharan-africa/uganda/2014/new-displacement-in-uganda-continues-alongside-long-term-recovery-needs>> (accessed 15-03-2018).

⁶⁹ See Chapter 5 part 5 6.

⁷⁰ Uganda IDP Policy 1.

⁷¹ S 3.3.

⁷² S 3.3.

⁷³ S 5.1.

and international bodies is also contemplated regarding raising awareness of the situation of IDPs.⁷⁴

The third step of the framework requires data collection in order to ascertain the number of IDPs and the conditions in which they are living. The Uganda IDP Policy provides that the District Probation and Welfare Officer is responsible for “maintaining a data base on IDPs”.⁷⁵

The fourth step requires States to provide training regarding the rights of IDPs. The Office of the Prime Minister – Department of Disaster Preparedness and Refugees and the Uganda Human Rights Commission are to ensure that the policy and security forces that engage with IDPs are trained regarding the Guiding Principles, children’s rights as well human rights and humanitarian law.⁷⁶ The Ugandan government in its 2008 report to the CRC Committee advised of the creation of UPDF child protection units in conjunction with Save the Children Uganda and that the members of these units received training on human rights and child protection.⁷⁷

The fifth step calls for the creation of a legal framework on internal displacement. The government of Uganda has not developed a specific legal framework for ensuring the rights of IDPs. However, the mission of the Uganda IDP Policy is to ensure that IDPs are able to enjoy the same rights and freedoms as other citizens.⁷⁸ Also, the Inter-Agency Technical Committee is tasked with “the initiation of legislative proposals on the protection and welfare of [IDPs]”.⁷⁹

The sixth step of the framework requires States to develop a national policy on internal displacement. As evidenced by the previous discussion on the Uganda IDP Policy, the government of Uganda had developed and adopted a national policy to respond to internal displacement.⁸⁰

The seventh step of the framework requires State to designate a focal point institution to coordinate its response to internal displacement. The Uganda IDP Policy designates a focal point agency to respond to internal displacement. It outlines that the Office of the Prime Minister – Department of Disaster Preparedness and Refugees as the lead agency and

⁷⁴ S 4.1.

⁷⁵ S 2.4 (ii).

⁷⁶ S 3.1.

⁷⁷ CRC Committee “Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Initial Reports of States Parties due in 2004 Uganda” (17 July 2008) CRC/C/OPAC/UGA/1 para 61.

⁷⁸ Uganda IDP Policy vi, 1.

⁷⁹ S 2.2.2 (xiii).

⁸⁰ See part 6 2 3.

designates other bodies with duties such policy formulation, planning, monitoring and protection at the national and district levels.⁸¹ The policy also outlines several other bodies that have a role in responding to internal displacement.⁸²

The eighth step of the framework is to integrate the national human rights commission into the State's work on internal displacement. The government of Uganda has incorporated the Uganda Human Rights Commission in its response to internal displacement. One such key area of involvement is the inclusion of the Uganda Human Rights Commission is part of the Inter-Agency Technical Committee.⁸³ A specific task of the Uganda Human Rights Commission is providing training as discussed above.⁸⁴ Also, the Uganda Human Rights Commission is to assist the Human Rights Promotion and Protection Sub Committee with monitoring human rights of IDPs.⁸⁵

The ninth step of the framework requires States to include IDPs in the decision-making process. In its response to internal displacement, the government of Uganda has incorporated the participation of IDPs. The Uganda IDP Policy provides that IDPs are to be consulted regarding the planning and implementation of services and infrastructure projects as well as their return and resettlement.⁸⁶ Also, IDPs, especially women and youth are to attend to Sub County Disaster Management Committee meetings, which is the body at the sub-county level that is responsible for the protection and assistance of IDPs at the sub-county level.⁸⁷

The focus on the tenth step is for the State to take actions that support durable solutions. The Uganda IDP Policy states that the government of Uganda is committed to achieving durable solutions to internal displacement.⁸⁸ Working towards durable solutions includes the return and resettlement of IDPs.⁸⁹

The eleventh step of the framework is to ensure that sufficient resources are allocated to the State's response to the problem of internal displacement The Inter-Agency Technical Committee is tasked ensuring with resources are directed to responding to internal

⁸¹ 3-19.

⁸² The bodies include Committees on Matters relating to Internally Displaced Persons, the Inter-Ministerial Policy Committee, Inter-Agency Technical Committee, Human Rights Promotion and Protection Sub Committee as well as other bodies at the district level. See Uganda IDP Policy 3-18.

⁸³ Uganda IDP Policy s 2.2.2.

⁸⁴ S 3.1.

⁸⁵ S 2.3.1.

⁸⁶ S 3.15, 3.4(5).

⁸⁷ S 2.5.1.

⁸⁸ Preamble (ii).

⁸⁹ S 3.4.

displacement.⁹⁰ When resources are inadequate, the government of Uganda has indicated that it will look to national and international partners to provide “financial and technical assistance”.⁹¹

The twelfth and final step of the framework requires the State to cooperate with members of the international community when is unable to respond to the problem of internal displacement on its own. The government has also incorporated cooperation with national and international humanitarian organisations in its strategy to provide protection and assistance to IDPs.⁹² Cooperation with other partners is also demonstrated by the inclusion of representatives from some international organisations such as the United Nations and Amnesty International on the Inter-Agency Technical Committee.⁹³

Overall, the government of Uganda has incorporated the 12 steps of the Brookings-Bern National Framework in the Uganda IDP Policy. With the exception of domestic legislation on internal displacement, Uganda has policies and mechanisms in place to support the practical implementation of its obligations to internally displaced children. These findings indicate that in theory, the government of Uganda has positively engaged with the principle of accountability as these policies and mechanisms have the potential to protect, respect and fulfil the rights and needs of internally displaced children.

6 3 The Central African Republic

6 3 1 Access to education

The ongoing conflict in the CAR has created challenges for access to education for all children. Parents often choose to not to send their children to school due to the ongoing conflict between the government security forces and the armed groups as well as the risk of abduction by the *coupeurs de route*, which are highway bandits⁹⁴ The conflict has also caused the destruction of schools and the many teachers have been killed or have fled.⁹⁵ All of these factors make it difficult for children in the CAR to access education.

Internally displaced children in CAR encounter additional challenges in accessing education. One explanation is the lack of services provided by the government to IDPs,

⁹⁰ Uganda IDP Policy s 2.2.2.

⁹¹ Uganda IDP Policy ss 4.1, 4.2(ii).

⁹² Uganda IDP Policy ss 4.1, 4.2.

⁹³ Uganda IDP Policy s 2.2.2.

⁹⁴ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 paras 20, 46, 61.

⁹⁵ Paras 60-61; ACERWC “Mission Report of the ACERWC to Assess the Situation of Children Affected by the Conflict in Central African Republic” (December 2014) 8-10.

including access to education.⁹⁶ In 2008, the IDMC reported that emergency education and school supplies were provided by NGOs and that the government of the CAR did not provide assistance to internally displaced children in the Kambokata region.⁹⁷ The IDMC also reported that adolescent boys living at the Kabo IDP site did not attend school and were susceptible to recruitment as there was no secondary school available in proximity to the IDP community.⁹⁸ Competing priorities also create challenges for internally displaced children to access education. In order to contribute to the provision of the basic needs of their families, internally displaced children must work rather than go to school.⁹⁹ The 2008 report by the IDMC also stated that internally displaced children from the Peuhl community were unable to attend school because they did not have adequate funds for school fees and the host community had a negative perception of this minority ethnic group, often associating them with the *coupeurs de route*.¹⁰⁰ Therefore, a lack of government services and competing needs has made it difficult for internally displaced children to access education.

However, in 2016, the government of CAR reported to the CRC Committee that it was working to restore access to education with the assistance of the Global Partnership for Education and the European Union.¹⁰¹ It opened 199 temporary learning and child protection spaces for internally displaced children in the 2015/2016 school year and has provided parent-teacher training.¹⁰² Another measure that the government of the CAR has taken is to waive the final year primary school examination fees for all internally displaced and refugee children living in camps.¹⁰³ The government of the CAR is also making efforts to ensure that returnee children can enrol in school.¹⁰⁴ It reported that armed groups that occupied schools were being evicted by the United Nations and government security forces and that there is a procedure in place to report any event that would prevent children from attending school.¹⁰⁵ The government of the CAR, despite the persistent problem of internal

⁹⁶ IDMC “State of Neglect Displaced Children in the Central African Republic” (November 2008) 16; United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 paras 24-29, 46-69.

⁹⁷ IDMC “State of Neglect Displaced Children in the Central African Republic” (November 2008) 16.

⁹⁸ 13.

⁹⁹ 17-18.

¹⁰⁰ 21-22.

¹⁰¹ See CRC Committee “Replies of the Central Africa Republic to the List of Issues” (27 December 2016) CRC/C/CAF/Q/2/Add.1 para 38-40.

¹⁰² Paras 42-49

¹⁰³ Para 38.

¹⁰⁴ Paras 38-43.

¹⁰⁵ Para 38-41.

displacement, has made efforts to improve access to education for children and have taken the additional challenges experienced by internally displaced children into consideration.

6.3.2 Drivers and triggers

The CAR is a fragile State that has continued to be plagued by internal displacement.¹⁰⁶ This State has had a history of internal armed conflict and violence that has made it susceptible to situations of internal displacement.¹⁰⁷ In 2015, approximately four per cent of its population was displaced by conflicts.¹⁰⁸ Children in the CAR are also negatively impacted by internal displacement. The IDMC reported that in 2013 there were approximately 60,000 unaccompanied internally displaced children in the CAR.¹⁰⁹

The primary driver of internal displacement in the CAR is instability. The underlying factors that contribute to the instability in this State began its post-independence period. After its independence in 1960, the situation in the CAR can be described as comprising of “large-scale poverty, severe political instability and a number of rebellions and armed conflicts”.¹¹⁰ The CAR has also been criticised for its inadequate military protection and inability to protect its civilians.¹¹¹ Another factor that contributed to instability within this State is the impunity of State security forces, the Central African Armed Forces (“FACA”) and the Presidential Guard. These State security forces have been responsible for summary executions of IDPs accused of assisting the armed groups, and other violations of human rights.¹¹² For example, young men are often believed by the security forces to be rebels or persons providing assistance to rebels and are unduly stigmatised.¹¹³ Summary executions,

¹⁰⁶ Para 61.

¹⁰⁷ Para 61.

¹⁰⁸ This figure represents new displacements and does not include IDPs displaced by conflict in previous year who are still displaced. This is the highest percentage of the nine other African States considered. Sudan and Nigeria were among the States considered. See IDMC “2017: Africa Report on Internal Displacement” (December 2017) 7.

¹⁰⁹ IDMC “Internal Displacement in Sub-Saharan Africa” (31-12-2013) <<http://www.internal-displacement.org/sub-saharan-africa/summary/>> (accessed 19-03-2018).

¹¹⁰ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 para 16.

¹¹¹ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 January 2011) A/HRC/16/43/Add.4 para 55; IDMC “Central African Republic: IDPs Face Significant Challenges as Instability and Political Transition Continue” (26 May 2015) 1, 3.

¹¹² United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 paras 10-11, 40-41, 48; United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 January 2011) A/HRC/16/43/Add.4 para 32.

¹¹³ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 para 69.

other violations of human rights and stigmatisation of a particular segment of the population by State actors creates a climate of impunity and one in which civilians do not feel safe. In addition to domestic instability, regional instability due to the conflicts in the neighbouring States of Sudan, the DRC, Chad and Cameroon “has also contributed to internal tensions in [the CAR]”.¹¹⁴ The overall instability of the CAR makes it weak. The government of the CAR acknowledged the fragility of the State and in its response to the CRC Committee when it stated,

“The Central African Republic remains a fragile State as a result of the recurrent crises that it continues to experience and the various consequences thereof.”¹¹⁵

One of the consequences of being a fragile State is susceptibility to internal displacement as it does not have adequate structures in place to prevent or mitigate events that trigger displacement.¹¹⁶ Therefore, the conditions of instability drive internal displacement within the CAR.

Conflict and violence are the primary triggers of internal displacement in the CAR. In 2017, there were 539,000 new displacements due to conflict and violence, and the total number of persons internally displaced by due to conflict and violence was approximately 689,000.¹¹⁷

The long history of conflicts between State security forces and armed groups have caused internal displacement.¹¹⁸ Beginning in the 1990s there were successive conflicts and rebellions such as an attempted government takeover in 2001, violence associated with President Bozizé’s taking control of the government in 2003, and post-election violence and conflict between State security forces and armed groups in 2005.¹¹⁹ In March 2013, the armed group called the Séléka overthrew President Bozizé and this conflict caused internal displacement.¹²⁰ There also have been conflicts between armed groups for control of territory and resources.¹²¹ In addition, instances of violence have triggered internal

¹¹⁴ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 para 16.

¹¹⁵ CRC Committee “Replies of the Central Africa Republic to the List of Issues” (27 December 2016) CRC/C/CAF/Q/2/Add.1 para 61.

¹¹⁶ See discussion in Chapter 3 part 3 2 2.

¹¹⁷ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 94.

¹¹⁸ United Nations Human Rights Council “Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic” (18 April 2008) A/HRC/8/6/Add.1 para 19.

¹¹⁹ Paras 17-19.

¹²⁰ IDMC “Central African Republic: IDPs Face Significant Challenges as Instability and Political Transition Continue” (26 May 2015) 3.

¹²¹ 3.

displacement in the CAR. Attacks and child abductions by the *coupeurs de route*, which are highway robbers, have displaced people from their homes and villages.¹²²

Disasters also trigger instances of internal displacement. For instance, heavy rains and flooding have caused internal displacement in the CAR.¹²³ In 2017, there were approximately 2,900 internal displacements due to disasters.¹²⁴ In summary, conflict, violence and disasters are triggers of internal displacement in the CAR.

6 3 3 Analysis of domestic legislation and policy

The government of the CAR has renewed its efforts to respond to the problem of internal displacement. In 2014, it drafted a Road Map to facilitate the domestication of the CAR's obligations to IDPs as a Member of the Pact and a State Party to the Kampala Convention.¹²⁵ Another response of the government of the CAR to the problem of internal displacement is the creation of draft legislation and policy with respect to internal displacement.¹²⁶ A review of these documents reveals that they address some of the risks, rights and needs that internally displaced children encounter in the categories of physical security, basic needs, social, economic and cultural rights and civil and political rights.

In the category of physical security, both the draft legislation and policy recognise children as a vulnerable group of IDPs with special needs, prohibit the recruitment and the participation of children in hostilities, support the acceleration of family reunification, especially when children are involved, and protect children from all forms of slavery.¹²⁷

¹²² United Nations Human Rights Council "Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic" (18 April 2008) A/HRC/8/6/Add.1 para 20; IDMC "Central African Republic: IDPs Face Significant Challenges as Instability and Political Transition Continue" (26 May 2015) 1, 4.

¹²³ IDMC "Central African Republic: IDPs Face Significant Challenges as Instability and Political Transition Continue" (26 May 2015) 4.

¹²⁴ IDMC "GRID 2018: Global Report on Internal Displacement" (May 2018) 94.

¹²⁵ Central African Republic "Feuille de Route: Pour l'élaboration de la législation nationale sur le déplacement interne Draft" (04 August 2014) <http://www.internal-displacement.org/static_content/law-and-policy/car/RCA_Feuillederoute_04082014.pdf> (accessed 20-03-2018)1-2.

¹²⁶ See Central African Republic "Feuille de Route: Pour l'élaboration de la législation nationale sur le déplacement interne Draft" (04 August 2014) <http://www.internal-displacement.org/static_content/law-and-policy/car/RCA_Feuillederoute_04082014.pdf> (accessed 20-03-2018); IDMC "IDP Laws and Policy Central African Republic" <<http://www.internal-displacement.org/law-and-policy/country/CF>> (accessed 20-03-2018).

¹²⁷ Portant protection et assistance aux personnes déplacée à l'Intérieur de la Republic Centrafricaine Loi No 15 Draft IDMC <http://www.internal-displacement.org/static_content/law-and-policy/car/DRAFT_Loi-Nationale-PDI-en-RCA.pdf> (accessed 04-09-2018) ("CAR Draft IDP Law") arts 1, 19(2), 25, 33; Politique nationale sur la protection et l'assistance aux personnes Déplacées internes en Centrafrique Draft (July 2015) IDMC <http://www.internal-displacement.org/static_content/law-and-policy/car/DRAFT_Politique-Nationale-PDI-en-RCA.pdf> (accessed 04-11-2016) ("CAR Draft IDP National Policy") 6-7, 17-18, 27, 30-32.

The draft legislation provides that the government of the CAR is responsible to provide all IDPs with basic needs. These needs include food, potable water, clothing, shelter, medical services and sanitation, education and necessary social services.¹²⁸

In terms of social, economic and cultural rights, the draft legislation specifically recognises the rights and needs of internally displaced children. Article 45 of the draft legislation provides that IDPs, in particular, children, receive free primary education.¹²⁹ This Article requires that education provided takes language, culture and religion of the learners into consideration.¹³⁰ The inclusion of education in the draft legislation on internal displacement also demonstrates that the government of the CAR is aware that access to education is a challenge for internally displaced children.

In the category of civil and political rights, the draft legislation provides IDPs with general civil and political rights such as the freedom of thought, conscience and religion, freedom of expression, freedom of association and the right to vote.¹³¹ Also, IDPs are to participate in decisions regarding their protection and assistance, especially women.¹³²

In summary, the draft legislation and policy in the CAR address risks, rights and needs of internally displaced children. However, the rights and needs in the categories of physical security and social, economic and cultural rights specifically contemplate children.

6 3 4 Practical steps for implementation

The government of the CAR has taken steps toward the practical implementation of its obligations to internally displaced children, which is an indication of efforts on the part of the government to be accountable for these obligations. Many of the 12 steps of the Brookings-Bern National Responsibility Framework are addressed by the draft legislation and policy. It should be noted that since the legislation and policy on internal displacement have yet to be adopted, the framework or mechanisms to implement many of the 12 steps may not be currently in place.

¹²⁸ CAR Draft IDP Law art 38.

¹²⁹ Art 45.

¹³⁰ Art 45. This provision is similar to the standards set out in the CRC, ACRWC and Guiding Principles. See CRC arts 28(1)(a), 2(1)(c); ACRWC art 113(a), (4); Guiding Principles prin 23(2). See also discussion in Chapter 3 part 3 3 2 3; Chapter 4 part 4 3 1 3.

¹³¹ CAR Draft IDP Law art 44.

¹³² Art 38.

The first step is for the State to prevent and minimise the negative impact of internal displacement. Both the draft legislation and policy require the government of the CAR to take measures to prevent and minimise the internal displacement.¹³³

The second step of the framework requires the State to raise awareness about the problem of internal displacement. The draft policy proposes a campaign to sensitise the general public regarding the problem of internal displacement and the plight of IDPs.¹³⁴

The third step requires the State to collect data on the number of IDPs and the conditions in which they are living. Data collection regarding IDPs is prescribed by the draft national policy. The data is to be collected by the registration of IDPs. The purpose of registration is to obtain information regarding the number and demographics of IDPs, to provide them with temporary identification documents and prevent persons who are not IDPs from fraudulently collecting assistance meant for IDPs.¹³⁵

The fourth step is to provide training on the rights of IDPs. The draft national policy provides for the training of national authorities, local authorities and communities on human rights and international law.¹³⁶

The fifth step of the framework is to create a legal framework on internal displacement. The government of the CAR has drafted a legal framework on internal displacement; however, the legislation is not in force.¹³⁷

The sixth step of the framework is to create a national policy on internal displacement. The government of the CAR had a draft national policy on internal displacement and a Road Map to guide its response to the problem of internal displacement.¹³⁸ The draft national policy has yet to be adopted.¹³⁹

The seventh step of the framework requires the State to designate a focal point institution to coordinate its work on internal displacement. The 2014 Road Map has assigned the Ministry of Health, Gender Promotion and Humanitarian Action as the lead agency for

¹³³ Arts 2-3; CAR Draft IDP National Policy 25-26.

¹³⁴ CAR Draft IDP National Policy 33.

¹³⁵ 41-42.

¹³⁶ 33.

¹³⁷ See CAR Draft IDP Law.

¹³⁸ See CAR Draft IDP National Policy; Central African Republic "Feuille de Route: Pour l'élaboration de la législation nationale sur le déplacement interne Draft" (04 August 2014) <http://www.internal-displacement.org/static_content/law-and-policy/car/RCA_FeuilledeRoute_04082014.pdf> (accessed 20-03-2018).

¹³⁹ CAR Draft IDP National Policy.

assisting IDPs.¹⁴⁰ Previously, in 2007, the Ministry of Social Affairs was tasked with the responsibility of aiding IDPs.¹⁴¹ This Ministry was underfunded and due to the conflict, local civil servants fled areas of safety and “lack[ed] the capacity to respond to the needs of IDPs or displaced children”.¹⁴² A change in the focal point agency has the potential to improve the protection and assistance provided to internally displaced children in the CAR.

The eighth step requires the State to incorporate its national human rights commission in its work on internal displacement. The government of the CAR incorporates the national human rights commission, *la Commission Nationale des Droits de l’Homme*, by recognising that the national human rights commission has a complementary role regarding the protection and assistance of IDPs.¹⁴³

The ninth step requires the State to ensure that IDPs are able to participate in decisions regarding their protection and assistance. As noted in the discussion above, the draft national legislation requires that IDPs participate in decisions regarding their protection and assistance.¹⁴⁴

The tenth step of the framework requires the State to support durable solutions to the problem of internal displacement. The government of CAR addresses the issue of durable solutions to the problem of internal displacement in its draft national policy. The policy outlines durable solutions will include the return and reintegration of IDPs and respect for their human rights.¹⁴⁵

The eleventh step of the framework requires adequate resources to be allocated to the State’s work on internal displacement. The draft national policy also states that the problem of internal displacement is a national priority and to the extent possible there will be a budget allocated to address this problem.¹⁴⁶ The government of the CAR will also seek financial assistance from the international community.¹⁴⁷

¹⁴⁰ Designating an institutional focal point for providing protection and assistance to IDPs is a practical step outlined by the Brookings-Bern National Responsibility Framework. See The Brookings Institution-University of Bern Project on Internal Displacement *Addressing Internal Displacement: A Framework for National Responsibility* (2005) 17.

¹⁴¹ United Nations Human Rights Council *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin Addendum Mission to the Central African Republic* (18-04-2008) A/HRC/8/6/Add.1 para 26; IDMC *State of Neglect Displaced Children in the Central African Republic* (2008) para 26.

¹⁴² IDMC *State of Neglect Displaced Children in the Central African Republic* (2008) paras 26-28.

¹⁴³ CAR Draft IDP National Policy 22.

¹⁴⁴ CAR Draft IDP Law art 38.

¹⁴⁵ CAR Draft IDP National Policy 46-47.

¹⁴⁶ CAR Draft IDP National Policy 46-47.

¹⁴⁷ 46-47.

The twelfth step of the framework requires the State to cooperate with actors in the international community in the event it lacks the capacity to comply with its obligations to its IDPs and address the problem of internal displacement. The draft policy demonstrates the government of the CAR is willing to seek assistance from the international community in the event it requires support to provide its IDPs with protection and assistance.¹⁴⁸ Also, the draft policy recognises the role of a regional institution, the international community and international humanitarian partners.¹⁴⁹

In summary, the actions of the government of the CAR so far demonstrate that it has the requisite political will to comply with its obligations to its internally displaced children.¹⁵⁰ The government of the CAR has drafted comprehensive legislation and policy, which address the 12 steps for practical implementation of its obligations to internally displaced children. Unfortunately, since the legislation and policy have yet to be adopted the majority of these steps have not been operationalised. While it is acknowledged that the government of the CAR has been accountable for its provision of education to internally displaced children, its inability to adopt its draft legislation and policy demonstrates that the government of the CAR, even in theory, lacks consistency its level of accountability in this context.¹⁵¹

6 4 Nigeria

6 4 1 Internally displaced children in detention

In response to the threat of Boko Haram government of Nigeria has taken measures to assess individuals who may have been in contact with or have links to this group. Men and boys are targeted as it is believed that they are more likely to be associated with Boko Haram.¹⁵² IDPs are a group of persons who have been targeted by this type of assessment. For instance, it has been reported that IDPs have been taken from camps by Nigeria security forces to be assessed for connections to Boko Haram.¹⁵³ IDPs have been held in detention

¹⁴⁸ 41.

¹⁴⁹ 23.

¹⁵⁰ CRC Committee “Consideration of Reports Submitted by States Parties in Application of Article 44 of the Convention Second Periodic Reports by States Parties Due in 1999 Central African Republic” (30 June 2016) CRC/C/CAF/2 para 312.

¹⁵¹ See part 6 3 1.

¹⁵² United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 58; UNDP & UNHCR “Strategy on Protection, Return and Recovery for the North-East Nigeria: Promoting Integrated Development and Humanitarian Solutions in Principled Manner” (February 2017) *Reliefweb* <<https://reliefweb.int/report/nigeria/strategy-protection-return-and-recovery-north-east-nigeria-february-2017>> (accessed 23-03-2018) 6.

¹⁵³ United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 59.

for the purposes of assessment. The Nigerian government have asserted that the detention of IDPs is justified as a security measure to combat terrorism.¹⁵⁴

Internally displaced children have not been from excluded assessment and detention by Nigerian authorities. The UNDP and the UNHCR report that among IDPs that the youth are subject to arbitrary arrest and detention.¹⁵⁵ In his report on his mission to Nigeria, the UN IDP Rapporteur also stated that internally displaced children and women were detained and assessed for connections to Boko Haram.¹⁵⁶ He also stated that there were an estimated 120 children held in Giwa Barracks.¹⁵⁷ The United Nations Security Council has acknowledged that this type of assessment and detention of IDPs is problematic. In 2017, the United Nations Security Council called upon States to comply with international law when assessing individuals, including those taken from IDP camps, who may have been associated with Boko Haram in a timely manner.¹⁵⁸ It also called upon States to ensure that the treatment of children in this regard is consistent with international law.¹⁵⁹

There are several problems with the detention of internally displaced children in Nigeria. For example, the detainees are held for long periods of time without being charged with a criminal offence and without access to their families or counsel.¹⁶⁰ The detainees were also kept in poor conditions.¹⁶¹ Amnesty International, in 2016, reported that detainees are not provided with sufficient food, water or medical care.¹⁶² Children were detained in

¹⁵⁴ Paras 59-60. See also UNDP & UNHCR “Strategy on Protection, Return and Recovery for the North-East Nigeria: Promoting Integrated Development and Humanitarian Solutions in Principled Manner” (February 2017) *Reliefweb* <<https://reliefweb.int/report/nigeria/strategy-protection-return-and-recovery-north-east-nigeria-february-2017>> (accessed 23-03-2018) 6.

¹⁵⁵ UNDP & UNHCR “Strategy on Protection, Return and Recovery for the North-East Nigeria: Promoting Integrated Development and Humanitarian Solutions in Principled Manner” (February 2017) *Reliefweb* <<https://reliefweb.int/report/nigeria/strategy-protection-return-and-recovery-north-east-nigeria-february-2017>> (accessed 23-03-2018) 6.

¹⁵⁶ United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 paras 57, 59.

¹⁵⁷ Para 57. See also Amnesty International ““If you see it, you will cry” Life and Death in Giwa Barracks” (2016) <<https://www.amnesty.org/download/Documents/AFR4439982016ENGLISH.PDF>> (accessed 22-03-2018)10-12.

¹⁵⁸ United Nations Security Council Resolution 2349 (2017) (31 March 2017) S/RES/2349 (2017) para 32.

¹⁵⁹ Para 32.

¹⁶⁰ According to interviews with former detainees, Amnesty International found that detainees were held between 2 to 18 months. See Amnesty International ““If you see it, you will cry” Life and Death in Giwa Barracks” (2016) <<https://www.amnesty.org/download/Documents/AFR4439982016ENGLISH.PDF>> (accessed 22-03-2018)20-21; United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 57. Suspects of terrorism may be detained by court order for 90 days. See Terrorism (Prevention) (Amendment) Act 2013 s 27(1).

¹⁶¹ Amnesty International ““If you see it, you will cry” Life and Death in Giwa Barracks” (2016) <<https://www.amnesty.org/download/Documents/AFR4439982016ENGLISH.PDF>> (accessed 22-03-2018) 10-11.

¹⁶² 10-11.

overcrowded cells with adults.¹⁶³ Also, it reported that children are not provided with access to education while in detention.¹⁶⁴ What is most shocking is that Amnesty International reported that twelve children between the ages of five months and 15 years died in detention in the Giwa Barracks located in north-eastern Nigeria.¹⁶⁵ The government of Nigeria denies the findings of the Amnesty International Report.¹⁶⁶ However, the United States of America's State Department reports that despite the government's denial, it "worked with UNICEF, and by October 2016 had released 876 children from [Giwa Barracks]".¹⁶⁷

Despite the denials of the government of Nigeria, the reports and statements of the UNDP, UNHRC, UN IDP Rapporteur and the United Nations Security Council demonstrate that internally displaced children have indeed been held in detention in Nigeria, even though, for children, detention is supposed to be a measure of last resort. International, regional and even domestic law discourage the detention of children.¹⁶⁸ In the event of detention, children are to given special care and consideration.¹⁶⁹ Nigeria's Child Rights Act 2003 states,

"While in detention, a child shall be given care, protection and all necessary individual assistance, including social, educational, vocational, psychological, medical and physical assistance, that he may require having regard to his age, sex and personality."¹⁷⁰

The detention of internally displaced children is indeed a departure for the set legal standards accepted and adopted by the government of Nigeria. Furthermore, detention in

¹⁶³ 10-11.

¹⁶⁴ For example, Amnesty International reports that in the Giwa Barracks an older detainee was brought to the children to taught them the English alphabet, but there were no educational materials provided and no formal education provided for the children in detention. See Amnesty International "If you see it, you will cry" Life and Death in Giwa Barracks" (2016) <<https://www.amnesty.org/download/Documents/AFR4439982016ENGLISH.PDF>> (accessed 22-03-2018) 11-12.

¹⁶⁵ 10; U.S. Department of State "Nigeria 2017 Human Rights Report" (2017) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dclid=277033>> (accessed 20-06-2018) 8.

¹⁶⁶ Anonymous "Nigeria: False Military Claims Against Amnesty International's Giwa Barracks Report" *State News Services* (13-05-2016) *Academic OneFile* <<http://link.galegroup.com/apps/doc/A452335230/AONE?u=27uos&sid=AONE&xid=267c1f3c>> (accessed 13-06-2018); R Gigova "Nigeria's Giwa Barracks 'Place of Death,' Rights Group Says" *CNN Wire* (14-05-2016) *Academic OneFile* <<http://link.galegroup.com/apps/doc/A452340774/AONE?u=27uos&sid=AONE&xid=cf864b6a>> (accessed 13-06-2018).

¹⁶⁷ U.S. Department of State "Nigeria 2017 Human Rights Report" (2017) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dclid=277033>> (accessed 20-06-2018) 8.

¹⁶⁸ See for example CRC art 37; ACRWC art 17(2). In Nigeria, child offenders are only subject to the child justice system, police investigation, detention and adjudication are measures of last resort and if detained provided with protection and support. See Child Rights Act 2003 (Nigeria) ss 204-213.

¹⁶⁹ See CRC art 37; ACRWC art 17.

¹⁷⁰ Nigeria Child Rights Act 2003 s 212(2).

such appalling and undignified conditions demonstrates that the government of Nigeria is not in compliance with obligations to its internally displaced children.

The UN IDP Rapporteur and the African Commission have made recommendations to the government of Nigeria to ameliorate this situation.¹⁷¹ The African Commission in its concluding observations on Nigeria's 2014 report recommended that children be separated from adults when in detention and that human rights training be provided to the police and law enforcement.¹⁷² The issue of detention is an example of a situation where despite the acceptance of standards on the part of the government of Nigeria, its implementation has fallen short.

6 4 2 Drivers and triggers

The situation of instability and conflict in north-eastern Nigeria instigated by Boko Haram has garnered international attention and has led to substantial numbers of IDPs in Nigeria.¹⁷³ However, there are many drivers and triggers of internal displacement in Nigeria that predate the Boko Haram.¹⁷⁴

There are several interrelated and underlying factors that contribute to the situation of internal displacement in Nigeria. The IDMC identifies five factors that increase the risk of internal displacement in Nigeria, namely, political, demographic, environmental, economic, and conflict and violence.¹⁷⁵ Problems associated with these factors include corruption,

¹⁷¹ United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 para 74(p); African Commission "Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011-2014)" (4-8 November 2015) paras 109-110.

¹⁷² African Commission "Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011-2014)" (4-8 November 2015) paras 109-110.

¹⁷³ IDMC "Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram" (9 December 2014) 1; United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 paras 1, 7; S Morlin-Yron S "Africa's Silent Refugee Crisis: 12.4 Million on the Run in their own Countries" (11-01-2017) *CNN* <<https://edition.cnn.com/2017/01/11/africa/africa-silent-refugee-crisis/index.html>> (accessed 09-07-2018). For example, attacks by Boko Haram are responsible for most of the new displacements due to conflict in Nigeria at the end of 2016. See IDMC "2017: Africa Report on Internal Displacement" (December 2017) 20. See also R Adeola "Boko Haram-induced Displacement: A Critique of Nigeria's Implementation of the African Union Internally Displaced Persons Convention" (2017) 50 *Comparative and International Law Journal of Southern Africa* 41-55 45-46.

¹⁷⁴ For example, while under a military regime, State security forces attacked people in Ogoni villages that protested the environmental degradation by oil companies. These attacks displaced thousands of the people in this village. See *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001). See generally IDMC "Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram" (9 December 2014).

¹⁷⁵ IDMC 2016: *Africa Report on Internal Displacement* (2016) 17. See also United Nations Human Rights Council *Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria* (12-04-2017) A/HRC/35/27/Add.1 para 14.

population growth, improper water management, high youth unemployment and tensions over resources, respectively.¹⁷⁶ These underlying factors create circumstances in which conflict, violence and disasters can cause internal displacement.

Conflict and violence are the primary triggers of internal displacement in Nigeria. At the end of 2017, there were approximately 1,707,000 persons internally displaced by conflict and violence.¹⁷⁷ Internal displacement in this State has affected a large number of children. The International Organisation for Migration (“IOM”) in Nigeria estimates that in December 2016 that at least 55 per cent of the 1.8 million IDPs in the six states that it monitors are children.¹⁷⁸ As noted earlier, the attacks perpetrated by Boko Haram in north-eastern Nigeria have caused large numbers of people to be internally displaced. Civilians are also displaced when they flee to avoid conflicts between the Nigerian security forces and Boko Haram.¹⁷⁹ Therefore, the security threat caused by Boko Haram is a trigger of internal displacement in Nigeria.

There are other forms of conflict and violence that trigger internal displacement in Nigeria. Inter-communal violence between farmers and pastoralists over land and post-election protests in 2011 have triggered displacements.¹⁸⁰ Exacerbated by the underlying causes discussed above, conflicts along ethnic and religious lines have caused internal displacement.¹⁸¹ In its report to the CRC Committee, the government of Nigeria acknowledged the problem of internal displacement and stated that it “is attributable to the various religious, ethnic and sectarian crises that occurred in some parts of the country.”¹⁸² The government has also been responsible for the displacement of its inhabitants. In the 1990s, the people in the Niger Delta region of Nigeria were adversely impacted by the oil companies in the area and the people in the Ogoni villages protested.¹⁸³ In response to the protests, the security forces of the then military government of Nigeria attacked Ogoni

¹⁷⁶ IDMC “2016: Africa Report on Internal Displacement” (December 2016) 17.

¹⁷⁷ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 95.

¹⁷⁸ IOM Nigeria “Displacement Tracking Matrix: Nigeria Round XIII Report” (December 2016) <https://nigeria.iom.int/sites/default/files/dtm_reports/01%20DTM%20Nigeria%20Round%20XIII%20Report%20December%202016.pdf> (accessed 09-08-2018) 3,7.

¹⁷⁹ IDMC “Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram” (9 December 2014) 4.

¹⁸⁰ 4; United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 6.

¹⁸¹ National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012 *IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/nigeria/2012-nigeria-draft-IDP-policy.pdf> (accessed 09-08-2018) 11.

¹⁸² CRC Committee “Written Replies by the Government of Nigeria to the List of Issues (CRC/C/NGA/Q/3-4) Related to the Consideration of the Third Period Report of Nigeria (CRC/C/NGA/3-4)” (28 May 2010) CRC/C/NGA/Q/3-4/Add.1 para 98.

¹⁸³ *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) paras 7-8.

villages, which led to internal displacement.¹⁸⁴ Another trigger of internal displacement in urban centres is forced evictions of inhabitants living in informal settlements for security reasons and development projects.¹⁸⁵

Disasters also contribute to the number of IDPs in Nigeria. In 2017, there were approximately 122,000 persons internally displaced by disasters.¹⁸⁶ Disaster and environmental factors that trigger internal displacement in Nigeria include floods and desertification.¹⁸⁷ Heavy rains causing floods occur annually; however, flooding is also caused by the Nigerian government and the governments of surrounding States releasing water from dams coupled with inadequate infrastructure to handle the release of the water, especially in informal settlements.¹⁸⁸ Desertification as a result of environmental degradation such as overuse of the land has caused internal displacement.¹⁸⁹

Some of the causes of internal displacement in Nigeria are recurrent such as the inter-communal violence and the annual floods. The recurrent nature of these causes of internal displacement is relevant to the State's response as a State can be held responsible for its failure to prevent or mitigate risks that are known.¹⁹⁰ In this case, being aware of the recurrent nature of some of the causes of internal displacement in Nigeria places an obligation of its government to take actions that prevent or mitigate the negative impacts on its IDPs.

6 4 3 Analysis of domestic legislation and policy

In 2004, the Nigerian Presidential Committee on Internally Displaced Persons was established.¹⁹¹ It drafted a national policy on internal displacement after consultations with many interest groups, including IDPs.¹⁹² The most recent version of the National Policy on

¹⁸⁴ *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) paras 7-8, 24, 60-63.

¹⁸⁵ IDMC "Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram" (9 December 2014) 6, 10; IDMC "2016: Africa Report on Internal Displacement" (December 2016) 24. However, displacement by development projects has been excluded from the scope of this study. See Chapter 1 part 1 7.

¹⁸⁶ IDMC "GRID 2018: Global Report on Internal Displacement" (May 2018) 95.

¹⁸⁷ IDMC "Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram" (9 December 2014) 4; United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 para 6.

¹⁸⁸ IDMC "Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram" (9 December 2014) 6.
¹⁸⁹ 7.

¹⁹⁰ *Case of Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008). See also discussion in Chapter 3 part 3 2 2 2.

¹⁹¹ United Nations Human Rights Council "First Regional Conference on Internal Displacement in West Africa (Abuja 26-28 April 2006)" (20 February 2007) A/HRC/4/38/Add.4 paras 22, 25.

¹⁹² Paras 22, 25

Internally Displaced Persons (IDPs) in Nigeria (“Draft Nigeria IDP Policy”) is dated 2012.¹⁹³ There are also two bills relevant to the protection and assistance of IDPs before the Senate and the House of Representatives in Nigeria. The National Commission for Internally Displaced Persons, Refugee and Migration Bill, 2016 is before the Senate.¹⁹⁴ The aim of this legislation is to establish a Commission that will provide the overarching structure for responding to the IDPs, refugees and migrants.¹⁹⁵ The Rights of Internally Displaced Persons (IDPs) Bill, 2016 (“Nigeria IDP Bill”) is before the House of Representatives.¹⁹⁶ The Nigeria IDP Bill will be the focus of the discussion as it incorporates the rights outlined in the Draft Nigeria IDP Policy.¹⁹⁷

A review of the Nigeria IDP Bill reveals a comprehensive piece of legislation. It aims to protect IDPs at all stages of internal displacement.¹⁹⁸ More importantly, the Bill defines protection as respect for rights.¹⁹⁹ The policy incorporates important concepts and standards derived from the law on internal displacement. For example, the Bill acknowledges the Guiding Principles “as an important international framework for the protection of internally displaced persons”.²⁰⁰ It also refers to specific standards in the Guiding Principles and the Kampala Convention, including the definitions of internal displacement, IDPs and arbitrary displacement.²⁰¹

In Nigeria, at least 75 per cent of IDPs live in host communities.²⁰² The Bill recognises the need to protect and take into host communities into consideration.²⁰³ It also includes duties for IDPs, which can be summed up as duties to comply with the law, respect the

¹⁹³ National Policy on Internally Displaced Persons (IDPs) in Nigeria 2012 *IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/nigeria/2012-nigeria-draft-IDP-policy.pdf> (accessed 09-08-2018).

¹⁹⁴ National Commission for Internally Displaced Persons, Refugees and Migrants Bill, 2016 SB. 335 *Federal Republic of Nigeria National Assembly* <<https://nass.gov.ng/document/bills>> (accessed 12-06-2018).

¹⁹⁵ S 5.

¹⁹⁶ Rights of Internally Displaced Persons (IDPs) Bill, 2016 HB 532 *Federal Republic of Nigeria National Assembly* <<https://nass.gov.ng/document/bills>> (accessed 12-06-2018).

¹⁹⁷ Draft Nigeria IDP Policy s 3.1.

¹⁹⁸ Nigeria IDP Bill ss 2-3.

¹⁹⁹ S 2(30).

²⁰⁰ S 2(21).

²⁰¹ It is interesting to note that the definition of arbitrary displacement in the Nigeria IDP Bill includes displacement by harmful cultural practices. See Nigeria IDP Bill ss 2(21),(25),(26),(27), 16(1).

²⁰² IOM Nigeria “Displacement Tracking Matrix: Nigeria Round XIII Report” (December 2016) <https://nigeria.iom.int/sites/default/files/dtm_reports/01%20DTM%20Nigeria%20Round%20XIII%20Report%20December%202016.pdf> (accessed 09-08-2018) 8; Nigeria Emergency Operations IOM “Situation Report” (1-15 December 2016) <<https://nigeria.iom.int/sites/default/files/newsletter/IOM%20Nigeria%20Situation%20Report%201%20-%202015%20December%202016.pdf>> (accessed 09-08-2018) 2. The IDMC provides a figure of 80%. See IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 20.

²⁰³ Nigeria IDP Bill ss 2(23), 11(2)(v),(xi).

culture of host communities and follow the rules within camps.²⁰⁴ The inclusion of duties for bearers of rights is a characteristic of African human rights law.²⁰⁵ The Nigeria IDP Bill places several of duties on the State regarding the protection and assistance of the IDPs, including preventing displacement, establishing bodies that provide assistance to IDPs and reporting.²⁰⁶

The Bill includes protections for children. Children are recognised as a vulnerable group of IDPs. The Nigeria IDP Bill states that,

“Such vulnerable IDPs shall include children accompanied, unaccompanied and orphans, women, including nursing and expectant mothers and female heads of households, persons with disabilities, and the elderly.”²⁰⁷

It is important to note that the Bill first acknowledges that all internally displaced children are considered as vulnerable as it takes into consideration the risks that internally displacement poses to children in general.²⁰⁸ Other examples of provisions that specifically mention children include protection from forced labour and recruitment and access to free primary education.²⁰⁹

What is most notable about Section 4 of the Nigeria IDP Bill is that it prescribes specific rights for internally displaced children.²¹⁰ This is unique as this feature is not included in other instruments on the law on internal displacement except for when addressing rights on topics such as family reunification, recruitment into hostilities and education.²¹¹ A review of Section four reveals that it addresses the risks, rights and needs of internally displaced children in all four categories used for the critical analysis of the law on internal displacement, namely, physical security, basic needs, social, economic and cultural rights,

²⁰⁴ S 10.

²⁰⁵ See for example ACHPR arts 27-29; ACWRC art 31. See also discussion in Chapter 2 part 2 3 2.

²⁰⁶ Nigeria IDP Bill s 11.

²⁰⁷ S 3(1)(e).

²⁰⁸ See discussion in Chapter 3 part 3 3 1.

²⁰⁹ Nigeria IDP Bill s 3(b),(d),(n).

²¹⁰ Nigeria IDP Bill s 4. The Bill also outlines specific rights for internally displaced women, IDPs that that are sick, wounded or have disabilities, IDPs with contagious and infectious diseases including and HIV/AIDS, elderly IDPs. See Nigeria IDP Bill ss 5-8.

²¹¹ There are is specific mention of children with respect to being an especially vulnerable group in need for protection for forced recruitment and other forms abuse and access to education. The exception is the ICGLR Property Protocol which specifically requires the application of the best interests of the child principle to returning children who have been orphaned or who have lost both parents during displacement or seeking refuge. See Guiding Principles prins 4, 11(2)(b),13; ICGLR IDP Protocol art 4(1)(d); ICGLR Property Protocol art 6(1)(f); Kampala Convention arts 7(5)(e),(f), 9(1)(d),9(2)(c), 13(4), 17(3), 23.

and civil and political rights.²¹² The particular rights will be discussed according to these four categories.

The Nigeria IDP Bill addresses the risks, rights and needs of internally displaced children regarding their physical security. This is done by prohibiting forced labour and exploitation; sexual exploitation including forced early marriage; the provision of child-friendly spaces in camps and psycho-social support for children who have had traumatic experiences; and protection in camps from sexual molestation, child labour, abduction, trafficking and forced prostitution.²¹³ The Bill also requires that authorities to “promote children’s right to survival, development, participation and protection in collaboration with UNICEF and other humanitarian agencies”.²¹⁴ In addition, the Bill indicates that internally displaced children with other special needs such as unaccompanied children, child-headed households, orphans, children with HIV/AIDS and other conditions, and children with disabilities require additional protection and assistance.²¹⁵ Overall, the Bill provides internally displaced children with comprehensive rights with respect to their physical security.

The basic needs of internally displaced children are also addressed in the Nigeria IDP Bill. Internally displaced children are given the right to “good medical care and immunization”.²¹⁶ In the event that internally displaced children are orphaned, the Bill provides for either adoption or foster families in an effort to ensure that internally displaced children in these circumstances receive a “proper upbringing”.²¹⁷ Facilitating adoption and fostering supports provision for their basic needs of internally displaced children who have lost their families as parents and guardians have an obligation to provide for the child’s basic needs.²¹⁸ Also, the Bill requires that the adoptive parents treat the child like their biological children.²¹⁹ The provision of basic needs, in terms of food, water, shelter and clothing are specifically is addressed in Section 3 of the Nigeria IDP Bill, which applies to all IDPs. This section provides that all IDPs have the right to an adequate standard of living.²²⁰

The economic, social and cultural rights and needs of internally displaced children are contemplated in the provisions of the Nigeria IDP Bill. Internally displaced children have the

²¹² See discussions in Chapter 3 part 3 3; Chapter 4 part 4 3.

²¹³ Nigeria IDP Bill s 4(d),(g),(n),(o)..

²¹⁴ S 4(n).

²¹⁵ S 4(m).

²¹⁶ S 4(e).

²¹⁷ S 4(b).

²¹⁸ See CRC art 20; ACRWC art 25.

²¹⁹ Nigeria IDP Bill s 4(b).

²²⁰ S 3(h),

right to communicate “in their native languages or any other language of choice”.²²¹ This provision ensures non-discrimination in addition to the right of internally displaced children to participate in their culture by way of communicating in their language of choice. Internally displaced children are to be protected from being called derogatory names that are culturally associated with a caste system.²²² This provision provides protection against discrimination based on social identity and class. The Bill also requires that the State provide internally displaced children with access to education. The actions to be taken by the State include ensuring that internally displaced children attend school while in camps, or relocating them to areas where there are schools, building new schools, creating environments that are conducive to learn and have adequate materials and providing informal education when formal education is not available.²²³ The State must also ensure special consideration is given to internally displaced women and girls regarding access to education.²²⁴ Section 4 of the Nigeria Bill, therefore, addresses many of the risks, rights and needs of internally displaced children regarding their social, economic and cultural rights.

The civil and political rights of internally displaced children in Nigeria are also addressed by the provisions of the Nigeria IDP Bill. Internally displaced children are given the right to a name and “to be identified with the community of his [or] her birth, where possible”.²²⁵ Therefore, this provision supports the right of internally displaced children to have an identity.²²⁶ Also, the Bill ensures that internally displaced children have the right to inherit property by the State to take actions to protect their right to inheritance.²²⁷ Finally, Section 4 requires the State to promote the rights of internally displaced children to participation.²²⁸ Therefore, the Bill addresses the risks, rights and needs of its internally displaced children in the category of civil and political rights.

In summary, the Nigeria IDP Bill includes provisions that if implemented provide comprehensive protection for IDPs in general. The Bill also includes a specific focus on internally displaced children and it responds to their risks, rights and needs. Regardless of the merits of the Nigeria IDP Bill, the government of Nigeria’s current response to the

²²¹ S 4(c).

²²² S 4(f).

²²³ S 4(j)-(k).

²²⁴ S 4(l).

²²⁵ S 4(a).

²²⁶ CRC art 8; ACRWC art 6.

²²⁷ Nigeria IDP Bill s 4(i).

²²⁸ S 4(n).

problem of internal displacement will remain unsatisfactory if the legislation is not enacted and implemented.²²⁹

6 4 4 Practical steps for implementation

The government of Nigeria has implemented the 12 Steps of the Brookings-Bern National Responsibility in the Draft Nigeria IDP Policy.²³⁰ This part of the discussion will highlight to what extent the government of Nigeria has incorporated each of the 12 steps of the framework.

The first step of the framework calls for the prevention and the minimisation of the negative impacts of internal displacement. The Draft Nigeria IDP Policy outlines a strategy for prevention of internal displacement, which includes protection from forced evictions, preparation for disasters and preventing and mitigating instances of conflict.²³¹ The Nigeria IDP Bill also requires the government to take actions to prevent internal displacement.²³²

The second step requires the State to raise awareness about the problem of internal displacement. The Nigeria IDP Bill provides that one of the functions of the Joint Humanitarian Funding Basket constituted in the legislation is to fund campaigns that raise awareness and sensitise the population “on the causes, impact and consequences of internal displacement”.²³³

The third step of the framework requires data collection. The Draft Nigeria IDP Policy requires the establishment of a monitoring and evaluation unit that will be responsible for data collection.²³⁴ The Nigeria IDP Bill provides for the data collection regarding internal displacement by requiring the government to register IDPs and maintain a national database using this information.²³⁵ In response to a request from the CRC Committee for further information regarding IDPs, the government of Nigeria provided the CRC Committee with a

²²⁹ The recommendation of the recommendation of the former Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani was to adopt laws and policies that are consistent with “the Guiding Principles [...], the Framework on Durable Solutions for Internally Displaced Persons and the Kampala Convention See ” United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 74(a); CRC Committee “Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Concluding Observations: Nigeria” (21 June 2010) CRC/C/NGA/CO/3-4 para 75.

²³⁰ Draft Nigeria IDP Policy s 4.1.

²³¹ S 5.1.1.

²³² Nigeria IDP Bill s 11(1)(b)(i).

²³³ S 12(7)(b)(ii).

²³⁴ Draft Nigeria IDP Policy s 6.2.

²³⁵ Nigeria IDP Bill s 11(1)(b)(iv).

breakdown of the number of IDPs in two of its states disaggregated by age and gender whether the internally displaced children were accompanied or unaccompanied.²³⁶

The fourth step of the framework requires the State to facilitate training on the rights of IDPs. The Draft Nigeria IDP Policy states that the designated focal point institution is to provide training and capacity building.²³⁷ The Nigeria IDP Bill states that the Internal Displacement Coordination Sector leads are responsible for this task.²³⁸ The Joint Humanitarian Funding Basket is to fund training and education on internal displacement.²³⁹

The fifth step of the framework requires the State to establish a legal framework on internal displacement. The Nigeria IDP Bill provides a comprehensive legal policy on internal displacement. The failure of the government of Nigeria to enact this policy means that it currently does not have a legal framework that governs the protection and assistance of IDPs.²⁴⁰ The UN IDP Rapporteur came to the conclusion that Nigeria's "[e]xisting laws and policies, [...] are not sufficient to address the challenges faced by internally displaced persons".²⁴¹ This concern was also shared by the CRC Committee.²⁴²

The sixth step requires the State to create a national policy on internal displacement. The Draft Nigeria IDP Policy is a national policy on internal displacement. However, this policy has not been adopted, which means that the government has yet to complete this step of the framework.

The seventh step of the framework calls for the State to designate a focal point institution to coordinate its work on internal displacement. The government of Nigeria has designated focal point agencies that are responsible for responding to situations of internal displacement. The bodies that respond to internally displaced persons are the National Emergency Management Agency ("NEMA") at the national level and in some states within Nigeria there are also a State Emergency Management Agency ("SEMA") that respond to

²³⁶ CRC Committee "List of Issues Related to the Consideration of the Third and Fourth Periodic Reports of Nigeria (CRC/C/NGA/3-4)" (2 March 2010) CRC/C/NGA/Q/3-4 para 16; CRC Committee "Written Replies by the Government of Nigeria to the List of Issues (CRC/C/NGA/Q/3-4) Related to the Consideration of the Third Period Report of Nigeria (CRC/C/NGA/3-4)" (28 May 2010) CRC/C/NGA/Q/3-4/Add.1 para 101.

²³⁷ Draft Nigeria IDP Policy s 5.3.3(I).

²³⁸ Nigeria IDP Bill s 11(2)(c)(vii)(28).

²³⁹ S 12(7)(b)(ii).

²⁴⁰ In addition, the National Commission for Internally Displaced Persons, Refugees and Migrants Bill, 2016 has not been passed into law. See Federal Republic of Nigeria National Assembly "Bills" <<https://nass.gov.ng/document/bills>> (accessed 19-06-2018).

²⁴¹ United Nations Human Rights Council "Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria" (12 April 2017) A/HRC/35/27/Add.1 para 17.

²⁴² CRC Committee "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Concluding Observations: Nigeria" (21 June 2010) CRC/C/NGA/CO/3-4 paras 75-76.

situations with the assistance of international organisations.²⁴³ In 2014, the Presidential Initiative for the North-East was created with the aim of providing “reconstruction, recovery and economic development”.²⁴⁴ Also, the IDPs, Refugees and Initiatives on North East Committee was tasked with addressing issues relevant to IDPs.²⁴⁵ For instance, in 2016, the House of Representatives referred an urgent matter of a large number of orphans in IDP Camps to this Committee.²⁴⁶

However, the Draft Nigeria IDP Policy mandates sectoral approach to providing protection and assistance to IDPs.²⁴⁷ The Nigeria IDP Bill operationalises this approach by creating bodies that coordinate the government’s response to internal displacement. It requires the establishment of a National Coordination Committee on Internally Displaced Persons, which is responsible for implementation and coordinating activities to respond to internal displacement.²⁴⁸ This Committee is also tasked with establishing an IDP Inter-Agency Coordinating Committee, which is made up of the representative of several government ministries.²⁴⁹ The function of the IDP Intern-Agency Coordinating Committee is to also plan and monitor the protection and assistance of IDPs.²⁵⁰ The Nigeria IDP Bill also creates Internal Displacement Coordination Sectors that have key roles in providing protection and assistance to IDPs.²⁵¹

The eighth step of the framework encourages the State to include its national human rights commission in its work on internal displacement. The National Human Rights Commission is included in the sectoral approach outlined in the Draft Nigeria IDP Policy.²⁵² In addition, the Draft Nigeria IDP Policy provides that the government of Nigeria is to ensure that the National Human Rights Commission “adequately integrate[s] internal displacement into [its] work”.²⁵³

The ninth step of the framework requires that IDPs are able to participate in decisions concerning their protection and assistance. As previously discussed, the Nigeria IDP Bill

²⁴³ United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 para 15.

²⁴⁴ Para 15.

²⁴⁵ Federal Republic of Nigeria National Assembly “IDPs, Refugees and Initiatives on North East Committee” <<https://nass.gov.ng/committee/45>> (accessed 19-06-2018).

²⁴⁶ Federal Republic of Nigeria House of Representatives “Matter of Urgent Public Importance Fate of Orphan Children in the Internally Displaced Persons Camps” (27 April 2016) National Assembly Debates (House of Representatives) <<https://nass.gov.ng/document/download/9166>> (accessed 19-06-2018) 2-4.

²⁴⁷ Draft Nigeria IDP Policy s 5.4.

²⁴⁸ Nigeria IDP Bill s 11(2).

²⁴⁹ S 11(2)(b)(xv).

²⁵⁰ S 11(2)(b)(xv).

²⁵¹ S 11(2)(c).

²⁵² Draft Nigeria IDP Policy s 5.4

²⁵³ S 4.1.

requires the government to promote the rights of internally displaced children to participation.²⁵⁴ The Draft Nigeria IDP Policy includes the participation of IDPs as a guiding principle and as a minimum standard.²⁵⁵

The tenth step requires the State to take actions that support durable solutions to the problem of internal displacement. The Draft Nigeria IDP Policy outlines a strategy for achieving durable solutions to internal displacement. The draft policy states that achieving a durable solution is a gradual process and it outlines criteria for determining the degree to which a durable solution has been attained.²⁵⁶ The Nigeria IDP Bill requires the government to “[create] conditions conducive to and [provide] durable and sustainable solutions”.²⁵⁷

The eleventh step of the framework requires the State to allocate sufficient resources to its work on internal displacement. The Nigeria IDP Bill outlines several ways resources will be raised to respond to internal displacement.²⁵⁸ The legislation provides that a Joint Humanitarian Funding Basket is funding by donor agencies and the President of Nigeria.²⁵⁹ The government will apply for grants and loans.²⁶⁰ Funds will be sought from government and humanitarian agencies.²⁶¹ The United Nations Central Emergency Response Fund and the AU emergency funds will also be utilised where necessary²⁶². The Draft Nigeria Policy also outlines strategies for funding the government’s response to internal displacement.²⁶³

The twelfth and final step of the framework is for the State to seek assistance from the international community if it unable to protect and assist its IDPs. The government of Nigeria is deemed to be the actor with the primary responsibility for the protection and assistance of IDPs and in the event that it is unable to discharge its obligations, it is to seek assistance from the international community.²⁶⁴ The Draft Nigeria IDP Policy outlines as “framework for international cooperation”.²⁶⁵ This framework includes regional and international actors.²⁶⁶

The obligations, frameworks and mechanisms created by the Draft Nigeria IDP Policy and the Nigeria IDP Bill comprehensively implement the 12 steps of the Brookings-Bern

²⁵⁴ Nigeria IDP Bill s 4(n).

²⁵⁵ Draft Nigeria IDP Policy ss 2.4.1 (d), 4.2.3(e)(i).

²⁵⁶ S 5.2.

²⁵⁷ Nigeria IDP Bill s 11(1)(b)(iii).

²⁵⁸ S 12.

²⁵⁹ S 12(1),(2).

²⁶⁰ S 12(3),(4).

²⁶¹ S 12(7).

²⁶² S 12(6).

²⁶³ Draft Nigeria IDP Policy s 6.1.

²⁶⁴ Nigeria IDP Bill ss 11(1)(e)(i); Draft Nigeria IDP Policy s 2.1.4 (a).

²⁶⁵ Draft Nigeria IDP Policy s 5.5.

²⁶⁶ S 5.5.

National Responsibility Framework, but the legislation and policy are not in force. The current response of the government of Nigeria to the problem of internal displacement and the rights and needs of its internally displaced children is insufficient, does not implement all of the 12 steps and it has been criticised as being “fragmented, uncoordinated and inadequate”.²⁶⁷ The actions as well the inaction on the part of the Nigeria government demonstrates that there is a limited level of accountability with regard to its internally displaced children. There have been serious violations of their rights, as evidenced by the detention of internally displaced children, but there have been efforts respond to the needs of internally displaced children, as demonstrated by the existence of the IDPs, Refugees and Initiatives on North East Committee. Similar to the situation in the CAR, the level of accountability in Nigeria lacks consistency and follow-through.

6 5 Sudan

6 5 1 Sexual violence in Sudan

The long-term and protected conflicts in Sudan have created situations have created risks for the physical security of its internally displaced children. The United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) explains that in Sudan the breakdown in the rule of law and economic difficulties contribute to the increased vulnerability of women and children.²⁶⁸ One risk especially impacting internally displaced girl children in Sudan is sexual violence. In its 2010 Concluding Observations with respect to the periodic report of Sudan, the CRC Committee expressed concern due to the instances of displacement due to armed conflict, sexual violence and recruitment impacting children.²⁶⁹ It has been reported that internally displaced girl children who are sent to gather firewood or collect water have been victims of rape and other forms of sexual violence.²⁷⁰ Between 2011 and 2016 a United

²⁶⁷ IDMC “Nigeria: Multiple Displacement Crises Overshadowed by Boko Haram” (9 December 2014) 15. See also United Nations Human Rights Council “Report of the Special Rapporteur of the Human Rights of Internally Displaced Persons on his Mission to Nigeria” (12 April 2017) A/HRC/35/27/Add.1 paras 17, 70-71.

²⁶⁸ OCHA “2017 Humanitarian Needs Overview: Sudan” (December 2016) 8; United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 para 39.

²⁶⁹ CRC Committee “Consideration of Report Submitted by States Parties Under Article 44 of the Convention Concluding Observations: Sudan” (22 October 2010) CRC/C/SND/CO/3-4 para 72.

²⁷⁰ See African Commission “Report of the African Commission on Human and Peoples’ Rights’ Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004)” (20 September 2004) EX.CL/364(XI) Annex III paras 38, 127; *Sudan Human Rights Organisation and Another Communication* nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009) para 177; OCHA “2017 Humanitarian Needs Overview: Sudan” (December 2016) 8; United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 para 38; United Nations Security Council “Report of the Secretary-General on Children and Armed Conflict in the Sudan” (06 March 2017) S/2017/191 para 36; Y Soomar “Brutal Weapon of Sexual Violence” *The Star* (06-04-2018) 25.

Nations Report states there were 372 cases of rape of children in Darfur and often the perpetrators are reported to members of government security forces.²⁷¹ The rape of IDPs has also been attributed to the Janjaweed.²⁷²

Despite the reports and allegations of rape and other forms of sexual violence, the government of Sudan has denied that such instances have taken place. The position of the police and the government of Sudan is that the instances were not investigated and could not be verified since the alleged victims could not identify the perpetrators.²⁷³ However, the government did establish women's committees to investigate allegations of rape.²⁷⁴

The IDPs and NGOs interviewed by a delegation of the African Commission that visited Sudan in 2004 stated that there was indifference on the part of the police with respect to allegations of rape.²⁷⁵ The Commission's decision in *Sudan Human Rights Organisation and Another v Sudan*²⁷⁶ provides a recommendation that the government of Sudan investigate abuses perpetrated by the State security forces, the Janjaweed and the other armed groups and to prosecute those responsible for violations of human rights such as rape.²⁷⁷ This recommendation is relevant to the risk of sexual violence encountered by internally displaced children in Sudan. In this decision, the Commission also mentions its 2004 investigative mission to Sudan.²⁷⁸ As noted above, the Commission made recommendations to the government of Sudan regarding the investigation of rape. This case demonstrates that the government of Sudan still had not taken actions to effectively respond to this risk.

The CRC Committee expressed its concern about the displacement in the Darfur region and risks of sexual violence and recruitment encountered by children.²⁷⁹ The African Commission as a result of its investigative mission to Sudan found that the government of Sudan did not pay proper attention to the allegations of rape.²⁸⁰ The African Commission, in its concluding observations of Sudan's report, recommended that Sudan "[t]ake legislative

²⁷¹ United Nations Security Council "Report of the Secretary-General on Children and Armed Conflict in the Sudan" (06 March 2017) S/2017/191 para 35.

²⁷² See African Commission "Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004)" (20 September 2004) EX.CL/364(XI) Annex III paras 54-57, 63, 80, 108, 123.

²⁷³ Paras 35-36.

²⁷⁴ Para 130.

²⁷⁵ Paras 77, 83-88.

²⁷⁶ Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009).

²⁷⁷ Para 229.

²⁷⁸ Para 225.

²⁷⁹ CRC Committee "Consideration of Report Submitted by States Parties Under Article 44 of the Convention Concluding Observations: Sudan" (22 October 2010) CRC/C/SND/CO/3-4 para 72.

²⁸⁰ Para 128.

and other measures that address rape”.²⁸¹ The Commission went on to recommend that allegations of rape be investigated immediately by the police.²⁸² The UN IDP Rapporteur’s investigative mission to Sudan in 2012 still found that sexual violence against internally displaced women and girls was still a concern and that the inconsistent investigation by the police “perpetuat[ed] a culture of impunity”.²⁸³ The continued instances of rape and sexual violence encountered by internally displaced children in Sudan is an example of a risk to which the government of Sudan has not adequately responded, even though this problem has been brought to the attention of the government.

6.5.2 Drivers and triggers

Sudan has had a long history of internal displacement. Since 1983, this State has been plagued with mass internal displacement due to conflict and disasters and it continues to experience severe internal displacement.²⁸⁴ Internal displacement has taken a heavy toll on Sudan’s children.²⁸⁵

The underlying causes of internal displacement in Sudan are complex and interlinked. Drivers of the conflict in Sudan fall along many lines. Conflicts between the northern and the southern regions of the State, between those who identify as Arab and those who identify as African, and between those who practise Islam and those who practise Christianity or adhere to traditional belief systems are some of the major factors that describe the overall conflict in Sudan.²⁸⁶ These factors describe various aspects of individual and communal

²⁸¹ African Commission “Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan” (29 July–4 August 2012) para 74.

²⁸² African Commission “Report of the African Commission on Human and Peoples’ Rights’ Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004)” (20 September 2004) EX.CL/364(XI) Annex III para 146.

²⁸³ United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 paras 38-39.

²⁸⁴ United Nations Commission on Human Rights “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” (21 January 1993) E/CN.4/1993/35 paras 203-204. See also HA Ruiz “Sudan: Cradle of Displacement” in R Cohen & FM Deng (eds) *The Forsaken People Case Studies of the Internally Displaced* (1998) 139-174; United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 paras 13-17. For example, Sudan has large number of IDPs due to conflict and disasters. See IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 96.

²⁸⁵ Internally displaced children in Sudan suffer from psychological trauma, malnutrition, sexual violence, forced recruitment and several other risks. See OCHA “2018 Humanitarian Needs Overview: Sudan” (February 2018).

²⁸⁶ FM Deng “Sudan at the Cross Roads” in FM Deng (ed) *New Sudan in the Making?: Essays on a Nation in Painful Search of Itself* (2010) 33-56 33-34. See also A Kajee “The Regional and International Dimensions of the Crisis in Darfur” in B Raftopoulos & K Alexander (eds) *Peace in the Balance: The Crisis in Sudan* (2006) 71-102 71. FM Deng “Portrait of a Divided Nation” in FM Deng (ed) *New Sudan in the Making?: Essays on a Nation in Painful Search of Itself* (2010) Inc 57-98.

identity. Deng explains that in Sudan, a crisis of national identity is the underlying cause for the protracted conflict and resulting displacements.²⁸⁷ The conflicts along regional, ethnic, religious lines do indeed support this position. However, there are other drivers of the conflict, which include, political and economic marginalisation of groups outside of the government in Khartoum, underdevelopment of the south and other areas, conflict over the oil resources, environmental degradation and scarcity of land and other resources.²⁸⁸

The instability and insecurity in Sudan due to the long-term, protracted conflicts has created conditions that have perpetuated internal displacement.²⁸⁹ The conflicts have caused insecurity amongst the civilian populations leading to death and risk of death, injury and risk of injury, abuse, exploitation, violence, loss of property, loss of their livelihoods, lack of access to basic services and poverty.²⁹⁰ The negative impacts of insecurity have left the civilian population with no other choice but to leave their homes and places of habitual residence. Therefore, instability and insecurity in Sudan drive internal displacement.

Due to the multiple causes of conflict in Sudan, the primary trigger of internal displacement in Sudan is conflict and violence. Sudan has high numbers of IDPs. The most recent estimate of persons internally displaced by conflict and violence in Sudan is 2,072,000.²⁹¹

As noted above, the mass internal displacement in Sudan was triggered by the civil war that began in 1983.²⁹² The government of Sudan and the South Sudan People's Liberation Army were the primary parties to the conflict.²⁹³ In 2005, the Comprehensive Peace

²⁸⁷ FM Deng "Sudan at the Cross Roads" in FM Deng (ed) *New Sudan in the Making?: Essays on a Nation in Painful Search of Itself* (2010) 33-56 33.

²⁸⁸ SE Cook & CK Mironko "Darfur – Understanding a Complicated Tragedy" in B Raftopoulos & K Alexander (eds) *Peace in the Balance: The Crisis in Sudan* (2006) 123-138 130-134; United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 4-10, 15.

²⁸⁹ IDMC "GRID 2017: Global Report on Internal Displacement" (May 2017) 57.

²⁹⁰ United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 paras 7-10. See also HA Ruiz "Sudan: Cradle of Displacement" in R Cohen & FM Deng (eds) *The Forsaken People Case Studies of the Internally Displaced* (1998) 139-174.

²⁹¹ IDMC "GRID 2018: Global Report on Internal Displacement" (May 2018) 96.

²⁹² The first conflict took place between 1956 and 1972 and began again in 1983. See United Nations Commission on Human Rights "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" (21 January 1993) E/CN.4/1993/35 para 204; United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 14.

²⁹³ United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 14. See also SE Cook & CK Mironko "Darfur – Understanding a Complicated

Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement / Sudan People's Liberation Army ("CPA")²⁹⁴ put a framework in place to resolve this conflict and provide Southern Sudan with some autonomy and provided for a referendum on independence for Southern Sudan.²⁹⁵ The peace process eventually led to the independence of South Sudan in 2011.²⁹⁶ The other major conflict that has and continues to plague Sudan is the conflict in Darfur. This conflict is between the government of Sudan, the Sudan Liberation Movement/ Army ("SLAM/A") and the Justice Equality Movement ("JEM").²⁹⁷ The Janjaweed, the Arab militia in Darfur is also responsible for violence against civilians.²⁹⁸ Ethnic cleansing and genocide are oft-cited hallmarks of this protracted conflict.²⁹⁹ These long-term conflicts are the primary causes of internal displacement in Sudan.

In addition to conflict, there are other triggers of internal displacement in Sudan. Inter-communal violence over resources, local politics as well as attacks by armed robbers have

Tragedy" in B Raftopoulos & K Alexander (eds) *Peace in the Balance: The Crisis in Sudan* (2006) 123-138 130-134.

²⁹⁴ Comprehensive Peace Agreement between the Government of the Republic the Sudan and the Sudan People's Liberation Movement/ Sudan People's Liberation Army (signed 9 January 2005) *United Nations Peacemaker*

<https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf> (accessed 05-09-2018); United Nations Peacemaker "Comprehensive Peace Agreement between the Government of Sudan and the SPLM/SPLA (with Annexes)"

<<https://peacemaker.un.org/node/1369>> (accessed 05-09-2018).

²⁹⁵ Machakos Protocol chp 1 Comprehensive Peace Agreement between the Government of the Republic the Sudan and the Sudan People's Liberation Movement/ Sudan People's Liberation Army (signed 20 July 2002) Part B s 2.5. See also United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 15.

²⁹⁶ Transitional Constitution of the Republic of Sudan, 2011 art 199(1); United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 4.

²⁹⁷ United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para 15.

²⁹⁸ See African Commission "Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004)" (20 September 2004) EX.CL/364(XI) Annex III paras 43-45; United Nations Commission on Human Rights "Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng Mission to the Sudan – The Darfur crisis Note by the Secretary-General" (27 September 2004) E/CN.4/2005/8 paras 3, 12-16, 29-30; IDMC "Sudan: Durable Solutions Elusive as Southern IDPs Return and Darfur Remains Tense A Profile of the Internal Displacement Situation" (23 December 2010) 24, 27-28. Flint states that there ought to be a more nuanced view of the Janjaweed. See J Flint *Beyond 'Janjaweed': Understanding Militias of Darfur* (2009).

²⁹⁹ The conflict in Sudan is complex and a thorough analysis and commentary on this issue is beyond the scope of this study. For further reading see: HR Ruiz "The Sudan: Cradle of Displacement" in R Cohen & FM Deng *The Forsaken People: Case Studies of the Internally Displaced* (1998) 139-174; B Raftopoulos & K Alexander (eds) *Peace in the Balance: The Crisis in Sudan* (2006); FM Deng (ed) *New Sudan in the Making?: Essays on a Nation in Painful Search of Itself* (2010); United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2.

caused internal displacement.³⁰⁰ Disasters, specifically flooding, is another cause of internal displacement in Sudan.³⁰¹ In 2017, there were approximately 54,000 persons internally displaced by disasters in Sudan³⁰². Overall, the triggers of internal displacement in Sudan can be summarised as conflict, generalised violence and disasters.

6 5 3 Analysis of domestic legislation and policy

In response to the acute problem of internal displacement, the government of Sudan has adopted a national policy and a peace agreement that are relevant to its domestic response to the rights and needs of IDPs. Therefore, the analysis will focus on Sudan's National Policy for Internally Displaced Persons (IDPs) 2009 ("Sudan IDP Policy") and the Doha Peace Agreement for Peace in Darfur 2011 ("DDPD").³⁰³ The Sudan IDP Policy and the DDPD will be assessed in light of the four categories of the risks, rights and needs of internally displaced children.³⁰⁴

The Sudan IDP Policy addresses the rights and needs of IDPs and outlines State obligations.³⁰⁵ While, there is no specific mention of children or other vulnerable groups, the policy, as a whole, aims to provide protection and assistance to all IDPs. The Preamble of the policy sets a positive and inclusive tone as it recognises that IDPs are citizens that are entitled the realisation of their rights without discrimination and the right to "live in dignity, safety and integrity".³⁰⁶ It also recognises the State as the primary duty-bearer.³⁰⁷ The Preamble also calls for the participation of IDPs and host communities regarding the planning and implementation of humanitarian assistance.³⁰⁸ The policy highlights the

³⁰⁰ United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 paras 9-10; IDMC "GRID 2017: Global Report on Internal Displacement" (May 2017) 57.

³⁰¹ HA Ruiz "Sudan: Cradle of Displacement" in R Cohen & FM Deng(eds) *The Forsaken People Case Studies of the Internally Displaced* (1998) 139-174 160; United Nations Human Rights Council "Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan" (25 June 2013) A/HRC/23/44/Add.2 para10.

³⁰² IDMC "GRID 2018: Global Report on Internal Displacement" (May 2018) 96.

³⁰³ Doha Document for Peace in Darfur (DDPD) (finalised 31 May 2011, signed 14 July 2011) *IDMC* <http://www.internal-displacement.org/static_content/law-and-policy/sudan/DDPD-English.pdf> (accessed 04-11- 2016); UNAMID "Doha Document for Peace in Darfur" <<https://unamid.unmissions.org/doha-document-peace-darfur>> (accessed 05-09-2018); United Nations Peacemaker "Doha Document for Peace in Darfur (DDPD)" <<https://peacemaker.un.org/sudan-dohadocumentpeace2011>> (accessed 05-09-2018)

³⁰⁴ See discussion in Chapter 3 part 3 3.

³⁰⁵ Sudan IDP Policy arts 6, 8.

³⁰⁶ Preamble.

³⁰⁷ Preamble.

³⁰⁸ Preamble.

importance of rights by defining protection in terms of rights. Article 2 of this policy defines protection as the “[r]espect and fulfillment [sic] of peoples’ rights”.³⁰⁹

Article 3 of the Sudan IDP Policy outlines the policy’s objectives. Two objectives that are particularly relevant to internally displaced children are the reunification of families and protection and assistance during all phases of displacement.³¹⁰ These objectives address the general rights and needs of internally displaced children in the categories of physical protection and basic needs.³¹¹ The principles of this policy and the rights of IDPs are outlined in Articles 5 and 6 of this Sudan IDP Policy respectively. In general, the rights address all four categories of risks, rights and needs of internally displaced children. These provisions provide for their freedom of movement, family reunification, provision of basic needs, access to education, skills development, property rights and access to justice.³¹² Building on the principles and rights, the policy provides activities and tools that support IDPs, which include psychological rehabilitation, access to justice, and registration of IDPs.³¹³

Another notable feature of the policy is that it outlines the obligations that the State has to IDPs. Article 8 of the Sudan IDP Policy sets out several obligations that the State owes to IDPs. The obligations include the following: raising awareness of issues that can cause internal displacement; preventing and mitigating of internal displacement; ensuring the rights of IDPs as per the national laws; allocating resources to respond to internal displacement; working with national and international partners to address the needs caused by internal displacement; collecting data regarding internal displacement; and, supporting “sustainable solutions”.³¹⁴ The State obligations provided in this policy are holistic and if implemented will contribute to addressing the rights, rights and needs of internally displaced children in Sudan as a whole. Article 9 of the Sudan IDP Policy focuses on monitoring, implementation and accountability. It calls for the creation of a High Committee on IDPs, which is tasked with reviewing policy, making plans, identifying roles and monitoring and implementing the policy.³¹⁵ The policy, therefore, includes an accountability mechanism. The final Article of the Sudan IDP Policy emphasises the importance of State sovereignty as well as its

³⁰⁹ Art 2(i).

³¹⁰ Art 3(4),(6).

³¹¹ See CRC arts 9, 18; ACRWC art 19. See also discussion in Chapter 2 part 2 4 2 1 c regarding the principle of universality.

³¹² Sudan IDP Policy arts 5-6.

³¹³ Art 7.

³¹⁴ Art 8.

³¹⁵ Art 9.

responsibility towards IDPs.³¹⁶ It also calls for accountability that is “transparent”.³¹⁷ Overall, the policy outlines a holistic response to the problem of internal displacement in Sudan.

However, Article 6(b) of the Sudan Policy stipulates that some rights provided in the policy due to public interest and security concerns may be “partially or temporarily limited”.³¹⁸ This limitation is a unique feature as none of the policies and draft policies examined in the other case studies includes a limitation of rights.³¹⁹ It could be interpreted that this provision demonstrates that the drafters contemplated the grave security situation in Sudan and that they anticipated making the bearers of rights aware of potential limitations of some of their rights was preferable to failing to be accountable for their obligations. In the context of conflict and limited resources, some limitations are indeed reasonable. Furthermore, it is relevant to be aware that such limitations when assessing the application of the principle of accountability as valid limitations change the standards to which the State is held accountable.

What is important is that the limits of the rights in the policy are reasonable. International law can provide some guidance to determine which rights can be limited by examining the guidelines that determine if a reservation proposed by a States Party is permissible. Article 19 of the Vienna Convention on the Law of Treaties 1969 addresses the formulation of reservations. A reservation, for example, may be prohibited by a treaty.³²⁰ If a treaty does not outline specific limitations on reservations, a reservation may still be not permitted if it “is incompatible with the object and purpose of the treaty”.³²¹ The rights of IDPs that directly correlate with the objectives of the policy ought not to be limited. The State must also have regard for the necessary resources to provide for the rights. Article 6 of the CRC is instructive on this position as it distinguishes life as an inherent right whereas the rights of survival and development are to be ensured “to the maximum extent possible”.³²² Article 6 of the CRC is

³¹⁶ Art 10(1).

³¹⁷ Art 10(2).

³¹⁸ Art 6(b).

³¹⁹ See Uganda IDP Policy; CAR Draft IDP Law; Nigeria IDP Bill.

³²⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(a). For example, States Parties to the Convention Relating to the Status of Refugees 1951 are not permitted to make reservations with respect to the principle of *non-refoulement*. See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 42(1).

³²¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(c). Article 4 of the International Covenant on Economic, Social and Cultural Rights also supports this approach to the limitation of rights See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 4.

³²² CRC art 6(2).

an example in children's rights law that justifies that some rights can be provided in a progressive manner.

In terms of African human rights law, there are selected instances where limitations of rights and State obligations are permitted. The ACHPR does not permit States Parties to derogate from their obligations pursuant to the Charter. The African Commission has confirmed that States Parties are not permitted to limit rights and freedoms provided in the ACHPR due to emergency situations.³²³ The African Commission in *Sudan Human Rights Organisation and Another v Sudan*³²⁴ found that only Article 27(2) of the ACHPR allowed rights and freedoms provided in the Charter to be limited with respect to "the rights of others, collective security, morality and common interest".³²⁵ The limitation of the Sudan IDP Policy is due to public interests and security concerns. This limitation is consistent with Article 27 of the ACHPR as public interests and security touches and concerns the rights of others, collective security and even common interest. The ACRWC, on the other hand, does not provide for limitations of rights except for State obligations to children with disabilities.³²⁶ The overall position of the ACRWC is that States Parties are required to take the necessary actions to comply with their obligations pursuant to the Charter.³²⁷ This provision is consistent with Article 1 of the ACHPR.³²⁸ Therefore, the limitation of rights provided to internally displaced children by the Sudan IDP Policy ought to be guided by international and regional human rights law.

In summary, the Sudan IDP Policy does not specifically mention internally displaced children, but the policy does include provisions that support the physical security, basic needs, social, economic and cultural rights and the civil and political rights of all IDPs, including internally displaced children. Another positive of this policy is its emphasis on rights and obligations. Even its partial limitation provided in the policy demonstrates that there must be a justification to limit the government of Sudan's obligations to IDPs.

³²³ See *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) paras 20-22; *Sudan Human Rights Organisation and Another* Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009) paras 165-168.

³²⁴ Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009).

³²⁵ ACHPR art 27(2); *Sudan Human Rights Organisation and Another* Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009) para 165.

³²⁶ States Parties are to provide children with disabilities with access to training, education and employment and access to certain locations in accordance with available resources. ACRWC art 13. The duties of children are also limited with due regard to their age, See ACRWC art 31. See also discussion in Chapter 2 part 2 3 2.

³²⁷ ACRWC art 1(1).

³²⁸ ACHPR art 1.

In contrast to the Sudan IDP Policy, the DDPD includes several provisions that specifically contemplate internally displaced children. The DDPD is a peace agreement, which includes the government of Sudan and other parties to the conflict in Darfur.³²⁹ The provisions of this agreement will be discussed with reference to the four categories of the risks, rights and needs of internally displaced children.³³⁰

The DDPD addresses the risks to the physical security of internally displaced children. It identifies internally displaced children as a group of IDPs that has special needs. Article 42 of the DDPD, like the Kampala Convention, recognises that separated and unaccompanied children have special protection needs.³³¹ Article 44 provides IDPs with protection from physical violence including sexual violence, abuse, exploitation, abduction, child recruitment, child labour and arbitrary detention.³³² The Parties are to provide this protection with the assistance of the African Union-United Nations Hybrid Operation in Darfur (“UNAMID”).³³³ The DDPD also addresses family reunification. Article 47 of the DDPD provides for expedited family reunification, particularly when separated and unaccompanied children are involved.³³⁴ Article 47 of the DDPD goes on to state that “[t]he Parties underscore their commitment to fight child abduction and trafficking, and shall work to prevent and disclose any irregular practices”.³³⁵ The inclusion of this statement in the provision on family reunification is noteworthy as it demonstrates that the drafters recognised that in the attempting to expedite family reunification, internally displaced children can be vulnerable to other forms of abuse or exploitation if the proper safeguards are not put in place.³³⁶

In the category of basic needs, the DDPD recognises that special care must be taken to ensure that children are provided with humanitarian assistance.³³⁷ Assistance is a means to ensure that internally displaced children have their basic needs met. The inclusion of this provision recognises the special needs of internally displaced children.

³²⁹ DDPD 6-9, Preamble. For a discussion on the legal status of peace agreements See C Bell “Peace Agreement: Their Nature and Legal Status” (2006) 100 *The American Journal of International Law* 373-412.

³³⁰ See Chapter 3 part 3 3.

³³¹ DDPD art 42 para 219. See also Kampala Convention art 9(2)(c).

³³² DDPD art 44 para 226.

³³³ Art 44 para 226

³³⁴ Art 47 para 238. This provision is consistent with the standard set out by the Guiding Principles, but the Guiding Principles only makes reference to children rather than separated and unaccompanied children. See Guiding Principles prin 17(3).

³³⁵ DDPD art 47 para 238.

³³⁶ For example, the UNHCR advocates for the use of a Best Interest Determination (“BID”) process with respect to family reunification. See UNHCR “Field Handbook for the Implementation of UNHCR BID Guidelines” (2011); UNHCR “Framework for the Protection of Children” (2012) 7, 21-22.

³³⁷ DDPD art 42 para 220.

The social, economic and cultural rights of internally displaced children are also included in the DDPD. For example, special consideration is given to internally displaced children regarding the provision of education and training.³³⁸ These provisions afford internally displaced children with access to education. Article 73 provides for the social and economic reintegration of children associated with armed forces or armed groups.³³⁹ This provision is consistent with the obligation of States Parties to reintegrate children associated with armed conflicts.³⁴⁰

The category of civil and political rights is addressed by several of the provisions of the DDPD. Article 46 provides that children in addition to women and men have an equal right to have documents issued in their own names and that the process of obtaining document is to be expedited in the case of separated and unaccompanied children.³⁴¹ This provision highlights the importance of ensuring that internally displaced children have a means of proving their identity.³⁴² Article 46 of the DDPD specifies that all internally displaced children require access to identity documents and then includes special provisions for separated and unaccompanied children and therefore addresses the rights and needs of all internally displaced children in this regard.³⁴³

Also, in the category of civil and political rights, Articles 43 and 44 address the issue of access to justice. Article 43 provides for financial compensation for loss and harm that is broad as it covers physical, mental, emotional as well as economic loss.³⁴⁴ In addition to providing protection, it also requires the Government of Sudan in the event of a violation “to ensure effective and timely justice”.³⁴⁵ When internally displaced children specifically children associated with conflict interact with the justice system, the DDPD requires that these children are treated “primarily as victims”.³⁴⁶ Treatment of internally displaced children is to be in accordance with the CRC and ACRWC as well as other standards that protect children in conflict with the law.³⁴⁷ These standards demonstrate a specific focus on treating

³³⁸ Arts 2, 11, 50 para 249,

³³⁹ Art 73 paras 438-441.

³⁴⁰ CRC art 39.

³⁴¹ DDPD art 46 para 237.

³⁴² See CRC art 7; ACRWC art 6.

³⁴³ DDPD art 46 para 237. The Kampala Convention in contrast only recognises separated and unaccompanied children with respect to the issuance of documentation in their own names. See Kampala Convention art 13(4).

³⁴⁴ DDPD art 43 para 225.

³⁴⁵ Art 44 para 226.

³⁴⁶ Art 55 para 286.

³⁴⁷ Arts 55 para 286, Art 62 para 341(ix).

internally displaced children in conflict with the law in accordance with the standards set out in children's rights law.

Finally, the DDPD makes the participation of internally displaced youth a priority. The DDPD requires IDP participation, especially, the participation of women and youth must be facilitated when planning and implementing policies and programs that affect their rights and other relevant issues.³⁴⁸ Article 48 also encourages the participation of youth and women when planning for return, resettlement or relocation.³⁴⁹ Youth, rather than children are included when participation is mentioned. A definition of youth is not provided, but it is most likely that older or adolescent children are included in this definition.³⁵⁰ It is commendable that the DDPD encourages IDP youth participation, but the use of the term youth rather than children excludes internally displaced children that are not old enough to be classified as a youth. In contrast, the term children would have been inclusive as it includes all persons under the age of 18 years.³⁵¹ Since children are mentioned in other Articles of the DDPD, the use of the term youth appears to be deliberate. Unfortunately, the drafters of the DDPD decided that participation in matters concerning them is limited to IDPs who have at least attained the status of youth. This approach is inconsistent with children's rights law as participation is linked to the capacity to express views and the weight given to those views is then assessed based on age and maturity.³⁵²

In comparison the Sudan IDP Policy, the DDPD addresses several risks, rights and needs of internally displaced children in all four categories. Overall, a review of the DDPD demonstrates an agreement that requires the government of Sudan and the other parties to the agreement to respond to the risks, rights and needs of internally displaced children in a comprehensive manner.

6 5 4 Practical steps for implementation

This part of the discussion will examine how the government of Sudan has taken practical steps to respond to the problem of internal displacement. The discussion will examine the extent to which the government of Sudan has incorporated the 12 steps of the Brookings-Bern National Responsibility Framework.

³⁴⁸ Art 42 para 221.

³⁴⁹ Art 48 para 246.

³⁵⁰ The African Youth Charter defines youth as "person[s] between the ages of 15 and 35 years". See African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009) 3.

³⁵¹ CRC art 1; ACRWC art 2.

³⁵² CRC art 12; ACRWC art 7.

The first step of the framework requires the State to prevent and minimise the negative impact of internal displacement. The Sudan IDP Policy states that the government of Sudan has its obligation to prevent and mitigate the negative effects of internal displacement.³⁵³

The second step requires the State to raise awareness regarding the problem of internal displacement. The policy also requires the government of Sudan to raise awareness about causes of internal displacement.³⁵⁴

The third step of the framework requires the State to collect data on the number of IDPs and the conditions in which they are living. The government of Sudan is also required as per the Sudan IDP policy to collect data on internal displacement.³⁵⁵

The fourth step requires the State to provide training on the rights of IDPs. The DDPD provides that the UNAMID would train the community police, which is the group responsible for the safety of IDP camps and voluntary return villages.³⁵⁶

The fifth step requires the State to enact a legal framework on international displacement. The government of Sudan has not drafted national legislation on internal displacement.

The sixth step of the framework is to develop a policy on internal displacement. The government of Sudan has adopted the Sudan IDP Policy and incorporated provisions in the DDPD on internal displacement.³⁵⁷ However, during his 2012 investigative mission, the UN IDP Rapporteur found for example that the implementation of the Sudan IDP Policy “[had] been slow, in part due to the lack of fully functional Government monitoring mechanisms”.³⁵⁸

The seventh step requires the State to designate a focal point institution to coordinate its response to the protection and assistance of its IDPs and the problem of internal displacement. The government of Sudan has designated focal point agencies for providing protection and assistance. These agencies are the Humanitarian Aid Commission (“HAC”), the High Committee on IDPs, the Voluntary Return and Resettlement Commission, the Darfur Regional Authority (“DRA”) and the Ministry of Humanitarian Affairs.³⁵⁹ This is a

³⁵³ Sudan IDP Policy arts 5(a)(a), 8 (2).

³⁵⁴ Art 8 (1).

³⁵⁵ Art 8(6).

³⁵⁶ DDPD art 70 para 413.

³⁵⁷ See part 6 5 4.

³⁵⁸ United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 para 19.

³⁵⁹ See United Nations Human Rights Council “Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani Addendum Mission to Sudan” (25 June 2013) A/HRC/23/44/Add.2 paras 20-22; DDPD art 10 para 63.

practical step that will facilitate the implementation of its obligations.³⁶⁰ The High Committee on IDPs also has a role in the monitoring and implementing the Sudan IDP Policy.³⁶¹

The eighth step of the framework encourages the State to include its national human rights commission in its work on internal displacement. The DDPD requires the establishment of a National Human Rights Commission in Sudan to monitor human rights in Darfur in general.³⁶²

The ninth step requires State to ensure that IDPs are able to participate in decisions concerning their protection and assistance. The participation of IDPs is mandated by the Sudan IDP Policy and the DDPD with regard to the planning and implementation of initiatives that affect them.³⁶³

The tenth step of the framework requires the State to work toward durable solutions to the problem of internal displacement. The Sudan IDP Policy requires the government of Sudan to support what it terms “sustainable solutions”.³⁶⁴ The obligation is consistent with step 10 of the framework, which suggests that States work towards durable solutions to the problem of internal displacement and its negative effects.

The eleventh step requires the State to allocate sufficient resources to its work on internal displacement. Article 8 of the Sudan IDP Policy requires the government of Sudan to allocate resources to respond to internal displacement.³⁶⁵

The twelfth and final step of the framework requires the State to seek assistance from the international community if it is unable to provide protection and assistance to IDPs. The prescribed involvement of the UNAMID to support efforts to provide protection to IDPs in Sudan demonstrates a willingness on the part of the government of Sudan to seek international and regional assistance to respond to internal displacement through the UNAMID.³⁶⁶ Also, the Sudan IDP Policy requires the government of Sudan to work with national and international partners to respond to the needs arising as a result of internal displacement.

The Sudan IDP Policy and DDPD support the practical implementation of Sudan’s obligations to its IDPs. The government of Sudan, in theory, has incorporated many of the

³⁶⁰ See Chapter 5 part 5.6.5.

³⁶¹ Sudan IDP Policy art 9.

³⁶² DDPD art 1 paras 13-14.

³⁶³ Sudan IDP Policy art 5(a)(2), 5(b)(1); DDPD art 42 para 221.

³⁶⁴ Sudan IDP Policy art 8(7).

³⁶⁵ Art 8(4).

³⁶⁶ DDPD art 44 para 226.

12 steps into its response to internal displacement and the protection and assistance of its IDPs. These efforts to implement its obligations demonstrates a level of accountability whereby it respects the obligations that it has to its internally displaced children.³⁶⁷ However, the discussion throughout this case study demonstrates that the government of Sudan has not been consistently accountable in fulfilling its obligations.

6 6 Summary of the findings of the cases studies

The case studies provided an opportunity to examine specific issues that internally displaced children encountered, the drivers and triggers of internal displacement in the selected states, the current national policies and proposed legislation and policy on internal displacement and the manner in which the selected implemented the 12 steps of the Brookings-Bern National Responsibility Framework. The issues encountered by internally displaced children in each of the case studies present a risk to one or more of the four categories of the risk rights and needs. The issues also demonstrate that in general, the States are making efforts to ameliorate the situation of internally displaced children. The discussion of the drivers and triggers of internal displacement highlight the multifaceted nature of the drivers of displacement and pervasiveness of conflict and violence in particular as triggers of displacement. The analysis of the policy and draft legislation and policy in each of the selected States reveals that the standards set out in these documents, in general, respond to the four categories of risks, rights and needs of internally displaced children. Furthermore, the discussion of the extent to which the selected States incorporate the 12 steps of the Brookings-Bern National Responsibility Framework reveals that the States have or will incorporate these based on the current and proposed policy and legislation. This finding demonstrates that there is the potential accountability on a theoretical level. In other words, the governments of the States considered in this chapter demonstrate that they respect their duties to internally displaced children and even accept the standards that will be used to assess their level of accountability.

There are two conclusions that can be reached based on the case studies. Regarding the policy, legislation and the 12 steps, a notable shortcoming uncovered by the case studies is the failure of the governments to adopt and enact their comprehensive policy and legislation. Uganda and Sudan have adopted national policies and the CAR and Nigeria have draft legislation and policy, but none of the selected States has actually enacted and implemented national legislation on internal displacement. The absence of a domestic legal framework to

³⁶⁷ See discussion in Chapter 5 part 5 2 2.

direct the State's response to internal displacement has led to actions that can be described as *ad hoc*.³⁶⁸

This second conclusion presents the possibility that at the domestic level, a legal framework, especially domestic legislation on internal displacement can contribute to the protection and assistance of internally displaced children. All of the States included in this chapter have ratified at least one international or regional instrument on children's rights law and the law on internal displacement.³⁶⁹ The case studies demonstrate that ratification is merely a step in the implementation process. Freeman states that "we must be careful not to mistake words for deeds".³⁷⁰ Building on that thought, Human emphasises that despite the symbolic value of international instruments "[o]ne must, [...] not underestimate the extent of changes in attitude and practice required at the national level for the recognition and the implementation of children's rights".³⁷¹ This statement can be applied to the implementation of the rights and needs of internally displaced children. The adoption of domestic legislation on internal displacement that takes into consideration the risks, rights and needs of internally displaced children is a positive change that contributes to implementing the obligations that States have to this group of children. Therefore, it is imperative to focus on tools, whether legislation, policy or practical steps that support the implementation of State obligations to internally displaced children.

The discussion in the final chapter will synthesise the findings in the preceding chapters to answer the primary and secondary research questions. It will also provide recommendations to improve the protection and assistance of internally displaced children in accordance with these findings.

³⁶⁸ Abebe highlights that this has also been the trend in the regional response to internal displacement in Africa. See AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 155-176 163; Chapter 4 part 4 2 2.

³⁶⁹ See Addendum A Table 1 African States Child Law and Internal Displacement Law Ratifications Status; Addendum B Table 2 Case Study States Information.

³⁷⁰ M Freeman "Taking Children's Rights More Seriously" (1992) 6 *International Journal of Law and the Family* 52-71 60.

³⁷¹ S Human "The Theory of Children's Rights" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 150-165 155, 165.

CHAPTER 7: CONCLUSION

“[T]he recognition of rights should be able to promote and improve the lived reality of children on the ground”.¹

7 1 Introduction

The first part of the chapter will focus on the findings of the study and explain how these findings correlate with the hypotheses and provide a response to the research questions. The second part of the discussion will also provide recommendations and outline a framework that will facilitate State implementation of their obligations to internally displaced children.

7 2 Assessing the hypothesis

The research questions investigated in this thesis was informed by four hypotheses. The findings of this thesis can also be used to assess the accuracy of these hypotheses.

The first hypothesis is that the law on internal displacement conceptualises internally displaced children as objects of protection rather than bearers of rights. The critical analysis of the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention reveal that the law on internal displacement recognises that internally displaced children are a group of IDPs with special needs and that the law in this area focusses on specific areas of concern regarding children. These areas of focus include protection from recruitment, family reunification and access to education.² The law on internal displacement provides comprehensive provisions that provide for the physical and basic needs of internally displaced children.³ The critical analysis also demonstrates that there is less focus on the right to participation of internally displaced children.⁴ In contrast with the Guiding Principles, the ICGLR IDP Protocol and the Kampala Convention frame their provisions in terms of State obligations rather than rights of IDPs.⁵ This approach provides one explanation for the limited focus on the participation of internally displaced children. Overall, the critical analysis of the law on internal displacement demonstrates that the key instruments in this area of the law recognise children but they are inconsistent in their conceptualisation of internally displaced children as bearers of rights.⁶

¹ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 38.

² There is specific mention on children regarding these areas Guiding Principles prins 13(1), 17(3), 23(2); Kampala Convention arts 7(5)(e),(f), 9(1)(d).

³ Chapter 4 part 4 4.

⁴ Chapter 4 part 4 4 5.

⁵ See ICGLR IDP Protocol; Kampala Convention; Chapter 4 part 4 3 3.

⁶ Chapter 4 part 4 4 5.

The second hypothesis is that children's rights law made little or no reference to internally displaced children as a group of children that requires special consideration. Based on an analysis of the CRC, this hypothesis is true as this instrument does not specifically recognise internally displaced children in the same way that it recognises children with disabilities, children from indigenous communities and refugee children.⁷ In contrast, this hypothesis is false with respect to the ACRWC as it was the first binding legal instrument to provide internally displaced children with specific rights.⁸ However, the strength that children's rights law offers as a whole is that it recognises that children in difficult circumstances require special consideration and it responds to almost all of the risks rights and needs of internally displaced children in the categories of physical security, basic needs, social, economic and cultural rights and civil and political rights.⁹

The third hypothesis is that factors such as climate change increase incidents of internal displacement induced by disasters and conflicts and have adverse effects on internally displaced children. The discussion in chapter three regarding climate change and protracted displacements is relevant to this hypothesis and demonstrates that the hypothesis is correct.¹⁰ Climate change has increased incidents of internal displacement due to slow-onset disasters. Also, adverse environmental impacts of climate change have reduced resources, led to violence and instances of internal displacement. Climate change increases the adverse effects of internal displacement, but it also contributes to violations of human rights, such as the right to life and the provision of basic needs.¹¹ Protracted displacements also prolong the time that internally displaced children spend in displacement and the length of time that they are affected by the risks caused by internal displacement. Some children spend their childhoods in situations of internal displacement.

The fourth hypothesis made in this study is that the most effective method to hold States accountable for their obligations to internally displaced children is the ratification of international and regional law in addition to the domestic implementation of binding and non-binding obligations. The discussion in chapter five demonstrates that acceptance and internalisation are of critical importance to State accountability.¹² The examination of the Brookings-Bern National Responsibility Framework and the extent to which the States selected for the case studies have implemented these steps demonstrates that there are

⁷ CRC arts 22, 23, 30; ACRWC arts 13, 23

⁸ ACRWC arts 23(4); 25(2)(b).

⁹ See Chapter 3 part 3 3 2.

¹⁰ See Chapter 3 part 3 2 3.

¹¹ See Chapter 3 part 3 2 3 1.

¹² See Chapter 5 part 5 2.

several other practical steps that support accountability, implementation and compliance of State obligations to IDPs in general.¹³ The findings of this study reveal that it is more accurate to state that the domestic implementation is one of the most important aspects to ensure State accountability and compliance with their legal obligations to internally displaced children.

7 3 Response to the research questions

The research undertaken for this thesis was based on the primary and a secondary research question. The primary research question sought to determine the legal obligations of States in view of international and regional sources of in respect of the rights and needs of internally displaced children. The secondary research question sought to determine the most effective measures that can be used to hold States accountable for their obligations to internally displaced children. The response to each of the research questions will be addressed in turn.

7 3 1 Legal obligations of States to internally displaced children

An examination of the problem of internal displacement and its adverse impacts on internally displaced children reveals that the point of departure for determining the legal obligations that States have to this group of children are their rights and needs. The principles of a children's rights perspective as outlined in chapter two forms the theoretical lens with which to view the rights and needs of internally displaced children and corresponding State obligations. The discussion in chapter three outlined that internally displaced children experience risks to their physical security, basic needs, social, economic and cultural rights and civil and political rights.¹⁴ These risks highlight particular rights and needs. The analysis of children's rights law and the law on internal displacement demonstrates that internally displaced children have corresponding rights in each of these categories. Based on these rights and needs States have legal obligations to all children, including internally displaced children. Therefore, States are legally obligated to respond to risks, rights and needs of internally displaced children and these obligations are prescribed by children's rights law and the law on internal displacement. The legal obligations that States have to internally displaced children can be summarised as taking a children's rights perspective to the interpretation and implementation of the law applicable to the protection and assistance of internally displaced children.

¹³ See Chapter 5 part 5 6; Chapter 6.

¹⁴ See Chapter 3 part 3 3.

7 3 2 Accountability

The findings of the research demonstrate that the most effective means to hold States accountable for their obligations to internally displaced children is the application of legal accountability from a children's rights perspective and synthesising the theoretical with the practical. The application of the principle of accountability employs the accountability process, the concept of sovereignty as responsibility, accountability mechanisms and practical steps for implementation. Therefore, an effective means to hold States accountable is comprised of both theoretical and practical aspects in a way that keeps internally displaced children at the fore.

The discussion in chapter five provided a theoretical underpinning for the principle of accountability. It outlined that the principle of accountability is comprised of three duties, namely, the duty to respect, protect and fulfil.¹⁵ For States to be accountable, they must satisfy each of the three duties, namely the duties to protect, respect and fulfil. The discussion also outlined that accountability can be linked to compliance and implementation as these concepts operationalise accountability into action.¹⁶ Accountability, in particular, legal accountability, also includes a process whereby duty bearers are required to give an account of how they have discharged their obligations and are sanctioned for non-compliance. This process can be understood in terms of three elements, specifically, standards, information and sanctions. This process presents another method to understand how the principle of accountability can be put into practice. In addition, the concept of sovereignty as responsibility supports compliance with international human rights norms, which includes the obligations that States have to internally displaced children.¹⁷

The latter part of the discussion examined accountability mechanisms and practical steps for implementation, which provide mechanisms to hold States accountable. The assessment of the accountability mechanisms, in particular, demonstrated that effective mechanisms facilitate the positive engagement of duty-bearers; are accessible to bearers of rights and include other actors that facilitate the implementation of the various mechanisms. This finding indicates that an effective means to hold States accountable involves States, internally displaced children and other actors such as NGOs and monitoring and evaluation bodies. NGOs support internally displaced children participate in accountability mechanisms. Monitoring and evaluation bodies, on the other hand, support the functioning

¹⁵ See Chapter 5 part 5 2 2.

¹⁶ See Chapter 5 part 5 2 2

¹⁷ See Chapter 5 part 5 3 1.

of the accountability mechanisms. The case studies highlighted that the implementation of the Brookings-Bern National Responsibility Framework not only provides practical steps for States to implement their obligations to internally displaced children, but it provides a means to assess a State's level of accountability.

Therefore, the findings support that the most effective means to hold States accountable for their obligations is to combine the theoretical aspects of accountability with the practical steps for implementation. This synthesis of the theoretical and practical must also include the positive engagement of duty-bearers, bearers of rights and actors that support the application of accountability in this context

7 3 3 Summary of findings

To improve the law's response to the protection and assistance of internally displaced children requires a change in the interpretation and implementation of the law and not necessarily the law itself. The critical analysis of children's rights law and the law on internal displacement demonstrates that on a theoretical level the law provides for the protection and assistance of internally displaced children.

The overall obligation that States have to internally displaced children is to conceptualise this group of children as bearers of rights and implement their specific legal obligations through consistent engagement with the principle of accountability. It is simple to say that internally displaced children are bearers of rights and that States will positively engage with the principle of accountability through its process, accountability mechanisms, theories of compliance and practical steps for implementation. The actual implementation of the law from a children's rights perspective is difficult. When writing about the implementation of children's rights Human cautions that "[o]ne must, however, not underestimate the extent of changes in attitude and practice required at the national level for the recognition and the implementation of children's rights".¹⁸ Implementing the law from a children's rights perspective, especially when responding to the risks, rights and needs of internally displaced children will take a process, which engages all of the relevant actors and synthesises in accountability mechanisms and practical steps for implementation. In summary, the overall answer to the research questions requires a synthesis of the theoretical and the practical aspects of State obligations from a children's rights perspective with a focus on the application of the principle of accountability.

¹⁸ S Human "The Theory of Children's Rights" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 150-165 165.

7 4 Recommendations

The findings of this thesis can be used to provide recommendations aimed at improving the protection and assistance of internally displaced children. The recommendations will be provided with respect to implementation at the international, regional and domestic levels.

At the international level, the primary recommendation is to use the Guiding Principles to complement the implementation of the CRC. Unlike the ACRWC, the CRC does not specifically mention internally displaced children. Also, at the international level, there is not a binding legal instrument which addresses internal displacement. Rather than advocating for the creation of a new international treaty, an effective and expedient way to improve the protection and assistance of internally displaced children using international law is to use the Guiding Principles to guide the implementation of the CRC when applied to situations involving internally displaced children. Practically, this means recognising that internally displaced children are children in particularly difficult situations that need special consideration. The Guiding Principles can be used to inform the special consideration provided through the CRC, especially when responding to risks that are unique to or often occur in the context of internal displacement. Examples of such risks include protection from displacement, family reunification, access to education and property rights.¹⁹ In addition, States ought to continue to include information regarding the protection and assistance to internally displaced children in their reports to the CRC Committee and the CRC Committee ought to continue to request this information from States.²⁰

At the international and regional level, internally displaced children have the standing to bring complaints; however, they require assistance to bring these complaints. It is recommended that NGOs, continue support and where necessary act as surrogates in the accountability process.²¹ Their support and can empower internally displaced children to hold States accountable for their obligations.

Based on the findings in this study, at the regional level it is recommended that the ICGLR IDP Protocol and the Kampala Convention are read with the ACRWC where reference to the best interests of the child, child participation and education are absent as these rights can be addressed by the implementation of the ACRWC in the context of internal

¹⁹ See discussion in Chapter 3 part 3 3 1.

²⁰ See Chapter 6.

²¹ See discussion in Chapter 5 part 5 5.

displacement.²² The UNHCR's BID can be used as a guide to implementing such a process in the context of internal displacement.²³

At the domestic level, in addition to the ratification and domestication of international and regional instruments, the primary recommendation is to include specific rights for internally displaced children in legislation. Section 4 of the Nigeria IDP Bill is an example of domestic legislation that takes a holistic approach to the rights and needs of internally displaced children and includes a section that provides specific rights for internally displaced children.²⁴ Incorporating a section that addresses children's rights in domestic legislation on internal displacement will as a minimum, contribute to raising awareness of the situation of internally displaced children. A caveat for this recommendation is that the legislation should adopt standards that are consistent with children's law and give children standing to hold the State accountable for the obligations provided in the legislation. The domestic legislation should include balancing the rights of internally displaced children with children in hosts communities to ensure the rights and needs of both groups of children are adequately addressed. To create an avenue for internally displaced children to hold the State accountable for its obligations, the domestic legislation must provide a complaints procedure that is accessible to internally displaced children and can be expedited.

The overall recommendation to improve the protection and assistance of internally displaced children is to take a children's rights perspective to the interpretation and implementation of the law. This task is most effectively accomplished at the domestic level. Taking a children's rights perspective requires the conceptualisation of children as bearers of rights, the interpretation of the law which considers the principles of a children's rights perspective and prioritisation of the principle of accountability. To practically implement a children's rights perspective requires that all of the principles in this perspective are used in the interpretation and implementation of the law. This means that the principles of non-discrimination; the best interests of the child; life, survival and development; participation; accountability; universality; and, interdependence and indivisibility must be incorporated in the law at all levels. In addition to the principle of accountability, which is a key principle, in this perspective, the findings in the research demonstrate that the best interests of the child

²² The CRC and the Guiding Principles are also applicable, especially with regard to education. See CRC arts 28-29; ACRWC art 11; Guiding Principles prin 23; Chapter 4 part 4 3 1 3.

²³ BID is the best interests determination. See UNHCR "Framework for the Protection of Children" (2012) 7, 21-22. See also UNHCR "Field Handbook for the Implementation of UNHCR BID Guidelines" (2011).

²⁴ See Nigeria IDP Bill s 4; Chapter 6 part 6 4 3.

principle and participation are not well articulated in the law on internal displacement.²⁵ It is, therefore, recommended that implementation of the law on internal displacement at any level explicitly incorporate the best interests of the child principle and participation.

The implementation of the recommendations provided in this section can improve the protection and assistance provided to internally displaced children. They will also inform the framework to encourage States to comply with their obligations to internally displaced children that will be outlined in the next section.

7 5 Framework

The final objective of this thesis is to develop a framework that encourages States to comply with their obligations to internally displaced children. The focal point principle is accountability as the aim of the framework is to encourage States to engage positively with the principle of accountability and comply with their obligations to internally displaced children. The issues of circumstances and capacity will be briefly considered before outlining the framework.

The conditions under which the rights and obligations are to be implemented are relevant to their implementation; therefore, the framework requires an assessment of the circumstances and the capacities of the parties. For internally displaced children, the relevant circumstances include the risks that they encounter due to internal displacement. The circumstances also include the particular challenges or problems that internally displaced children encounter due to the conditions within the State. The case studies outlined a number of problems that internally displaced children encountered in the selected States such as night commuting, difficulties accessing education, detention and sexual violence.²⁶ These circumstances are relevant to directing the implementation of obligations. The capacities of internally displaced children for the purposes of the framework is their ability to hold the duty-bearers, specifically States accountable for their obligations. There are some accountability mechanisms that are not accessible to internally displaced children and there are others that they require support from an advocate or surrogate such as an NGO, to adequately access. For instance, internally displaced children generally do not have the authority to conduct investigative missions, but they do have the standing to bring complaints before adjudicative and monitoring and evaluation bodies.²⁷ The purpose of

²⁵ See Chapter 4 part 4 4. The incorporation of the principle of accountability will be address in the framework. See Chapter 7 part 7 4.

²⁶ See Chapter 6.

²⁷ See Chapter 5 part 5 4.

recognising the limits of the capacity that internally displaced children have to hold States accountability is to ensure that the capacities, support and mechanisms that are accessible are leveraged to their full capability. Also, any barriers to their participation in these mechanisms must be managed. An example of a barrier is the requirement to exhaust local remedies before bringing a complaint to an international or regional forum. The African Commission and the ACERWC have addressed this issue by defining exhaustion of local remedies in terms of being “available, effective and adequate”.²⁸

States also encounter circumstances and have limits in their capacity to uphold their obligations. The focus on the continent of Africa and the case studies, in particular, have highlighted that the States in Africa encounter difficult circumstances.²⁹ The African Commission and the ACERWC recognise that emergency situations and situations of conflict do not absolve States of their obligations, but they create challenges for States to comply with their obligations.³⁰ What is important is the attitude of the State as adequate efforts may be frustrated by other forces.³¹ Therefore, having consideration for the circumstances that impact the ability of States to comply with their obligations is relevant to the assessment of the compliance and their accountability.

The capacity of States also affects their ability to discharge their obligations. One factor that impacts the ability of States to discharge their obligations is limited resources. In the context of internal displacement, the drivers or underlying causes of displacement such as political and economic instability and tensions between various identity groups can be evidence of a lack of resources or place additional strain available resources.³² There are competing needs such as the needs of host communities and IDP populations. States are responsible for responding to all of these needs. The notion of limited resources is a reality.³³ The tripartite relationship between States, parents and the international community and the

²⁸ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 32; *Sudan Human Rights Organisation and Another* Communication nos 279/03, 296/05 (2009) AHRLR 153 (ACHPR 2009) paras 99-102.

²⁹ See Chapter 6.

³⁰ *Commission nationale des droits de l'Homme et des libertés v Chad* Communication no 74/92 (2000) AHRLR 66 (ACHPR 1995) paras 20-22; *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* Communication no 2155/96 (2001) AHRLR 60 (ACHPR 2001) para 69; *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 36.

³¹ *Hunsungule and Others v Uganda* Communication no 1/2005 (ACERWC 15-19 April 2013) para 69; Chapter 6 part 6 2 4.

³² See Chapter 3 part 3 2 2; Chapter 6.

³³ C Himonga “African Customary Law and Children’s Rights: Intersections and Domains in a New Era” in J Sloth-Nielsen (ed) *Children’s Rights in Africa, A Legal Perspective* (2008) 73-90 81.

concept of sovereignty as responsibility provide that States should seek assistance when their resources are inadequate to respond to their obligations.³⁴

In addition, the capacities of States, like the capacities of internally displaced children in this framework is not only meant to be a limiting factor. African as a region has used the law to put forward a comprehensive response to the problem of internal displacement. It has binding legal instruments at the regional and sub-regional levels that address this problem. It also has adopted and enacted the ACRWC, which is a comprehensive instrument that regulates children's rights law in the region and addresses the rights of internally displaced children. The continent of Africa has taken a hard law response to the problem of internal displacement and has taken children's rights seriously.³⁵ As a regional community, it has the capacity to encourage States to be accountable for their obligations to internally displaced children in the region.

In view of the above discussion, a broad framework is proposed that consists of three parts, which are as follows:

Part one requires the implementation of the 12 steps Brookings-Bern State Responsibility Framework in consideration of the seven principles of a children's rights perspective.³⁶ Its implementation will include the following processes:

- i. **Accountability:** Use existing or create accountability mechanisms that are accessible to internally displaced children.
- ii. **Interdependence and indivisibility:** Ensure that the four categories of risks, rights and needs of internally displaced children are addressed through the implementation of the 12 steps.
- iii. **Universality:** Mandate that regardless of circumstances and limits on capacity that rights and needs of internally displaced children are met. These challenges must be used to seek solutions.
- iv. **Non-Discrimination:** Ensure that at each step internally displaced children do not encounter discrimination based on age, due to their situation as IDPs or on any other prohibited grounds.

³⁴ See Chapter 2 part 2 4 2 1 a; Chapter 5 part 5 3.

³⁵ See M Freeman "Taking Children's Rights More Seriously" (1992) 6 *International Journal of Law and the Family* 52-71.

³⁶ See Chapter 5 part 5 6.

- v. Best interests of the child: Include a determination of the best interests of the child at the implementation of each step. This determination can be incorporated as part of the process.
- vi. Life, survival and development: Ensure that the steps support the life, survival and development of internally displaced children in a holistic manner.
- vii. Participation: Ensure the participation of internally displaced children through child-friendly participation mechanisms and that children are contemplated during the implementation of each of the 12 steps.

Part two requires the development or amendment of national legislation on internal displacement to ensure that it incorporates a children's rights perspective. This step requires the incorporation of the seven principles of a children's rights perspective and ensuring that the physical security, basic needs, social, economic and cultural rights and the civil and political rights of internally displaced children. This step can be addressed by including a specific section on the rights of internally displaced children within the legislation. The legislation must also consider its impact upon other children, such as children in host communities in order to have regard for the rights of all children.

Part three requires the rapid implementation of the 12 steps and the national legislation. This step requires political will on the part of the State to implement its obligations. This step also requires internally displaced children and their advocates to use international, regional and domestic accountability mechanisms to hold States accountable for their progress and actions in this regard.

7 6 Concluding remarks

This thesis has achieved its aim of injecting a children's rights perspective into the law on internal displacement through the critical analysis of the key legal instruments and by providing a framework that will encourage States to comply with their obligations to internally displaced children. The findings in this thesis have moved the discussion forward by integrating children's rights law and the law on internal displacement. The application of the principles of a children's rights perspective provided the theoretical basis for this integration. The findings in this thesis have expanded the academic discussion on the protection and assistance of internally displaced children to be conceptualised as obligations that recognise participation and accountability in addition to welfare.

Two themes have consistently been interwoven throughout this thesis. The first theme is the notion of children as bearers of rights. Conceptualising children as bearers of rights

means balancing their vulnerability and relative powerlessness with their evolving capacities. The language of rights functions to empower children. As bearers of rights, internally displaced children possess rights that have corresponding duties on the part of States and other duty-bearers. The problem of internal displacement, especially when examining the risks encountered by internally displaced children presents, a temptation to focus solely on their welfare rather than embracing the empowering function of rights. Balancing the vulnerability with the evolving capacities of internally displaced children in no way detracts from the reality that they encounter substantial risks in all areas of their lives. It is a means of acknowledging that as bearers of rights, internally displaced children have the legal standing to hold duty-bearers accountable for their obligations. These labels are more than mere rhetoric. The law governing children's rights and internal displacement prescribe rights and corresponding obligations that are legally binding.

The second theme, namely, accountability is a key principle of a children's rights perspective. Rights provide the starting point for accountability. A relationship of accountability exists between bearers of rights and duty-bearers. In the context of this thesis, the function of accountability is to encourage States to respect, protect and fulfil their obligations to internally displaced children; obligations that they have freely accepted. Accountability requires that duty-bearers are answerable for their exercise of power. Rights also provide the standards that can be used to assess the exercise of power, and the mechanisms for obtaining information about the exercise of power and that sanction the improper use of that power.

Internal displacement is a complex and multifaceted problem that negatively impacts children. The situation of internally displaced children in Africa, in particular, is cause for concern. Fortunately, there has been a response from the peoples, leaders and States on the continent. One part of the response has been a legal one in the form of binding legal instruments in the areas of children's rights and internal displacement. There are indeed limits to the law as a tool. There are challenges with its enforcement, particularly in the context of human rights. Rather than being discouraged by the limited enforcement of human rights law in general and children's rights law and the law on internal displacement specifically, a children's rights perspective provides a "coherent theory"³⁷ to respond to this problem. The way forward is to focus on how the conceptualisation of children as bearers of

³⁷ R Dworkin *Taking Rights Seriously* (1977) 186.

rights and the application of the principle of accountability, can mutually reinforce each other and improve the law's response to internally displaced children in Africa and beyond.

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ADDENDUM A

Table 1 African States Child Law and Internal Displacement Law Ratifications Status

State ¹	IDPs Conflict 2017	IDPs Disasters 2017	REGION ²	CRC ³	ACRWC ⁴	KAMPALA ⁵	ICGLR ⁶	DOMESTIC ⁷
Abeyi Area	31,000							
Burundi	57,000	11,000	CENTRAL	X	X	*	X	X
Cameroon	239,000		CENTRAL	X	X	X		
CAR**	689,000	2,900	CENTRAL	X	X	X	X	
Chad	158,000		CENTRAL	X	X	X		
Congo	108,000		CENTRAL	X	X	X	X	
DRC	4,480,000	27,000	CENTRAL	X	*	*	X	
Equatorial Guinea			CENTRAL	X	X	*		
Gabon		8	CENTRAL	X	X	X		

¹ The States are the 55 Member States of the African Union. See African Union "List of Countries which have Signed, Ratified/ Acceded to the Constitutive Act of the African Union" <https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf> (accessed 04-06-2018); African Union *African Union Handbook 2018: A Guide for Those Working with and Within the African Union* (2018) 5-6.

² The regions are defined by the African Union. See African Union *African Union Handbook 2018: A Guide for Those Working with and Within the African Union* (2018) 16.

³ United Nations Treaty Collection "Convention on the Rights of the Child" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 01-06-2018).

⁴ African Union "List of Countries which have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child" <https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf> (accessed 01-06-2018).

⁵ African Union "List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention)" <https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf> (accessed 05-09-2018).

⁶ Pact for the Security, Stability and Development in the Great Lakes Region (adopted 15 December 2006, entered into force 21 June 2008, amended November 2012) art 1(d); ICGLR "The Pact" <<http://www.icglr.org/index.php/en/the-pact>> (accessed 12-07-2018).

⁷ Internal Displacement Monitoring Centre (IDMC) "IDP Law and Policies: A Mapping Tool" <<http://www.internal-displacement.org/law-and-policy>> (accessed 22-06-2016); The Brookings-LSE Project on Internal Displacement "IDP Laws and Policies: Africa" <<http://www.brookings.edu/about/projects/idp/laws-and-policies/africa-policies>> (accessed 22-06-2016).

São Tomé and Príncipe			CENTRAL	X	*	*			
Comoros	94		EAST	X	X	*			
Djibouti			EAST	X	X	X			
Eritrea			EAST	X	X	*			
Ethiopia	1,078,000	434,000	EAST	X	X	*			
Kenya	159,000	35,000	EAST	X	X	-	X		X
Madagascar		248,000	EAST	X	X	*			
Mauritius		100	EAST	X	X	-			
Rwanda		5,000	EAST	X	X	X	X		
Seychelles			EAST	X	X	-			
Somali	825,000	899,000	EAST	X	*	*			X
South Sudan	1,899,000	75,000	EAST	X	*	*	X		
Sudan**	2,072,000	54,000	EAST	X	X	-	X		X
Uganda**	24,000	95,000	EAST	X	X	X	X		X
Tanzania		1,900	EAST	X	X	*	X		
Algeria			NORTH	X	X	-			
Egypt	82,000		NORTH	X	X	-			
Libya	197,000	156,000	NORTH	X	X	-			
Mauritania		2,900	NORTH	X	X	X			
Morocco			NORTH	X	-	-			
Sahrawi Republic			NORTH	-	*	X			
Tunisia		990	NORTH	X	*	*			
Angola		14,000	SOUTH	X	X	X	X		X
Botswana		2,000	SOUTH	X	X	-			
Lesotho			SOUTH	X	X	X			
Malawi		84,000	SOUTH	X	X	X			
Mozambique	10,000	170,000	SOUTH	X	X	*			

Namibia		3,400	SOUTH	X	X	*		
South Africa		15,000	SOUTH	X	X	-		
Swaziland			SOUTH	X	X	X		
Zambia		2,800	SOUTH	X	X	X	X	X
Zimbabwe		10,000	SOUTH	X	X	X		
Benin		3,500	WEST	X	X	X		
Burkina Faso	4,900	8,200	WEST	X	X	X		
Cabo Verde			WEST	X	X	-		
Côte d'Ivoire	16,000		WEST	X	X	X		
Gambia		880	WEST	X	X	X		
Ghana		23,000	WEST	X	X	*		
Gineau-Bissau			WEST	X	X	X		
Guinea		710	WEST	X	X	*		
Liberia		970	WEST	X	X	X		
Mali	38,000	6,800	WEST	X	X	X		
Niger	144,000	189,000	WEST	X	X	X		
Nigeria**	1,707,000	122,000	WEST	X	X	X		
Senegal	22,000	630	WEST	X	X	*		
Sierra Leone		12,000	WEST	X	X	X		
Togo		50	WEST	X	X	X		

- Not a party
- * Signed by not ratified
- X Ratified
- ** Selected for case study

IDPs Internally displaced persons

CRC Convention on the Rights of the Child 1989

ACRWC African Charter on the Rights and Welfare of the Child 1990

- KAMPALA African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009
- ICGLR International Conference on the Great Lakes Region Member and bound by the ICGLR Protocol on the Protection and Assistance to Internally Displaced Persons 2006
- DOMESTIC Domestic legislation or policy with respect to internal displacement

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ADDENDUM B

Table 2 Case Study States Information

State	Region ¹	IDPs Conflict 2015 ²	IDPs Disasters 2015 ³	IDPs Conflict 2016 ⁴	IDPs Disasters 2016 ⁵	IDPs Conflict 2017 ⁶	IDPs Disasters 2017 ⁷	CRC ⁸	ACRWC ⁹	ICGLR ¹⁰	KAMPALA ¹¹
Uganda	EAST	30,000	600	53,000	2,500	24,000	95,000	X	X	X	X
CAR	CENTRAL	452,000	1,100	412,000	7,500	689,000	2,900	X	X	X	X
Nigeria	WEST	2,096,000	100,000	1,955,000	78,000	1,707,000	122,000	X	X		X
Sudan	EAST	3,182,000	8,300	3,300,000	123,000	2,072,000	54,000	X	X	X	

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¹ The regions are defined by the African Union. See African Union *African Union Handbook 2018: A Guide for Those Working with and Within the African Union* (2018) 16.

² IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 96-99.

³ IDMC “GRID 2016: Global Report on Internal Displacement” (May 2016) 96-99.

⁴ IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 113-116.

⁵ IDMC “GRID 2017: Global Report on Internal Displacement” (May 2017) 113-116.

⁶ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 94-96.

⁷ IDMC “GRID 2018: Global Report on Internal Displacement” (May 2018) 94-96.

⁸ United Nations Treaty Collection “Convention on the Rights of the Child” <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 01-06-2018).

⁹ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Charter on the Rights and Welfare of the Child” <https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf> (accessed 01-06-2018).

¹⁰ Pact for the Security, Stability and Development in the Great Lakes Region (adopted 15 December 2006, entered into force 21 June 2008, amended November 2012) art 1(d); ICGLR “The Pact” <<http://www.icglr.org/index.php/en/the-pact>> (accessed 12-07-2018).

¹¹ African Union “List of Countries which have Signed, Ratified/ Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa (Kampala Convention)” <https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf> (accessed 05-09-2018).