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## Improvement with Impunity: Development-Induced Displacement and the Guiding Principle 6(2)(c) Proportionality Test Applied to the Merowe Dam Project in Sudan

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## COMMENT

# IMPROVEMENT WITH IMPUNITY: DEVELOPMENT-INDUCED DISPLACEMENT AND THE GUIDING PRINCIPLE 6(2)(C) PROPORTIONALITY TEST APPLIED TO THE MEROWE DAM PROJECT IN SUDAN

TREVOR L. GROSS\*

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## INTRODUCTION

The government of Sudan is nearing completion of the Merowe Dam, a large hydroelectric dam north of Khartoum, Sudan's capital.<sup>1</sup> Reports differ, but at the Dam's completion, the reservoir behind it will stretch to approximately 175 kilometers in length.<sup>2</sup> To accommodate the vast size of the reservoir, the government of Sudan is displacing approximately 60,000 people.<sup>3</sup> As most are not leaving Sudan, they will join the ranks of the world's twenty-four million internally displaced persons ("IDPs").<sup>4</sup> A U.N. Special Rapporteur to

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1. See *Advocacy Group Calls to Suspend Merowe Dam Construction*, SUDAN TRIB., Mar. 23, 2006, <http://www.sudantribune.com/spip.php?article14670> [hereinafter *Suspend Merowe Dam Construction*] (observing that the Dam is the largest hydroelectric project being built in Africa today); Simon Apiku, *New Dam to Power Sudan from Next Year*, REUTERS, Aug. 15, 2007, <http://www.reuters.com/article/latestCrisis/idUSMCD541789> (reporting that two of the of Dam's ten turbine units will be online in 2008 for a total production of 250 megawatts of electricity, and the other eight will be operational by the end of 2009).

2. *Compare Suspend Merowe Dam Construction*, *supra* note 1 (stating that the reservoir will extend 200 kilometers), with PETER BOSSHARD & NICHOLAS HILDYARD, INT'L RIVERS NETWORK, A CRITICAL JUNCTURE FOR PEACE, DEMOCRACY, AND THE ENVIRONMENT: SUDAN AND THE MEROWE/HAMADAB DAM PROJECT: REPORT FROM A VISIT TO SUDAN AND A FACT-FINDING MISSION TO THE MEROWE DAM PROJECT § 3 (2005), <http://internationalrivers.org/files/050428merowe.pdf> [hereinafter *FACT-FINDING MISSION*] (estimating that the reservoir will extend 174 kilometers).

3. See Press Release, United Nations High Commissioner on Human Rights [UNHCHR], U.N. Expert Urges Sudan to Respect Human Rights of Communities Affected by Hydro-Electric Dam Projects (Aug. 27, 2007), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/E8A869684389FFA0C1257344005DD01D?opendocument> [hereinafter *UNHCHR Press Release*] (noting that women, children, and the elderly are among the over 60,000 people whom the project will displace); see also *FACT-FINDING MISSION*, *supra* note 2, § 6 (stating that the project will displace 9,500 families, for an estimated total of 50,000 people); Edmund Sanders, *The World: Fears of Another Darfur: As Tensions Flare over Proposed Dams, Many Predict Sudan's Nubia Region Will Be the Next to Erupt in Violence*, L.A. TIMES, Aug. 31, 2007, at A1 (predicting that the waters will displace 70,000 people).

4. See INTERNAL DISPLACEMENT MONITORING CENTRE & NORWEGIAN REFUGEE COUNCIL, INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2006 6 (Anne Glusker ed., 2007), available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/9251510E3E5B6FC3C12572BF0029C267/\\$file/Global\\_Overview\\_2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/9251510E3E5B6FC3C12572BF0029C267/$file/Global_Overview_2006.pdf) [hereinafter *INTERNAL DISPLACEMENT*] (listing statistics on IDPs and indicating that Africa is the most affected continent); see also U.N. Econ. & Soc. Council [ECOSOC],

Sudan has called for work on the Dam to stop until the government of Sudan guarantees the safety of those affected.<sup>5</sup>

This Comment explores the actions of Sudan's government as it displaces its citizens to complete the Merowe Dam project. Part II provides background information on IDPs and Sudan's experience with IDPs.<sup>6</sup> Part II also introduces the relevant instruments of international law addressing IDPs, including the International Covenant on Civil and Political Rights ("ICCPR"),<sup>7</sup> the International Covenant on Social, Economic, and Cultural Rights ("ICESCR"),<sup>8</sup> the Guiding Principles on Internal Displacement ("Guiding Principles"),<sup>9</sup> and the Rome Statute of the International Criminal Court ("ICC").<sup>10</sup> Finally, Part II discusses the Merowe Dam project and the flaws in its implementation.<sup>11</sup> Part III argues that Sudan is violating, among other things, provisions of the ICCPR and ICESCR as well as the Guiding Principles.<sup>12</sup> Part III also argues that

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Comm'n on Human Rights, *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39*, Intro., ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng) [hereinafter *Guiding Principles*] (defining internally displaced persons as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence . . . and who have not crossed an internationally recognized State border").

5. See UNHCHR Press Release, *supra* note 3 (urging the government of Sudan to adhere to accepted international standards in carrying out the Merowe Dam project, encouraging nations funding the project to ensure that the project does not violate human rights, imploring the companies involved in the construction of the dam to stop their work until the project's impact on human rights can be examined, and calling for an independent review by U.N. human rights monitors).

6. See discussion *infra* Part II (explaining the criteria for labeling people as IDPs and describing Sudan's extensive IDP problem).

7. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

8. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

9. *Guiding Principles*, *supra* note 4.

10. Rome Statute of the International Criminal Court, June 15-July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

11. See discussion *infra* Part II (presenting benefits of the Dam such as increased availability of electrical power in Sudan and the problems the Dam and its implementation present such as dangerous downstream water level variance).

12. See discussion *infra* Part III (specifying provisions of the Guiding Principles such as the right to choose one's place of residence and the right to an

Principle 6(2)(c) of the Guiding Principles is too vague and that the principle does not provide enough guidance for evaluating large development projects as a legitimate source of displacement.<sup>13</sup> Part III concludes by arguing that Article 7 of the Rome Statute gives the ICC the power to prosecute those responsible for the displacements in Sudan.<sup>14</sup>

Part IV recommends the establishment of a framework of regulations for Guiding Principle 6(2)(c) that elucidate the requirements for a justified forced relocation for a development project.<sup>15</sup> Part IV also recommends that Sudan adhere to international law as it undertakes the Merowe Dam project.<sup>16</sup> Part IV concludes by advocating prosecution of those who are responsible for the displacements under Article 7 of the Rome Statute.<sup>17</sup>

## I. BACKGROUND

IDPs are a worldwide problem.<sup>18</sup> The Guiding Principles recognize IDPs as a population distinct from traditional refugees and seek to apply some of the protections of international instruments to IDPs.<sup>19</sup> When large development projects cause internal

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adequate standard of living).

13. See discussion *infra* Part III (exploring the ambiguity of Principle 6(2)(c)'s proportionality test, which weighs the aggregate benefits of the project against the injury to those the project will displace).

14. See discussion *infra* Part III (detailing the procedure for U.N. Security Council review of a suspected human rights abuse and eventual referral to the U.N. Special Prosecutor in the event of such abuse).

15. See discussion *infra* Part IV (recommending that the Guiding Principles require that those displaced by large development projects benefit directly from the project that displaced them).

16. See discussion *infra* Part IV (urging Sudan to provide IDPs with an adequate standard of living).

17. See discussion *infra* Part IV (challenging the ICC's propensity to refuse to admit internal displacement cases).

18. See Roberta Cohen & Francis M. Deng, *Introduction*, in *THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED* 1, 1 (Roberta Cohen & Francis M. Deng eds., 1998) (recognizing that the number of nations affected by IDPs grew from eleven in 1982 to thirty-five in 1997); see also *INTERNAL DISPLACEMENT*, *supra* note 4, at 6 (reporting that by 2006, IDPs affected fifty-two countries).

19. See Bill Frelick, *Aliens in Their Own Land: Protection and Durable Solutions for Internally Displaced Persons*, in *WORLD REFUGEE SURVEY* 1998 30, 32 (1998) (reflecting on the Guiding Principles' definition of IDPs and focus on

displacement, the Guiding Principles present a proportionality test for determining the acceptability of the displacements.<sup>20</sup> As a large development project, such a test applies to the Merowe Dam project.<sup>21</sup> Forced displacement without adequate justification can constitute a crime against humanity, which allows the ICC to prosecute those responsible.<sup>22</sup>

#### A. IDPS AND SUDAN'S ONGOING PROBLEMS WITH IDPS

Historically, international instruments have not adequately protected IDPs, and this remains true today.<sup>23</sup> In the absence of binding law to specifically protect IDPs, national and international bodies have had difficulty determining which human rights guarantees apply to IDPs and how to apply them effectively.<sup>24</sup>

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protection of those displaced as opposed to the location of those displaced in order to best provide for IDPs).

20. See WALTER KÄLIN, AM. SOC'Y OF INT'L LAW, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 17 (2000) (positing that for a large development project causing displacement to proceed, Guiding Principle 6(2)(c) provides that the project must meet the "requirements of necessity and proportionality" to show "compelling or overriding public interests"); see also WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL: OPERATIONAL POLICIES: INVOLUNTARY RESETTLEMENT para. 2(a) (2001), available at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> [hereinafter OP 4.12] (clarifying the World Bank's policy on involuntary resettlement by permitting development projects provided that all viable alternatives are explored in the interest of avoiding displacement).

21. See discussion *infra* Part II.B.2 (outlining the benefits of the Merowe Dam project weighing against the harm of the displacements the project is causing); see also SUDAN TRIBUNE, *supra* note 1 (addressing the far-reaching impact of the Merowe Dam project, the largest hydroelectric dam project underway in Africa, on the environment of Sudan).

22. See Rome Statute, *supra* note 10, art. 7(1)(d) (listing forcible transfer of population as a crime against humanity prosecuted by the ICC).

23. See THOMAS G. WEISS & DAVID A. KORN, INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES, at xvii (Routledge 2006) (describing present efforts within the U.N. to protect IDPs as "frustratingly inadequate"); see also Cohen & Deng, *supra* note 18, at 1-2 (recognizing the lack of a protection mechanism for IDPs despite the global impact of internal displacement).

24. See ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 74 (1998) [hereinafter MASSES IN FLIGHT] (noting that "internally displaced persons do not forfeit their inherent rights because they are displaced," but the method for protecting these inherent

Existing instruments of international law continue to protect IDPs.<sup>25</sup> Such international instruments must compete with state sovereignty—the concept that an international body should not regulate activities taking place within a state’s borders.<sup>26</sup> However, this attitude is beginning to change, with the concept of sovereignty impressing upon nations a responsibility to respect their citizens.<sup>27</sup> An instance in which a state cannot or will not respect the human rights of its citizens raises the possibility that the international community will intervene.<sup>28</sup> In cases involving IDPs, this is often necessary because relying on the government that displaced the IDPs to protect them is impracticable.<sup>29</sup> As a response to abuse of

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rights has proven elusive).

25. See generally *id.* at 73-122 (providing an overview of the framework for protection of IDPs which includes such documents as the ICCPR, ICESCR, the Geneva Convention of 1949, and the International Labor Organization Conventions).

26. See U.N. Charter art. 2, para. 1 (acknowledging the importance of sovereignty by stating that “the principle of the sovereign equality of all its Members” is the foundation of the United Nations); see also WEISS & KORN, *supra* note 23, at 5 (admitting that nations have viewed sovereignty as a pretense for acting with impunity with respect to their citizens).

27. See WEISS & KORN, *supra* note 23, at 3 (distilling the concept of sovereign responsibility into two component parts: the responsibility of states to protect their citizens’ human rights and an international responsibility to intervene when states fail to do so); see also Friedrich Kratochwil, *Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?*, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 21, 42 (Gene M. Lyons & Michael Mastanduno eds., 1995) (arguing that there is a right to state intervention “when such interventions are based on the institution of the protection of nationals, or on the measures taken under Chapter VII of the [U.N.] Charter”).

28. See, e.g., U.N. Sec. Council, Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶ 569, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter *Darfur Inquiry*] (imploping the international community to act when Sudan did not act to stop the atrocities in Darfur); see also CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 214 (2004) (insisting that protection of individual human rights is now an international concern); Jeff Nicolai, Comment, *Operation Murambatsvina: A Crime Against Humanity Under the Rome Statute?*, 21 AM. U. INT’L L. REV. 813, 835 (2006) (referring to international protection of citizens when sovereign governments fail to protect them as an “emerging principle” of international law).

29. See, e.g., Luke T. Lee, Current Development, *The London Declaration of International Law Principles on Internally Displaced Persons*, 95 AM. J. INT’L L. 454, 457 (2001) (analogizing the situation of state governments protecting IDPs to wolves guarding chicken coops).

sovereignty, the international community has developed means of prosecuting individuals who allegedly are responsible for causing unlawful internal displacements.<sup>30</sup>

Sudan has the highest population of IDPs in the world.<sup>31</sup> Sudan's nearly twenty-year civil war and ensuing humanitarian crises led to many of the displacements.<sup>32</sup> Unlike these cases, the Merowe Dam presents an unambiguous case of a government's directly displacing persons for a development project it has undertaken.<sup>33</sup>

#### B. THE GUIDING PRINCIPLES AND THE PRINCIPLE 6(2)(C) PROPORTIONALITY TEST

The Guiding Principles provide protection for displaced persons and seek to avoid displacement altogether.<sup>34</sup> There are exceptions to the Guiding Principles' proscription of displacement, one of which allows displacement resulting from large development projects if the

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30. See Rome Statute, *supra* note 10, art. 7 (calling "deportation or forcible transfer of population," whether internal or international, a crime against humanity falling within the jurisdiction of the International Criminal Court); *cf.* Nicolai, *supra* note 28, at 816-17 (explaining that the ICC can still have jurisdiction over countries not party to the Rome Statute if the U.N. Security Council "refers the situation to [the] ICC prosecutor").

31. See INTERNAL DISPLACEMENT, *supra* note 4, at 6 (indicating Sudan's 5,355,000 IDPs places it first globally in internal displacement).

32. See Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 108-09 (2002) (explaining that the civil war is a result of tensions between an Islamic government and a non-Muslim rebel army, and the displacements are the result of the elimination of squatters around Khartoum and villages around oil fields). See generally Hiram A. Ruiz, *The Sudan: Cradle of Displacement*, in THE FORSAKEN PEOPLE, *supra* note 18, at 139, 139-74 (recognizing that internal displacement has affected Sudan more heavily than nearly all other nations in the twentieth century and describing the geographical, racial, political, and economic geneses of the issue).

33. See Dams Implementation Unit, Merowe Dam Project: Resettlement, <http://merowedam.gov.sd/en/social.html> (last visited Aug. 18, 2008) [hereinafter Resettlement] (discussing the relocation procedures Sudan proposes for those displaced, indicating that the government is aware that the Merowe Dam project is displacing people).

34. See generally Jean-Philippe Lavoyer, *Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law*, 38 INT'L REV. RED CROSS 467, 467-80 (1998), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57jpg9> (recognizing that the Guiding Principles' emphasis on avoiding displacement altogether is a reaffirmation of international humanitarian law concerning IDPs).

projects provide sufficient benefits for the public.<sup>35</sup> Therefore, the displacements caused by the Merowe Dam project warrant an analysis of the proposed benefits of the Dam under Guiding Principle 6(2)(c).<sup>36</sup>

*1. The Guiding Principles Generally and Principle 6(2)(c)  
Addressing Large Development Projects*

The Guiding Principles address the proper treatment of IDPs in all stages of displacement.<sup>37</sup> IDPs do not receive the same protections as refugees,<sup>38</sup> but they are equally, if not more, in need of such protections.<sup>39</sup> The purpose of the Guiding Principles is to clarify and complete the protections that existing international instruments provide.<sup>40</sup> This close relationship between the Guiding Principles and

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35. See Simons, *supra* note 32, at 146 (assessing the legality of forced relocation by positing that relocation must not be “based on an arbitrary purpose or process,” but rather on a public purpose compelling enough to justify the relocations); see also Maria Stavropoulou, *The Right Not to be Displaced*, 9 AM. U.J. INT’L L. & POL’Y 689, 729 (1994) (intimating that the international community views development-induced displacements differently than displacements resulting from violence or other human rights violations).

36. See discussion *infra* Part II.B.2 (discussing the potential benefits of the Merowe Dam project to the Sudanese people).

37. See KÄLIN, *supra* note 20, at 2 (presenting the phases of internal displacement as “protection against displacement; protection during displacement; . . . [provision of] humanitarian assistance; and protection during return, resettlement, and reintegration”).

38. See PHUONG, *supra* note 28, at 25 (proposing that legal protection of refugees is a “surrogate protection,” in which the international community assumes the responsibility for providing protection that would otherwise have been the responsibility of the home state, whereas protection of IDPs is a “complementary protection” that coexists with state protections, and contending that the categorizations should remain distinct to avoid diluting existing refugee protections); see also Francis M. Deng, *Section Three: International Processes: Divided Nations: The Paradox of National Protection*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 218 (2006) (noting that although the state is often the cause of internal displacement, the international community considers protection of IDPs to be the state’s responsibility).

39. See PHUONG, *supra* note 28, at 7 (noting that IDPs often live with poorer conditions and higher death rates than refugees because they are frequently inaccessible to aid agencies).

40. See *id.* at 58 (explaining that in addition to restating general norms of protection, the Guiding Principles apply them specifically to IDPs); see also KÄLIN, *supra* note 21, at v (stating that the Guiding Principles address “gray areas and gaps” in existing international law).

existing international law allows the Guiding Principles to serve an indicative function<sup>41</sup>—when a party fails to respect the nonbinding Guiding Principles, the party typically violates binding international law as well.<sup>42</sup> Although the Guiding Principles are not binding international law, both states and non-state actors widely respect them.<sup>43</sup>

Section One of Principle Six of the Guiding Principles proscribes arbitrary displacement.<sup>44</sup> Section Two of Principle Six presents a non-exhaustive list of situations in which the Guiding Principles prohibit displacement, including large-scale development projects, while still allowing some exceptions.<sup>45</sup> Read as a corollary, large

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41. See Lavoyer, *supra* note 34, at 467-68 (explaining that the Guiding Principles incorporate elements of “international humanitarian law, human rights law, and refugee law,” suggesting that the Guiding Principles draw attention to the synergies of these bodies of law with the protection of IDPs).

42. See *Guiding Principles*, *supra* note 4, princ. 5 (cementing the close relationship between the Guiding Principles and international law by requiring conformity with the latter).

43. See, e.g., WEISS & KORN, *supra* note 23, at 109-10 (citing Liberia, Sri Lanka, and Burundi, among others, as states that have issued policies and made declarations based on the Guiding Principles); Francis M. Deng, *International Response to Internal Displacement: A Revolution in the Making*, HUM. RTS. BRIEF, Spring 2004, at 24, 25 (lauding the extension of the invocation of the Guiding Principles’ application past states to non-state actors such as the Sudan People’s Liberation Movement/Army, a rebel group that considered the Guiding Principles in establishing its own rules on IDPs); Hanna Entwisle, *Tracing Cascades: The Normative Development of the U.N. Guiding Principles on Internal Displacement*, 19 GEO. IMMIGR. L.J. 369, 370-71 (2005) (stating that the Guiding Principles have become “surprisingly influential” in a short time span and underscoring the significant international attention paid to “contravention” of the Guiding Principles despite their nonbinding status); Pooja Mehta, Comment, *Internally Displaced Persons and the Sardar Sarovar Project: A Case for Rehabilitative Reform in Rural India*, 20 AM. U. INT’L L. REV. 613, 621-23 (2005) (recognizing the emergence of a normative framework, outlined by the Guiding Principles, for protection of IDPs as the result of the failure of the international community to produce an agreement similar to the 1951 Refugee Convention).

44. See *Guiding Principles*, *supra* note 4, princ. 6 (“Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”); see also KÄLIN, *supra* note 20, at 14 (noting that the Guiding Principles explicitly addressed arbitrary displacement, which human rights law had failed to do).

45. See *Guiding Principles*, *supra* note 4, princ. 6(2) (“The prohibition of arbitrary displacement includes displacement: (a) When it is based on policies of apartheid, ‘ethnic cleansing’ or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population; (b) In

development projects are an acceptable basis for displacement in a case where a government can show great public need.<sup>46</sup> Walter Kälin, the current Representative of the U.N. Secretary-General on the Human Rights of Internally Displaced Persons, introduced a proportionality test to determine if a development project is acceptable under the Guiding Principles.<sup>47</sup> The third and final section of Principle Six limits the duration of displacement—presenting another element of the proportionality analysis.<sup>48</sup> However, this provision may cause difficulty in instances where displaced persons cannot return to their original place of residence.<sup>49</sup>

## 2. Proposed Benefits Relevant for a Principle 6(2)(c) Proportionality Analysis

According to the Sudanese government, the Merowe Dam project proposes myriad benefits for Sudan and its citizens.<sup>50</sup> Foremost is the Dam's considerable power generating capability.<sup>51</sup> At full capacity,

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situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand; (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests; (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and (e) When it is used as a collective punishment.”).

46. See Interview by Debbie Elliot, Host, All Things Considered, with Miloon Kothari, U.N. Special Rapporteur on Adequate Hous. (Sept. 2, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14130080> [hereinafter NPR Interview] (conceding that while often detrimental, large-scale development projects may displace people if those displaced can “continue with their livelihood”).

47. See KÄLIN, *supra* note 20, at 17 (positing that a state must prove the “compelling and overriding public interests” required by the Guiding Principles to meet the requirement of “necessity and proportionality”).

48. See *Guiding Principles*, *supra* note 4, princ. 6(3) (“Displacement shall last no longer than required by the circumstances.”).

49. See KÄLIN, *supra* note 20, at 19 (asserting that prolonged displacement contradicts human rights norms and inhibits finding lasting solutions to questions surrounding IDPs).

50. See Dams Implementation Unit, Merowe Dam Project: About the Dam, <http://merowedam.gov.sd/en/location.html> (last visited Aug. 18, 2008) [hereinafter About the Dam] (indicating that the electrical power from the Dam will allow new industrial projects, development of a fishing industry in the lake created by the Dam, improved access to groundwater through use of electrical pumps, and a higher standard of living for those around the lake).

51. See Dan Morrison, *The Quest for Oil: China Invests while Sudan Wars in Darfur*, U.S. NEWS, July 29, 2007, available at <http://www.usnews.com/usnews/news/articles/070729/6china.africab.htm> (stating that, when fully operational, the

the Dam will increase the available electrical supply of Sudan's power grid by 150%.<sup>52</sup> Sudan lags behind the rest of the world, even the developing world, in availability of electricity, and the addition of the Merowe Dam will allow for much greater electrification.<sup>53</sup>

While the government of Sudan primarily cites electrical power as the reason for constructing the Merowe Dam, the government also proposes several other benefits, including flood control and irrigation of the arid land around the Dam.<sup>54</sup> Floods are a major problem in Sudan,<sup>55</sup> and in 2007, they affected half a million people in only three months.<sup>56</sup> If the Dam works as planned for flood control, the water level downstream from the Dam will continue to vary

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Merowe Dam will produce 1,250 megawatts of electricity).

52. See Apiku, *supra* note 1 (determining that just the initial two turbines, producing 250 megawatts, will immediately reduce some of the strain on Sudan's national power grid).

53. See FACT-FINDING MISSION, *supra* note 2, § 2 (revealing the degree to which Sudan is in need of electricity by explaining that in a nation of nearly forty million people, only 700,000 have electricity). Compare Central Intelligence Agency, The World Factbook: Sudan, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Aug. 19, 2008) (indicating Sudan's energy consumption of 3.298 billion kilowatt hours (kWh) for a population of 40,218,455 yielding only approximately 82 kWh per capita), with Central Intelligence Agency, The World Factbook: Egypt, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (last visited Aug. 19, 2008) (indicating Egypt's consumption of 84.49 billion kWh for a population of 81,713,517, or approximately 1034 kWh per capita).

54. See About the Dam, *supra* note 51 (lauding the dam as a solution to Sudan's slow economic and social development).

55. See American Red Cross: American Red Cross Presents Its Most Recent News and Research Developments, LIFE SCI. WKLY., Aug. 21, 2007, at 5945 (warning that seasonal flooding typical in Sudan during the summer could affect up to 2.4 million people in 2007).

56. See Badru Mulumba, *River Nile Could Displace One Million Sudanese*, NEW VISION (UGANDA), Aug. 19, 2007 (reporting that flooding destroyed 30,000 homes in Sudan and left an estimated 150,000 people homeless); FEWS South Sudan Food Security Watch Dec 2007 - Flood Induced Crop Losses Threaten Food Security, RELIEFWEB, Dec. 11, 2007, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EDIS-79TS27?OpenDocument> (noting that floods impacted an estimated 500,000 people between October and December 2007); FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, THE SUDAN: FLOODS FLASH APPEAL 2007 (2007), [http://www.fao.org/emergencies/tce-appfund/tce-appeals/appeals/emergenc-y-detail0/en/?uidf=1426&tx\\_ttnews%5Btt\\_news%5D=1077&tx\\_ttnews%5BbackPid%5D=1388&cHash=a](http://www.fao.org/emergencies/tce-appfund/tce-appeals/appeals/emergenc-y-detail0/en/?uidf=1426&tx_ttnews%5Btt_news%5D=1077&tx_ttnews%5BbackPid%5D=1388&cHash=a) (proposing relief projects for Sudan following a season of devastating flooding).

radically.<sup>57</sup> These variations will be predictable, but may cause problems.<sup>58</sup> The Sudanese government presents irrigation as another benefit of the Dam, but experts are skeptical about the ability of the Sudanese government to implement such a program.<sup>59</sup>

### C. THE BINDING INTERNATIONAL LAW OF THE ICCPR AND ICESCR PROTECTS IDPS

Sudan is party to both the ICCPR and the ICESCR, both of which historically have offered a limited degree of protection to IDPs.<sup>60</sup> The documents are entirely consistent with the Guiding Principles, and although they are general in scope, they apply to IDPs.<sup>61</sup> Both instruments contain guarantees of rights implicated in any situation of displacement, such as an individual's right to an adequate standard of living and the sanctity of the family unit.<sup>62</sup> The ICCPR provides that citizens shall have freedom of movement and choice of

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57. See CRISTIAN TEODORU ET AL., INDEPENDENT REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR THE MEROWE DAM PROJECT (NILE RIVER, SUDAN) 7 (2006), available at <http://www.eawag.ch/media/20060323/Independent-Review-20060323-Short.pdf> (warning that the operational cycle of the Dam will create dangerous fluctuations in water levels downstream from the Dam, an occurrence known as "hydropeaking," which "will have detrimental effects on aquatic ecosystems").

58. See FACT-FINDING MISSION, *supra* note 2, § 6 (noting the destructive effect of fluctuating water levels on irrigation pumps downstream from the Dam, as well as the danger to people working along the river).

59. See *id.* § 3 (noting the contradictory statements given by Sudanese government officials as to whether the irrigation component of the Dam would move forward).

60. See UNHCHR, Status By Country, [http://www.unhcr.ch/tbs/doc.nsf/new\\_hvstatusbycountry?OpenView&Start=1&Count=250&Expand=165#165](http://www.unhcr.ch/tbs/doc.nsf/new_hvstatusbycountry?OpenView&Start=1&Count=250&Expand=165#165) (last visited Aug. 19, 2008) (confirming that Sudan is a party to both the ICCPR and the ICESCR, and both covenants entered into force on June 18, 1986); see also discussion *supra* note 25 and accompanying text (explaining that protection for IDPs has traditionally fallen under international instruments).

61. See generally MASSES IN FLIGHT, *supra* note 24 (providing an overview of the Guiding Principles as they relate to the ICCPR and the ICESCR).

62. See ICESCR, *supra* note 8, arts. 10, 11 (reaffirming the commitment of the states party to the convention to the right to family and the right to an adequate standard of living); ICCPR, *supra* note 7, arts. 6, 7, 23, 26 (recognizing the inherent right to life, freedom from torture and inhuman treatment, and equality before the law, and reaffirming that the family is the fundamental societal unit); see also PHUONG, *supra* note 29, at 40 (maintaining that the first concern for IDPs is their physical safety and right to life, but that all areas of life from basic necessities to education or work are adversely affected).

residence.<sup>63</sup> Furthermore, the ICESCR provides for the right to education and the right to work.<sup>64</sup> The ICESCR and the ICCPR permit limitations to these rights only in a very specific number of situations.<sup>65</sup> The Guiding Principles echo many of these provisions.<sup>66</sup>

D. THE ROME STATUTE ALLOWS FOR PROSECUTION IN AN  
INTERNATIONAL FORUM OF THOSE RESPONSIBLE FOR SOVEREIGN  
VIOLATIONS OF BINDING HUMAN RIGHTS INSTRUMENTS

The Rome Statute established the ICC as a response to the limitations of *ad hoc* tribunals used in the past.<sup>67</sup> The Rome Statute prevents perpetrators of serious crimes, such as crimes against humanity<sup>68</sup> or war crimes,<sup>69</sup> from taking refuge in their state's refusal to prosecute them.<sup>70</sup> Article 7 of the Rome Statute enumerates acts that are crimes against humanity,<sup>71</sup> and Article 7(1)(d) specifically

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63. See ICCPR, *supra* note 8, art. 12.

64. See ICESCR, *supra* note 9, arts. 6, 13.

65. See *id.* art. 4 (requiring that limitations to these rights be both compatible with the rights and in the interest of the general welfare); ICCPR, *supra* note 7, art. 12 (permitting restrictions only to preserve public order, public morals, public health, national security, or the rights of others).

66. Compare *Guiding Principles*, *supra* note 4, princs. 10-23, with ICESCR, *supra* note 8, arts. 6-15, and ICCPR, *supra* note 7, arts. 6-27.

67. See Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT'L L. REV. 539, 540-41 (2007) (listing inadequacies and problems of ad-hoc tribunals such as the involvement of only a few states in their creation, their limiting geographic specificity, dependence on the international attitudes toward their creation, and the extensive delays and costs associated with their creation).

68. See Rome Statute, *supra* note 10, art. 7 (defining crimes against humanity as one of a number of acts "committed as part of a widespread or systematic attack directed against any civilian population").

69. See *id.* art. 8 (setting forth the definition of war crime and an extensive list of war crimes, including directing military attacks against non-combatants).

70. See *id.* art. 4 (circumventing a state's potential refusal to prosecute a criminal by defining the International Criminal Court's scope of powers to include functioning on the territory of any State Party and, "by special agreement, on the territory of any other State"); see also Kirsch, *supra* note 68, at 540-41 (illustrating the problem of dependence on national courts to prosecute perpetrators of serious crimes when such crimes generally made the state's judicial system the least willing or able to carry out such prosecution, often because the government itself was a party to the crimes, as in the cases of Rwanda and Cambodia).

71. See Rome Statute, *supra* note 10, art. 7 (listing, *inter alia*, murder, enslavement and torture as crimes against humanity).

names forcible transfer of a population as such a crime.<sup>72</sup> Article 7(2)(d) elaborates on the meaning of “deportation or forcible transfer,” specifying that the perpetrator must force the displaced persons from a place where they are lawfully present, and the displacement must violate international law.<sup>73</sup> The Rome Statute deems an act a “crime against humanity” only if the act passes a high threshold.<sup>74</sup> The statute requires that any of the acts it lists as crimes against humanity be committed in “a widespread or systematic attack”<sup>75</sup> and that those committing the act have knowledge of it.<sup>76</sup>

Article 13 of the Rome Statute gives jurisdiction over crimes committed by states not a party to the Statute.<sup>77</sup> The U.N. Security Council may refer a situation in a non-member state to the ICC pursuant to the Council’s Chapter VII powers.<sup>78</sup> The ICC requires such a referral because its jurisdiction is not universal.<sup>79</sup> The ICC

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72. *Id.* art. 7(1)(d).

73. *Id.* art. 7(2)(d).

74. See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 47 (1999) (observing that participants in the Rome Conference agreed that a strict standard for defining a crime against humanity was needed to prevent all inhumane acts from being considered “crimes against humanity”).

75. See Sylvia de Bertodano, *Current Developments in Internationalized Courts: East Timor – Justice Denied*, 2 J. INT’L CRIM. JUST. 910, 919 (2004) (reiterating the importance of the “widespread and systematic” element as a requirement for an act to rise to the level of a crime against humanity in the context of the ethnic conflict in East Timor).

76. See Rome Statute, *supra* note 10, art. 7(1) (requiring that the perpetrator of an act constituting a crime against humanity have knowledge of the act); see also YOUNG SOK KIM, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY OF THE ROME STATUTE* 82 (2003) (clarifying that the term “knowledge” as used in the Rome Statute does not require proof that the perpetrator knew exactly what was occurring or specifically what the state policy was with respect to the act, but only that the perpetrator had knowledge of the act’s occurrence).

77. See Rome Statute, *supra* note 10, art. 13.

78. See Philippe Kirsch & Darryl Robinson, *Referral by States Parties*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 619, 619-20 (Antonio Cassese et al. eds., 2002) [hereinafter *ROME STATUTE COMMENTARY*] (discussing the ICC’s realization that unforeseen situations would confront it and its subsequent development of “trigger mechanisms” for jurisdiction, including the Security Council referral process).

79. See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 61 (2001) (acknowledging two main objections to a court with universal jurisdiction: first, the potential that the ambitious nature of such a court would discourage its ratification, and second, the lack of legal rationale for a court

exercises complementary jurisdiction and will act only when the domestic courts of a country cannot or will not try those accused of committing a crime.<sup>80</sup> Furthermore, in addition to the complementary aspect of the court's jurisdiction, the concept of admissibility means that the ICC need not try every case over which it has jurisdiction, but only those it chooses to try.<sup>81</sup>

## II. ANALYSIS

Sudan is violating provisions of the ICCPR and the ICESCR and is implicating the Guiding Principles in the way it is undertaking the Merowe Dam project.<sup>82</sup> Under Guiding Principle 6(2)(c)'s proportionality analysis, the project causes impermissible hardship for the IDPs.<sup>83</sup> If Sudan does not strive to meet the standards set by the international instruments, the U.N. Security Council should refer the case to the ICC because the displacements constitute a crime against humanity, and Sudan is unable or unwilling to prosecute those responsible.<sup>84</sup>

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with universal jurisdiction).

80. See John T. Holmes, *Complementarity: National Courts versus the ICC*, in ROME STATUTE COMMENTARY, *supra* note 78, at 667, 672-73 (stressing that states heavily favored complementarity over concurrent jurisdiction when establishing the ICC); Kirsch, *supra* note 67, at 543-44 (stressing that under the principle of complementarity, the ICC will not act until all domestic options have been exhausted, unless the state is unwilling or unable to prosecute). *But see* SCHABAS, *supra* note 79, at 67 (referring to the term complementarity as a "misnomer" because the ICC and national justice systems often work in opposition to one another).

81. *Cf.* SCHABAS, *supra* note 79, at 69-70 (discussing non-discretionary instances when the ICC cannot adjudicate cases, such as pardons or cases that have already gone before domestic courts); Giuliano Turone, *Powers and Duties of the Prosecutor*, in ROME STATUTE COMMENTARY, *supra* note 78, at 1137, 1153 (observing that even where the issue is entirely discretionary, the prosecutor still must take the factors of the situation into account to avoid acting arbitrarily).

82. See discussion *infra* Part III.B (elucidating Sudan's specific transgressions with respect to the ICCPR, ICESCR, and the Guiding Principles).

83. See, e.g., KÄLIN, *supra* note 20, at 18 (detailing the ways in which the proportionality test has been incorporated into the internal rules of international organizations such as the World Bank and the Organization for Economic Co-operation and Development, including the requirement that alternatives to displacement receive careful consideration); see also discussion *infra* Part III.A (invoking the proportionality test when assessing the Merowe Dam project's displacements).

84. See OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, FACT

A. THE BROAD LANGUAGE OF GUIDING PRINCIPLE 6(2)(C)  
PRESENTS A LOOSELY-DEFINED PROPORTIONALITY TEST THAT  
COULD ALLOW THE MEROWE DAM PROJECT TO CONTINUE  
DESPITE LONG-TERM NET DETRIMENT TO THOSE THE PROJECT  
DISPLACES

Principle 6(2)(c) allows projects such as the Merowe Dam if they serve “compelling and overriding public interests.”<sup>85</sup> Sudan’s need for electricity, which the government uses as the main justification for constructing the Dam, is legitimate.<sup>86</sup> This is particularly relevant because Sudan currently is proposing several more hydroelectrical projects.<sup>87</sup> Sudan can justify construction of more dams, which are notorious for displacing large numbers of people,<sup>88</sup> by claiming the dams fulfill an essential need for the state and promote a higher standard of living for the displaced.<sup>89</sup>

Evaluating the Merowe Dam situation under Principle 6(2)(c) requires a proportionality test that takes into account the overall benefits of the project and the detriment to those the project

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SHEET: THE SITUATION IN DARFUR, THE SUDAN paras. 1, 31 (2007), *available at* [http://www.icc-cpi.int/library/organs/otp/ICC-OTP\\_Fact-Sheet-Darfur-20070227\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf) (last visited Aug. 19, 2008) [hereinafter FACT SHEET] (documenting the referral of the Darfur situation in Sudan to the ICC because the domestic authorities had failed to prosecute the crimes).

85. See KÄLIN, *supra* note 20, at 17 (conceding that large development projects “can contribute significantly to the realization of human rights” and that relocation is often necessary); *see also* NPR Interview, *supra* note 47 (recognizing that evictions must sometimes happen in the course of large development projects).

86. See Apiku, *supra* note 1 (quoting Sudan’s President Omar Hassan al-Bashir as saying, “[T]he amount of power currently being generated meets only a fraction of the requirements of the Sudanese people”); *see also supra* note 54 (calculating the kilowatt-hours per capita in Sudan and neighboring Egypt, revealing Sudan’s large relative power deficit).

87. See FACT-FINDING MISSION, *supra* note 2, § 2 (listing multiple planned power projects, including the construction of a thirty megawatt facility at an irrigation project and a fifty megawatt addition to an existing dam).

88. See, e.g., PHUONG, *supra* note 28, at 31 (estimating that the displacement resulting from the construction of the Three Gorges Dam in China will reach approximately 1.2 million people).

89. See Upendra Baxi, *What Happens Next is up to You: Human Rights at Risk in Dams and Development*, 16 AM. U. INT’L L. REV. 1507, 1509-10 (2001) (paraphrasing a World Commission on Dams report that calls dams a “necessary evil” and noting a general lack of parity in costs and benefits despite the positive aspects of dam construction).

displaces.<sup>90</sup> Applying a proportionality test leads to the conclusion that the benefits the Merowe Dam creates do not justify the difficulties the displaced persons encounter.<sup>91</sup> The irrigation component of the project proposed by the government of Sudan may not be feasible and will not operate efficiently if completed.<sup>92</sup> Flood control is likely to be more effective but will still create hazardous peaking downstream from the Dam.<sup>93</sup> The government of Sudan presents an inadequate relocation and compensation scheme.<sup>94</sup> Providing the displaced farmers with monetary compensation is not an adequate response.<sup>95</sup> The proportionality analysis requires that

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90. See Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 498 (2007) (reviewing cases in the analogous area of land-use rights of indigenous peoples and finding a need for proportionality between the rights of those affected and the action taking place in order to classify such an action as being in the "public interest"); see also OP 4.12, *supra* note 20, para. 2(a) (outlining an implicit proportionality test in which a state must consider "all viable alternative project designs" prior to proceeding with a project that will require involuntary resettlement).

91. See Ali K. Askouri, *The Merowe Dam: Controversy and Displacement in Sudan*, FORCED MIGRATION REV., Sept. 2004, at 56, 56-57, available at <http://www.fmreview.org/FMRpdfs/FMR21/FMR21full.pdf> (last visited Aug. 19, 2008) (denouncing the concealment of project plans, the failure of the authorities to consider the views of those the project is displacing, and the human rights abuses perpetrated against those protesting the project); TEODORU ET AL., *supra* note 57, at 5-7 (finding numerous points of concern resulting from the Merowe Dam project, among them sediment buildup in the Dam, which over time will substantially reduce the reservoir's capacity).

92. See FACT-FINDING MISSION, *supra* note 2, § 3; Adrian Laycock Limited, Irrigation and Drainage, <http://www.adrianlaycock.com/irrigate.htm> (last visited Aug. 19, 2008) (noting that the land surrounding the Dam is "extremely hostile" to such an irrigation, placing "severe constraints" on the design of the irrigation scheme). Adrian Laycock Limited is the irrigation design consultant for the Merowe Dam project. *Id.*

93. See TEODORU ET AL., *supra* note 57, at 6-7 (recommending a secondary dam to combat the harmful and dangerous effects of the daily peaking the Merowe Dam will cause).

94. See *Sudan Extends Merowe Dam Appeals Deadline to November*, BBC WORLDWIDE MONITORING, Sept. 29, 2007 (bringing to light a delay in the compensation scheme in which the government of Sudan put off the payment of compensation and fulfillment of contracts by several weeks). See generally FACT-FINDING MISSION, *supra* note 2, § 6 (delineating numerous social issues the relocations are causing, such as replacing fertile farmland with arid, desert land).

95. See Mehta, *supra* note 49, at 640 (disapproving of cash payments as compensation for lost land in cases of displacement of agrarian peoples as removing the social and cultural foundations on which agrarian societies are built);

those displaced enjoy a standard of living that is at least comparable to, and preferably superior to, the standard they enjoyed prior to displacement.<sup>96</sup> Sudan's actions concerning the disbursements and treatment of those displaced expose the inadequacies of the compensation program.<sup>97</sup>

The language of Guiding Principle 6(2)(c) suggests that it seeks to prevent states from using development projects to justify human rights violations.<sup>98</sup> Thus far, the government of Sudan does not appear to have an ulterior motive of discrimination for the Merowe Dam project.<sup>99</sup> In the absence of any such overtly negative motivation, the international community must evaluate Sudan's actions using the proportionality test of Principle 6(2)(c).<sup>100</sup> Similar, previous projects indicate that this analysis will likely conclude that the Merowe Dam project fails to provide sufficiently for the displaced.<sup>101</sup>

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*see also* Perrault et al., *supra* note 90, at 507 (encouraging alternate, non-monetary forms of compensation when monetary compensation does not adequately address the impact of displacement).

96. *See, e.g.*, OP 4.12, *supra* note 20, paras. 2(c), 6(b)(ii), 6(c)(i) (requiring that the state support those displaced by placing them in accommodations that, when all factors are analyzed, provide for a standard of living that is at least as adequate as that provided by their pre-displacement accommodations).

97. *See* Askouri, *supra* note 91, at 57 (decrying the Sudanese government's use of violence against farmers who attempted to return to their homes upon realizing the inadequacy of the farm land in the relocation area).

98. *See* KÄLIN, *supra* note 20, at 17 (interpreting Guiding Principle 6(2)(c) as asserting that development projects cannot be a disguise for discrimination).

99. *See* UNHCHR Press Release, *supra* note 3 (recognizing that the immediate issues involving human rights protection arise from the implementation of the Merowe Dam project and not from its development).

100. *See* Press Release, United Nations, As Mideast Fighting Rages, UN Rights Experts Urge Parties to Protect Civilians (July 22, 2006), <http://www.un.org/apps/news/story.asp?NewsID=19279&Cr=Leban&Cr1=> (reinforcing proportionality's role in situations where human rights law is implicated, including the protection of displaced persons).

101. *See* WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 321 (2000), *available at* <http://www.dams.org/docs/report/wcdreport.pdf> (deriding large scale displacements for dams as having been a clear failure and recognizing the impact of large dams on human development); *see also* Mehta, *supra* note 44, at 635-36 (attributing problems with those displaced by dam construction in India to the failure of the Indian government to provide an adequate legal framework to deal with such issues).

B. THE GOVERNMENT OF SUDAN FAILED TO RESPECT THE  
GUIDING PRINCIPLES AND VIOLATED THE INTERNATIONAL LAWS  
THAT FORM THE BASES OF THE GUIDING PRINCIPLES IN ITS  
RELOCATION OF THE PEOPLE IN THE PATH OF THE RESERVOIR

Displacement unavoidably violates the rights of those displaced.<sup>102</sup> The government of Sudan violated the right guaranteed in the ICCPR to choose one's place of residence when it forcibly relocated those in the way of the project without proper consultation.<sup>103</sup> The government of Sudan violated the right of the IDPs to work, which the ICESCR guarantees.<sup>104</sup> The ICESCR further guarantees an adequate standard of living and access to an education, both of which the government of Sudan has violated with the poorly planned and executed displacements.<sup>105</sup>

Besides Principle 6(2)(c) discussed above, Sudan failed to observe other provisions of the Guiding Principles, beginning with an obligation to prevent and avoid internal displacement.<sup>106</sup> The

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102. See PHUONG, *supra* note 28, at 40 (recognizing that the emphasis in displacement is typically on ensuring fundamental rights such as the right to life, but noting that even when such fundamental rights are observed, being transient interferes with rights arising from everyday activities, such as the right to work and the right to education).

103. See *Guiding Principles*, *supra* note 4, princ. 7(3)(d) (requiring an attempt to include those the project will displace in decisions regarding their displacement); see also ICCPR, *supra* note 7, art. 12 (granting those lawfully located within a territory the right to choose their residence).

104. See ICESCR, *supra* note 8, art. 6 (protecting the right to work for all people). But see Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 379 (2002) (construing the ICESCR's right to work provision as requiring a state party to the ICESCR to take steps to ensure the opportunity to work over time rather than to provide an immediate right to work).

105. See ICESCR, *supra* note 8, arts. 11, 13 (providing for an adequate standard of living, which includes food and housing, and the right to an education); see also FACT-FINDING MISSION, *supra* note 2, § 6 (linking an increase in disease in the resettlement areas with the closely spaced resettlement housing lacking adequate sanitation). Cf. Robert M. Cover, *Obligation: Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 71 (1987) (contrasting the difficulty of applying an affirmative right, such as the right to an education, with those rights which restrain the government because affirmative rights require a party to provide the guaranteed item).

106. See *Guiding Principles*, *supra* note 4, princ. 5 (mandating adherence to international law to prevent internal displacements).

government of Sudan further failed to include those it displaced in the displacement and resettlement process as Principle 7 of the Guiding Principles requires.<sup>107</sup> This is relevant because while the Guiding Principles are not binding, the ICCPR and ICESCR are binding upon signatory nations.<sup>108</sup> The existing law of the ICCPR and the ICESCR forms much of the basis for the Guiding Principles.<sup>109</sup> Sudan is a party to both the ICESCR and the ICCPR, and therefore Sudan is obligated to follow their provisions, and, by extension, the coinciding portions of the Guiding Principles which Sudan is violating.<sup>110</sup> If Sudan respects the Guiding Principles, the indicative function of the Guiding Principles suggests that Sudan is respecting binding international law as well.<sup>111</sup>

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107. *See id.* princ. 7(3)(d) (directing state agencies to attempt to include IDPs in decisions concerning their displacement); *see also* KÄLIN, *supra* note 20, at 21 (underscoring that similar requirements of fairness toward the displaced exist in other international instruments, such as International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples); Askouri, *supra* note 91, at 56-57 (condemning the government of Sudan's failure to consult the displaced in the displacement and resettlement processes and its use of violence to suppress dissenters). *But see* Resettlement, *supra* note 33 (presenting a framework in which the government of Sudan purported to consult the displaced in displacement and resettlement decisions).

108. *See* Entwisle, *supra* note 43, at 371 (establishing the Guiding Principles' foundation in binding international law adapted to address issues of displacement); *see also* DAVID A. KORN, EXODUS WITHIN BORDERS 90 (1999) (stressing that the drafters of the Guiding Principles deliberately avoided proposing a legally binding document to avoid the inevitable opposition and delay to the document's release).

109. *See* THE OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), TRAINING ON THE UN GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT 6 (Aug. 9-11, 2004), *available at* [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/139DAA0B7F0BB71680257091004B7656/\\$file/Puntland\\_workshop\\_report\\_2004.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/139DAA0B7F0BB71680257091004B7656/$file/Puntland_workshop_report_2004.pdf) (recognizing that the Guiding Principles are based on "international human rights law, international humanitarian law and refugee law" as outlined in conventions and treaties).

110. *See* KÄLIN, *supra* note 20, at 13 (noting that situations causing displacement are significantly less likely to occur if states respect international law).

111. *Id.*; *see also* *Guiding Principles*, *supra* note 4, princs. 1, 2 (requiring conformity with international law).

C. DESPITE THE FACT THAT THE ICC COULD FIND THAT SUDAN'S ACTIONS REACH THE LEVEL OF A CRIME AGAINST HUMANITY, THE ICC IS UNLIKELY TO TRY SUDAN FOR COMMITTING A CRIME AGAINST HUMANITY

By forcibly displacing people with the Merowe Dam project, Sudan is committing actions that the ICC could find to meet the requirements set forth by the Rome Statute for a crime against humanity.<sup>112</sup> Similar situations in the International Criminal Tribunal for Yugoslavia indicate that a forcible transfer within a nation's borders provides grounds for finding commission of a crime against humanity.<sup>113</sup> Although Sudan is not a party to the Rome Statute, the ICC can still obtain jurisdiction over the perpetrators of the Merowe Dam displacements by a referral of the U.N. Security Council pursuant to the Council's Chapter VII powers.<sup>114</sup> It is unlikely, however, that the ICC will prosecute members of the government of Sudan for their actions in the Merowe Dam project.<sup>115</sup> Although the ICC is investigating the situation in Darfur, the Darfur situation is distinguishable from the Merowe Dam displacements and does not necessarily indicate that the ICC will pursue those responsible for the Merowe displacements.<sup>116</sup>

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112. See Nicolai, *supra* note 28, at 815-17 (characterizing a comparable displacement in Zimbabwe as a crime against humanity); see also Rome Statute, *supra* note 10, art. 7(1)(d).

113. Prosecutor v. Krstic, Case No. IT-98-33, Trial Chamber Judgment, ¶¶ 532, 533, 687-88 (Aug. 2, 2001), available at <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf> (finding, under the ICTY statute, that forcible internal transfers of Bosnian Muslims from an area of Bosnia and Herzegovina constituted "inhumane treatment" that amounted to a crime against humanity).

114. See Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 784-86 (2003) (charging the U.N. Security Council with upholding "international peace and security" through the exercise of its Chapter VII authority and the Rome Statute).

115. See Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* 3-4 (Jan. 25, 2005), [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [hereinafter *Inquiry on Darfur*] (evaluating the list of crimes observed in Darfur before the ICC admitted the situation).

116. Cf. Katy Glassborow, *ICC Suspect Dealing with Darfur Crisis*, INSTITUTE FOR WAR & PEACE REPORTING, June 15, 2007, [http://iwpr.net/?p=acr&s=f&o=336362&apc\\_state=henpacr](http://iwpr.net/?p=acr&s=f&o=336362&apc_state=henpacr) (emphasizing the severity of the crimes for which the ICC issued a warrant in the Darfur situation, including the coordination of "murders, rapes, torture, forced displacement and unlawful imprisonment of

*1. Sudan's Actions Constitute a Crime Against  
Humanity under the Rome Statute*

The forced displacements resulting from the Merowe Dam project meet the threshold for a crime against humanity.<sup>117</sup> Without adequate justification, Sudan forced the IDPs from homes in which they were lawfully present, meeting the requirements set forth in Article 7(2)(d) of the Rome Statute.<sup>118</sup> The government of Sudan has knowledge of the displacements and is conducting them as part of a large scale program, meeting the requirements set forth in Article 7(1), applicable to all the named crimes against humanity.<sup>119</sup> Furthermore, Sudan is committing a crime against humanity even in the absence of armed conflict, as international law bans crimes against humanity at any time.<sup>120</sup>

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innocent civilians”).

117. See Rome Statute, *supra* note 10, art. 7(1) (listing forcible transfer of a population, among other crimes, as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”); see also Antonio Cassese, *Crimes Against Humanity*, in ROME STATUTE COMMENTARY, *supra* note 78, at 353, 360-65 (presenting the specific elements of *mens rea* and *actus reus* needed for crimes against humanity under the Rome Statute).

118. See Rome Statute, *supra* note 10, art. 7(2)(d) (“‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law . . . .”); see also KIM, *supra* note 76, at 563 n.223 (qualifying duress and coercion as meeting the requirement of force as used in Article 7(2)(d) of the Rome Statute and emphasizing that overt physical force is not a requirement of the article); Resettlement, *supra* note 34 (noting the government’s implicit acknowledgement of the legality of residence of those the Dam will displace).

119. See Cassese, *supra* note 117, at 373-74 (recognizing the requirement in customary international law and in the Rome Statute that the displacements or crimes against humanity must be large scale).

120. See *id.* at 356 n.8 (listing sources confirming the lack of necessity for a connection between war and crimes against humanity found in the dicta of a decision of the International Criminal Tribunal for the former Yugoslavia and by the International Committee of the Red Cross); see also SCHABAS, *supra* note 79, at 22 (regarding the ability to try crimes against humanity during times of war or peace as an example of the evolution of the definition of war crimes and crimes against humanity).

2. *The ICC has Jurisdiction over Sudan Despite Sudan Not Being a Member Party to the Rome Statute if the Security Council Refers the Matter Pursuant to Its Chapter VII Powers*

A criminal court that is unable to prosecute is not effective.<sup>121</sup> The U.N. Security Council can refer the Merowe Dam situation to the Special Prosecutor pursuant to the Council's powers under Chapter VII of the U.N. Charter.<sup>122</sup> A referral of this type is appropriate because Sudan will not otherwise appear before the ICC.<sup>123</sup> The Security Council has referred the Darfur situation, which is occurring within the same country, and this implies that the Security Council could refer the Merowe Dam situation to the Special Prosecutor as well.<sup>124</sup> Furthermore, the Special Prosecutor found the Darfur situation admissible, which means the ICC could potentially find the Merowe Dam situation to be admissible.<sup>125</sup> In contrast to the *ad hoc* tribunals that preceded the ICC, the ICC can try ongoing or presently occurring crimes.<sup>126</sup>

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121. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 219, 219 (Dinah Shelton ed., 2000) (arguing that ICC jurisdiction over states not party to the Rome Statute avoids the "dismal prospect" that the court would be unable to pursue its mandate as a result of a lack of jurisdiction).

122. See U.N. Charter, *supra* note 26, art. 39 (permitting the Security Council to intervene in instances of "any threat to the peace" or "to maintain or restore international peace and security"); see also S.C. Res. 1593, pmbl., U.N. Doc. S/RES/1593 (Mar. 31, 2005) [hereinafter Resolution 1593] (setting forth justifications for referring the situation in Darfur, Sudan to the ICC Prosecutor); *Darfur Inquiry*, *supra* note 28, at 5 (illustrating an instance in which the Security Council found a threat to international security and chose to intervene); SCHABAS, *supra* note 79, at 54-55 (underscoring that the ICC's jurisdiction may be over subject matter, territory, individuals, and time).

123. See SCHABAS, *supra* note 79, at 54-55 (indicating the appropriateness of bringing a case before the ICC when the state cannot or will not); see also FACT SHEET, *supra* note 84, para. 28 (limiting the reach of the ICC to cases where the judicial system that should be prosecuting the crime has failed to prosecute or to pursue a good faith effort to prosecute the crime).

124. See Resolution 1593, *supra* note 122, ¶ 1 (referring the situation in Darfur to the Special Prosecutor).

125. Cf. Kirsch, *supra* note 67, at 545 (recognizing the reality that states will continue to be unable or unwilling to prosecute those responsible for crimes falling under the jurisdiction of the ICC).

126. See *id.* (recognizing the additional difficulties created by the ICC's power

*3. The ICC is Likely to Find Sudan's Actions with Respect to the Merowe Dam Inadmissible, Despite Meeting the Requirements set forth by Article 7 of the Rome Statute for a Crime against Humanity*

The ICC is not obligated to prosecute a crime simply because it meets the requirements for jurisdiction, and it will likely refuse to take on this case of Sudan's forced displacements.<sup>127</sup> The Special Prosecutor and the ICC have discretion to hear or decline to hear any case, even if the ICC has jurisdiction.<sup>128</sup> Admissibility maintains the high standard of the Rome Statute by allowing the ICC to choose which cases it hears.<sup>129</sup> In the Darfur situation, the ICC chose to admit the case only after a commission found evidence of crimes

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to prosecute ongoing or presently occurring crimes in the areas of investigation and security); *see also* Rome Statute, *supra* note 10, art. 11 (establishing ICC jurisdiction for any crimes committed after the enactment of the Rome Statute, with the implication that these crimes may be ongoing); Int'l Criminal Court, *Report of the International Criminal Court*, ¶ 5, U.N. Doc. A/62/314 (Aug. 31, 2007) [hereinafter *Darfur Report*] (describing past practices of the ICC in protecting witnesses and victims, including issuance of warrants under seal or delay of proceedings until the ICC is able to guarantee the safety of all those involved).

127. *See* SCHABAS, *supra* note 79, at 55 (explaining that the hard and fast rules of jurisdiction and the largely discretionary rules of admissibility lead to overlap in which the Court's discretion stands to play a significant role).

128. *See* Kirsch, *supra* note 67, at 543 (stating explicitly that even if the ICC has jurisdiction it may not act because it is a court of last resort, making action inappropriate until all domestic remedies have been exhausted, and because the matter must hold sufficient gravity to merit ICC consideration); *see also* SCHABAS, *supra* note 79, at 55 (recognizing that the concept of admissibility of cases to the ICC is almost purely permissive, while the rules of jurisdiction are fixed, allowing no exceptions). *See generally* International Criminal Court, Jurisdiction and Admissibility, [http://www.icc-cpi.int/about/ataglance/jurisdiction\\_admissibility.html](http://www.icc-cpi.int/about/ataglance/jurisdiction_admissibility.html) (last visited Aug. 20, 2008) (recognizing that ICC jurisdiction is limited to states that have submitted to ICC jurisdiction, crimes taking place on the territory of states that have submitted to ICC jurisdiction, issues that have been referred to the ICC by the U.N. Security Council, and issues occurring after July 1, 2002, while admissibility is based on the principle of complementarity, thus limiting the instances in which the ICC will act).

129. *See* Eva Golinger-Moncada, *Why The Case Against Chávez Will Not Be Heard In The Hague*, VENEZUELANALYSIS.COM, Nov. 17, 2003, <http://www.venezuelanalysis.com/analysis/225> (underscoring the importance of maintaining high standards of admissibility under the Rome Statute to protect the credibility of the ICC and to prevent it from becoming a "forum of baseless complaints by extremists").

more serious than displacement.<sup>130</sup> Seeking prosecution solely on the grounds of forced displacement distinguishes the Merowe situation from the Darfur situation, in which the Security Council found that the situation posed a threat to peace and security in the region.<sup>131</sup>

### III. RECOMMENDATIONS

Guiding Principle 6(2)(c)'s proportionality test presents an inadequate means of determining the acceptability of a development project.<sup>132</sup> The United Nations should develop a framework that presents specific requirements for a project to continue. In the absence of such guidelines, the government of Sudan should strive to meet international standards already in place.<sup>133</sup> If Sudan fails to do so, the ICC should admit this case and punish those responsible for the forced relocations.

#### A. THE UNITED NATIONS SHOULD ESTABLISH A FRAMEWORK FOR DEFINING THE BALANCE BETWEEN NECESSITY AND HARDSHIP ON THOSE WHOM LARGE-SCALE DEVELOPMENT PROJECTS DISPLACE IN ORDER TO CLARIFY THE MEANING OF GUIDING PRINCIPLE 6(2)(C)

First, displaced persons should benefit directly from the displacing project. This is consistent with the language requiring a compelling public benefit and specifically applies the benefit to those displaced.<sup>134</sup> A requirement of direct benefit would ensure that IDPs

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130. See *Inquiry on Darfur*, *supra* note 115, at 3 (releasing investigation results revealing cases of murder, torture, rape, and disappearances of civilians in Darfur perpetrated by government forced and government supported militias).

131. See Resolution 1593, *supra* note 122, pmb. & ¶ 1 (deciding that the situation in Darfur “constitute[d] a threat to international peace and security” meriting referral to the Special Prosecutor under the Security Council’s Chapter VII powers).

132. Cf. OP 4.12, *supra* note 20, para. 2(b) (providing more guidance on what an effective proportionality test should produce, including “sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits” and an opportunity for the displaced to participate in the implementation of these programs).

133. See KÄLIN, *supra* note 20, at 13 (suggesting that adherence to the Guiding Principles and international law is concurrent given the significant overlap between them).

134. See *Guiding Principles*, *supra* note 4, princ. 6(2)(c) (proscribing forced

receive some benefit promptly.<sup>135</sup> In this situation, for example, Sudan should move the approximately 60,000 displaced persons to homes and communities that have reliable and extremely cheap electrical power.<sup>136</sup> The proximity inherent in such a requirement eliminates some of the practical hurdles to implementing such a “direct benefit” scheme.<sup>137</sup>

Second, the government should improve the infrastructure in the relocation areas to provide for a net reduction in the poverty level in those areas, in contrast to the increase in poverty created by the relocations for the Merowe Dam project.<sup>138</sup> The Guiding Principles and the ICESCR already include requirements for the adequacy of relocation housing.<sup>139</sup> This is consistent with the direct benefit scheme discussed above as well. In this case, the government of Sudan cannot show that the substantial number of IDPs will benefit suitably to allow the project to continue, so the project should not continue despite a showing of benefit for the nation as a whole.<sup>140</sup> While requiring an adequate standard of living for the displaced

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relocation for development projects in the absence of a “compelling or overriding public benefit”); *see also* OP 4.12, *supra* note 20, para. 2(b) (requiring that projects involving relocation be sufficiently funded to provide benefits to the displaced).

135. *Cf.* Le Thanh Long, *Vietnamese Water Resources Legislation and Legal Regulation of Dams: Viewed Through the World Commission on Dams’ Suggested Policy Framework*, 16 AM. U. INT’L L. REV. 1631, 1689 (2001) (detailing an example from Vietnam where citizens were displaced to make way for a large hydroelectric dam project and over twenty years later still have not received electricity from the dam).

136. *See* About the Dam, *supra* note 50 (recognizing the main benefit of the Dam as the production of cheap and efficient electricity).

137. *See* Long, *supra* note 135, at 1637-38 (explaining that the “traditional top-down scheme of decision-making” regarding dams and dam development fails to recognize that dams displace individuals who are often not the direct beneficiaries of the project).

138. *See* FACT-FINDING MISSION, *supra* note 2, § 6 (voicing concern that at the El Multaga relocation site, the poverty level has risen from ten percent to sixty-five percent in under two years).

139. *See* *Guiding Principles*, *supra* note 4, princ. 18 (guaranteeing “the right to an adequate standard of living” for displaced persons); ICESCR, *supra* note 8, arts. 11, 12 (recognizing the right of all people to “an adequate standard of living” and “the highest attainable standard of physical and mental health”).

140. *See* FACT-FINDING MISSION, *supra* note 2, § 6 (illustrating the inadequacy of the government’s proposed compensation plan, which provides only four years’ earnings for date trees, which “can provide dates for up to 100 years,” and only minimal compensation for vegetable gardens).

cannot prevent governments from operating in bad faith, it would be effective in deterring governments from attempting to displace people in situations where supplying an adequate standard of living is impossible.<sup>141</sup>

B. THE GOVERNMENT OF SUDAN SHOULD STRIVE TO MEET  
INTERNATIONAL STANDARDS IN THE RELOCATION OF THE IDPS  
THE MEROWE DAM DISPLACES

In order to comply with international law regarding appropriate treatment of IDPs, Sudan should provide the opportunity for the IDPS to have an adequate standard of living by allowing them to maintain the lifestyle they had before displacement.<sup>142</sup> Sudan should move the IDPs, who are mostly farmers, to areas where they are able to continue farming.<sup>143</sup>

Although providing appropriate accommodations for relocation will not absolve the government of Sudan of the other violations it has committed, it would greatly help Sudan comply with international law.<sup>144</sup> Sudan should also make efforts to include the IDPs in any future decisions about their relocation.<sup>145</sup>

C. THE U.N. SECURITY COUNCIL SHOULD RECOGNIZE FORCIBLE  
DISPLACEMENT AS A CRIME AGAINST HUMANITY AND SHOULD  
PROSECUTE THOSE RESPONSIBLE

Forced displacement is a crime against humanity, and the ICC should prosecute it even when the situation does not involve more

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141. *See id.* (listing some of the inadequacies and problems of the resettlement site of El Multaga, including poor soil quality and a sizeable portion of the land unable to be cultivated because it is still covered with sand).

142. *See* NPR Interview, *supra* note 46 (explaining that continuity of livelihood is a significant factor in justifying and legitimizing large development projects).

143. *See* OP 4.12, *supra* note 20, paras. 9, 11 (warning of the complexity of relocating people with close ties to the land due to impacts on their cultural identity and encouraging sustainable strategies for resettlement that provide specifically for IDPs who depend on the land); *see also* FACT-FINDING MISSION, *supra* note 2, § 6 (recognizing that farmers have suffered due to the forced relocations, as their diets and the quality of their products have deteriorated due to poor soil quality).

144. *See supra* Part II (discussing international law and possible violations).

145. *See Guiding Principles*, *supra* note 4, princ. 7 (requiring that those whom the government will displace participate in the planning concerning their displacement).

serious crimes.<sup>146</sup> The U.N. Security Council should choose to prosecute in appropriate cases in order to avoid rendering forced displacement's status as a crime against humanity a nullity.<sup>147</sup> Because of the existing crises in Sudan and the Security Council's willingness to recognize the deficiencies of the Sudanese judicial system,<sup>148</sup> the Merowe Dam situation is an ideal case for the Security Council to refer to the ICC.<sup>149</sup> The Merowe Dam situation will not dilute the high standard that must be met to constitute a crime against humanity, as it meets every qualification in the Rome Statute.<sup>150</sup>

The ICC should admit cases when a government commits a crime against humanity that meets the requirements of the Rome Statute—cases such as this.<sup>151</sup> Specifically, the ICC should admit the case of the Merowe Dam project because there is no other appropriate forum and because it is not a frivolous case.<sup>152</sup> The Special Prosecutor should take this case to uphold the function of the ICC as a court of last resort.<sup>153</sup> The domestic courts will not prosecute the government officials responsible for the displacements, making this an appropriate instance for ICC intervention.<sup>154</sup> The ICC and the U.N.

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146. Cf. Glassborow, *supra* note 116 (including forced displacement in charges against a suspect in the Darfur crisis, but only in addition to crimes generally regarded as more heinous, such as murder, rape, and torture).

147. See Christine A.E. Bakker, Comment, *A Full Stop to Amnesty in Argentina: The Simón Case*, 3 J. INT'L CRIM. JUST. 1106, 1113 (2005) (discussing the duty to prosecute arising in international law from both customary and conventional law).

148. See *Darfur Inquiry*, *supra* note 28, at 6 (illustrating the weakening of the Sudanese judicial system resulting from significant strengthening of the executive and the failure to adequately codify human rights norms).

149. See UNHCHR Press Release, *supra* note 3 (presenting evidence that the government of Sudan is committing serious violations of civil and political rights in the execution of the Merowe Dam project).

150. See Rome Statute, *supra* note 10, art. 7 (stating that a widespread "deportation or forcible transfer of population" qualifies as a crime against humanity).

151. See *id.* art. 1.

152. See Golinger-Moncada, *supra* note 129 (arguing that to maintain the level of international respect it commands, the ICC can and should refuse to hear frivolous cases or claims with no merit).

153. See *Darfur Report*, *supra* note 126, ¶ 2 (reiterating that the jurisdiction of the ICC is complementary in nature).

154. See Resolution 1593, *supra* note 122 (exemplifying a proper referral to the Special Prosecutor due to the failure of the national justice system in Sudan); Kirsch, *supra* note 67, at 540 (proffering historical examples of criminal government behavior protected by ineffective national courts).

Security Council should use this opportunity to make the statement that they will prosecute crimes against humanity, including forcible displacement.<sup>155</sup> Consistent with the emerging notion of sovereignty as responsibility, the international community should intervene because Sudan is not willing to prosecute.<sup>156</sup>

## CONCLUSION

Large development projects can be acceptable bases for forced displacements.<sup>157</sup> Sudan, however, is displacing those in the Merowe Dam situation in a manner inconsistent with accepted international guidelines. Sudan must comply with international norms and laws, and if it does not, the Security Council should refer the situation to the ICC for prosecution of those responsible.

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155. See Nicolai, *supra* note 28, at 814-17 (illustrating a situation in Zimbabwe that presents a strong argument for ICC prosecution of forced displacement as a crime against humanity but has not been pursued by the international community); see also *Zimbabwe Slum Evictions 'A Crime'*, BBC NEWS, May 23, 2007, <http://news.bbc.co.uk/2/hi/africa/6683619.stm> (relating a study by two human rights groups finding that the situation in Zimbabwe meets all the requirements of a crime against humanity and should be tried by the ICC).

156. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* 15 (1996) (indicating that states can avoid international intervention by fulfilling their sovereign responsibilities, and in instances when they do not, the international community may intervene).

157. See *Guiding Principles*, *supra* note 4, princ. 6(2)(c) (allowing forced displacements when states undertake them for development projects that serve "compelling and overriding public interests"); see also discussion *supra* notes 85-101 and accompanying text.