



# EMERGING LEGAL AND INSTITUTIONAL ARCHITECTURE FOR THE PROTECTION OF WOMEN DISPLACED BY CONFLICTS IN THE HORN AND EASTERN AFRICA

**Allehone Mulugeta Abebe, PhD Researcher**

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## Abstract

*The Horn and Eastern Africa region faces a grave crisis of internal displacement triggered by various types of armed conflicts. Women bear the brunt of the disproportionate consequences of displacement often being subjected to sexual and gender based violence, human rights violations by parties to the conflicts, forced eviction, lack of access to social services, separation from families, and abuse and mistreatment in camps. The experience of displaced women in Somalia and Sudan represent stark examples of civilian suffering. Regional laws and institutions have emerged as key elements of an effective response to the phenomenon of internal displacement in a region where the willingness and capacity of the state is conspicuously weak. This is particularly true to regional and sub-regional mechanisms developed under the auspices of the African Union, the Inter-Governmental Authority on Development, the East African Community and the International Conferences on the Great Lakes Region. The African Union Convention on the Protection and Assistance of Internally Displaced Persons and the two Great Lakes protocols related to internal displacement are innovative binding instruments, which promise protection and assistance to victims of displacement. Building effective institutions, which will be well positioned to implement this instrument is, therefore, an urgent task.*

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**Keywords:** Protection of displaced women, Horn of Africa, Eastern Africa, Conflict

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## Author's Affiliation

Allehone Mulugeta Abebe is a doctoral researcher at the University of Bern. He is also an Ethiopian diplomat working at the Permanent Mission at Geneva. All views expressed in this paper solely belongs to the author and do not reflect either the Permanent Mission or the Government of Ethiopia.

# **EMERGING LEGAL AND INSTITUTIONAL ARCHITECTURE FOR THE PROTECTION OF WOMEN DISPLACED BY CONFLICTS IN THE HORN AND EASTERN AFRICA**

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## **Introduction**

Internal displacement presents one of the worst forms of humanitarian crisis in the Horn and Eastern part of Africa. Out of the six largest cases of internal displacement, two of them are located in the region which covers countries, namely, Eritrea, Ethiopia, Djibouti, Kenya, Somalia, Sudan and Uganda. Though factors such as drought are important sources of displacement, conflicts, particularly non-international armed conflicts, constitute the main causes of internal displacement in the region where vulnerable groups such as women, children and the elderly bear the disproportionate burden. Various regional and sub-regional institutions, namely, the African Union (AU), the Great Lakes International Conference, Inter-Governmental Authority on Development (IGAD) and the Eastern Africa Economic Community (EAC) are developing laws and policies addressing the challenges of forced displacement in general and its impact on women in particular. These regional laws and policies present some obvious advantages. They are instrumental in harmonizing domestic laws and policies among member countries. Through their convening power, regional forums may also bring to light some important issues to heads of states and ministers. Moreover, they can also serve as tools of 'regionalizing' international norms and standards by incorporating certain regionally specific elements into existing norms.

This paper attempts to provide an overview of the regional response to the protection of women affected by internal displacement in the Horn and Eastern Africa, and identify some of the challenges undermining the effective implementations protective measures. The first section provides background to challenges of internal displacement in the region and the experience of women the Horn and Eastern part of Africa in the Horn and Eastern African region. Then an analysis of international and regional legal mechanisms for the protection of IDPs, in general and displaced women, in particular will be provided. The third section of the paper attempts to make a case for a genuine effort to strengthening institutional responses at the level of the African Union and at the sub-regional level. Finally, the paper identifies some of the challenges of regional and sub-regional protection of women, and suggests ways and means of addressing these shortcomings.

## **Background and context**

The region of the Horn and East of Africa has had a long experience with generating the displacement of civilian populations, including both inter-state and intra-state conflicts. From the reported 24 million IDPs worldwide in 2009, more than 11 million are located

in Africa.<sup>1</sup> Sudan and Somalia had a very large number of displaced people with 4.9 and 1.5 million IDPs.<sup>2</sup> While Kenya had an undetermined number of IDPs, other countries had significant number of displaced persons that included Eritrea with 10, 000, Ethiopia with 300, 000 and Uganda with 450, 000.<sup>3</sup> While the impact of the various forms of displacement on civilians has been considerably consequential, its consequences for women had been particularly grave. This section briefly illustrates the scope of conflict-generated displacement in the Horn and East Africa and its particular impact on women.

#### *Internal displacement in the Horn and East Africa*

The Horn and Eastern Africa region has faced many challenges such as armed conflicts, drought and extreme poverty, which led to the displacement of a great number of civilian populations. Since the 1960s, various inter-state and intra-state conflicts triggered waves of forced displacement. State institutions remain enormously weak and armed groups are often blamed for violations of human rights. In some cases, such as in Somalia, the entire edifice of state institutions has collapsed. Discriminatory and harmful traditional practices, namely, early marriage, abduction, and female genital mutilation are rampant.<sup>4</sup> Ongoing conflicts in Somalia, Sudan<sup>5</sup> and Uganda continue to generate large number of displaced persons. Conflicts and natural disasters are also credited for a large number of displacements in Ethiopia. Eritrea remains to be one of the major refugees generating states in the sub-region. Kenya is still struggling from the aftermath of post-election violence in 2007 which generated more than 300, 000 IDPs.<sup>6</sup>

The situation of displacement and the egregious human rights violations in the region has been studied and reported by the UN Secretary General Representative on the Human Rights of Internally Displaced Persons (SRSG), the African Commission on Human and Peoples Rights (ACHPR) and a number of non-governmental institutions. The SRSG conducted missions and presented report on displacement situations in the Sudan, Uganda<sup>7</sup> and Congo. These reports and other studies clearly show how displaced persons are subject, among others, to forced conscription,<sup>8</sup> economic hardships, military attacks, human rights violations, cultural breakdowns,<sup>9</sup> and gender-based violence.

#### *Women and Displacement in the region*

Women and girls make up the majority of displacement persons in Africa in general and Eastern and Horn of Africa region in particular. They are particularly and disproportionately affected by forced displacement triggered by conflicts.<sup>10</sup> The phenomenon of displacement often occurs in communities and societies where women and men are unequal, and particularly where the former suffer specific problems during

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<sup>1</sup> Internal Displacement: Global Trends and Displacement in 2009,( Geneva: IDMC:2010), 29.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, 30.

<sup>4</sup> See the concluding observations of the Committee on the Elimination all forms of Discrimination Against women with respect to the situation of women in countries from the region, located at <http://www.un.org/womenwatch/daw/cedaw/reports.htm>, ( accessed on 13 September 2010).

<sup>5</sup> Curtis Doebbler, The Human Rights of Internally Displaced Persons in Sudan, available at <http://www.huquq.com/elibrary/sudan-curtis.pdf>

<sup>6</sup> Alex Otino, 'Improving Kenya's Response to International Displacement' 30 Forced Migration Review, p. 55.

<sup>7</sup> E/CN.4/2004/77/Add.1.

<sup>8</sup>See Pham PN, Vinck P, Stover E. "The Lord's Resistance Army and Forced Conscription in Northern Uganda." *Human Rights Quarterly* 30 (2008): 404411.

<sup>9</sup> See J. Eruesto, 'The breakdown of cultures in refugee camps' 14 Forced Migration Review (2002).

<sup>10</sup> See S. F. Martin J. Tirman (eds.) *Women, Migration and Conflict* ( Spinger Science Business Media B.V. 2005), p. 1.

the various cycles of displacement, namely, sexual abuse, abduction, separation from families and lack of social services. Violence against them can be a cause for their flight. The experience of displacement also affects them differently compared to male displaced persons. Lack of health services, which is common in refugee and IDPs camps, often has severe consequences to women and children.

Violence against women within and outside of camps occurs as women collect water, fuel or animal fodder. Gender based attacks, often exacerbated during emergencies and armed conflicts include rape, forced impregnation, forced abortion, and trafficking.<sup>11</sup> There is also increasing incidences of domestic violence against women. Those, who in the past were spared from direct attacks, have now increasingly been victims of direct military attacks and victimization.<sup>12</sup> In DRC and Sudan, there have been instances where rape and sexual violence have been used as instruments of war by all parties to the conflicts. There were also incidents where displaced women in camps and settlements were forced to submit to sex in exchange for protection by local officials or camp management officers. In some cases, individuals working for international organizations and peacekeeping missions were allegedly involved in violations of human rights of displaced women. There were reports of sexual exploitation and violence against women and girls in various camps in Uganda.<sup>13</sup> These sexual attacks invariably result in exacerbating reproductive health needs.<sup>14</sup> Public services and communal networks are under immense strain during displacement putting a lot of pressure on women who sometimes, as a consequence of increased divorce or death of their husbands, become bread-winners.

Unless properly implemented, returns and integration processes may involve elements, which further expose women to danger and vulnerability. Land reallocation and compensation, if undertaken in a less transparent manner and in accordance with discriminatory customary practices, may seriously disadvantage women.<sup>15</sup> Thus protection of women from discriminatory laws and practices by allowing widows and those who lost their sons to return to their original neighborhoods and have access to land is important.<sup>16</sup>

### **International legal developments**

Regional legal reforms in the Horn and Eastern Africa benefit from legal developments at the international level. It has been observed that internal displacement is an important 'site of convergence' for humanitarian law and human rights norms. As such the jurisprudence developed around the implementation of these branches of law particularly that of the international humanitarian law is of direct relevance to the protection of women victimized by armed conflicts. Both the 1949 Geneva Conventions and the 1977 additional protocols provide for specific provisions directly related to the

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<sup>11</sup> Jeanne Ward, *If Not Now, When?, Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-Conflict Settings, the Reproductive Health for Refugee Consortium*, New York, April 2002, pp8-9.

<sup>12</sup> 'Sudan: Women and Children increasingly targeted in Southern clashes' IRIN, 04 September 2009.

<sup>13</sup> Internal Displacement Monitoring Center (2006), p. 67.

<sup>14</sup> See Fetters, Tamara. "Abortion Care Needs in Darfur and Chad." *Forced Migration Review*. #25 May, 2006. pp. 48.

<sup>15</sup> Report of the United Nations Representative on the Human Rights of Internally Displaced Persons, E/CN.4/2006/71/Add.6Para 7.

<sup>16</sup> See E. Mooney, *Internal Displacements and Gender, Focus on a Child Rights Approach to Complex Emergencies and Internal Displacement*, UNICEF, 1998.

protection of women during armed conflicts.<sup>17</sup> Several provisions urge belligerent parties to guarantee treatment 'without any adverse distinction founded on sex.'<sup>18</sup> They also stipulate the principle that 'women shall be treated with all the regard to their sex.'<sup>19</sup> Specific provisions are incorporated both in the Conventions and the protocol with respect to the protection of certain groups of women, namely, interned women, pregnant women, nursing women and those mothers with young children. Some of these provisions specifically protect women against rape, enforced prostitution or any other forms of indecent attacks against women.<sup>20</sup> In 2005, the International Committee of the Red Cross (ICRC) published its seminal study on customary international law, which has further consolidated existing customary international humanitarian law which are relevant for the protection of women rights.<sup>21</sup>

In addition to international humanitarian law, development in the area of international criminal law is also making important contributions to the evolution of the relevant normative framework on internal displacement. The statutes for criminal tribunals for Rwanda and former Yugoslavia include provisions defining rape as 'crimes against humanity.' The same is true of the statute of the International Criminal Court which defines crimes against humanity as "acts such as deportation and forced transfer of individuals; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization."<sup>22</sup> When committed as a part of a plan or policy, or at a large scale during times of war, these acts may also constitute war crimes.<sup>23</sup> The jurisprudence of the ICC and the *ad hoc* courts further developed these prescriptions by providing that in certain contexts rape and other forms of sexual and gender based violence may constitute war crimes and may in some cases be considered genocide.

The United Nations Security Council has adopted several resolutions with the view to providing specific provisions on the protection of civilians, particularly women and children during armed conflicts. In this respect, Security Council Resolution 1325, which is widely recognized as the first resolution of its kind by council on the subject ought to be mentioned.<sup>24</sup> Resolution 1325 recognizes the specific impacts of armed conflicts on women and their needs; underscores the importance of encouraging greater participation of women in peace processes; addresses certain gender specific issues with respect to peacekeeping and peacemaking; and calls for prosecution of war crimes committed against women. The Fourth World Conference on Women held in Beijing in 1995 calls for a more effective protection and assistance for refugee and displaced women. The various resolutions on the mandate of the UN Secretary General Representative on the Human Rights of Internally Displaced incorporate provisions

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<sup>17</sup> See Francoise Krill, 'The Protection of women in International humanitarian law,' International review of the Red Cross, No. 249(1985), pp. 337-362.

<sup>18</sup> Arts. 12 of Convention I and II; Art 16 of Convention III; Art. 27 of Convention VIII; and articles 74 and 4 of Protocols I and II.

<sup>19</sup> Arts 12( Conv.I and II); Art. 14 Con. III

<sup>20</sup> See Art. 27 of Conv. IV; Art. 76 of Proto.I

<sup>21</sup> See J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* ( ICRC, 2005).

<sup>22</sup> Article 7(1) g.

<sup>23</sup> Article 8(2)b(xxii) and Article 8(2)e(vi).

<sup>24</sup> Security Council Resolution 1325 was passed unanimously on 31 October 2000. Resolution (S/RES/1325).

requesting the mandate holder to give attention to the specific needs of women and children.<sup>25</sup>

The international community, through the auspices of the former Human Rights Commission, established the mandate of the UN Representative on the Human Rights of Internally Displaced Persons (SRSG) who has attempted to elaborate operational guidelines that identify specific needs of IDPs based on existing binding norms.<sup>26</sup> One important outcome of this mandate has been the elaboration of the UN Guiding Principles which, even though does not confer a separate legal status on women, provides numerous provisions relevant for meeting the specific needs of refugees and IDPs. The Guiding Principles provide the first formal definition for IDPs. Accordingly, IDPs “are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters and who have not crosses an internationally recognized state border.” The GP also identifies the various needs of displaced persons including women and children. Provisions of the Guiding Principles are expected to apply to all without discrimination based on race, religion, gender or any other social distinction.<sup>27</sup> Women’s right to be recognized as persons under the law, including access to documentation in their own name is also guaranteed.<sup>28</sup> The provisions of the principles are applicable to all forms of internal displacement including those triggered by armed conflicts.

In addition to its general provisions, the GP also provides specific provisions applicable to women. These provisions are preoccupied with two overriding objectives: protecting women from gender based violence and guarantee women’s access to basic services.<sup>29</sup> The GP declares that certain groups such as expectant mothers, female heads of household, and mothers with young children “shall be entitled to protection and assistance required by their condition and to treatment that takes into account their special needs”.<sup>30</sup> Though they do not specifically define the term ‘gender based violence’, the GP prohibits the following acts: gender based violence, rape, sexual slavery, forced prostitution, and any forms of indecent assault.<sup>31</sup> The need to give special attention to the health needs of women, including access to female health care providers and services, and counseling for victims of sexual abuses is also incorporated.<sup>32</sup> Moreover it is provided that appropriate measures shall be taken to involve women in the distribution of essential services and supplies to IDPs.<sup>33</sup> Principle 23(3) states that special efforts shall be undertaken to ensure the participation of women and girls in educational programs.

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<sup>25</sup> The UN Human Rights Council expressing its concern ‘at the grave problems faced by many internally displaced women and children, including violence and abuse, sexual exploitation, forced recruitment and abduction’ requested the representative to ‘pay more systematic and in-depth attention to their special assistance, protection and development needs’, See Resolution 6/32, para. 4.

<sup>26</sup> The Human Rights Council has also established a mandate on protection of women from violence.

<sup>27</sup> Principle 4.1.

<sup>28</sup> Principle 20(3).

<sup>29</sup> Principles 4, 7, 18, 19, 20, 23.

<sup>30</sup> Principle 4(2).

<sup>31</sup> Principle 11.

<sup>32</sup> Principles 19(2).

<sup>33</sup> Principle 18(3)

The UN Guiding Principles have now become authoritative guidelines for UN operations within the auspices of the Intra-Agency Standing Committee (IASC). The UNHCR has incrementally been involved in the provisions of assistance to displaced persons. On the ground, including in Africa, UNHCR, as a part of the Cluster Approach adopted by the IASC, is involved in the provisions of protection and assistance to IDPs. There are various guidelines, manuals and other specific documents adopted by various international agencies. These include; UNHCR's Guidelines on the Protection of Refugee Women and Guidelines against Sexual Violence; WHO/UNHCR's Clinical Management of Rape Survivors: Developing Protocols for Use with Refugees and Internally Displaced Persons; Reproductive Health in Refugee Situations: An Inter-Agency Field Manual. Countries can easily adopt these norms and standards into their national context. For example, the UN Special Representatives recommended to Ugandan authorities that they implement specific protection measures with respect to female displaced persons, among other things, by using UNHCR's guidelines on sexual violence. In a much broader context, there is a great expectation that the recent decision by the UN to bring its various institutions on women into a one UN organ will promote coherence and efficiency in its response to gender issues in general and to concerns of women affected by armed conflicts in particular.

### **Regional and sub-regional legal norms**

#### *The African Union laws relevant to the protection of displaced women*

The establishment of the African Union replacing the OAU presented a profound normative and institutional shift from the perspective of protection of displaced women. The Constitutive Act and its supplementary protocols including the Protocol establishing the Peace and Security Council provide explicit protection to women. The Act also provides that the organization shall be guided by the promotion of gender equality.<sup>34</sup> Unlike provisions of the OAU Charter, which were shaped by the then dominant doctrines of the sovereignty of states, decolonization, and non-interference in the internal affairs of the state, the Constitutive Act permits the Union to intervene in member states during incidents of massive violations of human rights and disruption of public order.<sup>35</sup> It also establishes a common defense policy, which, among others, calls for the establishment of regional standby forces and establishment of early warning systems.

These policies are an improvement from the provisions of the 1963 Charter, which does not even grant the minimal protection to human rights. Few important legal instruments preceded the AU Constitutive Act, which was an important development with respect to the protection of human rights. The Protocol on the Rights of Women in Africa and the Charter on the Rights and Welfare of the Child are two important binding instruments that include binding provisions on protection of refugee and displaced women and girls. As such they represent the first attempt to articulate the specific needs of these vulnerable groups from a legal stand point. But both instruments cover myriads of other important issues in addition to specific provisions dealing with displacement. Of course these two instruments supplement the African Charter on Human and Peoples'

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<sup>34</sup> Art. 4(m) of the Constitutive Act.

<sup>35</sup>See KIOKO, B. (2003) 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention', *International Review of the Red Cross* 87(852): 807-825.

Rights to which all Eastern Africa countries are signatories. The Charter does not specifically address the concerns of IDPs let alone those specific protection needs of displaced women. But the African Human and Peoples' Rights Commission attempted to address some of these gaps by developing jurisprudence through its determination of cases involving evictions, deportation, refugee protection, nationality, socio-economic rights and property rights.

The Commission also adopted numerous country specific and thematic resolutions applicable to the protection of displaced persons. It also establishes relevant special procedures including: the special rapporteur on the rights of women in Africa; and the special rapporteur on the rights of refugees, asylum seekers, IDPs and migrants. Through their promotional work and important studies, these mandate-holders have contributed significantly to the protection of displaced women in the continent. For instance, since the establishment of the mandate, the special rapporteur on the rights of women in Africa conducted missions in the following Eastern and Great lakes countries: Rwanda, Burundi, Sudan, Chad, Djibouti and Ethiopia. These visits led to a considerable level of dialogue between the special procedure and the concerned states on the protection of women including those who find themselves trapped in different forms of displacement. Likewise, the special rapporteur on the rights of refugees, asylum seekers, IDPs and migrants also led a fact finding mission to the region of Darfur, Sudan in 2004. Though the Commission adopted decisions authorizing fact-finding missions involving the Special rapporteur to conduct fact-finding missions in Kenya and Somalia, these missions did not take place.<sup>36</sup> Country missions held by the special rapporteurs resulted in adoption of reports by the AU Assembly. These reports incorporate a wealth of information on conditions of displaced women in countries visited and include recommendations to states on measures that could be taken at the national level.<sup>37</sup> These recommendations are not strictly binding. But they are part and parcel of the Commission's developing jurisprudence in the area, which have contributed including the response by the various policy organs of the African Union.

The mandate of the African Commission and its special rapporteur on the rights of women in Africa focuses on the implementation of the Protocol on the Rights of Women in Africa. The Protocol recognizes rights and freedom of women both in the private and public arena. It calls upon states to involve women in the promotion of peace, and to create a platform to actively participate in crafting efficacious responses to the problem of displacement and refugees. It enjoins states to involve women in structures, processes and institutions designed to prevent, manage, and resolve conflicts, and in the management of camps and settlements for refugees, returnees, and IDPs (Article 2(d)). Conscious of the fact that conflict presents women with disproportionate challenges, the Protocol includes provisions dealing with protection of women during armed conflicts (Article 12). These provisions enjoin African states to respect humanitarian law relevant to the protection of vulnerable populations such as women, and in particular to take measures to protect refugee, returnee, and displaced women from all forms of sexual violence, rape, and other forms of sexual exploitation. States are obligated to ensure that the aforementioned violations are considered as war crimes, genocide, and crimes against humanity and their perpetrators are brought to

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<sup>36</sup> See Report of the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants for the period 2008-May 2009.

<sup>37</sup> Some of these reports can be located at the Commission's website at [www.achpr.com](http://www.achpr.com).



justice. While representing considerable progress in the development of laws criminalizing abuses against women, this Protocol does not as such address situations where the state commits the crimes. The role of international criminal law and criminal tribunals, particularly that of the International Criminal Court, is considerably important in filling these gaps. Almost all of the key regional states where grave forms of displacement and conflict-related abuses occur have not yet acceded to the Rome Statute.

The Solemn Declaration on Gender Equality in Africa, adopted in July 2004 by the AU Assembly, clearly underscores the disproportionate impact displacement has on women and children. An implementation framework was adopted in 2005, which provides guidelines for states to report steps that they have taken. Accordingly, thirteen commitments are identified with the corresponding actions to be taken, targets to be achieved, and indicators for assessment. Despite a clear reference to the problem of displacement in the text of the declaration, the implementation framework does not present focused guidelines to help states to report on the measures they are taking in protecting the rights of displaced women (African Union 2006). But opportunity does exist to review both the declaration and its implementation framework so that specific issues that are not adequately addressed can be sufficiently covered. So far only nine states have presented a report to the AU.

By far the most significant codification effort by the African Union relates to the drafting of a regional binding convention on internal displacement. In 2004, the AU's Executive Council requested the secretariat to develop a legal instrument that provides adequate protection for IDPs.<sup>38</sup> In January 2008, the Council recalled its previous decision (Dec. 284 and 289 of June 2006) and specifically instructed that a draft treaty be finalized and be submitted to an AU Special Assembly on Refugees, Returnees, and Internally Displaced Persons. Originally this summit was scheduled to take place in November 2008, but was postponed to October 2009 as Uganda proposed to host it. An initial meeting of independent experts was held in May 2007. The first government expert meeting was held from 15 to 17 December 2007. The second meeting of government representatives was held between 2 to 6 June 2008. A third and final legal expert meeting took place in November 2008. These meetings also involved the participation of relevant UN agencies, ICRC, the UN Secretary General Representative on the Human Rights of internally Displaced Persons and civil society organizations. These meetings were used by member states to negotiate on the text of the Convention.

During the same period, a ministerial meeting adopted a draft text that would be considered by the AU Summit. The latter adopted this instrument during the Special African Union Summit on forced displacement, which was held In October 2009. Both the UN General Assembly and the former Commission on Human Rights passed numerous resolutions encouraging regional organizations to enhance their role in the protection of IDPs and their assistance. These decisions, however, never went to the extent of indicating a need for a regional treaty. But UNHCR and the SGR were involved in the formulation of the Convention. The UN Secretary General Representative on the Human Rights of Internally Displaced Persons warmly welcomed the AU's endeavor to

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<sup>38</sup> Dec. 127 of July 2004.

prepare a legally binding treaty on displacement.<sup>39</sup> The Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa has called the recent attempt to draft an African convention “a significant milestone in the protection of IDPs in Africa”.<sup>40</sup> In 2002, the Fourth National Conference of African National Human Rights Institutions made a call to African governments to draft a legal regime based on the guiding principles.<sup>41</sup> Several NGOs also called for the AU to consider the adoption of such a treaty.

The AU draft Convention aims to be a pan-African legal framework addressing all causes of internal displacement, protecting and assisting internally displaced persons, and enhancing cooperation. It makes reference to numerous international and regional instruments including the Additional Protocol on the Rights of Women in Africa. It provides the rights and entitlements of internally displaced persons, and inscribes the obligations of states and non-state actors. It envisages the establishment of a new African Union Office of the High Commissioner for Internally Displaced Persons and a fund that will resource regional response with respect to the protection and assistance of IDPs. During the negotiations that followed, the provision dealing with the establishment of the African Union High Commissioner on the Protection of and Assistance of IDPs was rejected as many feared that establishing such a body may create institutional overlap with existing organs of the African Union and that it may impose additional financial burdens

The convention also has provisions dealing with displacement related to development projects. States are required to prevent development induced displacement both by public and private actors, unless such displacement is a result of large scale development which is justified by overriding interest of the people, including persons or communities displaced by such projects. Though the draft Convention covered those who are displaced as a result of ‘lack of development’, it was omitted in the final text of the Convention due to resistance by member states.

The Convention incorporates several significant provisions specifically applicable to the protection of women. For example, displacement as a result of harmful practices is categorized as forms of prohibited and arbitrary displacement.<sup>42</sup> It obligated states to refrain from committing or prevent the commission of sexual and gender based violence such as rape, enforced prostitution, sexual exploitation, harmful practices, slavery and human trafficking.<sup>43</sup> States are also required to provide special protection and assistance services to those who have special needs including to mothers with young children,

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<sup>39</sup> Statement of the Representative of the UN Secretary-General for the Human Rights of Internally Displaced Persons, Professor Walter Kalin, on the Occasion of the 40th Ordinary Session of the African Commission on Human and Peoples’ Rights, 18 November 2006.

<sup>40</sup> NYANDUNGA, B. T. (2007) ‘Addressing IDP Protection in Africa’, Report of the Intersession Activities by Commissioner Bahame Tom Nyandunga, 41st Session of the African Commission on Human and Peoples’ Rights, 16–30 May 2007, Accra, Ghana, at [http://www.internaldisplacement.org/8025708F004CFA06/\(httpKeyDocumentsByCategory\)/E031CC10B4C4922C12573100030C2B4/\\$file/activityreport.pdf](http://www.internaldisplacement.org/8025708F004CFA06/(httpKeyDocumentsByCategory)/E031CC10B4C4922C12573100030C2B4/$file/activityreport.pdf).

<sup>41</sup> See Report of the 4th Conference of the African National Human Rights Institutions, Uganda, August 2002, accessed <http://www.nhri.net/pdf/African4thNhri/ANHRI%20-%204th%20Conference%20%20Kampala%20Declaration.pdf>.

<sup>42</sup> Art. 4. 4(e)

<sup>43</sup> Art. 8.1(d).

female heads of household, and expectant mothers.<sup>44</sup> There is specific reference to reproductive health needs of internally displaced persons and the obligation for member states to provide psychosocial support for women who suffered sexual and other abuses.<sup>45</sup> The Convention also guarantees the equal rights of women to have access to identity documentations.<sup>46</sup> Actual implementation of the Convention will present a considerable challenge both to the African Union and its member states. So far, only Uganda and Senegal have ratified the instrument. With the view to promoting ratification by states and promoting the harmonization of domestic legislations and policies, the African Union has adopted an action plan.

#### *Inter-Governmental Authority on Development*

In addition to legal developments at the level of the African Union, there have been some remarkable developments under the auspices of sub-regional mechanisms. IGAD represents one such key institutional arrangement. This section illustrates and examines some of the legal and policy developments occurring in this sub-region that have direct relevance to women.

Displacement caused by natural disasters was a major concern of the Inter-Governmental Authority on Drought and Development (IGADD) when it was originally established in 1986. The organization was established as an inter-state arrangement for cooperation in the sub-region to address natural disasters and spur economic development. Member states showed keen interest to also deal with conflicts and their impacts on the civilian population when the mandate of the organization was further expanded and revamped in 1995. In the new constitutional text, it clearly states that in addition to addressing the challenges of natural and man-made disasters, IGAD will also concern itself and establish mechanisms to prevent, manage, and resolve conflicts. Promotion and protection of human rights is also provided as one of the objectives of the organization.<sup>47</sup> Facilitation of freedom of movement and the right of citizens to establish residence within the sub-region is captured as an area of cooperation among member states.<sup>48</sup> The Agreement recognizes “the fundamental and basic right of the peoples of the region to benefit from emergency and other forms of humanitarian assistance.”<sup>49</sup> The agreement also requires member states to facilitate “movement of food and emergency supplies” during natural and man-made disasters.”<sup>50</sup> With respect to finding durable solutions to problems of displaced persons, the Agreement also provides that states will cooperate in facilitating ‘repatriation and reintegration’ of these groups of individuals based on national, regional and international standards.<sup>51</sup>

The ministerial meeting on IDPs in 2003 was a significant development in further entrenching the protection of displacement in IGAD’s normative framework. A declaration was adopted as an outcome of this meeting.<sup>52</sup> This text recognizes the United

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<sup>44</sup> Art. 8.2(3).

<sup>45</sup> Article 8.2(d).

<sup>46</sup> Article 12. 4.

<sup>47</sup> Art. 6 A(f) of the Agreement.

<sup>48</sup> Article 13 A (0) of the Agreement.

<sup>49</sup> Ibid., Art. 13 A(q).

<sup>50</sup> Ibid., Art. 13 A®.

<sup>51</sup> Ibid., Art. 13A(s).

<sup>52</sup> Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in IGAD Sub-region, 2 September 2003.

Nations Guiding Principles as “important tool for developing and evaluating appropriate national policies and legislations on internal displacement.’ Member states also agreed to develop national IDPs policies, urged all actors to facilitate access to humanitarian assistance, called for the establishment of an IDP unit within the Secretariat, and declared the second of September of each year as IGAD’s IDP day. The declaration recognizes that the majority of displaced persons in the region are women and children. It also calls member states and all authorities in IGAD to ensure the participation of women in decision-making processes regarding issues that affect their interest such as repatriation, reintegration, resettlement, and peace building efforts. The word ‘authorities’ reveals that the text is applicable not only to states but also humanitarian organizations, CSOs, rebel groups, and others. In addition to the aforementioned declaration, IGAD has been holding series of ministerial meetings on gender issues where some important decisions have taken place. Accordingly, a gender policy and an implementation plan have been adopted, and several decisions have also been made with the view to mainstreaming gender perspective in the prevention, management and resolution of conflicts; and peace building efforts.<sup>53</sup> Within the Secretariat, a gender unit has been established to stir the work of the organization in this regard.

The organization has achieved positive results in developing regional policies and strategies in gender related displacement. It, for instance, has been instrumental in facilitating the inclusion of concerns of IDPs in peace processes concerning Somalia and Sudan. It has also been effective in establishing a dispute settlement center which has undertaken important projects and studies in border regions of member state where conflict based on competition over natural resources is rather rampant. But its influence on shaping or reforming domestic policies and legislations has not been evident. Many of the states in the region do not have specific legislation or policies on IDPs, far less on displaced women. As has been evident from the enormous number of suffering civilians, particularly women and children, the impacts regional policy declarations on the ground leaves more to be desired

#### *East African Community (EAC)*

The East African Community presents another regional arrangement within which normative standards, which intersect gender and displacement is being developed. Kenya, Uganda, and Tanzania established the Eastern Africa Community Treaty in 1999. The treaty establishes the East African Court of Justice. Among the various principles that shall govern the specific objectives of the community includes the promotion of human rights.<sup>54</sup> The treaty also makes reference to the specific aspect of gender equality as one of the organizing principles of the regional mechanism.<sup>55</sup> The treaty notes the particular significance of gender equality in regional economic integration particularly the role women can play in development<sup>56</sup> and businesses.<sup>57</sup> It should, however, be noted that the treaty does not provide detailed list of human rights. One may wonder on what basis the court may entertain cases involving human rights? Will it also play a role in standardizing national legislations and laws by acting as an appellate structure?

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<sup>53</sup> Proceedings of the 3rd Regular Meeting of Ministers in Charge of Gender 21 Affairs --July 15, 2004, 21.

<sup>54</sup> See Article 6 of the Treaty.

<sup>55</sup> Ibid.

<sup>56</sup> See Article 121 of the Treaty.

<sup>57</sup> See Article 122 of the Treaty.

A group of NGOs have started an active lobby for a binding protocol that will supplement the EAC treaty.<sup>58</sup> Such a binding protocol on women, it is argued, will present an opportunity to bring together relevant provisions of binding regional and international instruments, and fill the gender-related gaps identified in the treaty. It is not entirely convincing if such a protocol is needed. First, the four countries that make up partner states under ECA have signed up to the African Charter on Human and Peoples' Rights and major international core human rights instruments including the CEDAW. The treaty makes reference to such instruments. Second, like in the case of the additional Protocol on the Rights of Women in Africa, such drafting initiatives may be used as opportunities to water down international and regional commitments. Fragmentation and multiplication of regional and sub-regional instruments also presents a risk of undermining a coherent and rationalized protection approaches at the national and regional level.

The East African Community is currently finalizing its comprehensive gender policy and strategic plan. One of the objectives of such a plan is mainstream gender related activities in all EAC's programs and activities. The strategic plan envisions reviewing GBV strategic plan and activities in member states and designing a regional framework by 2010.

#### *The International Conference on the Great Lakes region (ICGLR)*

The International Conference on the Great Lakes Region is another important sub-regional arrangement with a broad mandate involving the wider Great Lakes region.<sup>59</sup> EAC's four member states are at the same time signatories of the founding legal instruments of the ICGLR conference. The rationale of this sub-regional arrangement is grounded in the assumption that its member states are not only related geographically, but also connected by the unfortunate incidents of conflicts and other factors generating conflicts, which have regional resonance. The conference was launched in November 2004 when the Dar-es-Salaam Declaration was adopted. Article 6 of the declaration gives particular emphasis to the needs of women and children, especially those who suffer from sexual violence and exploitation. The declaration was supplemented with a binding all-embracing Pact on Security, Stability and Development that incorporates 11 binding protocols adopted in 2006. These protocols are considered integral parts of the pact and, thus, do not require separate ratification. In addition to the protocols, the pact also incorporates around 33 specific projects one of which focuses on Prevention and Fight against Sexual Exploitation, Abuse and Gender-Based Violence and Assistance to Victims.

#### *The Protocol on the protection and assistance to Internally Displaced Persons*

The Protocol on the protection and assistance to the internally displaced persons is the first binding international instrument exclusively dealing with the issues of internal displacement. It acknowledges the fact that 'there is no specific coherent international or regional legal regime and institution mandated to provide protection and assistance to

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<sup>58</sup> See Campaigning for an East Africa Gender Protocol, The Eastern Africa sub-regional support initiative for the advancement of women, 5 August 2009, [www.eassi.org](http://www.eassi.org).

<sup>59</sup> Angola, Burundi, Central Africa Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Uganda, Tanzania and Zambia.

internally displaced persons.’<sup>60</sup> Not only is there a rather striking similarity between the content of the protocol on IDPs and the Guiding Principles, article 6 of the Protocol obliges states specifically to adopt and implement the Guiding Principles. This article is of a great significance from a legal perspective.<sup>61</sup> It requires states to take steps in domesticating provisions of the Guiding Principles by adopting legislation incorporating these standards, and facilitating the domestication of the Guiding Principles is inscribed as one of the objectives of the Protocol.<sup>62</sup> But it offers a broader definition of internally displaced persons to include those who are affected by large development projects. The importance attached to the Guiding Principles is so important that both the Guiding Principles and a Model Low Legislation is annexed to the Protocol. Article 6 provides that members of the ICGLR underline and recognize the Guiding Principles as ‘regional framework’ and the annotations as ‘an authoritative source for interpreting the application of the Guiding Principles.’

The Protocol recognizes the special needs of vulnerable groups such as women, children and communities with special dependency on land.<sup>63</sup> Domestication of the protocol and the Guiding Principle through the adoption of a national legislation is given a great importance. To that effect, the Protocol outlines the following as critical element of a national legislation on internal displacement which is expected to be consistent with the Guiding Principle (a) definition of internally displaced persons in accordance with the provision of the Protocol, (b) procedure of addressing impact of development induced displacement, (c) identification of a national body with the mandate to protect and provide assistance to internally displaced persons, and (d) establishment of rules of cooperation and engagement with international organs and civic society organization.<sup>64</sup>

The Protocol underscores the primary responsibility of the state for protection of IDPs (Article 3(3)). It calls for member states to undertake national assessment of forced displacement within their borders and keep data on IDPs, and put in place and designate government organs with specific responsibilities in meeting the protection and assistance needs of IDPs. Specific rules are included in the protocol regulating humanitarian access to affected populations. Member states are obligated to ‘facilitate rapid and unimpeded humanitarian access and assistance to internally displaced persons’ and ‘ensure the safety and security of humanitarian personnel in the areas of displacement.’ It also establishes a sub-regional supervisory mechanism for monitoring the protection of internally displaced persons.

#### *Protocol on the Property Rights of Returning Persons*

This Protocol on the Property Rights of Returning Persons deals with the protection of the right of property of refugees, IDPs and other resettled persons, and stipulates provisions for recovery of lost property or compensation. The word ‘returnees’ include both refugees and IDPs who return to their original places of residence in the country of their origin. The Protocol deals with the protection of those individuals and

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<sup>60</sup> Preamble.

<sup>61</sup> W. Kalin, ‘The Great Lakes Protocol on Internally Displaced Persons: Response and Challenges’, paper presented at International Law Project Symposium on International Law in Post Conflict Situations: The Great Lakes Process, 27 September 2007, at 3.

<sup>62</sup> Art. 2(3). Other objectives of the Protocol includes to:

<sup>63</sup> Art. 4.

<sup>64</sup> Article 6(4).

communities who are returning to their original place of residence but could not enjoy possession of their property either because of loss of property or dispossession. It covers both conflict and development generated displacement, and as such provide protection of those who are returning either after conflict or displacement. It is therefore one of the two pioneering sub-regional binding legal instruments on internally displaced persons. The protocol adopts a rather broad definition of 'internally displaced persons' which include among others those who are affected by development projects. It is mentioned in the text that one of the objective of the Protocol is to ensure availability of legal remedies to IDPs who lost their property due to large-scale development projects.<sup>65</sup>

The Protocol underlines the right of property and obligation of states to protect such a right as enshrined under the African Charter on Human and Peoples' Rights and international human rights instruments. By invoking well-known principles of international humanitarian law, the Protocol recognizes the obligation of states to protect property of IDPs from pillage, direct, or indiscriminate attack or any other violence, from being object of reprisal, from being used as means of military shield, from being destroyed or appropriated as a means of collective punishment.<sup>66</sup> States may expropriate land or property abandoned by displaced persons, but such authority is constrained by a number of conditions. Accordingly, acquisition or expropriation of property belonging to IDPs and refugees may only be exercised "in compelling and overwhelming circumstances which are justified in the general interest of the public or community, provided that such acquisition or expropriation shall be carried out under procedures prescribed by law."<sup>67</sup> Moreover the state that undertake the expropriation is obligated to maintain 'a fair balance' between the objectives of the expropriation and the interest and right of IDPs particularly by ensuring that such expropriation does not put unreasonable and disproportionate burden on them without being restituted or compensated for such a loss, and that such measures do not undermine other entitlements and rights.

By requiring that states' measures should comply with the UN Principles on Housing and Property Restitution, it provides legal recognition to the latter.<sup>68</sup> The Protocol recognizes right to land both under statutory and customary legal system, and stipulates that states establish 'affordable registration scheme.' It recognizes the important role which traditional and customary authorities play in the administration of land, and requires states to adopt legislations under which these traditional authorities may play their role in assisting the recovery of property displaced persons left behind or were dispossessed of during their displacement. When recovery is not feasible, states are responsible for paying compensation 'in situation where they are directly responsible'. In situations where the responsibility of the state is not so direct, they are responsible 'to establish a framework for enabling the compensation of internally displaced persons and refugees by those responsible for the loss of the property.'<sup>69</sup> Regarding the terms and nature of the compensation, the Protocol leaves the issue to be

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<sup>65</sup> Art 2(5).

<sup>66</sup> Art. 3(2).

<sup>67</sup> Art. 4(5).

<sup>68</sup> Art 3(3).

<sup>69</sup> Art. 8(2).

determines by national legislations. States are also required to adopt 'simplified procedures' which allows IDPs and refugees to lodge complaint for recovery of property.

The Protocol incorporates specific provisions dealing with the property of marginalized group such as women<sup>70</sup>, children,<sup>71</sup> and communities with special attachment to land<sup>72</sup>. The protocol also recognizes the special needs of 'communities, pastoralists and other groups', which have special attachment to land. After their displacement, states are required to ensure proper integration of these groups to areas previously occupied by them, or provide alternative land with equal value when such reintegration is not possible.<sup>73</sup> When such options are not possible, then compensation should be paid based on standards stipulated under national legislations.

The Protocol does not establish a judicial or quasi-judicial organ to monitor the implementation of its provisions. Domestic and regional mechanisms are envisaged as institutional platforms where remedies for breaches of the protocol may be sought. It indirectly acknowledge the right of individual victims to bring their case to national and regional human rights body when it states that 'Nothing in this protocol shall affect the rights of internally displaced persons and refugees to take legal action aimed at recovering their properties through national courts and/or the African Commission or the African Court on Human and Peoples' Rights.' However, the Protocol establishes a Sub-Committee of experts under the Coordination Committee of Humanitarian and Social Issues, which will be responsible for monitoring the implementation of the protocol.<sup>74</sup>

#### *Protocol on the Prevention and Suppression of Sexual Violence against Women and Children*

The Protocol on the Prevention and Suppression of Sexual Violence against Women and Children in the Great Lakes region of Africa is a legal response to the unusually high and grave incidents of sexual violence often associated with conflicts in the region. It significantly expands the rights of women to be protected from sexual violence. The protocol, as such, takes into account developments at the international level such as criminalisation of some sexual violence as war crimes. The latter is defined as "any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law"<sup>75</sup> It provides a non-exhaustive list of acts which are considered as constituting sexual violence. These include: rape, sexual assault, grievous bodily harm, assault or mutilation of reproductive organs, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, harmful traditional practise, sexual exploitations, trafficking, enslavement. It calls member states to simplify procedures for victims to seek justice.

Addressing the problem of impunity is incorporated as a core element of the Protocol. As such prosecution of sexual crimes shall not be subjected to statute of limitation. It obligates states to cooperate and provide assistance to each other to

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<sup>70</sup> Art 5.

<sup>71</sup> Art. 6.

<sup>72</sup> Art. 7.

<sup>73</sup> Art 7 (1)-(3).

<sup>74</sup> Art. 9.

<sup>75</sup> Article 1( 5) of the Protocol.



facilitate the arrest and trial of persons involved in the commission of such crimes. Though the Protocol is not directly applicable within the context of crimes committed by the state itself, it complements international criminal instruments, such as the Rome Statute. The protocol calls for the establishment of mechanism for “for providing legal, medical, material and social assistance, including counseling and compensation, to women and children who are victims and survivors of sexual violence in the Great Lakes Region.”<sup>76</sup>

### **Building regional and sub-regional Institutions**

The transformation of the African Union has created a pan-African platform to address social issues. In 2004, the African Union adopted its Solemn Declaration on gender equality and equity. Earlier in 2000, African Heads of state and government had adopted the Solemn Declaration on Security, Stability, Development and Cooperation in Africa (CSSDA) which underlined the link between human rights and security. The Constitutive Act and its supplementary protocols sought to establish various mechanisms, which provide greater protection for human rights. These led to the creation of new mechanisms, and the revamping of old ones. During the time of the OAU, a women division existed under the Community Affairs department, but the role and impact of this division was considerably limited due to lack of clear legal framework on gender.<sup>77</sup> The establishment of a gender directorate within the African Union under the supervision of the office of the Chairperson was therefore a considerable improvement.<sup>78</sup>

At the sub-regional level, IGAD established the first women desk in 1999. It has also a displacement focal point. In 2000, member countries adopted a protocol establishing Conflict Early Warning and Response Mechanism (CEWARN) which is now has a fully operational headquarter in the Ethiopian capital, Addis Ababa. CEWARN's central objective is to ‘gather, verify, process and analyze information about conflicts in the region’ with the view to providing the same for decisions making to IGAD's policy organs.<sup>79</sup>

Regular meetings of national authorities in charge of women have been taking place. EAC has its own policy-making structures and a secretariat. ICGLR process also involves a plethora of institutions that will have gender mandates. Currently a regional center to promote democracy, good governance, human rights and civic education has been established. With the center, there is now a plan to establish a gender observatory. The main function of the observatory will be collection of data and information on the implementation of the pact and other instruments particularly with respect to women.

### **The role of international and regional peacekeeping forces**

Peacekeeping forces can play critical roles in the protection of civilians. Some have also expressed their concern regarding the possible role of peacekeeping in human rights

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<sup>76</sup> Art. 2(4).

<sup>77</sup> See Maria Nzomo, ‘From the OAU to the AU and NEPAD: Regional Integration Processes and the African Women’, Key Note Address at Regional Strategy Meeting on Women's Political Participation and Gender Mainstreaming in AU and NEPAD, Nairobi 27-31 October 2003.

<sup>78</sup> Ibid.

<sup>79</sup> Art 5(1)b.

abuses.<sup>80</sup> Despite such a potential, however, traditional peacekeeping has focused on observance of ceasefires and peace agreements. This meant that protection of civilians is not properly addressed. Such neglect of civilian protection needs, however, is gradually being tackled as peacekeeping missions increasingly incorporate doctrines and programs on civilian protection. Similarly in Africa past regional military interventions which were premised on decolonization<sup>81</sup> efforts are now replaced by visions of protecting human rights, solving conflicts, and undertaking similar tasks.

As has been described above, new treaties such as the African Union Constitutive Act also incorporate provisions allowing 'humanitarian intervention' by regional forces to address serious and egregious forms of human rights violations.<sup>82</sup> Regional and sub-regional standby forces are being established with the view to enhancing capabilities to undertake such missions. In 2003, the African Union adopted a policy framework for the establishment of the African Standby Brigade.

In Eastern Africa sub-region, a variety of peacekeeping operations have been in existence. On the one hand, the United Nations Security Council established UN Peacekeeping missions in Sudan and in the border area between Eritrea and Ethiopia. Following the destructive war between Eritrea and Ethiopia, which occurred between 1998 and 2000, a United Nations Peace Keeping Mission in Eritrea and Ethiopia (UNMEE) was established as a part of the peace agreement signed on 12 December 2000. Though UNMEE later established a human rights outreach program in the border area, its core mandate did not involve a direct protection of civilians. But as the proceedings and awards of the Eritrea Ethiopia Claims Commission clearly established, there were incidents of sexual and gender based violence committed by belligerents during the conflict.

The conflict in Sudan saw the establishment of two types of peacekeeping missions. The African Union established the African Union Mission in Sudan (AMIS) established in 2004 to operate in the region of Western Darfur. Later this peacekeeping force was replaced with the first UN-African Union hybrid force: UNAMID. The African Union has also established the African Union Mission in Somalia (AMISOM) which is currently struggling to establish itself in a challenging environment. The capability of these two missions is in contrast with the complex challenges on the ground. As a result of their narrow mandate and lack of capacity, these missions were not capable of providing protection to those who most need it.<sup>83</sup> In cases of AMISOM, there have been concerns that AMISOM troops might be involved in human rights violations.<sup>84</sup>

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<sup>80</sup> See Sherene Razack, *Dark Threats & White Knights: The Somali Affair, Peacekeeping and the New Imperialism* (University of Toronto Press, 2004).

<sup>81</sup> See Orobola Fasehun, 'Nigeria and the issue of an African High Command: Towards a Regional and/or Continental Defence System', *Afrika Spektrum* Vol. 3, No.4, 1980.

<sup>82</sup> Article 4, Constitutive Act.

<sup>83</sup> See Peter Takirambudde, *Darfur: African Union Must Insist on More Troops Mandate to Protect Civilians Should Be Top Priority at Abuja Peace Talks*, Human Rights Watch, August 20, 2004. <http://www.hrw.org/en/news/2004/08/20/darfur-african-union-must-insist-more-troops> accessed 10 March 2009).

<sup>84</sup> See Harsh Wars, *Harsh Peace: Abuses by Al-Shabaab, the Transitional Government and AMISOM in Somalia*, ( Human Rights Watch, 2010).

As a part of the African Union Standby Brigade arrangements, a number of Eastern African states established the East African Standby Brigade (EASBRIG).<sup>85</sup> Initially it was thought that thirteen countries would join this arrangement. However, all countries except Rwanda are members of the arrangement. The Memorandum of Understanding (MOU) establishing EASBRIG states that the objective of the regional force shall be to carry out the function of maintenance of peace and security as mandated by the AU Peace and Security Council.<sup>86</sup> In line with provisions of the Constitutive Act, such functions may include intervention to avert genocide, war crimes, and crimes against humanity. It is also provided in the MOU that the Brigade shall be guided by principles enshrined in instruments, including the African Charter on Human and Peoples' Rights. It is expected that during the development of specific doctrines for deployment and training manuals, strategies will be designed how to ingrate protection needs of women. EASBRIG's planning element based in Nairobi is responsible for such a task. Originally uncertainty regarding on coordination mechanism was a considerable challenge for the operationalisation of EASBRIG whose members spend a great deal of their time and resources debating on the role of IGAD in coordinating the initiative. Finally members agreed to create a separate coordination mechanism thereby missing the opportunity of taking advantage of already existing peace and security institutional arrangements within IGAD.

### **The challenges of creating effective regional and sub-regional responses: concluding reflections**

Effective domestication of regional legal instruments faces numerous problems. Many of the countries in the region do not yet have domestic legislations and policies on IDPs. So far Uganda is the only country that has officially adopted a comprehensive national IDP policy. Most IDPs and refugees live in camps, often in inhuman conditions, with their basic protection and assistance needs unmet.<sup>87</sup> As the recent decision by the Sudanese government to expel humanitarian agencies operating in Darfur indicated, provision of assistance and protection by international organisation is still considered the primary prerogative of the state concerned. So far there is little evidence suggesting that the increased regional and sub-regional engagement on the protection of displaced persons has led to a revitalised national response. What is then the added value of new regional and sub-regional legal norms? Would it not present opportunities to water-down hard won commitments at the international level? Credible criticisms based on such possibilities were made with regard to the Additional Protocol on the Rights of Women in Africa. Such criticism however cannot be meaningfully made with respect to the ICGLR protocols, which not only recognise the UN Guiding Principles, but also endorse the Annotations as authoritative sources of interpretation.

The referral of criminal prosecution of egregious human rights violations in Rwanda, Uganda, Congo and the Sudan to ICTR and ICC show that situations abound where national authorities or regional mechanisms are unable or/and unwilling to prosecute sexual and gender based crimes. By far the most serious challenges to the implementation of regional norms and to the proper functioning of the aforementioned

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<sup>85</sup> See A. Mulugeta, 'Promises and Challenges of a sub-regional force for the Horn of Africa' 12 *International Peacekeeping* 171.

<sup>86</sup> Art. 3, Memorandum of Understanding.

<sup>87</sup> Report of the Secretary General on Internally Displaced Persons: Uganda, E/CN.4/2004/77/Add.1, para. 53.

institutions will be lack of resources. Most of these institutions rely on outside assistance and donations for the designing and implementations of their policies and programs. Despite the existence of gender-related provisions, the budget of the secretariat does not reflect the focus that should be given in addressing the concerns of particularly displaced women.<sup>88</sup> On the ground, most of the specific projects are designed and implemented by international organisations.

Lack of rationalisation among regional and sub-regional mechanisms impedes the effective realisation of their mandate. It creates confusion regarding the competence and mandate of each institution thereby aiding fierce competition and lack of cooperation. With respect to the maintenance of peace and Security, the AU Peace and Security Council have the mandate to coordinate the cooperation between the AU and sub-regional organisations.<sup>89</sup> But the Protocol does not define regional mechanisms.<sup>90</sup> Moreover, whilst the potential of regional peacekeeping missions is promising, their actual influence and impact is undermined by lack of capacity and effectiveness.

In the presence of regional mechanisms such as IGAD and EAC, one wonders what the added value of the establishment of ICGLR secretariat and its mechanisms is. The same question can be raised with respect to the AU Convention on Internal Displacement, which envisages the establishment of a structure involving a conference of parties overseeing the implementation of the convention. Such a mandate could have simply been given to the African Commission on Human and Peoples' Rights. Some may question the wisdom of such recommendation in light of the weak capacity of the Commission to fully realise its mandate under the African Charter on Human and Peoples' Rights. It is true that the Commission's effectiveness in implementing the Charter leaves much to be desired. But additional resources that will be required to finance new institutions and structures could have been used to strengthen existing mechanisms.

A strong case can be made for rationalisation of regional approaches and mechanisms. For example, any arrangement on migrants and refugees among EAC may have little impact in addressing the challenges of migrants and refugees in Kenya most of whom come from Somalia, Ethiopia, Sudan and Eritrea. The need for a simplified and mainstreamed working method is also called for in the human rights report. Currently, states are required not only to present a report under the African Charter on Human and Peoples' Rights, but also under soft-law norms such as the Solemn Declaration on Gender Equality. Such a requirement is unrealistic given the fact that member states' default on their reporting obligation under the Charter is already significant. It is therefore important that the guidelines on state reporting under the Charter are continuously refined and updated with the view to facilitating the availability of specific and disaggregated data on displaced women from periodic reports.

Despite these challenges, sub-regional and regional institutions are now playing important role with respect to the protection of women affected by forced displacement. The establishment of the African Human and Peoples' Rights Court and EAC's Court of

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<sup>88</sup> See Juliana Omale-Atemi 'EAC women demand gender equality policy', Capital News, July 6, 2009.

<sup>89</sup> Art. 7(j), PAC Protocol.

<sup>90</sup> Abebe, promises and challenges, p. 173.

Justice signal the future relevance of enforcement of human rights of displaced women. There is a real possibility that these judicial organs may consider the new legal instruments in determining contentious cases. There are also positive examples where considerations of institutional coherence and rationalisation helped to resist proposals, which called for distinct institutional mechanisms with a mandate to oversee the implementation of additional protocols and instruments. For example, the Protocol on the Rights of Women in Africa does not establish a separate mechanism for implementation, rather granting such authority to the African Commission on Human and Peoples' Rights. Similarly, though the idea of 'Conference of Parties' as a supervisory mechanism is incorporated; the proposal to establish an 'African High Commissioner for Internally Displaced Persons' in the AU Convention on the Protection of and Assistance to IDPs was also rejected over fear of proliferation of efforts and lack of resources. The real source of strength for the regional mechanism is the extent to which member states are ready to invest in them the necessary political and financial resources with the view to making them develop robust response mechanism for displacement.

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