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## Internally Displaced Persons: Ordeals and Analyses of the Possible Regimes of Legal Protection Frameworks

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## ARTICLE

# INTERNALLY DISPLACED PERSONS: ORDEALS AND ANALYSES OF THE POSSIBLE REGIMES OF LEGAL PROTECTION FRAMEWORKS

OLAWALE OGUNMODIMU\*

I. Introduction.....	408
II. Effects of Internal Displacement on IDPs.....	412
A. The Effects of Internal Displacement on the Culture of IDPs .....	414
1. UNESCO’s General Conceptualization of Culture.....	414
B. The Effects of Internal Displacement on the Economic Potentials of IDPs .....	424
C. The Effects of Internal Displacement on External Displacement: Transition from IDPs to Refugees .....	428

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\*Law Success Instructor at St. Mary’s University School of law. I am grateful to God for this scholarly opportunity to advocate for stateless and displaced persons across the globe. At the onset of this acknowledgment, I would like to extend my sincere and heartfelt gratitude to all the personages who contributed and helped me in this endeavor. To my family, Omolola and Erastus Olumodimu, I appreciate your love and support. Phillip Ericksen and the entire *St. Mary’s Law Journal*, many thanks for your unalloyed support.

D.	Vulnerability as an Effect of Internal Displacement on IDPs .....	430
1.	IDPs Without Documentation.....	435
III.	Exploring Different Legal Regimes of Protection for IDPs.....	435
A.	Treaty and International Law Framework.....	438
B.	Beyond the Guiding Principles: Establishing and Enforcing Treaties on the Protection of IDPs.....	440
C.	The Constitutional Framework .....	444
1.	The Right Not to be Displaced as a Constitutional Right .....	444
2.	The Dignity Right of IDPs.....	446
D.	Statutory and Policy Frameworks Regarding IDPs .....	448
1.	Statutory Frameworks .....	448
2.	Policy Frameworks .....	455
IV.	Differences Between Kenyan and Nigerian Systems of Government on IDP Protection .....	456
A.	The Nigerian Draft Policy and the Kenyan Statute .....	461
B.	A Substantive Comparison.....	468
C.	Regional Differences: Signatories to the Kampala Convention on Internal Displacement .....	477
D.	Public Awareness and Other Issues.....	479
E.	Similarities Between the Nigerian Draft Policy and the Kenyan Statute.....	483
V.	Conclusion.....	486

## I. INTRODUCTION

Internally displaced persons are the most vulnerable of all migrating groups globally.<sup>1</sup> Internal displacement is the forced movement of people within the country in which they live, without hope of returning to their former places of residence. Currently, there are over 89.3 million displaced

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1. See Roberta Cohen, *Humanitarian Imperatives are Transforming Sovereignty*, BROOKINGS (Jan. 1, 2008), <https://www.brookings.edu/articles/humanitarian-imperatives-are-transforming-sovereignty/> [<https://perma.cc/MJY3-6DW9>] (emphasizing IDPs' "vulnerab[ility] to sexual abuse, forced relocations, and other manner of violence").

people in the world, of whom IDPs alone make up 53.2 million.<sup>2</sup> Internal displacement is a recent worldwide phenomenon that has reached disturbing proportions. The numbers of internally displaced persons have significantly increased at a higher rate than the figures of refugees and other migrating groups.<sup>3</sup> Internal displacement is a phenomenon associated with several causes, which this Article refers to as internal displacement drivers.<sup>4</sup> These causes include ethnic clashes, violence, terrorism, natural and human-made disasters, and development projects.<sup>5</sup> Crucially, the most vital needs of IDPs are socioeconomic in scope. More specifically, they need shelter, healthcare, water, food, and physical security during their displacement.<sup>6</sup> Those needs, though socioeconomic in nature, are the existential underpinnings of IDPs as human beings. For example, in Africa, countries such as Nigeria and Kenya have soft and hard laws for the advocacy of socioeconomic palliatives for their displaced citizens. The Nigerian draft policy<sup>7</sup> (soft law) and the Kenyan statute<sup>8</sup> (hard law) both protect civil and

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2. See *Figures at a Glance*, U. N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/ph/figures-at-a-glance> [<https://perma.cc/KL6M-VVD6>] (reporting statistics of displaced and stateless people).

3. See Richard Skretteberg, *The Global Displacement Figures*, NORWEGIAN REFUGEE COUNS. (June 19, 2017), <https://www.nrc.no/perspectives/2017/the-global-displacement-figures/> [<https://perma.cc/28PA-GWHM>] (noting the overall number of internally displaced persons has increased for five consecutive years).

4. Displacement drivers are elements or factors that uproot people from their permanent places of residence and leave them without any certainty of returning home. An important feature of displacement drivers is their interrelatedness in certain circumstances. In some situations, internal displacement does not arise because of a single factor; it occurs as a chain of contributory events. Combining comprehensive contextual analyses with available data, we find people across the globe are displaced for different reasons, but we also find it is possible to trace some similarities among the factors that uprooted them. Often, the presence of one displacement factor triggers another.

5. See Francis M. Deng (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Guiding Principles on Internal Displacement*, at 5, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*] (referencing “armed conflicts, situations of generalized violence, [and] violations of human rights”).

6. See *id.* at 3 (stating the Principles apply to “providing protection against arbitrary displacement”).

7. See generally FEDERAL REPUBLIC OF NIGERIA, NATIONAL POLICY ON INTERNALLY DISPLACED PERSONS (2021), <https://www.refworld.org/docid/632af49b4.html> [<https://perma.cc/C4NE-HPAC>] [hereinafter Nigerian Draft Policy] (providing a structure for protecting the rights of IDPs and diminishing the impact of internal displacement drivers).

8. See generally The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, No. 56 (2012) KENYA GAZETTE SUPPLEMENT No. 220 (providing assistance to IDPs and adopting the UN’s Guiding Principles).

economic rights and proscribe arbitrary displacement; however, they both maintain that the right not to be displaced is not absolute.<sup>9</sup>

Until 1998, no concrete definition of internally displaced persons comprehensively addressed the dynamics of displacement as an emerging global concern. The United Nations (U.N.) Secretary-General had previously proposed a working definition of IDPs, which was revised in 1998 and adopted in the U.N. document, “The Guiding Principles on Internal Displacement.”<sup>10</sup> This is the most widely recognized international document on the protection of IDPs.<sup>11</sup> The document is neither a convention nor a treaty, nor a legal norm but rather a set of persuasive norms adopted by the U.N. General Assembly on how states should protect their IDPs.<sup>12</sup> The document was compiled by a team of lawyers led by Dr. Francis Deng.<sup>13</sup> It defines internally displaced persons as:

[P]ersons 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 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.<sup>14</sup>

Crucially, the definition of IDPs, according to the Guiding Principles, differentiates people who are displaced but have not crossed an

9. For example, arbitrariness is when a state takes an action that infringes on the human rights of the victims of such a move without due process or providing affected persons with recourse to an established legal process. It means the rights of a people cannot be suspended without the law; it also connotes that there is no ex post facto law, and the law of the land must strictly control the limits of circumstances that may warrant infringement on human rights. *See* Nigerian Draft Policy, *supra* note 7, at 28 (stating although “[a]ll IDPs have the right to enjoy in full equality . . . as do all other citizens and persons[,] . . . non-citizens may not be eligible to vote and be voted for in local elections”); The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act § 22 (creating a procedure for permitting and enforcing internal displacement).

10. *See* CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 16 (2004) (discussing the 1951 Convention’s definition of IDPs, which was changed in 1992).

11. *See* Roberta Cohen, *Introduction to the Guiding Principles on Internal Displacement*, THE BROOKINGS INST. (Sept. 23, 2001), <https://www.brookings.edu/on-the-record/introduction-to-the-guiding-principles-on-internal-displacement-2/> [<https://perma.cc/X7L6-B3NP>] (noting “all the main international humanitarian, human rights and development organizations . . . have endorsed the Principles”).

12. *See Guiding Principles*, *supra* note 5, at 3 (acknowledging the Principles therein are merely restatements, which are “reflect[ive] and . . . consistent with international human rights law”).

13. *Id.* at 1.

14. *Id.* at 5.

internationally drawn line—that is, those who are still within their country as IDPs—from those who have been displaced and have passed into another country.<sup>15</sup> The latter group is generally known as refugees.

A refugee is defined and protected by the 1951 Refugee Convention and its 1967 Protocol.<sup>16</sup> The Convention is the key legal document that defines and outlines the rights of a refugee; a refugee is any person:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>17</sup>

Although crossing an internationally drawn line is the primary difference between a refugee and an IDP, it is essential to clarify further that this requirement does not always apply to all refugees because of peculiar circumstances that necessitated their displacements. For example, an IDP-turned-refugee is an individual who had first been uprooted by any of the displacement drivers identified in the previous section but who then had to cross into another state because the individual's country espoused no internal protection mechanisms.<sup>18</sup> This lack of mechanisms can necessitate the search for external protection across internationally drawn lines or international territories. This type of IDP-turned-refugee is different from a refugee who had to flee his country because of political persecution or persecutions because of race, religious belief, and ethnicity, as identified in the 1951 Refugee Convention.<sup>19</sup> To this end, the recognized displacement drivers in the Refugee Convention are different from those mentioned in

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15. *See id.* (excluding people who have “crossed an internationally recognized State border” from its definition of IDPs).

16. United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150, 152 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267, 268 [hereinafter Refugee Protocol].

17. Refugee Convention, *supra* note 16, at 152.

18. *See Refugees, IDPs and People on the Move*, MEDECINS SANS FRONTIERES (2022), <https://www.msf.org/refugees-idps-and-people-move-narrative> [https://perma.cc/HY42-BG3V] (classifying IDPs as people who have “been forced to flee home but has remained within his or her country’s borders” for reasons including, “war, conflict, persecution, natural disaster, deep-set destitution[,] and repression,” which have not been adequately resolved by the country).

19. Refugee Convention, *supra* note 16, at 152.

the Guiding Principles on Internal Displacement that trigger IDPs to eventually become refugees.<sup>20</sup>

While the 1951 Refugee Convention provides for displacement drivers like the fear of being persecuted or killed by a government because of the factors of race, religion, nationality, political opinion, or membership in a particular social group, the Guiding Principles provide for different displacement drivers capable of not only displacing people internally but also, eventually, turning them into refugees in another state.<sup>21</sup> Some of these drivers include natural and human-made hazards, development projects, socio-economic factors, and violence or conflict.<sup>22</sup> In an attempt to honor the peculiar drivers recognized by the Guiding Principles and the 1951 Refugee Convention, all factors identified by both frameworks can turn individuals into either refugees or IDPs, depending on the circumstances.

In some cases, internal displacement drivers can be intertwined. The presence of one driver could trigger another. When a natural disaster such as drought displaces a community populated with farmers, they may move in search of a new settlement in another agrarian community. Finding a new settlement in a host community may eventually trigger conflict between the original landowners and migrating farmers, which may uproot people from this community and leave them without the hope of returning home. In this scenario, a natural disaster or drought triggered conflict-induced displacement.

## II. EFFECTS OF INTERNAL DISPLACEMENT ON IDPS

This Part explains the ordeals IDPs experience at every stage of their displacement and why states should place priority on protecting their citizens from internal displacement drivers. It measures the effects of internal displacement on the economic potential of IDPs, the economic efficiency of a state, the resentment and rejection from host communities, the violation of cultural rights, and the effacement of IDPs' personhood. IDPs are the most vulnerable of all migrating groups globally.

Since the end of the inter-war period, distinct groups with diverse needs are emerging because of protracted wars, terrorism, global warming, lack of

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20. *Id.*; *Guiding Principles*, *supra* note 5, at 5.

21. *See generally* *Guiding Principles*, *supra* note 5 (explaining internally displaced persons have the right to seek asylum in other countries according to international and domestic laws).

22. *Id.* at 5.

socioeconomic incentives, and gross human rights violations.<sup>23</sup> IDPs seem to be among the most disadvantaged groups in need of urgent human rights protection.<sup>24</sup> They are victims of unplanned resettlement who become trapped in the path of armed attacks during a conflict.<sup>25</sup> Because many are without identification documents, often because they were unable to pack their belongings when their displacement occurred, they are easily targeted for police criminal identification parades, arbitrary detention, and forced conscription.<sup>26</sup> They lack food, shelter, and other essentials.<sup>27</sup>

The Eleventh Circuit affirmed the problems of IDPs in *Arboleda v. United States Attorney General*.<sup>28</sup> The court held there was substantial evidence showing that relocation in Colombia was not a reasonable alternative for displaced Colombians who had to come to the United States seeking asylum to escape persecution.<sup>29</sup> The documentary evidence from the State Department and Amnesty International showed that the guerrilla group that persecuted and displaced the Arboleda family operated throughout Colombia.<sup>30</sup> The group also included more than 15,000 combatants responsible for murders, kidnappings, and other atrocities against the civilian population.<sup>31</sup> Evidence presented showed that at least 300,000 persons had been displaced due to guerrilla violence, and that even when the Arboledas sought refuge in an urban area of Colombia, the guerrillas found them, destroyed their property, and continued to threaten them.<sup>32</sup>

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23. *Id.* at 2.

24. See Francis M. Deng (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Guiding Principles on Internal Displacement: Annotations, 2nd Edition*, U.N. Doc. E/CN.4/1998/53/Add.2, foreword (2004) (“Forced to abandon their homes and livelihoods, the internally displaced are often the most forgotten and neglected people in the many forgotten and neglected emergencies around the world.”).

25. See generally BEN SAUL, *INDIGENOUS PEOPLES AND HUMAN RIGHTS: INTERNATIONAL AND REGIONAL JURISPRUDENCE* (2016) (describing the sources of socio-economic and human rights strife, such as displacement secondary to armed conflict, faced by IDPs, many of whom are indigenous).

26. See ROBERTA COHEN & FRANCIS MADING DENG, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 103–04* (1998) (describing how IDPs lose their identification documents and the rights and privileges associated with having such documents).

27. *Id.* at 100.

28. *Arboleda v. U.S. Att’y. Gen.*, 434 F.3d 1220 (11th Cir. 2006) (per curiam).

29. See *id.* at 1227 (concluding the Board of Immigration Appeal’s affirmation of the Department of Homeland Security’s finding that the petitioners could have relocated within Columbia was not supported by the record).

30. *Id.* at 1224–25.

31. *Id.* at 1225.

32. *Id.* at 1226.



A. *The Effects of Internal Displacement on the Culture of IDPs*

Globally, cultural features such as language, lifestyle, property, and location help people identify their unique subset as part of the broader human community. There is a permanent link between people and their specific geographical terrain.<sup>33</sup>

However, the displacement of a people disconnects them from cultural preserves that enable them to establish a sense of “home.” Interestingly, beyond social settings and physical structures, the idea of home to some IDPs is a combination of values that inherently connect them to specific interests. Internal displacement disrupts the importance of home and does not acknowledge long-term benefits cultures contribute to the stability of a state. These cultural values have become part of the human rights framework and influence the relationship between a people, their distinctiveness, and the state.

1. UNESCO's General Conceptualization of Culture

The United Nations Educational, Scientific and Cultural Organization (UNESCO) describes the importance of culture and its underpinnings as follows:

[T]he set of distinctive spiritual, material, intellectual[,] and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions, and beliefs.<sup>34</sup>

[C]ulture is an integral part of social life . . . and that a policy for culture must therefore be seen in the broad context of general State policy, and . . . culture is, in its very essence, a social phenomenon resulting from individuals joining and co-operating in creative activities . . . . [T]he concept of culture . . .

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33. See Smadar Lavie & Ted Swedenburg, *Introduction: Displacement, Diaspora, and Geographies of Identity*, in *DISPLACEMENT, DIASPORA, AND GEOGRAPHIES OF IDENTITY 1* (Smadar Lavie & Ted Swedenburg, eds., 1996) (acknowledging “there is a homology between a culture, a people, or a nation and its particular terrain”).

34. THE GEN. CONF. OF THE UN EDUC., SCI. & CULTURAL ORG., UNIVERSAL DECLARATION ON CULTURAL DIVERSITY (Nov. 2, 2001), <https://www.unesco.org/en/legal-affairs/unesco-universal-declaration-cultural-diversity> [<https://perma.cc/M5QX-BSKM>].

include[s] all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities.<sup>35</sup>

These excerpts indicate a strong sense of connection between people and their culture. There are independent, inherent values that make people unique as a social group, and this uniqueness has vast cultural underpinnings that depict what a community stands for and their contribution of diversity to the larger political body of a state within the broad context of human coexistence. Culture is an essence of communal integration, and the assertion of creativity amplifies human existential values.

Internal displacement drivers acknowledge neither culture nor its imperatives.

When displacement strikes, persons seeking refuge could lose their connectivity to a community and their culture because they may never return home. Therefore, the more people are displaced, the more culture is displaced, and the more its benefit of diversity to a state diminishes. When a community of people in a state is displaced without the possibility of returning or being resettled, a defining feature of a state as a complete political entity is threatened. When IDPs continue to move around in the state without protection and without the ability to return home, they may eventually cross an internationally drawn border to seek asylum as refugees in another country, or lose their sense of collective identity and culture within the state.

In context, a reference to culture here is in alignment with the scope of the provision of Article 27 of the Universal Declaration of Human Rights and Article 15(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>36</sup> Compared to the rigorous emphasis placed on

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35. The General Conference of the United Nations Educational, Scientific and Cultural Organization, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, (Nov. 26, 1976), <https://en.unesco.org/about-us/legal-affairs/recommendation-participation-people-large-cultural-life-and-their> [<https://perma.cc/2QKR-RR4V>] [hereinafter *Recommendation on Participation*].

36. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 27, ¶ 1 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts[,] and to share in scientific advancement and its benefits.”); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights art. 15(1)(a) (Dec. 16, 1966) [hereinafter ICESCR] (recognizing “the right of everyone[] . . . [t]o take part in cultural life”).

civil and political rights, cultural rights are not as pronounced.<sup>37</sup> This lower degree of emphasis on cultural rights at both national and international levels significantly inspired the adoption of the 1982 UNESCO Mexico City Declaration on Cultural Policies, which notes:

Culture . . . makes us specifically human, rational beings, endowed with a critical judgment and a sense of moral commitment. It is through culture that we discern values and make choices[,] . . . [express ourselves], question [our] own achievements, . . . and create[] works through which [we] transcend[] [our] limitations.<sup>38</sup>

In this context, respect for and promotion of cultural rights is essential for the maintenance of human dignity, as well as for fostering positive social interaction between individuals and communities in a diverse and multicultural world.

In reality, the expression of human rights is increasing in the bid to be understood universally as a moral standard among state actors and individuals.<sup>39</sup> When human rights are violated, there are vigorous reactions from individuals, states, media, and institutions denouncing the violations and making a case for the oppressed.<sup>40</sup> Nations indifferent to human rights of their citizens will not respect the values of the international community on the necessity of human protection.<sup>41</sup>

The expression of cultural values is an aspect of human rights, as established by the ICESCR.<sup>42</sup> In literal terms, there is complexity in defining the term “human rights.”<sup>43</sup> The term could be used to mean all the rights human beings should enjoy or only to those that are central or fundamental

37. See Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights*, 50 INT. SOC. SCI. J. 559, 559 (1998) (observing “one can hardly find a State constitution which . . . has a chapter dealing comprehensively with cultural rights”).

38. World Conference on Cultural Policies, *Mexico City Declaration on Cultural Policies* 41, 41 U.N. Doc. CLT/MD/1 (July 26 1982–Aug. 6, 1982) [hereinafter *Mexico City Declaration*].

39. See generally *id.* (reporting an increasing number of people seek the development of human beings, their wellbeing, and fellowship).

40. See generally *id.* (reporting the urgency to establish international collaboration to guarantee the right to culture).

41. See generally KATE E. TUNSTALL, *DISPLACEMENT, ASYLUM, MIGRATION: THE OXFORD AMNESTY LECTURES 2004* (Kate E. Tunstall ed., 2006) (addressing the challenges to human rights posed by displacement, asylum, and migration).

42. ICESCR, *supra* note 36, art. 15.

43. See generally Joe Hoover, *Rereading the Universal Declaration of Human Rights: Plurality and Contestation, Not Consensus*, 12 J. HUM. RIGHTS 217 (2013) (explaining human rights and ongoing politics by acknowledging its ambiguous history).

to their humanity. The Universal Declaration of Human Rights is the first widely known document that popularized the concept; in some instances, it used the terminology “human rights” while it addressed “fundamental human rights” at other times.<sup>44</sup>

According to Joe Hoover, human rights mean the rights of human beings, which are of utmost moral importance and deserve the most significant moral weight.<sup>45</sup> When used in either the former or latter sense, culture (viewed beyond ancestral connections but instead as a way of life of a people) is a natural human makeup fundamental to the very existence and development of a people and what they stand for as members of a community or nation.<sup>46</sup>

Moreover, core values are singled out for special attention because they provide the link between a people’s culture and their social system.<sup>47</sup> Generally, internal displacement does not acknowledge the core values of social groups, the rights and identity of a people, or the distinctive nature of ethnic, scientific, religious, and other cultural communities. Some human rights experts have generally called these identified values second-generation rights.<sup>48</sup> They are a part of recognized human values of states’ directive principles<sup>49</sup> contained in the ICESCR adopted in 1966 by the United Nations General Assembly.<sup>50</sup> Human rights are one of the components of the International Bill of Rights, which includes the Universal Declaration of

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44. See Universal Declaration of Human Rights, *supra* note 36, arts. 8, 26(2) (using “human rights” and “fundamental human rights” to define a common standard of achievement).

45. See Hoover, *supra* note 43, at 217–18 (espousing the “unavoidable claim . . . that humanity has a common, and perhaps singular, moral nature, shared by each of us, which provides a universal standard that all political authorities should meet”).

46. See generally Thomas G. Weiss & David A. Korn, INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES (2006) (tracing the political challenges of assisting internally displaced persons).

47. See Jerzy Smolicz, *Core Values and Cultural Identity*, 4 ETHN. RACIAL STUD. 75, 75–90 (1981) (positing core values form the basis for a group’s culture).

48. See Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 438 (1981) (providing a brief history of second-generation rights and how they are characterized).

49. *E.g.*, CONSTITUTION OF NIGERIA, §14-27, ch. II (1999) (listing fundamental principles by which Nigerian is governed); see also Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 INT. J. CONST. L. 389, 395–98 (2018) (discussing how constitutions can be used to accommodate ideological dissenters).

50. See ICESR, *supra* note 36 (affirming human rights on an international scale).

Human Rights,<sup>51</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>52</sup> and the ICESCR.<sup>53</sup>

The ICESCR is the most important bill of rights that guarantees cultural rights at the international community level.<sup>54</sup> This component also applies to the protection of the cultural rights of IDPs. It imposes positive obligations on the state to act to protect its citizens' cultural rights from violation, providing that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>55</sup>

The ICESCR enjoins state actors to protect people's culture and cultural norms, providing that:

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.<sup>56</sup>

It also has a working committee that developed a minimum core of standards, which states are meant to comply with within a reasonable time, meaning that:

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51. Universal Declaration of Human Rights, *supra* note 36.

52. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

53. ICESCR, *supra* note 36.

54. *See* Economic, Social and Cultural Rights, INT'L JUST. RES. CTR. (2014), <https://ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2/> [<https://perma.cc/QWK9-3C4Y>] (attesting to the comprehensiveness of the ICESCR).

55. ICESCR, *supra* note 36, at art. 2(1).

56. ICESCR, *supra* note 36, at art. 15(1), (2).

Governments, no matter what level of resources are at their disposal, are obligated to make sure that people living under their jurisdiction enjoy at least essential levels of protection of each of their economic, social, and cultural rights. While the ICESCR recognizes the principle of progressive realization of ESCR, this does not mean that states are free to postpone undertaking their duties vis-à-vis ESCR until a later date. Protection from starvation, primary education, emergency health care, and basic housing are among the minimum requirements to live a dignified life and it is the duty of governments to ensure these at all times. Even in cases of economic downturn or other emergency, these core requirements must be guaranteed to everyone. States should use all the available resources, including international assistance, to make sure that every individual in their territory enjoys a bare minimum of ESCR.<sup>57</sup>

Moreover, according to the Working Committee on Economic Social and Cultural Rights, the meaning of “reasonably short time” for the actualization of this Covenant means that the covenant should have been domesticated or entered into force in a state within this time frame.<sup>58</sup> A specific application of this reasoning to IDPs reinforces the obligation of states to act within a reasonable time frame to prevent the extinction of IDPs’ cultural symbols. Reasonable time, in this context, could mean within the time frame during which the state could still stop any displacement driver from destroying critical historic sites such as museums or a community with substantial cultural endowments.

Culture is one of the formative principles of expression. Article 9 of the African Charter on Human and Peoples Rights (ACHPR) reiterates the position of Article 19 of the ICCPR: that every individual shall have the right to receive information and the right to express and disseminate opinions within the law.<sup>59</sup> People can speak through their culture; they can validate what they stand for by expressing what their history and norms showcase. This sense of expression becomes complicated for IDPs when they involuntarily migrate into new environments and resettle in host communities. For example, in 1996, in Sierra Leone, over 1,000 young

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57. *Minimum Core Obligations*, ESCR-Net, <https://www.escr-net.org/resources/minimum-core-obligations> [<https://perma.cc/73CJ-DFBK>].

58. U.N. Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, General Comment. No. 3: The Nature of States Parties’ Obligations (Dec. 14, 1990).

59. African Commission on Human and Peoples’ Rights (ACHPR), *African (Banjul) Charter on Human and Peoples’ Rights*, art. 9, (June 27, 1981).

internally displaced girls were forcibly circumcised in a mass ceremony.<sup>60</sup> The forced circumcisions happened after they fled to an area where the practice is widespread and imposed on the community's female members; the new residents could not decline because the ceremony was an unavoidable requirement for their settlement into that community.<sup>61</sup>

While a displaced population may appear small, if no special effort is made to contain displacement drivers, a state gradually loses culture, and a contributory factor to its social, political, and economic existence. States do not exist without a visible community, and when this population depletes due to displacement drivers, the entire political body faces a threat of annihilation. The maintenance of a standing population is a requirement of a sovereign state. Most preambles of constitutions claim that governmental powers are derived from "the people of their states" who elect state officials or representatives into their offices.<sup>62</sup> No state can stand without its people, and no people exist without their cultural identities or values; however, internal displacement drivers may erode these values.

Culture can be perceived in the traditional or classic sense, such as art, literature, music, theatre, and architecture. It can also be seen as a way of life, a definition that acknowledges embedment in daily activities and encompassment of humans' values, beliefs, practices, and ways of doing and thinking.<sup>63</sup> Moreover, people can view culture as sets of collective memories, a concept that acknowledges shared ideas and opinions of history, ancestry, and life sustained in the community that ascribes meaning to heritage and cultural practices.<sup>64</sup> Therefore, the connectivity between indigenous people and their land is supported by collective memory, as is the relationship between communities and significant historical events.<sup>65</sup>

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60. See PHUONG, *supra* note 10, at 94 (arguing the existing framework for human rights should be used to address the issue of IDPs); see also Judy A. Benjamin & Khadija Fancy, *The Gender Dimension of Internal Displacement: Concept Paper and Annotated Bibliography*, UNICEF 1, 3 (1998) (corroborating the perils particular to female IDPs).

61. See Benjamin & Fancy, *supra* note 60, at 16 (describing the excuse of "cultural practice" used to defend this behavior).

62. See Universal Declaration of Human Rights, *supra* note 36, at art. 8 & 26(2) (describing the source of elected officials' authority); U.N. Charter, art. 55, ¶ 1.

63. See MANISULI SSENIONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 258 (2d ed. 2016) ("Culture includes 'inherited ideas, beliefs, values, and knowledge, which constitute the shared bases of social action.'").

64. *Id.*

65. See Pok Yin S. Chow, *Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights*, 14 HUM. RTS. L. REV. 611, 611 (2014) ("The above understanding failed to accommodate an emerging understanding of 'culture', the content of which treats culture as sets of

Internal displacement, on the other hand, disrupts social settings like culture, associations, institutions, and governance. When people become displaced, they are no longer in the right frame of mind to defend valuables like cultural icons such as monuments, historical objects, and archaeological antiquities. Displacement harms culture by taking people into new settlements, which are often misaligned with their belief systems; they are usually left with no choice but to resettle far away from places they once knew as home. Article 17(2) of the African Charter provides: “Every individual may freely take part in the cultural rights of his community.”<sup>66</sup> Although the Charter does not explain the scope and extent of participation of individuals in cultural rights, one can make reasonable inferences. According to Manisuli Ssenyonjo, the right to the involvement as mandated by the African Charter protects an individual’s participation in cultural life and is meant to promote and respect traditional and historic values recognized by the community.<sup>67</sup> This obligation requires states to take measures that prevent third or private parties—including individuals, groups, corporations, and other entities, as well as agents acting under their authority—from interfering in any way with this right.<sup>68</sup> Expressly, this provision of the law does not mention internal displacement as an agent of interference, but it is reasonably inferred by the usage of words like “agents” and “third parties.”<sup>69</sup> Internal displacement factors can become agents of displacement and are therefore related to the obligation of the state to protect the cultural rights of a people. States are implicated as accomplices when they refuse to intervene in conflicts that disrupt communities and cause the displacement of people.<sup>70</sup>

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collective memories, a concept which acknowledges the aspect of culture that consists of shared ideas and beliefs of history.”)

66. *African (Banjul) Charter on Human and Peoples’ Rights*, *supra* note 59, at art. 17.

67. SSENYONJO, *supra* note 63, at 251.

68. U.N. Economic and Social Council, Committee on Economic & Social and Cultural Rights, General Comment no. 15, at 15 (2002).

69. *See id.* at 9 (describing obligations of protection placed upon the states).

70. *See* Mark Amaza, *A Widening Conflict Between Herdsmen and Farmers is Redefining Nigeria’s Geopolitics*, QUARTZ (Feb. 12, 2018), <https://qz.com/africa/1204744/nigeria-fulani-herdsmen-clashes-are-redefining-its-geopolitics/> [<https://perma.cc/3VUH-KKV9>] (describing the tensions between the Nigerian herdsmen and farmers); *see also* Dan Agbese, *Nigeria: Fulani Herdsmen? Here Are the Grim Statistics*, GUARDIAN (Nov. 3, 2017), <https://allafrica.com/stories/201711030799.html> [<https://perma.cc/FA7L-562W>] (describing the massacre and displacement of the Fulani herdsmen).



General international and regional human rights standards address some cultural and indigenous lapses.<sup>71</sup> Some of these general human rights standards are the ICESCR,<sup>72</sup> the rules of the Committee on the Rights of the Child,<sup>73</sup> Committee on the Elimination of Racial Discrimination;<sup>74</sup> the provisions of the Committee on the Elimination of Discrimination against Women;<sup>75</sup> and the standards of the Committee Against Torture.<sup>76</sup> All these standards include recommendatory “general comments” on cultural values and indigenous rights of people on whose behalf these committees were formed. Who counts as indigenous in a country depends on different issues, shaped by a range of human interactions such as history, cultural affiliations, civic duties, and social relations.<sup>77</sup> While these factors can vary from place to place, there is a unified identity of “a people” as defined by law.<sup>78</sup>

Regarding internal displacement and the violation of cultural rights, it is germane to evaluate the case of *Moiwana Community v. Suriname*.<sup>79</sup>

On November 29, 1986, members of the armed forces of Suriname attacked the N'djuka Maroon village of Moiwana. State agents allegedly massacred over [forty] men, women, and children, and razed the village to the ground. Those who escaped the attack supposedly fled into the surrounding forest,

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71. *See id.* (explaining some regional organizations mentioned indigenous inhabitants in their treaties).

72. ICESCR, *supra* note 36.

73. *Committee on the Rights of the Child*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER [OHCHR] <https://www.ohchr.org/en/treaty-bodies/crc> [<https://perma.cc/YV7F-NRSV>].

74. *Committee on the Elimination of Racial Discrimination*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER [OHCHR] <https://www.ohchr.org/en/treaty-bodies/cerd> [<https://perma.cc/RP5B-MYB4>].

75. *Committee on the Elimination of Discrimination Against Women*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER [OHCHR] <https://www.ohchr.org/en/treaty-bodies/cedaw> [<https://perma.cc/JXR8-DRAG>].

76. *Committee Against Torture*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER [OHCHR] <https://www.ohchr.org/en/treaty-bodies/cat> [<https://perma.cc/X7R8-UACU>].

77. *See SAUL*, *supra* note 25, at 23 (explaining how defining the term indigenous may change depending on how it is analyzed).

78. *See generally* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 171–72 (Reprinted ed. 1996) (examining how self-determination has evolved into an international legal standard); *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 3d ed. 2012) (analyzing the evolution of the U.N. Charter with the passage of time).

79. *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 86(1) (June 15, 2005).

and then into exile or internally displacement. Furthermore, as of the date [this case was brought before the Inter-American Court of Human Rights], there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands . . . [and] unable to return to their traditional way of life.<sup>80</sup>

The court found that the state violated the provisions of cultural integrity in the American Convention on Human Rights because it willfully refused to protect the human rights of the affected persons.<sup>81</sup> The court reasoned that there was a difference between willfully refusing to act and being incapacitated or unable to function.<sup>82</sup> In this case, the actions constituted a willful refusal to protect human rights, and Suriname used its military to violate the human rights of its people by displacing them from the locations they had built as home.<sup>83</sup>

The problem of dislocation of IDPs is significant. This unimaginable suffering reduces the human worth of IDPs once they are uprooted from home, and they are left without any hope of returning. The negative effects of internal displacement on IDPs transcend the pain of being expelled from a community to which they may never return; negative effects also include the lifetime psychological trauma of losing human worth through their inability to determine their fate. Internal displacement is an incursion on the right of an individual to choose a place of belonging. In disturbing proportions, IDPs are neglected by their governments; host communities also reject them because they are not seen as compatriots or fellow citizens but as criminals and are often stigmatized as invaders.<sup>84</sup> Internal displacement also undermines the bodily integrity of IDPs, a minimum requirement for the standard of personhood.<sup>85</sup> Some bodily violations amounting to the effacement of IDPs' personhood include forced

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80. *Id.*

81. *Id.* at 51.

82. *See id.* at 11 (stating Suriname completely ignored any attempts by victims to obtain justice).

83. *See id.* (holding the crimes committed by the military were committed on behalf of the state).

84. *See* Anuna Bukia, *Internal Displacement as a Stigma in Georgia*, HUMAN RIGHTS HOUSE FOUNDATION (Dec. 27, 2012), <https://humanrightshouse.org/articles/internal-displacement-as-a-stigma-in-georgia/> [<https://perma.cc/8GM8-V2ZA>] (stating stigmatization of IDPs can occur simply by the use of the term "refugee").

85. *See* George J. Annas, *Bodily Integrity and Informed Choice in Times of War and Terror*, AM. BAR ASS'N (Apr. 1, 2003), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol30\\_2003/spring2003/hr\\_spring03\\_intro/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/spring2003/hr_spring03_intro/) [<https://perma.cc/YNU4-F3FQ>] (concluding civilians should retain full bodily integrity even during war or bioterrorist attacks).

conscripted, tortured, child marriage, and female genital mutilation.<sup>86</sup> Beyond the violation of bodily integrity, internal displacement also undermines the personhood of IDPs by inflicting psychological instability. The combination of the violation of bodily and psychological integrity of IDPs erodes their existential value as members of a state.

B. *The Effects of Internal Displacement on the Economic Potentials of IDPs*

There are specificities, disparities, and negative trends concerning the economic impacts of internal displacement on IDPs, host communities, private investors, and the government. Displacement drivers such as violence and terrorism overwhelmingly worsen opportunity for IDPs. Because entire sectors of state economies are connected to the activities of IDPs, internal displacement can create financial crisis for IDPs by reducing their access to livelihood and opportunities.<sup>87</sup> Internal displacement affects IDPs forced to leave their home because of displacement drivers in a number of ways. When displacement drivers occur, IDPs immediately lose their housing, social and family life, security, and environment. They also lose their means of livelihood because they are being pushed away from their income source and may endure protracted displacement without the means of financial hope.<sup>88</sup>

In March 2019, the Internal Displacement Monitoring Centre (IDMC) published estimates of the economic losses associated with internal displacement at the global level, amounting to \$13 billion per year.<sup>89</sup> In 2018, Africa had an estimated \$4 billion total economic impact of internal displacement, which represents 0.4% of thirteen countries' GDP, a significant burden for already struggling economies.<sup>90</sup> In most instances, crises that displace the highest number of people for the longest time result in the highest economic impacts. When those crises occur, a state is required to bear high financial burdens of providing social amenities such

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86. See Glob. Prot. Cluster Working Grp., *Handbook for the Protection of Internally Displaced Persons*, U.N. HIGH COMM'N FOR REFUGEES [UNHCR] 29, <https://www.unhcr.org/4c2355229.pdf> [<https://perma.cc/DYE8-5H5B>] (describing the key principles of international humanitarian law).

87. OCHA, *DTM Burundi Displacement Dashboard Nov 2017* (Nov. 20, 2017), <https://www.humanitarianresponse.info/ru/operations/burundi/infographic/dtm-burundi-displacement-dashboard-nov-2017-en> [<https://perma.cc/W63R-RNZT>].

88. See Internal Displacement Monitoring Centre, *The Ripple Effect: Economic Impacts of Internal Displacement* (June 2019), at 3 (“By disconnecting people from their productive activity for days, weeks, months or even years, internal displacement reduces economic production.”).

89. IDMC, *Unveiling the Cost of Internal Displacement* (Mar. 2019).

90. IDMC, *Unveiling the Cost of Internal Displacement in Africa* (Nov. 2019), at 5.

as housing, health, education, and general livelihoods for IDPs. States with limited resources may have to divert their budgetary spending toward protecting IDPs, which invariably affects another sector's funding. To this end, displacement financially burdens national economies, thereby leading to regress in governments' sustainable development goals.

As well as states, internal displacement drivers directly affect IDPs because they limit their ability to contribute to the economy and generate specific, additional spending needs.<sup>91</sup> Most IDPs previously had their private businesses and remitted taxes and dues prescribed by the government. However, when they become displaced, those streams of income and tax remittance to the government are impeded. When IDPs move to new communities, there is an exacerbated pressure on already insufficient or limited resources and access to basic social services in those new communities, which could increase vulnerability of host populations.<sup>92</sup> For example, when there is an influx of IDPs into a host economy, there is an increase in the supply of workers, which results in increased competition for jobs and a combination of lower wages and higher unemployment.<sup>93</sup>

The national disaster loss databases for Kenya, Uganda, and Ethiopia show that about 1,270 homes were destroyed between 2001 and 2017; a majority of those belonged to people who lived in arid and semi-arid areas, and they depended on pastoral farming, herding, or rain-fed agricultural production for their livelihoods.<sup>94</sup> The number of people displaced by loss of homes caused by natural disasters resulted in the loss of businesses that had facilitated intra- and interstate Kenyan commerce.

Internal displacements impede the circulation of cash, reduce interstate commerce, and prevent the transportation of agricultural produce from production sites to end-product users.<sup>95</sup> It hinders transportation for factory workers, discourages foreign, direct or portfolio investment, and causes inflation.<sup>96</sup> The phenomenon also forces states to supplement budgets to account for emergency spending. Most importantly, it discourages successful, rural small businesses from contributing to the nation's economy.

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91. *Id.* at 7.

92. *See id.* at 14 (describing the effect IDPs have on a country's local economy).

93. *See id.* at 8 (describing the impact IDPs have on host communities).

94. IMDC, *Reducing Displacement Risk in the Greater Horn of Africa* (Aug. 2017), at 20.

95. *See* IDMC, *Thematic Series: The Ripple Effect: Economic Impacts of Internal Displacement* (June 2019), at 4 (graphing different factors that are correlated to an increase in IDPs).

96. *Id.*

Another economic effect of displacement on IDPs is development-induced displacement. This occurs when people in a settlement are forced to leave their permanent places of residence to make room for development projects like dams, roads, and other public amenities. Several contemporary developments have increased attention to development-induced displacement.<sup>97</sup> Although development can indicate governmental efficiency, some projects can directly burden the community and do not provide the necessary compensation to those affected.<sup>98</sup>

The debate around the subject and its impoverishing effects is hardly new.<sup>99</sup> Some see the suffering caused by development as a byproduct of the inequitable distribution of power and resources. Others see these inequities as inherent to development.<sup>100</sup>

For example, Nigeria currently faces conflict and disaster-induced displacements in some of its northern states, causing an economic decline.<sup>101</sup> The northern part of the country is more agriculturally inclined and contributes heavily to the nation's food production.<sup>102</sup> It includes nineteen states, which produce most of the country's food and materials.<sup>103</sup> However, these fertile states are the operation base of a notorious Islamic

97. See Peter Vandergeest et al., *Introduction to DEVELOPMENT'S DISPLACEMENTS 5* (Peter Vandergeest et al., eds., 2007) (analyzing the correlation between increased development and the number of IDPs).

98. See Michelle Kooy, *Enforcement and/or Empowerment? Different Displacements Induced by Neoliberal Water Policies in Thailand*, in *DEVELOPMENT'S DISPLACEMENTS*, *supra* note 97, at 111, 124 ("Perversely, it is these very strategies allowing rural households to survive in a difficult environment that are now threatening to increase probabilities of negative displacements.").

99. See *id.* (showing a questionable success rate between attempts to raise crop outputs and raising rural income).

100. See *id.* at 125 (describing the risk of increased displacement caused by failure to provide adequate agricultural yields).

101. See Romola Adeola, *Boko Haram-Induced Displacement: A Critique of Nigeria's Implementation of the African Union Internally Displaced Persons Convention*, 50 *COMP. & INT'L L. J. S. AFR.* 41 (2017) (examining displacement caused by Boko Haram in Northern Nigeria); see also *Nigeria Economic Report: Improved Economic Outlook in 2014, and Prospects for Continued Growth Look Good*, THE WORLD BANK, <https://www.worldbank.org/en/country/nigeria/publication/nigeria-economic-report-improved-economic-outlook-in-2014-and-prospects-for-continued-growth-look-good> [<https://perma.cc/3BUJ-AWP9>] (describing the economic problems and poverty of Northern Nigeria).

102. See Morris E. Zuckerman, *Nigerian Crisis: Economic Impact on the North*, 8 *J. MOD. AFRICAN STUD.* 37, 38 (1970) (noting the different crops that are cultivated in Northern Nigeria).

103. See *List of Northern States in Nigeria & Their Details*, NIGERIAN FINDER, <https://nigerianfinder.com/list-of-northern-states-in-nigeria/> [<https://perma.cc/6ADG-ME25>] (listing all of Nigeria's Northern states).

sect: Boko Haram.<sup>104</sup> Statistics show this terror group is responsible for the death and displacement of over 1 million people, including farmers.<sup>105</sup> Generally, agriculture is a robust economic segment in Nigeria.<sup>106</sup> However, the displacement of farmers, destruction of farms, the seizure of farm produce and equipment, and planting of landmines and explosives around silos by insurgents have reduced the harvest of farm produce, contributing to hunger and famine across Nigeria.<sup>107</sup>

In stark contrast, the south and southwest of Nigeria have substantially reduced poverty, while it has remained stagnant in the northwest and increased in the northeast.<sup>108</sup> Thus, disparities in poverty and living standards have increased.<sup>109</sup> The south of Nigeria has relatively low poverty rates, ranging from 16% in the southwest to 28.8% in the southeast.<sup>110</sup> This is significantly lower when compared to the poverty rates in the northwest and northeast, which are 45.9% and 50.2%, respectively.<sup>111</sup> This disparity is likely related to displacements caused by Boko Haram in northern Nigeria.<sup>112</sup> However, the growing gap may also be caused by decreased production and communal conflicts that keep farmers away from their farmlands and prevent the transportation of goods to market.

Most government-induced displacements come with the promise of compensation.<sup>113</sup> Still, for most displaced farmers, cash provides no economic advantage. The forced sale of land leads to losses of access to

104. See Adeola, *supra* note 101, at 45 (“From its small-scale violent attacks in 2010, Boko Haram has morphed into a violent armed group orchestrating large-scale kidnappings, suicide bombings, and capturing cities in states across Northern Nigeria.”).

105. See *id.* (asserting Boko Haram has displaced “between 1.9 million and 5 million” people in “the North-Eastern region of Nigeria”).

106. See Eze Onyebuchi Michael, *Agricultural Sector Performance and Nigeria’s Economic Growth*, 15 *ASIAN J. AGRIC. EXTENSION, ECON. & SOCIO.* 1, 2 (2017) (demonstrating how agriculture is “an important sector of [Nigeria’s] economy”).

107. See Adeola, *supra* note 101, at 49–50 (describing violence perpetrated by Boko Haram, including bombings in Northern Nigeria).

108. WORLD BANK, *NIGERIA ECONOMIC REPORT* 17 tbl.8, 18 (July 2014).

109. *Id.* at 18.

110. *Id.* at 17 tbl.8.

111. *Id.*

112. See Adeola, *supra* note 101, at 45–46 (suggesting Boko Haram has caused untold damage to Northern Nigeria).

113. See Elizabeth Ferris et. al., *From National Responsibility to Response—Part II: IDPs’ Housing, Land and Property Rights*, BROOKINGS (Feb. 22, 2012), <https://www.brookings.edu/opinions/from-national-responsibility-to-response-part-ii-idps-housing-land-and-property-rights/> [<https://perma.cc/YDG9-HAKK>] (addressing several nations’ unfulfilled promises to compensate IDPs).

resources, earning opportunities, and shelter. Compensation plans mandated by states frequently fail to provide either full or adequate compensation for the physical and social resources lost by those with land-based livelihoods.<sup>114</sup> Such systems restrict payment to officially recognized, locally accepted forms of property rights.<sup>115</sup> They neglect entire categories of loss, including access to social networks crucial to the agricultural production system, markets, and other human resources. Further, the systems fail to account for start-up costs needed to relocate and re-establish in another location. In terms of economic impact, the most crucial challenge for IDPs is the impoverishment of an already poor people.<sup>116</sup>

C. *The Effects of Internal Displacement on External Displacement: Transition from IDPs to Refugees*

IDPs unable to procure necessary assistance from their governments and seek extraterritorial help become refugees, provided they meet the definition.<sup>117</sup> Sometimes, displaced persons cannot resettle internally because the state is the perpetrator of their displacement. In other instances, internal resettlement may threaten the displaced person's life. Here, the only option is to seek asylum as a refugee.

For example, the Tenth Circuit found that internal relocation may be unreasonable for a refugee fleeing internal conflict.<sup>118</sup> The court found that the petitioner faced "past persecution" at the hands of his government, which "created a rebuttable presumption of a well-founded fear of future persecution."<sup>119</sup> It also found the Board of Immigration Appeals (BIA) "failed to adequately consider whether it was reasonable for [him] to

114. *Id.*

115. *See id.* (explaining how property restitution plans often fail to deliver).

116. *See* Kooy, *supra* note 98, at 124 (showing a questionable success rate between attempts to raise crop outputs and raising rural income); *see also* Michael M. Cernea & Christopher McDowell, *Risks and Reconstruction: Experiences of Resettlers and Refugees*, THE WORLD BANK, <http://documents.worldbank.org/curated/en/947311468739277702/Risks-and-reconstruction-experiences-of-resettlers-and-refugees> (analyzing the effects and difficulties of displacement and impoverishment).

117. *See Field Listing—Refugees and Internally Displaced Persons*, CENT. INTEL. AGENCY: THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/refugees-and-internally-displaced-persons/> [<https://perma.cc/969Z-D5SW>] (noting the distinctions between a refugee and internally displaced person).

118. *Thiam v. Holder*, 555 F. App'x 773, 779 (10th Cir. 2014) (remanding to the Board of Immigration Appeals because evidence indicated "that internal relocation . . . would be unreasonable").

119. *Id.* at 777 (citing 8 C.F.R. § 1208.13(b)(1)).

relocate.”<sup>120</sup> However, the State Department Country Report on Senegal, on which the BIA had partially relied, did not address the petitioner’s “particular circumstances of possible persecution.”<sup>121</sup> Accordingly, the court reasoned that “[t]he BIA failed to consider and apply [regulatory] factors” necessary to determine “reasonableness,” as the appellant produced evidence “that internal relocation . . . would be unreasonable.”<sup>122</sup>

Some 65 million people worldwide need protection and assistance as a consequence of forced displacement.<sup>123</sup> Forcibly displaced populations include refugees, IDPs, and asylum seekers.<sup>124</sup> Globally, over 40.3 million people were internally displaced in 2016 as a result of conflict—the equivalent of more than one person per second.<sup>125</sup> Further, there are roughly 22.5 million refugees and 2.8 million asylum-seekers.<sup>126</sup> When displacement is protracted, many IDPs flee to refugee camps in neighboring states.

While porous borders make it difficult to calculate the number of IDPs moving between nations, the process is usually easy so long as internal protection mechanisms are not available.<sup>127</sup> This influx puts pressure on the limited resources and facilities available in refugee camps and eventually creates an environment not suitable for human dignity.<sup>128</sup> The current refugee influx is, in part, a symptom of the failure of national governments to protect and assist IDPs.<sup>129</sup>

As discussed in the introduction, IDPs forced to seek asylum elsewhere, if approved as refugees, are protected by the international community (UNCHR).<sup>130</sup> The Guiding Principles on Internal Displacement do not

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120. *Id.* at 779.

121. *Id.* at 777.

122. *Id.* at 778 (citing § 1208.13(b)(3)).

123. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 5 n.6, 6 fig.1 (2017).

124. *Id.*

125. *Id.* at 35.

126. *Id.* at 2.

127. See Hanne Eide Andersen, *Humanity Has No Borders*, NRC (May 25, 2017), <https://www.nrc.no/news/2017/april/humanity-has-no-borders/> [https://perma.cc/N5W4-BJCD] (calling for more attention and information on the scale of the displacement crisis).

128. Mohamed Malim, *Refugee Settlement Living Conditions*, EPIMONIA (Mar. 16, 2020), <https://epimonia.com/blogs/news/refugee-living-conditions> [https://perma.cc/YZ5T-BZ9P] (noting refugee camps often lack access to medical care, education, or employment).

129. See *The Global Refugee Crisis, Explained*, CONCERN WORLDWIDE U.S. (Apr. 26, 2022), <https://www.concernusa.org/story/global-refugee-crisis-explained/> [https://perma.cc/XM8C-G58U] (describing the refugee influx is in large part due to lack of resources from host countries).

130. See *supra* Part I (discussing international protections afforded to refugees).



protect refugees; refugees are instead protected by the laws of their receiving countries and the 1951 Refugee Convention<sup>131</sup> and its 1967 Protocol.<sup>132</sup> However, admitting new asylum seekers causes an additional burden on the receiving state's resources, which may already be insufficient for its citizens.

#### D. *Vulnerability as an Effect of Internal Displacement on IDPs*

The Guiding Principles recognize some categories of vulnerable IDPs on which states should focus. In particular, Principle 4 (2) provides:

Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.<sup>133</sup>

IDPs are generally defenseless people and many are women and children who are particularly vulnerable to abuse.<sup>134</sup> Internal displacement creates additional vulnerabilities for nations such as Nigeria, rife with violence and insurgency.<sup>135</sup> This displacement driver has uprooted more than 2 million people in northeast Nigeria—an area with high poverty density facing consistent internal displacement because of the Boko Haram invasion.<sup>136</sup>

131. Refugee Convention, *supra* note 16.

132. Refugee Protocol, *supra* note 16.

133. *Guiding Principles*, *supra* note 5, at 6.

134. See generally PHUONG, *supra* note 10 (discussing the impact of refugee definitions and gender-related violence); see also Roberta Cohen, *Protecting Internally Displaced Women and Children*, in INTERNAL DISPLACEMENT WORLDWIDE 63 (Wendy Davies ed., 1998) (showing increased international concern for woman and other vulnerable groups); Human Rights Council Res. 1994/68, E/CN.4/1994/132, (Mar. 9, 1994) (encouraging specific attention to the protection and assistance of specific needs of women and children); G.A. Res. 50/195 (Mar. 11, 1996) (focusing on gender and children issues).

135. See Emmanuel Akinwotu, *Nigerian President's Vow to End Violence Lies in Tatters as Insurgencies Grow*, GUARDIAN (May 24, 2021, 8:24 AM), <https://www.theguardian.com/world/2021/may/24/nigerian-presidents-vow-to-end-violence-lies-in-tatters-as-insurgencies-grow> [<https://perma.cc/8HZL-ETJN>] (describing the current political climate in Nigeria).

136. Wole Mosadomi, *Aftermath of Boko Haram Invasion: Niger State Communities in Panic Mode as Victims, Others Flood IDPs Camps*, VANGUARD: AREWA VOICE (Apr. 30, 2021), <https://www.vanguardngr.com/2021/04/aftermath-of-boko-haram-invasion-niger-state-communities-in-panic-mode-as-victims-others-flood-idps-camps/> [<https://perma.cc/29LW-VZEM>]; Agence France-Presse, *Boko Haram Attacks Leave Over 2.1 Million Displaced in Nigeria*, NDTV (Sept. 4, 2015, 9:08 PM IST), <https://www.ndtv.com/world-news/boko-haram-attacks-leave-over-2-1-million-displaced-in-nigeria-1214400> [<https://perma.cc/BY7Y-7KUG>].

IDPs are often beyond the reach of international aid, especially when the state prohibits access.<sup>137</sup> In some circumstances, IDPs are targeted victims, forcefully uprooted from their community by the state or its policies.<sup>138</sup> While a policy cannot unilaterally uproot people, it can be used as a government pretext to forcefully displace them.<sup>139</sup> When this occurs, IDPs struggle to resettle, as potentially arbitrary government policy is what uprooted them in the first place.<sup>140</sup>

Internal displacement itself may signal a deliberate abuse of human rights. Once it occurs, internal displacement brings about a set of circumstances that render those affected highly vulnerable.<sup>141</sup> At the same time, displacement breaks up families and community support networks.<sup>142</sup>

During the Rwandan genocide, gender violence was a common fate of internally displaced women.<sup>143</sup> Families were separated and most husbands were killed, leaving the women to lead their families from violence-ravaged areas.<sup>144</sup> Most women were abused in the form of rape, sexual slavery, forced female genital mutilation, or death.<sup>145</sup>

The Second Circuit addressed similar abuses in *Mutonyi v. Gonzales*.<sup>146</sup> While the court denied review, it recognized the danger internal

137. See *Internally Displaced People*, CPD, <https://disasterphilanthropy.org/resources/internally-displaced-people/> [<https://perma.cc/6DTN-9HGU>] (noting state governments can be responsible for forced displacement).

138. *Id.*

139. *Id.* (describing how state governments may be directly or indirectly responsible for displacement).

140. *Id.* (“IDPs remain within their own country—even when that government is responsible for their displacement. They may be unwilling or unable—physically or financially—to leave their homeland and instead migrate within their country to another area.”).

141. See MJ Toole & RJ Waldman, *The Public Health Aspects of Complex Emergencies and Refugee Situations*, 18 ANN. REV. PUB. HEALTH 283, 289–91 (1997) (explaining the precarious health situation of the internally displaced).

142. See *Displacement: OHCHR and the Right to Adequate Housing*, UNITED NATIONS: OFFICE OF THE HIGH COMM’R OF HUM. RTS., <https://www.ohchr.org/en/housing/displacement> [<https://perma.cc/7DUU-D24F>] (describing the effects of displacement).

143. *The Silenced Women of the Rwandan Genocide and Their Fight to Be Heard*, UNIV. OF ALA. AT BIRMINGHAM: INST. FOR HUM. RTS. BLOG (Sept. 26, 2017), <https://sites.uab.edu/humanrights/2017/09/26/silenced-women-rwandan-genocide-fight-heard/> [<https://perma.cc/MK7U-5YUV>].

144. See generally Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L. L. 97 (1999) (describing the horrible conditions endured by women during the Rwandan genocide).

145. See *id.* at 107 (illustrating the widespread use and impact of rape and other gender-based crimes).

146. *Mutonyi v. Gonzales*, 181 F. App’x 14 (2d Cir. 2006).

displacement posed to a vulnerable, war-torn community of Ugandans.<sup>147</sup> The court recognized that violence against women constituted a common, traditional, and widespread societal discrimination.<sup>148</sup> Further, it acknowledged the attacks by guerillas where women were raped, abducted, or killed.<sup>149</sup> However, it found the asylum seeker did not present evidence that she—as a professional woman—would be personally targeted for such treatment.<sup>150</sup>

IDPs are also stigmatized and viewed with suspicion and hostility by host communities.<sup>151</sup> They are especially vulnerable to violence, human trafficking, and recruitment as terrorists, including child recruitment, forced conscription, and sexual assault by members of their new community.<sup>152</sup> Further, displaced widows often encounter obstacles when trying to reclaim the property of their deceased husbands.<sup>153</sup> Though not entirely related to IDPs, many countries have customary practices that see women as objects of inheritance, preventing them from inheriting property, which is particularly impactful for those without other means of survival.<sup>154</sup>

Generally, children are vulnerable if no effective state protection mechanisms are in place. “Unaccompanied children” and “lone children” tend to face a disproportionate share of this vulnerability.<sup>155</sup> For the purposes of this discussion, unaccompanied children are those who fled without their parents or guardians, while lone children are those who had previously lost or could not trace their family members before their displacement.<sup>156</sup> “At the end of 2018, over 17 million children were

147. *Id.* at 15.

148. *Id.*

149. *Id.*

150. *Id.*

151. Clara Inés Atehortúa Arredondo et al., *The Effects of Internal Displacement on Host Communities*, BROOKINGS (Oct. 1, 2011), <https://www.brookings.edu/research/the-effects-of-internal-displacement-on-host-communities/> [<https://perma.cc/H9FA-5NEY>].

152. Erin Mooney, *The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concerns*, 24 REFUGEE SURV. Q. 9, 15 (2005).

153. See U.N. Secretary-General, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, ¶¶ 174, 306, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995) (recognizing the problem of women being unable to own property by explaining how women are entitled rights thereto).

154. *Id.* at ¶ 174 (explaining women are often viewed as objects themselves).

155. Susanna Corona Maioli & Kol Wickramage, *Unaccompanied or Separated Children Face Increased Health Risks During Migration*, MIGRATION DATA PORTAL (July 6, 2022), <https://www.migrationdataportal.org/blog/unaccompanied-or-separated-children-face-increased-health-risks-during-migration-0> [<https://perma.cc/LF3X-4NU8>].

156. See *id.* (defining an unaccompanied child); see also John Hooper, *Africa's Lone Child Migrants Face Robbery and Torture on Journey to Europe*, GUARDIAN (Apr. 18, 2015),

internally displaced by conflict or violence . . . .”<sup>157</sup> The vulnerability of children to internal displacement is disturbing because the consequences are unique and tend to disproportionately affect children.<sup>158</sup> In particular, many children are forced into armed groups, gangsterism, child trafficking, female genital mutilation, forced or underage marriage, and domestic violence.<sup>159</sup> In Afghanistan, for example, “at least one child had been forced to marry in almost a third of IDP households.”<sup>160</sup> All told, 27% of internally displaced girls were forced to marry against their will.<sup>161</sup> When conflict or violence occurs, civilians are not only displaced, but schools, hospitals, and welfare facilities, which should help children survive, are also targeted and destroyed.<sup>162</sup> Further, children from impoverished families sometimes play the role of providers.<sup>163</sup> They are forced to participate in child labor and unregulated labor markets that are rife with illegal activities, which places them at a high risk of exploitation and abuse.<sup>164</sup>

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<https://www.theguardian.com/world/2015/apr/18/africas-lone-child-migrants-face-robbery-and-torture-on-journey-to-europe> [<https://perma.cc/P85L-BXWB>] (describing how many children who are fleeing conflict or persecution often fall victim to their parents being murdered).

157. UNICEF, INT’L DISPLACEMENT MONITORING CTR., PROTECTING AND SUPPORTING INTERNALLY DISPLACED CHILDREN IN URBAN SETTINGS 2 (2019).

158. See Laura Wignall, *What Happens to Children Displaced After a Disaster?*, BBC NEWS (Apr. 30, 2015), <https://www.bbc.com/news/newsbeat-32481542> [<https://perma.cc/PPD8-N2P2>] (explaining how children face greater risks than adults with displacement).

159. See *id.* (describing trafficking and gender-based violence risks); *Children Recruited by Armed Forces or Armed Groups*, UNICEF (Dec. 22, 2021), <https://www.unicef.org/protection/children-recruited-by-armed-forces> [<https://perma.cc/G8TT-3V32>] (describing how children are forced into armed groups).

160. SAMUEL HALL ET AL., CHALLENGES OF IDP PROTECTION 8 (2012).

161. *Id.*

162. Erin Mooney & Colleen French, *Education for IDPs: Poor Marks*, BROOKINGS INST.-UNIV. OF BERN PROJECT ON INTERNAL DISPLACEMENT, <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/education-emergencies/mooney-french.pdf> [<https://perma.cc/M6QS-YF34>]; see *Widespread Destruction of Health Facilities in Ethiopia’s Tigray Region, Doctors Without Borders* (Mar. 15, 2021), <https://www.ethiopiaobserver.com/2021/09/22/more-than-1500-health-facilities-destroyed-or-damaged-in-amhara-and-afar-minister-of-health/> [<https://perma.cc/B65L-6YHV>] (describing how health facilities were deliberately destroyed and occupied by armed groups due to conflicts within the country).

163. See Mooney & French, *supra* note 162 (describing how children often forgo schooling in lieu of providing for their families).

164. See Bureau of International Labor Affairs, *Child Labor, Forced Labor & Human Trafficking*, U.S. DEPT LAB., <https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking> [<https://perma.cc/7UEN-8HK9>] (describing the activities child laborers are often forced to perform).

Most constitutions guarantee the right to peaceful family life and privacy.<sup>165</sup> In the United States, federal courts have upheld the treatment of the “liberty” of familial relationships as a principle under the U.S. Constitution.<sup>166</sup> Starting with *Meyer v. Nebraska*<sup>167</sup> and *Moore v. City of East Cleveland*,<sup>168</sup> the courts have held “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”<sup>169</sup> Children are sometimes regarded as the nucleus of the family with the potential to start a new family when they grow. In states where displacement is frequent, displacement drivers are a particular threat to children.

In addition to the protection guaranteed by national laws, international law also advocates the protection and rights of a child to all its member states through the Convention on the Rights of the Child,<sup>170</sup> recognizing those rights that are available to every child and under circumstances that make children vulnerable to social difficulties. Still, some nations like the United States have yet to ratify it, believing sufficient protection for children is already in place.<sup>171</sup>

Nigeria has about 1.6 million IDPs, including children and women.<sup>172</sup> The country has both ratified and domesticated the Convention on the Rights of a Child through local legislation.<sup>173</sup> This Act makes provisions for children in need of special protection measures, including mentally or physically challenged, and street children.<sup>174</sup> It stipulates that children are

165. *E.g.*, CONSTITUTION OF NIGERIA (1999), § 37.

166. *See* *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (describing how the U.S. Constitution protects the sanctity of the family); U.S. CONST. amend. XIV (containing implicit protection for the right to privacy).

167. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

168. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

169. *Moore*, 431 U.S. at 503.

170. *Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention> [<https://perma.cc/FL4K-YB2W>] (noting the Convention on the Rights of the Child is the most widely ratified human rights treaty in the world and establishes a comprehensive set of goals for individual nations to achieve on behalf of their children).

171. *See United Nations Treaty Collection*, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en) [<https://perma.cc/HBA2-VRK7>] (listing the member states to the Convention on the Rights of the Child).

172. Kusali Kubwalo, *Pregnant and Displaced: Delivering Babies in Conflict Affected North East Nigeria*, UNICEF (Feb. 20, 2018), <https://www.unicef.org/nigeria/stories/pregnant-and-displaced-delivering-babies-conflict-affected-north-east-nigeria> [<https://perma.cc/SZB7-KD7X>].

173. Child’s Rights Act (2003) (Act No. 26/2003) (Nigeria).

174. *Id.*

to be protected in a manner that would enable them to achieve their fullest possible social integration and moral development.<sup>175</sup> Nigeria has also ratified the African Charter on the Rights and Welfare of the Child.<sup>176</sup> Like the Child's Rights Act, Nigeria's legislation does not specify the rights of a displaced child, and both documents emphasize the rights of all children in Nigeria, whether displaced or not.<sup>177</sup>

#### 1. IDPs Without Documentation

Lack of documentation is yet another vulnerability for IDPs. This is a common problem, as documentation is frequently lost, destroyed, or confiscated during flights.<sup>178</sup> The "lack of documentation can lead to denial of access to healthcare, education, and other government services," where the government uses proof of documentation or identity as a prerequisite for receiving social assistance.<sup>179</sup> The problem of documentation also occurs in circumstances surrounding property claims and restitution or compensation upon return.<sup>180</sup> "Moreover, because voting rights are almost invariably tied by laws of general application to the elector's place of residence, a lack of documentation commonly results in the disenfranchisement of the internally displaced, depriving them of a say in the political, economic, and social decisions that affect their lives."<sup>181</sup>

### III. EXPLORING DIFFERENT LEGAL REGIMES OF PROTECTION FOR IDPS

This Article next explores the different legal regimes universally recognized as IDP-protective legal frameworks, which could be international, regional, and municipal in scope. Before analyzing these identified legal frameworks, it is apt to define what the term "protection" entails.

Defining protection in the context of internal displacement is difficult because a protection strategy that works for a particular displacement driver

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175. *See id.* (noting children have the right to the freedom of assembly and a child is to be given protection and care necessary for the child's wellbeing).

176. *Id.*; *see generally* Org. of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, pmbl., (Nov. 29, 1999), <http://hrlibrary.umn.edu/africa/afchild.htm> [<https://perma.cc/73N8-ZCAR>] [hereinafter *African Charter*] (ratifying the need for protection for rights and welfare of the child).

177. *African Charter*, *supra* note 176.

178. Mooney & French, *supra* note 162, at 17.

179. *Id.*

180. *Id.*

181. *Id.*

might not serve to address another type. The term arguably lacks conceptual clarity due to the multidimensional nature of displacement.<sup>182</sup>

There are at least three factors or considerations in developing legal frameworks and responses to the containment of internal displacement. The first factor is whether a state should establish protection strategies to contain each displacement driver within its territory. Each displacement driver attracts a specific legal framework, which could eventually lead to an unnecessary multiplicity of law.

The second factor or consideration is whether states should develop all-encompassing legislation, tackling each displacement driver with a singular approach. However, the drawback is that a singular approach might not work for all displacement drivers because some drivers are sporadic and less threatening, while others are steady, and their recurring effects could lead to more displacements. This approach presents a challenge of prioritizing attention and choosing which driver deserves the most attention considering limited state resources.

The third consideration is that protection strategies may not need new, specifically written legislation at all. The state could expand the interpretation of the existing legal frameworks of human rights protection to address internal displacement drivers until long-term, permanent solutions are found or developed.

These three factors make it difficult to conceptualize specific protection mechanisms for IDPs. States should conceptualize their legal frameworks on a choice-based system—that is, they should adopt appropriate legal frameworks that would best tackle their internal displacement drivers. Once states are able to successfully analyze the required forms of protection framework best fit for their territories, it will be easier to determine how to frame the structure and contents of such a legal framework.

The term “protection” is defined in a policy paper by the Inter-Agency Standing Committee (IASC) and the International Committee of the Red Cross (ICRC).<sup>183</sup> These committees propose that protection

182. See generally PHUONG, *supra* note 10 (analyzing the objective efforts of the U.N. in protecting IDPs).

183. The Inter-Agency Standing Committee (IASC) is the primary mechanism for inter-agency coordination of humanitarian assistance. It is a unique forum involving the key U.N. and non-U.N. humanitarian partners. It comprises U.N. agencies and international NGOs. See generally Inter-Agency Standing Comm. Res. 46/182 (June 1992) (providing various humanitarian emergency assistance resolutions adopted by the Inter-Agency Standing Committee); Int'l Comm. of the Red Cross, *Practice Relating to Rule 132. Return of Displaced Persons*, CUSTOMARY IHL, <https://ihl->

“encompass[es] all activities aimed at obtaining full respect for the rights of the individual by the letter and spirit of the relevant bodies of law: human rights law, international humanitarian law, and refugee law.”<sup>184</sup> The IASC identifies the ideology of “human protection” as a part of the international norm that may be conveyed by international legal frameworks, such as international human rights law, regional agreements, and other non-specific international conventions, all of which could benefit IDPs if interpreted broadly.<sup>185</sup> Examples include the three international bills of rights: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the ICESCR; and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Rome Statute, and the Geneva Conventions.<sup>186</sup>

Beyond the identified international protection frameworks addressed above, national or local protection frameworks and their international counterparts should work in synergy. Since the causes of internal displacement are local concerns within state territories, therefore, national strategies or legal frameworks of protection are more relevant than those developed at the international level because local legislation primarily address the local problems for which it was enacted. Internal displacement is a homegrown problem and therefore would first require the parliament to deploy homegrown strategies before exploring extraterritorial mechanisms of protection. Generally, the international community has a secondary responsibility in preventing the violation of human rights within national territories without violating the international law principle of territorial integrity when it is established that a state has failed in its constitutional duties to ensure that human rights are protected.<sup>187</sup>

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databases.icrc.org/customary-ihl/eng/docs/v2\_cha\_chapter38\_rule132 [https://perma.cc/HYH2-TFKD] (describing the policies of various governments towards internationally displaced persons).

184. PHUONG, *supra* note 10, at 83.

185. Inter-Agency Standing Comm. Res. 46/182, *supra* note 183.

186. See *Practice Relating to Rule 132. Return of Displaced Persons*, *supra* note 183 (describing the policies of various governments towards internationally displaced persons); *United Nations Treaty Collection*, *supra* note 171 (listing treaties in Chapter IV); Rome Statute of the International Criminal Court, July 17, 1998, 2187 T.S. 38544 (explaining the purpose of the Rome Statute, the legal processes, and enforcement procedures).

187. See G.A. Res. 60/1 2005 World Summit Outcome ¶¶ 138–39 (Sept. 16, 2005) (detailing each individual state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing). The document also establishes responsibility for prevention of these crimes, noting that the international community should encourage or assist states with exercising this responsibility. *Id.* The international community has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help protect populations threatened



Therefore, in addition to international legal frameworks, this research identifies and discusses other protection frameworks in the forms of national, regional, and municipal legislation as concurrent protection mechanisms.

#### A. *Treaty and International Law Framework*

For many years, the plight of IDPs remained ignored by national authorities and international organizations.<sup>188</sup> The first response of the international community was the appointment of a representative of the Secretary-General on IDPs, who was tasked with forming a committee of experts on the subject.<sup>189</sup> Subsequently, the Secretary-General, with the help of his committee members, drafted the Guiding Principles on Internal Displacement and initiated the necessity for states to domesticate these principles as part of their local legislation.<sup>190</sup>

The Guiding Principles contain abstract general principles of international law that, to be effectively implemented in a national context, should be domesticated and executed to reflect each country's situation.<sup>191</sup> "The process of developing a comprehensive law or policy presents an opportunity for all relevant stakeholders to share perspectives on the best

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by these crimes. *See id.* (detailing each individual state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing). When a state manifestly fails in its protection responsibilities, and peaceful means are inadequate, the international community must take stronger measures, including collective use of force authorized by the Security Council under Chapter VII. *See id.* (noting states must be prepared to take collective action when peaceable means are insufficient).

188. Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 HUM. RIGHTS BRIEF 1, 7 (2006).

189. *See* U.N. ESCOR, 62d Sess., at 4, U.N. Doc. E/CN.4/2006/71/Add.3 (Dec. 29, 2005) (describing the recommendations by Walter Kälin, Representative of the Secretary-General).

190. *See generally* U.N. ESCOR, 54th Sess., U.N. Doc. E/CN.4/1998/53 (Feb. 11, 1998) (emphasizing the need for each country to implement the Guiding Principles). Francis Deng of Sudan served as Representative of the United Nations Secretary-General on Internally Displaced Persons from 1992 to 2004. Wyndham, *supra* note 188, at 7, 12. His successor was Walter Kälin. *Id.* at 7. Furthermore, the Commission on Human Rights, Resolution 2004/55, provided the framework for a new mandate, that of Representative of the Secretary-General on the Human Rights of Internally Displaced Persons. *Id.* at 11. Giving specific human rights focus to the mandate, it invited the representative to engage in coordinated international advocacy and action for improving protection and respect for the human rights of persons who have become internally displaced. *Id.* In September 2004, Walter Kälin, a Swiss Jurist, was appointed Representative. *Id.* at 12.

191. *See* Wyndham, *supra* note 188, at 7; *see* U.N. Doc. E/CN.4/1998/53, *supra* note 190 (describing how the Guiding Principles are consistent with international law).

practices for addressing internal displacement.”<sup>192</sup> A typical example of states domesticating the Guiding Principles is the one-page Instrument of Adoption of Liberia.<sup>193</sup> This instrument adopts the Guiding Principles as a source of ongoing reference for the protection, dignity, and rights of internally displaced persons in that country.<sup>194</sup>

The fact that Liberia adopted the Guiding Principles does not prevent its government from developing a more tailored law or policy for IDPs in agreement with these principles.<sup>195</sup> Generally, internal displacement is not considered an international law issue, because of the constraint of the sovereignty of states.<sup>196</sup> There is a plausible concern over intervention by the international community and the sovereignty of states regarding internal displacement.<sup>197</sup> However, a human rights approach can lead to a rethinking of sovereignty and intervention with regard to the notion of responsibility.<sup>198</sup>

For practical, legal, and moral reasons, the primary responsibility for protecting IDPs should rest with the state in which they are located, not with international organizations or the community of nations.<sup>199</sup> However, when a state is unable—as opposed to unwilling—to protect the internally displaced, it sometimes requests international assistance.<sup>200</sup> International law is normative and persuasive toward states; it does not bind state actors

192. Wyndham, *supra* note 188, at 8.

193. See Nat’l Legis. Bodies & Nat’l Authorities, *Liberia: Instrument of Adoption of Guiding Principles on Internally Displaced Persons* (Nov. 8, 2004), <https://www.refworld.org/docid/447c56244.html> [<https://perma.cc/LJ66-NE7C>] (adopting the Guiding Principles through a formal document signed by C. Gyude Bryant, Chairman of the National Transitional Government of Liberia).

194. *Id.*

195. See Wyndham, *supra* note 188, at 8 (emphasizing governments should tailor policies to fit issues their respective countries face).

196. See Promod Nair, *Towards a Regime for the Protection of Internally Displaced Persons*, ISIL Y.B. INT’L HUMANITARIAN & REFUGEE L. (2001), <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/10.html> [<https://perma.cc/WS5A-UJVA>] (explaining the UN’s inability intervene in issues that fall within the domestic jurisdiction of states).

197. See *id.* (noting IDPs tend to move from one place to another, requiring protection from multiple different states).

198. See PHUONG, *supra* note 10, at 208 (introducing the concept of rethinking sovereignty and intervention).

199. *Id.* at 185.

200. See *Handbook for the Protection of Internally Displaced Persons*, *supra* note 86, at 487, (noting states should request international assistance when they are unable to adequately protect IDPs).

until they have signed and ratified a treaty.<sup>201</sup> Notably, before the emergence of treaty regimes, international laws were developed by states in alignment with their conventional practices, known as customary international law with two parts: state practice and *opinio juris*.<sup>202</sup>

B. *Beyond the Guiding Principles: Establishing and Enforcing Treaties on the Protection of IDPs*

A treaty is an international agreement intended bind two or more states, and it is written and governed by international law.<sup>203</sup> A treaty is like a contract; however, while signing is an essential requirement to make a treaty, it may not be sufficient to make a treaty effective.<sup>204</sup> A treaty is not made when signed but rather when all parties comply with necessary processes, such as ratification, adoption, signing, depositing, and compliance with the objects and purpose of the treaty.<sup>205</sup> For the purposes here, the relevant question is whether treaties or conventions protect IDPs. The answer is negative, but there are some international norms in the form of soft laws developed to guide states on how they should protect their displaced persons and ensure that their human rights are not violated.<sup>206</sup>

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201. See Nair, *supra* note 196 (explaining the U.N. is unable to intervene in issues that fall within the domestic jurisdiction of states).

202. See U.N. Charter art. 92, 96 (creating the Statute of the International Court of Justice (ICJ)).

203. Vienna Convention on the Law of Treaties 1969, art. 2(1)(a) [hereinafter Vienna Convention].

204. See Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L. J. 824, 829, 837 n.63 (2007) (explaining while treaties are similar to contracts, signing is not enough to make them effective).

205. See *id.* at 838 (“[T]he text of a treaty is merely evidence of the agreement—not the agreement itself.”); Vienna Convention, *supra* note 203, art. 2(1)(b) (naming acts where states establish consent to be bound by treaties).

206. See Walter Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, Brookings/CUNY Project on Internal Displacement 6 (Dec. 19, 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf> [<https://perma.cc/C5ZM-PB8Y>] (describing the Guiding Principles to be soft law or, in other words, recommendations for states to follow).

The Guiding Principles on Internal Displacement includes preventative protection principles.<sup>207</sup> Again, this document is not a convention or a treaty; rather, it guides states on how to treat their IDPs.<sup>208</sup> The document lacks enforcement and does not carry the legal consequences of a treaty.<sup>209</sup> One could argue the intent of the drafters was not to come up with a legal framework or to draft the text of a declaration on the rights of internally displaced persons.<sup>210</sup> The drafters did not have the authority of state actors or international inter-governmental agencies to contract an international agreement on the protection of IDPs on their behalf.<sup>211</sup> They had a great deal of latitude to decide what kind of framework would be appropriate under the circumstances of a global displacement crisis, but for their lack of capacity to contract a treaty in this regard, they effectively developed normative protection ideologies on IDP protection known as the Guiding Principles on Internal Displacement.<sup>212</sup>

A treaty regime on the protection of IDPs could be a viable way of committing states and the international community to a coordinated response to the global containment of displacement. States are generally not bound by an international agreement to which they did not consent.<sup>213</sup> However, if states willingly sign, ratify, and act in line with the object and purpose of the agreement, these states have established a commitment to an international agreement on the protection of IDPs.<sup>214</sup> However, whether states would voluntarily sign, ratify, and comply with the object and purpose of the treaty seems to be the problem in international state practice.<sup>215</sup>

For example, the ICESCR provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic

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207. See *Guiding Principles*, *supra* note 5 (elaborating on preventative protection principles).

208. Kälin, *supra* note 206, at 5–6.

209. *Id.*

210. *Id.* at 1.

211. *Id.* at 2.

212. See Human Rights Council Res. 1996/52, at 165, U.N. Doc. E/CN.4/RES/1996/52 (Apr. 19, 1996) (describing how the Guiding Principles state humanitarian assistance must be provided); see also Kälin, *supra* note 206, at 1–2 (outlining the reasoning for choosing a normative framework).

213. See Kälin, *supra* note 206, at 5–6 (contrasting the Guiding Principles with strict international law that is binding onto nations).

214. See *Handbook for the Protection of Internally Displaced Persons*, *supra* note 86, at 512 (defining ratification as applied to treaties).

215. See Kälin, *supra* note 206, at 3.

and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>216</sup>

Based on this provision, there is an obligation on state parties to “take steps” to achieve the full realization of the rights in the Covenant progressively.<sup>217</sup> These steps comprise of the measures states’ political branches would take to ratify, domesticate, and enforce the treaty.<sup>218</sup> This implies that the treaty would not be enforceable until states take steps by domesticating the treaty to progressively achieve its goal.

Moreover, the latter part of the ICESCR notes that states will take “appropriate means,” which includes the adoption of legislative measures.<sup>219</sup> This treaty will not be automatically enforceable because states have to make an additional effort to adopt measures in parliament that would make the treaty part of the local legislation in a state.<sup>220</sup> An excellent example of this legislative measure is provided in § 12 of the Nigerian 1999 Constitution, which provides for the procedures for the domestication of the international agreement subject to the Constitution.<sup>221</sup>

One of the most profound ways the international community could respond to internal displacement is by making a multilateral convention that addresses all displacement drivers, which could replicate protection measures entrenched as normative principles in the Guiding Principles on Internal Displacement.<sup>222</sup> Having such a multilateral convention on the protection of IDPs would make contracting states have a common interest, which is to collectively tackle internal displacement as a global problem or amongst signatory states that are facing the challenges of internal displacement in their territories. Moreover, to assist the contracting states to frame the contents of the treaty, the object and purpose need not differ from those provided in the Guiding Principles on Internal Displacement.<sup>223</sup>

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216. ICESCR, *supra* note 36, at art. 2 ¶ 1.

217. *Id.*

218. *Id.*

219. *Id.*

220. *See* CONSTITUTION OF NIGERIA (1999), § 12 (noting the measures needed to be taken in order to adopt a treaty into local legislation).

221. *Id.*

222. *See generally* *Guiding Principles*, *supra* note 5 (describing how the Guiding Principles provide practical guidance to address IDPs).

223. *Id.*

Treaties do not have to be made for the protection of IDPs at the international level alone before they are recognized as treaties. Regional instruments are also treaties that can serve the purpose of the protection of IDPs. For example, such instruments include the African Union Convention for the Protection and Assistance of Internally Displaced Persons;<sup>224</sup> the 1984 Cartagena Declaration on Refugees;<sup>225</sup> the Policy Framework for Pastoralism in Africa;<sup>226</sup> and the Great Lakes Pact and its Protocol.<sup>227</sup> Instruments like the UN Secretary General's Agenda for Humanity;<sup>228</sup> the Sendai Framework for Disaster Risk Reduction;<sup>229</sup> and the UN Framework Convention on Climate Change (UNFCCC)<sup>230</sup> are not regional, but they have been used as precedents to draft regional instruments that address the specific subjects for which these international instruments were created. However, these regional conventions are futile if states do not domesticate them and implement them in response to the protection of their IDPs.

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224. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Oct. 23, 2009 [hereinafter Kampala Convention].

225. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, [hereinafter Cartagena Declaration] (“Expressing its conviction that many of the legal and humanitarian problems relating to refugees which have arisen in the Central American region, Mexico and Panama can only be tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts . . .”).

226. See *Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities*, AFR. UNION DEP'T OF RURAL ECON. & AGRIC. I, (Oct. 2010), [https://au.int/sites/default/files/documents/30240-doc-policy\\_framework\\_for\\_pastoralism.pdf](https://au.int/sites/default/files/documents/30240-doc-policy_framework_for_pastoralism.pdf) [https://perma.cc/G35L-M4XY] (describing the purpose of this document is to secure, protect, and reinforce pastoralism in Africa).

227. The Pact on Security, Stability and Development for the Great Lakes Region, Dec. 2006 [hereinafter Great Lakes Pact] (“Promoting policies aimed at disaster prevention, protection, assistance, and the search for durable solutions for refugees and internally displaced persons, as well as their environment.”); Protocol on the Protection and Assistance to Internally Displaced Persons, Nov. 30, 2006 [hereinafter Great Lakes Protocol].

228. See generally AGENDA FOR HUMAN., [agendaforhumanity.org](https://perma.cc/52EE-F8P4) [https://perma.cc/52EE-F8P4] (listing the “five major areas for action and change” to aid those who are vulnerable or in need).

229. See generally *Sendai Framework for Disaster Risk Reduction 2015-2030*, U.N., [https://www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf) [https://perma.cc/6QB6-3WZU] (including precedent from similar regional documents).

230. UNFCCC Paris Agreement, U.N. (2015), [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) [https://perma.cc/D5QL-YMSN].

### C. *The Constitutional Framework*

Globally, no constitutions specifically mention protection clauses regarding IDPs. Notably, while some constitutions answer specific political questions, most of them do not; they deal with general principles of the law as opposed to more specific statutes. The arguments proffered in this section are based on the merits of interpreting general and existing constitutional rights broadly, to cover the protection of IDPs.

Although most constitutions do not specifically use the terminology, “Internally Displaced Persons,” they do mention a category of persons called “vulnerable groups” as a group of individuals in need of special protection.<sup>231</sup> For example, the Kenyan Constitution places an obligation on government departments to address the needs of “vulnerable groups” in the state.<sup>232</sup> Specifically, it mentions the following as vulnerable groups: women, elders, persons with disabilities, children, and members of marginalized communities.<sup>233</sup> These groups align with the argument posited earlier in this work: that IDPs need an interim regime of legal protection because internal displacement places additional vulnerability on already vulnerable persons, and the subset is the same as those identified in the Kenyan Constitution.

The usage of “vulnerable persons” in the Kenyan Constitution could be implied to cover IDPs.<sup>234</sup> It is, therefore, possible to extend the spectrum of protections for ordinary citizens to specific issues like internal displacement. By implication, displaced persons are also classified as vulnerable persons and can rely on every right a constitution guarantees for all citizens—displaced or not—but with exceptions to applicable constitutional limitations.

#### 1. The Right Not to be Displaced as a Constitutional Right

The concept of the right not to be displaced could be framed as part of IDPs’ fundamental human rights, inherent in them as an inalienable right, that predates the existence of a political unit called a state. It is necessary to establish whether it is possible to constitutionalize the right not to be

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231. *See e.g.*, CONSTITUTION art. 21(3) (2010) (Kenya) (discussing vulnerable groups and the government’s duties towards those groups).

232. *Id.*

233. *Id.*

234. *See* The Victim Protection Act, No.17 (2014) KENYAN GAZETTE SUPPLEMENT NO. 143 (bringing into effect Article 50(9) of the Kenyan Constitution and providing for victims of various challenges).

displaced. If it can, this means that such a right exists; if not, it may exist as an interpretation of other already existing human rights.

Although there are no specific protective measures for IDPs in most constitutions, there is an inferred right for people not to be displaced arbitrarily. The right not to be displaced could be inferred based on the right to free movement<sup>235</sup> within a territory because displacement keeps IDPs clustered and restricts their ability to move around or choose where to live, often forcing them into clustered camps or dilapidated buildings. The right to free movement is present if people can determine where they want to go or resettle in situations when IDPs are not unlawfully evicted from their home.

This right can be understood as a dignity right, which encompasses the desire to feel at home and be protected from being deprived of that home, both physically and mentally.<sup>236</sup> It could be inferred from the right to be free from forced eviction and the right to property, which may be understood as the right to own moveable or immovable properties anywhere the owner wishes and to exist within the territorial space of a nation.<sup>237</sup> These inferences are constitutionally recognized as people's fundamental rights, which flow from their citizenship as a member of a state.<sup>238</sup>

No right is absolute, and the right to not be displaced is equally not an absolute human right. However, the scope of the right not to be displaced should provide conditions for limitations and conditions under which displacement could occur without violating a constitution, without being done arbitrarily. Moreover, it is crucial to show the existing connections between the right not to be displaced and the concept of human dignity.

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235. CONSTITUTION art. 39(1) (2010) (Kenya).

236. See generally Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, Nov. 19–20, 2004 [hereinafter Dar-Es-Salaam Declaration] (elaborating on dignity rights of persons who are considered to be displaced).

237. See CONSTITUTION OF NIGERIA (1999), § 43 (discussing property rights of Nigerian citizens).

238. See Antonio Garrigues Walker, *Their Right to Stay Where They Are*, INT'L HERALD TRIB. (Oct. 20, 1993), <https://www.nytimes.com/1993/10/20/opinion/IHT-their-right-to-stay-where-they-are.html> [perma.cc/C2SK-CNTX] (“If we forget the existence of ‘the right to stay,’ we will have not title to prevent the enormous and unstoppable exercise of ‘the right to migrate.’”); see also Patrick M. McFadden, *The Right to Stay*, 29 VAND. J. TRANSNAT'L L. 1, 3 (Jan. 1996) (“In both its urban and rural manifestations, the desire to stay where one is, and not to be moved, is deeply rooted in the human psyche.”); see generally Alfred de Zayas, *Forced Population Transfer*, OXFORD PUB. INT'L L. (Oct. 12, 2010) (exploring the concept of involuntary displacement and its history).



## 2. The Dignity Right of IDPs

This Article examines the concept of dignity in the relationship between human dignity and displacement based on empirical proof from Nigeria and Kenya, two nations currently facing the crisis of population displacement.<sup>239</sup> The concept of human dignity appears increasingly in constitutions, with different meanings; it is a difficult concept to capture in precise terms. The Constitutional Court of South Africa held that “[a]t its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.”<sup>240</sup> It previously held that “recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”<sup>241</sup> This case law describes the attributes of dignity but does not specifically define it.

Textually, the Nigerian Constitution (Constitution) provides for the concept of human dignity.<sup>242</sup> However, whether the state practices what the Constitution says requires empirical examination. Section 17(2)(b) of the Constitution states: “the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced.”<sup>243</sup> Furthermore, § 21(a)(b) says: “The State shall protect, preserve, and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter.”<sup>244</sup> In both the South African case and the Nigerian Constitution, dignity is used to describe bodily protection and social welfare.

The South African case references dignity as protection against capital punishment, while the Nigerian Constitution previously cited protects the sanctity of the human person and other essentials that make life worth living.<sup>245</sup> The human dignity clause under the Nigerian Constitution is both

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239. *Kenya and Nigeria Struggle with Increasing Numbers of Internally Displaced*, RELIEFWEB (Aug. 14, 2015) <https://reliefweb.int/report/nigeria/kenya-and-nigeria-struggle-increasing-numbers-internally-displaced> [<https://perma.cc/X57K-NLKA>].

240. *Nat'l Coal. For Gay and Lesbian Equal. v. Minister of Justice* 1998 (1) SA at 30 para. 28 (CC) (S. Afr.).

241. *S v. Makwanyane and Another*, 1995 (3) SA 391, 1995 SACLR LEXIS 218, at 328 (S. Afr. Constitutional Ct. June 6, 1995) (Langa, J.).

242. CONSTITUTION OF NIGERIA (1999), § 17(2)(b).

243. *Id.*

244. *Id.* § 21(a)(b).

245. *See Uzoukwu v Ezeonu II* [1991] 6 NWLR (pt. 200) para. 33 (Nigeria). In this case, one of the issues for determination was whether it was a violation of the dignity of the human persons to call a person a slave. This had to do with the indignity of subjecting a person to a denigrating definition

broadly and narrowly used, and both are evident under Chapter Two of the Constitution, which is called the Fundamental Objectives and Directive Principles of State Policy, also known as the second generational rights, the blue rights, or socio-economic rights.<sup>246</sup> In Chapter Four, the framers outline fundamental rights; § 34(1) says: “Every individual is entitled to respect for the dignity of his person . . . .”<sup>247</sup>

Another example is the Kenyan Constitution, where human dignity appears first under Article 2; it is used as one of the pillars of the nation’s values and principles of governance.<sup>248</sup> It is used broadly alongside social justice, inclusiveness, equality, protection of the marginalized, human rights, and non-discrimination.<sup>249</sup> It emphasizes that equality is a form of human dignity.<sup>250</sup> The High Court at Nairobi, while linking the concepts of equality and human dignity, reiterated:

[T]he principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. . . . Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.<sup>251</sup>

Therefore, constitutionalizing the protection of IDPs may not appear directly in the wordings of constitutions, but it can be inferred as a constitutional right because certain constitutional concepts—such as equality, protection of vulnerable persons, freedom of movement, right not to be arbitrarily evicted, right to own moveable and immovable property, and access to courts—are fundamental rights that a constitution guarantees

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with regard to personhood. *See* CONSTITUTION OF NIGERIA (1999), § 18 (referencing education, respect, and culture as examples of objectives that enhance human dignity).

246. CONSTITUTION OF NIGERIA (1999), Ch. 2.

247. *Id.* § 34(1).

248. CONSTITUTION art. 10(2) (2010) (Kenya).

249. *Id.* art. 10(2) (2010).

250. *See id.* (“The national values and principles of governance include . . . human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination, and protection of the marginali[z]ed.”).

251. Charles Omanga & Another v. The Independent Electoral & Boundaries Commission & 2 Others (2012) eKLR (Kenya).

to displaced and non-displaced persons, depending on who claims these rights. Other constitutional rights not mentioned here are also available to displaced persons; those rights in themselves do not protect from internal displacement but may be reasonably inferred as general and specific constitutional rights. For example, § 33 of the Nigerian Constitution guarantees the protection of the right to life of everyone in the state.<sup>252</sup> Displaced persons could claim this right by asserting this constitutional provision when the state refuses to provide for their protection from Boko Haram insurgents or when the state does not provide security at IDP camps, which makes it possible for insurgents to enter the camp and kill or abduct young girls. Here, the right to life is contingent on the obligation of the state to provide human security.

#### D. *Statutory and Policy Frameworks Regarding IDPs*

##### 1. Statutory Frameworks

A statute may not end internal displacement, but it can be a reasonable way for states to contain displacement and be guided by some legislative structures that reflect the preventive protection of the Guiding Principles on Internal Displacement.<sup>253</sup> The implementation of such structures shows the proactiveness of the state to protect its population; however, if a statute is not implemented, its existence becomes irrelevant.

While a statute may address specific aspects of displacement, its drivers should be tackled by the general laws available in a state. For example, the legislation dealing with displaced students in a state should not address displacement drivers like global warming as a possible cause of hurricanes. The general environmental laws and policies of concerned institutions are adequate for the containment of these displacement drivers, while a statute may address specific aspects of displacement, like the resettlement of IDPs in former places of permanent residence, compensation, access to court, and documentation.

The importance of developing a national legal framework upholding the rights of IDPs and the adoption of a national policy or plan of action on internal displacement must be emphasized as part of the responsibility of all nations challenged by internal displacement and those likely to experience it

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252. CONSTITUTION OF NIGERIA (1999), § 33.

253. *Guiding Principles*, *supra* note 5.

in years to come.<sup>254</sup> According to Principle 3(1) of the Guiding Principles on Internal Displacement, “national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”<sup>255</sup> The development of a national legal framework upholding the rights of IDPs and the adoption of a national policy or plan of action on internal displacement are considered part of the national responsibility of all states.<sup>256</sup> The focus here is to draw the attention of national authorities to some of the obligations and principles enshrined in the Guiding Principles on Internal Displacement in the context of making statutes in response to internal displacement.

Moreover, statutory adoption for the protection of IDPs is useful only if states ensure these statutes answer specific questions, such as: How exactly will the rights of the displaced persons be protected? By whom? With what funds? Would there be a penalty for failing to safeguard IDPs? Who is monitoring compliance with the statute? What pre-displacement, displacement, and post-displacement plans should be implemented? What are the methods to return or resettle and reintegrate IDPs into their former communities or to new areas of settlement? Until these fundamental questions are answered in the statute, it is unlikely to have a significant impact on protecting IDPs.

Furthermore, national legislation aimed at protecting displaced persons must address a specific cause or specific stage of displacement. For example, in 2003, India passed a bill into law to address the challenge of economic displacement caused by a development project.<sup>257</sup> The policy, known as National Policy on Resettlement and Rehabilitation for Project Affected Families (NPRR), addresses the need to provide comfort to the rural poor who lack assets, and to support the rehabilitation efforts of the

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254. See Francis M. Deng (Representative of the Secretary-General), *Human Rights, Mass Exoduses, and Displaced Persons: Internally Displaced Persons*, ¶ 26, U.N. Doc. E/CN.4/1997/43, (Feb. 4, 1997) (discussing the responsibility of nations with regard to IDPs); Francis M. Deng (Representative of the Secretary-General), *Specific Groups and Individuals: Mass Exoduses and Displaced Persons*, ¶ 100, U.N. Doc. E/CN.4/2002/95, (Jan. 16, 2002) (noting that responsibility for IDPs rests with national authorities); Walter Kälin (Representative of the Secretary-General), *Specific Groups and Individuals: Mass Exoduses and Displaced Persons Mission to Nepal*, ¶ 25, U.N. Doc. E/CN.4/2006/71/Add. 2, (Jan. 7, 2006); Walter Kälin, Representative of the United Nations Secretary-General, Opening Statement on The Human Rights Policy for Internally Displaced Persons, Kampala, Uganda (July 3–4, 2006).

255. *Guiding Principles*, *supra* note 5, at 6.

256. *Specific Groups and Individuals: Mass Exoduses and Displaced Persons*, *supra* note 254.

257. See National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003, § 1.1 (India) (discussing the negative impacts and consequences of displacing people).

communities that do not have access to social amenities or resources: specifically, small and marginal farmers, referred to as Scheduled Castes/Scheduled Tribes(SCs/STs),<sup>258</sup> and women who have been displaced.<sup>259</sup> It extends its mandate to include landless agricultural workers, forest dwellers, tenants, and artisans but does not explicitly answer some gender-related problems faced by some specific vulnerable IDPs, such as women and children.<sup>260</sup> It makes provisions for adult sons to receive compensation but not for adult daughters.<sup>261</sup> This is the same in previous drafts of the NPRR and support provided by the Narmada Waters Dispute Tribunal (NWDIT) Award.<sup>262</sup> Thus, an example of a statute that deals explicitly with the compensation of victims of economic displacement in India; however, it has significant drawbacks in terms of gender inequality.

Angola also made a specific statutory response to internal displacement; as of 2001, about four million persons were displaced because of the country's twenty-seven-year civil war between the government of Angola and the National Union for Total Independence of Angola (UNITA).<sup>263</sup> The number of displaced persons was one-third of the nation's population, during which time Angola had the highest number of IDPs globally.<sup>264</sup> After the civil war came to an end, to resettle displaced persons in their former places of permanent residence, the government of Angola passed a statute to address the problem of population displacement.<sup>265</sup>

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258. See Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, (India) ("The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is an Act to prevent the Commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes and to provide for special Courts for the trial of such offences. By exercising inherent powers Courts are empowered to compound offences under S. C. and S. T. (Prevention of Atrocities) Act, 1989 and Protection of Civil Rights Act, 1955.")

259. See National Policy on Resettlement and Rehabilitation for Project Affected Families (listing women among the protected groups).

260. *Id.* § 1.2.

261. *Id.* § 3.1(j).

262. See INDIA CONST. art. 262 (granting Parliament power to legislate for adjudication of interstate water disputes); see also The Interstate Water Disputes Act, 1956, § 5, at 3 (India) (advising to refer water disputes to the Tribunal); *Narmada Dam Water Disputes between Indian States*, CLIMATE DIPLO., <https://climate-diplomacy.org/case-studies/narmada-dam-water-disputes-between-indian-states> [<https://perma.cc/XNM3-PU6K>] (describing history of such interstate disputes).

263. See Global IDP Project, *Updated Background Information on the IDP Situation in Angola*, RELIEFWEB (Aug. 12, 2002), <https://reliefweb.int/report/angola/updated-background-information-idp-situation-angola-0> [<https://perma.cc/E6NQ-RJR8>] (providing statistics on Angolan IDPs).

264. *Id.*

265. Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01, (Jan. 5, 2011) (Angl.).

This Angolan statute addresses specifically the return and resettlement of IDPs to their homes and communities after their displacement, providing:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following: (a) To plan, organize, and ensure the implementation of all resettlement and return processes for displaced persons; (b) To receive new internally displaced persons and returnees and direct them to the reception centres; (c) To identify the displaced persons who wish to be resettled or return to their areas of origin, giving particular attention to the most vulnerable (widows, children, elderly, disabled) that may require special assistance; (d) To identify resettlement and return sites; (e) To monitor the overall resettlement and return process, ensuring the implementation of the norms on the resettlement of internally displaced populations; (f) To verify the voluntary nature of resettlement and return and the presence of State Administration; (g) To guarantee adequate transportation to assist populations returning to their points of origin; (h) To take appropriate measures to ensure family reunification, and the safety and dignity of populations during movements to return and resettlement sites; (i) To exercise any other competences as determined by higher authorities or conferred by the law.<sup>266</sup>

Although statutes answer more specific questions than constitutions, states should be wary of enacting statutes that provide only partial protection strategies to IDP challenges. The Indian statute mentioned previously addresses development-induced displacement and compensation for affected displaced persons but neglects other ordeals of internal displacement in the country.<sup>267</sup> For example, it provides compensation for male adults but not for female adults.<sup>268</sup> It is also silent on other post-displacement plans like assisted resettlement, access to court to claim compensation if needed, and recovery of property that would help IDPs reintegrate into new communities.<sup>269</sup>

The provisions of the Angolan statute identify the need for resettlement and the return procedure for IDPs to reintegrate into their community but does not address the displacement driver (violence and war) that uprooted

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266. *Id.* at art. 3.

267. *See* The Interstate Water Disputes Act, § 5, at 3 (focusing on development-induced displacement).

268. National Policy on Resettlement and Rehabilitation for Project Affected Families § 1.1.

269. *Id.* § 5, at 3.

them.<sup>270</sup> Although it is unlikely to stop the problem of civil war as a significant displacement driver in the country, the state has a responsibility to incorporate peace-promoting measures in its IDP legislation. It is more likely to be resolved by the general law or mechanisms for conflict resolution that may address the conflict between the government of Angola and freedom fighters, like the Union for the Total Independence of Angola.

States like Bosnia, Herzegovina, Nepal, and Azerbaijan have specific statutes and policies on particular phases of internal displacement. For example, Azerbaijan protects forcibly displaced persons by providing social protection but neglects to account for displacements not triggered by forced migration or displacement.<sup>271</sup> Bosnia and Herzegovina have statutes on displaced persons and general returnees but do not elaborate on pre-displacement and displacement phases (as the Angolan statute does).<sup>272</sup> Nepal has a policy on relief programs for IDPs; this program appears more comprehensive than its counterparts that only address post-displacement problems of resettlement.<sup>273</sup> These different schemes indicate that enactment of broad statutes, which answer questions on the drivers and stages of internal displacement, is crucial to the human rights protection of displaced persons. The best model or description of a statute on the protection of IDPs is to domesticate the Guiding Principles on Internal Displacement in its entirety as a statute because the document addresses pre-displacement, displacement, and post-displacement protection measures.<sup>274</sup>

Another form of the statutory framework focuses on how states could handle specific forms and levels of displacement by addressing the corresponding rights of IDPs. An excellent example is the Turkish statute on the compensation of persons who suffered damage during the flight

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270. *See generally* Norms on the Resettlement of the Internally Displaced Populations, Decree Number 1/01, (Jan. 5, 2011) (Angl.) (omitting a solution for terrorism).

271. *E.g.*, Wyndham, *supra* 188, at 8 (examining the IDP policy of multiple countries, including Azerbaijan).

272. *See generally* Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina, March 16, 2005 (No. 15/05) (detailing Bosnia and Herzegovina's IDP program).

273. *See* Wyndham, *supra* note 188, at 10 (“[The Nepal IDP statute] gives monitoring and evaluation responsibilities to government committees identified at the central, regional, and district levels.”).

274. *Guiding Principles*, *supra* note 5, at 5.

from terror.<sup>275</sup> Although not directly and entirely for the protection of IDPs, it addresses a specific aspect of IDPs' protection in Turkey.<sup>276</sup> This law not only addresses those affected by terrorism but also provides compensation for displaced persons affected by violence-induced displacement.<sup>277</sup>

The Turkish law amplifies the decision of the European Court of Human Rights on the nature of giving adequate compensation. The court held, in *Loizidou v. Turkey*,<sup>278</sup> that when displaced persons are unable to return to their homes because their property has been destroyed or claims against a current occupant are unsuccessful, they are entitled to compensation. The right to an effective remedy suggests that there should be a right to financial compensation when a displaced person cannot repossess her property and when the state has encumbered the plaintiff's right to compensation for the years she had been denied access to her property.<sup>279</sup> The court also held that this decision was based on Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR), which provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions."<sup>280</sup>

The Turkish law further states that "the objective of this law is to lay down the principles and procedures for the compensation of material damages suffered by persons due to terrorist acts or activities undertaken during the fight against terror."<sup>281</sup> Article 2 of the statute regulates:

[T]he principles and procedures regarding the compensation—by way of friendly settlement—of material damages suffered by natural persons and

275. See The Law on the Compensation of Damages That Occurred Due to Terror and the Fight Against Terror, July 27, 2004, No. 5233 (Turk.) (detailing compensation of refugees displaced by terrorism).

276. See *id.* ("This law regulates the principles and procedures regarding the compensation—by way of friendly settlement - of material damages suffered by natural persons and legal entities of private law . . .").

277. See *id.* ("This Law shall also be applicable . . . as well as to losses due to activities carried out within the scope of the fight against terrorism . . .").

278. Case of *Loizidou v. Turkey*, App. No. 15318/89, (July 28, 1998), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58201%22%5D%7D> [<https://perma.cc/5CFZ-N72N>].

279. *Id.*

280. *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS 6 (2002), [https://www.echr.coe.int/Documents/Guide\\_Art\\_1\\_Protocol\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf) [<https://perma.cc/HBE8-PA9N>].

281. The Law on the Compensation of Damages That Occurred Due to Terror and the Fight Against Terror, at art. 1 (Turk.).



legal entities of private law, as a result of the acts falling under Articles 1, 3, and 4 of the Anti Terror Law no. 3713, or due to the activities conducted under the fight against terrorism.<sup>282</sup>

The statute also addresses the establishment of “Damage Assessment Commissions” for implementation and prevention of human rights abuse; the function of the Commission, as provided for in Articles 4 and 5, states that:

Damage Assessment Commissions shall be established in provinces within a period of ten days upon applications made under this law. The Commission shall be composed of one chair and six members. The chairman of the Commission shall be the deputy governor designated by the governor; and the members shall be appointed by the governor from among the public employees working in that particular province and be experts in finance, public works and settlement, agriculture and rural affairs, health, industry and commerce; and a lawyer appointed from among bar members by the managing board of the bar.<sup>283</sup>

According to Jessica Wyndham, coordinator of the American Association for the Advancement of Science (AAAS) featuring in Science and Human Rights Coalition, Turkey explicitly developed the law to facilitate the provision of compensation to those affected by ongoing civil strife within Turkey, many of whom are IDPs.<sup>284</sup>

The Hurricane Education Recovery Act (HERA) passed by the U.S. Congress intended to assist students and teachers affected by Hurricane Katrina.<sup>285</sup> This legislation approved three new grant programs to support

282. *Id.* at art. 2.

283. *Id.* at art. 4.

284. Wyndham, *supra* note 188, at 8.

285. Hurricane Education Recovery Act, Pub. L. No. 109-148, 119 Stat. 2680 (2006).

In 2005, Hurricanes Katrina and Rita had a devastating and unprecedented impact on students who attended schools in the declared disaster area: Louisiana, Mississippi, Alabama, and Texas. Because of the devastating effects, a significant number of students enrolled in schools outside of the area in which they resided before hurricanes struck. Hurricane Katrina alone displaced about 372,000 students, with over 45,000 students displaced to Texas. In response to these extraordinary conditions, Congress created one-time only emergency grants for the 2005–06 school year.

U.S. DEPT EDUC., OFF. INSPECTOR GEN., Final Audit Report in Letter to Mr. Robert Scott (Acting Commissioner of Education, Texas Education Agency) (Sept. 18, 2007), at 1, <https://ed.gov/about/offices/list/oig/auditreports/a06g0009.pdf> [<https://perma.cc/C5UZ-W6YP>].

schools in reopening quickly and meeting the educational needs of the displaced students.<sup>286</sup> The Environmental Impact Assessment (EIA) was created to provide funds to school districts accepting of displaced students.<sup>287</sup>

“To receive the funding, eligible State Education Agencies (SEAs) provided quarterly enrollment counts of displaced students and other application information to the Department of Education.”<sup>288</sup> Displaced students were:

[T]hose students who, on August 22, 2005, were enrolled in a school in an area that the Federal government declared a major disaster area related to Hurricanes Katrina or Rita; and as a result of their displacement by the storms, were subsequently enrolled in schools other than their normal school on specific quarterly count dates.<sup>289</sup>

In § 107(e)(1) of HERA, the authorized uses of EIA funds included compensation of personnel, classroom supplies, mobile educational units, leasing sites, educational services, reasonable transportation costs, health and counseling services, and education and support services.<sup>290</sup> To this end, whether a statute is drafted with a general goal of containing internal displacement or to deal with specific displacement drivers, the enactment of the statute and its enforcement to achieve implementation goals is a practical tool to prevent and manage internal displacement drivers in a state.

## 2. Policy Frameworks

The formulation of national policy as a legal protection framework for IDPs is one way a state could attempt to contain its internal displacement problems. This Article next emphasizes policy as a type of legislation a state could adopt in response to its internal displacement problems. Examples of national policies on the protection of IDPs include the Nigerian draft national policy on internally displaced persons,<sup>291</sup> Uganda’s policy for

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286. Final Audit Report, at 2.

287. *Id.*

288. *Id.* at 2.

289. *Id.*

290. Hurricane Educ. Recovery Act § 107(e)(1).

291. *See generally* Nigerian Draft Policy, *supra* note 7 (outlining the Nigerian policy regarding IDPs).

internally displaced persons,<sup>292</sup> and the Yemen IDP national policy.<sup>293</sup> As noted, a crucial consideration is whether these states implement their policies as designed.

#### IV. DIFFERENCES BETWEEN KENYAN AND NIGERIAN SYSTEMS OF GOVERNMENT ON IDP PROTECTION

This part compares the systems of government in Nigeria and Kenya and reflects on how these differences impact the control of internal displacement in the two countries. It also adopts a comparative analysis of their legal regimes for IDPs, bifurcating the comparisons into two parts—structural and substantive. The structural comparison examines the differences between the systems of government in their administration of internal displacement control mechanisms. The substantive comparison examines the differences in the contents of their legal frameworks by analyzing the differences between the Nigerian policy on the protection of IDPs and the Kenyan statute on the protection of IDPs.

Nigeria has a draft national policy on IDPs, which was developed in 2012; the Kenyan government passed the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Community Act in 2012.<sup>294</sup> The pivotal question is whether Nigeria and Kenya need a special regime of legal protection to meet the protection and assistance needs of their IDPs. Before answering, it is essential to note at least three scholarly positions on the plausibility of adopting legal protection frameworks for IDPs generally. The first is the belief that it is best to leverage existing international human rights and humanitarian law to protect IDPs; the second is that there should be new legal regimes that are comparable to international refugee law but with concentration on the protection of IDPs; and the third is that there must be a unique and all-encompassing legal regime that mainly protects IDPs and addresses all internal displacement drivers.<sup>295</sup>

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292. *See generally* Office of the Prime Minister Department of Disaster Preparedness and Refugees, *National Policy for Internally Displaced Persons*, REPUBLIC OF UGANDA (Aug. 2004) (outlining the Ugandan policy regarding IDPs).

293. *See generally* The National Policy for Addressing Internal Displacement in the Republic of Yemen, *Cabinet Decree No. (148)*, COUNCIL OF MINISTERS EXECUTIVE UNIT FOR IDPS (Jun. 2013) (outlining the Yemeni policy regarding IDPs).

294. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

295. The author here wishes to thank and credit the scholars who introduced him to these schools of thought at a beneficial roundtable discussion focused on migration.

In consensus with the three answers to the justiciability of adopting various legal protection frameworks for IDPs, states should place primacy on general implementation of existing laws and effective public administration. In most cases, the implementation of existing constitutional and human rights, in combination with effective public administration, may suffice for the protection of IDPs. However, this work supports the third existing recommendation for a unique all-encompassing legal regime. The recommendation adds the caveat that, where existing laws cannot fully address some displacement drivers because of their peculiar effects on IDPs, states should adopt comprehensive and special legal regimes of protection addressing peculiar displacement drivers not covered by existing laws. Where states adopt special legal regimes of protection for IDPs, they should ensure those regimes include the minimally required components for a reasonably functioning regime.

More specifically, a minimum requirement for an IDP regime should combine the accessibility of civil rights and the minimum core values of economic rights. It should provide for an effective national database that maintains the registration of all IDPs in the state. Registering IDPs helps enable a state to prepare efficiently for a specific number of persons that need assistance and provides necessary documentation, such as identity cards and travel documents. The components should also provide for monitoring, transparency, and accountability mechanisms. These mechanisms can help to guide against corruption and maladministration of intervention and humanitarian funds for IDPs. Further, a minimum regime should include effective conflict resolution mechanisms. A state should implement mediation measures between host communities and IDPs and prepare for other ethnic clashes requiring resolution. Mid- and long-term developmental projects should also be considered, as well as disaster risk assessments, which may include preemptive, preventive, and protective strategies. Furthermore, stakeholder partnerships that allow the IDPs, private individuals, NGOs, state officials, and the international community to access such measures could prove vital.

There are several reasons for comparing the IDP legal regimes of Nigeria and Kenya. One reason is to determine which regime, either a national policy or a statute, stands a higher chance of success toward IDP protection. In the long run, the choice is to show how the recommendations that result from this two-nation comparison can extrapolate to other states facing internal displacement crises. Its results will help to probe which model could more effectively guide nations in the formation of IDP protection

regimes. However, this Article's recommendations are also based on the premise that different states may have to adopt different measures for the relative protection of their IDPs. This is because states may have unique displacement problems that the model proposed in this two-state comparison may not answer.

Another rationale for comparison is to compare a statute (hard law) and a policy (soft law) in terms of their justiciability and enforceability in the two states. Statutes are formal rules that regulate and prescribe the conduct and political affairs of a state and are formally written.<sup>296</sup> Policy is an informal statement of what the government actually does.<sup>297</sup> Policy explains governance to the citizenry or brings the government's intention closer to the people when implemented. Moreover, this Article also compares the use of administrative and legislative powers to control internal displacement challenges and identifies where such efforts are situated within the constitutional and administrative laws of the two states.

Located in Africa's Sub-Saharan region, Nigeria and Kenya both recognize and replicate contents of the Guiding Principles on Internal Displacement.<sup>298</sup> However, they differ in the signing, ratification, domestication, and enforcement of some regional agreements about internal displacement. Nigeria is a signatory to the Kampala Convention, also known as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.<sup>299</sup> Kenya is not a signatory to the Kampala Convention but instead to the Great Lakes Pact on Internally Displaced Persons.<sup>300</sup> A comparison of the two is in order.

The Kampala Convention is "the world's first continental instrument that legally [binds] governments to protect the rights and wellbeing of people forced to flee their homes [because of] conflict, violence, disasters, and human rights abuses."<sup>301</sup> Currently, forty nations have signed the

296. See *Statute*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A law enacted by a legislative body . . .").

297. See *Policy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A standard course of action that has been established by an organization, business, political party, etc.").

298. See generally *Guiding Principles*, *supra* note 5 (addressing the plight of internally displaced persons worldwide).

299. See generally *Kampala Convention*, *supra* note 224 (describing the African Union's plan for addressing internal displacement).

300. See generally *Great Lakes Pact*, *supra* note 227 (forming a plan towards stability in Africa's Great Lakes region).

301. Internal Displacement Monitoring Centre, *The Kampala Convention, Two Years On: Time to Turn Theory into Practice* (Dec. 2014), <https://www.internal-displacement.org/publications/the->

convention<sup>302</sup> but not all of those have domesticated it. Nigeria, as a signatory, domesticated it in 2019 and is legally bound by its obligations.<sup>303</sup>

In contrast, the Great Lakes Pact, also known as the IDP Protocol, is a regional instrument coordinating IDP protection in Africa's Great Lakes Regions.<sup>304</sup> The regional instrument is a pact on security, stability, and development.<sup>305</sup> It is a legal framework and an agenda of the International Conference on the Great Lakes Region (ICGLR) to create the conditions for security, stability, and development between the member states. It has ten protocols, the most relevant to IDPs in Kenya being the Protocol on the Protection and Assistance to Internally Displaced Persons.<sup>306</sup>

The first difference between the two regional agreements is their sources. The Kampala Convention derives its source from the various members of the African Union—specifically, the 2000 Constitutive Act of the African Union, the 1945 Charter of the United Nations, and Executive Council Decisions: EX.CL/Dec. 129 (V) and EX.CL/127 (V) of July 2004.<sup>307</sup>

In contrast, the source of the IDP protocol is different from that of the Kampala Convention. The background to this protocol is its source, which is the “pact,” an offshoot of the ICGLR on security, stability, and development in the Great Lakes Region.<sup>308</sup> The protocol is a combination of the Protocol on the Protection and Assistance to Internally Displaced Persons and the Protocol on the Property Rights of Returning Populations,

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kampala-convention-two-years-on-time-to-turn-theory-into-practice [https://perma.cc/T2SK-7KZB].

302. *See id.* (listing the various countries who have signed the convention); *see also* Internal Displacement Monitoring Centre, *2016 Thematic Report: 12 Ways the Kampala Convention Provides IDPs with Legal Protection in the Kampala Convention Two Years: Time to Turn Theory to Practice* (Dec. 8, 2014), <https://www.internal-displacement.org/expert-opinion/12-ways-the-kampala-convention-protects-displaced-people-from-legal-limbo> [https://perma.cc/89M9-BTHW] (demonstrating ways the Kampala Convention provides IDPs legal protection).

303. Kampala Convention, *supra* note 224, at 10.

304. *See generally* Great Lakes Pact, *supra* note 227 (containing instructions on how to protect IDPs in the Great Lakes Regions).

305. *Id.* at 1.

306. *Id.* at 6.

307. *See* Kampala Convention Preamble, Oct. 23, 2009, 52 I.L.M. 397, 400–02 (considering the various acts and decisions the member states have made).

308. Great Lakes Protocol, *supra* note 227, at 6.

which was implemented in 2008.<sup>309</sup> It is a regional instrument coordinating the protection of IDPs in Africa's Great Lakes Regions.<sup>310</sup>

The IDP protocol made some changes to the displacement drivers identified by the Kampala Convention.<sup>311</sup> It defines IDPs as "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 to avoid the effects [. . .] of large-scale development projects."<sup>312</sup> The IDP Protocol added "large-scale development projects" as an additional displacement driver to its definition of IDPs. Though the Kampala Convention treats the subject of development projects as a driver, it does not mention it in its definition.<sup>313</sup>

Both regional instruments overlap in some circumstances. A combined reading of Articles 3 and Sections 3 and 4 of the Great Lakes Protocol; and Article 5, § 1 of the Kampala Convention is instructive about the state's responsibility to protect IDPs.<sup>314</sup> Both regional instruments agree that states hold the primary duty to protect their IDPs as their citizens.<sup>315</sup> They agree that this protection could be in the form of humanitarian assistance or the facilitation of existing constitutional protection mechanisms that could help protect IDPs.<sup>316</sup>

Both regional instruments similarly have protection clauses on how displaced communities that are specially attached to their land could be protected from displacement drivers.<sup>317</sup> According to David Kigozi, a law and society scholar:

The Kampala Convention is similar to the IDP protocol in seeking to protect "communities with a special attachment to, and dependency on, land due to

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309. International Conference on the Great Lakes Region, *Humanitarian Social and Environment Issues*, ICGLR, <https://icglr.org/programs/humanitarian-social-and-environment-issues/> [https://perma.cc/G2WB-T973].

310. *See id.* (implementing a program to assist in protecting IDPs).

311. Great Lakes Protocol, *supra* note 227, at 2.

312. *Id.*

313. *See id.* (defining an internally displaced person); *see generally* David Kigozi, *Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact*, INTERNATIONAL REFUGEE RIGHTS INITIATIVE (Jan. 2014), <http://refugee-rights.org/wp-content/uploads/2019/03/Comparative-Note-on-the-Kampala-Convention-and-IDP-Protocol-FINAL-EN.pdf> [https://perma.cc/UCN3-T8RW] (comparing the Kampala Convention and the Great Lakes Pact).

314. *See* Kigozi, *supra* note 313 (outlining the similarities between instruments).

315. *Id.*

316. *See id.* (explaining both instruments encourage states to protect IDPs).

317. *See id.* at 4 (describing how some IDPs are attached to their land).

their particular culture and protection against displacement, except in compelling and overriding public interests.” (Article 4.5). The IDP protocol also provides special protection for displaced populations, communities, pastoralists and other groups, with a special dependence on and attachment to their lands, consistently with the provisions of the International Covenant on Civil and Political Rights 1966, the African Charter on Human and Peoples’ Rights 1981 and the UN Guiding Principles. (Article 4(1)(c)).<sup>318</sup>

The contents of both regional instruments also affirm the similar commitment of member state signatories on tackling the root causes of internal displacement as the best remedy to containing displacement drivers in Africa.<sup>319</sup> They both provide an obligation on state parties to first determine the root causes of internal displacement within their territories by establishing appropriate local measures or frameworks aimed at putting an end to internal displacement.<sup>320</sup> Specifically, while the preamble of the Kampala Convention provides that states should develop local strategies to end persistent and recurrent conflicts, as well as displacements triggered by natural disasters,<sup>321</sup> the Protocol in Article 3, § 1 goes further, by committing states to the prevention of arbitrary displacement and elimination of its causes.<sup>322</sup>

#### A. *The Nigerian Draft Policy and the Kenyan Statute*

Nigeria has a draft policy on IDP protection while Kenya has a statute for the same purpose.<sup>323</sup> The Nigerian Parliament recently adopted an IDP policy identical in practice to the draft policy; however, the state has taken steps toward the protection of its displaced persons.<sup>324</sup> The Kenyan statute enforces IDP protection in court and holds the state responsible for its implementation.<sup>325</sup> This Article next discusses the differences.

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318. *Id.* (quoting the Kampala Convention).

319. *See id.* (detailing how both instruments choose to focus on and address root causes of IDPs).

320. *See id.* (providing information about the similarities between the instruments’ obligations).

321. *See id.* at 5 (outlining the Kampala Convention’s solution for arbitrary displacement).

322. *See id.* (delineating the IDP Protocol’s solution for arbitrary displacement).

323. Nigerian Draft Policy, *supra* note 7; The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

324. Kehinde Akintola, *Nigeria Rolls-Out National Policy on IDPs, Humanitarian Open House*, NIGERIAN TRIB. (Mar. 22, 2022), <https://tribuneonline.com/nigeria-rolls-out-national-policy-on-idps-humanitarian-open-house/> [https://perma.cc/5HF6-5KQK].

325. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.



The first difference between a statute and a policy is enforceability. A statute is enforceable in a court of law, and it is subject to the interpretation of the court on the rights and obligations existing between displaced persons and the state.<sup>326</sup> A policy, as a subsidiary to legislation, may be enforceable and may create rights and obligations if it is a policy in its technical sense.<sup>327</sup> In its nontechnical sense, a policy is a mere reference to what a state wishes to do.<sup>328</sup> Individuals, families, clubs, cultural groups, communities, government departments, and small and large business organizations each make policies in the general or nontechnical form.<sup>329</sup>

In its nontechnical form, a policy can include actions taken in the course of distributing, regulating, and redistributing resources in the state.<sup>330</sup> Although a state and its agencies are the major actors in policy formulation and implementation, the citizenry can play a vital role in this function as well by giving policy initiatives to the government and proposing the formulation of new policy.<sup>331</sup> If an existing policy does not protect the interest of the public, the citizenry can also challenge it in a court of law.<sup>332</sup>

Furthermore, in its nontechnical sense, policy may show certain administrative practices adopted by a government agency as its mode of operation.<sup>333</sup> Generally, this type of policy is not actionable and merely regulates administrative protocols.<sup>334</sup> For example, a state may choose such a policy to determine the time frame in response to resource allocation, procedures in promoting staff members, and public holiday.<sup>335</sup>

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326. See Steven Dukeshire & Jennifer Thurlow, *A Brief Guide to Understanding Policy Development*, RURAL COMMUNITIES IMPACTING POL'Y PROJ. (2002), at 4 (providing a description of policy development).

327. See *id.* at 2 (describing the functions of policy).

328. See generally *id.* (discussing what forms a policy can take).

329. See Devon Dodd & Herbert Boyd, *Food for Thought, What is Policy?*, <http://www.foodthoughtful.ca/section4/4.pdf> [<https://perma.cc/VJD5-BR5F>] (explaining the term "policy" expands beyond the traditional understanding of the word).

330. See Dahida Philip, *Public Policy Making and Implementation in Nigeria: Connecting the Nexus*, 3 PUB. POL. & ADMIN. RSCH. PAPER 56, 56 (2013) (stating the ways in which policy can take form).

331. See *id.* (describing how the public has control over the creation of new policy).

332. *Id.* at 60.

333. See generally Dukeshire & Thurlow, *supra* note 326 (explaining the purpose of policy).

334. For example, parents can make a policy of no TV until their child's school assignment is done; a corporation can create a policy on dress code and work ethics. The use of policy, in this sense, does not attract legal sanctions.

335. See Dodd & Boyd, *supra* note 329, at 27 (discussing a government's role in making public policy).

Nigeria practices federalism: a system of government that, under its constitution, horizontally divides governmental powers among the three levels of government—federal, state, and local.<sup>336</sup> The autonomy of each level is guaranteed by the constitution.<sup>337</sup> The Nigerian Constitution provides for the autonomy of the subnational units, but their powers, as described in the legislative lists, are not equal.<sup>338</sup> Constitutionally, the protection of IDPs in Nigeria depends on whether a particular level of government has the constitutional power to legislate and enforce protection measures on its various components.<sup>339</sup> Most of the protection measures IDPs need are included within the federal government’s exclusive legislative list.<sup>340</sup> State governments would need the federal government’s permission to legislate on such measures.<sup>341</sup> Local governments do not have the constitutional powers or resources to legislate and protect IDPs.<sup>342</sup>

In contrast, Kenya practices devolution, a system of government where a central government transfers power to subnational authorities—the forty-seven county governments.<sup>343</sup> Although the Kenyan Constitution does not specifically mention IDPs, the national government empowers county governments by legislation and not by the Kenyan Constitution, as seen in the Nigerian federal system.<sup>344</sup>

Article 186 § 4 of the Kenyan Constitution provides that, “For greater certainty, Parliament may legislate for the Republic on any matter.”<sup>345</sup> This constitutional provision implies that the national government, and not the county governments, has the exclusive power to legislate and protect IDPs because internal displacement is a national matter.<sup>346</sup> However, the national government could delegate this power to county governments through

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336. See Legal Information Institute, *Federalism*, <https://www.law.cornell.edu/wex/federalism> [<https://perma.cc/7UHV-QQEM>] (explaining how federalism functions).

337. *Id.*

338. CONSTITUTION OF NIGERIA (1999), art. 4.

339. See *id.* (containing a description of the division between the national and subnational governmental units).

340. See *id.* § 4 (listing a number of exclusive legislative powers).

341. See *id.* § 2 (stating the National Assembly has the power to make laws within the federal government’s exclusive legislative list).

342. See *id.* schedule 4, art. 1 (listing the local governments responsibilities).

343. See generally CONSTITUTION (2010) (Kenya) (containing a complete list of constitutional provisions).

344. See generally *id.* (excluding explicit mention of IDPs in the constitution).

345. *Id.* art. 186, § 4.

346. See *id.* (describing parliamentary control of legislative matters over county governments).

legislation to protect IDPs in their territories.<sup>347</sup> In the instrument of legislation, the national government determines the extent of powers the county governments can have concerning IDP protection.<sup>348</sup>

In Nigeria, the national government does not give powers to states and local governments because the 1999 Constitution already delineates governmental powers among these levels of government.<sup>349</sup> Moreover, the federal government cannot determine the extent of powers the subnational governments can exercise, especially if they are not acting outside the exclusive federal preemption.<sup>350</sup>

Moreover, all bills and legislative proposals, whether for the benefit of the national or county governments, originate from the Kenyan National Parliament in line with Article 109 of the Constitution on the legislative powers of the National Assembly.<sup>351</sup> This Article implies the national government in Kenya can make laws for county governments.<sup>352</sup> When specifically tied to internal displacements, laws and policies from the national government are binding for county governments.<sup>353</sup> Arguably, the fact that the national government makes laws and policies for IDPs on behalf of the county governments does not prohibit county governments from making laws to protect IDPs in their territories if they do so within the powers delegated by the national government.

This would depend on the interpretation of powers and functions of the county government and whether the instrument of delegation authorizes county governments to take such protection measures. The devolution of power does not need to address internal displacements specifically; it might be inferred from the role of a county government to maintain law and order or to protect everyone in a county from disaster.

In Nigeria, the National Assembly does not make laws for states' Houses of Assembly or the local government.<sup>354</sup> The states are governed by the laws

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347. *See id.* art. 187 (describing the transfer of functions and powers between the government).

348. *See id.* art. 185 (stating the powers of the subnational government).

349. *See generally* CONSTITUTION OF NIGERIA (1999) (establishing federalism, which creates levels of government).

350. *See id.* art. 4, § 5 (explaining the power of the National Assembly's ability to preempt laws enacted by the House Assembly).

351. *See* CONSTITUTION art. 109 (2010) (Kenya) (containing the legislative powers of the national assembly and parliament).

352. *See id.* (containing the legislative powers of the national assembly and parliament).

353. *Id.*

354. CONSTITUTION OF NIGERIA (1999), art. 100.

of their Houses of Assembly.<sup>355</sup> Therefore, the federal government makes federal statutes and policies for the protection of IDPs as a national response to internal displacement, where necessary.<sup>356</sup>

Although county governments in Kenya depend to a large extent on the laws made by the national government, they can only make laws within the powers devolved to them by the national government.<sup>357</sup> In Nigeria, the autonomy of the states' Houses of Assembly is similar to that of the National Assembly at the federal level, and the National Assembly cannot command states' assemblies.<sup>358</sup> More specifically, the National Assembly cannot use an Act of Parliament to legislate on specific matters or act in a particular way because the Nigerian Constitution defines their separate obligations.<sup>359</sup> Only a court of law may exercise the power of judicial review to compel a state's House of Assembly to comply with its constitutional obligation of lawmaking.<sup>360</sup> A state's House of Assembly can make laws on items in the concurrent and residual legislative lists to protect IDPs in its territory but may not legislate on those items in the exclusive list; further, it does not need a delegation from the National Assembly.<sup>361</sup> In Kenya, county governments have to rely on the national government to make IDP protection laws, except when a statutory devolution from the national government already gives the county governments the power to make such laws.<sup>362</sup>

Under Article 192, § 1 of the Kenyan Constitution, the president can suspend a county government.<sup>363</sup> According to the provision, it must be established that an emergency is arising from internal conflict, war, or some other exceptional circumstance in order to do so.<sup>364</sup> It is not clear if internal displacement qualifies as an emergency that would warrant the suspension of a county government. However, it is plausible to argue that conflict-

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355. *Id.*

356. *See id.* art. 4, § 2 (stating the National Assembly has the power to make laws for the peace and order of Nigeria).

357. *See generally* CONSTITUTION (2010) (Kenya) (establishing a devolution styled Constitution and government).

358. CONSTITUTION OF NIGERIA (1999), art. 4 § 7.

359. *See id.* art. 47–129 § 7 (creating articles that describe the powers and functions of both the National and House assembly).

360. *See id.* art. 6, § 2 (explaining the power of judicial review exists in Nigeria and is solely within the courts).

361. *Id.* art. 4, § 7.

362. *Id.* art. 4, § 7(c).

363. CONSTITUTION art. 192 § 1 (2010) (Kenya).

364. *Id.* art. 192, § 1(a)(b).

induced displacement is a displacement driver that might lead to internal war and, consequently, to such a suspension.

The citizenry can also petition the president to suspend a government.<sup>365</sup> For example, there could be a petition for the suspension of a county or local government in Kenya if human rights violations are present based on Article 19, § 2 of the Kenyan Constitution.<sup>366</sup> By this constitutional provision, the state holds responsibility to protect human rights.<sup>367</sup> It states that “the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and realization of the potential of all human beings.”<sup>368</sup>

The Kenyan Constitution does not mention what other conditions might warrant suspension of government; therefore, what qualifies as “exceptional circumstances” must be scrutinized by an independent commission of inquiry that has investigated allegations against a county government to make the determination.<sup>369</sup> Upon these findings, if the president is satisfied that the claims are justified and the Senate has authorized the suspension, a county government is duly suspended but may be reinstated by the Senate.<sup>370</sup>

In Nigeria, there is no suspension of government but rather the suspension of rights, which is subject to the provisions of the constitution regarding the derogation of human rights.<sup>371</sup> Derogations are not peculiar to the Nigerian Constitution. Almost all constitutions have provisions for the derogation of human rights.<sup>372</sup> In the absence of the suspension of the government in Nigeria, neither the federal government nor the president

365. See generally *Petition for Suspension of the Government of Makeni County*, KENYA LAW (Apr. 29, 2015), <http://kenyalaw.org/kenyalawblog/suspension-of-the-government-of-makeni/> [https://perma.cc/V3H2-6AZK] (petitioning in court to suspend the government). This is an example of the citizenry petitioning for the suspension of a government. At the time of this research the decision of the suspension was not known.

366. See CONSTITUTION art. 19 § 2 (2010) (Kenya) (recognizing and protecting human rights of all human beings).

367. *Id.*

368. *Id.*

369. *Id.* art. 192 § 2.

370. *Id.* art. 192 § 6.

371. See CONSTITUTION OF NIGERIA (1999), art. 45 § 2 (stating the government will not be suspended unless there is a derogation of human rights).

372. See Venice Commission, *Observatory on Emergency Situation*, VENICE COMMISSION, <https://www.venice.coe.int/files/EmergencyPowersObservatory//T09-E.htm> [https://perma.cc/86FC-9VGJ] (listing over fifteen different countries and their use of derogation in their individual constitutions).

may suspend a state government in the exercise of the executive powers.<sup>373</sup> Similarly, the National Assembly cannot suspend a government on the grounds that it is not protecting citizens against displacements in their territories.<sup>374</sup> The national government would be precluded by the principle of federal-state autonomy. The only factor that may suspend the government at either the state or county level is military intervention through a coup d'état, which naturally suspends all governments at all levels and overturns the constitution, replacing it with military decrees and edicts.<sup>375</sup>

However, according to Section 305 of the Constitution, the Nigerian president may, by instruments published in the official gazette of the government of the federation, issue a proclamation of a state of emergency in the federation or any part of the states.<sup>376</sup> This does not literally lead to the suspension of a government. However, for it to be valid, Nigeria must be experiencing the following conditions: at war; an imminent threat of invasion or involvement in a state of war; an actual breakdown of public order and public safety in the federation or any part thereof to such an extent as to require extraordinary measures to restore peace and security; or a clear and present danger of an actual breakdown of public order and public safety in the federation or any part thereof, requiring extraordinary measures to avert such danger.<sup>377</sup> As stated, the IDP crisis in northeast Nigeria is a possible threat warranting a declaration of emergency. For example, in 2013, Nigeria declared a state of emergency in three states following the Boko Haram attacks that killed and displaced people in large numbers.<sup>378</sup>

In Kenya, the government suspension petition has occurred in areas of corruption primarily based on the mismanagement of public funds. Petitions have also arisen from internal conflicts. For example, in 2018, the

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373. See generally CONSTITUTION OF NIGERIA (1999) (prohibiting the federal government or president from suspending the government).

374. See generally *id.* (disallowing the National Assembly the ability to suspend the government for failure to protect citizens).

375. See *Coup d'état*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A sudden, usu[ally] violent, change of government through seizure of power; a quick and often violent attempt by a group to take control of the government. — Often shortened to coup.").

376. CONSTITUTION OF NIGERIA (1999), art. 305 § 1.

377. *Id.* art. 305 § 3 (a)–(f).

378. See generally Korva Coleman, *Nigeria Declares State of Emergency in 3 States*, NPR (May 15, 2013), <https://www.npr.org/sections/thetwo-way/2013/05/15/184201332/nigeria-declares-emergency-in-3-states-over-terrorism> [<https://perma.cc/WDD6-A45B>] (explaining the effects of the Boko Haram attacks had on Nigeria).

residents of Sonko County petitioned President Uhuru and the Senate to dissolve the Sonko County government due to its failure to deliver social services.<sup>379</sup> Lack of social services—or, at minimum, the core of socioeconomic benefits—is a displacement driver, which may be interpreted by a court of law as an emergency that warrants government suspension.

Section 305 of the Nigerian Constitution further states that the governor of a state may declare a proclamation for a state of emergency if the previously identified events are present.<sup>380</sup> The exercise of this power to declare a state of emergency by county governors is not practicable in Kenya unless the national government transfers this authority to the county governments.<sup>381</sup>

Suspending county governments in Kenya implies these county governments, and local governments by extension, would be prevented from taking steps to protect the people under their administrative control. It is best for county governments to communicate with displaced Kenyans at the local levels because they are closer to them than the national government in Nairobi. Therefore, the county government suspension could lead to the discontinuity of the national government, ultimately causing further discontinuity of local IDP protection. While the Nigeria National Assembly does not have the power to suspend the government, military interventions could suspend democratic governments and structures in the state.<sup>382</sup>

#### B. *A Substantive Comparison*

This part examines the substantive differences of the Kenyan statute and the Nigerian draft policy based on their respective governments' choices. These choices differ not because one system is better than the other but because of policy preferences regarding their particular displacement problems. Both governments understand the effects of displacement drivers on their populations and how best to solve them.

According to the Brookings Institution, Kenya's Social Works Department rescues children from the street, including some displaced

379. See generally Betty Njeru, *City Residents Petition Uhuru, Senate to Dissolve Sonko Government*, STANDARD (Sept. 11, 2018), <https://www.standardmedia.co.ke/article/2001295274/petition-to-dissolve-nairobi-county-government-drafted> [https://perma.cc/R7YL-2KTS] (describing Kenyans' desires to rid their government of corrupt officials).

380. CONSTITUTION OF NIGERIA (1999), art. 305 § 4.

381. CONSTITUTION art. 58 (2010) (Kenya).

382. *Coup d'etat*, *supra* note 375.

children who were integrated into new communities and given access to education and other means of surviving until they could reunite with their families.<sup>383</sup> However, the Kenyan statute does not provide for the adoption of displaced children, while the Nigerian IDP draft policy does, and there are no specific laws that govern the adoption of displaced children in Kenya.<sup>384</sup> The Kenyan Social Works Department ensures that displaced children have access to education, food, and shelter.<sup>385</sup>

The United Nations High Commissioner for Refugees Vulnerability Screening Report Round II estimated that in Nigeria there are more than “20,000 displaced, unaccompanied, and separated children across the three States of Emergency.”<sup>386</sup> For instance, “[t]he Office of the National Security Advisor (ONSA) estimate[d] 8,000 children may have been recruited and used by Boko Haram in both combat and support roles.”<sup>387</sup> Children have also been recruited by the Civilian Joint Task Force and vigilante groups.<sup>388</sup> However, the Nigerian policy and the Kenyan statute differ in their recommendations as to how internally displaced children whose parents have died or gone missing during displacement should be assisted. The Nigerian policy provides for their legal adoption of these children, whereas the Kenyan statute does not include such a provision.<sup>389</sup>

Section 3.1.4 of the Nigerian policy provides for the adoption of displaced children.<sup>390</sup> They can fully enjoy their rights under the Nigerian Constitution and relevant state laws. In clear terms, the policy provides that they shall, in particular, enjoy their rights under the Child Rights Act and

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383. See PRISCA KAMUNGI, MUNICIPALITIES AND IDPS OUTSIDE OF CAMPS: THE CASE OF KENYA’S ‘INTEGRATED’ DISPLACED PERSONS 31 (Brookings Inst. 2013) (explaining the process of rescuing children from the streets).

384. See generally The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (lacking any mention of the adoption of IDPs who are children); see also Nigerian Draft Policy, *supra* note 7 (discussing the rights of internally displaced children).

385. Department of Children Services, MINISTRY OF LABOUR AND SOCIAL PROTECTION, <https://www.socialprotection.go.ke/children-services> [<https://perma.cc/Y4CG-F9VE>].

386. UNHCR, ACCESS TO JUSTICE PROJECT REPORT JUNE–DECEMBER 2016, 1 (U.N. High Comm’r for Refugees 2016), <https://data2.unhcr.org/en/documents/download/52663> [<https://perma.cc/WQ6P-QQMT>].

387. *Id.*

388. See *id.* (describing the violence and displacement children experience).

389. See generally The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act; see also Nigerian Draft Policy, *supra* note 7 (containing Nigeria’s policy for adopting internally displaced children).

390. Nigerian Draft Policy, *supra* note 7.



similar laws enacted at the state and local government levels.<sup>391</sup> The draft policy does not provide specific measures for the adoption process, and it is plausible that those interested in adopting displaced children may need to rely on the general laws of adoption and the Child Rights Act.<sup>392</sup>

Pursuant to Section 3.1.4(b) of the draft national policy, an internally displaced child who is orphaned could be adopted by a family from his or her ethnic group or otherwise, which means the child's new family could decide his or her status.<sup>393</sup> The caveat to this type of adoption is that it must not contravene any state or federal legislation on adoption. It is difficult to find an estimate of displaced children who have been adopted in Nigeria because there is no national database for IDPs with which to track their profiles. Subparts (e), (f), and (g) of Section 3.1.4 provide an alternative to adoption, which is foster parenting and ensuring that a child has access to all rights available to all children generally; in addition, former IDPs' status as foster children is not grounds for discrimination.<sup>394</sup>

A crucial part of the Nigerian draft policy is its prohibition of social stereotypes, or ethnocentrism, which is not present in Kenya's statute.<sup>395</sup> Some social stereotypes like the caste system in Nigeria include "Osu," "Abiku," and "Ogbanje."<sup>396</sup> The Osu is an ancient caste system practiced in the eastern part of Nigeria, Igboland.<sup>397</sup> It discourages social interactions and marital relationships with these people, who are known as outcasts.<sup>398</sup> The terms Abiku and Ogbanje "refer to people who are believed to cycle rapidly and repeatedly through birth and death."<sup>399</sup> The group believes a consecutive familial sequence of infants' births and deaths is the same child dying and being born over and over again.<sup>400</sup> Further, "[t]he Igbos believe

391. Child's Rights Act No. 26 (2003) LFN (Nigeria).

392. See Nigerian Draft Policy, *supra* note 7 (discussing the rights of internally displaced children).

393. *Id.*

394. *Id.*

395. See generally Child's Rights Act, *supra* note 391 (containing a prohibition of social stereotypes).

396. See Sunday Ilechukwu, *Ogbanje/Abiku and the Cultural Conceptualizations of Psychopathology in Nigeria*, 10 J. MENTAL HEALTH, RELIGION & CULTURE 239, 239 (2007) (discussing some Nigerian people's beliefs with other Nigerian people's beliefs).

397. Franklin Ugobude, Culture: The Osu Caste System in Igboland, *Guardian Life* (Nov. 18, 2018), <https://guardian.ng/life/culture-the-osu-caste-system-in-igboland/> [<https://perma.cc/7AQT-3WDU>].

398. See Ilechukwu, *supra* note 396, at 239 (defining the terms "ogbanje" and "abiku").

399. *Id.*

400. See *id.* (describing the Ogbanje and Abiku peoples' beliefs in reincarnation of the infant).

that ogbanje results from the subversion of human destiny through the willful alliance of the newborn with deities who guard the postulated interface between the birth and pre-birth (spirit) existence.<sup>401</sup> Another group, the Yoruba, often attribute the Abiku to the possession of a pregnancy by spirit pranksters, known as emere.<sup>402</sup>

These caste groups affect the normal order of social classes, which allows a group of people—who participate socially with one another on equal terms or who would be willing to do so—to find common ground. Although this system violates the constitutional principle of non-discrimination,<sup>403</sup> these culturally-driven caste systems are social stereotypes prevalent in specific Nigerian communities.<sup>404</sup> Accordingly, a stereotyped community that eventually becomes displaced may struggle to resettle in a new host community that previously treated them as a subordinated group.

Comparatively, the Kenyan statute is silent on IDPs who originate from caste communities.<sup>405</sup> However, discrimination on the basis of descent exists in Kenya as well. For example, ever since some Indians migrated to Kenya, discrimination against the Asian and Hindu communities has existed.<sup>406</sup> Hindus in Kenya today are divided into four main castes: Brahmin, Kshatriya, Vaishya, and Sudra, from the highest ranking to the lowest.<sup>407</sup> Generally, there is no provision for intermarriages between the castes, nor is there an ability to move up to a superior caste.<sup>408</sup>

Another type of caste in northeastern Kenya is the Borana community, in northeastern Kenya, which believes that the members of the Watta, or the lower caste, must be confined to a life of servitude and that some members of another caste are less than other human beings.<sup>409</sup> While internal displacement drivers do not necessarily correlate directly with the ethnic lines in which a caste thrives, they uproot people from their locales.

401. *Id.*

402. *Id.*

403. *See* CONSTITUTION OF NIGERIA (1999), art. 15 § 2 (stating national integration should be encouraged).

404. *See* Ilechukwu, *supra* note 396, at 247 (explaining the emere are often seen as bad children).

405. *See generally* The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (lacking information regarding IDPs and their castes).

406. *See generally* Adam Hussein Adam, *Caste in Kenya*, *Center for Minority Rights Development*, THE INTERNATIONAL DALIT SOLIDARITY NETWORK (Aug. 2002), [https://idsn.org/wp-content/uploads/user\\_folder/pdf/Old\\_files/africa/pdf/kenya.pdf](https://idsn.org/wp-content/uploads/user_folder/pdf/Old_files/africa/pdf/kenya.pdf) [<https://perma.cc/5RTY-Q9AH>] (describing examples of how discrimination between caste members takes effect in Kenya).

407. *Id.*

408. *Id.*

409. *Id.*

If the majority of IDPs were Borana, they would not be tolerated if they were resettled in predominantly Sudra communities. The consequence of this intolerance could be an amplification of displacement and ethnic violence. A group of people discriminated against based on their descent is likely to be subject to discrimination by host communities, and government aid may not reach these individuals due to cultural segregation.<sup>410</sup>

The Kenyan statute also differs from the Nigerian policy in its criminalization of internal displacement and resulting sanctions in line with the International Crimes Act of 2008 of the Rome Statute.<sup>411</sup> Although Nigeria is a signatory to the Rome Statute, its draft policy does not provide for criminal sanctions for those who trigger internal displacement drivers. Still, it prohibits arbitrary displacements, and the victims of displacement can seek judicial redress, such as compensation, specific performance, and injunction against the state or corporations and individuals who cause displacement.<sup>412</sup>

The Kenyan government domesticated the International Crimes Act through an Act of Parliament to punish certain international crimes—namely genocide, crimes against humanity, and war crimes—and to enable Kenya to cooperate with the ICC established by the Rome Statute.<sup>413</sup> The Rome Statute criminalizes the following activities: arbitrarily displacing other persons, impeding access of foreign aid or humanitarian serving agencies to IDPs, causing harm to internally displaced persons, causing harm to humanitarian personnel, obstructing the work of humanitarian personnel, obstructing the provision of humanitarian assistance to IDPs, and engaging in other related offenses.<sup>414</sup>

In the ICC, international crime refers to a crime over which the ICC has jurisdiction under Article 5 of the Rome Statute.<sup>415</sup> Although the Kenyan statute does not prohibit displacement, it prohibits arbitrary displacements.<sup>416</sup> Arbitrary displacement occurs when a state implements displacement outside the regulations of the law, and non-arbitrary

410. *Id.*

411. *See generally* The International Crimes Act, No. 16 (2008), (Kenya) (containing information regarding criminalization of certain actions).

412. Nigerian Draft Policy, *supra* note 7.

413. The International Crimes Act.

414. Rome Statute of the International Criminal Court.

415. *Id.*

416. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (prohibiting arbitrary displacement).

displacement means that the law regulates the process of displacing people while the government provides compensation and resettlement plans.

Kenya prescribes punishment in § 6 of the International Crimes Act to humans and entities that trigger displacement.<sup>417</sup> Although internal displacement is not included in ICC jurisdiction when any of the international crimes occur, displacement will probably happen, and those responsible for these international crimes are also held criminally liable. For example, the 2007 presidential election in Kenya, which displaced more than 1 million people, was a subset of the alleged crimes against humanity under which the ICC charged the Kenyan government (Uhuru Kenyatta).<sup>418</sup>

Article 7(2)(d) of the first schedule of the International Crimes Act prohibits the forced displacement of people by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.<sup>419</sup> Article 8(2)(viii) also criminalizes ordering the displacement of the civilian population for reasons related to conflict unless the security of civilians is involved or imperative military bases demand the replacement.<sup>420</sup> Except for Kenyatta's case, the Rome Statute has had no practical effects on how criminal sanctions at the ICC have impacted the protection of IDPs in Kenya.

In contrast, Nigeria, although a signatory to the Rome Statute, has not domesticated the International Crimes Act, and its policy does not include criminal sanctions.<sup>421</sup> A policy is not a sufficient vehicle for criminal sanctions, but the general criminal sanctions from the Nigerian criminal laws could apply. Still, § 3.1.3 provides that IDPs' right to life is guaranteed, with express prohibitions of international crimes such as genocide, war crimes, and crimes against humanity.<sup>422</sup> In practice, those international crimes prohibited in the draft policy can violate the right to life provided under § 33(1) of the Nigerian Constitution.<sup>423</sup> It seems hopeless to be a signatory to the Rome Statute because both countries have indicated intentions to

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417. The International Crimes Act.

418. *See* The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11 (Mar. 13, 2015) (withdrawing charges against Kenyatta after the president was accused of five counts of crimes against humanity).

419. The International Crimes Act, art. 7(2)(d).

420. *Id.* art. 8(2)(viii).

421. *See* Nigerian Draft Policy, *supra* note 7 (discussing the rights of internally displaced children).

422. *Id.* at 3.1.3.

423. CONSTITUTION OF NIGERIA (1999) art. 4 § 33(1).

remove themselves.<sup>424</sup> Kenya departing from the Rome Statute would amend the IDP statute to remove the criminal sanctions pursuant to the Rome Statute; furthermore, the initial decision, set as precedent based on Kenyatta's case, would not be binding as an authority in Kenyan courts. Moreover, all state obligations arising from the statute would lapse and the government would subsequently rely on criminal laws to prosecute individuals and entities that arbitrarily displace people.

The Kenyan statute sets out clear, procedural steps towards IDP justice.<sup>425</sup> It establishes a committee detailing the government's responsibilities toward Kenyan IDPs.<sup>426</sup> This committee is composed of judicial officials who ensure IDPs have access to courts to enforce their rights.<sup>427</sup>

IDPs' access to courts does not only mean physical access; it also means access to legal aid, representation, and judicial oversight. As in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*,<sup>428</sup> the ICC found proof that IDPs in Kenya could not enforce their right not to be discriminated against in local courts. The ICC found evidence of discriminatory practices between IDPs living in camps and those who were not, who were referred to as integrated IDPs.<sup>429</sup> Those IDPs were affected by post-election violence but did not live in camps immediately after their displacement; they were instead eventually reintegrated with their counterparts as IDPs.<sup>430</sup>

The Kenyan IDP statute ensures that a state official designated as the Principal Secretary of the Government Justice and Constitutional Affairs Department would perform monitoring roles to ensure that IDPs have access to courts and that their status is not used as grounds for discrimination.<sup>431</sup> Whether IDPs actually went to court and received the

424. The International Crimes Act.

425. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

426. *Id.* at § 12.

427. *Id.*

428. See *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 (Mar. 13, 2015) (withdrawing charges against Kenyatta after the president was accused of five counts of crimes against humanity); see generally Jean Migabo Kalere, *Genocide in the African Great Lakes States. Challenges for the International Criminal Court in the Case of the Democratic Republic of the Congo*, 5 INT'L CRIM. L. REV. 463 (2005) (providing a synthesis on the factual, theoretical, and judicial problems of genocide in the DR Congo and in the African Great Lakes States).

429. ICC-01/09-02/11.

430. *Id.*

431. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, § 12(3)(f).

necessary remedies is the essence of the issue. For example, in the ICC decision previously mentioned, the Special Rapporteur's 2009 report of the Kenya Human Rights Commission (KHRC) on the IDPs' situation indicated that, in areas like Migori and Rongo in the Nyanza region, there were no visible camps.<sup>432</sup> However, hundreds of displaced persons lived within the community.<sup>433</sup> The government did not provide any form of financial assistance, as these persons were considered to be integrated IDPs.<sup>434</sup> In July 2011, the Kenya National Assembly's Select Committee on the Resettlement of Internally Displaced Persons ("Select Committee") stated that it was informed during several meetings about discrimination in different parts of Kenya regarding the distribution of government aid in favor of the Kikuyu community, while other communities were neglected.<sup>435</sup> Further, there were no avenues by which those IDPs who suffered discrimination could seek judicial redress. Therefore, it is not enough for the statute to provide IDPs with access to the courts; there must also be proof of full access. Some of these channels include the availability of free legal representation, pro bono counseling, out-of-court settlements, legal aid services, and the prosecution of persons who willfully trigger internal displacement drivers.

In one 2010 case, the African Human Rights Commission affirmed the decision of the Kenya High Court in justifying the development of project-induced displacement of the Endorois community in northern Kenya.<sup>436</sup> This community had been displaced by the state's dam construction, which was intended to provide water for a larger Kenyan population.<sup>437</sup> However, the commission upheld their fundamental human right to seek redress from local courts in Kenya, as well as seeking the same redress at the regional level by suing the state at the African Human Rights Commission.<sup>438</sup> The court also held that the Great Lakes Protocol on Internal Displacement and the Internally Displaced Persons Act (2012) empowered IDPs to enforce

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432. Annual Report & Financial Statements, Kenya Human Rights Commission (2009).

433. *Id.*

434. *Id.*

435. *Id.*

436. *See* Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African Commission on Human and Peoples' Rights, Comm No. 276/2003 (Feb. 4, 2010) (holding Kenya violated Articles 1, 8, 14, 17, 21 and 22 of the African Charter and must reconstitute Endorois ancestral land).

437. Implement Endorois Decision 276/03, <https://www.witness.org/wp-content/uploads/2022/04/Endorois-Report.pdf> [<https://perma.cc/6T26-6V5P>].

438. *Centre for Minority Rights Development*, No. 276/2003.

their rights by seeking remedies from regional courts if they were dissatisfied with the judgments given at the national level.<sup>439</sup>

On the other hand, the Nigerian policy on IDP protection is not as robust on substantive and procedural justice as its Kenyan counterpart.<sup>440</sup> The policy does not mention whether there are special tribunals or ad hoc panels in place that can augment the role of the regular courts and provide judicial remedies.<sup>441</sup> IDPs in Nigeria should have access to the same judicial resources described above, but they lack these resources because the draft policy fails to provide them. Section 3.1.4 provides that all human rights in the Nigerian Constitution are available to IDPs but does not provide guidelines on how they would attain those rights.<sup>442</sup> There are no basic legal services for IDPs to enhance their daily living, such as the need for the replacement or reissuance of legal documentation, including birth and death certificates, travel documents, identity cards, probate and testamentary documents, and marriage certificates.

A crucial component of access to justice is the implementation of the Terrorism Prevention Act of 2013.<sup>443</sup> This legislation aims to prosecute terrorism in Nigerian federal courts.<sup>444</sup> Displaced persons whose family members were killed during Boko Haram attacks continue protesting that the government should prosecute insurgents who were arrested in connection with those killings; however, since 2013, some of those alleged insurgents have not been prosecuted, and it has been alleged that the federal government traded those alleged insurgents for some women Boko Haram abducted.<sup>445</sup>

According to the UNHCR, “there is a significant backlog of counter terrorism cases which remain unprocessed due to the lack of adequate

439. *Id.*

440. Nigerian Draft Policy, *supra* note 7; The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

441. Nigerian Draft Policy, *supra* note 7.

442. *Id.*; CONSTITUTION OF NIGERIA (1999) art. 4 § 33(1).

443. *See* Terrorism (Prevention) (Amendment) Act (2013) Government Notice 70 25:100 O.G., (Nigeria) (delineating punishable acts of terrorism and financing).

444. *Id.*

445. *See generally* Francis Diep, *The True Story of the Nigerian School Girls who Survived Boko Haram*, PACIFIC STANDARD (July 10, 2019), <https://psmag.com/ideas/the-true-story-of-the-nigerian-schoolgirls-who-survived-boko-haram> [<https://perma.cc/4KT6-ML8G>] (detailing the story of kidnapped schoolgirls used as trading pawns between Boko Haram and the Nigerian government). Although definitive proof for this point is unavailable, evidence of criminal convictions of insurgents is lacking.

resources, lack of legal frameworks, and policy guidelines on prosecution.”<sup>446</sup> Also,

[T]here are hundreds of cases where the evidence of association with armed groups is not strong enough to secure a conviction in the criminal justice system. While these cases remain outstanding, the suspects remain in detention. It is unclear how many of these cases there are, although some estimates put their numbers in the thousands. It is also not clear whether the humanitarian monitoring of detention facilities and conditions is taking place, whether any or all these suspects have been granted access to legal advice, or even if their families have been told where they are being held.<sup>447</sup>

In Nigeria, more than seven thousand women and girls have been sexually assaulted by terrorists.<sup>448</sup> Women who gave birth while in Boko Haram’s detention have suffered discrimination, and their babies have been termed by their communities as abominable and unwelcome due to cultural undertones.<sup>449</sup> These women and their babies have been described as victims of sexual and gender-based violence.<sup>450</sup> No evidence exists that displaced women and children stigmatized and discriminated against because they are victims of SGBV have been protected by the law. The rights of children are protected by the Child’s Right Act, but it is not clear whether these minors have any legal representation through their parents or guardians to prevent them from discrimination at school and ostracism from their communities. However, the Nigerian Constitution prohibits all forms of discrimination on grounds of race, color, sex, religion, and ethnicity.<sup>451</sup>

### C. *Regional Differences: Signatories to the Kampala Convention on Internal*

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446. See generally ACCESS TO JUSTICE REPORT, *supra* note 386 (discussing the work provided by the UN Refugee Agency to IDPs).

447. *Id.*

448. See generally Temitope Oriola, *Unwilling Cocoons, Boko Haram’s War Against Women*, 40 J. STUD. CONFLICT & TERRORISM 99, 101 (2017) (providing an analysis of the effects Boko Haram is having for women and communities).

449. Samuel Oyewole, *Boko Haram and the Challenges of Nigeria’s War on Terror*, 29 J. ON DEF. & SEC. ANALYSIS 253 (2013) (explaining Nigerian government countermeasures to Boko Haram).

450. See generally *id.* (explaining the impact of Boko Haram on Nigeria).

451. See CONSTITUTION OF NIGERIA (1999), § 42 (1) (detailing prohibited forms of discrimination).



*Displacement*

The provisions of the Kampala Convention and the Great Lakes Pact are similar in content, objectives, and structures.<sup>452</sup> The Kampala Convention, also known as the AU, is the response of nations to unify protection mechanisms for African IDPs in a single legal document targeting internal displacement on the continent because Africa currently houses the majority of the world's IDPs.<sup>453</sup> If the continent could drastically reduce its internal displacement problems, it would have positive effects on lowering external displacement and refugee congestion globally.<sup>454</sup>

Although the merit or drawbacks of the Kampala Convention is not the focus of this work, African nations that have signed it explore how to approach internal displacement. Currently, twenty-five nations have signed the convention, but not all of them have domesticated it.<sup>455</sup> Nigeria is one such signatory, domesticating it in 2019.<sup>456</sup> Therefore, Nigeria is legally bound by its obligations.

Kenya is not a signatory to the convention but signed the Great Lakes Pact on internal displacement: another regional instrument on IDP protection for states in the Great Lakes region of the continent.<sup>457</sup> The critical difference here is that Nigeria's draft IDP policy replicates the principles of the Kampala Convention to frame some of its protection measures regarding a state's responsibility to IDPs.<sup>458</sup> The Kenyan statute does not replicate Kampala Convention provisions but includes the normative principles entrenched in the Guiding Principles on Internal Displacement.<sup>459</sup>

In contrast, the protection measures and principles in the Kampala Convention are binding on Nigeria without reservation because Nigeria is

452. See generally Kigozi, *supra* note 313, at 7 (providing a comparison between the Kampala Convention and the Great Lakes Pact).

453. Kampala Convention, *supra* note 224.

454. See Adeola, *supra* note 101, at 41 (critiquing Nigeria's implementation of the IDPs African convention).

455. *Id.*; see also IDMC 2016 *Thematic Report*, *supra* note 302 (noting how the Kampala Convention has provided some legal protections to internally displaced persons).

456. See generally Cedao Ecowas, *Comparative Experiences on Implementing the Kampala Convention in West Africa*, GLOBAL PROTECTION CLUSTER (Mar. 21–22, 2019) (comparing implementation of the Kampala Convention within West Africa).

457. Great Lakes Pact, *supra* note 227.

458. Nigerian Draft Policy, *supra* note 7.

459. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

obliged to obey the treaty by not infringing on its objects and purpose or acting in any way that violates its integrity.<sup>460</sup> Nigeria, as a dualist state, does not apply international agreements directly as the law of the land until the National Assembly domesticates them through a ratification and domestication instrument, usually legislation. The process of domestication is enshrined in § 12 of the 1999 Constitution of Nigeria.<sup>461</sup> In a 1997 case, the Supreme Court held that once domesticated, an international treaty like the Kampala Convention becomes applicable as an enforceable law in Nigerian courts.<sup>462</sup> As a signatory to an international agreement that has been domesticated in Nigeria, the federal government must give effect to such international agreements, and this effect could be achieved through legislation.<sup>463</sup>

A potential justification for Kenya's failure to sign the Kampala Convention could be that the Great Lakes Pact is sufficient to protect its IDPs.<sup>464</sup> However, Kenya has consolidated protection mechanisms in the Guiding Principles on Internal Displacement,<sup>465</sup> the Kenyan Constitution,<sup>466</sup> the Great Lakes Protocol,<sup>467</sup> and other human rights frameworks to enact a statute passed by the legislators and binding on all state institutions in Kenya.<sup>468</sup> This is an impressive development, as the displacement figures in Kenya have drastically reduced since the inception of the statute.<sup>469</sup> However, while cause for the reduction in the number of IDPs in Kenya could be the implementation of the IDP statute, it is not definitively known.

#### D. *Public Awareness and Other Issues*

There has been a paradigmatic shift in Kenya's efforts to create public awareness of internal displacement; for example, schools have even included

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460. Kampala Convention, *supra* note 224.

461. CONSTITUTION OF NIGERIA (1999) § 12.

462. General Sanni Abacha et. al. v. Chief Gani Fawehinmi [1997] LRCN 45 (Nigeria).

463. Kampala Convention, *supra* note 224, at art. 3(2)(a).

464. Great Lakes Pact, *supra* note 227, at art. 12–13.

465. *Guiding Principles*, *supra* note 5.

466. CONSTITUTION art. 59 (2010) (Kenya).

467. Great Lakes Protocol, *supra* note 227, at art 4.

468. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act § 12.

469. See KAMUNGI, *supra* note 383, at 25 (noting the progress of IDP resettlement in Kenya following enactment of the IDP statute).

the subject within classroom curriculum.<sup>470</sup> The government department responsible for education has been tasked with developing and implementing a training curriculum on the causes, impacts, and consequences of internal displacement—as well as on the means of prevention, protection, and assistance to IDPs—to be integrated into syllabi at all levels, starting in early childhood education development centers.<sup>471</sup> In 2010, the Kenyan National Commission on Human Rights started an awareness and advocacy program to build the internal capacity of human rights organizations and various state departments involved in monitoring the IDP situation in Kenya.<sup>472</sup> Kenya has also implemented awareness programs as provided in the statute by translating the Guiding Principles and the Great Lakes Pact on Internal Displacement into Kiswahili.<sup>473</sup>

Nigeria, on the other hand, does not have an education training curriculum for raising awareness of internal displacement, nor does it have mechanisms in place to teach internal displacement through educational institutions, such as schools. However, the country has other means of creating IDP awareness among the general public and within communities prone to displacement drivers. Nigeria's public awareness initiatives are organized through its Ministry of Interior and promote awareness through community resilience programs such as town hall meetings, publicity on IDP camps, and host communities.<sup>474</sup> Section 4.1 of the Nigerian draft policy specifies that it is the responsibility of the national government to create awareness among to the public on how to ameliorate internal displacement.<sup>475</sup> Still, unlike its Kenyan counterpart, the policy does not

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470. See The Prevention Protection and Assistance to Internally Displaced Persons and Affected Communities Act § 17(2) (requiring public awareness, education, and information campaigns to occur in schools and learning institutions).

471. See *id.* § 18(2) (implementing certain educational initiatives to raise awareness around Internally Displaced Persons and communities).

472. See generally KAMUNGI, *supra* note 383, at 23 (discussing the rising issue of displacement in Kenya and its solutions).

473. See The U.N. Office for the Coordination of Humanitarian Affairs, *Horn of Africa Crisis Situation Report*, No. 19 (Oct. 21, 2011) (explaining Kenya providing education kits and emergency preparedness to children in areas affected by heavy rains, border conflict, and disease outbreaks).

474. See Nigerian Draft Policy, *supra* note 7, at § 4.1 (2) (obligating relevant entities to implement effective measures to raise national awareness of displacement issues).

475. Nigerian Draft Policy, *supra* note 7, § 4.1.

comprehensively discuss what means of communication it intends to use to achieve this purpose.<sup>476</sup>

Public awareness is a useful tool for communicating to people how to prepare for displacement drivers that may affect them if they become unavoidable. Empirically, Kenya's awareness programs appear to be more productive than Nigeria's. Public awareness through either approach is a valid response to contain internal displacement, yet room for improvement remains.

Another crucial difference between the Kenyan statute and the Nigerian draft policy is their data management and monitoring mechanisms through which to enhance the registration, profiling, and documentation of IDPs.<sup>477</sup> Accordingly, in the Kenyan statute, one of the functions of the National Consultative Coordination Forum, the overall coordinating body liaising with the government and other international organizations on behalf of IDPs, is to ensure the registration of all IDPs in order to maintain a national database of such persons.<sup>478</sup> The statute provides a thirty-day timeline for registration of displaced Kenyans.<sup>479</sup>

This process involves ascertaining the identification, profile, conditions, and numbers of IDPs in Kenya.<sup>480</sup> The purpose of this profiling is to implement Article 3 (4) of the Great Lakes Protocol, which provides, "Member States shall be responsible for assessing the needs of internally displaced persons and shall, to the extent necessary, assist them with registration and, in such cases, Member States shall maintain a national database for the registration of internally displaced persons."<sup>481</sup>

In contrast, Nigeria's draft IDP policy merely anticipates that the government would develop a national database for IDPs.<sup>482</sup> Currently, Nigeria lacks a reliable national database with a comprehensive profile of IDPs. The policy anticipates the establishment of a national IDP databank

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476. Compare *id.* (providing no means to promote public awareness), with The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (requiring the Kenyan government to create education and information campaigns on displacement).

477. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act; Nigerian Draft Policy, *supra* note 7.

478. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, § 13(d)(i)–(iii).

479. *Id.* § 13(d)(i).

480. *Id.* § 13(e).

481. Great Lakes Protocol, *supra* note 227, art. 3(4).

482. Nigerian Draft Policy, *supra* note 7.

and clearinghouse to verify and profile IDPs in Nigeria.<sup>483</sup> Currently, Nigeria uses figures provided by the Ministry of Interior and the National Population Commission to furnish the names of persons believed to be displaced in Nigeria.<sup>484</sup> Nigeria could develop a national databank for IDPs independently of the draft policy's implementation. The main issue is whether Nigeria has the political will to develop a national database for the registration of its IDPs.

Furthermore, the Kenyan statute criminalizes persons who provide false information during the verification or profiling of IDPs or who falsely present themselves as IDPs.<sup>485</sup> Convicted persons may face a fine not exceeding 5 million shillings, a maximum of ten years imprisonment, or both.<sup>486</sup> The Nigerian policy does not criminalize false information or profiling of those who are not IDPs for the purpose of illegally benefiting from the meager resources earmarked for the protection of bona fide displaced persons. Every displaced person in Nigeria should have a proper means of identification.

To ensure this right, in line with its policy, Nigeria should facilitate the issuance or replacement of legal documentation for IDPs.<sup>487</sup> Some of the necessary documentations include ID cards, passports, family cards, voter cards, property deeds, educational records, birth certificates, marriage certificates, vocational training certificates, and other professional certificates to facilitate gainful employment.

Furthermore, the Nigerian draft national policy adopts special protection strategies for IDPs living with HIV/AIDS.<sup>488</sup> The policy admits that the disease is more contagious in congested locations like IDP camps and other public facilities, and special protection for sub-categories of IDPs living with HIV/AIDS—such as children, pregnant women, and elders—is imperative.<sup>489</sup> The policy provides for an extension of existing government agencies' responsibilities to cater to IDPs at all levels of displacement.<sup>490</sup> To

483. *Id.* § 6.2.

484. Stanley Nwosu, *We Will Count Special Populations, and Locations in the 2023 Census- NPC Chairman*, NAT'L POPULATION COMM'N, <http://nationalpopulation.gov.ng/we-will-count-special-populations-and-locations-in-the-2023-census-npc-chairman/> [<https://perma.cc/RS7F-E5JT>].

485. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, No. 56, § 24(a)–(b).

486. *Id.*

487. Nigerian Draft Policy, *supra* note 7, §§ 5.2(e), 5.1.3(f).

488. *Id.* § 3.1.7(a).

489. *Id.* §§ (d), (f).

490. *Id.* § 3.1.7.

this end, federalism plays a vital role in resource control and institutional management of HIV/AIDS in IDP camps in Nigeria; this process includes the National Agency for the Control of AIDS (NACA) at the federal level, State Agencies for the Control of AIDS at the state level (SACA), and the Local Agencies for the Control of AIDS (LACA).<sup>491</sup> These institutions have established a coalition with international humanitarian agencies, non-governmental organizations, and local community-based support groups to contain the spread of HIV/AIDS among IDPs.<sup>492</sup> In contrast, the Kenyan statute does not address IDPs living with HIV/AIDS but uses the protection strategies recognized in its Constitution and statute, as well as the available healthcare system, to take care of all Kenyans displaced or not.

E. *Similarities Between the Nigerian Draft Policy and the Kenyan Statute*

There are structural, institutional, and objective similarities between the Nigerian draft policy and the Kenyan statute on IDP protection.<sup>493</sup>

Both the Nigerian draft policy and the Kenyan statute adopt a human rights-based approach in analyzing protection measures.<sup>494</sup> Both systems are based on a belief that the factual circumstances of internal displacement should not constrain or violate IDPs' human rights. This human rights-based approach "is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights."<sup>495</sup> The choice of this approach particularly emphasizes the protection of IDPs' inalienable rights as human beings, which should be protected in alignment with international law standards. This strategy emphasizes the combination of the civil political rights and socioeconomic rights of IDPs.

Providing the ordinary constitutional and legal protection in both regimes might be sufficient to meet the international obligations regarding IDPs. Nigeria and Kenya may not need special regimes of protection if they simply

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491. *Id.*

492. *Id.*

493. Nigerian Draft Policy, *supra* note 7; The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

494. *See* Nigerian Draft Policy, *supra* note 7, § 4.3.1; The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act. pt. VI § 23 (1) (providing principles of prevention and public awareness).

495. U.N. Human Rights Based Approach Portal, *What is a Human Rights Based Approach?*, <http://hrbportal.org/faq/what-is-a-human-rights-based-approach> [https://perma.cc/8Y9B-MUT8]

enforce the ordinary and existing measures of human rights protection in their constitutions. If not implemented, laws and policies do not implement themselves. States must enforce their legal regimes.

In Nigeria and Kenya, IDPs' needs are a combination of civil, political and socioeconomic rights, and all are protected in both constitutional regimes. The Nigerian Constitution provides for fundamental human rights, which are also called civil political rights.<sup>496</sup> For example, the right to life under § 33 (1), Chapter II of the Nigerian Constitution contains socioeconomic rights or the fundamental directives and principles on state policy.<sup>497</sup> The right to education, for instance, is addressed under § 18(1).<sup>498</sup> However, it also states that socioeconomic rights are non-justiciable.<sup>499</sup> IDPs in Nigeria need their lives protected from displacement drivers as a civil political right, and they at least need the minimum standards of education, water, food, clean environment, and the preservation of their cultural rights. To achieve the human protection of IDPs in Nigeria, a political right is not more important than an economic right because both are necessary for survival. There is no physical life without food, shelter, and potable water. This is the context in which the Nigerian draft policy uses the idea of existing constitutional protection.<sup>500</sup>

In Kenya, the human rights approach ensures that the state prioritizes the protection of IDPs' human rights through a combination of civil, political rights, and minimum standards of socioeconomic rights. The constitution provides that the bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic, and cultural policies.<sup>501</sup> The fundamental freedoms included in the bill of rights do not exclude other rights not expressly mentioned in the constitution.<sup>502</sup> The guaranteed rights are valid, except to the extent they are inconsistent with the bill of rights.<sup>503</sup> Furthermore, the Kenyan Constitution has expressly recognized education as a right for all Kenyans, including IDPs.<sup>504</sup> Article 53(1)(b) provides that

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496. CONSTITUTION OF NIGERIA (1999) ch. IV.

497. *Id.* ch. IV, § 18(1).

498. *Id.* § 18(1).

499. See generally Iyabode Ogunniran, *Enforceability of Socioeconomic Rights: Seeing Nigeria Through the Eyes of Other Jurisdictions* 1 U.J. INT'L L. & JURIS. 61 (2010) (analyzing the enforceability of socioeconomic rights in Nigeria and comparing it to other jurisdictions).

500. Nigerian Draft Policy, *supra* note 7.

501. CONSTITUTION art. 19(1) (2010) (Kenya).

502. *Id.* art. 19(1)(b).

503. *Id.* art. 19(3)(b).

504. *Id.*

every child has the right to basic education.<sup>505</sup> The textual reading shows that Kenyan IDPs have the right to education; while the IDP statute does not explicitly include education as a right, it adopts the concept of socioeconomic need in Article 43(1).<sup>506</sup> The Kenyan IDP statute does not mention all socioeconomic rights but focuses on a few of them, including education, employment, health, and housing, as crucial needs that displaced persons need to survive.<sup>507</sup>

Both states have similar structures and strategies for IDP protection. For example, both use their existing institutions or their state departments to contain internal displacement drivers because neither has specific departments for the management of the crisis. They extend the primary responsibilities of their state departments, which are connected directly or indirectly to particular displacement drivers, to be integrated into a more extensive scope of operations described in their enabling laws because they recognize the national scope of the problem.

Another similarity is that both states are signatories to international and national instruments on the protection of IDPs, as previously discussed. They both posit that what happens within their borders can affect other states, the whole region, and even the entire continent if not well contained. To regulate internal displacement within regions in Africa, the two states adopted regional instruments that replicate the Guiding Principles on Internal Displacement and the Universal Declaration of Human Rights.<sup>508</sup>

Based on this analysis of the differences and similarities in both states, Nigeria and Kenya have robust theoretical regimes for the protection of their IDPs, but implementation is lacking. A particular regime is not better than the other if both states require substantive improvements of implementation. Specifically, the Nigerian government could immediately implement the protection measures as full-throated national policy. Other states could adopt either a statute or a policy, but the overarching principle is that their protection regimes should reflect the minimally required components for a reasonably functioning IDP protection regime.

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505. *Id.* art. 53(1)(b).

506. *Id.* art. 43(1)(f).

507. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

508. See generally *Guiding Principles*, *supra* note 5 (addressing specific needs of internally displaced persons and providing protections and assistance during displacement); Universal Declaration of Human Rights, *supra* note 36 (proclaiming a common standard of respect for human rights and freedoms).



## V. CONCLUSION

Internal displacement drivers constitute—*Hostis Humani Generis*, or, a common enemy of humankind. Whether for the Nigerian Ogoni people in the south, victims of Boko Haram insurgency in the country's north, the native American tribes in Montana, South Dakota residents seeking the protection of their ancestral homeland, the Endorois community in Kenya, Australian aborigines, Native Americans, or the Inuit in the Arctic, culture is a significant component that underscores human rights and the dignity of IDPs' personhood. Unfortunately, internal displacement drivers operate to erode the cultural relevance of IDPs once uprooted from their homes without the hope of resettlement.

Beyond cultural displacement, these drivers cause other negative consequences on a state's economy, loss of labor, eventual emigration, and unaccounted death or losses.<sup>509</sup> These are the costs or effects, which amplify the need for states to adopt legal protection regimes for their displaced persons and ensure those regimes are implemented as designed.

Some of the protection legal frameworks for IDPs are international, regional, and national laws. Experience has shown that these frameworks are useless if adopted but not implemented as designed. Due to the multidimensional nature of internal displacement drivers, one can plausibly argue that a synergized framework in which a single law addresses all displacement drivers with cognizance of their peculiarities may stand a chance of success for effective protection of IDPs. When case law or judicial precedent is silent on subjects like internal displacement, states can enact a statute, adopt and sign a treaty, or develop policies to face such a crisis. However, these legal frameworks of protection are not as important as the political will to implement them. Stagnancy is the major obstacle for the protection of IDPs' human rights.

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509. *Guiding Principles*, *supra* note 5, at 2.

2023]

*INTERNALLY DISPLACED PERSONS*

487