



# A review of the normative framework in Kenya relating to the protection of IDPs

In the context of the Kampala Convention and other supranational frameworks



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August 2015

## Contributors

This study was carried out by a team of international legal researchers under the guidance of Martina Caterina and Jacopo Giorgi of IDMC-NRC and with the assistance of a research task force and an advisory committee. Members of the former were representatives of organisations and other institutions operating in Kenya with specific expertise in legal aspects of the response to internal displacement in the country. The advisory committee included international experts in the area of development of normative frameworks on internal displacement, including: Al-lehone Abebe, Legal Officer of the United Nations High Commissioner for Refugees; Nadia Khoury, Coordinator for Africa of the Disaster Law Programme of the International Federation of the Red Cross; Neddie Akello, Legal Advisor at the Mandate of the Special Rapporteur on the Human Rights of IDPs; Erin Mooney, independent expert on IDP protection and author of a report providing an analysis of national laws relevant to internal displacement in the Central African Republic; and Daniel Berlin, independent expert on IDP legislation who collaborated with IDMC on a previous study on the national framework for displacement in Zimbabwe. The research also benefitted from inputs provided by members of civil society organisations and national and international institutions who participated in a workshop organised by IDMC-NRC in Nairobi in June 2015, including: Amnesty International, Danish Refugee Council, Gesellschaft für Internationale Zusammenarbeit, Haki Centre, Internal Displacement Policy & Advocacy Centre, International Rescue Committee, Kenya National Bureau of Statistics, Kituo Cha Sheria, Kenya National Commission for Human Rights, Refugee Consortium of Kenya, the Regional Durable Solutions Secretariat, the UN Office for Coordination of Humanitarian Affairs and the UN Refugee Agency. The contents of the analysis and the recommendations of this study were also endorsed by the Protection Working Group on Internal Displacement, the forum coordinating different national and international actors engaged in internal displacement response and advocacy in Kenya.

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Cover photo: IDMC-NRC organised a workshop in June 2015 on normative frameworks relating to internal displacement in Kenya. NRC/Nashon Tado, June 2015



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## References and Acronyms

ACRWC	The African Charter on the Rights and Welfare of the Child.
ADESO	African Development Solutions.
AMREF	The African Medical and Research Foundation.
AU	The African Union.
AU Commission	The commission of the African Union.
AU Model Law	The African Union Model Law.
Basic Principles	The Basic Principles and Guidelines on Development-Based Evictions and Displacement.
CESCR	International Covenant on Economic, Social and Cultural Rights.
Kampala Convention	The Kampala Convention
CRC	The Convention on the Rights of the Child.
CSGs	The County Steering Groups.
CSOs	Civil society organisations.
CTPA	The Counter Trafficking in Persons Act, 2010.
DDC	County Disaster (management) Committees
Dr. Beyani or Dr. Chaloka Beyani	The UN Special Rapporteur on the Human Rights of IDPs, Chaloka Beyani, Ph. D.
Draft IDP policy	The draft National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya, 2011.
DRM	Disaster Risk Management.
DRR	Disaster risk reduction.
EWS	Early warning systems.
Great Lakes Pact	The Pact on Security, Stability and Development in the Great Lakes Region.
Great Lakes Protocol	The International Conference on the Great Lakes Region (ICGLR) Protocol on Protecting and Assisting IDPs.
Guiding Principles	The Guiding Principles on Internal Displacement.
Guiding Principles Annotations or Annotations	The Annotations to the Guiding Principles on Internal Displacement.
High Court	The High Court of Kenya at Nairobi.
HLP	Housing, Land and Property.
Humanitarian Fund	The "Humanitarian fund for Mitigation of Effects and Resettlement of victims of post-2007 Election Violence" established by regulation 3 of the government Financial management Regulations, 2008.
Hyogo Framework	Predecessor to the Sendai Framework.
ICC	International Co-ordinating Committee of National Human Rights Institutions.
ICESCR	The International Covenant on Economic, Social and Cultural Rights.
ICGLR	The International Conference on the Great Lakes Region.
ICGLR Member State	Member State of the International Conference on the Great Lakes Region.
ICRC	The International Committee of the Red Cross.
IDMC	The Internal Displacement Monitoring Centre.
IDMC-NRC	The Internal Displacement Monitoring Centre of the Norwegian Refugee Council.
IDP act	The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012.
IDPs	Internally Displaced Persons.
IGAD-CEWARN	The Conflict Early Warning and Response Mechanism of the Intergovernmental Authority on Development.
Kampala Convention	The AU Convention on the Protection and Assistance of IDPs.
Kampala Declaration	The Kampala Declaration and Agenda for Global Action endorsed by the World Health Organization.

Kenya Vision 2030	Kenya's development programme covering the period 2008 to 2030.
KFSM	The Kenya Food Security Meeting.
KFSSG	The Kenya Food Security Steering Group.
KHPT	The Kenya Humanitarian Partnership Team.
KLRC	The Kenya Law Reform Commission.
KNBS	The Kenya National Bureau of Statistics.
KNCHR	The Kenya National Commission on Human Rights.
KNCHR Handbook	The "Handbook on Forced Evictions: Roles and Responsibilities of the government (National and Country) and Private Developers," August 2014.
KRCS	The Kenya Red Cross Society.
LAPSSET	The Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor.
LASWG	The Legal and Advocacy Sub-Working Group.
Legal and Advocacy Sub-Working Group	The Legal and Advocacy Sub-Working Group (LASWG) under the Protection Working Group on Internal Displacement.
MoSSP	The Ministry of State for Special Programmes.
NADIMA	National Disaster Management Agency.
NANHRI	The Network of African National Human Rights Institutions.
Nansen Initiative	The Nansen Initiative on Disaster-Induced Cross-Border Displacement.
NCCC	The National Consultative Coordination Committee.
NDCC	The National Disaster Coordination Committee.
NDCF	National Drought Contingency Fund.
NDEC	The National Disaster Executive Committee.
NDMA	The National Drought Management Authority.
NDOC	The National Disaster Operations Centre.
NGOs	Non-governmental organizations.
NPSA	The National Police Service Act.
NRC	The Norwegian Refugee Council.
NSC	The National Steering Committee on Peace Building and Conflict Management.
PEP	Post-Exposure Prophylaxis kit.
PEV	Post-election violence.
The Pinheiro Principles	UN Principles on House and Property Restitution for Refugees and Displaced Persons.
Plan	National Disaster Response Plan.
Protection Agenda	The draft Protection Agenda of the Nansen Initiative.
PSC	Parliamentary select committee on the resettlement of IDPs
Public Health Act	The principal legislation relating to healthcare management in Kenya.
PWCID	The Protection Working Group on Internal Displacement.
PWGID	The Protection Working Group on Internal Displacement.
RTF	Research Task Force.
Sendai Framework	The Sendai Framework for Disaster Risk Reduction 2015-2030.
SGBV	Sexual and gender-based violence.
SLAA	The Security Laws (Amendment) Act, 2014.
Sub-Working Group	The Legal and Advocacy Sub-Working Group under the Protection Working Group on Internal Displacement.
TJRC	The truth, justice and reconciliation commission of Kenya.
UN	The United Nations.
UNDP	The United Nations Development Programme.
UNHCR	The UN Refugee Agency.
Vision 2030	Kenya Vision 2030, Kenya's development programme covering the period 2008 to 2030.
Water Act	The main legislative source related to water in Kenya.



## Executive Summary

Kenya has been affected by mass and recurring internal displacement for decades, but in the absence of official, comprehensive and up-to-date data, providing an accurate picture of this phenomenon in the country may prove challenging. The largest wave of internal displacement occurred in the aftermath of the disputed presidential elections in December 2007, when nearly 664,000 Kenyans fled their homes. Nevertheless, internal displacement in the country has also been triggered by a wide range of causes beyond political violence, including communal and land-related violence, disasters and development projects.

Whereas an overall acknowledgement of internal displacement in the country had been faltering in the past, the extent of the displacement that took place following the 2007/2008 violence brought about a clear recognition of the problem, which resulted in the government devising, for the first time, basic mechanisms to adequately meet the needs of IDPs and to guarantee their protection. The then Ministry of State for Special Programmes, the national institution entrusted to provide a response, set up different programmes to address displacement-related needs and to facilitate durable solutions at least for those IDPs who had been officially registered (mostly those in camps). With delays and loopholes in the government's action proving its inadequacy, the idea of a comprehensive national framework to provide coordination in preventing and responding to instances of displacement started to gain increasing support. Meanwhile, Kenya had become a member of the Great Lakes Pact and was therefore duty bound to incorporate the Guiding Principles on Internal Displacement in the national legislation (the "Guiding Principles"). As a result, the institutions of Kenya, with the assistance of the Protection Working Group on Internal Displacement (the "PWGID"), worked towards the development of a draft IDP policy and adopted the Prevention, Protection and Assistance to Internally Displaced Persons Act (the "IDP act") at the end of 2012.

Three years after the enactment of the IDP act, Kenya is equipped with a solid instrument which has the potential to provide an adequate response to displacement. Nevertheless, the national institutional and legal set up still faces several challenges which threaten to jeopardise the results accomplished thus far. The implementation of the IDP act is still at an early stage, while potentially competing and uncoordinated normative frameworks, especially in the areas of disaster and land management, carry the risk of pre-empting some of the guarantees envisaged

under the IDP act itself. The absence of an IDP policy articulating some aspects of the government's action and substantiating individual rights recognised to IDPs may continue to stem the efficacy of the response system. Kenya is also still to sign and ratify the AU Convention on the Protection and Assistance of IDPs ("Kampala Convention") under the prevailing argument that the national normative framework already provides substantial guarantees for IDPs and this would therefore make the ratification of the convention unnecessary.

Harmonising the different pieces of legislation (those in place or pending adoption) and ensuring coherence between the IDP act and other sectoral frameworks is an integral part of the implementation efforts that are required of the Kenyan authorities. The adoption of the IDP policy does not only represent the conclusion of a process that started in the aftermath of the greatest IDP crisis suffered in Kenya in recent years, but is also a crucial component of the creation of a credible and functioning response framework. The ratification of the Kampala Convention may be the opportunity to relaunch such discussions at an institutional level.

This study by IDMC aims to support the ongoing efforts of the institutions and civil society of Kenya in translating supranational standards into the national framework for IDP protection and in detecting areas where intervention is still needed to guarantee the alignment and implementation of the IDP normative instruments. By considering national legislation, policies and other instruments in fifteen thematic areas relevant to a response to internal displacement, it provides recommendations to the government of Kenya, the international community and the civil society that relate both to normative action and to the implementation of the existing framework.



# A

## Introduction

### Context

Since independence in 1963, Kenya has repeatedly experienced internal displacement triggered by political, ethnic and land-related violence as well as disasters and development projects. Political violence in particular, or the threat of it, has overshadowed every election since Kenya's first multi-party elections in 1992. The gravest instance occurred in the aftermath of the disputed presidential elections in December 2007 when nearly 664,000 Kenyans fled their homes and around 1,300 were killed. About 350,000 people took refuge in 118 camps, while 300,000 people found shelter with host communities or in rented accommodation in urban and peri-urban areas and were considered to be "integrated". Generalised violence has continued to cause new displacement since then. Disasters induced by natural hazards such as drought and floods also cause significant displacement every year. The displacement of pastoralist communities, which is intrinsically linked to their loss of livestock and access to land, resources and markets, in arid and semi-arid areas of the country, is common.<sup>1</sup> Evictions, particularly to make way for development and environmental protection projects, have also displaced a substantial number of people over the years, driving them off private, public and communally owned land in both urban and wilderness areas. These causes of displacement are often interwoven, and tenure issues, which have remained unresolved since the redistribution of land during colonial times, complicate this further still.

There is no official, comprehensive and up-to-date national data on IDPs in Kenya. Data gathering tends to focus on new displacement caused by violence and rapid-onset disasters. Little scattered quantitative and qualitative information exists on the dynamics after the initial flight of IDPs.<sup>2</sup> A registration exercise was undertaken in 2007/2008 for the post-election violence (PEV) IDPs, but the methodology applied was often inaccurate, inefficient and not disaggregated. As a result, the national database was restricted to the 6,800 households, which were identified and formally recognised by the Ministry of State for Special Programmes (MoSSP), the ministry responsible for IDP issues at the time (currently Directorate of Special Programmes under the Ministry of Devolution and Planning).<sup>3</sup>

Those newly displaced by inter-communal violence in 2014 (over 220,000 people<sup>4</sup>) faced inadequate access to shelter, food, water and livelihoods. Many cited inse-

curity as a major obstacle to their return and ability to restart their lives. IDPs living in protracted displacement identified inadequate access to land, basic services and livelihood opportunities as their protection concerns. Many IDPs are displaced in areas of the country that are environmentally and economically vulnerable, and as such they have fewer opportunities for integration and development. The level of service provision and donor attention to IDPs in recent years has drastically declined, and a clear gap has remained between short-term emergency measures and the comprehensive medium and long-term initiatives they need to restart their lives.

The violence around the election in 2007/2008 was a defining moment in the evolution of the government's response to internal displacement in Kenya. Prior to that time, displacement was largely neglected and the government did not explicitly recognise the protection needs of IDPs, even though Kenya had become a member state to the Pact on Security, Stability and Development in the Great Lakes Region ("Great Lakes Pact"). Its protocols, including that on internal displacement, include the Guiding Principles.<sup>5</sup> Although there were efforts to investigate events that triggered displacement, including through the establishment of temporary institutions, the government's overall response was fragmented and lacked a special focus on IDPs. Interventions were consequently majorly ad hoc and not necessarily focused on IDPs.<sup>6</sup>

In the aftermath of the 2007/2008 violence that triggered large-scale displacement, the government had some basic mechanisms in place for responding to internal displacement. For the first time, through what was then the MoSSP, it initiated programmes to assist the displaced in the form of Operation *Rudi Nyumbani* (Return Home), Operation *Tujenge Pamoja* (Build Together) and Operation *Ujirani Mwema* (Good Neighborliness). While these programmes were unprecedented in their scope and reach, they had major shortcomings.<sup>7</sup> For example, the provision of assistance was criticised for being inadequate and too slow, for its bias towards land-owning rural IDPs, and because more could have been done to secure IDPs' substantive participation in the planning and implementation of the operations. Moreover, as resettlement and return efforts by the government have mostly focused on registered IDPs, assistance programmes have thus excluded a significant number of the displaced throughout Kenya.<sup>8</sup> The situation of people displaced by earlier or subsequent violence or by other causes has also not been adequately addressed. Therefore, the unsatisfactory

response by the government (poor coordination, short-term planning, failure to allocate sufficient resources and poor profiling) and the uncoordinated manner in which various civil society organisations responded to internal displacement following the violence, served to highlight the need for a comprehensive national legal framework.<sup>9</sup>

## Law & policy

### ***Kenya and the Kampala Convention***

As indicated above, Kenya is a member state to the great lakes pact and its protocols but it has yet to sign and ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa – the Kampala Convention. The process of ratification of the Kampala Convention has been delayed by the fact that Kenya's new constitution in 2010 marked a change in the legal procedure to adhere to international obligations,, which made it necessary to adopt a law on the domestication of treaties.<sup>10</sup> The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 (IDP act) was eventually adopted in December 2012, so the country is now in the position to ratify the Kampala Convention. According to the IDP act, the executive (or the relevant state department) is responsible for initiating the treaty making process. In consultation with the attorney general, the cabinet secretary of the relevant state department shall then submit the treaty together with a memorandum to the cabinet for approval.<sup>11</sup> The treaty shall then go to the Parliament for further approval. Subsequently, the relevant cabinet secretary shall prepare the instrument of ratification of the treaty, which will need to be signed, sealed and deposited by the cabinet secretary at the requisite international body (in this case, the AU Commission) and a copy shall be filed with the registrar.

Some argue that as Kenya has made significant progress towards a comprehensive legal and policy framework on internal displacement in an effort to implement its commitments with regard to the Protocol on the Protection and Assistance to IDPs of the ICGLR security pact, ratifying the Kampala Convention has become unnecessary. However, there are still several good reasons for Kenya to join the convention.

The ratification of an international treaty is a mark of national responsibility and a way for the government of Kenya to demonstrate the credibility of its response to internal displacement and to showcase its approach to displacement issues in an international forum. In substantive terms, as the IDP act makes direct reference to and incorporates the Guiding Principles, the national framework of Kenya can be considered to be largely

compliant with international standards. Nevertheless, the ratification of the Kampala Convention would create an opportunity to integrate and uphold those additional protection standards that have been introduced by the Kampala Convention. If Kenya were to ratify the Kampala Convention, it may be necessary to revise the draft IDP policy to ensure consistency with the convention's requirements, and consider eventual amendments to the IDP act and/or other relevant legislation.<sup>12</sup> For example, the IDP act might need to be integrated to include reference to the role of 'non-state armed groups'. An important aspect of the Kampala Convention is also the fact that, by endorsing a collaborative approach, it holds all actors, including non-state armed groups, accountable and requires of them to contribute to respond to IDPs' needs.

Furthermore, the Kampala Convention provides for a well-established mechanism of monitoring compliance and provides a good platform for the government of Kenya to report on the progress it has made in assisting IDPs and supporting durable solutions for IDPs through the Conference of State Parties. Provided that states comply with their reporting obligations in a timely fashion, the International Conference of the Great Lakes Region constitutes a means of regular, external, independent and expert scrutiny of a state's compliance with its human rights obligations. At the same time, the periodic nature of reporting also encourages a state, and civil society, to regularly reflect on its human rights situation. The government of Kenya could also use such a platform to share its experience and best practice in terms of the development of legal and policy frameworks on internal displacement, inspiring other countries within the region and beyond.

There is at least one additional benefit that may be derived from the ratification of the Kampala Convention that should not be underestimated. Once a treaty has been ratified, this is likely to result in opportunities for resources, capacity building and training from various sources. Aside from technical assistance directly linked to treaty ratification and implementation, ratification might also indirectly support efforts to attract aid and political support and would be particularly relevant for internal displacement in Kenya as donor attention on the issue has significantly declined.

Finally, by adopting "a legal framework for solidarity, co-operation and the promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences"<sup>13</sup> the Kenyan authorities would provide confirmation of their adherence to the values of "Pan-Africanism".

### ***The draft IDP policy and IDP act***

The development of a legal and policy framework on

internal displacement in Kenya was driven by the level of prominence afforded to internal displacement following the 2007/2008 PEV, when the inadequate and uncoordinated nature of responses highlighted the need for a framework to act as a platform for collaboration and coordination. Members of the Legal and Advocacy Sub-Working Group (LASWG) under the Protection Working Group on Internal Displacement (PWGID, which was created in 2009 and replaced the IDP Protection Cluster that had been established the year before to coordinate humanitarian assistance in Kenya) worked closely with the ministry of special programmes, the ministry of justice and constitutional affairs and with a technical advisor from the office of the special rapporteur on the human rights of IDPs to draft a national policy on the prevention of internal displacement and the protection and assistance to internally displaced persons in Kenya (hereinafter “draft IDP policy”), finalised in April 2010.<sup>14</sup> Largely based on international and regional instruments and standards, it provides for a comprehensive approach to addressing internal displacement caused by conflict, other forms of violence, disasters and development projects, irrespective of IDPs’ location and ethnic affiliation. It outlines institutional frameworks, roles and responsibilities for state and non-state parties in all phases of displacement. It sets out measures to prevent, manage and mitigate displacement risks and to protect and assist IDPs to find durable solutions. In November 2010, the LASWG revised the draft policy to bring it in line with the newly-promulgated Kenyan constitution. Following these revisions, a draft cabinet memorandum was prepared and presented to the MoSSP in March 2011, and later presented to the relevant cabinet subcommittee. In July 2012, the policy was revised again to align it with developments in the land sector, in particular with the provisions of the Land Act, the Land Registration Act and the National Land Commission Act with respect to the protection of IDPs in the context of landlessness.<sup>15</sup> The draft IDP policy was endorsed by the cabinet in October 2012<sup>16</sup> but, unfortunately, there has been no subsequent progress towards its final adoption.

The need for legislation on internal displacement in Kenya had been identified by stakeholders since 2007. Between May and December 2010, the sub-working group audited the existing legal, policy and institutional frameworks with a view to informing the implementation of the proposed policy. A detailed matrix was developed and disseminated indicating the weaknesses in the existing legal architecture and justifying the need for a concrete legal framework to foster the implementation of the draft IDP policy.<sup>17</sup> The momentum came about in November 2010, when the Parliament established a parliamentary select committee on the resettlement of IDPs (PSC), whose mandate included preparing a draft bill on forced displacement. Given the progress that the PWGID had made

by then in relation to the draft IDP policy, the PSC and the PWGID worked together to overcome structural challenges and successfully develop a comprehensive bill on internal displacement.<sup>18</sup> The draft IDP policy was therefore complemented by the IDP act, which received presidential assent on 31 December 2012. The IDP act largely reflects key protection principles throughout the displacement process and establishes an institutional framework for IDPs’ protection and assistance, in particular by providing for the establishment of an inclusive implementation committee, the national consultative coordination committee (NCCC). The NCCC became operational in February 2015.

The adoption of the draft IDP policy, the fast-tracking of the operationalisation of the IDP act and the ratification of the Kampala Convention are some of the recommendations that the UN special rapporteur on the human rights of IDPs made to Kenya following his visits to the country in 2012<sup>19</sup> and 2014, and that the Kenyan Truth, Justice and Reconciliation Commission also included in its final report.<sup>20</sup> While some feel that the draft IDP policy has been overtaken by the IDP act and there would be less added value in adopting the draft policy now, an approved IDP policy would certainly help facilitate implementation of the IDP act. Both instruments are essential to improve the government’s response to the needs of IDPs and the affected communities.

As the draft IDP policy was adopted by the cabinet as a sessional paper, for it to be finally endorsed, parliamentary approval is required. There are a few steps that can be undertaken in order to foster its enactment: a stakeholders audit, for example, would assist in identifying which miscellaneous amendments the current draft policy should incorporate to be brought in line with the IDP act. In this context, it would be ideal to consider the eventual amendments necessary for the draft to meet the requirements of the Kampala Convention. As happened during the development of the draft itself, the Advocacy Sub-Working Group of the PWGID could play an important advocacy role through engagement with the relevant parliamentary committee and principal secretaries, and with the parliamentary clerks in order to fine-tune the text of the draft. A forum with high-level key actors could be organised to raise awareness and enhance support for the draft prior to its tabling in cabinet and its subsequent signing.

The implementation of the IDP act raises important questions on the need to bring amendments to the existing text. The analysis conducted by the IDMC reveals that “surgical” interventions may be required to ensure the smooth realization of the objectives of the same act. In particular, additional rules may assist clarifying the role of the NCCC and its relations to different governmental and non-governmental entities and, ultimately, in improving its

functioning. Likewise, the re-labelling of the “Humanitarian Fund” into the “Fund” and the definition of its purposes could be coupled with a clearer definition of its sources. In the same fashion, the role of the county governments, which are attributed competencies on many matters, including trade and agriculture, according to the Fourth Schedule of the constitution, should be made more explicit with regard to functions that relate to IDPs.

Nevertheless, in approaching a new legislative effort, due consideration will need to be given to the practicability of the proposed changes. The amendment process is likely to be time consuming and may, therefore, result in further delays in the desired implementation of the IDP act. Also, it might be difficult to create the political momentum required to secure the recommended amendments. It may thus prove to be more strategic, especially in the early stages of the implementation, to rely on the existing text and provide an interpretation in light of the provisions of the Kenyan constitution. When adopted, an updated IDP policy which meets the requirements of the Kampala Convention would also serve to integrate and support the implementation of the IDP act in line with the convention.

Whereas additional normative action amending the IDP act may result in difficulty for the above-mentioned reasons, a series of practical measures will have to be undertaken to support the implementation of the same. These include: mapping of non-state actors<sup>21</sup>, line ministries and other relevant government departments and agencies to facilitate central government planning; issuing guidelines to ensure coordination with peripheral NCCC structures and establish clear linkages between county level institutions and central government; setting up oversight mechanisms to monitor the use of the exchequer’s apportion to the “Fund”, formerly known as the “Humanitarian Fund”; ensuring the necessary arrangements for conducting regular data collection on IDPs, particularly at county level; and considering the adoption of a regulatory framework, providing this does not result in more stumbling blocks.

#### ***Other frameworks relevant to internal displacement***

In recent years, the government of Kenya has produced a number of policies and laws that are relevant in terms of preventing and addressing displacement even if they are not IDP-specific. For example, frameworks that govern disaster management are particularly relevant to the prevention of and response to displacement caused by disasters. These include a draft national disaster management policy developed in 2009 and a disaster management bill, both pending. A national disaster response plan is already in place, linked to the Vision 2030 development strategy for northern Kenya and other arid lands. A number of other government initiatives aim to prevent or minimise the

extent and impact of internal displacement, such as the 2009 draft national policy on peacebuilding and conflict management. Kenya has also made significant progress in developing a comprehensive land-related framework, which again is very relevant to address displacement. It adopted a national land policy in 2009 and a series of new laws in 2012 (the Land Act, the Land Registration Act and the National Land Commission Act). Despite the progress, Kenya’s land reform has not been completed. Two important pieces of legislation are still pending, the evictions and resettlement procedures bill 2013 (establishing procedures to be applied in case of evictions) and the community land bill (intended to safeguard community land rights). Adoption and thorough implementation of these legal and policy frameworks is fundamental to ensure real protection of IDPs’ rights and prevent further displacement.<sup>22</sup>

However, as the PWGID highlighted,<sup>23</sup> there is a risk that the lack of harmonisation of these normative development processes and existing frameworks may result in Kenya having multiple legal frameworks that apply to IDPs, but that may be disjointed or may offer overlapping or potentially conflicting protection frameworks. This could ultimately represent a challenge to the implementation of the IDP act and draft IDP policy.

### **Scope, methodology and structure of the study**

In February 2015, the IDMC with the assistance of national and international institutions and civil society organisations (CSOs) operating in the field of internal displacement response, initiated the research project “Analysis of normative frameworks relating to internal displacement in Kenya” with two main objectives:

1. to verify the actual compliance of the national internal displacement framework of Kenya, including both existing and draft legislation when relevant, to the international legal standards on IDP protection with the aim of highlighting eventual gaps or obstacles to the full enjoyment of IDPs’ rights;
2. to address areas of potential incoherence between different pieces of the national legislation, especially in areas where legal developments are already being undertaken, so to avoid conflicts with more specific standards relating to internal displacement.

Before initiating this project, in 2014 the IDMC commissioned a group of consultants in Kenya to develop a piece of research on the subject,<sup>24</sup> which has been used to check the IDMC/NRC’s initial assumptions. This document confirmed the need for a more thorough and in-depth analysis of Kenya’s legal frameworks, and it has also been used as a background document to support the analysis.

The analysis of Kenya's overall legal and policy framework for the protection and assistance of internally displaced persons was conducted by a team of international legal researchers coordinated by the IDMC. The analysis was undertaken in light of the supranational standards established at the UN and AU level, in particular the Guiding Principles and the Kampala Convention. Other relevant supranational normative frameworks were addressed if they articulated protection standards beyond what was established by the Kampala Convention. In particular, reference to non-binding frameworks such as the Kampala Declaration, and guidance-related but non-standard setting instruments like the Framework on National Responsibility, were limited to the essential. The analysis included age, gender and diversity considerations as well as reference to host communities as relevant. It also considered different phases of response to internal displacement and focused on 15 thematic areas of central interest. These are:

1. Definition of IDPs
2. Protection against discrimination
3. Awareness raising and training
4. Prevention of displacement and prohibition of arbitrary displacement
5. Data collection relating to IDPs
6. National and local structures of governance for an IDP response
7. Allocation of necessary financial and human resources
8. Recognition, issuance and replacement of documents
9. Freedom of movement
10. Participation of IDPs and electoral rights
11. Right to family life
12. Housing land and properties
13. Basic necessities of life
14. Other economic, social and cultural rights (such as education and employment)
15. Displacement related to natural hazards

The study dedicates a chapter to each of these thematic areas. Each chapter first sets out the relevant minimum essential elements identified in the Manual for Law and Policymakers and addresses the protections IDPs should expect to enjoy under the Kampala Convention and the other supranational normative frameworks. Each chapter then considers the extent to which the minimum essential elements and these protections are provided for by Kenya's normative framework (existing or under development) and provides recommendations considering the relevant legal instruments in light of the situational context. A distinction is always made between recommendations on normative action and on implementation. Where relevant, recommendations are also set out in order of the phase of displacement that they relate to: (i) protection from displacement; (ii) protection during displacement; and (iii) protection after displacement – "durable solutions". A complete list of the recommendations is presented in the table set out in Appendix A.

In order to verify the completeness, soundness and relevance of the analysis and the development of adequate recommendations, the IDMC instituted two advisory structures: an advisory committee, consisting of representatives of international organisations and independent experts, and a research task force (RTF) operating at the Kenya government level and chaired by NRC, which featured a series of CSOs, human rights institutions and local offices of humanitarian agencies with specific expertise on legal aspects of the internal displacement response.

With the support of NRC, the IDMC also organised a 1.5 day workshop in Nairobi with national and local stakeholders concretely engaged in displacement response (including the ones represented in the RTF, see list of participants in the Appendix C). The workshop aimed to:

- analyse the preliminary findings of the research with a view to suggesting potential amendments and to formulating theme-specific recommendations;
- identify overall key recommendations, and
- discuss how the findings of the study can inform and support the PWGID's initiatives towards the implementation of the existing framework and its alignment with international standards.

The feedback provided by the participants was then incorporated by the IDMC before the study was reviewed and finalised.

# B

## Recommendations

The key recommendations from the IDMC and the NRC to the government, following the review of the relevant legal instruments discussed in the thematic chapters, are as follows:

### On normative action:

1. Ratify and implement the Kampala Convention, to ensure that national legislation is aligned with the convention's provisions and that oversight of the supranational monitoring mechanisms envisaged in the African Union system is duly accepted.
2. Adopt and implement the draft IDP policy with a view to articulating the modalities of state, and other relevant stakeholders', engagement in the three phases of internal displacement response, and the concrete actions to be undertaken to effectively respect, protect and fulfil IDPs' rights.
3. Harmonise non-IDP specific piecemeal legislation and other frameworks relevant to particular aspects of displacement response, so that gaps or overlaps in language that may undermine IDPs' protection are addressed. In particular, ensure that non-IDP specific policies and legislation refer to the pertinent provisions of the IDP act, and that the guarantees set out by the latter supersede potentially conflicting norms which may be found in non-IDP specific laws and policies.
4. Reinforce existing protection in critical areas, including by adopting adequate measures to guarantee the right to issuance and replacement of identity documents for all IDPs or persons at risk of displacement, creating effective mechanisms for access to justice and reparations for persons displaced, providing assurances against planned evictions and demolitions in urban settings through the amendment or adoption of relevant legislation, and setting out the explicit prohibition of family separation as well as unambiguous protection against discrimination of IDPs.
5. Progressively amend the IDP act so as to include provisions reforming the structure and the *modus operandi* of the NCCC, e.g. enabling the NCCC to set up a Secretariat capable of directly performing operational functions, where needed, and allocating a portion of the national budget to the Fund, to be managed by the NCCC.
6. Urgently finalise pending normative frameworks on land tenure and disasters relevant to internal displacement by ensuring that they are in line with international standards. Adopt these frameworks and take immediate steps to implement them. The following are particularly important:

- the national disaster management bill and draft IDP policy, so as to rationalize the number of existing bodies variously responsible for disaster prevention and management and set up NADIMA as the body mainly in charge of coordination of disaster relief-related efforts;
- the evictions and resettlement procedures bill; and
- the community land bill.

### On implementation:

In the context of the response to disaster-induced displacement (prevention, protection and assistance and durable solutions), the NCCC should:

1. Create channels of coordination with other relevant governmental and nongovernmental bodies and strengthen participation and information sharing with IDP and host communities.
2. Allocate adequate resources to address IDP issues in Kenya through a yearly apportionment of the national budget to the Fund, and clarify the definition and use of the term.
3. Clarify how the NCCC will relate to public benefit organisations and UN agencies operating in the country, in addition to those delegated to represent 'non-state actors'.
4. Establish channels and procedures for the NCCC to engage with relevant government departments and intergovernmental committees and bodies (e.g. NDEC).
5. Set up and maintain regular and systematic lines of communication with IDPs and with humanitarian agencies, civil society organisations and other stakeholders working closely with IDPs with a view to facilitating information flow and ensuring effective participation of IDPs in decision-making processes.
6. Take measures to ensure comprehensive internal displacement data collection and verification: this should be done through reliable data collection exercises to be coordinated by the NCCC and carried out with the direct engagement of the National Bureau of Statistics.
7. Better specify the role of county authorities in addressing displacement, and ensure cooperation and coordination of national and county governments in the planning and delivery of services addressing displacement-specific issues and in facilitating conflict resolution arrangements targeting both IDPs and communities affected by displacement.
8. De-emphasise the notion that durable solutions for IDPs can only be attained through land acquisition and allocation and ensure that alternative options are equally explored in meaningful consultations with IDPs and other affected communities.



## Thematic chapters

### 1. Definition of IDP

#### 1.1 General Context and Minimum Essential Elements

##### *Minimum Essential Element:*

Adopt a definition of an IDP that is consistent with, and not narrower than, that used in the Guiding Principles and the Kampala Convention. The definition of an IDP must not create a specific legal status that is granted, refused or ceased in individual cases; it should serve as a factual description of the circumstances of a person that is used to determine the applicability of the government's laws and policies on IDPs.<sup>25</sup>

Adopting a definition of IDPs in domestic law or policy is fundamental, as it can help state and non-state actors to assess and identify those persons in need of protection and assistance and, accordingly, to apply any relevant specific laws and policies relating to internal displacement. It also helps clarify the scope of the national framework. It should be emphasised that defining IDPs under domestic law does not imply the creation of a specific legal status for displaced persons. IDPs remain citizens or habitual residents of their country and are entitled to fulfillment of their human rights under national and international law, including protection and assistance from the state on that basis alone. Nonetheless, a definition of IDPs, consistent with the Guiding Principles, should be adopted in local law.

#### 1.2 Relevant Supranational Frameworks

##### *a. Guiding Principles*

The Guiding Principles provide the following descriptive identification of IDPs,<sup>26</sup> which has gained wide-ranging international acceptance:

“For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.”<sup>27</sup>

The examples provided in the descriptive identification are non-exhaustive, and in essence anyone who has been

forced or obliged to leave his or her home and does not cross an internationally recognised state border is an IDP.<sup>28</sup> Rather than conferring a legal status on a category of people, the IDP descriptive identification focuses on vulnerabilities to ensure that adequate protection and assistance is given to IDPs and that displacement does not lead to discrimination or other violations of an individual's rights.

The Annotations to the Guiding Principles provide further guidance on how this descriptive identification is to be approached, as follows:

“[The descriptive identification] highlights two elements: (1) the coercive or otherwise involuntary character of movement; and (2) the fact that such movement takes place within national borders. The second requirement is to be understood in a broad sense. It refers to the place where the displaced person finds refuge and is also met if displaced persons, for example, have to transit through the territory of a neighbouring state in order to gain access to a safe part of their own country; first go abroad and then return (voluntarily or involuntarily) to their own country but cannot go back to their place or origin/habitual residence or home for reasons indicated in paragraph 2; or left voluntarily to another part of their country but cannot return to their homes because of events occurring during their absence that make return impossible or unreasonable [...]

[Paragraph 2] provides some examples of how displacement may be brought about [...]. The words ‘in particular’ indicate that the listed examples are not exhaustive.

[T]he notion of who is an internally displaced person [...] is not a legal definition. Becoming displaced within one's own country of origin or country of habitual residence does not confer special legal status in the same sense as does, say, becoming a refugee. This is because the rights and guarantees to which internally displaced persons are entitled stem from the fact that they are human beings and citizens or habitual residents of a particular state. Those rights and guarantees emanate from the peculiar vulnerability and special needs that flow from the fact of being displaced [...] as human beings who are in a situation of vulnerability [internally displaced persons] are entitled to the enjoyment of all relevant guarantees of

human rights and humanitarian law applicable to the citizens or habitual residents of the country concerned. This does not rule out the possibility of administrative measures such as registration on the domestic level to identify those who are displaced and need special assistance.<sup>29</sup> However, lack of such registration would not deprive internally displaced persons of their entitlements under human rights and humanitarian law.

[P]eople may become internally displaced either after suffering the effects of coercive factors or in anticipation of such effects.<sup>30</sup>

#### *b. Kampala Convention*

The Kampala Convention codifies verbatim the definition of internally displaced persons used in the Guiding Principles, that is:

“Internally Displaced Persons’ means persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.”<sup>31</sup>

The Guiding Principles and the Kampala Convention, without including the specific words in the definition, explicitly extend the range of causes of displacement to ‘large scale development projects’<sup>32</sup> and ‘development projects’<sup>33</sup>.

#### *c. Great Lakes Protocol*

The International Conference on the Great Lakes Region (ICGLR) Protocol on Protecting and Assisting IDPs, the “Great Lakes Protocol”, Article 1(4) also codifies the descriptive definition of internally displaced persons used in the Guiding Principles.<sup>34</sup> Therefore, it can be seen that there is a consistent and recognised descriptive identification of IDPs at the international as well as regional level. Signatories to the great lakes protocol agreed, in Article 6(4)(a), to enact legislation that defines internally displaced people according to the definition in the great lakes protocol.

(a) UN Principles on House and Property Restitution for Refugees and Displaced Persons – “The Pinheiro Principles”

The Pinheiro Principles do not contain a definition of internally displaced people, although IDPs are distinguished from “other similarly situated displaced persons who fled across national borders”.<sup>35</sup>

### **1.3 Kenya-specific Analysis**

State sovereignty means that the primary responsibility for addressing internal displacement lies with national governments. IDPs are either citizens or habitual residents of the country in which they are displaced, so ensuring a national legal framework that protects their rights and addresses their specific needs, including if necessary through the development of legislation on this issue, is a core responsibility of governments facing internal displacement.<sup>36</sup>

The 2012 IDP act replicates the descriptive definition of “internally displaced person” contained in the Guiding Principles, i.e.:

“internally displaced person means a person or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.”<sup>37</sup>

This means that the Kenyan legislation meets the minimum essential element necessary to create a satisfactory IDP definition, as it does not create a specific legal status but rather serves as a factual description of the circumstances that may lead to displacement.

However, the fact that such definition refers to ‘large scale development projects’ could potentially narrow the scope of the Kampala Convention definition, which only refers to ‘development projects’, as the draft IDP policy also does.

In addition, the draft IDP policy goes further and makes the definition more Kenya-specific, by explicitly specifying that the definition of IDPs includes:

(a) Persons internally displaced by politically instigated violence or inter-communal hostilities such as competition over lands or other resources.

(b) Persons internally displaced by natural disasters, whether or not triggered by the change of climate.

(c) Persons internally displaced by development projects or projects on the preservation of the environment, including those forcibly evicted, who remain without proper relocation and sustainable re-integration.”

Finally, it also emphasises that the definition “includes IDPs irrespective of the location they have been displaced



to, including camps, transit sites, settlements or host families in rural and in urban areas”.<sup>38</sup>

The draft IDP policy contains a specific objective, “the creation of a common understanding in Kenya of who an IDP is”.<sup>39</sup> This is particularly important because, despite the comprehensive legal definition adopted in national legislation, it seems that it is not always understood what circumstances constitute internal displacement and/or that government response to internal displacement varies in different cases (for example, there has been a stronger emphasis on the 2007/2008 election-related IDPs than on other categories of IDPs).<sup>40</sup> As the UN special rapporteur on the human rights of IDPs, Chaloka Beyani, Ph. D. (“Dr. Chaloka Beyani” or “Dr. Beyani”) highlighted after his latest visit to Kenya “causes of internal displacement [in Kenya] are many and recurrent, and solutions must be pursued more rigorously for all IDPs in an equal manner”.<sup>41</sup> Acknowledging that IDPs are not limited to those affected by the particular PEV scenario and helping to create an understanding of the other types of situations that can cause internal displacement would be a step in the right direction.

Significant steps need to be taken to improve national awareness among local authorities, the general public and IDPs themselves, in order to create a common understanding in Kenya of who an IDP is (on this, please see also the chapter on training and awareness raising). This would also include awareness of the scale of displacement, as currently there is a lack of clear data on the total number of people affected, because no agency consistently tracks IDPs’ location and needs over time.<sup>42</sup>

Finally, it is to be noted that there are several normative frameworks in Kenya (adopted or pending, such as the draft national disaster management bill, the draft national disaster management policy, the community land bill and the evictions and resettlements procedures bill) which are all relevant to internal displacement and should make reference to the 2012 IDP act to ensure consistency across legislation. Unfortunately, these frameworks do not currently make any reference to the IDP act and its descriptive identification of IDPs.

## 1.4 Recommendations

### *On normative action:*

- Consider amending the 2012 IDP act in relation to the applicability of the provisions related to development-induced displacement beyond the current restriction to “large-scale” projects.
- Ensure that other Kenyan normative frameworks relevant to displacement (existing or under development) refer to the 2012 IDP act.
- Consider aligning categories used in other Kenyan

normative frameworks relevant to displacement (existing or under development) which do not correspond to international standards (e.g. squatters as per draft evictions and resettlement procedures bill 2013) with categories used in IDP relevant instruments.

### *On implementation:*

- For the government/civil society: Promote a common understanding in Kenya of who qualifies as an IDP through awareness-raising and sensitisation activities (see chapter on awareness raising).
- For the government: give an update on the situation of:
  - the remaining PEV IDPs (integrated and remaining in camps), and
  - all other categories of IDPs that were displaced before and after the election (by violence and other causes).

## 2. Protection of IDPs Against Discrimination

### 2.1 General Context and Minimum Essential Elements

The principle of non-discrimination is well established in international law. Discrimination involves distinctions, exclusions or preferences made on the basis of various protected characteristics which have the effect of nullifying or impairing equality of opportunity or treatment. The principle of non-discrimination provides that those in equal circumstances are dealt with equally in law and practice and that those with certain protected characteristics are not treated less favourably. There are various international and regional instruments addressing the prohibition on discrimination. There are two main issues to be considered in this context: (i) discrimination vis-à-vis non-displaced persons; and (ii) discrimination among displaced persons and protection of inherently vulnerable groups of IDPs.

#### *(i) Discrimination vis-à-vis non-displaced persons*

The prohibition of discrimination against IDPs because of their displacement status is increasingly being recognized by state practice at the regional and domestic level.<sup>43</sup> The prohibition of discrimination against IDPs is particularly important given that instances of displacement may be rooted in the intentional discrimination against certain groups. The principle of non-discrimination does not preclude special measures addressing the specific needs of displaced persons. As commentators have noted:

“The principle of equal treatment is fundamental to the approach to displacement taken in the Guiding Principles. That approach is based on the observation that displacement consistently results in specific, severe vulnerabilities and harms for those affected [ . . . ] As a result, in order to place IDPs back on an even footing with the non-displaced population, the state should provide specific and targeted measures of assistance and protection of a nature and scope corresponding to the needs and vulnerabilities resulting from displacement. This approach is supported by numerous rules of international human rights law that prescribe positive or special measures in favour of vulnerable groups. Although such measures result in differential treatment, they are not prohibited as being discriminatory; rather they are required by the basic principle that what is different must be treated differently, as long as they respond to genuine vulnerabilities and do not last longer than necessary to address them”.<sup>44</sup>

#### *(ii) Discrimination among displaced persons and protection of inherently vulnerable IDPs*

The same principles of non-discrimination that govern the treatment of IDPs in relation to non-displaced persons also apply within the internally displaced population. As commentators have noted:

“Internally displaced populations are typically diverse and it is important to ensure that some segments do not arbitrarily receive worse treatment than others. Factors that can give rise to differential treatment within displaced populations include the following: Cause of displacement [ . . . ] Location of displacement [ . . . ] Inherent vulnerability [ . . . ]

Attention to the protection needs of inherently vulnerable groups should be an absolute priority in any internal displacement situation [ . . . ] Some of the groups that raise the greatest concern include:

- single parents, particularly female-headed households [ . . . ]
- minors, especially when unaccompanied
- older people, especially when unaccompanied or otherwise without family support
- people with disabilities, chronic illnesses, or HIV/AIDS
- traumatised people
- pregnant or lactating women
- members of ethnic or religious minorities
- indigenous peoples”<sup>45</sup>

#### *Minimum Essential Element:*

- Recognise the right of any IDP to be protected against discrimination on the ground that he or she is internally displaced, as well as against discrimination in relation to other IDPs or non-displaced individuals and communities on any ground such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, or birth or any similar criteria.<sup>46</sup>

### 2.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

The Kampala Convention specifically prohibits discrimination based on displacement status, in several of its provisions.

##### *i. Non-discrimination vis-à-vis non-displaced people*

Article 3(i)(d) states that state parties shall “[r]espect and ensure respect and protection of the human rights of internally displaced persons, including [...] non-discrimination”.<sup>47</sup>

Article 9(1)(a) provides that “States Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, the following acts, amongst others: [...] Discrimination against such persons in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons”.<sup>48</sup>

Article 9(2)(a) goes on to say that state parties shall “[t]ake necessary measures to ensure that internally displaced persons are received without discrimination of any kind and live in satisfactory conditions of safety, dignity and security”.<sup>49</sup>

*ii. Non-discrimination among displaced people and protection of inherently vulnerable IDPs*

The Kampala Convention places a blanket prohibition on “displacement based on policies of racial discrimination, or other similar practices aimed at or resulting in altering the ethnic, religious or racial composition of the population”.<sup>50</sup>

The Kampala Convention also places an obligation on state parties to provide protection and assistance to displaced people without discrimination. For example, Article 5(1) provides that state Parties shall “bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind”.<sup>51</sup>

Article 9(2)(c) requires states to “provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly and persons with disabilities or communicable diseases” whereas Article 9(2)(d) demands “special measures to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses”.

**b. Guiding Principles**

*i. Non-discrimination vis-à-vis non-displaced people*

Principle 1(1) of the Guiding Principles provides that:

“Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discrimi-

nated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced”.<sup>52</sup>

Principle 29(1) states:

“Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services”.<sup>53</sup>

The Guiding Principles Annotations provide further guidance on Principle 1:

“[Principle 1(1)] embodies the principle of equality and non-discrimination and makes explicit what is only implicit in international law: internally displaced persons are entitled to enjoy the same rights and freedoms as other persons in their country. Any discrimination against internally displaced persons is prohibited”.<sup>54</sup>

“[T]he prohibition of discrimination is violated if internally displaced persons are disadvantaged on the sole ground that they are displaced, but it does not outlaw the distinctions that are based on serious and objective reasons. In particular, the principle of non-discrimination does not preclude special measures addressing, for example, the specific needs of displaced women and children”.<sup>55</sup>

The Guiding Principles Annotations highlight that the Principle 29(1) emphasises the general prohibition of discrimination as embodied in Principle 1(1).

*ii. Non-discrimination among IDPs and protection of inherently vulnerable IDPs*

Principle 4 of the Guiding Principles states:

“1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth or on any other similar criteria.

2. 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 that takes into account their special needs".<sup>56</sup>

The Guiding Principles Annotations make it clear that the "wording of paragraph 1 follows formulations of human rights and humanitarian law provisions that prohibit discrimination [...] [P]aragraph 1 does not guarantee an independent right to freedom from discrimination [as Principle 1 does], but rather an accessory right. Thus its scope is restricted to protecting internally displaced persons against discrimination only with respect to the provisions set forth in the Guiding Principles".<sup>57</sup>

The Guiding Principles Annotations continue: "Paragraph 2 addresses the situation of particularly vulnerable groups of internally displaced persons [...] and emphasises that they are entitled to the protection and assistance required by their condition and to treatment that takes into account their special needs. Whereas paragraph 2 sets out the general rule, several other Principles address specific aspects of the special attention that should be paid to vulnerable groups (see, for example, Principles 13, 19 and 23). Accordingly, special treatment to some groups of internally displaced persons does not violate the principle of equality as objectively disparate situations should not be treated equally and specific vulnerabilities should be taken into account [...] Several provisions of humanitarian law expressly set forth that special measures for the protection of children and women shall be taken by parties to a conflict. Similarly, human rights law deals with the special needs of vulnerable categories of persons in specific instruments".<sup>58</sup>

### **2.3 Kenya-specific Analysis**

Discrimination of IDPs in Kenya based on their status is not a common issue. However, the level and the type of governmental assistance received by IDPs in Kenya has differed consistently on the basis of a series of factors. Most IDPs who were affected by the 2007/2008 PEV and were profiled and registered in the national database received some assistance, though it has been criticised as unevenly distributed and largely inadequate. Other IDPs, including those that after the 2007/2008 PEV missed the cut-off date for registration or fled to host communities, IDPs displaced by violence prior to 2007, or IDPs fleeing for reasons other than political violence such as those forcibly evicted from urban areas or government forests in the Rift Valley and Central provinces,<sup>59</sup> have either been entirely excluded from any assistance and protection programmes or have received only sporadic emergency assistance, such as food relief.<sup>60</sup>

IDPs outside of camps have largely been excluded due to their low visibility and the widespread perception that their lives have normalized within the community. They may face discrimination, because they are not members of that community, thus adding to their challenges in adjusting to an unfamiliar host area. However, many IDPs reportedly preferred to move to host communities instead of camps on purpose to avoid being identified as such, especially those that were relatively better-off and who had managed to integrate into society. They did not want to be seen receiving food or 'handouts' from the government or well-wishers.<sup>61</sup>

Government authorities allegedly discriminated against some groups of IDPs belonging to certain ethnic communities that were associated with particular political parties or beliefs when providing assistance and conducting resettlement programmes. The return and resettlement programs initiated by the government further prioritized land-owning IDPs "because it is easier to deal with people with a definite place to go back to and also because revitalizing the agriculture sector was a main government priority". Consequently, landless people, squatters, traders such as hawkers and business people remained stranded after the official closure of camps.<sup>62</sup>

Finally, there are significant populations of vulnerable groups among displaced persons in Kenya, including elderly, orphans and other vulnerable children, individuals living with HIV/AIDs or disability, as well as pregnant women.<sup>63</sup> As disaggregated data, even for registered IDPs, has never been collected in a systematic and comprehensive way, attention to the protection needs of these vulnerable groups has been low.<sup>64</sup>

Kenya has various instruments that make reference to prohibitions of discrimination. Kenya has a constitution that contains non-discrimination provisions and national law makes reference to various international instruments.

Article 27 of the Kenyan constitution contains the following non-discrimination provision:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or so-

cial origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.<sup>65</sup>

*i. Non-discrimination vis-à-vis non-displaced people*

The general prohibition on discrimination in the constitution implicitly protects IDPs from discrimination. While the constitutional non-discrimination provisions are to be applauded, the constitution does not specifically prohibit discrimination based on displacement condition.

The IDP act contains passing references to discrimination, although it does not contain a detailed provision on non-discrimination vis-à-vis non-displaced persons. For example, Section 9(2) on durable solutions provides that there should be “enjoyment of an adequate standard of living without discrimination” and “access to justice without discrimination”.<sup>66</sup> However, Section 3(b) provides that:

“Subject to the Constitution and this Act, the provisions of the Guiding Principles shall apply to all internally displaced persons in Kenya”.<sup>67</sup>

Therefore, Kenya’s legislation technically satisfies the minimum essential element identified above, as the IDP act incorporates the Guiding Principles into Kenyan law.

The draft IDP policy did go further, stating in Chapter 1.2:

“IDPs shall enjoy, in full equality, the same rights and freedoms under ratified international and

regional instruments as well as domestic law as all other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced. Targeted measures to address the particular assistance and protection needs of specific categories of IDPs, including women and children, the elderly or persons with disabilities, do not constitute discrimination if, and to the extent that, they are based on differing needs.

All IDPs shall enjoy the same assistance and protection in full equality and without discrimination. The disadvantaged among a displaced population shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs”.<sup>68</sup>

In addition to the Overarching Principles in Chapter 1, the draft IDP policy also contains many other specific protections against discrimination in specific chapters, for example in Chapter 8 on Providing Protection and Assistance: the Response During Displacement, it is stated that “The government respects, protects and fulfils the rights and freedoms of all IDPs and ensures the enjoyment of their rights and freedoms without discrimination”.

Although the Guiding Principles have been incorporated into Kenyan Law, the IDP act does not contain specific substantive provisions providing protection and assistance to IDPs without discrimination. Neither does it specifically enact any measures or create any bodies to enforce the Guiding Principles in practice.

*ii. Non-discrimination among displaced people and protection of inherently vulnerable IDPs*

In Kenya, there are significant populations of vulnerable groups among displaced people. Out of 3994 displaced households interviewed in 2011, 18.03% of them had older people among them while 17.7% had orphans and other vulnerable children. The third largest group of vulnerable persons comprised individuals with HIV/AIDs at 8.1%. People living with disability and pregnant women were reported from 7.0% and 5.9% of the households respectively.<sup>69</sup>

The general prohibition on discrimination in the constitution implicitly protects different groups of people within the displaced population from discrimination. In the context of protecting vulnerable

groups, it is notable that the state has a positive duty to take measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals of groups because of past discrimination.<sup>70</sup> This positive duty could be interpreted to extend, for example, to protect and provide redress to vulnerable groups within displaced populations. It is also provided that any measures under such a programme or policy shall adequately provide for any benefits to be on the basis of genuine need.<sup>71</sup> This provision could therefore be interpreted to allow the state to take special measures to protect or provide redress to vulnerable groups within displaced populations.

In addition, there are several specific provisions of the Kenyan constitution which refer to vulnerable groups, as follows. Article 10.2(b) of the Kenyan constitution includes among the national values and principles of governance in Kenya the “protection of the marginalised”. In addition, Article 21 on the implementation of rights and fundamental freedoms affirms that “All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities”.

Although internally displaced persons are not explicitly referred to in any of these articles as “vulnerable groups within society” or as “marginalised communities” or “marginalised groups”, the protection provided to such groups and communities may be extended if these articles are interpreted as implicitly protecting vulnerable IDPs as well.

In addition to the various provisions of the Kenyan constitution, the IDP act contains references to vulnerable IDPs. An example is Article 8(i) which outlines that “The government shall put into place measures for assistance and protection needs of internally displaced persons with particular regard to displaced communities with a special dependency on and attachment to their lands and the protection needs of women, children, persons with disabilities, the elderly and persons with special needs”. Further, Article 8(2) outlines that “Assistance and protection needs of communities in rural and urban areas where displaced persons find refuge shall equally be addressed based on their needs”. Finally, Article 22(4) details that “The government shall ensure that the displacement is carried out in a manner that is respectful of the human rights of those affected, taking in particular

into account the protection of community land and the special needs of women, children and persons with special needs.”

While the NCCC is ultimately responsible for the implementation of the IDP act, including its provisions on non-discrimination against IDPs and protection of vulnerable internally displaced persons and groups, it is important to refer to the role that the national gender and equality commission may have in that regard. Although the National Gender and Equality Commission Act 2011 does not include any explicit reference to IDPs, most of its functions (as presented in Article 8) could be very relevant to ensure that IDPs are not discriminated against, and that their specific vulnerabilities are considered. Among other things, the commission has responsibilities to:

- a. promote gender equality and freedom from discrimination in accordance with Article 27 of the constitution;
- b. monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- c. act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children;
- d. co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the government on all aspects thereof;
- e. monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- f. co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination; and
- g. conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the constitution.

The same can be said in relation to the national cohesion and integration commission: although the National Cohesion and Integration Act, 2008 does not explicitly refer to internal displacement, it assigns to its commission very relevant functions, for example to:

- a. promote the elimination of all forms of discrimination on the basis of ethnicity or race;
  - b. discourage persons, institutions, political parties and associations from advocating or promoting discrimination or discriminatory practices on the ground of ethnicity or race;
  - c. promote tolerance, understanding and acceptance of diversity in all aspects of national life and encourage full participation by all ethnic communities in the social, economic, cultural and political life of other communities;
  - d. plan, supervise, co-ordinate and promote educational and training programmes to create public awareness, support and advancement of peace and harmony among ethnic communities and racial groups;
  - e. promote equal access and enjoyment by persons of all ethnic communities and racial groups to public or other services and facilities provided by the government; and
  - f. promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.
- Consider developing specific affirmative actions as necessary to ensure IDPs' access to rights (for example in the area of access to justice).
  - Ensure that all IDP activities and data-collection mechanisms support assistance to vulnerable groups, including, inter alia: particularly vulnerable groups of women; internally displaced women more broadly, with regard to protection from discrimination (for example, with respect to the right to information, participation, documentation, and all entitlements) and sexual and gender-based violence; internally displaced children; the chronically ill; and disabled or older persons.

This highlights the importance for the NCCC to also liaise with other relevant institutions such as the national gender and equality commission and the national cohesion and integration commission for matters relating to discrimination against IDPs and protection of specific vulnerable groups of IDPs.

## **2.4 Recommendations**

On normative action:

- Consider amending the IDP act in order to include explicit provisions prohibiting discrimination based on displacement as well as prohibiting discrimination against IDPs on any ground such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, or birth or any similar criteria.
- Adopt the draft IDP policy, with a particular view to enacting the recommendations on measures the government should adopt on non-discrimination of IDPs.

On implementation:

- Ensure that measures on anti-discrimination and protection of vulnerable groups of IDPs are implemented in practice, including by strengthening collaboration between the NCCC and the national gender equality commission, and ensuring that the latter also considers relevant IDP issues in its work.
- Mainstream IDP issues within the work of relevant government institutions and ensure adequate awareness is raised around such issues through sensitisation activities.

### 3. Training and Awareness Raising

#### 3.1 General Context and Minimum Essential Elements

An essential aspect of the successful implementation of national laws and policies addressing internal displacement involves raising awareness, among relevant national actors, of the existence and nature of internal displacement. This is particularly important when special measures are adopted under national laws and policies to address the vulnerabilities of IDPs, for example in the context of providing humanitarian aid to IDPs which is not available to the general public. “Raising National Awareness of the Problem” and “Training on the Rights of IDPs” constitute two distinct benchmarks (two and four, respectively) in the Framework for National Responsibility.

##### *i. Raising awareness of the problem*

Before implementing laws and policies on displacement, states must “[r]ais[e] awareness of the existence and nature of internal displacement among all relevant stakeholders and of the steps necessary to address it [...]”<sup>72</sup> Public awareness campaigns allow the laws and policies relating to IDPs to be more effectively implemented and to be more easily and widely accepted by the general public. General campaigns aimed at raising public awareness are invaluable for several reasons, including:

- i. helping to reduce the stigma that is often associated with displacement and thereby assisting in reducing discrimination against IDPs; and
- ii. encouraging understanding of why IDPs may need special assistance in certain circumstances that non-IDPs may not be entitled to.

For the same reasons, it is also particularly important to target public awareness campaigns to those communities or areas where large populations of IDPs live.

##### *ii. Providing training on the rights of IDPs*

In order to ensure that the implementation of IDP laws and policies are effective, the enactment of IDP laws and policies needs to be accompanied by comprehensive training for those government officials who will be involved in implementation or whose work otherwise involves IDPs. Generally, the training should include:

- i. the technical aspects of implementing IDP laws and policies;

- ii. a general overview of the issues facing IDPs and their vulnerable situation; and
- iii. special protections and assistance available to IDPs or vulnerable groups of IDPs.

This will enable government officials to adopt an appropriate response when dealing with IDPs. For example, when an IDP registers for a service with limited personal documentation, the relevant administrative official will recognise that a lowered standard of evidence may be acceptable as it reflects the different situation of IDPs compared with the general population. It has been observed that the “[p]rovision of training on internal displacement issues to government officials at all levels is a key element of the exercise of national responsibility and can contribute to all aspects of an official response”.<sup>73</sup>

#### 3.2 Relevant Supranational Frameworks

##### *a. Kampala Convention and AU Model Law*

Although the Kampala Convention does not directly address awareness raising or training, the African Union Model Law provides that the government shall, in collaboration with all relevant actors including the national coordination mechanism and civil society organisations, take active measures to prevent and avoid conditions that might lead to internal displacement. In furtherance of this objective, authorities shall raise public awareness, and undertake sensitisation, training and education about the causes, impact and consequences of internal displacement, as well as on means of prevention, protection and assistance to internally displaced persons.

##### *b. Guiding Principles*

Like the Kampala Convention, the Guiding Principles do not specifically address awareness raising and training. However, the Guiding Principles’ general requirements that states assume responsibility for the protection and assistance of IDPs can, like those in the Kampala Convention, be interpreted to include awarenessraising and training activities. In addition, a government’s official recognition of the validity of the Guiding Principles and references to them are, in themselves, acknowledgements of the problem of internal displacement and of the special needs of IDPs.

##### *c. Pinheiro Principles*

Concerned with housing and property rights, the Pinheiro Principles make references both to training of relevant officials and raising awareness of the rights of IDPs amongst the general public. These two respective principles are as follows:

- i. “States should establish guidelines that ensure the effectiveness of all relevant housing, land



and property restitution procedures, institutions and mechanisms, including guidelines pertaining to [...] staff training and caseloads; and

- ii. States should implement public information campaigns aimed at informing secondary occupants and other relevant parties of their rights and of the legal consequences of non-compliance with housing, land and property restitution decisions and judgments”.

Other principles, such as ensuring a gender-sensitive property restitution programme and procedure, may also require “training for officials entrusted with working”<sup>74</sup> on such matters.

### 3.3 Kenya-specific analysis

The Kenya national commission on human rights (KNCHR) in partnership with members of the PWCID has been undertaking targeted sensitisation forums on the IDP act for the state and non-state actors, at national and county levels. At times, the trainings are carried out by different actors based on institutional planned activities. The main challenge has been that training activities have been disorganized which has resulted in their failure. Other challenges included obstacles of a political and social nature (consider for example the public pronouncement by the Kenyan president on 20 October 2013 that “all IDPs had been resettled”, or the resistance encountered from the affected communities when these communities state that such interventions will only re-open bitter enmity between people that have already forgotten the post-election skirmishes and have moved on. Another issue is the focus given to the 2007/2008 PEV-related displacement, while displacements caused by other drivers get little or no attention at all. As a result, most donors have redirected their funding to different activities. Financial support for IDP work has dramatically declined over the past few years, thus making it difficult for the actors to plan training initiatives on internal displacement.

One of the key functions of the NCCC is to “raise national awareness, sensitise and facilitate and coordinate training and education on the causes, impact and consequences of internal displacement and means of prevention, protection and assistance”.<sup>75</sup> Part IV of the IDP act is dedicated to the issue of “Public Awareness, Sensitisation, Training and Education”. In particular, it provides that in “the national government, in order to prevent future instances of internal displacement in Kenya, shall promote public awareness about the causes, impact and consequences of internal displacement as well as on means of prevention, protection and assistance to internally displaced persons through a comprehensive nation-wide education and information campaign”.<sup>76</sup> The target audience for such activities is defined broadly and includes schools

and other institutions of learning, prisons, remand homes and other places of confinement, amongst the disciplined forces, at places of work and in all communities throughout Kenya. Furthermore, the national government, in collaboration with the NCCC, shall provide awareness raising activities on internal displacement for employees of all the relevant national government departments, authorities and other agencies; employees of private and informal sectors; community and social workers; and media professionals, educators, and other stakeholders involved in the dissemination of information to the public on the causes, effects, and means of prevention of internal displacement, and the protection of and assistance to internally displaced persons. Although the IDP act is not clear on how the various governmental institutions should interact with the pre-existing county institutions, the only activity specifically reserved for the county level is public awareness, and educational and information campaigns on the causes, impact and consequences of internal displacement.

The draft IDP policy mainstreams awareness raising and training through its sections by identifying this function, such as “the strengthening of the protection of the rights of IDPs and the raising of awareness of their rights”<sup>77</sup> as one of the principal objectives of the instrument. In addition it provides details on how it should be discharged and highlights key areas on which training is to be regarded as crucial.

The government is empowered to undertake actions that may contribute to preventing displacement including “sensitising, creating an understanding and building of capacity for human rights and international humanitarian law” and “promoting an understanding among the public at large of the phenomenon of internal displacement and its social, economic, political and legal consequences for the individual, the community and the country”.<sup>78</sup> With a view to ensuring the effectiveness of this task, the state is also empowered to set up adequate mechanisms to ensure “systematic capacity building at national, county and appropriate administrative levels below for all relevant actors [...] for human rights and international humanitarian law, in particular through the development of practical guides and training modules”.<sup>79</sup> Mindful of the particular responsibilities that military and law enforcement agencies bear in terms of refraining from and preventing acts of displacement, the draft IDP policy also recommends that all such actors “receive sufficient training in particular also on international humanitarian law to ensure that the military and security operations are carried out without causing the displacement of civilian populations”.<sup>80</sup>

Awareness raising and training is also included in the draft IDP policy as a way to officially acknowledge the existence of internal displacement and the rights of IDPs.

In this respect, the entirety of paragraph 102 is focused on the different activities that are required to ensure that IDPs rights are recognised and that IDPs, being made aware of their entitlements, are granted the means to claim their rights to and access to effective remedies and justice against potential violations.<sup>81</sup> This aspect is further emphasised in Chapter 10, dedicated to implementation aspects, whereby the government is requested to engage in the dissemination of the policy by “creating and raising national awareness of existence and nature of internal displacement in Kenya and this Policy”.

The NCCC will be primarily responsible for raising the overall awareness on the phenomenon of internal displacement in Kenya and in the promotion of the contents of the IDP act including through desirable learning initiatives. It would be recommendable that other government institutions, agencies and non-governmental organisations retain training functions on more theme-specific activities in line with their mandates and expertise, such as data collection, documentation, prevention of displacement and IDPs' rights.

### **3.4 Recommendations**

#### *On implementation:*

For civil society/KNCHR:

- support awareness raising and capacity building around the IDP act targeting relevant national and county government, authorities and media
- support awareness raising with IDPs, affected communities and people at risk of displacement on their human and land rights

For the NCCC:

- to ensure that a portion of the Fund be allocated to raising awareness and training events and devolve a percentage of the allocated amount to 'non-state actors' for them to implement the activities
- to design a yearly plan to raise awareness which would cover different aspects of IDP response (as envisaged at Article 19 of the IDP act) in partnership with the different relevant ministries and international and civil society organisations
- to establish a multidisciplinary curriculum for all officials engaged in IDP response and ensure regular training opportunities for the same

## 4. Prevention of Displacement and Prohibition of Arbitrary Displacement

### 4.1 General Context and Minimum Essential Elements

The right to freedom of movement and to freely establish one's own residence has been enshrined in a number of significant human rights instruments. Restrictions to the full enjoyment of these rights may only be considered legitimate in specific circumstances.<sup>82</sup> As a result, displacement should be avoided wherever possible and, even when justifiable, should be considered as a measure of last resort. Ultimately this creates an obligation on the part of a state to "ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimise displacement and its adverse effects".<sup>83</sup>

International human rights law includes the right to be protected from arbitrary interference with homes and property, and it protects security of tenure. Accordingly, international law protects individuals from arbitrary displacement and evictions, namely forceful removals carried out against individual will in ways which are not compatible with national law or international standards enshrined in international human rights and humanitarian law treaties.<sup>84</sup>

The law recognises that "arbitrary" does not necessarily mean that there is an absence of reason or purpose which drives the displacement: the Kampala Convention, among other frameworks, explicitly recognises that arbitrary displacement may be based on reasons which cannot be justified under international human rights and humanitarian law, including a failure to comply with required procedural standards. In this regard, and as outlined in this chapter, many instruments require states to justify displacement induced by development projects. Forced evictions may amount to arbitrary displacement where evictions do not respect basic human rights guarantees or appreciate the different interests at stake.

#### *Minimum Essential Elements:*

- Recognise the right to be free from arbitrary displacement
- Penalise arbitrary displacement in domestic law under circumstances in which it amounts to a crime against humanity or war crime in accordance with the Rome Statute of the International Criminal Court
- Take penal and administrative measures to ensure compliance with relevant rules of international humanitarian law, including rules on the conduct of hostilities and the duty to distinguish between civilians and combatants and between civilian objectives and military objectives
- Adopt national policies that not only regulate response

but also focus on risk reduction and preparedness

- Include in national development plans and resettlement policies a clear articulation that forced displacement or relocation induced by development projects must be authorised by law, justified by compelling and overriding public interests, necessary to protect these interests and carried out with full respect for the human rights of affected persons. These must also include provisions on procedures by which any such displacement or relocation will be affected, available remedies including resettlement and compensation, and the right to administrative or judicial review

### 4.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

The Kampala Convention imposes broad obligations on states to protect individuals from arbitrary displacement and to punish acts of arbitrary displacement. Under Article 3(1), state parties have a general obligation to refrain, prohibit and prevent arbitrary displacement: in this regard state parties must comply with international law obligations, including under human rights and humanitarian law, to prevent and avoid conditions which might lead to arbitrary displacement.<sup>85</sup>

The Kampala Convention does not conclusively define "arbitrariness" but lists non-exhaustive categories of arbitrary displacements in Article 4(4). This is relatively broad and includes but is not limited to:

- i. displacement based on policies of racial discrimination or other similar practices aimed at/ or resulting in altering the ethnic, religious or racial composition of the population
- ii. individual or mass displacement of civilians in situations of armed conflict, unless necessary for the security of the civilians involved or for imperative military reasons, in accordance with international humanitarian law
- iii. displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict
- iv. displacement caused by generalised violence or violations of human rights
- v. displacement as a result of harmful practices
- vi. forced evacuations in cases of natural or man-made disasters or other causes if the evacuations are not required by the safety and health of those affected
- vii. displacement used as a collective punishment
- viii. displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.

The last category of arbitrary displacement (Article 4(4)(h)) notably acts as a “catch-all” for any other event which would cause displacement. This further highlights that the list under Article 4(4) is an open list of examples, and any unjustifiable acts which cause displacement will amount to arbitrary displacement under the Kampala Convention.

The Kampala Convention imposes a number of obligations for state parties to punish acts of arbitrary displacement. State parties must ensure individual responsibility for acts of arbitrary displacement in accordance with applicable domestic and international criminal law.<sup>86</sup> Under Article 4(6) of the Convention state parties must specifically criminalise acts of arbitrary displacement which amount to genocide, war crimes or crimes against humanity. State parties must also ensure that non-state actors are held accountable for acts of arbitrary displacement or complicity in such acts, which includes multinational companies and private military or security companies.<sup>87</sup>

While the Kampala Convention does not explicitly refer to displacement induced by development projects, such displacement, where it is sufficiently harmful and it cannot be justified under international human rights and humanitarian law, could fall under Article 4(4)(h). More generally, the convention requires state parties to hold accountable non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement. Such activities by nature may involve large-scale development projects as part of the exploratory or explanative process.<sup>88</sup>

Specific obligations are imposed under Article 10 which states that state parties must prevent, as far as possible, the displacement caused by projects carried out by public or private actors,<sup>89</sup> and ensure that these entities have considered alternative options after consulting those likely to be affected by the projects.<sup>90</sup> State parties should also undertake an evaluation of the socio-economic and environmental impact of any proposal for a development project before its implementation.<sup>91</sup>

In relation to both arbitrary displacement and displacement induced by development projects, the Kampala Convention accords special attention to communities with a particular dependency on the land due to their cultural and spiritual values, including pastoral and indigenous communities. In such cases, the Convention imposes a necessity requirement, that state parties should endeavour to protect these communities from displacement except where it is necessary for compelling and overriding public interests.<sup>92</sup>

#### ***b. International Human Rights Frameworks***

The Kampala Convention and its obligations for the pre-

vention and protection against arbitrary displacement largely mirror the standards established by other international frameworks, such as those outlined below. Many of these instruments have more clearly laid out or qualified the general obligations for states with regard to arbitrary displacement and displacement induced by development projects. Significantly, many instruments have gone further than the Kampala Convention and imposed more substantial obligations.

In the context of displacement induced by development projects in particular, many prominent international human rights frameworks have provided the foundation for the protection of security of tenure. Subsequent supra-national frameworks have built on these foundations to prohibit forced evictions, which often result from large-scale construction and development work.<sup>93</sup> One of the consequences of eviction includes temporary or even permanent displacement from an individual's home. Article 17:1 of the International Convention on Civil and Political Rights affirms that individuals should not be subjected to arbitrary or unlawful interference with their privacy, family life or homes. Accordingly, displacement which results from a forced eviction may constitute arbitrary displacement, insofar as the eviction has no justification or was not carried out in accordance with national or international law.<sup>94</sup> The relationship between forced evictions and arbitrary displacement is important because protective regimes against forced evictions could indirectly prevent and prohibit arbitrary displacement where this displacement results from the eviction.

The committee on economic, social and cultural rights has reaffirmed that all individuals should possess a degree of security of tenure which guarantees legal protection against forced evictions,<sup>95</sup> and acknowledges that although forced evictions might appear to occur primarily in heavily populated areas they also take place in connection with internal displacement<sup>96</sup> and development.<sup>97</sup> In this regard, General Comment No. 7 indicates that forced evictions should comply with international human rights law and in accordance with the principles of reasonableness and proportionality: domestic legislation must specify “in detail” the precise circumstances in which such interference may be permitted.<sup>98</sup>

More specifically, the ILO Indigenous and Tribal Peoples Convention 1989 (Indigenous and Tribal Peoples Convention) guarantees the rights of indigenous peoples to the natural resources pertaining to their lands, even if the land or other resources pertaining to the land are in state ownership.<sup>99</sup> States also have a consultation obligation towards affected individuals, and states should maintain procedures to consult these individuals in determining the extent to which the planned activity would prejudice their interests.<sup>100</sup> Article 16(1) imposes a general restriction

on removing indigenous peoples from lands which they occupy, unless relocation would be “necessary as an exceptional measure” and the affected individuals had given their free and informed consent.<sup>101</sup> States are required to compensate the relocated individuals in this case.<sup>102</sup>

### c. Guiding Principles

Principle 6 of the Guiding Principles imposes a general obligation on states to protect against arbitrary displacement. However, unlike the Kampala Convention, the Guiding Principles specifically recognise that the prohibition against arbitrary displacement includes displacement induced by large-scale development projects.<sup>103</sup> Furthermore, the annotations to Principle 6 suggest that “arbitrary” implies that the acts contain elements of injustice (including an aim which is not legitimate under international law), unpredictability (including inconsistency with international or national law) and unreasonableness (including an absence of necessity and proportionality).

An evaluation of the lawfulness of an act of displacement is not limited to an assessment of a possible breach of substantive guarantees. As suggested in the Guiding Principles, procedural standards are equally to be respected. Principle 7 recommends certain *information* and *consultation* obligations on states, albeit this obligation is not couched specifically in terms of arbitrary displacement or development projects in particular. They generally apply if displacement occurs in “situations other than during the emergency stages of armed conflicts and disasters”.<sup>104</sup> States have an obligation to:

- i. ensure that a specific decision authorising the displacement has been taken by a government authority empowered by law to order such measures
- ii. inform those displaced of the reasons for their displacement and procedures to be followed as well as of arrangements for compensation and relocation, where applicable
- iii. seek the free and informed consent of those to be displaced
- iv. involve those affected, particularly women, in the planning and management of their relocation
- v. ensure that the competent legal authorities carry out law enforcement measures where required
- vi. ensure the right of those affected to an effective remedy

These procedural guarantees should be considered applicable in cases of displacement induced by development projects and displacement more generally. Indeed, in certain circumstances the failure to ensure participation of the persons affected may in itself be an indication of the arbitrariness of displacement.<sup>105</sup>

Principle 6(2)(c) imposes additional *necessity* and *proportionality* tests for development-induced displacement which are not explicitly referred to in the Kampala Convention and, as a result, such displacement is prohibited unless it is “justified by compelling and overriding public interests.” The Guiding Principles refer to other supranational organisations or entities that have issued operational guidelines to help states take appropriate steps to meet these tests. Ultimately, referencing both the World Bank operational policy 4.12 of 2001 and the Organisation for Economic Cooperation and Development,<sup>106</sup> the Guiding Principles emphasise that as part of this balancing exercise, states should consider viable alternative designs to the development proposed.

### d. Great Lakes Protocol

The Great Lakes Protocol replicates key Guiding Principles and in some instances qualifies the obligations of the Guiding Principles and the Kampala Convention in more detail. For instance, while it cannot be regarded as an authoritative legal instrument, the Great Lakes draft model legislation declares that any person who causes, with intent, the arbitrary displacement of people, or aids or abets any such displacement is guilty of a criminal offence and shall be imprisoned for a minimum term of five years. The Guiding Principles do not recommend minimum sentences, leaving this exercise to a state’s discretion.<sup>107</sup>

The Great Lakes Protocol also links an ICGLR member state’s protection obligations with displacement induced by development projects more directly. For instance, the Great Lakes Protocol imposes obligations on ICGLR member states which specifically apply in the context of development projects, including obligations to provide full information<sup>108</sup> and as far as possible to obtain the free and informed consent of affected individuals before they are displaced.<sup>109</sup>

### e. Basic Principles and Guidelines on Development-Based Evictions and Displacement

The Basic Principles and Guidelines on Development-Based Evictions and Displacement (the “Basic Principles”) acknowledge that while forced evictions remain a distinct phenomenon, under international law they share many of the consequences similar to those resulting from arbitrary displacement.<sup>110</sup>

Paragraph 8 in particular provides an illustration of possible forms of ‘forced evictions’ that may relate to displacement induced by development projects: “development-based evictions include evictions often planned or conducted under the pretext of serving the ‘public good’, such as those linked to development and infrastructure projects (including large dams, large-scale industrial or energy projects, or mining and other extractive

industries); land-acquisition measures associated with urban renewal, slum upgrades, housing renovation, city beautification, or other land-use programmes (including for agricultural purposes); property, real estate and land disputes; unbridled land speculation; major international business or sporting events; and, ostensibly, environmental purposes. Such activities also include those supported by international development assistance".<sup>111</sup>

International human rights law affirms that development-based evictions are generally prohibited unless exceptional circumstances call for these measures and the measures can be fully justified.<sup>112</sup> The Basic Principles indicate that forced evictions could only be carried out if they are authorised by law and are carried out in accordance with human rights legislation.<sup>113</sup> Like the Guiding Principles and the Great Lakes Protocol, the measures are subject to threshold criteria: they need to be reasonable and proportional, and undertaken solely for the purpose of promoting general welfare.<sup>114</sup>

Specific measures and procedures ensuring the above include preventive measures, procedures applying prior to any eviction or subsequent resettlement, procedures applying to the eviction itself and principles governing the provision of remedies after an eviction has taken place. Among others, states should take preventive measures:

- aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land<sup>115</sup>
- to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate<sup>116</sup>
- requiring that relevant professionals (such as lawyers, law enforcement officers and planners) receive training in applying international human rights norms<sup>117</sup>

The Basic Principles also state that an "independent national body, such as a national human rights institution" should be entrusted with the monitoring and investigation of evictions and state compliance with the Basic Principles and international human rights law.<sup>118</sup>

Before any eviction takes place, planning and development processes "should involve all those likely to be affected",<sup>119</sup> and states should "fully explore all possible alternatives to evictions".<sup>120</sup> If an eviction is to take place, authorities "must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare,"<sup>121</sup> and states "must make provision for the adoption of all appropriate measures, to the maximum of its available resources [...] to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided".<sup>122</sup>

If resettlement is contemplated, a comprehensive resettlement policy should be in place, and the "entire resettlement process should be carried out with full participation by and with affected persons, groups and communities."<sup>123</sup> Affected persons, groups and communities must also be provided with 90 days' notice of resettlement prior to the date of resettlement.<sup>124</sup> Moreover, the "actor proposing and/or carrying out the resettlement shall be required by law to pay for any associated costs, including all resettlement costs".<sup>125</sup>

When an eviction takes place, government officials or their representatives must be present on site, identify themselves to those being evicted and present formal authorisation for the eviction action.<sup>126</sup>

### **4.3 Kenya-specific analysis**

Since Kenya's independence in 1963, political, ethnic and land-related violence and disasters have repeatedly caused internal displacement.<sup>127</sup> Displacements have also taken place as a result of development and conservation projects, where evictions are often conducted without effective redress or compensation mechanisms, and without sufficient assistance or alternative durable solutions in place.<sup>128</sup> Issues have arisen in relation to the rise in large-scale and high-impact development projects like the Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor ("LAPSSSET"). These have only highlighted the need for a more comprehensive and coordinated framework which accommodates displacement induced by development projects.

The Kenyan government has undertaken a number of initiatives intended to prevent or minimise the extent and impact of internal displacement, and protect people from arbitrary displacement. Provisions on the prevention of and protection from arbitrary displacement and displacement induced by development are included within the protective scope of a number of frameworks in Kenya.

#### ***a. Existing and draft legislation***

##### *i. Kenyan constitution*

The Kenyan constitution does not explicitly protect against arbitrary displacement, but more generally upholds property and housing rights, and the rights to privacy and family life: these rights are all protected from arbitrary interference under Article 17.1 of the International Covenant on Civil and Political Rights. Article 43(1)(b) of Part 2 (Rights and Fundamental Freedoms) of the Kenyan constitution guarantees the right to accessible and adequate housing which indirectly protects individuals from being forcibly evicted from their homes or property.

Article 39(3) states that every citizen has the right to remain and reside anywhere in Kenya, and Article 31(b) explains that the right to privacy includes the right not to have possessions seized. Article 40(1) provides the general right of individuals to own property and prohibits the state from depriving individuals of property unless, amongst other things, the deprivation is for a public purpose or in the public interest, and is carried out in accordance with the Kenyan constitution and any act of parliament that:

- i. requires the prompt and complete payment of just compensation to the individual; and
- ii. allows any person with an interest in the property access to a court.

In this way, these articles provide a framework of interlocking rights which protect against forced eviction, and the potential consequence of displacement.

The KNCHR has produced a handbook which addresses the roles and responsibilities of state and non-state actors in preventing forced evictions. The handbook states that any person who carries out forced evictions violates the Kenya constitution.<sup>129</sup> This view has been reaffirmed in the High Court of Kenya. In *Ibrahim Sangor Osman & 1,122 others v. the Minister of State for Provincial Administration and Internal Security and ten (10) others*,<sup>130</sup> which concerned the construction of a road which led to the eviction of a number of individuals. The High Court of Kenya found that the individuals had not been issued with an eviction notice, nor consulted about the planned development, nor had any alternative development plans been tabled by the developers. The High Court reaffirmed that this forced eviction was a violation of Article 43(1)(b) of the Kenyan constitution.

ii. *Prevention, Protection and Assistance to IDPs and Affected Communities Act 2012*

The IDP act sets out a comprehensive framework for preventing displacement and prohibiting arbitrary displacement, and expressly cross-refers to the Guiding Principles. This maximises the coverage of protection and aligns the national standards with international standards.

Under Section 5(2), the government and third party organisations, bodies or individuals should prevent internal displacement from man-made disasters and development projects. The IDP act is also more onerous than the Kampala Convention and the Guiding Principles in requiring the government,

and third parties to prevent and avoid conditions which even have the *potential* of resulting in the displacement of individuals.

In terms of practical steps to prevent displacement, the IDP act states that the government will establish a prevention mechanism which will be charged with monitoring areas inhabited by persons at risk of displacement, with periodic reporting and early warning systems of internal displacement.<sup>131</sup>

The IDP act requires that the government protect “every human being” against arbitrary displacement.<sup>132</sup> Arbitrary displacement in a manner specified under Principle 6(2) of the Guiding Principles is prohibited and punishable as a criminal offence.<sup>133</sup>

In terms of displacement induced by development projects, Article 6(3) of the IDP act reaffirms that displacement and relocation will only be permitted if carried out in accordance with the conditions and procedures in Article 5 of the Great Lakes Protocol, Principles 7-8 of the Guiding Principles and Section 21-22 of the IDP act.

The government must avoid displacement induced by development projects or projects to preserve the environment,<sup>134</sup> which under Section 21(2) would only be permitted where the displacement is:

- i. authorised and carried out in accordance with applicable law;
- ii. justified by compelling and overriding public interests in the particular case; and
- iii. conducted where no feasible alternatives exist.

Section 22 outlines additional obligations which should be observed during the displacement, including the information and consultation obligations owed to the affected individuals.<sup>135</sup>

iii. *Evictions and Resettlement Procedures Bill 2013*

In certain respects the evictions and resettlement procedures bill 2013 builds on the obligations under the IDP act. For instance, under section 4(1) evictions must be justified by a court order rather than in accordance with applicable law generally. The bill also expands on particular requirements, so while the Kampala Convention requires that a socio-economic and environmental impact assessment be carried out in cases of displacement induced by development projects, the bill specifically outlines the content of a “holistic and comprehensive” assessment at section 6(1)(i). This includes establishing the prevailing land tenure system in the context of the eviction. This is particularly relevant

in light of concerns that pre-colonial and customary land rights in Kenya increasingly conflict with land acquisition by private developers.

Nevertheless, with a view to categorising specific phenomena, such as the genuine or abusive occupation of property or land, the bill establishes a series of additional categories. Notably, “squatter” refers to a “person who has occupied land without the express or tacit consent of the owner or person in charge for a continuous period of at least six years without any right in law to occupy such land and that person does not have sufficient income to purchase or lease alternative land.”<sup>136</sup> This category may overlap with specific cases of persons who may have been internally displaced. By lacking a reference to internal displacement and an overall alignment of the text to the IDP act, the bill risks failing to acknowledge the fact that individuals may become “squatters” as a result of internal displacement, and risks failing to reiterate the overall duty to provide alternative housing “to the maximum of its available resources<sup>137</sup> in the absence of sufficient means to gain access to alternative land”.

*iv. Community Land Bill 2013*

The community land bill 2013 has not yet been formally adopted as legislation either, but it reflects the approach of international instruments like the Guiding Principles and the Indigenous and Tribal Peoples Convention, in recognising situations of special attachment to land held by some communities and indigenous people. Accordingly, and in light of Kenya’s historic policies which undermined the customary land rights of indigenous communities, the community land bill 2013 is designed to protect against the infringement of indigenous people’s land rights by forced eviction.

Under Article 6(2)(a), the community land bill 2013 specifically recognises and protects traditional, customary land rights and reaffirms that a customary right of occupancy of communal land shall be a valid and recognisable right of occupancy.<sup>138</sup> Article 6(i) reaffirms that land designated as “community land” in Kenya shall be owned by communities, and under Article 7(2) no right to community land can be expropriated or confiscated save by law, public interest and after payment of full and just compensation.

*v. The Land Registration Act 2012*

The Land Registration Act 2012 (the “land registration act”) is a recent piece of legislation which

effects recommendations proposed in the national land policy 2009 (the “national land policy”) in relation to title registration. However, it also introduces new provisions which could have the effect of protecting the right of tenancy of individuals and preventing forced evictions.<sup>139</sup>

Section 24(a) states that registration of title will now vest in the registered person absolute ownership of land,<sup>140</sup> which may help alleviate common land disputes over ownership and a lack of evidence of title, which have historically resulted in displacement.<sup>141</sup> The land registration act also recognises overriding interests which may subsist without being noted on the land register, including trusts and spousal rights over matrimonial property.

*vi. The Land Act 2012*

As with the land registration act, the Land Act 2012 (the “land act”) implements recommendations proposed under the national land policy, which includes closer regulation of compulsory acquisition land by the state and protects the existing occupancy rights of individuals.

Section 4 outlines guiding values and principles which apply to state organs, state officers, public officers and, more broadly, all persons whenever any of them enact, apply or interpret any provisions of the land act and make or implement public policy decisions. These guiding principles include security of land rights,<sup>142</sup> encouragement of communities to settle land disputes through recognised local community initiatives,<sup>143</sup> and the protection of marginalised communities,<sup>144</sup> which can ultimately help prevent the root causes of displacement such as violent land disputes and the exploitation of minority communities.<sup>145</sup>

In order to compulsorily acquire land, section 107(i) now requires that the state submits a request to the national land commission<sup>146</sup> for the national land commission to acquire the land on its behalf. The national land commission must certify in writing that the land is required for public purposes or in the public interest, related to and necessary for the fulfilment of the stated public purpose.<sup>147</sup>

*b. Existing and draft policies and other frameworks*

*i. The draft national policy on the Prevention of Internal Displacement Protection and Assistance to IDPs in Kenya 2011*

The draft IDP policy<sup>148</sup> refers more directly to pro-



tection against arbitrary displacement and largely falls in line with the international standard under the Guiding Principles and the Kampala Convention. It prohibits arbitrary displacement<sup>149</sup> and defines it with a similar categorisation to the Guiding Principles, which includes displacement in cases of development projects.<sup>150</sup>

The draft IDP policy indicates that IDPs are under no circumstances compelled to return to areas where conditions for achieving durable solutions are not yet in place, or where their life, safety and integrity are at risk.<sup>151</sup> Significantly, and unlike the Kampala Convention, the draft IDP policy also states that displacement that was initially legitimate under domestic and international law may become arbitrary if it lasts longer than required under the circumstances.<sup>152</sup>

The draft IDP policy specifically addresses forced evictions between paragraphs 61 and 66, and mirrors the Guiding Principles by requiring that the eviction is based on, authorised and carried out in accordance with the law,<sup>153</sup> and is justified by compelling and overriding public interests.<sup>154</sup>

## ii. *National Land Policy 2009*

The national land policy published by the Kenyan government proposes a wide-range of consolidative land reforms, addressing issues which include ongoing land tenure issues, historic dispossessions and private development projects. The national land commission was formed in 2013 as the lead agency on land matters. The Commission's goal is to steer Kenya's land reform by pursuing a national plan to implement the national land policy over a five year period. The national land policy notes that at the time of its writing, there were no legal, policy or institutional frameworks for dealing with issues arising from internal displacement.<sup>155</sup> However, as outlined in this chapter and this report generally, the Kenyan government has started producing a number of normative frameworks relevant to displacement in the subsequent years.

The national land policy attempts to impose restrictions on foreign investors in Kenya, who may acquire land for development purposes in the future. On a broader level, the national land policy indicates that foreign investors should not be able to acquire freehold title to land,<sup>156</sup> and that the government should ensure that the acquisition of any land for investment purposes is carried out in accordance with national development strategies.<sup>157</sup>

The national land policy specifically addresses land issues which affect Kenya's coastal region including the mass displacement of indigenous communities. In particular, the national land policy recognises that salt mining on the coast has not been rationalised with other land uses, and, as a result, private mining companies have acquired large tracts of coastal land.<sup>158</sup>

The national land policy recognises that minority communities have particular cultural dependencies on land, especially for their livelihoods,<sup>159</sup> and states that the government will develop a legislative framework to secure the rights of these communities to access their land.<sup>160</sup> Notably, the national land policy concludes that a framework should be established whereby indigenous occupants of land are consulted before land use projects are pursued.<sup>161</sup> This reflects the discourse in supranational human rights instruments towards providing information and consulting communities which are vulnerable to displacement induced by development projects. The government also resolves to regulate ownership and the use of coastal islands by foreigners.<sup>162</sup>

However, aside from these pledges to develop a comprehensive framework which could protect indigenous occupants from displacement, the national land policy does not follow the Kampala Convention in specifically stating that communities with a special attachment to and dependency on land should be protected from displacement except for compelling and overriding public interests.<sup>163</sup>

## iii. *The draft national policy on disaster management 2009*

The government has drawn up a comprehensive policy which helps address internal displacement induced by disasters, and this is outlined in detail in Chapter 14 of this report. The goals of the draft policy include disaster prevention, with measures designed to minimise the harmful effects of a disaster on communities,<sup>164</sup> and disaster mitigation, which is designed to reduce the impacts that disasters have on communities where prevention has failed.<sup>165</sup> Therefore, the draft policy is partly directed to prevent and mitigate the internal displacement which has been induced by disasters, by establishing a framework of practical steps to guide institutions.

## iv. *The National Policy on Human Rights 2010*

The national policy on human rights acknowledges

that attempts to reverse the worsening problem of internal displacement have been undermined by the absence of a legal and policy framework.<sup>166</sup> It therefore recommends that the government develops a legal framework for the settlement of IDPs and domesticates the Kampala Convention. It recognises that displacement in Kenya has been linked to evictions and insecure land tenure systems. In addition, the draft human rights policy calls on the government to take measures to upgrade slums and stem the proliferation of slums.<sup>167</sup>

The draft national policy on human rights also notes that evictions from land for the purposes of development and environmental protection have generated conflict in the past. Key remaining issues include the non-adjudication of disputed land and the ineffectiveness of adjudication through the existing legal framework<sup>168</sup> and the government expressly agrees to implement the land reforms as proposed in the national land policy.

v. *KNCHR, Handbook on Forced Evictions in Kenya*

The “Handbook on Forced Evictions: Roles and Responsibilities of the government (National and Country) and Private Developers,” August 2014 (the “KNCHR Handbook”) specifically addresses the “national” problem of forced evictions in Kenya. While it is not strictly a policy, it is a statement on best practice when evictions are carried out, and it highlights key frameworks and court decisions in Kenya which protect individuals against forced evictions.

The KNCHR Handbook lists the minimum procedural protections which should be available during evictions, which include:

- issuing adequate and reasonable written notice to all affected persons in advance of the intended eviction date
- carrying out adequate and genuine consultation during the planning process, with the full spectrum of affected persons, and providing adequate information to affected persons in advance of the intended eviction date
- ensuring government supervision during the evictions, and upon request the attendance of neutral observers (including regional and international observers) to ensure transparency and compliance with human rights principles
- carrying out the evictions without violating dig-

nity and the human rights of those affected. Any use of force must respect the principles of necessity and proportionality, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and any national or local code of conduct consistent with international law enforcement and human rights standards<sup>169</sup>

The KNCHR Handbook also emphasises that evictions can only be justified in the most exceptional circumstances, and in accordance with relevant human rights law and principles.<sup>170</sup>

vi. *The National Policy on Peace-Building and Conflict Management 2011*

The national policy on peace-building and conflict management establishes an institutional framework for peace-building and conflict management, but it has still not been formally adopted. By seeking to address and avert conflict and the causes of conflicts, the national policy on peace-building and conflict management is also designed to prevent displacement as a common consequence of conflict situations.<sup>171</sup>

The national policy on peace-building and conflict management outlines early warning and response procedures generally, which could help prevent or alleviate the consequences of conflict situations. In particular, paragraph 62 indicates that the state is a signatory to the IGAD-CEWARN protocol which is designed to strengthen Kenya’s mechanisms in conflict early warning and response. It also recognises that early warning and early response are critical in order to prevent conflict, and a national conflict early warning and early response system will be created and linked to similar regional initiatives.<sup>172</sup>

#### **4.4 Recommendations**

Kenya’s recent legislation and policies have moved closer towards achieving a comprehensive framework to prevent or minimise the extent and impact of internal displacement, and protect individuals from arbitrary displacement and displacement induced by development projects. The following recommendations would help consolidate Kenya’s protective frameworks and bring Kenya further in line with the relevant minimum essential elements and supranational normative frameworks in this area.

##### **a. Protection from Displacement**

###### *i. Prevention of Displacement*

On normative action:

- Urgently finalise pending legal frameworks on land tenure and disasters relating to internal displacement, by aligning the frameworks with national and international standards, in particular:
- the eviction and resettlement procedures bill 2012
- the community land bill 2013
- the draft national policy for disaster management in Kenya 2009, and the county disaster management bill 2014
- the national policy on peace-building and conflict management 2011
- Urgently finalise a legal framework on internal displacement by adopting the draft IDP policy.

On implementation:

- Take immediate steps to implement the IDP act.
- Provide adequate funding and resources for the national consultative coordination committee on internal displacement to facilitate the effective and immediate implementation of the IDP act.
- Ensure the establishment of capacity building programs on prevention of displacement on the part of the NCCC.
- Urgently implement the national policy on peace-building and conflict management 2012.

## ii. *Prohibition of Arbitrary Displacement*

On normative action:

- Review pre-existing policies and legislative frameworks relevant to displacement to ensure that the risks of development-induced displacement are effectively reduced and the protections under supranational frameworks are adequately reflected whenever displacement results inevitable.
- Urgently adopt the evictions and resettlement procedures bill.
- Rationalise pre-existing legislation to harmonise the practical steps which should be taken

by private entities and state authorities when seeking to evict individuals to the ones recommended by the relevant international standards, with a view to respecting both information and consultation obligations.

- Harmonise all frameworks and policies related to forced evictions in line with international standards and streamline reference to internal displacement in all such documents.
- Urgently implement the national policy on peace-building and conflict management 2012.

On implementation:

- Adequately fund and resource the national land commission to ensure the implementation of the national land policy within its five year timescale.
- Establish work streams within the national land commission which specifically address forced evictions and development-induced displacements, and support the development of frameworks to find adequate durable solutions for large pre-existing displaced groups such as in Kenya's coastal region.

## *b. Protection during Displacement*

On implementation:

- Improve and streamline judicial and administrative redress and compensation processes for displaced or forcibly evicted individuals.
- Ensure that the national, county and district institutions which address land disputes, forced evictions and displacement are coordinated both at the national and district level to enhance efficient cooperation during displacement events.

## *c. Protection after Displacement - Durable Solutions*

On normative action:

- Ensure the adoption of a comprehensive resettlement framework to address the whole range of communities potentially affected by internal displacement, including urban IDPs, rather than particular groups like land-owners or pastoralists.
- Urgently implement the national policy on peace-building and conflict management 2012.

On implementation:

- Ensure that resettlement or relocation processes are carried out in compliance with the international standard of voluntariness and adhere strictly to a participatory approach also with a view to ensuring attainment of durable solutions.

## 5. Data Collection Relating to IDPs

### 5.1 General Context and Minimum Essential Elements

Having accurate information on the number, location and condition of IDPs is fundamental to addressing IDPs' needs and implementing legislation or policy to address those needs.<sup>173</sup> Collecting accurate data on IDPs allows policy and legislation to be narrowly tailored to the specific needs and vulnerabilities of the IDP community. Data, including the number of IDPs, their location, age, ethnicity, needs and vulnerabilities, should be collected from the time of displacement and updated regularly.<sup>174</sup>

There are several methods to collect data on IDPs, including profiling,<sup>175</sup> registration (see below), needs assessments, rapid population estimates or (national) census. Each method has a different focus, offers specific advantages and carries different risks that need to be assessed in order to determine the most effective method of data collection for any given situation.

While registration has many benefits, including collecting information and facilitating the issuance of new documentation, it is important that registration does not create a legal category of IDP. Creating a legal category of IDP is not only overly bureaucratic, but also raises significant concerns about protection by making IDPs a target for discrimination and human rights abuses.<sup>176</sup> These risks can be overcome through a strong domestic regime for the protection of IDPs and their rights, including easy access to remedies for breach of those rights. To protect IDPs,

“[n]ational authorities that decide to undertake registration should ensure that:

- Procedures are transparent, non-discriminatory, known and accessible to all IDPs and swift so that access to particular benefits linked to registration is not delayed;
- Criteria for registration are clear, non-discriminatory and do not exclude individuals or groups of IDPs, in line with the Guiding Principles;
- Procedures include all IDPs, including those in remote or inaccessible areas and those who are less visible, for example because they are not living in camps;
- The process does not create protection risks for the displaced population;
- Those without documentation are not excluded from registration, but rather are provided with the documents needed to register; [and]
- Any information collected is protected and its confidentiality ensured in order not to expose IDPs to further risks.”<sup>177</sup>

If IDP registration is undertaken, IDPs should be regis-

tered for specific concrete goals, such as food assistance, medical care, waiver of school fees, or entitlement to stay in camps. Therefore, it may not be necessary to register IDPs who do not require humanitarian assistance or other IDP-specific assistance. As a result, a comprehensive data collection strategy will need to include more than just registration.<sup>178</sup>

#### *Minimum Essential Element:*

- Establish systems for the collection and protection of relevant data.

### 5.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

The Kampala Convention imposes an obligation on state parties to assess or facilitate the assessment of the needs and vulnerabilities of IDPs and those of their host community, in cooperation with international organisations and agencies.<sup>179</sup>

In addition, the Kampala Convention requires state parties, in collaboration with international organisations or humanitarian agencies or civil society organisations, to create and maintain an up-to-date register of all IDPs.<sup>180</sup>

#### *b. African Union (AU) Model Law*

Article 30 of the AU Model Law requires the government to establish a mechanism for the registration and collection of information on IDPs.<sup>181</sup> In addition, the government shall facilitate the registration of IDPs and the issuance of new identification documents, potentially through a simplified process.<sup>182</sup> Furthermore, the AU Model Law requires governments to ensure that the lack of documentation shall not be used to block IDPs from access to essential food and relief services, travel to safe areas or to impede employment opportunities.<sup>183</sup> The government is to collaborate with international agencies and organisations as necessary.<sup>184</sup>

The information collected under Article 30 should be shared, via an established procedure, with IDPs and international organisations working to promote IDPs' rights.<sup>185</sup>

#### *c. Guiding Principles*

Although the Guiding Principles do not explicitly refer to the need to collect data on IDPs, the interpretation of the Guiding Principles in the annotations makes clear that there is an implied need for states to identify individuals and groups in need as a result of displacement. Data collection is also implied in the operationalisation of the definition of IDP offered by the Guiding Principles, including information on age, and gender. Finally, the Framework for National Responsibility, Benchmark 2, Raise National Awareness of the Problem, requires states to collect data on IDPs.<sup>186</sup>

#### *d. Great Lakes Instruments*

Under the Great Lakes instrument, member states must assess the needs of IDPs and assist with registration as necessary. It also requires member states, in specific situations, to establish databases for the registration of IDPs.<sup>187</sup>

#### **5.3 Kenya-specific Analysis**

No comprehensive and up-to-date national data on displacement is available for Kenya, as the country has no centralised IDP-related data collection system and the government has never carried out an exercise to profile IDP numbers and locations throughout the country.

In the absence of any updates, the UN office for the coordination of humanitarian affairs has continued to refer to a figure of 309,200 IDPs since 2012. This figure includes a protracted yet unverified number (about 250,000) of people internally displaced by ethnic, political and land-related violence since the 1990s and an additional approximately 50,000 registered IDPs who had fled as a result of the 2007/2008 PEV and who, at the time, had not been resettled. The estimate therefore does not include people displaced after 2008, although new displacements have continued to take place, including 50,000 people reported to be newly displaced in 2011, 112,000 in 2012,<sup>188</sup> 55,000 in 2013 and more than 220,000<sup>189</sup> in 2014 – mostly due to inter-communal violence.

Although over the years many of the 309,200 IDPs have settled, either returned to their homes or resettled elsewhere, no official assessment of their numbers and remaining protection needs was carried out. The situation of those newly displaced who are believed to have returned to their homes has rarely been assessed. According to humanitarian reports, at least 60,000 of the 220,000 newly displaced in 2014 were still living in camps in Mandera County as of December 2014.

The estimate also excludes people displaced by disasters and development projects, and the so called “integrated” IDPs namely people displaced following the 2007/2008 election-related violence who fled to urban or peri-urban areas and found shelter with host communities or in rented accommodation. The latter constitute an estimated 300,000 out of the over 650,000 that fled at that time. The remaining 350,000 IDPs took refuge in camps. A registration exercise was undertaken in 2007/2008 for election-related violence IDPs, but the methodology applied was often inaccurate, inefficient and not disaggregated. Thus, as a result, the national database was restricted to the 6,800 households identified and formally recognised by the MOSSP, the ministry responsible for IDP issues at the time.<sup>190</sup> The results of a verification exercise are yet to be released.

Data gathering on internal displacement in Kenya generally focuses on instances of fresh displacement caused by violence or rapid-onset disasters such as floods, and is usually carried out by the first responders to a crisis, such as the Kenya Red Cross Society. However, there is little quantitative or qualitative data on displacement dynamics after the IDPs' initial flight.

The NCCC established by the IDP act is required to “ensure the registration of all internally displaced persons in order to maintain a national database of such persons”.<sup>191</sup> The registration “shall commence and conclude within 30 days of displacement” and be exclusively used “for reasons of ascertaining the identification, profile, conditions and numbers of internally displaced persons” to provide protection and assistance to IDPs.<sup>192</sup> As Dr. Chaloka Beyani, the UN special rapporteur on the human rights of internally displaced persons, recommended during his visit to Kenya in 2012, such database or registration systems should be accurate, comprehensive and disaggregated, and inclusive of all categories of IDPs.<sup>193</sup>

While establishing the central role of the NCCC in data collection, the IDP act fails to specify which institution(s) will be actively engaged in data collection or their roles and does not describe the methodology of such a process.

Moreover, the IDP act does not contemplate any collection of information on IDPs subsequent to the first 30 days after their displacement, or information on people already living in displacement.<sup>194</sup> In relation to the latter, it should be noted that, during his aforementioned 2012 visit to Kenya, Dr. Beyani also urged the government to undertake, at the earliest opportunity, a comprehensive data-collection exercise to collect information on people already living in displacement, with a special focus on how best to identify, assess and respond to IDPs' assistance, protection and durable-solution needs, with particular attention on vulnerable groups. Similarly, in its final report in 2013 the truth, justice and reconciliation commission of Kenya (TJRC), the body set up with international assistance to strengthen the national accord which ended the 2007-2008 political crisis, recommended that the audit and registration of all 2007/2008 IDPs be conducted by an organisation independent of the government, with a particular focus on integrated IDPs.<sup>195</sup>

In addition to the IDP act, the draft IDP policy introduced important guarantees both at substantive and procedural level on how identification of IDPs can be carried out, by acknowledging different possible methodologies such as profiling and registration. Mindful of the exclusionary practices adopted in Kenya during the past, the draft IDP policy also requires the Kenyan government to initiate a comprehensive identification of all IDPs “whether or not

they are staying in or outside camps and irrespective of the cause of their displacement". In this comprehensive identification process, special attention should be devoted to IDPs "in particular when living with host communities" and to ensuring that "IDPs are involved in such identification processes". The draft national IDP policy also sets out a duty for the government to take "into account the right to privacy and protection of data of the individual concerned in accordance with the law".<sup>196</sup>

Any future regulation of IDP data collection should clarify such aspects. More specifically, it should determine how the NCCC will interact with other relevant institutions such as the Kenya National Bureau of Statistics (KNBS), and work with them to establish systems and tools for the continuous collection of data on IDPs, periodic data collection exercises, and protection of relevant data on internal displacement in Kenya.

According to the Statistics Act 2006, KNBS "shall be the principal agency of the government for collecting, analysing and disseminating statistical data in Kenya and shall be the custodian of official statistical information" (Art. 4.1). The bureau is responsible for: "(a) planning, authorising, co-ordinating and supervising all official statistical programmes undertaken within the national statistical system; (b) establishing standards and promoting the use of best practices and methods in the production and dissemination of statistical information across the national statistical system; (c) collecting, compiling, analysing, abstracting and disseminating statistical information on the matters specified in the First Schedule; (d) conducting the Population and Housing Census every ten years, and such other censuses and surveys as the Board may determine; and (e) maintaining a comprehensive and reliable national socio-economic database" (Art. 4.2).

KNBS collected some information on IDPs during the last census in 2009, but it only looked at people displaced by the 2007/2008 PEV residing in camps. The method used by the census was negatively impacted by a lack of clarity around the IDP definition and the boundaries of displacement. This highlights the importance of sensitisation and raising awareness around the IDP act and of collaboration between KNBS and other institutions engaged in preventing and addressing displacement, particularly the NCCC. As preparations for the next census (to be held in 2019) have started, such stakeholders should engage with the process to ensure that this opportunity is used to collect relevant displacement-specific information, and the best methodology is developed for that purpose.

As the census will not be available for at least another 5 years, KNBS and interested partners could, in the meantime, explore collaboration to carry out a specific survey on internal displacement in Kenya. Such studies

are usually initiated by request of the "data users" (for example the NCCC or other stakeholders such as the PWGID) and need to be accepted and prioritised by the board of the bureau.

## 5.4 Recommendations

### *On normative action:*

For the government of Kenya:

- consider amending the IDP act so that it provides for the regular collection of relevant IDP data necessary for the adequate protection of and assistance to IDPs (beyond the registration within 30 days of displacement), including during the national census.
- adopt the draft IDP policy, with a particular view to enacting its provisions on the identification of IDPs and the protection of data included in its section 2.3.

### *On implementation:*

For NCCC:

- prioritise data collection on internal displacement, and specify which institutions it will engage with so that relevant data is collected.
- collaborate with relevant partners to establish adequate systems and tools for the collection and protection of data on internal displacement.
- ensure that a specific, comprehensive data collection exercise is undertaken at the earliest opportunity, with a view to considering how best to identify, assess and respond to IDPs' assistance, protection and durable-solution needs, with particular attention to vulnerable groups.
- ensure that IDPs are registered in order to facilitate the provision of adequate protection and assistance.
- ensure that the information collected is adequately secure to protect the privacy of IDPs and that registration does not create a separate legal status for IDPs or that non-registered IDPs should not be provided with assistance.
- ensure that a database on IDPs is maintained and that such database is accurate, comprehensive, disaggregated by age and sex at least, and inclusive of all categories of IDPs.

For NCCC and other stakeholders involved in the IDP response:

- engage with the census process led by the KNBS in order to ensure that adequate data on internal displacement will be collected during the next census in 2019.

## 6. National and Local Structures of Governance for an IDP Response

### 6.1 General Context and Minimum Essential Elements

A comprehensive humanitarian response to internal displacement requires states to create a framework of national and local structures of governance which contribute to the prevention, mitigation and resolution of displacement. This includes the designation of a national institution focal point for IDPs, which is an institution “ensuring sustained attention to the problem and also facilitating coordination within the government and with local and international partners”.<sup>197</sup> Countries that have not adopted a national law or a policy on internal displacement are less likely to have appointed such an institution. The stratification of different bodies of law or other sectorial normative frameworks covering issues strictly related to displacement may also contribute to an overall fragmentation of the government structures responsible for displacement. Peripheral structures may be tasked with the ultimate delivery of prevention, protection and assistance to IDPs, adding extra layers to the institutional architecture and creating different levels of responsibility.

#### *Minimum essential elements:*

States must create structures and implement measures at the national and local levels to ensure the following minimum essential elements:

- Identify an institutional structure in charge of coordination with relevant stakeholders through all the three phases of displacement response to prevent or minimize displacement (disaster mitigation and preparedness plans, training of security forces); to respond in the immediate displacement phase; and to establish conditions necessary for the achievement of durable solutions;
- Designate, where appropriate, sub-national structures in charge of coordination with relevant stakeholders through all the three phases of displacement response;
- Create a mechanism responsible for coordinating the provision of humanitarian assistance to IDPs;
- Assign to relevant authorities or organisations at the national and local levels clear and specific obligations in the area of humanitarian assistance to IDPs, and provide them with the necessary support to do so;
- Vest an institution such as the national human rights commission with the authority and responsibility to monitor and report on the respect and protection of the rights of IDPs.

### 6.2 Relevant Supranational Frameworks

#### *a. Kampala Convention and Kampala Declaration*

The Kampala Convention states that state parties are

obliged to designate an authority or body, “where needed”, responsible for coordinating activities aimed at protecting and assisting IDPs and for cooperating with relevant international organisations or agencies, and civil society organisations, where no such authority or body exists.<sup>198</sup>

The Kampala Declaration also calls signatory states to establish or strengthen high-level national mechanisms to address the problem of forced displacement, with particular focus on its root causes.<sup>199</sup> While under the Kampala Convention states “may seek” the cooperation of international organisations or humanitarian agencies, civil society organisations and other relevant actors in an attempt to prevent and avoid conditions that might lead to the arbitrary displacement of persons,<sup>200</sup> Article 5(3) reiterates that ICGLR member states should respect the mandates of the African Union and the United Nations, as well as the roles of international humanitarian organisations in providing protection and assistance to IDPs, in accordance with international law.<sup>201</sup> To aid the provision of support to IDPs, the Kampala Declaration encourages African Union member states to cooperate with UN bodies, international organisations, bilateral and multilateral partners and NGOs to strengthen the coordination of their humanitarian programmes.<sup>202</sup> States parties have the obligation to assess or facilitate the assessment of the needs and vulnerabilities of IDPs, in cooperation with international organisations.<sup>203</sup> Where the resources of the state parties are inadequate to enable sufficient protection of and assistance to IDPs, they shall cooperate in seeking the assistance of international organisations, aid agencies and NGOs (which may offer their services to all IDPs in need of assistance).<sup>204</sup>

Under Article 9(3), state parties are required to discharge their obligations under Article 9(2) (relating to protection and assistance during displacement) with the assistance of international organisations, humanitarian agencies, civil society organisations and other relevant humanitarian partners, where appropriate.<sup>205</sup> The obligations under Article 9(2) include taking measures to ensure that IDPs do not face discrimination and live in safe, dignified and secure conditions,<sup>206</sup> providing IDPs with humanitarian aid to the fullest extent possible without delay,<sup>207</sup> providing special protection for IDPs with special needs<sup>208</sup> and for displaced women’s sexual health,<sup>209</sup> and guaranteeing freedom of movement and choice of residence for IDPs.<sup>210</sup> The consideration of “appropriateness” under Article 9(3) includes a situation where state parties have insufficient resources to comply with their duties under the Kampala Convention, such that they require external assistance. Article 11(3) further obligates state parties to cooperate with such organisations to find a durable solution for IDPs, either by providing for sustainable return, local integration or relocation and long-term reconstruction.<sup>211</sup>

Alongside a national institutional focal point a national hu-

man rights commission may play a key role in advancing the rights of IDPs. While the Kampala Convention does not explicitly refer to the role of such an institution, it does, enumerate a number of responsibilities which are commonly entrusted within the mandates of national human rights institutions. This includes presenting reports of states' compliance with the African Charter<sup>212</sup> indicating the legislative and other measures that have been taken to give effect to international provisions, a role which may be delegated to a national human rights commission.<sup>213</sup>

#### ***b. Great Lakes Instruments***

The obligation to designate a national institutional focal point to coordinate and facilitate the provision of protection and assistance for IDPs is less demanding in the Kampala Convention than according to the Great Lakes Protocol, which requires ICGLR Member States to establish and designate organs of government responsible for disaster emergency preparedness and coordinating protection and assistance to IDPs, as well as establishing focal structures responsible for cooperating with international agencies and civil society responsible for IDPs.<sup>214</sup> Such legislation shall also provide for channels of engagement and cooperation between the organs of government, the United Nations, the African Union and civil society.<sup>215</sup>

### **6.3 Kenya-specific Analysis**

#### *i. Government's responsibility to prevent and address displacement and find durable solutions*

Despite the adoption of the IDP act, lack of clarity around the exact roles and responsibilities of institutions responsible for preventing, protecting and addressing displacement, as well as around the way in which they should interact, remains. The IDP act does not specify the ways in which the national and county governments will collaborate in fulfilling their mutual responsibility for the IDP act's administrative implementation. The National Consultative Coordinating Committee on Internally Displaced Persons, as envisaged in the IDP act, has been formed<sup>216</sup> and it held its first meeting in February 2015,<sup>217</sup> but disagreement persists around its exact scope of responsibilities.

According to the IDP act,<sup>218</sup> the government shall exercise and carry out its functions through the cabinet secretary in charge of the government department for the time being responsible for matters relating to internally displaced persons, which according to the most recent government's structure is the directorate of special programmes under the Ministry of Devolution and Planning.

The draft IDP policy, while reaffirming the government's primary responsibility to respond to displacement, introduces specific arrangements aimed to clarify the institutional responsibilities in pursuing this effort. It assigns the directorate of special programmes, formerly the MOSSP, as the national institution responsible for internal displacement within the government.<sup>219</sup> Under the draft policy, the directorate of special programmes is allocated the following tasks:<sup>220</sup>

- Policy implementation and coordination of implementation efforts with
  - i. its branches and other relevant governmental stakeholders at the regional and local level
  - ii. other relevant departments and governmental entities in accordance with their respective ministerial responsibilities
- Ensuring that effective coordination efforts take place at the regional and national level including the county and the administrative levels below it
- Monitoring and evaluation of the implementation progress and accountability to this end
- Developing relevant guidelines as recommended in this policy as well as national legislation on internal displacement in collaboration with other relevant Departments

Should the process of adoption of the draft IDP policy be taken forward, the above-mentioned list will need to be reviewed in order to ensure consistency with the provisions of the IDP act and in view of the creation of the NCCC.

The act establishes the NCCC as an unincorporated body that supports the work of the directorate of special programmes,<sup>221</sup> which is responsible for matters relating to internal displacement in Kenya.<sup>222</sup> It adds that to prevent internal displacement the government shall establish a prevention mechanism<sup>223</sup> charged with monitoring areas inhabited by persons at risk of displacement, periodical reporting on the situation in such designated areas and issuing early warnings to the cabinet secretary and the chair of the committee for further action.<sup>224</sup>

The IDP act also establishes that "the government shall create the conditions for and provide internally displaced persons with a durable solution in safety and dignity" and recognises the individual right "to make a free and informed choice" on the



different settlement options.<sup>225</sup> The draft IDP policy, while reaffirming the government's primary responsibility to provide durable solutions to IDPs and the importance of providing continued assistance to IDPs in attaining economic self-sufficiency in support of eventually finding a durable solution to their displacement,<sup>226</sup> introduces specific arrangements aimed to clarify the institutional responsibilities in pursuing this effort. The directorate of special programmes is mandated as the national institution responsible for durable solutions, while other departments at the national, county and other appropriate administrative levels below will be allocated responsibilities in line with their respective sectors to respond to the needs and vulnerabilities of IDPs in the context of durable solutions.<sup>227</sup> The government acknowledges that finding a durable solution is a long-term commitment which requires coordinated and concerted engagement of all of those involved in the humanitarian response<sup>228</sup> and it commits itself to working together with national and international humanitarian, human rights and development actors to effectively support IDPs.<sup>229</sup> To this end, the government commits itself to assessing the need for institutional, legal and policy reforms to achieve a sustainable and durable solution.<sup>230</sup>

The act expressly aims to conform with the Guiding Principles and the Great Lakes Protocol with respect to creating institutional frameworks which are in charge of coordinating with relevant stakeholders through all the three phases of displacement response. Consequently, the institutional structures created by the IDP act are consistent with the provisions of the Kampala Convention, which are less demanding as when compared with the aforementioned international legal frameworks.

ii. *Coordination between the NCCC and relevant government departments and intergovernmental committees and bodies*

The NCCC is comprised of thirteen committee members, with four appointments from civil society and non-state actors, one from the Kenyan national commission on human rights and eight state officers.<sup>231</sup> The inclusive and diverse nature of the committee is designed to enhance the facilitation of coordination among relevant stakeholders. Article 13 of the IDP act enumerates the functions of the NCCC. The committee is assigned the role of coordinating prevention and preparedness efforts, protection and assistance to IDPs throughout their displacement until a durable and sustainable solution is found, and hosting com-

munities as needed, among relevant government departments, the United Nations, and non-state actors.<sup>232</sup> In practice, the division of responsibilities and the coordination of the mechanisms whereby the various domestic institutions individually mandated to act in preparedness and response largely remain to be defined. This is particularly the case with the various bodies which are responsible for disaster risk reduction, disaster prevention and disaster management. Institutional fragmentation exists with respect to monitoring, assessing risk and responding to internal displacement. A clear overlap may emerge between bodies operating in a preventative fashion, namely the ones already assigned with early warning functions and the "prevention mechanisms" to be set up by the government and those "charged with monitoring areas inhabited by persons at risk of displacement, periodical reporting on the situation in such areas and early warning issued to the cabinet secretary and the chair of the NCCC".<sup>233</sup> A number of other legal acts are ambiguous on the institutional arrangements for IDP protection. For example, the evictions and resettlement procedures bill 2013, which should deal with forced eviction, does not assign any government agencies with the responsibility for developing resettlement plans for those who have been forcibly evicted. It merely assigns the responsibility to county government officials to be present during the actual process of eviction.<sup>234</sup>

Furthermore, the national disaster management bill does not stipulate the duties and responsibilities of the many disaster management agencies in the country and there is currently no overarching institutional framework which addresses disaster management. The draft national policy for disaster management, in contrast, aims at the establishment and strengthening of disaster management institutions and partnerships so as to strengthen the resilience of vulnerable groups so they may cope with potential disasters. This policy also elaborates on the roles of the various disaster management agencies in more detail, for example identifying a new National Disaster Management Agency (NADIMA) as the agency which should be in charge of the day-to-day national management of all disaster management activities in Kenya. Disaster-related sectorial legislation and other frameworks currently being developed set up a myriad of institutions with different responsibilities for disaster prevention and management at national level. A detailed explanation of the same is to be found in the section dedicated to displacement related to natural hazard.

In the current system, parallel structures operate in a rather disarticulated way at county level. The lack of resources made available to undertake preventive and responsive action on internal displacement increases the chances of competition between these structures. A desirable rationalisation of the overall governance system should consider the possibility of subsuming some of the structures currently assigned with auxiliary but mandates under the ones with more operational capacity.

The national steering committee on peace building and conflict management (NSC) is an inter-agency body which brings together civil society and other government bodies with the Office of the President. As a multi-agency organisation, NSC is mandated with the coordination of all peace-related activities, as well as early warning and early response initiatives in Kenya.<sup>235</sup>

The NCCC, the NADIMA and the NSC are all responsible for monitoring disaster risks. As a result of this institutional fragmentation, many domestic authorities are given responsibility over IDP issues without proper capacity. This may mean that in practice, no agency is likely to take specific responsibility for matters relating to IDPs, if all are held to be responsible.<sup>236</sup> Creating a coherent institutional framework requires that the Kenyan government harmonise all related draft legislation to create institutions that work together.<sup>237</sup> As part of NCCC's responsibility to coordinate protection, assistance, prevention and preparedness efforts to IDPs throughout their displacement until durable solutions are found, it is its task to develop coordination channels and procedures amongst the various agencies. One of the key functions of the NCCC will then be to determine and establish channels and procedures of engagement and cooperation between these institutions in order to enhance the effectiveness of the government's IDP response. The draft IDP policy notes that its implementation is guided by the principles of good partnership between all the different bodies involved in the humanitarian response in addressing internal displacement in Kenya: cooperation and collaboration to ensure efficient use of capacities and avoid duplication; and transparency and predictability in all actions and activities among the different bodies.<sup>238</sup>

The IDP act further mandates the NCCC to ensure the registration of all internally displaced persons in order to maintain a national database of such persons,<sup>239</sup> but ultimately does not clarify which institution will be in charge of carrying out regis-

tration, nor does it elaborate on the rapport with the KNBS or other relevant bodies. Nor is such guidance found in the draft IDP policy which simply instructs the directorate of special programmes to collect data on and analyse the situation of groups of people internally displaced, particularly those living with host communities (see chapter on data collection relating to IDPs).<sup>240</sup> Raising awareness among stakeholders of the existence and nature of internal displacement is addressed in Article 13(e). NCCC is tasked with raising national awareness on sensitising, as well as facilitating and coordinating training and education on the causes, impact and consequences of internal displacement and means of prevention, protection and assistance (see chapter on awareness raising), but there is no clarity on which capacity it is supposed to rely in discharging this task. The NCCC has a further function to oversee the management and use of the Fund which is established under the IDP act to facilitate the provision of IDP assistance (see chapter on allocation of financial and human resources).<sup>241</sup> The committee is tasked with presenting an annual report to the Parliament explaining how it has fulfilled its functions in relation to the situation of IDPs.<sup>242</sup> Additionally, the committee is charged with monitoring and supervising the operational implementation of the Great Lakes Protocol and the Guiding Principles.<sup>243</sup> The NCCC has a further role in advising the cabinet secretary on the exercise of his or her powers and functions under the IDP act, which includes making rules to prescribe what is required under the IDP act; providing for the prior administrative steps to be taken under the act; and providing for the management of the Fund.<sup>244</sup>

### *iii. Coordination between national and local levels*

Lack of a clear division of responsibilities and lack of provisions for effective coordination also affects the overall relation between central and peripheral bodies. The IDP act assigns both the government of Kenya and the county governments administrative responsibility with regard to its implementation, yet it fails to clearly articulate how and to what extent the functions assigned to the former should be delegated to the latter.

The IDP act states that "the national government shall bear ultimate responsibility for the administrative implementation of this Act."<sup>245</sup> At the same time, it notes that "County governments shall bear responsibility for the administrative implementation of the provisions of this Act in accordance with their functions and powers accorded by Article 186 and the Fourth Schedule of the Constitution".<sup>246</sup>

However, Article 186 of the constitution does not assign specific functions to the county governments. It merely notes that when a function or power is conferred on more than one level of government, it is a function or power within the concurrent jurisdiction of each of those levels of government.<sup>247</sup> Article 186 does clarify that when a function or power is not assigned by the constitution or national legislation to a county, it is a function or power of the national government.<sup>248</sup>

More guidance on the distribution of the functions between the national government and the county governments can be found in Schedule Four of the constitution. A number of the functions which are assigned to the national and county governments are directly relevant to the protection of IDPs. For instance, Schedule Four states that the national government bears the overall responsibility of formulating the housing policy of individual counties and general principles of land planning and the coordination of planning by the counties.<sup>249</sup> County governments, on the other hand, are tasked with implementing the county planning and development policies, including land survey and mapping, as well as housing.<sup>250</sup> Conversely, both the national and county governments are responsible for disaster management without clear distinction of their respective roles.<sup>251</sup> Thus, under Article 186, both the national and county governments have jurisdiction over disaster management. The act is only clear about the responsibilities of local authorities in terms of awareness raising, education and information campaigning (see chapter on awareness raising).<sup>252</sup>

The draft IDP policy notes that the NCCC should support the work of the directorate of special programmes.<sup>253</sup> Article 5(i) of the IDP act gives the NCCC the authority to establish sub-committees at the national level and such sub-committees at the county level as the committee deems appropriate to perform such functions and responsibilities as it may determine. The act does not elaborate as to how the sub-committees should interact with the pre-existing county institutions.

*iv. Coordination with international humanitarian agencies and relating guarantees*

Response to the urgent humanitarian situation resulting from the 2007/2008 PEV was coordinated through the cluster system, which was activated in Kenya in January 2008. The Protection Cluster was led by the UN refugee agency (UNHCR) and brought together more than 30 agencies from

the UN, Kenya national commission on human rights, national and international NGOs and the IDP network. While the terms of reference of the Protection Cluster were limited at that time to the response to the PEV, there was recognition that there are other, largely forgotten and unassisted displacements and key policy issues that also required attention. In 2009, in agreement with all the parties, the Protection Cluster transitioned into a national coordination forum, the PWGID.

The mandate of the PWGID was to enhance the capacity of all of those involved in the humanitarian response to address the protection needs of IDPs throughout Kenya through training on the Guiding Principles, advocating for the implementation of the Great Lakes Protocol, finalising the ratification process of the Kampala Convention, developing a national legal and policy framework for the protection of IDPs in Kenya, establishing a monitoring mechanism to ensure compliance with regional and international commitments, and identifying the protection needs of IDPs by highlighting the human rights context, gaps and specific government obligations.

The PWGID is co-chaired by the Ministry of Justice and Constitutional Affairs (now Department of Justice) and the KNCHR. The members of the PWGID are currently revisiting the National PWGID terms of reference in order to guide their coming engagement on IDP matters at all levels. All members highlighted the need to understand the current status/context analysis on matters relating to IDPs to inform future interventions and coming up with a PWGID consolidated work plan.

While the UN cluster system is not activated in Kenya, the government-led sectorial approach is well established and supported by global cluster lead agencies. The resident representative of UNDP also serves as the UN resident and humanitarian coordinator. The UN resident coordinator leads and coordinates UN efforts to support the government in creating and sustaining an enabling environment for the promotion of human rights, good governance and the improvement of the quality of life and well-being of the people of Kenya by reducing poverty, with a particular focus on the most vulnerable groups and regions. The UN humanitarian coordinator leads humanitarian coordination (and the Kenya humanitarian partnership team (KHPT)) and serves as liaison with the government of Kenya.

The NCCC is mandated under the IDP act to serve

as the official impartial and humanitarian focal body to manage relations between the government of Kenya and bilateral and multilateral organisations (such as the African Union and United Nations agencies) to enhance the effectiveness of the response to internal displacement.<sup>254</sup> Both the IDP act and the draft IDP policy note that the government should actively seek to support and cooperate with members of the international community, including humanitarian, development and human rights actors, in particular in circumstances where the government is lacking capacity to provide adequate protection and assistance to IDPs.<sup>255</sup> The draft IDP policy clarifies that one of the functions of the directorate of special programmes is to implement and collaborate with other relevant national stakeholders including humanitarian agencies, members of the civil society, members of the international community and humanitarian and development partners.<sup>256</sup> As the IDP act states in Article 13(b), it is the NCCC's task to "determine and establish procedures and channels of engagement and cooperation between government departments, the United Nations, non-state actors, the secretariat of the Conference of the Great Lakes Region and where appropriate the African union in order to enhance the effectiveness of the response to internal displacement". This will certainly be an important aspect of the NCCC's work, which will need to be prioritised.

In conformity with the Kampala Convention, the Kenyan government acknowledges that international humanitarian organisations have the right to offer their services in support of the IDPs and such offer will not be regarded as unfriendly acts or interference in internal affairs and shall be considered in good faith.<sup>257</sup> It has agreed to grant and facilitate the free passage of humanitarian assistance, including through elimination of subsidies or price regulations on domestic commodities, and waives of customs and taxes for humanitarian goods.<sup>258</sup> In line with the international legal frameworks, Kenya has demonstrated its willingness to cooperate with the international community by inviting the UN special rapporteur on the human rights of IDPs to visit the country in 2010 to review the treatment of IDPs in Kenya and hosted the special rapporteur again in 2012 and 2014.

In line with the Kampala Convention, and in accordance with the Guiding Principles and the Great Lakes Protocol, the IDP act states that the government should ensure rapid and unimpeded access of humanitarian personnel to all IDPs, and that humanitarian assistance is not diverted; and

should protect humanitarian personnel, transports and goods.<sup>259</sup> Provision is made for the prosecution of any person who causes harm to humanitarian personnel; impedes the work of humanitarian personnel; obstructs the provision of humanitarian assistance to IDPs; steals, loots, or destroys humanitarian supplies for IDPs; or misuses or abuses the use of humanitarian assistance for IDPs.<sup>260</sup>

v. *The role of the national human rights commission*

The KNHRC is established pursuant to Article 59(4) of the constitution as an independent commission. Its enabling legislation, the Kenya National Commission on Human Rights Act 2011, sets out its functions in detail. Those which are directly relevant in the context of protecting IDPs, include: (i) promoting respect for human rights and developing a culture of human rights in Kenya; (ii) promoting the protection and observance of human rights in public and private institutions; (iii) monitoring, investigating and reporting on the observance of human rights in all spheres of life in Kenya; (iv) receiving and investigating complaints about alleged abuses of human rights, and taking steps to secure appropriate redress where human rights have been violated; (v) on its own initiative or on the basis of complaints, investigating or researching matters in respect of human rights, and making recommendations to improve the functioning of state organs; (vi) acting as the principal organ of the state in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights; and finally (vii) performing such other functions as the commission may consider necessary for the promotion and protection of human rights.<sup>261</sup>

Although KNCHR is not explicitly tasked with protecting IDPs, its various roles in promoting respect for human rights are directly applicable in this sphere. In fact, KNCHR has, since its inception in 2003, taken an active role in profiling the situation of IDPs in Kenya through its monitoring and reporting function.<sup>262</sup> It has not only issued advisories to the government, but has organised targeted capacity-building workshops to address issues relating to IDPs and has taken an active role in developing advocacy on policy and legislative reforms. This function saw KNCHR establish a mechanism for the monitoring and documentation of the human rights and protection concerns of IDPs, an initiative which led to its appointment as the cluster lead of the PWGID, a consortium of government ministries and departments, and international and national non-governmental or-

ganisations that work with IDPs.<sup>263</sup> The KNCHR's contribution to the work of the PWGID led to the drafting of the IDP policy and the IDP act in Kenya. In 2011, it conducted country-wide monitoring of all cases of displacements and the findings of which are currently being documented in a protection assessment report that will guide the government and other actors on interventions and durable solutions.<sup>264</sup> The KNCHR plays an important role in advancing the rights of IDPs in Kenya. As KNCHR continues to be the co-chair of the PWGID and as it is also a member of the NCCC, it has an important role to play in terms of supporting coordination efforts and information flows between those different actors.

The KNCHR has been accredited as an "A status" institution by the International Co-ordinating Committee (ICC) of National Human Rights Institutions. It is also a member of the Network of African National Human Rights Institutions (NANHRI), the ICC's regional grouping for Africa.

#### **6.4 Recommendations**

The recommendations outlined below would help bring Kenya further in line with the relevant minimum essential elements and supranational normative frameworks in this area.

On normative action:

the government of Kenya must:

- Review and update the draft IDP policy before its adoption, in order for it to be brought in line with the IDP act.
- Consider the adoption of a regulation to assist the operationalisation of the IDP act.
- Introduce a requirement of submission of quarterly reports to increase institutional accountability of the NCCC.

On implementation:

the Kenyan government must:

- Clarify the reporting channels and modalities of the NCCC, in particular whether the NCCC is supposed to report directly to the parliament or through the relevant government department.
- Better clarify the role of county authorities in implementing the IDP act, beyond a generic mention to Fourth Schedule of the constitution.
- Clarify the relation between the prevention mechanism to be established by the government of Kenya as per Article 5(4) of the IDP act and the preventive role assigned to other institutions envisaged by relevant disaster management frameworks (e.g. National Drought Management Authority, National Disaster Management Authority, National Disaster Risk Reduction Platform).

NCCC:

- Prioritise the establishment of procedures and channels of engagement and cooperation with relevant government departments, intergovernmental committees and bodies, the UN, non-state actors and other relevant existing coordination structures

## 7. Allocation of Necessary Financial and Human Resources

### 7.1 General Context and Minimum Essential Elements

The coordinated provision of humanitarian assistance for IDPs, through a solid mechanism of allocation of financial and human resources, can be life-saving and crucial to avoid exacerbating vulnerabilities due to displacement. However, in order to ensure an efficient, effective and non-discriminatory distribution to IDPs according to their needs and vulnerabilities, adequate and timely mechanisms and procedures need to be put in place beforehand and proper planning is required.

#### *Minimum Essential Elements:*

- Provide for the allocation of necessary human and financial resources.
- Assign to relevant authorities or organisations at the national and local level clear and specific obligations in the area of humanitarian assistance to IDPs and provide them with the necessary means to do so.
- Determine criteria for the delivery of humanitarian goods and services in accordance with recognised international minimum standards.
- Set up criteria and mechanisms ensuring full humanitarian access to all people in need.
- Eliminate any obstacles hindering the provision of goods from domestic sources, such as subsidies or price regulations on domestic commodities that set their prices above global prices.

### 7.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

Under the Kampala Convention, the obligation falls on the state parties to provide, to the extent possible, the necessary funds for protection and assistance of IDPs.<sup>265</sup> In the event that sufficient funds are not available to ensure the appropriate protection and assistance for IDPs, state parties are obliged to cooperate in seeking the assistance of international organisations and humanitarian agencies, civil society organisations and other relevant actors.<sup>266</sup> However, the African Union offers support to member states with regard to the coordination and mobilisation of resources in order to protect and assist IDPs.<sup>267</sup>

The Kampala Declaration places a high burden on the member states to provide the necessary human and financial resources to assist IDPs, and enumerates the following objectives which are deemed important for the effective fulfilment of this obligation:

- i. States undertake to expedite targeted support to post-conflict countries, including meeting critical gaps in human resources.<sup>268</sup> In this re-

gard, the African Union Commission is urged to establish the African Union volunteers programme and database of African experts on post-conflict reconstruction and peace building.<sup>269</sup>

- ii. States commit themselves to deploying adequate human, financial and material resources to support the return, reintegration and rehabilitation of returnees and the receiving communities.<sup>270</sup>
- iii. The Kampala Declaration calls upon development partners to dedicate a portion of their development assistance to projects and activities that benefit IDPs as well as their hosting communities, and they must ensure that there is sufficient funding for infrastructural and other improvements in areas where IDPs return and reintegrate.<sup>271</sup>
- iv. States are asked to contribute generously to the African Union Special Refugee Contingency Fund, which is used to support the fast tracking of the implementation of programmes to meet the needs of IDPs and other conflict-affected populations, during the critical period straddling the transition from conflict to peace.<sup>272</sup>
- v. States undertake to work closely with national parliaments to ensure the adoption of provisions on adequate resources to address challenges posed by forced displacement.<sup>273</sup>
- vi. The principles stress the need to forge partnerships, particularly with regards to financing, through the African Development Bank.<sup>274</sup>
- vii. The declaration calls upon the United Nations systems, international organisations, bilateral and multilateral partners, as well as NGOs, to strengthen coordination of their programmes including joint planning, implementation, monitoring, and impact assessment, in partnership with national authorities, particularly in countries affected by conflict, and welcome the ongoing reform process by the international humanitarian community to improve effectiveness, predictability and partnership in all aspects of humanitarian operations.<sup>275</sup>

#### *b. Guiding Principles*

The Kampala Convention and the Kampala Declaration reaffirm the importance which the Guiding Principles place on resource allocation. The Guiding Principles established that the national authorities have a duty to provide protection and humanitarian assistance to IDPs, which was considered by the UN General Assembly to include the allocation of adequate budgetary resources to deal with all stages of displacement. The Guiding Principles specifically recognised that the authorities

must provide the means which allow IDPs to return to their homes or to resettle in another part of the country.

The Guiding Principles further highlight that humanitarian assistance to IDPs shall not be diverted, in particular for political or military reasons. The principles emphasise that “[t]he primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities” and “[i]nternational humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a state’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance”.

#### *c. Great Lakes Protocol*

It is expected that the committee on the protection and assistance of IDPs will have among its responsibilities to mobilise the necessary resources to facilitate the protection and assistance of IDPs during all phases of displacement, including assistance to host communities, as may be needed by such communities.<sup>276</sup>

Furthermore, where governments of member states lack the capacity to protect and assist internally displaced persons, they are required to accept and respect the obligation of the organs of the international community to provide protection and assistance to IDPs.<sup>277</sup>

#### *d. Pinheiro Principles*

The Pinheiro Principles stress that states have the onus to cooperate with each other and with international actors in providing aid and assistance to IDPs in the post-displacement stage. States should request from other states or international organisations the financial and/or technical assistance required to assist the effective voluntary return of IDPs, if national resources are insufficient to achieve this.<sup>278</sup> Furthermore, states should provide appropriate institutions and mechanisms with adequate financial, human and other resources to facilitate housing, land and property restitution processes.<sup>279</sup> Again, where states are unable to shoulder the weight of implementing restitution programmes themselves, the principles suggest an avenue for the sharing of critical expertise and capacity.<sup>280</sup> However, it is important to note that states have the primary responsibility to finance these programmes, and only if they are unable to find the necessary resources, should they then request assistance from the international community.<sup>281</sup>

### **7.3 Kenya-specific Analysis**

While Kenya’s normative frameworks contain a certain number of provisions designed to allocate, directly or

indirectly, some resources to the IDPs, the lack of harmonisation of legal development processes relating to displacement has translated into the establishment of several agencies with partially overlapping mandates (see chapter on National and Local Structures for IDP response). There is a risk that this may lead to wasteful duplication of efforts, resources and capacity being scattered, tensions between institutions, and challenges to ensuring transparency and accountability.

Another aspect that needs to be considered is how financial and human resources are allocated and shared at the central and local level. IDP issues are ultimately a national government responsibility, but local authorities also have an important role to play in addressing displacement. However, it was observed that, for example, municipalities in Kenya do not receive specific funding for IDP protection and assistance programs. This is also related to data collection issues: municipal authorities know little about the number of people living in their towns or municipalities. Yet, reliable data on the population as well as ward-level information are critical for planning and budgeting for social service delivery.<sup>282</sup>

The IDP act is the strongest legal instrument that is designed to ensure proper allocation of resources to internal displacement response in Kenya and to the institutions that are assigned to this task. The IDP act provides that the government bears in particular the responsibility to: (a) ensure adequate provision of basic social and health services in areas inhabited by IDPs; (b) ensure the maintenance of public order in areas inhabited by IDPs; (c) safeguard the civilian and humanitarian character of settlements; and (d) ensure adequate provision of the social economic rights.<sup>283</sup> The same IDP act restructured the existing national “Humanitarian Fund” (the “Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence” established by regulation 3 of the government Financial Management Regulations, 2008). The purpose of the new fund is to finance<sup>284</sup>:

- a. the protection and assistance to internally displaced persons and the provision of a durable solution to them, including:
  - i. Their former homes or alternative settlement sites
  - ii. The replacement of their basic household effects
  - iii. Enabling them to restart their basic livelihoods
  - iv. The reconstruction of destroyed basic housing and rehabilitation of community utilities and institutions
- b. the prevention of internal displacement through preventive measures, including:
  - i. The establishment of the preventive mechanism as provided for in section 5(4) of the Act

- ii. Public awareness campaigns, sensitisation, training and education on the causes, impact and consequences of internal displacement
- c. assisting in the operations of the Committee and non-state actors' programme
- d. any other matter incidental to the matters stated in paragraphs (a), (b) and (c)<sup>285</sup>

It is also important to note that Section 15(2) of the IDP act provides that the fund is destined to cover “any capital and recurrent expenditures made, that exceed the resources available, by County governments in accordance with their responsibility for the administrative implementation of the provisions of this Act in accordance with their functions and powers accorded by Article 186 and the Fourth Schedule of the Constitution.” Although the powers accorded to the county government in Article 186 and the Fourth Schedule of the Kenyan constitution do not specifically provide for the competence of the county government to incur expenditure in issues related to IDPs, in accordance to Section 11(3) of the IDP act, county governments should ensure that when exerting their functions in their areas of competence as identified in the Fourth Schedule (such as education, health services, housing), they also include IDPs.

It is important to note that according to Article 14 (3) of the act, the fund shall consist of: “(a) any balance existing in the Humanitarian Fund as at the commencement of this Act; (b) donations by bilateral and multilateral donors, without prejudice to their possibility to directly fund activities to assist and protect internally displaced persons in Kenya; (c) sums received, including grants, donations, contributions or gifts from any person or institution; (d) moneys earned or arising from any investment of the Fund; (e) funds from the exchequer; and (f) all other sums which may in any manner become payable to, or vested in, the Fund”. The absence of an express budgetary line related to the allocation of financial and human resources to IDPs in the budget of the Republic of Kenya<sup>286</sup> makes it more difficult to ensure that adequate funding is allocated to the prevention and response to displacement. This is something that the draft IDP policy acknowledges, adding that government should commit to engage in fundraising for sustained allocations to the IDP fund.

There are other normative frameworks, which include provisions aimed to support financially the work of agencies and bodies that are engaged in IDP response, that should be looked at. For example, the Land Act 2012 established a land settlement fund to be administered by the national land commission and which is intended to provide access to land for squatters and IDPs among others, to purchase private land for settlement schemes and to provide shelters and livelihoods to those in need.

The evictions and resettlement procedures bill 2012, although it does not contain any explicit provisions referring to IDPs, contains provisions ensuring that evictees or relocatees, who do not have the means to provide for themselves, still have their right to adequate housing guaranteed. For example, the bill provides that:

- No order for eviction shall be granted when it is clear to the court that such an order would result in rendering the affected person homeless<sup>287</sup>
- The person proposing or carrying out the resettlement shall pay for any associated costs including all resettlement costs, and those resettled shall be given security of tenure to avoid future evictions<sup>288</sup>
- Where an eviction is inevitable, resettlement plans shall be developed that will incorporate provisions for sufficient resources and opportunities to the affected people, compensation for losses incurred prior to the eviction, and support during the transition period<sup>289</sup>
- Where private or community land has been taken, the evicted persons should be compensated promptly, fairly and fully<sup>290</sup>

The draft national policy for disaster management of February 2009 also provides for the allocation of financial resources by establishing various funds for management of disasters (such as the humanitarian disaster fund, the national drought fund, and the national disaster management contingency fund), and by recommending the conduct of training needs assessments to establish the disaster management skills and experiences in order to fill the identified gaps.<sup>291</sup> The policy itself recognises that “within the country, plenty of human and non-human resources are in place, effective inventorying and coordination for disaster management in emergencies are inadequate”.<sup>292</sup>

Indeed, adequate coordination between the NCCC and other institutions, committees and bodies who manage resources relevant to address issues of internal displacement is essential in order to prevent resources and capacity from being scattered or invested in duplicated efforts.

#### 7.4 Recommendations

On normative action:

- Consider amending Section 14 of the IDP act in order to rename the “Humanitarian Fund” as “IDP Fund”.
- Consider amending Section 15 of the IDP act concerning the establishment and composition of the fund in order to provide for a yearly allocation of national budget to IDP response.
- Adopt the draft IDP policy, with a particular view to enacting the recommendations on the adequate and sustainable resource allocation included in its Section 180.



On implementation:

- In compliance with the Kampala Convention, allocate adequate resources in the national budget to address the phenomenon of internal displacement, and provide authorities with the necessary financial means to assist IDPs when responsibility is assigned to them.<sup>293</sup>
- Ensure that the various funds established (e.g. the fund administered by the national land commission and the restructured humanitarian fund) do not overlap by allocating money to the same projects, in order to ensure rational spending of funds.
- Better clarify county governments' responsibilities in relation to the protection and assistance of IDPs in order to address the lack of clarity over the coverage of expenditures related to IDPs at a local level.

## 8. Recognition, Issuance and Replacement of Documents

### 8.1 General Context and Minimum Essential Elements

The ability of people to exercise their rights is frequently contingent on their access to identity documents such as a passport, birth certificate or marriage certificate. In many circumstances, however, IDPs may have never had such documents, even prior to their displacement. In situations where they had such documents prior to their displacement, IDPs often lose access to them in the course of their displacement in many cases, or face bureaucratic impediments and no longer have access to the relevant authority which would normally reissue them. Moreover, even if they have access to the relevant authority, IDPs may struggle to afford the cost of replacement documentation. These difficulties present major obstacles for IDPs in their ability to access the protection and assistance which they require. Lack of documents also often impedes IDPs' right to education and access to certain livelihood opportunities. It is an obstacle to exercising their fundamental rights including rights to employment, to vote and to take part in public affairs. It makes it difficult for IDPs to attain a durable solution to displacement through local integration, settlement elsewhere in the country or return to their place of origin. Further, without documentation, IDPs are restricted in their access to essential services such as education and health care.

Accordingly, to enable IDPs to exercise their rights, such as gaining access to basic services, effective access to documentation is crucial.

#### *Minimum Essential Elements:*

- Establish institutional mechanisms and facilitated procedures for issuing or reissuing essential documentation to IDPs, including use of official records and alternative forms of evidence available to IDPs.
- Ensure that, when appropriate and necessary, the issuance of IDP cards for purposes of identification and access to specific assistance is carried out in a rapid and accessible process.<sup>294</sup>
- Ensure that women and men have equal rights to obtain such necessary documents and have the right to have such documentation issued in their own names.

### 8.2 Relevant Supranational Normative Frameworks

#### *a. Kampala Convention*

Article 13 of the Kampala Convention covers 'Registration and Personal Documentation' and provides as follows:

- “1. States Parties shall create and maintain an up-dated register of all internally displaced persons within their jurisdiction or effective control. In doing so, States Parties may collaborate with international organisations, humanitarian agencies or civil society organisations.
2. States Parties shall ensure that internally displaced persons shall be issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificate.
3. States Parties shall facilitate the issuance of new documents or the replacement of documents lost or destroyed in the course of displacement, without imposing unreasonable conditions, such as requiring return to one's area of habitual residence in order to obtain these or other required documents. The failure to issue internally displaced persons with such documents shall not in any way impair the exercise or enjoyment of their human rights.
4. Women and men as well as separated and un-accompanied children shall have equal rights to obtain such necessary identity documents and shall have the right to have such documentation issued in their own names”.<sup>295</sup>

#### *b. The AU Model Law*

The AU Model Law details the arrangements required to give full implementation to this provision. In particular, state authorities are recommended to “provide for the waiver of standard and universal requirements such as specific documentation, residency requirements, health insurance coverage that limit or exclude access of internally displaced persons to health services, and for free access to such services on the basis of needs and particular vulnerabilities.”<sup>296</sup>

Also “the relevant government institution shall elaborate a simplified, (gender, age, and disability sensitive) procedure for issuing the necessary documentation upon applications by internally displaced persons”. Notably, the AU Model Law advocates for the adoption of proactive arrangements by suggesting that “these procedures shall be publicised to areas where internally displaced persons are located” and clarifies that “loss or lack of personal documentation or lack of registration should not be used: (a) to justify the denial of essential food and relief services; (b) to prevent individuals from travelling to safe areas or from returning to their homes; or (c) to impede their access to employment opportunities”.<sup>297</sup> With a view to protecting IDPs' right to reacquisition of lost property or compensation thereof, governments should “restore land

deeds and property documents that are destroyed or lost to owners of land and property without undue delay.<sup>298</sup> The AU Model Law, in keeping with the criteria set out by the IASC Framework for Durable Solutions, refers to guaranteeing IDPs' "access to documentation" as one of the minimum safeguards upon return and reintegration.<sup>299</sup>

### *c. Guiding Principles*

Principle 20 of the Guiding Principles addresses the recognition, delivery and replacement of documents in the following manner:

- “1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates, and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names”.<sup>300</sup>

The Guiding Principles Annotations explain the legal foundations of the above principle and confirm that every IDP has the right to recognition everywhere as a person before the law and such rights are non-derogable.<sup>301</sup> The annotations confirm that the states should take affirmative steps to ensure such rights are upheld because “even if most human rights treaties remain silent on the issue of identity documents, the reluctance of authorities to issue documents may raise questions under several other guaranteed rights.”<sup>302</sup> The Guiding Principles Annotations confirm that the principle of equality and non-discrimination would require that IDPs are able to exercise their right to obtain necessary documents.

### **8.3 Kenya-specific Analysis**

IDPs often report the loss of documents such as birth certificates, national identity cards and land ownership documents, which are critical in enabling them to access assistance and services, claim their rights to property and exercise their right to participation in political processes.

Section 3 of the IDP act clearly stipulates that Principle 20 of the Guiding Principles addressing the recognition,

delivery and replacement of documents shall apply to all internally displaced people in Kenya.<sup>303</sup> Section 9 of the IDP act also provides recognition for the rights of IDPs to documentation.<sup>304</sup>

Under the Kampala Convention, and other supranational normative frameworks including international human rights law, the government of Kenya should not only establish procedures for issuing essential documentation to IDPs but make such procedures easier for them. A facilitated documentation process should be based on procedures that do not impose ‘unreasonable conditions’ such as arbitrary costs, delays or administrative burdens on IDP applicants, or requiring the return to the area they were displaced from to obtain such documentation. A crucial element of this is making the procedures well known among IDPs.

In this respect, the draft IDP policy provides for additional substantive guarantees that may assist in the implementation of this right. Under paragraph 94 of section 8.1.11, the government is to provide “all IDPs with the documents necessary for the enjoyment and exercise of their human and legal rights, such as passports, identification documents, birth certificates, marriage certificates or title deeds or replace them in case of loss or destruction.” In addition, it should also replace documents “such as proof of security of tenure or education certificates to the extent possible”. The right to obtainment or replacement of documentation is equally recognised to all IDPs with special emphasis, at paragraph 95, given to ensuring that the right is recognised, irrespective of the sex or age of IDPs.

The measures envisaged to guarantee the full realisation of the right are listed at paragraph 96:

- a. Facilitating the issuance of new documents or the replacement of documents lost or destroyed in the course of displacement without imposing unreasonable conditions such as requiring the return to the area they were displaced from to obtain such documentation;
- b. Establishing mechanisms and facilitated procedures for IDPs to have lost or destroyed documentation replaced, or obtain new documentation and ensuring that such procedures are accessible, affordable, rapid, transparent and allow for effective remedies in case of refusal;
- c. Using official records and allowing and recognising alternative forms of evidence available to IDPs;
- d. Ensuring the integrity and protection of personal data of IDPs in this process.

Finally, paragraph 97 of the draft IDP policy recommends that, when IDP-cards are introduced to facilitate access to assistance “the government shall provide all IDPs with

such cards in a rapid and all-accessible process and ensure that all IDPs receive such cards without discrimination”.

However, even though IDPs have the rights to documentation under the IDP act and potentially under the draft IDP policy, often they only have limited knowledge of how to recover identity and property documents. According to a study on IDPs’ right to information, the vast majority of the IDPs who were interviewed did not know what to do to recover their documents, beyond reporting their loss to the police and local administration.<sup>305</sup> In other cases, efforts to seek information and assistance from the government to replace or recover crucial documents were fruitless. The main challenges faced by IDPs in replacing documents or reclaiming property lost included the following: poor feedback from authorities (36%), financial constraint (22%), being asked to go back where they originated from to seek supporting documents or proof of loss, and lack of proof of lost, stolen or burn documents (11%). Other respondents pointed at the process of replacing documents which they found to be hard and costly (14%). Distance, costs, frustration and lack of information on the process affected them.<sup>306</sup>

It should also be noted that the Security Laws Amendment Act (2014) introduced different measures resulting in restrictions of basic human rights, which may have an impact on IDPs’ enjoyment of their right to issuance or replacement of identity documents. In particular the IDP act introduces Section 18A to the Registration of Persons Act by providing that:

- “(1) The Director shall cancel registration and revoke the identity card of any person issued under this Act if the card was obtained through
- (a) misrepresentation of material facts. Petition No. 628 of 2014 consolidated with Petition No. 630 of 20154 and Petition No. 12 of 2015 Page 188
  - (b) concealment of material facts
  - (c) fraudulently
  - (d) forgery
  - (e) multiple registration or
  - (f) any other justifiable cause”.

While not specifically directed at IDPs and potentially far more impacting for foreign nationals, including refugees, the IDP act is in principle of concern for IDPs or other persons at risk of displacement who may not be able to provide the required supporting evidence to substantiate

their entitlement. This is particularly the case of individuals belonging to nomadic groups, often exposed to the risk of displacement.

#### **8.4 Recommendations**

On normative action:

- Adopt the draft IDP policy, with a particular view to enacting the recommendations on measures the government should adopt in order to facilitate the process of recovery or replacement of documents for IDPs included in its Sections 96 and 97.

On implementation:

- Make the rights and process of the issuance and replacement of identity documentation well known among IDPs so that IDPs can exercise their right to access protection and assistance identity documents (see this in conjunction with recommendations in the chapter on awareness raising, but with a specific focus on documentation).

## 9. Freedom of Movement

### 9.1 General Context and Minimum Essential Elements

Movement-related rights become relevant in all phases of the IDP response. The relating international and national normative provisions are in fact meant to prevent displacement when not justified by the need to address superior concerns, to ensure that once they have been displaced, IDPs can move freely during displacement, both to avoid unsafe situations, as well as to undertake other necessary or desired travel.<sup>307</sup> This would include, for example, movement to markets, to livelihoods, or to participate in social and community affairs. In principle, IDPs should be able to choose where to live during displacement and to voluntarily reassess such decisions when the reasons for their displacement or the barriers to their return have ceased to exist.<sup>308</sup> Further, displacement itself constitutes a restriction of the freedom of movement and the right to choose one's own residence.<sup>309</sup>

#### *Minimum Essential Elements:*

- Recognise that displacement represents an exception to the freedom of movement and to choose one's own residence and that unlawful restrictions to such right may amount to *arbitrary displacement*.
- Recognise IDPs' right to freedom of movement, including specifically the right to seek safety in another area of the country, to leave the country and to seek asylum in another country and to be protected against forced return to or resettlement in any place where their life, safety, liberty and/or health would be in danger.
- Abolish administrative obstacles that may exist, limiting the possibility of IDPs to reach safe areas, or, when the conditions allow it, to return to their homes.
- Recognise that displacement should last no longer than required by the circumstances and the right of all IDPs to make a voluntary and informed choice between return, integration at the location of displacement or resettlement in another part of the country.
- Provide for specific measures (such as deployment of police forces or demobilisation of combatants in the zones of return) to ensure long term safety and security for returning IDPs.<sup>310</sup>

### 9.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

Article 4(i) of the Kampala Convention reaffirms the duty of state parties to "prevent and avoid conditions that might lead to arbitrary displacement of persons."<sup>311</sup> Article 4(4) of the Kampala Convention provides that all persons have the right to be protected from arbitrary displacement, and includes a non-exhaustive list of prohibited categories of arbitrary displacement.<sup>312</sup> Article 9(2)(f) of

the Kampala Convention provides that state parties shall:

"[g]uarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security, public order or public health".<sup>313</sup>

Article 9(2)(e) requires state parties to "respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."<sup>314</sup> Article 7(5)(d) prohibits members of armed groups from restricting "the freedom of movement of internally displaced persons within and outside their areas of residence."<sup>315</sup> Article 11(1) of the Kampala Convention obliges state parties to

"seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity".<sup>316</sup>

Article 11(2) of the Kampala Convention requires States Parties to "enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions".<sup>317</sup>

#### *b. African Union Draft Model Law*

Article 33 of the African Union Draft Model Law details the way IDPs freedom of movement should be recognised and implemented:

(4) IDPs are at liberty to move freely and chose[sic] their areas of residence.

(5) The government shall ensure that a person's freedom of movement and choice of place of residence will not be subject to any restrictions save those maintained by the law as they are deemed necessary, justified and proportionate for reasons pertaining to national security, public order or health, morals or other people's rights and freedoms.

(6) The government shall respect and ensure respect [of] the right of IDPs to seek safety in another part of the country and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

(7) The right of IDPs to move freely in and out of camps

or other settlements shall not be restricted unless it is done under transparent rules based on public necessity.

(8) Competent authorities should abolish administrative obstacles that may hinder the possibility of internally displaced persons to reach safe areas or when conditions allow, to return to their homes.

(9) IDPs shall enjoy the right to leave the country without discrimination".<sup>318</sup>

### c. Guiding Principles

Principles 6(1) and (3), 12, 14, 15 and 28(1) of the Guiding Principles are meant to prevent arbitrary displacement and, if displacement does occur, to ensure that it does not last longer than required by circumstances and IDPs are able to move freely during displacement, both to avoid unsafe situations, as well as to undertake necessary travel<sup>319</sup> and to recognise their right to freely choose their settlement option.

Principle 6 articulates the obligation to prevent arbitrary displacement and the right to be protected against arbitrary displacement. Principle 6(3), which states that "displacement shall last no longer than required by the circumstances",<sup>320</sup> recognises the rights to return or to re-settle, which are discussed further in Principle 28.

Principle 12 provides that every human being has the right to liberty and security of person and no one shall be subject to arbitrary arrest or detention. To give effect to the foregoing right, IDPs shall not be confined in or interned to a camp (thereby restricting their mobility rights), and even if such confinement or internment is necessary, it should not be for a duration longer than that which is "required by the circumstances".<sup>321</sup> IDPs must also be protected against discriminatory arrest and detention as a result of their displacement.<sup>322</sup>

Principle 14(1) provides that every IDP "has the right to liberty of movement and the freedom to choose his or her residence".<sup>323</sup> This Principle is therefore concerned with movement rights during displacement. Principle 14(2) provides that IDPs "have the right to move freely in and out of camps or other settlements".<sup>324</sup>

Principle 15 lists the following mobility rights: the right to seek safety in another part of the country,<sup>325</sup> the right to leave their country,<sup>326</sup> the right to seek asylum in another country,<sup>327</sup> the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.<sup>328</sup>

Principle 28(1) provides, that

"[c]ompetent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow IDPs to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled IDPs".<sup>329</sup>

Principle 28(2) provides that "[s]pecial efforts should be made to ensure the full participation of IDPs in the planning and management of their return or resettlement and reintegration".<sup>330</sup>

### d. Great Lakes IDP Protocol

Article 4(1)(g) of the Great Lakes IDP Protocol provides that ICGLR member states undertake to: "[e]nsure freedom of movement and choice of residence within designated areas of location, except when restrictions on such movement and residence are necessary, justified, and proportionate to the requirements of maintaining public security, public order and public health".<sup>331</sup>

### e. Pinheiro Principles

In line with other international instruments, Principle 9 sets forth the right to freedom of movement, which includes the right to choose one's own residence and limits the State's right to restrict the freedom of movement to certain areas.

Principle 10 contains several provisions which relate to mobility rights of IDPs, which include the voluntary right of return to their former homes, lands or places of habitual residence, in safety and dignity, as well as the right to not be coerced into returning to their former place of residence:

"10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including physical, material and legal safety issues in countries or places of origin.

10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirect-

ly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.

10.4 States should, when necessary, request from other States or international organisations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons<sup>332</sup>

#### *f. African Charter*

Article 12 of the African Charter contains several provisions relating to the right to freedom of movement: every individual has the right to freedom of movement and residence within the borders of a state provided he abides by the law; every individual has the right to leave any country including his own, and to return to his country, which may be subject to certain restrictions (for the protection of national security, law and order, public health or morality). The charter provides that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. It further provides that a non-national legally admitted in a territory of a state party to the African Charter, may only be expelled from it by virtue of a decision taken in accordance with the law and that mass expulsion (aimed at national, racial, ethnic or religious groups) of non-nationals shall be prohibited.<sup>333</sup>

#### **9.3 Kenya-specific Analysis**

Kenya has a comprehensive legal and policy framework in the area of freedom of movement of IDPs that is generally compliant with the Kampala Convention and the various other legal frameworks referenced herein. Article 39(1) of the constitution provides that “every person has the right of freedom of movement”.<sup>334</sup> Further, Article 39(2) provides that “every person has the right to leave Kenya”.<sup>335</sup> Article 39(3) of the Constitution also guarantees that “every citizen has the right to enter, remain in and reside anywhere in Kenya”.<sup>336</sup> Articles 29(a) and (b) of the constitution also guarantee to “every person” the right to freedom and security which includes the right not to be “deprived of freedom arbitrarily or without just cause” or “detained without trial, except during a state of emergency, in which case the detention is subject to Article 58 of the Constitution.”<sup>337</sup> Articles 49 and 50 of the constitution provide additional due process rights to arrested or detained persons.

The IDP act formally adopts the great lakes IDP protocol and the Guiding Principles as Kenyan law, giving broad rights to IDPs with regard to freedom of movement.<sup>338</sup> Section 5 of the IDP act affirms the duty of the govern-

ment to “guard against factors and prevent and avoid conditions that are conducive to or have the potential to result in the displacement of persons” and to “prevent internal displacement in situations of armed conflict, generalized violence, human rights violations, natural or man-made disasters and development projects”.<sup>339</sup> Section 6 of the IDP act provides that the government shall “protect every human being against arbitrary displacement” and that “arbitrary displacement in a manner specified under principle 6(2) of the Guiding Principles is prohibited and shall constitute an offence punishable under the IDP act”.<sup>340</sup> Further, Section 9 of the IDP act requires the government to

“create conditions for and provide internally displaced persons with a durable and sustainable solution in safety and dignity and shall respect and ensure respect for the right of internally displaced persons to make an informed and voluntary decision on whether to return, locally integrate or resettle elsewhere in the country”.

The IDP act also provides that such conditions for durable solutions shall include, among other things, the “full restoration and enjoyment of the freedom of movement” and “access to documentation”.<sup>341</sup>

Similarly, the draft IDP policy sets forth various protective measures with regards to the freedom of movement of IDPs. Section 38 of the draft IDP policy affirms the government’s duty to “protect its population from acts of [armed groups and similar non-state actors] that lead to arbitrary displacement.”<sup>342</sup> Further, the IDP policy provides that the government shall “protect IDPs while displaced and when searching for a durable solution from acts of [non-state actors] that infringe on their human rights.”<sup>343</sup> Section 76 protects movement-related rights including: the right to move freely in and out of camps or other settlements; the right to seek safety in any other part of Kenya; the right to leave Kenya and seek safety elsewhere, including through the right to seek and enjoy asylum in another country; the right to be protected against forcible return or settlement in any place where other life, safety, liberty and health would be at risk.<sup>344</sup> Finally, Section 77 requires the government to ensure that national legislative and regulatory framework does not contain administrative obstacles to IDPs leaving to reach safe areas.<sup>345</sup>

Unlike IDPs, refugees in Kenya are subject to strict restrictions with regard to their freedom of movement. Kenya is a signatory to the UN Convention and Protocol Relating to the Status of Refugees and the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa. In 2006, the Kenyan legislature passed the Refugees Act, 2006, which establishes that a person shall be a refugee for purposes of the act if such person:

- “(a) owing to well-founded fear of being persecuted for reasons of race, religion, sex, 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
- (b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-rounded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it”.<sup>346</sup>

Section 11 of the refugee act requires that any person who has entered Kenya and wishes to remain within Kenya as a refugee must make his or her intentions known to the commissioner immediately but in any event within thirty days of his or her entry into Kenya.<sup>347</sup> Section 12 of the refugee act provides that an applicant for refugee status may remain in Kenya until such person has been recognized as a refugee, subject to appeals.<sup>348</sup> Section 14 of the refugee act provides that every refugee and asylum seeker shall (a) be issued with a refugee identity card and (b) be permitted to remain in Kenya in accordance with provisions of the refugee act.<sup>349</sup>

Despite the various rights afforded to refugees by law, the country has employed a *de facto* encampment policy since the early 1990's which required all refugees to reside in camps located in the northern part of the country.<sup>350</sup> Moreover, the government restricted the movement of refugees in and out of the refugee camps by requiring them to apply for permission and obtain a “movement pass”.<sup>351</sup> Movement passes were issued for medical reasons, to further education or for resettlement or humanitarian reasons though the criteria for obtaining a movement pass developed in an ad hoc manner and had not previously been formalized in legislation or regulations.<sup>352</sup>

The IDP framework is comprehensive but efforts to operationalize these laws and policies have been relatively unsuccessful. The IDP act stalled extensively after its adoption with the national consultative coordination committee, the body mainly entrusted with coordinating its implementation, being set up only in February 2015 and the IDP policy, adopted at Cabinet level, still awaiting parliamentary approval.<sup>353</sup> Thorough implementation of these legal and policy frameworks is fundamental to ensuring effective protection of IDPs' freedom of movement rights.

The implementation of the IDP regime may also assist in harmonizing the mandates of different governmental departments. Since 2014, all matters relating to internal displacement have been handled by the ministry of devolution and planning.<sup>354</sup> Yet, the fundamental right

to freedom of movement falls under the purview of the KNCHR, which is charged with protecting human rights.<sup>355</sup> Similarly, the Kenya law reform commission (KLRC) is responsible for reforming laws to ensure the observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya.<sup>356</sup> As such, the KLRC may be responsible for abolishing administrative obstacles in national legislative or regulatory frameworks that limit the ability of IDPs to reach safe areas.<sup>357</sup>

The implementation of the IDP regime will require a review of any Kenyan laws which place restrictions on the freedom of movement which could be detrimental to IDPs. The National Police Service Act (the “NPSA”), for example, empowers the police to arrest any person who fails to produce

“a license, permit, certificate or pass within forty-eight hours when called upon to do so ... unless he gives his name and address and otherwise satisfies the officer that he will duly answer any summons or any other proceedings which may issue or be taken against him or her”.<sup>358</sup>

Similarly, the Security Laws (Amendment) Act, 2014 (the “SLAA”) amends the Registration of Persons Act by adding Section 18A which provides:

“The Director may cancel the registration and revoke the identity card of any person issued under [the Registration of Persons Act] if the card was obtained through – (a) misrepresentation of material facts; (b) concealment of material facts; (c) fraudulently; (d) forgery; (e) multiple registration; or (f) any other justifiable cause”.<sup>359</sup>

The amendment gives seemingly boundless authority and discretion to officials to cancel registration and to revoke the identity card of any person. Yet, the High Court of Kenya at Nairobi (the “High Court”) ruled that the amendment did not derogate the right to citizenship and/or registration and that the safeguards in place ensured that the revocation of the identity card would not be done arbitrarily.<sup>360</sup>

Absence of documentation constitutes a major obstacle to the exercise of freedom of movement especially for certain populations, such as nomadic and pastoralist groups, mainly to be found in the north of Kenya. Lacking identity documents these groups are often at risk of being prevented from freely circulating in their ‘habitual pastoral space’, which in many circumstances extends across borders.

The act does not exempt IDPs from the requirements of the NPSA or the SLAA nor does it ensure their ability to



move freely without documentation. This could conflict with the draft IDP policy which requires the government to introduce measures to facilitate movement of IDPs away from danger areas, such as instituting procedures to pass checkpoints and ensuring that a lack of documentation does not hinder the liberty of movement of IDPs.<sup>361</sup>

In addition, the SLAA further limits the freedom of movement of refugees. The SLAA amends the refugee act by requiring refugees to: (i) appear before the commissioner immediately upon entry into the country (rather than within 30 days), (ii) reside in designated refugee camps pending approval of their status as refugees and (iii) remain in the designated refugee camps unless given permission by the refugee camp officer.<sup>362</sup> The High Court considered whether Section 47, specifically, violated Article 39 of the constitution and ultimately found that “the right to enter, remain and reside anywhere in Kenya is guaranteed to citizens [and not refugees]”.<sup>363</sup>

The amendments in the Security Act and the High Court's decision increase refugee vulnerability. Moreover, they formalize existing policies which are in direct violation of many articles in the UN convention which specify that refugees should be accorded fair treatment including, but not limited to, the right to freedom of movement. And while there is no encampment policy in place with respect to IDPs, the SLAA amendments place IDPs at risk through the possible denial or revocation of documents or through inadvertent confinement.

#### **9.4 Recommendations**

As noted above, the current legislation provides a comprehensive framework in the area of freedom of movement for IDPs but efforts to operationalize these laws and policies have been relatively unsuccessful. It is therefore recommended that Kenya:

On normative action:

- Clarify in legislation that the detention of IDPs, which would include internment or confinement in camps, should only take place if absolutely necessary and that if such confinement or internment is necessary, it should not last longer than required by the circumstances.

On implementation:

- Adopt the draft IDP policy in order to introduce specific arrangements easing IDPs' enjoyment of freedom of movement such as measures to facilitate issuance of personal documentation or waiving the requirement of documentation in given circumstances.
- Organise awareness raising campaigns targeting persons likely to be affected by freedom of movement restrictions related to lack of documentation. In particular such campaigns should be aimed to promote access to

mechanisms to be established to facilitate issuance of documentations to such groups.

- Introduce measures to facilitate evacuations from danger areas and issue guidelines to police and security forces and other competent officials to ensure that such evacuations are carried out in compliance with basic human rights standards.

## 10. Participation of IDPs and Electoral Rights

### 10.1 General Context and Minimum Essential Elements

The rights to participation in political life and to participation in decision-making processes, which directly affect the lives of IDPs, are crucial elements in the protection of IDPs. If IDPs are unable to participate in elections and referenda as voters and candidates for election, representation of their views will be diminished and, as a result, governments will be less attentive to their needs and the challenges they face. Similarly, a lack of participation in the decision-making processes that directly affect them will leave IDPs insufficiently informed on matters affecting them and less able to affect policy decisions relating to IDPs. Consequently, an effective policy relating to the protection of IDPs requires governments to support the participation of IDPs in the political process.

In most political systems, IDPs, insofar as they are citizens of the country in which they are displaced, will retain the formal right to vote and stand for election despite their displacement. However, significant barriers to the exercise of participation rights may result from displacement. This is especially the case in parliamentary and municipal elections, where voter eligibility is usually tied to the place of residence. A key challenge is whether IDPs are allowed to cast their votes in the locality of their displacement or in the constituency of their former residence, and whether it is even safe or otherwise possible to do the latter. Further, voter registration requirements, in particular the need to supply identity documents, such as an identity card or Kenyan passport, often contribute to the difficulties that many IDPs experience in exercising their electoral rights. Other challenges arise from the failure to provide adequate information, voting facilities or security support to IDPs during the electoral process.

The requirement to consult and engage IDPs in all matters affecting them goes back to three key considerations:<sup>364</sup>

- Firstly, IDPs' right to participate is founded on internationally guaranteed human rights to freedom of expression and political participation, which includes the right to seek, receive, and impart information and to take part in the conduct of public affairs.<sup>365</sup>
- Secondly, including IDPs in decision-making enables governments to adopt more effective responses to issues faced by IDPs. Consulting with IDPs provides the government with reliable information on the realities and conditions faced by IDPs.
- Thirdly, involving IDPs in decision-making encourages them to seek independent solutions for their displacement and associated issues, alongside government action.

#### *Minimum Essential Elements:*

The relevant minimum essential requirements to protect the participation and electoral rights of IDPs are as follows:

- Collect accurate information on the number and location of IDPs in order to guide implementation and be cognisant of possible ongoing conflict within IDP populations at times of voting.
- Provide mechanisms for IDPs to be registered as voters during displacement. This may be done through facilitated procedures to maintain existing registration, to transfer registration, and/or to waive requirements that would prevent IDPs from registering at the site of displacement.
- Allow IDPs to cast their vote at the location of displacement, for either the constituency of origin (absentee vote) or the constituency of displacement.
- Ensure the consultation and participation of IDPs in all matters affecting them during all phases of displacement and provide sufficient information on such matters to enable them to make voluntary and informed decisions about their future.<sup>366</sup>

### 10.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

Generally the Kampala Convention acknowledges the signatory states' duty to involve IDPs in decision-making processes by requesting them to "consult internally displaced persons and allow them to participate in decisions relating to their protection and assistance."<sup>367</sup> In addition, state parties to the Kampala Convention are required to take "necessary measures to ensure that internally displaced persons who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office".<sup>368</sup>

The Kampala Convention also recognises that the full enjoyment of such rights is largely dependent on the issuance of the required documentation. In this respect, "state parties shall ensure that internally displaced persons shall be issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents" and shall "facilitate the issuance of new documents or replacements of documents lost or destroyed in the course of displacement, without imposing unreasonable conditions".<sup>369</sup> In situations where displacement is caused by projects carried out by public or private actors, state parties are obliged to ensure that the stakeholders explore feasible alternatives, with full information and the consultation of persons likely to be displaced by projects.<sup>370</sup>

Furthermore, the Kampala Convention calls on state parties generally to create satisfactory conditions for

voluntary return, local integration or relocation and to enable IDPs to make a free and informed choice by consulting with them on these and other options, and ensuring their participation in finding sustainable solutions.<sup>371</sup> The Kampala Convention calls on state parties to pay special attention to vulnerable groups such as children, the disabled, women, and victims of sexual violence and other abuses.<sup>372</sup>

It does not, however, elaborate on the need to ensure that these groups are included in the consultation and decision-making processes.<sup>373</sup> Overall, the Kampala Convention is relatively innovative in recognising how IDPs themselves, and the host communities, have an important role to play in decisions that affect their lives.

### *b. Guiding Principles*

The Guiding Principles enshrine the rights of IDPs to participate in economic and community affairs, and to participate in public and governmental affairs, including the right to vote. They provide that IDPs have the right of access to the means necessary to exercise their rights of participation in public and governmental affairs. The Guiding Principles also protect the rights to freedom of thought, conscience, religion or belief, opinion and expression of IDPs.<sup>374</sup>

Furthermore, the Guiding Principles require authorities to facilitate the issuance of identity and other personal documents “necessary for the enjoyment and exercise of legal rights”.<sup>375</sup> Although this Principle is specifically directed towards guaranteeing the right to recognition as a person before the law, it is fundamentally intertwined with electoral rights and other forms of public participation.

In contrast to the Kampala Convention, the Guiding Principles explicitly urge states to involve women in the planning and management of their relocation.<sup>376</sup> The Kampala Convention confirms the requirements laid down in the Guiding Principles, which require states to take adequate measures to guarantee IDPs with “full information on the reasons and procedures for their displacement”<sup>377</sup> and ensure that their “free and informed consent”<sup>378</sup> is sought. For cases other than in emergency stages of armed conflicts and disasters, the Guiding Principles lay down procedural safeguards to ensure the fairness of the process of displacement and the decision-making procedures in the event of displacement.<sup>379</sup>

When describing the adequate standard of living which IDPs should be provided, the Guiding Principles point out that “special efforts should be made to ensure the full participation of women in the planning and distribution” of basic subsistence supplies.<sup>380</sup> Again, this requirement highlights that women are a particularly vulnerable group whose participation adds legitimacy to the processes.

The Guiding Principles do not define what is “adequate” under the circumstances, although guidance can be found in the interpretative pronouncements of the International Covenant on Economic, Social and Cultural Rights. (CESCR).<sup>381</sup>

In any case, consultation and participation of IDPs may provide a useful tool in identifying when this standard is met, taking into consideration the prevailing social, economic, and cultural conditions and circumstances and the specific needs of IDPs.

Special efforts should be made to ensure the full participation of IDPs in the planning and management of their return or resettlement and reintegration.<sup>382</sup> Furthermore, the Guiding Principles highlight that IDPs who have returned to their homes or resettled should not be discriminated against as a result of their having been displaced and such individuals have the “right to participate fully and equally in public affairs at all levels and have equal access to public services”.<sup>383</sup> This paragraph stresses the non-discriminatory right to participate as embodied in the Guiding Principles in situations of return or resettlement.<sup>384</sup> As considered above, IDPs should not be discriminated against due to their displacement, in particular in relation to rights to freedom of expression, association and equal participation in community affairs, and with respect to voting and participation in governmental and public affairs.<sup>385</sup> These rights are guaranteed by all substantive human rights instruments.<sup>386</sup>

### *c. Great Lakes Protocol*

It falls on the ICGLR Member States to ensure the effective participation of IDPs in the preparation and design of national laws which domesticate and implement the Guiding Principles.<sup>387</sup> In the event of displacement caused by development projects, the ICGLR Member States are committed to ensuring “the effective participation” of IDPs, in particular of women, in the planning and management of their relocation, as well as their return, resettlement and reintegration.<sup>388</sup>

In this respect, the Great Lakes Protocol follows the Guiding Principles by ensuring that women are involved in decision-making processes. In fact, the Great Lakes Protocol also obliges ICGLR Member States to respect and uphold Security Council Resolution 1325, which is applicable to the protection of women and their role during armed conflict, “including their participation in decision-making and administration of programs with respect to their safety, welfare, health needs, sanitary care, reproductive rights, food distribution and the process of return”.<sup>389</sup>

Moreover, the Great Lakes Protocol Model Legislation specifies that the committee for the protection and as-

sistance of IDPs, which each ICGLR Member State should establish, should include representatives of displaced people, with equal representation of women and men.<sup>390</sup>

#### *d. Pinheiro Principles*

Under the Pinheiro Principles, there is recognition of the importance of involving IDPs as participants in processes relating to housing, land and property rights, rather than allowing them simply to be the subject of such measures.<sup>391</sup>

States and other international and national actors are under the obligation to “ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities”.<sup>392</sup>

Marginalised groups such as women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children should be adequately represented, and “have the appropriate means and information to participate effectively”.<sup>393</sup> It is highlighted that the specific needs of vulnerable people, such as the elderly, single female heads of households, separated and unaccompanied children and the disabled should be given particular attention in any measures or decisions taken.<sup>394</sup> The Pinheiro Principles echo the Guiding Principles, which highlight that special efforts should be made to ensure the full participation of IDPs in the planning and management of their return or resettlement and reintegration.<sup>395</sup>

### **10.3 Kenya-specific Analysis**

Consultation and participation of IDPs in decision-making processes that affect them has frequently been found to be inadequate in Kenya. For example, in the context of the ‘Rudi Nyumbani operation’,<sup>396</sup> when seeking to return those displaced by the PEV in 2008, the authorities were criticised for failing to secure the substantive participation of IDPs in the planning and implementation of the process.<sup>397</sup> In several cases the government bought land for resettlement without prior consultation with the IDPs, who were unable to see the sites in advance in order to assess the viability and security of the land<sup>398</sup> and without involving host communities in the exercise, bringing on the possibility of inter-communal conflicts. government efforts therefore failed to effectively address the concerns and wishes of the displaced persons and in some cases only served to re-victimize the IDPs by forcing them to return to the areas of their original violation without credible security guarantees. While the lack of involvement of IDPs in decision-making and lack of information during the early stages of the displacement could be attributed to hasty implementation of the programmes due to significant humanitarian needs, the same cannot be said regarding subsequent programmes for return,

resettlement or integration where respondents described information dissemination regarding these programmes as poor.<sup>399</sup>

On the issue of electoral rights, there have been reports over a number of years of cases where IDPs were unable to vote due to the loss or destruction of their documents and their inability to replace them. This was notably the case in the 1997 election.<sup>400</sup> Low voter registration rates, in particular among IDPs, has been attributed to several factors, including their traumatisation by the violence associated with past elections and an absence of trust in the election system due to their experience of vote-rigging. Some IDPs also reported logistical difficulties, such as lack of transportation to the election centres.

Reports of intimidation and the displacement of people specifically aimed at distorting the voter distribution pattern and changing the electoral demography have also occurred in Kenya.<sup>401</sup> The prediction of violence in particular areas by politicians and their voicing of blame for certain groups was arguably intended to cause unrest and contributed significantly to the 2007/2008 election violence. Indeed, there are further reports that the resistance of some politicians to allowing IDPs to settle in certain areas stems from a concern that such resettlement might change voting patterns and adversely affect their chances of re-election.

The 2010 constitution created 47 county governments with three county-wide officials elected for each. With the devolution of powers from central to local level, and as many of the counties are ethnically diverse, the risk of election-related violence (and consequent displacement) has also been “devolved”.

#### *a. The legal framework for participatory rights*

Central to the ability of all Kenyan citizens to participate in the political system is their ability to access information. Citizens have a right to access information under Article 35 of the constitution, which states that “[e]very citizen has the right of access to- (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom”. Article 35 of the constitution is given effect to by the access to information bill, 2013, which has been forwarded to the Attorney General for publication. Its stated purpose is to confer on the commission on administrative justice the oversight and enforcement functions and powers for connected purposes. Among the objects of the bill is to promote routine and systematic disclosure of information by public entities and private bodies based on the constitutional principles relating to accountability, transparency, public participation and access to information.

Under Article 4(1) of the bill, the language of Article 35 of the constitution is reflected in that every citizen has “the right of access to- (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom”. This would include the right to participation, which is enshrined in Article 118 of the constitution: “Public access and participation”. This notion is explained in Article 119, which provides every person with the right “to petition Parliament to consider any matter within its authority”.

The IDP act features several references to IDPs’ participatory rights, including through a provision, echoing the relevant requirement set out in the Kampala Convention, demanding that protection and assistance programmes be developed in consultation with IDPs.<sup>402</sup> Elaborating on the issue of the search for durable solutions, the IDP act also establishes that “the government shall ensure that consultation is made with internally displaced persons”.<sup>403</sup> In furtherance, the government’s commitment to promoting public awareness, sensitisation training and education on internal displacement explicitly mentions the need to “ensure the involvement and participation of individuals and groups affected by internal displacement without endangering their safety”.<sup>404</sup> Furthermore, with specific reference to the possibility of displacement being caused by “development projects or projects to preserve the environment, the government shall:

- a. seek the free and informed consent of the affected persons; and
- b. hold public hearing on the project planning.”<sup>405</sup>

In practice, it is unclear to what extent these provisions are actually met, especially when we consider the inherent difficulties in relation to organising the IDP community, as discussed above. It rather appears that, even though the rights of citizens to participation are safeguarded through the constitution, which guarantees the fundamental rights of freedom of expression and political participation, in practice the framework to directly empower IDPs through consultation and participation remains largely unimplemented.

#### ***b. The legal framework for electoral rights***

Relevant Kenyan legislation on political participation in general includes the 2011 Elections Act and the constitution. The framework and provisions of the Elections Act are administered by the independent electoral and boundaries commission, which was established under Article 88 of the constitution. The constitution does not make specific reference to the voting rights of IDPs, although it does include language supporting universal suffrage, which must therefore also include the right of IDPs to vote. The constitution provides at Article 38(2) and 38(3) that:

- “(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
  - (a) any elective public body or office established under this Constitution;
  - or
  - (b) any office of any political party of which the citizen is a member.
- (3) Every adult citizen has the right, without unreasonable restrictions—
  - (a) to be registered as a voter;
  - (b) to vote by secret ballot in any election or referendum”.

Furthermore, Article 88 establishes the independent electoral and boundaries commission outlines that the commission is responsible for:

- “conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
- (a) the continuous registration of citizens as voters;
  - (b) the regular revision of the voters’ roll;
  - (c) the delimitation of constituencies and wards; [...]
  - (g) voter education”.

The constitution requires the state to take measures to ensure that all qualified citizens are registered to vote and that every citizen who is eligible to vote in an election or referendum has the opportunity to cast a vote and includes among its responsibilities voter education. Under Section 40 of the Elections Act, the independent electoral and boundaries commission is responsible for “performing its duties under Article 88(4)(g) of the Constitution [to] establish mechanisms for the provision of continuous voter education and [to] cause to be prepared a voter education curriculum”.

Article 81 of the constitution, concerning the general principles for the election system, outlines that the election system shall follow principles of:

- “(e) free and fair elections, which are—

- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

Following the devastating impact of the 2007/08 PEV, the provision under (e)(ii) is a particularly poignant one. The evictions and resettlement procedures bill, 2012 also states at Section 11:

“Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall –

- (e) not take place in bad weather, at night, during festivals or religious holidays, prior to an election or prior to or during national examinations.”

The 2011 elections act reflects the relevant provision of the constitution when it states at Section 3(i): “[a]n adult citizen [over 18] shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with this Act”. Section 5 provides for the “[r]egistration of voters and revision of the register of voters [to] be carried out at all times except” during certain election periods. This restriction may affect certain IDPs who will be unable to register at these specific periods. Nevertheless, a prohibition on evictions taking place prior to an election, as in the evictions and resettlement procedures bill, would guard against potential IDPs being denied their electoral rights.

In order to register to vote under Section 5(3) of the 2011 act, a citizen must evidence that they have “attained the age of eighteen years . . . by either a national identity card or a Kenyan passport”. Of course such a requirement may be beyond the capability of people who have lost documentation in the course of their displacement, as discussed above. The administrative requirements for identification and documentation to determine residency may make it difficult for IDPs to register and to vote in the place of their displacement, and the powers granted to electoral officers leave open the possibility of abuse to prevent IDPs (or other disadvantaged groups) from voting once at the polling station. As currently drafted the relevant legislation makes voting at their place of former residence and voting at the place of their displacement difficult for IDPs who have lost their documentation.

It is clear that there is a gap between the legal environment for the support of IDPs' participation in the electoral

process and the practical implications of displacement on an individual's ability to register and vote. Of particular concern is the fact that IDPs risk being removed from the register of voters if they are absent from their habitual residence for a significant period of time<sup>406</sup> and may have difficulty meeting the requirements for registering as voters in the place of their displacement. If they remain on the electoral roll in their constituency of former residence, the lack of any provisions for absentee or proxy voting would severely hinder IDPs from voting in that place. Appeals may be made by IDPs under Section 12(2) to the principal magistrates court on matters of fact and law and to the High Court on matters of law, but the administrative requirements would make recourse to an appeal difficult for many IDPs.

The IDP act in the section relating to durable solutions, recalling the standards set out by the IASC Framework for DS, recommends that in creating the conditions for durable and sustainable solutions to the plight of IDPs, the government ensures IDPs' right to “equal participation in public affairs”.<sup>407</sup> This can only be implemented through affirmative action directed to removing the legal and practical obstacles that may impede the enjoyment of such right on an equal basis with the rest of the population, as highlighted above.

Considerable progress in this respect could be achieved through the adoption and the implementation of the draft IDP policy. The instrument contributes to specifically addressing the right to participation in political life of IDPs through a general recognition of this entitlement contained in Section 91:

#### “8.1.10 Participatory Rights

91. The government shall respect and protect participatory rights of all IDPs in accordance with the Constitution, regional and international human rights and humanitarian law standards on an equal basis and without discrimination. This includes:

- a) The right to freedom of association and assembly;
- b) The right to vote and to equally participate in governmental, public and community affairs, including the right to vie for any elective post as well as the right to have access to the means necessary to exercise this right.”

In terms of concrete realisation of this right the draft IDP policy goes further by setting out specific measures to be undertaken. Section 92 states in fact:

“92. Therefore, the government shall envisage in particular the following measures:

- a) Including issues related to internal displacement in the election management processes;
- b) Providing for registering of IDPs for elections, including by:
  - i. Recognising the continuing validity of pre-displacement registration as voter;
  - ii. Removing requirements and administrative obstacles to registering, such as the requirement to return to one's home or habitual residence for voter registering;
  - iii. Setting up facilities for and fast-tracking voter registration, including issuing and replacement of necessary documentation, in areas where IDPs find themselves.
- c) Removing all obstacles hindering IDPs from effectively exercising their political rights, including by:
  - i. Informing IDPs on the electoral process;
  - ii. Allowing IDPs to cast their vote at the registered constituency of choice;
  - iii. Ensuring safe access to and privacy at polling stations for IDPs."

Although these provisions indicate that the issue of political participation has been considered specifically in the context of IDPs, it is unclear to what extent these provisions have had a practical positive impact on the political participation of IDPs.

## 10.4 Recommendations

### *Participatory rights*

On implementation:

- The government must maintain a regular and systematic line of communication with IDPs to provide them with updates on government plans aimed at finding durable solutions. The government should also work closely with CSOs and other stakeholders providing services to IDPs to facilitate information flow.
- The government must engage with IDP leaders and consult with IDPs and other stakeholders on any matter relating to IDPs, including in the planning and management of durable solutions. Special efforts should be made to involve vulnerable groups of internally displaced persons.
- CSOs should engage more with IDP leaders and other IDPs to organise sensitisation activities particularly to ensure IDPs are informed about their rights, and are enabled to exercise them without being subject to discrimination.

- Better articulate how to ensure, in compliance with the Pinheiro Principles, the participation of IDPs in housing, land and property restitution programmes.

### *Electoral rights*

As noted above, the Elections Act and the constitution provide a reasonable legal framework for electoral rights and participation. However, there are several areas where the electoral rights of IDPs could be better protected in Kenya. In particular, the steps outlined below would assist Kenya in conforming to the international frameworks discussed in this chapter. Central to the suggested reforms would be a relaxation of the standard voting procedures to take account of the particular challenges facing IDPs. It is noted that relaxation of voting procedures runs the risk of enabling increased electoral fraud. Therefore, such reforms must be carefully targeted so that they apply to IDPs and do not undermine the fair administration of elections in Kenya.

### *On normative action:*

It is recommended that Kenya amend the Elections Act and/or accompanying administrative instructions to:

- Provide simplified absentee voting procedures to allow IDPs to vote in their constituency of former residence.
- Provide procedures allowing the issuance of documentation required for registration purposes outside IDPs' constituency of former residence.
- Provide exceptions to allow IDPs to remain on the electoral roll in their constituency of former residence if they wish.
- Provide simplified procedures for IDPs to register to vote in their constituency of displacement.

## 11. Right to Family Life

### 11.1 General Context and Minimum Essential Elements

The importance of non-interference with and protection of family life during internal displacement is a human right and is essential for the well-being of IDPs. Key issues with respect to family life during displacement include: preserving family unity, pursuing family reunification, determining the fate of any missing family members, treating the dead with appropriate respect, and ensuring adequate living conditions through the provision of housing.<sup>408</sup>

#### *Minimum essential elements:*

- Recognise the right of IDPs to family unity; and
- Assign responsibilities to government agencies to search for and reunite members of families who have become separated in the course of displacement; and/or to seek support from the international community for this task.

### 11.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

The Kampala Convention requires states to, “take the necessary measures, including the installation of specialised mechanisms, to find and reunify the families separated during displacement, for re-establishment of the family ties”.<sup>409</sup> The Kampala Convention further requires that armed groups be prohibited from separating members of the same family,<sup>410</sup> including “recruiting children or requiring or permitting them to take part in hostilities”<sup>411</sup> and “forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons, especially women and children”.<sup>412</sup> Moreover, Article 13(1) of the Kampala Convention requires member states to, “provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases”.<sup>413</sup> Member states must also “create and maintain an up-dated register of all internally displaced persons within their jurisdiction or effective control”.<sup>414</sup>

Article 10(2) of the Kampala Convention imposes an obligation on state parties to ensure that stakeholders concerned will explore all feasible alternatives, with full consultation of persons likely to be displaced by projects.<sup>415</sup> This provision is relevant in the context of demolition due to not only due to projects, but evictions in general, which can result in the loss of adequate housing, which ultimately interferes with the right to enjoy family life.

While the Kampala Declaration does not have an express provision with regards to family life, Paragraph 12 does contain provisions regarding meeting the specific needs of displaced women and children, and other vulnerable groups, which are indirectly related to the right to family life. In particular, the signatories “strongly support the need for protection of civilians in situations of armed conflict, based on International Humanitarian Law”,<sup>416</sup> taking note of the disproportionate share of special vulnerability of displaced persons, especially women, children and other groups including persons with disability.<sup>417</sup> The Kampala Declaration similarly contains a commitment to the prohibition of the recruitment of children into armed forces and groups,<sup>418</sup> which is an important element in preventing the separation of children from their family units.

The international norms described below contain generally contain protections for the family unit and the right to family life. In addition, several instruments impose obligations on the State to provide assistance and information about displaced persons to their separated families.

#### *b. Guiding Principles*

Principles 16 and 17 of the Guiding Principles protect the right of IDPs to “non-interference with and protection of family life, obliging states to take measures to preserve family unity, pursue family reunification, determine the fate of the missing, and treat the dead with appropriate respect”.<sup>419</sup>

Principles 16(1) and (2) provide that all IDPs have the right to “know the fate and whereabouts of missing relatives”, and require authorities to establish the fate of IDPs reported missing, and cooperate with international organisations engaged in the task.<sup>420</sup> Authorities must also inform next of kin on the progress of the investigation and notify them of any results. Principle 16(3) requires authorities to endeavour to collect and identify the remains of the deceased, to prevent their disrespect and mutilation of the remains, and facilitate return of remains to their next of kin, or dispose of them respectfully.<sup>421</sup> Principle 16(4) requires that grave sites of IDPs be protected and respected in all circumstances, and that IDPs have the right to access the grave sites of deceased relatives.<sup>422</sup>

Principle 17 provides that every human being has the right to respect of his or her family life, and that to give effect to this right, family members wishing to remain together should be allowed to do so.<sup>423</sup> Principle 17(3) provides that families separated by displacement should be reunited as quickly as possible, and that appropriate steps be taken to expedite the reunion of families, especially those which include children. Authorities must facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organisations working on family



reunification.<sup>424</sup> Principle 17(4) provides that members of IDP families whose personal liberty has been restricted to internment or confinement camps, have the right to remain together.<sup>425</sup>

### *c. Great Lakes Instruments*

The Great Lakes Protocol obliges member states to recognise that every human being has the right to respect of his or her family life.<sup>426</sup> Member States are committed “to facilitate the reunification of the families and to provide, if necessary, special protection for families with mixed ethnic identity”.<sup>427</sup> States are further committed to providing “special protection for women, children, the vulnerable and displaced persons with disabilities”.<sup>428</sup>

### *d. International Covenant on Economic, Social and Cultural Rights (CESCR)*

Pursuant to Article 11(i) of the CESCR, states must “recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The CESCR makes an important link between the right to enjoyment of family life and adequate housing, especially in the context of forced evictions.<sup>429</sup> General Comment No. 4 clarifies that the right to adequate housing should be recognised to the individual *and his family*: “While the reference to ‘himself and his family’ reflects assumptions regarding gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups”.<sup>430</sup> Thus, the concept of “family” must be understood in a broad sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. General Comment No. 4 also states that the concept of housing should be understood in a wider sense than the mere provision of shelter but should rather encompass “the right to live somewhere in security, peace and dignity”,<sup>431</sup> a notion that underpins the right to family life.

More importantly, through General Comment 4 restating the “right not to be subjected to arbitrary or unlawful interference with one’s privacy, [or] family”,<sup>432</sup> the CESCR classifies forced evictions as acts *prima facie* incompatible with human rights and asserts the principle of recognition of a minimum level of tenure security to every individual, regardless of the status of tenure.

### *e. African Charter on the Rights and Welfare of the Child*

Article 18(i) of the African Charter on the Rights and Welfare of the Child (“ACRWC”)<sup>433</sup> (adopted by the African member states of the Organisation of African Unity)

provides that the “family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.” Article 19(2) of the ACRWC further provides that “[e]very child who is separated from one or both parents shall have the right to maintain personal relations with and direct contact with both parents on a regular basis”.<sup>434</sup> Article 19(3) of the ACRWC provides that where “separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made”. Article 25 provides “special protection and assistance” to any child who is “permanently or temporarily deprived of his family environment for any reason”. In particular, Article 25(2)(b) provides that state parties “shall take all necessary measures to trace and re-unite children with parents or relatives whose separation is caused by internal or external displacement arising from armed conflict or natural disasters”.<sup>435</sup>

### *f. Convention on the Rights of the Child*

Article 9(i) of the Convention on the Rights of the Child (“CRC”)<sup>436</sup> provides, *inter alia*, state parties “shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. Article 9(3) provides that “state parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. Finally, Article 9(4) of the CRC provides, *inter alia*, that when separation results from “any action initiated by a State Party... that State Party shall, upon request, provide the parents, the child or if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child”.<sup>437</sup>

## **11.3 Kenya-specific Analysis**

As there are no official comprehensive and updated statistics on the number of IDPs in Kenya due to different causes, no official estimates exist of the number of IDPs who are separated from family members, who are seeking reunification with displaced family members, or who are unable to determine the whereabouts of their family members as a result of internal displacement.

### *a. Constitution of Kenya*

Kenyan law provides certain broad protections for the right to family life in general, as well as in relation to IDPs in particular. Article 45(i) of the Kenyan constitution<sup>438</sup> broadly provides that the family is the “natural and fundamental unit of society”, and it shall “enjoy the recognition and protection of the State.”

#### *b. IDP act*

The IDP act contains several provisions which provide protections to family life of IDPs, but unlike the Kampala Convention, it does not use express language to prohibit family separation by armed groups. The IDP act does however refer more broadly to non-state actors, which are defined as “persons and organisations who are not attributable to the state and whose actions are generally attributable to the state”.<sup>439</sup> While this definition can incorporate legitimate non-governmental organisations and civil society organisations, depending on the specific context within the IDP act, it can also include armed groups.

Article g(2)(g) of the IDP act provides that “family reunification and the establishment of the fate and whereabouts of missing relatives” is a condition the government is obligated to create as part of other durable solutions to the IDP problem. Article 22(4) of the IDP act requires the government to be respectful of the human rights of affected persons during displacement relating to development projects. In particular, this includes creating “satisfactory conditions of safety, nutrition, health and hygiene and protection of the family unity”.

#### *c. Kenya Red Cross Society Act*

The Kenya Red Cross Society (“KRCS”) and the International Committee of the Red Cross (“ICRC”) assist in looking for family members in Kenya, through the “Tracing and Restoration of Family Links” program.<sup>440</sup> The KRCS and the ICRC assist in locating lost family members who have been lost due to: (i) armed conflict or other situations of violence; (ii) natural or man-made disasters; (iii) migration; or (iv) in other situations of humanitarian need, when possible. The KRCS and ICRC also assist in restoring and maintaining contact between family members, and reunite people in Kenya with their families where possible, with a particular emphasis on unaccompanied and separated minors.

#### *d. Draft IDP Policy*

The draft IDP policy<sup>441</sup> also contains several protections for family life. In particular, section 8.1.6 provides express protections for the family. Article 84 of the draft IDP policy provides that the government “shall respect and protect the right to respect the family life of all IDPs in accordance with the Constitution, regional and international human rights and humanitarian law standards without discrimination”. This includes: (i) the right to have the family unity protected from separation, including when

freedom of movement of families has been restricted by internment or confinement to camps; (ii) the right to family reunification, including when family members have been separated in the course of evacuations; (iii) the right to know the fate and whereabouts of missing members of the family; and (iv) the right to have grave sites protected and respected in all circumstances and to have access to such sites of deceased relatives.

Section 85 of the draft policy provides that the government would envisage various measures to protect family life, including the following:

- a) Preventing separation of families by ensuring that plans and procedures with respect to the movement of IDPs, such as the transfer to camps, transit sites or in the context of finding durable solutions do not create an environment conducive to such separation;
- b) Protecting IDPs against having to resort to separation of families as a coping or adaptation strategy as a response to physical insecurity, lack of food, lack of shelter, lack of livelihood options or other reasons by measures such as:
  - i. Provision of humanitarian assistance in a manner allowing and encouraging maintaining the principle of family unity;
  - ii. Introduction of school feeding programmes;
  - iii. Creation of incentives for those displaced families who act as care givers for the most vulnerable among their families who cannot sustain their survival without family bond;
  - iv. Provision of special protection for families of mixed ethnic or communal identity.
- c) Facilitating systematic identification of existing family units and unaccompanied/separated IDPs, in particular children, when registering them for humanitarian assistance and allowing the use of these data in tracing activities;
- d) Facilitating and expediting family reunification, especially where children are involved, including through:
  - i. Facilitation of inquiries or tracing requests made by separated family members;
  - ii. Using or making available existing data of birth registration systems;

- iii. Establishing tracing and reunification mechanisms, including a registry for the collection, protection and coordination of data of separated family members, and liaising with the work of humanitarian organisations engaged in the task of tracing and reunifying separated family members;
- iv. Setting up communication systems in camps and settlements.
- e) Providing particular protection and assistance to unaccompanied IDPs who due to their separation from their families have become particularly vulnerable, such as female and child-headed households, children or the elderly. In particular, ensuring interim care arrangements for children, always taking into account the best interests of the child;
- f) Endeavouring to establish the fate and whereabouts of persons reported missing by collecting and coordinating of data of missing persons and liaising with organisations engaging in such tasks;
- g) Informing and keeping next of kin informed on the progress of tracing and investigation of cases of missing persons and notifying them of any result. Pending a resolution, arrangements must be made to safeguard assets and interests as well as to take care of the missing person's dependents;
- h) Collecting and identifying mortal remains of the deceased, preventing their despoliation and mutilation and facilitating the return of those remains to the next of kin or disposing of them respectfully. Waiving fees and providing basic support to displaced families who cannot afford a respectful disposal. Before the disposal of mortal remains to a mass grave, the consent of the next of kin shall be sought and secured where feasible".<sup>442</sup>

In addition, Section 56(b) of the draft IDP policy, which discusses evacuation conditions and procedures, provides that "[c]onsent to evacuations should, to the extent the emergency allows, be sought from affected persons, through [consultation] and participation to identify suitable alternatives, evacuation routes and measures to protect property and belongings and family unity".<sup>443</sup>

Finally, Section 117(g) of the draft IDP policy provides that the government acknowledges, *inter alia*, that family reunification and establishing the fate and whereabouts of missing relatives for IDPs in line with the draft IDP policy, is necessary for a durable solution, and will strive towards creating them.<sup>444</sup>

**e. Evictions and Resettlement Procedures Bill, 2012**  
Article 12(3)(a) of the evictions and resettlement procedures bill, 2012, provides that in connection with eviction and resettlements, measures shall be taken, "especially for those who are unable to take care of themselves", so that "members of the same family are not separated".<sup>445</sup>

#### **f. The Children's Act**

Forced separation of children from families due to armed conflicts is also addressed in Article 10(2) of the children's act,<sup>446</sup> which provides that "[n]o child shall take part in hostilities or be recruited in armed conflicts, and where armed conflict occurs, respect for and protection and care of children shall be maintained in accordance with the law". A child is a person under eighteen years of age.<sup>447</sup>

#### **g. Palermo Protocol and CTPA**

Kenya has also passed domestic legislation implementing the Palermo Protocol<sup>448</sup>, which is the Counter Trafficking in Persons Act, 2010 (the "CTPA").<sup>449</sup> The CTPA penalizes offenses relating to trafficking in persons both within and outside Kenya. Victims of trafficking are entitled to services, including re-settlement, re-integration, shelter and basic needs.<sup>450</sup>

### **11.4 Recommendations**

On normative action:

- Consider amending the IDP act in order to include an explicit prohibition of family separation, and make explicit in the normative framework that all non-state actors, including armed groups in particular, are prohibited from separating members of the same family,<sup>451</sup> including recruiting children or requiring or permitting them to take part in hostilities<sup>452</sup> and forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons, especially women and children.<sup>453</sup>
- Extend the guarantees set out by the IDP act for displacement and relocations in the context of development to all situations amounting to 'forced evictions' as termed by the relevant international human rights mechanisms, and strengthen provision of effective remedies, based on the overall recognition of the right to adequate housing as a precondition to the full enjoyment of family life.
- Adopt the draft IDP policy, with a particular view to enacting the recommendations on measures the government should adopt in order to better protect IDPs' family life included in its section 85.
- Enact legislation to ensure that grave sites of IDPs are protected and respected in all circumstances, and that IDPs have the right to access the grave sites of deceased relatives.<sup>454</sup>

On implementation:

- Introduce a system of registration of IDPs, for example, when they receive aid or medical care, which could assist families in locating missing relatives.<sup>455</sup>
- Maintain an up-dated register of all IDPs within the jurisdiction or effective control of local authorities.<sup>456</sup>

## 12. Housing, Land and Property

### 12.1 General Context and Minimum Essential Elements

The origins of the housing, land and property (“HLP”) concept lie in international human rights law, particularly in relation to the right to adequate housing. However, HLP encompasses a wide array of rights, which go well beyond right to property. HLP includes rights that are recognised both statutorily and customarily. Displacement often brings about a major disruption in the free enjoyment of some or all of such rights. Loss of housing may jeopardise a healthy and normal lifestyle, as housing guarantees privacy, security and protection. In dealing with land rights, all the different forms of tenure need to be considered: access to land may be shaped in different forms each corresponding to a different right that may need to be protected. As stated by different international human rights institutions, everyone is entitled to a minimum level of security of tenure, regardless of his/her title. Property, instead, can be defined as “any external thing over which the rights of possession, use and enjoyment are exercised”.<sup>457</sup>

HLP issues are relevant for IDPs in all the three different phases of the response. Recognition of security of tenure and protection of the individual right to adequate housing are integral parts of the assessment of the arbitrariness of an act of displacement, and may ultimately determine its prohibition. IDPs’ right to basic shelter needs to be guaranteed in the most acute phases of an emergency, and the authorities have a duty to protect the properties left behind by IDPs during displacement. Provision of secure and stable housing arrangements and access to arable or otherwise productive land are instrumental to attaining durable solutions.

Recovery of lost property is crucial to the achievement of durable solutions to internal displacement.<sup>458</sup> Such property is often appropriated or occupied by others during IDPs’ absence because of the value of property left behind or because of housing shortages.<sup>459</sup> The problem is further complicated by the fact that those re-occupying property left behind by IDPs are often vulnerable populations who are IDPs themselves, or would be if evicted,<sup>460</sup> and by the fact that IDPs’ rights are often neither formal nor recorded.<sup>461</sup> The protection of IDPs’ property during displacement from unlawful appropriation, unlawful occupation, looting and other damage, and procedures for restitution of such property to IDPs upon their return, must be prioritised in any effort to address internal displacement.

#### *Minimal Essential Elements:*

- Recognise the property rights of IDPs to their aban-

doned homes, property and land, including the right to protection and restitution of such property.

- Take basic measures to secure homes, lands and property left behind by IDPs against destruction, unlawful use or occupation and appropriation.
- Develop facilitated procedures to restore or compensate IDPs’ rights in housing, land and property; where this is not possible, provide support to informal dispute resolution bodies to take into account human rights law in negotiating solutions to local property claims.
- Recognise individual rights to a minimum level of tenure security, regardless of tenure status.<sup>462</sup>

### 12.2 Relevant Supranational Frameworks

#### *a. The Kampala Convention*

##### *i. Rights relating to IDPs’ property, in general*

During displacement, the Kampala Convention requires state authorities to “[t]ake necessary measures to protect individual, collective and cultural property left behind by displaced persons [...]”.<sup>463</sup> State authorities are also obligated to protect IDPs’ property in the place where they currently reside.<sup>464</sup> After IDPs’ displacement, state authorities are obligated to “establish appropriate mechanisms providing for simplified procedures[,] where necessary, for resolving disputes relating to the property of internally displaced persons”.<sup>465</sup> As it is not always possible to return property of IDPs (for example, where it has been destroyed), the Kampala Convention requires the establishment of “an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards”.<sup>466</sup> One particular instance in which the Kampala Convention compels states to make reparations is the case in which the state fails to protect IDPs during a natural disaster and the IDPs suffer damages as a result.<sup>467</sup>

The IASC Framework on Durable Solutions<sup>468</sup> lists restoration of housing, land and property among the eight criteria used to determine the extent to which the search for durable solutions for IDPs has been successful.

##### *ii. Rights relating to IDPs’ homes, residences and/or land, in particular*

Without limiting the rights discussed above, the Kampala Convention also recognises special rights relating to IDPs’ homes, residences and land. Inter-

nal displacement and housing law and policy are inextricably linked. Indeed the abandonment of a home is one of the key elements to determining whether someone is an IDP.<sup>469</sup>

The right to protection against arbitrary displacement – to remain in one's home – is consistent with the broader right, recognised by the Kampala Convention to “freedom of movement and choice of residence of internally displaced persons, except where the public interest demands it”.<sup>470</sup> The broader right also includes the right to leave one's home in search of safety,<sup>471</sup> the right of IDPs to move in and out of their areas of residence<sup>472</sup> and the right against “forcible return to or resettlement in any place where [one's] life, safety, liberty and/or health would be at risk”, which could include an IDP's former home.<sup>473</sup>

Under the Kampala Convention, state authorities also have certain positive obligations to help IDPs rebuild their lives in the location of their choice. State authorities must “promot[e] and creat[e] satisfactory conditions for” any of three lasting solutions to displacement: (1) voluntary return to IDPs' former homes (often regarded as the preferred solution),<sup>474</sup> (2) local integration (i.e., in the place where the IDPs currently reside) or (3) relocation to some third part of the country, all “on a sustainable basis and in circumstances of safety and dignity.”<sup>475</sup> This right of IDPs to aid in rebuilding their lives is deduced from the general right to liberty of movement<sup>476</sup> and the related right to choose one's own residence found in Article 12(i) of the International Covenant on Civil and Political Rights.<sup>477</sup> The Kampala Convention follows international norms in paying special attention to “communities with special attachment to, and dependency, on [sic] land due to their particular culture and spiritual values [...]”.<sup>478</sup>

### ***b. Guiding Principles***

The Kampala Convention generally tracks the Guiding Principles in the property protections it offers IDPs. The Guiding Principles contain the general statement that “[n]o one shall be arbitrarily deprived of property and possessions”.<sup>479</sup> This general right not to be deprived of property, whether real property or personal property, reflects principles in international instruments like the Universal Declaration of Human Rights<sup>480</sup> and the African Charter.<sup>481</sup> State authorities are prohibited from infringing this right themselves, except in extraordinary circumstances;<sup>482</sup> but the Guiding Principles make it clear that state authorities are also obligated affirmatively to protect IDPs from arbitrary deprivation of property in various circumstances.

At all times, whether during displacement, after displacement or when protecting against displacement, state authorities are to protect the property of IDPs against the following actions:

- “Pillage;
- Direct or indiscriminate attacks or other acts of violence;
- Being used to shield military operations or objectives;
- Being made the object of reprisal; and
- Being destroyed or appropriated as a form of collective punishment”.<sup>483</sup>

This list, while non-exhaustive, reflects the core property rights embodied in international law and identifies acts that are never justified and always constitute arbitrary deprivation of property.<sup>484</sup>

State authorities' obligations, under the Kampala Convention and the Guiding Principles, to protect IDPs' property *during* displacement are summarised in the Guiding Principles Annotations into three affirmative protections state authorities must offer: (1) preventative actions (for example, deploying troops to protect property, (2) deterrent actions (for example, prosecuting those who destroy or illegally appropriate such property) and (3) preparatory actions (for example, registration of land and ownership rights).<sup>485</sup>

After displacement, while the Kampala Convention requires the establishment of “an effective legal framework to provide just and fair compensation and other forms of reparations”, the Guiding Principles explicitly recognise state authorities' general obligation “to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement”.<sup>486</sup> This means IDPs are entitled to the remedy of restitution (subject to certain exceptions).<sup>487</sup> The Guiding Principles Annotations point to a general trend in human rights instruments recognising the right to restitution or compensation.<sup>488</sup> Among the instruments the Guiding Principles Annotations point to are the Great Lakes Returning Persons' Property Rights Protocol and the Pinheiro Principles, both discussed below.

### ***c. Great Lakes Instruments***

The Dar Es Salaam Declaration, the Great Lakes Pact and the Great Lakes Returning Persons' Property Rights Protocol reflect the principles articulated in the Guiding Principles and the Kampala Convention, often in nearly the same terms. The Great Lakes Returning Persons' Property Rights Protocol moves beyond these principles, however, and further specifies *how* ICGLR member States are to discharge these obligations to develop legal principles and legal frameworks ensuring recovery of property and efficient resolution of disputes. For this rea-

son, among others, the Great Lakes Returning Persons' Property Rights Protocol is a helpful reference point, including for Kenya, an ICGLR Member State.

Under the Great Lakes Returning Persons' Property Rights Protocol, ICGLR member states are obligated to:

- “Elaborate legislative procedures under which the local traditional and administrative authorities referred to in Article 6g of the Dar Es Salaam Declaration, can assist to recover the property of returning refugees and displaced persons;
- Establish simplified formal judicial procedures to enable [i]nternally displaced persons and refugees to lodge their formal claims relating to the loss or recovery of their property;
- Establish alternative and informal community[-]based mechanisms and process for resolving property disputes, with simple requirements of proof of ownership based upon reliable and verifiable testimony; [and]
- Establish an affordable property registration scheme under which title to property, including land, held under both customary and statutory land tenure systems is recognised”.<sup>489</sup>

When recovery of property is not possible, ICGLR Member States “shall provide or assist such persons in obtaining appropriate compensation”.<sup>490</sup>

ICGLR Member States also commit themselves to addressing specific problems relating to the protection of the property rights of returning spouses, single-parent families, single women, children and orphans.<sup>491</sup> Annexed to the Great Lakes Returning Persons' Property Rights Protocol is an especially helpful resource, the Great Lakes Returning Persons' Property Rights Protocol Model Legislation. Notable features of the model legislation include the formation of local property recovery panels and a property claims commission for returnees.<sup>492</sup>

#### *d. Pinheiro Principles*

Principles 2, 5, 6, 7, 9 and 10 of the Pinheiro Principles reaffirm the rights of IDPs discussed above, under the Kampala Convention, the Guiding Principles and the Great Lakes Returning Persons' Property Rights Protocol: against arbitrary displacement, to peaceful enjoyment of their possessions, to freedom of movement and voluntary return and to recovery of property or compensation where recovery is factually impossible. Principles 11-21 of the Pinheiro Principles describe the framework of housing and property restitution rights and address, *inter alia*, accessible national restitution procedures,<sup>493</sup> participation of affected persons in the design and implementation of such procedures,<sup>494</sup> records and documentation,<sup>495</sup> the rights of tenants, non-owners and secondary occupants,<sup>496</sup> laws and enforcement of restitution decisions<sup>497</sup> and compensation.<sup>498</sup> While this report cannot summa-

rise every point made in Principles 11–21 of the Pinheiro Principles,<sup>499</sup> it can identify a few important provisions contained therein.

The Pinheiro Principles envision “equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims”.<sup>500</sup> The procedures, institutions and mechanisms are to be age and gender sensitive<sup>501</sup> and accessible to all, including via proxy<sup>502</sup> and by collective claim,<sup>503</sup> without regard to gender, age, and place of residence.<sup>504</sup> Legal and other assistance should be provided to ensure accessibility.<sup>505</sup> The procedures must set out a clear time period for filing claims that is sufficiently long to provide an adequate opportunity to IDPs to file claims.<sup>506</sup> All affected parties must be represented and included in the decisions regarding claims made.<sup>507</sup>

IDPs with formal ownership rights to property left behind are not the only ones whose property rights should be protected. States should ensure that tenants and social-occupancy rights holders “are able to repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights”.<sup>508</sup> Moreover, secondary occupants (i.e., those who occupy property after IDPs' departure) must be protected against arbitrary forced eviction.<sup>509</sup> Where eviction, for the sake of returning IDPs, is deemed justifiable, unavoidable and therefore non-arbitrary, states should ensure that such evicted persons have access to other adequate housing and should identify and provide alternative housing and/or land for such persons.<sup>510</sup> Where secondary occupants have sold property to third parties acting in good faith, states may consider providing compensation to third parties.<sup>511</sup>

States should establish a national system for the registration of housing, land and property rights.<sup>512</sup> Moreover, restitution decisions should be recorded.<sup>513</sup> States should also ensure that existing records are not destroyed in times of conflict.<sup>514</sup>

Establishing and implementing these procedures will require changes to local law. States are to “develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law”.<sup>515</sup> This framework must “clearly delineate every person and/or affected group [including any subsidiary claimant like a resident family member] that is legally entitled to the restitution of their housing, land and property [...]”.<sup>516</sup> Moreover, states “should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution [...]”.<sup>517</sup> States must also designate specific agencies for enforcing restitution decisions<sup>518</sup> and ensure

“that local and national authorities are legally obligated to respect, implement and enforce” restitution decisions.<sup>519</sup>

Finally, states are to respect IDPs’ right to compensation (monetary or in kind).<sup>520</sup> The state must only use compensation as a remedy, however, when restitution is not factually possible, the injured party voluntarily accepts compensation in place of restitution or when the terms of a peace settlement provide for a combination of restitution and compensation.<sup>521</sup> Factual impossibility should be determined by an impartial tribunal, and IDPs should have the right to rebuild, whenever possible.<sup>522</sup>

The Pinheiro Principles Handbook acknowledges that customary or traditional law can be relevant to working out IDPs’ property rights. This is especially true in Africa, which “may ultimately require different approaches and tools than those which played out in Eastern Europe and assorted other regions and sub-regions given the widespread application of customary law throughout the continent”.<sup>523</sup> In Sudan and South Sudan, for example, where formal land legislation is in place for some areas while customary land arrangements are in place for other areas, “[r]econciling such differences and incorporating the [human rights consistent] elements of customary or traditional land arrangements existing in the South with the formal provisions in the North [...] will be a complex endeavour [...]”.<sup>524</sup> Indeed, “[i]n many settings customary law arrangements on land are equitable, widely accepted and far more simple to administer and cost effective than formal, title-based systems [...] [and] restitution practitioners will [therefore likely] be assisting in the re-assertion of the housing, land and property rights established under customary law”.<sup>525</sup>

#### *e. Report of the Special Rapporteur on Adequate Housing*

In order to secure and protect the tenure rights of IDPs’ the adequate housing report advocates for states’ recognising a broad range of tenure forms.<sup>526</sup> Such recognition would strengthen IDPs’ claims to property left behind. On the other hand, it is important to understand that the recognition of such tenure forms (for example, adverse possession) may also strengthen the claims of secondary occupants. The adequate housing report also advocates for registration of tenure rights,<sup>527</sup> which in certain contexts would greatly facilitate the adjudication of claims to property left behind.

Among other sources to be referred to are the UN Basic Principles and Guidelines on Development-based Evictions and Displacement (2007) earlier defined as Basic Principles.

## **12.3 Kenya-specific Analysis**

### *a. Background*

Internal displacement in Kenya occurs for a range of reasons, many of which already have already been discussed in previous sections. Issues related to land and housing rights—the focus of this section—can contribute to internal displacement, and also can perpetuate displacement after it occurs.

Land, in particular, has been and remains of crucial importance to Kenyans.<sup>528</sup> Thus, rules governing land access and rights are also very important, and they influence housing-related rights. While modern legislation passed to promote improved land access exists, issues related to land access arose out of Kenya’s complex history with land and land administration. As such, a historical overview of land administration in Kenya specifically is necessary to contextualise current legislative efforts.

Kenya gained independence from British colonial rule in 1963.<sup>529</sup> During their rule, the British imposed complex land regulatory systems on Kenyan lands that subverted existing, customary land-management practices. Colonial rule resulted in the allocation of large land parcels to the British and certain Kenyans, while most Kenyans were forced to remain on small land parcels.<sup>530</sup> Deemed “native reserves,” these parcels did not provide secure possessory rights and could be appropriated and reallocated by the British at any time.<sup>531</sup>

Even after Independence, British land laws remained mostly intact and were adopted by the new Kenyan government.<sup>532</sup> Thus, the successive Presidents retained the discretionary ability to allocate land,<sup>533</sup> even on a discriminatory or ad-hoc basis.<sup>534</sup> Initial post-Independence land grants allocated small parcels of land to previously landless citizens. However, over time, presidencies awarded large amounts of land to political supporters, going so far as to unilaterally take and reallocate public land.<sup>535</sup>

Due to the aforementioned misrepresentation of land matters and other factors that are discussed in-depth elsewhere, land accessibility decreased, scarcity increased, and regional conflicts over land emerged and persisted. These conflicts, at times violent, created additional displacement, compounding existing disparities in property access.

### *b. Land-Related Legislation*

Violence surrounding the 2007 Kenyan presidential election resulted in the internal displacement of approximately 600,000 people,<sup>536</sup> following a history of displacement caused by political, ethnic and land-related disputes. Other causes of internal displacement since Independence include land allocation and acquisition for development



projects<sup>537</sup> and land registration interventions, impacting pastoralists in particular.<sup>538</sup> In a 2009 sessional paper, Kenya's ministry of lands acknowledged the failure of existing land laws to operate effectively, creating

“...fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.”<sup>539</sup>

The Ministry also provided a series of land reform goals. It called for the resolution of gaps in the Kenyan constitution related to property rights; the redress of land tenure problems across multiple ownership and possessory regimes; the improvement of land use management and land administration systems; and the provision of care to certain groups—including IDPs—that require special government intervention efforts.<sup>540</sup> IDP-specific goals included creating inventories of IDP populations; identifying causes of internal displacement; creating political and legislative mechanisms to respond to issues arising out of displacement; and appropriately resettling IDPs.<sup>541</sup> The government also acknowledged issues tied to pastoralists<sup>542</sup> and stemming from corruption in the land-sector.<sup>543</sup>

After the ministry of lands 2009 sessional paper release, the Kenyan government enacted a series of legislative reforms aimed at resolving property rights issues. In August 2010, the Kenyan government revised and amended the national constitution. The amended constitution included a series of articles that addressed property rights, including land rights. Specifically, the constitution enumerated:

- All persons, subject to limitations based on citizenship status, have the right to acquire or own property (a) of any description and (b) in any part of Kenya.<sup>544</sup>
- No laws may exist that permit either the State or a person to (a) arbitrarily deprive someone of their property rights or (b) limit or restrict rights granted under Article 40 for discriminatory purposes.<sup>545</sup>
- States cannot deprive individuals of their property rights with exceptions for (a) certain specified land acquisitions and (b) where the public interest requires.<sup>546</sup>
- Compensation for occupants in good faith of land acquired with Constitutional support can be provided, even where the occupants do not hold title to the land so acquired.<sup>547</sup>
- Constitutional protections do not reach those individuals who obtained land rights illegally or improperly.<sup>548</sup>

The constitution also devoted an entire chapter to land legislation. There, it established classification categories for land; land became either public, community, or

private.<sup>549</sup> After detailing each land type,<sup>550</sup> it then noted that non-citizens may possess lease—but not ownership—rights to land.<sup>551</sup> It also established the national land commission, and tasked it to “manage public land... [investigate] present or historical land injustices... [and] monitor and have oversight responsibilities over land use planning throughout the country”.<sup>552</sup> Finally, the constitution called on Parliament to revise existing land laws and to create new laws to improve land management and protection of public and private land interests.<sup>553</sup>

After these constitutional revisions, the IDP act, which covers a range of issues affecting IDPs, including their rights related to land.<sup>554</sup> The government also enacted four major pieces of land legislation in 2012. These laws do not apply exclusively to IDPs and include: the Land Act, 2012; the Land Registration Act, 2012; the Environment and Land Court Act; and the National Land Commission Act.<sup>555</sup>

The National Land Commission Act expanded on the creation of the commission by the constitution. The act provided some scope of the commission's regulatory functions, and also detailed its structure.<sup>556</sup> The Land Act also provided additional, broad guidance for the commission. Significantly, the commission gained oversight over the allocation of public lands to private individuals.<sup>557</sup> The commission also gained the ability to assign public land, including for investment purposes and to foreign governments. However, such allocations were required to be used for their designated purpose.<sup>558</sup>

The commission also gained the responsibility to receive requests for land acquisitions, to create guidelines for relevant acquiring authorities related to land acquisition and to determine whether acquisitions requested should occur.<sup>559</sup> Where the commission allowed the request, it then became tasked with providing notice of the acquisition,<sup>560</sup> and allocating appropriate compensatory awards.<sup>561</sup> The commission was also held responsible for establishing resettlement programmes for individuals impacted by acquisition.<sup>562</sup> Allocations by the commission or government made in under corrupt circumstances were void.<sup>563</sup>

In sum, the commission gained significant control over land acquisition processes. It determined whether a request for acquisition should occur, gave notice for imminent acquisitions, and provided compensation or resettlement to those affected by acquisition. Additional powers granted to the commission included the ability to determine whether the unlawful occupation of certain public lands occurred,<sup>564</sup> and if so, the ability to order the removal of unlawful occupants from land using “any steps which may be necessary for the purpose”.<sup>565</sup>

The ability of the commission to interact with individu-

als' property rights is a sign that a system of property registration exists that accurately describes individuals' property interests. In fact, in both pre- and post-colonial Kenya, efforts were made across the country to establish property rights systems,<sup>566</sup> with some estimates placing 90% of land in farming districts as privatised.<sup>567</sup>

However, since independence, despite these rigorous attempts, the positive intended effects of privatisation have failed to endure. Instead, issues continue to arise, such as titles remaining registered in the names of deceased relatives rather than being updated to reflect successors rights; titles remaining registered in the names of previous owners even after sale; the re-fragmentation of consolidated and registered titles; and customary practices restricting the sale of titled land, all thwarted envisioned gains from privatisation.<sup>568</sup> These issues stem from a general absence of adequate information sharing from government institutions who are not adequately informing individuals how to access and protect their properties.

Other factors, like customary inheritance rights, misguided attempts to regulate pastoralist land access, and population growth that promoted increased land fragmentation also frustrated the sustainability of property titles attached to land.<sup>569</sup> Finally, the Kenyan government itself acknowledged the problematic complexity of laws governing land registration in 2009.<sup>570</sup>

In an attempt to redress problems associated with faulty land registration, the government passed the Land Registration Act in 2012. The act consolidated and overrode prior laws related to land registration.<sup>571</sup> Key provisions relevant to internal displacement included the registration of community land and its membership<sup>572</sup> as well as co-tenancies and their memberships,<sup>573</sup> and the rule that certificates of title would be taken as prima facie evidence that "the person named is the absolute and indefeasible owner", except in instances of fraud or corruption.<sup>574</sup>

Disputes related to land fell within the jurisdiction of the Environment and Land Court, established by act in 2012. The Court's jurisdiction over land-related issues remains broad, encompassing any "dispute relating to...land".<sup>575</sup> The court also has the ability to make "any order and grant any relief as [it] deems fit and just..." when hearing claims within its jurisdiction.<sup>576</sup>

Despite the success of the Kenyan government in passing the four aforementioned acts, the community land bill, which is especially pertinent to internal displacement in Kenya, remains outstanding.<sup>577</sup> The bill provides leeway to communities, like pastoralists, who rely on large tracts of land managed by multiple people rather than a sole titleholder. The bill is important in this regard, as the Land Registration Act alone—and its emphasis on individual

titleholding—may frustrate the rights of particularly pastoralist groups.

For example, through registration of land parcels to individuals, non-registered pastoralists who rely on free movement for their livelihoods may lose out on the opportunity to traverse wide areas of land once they fall into private possession. Consequently, in attempting to protect the land and property rights of certain people, the Land Registration Act may arbitrarily displace pastoralists and deprive them of their freedom of movement.<sup>578</sup> If groups of pastoralists gain the ability to register large land areas, then they may be able to sustain their livelihoods even as increasing numbers of individual landholders emerge.

Beyond improving pastoralist rights protection, the community land bill also allows for commission decisions related to community land to be ratified by the community before implementation.<sup>579</sup> Moreover, while community land registrations provide absolute ownership rights,<sup>580</sup> those rights are subject to similar limitations as those provided for individually registered land parcels under the Land Registration Act, 2012, e.g. for compulsory acquisition as provided under other law; or for any other rights provided under other laws.<sup>581</sup> Finally, conversion of community land into private land requires approval by community members,<sup>582</sup> and while rights under pastoral custom are respected, they require consideration under the IDP act only to the extent that they do not contradict written law.<sup>583</sup>

While the Kenyan government has received acknowledgment for its legislative efforts to create land reforms,<sup>584</sup> certain problems continue to date. Land-reform shortfalls relevant to IDPs include persistent corruption and inefficiency in land registration and management, even in cases of re-settlement<sup>585</sup> and evictions of individuals from their land.<sup>586</sup> Moreover, where IDP re-settlement has occurred, procedures have been criticised for lacking transparency and for placing IDPs into settlements that remain insecure and unsuitable for livelihood generation.<sup>587</sup>

### *c. Housing-Related Legislation*

Housing, like land, also of critical importance to many Kenyan IDPs. Whether owned outright or leased, the government in its IDP act noted that access to mechanisms that restore housing to displaced persons was a pre-condition for durable solutions.<sup>588</sup> It further declared that funding for IDPs should be used to provide access to former homes or alternative settlement sites, or the reconstruction of destroyed housing.<sup>589</sup>

However, even before the 2012 Act, Kenya arguably required legislation that improved housing access.<sup>590</sup> For example, by the 1990s, scholars noted issues with rental

housing in Kenya, which involved landlords who “rarely record[ed] their tenancy agreements formally”, “ma[de] alterations [to apartments] without involving tenants except to inform them when to vacate to facilitate the work”, and “increase[d] rents without notice”.<sup>591</sup> The rental housing market saw years of high rents, due in part to low rental housing supplies and urban growth.<sup>592</sup> The combination of unpredictable landlord practices with high rental prices meant tenants were both vulnerable to losing rental housing they could access, and also vulnerable to exclusion from the rental market altogether after eviction. This rental reality also breached the “affordability” element of the Right to Adequate Housing as promulgated by the UN High Commissioner on Human Rights. The UNHCR defines housing that costs so much so as to preclude the ability to enjoy other human rights as inadequate.<sup>593</sup>

In 2007, the government introduced the landlord and tenant bill to improve protections for tenants.<sup>594</sup> The bill created a landlord and tenant tribunal to adjudicate disputes relating to rental housing.<sup>595</sup> It also placed restrictions on rent, including rent increases,<sup>596</sup> and on tenant evictions.<sup>597</sup> While the bill remains pending for passage to date, in 2012 the Kenyan government did revise its Rent Restriction Act, which is in force but only applies to certain rental housing with monthly rents under 2,500 shillings.<sup>598</sup> Key provisions in the IDP act include guidelines for the determination of fair rent values,<sup>599</sup> adequate notice periods for rent increases,<sup>600</sup> and under what circumstances tenant evictions may occur.<sup>601</sup> The year 2012 also saw a revision to Kenya’s housing act, which outlines responsibilities for the national housing commission,<sup>602</sup> itself established in 1967.<sup>603</sup> The primary purpose of the commission is to provide financing for housing construction throughout the country.<sup>604</sup>

While the Rent Restriction Act and the Housing Act both use language that supports housing access for the general population, neither Act seems to address the particular difficulties faced by persons vulnerable to displacement in the first instance. Issues of potential concern to such individuals—like receiving accommodation if displaced by large-scale projects<sup>605</sup> or from resettlement-allocated land<sup>606</sup>—are not discussed in either act, though both arguably cover all types of circumstances. Therefore, while it may be assumed that the IDP acts benefit IDPs, the actual reach of the IDP acts’ language to positively impact them and their interests remains uncertain.

Nonetheless, the importance of housing finance in Kenya cannot be understated; as of 2012, Kenya’s housing stock suffered from a two-million unit deficit, which was estimated to grow at another 200,000 units per year.<sup>607</sup> Housing shortages can correspond with increased rental and ownership costs, thereby making it difficult for many Kenyans to afford formal housing.<sup>608</sup>

Two consequences arise from Kenya’s housing shortage that are especially relevant for IDPs. First, where housing is scarce, incentives exist for landlords, developers, and even the government to dispossess tenants or landowners from their properties (including land), even if doing so contravenes laws written to protect the populace from exactly these practices. The properties then can be converted into housing to achieve better market prices.<sup>609</sup> This has occurred even in the case of some affordable housing<sup>610</sup> or IDP resettlement projects, where land allocated was grabbed.<sup>611</sup> Thus, circumstances can be envisioned where the government obtains the legal authority to acquire land or property, thereby displacing individuals, who then are placed in resettlement housing which is itself vulnerable to capture.

When Kenyans are displaced from their properties without provision of alternative housing, or cannot access the housing market, they may live in informal housing, including structures in slums. In 2013, an estimated 5.4 million Kenyans lived in slums, and approximately 71% of urban residents resided in them.<sup>612</sup> Informal housing by definition lacks legal recognition—it is not formally registered. Consequently, informal housing may not be recognised under law and in turn, may not receive legal protections afforded to registered properties. Such housing remains susceptible to demolition, and residents remain vulnerable to further dispossession.<sup>613</sup> Moreover, informal housing can still demand rents disproportionate to the quality of facilities provided.<sup>614</sup>

To prevent eviction and slum development, the Kenyan government promulgated two documents: the evictions and resettlement procedures bill, 2013, and a draft national slum upgrading and prevention policy.<sup>615</sup> The evictions and resettlement procedures bill provides comprehensive rules for eviction proceedings under different circumstances, e.g. individual versus group eviction, and also rules on resettlement practices.<sup>616</sup> The bill establishes that individuals cannot be evicted absent allowances provided by the bill,<sup>617</sup> and that both government and individual actors must take certain steps before attempting an eviction.<sup>618</sup> Where evictions impact people deemed “unlawful occupiers”, the government is required to demonstrate that the eviction of the occupiers is consistent with the bill of rights.<sup>619</sup> As of April 2014, the bill remained outstanding and not passed into law.<sup>620</sup>

Pursuant to the drafting of the slum policy, the Kenyan government created a series of comprehensive recommendations for improving shelter and housing in slums.<sup>621</sup> Suggestions included providing low-cost micro-financing for housing mortgages, recognising tenancies-at-will so tenants aggrieved by landlords could simply terminate their leases,<sup>622</sup> and improving tenure security for slum residents.<sup>623</sup>

Despite these efforts, affordable housing remains limited in Kenya.<sup>624</sup> Consequently, Kenya's low-income population—particularly in urban areas—remains in informal housing without secure property rights.<sup>625</sup> Rural-to-urban migration has further aggravated housing shortages in urban areas.<sup>626</sup> The Kenyan government has recently taken steps to provide additional affordable housing—including building houses directly<sup>627</sup> or through partnerships with private entities.<sup>628</sup> Moreover, while the government has received praise for its IDP resettlement efforts,<sup>629</sup> in some areas, housing shortages persist and frustrate IDP resettlement into sustainable shelters.<sup>630</sup>

#### 12.4 Recommendations

The previous discussion aimed at describing the challenges faced by Kenyans, especially IDPs, face with regards to land and housing, as well as the Kenyan government's legislative response. With regards to land, many Kenyans have been displaced due to violent conflicts over land rights, particularly as land shortages increased. Development projects also created displacement, as did property rights regimes which have failed to account for the needs of pastoralist or non-registered landholders'.

With regards to housing, as rural-to-urban migration increased—likely in part due to the growing shortage of land-based livelihood opportunities in rural areas in Kenya and more generally worldwide—housing shortages also increased. These shortages fuelled informal housing development, which provided limited or no property rights protections to inhabitants. When these developments were targeted for demolition or were otherwise seized, additional displacement occurred. Even where rural and urban displacement were matched by new IDP resettlement projects, the projects themselves did not always include sufficient property rights protections to survive.

To redress these complex land and housing issues and mitigate their impact on affected populations, including IDPs, the Kenyan government passed the rigorous legislation discussed in this section. Much of this legislation aligns with international and regional law on property rights protections, especially for IDPs.

However, work remains to be done to ensure that Kenyans do not experience displacement, and where they do, that their rights are protected during the displacement and thereafter. Below is a list of recommendations for the Kenyan government, aimed at improving the circumstances of IDPs and others susceptible to displacement. These recommendations tie into those provided by international and regional law discussed earlier in this chapter.

##### *a. Protection from Displacement*

On normative action:

- Fully implement the IDP act.

- Pass the eviction and resettlement procedure and community land bills to respect the circumstances of individuals not possessing individual property rights.
- Ensure laws passed to formalise property rights do not undermine or fail to recognise customary rights systems.
- Coordinate various legislation relating to IDPs such that gaps or overlaps in language that may undermine assistance to IDPs are redressed.

On implementation:

- Eliminate corruption within the property rights registry systems and improve access to them so that they function as envisaged within multiple pieces of land- and housing-related legislation, and so that they decrease the risk of rights recordation losses during conflict times.
- Encourage sites and services rehabilitation programmes for slum areas, rather than demolition, to minimize unnecessary urban displacement.
- Limit government collusion with foreign and private developers, so that public-private partnerships can work effectively to provide cost-effective housing and resettlement homes.
- Provide specialised support to urban planning and national or regional development processes, with a view to ensuring these are sensitive to the prevention and mitigation of internal displacement and the rights of IDPs.
- Monitor the risk of displacement induced by development projects.
- Eliminate land grab practices by foreign, elite, and government agents.
- Ensure that projects which are not justified by overriding public interests do not result in internal displacement.
- Improve and increase public education on internal displacement, to ensure that those vulnerable to displacement, or already displaced, are aware of their rights entitlements.

##### *b. Protection during Displacement*

On implementation:

- Shore up resettlement programs to ensure displaced persons are housed appropriately and with secure, enforceable property rights within settlement areas. Penalize individuals or entities, including government agents, who attempt to resell or reallocate land and housing allocated to IDPs.
- Ensure compensation provided to displaced persons is market rate, to avoid additional exploitation via under-compensation.
- Protect IDP property remaining in places of dislocation after the original owners are forced to leave. This includes ensuring that if an IDP property-owner loses her citizenship identification during displacement, she

is not further deprived of her property rights by being deemed a non-citizen.

- Recognise that IDPs remain in-country to date, and treat as legitimate those reasonably presenting as such.

*c. Protection after Displacement – Durable Solutions*

On normative action:

- Establish clear and accessible procedures for compensation and/or restitution that are specific to IDPs.

On implementation:

- Create sufficient affordable housing to ensure those who seek employment and livelihood in urban areas can live in formal, secure properties.
- Where development projects must occur, ensure that these hire and train local workers and house them appropriately so that livelihood losses are offset.
- Discourage the notion that durable solutions can only be attained through land acquisition or allocation. Other alternative options to durable solutions should be explored with equal attention.
- The national land commission and national consultative coordination committee should liaise to ensure that their efforts operate in sync and reach IDPs as planned.

## 13. Basic Necessities of Life

### 13.1 General Context and Minimum Essential Elements

Meeting IDPs' basic necessities of life implies the fulfilment of the right to health care and to the underlying determinants of health, such as the right to food, water and sanitation, basic shelter and adequate housing. The interpretative pronouncements of the CESCR, further crystallised in a number of instruments providing guidance on specific thematic issues, set out concrete benchmarks that establish the extent to which states exercise their responsibilities towards IDPs by duly fulfilling the rights mentioned therein.

The CESCR General Comment No. 14 states, in fact, that “[h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity”.<sup>631</sup> The right to health does not mean the unlimited right to be treated for every medical condition, but rather elucidates two elements which together encapsulate the basic necessities of human life, the first being the right to health care, and the second being the right to live in healthy conditions.<sup>632</sup> This is expressed in General Comment No. 14 as follows:

“The Committee interprets the right to health, as defined in article 12.1 of the ICESCR, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health”.<sup>633</sup>

#### a. The right to healthcare

IDPs often lose access to medical facilities, goods and services as a result of their displacement. This may be through physical inaccessibility due to the remoteness of the area to which they have been forced to relocate or due to discriminatory policies adopted by the state that block their access to treatment.<sup>634</sup> Access may also be constrained due to destruction or damage to health infrastructure as a result of the causes of displacement (e.g. conflict, violence, disaster), or because health infrastructure simply does not exist in the areas where IDPs reside during displacement.

#### Minimum Essential Elements:

In light of these issues, the relevant minimum essential elements of state regulation underpinning IDPs' right to

health care are as follows:

- Recognise the right to health for IDPs.
- Designate an agency or organisation responsible for providing essential health services to IDPs in cases where IDPs cannot easily access regular services available to the general population.
- Seek and accept assistance from the international community if needs of IDPs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritise beneficiaries of health services on the basis of need and particular vulnerability.
- Provide for the waiver of standard and universal requirements, for example, specific documentation, residency requirements, or health insurance coverage, that limit or exclude access of IDPs to health services, and for free access to these services on the basis of need and particular vulnerability.<sup>635</sup>

#### b. The right to the underlying determinants of health

The second element of the right to health points to “a public health, preventive perspective focusing on the social determinants of health – including water, sanitation, nutrition and health education”.<sup>636</sup> Displacement will often present challenges to ensuring the supply of adequate food, water and sanitation services to IDPs, or basic shelter and adequate housing, especially for vulnerable social groups such as women, children or ethnic or religious minorities. Displacement can also have an impact on health through the inadequacy of temporary living accommodation in relation to issues including overcrowding, the risk of attacks or sexual assaults, and poor water supply and sanitation issues leading to the spread of waterborne disease.<sup>637</sup> The obstacles to economic self-sufficiency typically faced by IDPs often leave them dependent on humanitarian aid for their day-to-day food and water allocation, and provision of sanitation and shelter. In all situations, the fulfilment of these rights must be ensured without discrimination of any kind, including on the ground of their displacement.

#### i. The right to water and hygiene

Water is essential for human survival and is therefore a fundamental precondition for the exercise of virtually all human rights<sup>638</sup> and, in particular, the right to an adequate standard of living in safety, dignity and security. The adequacy of water supply is evaluated in terms of its availability for continuous personal and domestic uses, including drinking, personal sanitation and household hygiene, quality (i.e. water purity) and accessibility, constituting availability within safe physical reach (physical accessibility), affordability (economic accessibility) and access for all (non-discrimination).<sup>639</sup>

## ii. *The right to food*

The basic right to adequate food is also an essential precondition for the exercise of virtually all other human rights. The right is recognised in several instruments under international law, including the Universal Declaration of Human Rights, which provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food”.<sup>640</sup> It is incumbent on states to ensure that there is an adequate supply of food during the course of IDPs’ displacement and following their resettlement elsewhere in the country. The fulfilment of the right to adequate food is achieved when every person has physical and economic access at all times to adequate food or means for its procurement.

## iii. *The right to basic shelter and adequate housing*

The right to housing is also formally recognised as a basic entitlement of any human being under the Universal Declaration of Human Rights.<sup>641</sup> Other international human rights instruments and related authoritative guidance<sup>642</sup> have specified that the right to adequate housing entails much more than just four walls and a roof over one’s head. The need to guarantee everyone’s access to shelter is thus coupled with additional guarantees protecting housing as a space where each individual finds his or her own security and develops human relationships in dignity as well as in a climate of privacy. Displacement entails a major disruption in human living, which puts in jeopardy the full satisfaction of such entitlements.<sup>643</sup> Housing issues are also sometimes the cause of displacement. Insecure tenure can make inhabitants vulnerable to forced evictions.<sup>644</sup> Securing adequate housing therefore addresses one of IDPs’ most important needs, providing them with the following protections and assistance, while also preventing additional displacement:

- Legal security of tenure, especially in the form of protection against forced evictions.
- Available services and infrastructure: access to water, energy for cooking, heating, and lighting, sanitation and washing facilities, food storage, waste disposal, and so on.
- Affordable housing costs such that the attainment of other basic needs is not threatened.
- Habitability in the sense of adequate space, physical safety, protection from cold, damp,

heat, rain, wind, structural hazards, and disease vectors.

- Sufficient accessibility so that disadvantaged or vulnerable groups are not left without shelter appropriate to their particular needs.
- A physical location allowing affordable access to employment options, healthcare services, schools, childcare centres, and other social facilities and avoiding risks from pollution sources.
- Appropriate construction and materials for the expression of cultural identity, and compliance with safety standards aimed at minimising damage from future disasters.<sup>645</sup>

### *Minimum Essential Elements:*

In light of these issues, the relevant minimum essential elements to ensure the protection of an IDP’s right to the underlying determinants of health are as follows:

#### a. In relation to water and hygiene:

- Recognise the right to potable water for IDPs.
- Designate an agency at the local level responsible for the provision and maintenance of water and sanitation services for IDPs and the allocation of sufficient funds for that purpose.
- Seek and accept assistance from the international community if the needs of IDPs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and classify the recipients of water and sanitation services on the basis of their need and particular vulnerability.<sup>646</sup>

#### b. In relation to food:

- Recognise the right to adequate food for IDPs.
- Designate a governmental authority to be responsible for the procurement, storage and distribution of food to IDPs, and the allocation of sufficient funds for that purpose.
- Seek and accept the support of the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritise beneficiaries of food and other nutritional as-

sistance on the basis of need and particular vulnerability.

- Eliminate any obstacles hindering the domestic sourcing of food, such as subsidies or price regulation on domestic commodities that set their prices above global levels.<sup>647</sup>

c. In relation to basic shelter and adequate housing:

- Recognise the right to basic shelter and adequate housing for IDPs.
- Designate a governmental agency responsible for addressing shelter and housing needs of displaced persons and the allocation of sufficient funds for that purpose.
- Seek and accept the support of the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritise beneficiaries of basic shelter and adequate housing on the basis of need and particular vulnerability.
- Remove legal obstacles as contained, for example, in building and similar codes, for the construction of transitional shelters or the rebuilding of houses in areas to which IDPs are returned or relocated.
- Create specific guarantees to protect IDPs against forced evictions where general guarantees are insufficient.<sup>648</sup> The authorities should also include provisions on the procedures by which evictions may be legitimately carried out.

### 13.2 Relevant Supranational Frameworks

#### a. Kampala Convention and draft African Union Model Law

The Kampala Convention sets out overarching obligations of state parties in relation to the protection of IDPs' right to the basic necessities of life. Article g(2) of the Kampala Convention requires that:

“state parties shall:

- a. Take necessary measures to ensure that internally displaced persons are received, without discrimination of any kind and live in satisfactory conditions of safety, dignity and security;
- b. Provide internally displaced persons, to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which

shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities;

- c. Provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases;
- d. Take special measures to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses;
- e. Respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk;
- f. [...]
- g. Respect and maintain the civilian and humanitarian character of the places where internally displaced persons are sheltered and safeguard such locations against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons.”<sup>649</sup>

Article g(1)(e) of the Kampala Convention requires that state parties protect the rights of IDPs regardless of the cause of displacement by refraining from, and preventing, *inter alia*, starvation.<sup>650</sup>

The Kampala Convention also prohibits members of armed groups from “[d]enying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter.”<sup>651</sup> State parties must concern themselves with the basic needs of IDPs following their return from displacement by seeking “lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstance of safety and dignity.”<sup>652</sup> In line with international humanitarian law, the Kampala Convention also stipulates obligations on members of armed groups with respect to protecting IDPs in situations of armed conflict.<sup>653</sup>

Beyond their obligations relating to the provision of humanitarian aid in general and co-operation with humanitarian actors, states have the obligation to provide to IDPs “to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance” including food.<sup>654</sup>



Further articulating the provisions of the Kampala Convention, the draft African Union Model Law elaborates on the state's obligation to provide "adequate humanitarian aid" by requiring that, at a minimum, the competent authorities, which would suggest the relevant state and regional administrative authorities, provide IDPs, regardless of the circumstances and without discrimination, with essential food and potable water, basic shelter and housing, and essential medical services, including psychosocial support, and sanitation.<sup>655</sup> The draft African Union Model Law further sets out a number of provisions which build on the principles of protecting IDPs' basic needs set out in the Kampala Convention.

Article 27 of the draft African Union Model Law relates to the provision of healthcare, stating that:

"Competent authorities shall:

- (1) Take measures to ensure that all wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones.
- (2) Guarantee that internally displaced persons shall have access to psychological and social services.
- (3) Give special attention to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
- (4) Provide special attention to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.
- (5) Seek and accept support from the international community if needs cannot be sufficiently satisfied at the domestic level.
- (6) Establish procedures to identify and prioritise beneficiaries of health services on the basis of need and particular vulnerabilities, including the provision of animal health services.
- (7) Provide for the waiver of standard and universal requirements such as specific documentation, residency requirements, [or] health insurance coverage that limit or exclude access of internally displaced persons to health services, and for free access to such services on the basis of needs and particular vulnerabilities."<sup>656</sup>

Article 28, dealing specifically with food, water and sanitation, requires that:

"Competent authorities shall:

- (1) Guarantee the rights of internally displaced persons to essential food and potable water.
- (2) Seek and accept support from the international community if needs of internally displaced persons to food and potable water cannot be sufficiently satisfied at the domestic level.
- (3) Establish procedures to identify and prioritise beneficiaries of food, nutritional aid, water and sanitation services on the basis of need and particular vulnerability.
- (4) Facilitate the importation of food aid including with exemption from import restrictions and quotas, custom duties and other taxes".

Article 25 further sets out the relevant protections in relation to basic shelter and housing, under which:

"Competent authorities shall:

- (1) Respect the right of internally displaced persons to housing and shelter.
- (2) At the minimum, regardless of the circumstances, and without discrimination, provide internally displaced persons with and ensure safe access to basic housing and shelter.
- (3) Seek and accept support from the humanitarian organisations when the needs of internally displaced persons cannot be sufficiently satisfied at the domestic level.
- (4) Establish procedures to identify and prioritise beneficiaries of basic shelter and adequate housing on the basis of need and particular vulnerability.
- (5) Remove legal and administrative obstacles that could be contained in building codes and similar instruments, for the construction of transitional shelters or the rebuilding of houses in return or relocation areas.
- (6) Protect internally displaced persons against forced evictions."<sup>657</sup>

Specific protections are established for vulnerable groups among IDPs who may be further marginalised during their displacement, as a result of a particular characteristic

or vulnerability.<sup>658</sup> In particular, “[c]ompetent authorities should take measures to ensure that those displaced by disasters are given access to psychosocial assistance and social services, when necessary. Special attention should be given to the health needs of women, including the provision of appropriate clothing and hygienic supplies, access to female health care providers and such services as reproductive healthcare”.<sup>659</sup> Under Article 36, government authorities’ assistance to persons with special needs must be tailored taking into account their “health needs, reproductive healthcare as well as appropriate counselling [*sic*] including access to psychological and social counselling [*sic*]”,<sup>660</sup> while special measures must also be instituted to cater to internally displaced women’s reproductive and sexual health.<sup>661</sup>

The draft African Union Model Law further imposes obligations on the state to provide protection and assistance to IDPs during all phases of the displacement cycle. The foundation of these obligations is the requirement that the State take all possible measures to ensure that IDPs are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition, among other basic necessities.<sup>662</sup> Where displacement arises from national development projects, the competent authorities of the state are required, regardless of the circumstances and without discrimination, to ensure that all persons are provided with access to basic necessities, including shelter, food, water, sanitation and health services.<sup>663</sup> Upon the return and re-integration of IDPs to a community, the competent authorities must ensure that the returning IDPs receive all guarantees of human rights in the locations of their return, including “[e]njoyment of an adequate standard of living without discrimination, including adequate shelter, housing, food, water, sanitation, as well as health and medical care”.<sup>664</sup>

Article 57(1) further strengthens these obligations on the state in providing that any person who “denies internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter” has committed an offence,<sup>665</sup> punishable in accordance with the stringent penalties set out under Article 58.

#### *b. Guiding Principles*

The Guiding Principles affirm the right of IDPs “to an adequate standard of living”.<sup>666</sup> The protection of the right to health care and the right to the underlying determinants of health is encapsulated within the scope of this fundamental protection, as Principle 18 specifies that at the minimum, regardless of the circumstances and without discrimination, authorities must provide and ensure IDPs safe access to essential food and potable water, basic shelter and housing, and essential medical services and sanitation, as well as appropriate clothing.<sup>667</sup> This

language tracks provisions in the ICESCR, the Universal Declaration of Human Rights and the CRC.<sup>668</sup>

Principle 19 elaborates on the requirement of providing essential medical services and other healthcare services, in stating that:

- “1. All wounded and sick internally displaced persons, as well as those with disabilities, shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women including access to female healthcare providers and services, such as reproductive healthcare, and appropriate counselling for victims of sexual abuse and other abuses.
3. Special attention should be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons”.<sup>669</sup>

Principle 19(1) adopts wording used in customary international humanitarian law in order to set the highest attainable standard of health and facilities for all those in need, without any discriminatory profiling to determine those who receive care. The inclusion of the phrase, “to the fullest extent practicable”, however, mirroring the wording of the Kampala Convention,<sup>670</sup> highlights that it is sometimes difficult to provide the level of care required. It is noted that this qualification is in contrast to the unqualified guarantee of the basic necessities of life set out under Principle 18. Principle 19(2) requires additional focus on female health issues to counter gender bias and the provision of inadequate and inappropriate medical services to women. Principle 19(3) is also aligned with various sources of international humanitarian law relating to the prevention of “epidemic, endemic and other diseases”.<sup>671</sup>

Principle 3 also states that IDPs have the right to receive and request humanitarian assistance and protection from their national authorities.<sup>672</sup> The Guiding Principles Annotations further specify that humanitarian assistance “encompasses material and services that are essential for the survival of internally displaced persons, such as food, water, medical supplies, shelter and clothing”.<sup>673</sup>

Principle 25(1) reaffirms that the primary duty and responsibility for providing humanitarian assistance to IDPs lies with national authorities. International humanitarian organisations and other appropriate actors also have the right to offer their services to IDPs, and authorities may

not arbitrarily prohibit such actors from offering such services, especially if they are unable or unwilling to provide the necessary humanitarian assistance.<sup>674</sup> Without limiting the above, if national authorities undertake any action requiring displacement, such authorities must ensure that accommodation provided to IDPs is of a satisfactory condition in relation to “safety, nutrition, health and hygiene”.<sup>675</sup> This principle corresponds with Article 49(3) of the Geneva Convention IV and requirements under customary international humanitarian law, as well as human rights guarantees pertaining to social rights where circumstances fall below the threshold for the application of humanitarian law.

### *c. Pinheiro Principles*

The Pinheiro Principles address IDPs’ right to housing as part of a broader set of rights to housing, land and/or property lost through the displacement process. For a broader discussion of these rights (see Chapter 12. “Housing, Land and Property”). The Pinheiro Principles do, however, address two rights specifically related to adequate housing. First, the Pinheiro Principles recognise that “[e]veryone has the right to be protected against arbitrary or unlawful interference with his or her privacy and his or her home” and provide that states shall ensure that proper safeguards are put in place to protect such rights.<sup>676</sup> Second, the Pinheiro Principles also explicitly recognise the right to adequate housing, continuing that states “should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing”.<sup>677</sup>

Though the Pinheiro Principles do not offer specific principles related to the protection of the right to health, food, water and sanitation, the recognition of the right to adequate housing also implies that IDPs should enjoy the right to reside in healthy conditions, with access to food, water, health and sanitation facilities both during and after their displacement.<sup>678</sup>

### *d. Other Frameworks*

As the foundation for the exercise of virtually all other human rights, the rights to health, food, water and sanitation, and basic shelter and adequate housing are recognised and defined in detail in several instruments under international law, outside of the context of internal displacement.

The ICESCR provides that signatory state parties “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>679</sup> Article 11.1 of the ICESCR provides that “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and the continuous improvement of living conditions”.<sup>680</sup> The fulfilment of these basic necessities is measured by the

accessibility (comprising physical, economic and information access on a non-discriminatory basis), acceptability and quality of the enjoyment of such rights.<sup>681</sup> General Comment No. 7 further elaborates on standards related to adequate housing by defining forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” General Comment No. 7 further confirms that forced evictions are *prima facie* incompatible with the requirements of the ICESCR.<sup>682</sup>

The Basic Principles is also relevant in the assessment of the right to basic shelter and adequate housing. The report defines security of tenure, which is “an integral part of the right to adequate housing”,<sup>683</sup> as “a set of relationships with respect to housing and land, established through statutory or customary law or informal or hybrid arrangements, that enables one to live in one’s home in security, peace and dignity”.<sup>684</sup> Underlying the Basic Principles set forth in the adequate housing report, is “a presumption that individuals and communities occupying land or property to fulfil their right to adequate housing, and who have no other adequate option, have legitimate tenure rights that should be secured and protected”.<sup>685</sup> To secure and protect these tenure rights, the Basic Principles advocate that states recognise a broad range of tenure forms. Among these forms are adverse possession, use rights (formal permission to continue using property until and unless certain conditions are met), collective tenure (where ownership, rental or use rights are held under a shared governance structure), housing cooperatives and community land trusts.<sup>686</sup>

Security of tenure in the context of displacement should be ensured *in situ* (i.e., in the place where the IDPs in question currently reside) rather than through resettlement, unless concerns for public health and safety or the environment dictate otherwise.<sup>687</sup> Even where such concerns exist, “States must explore all feasible alternatives in consultation with affected persons” before resettling and “should use all resources at their disposal, including through international assistance, to explore *in situ* alternatives”, including through improving housing *in situ*.<sup>688</sup>

Possible methods of securing tenure *in situ* on private property include: recognition of adverse possession rights; rental of property by the owner with legal tenancy protections; sale of the property with state support; sale of private property to the state and subsequent grant or rental to occupants, expropriation and subsequent grant or rental to occupants; and land-sharing arrangements.<sup>689</sup>

To ensure that sufficient public or private land is allocated to meeting the tenure needs of IDPs, states should: con-

duct audits of unused public lands and current housing needs; allocate public land to the provision of housing to IDPs; restrict property speculation and tax underutilised private property; implement regulations that restrict predatory lending and reduce the risk that poor households will lose their homes; and prohibit eviction until a household has access to alternative adequate housing.<sup>690</sup>

### 13.3 Kenya-specific Analysis

#### a. Contextual analysis

##### i. The right to healthcare

Although it should be noted that in developing countries healthcare issues, particularly the availability and quality of medical services, apply universally to the whole population, the special characteristics of the IDP community mean that it may be appropriate for state authorities to develop a specific national regime in relation to IDPs who are often at greater risk of being unable to exercise their rights than the general population, as a result of their displacement. As identified above, a significant problem that IDPs often encounter is that health facilities are inaccessible to them, as a result of their physical isolation or economic hardship, such that they are unable to afford transportation to the nearest clinic or medical care costs prove prohibitive.<sup>691</sup> In relation to physical inaccessibility in Kenya, UNHCR and KNCHR reported in December 2011 that approximately a quarter of the households monitored for the study were accessing health services provided from facilities more than ten kilometres from their home.<sup>692</sup> Issues of access are particularly acute in remote regions, indeed, in Northern Kenya, an arid and semi-arid environment with a desert climate, “[t]he health service infrastructure is particularly poor, with few and scattered health facilities staffed by inadequate numbers of personnel. Distances to referral facilities may be much longer, on poorer roads, than in other parts of the country. The average distance to a health facility in Northern Kenya is 52 km, ten times further than the national target of 5 km”.<sup>693</sup>

##### ii. The right to water and hygiene

The provision of water in Kenya, which experiences climatic variability (including episodes of flooding and droughts), is also an issue which affects the country generally. For example, the government’s “Vision 2030 Development Strategy for Northern Kenya and Other Arid Lands” policy document notes that, in relation to the arid areas in northern Kenya:

“[t]he water infrastructure is also undeveloped. The condition of underground water has not been fully assessed. The region’s large rivers could provide irrigation, but the lessons from the many failed irrigation schemes of the past are yet to be learned. Catchment management is poor, and the potential for water harvesting has been inadequately explored. Sanitation infrastructure is also very poor”.<sup>694</sup>

Water supply is particularly problematic for IDPs who, as a result of their displacement, may be forced to reside in temporary accommodation which is not connected to the local water supply, or humanitarian aid camps which may be overcrowded with insufficient supply for domestic needs. As an example, UNHCR’s and KNCHR’s report stated that a significant number of displaced people in Kenya relied on water from rivers and streams or unprotected boreholes and wells. Fewer received their water supply from pipes or protected boreholes and wells.<sup>695</sup> The most significant issues identified by IDPs were the quality of water and distance to the source of water, with 28 per cent. of households sampled travelling more than one kilometre to reach their nearest source, followed by the cost of water and water rationing.<sup>696</sup> In addition, the majority of displaced families only had access to basic sanitation facilities such as latrines or, in circumstances where no sanitation facilities were available, open spaces and bushes.<sup>697</sup> Although the report found that most sanitation facilities were within the premises or within a ten minute radius of the premises,<sup>698</sup> overcrowding of sanitation facilities are further issues, as 95 per cent. of the households surveyed shared those facilities, while the facilities themselves fall short of ordinary expected standards where they do not include hand washing facilities.<sup>699</sup>

##### iii. The right to food

Displacement disrupts access to food by separating those who would supply themselves with food from the means of producing it and by separating those who purchase their food from both the income sources and the markets necessary to buy it. As a result, all IDPs, regardless of the causes of their displacement, tend not to enjoy access to their traditional sources of food and are therefore inherently vulnerable to deprivation of this most vital resource. Inadequate food exposes the most inherently vulnerable members of IDP communities, such as children, pregnant or lactating women, the ill and the elderly, to specific health risks. Culturally inappropriate food may be rejected, particularly by indigenous peoples.

The obstacles to economic self-sufficiency typically faced by IDPs often leave them dependent on humanitarian aid for their daily food. Such dependency creates the immediate risk of exploitation by those in charge of food distribution. If IDPs have suffered from chronic food insecurity prior to their displacement, this increases their vulnerability to malnutrition during their displacement. Addressing food shortages amongst IDP populations appropriately, and as a matter of priority, is essential to forestall the adoption of coping strategies, which often raise protection risks, in response to food shortages or inappropriate or inadequate food aid. Attempts to supplement food aid, for example, by leaving encampments or safe areas to seek food or outside income may expose IDPs to the risks of attack and sexual violence. Even when adequate food supplies are available, distribution systems that force IDPs to carry food long distances and that do not provide food directly to vulnerable categories of IDPs may increase the risk of attack and exploitation.

*iv. The right to basic shelter and adequate housing*

Despite the existence of a national legislative and policy framework in Kenya providing for the recognition of the rights of IDPs to basic shelter and adequate housing, and in some respects allocating resources to facilitate access to those rights, the practical situation on the ground in Kenya does not entirely match the legislative position. Dr. Chaloka Beyani the UN special rapporteur on the human rights of internally displaced persons, assessed the reality facing IDPs in Kenya and described in his report of 6 February 2012 their treatment as being inadequate:

“With regard to registered post-election violence IDPs, the Special Rapporteur found that the protection and assistance extended to them has largely been inadequate, including due to the lack of sufficient or nutritious food, access to adequate shelter, water and sanitation facilities, and other services such as education and health care”.<sup>700</sup>

The report identified that in the absence of appropriate assistance for shelter, since 2012, many IDPs continue to live in temporary tents or tarpaulins which leaves them exposed to the elements. Furthermore, in some cases, it had been reported that prolonged rains had damaged or destroyed shelter in IDP camps. Insecure housing also increased the risks to the IDP population of rape and robbery and placed other essential rights at risk with inad-

equated sanitation and the spread of preventable diseases.<sup>701</sup> Displaced persons who had relocated to cities such as Nairobi and Kisumu were also reportedly living in highly inadequate conditions in informal settlements.

*b. National framework in Kenya relating to the basic necessities of life*

Fulfilment of the basic necessities of life should be sought throughout the different phases of the displacement response as it constitutes a precondition for the enjoyment of the other human rights.<sup>702</sup> Importantly, the realisation of the basic human rights to health, water, sanitation, food and adequate housing also constitutes a fundamental component of achieving durable solutions for IDPs.

The constitution, as the principal legal document setting out the rights and freedoms of each Kenyan citizen, sets out their economic and social rights under Article 43(t), including rights related to the basic necessities of life:

- “(t) Every person has the right—
- (a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare;
  - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
  - (c) to be free from hunger, and to have adequate food of acceptable quality;
  - (d) to clean and safe water in adequate quantities”.<sup>703</sup>

Article 43(2) further provides that no person shall be denied emergency medical treatment.<sup>704</sup>

In relation to the protection of vulnerable social groups, the state is also prohibited from discriminating, either directly or indirectly, against any person on any grounds.<sup>705</sup> Under Part 3 of Chapter 4, provisions are set out for the specific application of basic human rights and fundamental freedoms to vulnerable groups. For example, Article 53(i)(c) protects the right of every child to health care,<sup>706</sup> while Article 56(a) requires the state to “put in place affirmative action programmes designed to ensure that minorities and marginalised groups—[...] have reasonable access to water, health services and infrastructure”.<sup>707</sup> Providing protection to all vulnerable groups implicitly grants IDPs access to the rights enshrined in the constitution on an equal basis with the rest of the population. In addition to the foregoing, the IDP act, discussed below, while not containing specific prohibition of discrimination of IDPs vis-à-vis non-displaced persons, incorporates the Guiding

Principles which clearly rule out discrimination against IDPs and request the adoption of specific measures to protect those who have been displaced. Notwithstanding the above, however, it would be recommendable for the state to introduce a clear prohibition of discrimination against IDPs and a provision requiring the government to adopt specific measures to ensure effective access for IDPs to the rights underpinning the satisfaction of their basic needs, possibly through referring to the measures listed in the draft IDP Policy, which is discussed below.

The Fourth Schedule to the constitution sets out the distribution of healthcare and medical service functions between the national government and the county governments. In relation to health services, Part 1 of the Fourth Schedule to the constitution sets out that the government is responsible for national referral health facilities and health policy.<sup>708</sup> In addition, the state has the power to regulate the use of land on the ground that it is in the interest of public health.<sup>709</sup> On the other hand, Part 2 of the Fourth Schedule to the constitution establishes that county governments are responsible for county health services, including health facilities and pharmacies, ambulance services, promotion of primary healthcare and refuse removal, refuse dumps and solid waste disposal.<sup>710</sup>

Aside from the constitution, the government's overall development framework is guided by the Kenya Vision 2030 strategy, a key component of which is providing an "equitable and affordable health care at the highest affordable standard" through devolving the funding and management of healthcare from the State to local stakeholders and "shift[ing] the emphasis to "promotive" [*sic*] care in order to lower the nation's disease burden," and bring about "improve[ed] access and equity in the availability of essential healthcare and result in a healthy population that will effectively participate in the development of the nation".<sup>711</sup>

Vision 2030 notes that water is a scarce resource in Kenya and that the economic, social and political priority projects anticipated by Vision 2030 will require more high quality water supplies than present levels.<sup>712</sup> The policy notes that "[e]fficient water management will, therefore, not only contribute to sustainable long-term economic growth, but also to poverty reduction, health and security", and "the poor will gain directly from improved access to water and sanitation through improved health, reduced health costs and time saved".<sup>713</sup> Flagship water and sanitation projects include the construction of multi-purpose dams on the Nzoia and Nyando with significant water storage capacity, and rehabilitation and expansion of urban water supply and sanitation in key satellite towns identified under the Vision 2030 economic pillar.<sup>714</sup>

Though the constitution and Vision 2030 have universal application for all Kenyan citizens, the specific domestic framework for the protection of IDPs in Kenya comprises, primarily, the IDP act and, secondly, the draft IDP Policy.

Under Section 11 of the IDP act, the government bears the primary duty and responsibility to:

- (c) ensure adequate provision of basic social and health services in areas inhabited by internally displaced persons;
- (d) ensure, where necessary, the maintenance of [...] public health in areas inhabited by internally displaced persons;
- [...]
- (f) ensure adequate provision of the social economic right specified in Article 43 of the Constitution".<sup>715</sup>

In relation to development-induced displacement, the IDP act specifically provides that "the government shall ensure that the displacement is carried out in a manner that is respectful of the human rights of the affected [...]. This requires in particular – [...] (b) provision of safe, adequate and habitable sites and to the greatest practicable extent, of proper accommodation; and (c) creation of satisfactory conditions of safety, nutrition, health and hygiene".<sup>716</sup> In this context, the evictions and resettlement procedures bill builds on the protections of vulnerable groups following an "eviction and resettlement exercise". Clause 12(3) requires that "the relevant authorities shall facilitate the management and handing over of the infrastructure present at the resettlement site."<sup>717</sup> Sub clause (3) requires that "[m]easures shall be taken to ensure, especially for those who are unable to provide for themselves, that— [...] (c) essential medical services are accessible; (d) psychological and counselling services are provided; [...] (f) on-going treatment is not disrupted as a result of the resettlement; (g) spread of contagious and infection diseases including HIV/AIDS at the resettlement sites are avoided; (h) essential food, potable water and sanitation are provided; (i) basic shelter and housing is provided".<sup>718</sup>

It should be noted, however, that while the IDP act gives domestic effect to the Great Lakes IDP Protocol and the Guiding Principles, the constitution takes precedence over other legislative provisions. Indeed 12(i) of the IDP act states that "every citizen is entitled to—(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this constitution. Article 24(i) indicates that the rights provided by the constitution are not absolute and will ultimately be limited by what is reasonable in the circumstances."<sup>719</sup>

The draft IDP policy focuses on specific policies concerning the protection of IDPs within Kenya, including the provision of healthcare services, food, water and sanitation, and adequate housing during all phases of the displacement cycle. In the first instance, the government recognises the need to take measures in order to prepare and mitigate against emergency situations, including providing for the storage of food, water, shelter material, health equipment and sanitation material,<sup>720</sup> detailing the logistical process for transporting the humanitarian goods required for addressing the immediate humanitarian and protection needs of displaced persons,<sup>721</sup> and developing measures for “[t]he possibility of “rapid deployment of health teams, psychosocial teams, nutritional teams and other primary responders for the case of emergency” and the enhancement of existing hospital services.<sup>722</sup> In such emergencies, the government is duty-bound to ensure that the most immediate humanitarian and protection needs of displaced communities, including their safety and survival, and the provision of food, water, shelter and health care, are addressed.<sup>723</sup>

The draft IDP policy also sets out provisions relating to overall response and provision of protection and assistance during displacement. During a displacement event, the government’s protection initiatives should respect, protect and fulfil the rights and freedoms of all IDPs and ensure fulfilment of such rights and freedoms without discrimination.<sup>724</sup>

In relation to the right to healthcare, the draft IDP policy states as follows:

“8.1.4 Health

80. The government shall respect and protect the right to health of all IDPs in accordance with the Constitution, regional and international human rights and humanitarian law standards without discrimination. This includes the right of all IDPs, in particular the wounded, the sick, those living with disabilities or chronic illnesses such as HIV/AIDS, women and children, to be provided with and having safe access to health and medical care, including reproductive healthcare and psycho social care, adequate to their situation, needs and vulnerabilities, without discrimination. This includes:

- a) Availability of health care facilities, goods and services in sufficient quality and quantity including all underlying determinants of health
- b) Physical and economic accessibility

- c) Acceptability of services and goods offered, including respect for medical ethics and confidentiality
- d) Adaptability of services to the needs of the displaced populations<sup>725</sup>

This general obligation on the state is augmented by the specific measures set out in the draft IDP policy that require that the government shall envisage, among other things: “carrying out a baseline assessment of immediate health needs among a displaced population, based on needs and vulnerabilities,”<sup>726</sup> “[e]nsuring that IDPs have access to regular health services available to the general population, such as hospitals,” including removing obstacles which may exclude IDPs from accessing health services and providing essential healthcare services on a free or subsidised basis,<sup>727</sup> ensuring that IDPs have physical access to health services by establishing health posts within reach of all IDPs, taking into account the physical attributes persons of limited mobility, such as the elderly or persons with disabilities,<sup>728</sup> or providing health services through mobile health clinics for IDPs,<sup>729</sup> specifically addressing the health needs of women, particularly in relation to providing access to reproductive and specialised health services concerning family planning, maternal healthcare and antenatal care,<sup>730</sup> as well as providing comprehensive care relating to prevention and treatment of HIV/AIDS and malaria.<sup>731</sup>

Specific provisions are also set out relating to IDPs’ right to live in healthy conditions of an adequate standard:

“8.1.3 Adequate Standard of Living

78. The government shall respect and protect the right to an adequate standard of living of all IDPs in accordance with the Constitution, regional and international human rights and humanitarian law standards without discrimination. This includes:

- a) The right to adequate food, potable water and sanitation, shelter, housing and clothing
- b) The right to be provided with and having safe access to adequate food, potable water, sanitation, shelter, housing and clothing without discrimination
- c) The recognition that adequacy of these goods and services means that they are available in sufficient quantity and quality, physically and economically accessible, culturally acceptable and sensitive to gender, age or health and adaptable to change of needs

79. Therefore, the government shall envisage in particular the following measures:

- a) Establishing service or distribution points for these goods that are located within reach for all internally displaced persons whether or not they stay in camps, taking into account the needs of persons with limited mobility, such as the elderly or persons with disabilities
- b) Providing information on service and distribution points
- c) Ensuring that routes to service and distribution points are safe for all internally displaced persons
- d) Including IDPs, in particular women and child-headed households, in the planning and provision of humanitarian goods and services
- e) Maintaining established services, such as water points or water tanks, and sustaining the distribution of these goods and services according to the needs and vulnerabilities of IDPs throughout their displacement until they have found a sustainable durable solution<sup>732</sup>

In line with the IDP act, the draft IDP Policy requires the government to ensure that development induced “evictions and relocations are carried out with full respect for the human rights of the affected” and that the alternative housing provided is adequate and at a suitable location from which basic services are accessible.<sup>733</sup>

As part of a durable solution for displaced communities, the government acknowledges that returning IDPs must enjoy, as a condition to that solution, an adequate standard of life including access on a non-discriminatory basis to adequate shelter, housing, food, water, sanitation, as well as health and medical care, including reproductive health care and psycho-social and trauma counselling. The government shall, in particular:

- i. Ensure adequate and sustainable access to these goods and services, which are available in sufficient quantity and quality, safely accessible for all IDPs, including physical and economical accessibility, culturally appropriate and acceptable and adaptable to the changing needs of the displaced and to the extent feasible the host communities
- ii. Provide IDPs with equal and unimpeded access to generally available public programmes, such as so-

cial housing or welfare measures, poverty alleviation programmes or development strategies to progressively realise all their economic, social and cultural rights along with non-displaced populations and to protect them from discrimination whatsoever<sup>734</sup>

The relevant legal and policy frameworks relating to the right to health care, on the one hand, and the right to the underlying determinants of health, on the other, will be considered further below to identify whether such obstacles present themselves.

#### *i. The right to healthcare*

As considered above, health care is a pervasive issue which affects all Kenyans. The provisions of the constitution and the Public Health Act, which is discussed below, apply universally, while the ministry of health has a wide ranging mandate that concerns all aspects of healthcare, including, “Health Policy and Standards Management”, “Pharmacy and Medicines Control”, “Public Health and Sanitation Policy Management”, “Medical Services Policy”, “Reproductive Health Policy”, “Preventive Health Programmes Including Health Services” and “Co-ordination of Campaign Against HIV/AIDS” among other functions.<sup>735</sup> Kenya has developed a planning and policy framework that is focused on the improvement of general public health and healthcare provision to all Kenyan citizens. It is thus necessary to identify first the framework that is applicable to the general population, before identifying any gaps and/or inconsistencies which may exist when considered in light of necessary IDP-specific protections.

The public health act is the principal legislation relating to healthcare management in Kenya. The central board of health established under the Public Health Act<sup>736</sup> is tasked with advising the minister of health upon all matters relating to public health in Kenya<sup>737</sup> and, in particular, “to prevent and guard against the introduction of infectious disease into Kenya from outside; to promote the public health and the prevention, limitation or suppression of infectious, communicable or preventable diseases within Kenya; to advise and direct local authorities in regard to matters affecting the public health; to promote or carry out research and investigations in connection with the prevention or treatment of human diseases; to prepare and publish reports and statistical or other information relative to public health; and generally to carry out in accordance with directions the powers and duties in relation to the public health conferred or imposed by the public health act”.<sup>738</sup>



Local authorities are also under a duty to “take all lawful, necessary and, under its special circumstances, reasonably practicable measures for preventing the occurrence or dealing with any outbreak or prevalence of any infectious, communicable or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred or imposed on it by the public health act or by any other law”.<sup>739</sup>

The government has also published a number of planning and legal documents which set out strategic considerations relating to the improvement of public health in Kenya. The Kenya health policy 2012 – 2030 is the primary policy document concerning the long term health strategy of the government during 2012 to 2030 which has been developed to realise the Vision 2030's goal of maintaining a skilled workforce which is necessary for driving a prosperous Kenyan economy.<sup>740</sup> At the core of the policy are six objectives aimed at achieving the overarching goal of “attaining the highest possible standard of health in a manner responsible to the needs of the population”, namely:

1. eliminating communicable conditions
2. halting and reversing the rising burden of non-communicable conditions
3. reducing the burden of violence and injuries
4. providing essential healthcare services that are affordable, equitable and accessible and respond to clients' needs
5. minimising exposure to health risk by facilitating tools that instil healthy behaviours in the population
6. strengthening the collaboration of the health sector with other sectors that have an impact on public health, in order to influence, among other things, female literacy, access to potable water and adequate sanitation facilities, public nutrition, safe housing, road safety and security<sup>741</sup>

In addition to the generality of the government's strategic aim under Vision 2030 of providing a healthcare system of the highest standards in order to improve the livelihoods of Kenyans, a fundamental principle of the Kenya health policy 2012 – 2030 is “equity in distribution of health services and interventions” which “aims to ensure that

there is no exclusion and social disparities in the provision of health care services [which] shall be provided equitably to all individuals in a community irrespective of their gender, age, caste, colour, geographical location and socio-economic status”.<sup>742</sup>

Aligned with the Kenya health policy 2012 – 2030 is the human resources strategy 2014 – 2018, which seeks to “guide and provide a road map for [human resources for health] interventions for improved health service delivery.”<sup>743</sup> The human resources strategy 2014 – 2018 explains that “Human Resources for health is one of the core building blocks of a health system in any country”.<sup>744</sup>

The government has also sought to address region-specific health issues faced by Kenyan citizens. For example, as part of its vision statement for the provision of quality, accessible healthcare for all Kenyan citizens in northern Kenya, the “Vision 2030 Development Strategy for Northern Kenya and Other Arid Lands” of August 2011 adopts six strategic objectives, namely: the improvement of access to healthcare for the entire population; the increase in the number and retention of health and nutrition professionals, particularly those from northern Kenya; the promotion of health education; the tackling of issues disproportionately affecting the health, nutrition and social status of women and other vulnerable groups; the strengthening of logistical chain, for the transportation of medical supplies and equipment in the region; and the improvement of public health in urban areas.<sup>745</sup>

Thus there is a comprehensive national and regional legislative and policy-based framework relating to general public health. This, however, presents a separate framework to the IDP-specific healthcare focus covered by the IDP act and the draft IDP policy. A fundamental issue with the dual-track approach to healthcare planning for the general public on the one hand and the IDP community, on the other, is that the national health policies do not specifically cater for the special protections set out in the supranational normative frameworks or the domestic IDP framework, despite having the universal improvement of public health in Kenya as their objective. This is a significant gap, as it means that IDP health issues may not be perceived as a core element of the ministry of health's national health policy. The IDP act and the draft IDP Policy should not be read or conceived as an isolated framework, but rather should be incorporated across all areas of national policy. Specifically, in relation to public health planning, the draft IDP Policy should be incorporated by reference into

the Kenya health policy 2012 – 2030 and other long term strategic health planning documents (or alternatively, specific principles and policies derived from the IDP policy and the IDP act should be drafted in revised drafts of those planning documents), in order for health planning relating to the specific requirements of the IDP community in Kenya is an integral component of a coordinated national health planning framework.

Another potential issue is that the government's strategic objective of devolving the provision of healthcare services to regional and community levels could give rise to a disjointed approach to medical and psychosocial care services across richer and poorer regions in Kenya, particularly to the detriment of IDPs. In circumstances where IDPs relocated in one locality receive a comprehensive package of health related services, while IDPs in a neighbouring community, or even members of the general public who have not suffered displacement, do not have access to such services, tensions will arise. Not only would such failures of protection fall below the accepted standards under the international instruments identified above, such a disparity would infringe upon the principles of providing protection on a non-discriminatory basis to all IDPs. The government must ensure that, despite delegating healthcare services to the relevant local authorities, the necessary mechanisms and procedures are put in place at the national level to ensure that local authorities are able to adhere to the relevant standards of protection for IDPs under the IDP framework, as well as ensuring that the government is able to fulfil its primary duty to provide humanitarian assistance to IDPs.

## ii. *The right to water*

The Water Act, as the main legislative source related to water in Kenya, “provide[s] for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services”.<sup>746</sup> The water act defines a “water resource” broadly to cover any body of water, including a lake, pond and stream, whether above or below ground.<sup>747</sup>

Every water resource is vested in the state<sup>748</sup> and it is the duty of the minister of environment, water and natural resource, referred to as the “Minister” throughout the water act, to “promote the investigation, conservation and proper use of water resources throughout Kenya and to ensure the

effective exercise and performance by any authorities of persons under the control of the Minister of their powers and duties in relation to water”.<sup>749</sup> The Water Resources Management Authority is chiefly responsible for developing principles, guidelines and procedures for the allocation of water resources, monitoring the national water resources management strategy, determining water licence applications and regulating and protecting the quality of water resources and other supporting functions.<sup>750</sup>

Under section 49 of the water act, the minister is required to formulate a national water services strategy, which has as its aim, the “institut[ion] of arrangements to ensure that at all times there is in every area of Kenya a person capable of providing water supply” and the establishment of “a programme to bring about progressive extension of sewerage to every centre of population in Kenya”.<sup>751</sup> It is an express requirement that the national water services strategy contains information relating to:

- “(a) existing water services
- (b) the number and location of persons who are not being provided with a basic water supply and basic sewerage
- (c) plans for the extension of water services to underserved areas
- (d) the time frame for the plan
- (e) an investment programme”<sup>752</sup>

The public health act is also relevant in the context of water and sanitation services in Kenya. In the first instance, the public health act establishes that it is the duty of each local authority to ensure the cleanliness and sanitary condition of its district, and to remedy any nuisance and take legal action against those responsible for causing such nuisance.<sup>753</sup>

Though, for the main part, the provisions set out above do not, in and of themselves, create problems for IDPs in Kenya, the special characteristics of, and context in which, IDPs find themselves may mean that certain provisions may restrict the fulfilment of their right to water and sanitation. Some may receive humanitarian aid in specially designated camps, but even there, conditions will be difficult, with overcrowding and limited water supply. For other displaced families who may be residing in temporary accommodation not catered by human-

itarian aid agencies, the power of licensed water service providers to set their own tariffs under the water act may be of great concern particularly in circumstances where they have lost their livelihood and where, as a result, they are economically barred from such essential water supply. Specific provisions should be drafted whereby the state provides a special regulatory regime for suppliers with respect to the supply of water to displaced communities, so that IDPs are able to exercise their right to water and hygiene in the same manner as the general population.<sup>754</sup> That could involve, in the first instance at least, setting out a special regime for IDPs whereby all IDPs are provided with access to such facilities, free of cost.<sup>755</sup> One potential way in which this might be achieved would be for the Water Resources Management Authority to allocate a proportion of the water services trust fund, a pool of funding intended “to assist in financing the provision of water services to areas of Kenya which are without adequate water services”,<sup>756</sup> to specifically cover the cost of water supply to displaced communities during their displacement.

Another potential concern is that a state scheme, which might have as its aim the provision of better water services to a particular area, could in itself bring about displacement of individuals on land demarcated for development which is acquired for the purposes of the scheme.<sup>757</sup> The water act does not provide any recompense for IDPs who may be residing in temporary accommodation and may not be legal owners of the land. As identified in relation to the right to basic shelter and adequate housing, security of tenure is a significant issue which IDPs face during their displacement. Such persons may be at risk of further arbitrary displacement brought about on the pretext of a state scheme. In such circumstances, the water act should be amended to include a specific provision that state schemes which affect IDP communities are subject to the provisions concerning displacement induced by development in the great lakes IDP protocol, as incorporated into national law by the IDP act. The water act could also draft corresponding obligations to ensure that the State provides alternative accommodation with access to adequate water supply. In a similar context, amendments to the public health act should be considered so as to prevent the perverse scenario where IDPs, forced into temporary accommodation, face further displacement as a result of an arbitrary order that the temporary accommodation is so defective that it should be demolished.

As the regulatory body instituted under the water

act, the Water Resources Management Authority's Strategic Plan for 2012 – 2017 should play a key role in ensuring the protection of IDPs' right to water and sanitation. The plan identifies the water resource management authority's six strategic objectives, namely to: achieve financial sustainability; maintain efficiency and effectiveness in water resource planning and management; promote partnerships; uphold equity in water resources allocation; heighten national development agenda on water resources; and build institutional capacity and improve work environment.<sup>758</sup> Under the fifth principle, the Water Resources Management Authority seeks to:

“promote harmony in the use of international water resources[;] develop and implement programmes to strengthen communities' preparedness/adaptation to impacts of climate change[;] develop integrated River Basin flood management planes[;] develop and enforce codes of practice for Surface and Ground Water resources development and management[; and] [i]mplement vision 2030 flagship projects that are aligned to water resources management”.<sup>759</sup>

It is noted that these strategies do not specifically refer to IDPs in Kenya, but if pursued and implemented in a manner that is equitable and non-discriminatory, the IDP population should receive the same benefits as the general population.

### *iii. The right to food*

At the domestic level, the right to adequate food is rarely accorded explicit protection. Article 43 of the constitution, though broad in scope, is thus of significance in providing the basis upon which other national instruments may further provide for the fulfilment of this right. It is, nevertheless, unclear as to the extent to which the rights articulated in Article 43 are aspirational, and even constrained by the state's available resources. There is an absence of guidance on the obligation of state authorities or on undertakings which this right might involve.

In a report from April 2014, entitled ‘National Climate Change Response Strategy’, the government of Kenya, identified “inadequate policy, legal and institutional frameworks,” although it determined that “the food sub-sector, so far, is the most organised in terms of emergency response. Management of other relief sub-sectors is more difficult to monitor and assess”.<sup>760</sup>

The code of conduct in disaster management<sup>761</sup> (to which there are several Kenyan signatories, including African Development Solutions (ADESO), the African Medical and Research Foundation (AMREF) and Humanitarian Action for Relief and Development Organisation) seeks to guard standards of behaviour among different stakeholders. It is less about operational details, such as how to calculate food rations or set up an IDP camp, than otherwise seeking to maintain the high standards of independence and effectiveness to which the government of Kenya aspires.

There is a distinct lack of provision for, or guidance on, the practical means of meeting the food rights of IDPs set out in the Kenya IDP framework. There are two types of food distribution that ought to be considered in the context of IDPs.<sup>762</sup> The first is 'free food aid', namely the general distribution of food in the immediate aftermath of displacement or humanitarian disaster. This ought to be a temporary measure to target specific vulnerable groups and fill an immediate gap. It should not stifle opportunities to develop food self-sufficiency or generate dependency in the IDP population, but it ought to seek to address any disparity between the caloric and nutritional needs of IDPs and what they are able to acquire for themselves. Food aid should specifically seek to discourage unsustainable coping strategies which IDPs may be driven to by hunger and which usually entail significant risks. These activities might include prostitution or the sale of organs or the sale of vital assets such as livestock in order to satisfy a short term food need. Importantly, food aid is also a form of income transfer which will allow IDPs to invest resources in methods which will allow them to achieve self-sufficiency. Food aid ought to be coordinated with longer term efforts to assist IDPs in achieving durable and sustainable means of producing their own food. In particular, with a view to supporting durable solution processes and avoiding potential conflict both in the short and the long term, government policies should aim to broaden the livelihood options for both IDPs and host communities and guarantee food self-sufficiency through targeted interventions aimed at regional or zonal development.

Immediate food aid should be available in sufficient quality and quantity to address and prevent hunger and malnutrition and reduce or eliminate the need on the part of IDPs to engage in these unsustainable or risky coping strategies in order to acquire food. Cultural acceptability and familiarity plays a significant role in ensuring the food that IDPs are

provided with is appropriate and that they know how to prepare, store and handle the food. Information on packaging ought to be in a language the IDPs are able to understand. Consultation with the IDP community may serve to boost community morale, enabling the IDPs to retain some element of control over their diet.

The second type of food distribution is that of a 'supplementary feeding program', namely food distribution intended to pre-empt or address malnutrition with food rations and health inputs according to international guidelines.<sup>763</sup> International guidelines on feeding programs stress that food production and distribution often take place simultaneously at the household, community, regional and national level and as a result may be regulated through a broad, diverse body of laws addressing issues such as agricultural production, nutritional and safety standards, handling and treatment, and import and export rules. Policies and frameworks enacted specifically to address the needs of IDPs should include both general provisions confirming the right of IDPs to adequate food as well as more specific measures, such as benchmarks and the indicators and inclusion of food related criteria in coordination, information gathering, consultation and monitoring mechanisms. Frameworks should also clarify the powers and responsibilities of the governmental agencies concerned and assign powers and responsibilities as appropriate, including, when relevant, to the local government authorities.

Key to facilitating the adequate supply of food to IDPs is organisation and control at the institutional level, where bodies have the authority to make the necessary arrangements for distribution and ensure that food is properly administered to the IDP population. To allow this to happen, authority and responsibility for implementing assigned tasks must be allocated appropriately and in an organised manner. The Kenya constitution does not specifically allocate responsibility for food supply, although under Schedule Four, Part 2(i), county governments have responsibility for agriculture, including crop and animal husbandry and livestock sale yards. The most effective system would involve one governmental agency at national level with responsibility and the ability to oversee regional or local bodies and processes to distribute funds, vouchers or food aid to IDPs in need or to seek help from the international community if unable to meet the need domestically. Such an organisation at the institutional level then ought to be in a position to overcome import restrictions such as quotas or customs which may prevent food

being sourced internationally and have the legal authority to remove such obstacles. One issue, which the mandated governmental agency should bear in mind when developing food aid strategies, is to ensure that IDPs who benefit from aid do not find themselves resented by neighbouring communities, both during displacement and on their eventual return home, based on the perception that they receive food of a higher quality than the food available to others or because they may compete for available sources of food or means of producing food, thus jeopardising local food security. In the context of internal displacement, these issues must be considered when implementing relevant frameworks or instruments in relation to the provision of food.

In order to properly assess the needs of the IDP population and the best means of meeting those needs, the authorities should also seek to compile information from the IDP population on their habitual food consumption and dietary requirements. A nutritional survey would assess the immediate requirements of the IDP population. Consultation is important for all affected communities. As well as the IDP population, host communities should also be consulted for the purpose of creating a food aid and food security programme as sourcing food aid, and introducing aid into the local markets can have significant effects on local production and trade patterns. Information gathering is important to determine the most appropriate forms of food aid and the safest and most equitable method of distribution. This information will assist the authority in determining what types of food would be appropriate to supply, whom the food ought to be distributed to within each household, the pre-displacement means of food production and durable solutions to the food shortage issues. Information gathered may also assist the authorities with addressing any coping strategies IDPs may have developed for combatting food shortages.

#### *iv. The right to basic shelter and adequate housing*

As discussed above, the principal legal instrument protecting the right to basic shelter and adequate housing in Kenya is the constitution. The right to “accessible and adequate housing” should be determined in accordance with the international legal framework identified above to entail the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity.<sup>764</sup> According to the Kenya constitution, Schedule Four Part 2(8), responsibility for country planning and development is with the county gov-

ernments. This includes responsibility for statistics, land survey and mapping, boundaries and fencing, housing and electricity and gas reticulation and energy regulation.

Discrimination on the basis of displacement is forbidden in the provision of adequate housing and IDPs are recognised as a disadvantaged social group.<sup>765</sup> In addition to the right to “adequate housing”, the Kenya constitution recognises the right to shelter specifically in the context of the rights of children at Article 53. It states that “every child has the right—(c) to basic nutrition, shelter and health care”. The evictions and resettlement procedures bill, 2012 provides, under Part V Miscellaneous Provisions, 12(1) for the situation “following an eviction and resettlement exercise” and determines at subsection (i) that “measures shall be taken to ensure, especially for those who are unable to provide for themselves, that ... basic shelter and housing is provided”.

The Kenya land act is another legal instrument that is of relevance in the context of the protection of IDPs’ right to basic shelter and adequate housing. Part IX, concerning Settlement Programmes, sets out provisions relating to the establishment of a settlement scheme. Section 134(i) states that “the [national land commission, established under Article 67 of the constitution] shall, on behalf of the national and county governments, implement settlement programmes to provide access to land for shelter and livelihood”. In addition to this, Section 135(i) establishes the land settlement fund, administered by the national land commission. Among the purposes of the fund, at Section 135(3)(a)(ii), is the “provision of access to land for displaced persons”. In this section lies not just a recognition of the rights of IDPs, but a particular provision for the practical realisation of those rights.

The national disaster response plan of 2009 looks to ensure the availability of shelter and planned settlements to displaced populations following disaster.<sup>766</sup> The plan prioritises existing shelter and settlement solutions and seeks to ensure that there are mass shelters or temporary camps to accommodate affected households who cannot return to the site of their original dwellings, settle independently within a host community, or settle with host families. The standard of adequate housing is more appropriately applied in the context of seeking durable solutions. Arguably, however, the most significant example of internal displacement in Kenya dates from 2012 and three years post displacement can no longer be considered to be

the immediate aftermath. It is expected that, in this respect, the relevant authorities ought now to be addressing the feasible durable solutions in the context of adequate housing.

### 13.4 Recommendations

The recommendations below seek to address the gaps identified above in relation to the protections afforded by current Kenyan legislation for IDPs' right to health care and other basic necessities of life. As a general comment, the amendment of the IDP act upon Kenya's signing and ratification of the Kampala Convention to state that the provisions of the Kampala Convention apply to all Kenyan IDPs would further legitimise and strengthen the obligations on the State to protect and assist such displaced persons.

In conjunction with the generality of the above recommendation, it is recommended that the government:

#### a. Protection from Displacement

On normative action:

- adopts the relevant provisions in the draft IDP policy as an integral part of the ministry of health's national health planning policies to ensure that there is a coordinated framework ensuring the protection of IDPs' right to health and enjoyment of uninhibited access to medical care in Kenya that is part of the wider objective of improved healthcare provision and improved levels of public health in Kenya.

On implementation:

- implements the public health policy 2012 – 2030 and other strategic health planning documents so as to improve the provision of healthcare to all Kenyan citizens, ensuring that the relevant mechanisms and structures are put in place at the national level to ensure coordination of regional and community health service provision.
- ensures that all Kenyan citizens have full exercise of their right to adequate water and hygiene by continuing to maintain and develop the water and sewerage service infrastructure throughout the country, in accordance with the provisions of the water act.

#### b. Protection during Displacement

On normative action:

- amends the water act to include provisions under which a special regime is developed in relation to regulating suppliers' obligations with respect to the supply of water to displaced communities, so that IDPs are able to exercise their right to water and hygiene in the same manner as the general population.
- ensures that IDPs enjoy full rights of access to hospitals and clinics open to the general public, removing language and document requirements, as well as fees and other barriers to IDPs' enjoyment of their right to health.

On implementation:

- ensures that the provision of healthcare, food, water and sanitation, and basic shelter and adequate housing adheres to the principles of adequacy under the ICE-SCR, as elaborated by the relevant CESCR General Comments, including ensuring economic access to such goods and services and
- conducts a baseline assessment and takes into account IDPs' pre-displacement and current food, water and sanitation and health care sources and needs, as well as housing traditions, practices and needs.
- establishes health posts and water and food service stations in camps or easily accessible locations, having mobile clinics; providing information on services.
- addresses the health needs of women, including providing: antenatal, reproductive and sexual healthcare; psycho-social/trauma care; and SGBV counselling.
- implements a coordinated strategic approach to ensure that all IDPs receive adequate healthcare, including medical (such as the provision of PEP kits and other antiretroviral medication) and psychosocial care and services, without discrimination, with special consideration of the vulnerable, including the wounded, the chronically ill, particularly, those suffering from HIV/AIDS, women and children.
- enforces the provisions of the IDP act to ensure that persons displaced as a result of development projects are relocated to areas with adequate water supply, along with the corresponding amendment of the public health act to ensure that in circumstances where IDPs are forced to relocate to areas which do not meet these criteria, the relevant medical officer is mindful of the specific circumstances of the IDPs who might, in other circumstances, be considered the perpetrators of a nuisance under the public health act.
- ensures that, despite delegating healthcare services to the relevant local authorities, the necessary mechanisms and procedures are put in place at the national level to ensure that local authorities are able to adhere to the relevant standards of protection for IDPs under the IDP framework.
- ensures that the livelihood options for host communities and IDPs are supported or improved with a view to ensuring sustainability of different settlement options and avoiding potential conflict with returning or resettled communities.

#### c. Protection after Displacement – Durable Solutions

On implementation:

- provides IDPs with transitional shelter pending reconstruction or safe access to their homes in cases where rapid return is possible. Such shelter should be located in safe areas with access to humanitarian aid distribution, as well as social, educational, medical facilities, and employment and livelihood opportunities. In order to facilitate this, the government should design transi-

tional housing in grouped settlements in consultation with IDPs, taking into account their pre-displacement housing practices, so as to minimise protection risks and maximise adequacy.

- designs all housing procedures in assistance of IDPs so as not only to maximise current adequacy but also to facilitate voluntary durable solutions.
- ensures that returning IDPs receive health care, food, water and sanitation services, as well as basic shelter and housing assistance, which is adequate and which is provided on the same basis (that is non-discriminatory) as to the host community.
- continues to support returning IDPs as they settle in their new host communities, only gradually reducing the support and concessions that they have received during their displacement, such as reduced water service costs, over an extended period of time.

## 14. Other Economic, Social and Cultural Rights

### 14.1 General Context and Minimum Essential Elements

Displacement often results in IDPs losing their former employment, their assets and the social networks that supported their economic activities, and disrupting the education of internally displaced children.

Employment, participation in economic activities, and access to social protection programmes are important prerequisites for IDPs to achieve a durable solution and to develop self-sufficiency. Even in cases where displacement has not caused an IDP to lose his or her livelihood, an IDP's livelihood may suffer significant hardship when, for example, his or her access to markets may get cut off. In many cases IDPs also struggle to access social protection or prove their professional qualification because of lack of documentation. In addition to these challenges, IDPs may face discrimination that hinders their attempts to re-enter the job market or gain access to social protection programmes. As a result of these difficulties, without appropriate support IDPs are at significant long-term risk of impoverishment and reliance on humanitarian assistance. In such circumstances, IDPs are exposed to the dangers of exploitation in the informal economy, which may particularly harm vulnerable IDPs, especially children and women.

For internally displaced children, organising adequate educational provision in their place of displacement often proves challenging. However, education during displacement can be life-saving and life-sustaining by protecting IDPs from exploitation and by offering stability and hope for the future.<sup>767</sup> Even where schools are available for displaced children in their place of displacement, their educational experience might be complicated by overcrowding, tensions with the host community, the trauma of displacement, or the demands of their life outside school. Furthermore IDP's access to education may be impeded by missing identity documentation, education certificates, and educational records. Finally, internally displaced families might find it difficult to fulfil registration requirements and to afford school fees and other costs of education, although some of these problems are by no means confined to IDPs.

Ensuring adequate employment opportunities, social support, and education is of critical importance for the immediate welfare of IDPs and their children for their future life chances and for their reintegration into communities.

#### *Minimum essential elements:*

- Recognise IDPs' rights to work and to access social

protection programmes.

- Take specific measures to protect IDPs against discrimination in the labour market and to give IDPs access to social protection programmes.
- Direct government agencies responsible for employment and social security specifically to evaluate and take action in response to the particular problems faced by IDPs (for example, through provisional work programmes, access to microcredit and other assistance, skills transfer and vocational training, and access to labour market and social protection programmes) and provide for measures (such as microcredit systems, vocational training, and distribution of farming implements, seeds or animals) that help former IDPs to regain their livelihoods or engage in new economic activities in their place of settlement.
- To acknowledge the right of all citizens, including IDPs, to receive education provided either without charge or on terms at least as favourable as those applicable to other disadvantaged members of the host community.
- To eliminate unreasonable and discriminatory administrative obstacles that limit access of IDPs to school through a failure to sufficiently take into account IDPs' specific problems (for example, administrative requirements relating to documentation and formal school transfers, or requirements to provide school books and uniforms).
- To establish a clear obligation on the part of the competent relevant authority to provide an education to IDPs located in areas where existing schools are inaccessible.<sup>768</sup>

### 14.2 Relevant Supranational Frameworks

#### *a. Kampala Convention and Declaration and Other*

The Kampala Convention protects IDPs' rights to education and employment by preventing discrimination against IDPs and by requiring state parties to provide them with support and assistance. In addition, the Convention requires states to encourage self-reliance and sustainable livelihoods among IDPs. The Kampala Declaration further emphasises the importance of these employment goals.

Under the Kampala Convention, state parties are prohibited from "[d]iscriminati[ng] against such persons in the enjoyment of any rights or freedoms on grounds that they are internally displaced persons".<sup>769</sup> Similarly, state parties are required to "[p]romote self-reliance and sustainable livelihoods amongst [IDPs]".<sup>770</sup>

The Kampala Convention requires state parties to:

"provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include . . . education, and any other necessary social



services, and where appropriate, extend such assistance to local and host community".<sup>771</sup>

Finally, the Convention also requires state parties to "seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis"<sup>772</sup> which, when read with the IASC framework, requires state parties to provide at least a primary education and access to livelihood and employment.<sup>773</sup>

Further, under the Kampala Declaration the African Union member states are committed to ensure access to education for all IDPs and other vulnerable groups<sup>774</sup> and to create:

"an enabling environment for refugees and internally displaced persons particularly women and vulnerable groups as well as the youth to become self-reliant through socio-economic integration which will enable them to prepare to contribute to the local economy upon return".<sup>775</sup>

Article 29 of the African Union Model Law for the Implementation of the Kampala Convention requires the state to ensure IDPs rights to work and to social security are recognised, to take specific measures to prevent discrimination against IDPs in the labour market and social security and to promote training, work programs and other programs to help IDPs re-establish their livelihoods or engage in new livelihoods.<sup>776</sup>

In addition to addressing employment, the model law also addresses education in Article 26. Article 26 requires states (i) to respect the right of every IDP to education; (ii) to ensure IDPs, particularly children, receive free and compulsory primary education; (iii) to undertake special efforts to ensure women and girls participate in educational efforts equally; (iv) to provide education even to IDPs in areas where existing schools are inaccessible; and (v) to ensure education and training facilities are available to all IDPs, especially women and adolescents.<sup>777</sup>

#### *b. Guiding Principles*

The Guiding Principles provide that "[w]hen necessary, internally displaced persons shall have access to ... social services" both during their displacement and following their re-establishment.<sup>778</sup> In addition, the Guiding Principles require that "[i]nternally displaced persons ... shall not be discriminated against as a result of their displacement in the enjoyment of the ... right to seek freely opportunities for employment and to participate in economic activities".<sup>779</sup>

Principle 23 provides that "[e]very human being has the right to education" and goes on to require the state pro-

vide that displaced children receive free and compulsory primary education, ensuring the full and equal participation of women and girls, and respecting the culture, language, and religion of IDPs.<sup>780</sup> Further, the Guiding Principles provide that "[e]ducation and training facilities shall be made available" to IDPs.<sup>781</sup>

#### *c. Great Lakes Instruments*

While the Great Lakes IDP Protocol does not contain any direct reference to employment, economic activities or social protection, the Guiding Principles are, however, incorporated into the Annex to the Great Lakes protocol.

Under the Great Lakes Pact, the ICGLR member states must implement action programmes focused on "[p]romoting policies aimed at disaster prevention, protection, assistance, and the search for durable solutions for refugees and internally displaced persons, as well as their environment"<sup>782</sup> and "[p]romoting relevant policies to guarantee access to basic social services by the populations affected by conflicts and effects of natural disasters".<sup>783</sup>

Attached to the Great Lakes Protocol, the Great Lakes Protocol model legislation further specifies that the education ministry should be represented on a committee for the protection and assistance of IDPs.<sup>784</sup>

#### *d. Other*

Under the CESC, states are under a general obligation to guarantee basic living standards by adequately prioritising the overall allocation of resources available. On this point the committee on economic, social and cultural rights has expressed the opinion that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Convention".<sup>785</sup>

The African Charter on the Rights and Welfare of the Child, to which Kenya is party, requires signatories to provide free and compulsory education to all children<sup>786</sup> and also guarantees all rights, including access to education, regardless of "race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status".<sup>787</sup>

Similarly, the CRC, which Kenya ratified in 1990, provides for free and compulsory primary education for all children.<sup>788</sup>

### **14.3 Kenya-specific Analysis**

Economic self-sufficiency, social protection and educa-

tion are protected by various legal instruments in Kenya. Particular provisions contained in instruments designed specifically for IDPs may assist in guaranteeing the fulfilment of the related rights by this group.

#### *a. Constitution of Kenya*

The 2010 constitution provides every person the right to social security and education.<sup>789</sup> It also requires the government to provide “appropriate social security” to any person who is not able to support themselves or their dependents.<sup>790</sup> The Constitution goes further to protect marginalised groups, stating, “The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups – . . . (b) are provided special opportunities in educational and economic fields; [and] (c) are provided special opportunities for access to employment”.<sup>791</sup> While the Constitution’s definition of marginalised groups does not explicitly include IDPs, it does include any group disadvantaged by discrimination based on “ethnic or social origin” as well as a number of other factors.<sup>792</sup>

#### *b. The IDP act*

The IDP act requires the government to “create the conditions for and provide” all IDPs with durable solutions including: “(c) the enjoyment of an adequate standard of living without discrimination; (d) access to employment and livelihoods. . .”.<sup>793</sup> Although the IDP act does not specifically mention education, it requires the government to protect the rights of IDPs under Article 43 of the Constitution, which includes the right to education and incorporates the Guiding Principles, by reference.<sup>794</sup> Article 18 of the IDP act requires cooperation between the NCCC established by the IDP act to liaise with the government organisations responsible for education to ensure IDPs are able to receive the necessary support in education at all levels.<sup>795</sup>

#### *c. Draft IDP policy*

Complementing the provisions of the IDP act, the draft IDP policy dedicates two entire sections to the issues of education<sup>796</sup> and economic rights and social protection.<sup>797</sup>

According to the relevant provisions of the draft policy, the government is to respect and protect the right to education of all IDPs including by ensuring “(a) the right to receive primary education; [and] (b) the right to be provided with and have safe access to education on an equal basis and without discrimination.” This entails the adoption of specific measures aimed at lifting the impediments often jeopardizing IDPs’ access to education, such as waiving administrative requirements, including reducing documentation for registering and practical obstacles to enrolment; facilitating registration procedures and school transfers; facilitating the replacement of lost or destroyed documentation; and creating additional

examination opportunities for children unable to take an exam for reasons related to displacement. In addition, there are special measures which should be implemented to enable internally displaced children to participate in educational programmes, such as waivers of examination fees, creation of temporary learning facilities in camps or settlements for IDPs, or upgrading or enlarging existing educational services in areas receiving a large influx of IDPs. To support IDPs needing post primary and secondary education, the draft policy also recommends the creation of specialised training facilities, including vocational training.

The draft IDP policy gives equally high attention to “economic rights and social protection”. Further to recognising IDPs’ rights to work, to social security, to protection against discrimination in the labour market, and to ensuring IDPs are able to access social security benefits, the government is also to promote affirmative action for IDPs. Such affirmative action will support IDPs’ ability to regain their livelihoods or to engage in new income generating activities, or to access social security even if the required documentation is lost or destroyed. In addition, it will help evaluate and take necessary measures to ensure IDPs’ access to employment opportunities and social benefits.

#### *d. Sectorial legislation on employment, social security and education*

In the employment sphere, the primary protection for workers’ rights is the Employment Act of 2007. The employment act prohibits employers from discriminating on the grounds of “race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status”.<sup>798</sup> While employment discrimination against IDPs may fall into certain of these enumerated categories, often IDPs are discriminated against simply because they are IDPs, an act that is not prohibited by the employment act. In addition to the employment act, workers in Kenya are protected by the Labour Relations Act 2007, which protects the freedom of association and workers’ rights to unionise and regulates trade union activities.<sup>799</sup> Although IDPs’ rights to employment without discrimination are protected under the IDP act, they are not explicitly protected in the employment act or the labour relations act. Therefore, these acts should be updated to fully protect IDPs’ from discrimination in employment.

Every child in Kenya is guaranteed a right to “free compulsory basic education” by the 2010 constitution.<sup>800</sup> A “child” is defined as “any individual who has not reached the age eighteen years”.<sup>801</sup> Furthermore, the state must put in place affirmative action programs to ensure youth, defined as any individual between the ages of eighteen and thirty-five, have access to relevant training and education programs.<sup>802</sup>

The Basic Education Act, 2013 provides for every child to have access to free and compulsory basic education.<sup>803</sup> It requires all parents whose child is Kenyan or resides in Kenya to ensure their child attends school regularly, imposing a fine or up to one year of imprisonment for parents whose children do not regularly attend school.<sup>804</sup> The basic education act requires the cabinet secretary in charge of education to ensure “children of marginalised, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education”.<sup>805</sup> However, marginalised, vulnerable and disadvantaged are not defined within the IDP act, potentially leading to the exclusion of IDPs.<sup>806</sup>

Schools are prohibited from discriminating against any student seeking admission, including on the grounds of “ethnicity, gender, sex [except in single-sex schools], religion, race, colour or social origin, age, disability, language or culture”.<sup>807</sup> While the act requires proof of a child’s age for admission to school, it also prohibits denial of admission to a child for lack of proof of age.<sup>808</sup> Internally displaced children are not explicitly protected in the basic education act, however some of the protections of the IDP act may be extended to them based on their other characteristics. As such, the basic education act should be updated to explicitly protect IDPs.

While the 2012 IDP act has begun the process of thoroughly protecting IDPs’ rights to employment, social protection and education, protection remains incomplete until the draft IDP Policy, detailing the commitments expected on the part of the government of Kenya in relation to the fulfilment of IDPs’ basic rights. The recommendations below set out some suggestions for implementing the overall IDP framework of Kenya.

#### **14.4 Recommendations**

As noted above, the current legislation provides a reasonable, although incomplete, framework for the protection of IDPs’ rights to participate in economic activity, to social protection and to education in Kenya. The steps below would help improve this framework and bring Kenya in line with the international instruments protecting IDPs. Therefore, it is recommended that Kenya:

On normative action:

- Adopt the draft IDP policy and follow up on the adoption of the measures required by the Policy itself to ensure access to education, employment and social protection.

On implementation:

- Protect IDPs and their children from discrimination by removing potential obstacles to the enjoyment of their educational rights, such as documentation or school fees requirements.
- Create learning facilities in camps whenever exter-

nal schools are not physically reachable by IDPs and strengthen the educational services in areas affected by large numbers of IDPs.

- Take measures to remove practical barriers that prevent IDPs from accessing employment opportunities, social protection or education, including relaxing certain documentation requirements to prove status, age, educational history, professional qualifications or residency.
- Take measures to build capacity among the educational profession and public authorities with regard to the provision of education for internally displaced children, including awareness of internally displaced children’s specific educational needs and challenges.
- Formulate indicators to measure access to education, employment and social protection among IDPs in areas of return, resettlement and integration as a way to verify attainment of durable solutions.

## 15. Displacement Related to Natural Hazards

### 15.1 General Context and Minimum Essential Elements

Internal displacements can be caused by conflict, generalised violence, widespread human rights violations and disasters induced by natural hazards,<sup>809</sup> which have a devastating impact on human life, peace, stability, security and development. Situations may, of course, overlap, in particular where displacement related to natural hazards occurs in the context of complex emergencies. It is also increasingly evident that climate change exacerbates natural disasters and related displacement, as reported in the Nansen Initiative Agenda<sup>810</sup>, even if not all displacement related to disasters is related to climate change.

The Sendai Framework for Disaster Risk Reduction 2015-2030 (the “Sendai Framework”) priorities require governments to strengthen Disaster Risk Management (“DRM”) governance, invest in risk reduction, enhance risk and early warning information and provide disaster education on the reduction of underlying risks and emergencies<sup>811</sup>. The African Union made its position on the topic known to the fourth session of the global platform on disaster risk reduction by acknowledging that natural hazards are seen as a major cause of internal displacement in Africa and emphasising the need to reflect internal displacement concerns in the international frameworks.<sup>812</sup>

Disasters brought on by natural hazards not only create humanitarian challenges, but may also be the cause of important human rights concerns. Sudden or recurrent natural hazards such as volcanic eruptions, earthquakes, tidal waves/tsunamis, cyclones, floods and landslides often trigger severe and protracted disaster situations in countries where local capacities are not sufficient to ensure reasonable preparedness for and consequently an adequate response to the devastating effects of such events on the population.

The impact of natural hazards is most acutely felt by individuals and communities with pre-existing vulnerabilities which are often characterised by the limited enjoyment of rights. Many of the most important protection challenges in disaster situations are long-standing protection and human rights concerns which are brought to light and further exacerbated by the emergency. Disaster situations cause and worsen protection risks such as sexual and gender-based violence, family separation, child trafficking, unequal access to assistance, discrimination in aid provision, enforced relocation, loss of personal documentation, land disputes and issues related to land and property rights.

As in situations of complex emergencies, natural hazards often result in internal displacement of populations. Whereas during the emergency phase of a disaster, patterns of discrimination and a lack of respect for basic human rights may emerge quickly, such concerns tend to become more acute the longer the effects of a disaster last.

“Particularly at risk are those among the affected populations who are forced to leave their homes or places of habitual residence because of the disaster and who, as a result, become internally displaced”.<sup>813</sup>

#### *Minimum Essential Elements:*

- Adopt disaster policies that not only regulate Kenya's response to disasters brought on by natural hazards or by human activity but also focus on disaster risk reduction and preparedness;
- Provide for the allocation of necessary human and financial resources to sustain disaster risk reduction and disaster preparedness;<sup>814</sup> and
- Ensure that disaster policies and regulations refer to and reiterate the rights of IDPs as stated in the Kenya IDP specific legislation.

### 15.2 Relevant Supranational Frameworks

#### *a. Kampala Convention*

The objectives of the Kampala Convention also include the provision of a legal framework for the protection of displaced people, including by natural disasters, which “have a devastating impact on human life, peace, stability, security, and development.” Under Article 1(K), the definition for internally displaced people not only covers “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence” as a result of events including natural or man-made disasters, but also those who do so in anticipation of or in order to avoid the effect of disasters. This is intended to cover individuals who are displaced in order to avoid the effect of disasters associated with environmental factors such as droughts or flooding. People who are involuntarily displaced as a result of states' adaptive measures may also be considered as internally displaced people (Art 1(I) states that internal displacement shall also refer to “the involuntary or forced movement, evacuation or relocation of persons”). The convention even goes further in Article 4(4)f, by clearly defining as arbitrary any “forced evacuation in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected”.

The Kampala Convention, in fact, requires that state parties take measures to protect and assist people displaced in the context of disasters brought on by natural hazards or by human activity, including climate change.<sup>815</sup> In ar-

eas of potential displacement, these measures include continental early warning systems, the establishment and implementation of DRR strategies, emergency and disaster preparedness, management measures and, where necessary, arranging for immediate protection and assistance for IDPs.<sup>816</sup>

The Kampala Convention also prohibits arbitrary displacement in case of forced evacuations resulting from disasters brought on by natural hazards or by human activity if the evacuations are not required for the safety and health of those affected.<sup>817</sup> Arguably, in conjunction with Article 4(2), the failure to undertake adequate DRR measures needs to be taken into consideration when analysing the “legitimacy” of forced evacuations resulting from disasters.

State parties shall be liable to compensate IDPs for damage when that state party refrains from protecting and assisting IDPs in the event of disasters brought on by natural hazards.<sup>818</sup> This principle is particularly relevant in relation to assets left behind by IDPs, for which the Kampala Convention requests state parties to take necessary protective measures.<sup>819</sup>

At the aforementioned fourth session of the global platform for disaster risk reduction, the African Union delegation took note of ratification of the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa that acknowledges the responsibilities of governments to protect people displaced by natural disasters and climate change and take measures to mitigate such displacement.<sup>820</sup>

Meanwhile, African Union member states endorsed a regional disaster risk reduction (“DRR”) strategy through the extended programme of action for the implementation of the Africa regional strategy for disaster risk reduction (2006 – 2015).

#### *b. Guiding Principles*

Principle 6 of the Guiding Principles articulates a right for every person to be protected against being arbitrarily displaced from his or her home or place of habitual residence. That right includes cases of disaster, unless the health and safety of those affected requires their evacuation.<sup>821</sup>

Prior to any decision requiring displacement, the authorities concerned must explore the feasibility of alternatives to displacement. Where no alternatives to displacement exist, all measures shall be taken to minimise displacement and its adverse effects.<sup>822</sup>

#### *c. Great Lakes IDP Protocol*

The Great Lakes IDP protocol requires member signatory

states to establish and designate organs of government responsible for disaster emergency preparedness, coordinating protection and assistance to IDPs, as well as the focal point structures responsible for cooperating with international agencies and civil society responsible for IDPs.<sup>823</sup> Member states shall ensure that national legislation specifies the organs of government responsible for providing protection and assistance to IDPs, disaster preparedness and the implementation of the legislation incorporating the Guiding Principles.<sup>824</sup>

In addition, states are to engage with the implementation of an action programme aiming, *inter alia*, at “[p]romoting policies aimed at disaster prevention, protection, assistance, and the search for the durable solutions for refugees and internally displaced persons, as well as their environment”.<sup>825</sup> States are also expected “to the extent possible, [to] mitigate the consequences of displacement caused by natural disasters and natural causes”.<sup>826</sup>

Moreover, the signatory member states have committed themselves to establishing “a regional early warning and rapid response mechanism for natural and man-made disasters” and building “capacities for environmental restoration in areas degraded by the settlement of refugee and displaced populations.”<sup>827</sup>

#### *d. Other Frameworks*

The Sendai Framework is a 15-year plan to make the world safer from natural hazards by building the resilience of nations and communities to disasters brought on by natural hazards.<sup>828</sup> It was adopted at the third world conference on disaster risk reduction, held in March, 2015 and aims to substantially reduce disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries.<sup>829</sup> The Sendai Framework priorities require governments to strengthen DRM governance, investment in disaster risk reduction, risk and early warning information, disaster education, reduction of underlying risks and emergency preparedness and response at national and regional levels.

The Nansen Initiative published a draft protection agenda (the “protection agenda”) for which the stated purpose was to consolidate the outcomes of broad consultations undertaken by the Nansen Initiative on cross-border displacement induced by natural hazards, in a bottom-up consultative process. The agenda concludes that climate change is one of the biggest challenges for combatting displacement induced by natural hazards and the number of people displaced by climate change is likely to increase drastically.<sup>830</sup> The protection agenda addresses the roles and responsibilities of states and identifies effective practices in cross-border displacement in the stages before, during and after natural disaster-induced displacement,

with focus on displacement induced by climate change.<sup>831</sup> The protection agenda prioritises identification of people at risk of being displaced, building risk resilience in communities, undertaking planned relocation and facilitating voluntary migration as a means to adapt to the effects of climate change.<sup>832</sup>

Under the IASC operational guidelines, national authorities have the primary duty and responsibility to provide assistance to persons affected by disasters brought on by natural hazards.<sup>833</sup> This principle was recently reaffirmed in the Sendai Framework.<sup>834</sup> International humanitarian organisations, agencies and non-governmental organisations have the right to offer their services in support of people affected by disasters brought on by natural hazards and in need of protection and humanitarian assistance when, and to the extent that, the authorities concerned are unable or unwilling to provide the required humanitarian assistance.<sup>835</sup> All authorities and international actors shall respect and ensure respect for their obligation under international law, so as to prevent and avoid conditions that might lead to the displacement of persons.

The IASC operational guidelines do not specifically address IDP issues, however, the guidelines do put human rights into the same four categories as the former Special Rapporteur Walter Kälin did with regard to IDP rights, which makes them a useful reference in relation to IDPs in the event of a disaster. The overall concept to bear in mind when reviewing these guidelines is *non-discrimination* with respect to IDPs which is heavily emphasised by the IASC:

*i. Protection of life; security and physical integrity of the person; and family ties.*

In relation to this category, the IASC lists a number of issues particularly relevant to IDPs. Protection activities should be prioritised on the basis of assessed needs and against secondary impacts of natural hazards. Preparedness measures with respect to secondary activities include risk assessment of sites where affected IDPs continue to stay and mapping/updating of risks of those sites. Protection of life, physical integrity and health of persons exposed to imminent risk is directly applicable to IDPs, as well as the requirement to pay special attention to protection against violence in camps during and after the emergency. Protection against separation of families and of unaccompanied children is also applicable to IDPs, as is security in host families and communities to ensure that IDPs eventually resettle in a durable way.<sup>836</sup>

*ii. Protection of rights related to the provision of food;*

*health; shelter; and education.*

It is vital for IDPs to have equal access to humanitarian goods, services, health care, food and water as other groups in society. Safe and dignified shelter and sanitation are also key in this respect. With regard to education, the IASC suggests that re-schooling of displaced children following a disaster should be facilitated.<sup>837</sup>

*iii. Protection of rights related to housing; land and property; livelihoods and secondary and higher education.*

The IASC guidelines also refer to the protection of property left behind, the provision of adequate shelter and guarantees in case of evictions as relevant areas for IDP policies to address. IDPs are often exposed to arbitrary evictions, making this kind of protection particularly important. The location of camps and sites and access to livelihoods is also relevant to IDPs in order to provide them with a durable post-disaster resettlement solution.<sup>838</sup> Durable resettlement solutions also include guarantees against further exposure to the risk of disasters brought on by natural hazards. In this respect, the Sendai Framework requests States to “integrate post-disaster reconstruction into the economic and social sustainable development of affected areas. This should also apply to temporary settlements for persons displaced by disaster.”

*iv. Protection of rights related to documentation; movement; re-establishment of family ties; expression and opinion; and elections.*

There should be measures in place to ensure that IDPs are able to return to their pre-displacement homes even if they lack documentation. In this respect, their electoral rights should also be protected, regardless of their status as IDPs. IDPs should also be granted freedom of movement in their efforts to resettle. Family unity during all phases of the disaster response is another issue that is as relevant for IDPs as for other groups in society.<sup>839</sup>

### **15.3 Kenya-specific Analysis**

#### ***a. National legislation***

The draft IDP policy published by the government of Kenya recognises that disasters impact IDPs in two distinct ways. First, disasters can be the initial cause of displacement, which includes persons preventively evacuated in the imminence of a disaster. Second, prior disasters diminish the resilience of communities, exposing them to the risks of further displacement. High rates

of poverty, coupled with naturally occurring hazards such as droughts, floods, landslides and epidemic outbreaks, among others, pose high and increasing disaster risks to Kenyan society.<sup>840</sup> Disasters brought on by various factors are one of the main causes of displacement, and have generally caused short-term displacement, especially when they are due to sudden-onset hazards. Climate change is expected to increase the frequency and severity of natural hazards and lead to more prolonged displacements.<sup>841</sup> Drought is the most prevalent natural hazard in Kenya, having affected more than one million people in the last 20 years.<sup>842</sup> It is recognised that climate change may exacerbate the consequences of drought further, as weather conditions become more unpredictable. The Kenyan government has also acknowledged the link between inequality and vulnerability in the context of droughts, which is relevant in relation to IDPs, who are amongst the most vulnerable in society.

The government's response to displacement related to disasters has tended to be fragmented and ad hoc, as there has been no institutional framework to coordinate it.<sup>843</sup> A draft national disaster management policy was drafted in 2009 and a disaster management bill was still under discussion as of May 2014. However, there is currently a national disaster response plan in force, which provides a fairly comprehensive pre- and post-disaster framework.

The 2010 Kenyan constitution is the highest legislative instrument that ensures the protection of IDPs as a marginalised group. It is focused on rights and places a duty on the state to protect vulnerable individuals and groups in Kenyan society, which would include IDPs. For example, Part III, section 56(e) provides that "*The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups... have reasonable access to water, health services and infrastructure*". Similarly, "*in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals*".<sup>844</sup> This duty to address the needs of vulnerable groups is placed upon all state organs and all public officers under Section 21(3).<sup>845</sup> This is in line with the Sendai Framework, which states that responsibility lies with the state, and the IASC Guidelines, which state that resource prioritisation should be based on needs. Moreover, Section 59 also established the Kenya national human rights and equality commission. One of the commission's functions is to act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights; this is clearly relevant to IDP protection.

The rights-based IDP act expressly aims to conform

with the Great Lakes Protocol and Guiding Principles in respect to IDPs. With regard to disaster-induced displacement, the IDP act addresses all stages of displacement: preparedness for displacement, protection during displacement and provision of durable solutions after displacement. In line with the Hyogo Framework (predecessor to the Sendai Framework), the ultimate responsibility for implementing the IDP act lies with the national government, although county governments are also placed under a duty of administrative implementation.<sup>846</sup> Under Section 5(2), the government and any other organisation shall prevent internal displacement in situations of natural or human-made disasters and, under Section 5(4), establish a prevention mechanism for monitoring areas inhabited by persons at risk of displacement. Furthermore, under Section 7, the government shall put into place measures and structures to prepare for emergency disaster and ensuing internal displacement and mitigate its consequences, in line with the Great Lakes Protocol, Article 3(2). Lastly, section 9 outlines the rights of IDPs to durable solutions in the aftermath of displacement, including disaster-induced displacement. The IDP act provides for protection prioritisation based on needs, which is in line with the IASC guidelines.

The county disaster management bill, yet to be approved, provides for a committee to advise the county governments on matters relating to disaster management policies and education on disaster management. The committee will collaborate with the national government and promote an integrated approach to disaster management with special emphasis on prevention, mitigation and disaster risk reduction. Importantly, the committee is responsible for disseminating information regarding disaster management to *communities in the county that are vulnerable to disasters*,<sup>847</sup> which can include IDPs by inference. The bill also provides for the establishment of a county disaster management fund to meet the expenses for emergency preparedness, response, mitigation, relief and reconstruction.<sup>848</sup> In theory, this bill is in line with the requirements for IDP protection measures at the district level. However, inadequate resources at the district level have crippled disaster preparedness efforts to date.

#### *b. Institutional arrangements*

Kenya has a large number of institutions, at both the district and national level that are responsible for disaster prevention and management. Most of these institutions deal with general disaster prevention and management but some manage specific natural hazard risks such as droughts. District level disaster management is particularly important for IDP protection, as it is more involved in targeting local vulnerable groups, including IDPs. The linkages between local communities on the one hand, and district and national levels on the other, have remained weak, which is problematic.<sup>849</sup>

National institutions

- **Cabinet Secretary and related competencies**
- **National Disaster Executive Committee (NDEC)**

This committee is the highest institution in disaster systems and falls under the cabinet office. It makes decisions on management issues especially during emergencies and includes ministers from a number of government ministries. Consequently, it works on an ad hoc basis.

- **National Disaster Operations Centre (NDOC)**

This committee was established in 1998 and is responsible for translating the strategies and instructions from the national disaster executive committee (NDEC) into actions to be carried out by ministries and departments. It also coordinates all disaster-related activities before, during and after occurrence.

- **National Disaster Coordination Committee (NDCC)**

This is the executive arm of the NDEC and is responsible for executing policy. Other functions include providing information on disaster management plans and identification of resource gaps; the committee works on an ad hoc basis.<sup>850</sup>

- **National Platform for Disaster Risk Reduction**

Promote and enhance education, public awareness of disaster risks, obtain commitment from the public leadership to disaster risk reduction. Improve dissemination and understanding of natural and man-made causes of disasters, and *their related effects upon vulnerable communities*.

- **National Drought Management Authority (NDMA)**

This is a permanent state corporation established in 2011 to provide leadership and coordination of drought management and climate change adaptation.

- **National Disaster Management Agency (NADIMA)**

This agency, following the implementation of the draft national policy for disaster management in Kenya, will be in charge of the day-to-day national management of all disaster management activities. It operates an effective and efficient national early warning/disaster monitoring information system and facilitates national, county and community level disaster management contingency processes. In addition, the NDMA operates the disaster management funds and documents, publishes and disseminates all relevant disaster management data and information to all stakeholders in and around the country.

#### c. County-level and local institutions

- **County Disaster (Management) Committees (DDC)**

In line with the minimum essential elements, these committees operate district early warning systems (EWS) and formulate and coordinate district disaster contingency plans. In addition, they administer district disaster and contingency funds and are responsible for training and public awareness programmes and activities. Such

warning systems are particularly important in relation to vulnerable populations, as the Great Lakes Protocol makes clear.

As noted above, the Great Lakes Protocol requires states to designate a national institutional focal point for disaster risk reduction. In fact, Kenya has created a plethora of governmental bodies responsible for disaster preparedness and mitigation. Importantly, the documents outlining these bodies' responsibilities have emphasised coordination of activities at the regional and federal levels. The bodies are also responsible for cooperating with the private sphere, NGOs and international aid organisations when responding to a disaster, in line with the protocol. The multitude of institutions, however, could be some cause for concern as coordination and potential overlap might be problematic.<sup>851</sup> There are also some concerns that the institutions at the district and provincial level lack resources, which would be problematic, given that IDPs may require extra resources due to their specific needs.

#### d. Policies and frameworks

- **National Disaster Management Policy**

Disaster risk management efforts in Kenya have been impeded by the absence of a coordinated institutional framework that enables systematic preparation for and response to disasters, as focus has mostly been on short-term relief.<sup>852</sup> Consequently, the draft national disaster management policy was created. Although not yet formally implemented, as applied in practice the policy establishes a framework for institutionalising and coordinating disaster risk management across sectors and actors, placing equal emphasis on prevention, preparedness and recovery.<sup>853</sup> Its overall goal is to prevent disasters and reduce their impact on people, infrastructure and the environment, and to increase the resilience of families and communities affected by disasters.

The draft national disaster management policy in Kenya seeks to institutionalise mechanisms for addressing disasters and is premised on the increasing disaster risks from climate change. It also adopts an approach of "subsidiarity", providing that disasters shall be handled first and foremost by the communities affected and local institutions present at the community level.

Drought is one of the key disaster risks in Kenya. Kenya has a detailed drought management system in place, where the key organisation is the NDMA – a permanent state corporation established in 2011 to provide leadership and coordination of drought management and climate change adaptation. This framework has not been developed with the aim of preventing and addressing internal displacement in mind, however the constitution and the 2012 act provide the more rights-based policies, which might complement it adequately. The fact that the NDMA,



amongst other things, targets climate change, is in line with the Kampala Convention.

The NDMA facilitates the development of county level contingency plans for rapid reaction to early warning information and changes in the warning stages in line with the Sendai Framework provisions on warning systems. It also coordinates parallel structures both at the national and county level, principally the Kenya food security meeting (KFSM), the Kenya food security steering group (KFSSG), and the county steering groups (CSGs), the latter responsible for coordination at the county level with communities. The government also intends to create a national drought contingency fund (NDCF), managed independently of the NDMA. There are also various long-term measures to reduce risk and strengthen resilience. These include guiding the new county governments in mainstreaming drought risk reduction within their development plans and budgets, introducing county climate adaptation funds, and implementing a range of risk reduction and social protection programmes. Such ambitions are in line with the Great Lakes Protocol and Sendai Framework provisions.

#### ▪ **National Disaster Response Plan (the “Plan”)**

In implementing the National Disaster Response Plan, the Kenyan government has acknowledged itself as ultimately responsible for assisting people affected by a disaster, in line with the IASC guidelines.<sup>854</sup> The plan gives guidelines for coordination and response to all types of disasters and was developed together with government ministries, UN agencies, NGOs and various humanitarian partners.<sup>855</sup> It is structured subject to the following strategic and operational objectives:

1. ensure a collaborative and coordinated response to the disaster among all stakeholders
2. ensure food availability/security and good nutrition to affected populations in times of disaster
3. ensure promotion of hygiene, water supply and proper sanitation
4. ensure availability of shelter and planned settlements as well as availability of non-food items to displaced populations following disaster<sup>856</sup>

Amongst other things, the Plan ensures that information about the assistance programme is given to affected and vulnerable populations during all stages of the disaster cycle, and outlines the agencies that are responsible for this dissemination of information.<sup>857</sup> Detailed preparedness and response interventions that support and protect the affected populations are also provided for in the plan.

Moreover, humanitarian assistance is to be based on a thorough analysis of *vulnerability*. The plan also provides for an assessment on the rights of those affected, as defined by international laws and agreed regulations to be made, suggesting that international IDP rights will be recognised in the event of a disaster.<sup>858</sup>

Importantly, the plan contains a humanitarian code of conduct, which sets out the standard of conduct in disaster response. The emphasis is on non-discrimination between victims of disasters, as provided by the IASC guidelines.

On the whole, the plan is highly comprehensive in its disaster prevention and relief and the risk reduction and management systems are in the spirit of the Kampala Convention and Great Lakes Protocol. In particular, it recognises the need to focus on vulnerable groups in society and aims to coordinate all concerned organisations at the federal and district level. However, it is potentially problematic that the Plan focuses its efforts on vulnerable “groups” and “communities”, as IDPs fall outside any recognisable ethnic groups. The plan assumes that all individuals and groups are easily identifiable, communicative and connected, which is not necessarily the case with IDPs. Moreover, it would be preferable if the plan specifically recognised IDPs as “vulnerable” and acknowledged their specific needs.

#### **15.4 Recommendations**

The IDP Act formally addresses the right of IDPs to be protected in the event of displacement, including albeit not exclusively *in the context of disasters*. Moreover, Kenya has several other relevant frameworks in place, addressing the protection of vulnerable groups at different disaster stages, which would also apply to IDPs. These policies and arrangements go far in achieving a comprehensive protection framework in relation to disaster-induced displacement. The steps outlined below would help bring Kenya further in line with the relevant minimum essential elements and supranational normative frameworks in this area.

As an overall recommendation, the Kenya government should strengthen the overall national capacity with regard to natural disasters, both sudden and slow onset, and the prevention and mitigation of internal displacement, including through enhanced: research, monitoring, disaster risk reduction and early warning, operational and policy responses (for example, relating to livelihoods and food security), and related regional and international cooperation, including adaptation and responses to climate change.

##### **a. Protection from Displacement**

- Ensure that the various institutions that deal with dis-

aster prevention are coordinated both at the national and county level to enhance efficient cooperation and, consequently, protection from disaster-induced displacement. Such institutions should link up with the NCCC to optimise coordination.

- Ensure that institutions at the national and county level consult with communities to create channels for community participation in disaster prevention and preparedness efforts.
- Incorporate IDPs specifically into the framework and policy statements of drought-management organs and institutions. Droughts cause particular harm to the poor and vulnerable; efforts should consequently be made to protect these individuals, including individuals that have been displaced, from further harm.
- Ratify the Kampala Convention to ensure more emphasis on monitoring durable solutions, which is currently lacking in the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012.

*b. Protection during Displacement*

- Ensure that disaster management institutions at the county level have the means and resources to protect IDPs during displacement. This will involve adequate funding and personnel.
- Ensure that the various institutions that deal with disaster prevention are coordinated both at the national and district level to enhance efficient cooperation and, consequently, protection during displacement. These institutions should work closely with local communities to mitigate disaster impact on groups as well as individuals in affected areas. Such institutions should link up with the NCCC to optimise coordination.

*c. Protection after Displacement – Durable Solutions*

- Ensure that the county disaster management fund is adequately funded. Resettlement of IDPs and rebuilding of communities require targeted resources in the form of capital and skilled personnel.
- Enhance coordination between disaster management institutions at the national and county level to ensure that competence and resources are being shared for effective IDP resettlement and (re)integration. Such institutions should link up with the NCCC to optimise coordination.

# Appendix A: Kenyan Legislation Reviewed under each Thematic Chapter and Relevant Recommendations

## 1. Definition of IDPs

### **Relevant Kenyan Legal and Policy Sources**

Republic of Kenya, Draft 'National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons in Kenya'  
Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act (the "IDP act"), 2012 / Sections 2, 8

### **Recommendations**

On normative action:

- Consider amending the IDP act in relation to the applicability of the provisions related to development-induced displacement beyond the current restriction to "large-scale" projects.
- Ensure that other Kenyan normative frameworks relevant to displacement (existing or under development) refer to the IDP act.
- Consider aligning categories used in other Kenyan normative frameworks relevant to displacement (existing or under development) which do not correspond to international standards (e.g. squatters as per draft evictions and resettlement procedures bill 2013) with categories used in IDP relevant instruments.

### **Relevant International Legal and Policy Sources**

Guiding Principles, 1998  
Kampala Convention / Article 1  
Great Lakes Protocol / Article 1  
UN Principles on House and Property Restitution for Refugees and Displaced Persons (the "Pinheiro Principles") / Principle 1  
"National Instruments on Internal Displacement, A Guide to their Development", Internal Displacement Monitoring Centre

On implementation:

- For the government/civil society: Promote a common understanding in Kenya of who qualifies as an IDP through awareness-raising and sensitisation activities (see chapter on awareness raising).
- For the government: give an update on the situation of:
  - the remaining PEV of IDPs (integrated and remaining in camps); and
  - all other categories of IDPs that were displaced before and after the election (by violence and other causes).

## 2. Protection of IDPs against Discrimination

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution / Article 27  
Republic of Kenya, Draft 'National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons in Kenya'

### **Recommendations**

On normative action:

- Consider amending the IDP act in order to include explicit provisions prohibiting discrimination based on displacement as well as prohibiting discrimination against IDPs on any ground such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, or birth or any similar criteria.
- Adopt the draft national IDP policy, with a particular view to enacting the recommendations on measures the government should adopt on non-discrimination of IDPs.

On implementation:

- Ensure that measures on anti-discrimination and protection of vulnerable groups of IDPs are implemented in practice, including by strengthening collaboration between the NCCC and the national gender equality

### **Relevant International Legal and Policy Sources**

Kampala Convention / Articles 3, 4, 5, 9  
Guiding Principles / Principle 1, 4, 29  
American Convention on Human Rights / Article 24  
First Geneva Convention / Article 3  
Second Geneva Convention / Article 3  
Third Geneva Convention / Article 3  
Fourth Geneva Convention / Article 3

commission, and ensuring that the latter also considers relevant IDP issues in its work.

- Mainstream IDP issues within the work of relevant government institutions and ensure adequate awareness is raised around such issues through sensitisation activities.
- Consider developing specific affirmative actions as necessary to ensure IDPs' access to rights (for example in the area of access to justice).
- Ensure that all IDP activities and data-collection mechanisms support assistance to vulnerable groups, including, inter alia: particularly vulnerable groups of women; internally displaced women more broadly, with regard to protection from discrimination (for example, with respect to the right to information, participation, documentation, and all entitlements) and sexual and gender-based violence; internally displaced children; the chronically ill; and disabled or older persons.

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## 3. Awareness Raising and Training

### **Relevant Kenyan Legal and Policy Sources**

IDP act / Articles 13(e), 17(1)  
Draft National IDP Policy / Introduction, Objective 7, Paragraphs 43(b), 44(a), 45(f), 102.

### **Recommendations**

On implementation:

- For civil society/KNCHR: Support awareness raising and capacity building around the IDP act targeting relevant national and county government, authorities and media.
- For civil society/KNCHR: Support awareness raising with IDPs, affected communities and people at risk of displacement on their human and land rights.
- For the NCCC: To ensure that a portion of the Fund be allocated to awareness raising and training events and

### **Relevant International Legal and Policy Sources**

Pinheiro Principles, Principle 20

devolve a percentage of the allocated amount to 'Non State Actors' for them to implement the activities

- For the NCCC: To design a yearly awareness raising plan covering different aspects of IDP response (as envisaged at Article 19 of the IDP act) in partnership with the different relevant ministries and international and civil society organisations;
- For the NCCC: Establish a multidisciplinary curriculum for all officials engaged in IDP response and ensure regular training opportunities for the same.

## 4. Prevention of Displacement and Prohibition of Arbitrary Displacement

### **Relevant Kenyan Legal and Policy Sources**

Kenya National Commission on Human Rights, Constitutional Petition No. 2, 2011  
Community Land Bill, 2013 / Article 11  
Republic of Kenya, Draft 'National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons in Kenya' / Paragraphs 49-51, 63, 65  
National Land Policy, 2009 / Paragraphs 93-94, 188, 193, 208

### **Relevant International Legal and Policy Sources**

Kampala Convention / Articles 3, 4, 10  
Guiding Principles / Principles 6, 7  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Sections 3(6) and (7).  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Article 5(4)  
Pinheiro Principles / Principles 2, 13, 17  
UN Development-Based Evictions Guidelines / Paragraphs 5, 8, 21, 25, 30, 34, 37, 38, 50, 43, 45, 55, 56, 64, 67, 70  
UN Committee on Economic, Social and Cultural Rights, General Comment No. 4  
UN Committee on Economic, Social and Cultural Rights, General Comment No. 8  
ILO Indigenous and Tribal Peoples Convention / Articles 15-16

### **Recommendations**

#### *Protection from Displacement*

##### Prevention of Displacement

On normative action:

- Urgently finalise pending legal frameworks on land tenure and disasters relating to internal displacement, by aligning the frameworks with national and international standards, in particular:
  - The eviction and resettlement procedures bill 2012.
  - The community land bill 2013.
  - The draft national policy for disaster management in Kenya 2009, and the county disaster management bill 2014.
  - The national policy on peace-building and conflict management 2011.
- Urgently finalise a legal framework on internal displacement by adopting the draft national policy on the prevention of internal displacement and the protection and assistance to internally displaced persons in Kenya 2011.

On implementation:

- Take immediate steps to implement the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012.
- Provide adequate funding and resources for the national consultative coordination committee on internal displacement, to facilitate the effective and immediate implementation of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012.
- Ensure the establishment of capacity building programs on prevention of displacement on the part of the NCCC.
- Urgently implement the national policy on peace-building and conflict management 2012.

##### Prohibition of Arbitrary Displacement

On normative action:

- Review pre-existing policies and legislative frameworks relevant to displacement to ensure that the risks of development-induced displacement are effectively reduced and the protections under supranational frameworks are adequately reflected whenever displacement results inevitable.
- Urgently adopt the evictions and resettlement bill.
- Rationalise pre-existing legislation to harmonise the practical steps which should be taken by private entities and state authorities when seeking to evict individuals to the ones recommended by the relevant international standards, with a view to respecting both information and consultation obligations.
- Harmonise all frameworks and policies related to forced evictions in line with international standards and streamline reference to internal displacement in all such documents.
- Urgently implement the national policy on peace-building and conflict management 2012.

On implementation:

- Adequately fund and resource the national land commission to ensure the implementation of the national land policy within its five year timescale.
- Establish work streams within the national land commission which specifically address forced evictions and development-induced displacements, and support the development of frameworks to find adequate durable solutions for large pre-existing displaced groups such as in Kenya's Coast region.

### *Protection during Displacement*

On implementation:

- Improve and streamline judicial and administrative redress and compensation processes for displaced or forcibly evicted individuals.
- Ensure that the national, county and district institutions which address land disputes, forced evictions and displacement are coordinated both at the national and district level to enhance efficient cooperation during displacement events.

### *Protection after Displacement - Durable Solutions*

On normative action:

- Ensure the adoption of a comprehensive resettlement framework to address the whole range of communities

potentially affected by internal displacement, including urban IDPs, rather than particular groups like land-owners or pastoralists.

- Urgently implement the national policy on peace-building and conflict management 2012.

On implementation:

- Ensure that resettlement or relocation processes are carried out in compliance with the international standard of voluntariness and adhere strictly to a participatory approach also with a view to ensuring attainment of durable solutions.

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## 5. Data Collection Relating to IDPs

### ***Relevant Kenyan Legal and Policy Sources***

IDP act / Article 13  
Statistics Act, 2006 / Article 16 and First Schedule  
Registration of Persons Act (as amended 2012) / Articles 5-6

### ***Recommendations***

On normative action:

- Consider amending the IDP act so that it provides for the regular collection of relevant IDP data necessary for the adequate protection and assistance to IDPs, beyond the registration within 30 days of displacement, including during the national census.
- Adopt the draft IDP policy, with a particular view to enacting its provisions on identification of IDPs and protection of data included in its section 2.3.

On implementation:

- Prioritize data collection on internal displacement, and specify which institutions it will engage with so that relevant data is collected.
- Collaborate with relevant partners to establish adequate systems and tools for the collection and protection of data on internal displacement.
- Ensure that a specific, comprehensive data collection exercise is undertaken at the earliest opportunity,

### ***Relevant International Legal and Policy Sources***

ICGLR, "Protocol on the Protection and Assistance to IDPs" / Articles 3, 6  
Kampala Convention, 2009 / Articles 5, 13  
Draft African Union Model Law / Articles 3, 30-31, 41, 50-51, 57-58

nity, with a view to considering how best to identify, assess and respond to IDPs' assistance, protection and durable-solution needs, with particular attention to vulnerable groups.

- Ensure registration of IDPs to facilitate the provisions of adequate protection and assistance.
- Ensure that the information collected is adequately secure to protect the privacy of IDPs and that registration does not create a separate legal status for IDPs or that non-registered IDPs should not be provided with assistance.
- Ensure that a database on IDPs is maintained and that such database is accurate, comprehensive, disaggregated by age and sex at least, and inclusive of all categories of IDPs.
- Engage with the census process led by the KNBS in order to ensure that adequate data on internal displacement will be collected during the next census in 2019.

## 6. National Local Structures of Governance for an IDP Response

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution, 2010 / Article 186; Schedule 4  
Draft National IDP Policy / Sections 18-20, 23, 33, 88, 104, 105, 108, 114, 177; Principles 13, 17.  
Draft National Policy for Disaster Management in Kenya, 2009 / Chapter 4  
Evictions and Resettlement Procedures Bill, 2013  
Kenya National Commission on Human Rights Act, 2011 / Article 8.  
National Policy on Peace Building and Conflict Management, 201  
IDP act / Sections 5, 11-13, 19-20  
Statistics Act, 2006 / Article 16 and First Schedule

### **Recommendations**

On normative action:

- Review and update the draft IDP policy before its adoption, in order for it to be brought in line with the IDP act.
- Consider the adoption of a regulation to assist the operationalization of the IDP act.
- Introduce a requirement of submission of quarterly reports to increase institutional accountability of the NCCC.

On implementation:

- Clarify the reporting channels and modalities of the NCCC, in particular whether the NCCC is supposed to report directly to the Parliament or through the relevant government department.
- Better clarify the role of county authorities in implementing the IDP act, beyond a generic mention to Fourth Schedule of the constitution.
- Clarify the relation between the prevention mechanism to be established by the government of Kenya as per Article 5(4) of the IDP act and the preventive role assigned to other institutions envisaged by relevant disaster management frameworks (e.g. National Draught Management Authority, National Disaster Management Authority, National Disaster Risk Reduction Platform).
- Prioritise the establishment of procedures and channels of engagement and cooperation with the UN and non-state actors and relevant existing coordination structures.

### **Relevant International Legal and Policy Sources**

ACHPR, "31: Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa"  
Kampala Convention / Preamble, Articles 3-5, 8-9, 11, 14  
Kampala Declaration / Paragraphs 23, 27  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Sections 4-5  
ICGLR, Model Legislation / Sections 5, 7  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Articles 3, 6  
  
Draft African Union Model Law / Articles 3, 4, 6  
  
Paris Principles, 1993 / Sections A.1-A.2, B.1-B.2

## 7. Allocation of Necessary Financial and Human Resources

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution, 2010 / Articles 29, 40, 43  
Draft National Policy for Disaster Management in Kenya, 2009  
Environment and Land Court Act, 2011 / Section 13  
Evictions and Resettlement Procedures Bill, 2012 / Section 4, 12  
Land Act, 2012 / Sections 134-135  
National Disaster Response Plan, 2009  
National Land Policy, 2009 / Section 205  
National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons in Kenya / Section 5, 8  
National Policy on Peace Building and Conflict Management, 2011 / Sections 29, 34  
IDP act / Section 11

### **Recommendations**

On normative action:

- Consider amending Section 14 of the IDP act in order to rename the "Humanitarian Fund" as "IDP Fund".
- Consider amending Section 15 of the IDP act concerning the establishment and composition of the Fund in order to provide for an yearly allocation of national budget to IDP response.
- Adopt the draft IDP policy, with a particular view to enacting the recommendations on the adequate and sustainable resource allocation included in its section 180.

On implementation:

- In compliance with the Kampala Convention, allocate adequate resources in the national budget to address the phenomenon of internal displacement and provide authorities with the necessary financial means to assist IDPs when responsibility is assigned to them.
- Ensure that the various funds established (e.g. the fund administered by the national land commission and the restructured humanitarian fund) do not overlap by allocating money to the same projects, in order to ensure rational spending of funds.
- Better clarify county government's responsibilities in relation to the protection and assistance of IDPs in order to address the lack of clarity over the coverage of expenditures related to IDPs at a local level.

### **Relevant International Legal and Policy Sources**

Kampala Convention / Articles 3, 5, 7-8  
Kampala Declaration / Principles 16, 18, 20, 23, 25, 26, 27  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Section 7  
ICGLR, "Protocol for the Prevention and the Punishment of the Crime of Genocide" / Section 6  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Article 3  
Great Lakes Protocol, 2006 / Article 3  
Pinheiro Principles / Principles 10, 12



## 8. Recognition, Issuance and Replacement of Documents

### *Relevant Kenyan Legal and Policy Sources*

IDP act / Sections 3, 9, 13

### *Recommendations*

On normative action:

- Adopt the draft national IDP policy, with a particular view to enacting the recommendations on measures the government should adopt in order to facilitate the process of recovery or replacement of documents for IDPs included in its sections 96 and 97.

### *Relevant International Legal and Policy Sources*

Draft African Union Model Law / Articles 27, 30, 45, 49

Kampala Convention / Article 13

Guiding Principles / Principle 20

On implementation:

- Make the rights and process of the issuance and replacement of identity documentation well known among IDPs so that IDPs can exercise their right to access protection and assistance identity documents (see this in conjunction with recommendations in the chapter on awareness raising, but with a specific focus on documentation).

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## 9. Freedom of Movement

### *Relevant Kenyan Legal and Policy Sources*

Kenya Constitution / Articles 29(a), 29(b), 39(1)-(3)

IDP act / Sections 3, 5(1)-(2), 6(1)-(2), 9(1)-(2), 12

Draft National IDP Policy / Sections 38(a)-(b), 76(a)-(d), 77

Kenya National Law Commission on Human Rights Act, 2011 / Section 8

Kenya Law Reform Commission Act, 2013 / Section 6

National Police Service Act, 2012 / Section 56(2)

Public Health Act, 2012 / Section 26

### *Relevant International Legal and Policy Sources*

UN General Assembly, International Covenant on Civil and Political Rights / Article 12

Kampala Convention / Articles 4(1), 4(4), 7(5)(d), 9(2)(e), 9(2)(f), 11(1), 11(2)

Draft African Union Model Law / Articles 33(4)-(9)

Guiding Principles / Principles 6(3), 12, 14(1), 14(2), 15(a)-(d), 28

Pinheiro Principles / Principle 10

ICGLR, "Protocol on the Protection and Assistance to IDPs" / Article 4(1)(g)

African Charter on Human and Peoples' Rights / Article 12

### *Recommendations*

On normative action:

- Clarify in legislation that the detention of IDPs, which would include internment or confinement in camps, should only take place if absolutely necessary and that if such confinement or internment is necessary, it should not last longer than required by the circumstances.

On implementation:

- Adopt the IDP policy in order to introduce specific arrangements easing IDPs' enjoyment of freedom of movement such as measures to facilitate issuance of personal documentation or waiving the requirement of documentation in given circumstances.

- Organise awareness raising campaigns targeting persons likely to be affected by freedom of movement restrictions related to lack of documentation. In particular such campaigns should be aimed to promote access to mechanisms to be established to facilitate issuance of documentations to such groups.
- Introduce measures to facilitate evacuations from danger areas and issue guidelines to police and security forces and other competent officials to ensure that such evacuations are carried out in compliance with basic human rights standards.

## 10. Participation of IDPs and Electoral Rights

### **Relevant Kenyan Legal and Policy Sources**

IDP act / Part II, Sections 9(2)(h), 9(4); Part V, Section 22(1)  
Kenya Constitution / Articles 25, 35, 38, 81, 88, 118-119  
Elections Act, 2011 / Sections 3(1), 5(3)  
Evictions and Resettlement Procedures Bill, 2012 / Section 11  
Access to Information Bill, 2013 / Articles 4(1)  
National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons / Sections 91-92

### **Relevant International Legal and Policy Sources**

UN General Assembly, "Universal Declaration of Human Rights" / Article 19  
UN General Assembly, "International Covenant on Civil and Political Rights" / Article 25  
Kampala Convention / Articles g(2)(k), g(2)(l), 9, 10 11, 13(2), 13(3)  
Guiding Principles / Principles 7(3)(b)-(d), 18(3), 22, 28(1), 28(2), 29(1), p. 132  
UN General Assembly, "Universal Declaration of Human Rights" / Articles 18-21  
UN General Assembly, "International Covenant on Civil and Political Rights" / Articles 18, 19, 21  
American Convention on Human Rights / Articles 12, 13, 16, 23.  
Annotated Guiding Principles / p. 40  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Articles 4(1)(b), 5(6), 6(5)  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Article 5(6)  
Pinheiro Principles Handbook / p. 72  
Pinheiro Principles / Principles 14.1, 14.2

### **Recommendations**

#### **Participatory rights**

On implementation:

- The government must maintain a regular and systematic line of communication with IDPs to provide them with updates on government plans aimed at finding durable solutions. The government should also work closely with CSOs and other stakeholders providing services to IDPs to facilitate information flow.
- The government must engage with IDP leaders and consult with IDPs and other stakeholders on any matter pertaining to IDPs, including in the planning and management of durable solutions. Special efforts should be made to involve vulnerable groups of internally displaced persons.
- CSOs should engage more with IDP leaders and other IDPs to organize sensitization activities particularly to ensure IDPs are informed about their rights, and are enabled to exercise them without being subject to discrimination.
- Better articulate how to ensure, in compliance with the Pinheiro Principles, the participation of IDPs in housing, land and property restitution programmes.

#### **Electoral rights**

On normative action:

- Kenya amend the elections act and/or accompanying administrative instructions to:
  - Provide simplified absentee voting procedures to allow IDPs to vote in their constituency of former residence.
  - Provide procedures allowing the issuance of documentation required for registration purposes outside IDPs' constituency of former residence.
  - Provide exceptions to allow IDPs to remain on the electoral roll in their constituency of former residence if they wish.
  - Provide simplified procedures for IDPs to register to vote in their constituency of displacement.

## 11. Right to Family Life

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution / Article 45  
IDP act  
Evictions and Resettlement Procedures Bill, 2012 / Article 12(3)(a)  
Birth and Death Registration Act / Chapter 149, Articles 3, 7, 26  
Children Act / Articles 2, 10(2)

### **Relevant International Legal and Policy Sources**

Kampala Convention / Articles 7(5)(c), 7(5)(e), 7(5)(f), 9(1)(c), 9(2)(c), 9(2)(h), 10(2), 13(1)  
Kampala Declaration / Paragraph 12  
Fourth Geneva Convention / Article 26  
ICRC, Protocol I / Article 74  
ICRC, Protocol II / Article 4(3)(b)  
ICRC, Customary Rule 131 on the Treatment of Displaced Persons  
Guiding Principles / Principles 16, 17  
ICGLR, "Protocol on the Protection and Assistance to IDPs"  
ECOSOC, Guiding Principles / Principle 17

### **Recommendations**

On normative action:

- Consider amending the IDP act in order to include an explicit prohibition of family separation, and make explicit in the normative framework that all non-state actors, including armed groups in particular, are prohibited from separating members of the same family, including recruiting children or requiring or permitting them to take part in hostilities and forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons, especially women and children.
- Extend the guarantees set out by the IDP act for displacement and relocations in the context of development to all situations amounting to 'forced evictions' as termed by the relevant international human rights mechanisms and strengthen provision of effective remedies, based on the overall recognition of the right to adequate housing as a precondition to the full enjoyment of family life.
- Adopt the draft national IDP policy, with a particular view to enacting the recommendations on measures the government should adopt in order to better protect IDPs' family life included in its section 85.
- Enact legislation to ensure that grave sites of IDPs are protected and respected in all circumstances, and that IDPs have the right to access the grave sites of deceased relatives.

On implementation:

- Introduce a system of registration of IDPs, for example, when they receive aid or medical care, which could assist families in locating missing relatives.
- Maintain an up-dated register of all IDPs within the jurisdiction or effective control of local authorities.

## 12. Housing, Land and Properties

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution / Articles 40(1)-(4), 40(6), 61(2), 62-64, 65(1), 67, 68  
IDP act / Articles 9(1)(e), 15(1)(a), 21, 22(4)(a)  
National Land Commission Act, 2012 / Chapter 5D  
Land Act, 2012 / Articles 9(4)(a), 12(1)-(9), 107(1), 107(5), 113, 134, 155, 156(1), 158,  
Land Registration Act, 2012 / Introduction, Articles 5, 8, 26, 28, 29, Part IX  
Environment and Land Court Act, 2012 / Articles 13(2)(e), 13(7)  
Community land bill, November 2014 / Articles 20(2), 33(1), 36(k), 41(2)(b), 46(1)  
Landlord and Tenant Bill, 2007 / Articles 4, 45, Part III  
Rent Restriction Act, 2010 (revised 2012) / Articles 2(1)(c), 5(1), 13(2), 14  
Housing Act, 1990 (revised 2012)  
Eviction and Resettlement Procedures Bill, 2013 / Articles 6, 9, 12  
Republic of Kenya, Ministry of Lands, *Seasonal Paper No. 3 of 2009 on National Land Policy*, August 2009

### **Recommendations**

#### *Protection from Displacement*

On normative action:

- Fully implement the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2014.
- Pass the eviction and resettlement procedure and community land bills to respect the circumstances of individuals not possessing individual property rights.
- Ensure laws passed to formalize property rights don't undermine or fail to recognize customary rights systems.
- Coordinate various legislation relating to IDPs such that gaps or overlaps in language that may undermine assistance to IDPs are redressed.

On implementation:

- Eliminate corruption within the property rights registry systems and improve access to them so that they function as envisaged within multiple pieces of land- and housing-related legislation, and so that they decrease the risk of rights recordation losses during conflict times.
- Emphasize sites and services rehabilitation programs for slum areas, rather than demolition, to minimize unnecessary urban displacement.

### **Relevant International Legal and Policy Sources**

Pinheiro Principles, Principles 12-21  
Kampala Convention, Articles 1, 4(5), 7(5)(d), 9(2), 11(1), 11(4), 12(2), 12(3)  
UN Guiding Principles, Principles 9, 14(2), 15(a) – (d), 21(1) – (3), 28(1), 29(2)  
Great Lakes Returning Persons' Property Rights Protocol, Articles 4(2) and 8  
ICGLR, "Protocol on the Property Rights of Returning Persons", Article 3(1)(a)  
UN General Assembly, "Universal Declaration of Human Rights", Article 17  
African Charter on Human and Peoples' Rights  
ICGLR, "Protocol on the Property Rights of Returning Persons," Article 4(2),(3), 5 and 6  
ICGLR, "Model Legislation on Property Rights of Returning Persons," Sections 5 and 7  
UN Human Rights Council, "Adequate Housing Report", III(C)(31)

- Limit government collusion with foreign and private developers, so that public-private partnerships can work effectively to provide cost-effective housing and resettlement homes.
- Provide specialized support to urban planning and national or regional development processes, with a view to ensuring these are sensitive to the prevention and mitigation of internal displacement and the rights of IDPs.
- Monitor the risk of displacement induced by development projects.
- Eliminate land grab practices by foreign, elite, and government agents.
- Ensure that projects not justifiable by overriding public interests do not result in internal displacement.
- Improve and increase public education on internal displacement minimally to ensure that those vulnerable to displacement or already displaced are aware of their rights entitlements.

#### *Protection during Displacement*

On normative action:

- Shore up resettlement programs to ensure displaced persons are housed appropriately and with secure,

enforceable property rights within settlement areas. Penalize individuals or entities, including government agents, who attempt to resell or reallocate land and housing allocated for IDPs.

- Ensure compensation provided to displaced persons is market rate, to avoid additional exploitation via under-compensation.
- Protect IDP property remaining in places of dislocation after the original owners are forced to leave. This includes ensuring that if an IDP property-owner loses her citizenship identification during displacement, that she is not further deprived of her property rights by being deemed a non-citizen.
- Recognize that IDPs remain in country to date, and treat as legitimate those reasonably presenting as such.

#### *Protection after Displacement – Durable Solutions*

On normative action:

- Establish clear and accessible procedures for compensation and/or restitution that are specific to IDPs.

On implementation:

- Create sufficient affordable housing to ensure those who seek employment and livelihood in urban areas can live in formal, secure properties.
- Where development projects must occur, ensure land acquisition for development purposes hires and trains local workers and houses them appropriately so that livelihood losses are offset.
- Deemphasize the notion that durable solutions can only be attained through land acquisition or allocation. Other alternative options to durable solutions should be explored with equal attention.
- The national land commission and national consultative coordination committee should liaise to ensure that their efforts operate in sync and reach IDPs as envisioned.

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## 13. Basic Necessities of Life

### ***Relevant Kenyan Legal and Policy Sources***

Kenya Constitution / Articles 24, 27, 43, 53, 56, 66 and Schedule 4  
IDP act / Sections 3, 5, 6, 7, 8, 11(5), 15(1), 22(4)  
Evictions and Resettlement Procedures Bill / Clause 12(1), 12(3)  
Draft National IDP Policy  
Executive Order / Section 7  
Public Health Act  
Kenya Medical Supplies Authority Act  
Pharmacy and Poisons Act  
Ministry of Medical Services, Ministry of Public Health and Sanitation, "Kenya Health Policy 2012-2030"  
Ministry of Health, "Human Resources Strategy 2014-2018"  
Water Act  
Water Resources Management Authority, "Strategic Plan for 2012-2017"  
government of Kenya, "National Climate Change Response Strategy", April 2010 / Section 2.2.1  
  
National Disaster Response Plan of 2009 / Chapter 2, 18(e)  
government of Kenya, "Vision 2030 Development Strategy for Northern Kenya and Other Arid Lands"

### ***Relevant International Legal and Policy Sources***

UN General Assembly, "Universal Declaration of Human Rights" / Article 25  
UN General Assembly, "International Covenant on Economic, Social and Cultural Rights" / Article 11(1), 12  
UN General Assembly, "Convention on the Rights of the Child" / Article 27(3)  
Kampala Convention / Articles 7(5)(c), 9(1)(e), 9(2)(a)-(e), 9(2)(g), 11(1)  
Kampala Declaration / Paragraph 10  
Draft African Union Model Law / Articles 5(2), 5(3), 14(4), 19(5), 24(2)(a), 24(2)(b), 24(2)(d), 25, 27, 36(2), 36(7), 38(1), 49(1)(b), 57(1)  
Guiding Principles / Principles 3, 7(2), 18(1), 18(2), 19, 24(1), 24(2), 25  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Articles 4(1)(b), 4(1)(f), 5(5), 6(5)  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Section 4(1), 4(10), 4(11)  
Pinheiro Principles / Principles 6.1-6.2, 8  
Pinheiro Principles Handbook / pp. 48-49  
UN Human Rights Council, "Security of Tenure Guidelines" CEDAW / Article 12(2)  
Fourth Geneva Convention / Article 23(1)  
The International Federation and the International Committee of the Red Cross Code of Conduct, 1994 / Part 3.5  
Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (Geneva, 1998)

## Recommendations

### *Protection from Displacement*

On normative action:

- Adopt the relevant provisions in the draft IDP Policy as an integral part of the ministry of health's national health planning policies to ensure that there is a coordinated framework ensuring the protection of IDPs' right to health and enjoyment of uninhibited access to medical care in Kenya that is part of the wider objective of improved health care provision and improved levels of public health in Kenya.

On implementation:

- Implement the public health policy 2012 – 2030 and other strategic health planning documents so as to improve the provision of health care to all Kenyan citizens, ensuring that the relevant mechanisms and structures are put in place at the national level to ensure coordination of regional and community health service provision.
- Ensure that all Kenyan citizens have full exercise of their right to adequate water and hygiene by continuing to maintain and develop the water and sewerage service infrastructure throughout the country, in accordance with the provisions of the water act.

### *Protection during Displacement*

On normative action:

- Amend the water act to include provisions under which a special regime is developed in relation to regulating suppliers' obligations with respect to the supply of water to displaced communities, so that IDPs are able to exercise their right to water and hygiene in the same manner as the general population.
- Ensures that IDPs enjoy full rights of access to hospitals and clinics open to general public (removing language and document requirements, as well as fees and other barriers to IDPs' enjoyment of their right to health).

On implementation:

- Ensure that the provision of health care, food, water and sanitation, and basic shelter and adequate housing adheres to the principles of adequacy under the ICE-SCR, as elaborated by the relevant CESC General Comments, including ensuring economic access to such goods and services and
- Conduct a baseline assessment and takes into account IDPs' pre-displacement and current food, water and sanitation and health care sources and needs, as well as housing traditions, practices and needs.
- Establish health posts and water and food service stations in camps or easily accessible locations, having mobile clinics; providing information on services.
- Addresses the health needs of women, including providing: antenatal, reproductive and sexual health care; psycho-social/trauma care, and SGBV counselling.

- Implement a coordinated strategic approach to ensure that all IDPs receive adequate health care, including medical (such as the provision of PEP kits and other antiretroviral medication) and psych-social care and services, without discrimination, with special consideration of the vulnerable, including the wounded, the chronically ill (particularly, those suffering from HIV/AIDS), women and children.
- Enforce the provisions of the IDP act to ensure that persons displaced as a result of development projects are relocated to areas with adequate water supply, along with the corresponding amendment of the Public Health Act to ensure that in circumstances where IDPs are forced to relocate to areas which do not meet this criteria, the relevant medical officer is mindful of the specific circumstances of the IDPs who might, in other circumstances, be considered the perpetrators of a nuisance under the Public Health Act.
- Ensure that, despite delegating health care services to the relevant local authorities, the necessary mechanisms and procedures are put in place at the national level to ensure that local authorities are able to adhere to the relevant standards of protection for IDPs under the IDP framework.
- Ensure that the livelihoods options for host communities and IDPs are supported or improved with a view to ensuring sustainability of different settlement options and avoiding potential conflict with returning or resettled communities.

### *Protection after Displacement – Durable Solutions*

On implementation:

- Provide IDPs with transitional shelter pending reconstruction or safe access to their homes in cases where rapid return is possible. Such shelter should be located in safe areas with access to humanitarian aid distribution, as well as social, educational, medical facilities, and employment and livelihood opportunities. In order to facilitate this, the government should design transitional housing in grouped settlements in consultation with IDPs, taking into account their pre-displacement housing practices, so as to minimise protection risks and maximise adequacy.
- Design all housing procedures in assistance of IDPs so as not only to maximise current adequacy but also to facilitate voluntary durable solutions.
- Ensure that returning IDPs receive health care, food, water and sanitation services, as well as basic shelter and housing assistance, which is adequate and which is provided on the same basis (that is non-discriminatory) as to the host community.
- Continue to support returning IDPs as they settle in their new host communities, only gradually reducing the support and concessions that they have received during their displacement, such as reduced water service costs, over an extended period of time.

## 14. Other' Economic, Social and Cultural Rights

### **Relevant Kenyan Legal and Policy Sources**

Kenya Constitution, 2010 / Articles 27, 43, 53, 55, 56, 260  
Employment Act, 2007 / Article 5(3)  
Labour Act, 2007  
Basic Education Act, 2013 / Articles 28, 30, 33, 34, 39

### **Relevant International Legal and Policy Sources**

Kampala Convention / Articles 3, 9  
Kampala Declaration / Paragraphs 11, 14  
Draft African Union Model Law / Articles 26, 29  
Guiding Principles / Principles 19, 22, 23, 29  
ICGLR, "Security Pact" / Article 20  
ICGLR, "Draft Model Legislation on the Protocol on the Protection and Assistance to IDPs" / Section 5(1)  
African Charter on the Rights and Welfare of the Child / Articles 3, 11  
UN General Assembly, "Convention on the Rights of the Child" / Article 28(1)  
IDP act / Articles 5, 9

### **Recommendations**

On normative action:

- Adopt the draft IDP policy and follow up on the adoption of the measures required by the policy itself to ensure access to education, employment and social protection.

On implementation:

- Protect IDPs and their children from discrimination by removing potential obstacles to the enjoyment of their educational rights, such as documentation or school fees requirements.
- Create learning facilities in camps whenever external schools are not physically reachable by IDPs and strengthen the educational services in areas affected by large numbers of IDPs.
- Take measures to remove practical barriers that prevent IDPs from accessing employment opportunities, social protection or education, including relaxing certain documentation to prove status, age, educational history, professional qualifications or residency.
- Take measures to build capacity amongst the educational profession and public authorities with regard to the provision of education for internally displaced children, including awareness of internally displaced children's specific educational needs and challenges.
- Formulate indicators to measure access to education, employment and social protection among IDPs in areas of return, resettlement and integration as a way to verify attainment of durable solutions.

## 15. Disaster-induced Displacement

### **Relevant Kenyan Legal and Policy Sources**

Government of Kenya, Ministry of State for Special Programmes, Office of the President, "Draft National Policy on Disaster Management," February 2009  
Kenya Drought Operations Plan 2013-14, October 2013  
Kenya Constitution  
IDP act  
County Disaster Management Bill  
National Disaster Response Plan, 2009

### **Relevant International Legal and Policy Sources**

Sendai Framework for Disaster Risk Reduction 2015-2030  
Kampala Convention / Articles 4, 5, 9, 12  
Guiding Principles / Principles 6, 7  
ICGLR, "Security Pact" / Article 20  
ICGLR, "Protocol on the Protection and Assistance to IDPs" / Articles 3, 6  
ICGLR, "Dar Es Salaam Declaration" / Paragraph 65.

### **Recommendations**

#### *Protection from Displacement*

- Ensure that the various institutions that deal with disaster prevention are coordinated both at the national and county level to enhance efficient cooperation and, consequently, protection from disaster-induced displacement. Such institutions should link up with the NCCC to optimise coordination.
- Ensure that institutions at the national and county level consult with communities to create channels for community participation in disaster prevention and preparedness efforts.
- Incorporate IDPs specifically into the framework and policy statements of drought-management organs and institutions. Droughts cause particular harm to the poor and vulnerable; efforts should consequently be made to protect these individuals, including individuals that have been displaced, from further harm.
- Ratify the Kampala Convention to ensure more emphasis on monitoring durable solutions, which is currently lacking in the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012.

#### *Protection during Displacement*

- Ensure that disaster management institutions at county level have the means and resources to protect IDPs during displacement. This will involve adequate funding and personnel.
- Ensure that the various institutions that deal with disaster prevention are coordinated both at the national and district level to enhance efficient cooperation and, consequently, protection during displacement. These institutions should work closely with local communities to mitigate disaster impact on groups as well as individuals in affected areas. Such institutions should link up with the NCCC to optimise coordination.

#### *Protection after Displacement – Durable Solutions*

- Ensure that the county disaster management fund is adequately funded. Resettlement of IDPs and rebuilding of communities require targeted resources in the form of capital and skilled personnel.
- Enhance coordination between disaster management institutions at the national and county level to ensure that competence and resources are being shared for effective IDP resettlement and (re)integration. Such institutions should link up with the NCCC to optimise coordination.



## Appendix B: List of participants Nairobi Workshop, 10 - 11 June 2015

Name	Title	Organisation
Caren Kiptoo	Programme Officer	DRC
Victor Nyamori	Refugee Officer	Amnesty International
Rufus Karanja	Regional Comms & Advocacy Officer	DRC
Wairimu Munyinyi	Regional Protection and Advocacy Advisor	NRC
Phelix Lore	Programmes Coordinator	Haki Centre
Keffa K. Magenyi	Programmes Coordinator	IDPAC Kenya
Neddie Eve Akello	Legal Advisor	SR/UNHCR
Gemma Davies	Coordinator	ReDSS
Henry Benjamin Odhambo	Assistant Programme Officer	RCK
Ronnie Akedi	Assistant Protection Officer	UNHCR
Verena Waldhart	Peacebuilding Advisor	GIZ
Julie K. Matoke	Legal Officer	Kituo Cha Sheria
Henry Osoro	Senior Statistician	KNBS
Wouter de Cuyper	Humanitarian Affairs Officer - Kenya Focal Point	OCHA
Steve Apudo	Programme Officer	IRC
Aimee Ongeso	Programme Coordinator	Kituo Cha Sheria
Paul Kawega	Peacebuilding Advisor	GIZ
Nashon Tado	Regional Information & Advocacy Officer	NRC
Faith Alubbe	Programme Advisor	KHRC

## Appendix C: Citation abbreviations

<i>ACHPR, “31: Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa”</i>	African Commission on Human and Peoples' Rights (ACHPR), “31: Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa”, 31 October 1998, <a href="http://www.achpr.org/sessions/24th/resolutions/31/">http://www.achpr.org/sessions/24th/resolutions/31/</a> (accessed 16 October 2014).
<i>African Charter on Human and Peoples' Rights</i>	Organisation of African Unity, “African Charter on Human and Peoples' Rights”, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <a href="http://www.refworld.org/docid/3ae6b3630.html">http://www.refworld.org/docid/3ae6b3630.html</a> (accessed 15 September 2014).
<i>African Union, “Africa Position to the 4<sup>th</sup> Global Platform for Disaster Risk Reduction”</i>	African Union, “Africa Position to the 4 <sup>th</sup> Global Platform for Disaster Risk Reduction”, Geneva, 19 – 23 May 2013, <a href="http://www.preventionweb.net/files/33256_officialstatementafricanunion21may.pdf">http://www.preventionweb.net/files/33256_officialstatementafricanunion21may.pdf</a> (accessed 16 October 2014).
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<i>Draft National Policy on Disaster Management</i>	Government of Kenya, Ministry of State for Special Programmes, Office of the President, 'Draft National Policy on Disaster Management', February 2009. <a href="https://www.ifrc.org/docs/idri/765EN.pdf">https://www.ifrc.org/docs/idri/765EN.pdf</a>
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## Notes

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- 2 IDMC, 3 June 2014.
- 3 OHCHR, February 2012.
- 4 OCHA, 4 December 2014.
- 5 IDMC/NRC/IDPAC, The potentials of the Kenyan policy and legal framework for addressing internal displacement, January 2015, unpublished.
- 6 RCK/DRC, January 2013 p. 8.
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- 8 OHCHR, February 2012.
- 9 RCK/DRC, January 2013 p. 17.
- 10 IDMC/NRC/AU, December 2013.
- 11 See *id.* Art. 7: The memorandum shall outline: (a) the objects and subject matter of the treaty; (b) any constitutional implications including (i) any proposed amendment to the Constitution; and (ii) that the treaty is consistent with the Constitution and promotes constitutional values and objectives; (c) the national interests which may be 'affected by the ratification of the treaty; (d) obligations imposed on Kenya by the treaty; (e) requirements for implementation of the treaty; (f) policy and legislative considerations; (g) financial implications; (h) ministerial responsibility; (i) implications on matters relating to counties; (j) the summary of the process leading to the adoption of the treaty; (k) the date of signature; (l) the number of states that are party to the treaty; (m) the views of the public on the ratification of the treaty; (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations; (o) the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the Constitution; and (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.
- 12 As stated in Art. 3.2.a) and c) of the Kampala Convention.
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- 14 For more information on the process of development of the national IDP policy in Kenya, please see: RCK/DRC, January 2013.
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- 16 Cabinet, October 2012.
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- 21 The IDP act defines "non state actors" as "persons or organisations who are not attributable to the state and whose actions are generally not attributable to the state". However, the interpretation that has been given to this term seems to indicate a narrower scope, mostly national and international civil society organisations. This would therefore seem to exclude non state armed groups. A comprehensive domestication of the Kampala Convention instead, would require a specific reference to the latter.
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- 29 As noted in the Brookings-LSE Project on Internal Displacement, "National Instruments on Internal Displacement: A Guide to their Development," August 2013, pp. 29-30, whether or not to undertake registration can be a difficult decision. On the one hand, it may be necessary or useful when it serves a specific purpose, for example, identifying those entitled to receive or access a specific benefit such as food relief. On the other hand, registration may not be appropriate, particularly if sensitive data cannot be properly managed and protected, the displacement situation is volatile, IDPs have fled to inaccessible areas or the necessary resources and capacities are not available to manage and complete the process. Registration also carries risks, such as the misuse of personal data; the exclusion of some IDPs, not only from registration but also from assistance if these are linked; the creation of unrealistic expectations in terms of assistance or protection; reliance on outdated data if databases are not properly maintained; and reprisals because registration may associate IDPs with particular parties to a conflict.
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- 31 Kampala Convention, Article 1, Paragraph k.  
 32 UN Guiding Principles, 1998, Principle 6.  
 33 Kampala Convention, Article 10.  
 34 Great Lakes Protocol, Article 1(4).  
 35 The Pinheiro Principles, Principle 1, Scope and application.  
 36 Internal Displacement Monitoring Centre (IDMC), Brookings-LSE Project on Internal Displacement, "National Instruments on Internal Displacement: A Guide to their Development," August 2013, p. 9, available at [http://www.brookings.edu/~media/research/files/reports/2013/09/03-policy-makers-guide-idp/la-wandpolicymaking\\_guide2013.pdf](http://www.brookings.edu/~media/research/files/reports/2013/09/03-policy-makers-guide-idp/la-wandpolicymaking_guide2013.pdf).  
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 39 Draft National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya, August 2011, Objective 2.  
 40 Magenyi, Karanja, Klopp, Huggins & Li, NRC/IDMC & Internal Displacement Policy & Advisory Centre, "The potentials of the Kenyan policy and legal framework for addressing internal displacement," November 2014, p. 3.  
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 45 Manual pp 17 - 18  
 46 Manual, Annex III.  
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 48 Kampala Convention, Article 9(i)(a).  
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 50 Kampala Convention, Article 4(4)(a).  
 51 Kampala Convention, Article 5(i).  
 52 UN Guiding Principle, Principle 1(i).  
 53 UN Guiding Principle, Principle 29(i).  
 54 Kälin, "Guiding Principles on Internal Displacement: Annotations", pp. 11 – 12. See, e.g., UN General Assembly, "Universal Declaration of Human Rights", Article 7; UN General Assembly, "International Covenant on Civil and Political Rights", Article 26; American Convention on Human Rights, Article 24; ThinkAfricaPress, "5: Understanding the African Charter on Human and Peoples' Rights"; First Geneva Convention, Article 3; Second Geneva Convention, Article 3; Third Geneva Convention, Article 3; and Fourth Geneva Convention, Article 3.  
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 64 OHCHR, "Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani", p. 13  
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98 CESCR, General Comment No. 7, Paragraph 14.  
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A group photo of the Law and Policy workshop participants in Nairobi. NRC/N. Tado, June 2015




# About IDMC


The Internal Displacement Monitoring Centre (IDMC) is the leading source of information and analysis on internal displacement. For the millions of people worldwide displaced within their own country, IDMC plays a unique role as a global monitor and evidence-based advocate to influence policy and action by governments, UN agencies, donors, international organisations and NGOs.

IDMC is part of the Norwegian Refugee Council (NRC), an independent, non-governmental humanitarian organisation.

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