

**UNIVERSITY OF NAIROBI**  
**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES (IDIS)**

**POST-ELECTION VIOLENCE, INTERNAL DISPLACEMENT AND THE LAW:  
A CASE STUDY OF KENYA (2007-2008)**

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A Research Proposal submitted in partial fulfillment of the degree of Masters of Arts in  
International Studies

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## DECLARATION

This Research Project is my original work and has not been submitted for a Master's degree in any other university.

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I wish to thank the faculty members who ensured that, despite straying, I have been restored to the path of academic pursuit. A special mention to the Director of the Institute of Diplomacy and International Studies Prof. Maria Nzomo who assigned me a new supervisor, the incomparable Machogu Tirimba, when the easier option would have been to declare me discontinued after such a long interlude.

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I am forever in your debt, and wish to express my sincere gratitude for all you have done.

## **DEDICATION**

At the close of 2009, in the dying embers of post-election violence, an IDP camp was thriving inside the Nakuru Agricultural Society of Kenya (A.S.K) showground barely fifty metres from the author's home.

As part of the community, our family decided to sponsor the best Kenya Certificate of Primary Education (K.C.P.E) student to secondary school. In conjunction with the local Trinity Catholic Church, we identified a girl called Rachael Njeri Mwangi and bore the responsibility of paying her secondary school fees. She completed her secondary education in December 2013 but tragically died of medical complications early this year on 11<sup>th</sup> January 2014.

This paper is dedicated to the memory of Rachel, and to all the other IDPs who suffered, and continue to suffer, pestilent forced migration.

## **ABSTRACT**

History is littered with situations of forced migration, for whatever reason, since the beginning of time and throughout human existence. In many cases, it is mother earth herself who wreaks havoc on her inhabitants through natural calamities forcing them to move from their customary abodes. Little, if anything, can be done to counter displacement caused by floods, earthquakes, or even volcanic eruptions.

It is a far more curious affliction when the displacement of persons is, often violently, inflicted by their fellow human beings. Is it our innate instinct for survival? Is it our constant conflict over resources? Or have we merely succumbed to base (re)actions fuelled by greed, fear and hatred? It is possible to have a cerebral discussion of the phenomenon of internal displacement and that is what this research paper endeavours to do.

If it is agreed that certain entities - in this case states - are principally responsible for the welfare and security of their people, then we must ask questions when they fail to protect citizens from forced migration. In so doing, one can interrogate the strength of the unit responsible i.e. the state and the efficiency of the structures and systems put in place to prevent internal displacement.

Only then can we begin to deal with the stupefying realization that internally displaced persons have overtaken refugees and are now in excess of 50 million worldwide.

## **ABBREVIATIONS**

AG	Attorney General
AU	African Union
CIPEV	Commission of Inquiry into Post-election Violence
GSU	General Service Unit
IASC	United Nations Inter Agency Standing Committee
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
KNCHR	Kenya National Commission on Human Rights
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAU	Organization for African Unity
SLDF	Sabaot Land Defence Force
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Emergency Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs

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## CHAPTER 1: BACKGROUND TO THE STUDY

### 1.1 INTRODUCTION

Internal displacement is hardly a new phenomenon in Kenya and, indeed, the world at large. For those of us who have lived in relatively peaceful times, it is easy to forget that conflicts and the resultant forcible migration have been a common feature of human existence since ancient times. A cursory glance at the world's most prolific publication – The Bible – reveals a history replete with examples of conflict and consequent displacement. Some scholars have written extensively on the forced migration of communities in the Bible noting that displacement in ancient ages shares many common features with displacement in the modern era<sup>1</sup>.

Adam and Eve are offered up as the earliest example of forcibly displaced people. To quote the first book of the Bible *“So the Lord God expelled him from the garden of Eden, to till the soil from which he had been taken. He banished the man, and in front of the Garden of Eden he posted the great winged creatures and the fiery flashing sword, to guard the way to the tree of life.”*<sup>2</sup> Not only were Adam and Eve banished, they were barred from returning to the Garden of Eden for good measure. Present day internally displaced persons (IDPs) would find that narrative familiar when they contemplate the two-pronged punitive nature of displacement; forced migration accompanied by an obstacle to repatriation. That incident is quickly followed up by the story of Cain's banishment by God as punishment for killing his brother Abel in Genesis 4: 12-14. These are just a few among many other examples in the bible. Based on the trend or pattern of displacement established as early as the (biblical) existence of man, it is no wonder that displacement is such a massive concern today. Reference to the Bible helps in setting out a

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<sup>1</sup> Brad E. Kelle, Frank Ritchel Ames and Jacob L. Wright - *Interpreting Exile: Displacement and Deportation in Biblical and Modern Contexts* 2011

<sup>2</sup> The New Jerusalem Bible, Genesis 3:23-24

hypothetical timeframe and to identify a possible commencement point for forced migration. It does no harm to have this biblical backdrop to an issue that has been in existence as long as man himself. Early illustrations in the Bible help to bring the issue of displacement into focus. The religious analogy may be useful to the scholar while preparing to dissect the topic of displacement and to draw informed conclusions.<sup>3</sup>

## **1.2 BACKGROUND TO THE RESEARCH PROBLEM**

Wars, human rights violations and other forms of civil strife have resulted in people being forced to relocate within the borders of their own countries to seek refuge. In Kenya, from independence to date<sup>4</sup>, the issue of internal displacement of persons continues to constitute one of the unresolved issues of personal insecurity, human rights violations, homelessness, poverty, hunger, degradation and deprivation. The word “refuge” is used advisedly and in the knowledge that it is the noun from which the status of refugee is derived. The irony here is that internally displaced persons in Kenya are not classified as refugees despite their desperate need for refuge. We are, therefore, left with a group or groups of people forcibly evicted from their homes, deprived from their constitutional right to own property<sup>5</sup>, assaulted physically or mentally and occasionally tortured, raped and murdered. It is inconceivable that the single largest and most vulnerable population in the world has no legal definition. It must be pointed out, however, that in the intervening period during which this paper has been written, the Republic of Kenya adopted a new Constitution. This was executed by way of a referendum in 2010 where Kenyans voted overwhelmingly for a new Constitution. The current constitutional regime in Kenya actually recognizes IDPs as a special class that requires specialized attention and protection.

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<sup>3</sup> Refugees in the Bible, International Association for Refugees 2012 – [www.iafr.org](http://www.iafr.org)

<sup>4</sup> On the Trajectory of Internally Displaced Persons - Commission of Inquiry on Tribal Clashes 1992-1997

<sup>5</sup> Section 75 of the Constitution of Kenya 1963

One must appreciate that, by description, internally displaced persons (IDPs) are an internal problem. Consequently, the international community may be slow to intervene on the basis of the principles of territorial sovereignty, non-interference and territorial integrity. However, to assert the need for international intervention is to absolve Kenya of its responsibility to tackle its problems and to concede to our inability to solve our internal problems. **The solution to the IDP conundrum may not lie beyond our borders. As a country we should be loath to conduce to a situation whereby an internal problem must be resolved by external factors. This is an abdication of responsibility and the problem will never, truly go away.**

The causes of internal displacement in Kenya are all capable of identification. The majority of those causes are also capable of local resolution. We only ought to seek external assistance when particular concerns are beyond the means of the state. To begin with, IDPs must be defined in law so that their needs may be addressed. It is impossible to articulate the plight of internally displaced persons, particularly, when one considers that there are no legal channels for the solution of their problems.

Prior to the December 2007 parliamentary and presidential elections, conflict-induced displacement had already led to major displacement in 1992, 1997, 2006 and 2007, especially in the Rift Valley. Many of the people displaced by the 2007 election violence had previously experienced such violence, and roughly 400,000 had already been displaced. Displacement unrelated to the election violence has continued to affect many parts of Kenya through 2008. Non-election related violence attributed to clashes over ownership of land, has also been

experienced in parts of coastal and Rift-Valley provinces commonly known as the “land clashes”. In Mount Elgon, security operations by the government against the Sabaot Land Defence Force (SLDF) led to loss of lives and livelihoods and displaced thousands of people<sup>6</sup>.

This research is partly motivated by the events that took place in the aftermath of the hotly contested presidential elections of 2007. Various factions disputed the results and their frustrations escalated into violent conflict. The violence that followed caused many deaths and resulted in the mass uprooting of various peoples from their homes in fear for their lives. The other motivation for this study is the alarming pattern of violent conflict immediately preceded by general elections in Kenya. For the last two decades, each general election has been followed by violent conflict between perceived victors and losers. Internal displacement is one of the disappointing outcomes of clashes between political contestants and/or their acolytes. Internal displacement cannot be regarded in isolation and it is against the backdrop of political power struggles that we must regard this problem in Kenya. Added to that, it is vital that the existing framework on protection and promotion of the rights of marginalized persons be considered so that shortcomings may be identified. The absence of a binding international legal regime on internal displacement poses a great challenge on protection of IDPs<sup>7</sup>.

### **1.3 STATEMENT OF THE RESEARCH PROBLEM**

This study analyzes the status of internally displaced persons in international law with specific reference to the Kenyan situation. In particular, it examines the utility of international legal principles in protecting the interests and welfare of Kenya’s IDPs.

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<sup>6</sup> IDMC “*Kenya: No durable solutions for internally displaced yet*” available at [www.internal-displacement.org](http://www.internal-displacement.org) last accessed on 20<sup>th</sup> June 2010

<sup>7</sup> Nyandugi, F. Forced Migration Review Number 8

The status of refugees is recognized in International law. In fact, the rights that refugees are entitled were expressly defined as early as 1951<sup>8</sup>. It beggars belief that there is no mechanism or framework in place to address the plight of the exceedingly unfortunate IDPs. This is all the more remarkable when one considers that there are more internally displaced persons than refugees worldwide. It appears that the problem lies in the legally accepted definition of a refugee, in contrast with the amorphous term “internally displaced persons”. The greater concern is that notwithstanding the extreme distress suffered by this group, no steps have so far been taken to create a binding international legal framework within which the concerns of IDPs may be addressed. The gravity of the situation appears to have escaped the attention of international lawyers, international organizations and other non-state actors that provide assistance and relief during crises. Perhaps, the enormity and complexity of the problem has overwhelmed those expected to provide solutions.

Ideally, the extensive provisions of refugee law, international law and international humanitarian law ought to afford adequate protection to those finding themselves displaced. However, owing to the peculiar status of IDPs as a nebulous collective, they slip through the cracks in international legislation. This is particularly disconcerting when one considers that the number of afflicted groups of different classification has been steadily reducing on account of the giant strides in international law. Of particular interest are the refugees whose numbers have been drastically reduced worldwide and whose needs receive adequate attention.

Indeed it should not be permissible for the technical distinction between refugees and IDPs to perpetuate the suffering of persons displaced within their own countries. It is possible to enact

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<sup>8</sup> Convention relating to status of Refugees 1951

international legislation that will take into account the special characteristics of IDPs and create a system of checks and balances for their welfare. By discounting IDPs as a problem for the individual state(s), the international legal fraternity is guilty of granting unwarranted reverence to the issue of sovereignty. Equally, the reluctance by international lawyers' and their inertia in resolving issues on the definition of IDPs contributes to the continued enormity of the IDP problem. Consideration must be had for the bigger picture: that although IDPs are primarily a domestic issue, the escalation of IDP numbers is global concern.

#### **1.4 OBJECTIVES OF THE STUDY**

1. To investigate the utility and adequacy of international legal, institutional and operational frameworks in providing protection of internally displaced persons in Kenya.
2. To evaluate performance of the Kenyan government in implementing protection programmes for the benefit of IDPs in accordance with existing international human rights and humanitarian normative standards.
3. To make appropriate recommendations on strengthening of legal and institutional frameworks geared towards enhancing the welfare of Kenya's internally displaced.

## **1.5 RESEARCH QUESTIONS**

1. What are the legal and institutional frameworks for the protection and assistance of IDPs in Kenya?
2. How effective has the Government of Kenya been in implementing the legal and institutional frameworks for the protection of IDPs in Kenya?
3. How can the protection and assistance to Kenyan IDPs be enhanced using the legal and institutional frameworks?

## **1.6 JUSTIFICATION OF THE STUDY**

This study has been selected due to concerns over the absence of suitable legal mechanisms, escalation of number of IDPs in post 2007 period, delayed resettlement of IDPs, failure of *operation rudi nyumbani* (Swahili for “return home”) programme and the possible recurrence of the phenomenon during the future elections.

The current policies applied are simply inadequate to address a problem that is growing with no signs of being solved in the near future. State governments are charged with the responsibility of protecting the constitutionally guaranteed rights of IDPs. Whereas, on the one hand, I believe that we have laws in place that could serve to protect IDPs if only a little creativity were employed to the interpretation and enforcement of those laws, it is not clear what is supposed to happen when those governments are not in a position to do so. Especially, upon consideration of the fact that the most afflicted IDPs are citizens of Third World Countries bedeviled by a myriad of problems. Even a well-intentioned government may exacerbate its IDP situation by its inability to cope with their needs. As stated earlier, there are more IDPs than refugees yet there



exists a clear framework for handling *that* demographic. To make matters worse, it is well documented that some governments are the direct causes and perpetrators of acts leading to displacement.

Even the simple task of defining the term IDP has yielded unsatisfactory results. Legal experts who prepared the Guiding Principles on Internally Displacement<sup>9</sup> studiously avoided the use of the term ‘definition’; there is frequent ill-informed mention of the so-called ‘IDP definition’. More accurate is Walter Kalin’s recent assertion that what the Principles give us is “a descriptive identification of that category of persons whose needs are the concern of the Guiding Principles”<sup>10</sup>.

Secondly, existing literature focuses on the status quo and situational analysis of the IDP problem and the political solutions that have been offered by the government to date including the *operation rudi nyumbani* initiative. Little work has given prominence the need for addressing the problem through legal reform and prescribing long-term solutions. The study aims to fill in these gaps in existing literature and offer alternative perspectives to resolution of the research problem. Inquiry into the strengthening of the legal framework is justified on basis that legal reform would enhance the welfare of IDPs and offer long-term solutions in terms of entitlement to security, economic empowerment, access to justice and resettlement.

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<sup>9</sup> United Nations The Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, February 11, 1998

<sup>10</sup> Vincent, P. Forced Migration Review Number 21

This study is therefore intended to contribute towards the debate on how best to address IDPs problems in Kenya. The conclusions and recommendation would be useful in informing public policy and legislation to avoid future displacement of Kenyan citizens.

## **1.7 CONCEPTUAL FRAMEWORK**

Kenya's approach to the problem of IDPs is in no small way informed by the tenets of Realism, where the state remains the primary actor in international relations. In the absence of a world government, anarchy prevails. The state concerns itself with the "three S" triumvirate of Survival, Security and Sovereignty.

As a result, the modest advances in IDP protection structures are slowed into a grinding halt by the overriding need to acknowledge the state's sovereignty. The international community may wish to extend humanitarian support but it cannot do so without Kenya's permission. On the other hand, consideration must be had for Kenya's genuine fears of and abhorrence for external interference. It is not uncommon for humanitarian intervention to result in unwanted consequences for certain governments. Recent events in North Africa and the Middle East are testament to this. The North Atlantic Treaty Organization (NATO) resolved<sup>11</sup> on 31<sup>st</sup> March 2011 to intervene on behalf of Libyan citizens protesting the oppression suffered under the regime of President Muammar Gaddafi. As a consequence Libya's dictatorship was toppled and Gaddafi was himself captured and killed by rebel fighters signaling a change of guard in that country. It remains debatable whether the citizens of Libya are better off for that intervention.

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<sup>11</sup> United Nations Security Council Resolution 1973 of 2011

Even the powers behind dislodging Libya's dictatorship may be ruining some of their choices. On 11<sup>th</sup> September 2012, rebels attacked the United States of America's Consulate in Benghazi resulting in four casualties<sup>12</sup>. Among the victims of that attack was the U.S. Ambassador to Libya; the principal American representative of U.S. Government interests in Libya. News reports indicate a nation in a persistent state of flux with subsequent attacks on high profile targets including the French Embassy in Tripoli<sup>13</sup> on 23<sup>rd</sup> April 2013. Potential interveners must be thinking twice about the wisdom of their actions when both America and France are unable to protect their most valuable assets in the country. So, what hope for IDPs if superpowers can't even guarantee the safety of their own?

While national sovereignty does offer vital protection to small and weak states, "it should not be a shield for crimes against humanity."<sup>14</sup> A key concern here is that in many instances, the state entrusted to protect its displaced citizens is also the main oppressor of those people. The first step must be to try to reconcile at the conceptual level the tension between sovereignty and humanitarian intervention. This can be done by promoting the concept of sovereignty as "responsibility" to one's citizens and to the international community<sup>15</sup>.

The seemingly inevitable reference to Realism as the dominant theory does not imply that it is the sole framework capable of establishing a basis for this study. The role of non-state actors in protection of IDPs must not be ignored. The involvement of international organizations, multinational corporations, charitable bodies, non-governmental organizations and other such

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<sup>12</sup> BBC News Africa - <http://www.bbc.co.uk/news/world-africa-19587068>

<sup>13</sup> BBC News Africa - <http://www.bbc.co.uk/news/world-africa-22260856>

<sup>14</sup> Kali, Annotations to The Guiding Principles on Internal Displacement 1998

<sup>15</sup> Deng, Masses in Flight: The Global Crisis of Internal Displacement, Brookings Institution Press, 1998

like entities happens to be very important. So significant are the contributions of those actors that their participation lends credence to the arguments in support of the Liberal Institutionalism. There are marked differences between theories of Realism and Liberal Institutionalism. This study seeks to rely on the theory of Liberal Institutionalism as one that employs alternative approaches to establishment of legal framework and lasting solutions to the IDP challenges.

## **1.8 HYPOTHESIS**

- (a) International normative standards and principles adequately provide for the protection and assistance of IDPs in Kenya save for the government's shortcomings in implementation thereof.

## **1.9 RESEARCH METHODOLOGY**

It is proposed that the study will rely on both primary and secondary data. Collection of relevant primary data is undertaken through interviews. Three categories of persons were proposed to be interviewed, namely, IDPs, public officials from the relevant Government Ministry and non-state actors such as Red Cross officers. Unstructured questionnaires to IDPs would have been preferred as they allow for flexibility of responses and the results are usually free of distortion. However, this method is intensive in terms of time and resources. In most circumstances, where IDPs were in far-flung destinations, structured questionnaires have been used.

It was proposed that no fewer than twenty (20) oral interviews with displaced individuals be conducted in person. Ultimately, ten (10) IDPs were interviewed as well as two (2) camp

administrators from Vumilia IDP camps “A” and “B” both situated in Gilgil Town approximately 600 kilometres from the researcher’s current location in Mombasa.

Interviews with officials of relevant government departments were to be interviewed by the writer with a view to establishing the role of Kenya’s government in protecting its internally displaced. This previously fell within the docket of the Ministry for Special Programmes but following Government restructuring after the 2013 elections the responsibility for IDPs was transferred to the Ministry of Interior. This transfer of responsibility presented the author with yet another challenge in data collection.

In order to bring the issues into sharper focus, the role of the United Nations High Commission for Refugees is placed under the spotlight. With the Head Office situated at Nairobi, access to information was not difficult. A perusal of their various reports on the IDP phenomenon coupled with oral interviews illuminates the matters raised by this study.

Desk review of primary data including international treaties, conventions, agreements, protocols, rules, handbooks and guiding principles will be undertaken. This will enable the collection of information on existing legal regimes and their roles. It will also enable reference to provisions relating to refugee law, humanitarian law and human rights law.

With regard to non-reactive data, it is proposed to carry out a thorough examination of previous writings on the subject. For example, perusal of editions of the Forced Migration Review journal has contributed to the preparation of the proposal to this study. In addition, there are many

informative sources on the Internet that will assist in the articulation of this research problem. Certain aspects of this research which would have been previously inaccessible are only a click away on the net. The sample size is magnified exponentially when research is based on non-reactive data such as books as a much wider source of information is available. Also, there is little risk of a researcher/respondent bias arising as there is no interaction. However, one must take care not to adopt certain biases that were already contained in the text. Equally important are the cost implications of conducting research by these means. It is cheaper to read widely than to travel the four corners of the globe in search of answers. The quality of most published material is usually very high and such quality is reflected in the research.

#### **1.10 LITERARY SCOPE AND LIMITATION**

The first challenge encountered in collection of data is the fact that there is a dearth of material published in books regarding the subject of internal displacement. Much less, when the parameters are narrowed to displacement caused by violence of the nature experienced in Kenya over the relevant period. To make matters worse, where literature is retrievable, it is dated and outmoded. Fortunately, there are numerous and current journals on the topic of displacement. Publications such as the Forced Migration Review and International Journal of Refugee Law provided a source of vital information.

#### **1.11 LITERATURE REVIEW**

In the preparation of this project paper, it was felt that reference must be made to the earliest instances of displacement ever recorded in human history. It should come as no surprise then that

the very first reference point was the Holy Bible. In particular, **The New Jerusalem Bible**<sup>16</sup> is a rich source of narratives on displacement starting with the story of Adam and Eve.

Naturally, it became important to delve deeper into the biblical analogy of displacement as a launch pad for this project. A perusal of literature on the anthropology of biblical exile<sup>17</sup> directed this scholar to yet another publication on interpretation of biblical exile<sup>18</sup>. Perceiving forced migration from this early vantage point helped in laying the groundwork for appreciating displacement as a terminal condition of human existence. Exile appears as a common theme in the bible with numerous incidents of God's children being displaced to Egypt, Babylon and so on. A minor distinction may be drawn where the forced migration of biblical times resulted in the victims moving out of their "nations." For example, in the book of Exodus, the Israelites had been taken to Egypt and sought to return "home." That situation may be distinguished as that of refugees rather than IDPs. That would also be the case where Israelites were displaced to Babylon; a region which is now widely accepted to be the area occupied by present day Iraq. That was also more likely to be an issue of refugees as opposed to what we refer to as IDPs on account of victims traversing "national" borders.

This project attempts to address, principally, the displacement that occurred in the wake of presidential elections in 2007. The shocking levels of violence witnessed and the sheer magnitude of the problems that arose as a consequence of that conflict led to many questions regarding how the country found itself in such a crisis. In the mood of self-reflection, a national

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<sup>16</sup>The New Jerusalem Bible Published 1990 by Darton, Longman & Todd Ltd.

<sup>17</sup> The Crisis of Israelite Religion: Transformation of Religious Tradition in Exilic and Post-Exilic Times, Becking Bob & Marjo C.A Korpel (1999)

<sup>18</sup>Interpreting Exile: Displacement and Deportation in Biblical and Modern Context by [Brad E. Kelle](#), [Frank Richtel Ames](#) and Jacob L. Wright 2011.

inquiry was launched by the government. Christened the **Commission of Inquiry into Post Election Violence (CIPEV) 2008**, the entity was formed in May 2008 and commenced work in June 2008. Its mandate was to investigate the facts and circumstances surrounding the violence, the conduct of state security agents in their handling of it and to make recommendations. This mandate was captured in its report published towards the end of 2008. The roots of electoral conflict were traced back to Kenya's nascent multi-party democracy in the 1990s when there was deliberate use of violence by politicians to obtain power. Coupled with the absence of punitive measures, the politicized violence grew into the monster that devoured thousands of Kenyan souls in 2007-2008. It would, under the circumstances, be remiss, for the scholar to ignore the **Report of the Commission of Inquiry into Tribal Clashes of 1992 and 1997**.

The **Report of the Commission of Inquiry into Tribal Clashes of 1992 and 1997**<sup>19</sup> (popularly referred to as the Akiwumi Commission) contains the causes and effects on tribal clashes that had erupted attributable to the 1992 and 1997 elections<sup>20</sup>. The Commission made findings to its investigation and concluded by giving recommendations that should be implemented to prevent recurrence of the violence and displacement of citizens; ensure perpetrators were held accountable for their actions; address issue of land; and, to end a culture of impunity. In its findings, the report implicated the security forces in particular the Administration Police and the Police in contributing to the escalation of violence because of reluctance to intervene even though there was sufficient actionable intelligence that tribal clashes were imminent. The reason for their reluctance was linked to resistance to democratic governance as the country as democratic transition from one-party rule to multi-party system of government. The violence was

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<sup>19</sup> Republic of Kenya, Report of the Commission of Inquiry into Tribal Clashes of 1992 and 1997 Government Printers

<sup>20</sup> This report was released more than 4 years after conclusion of the work of the judicial commission.



fuelled by ethnically divisions amongst communities catalyzed by political incitement in period preceding the 1992 and 1997 elections. Recommendations were made for prosecution of certain political leaders and perpetrators of the violence. The report failed to explore solutions to displacement of persons based on establishing a legal framework for addressing underlying causes and protection of IDPs. Instead the focus was centered on prosecution of perpetrators.

CIPEV 2008 identified several contributing factors to post-election violence including, but not limited to, growth and personalization of power around the presidency. Additionally, there were issues of historical marginalization among certain ethnic communities in Kenya. The report also pointed to a growing population of poor, unemployed and uneducated youth who associated themselves with violent gangs that were occasionally employed by politicians to carry out attacks on opponents. This combination of factors was a melting pot of ingredients for the violence unleashed in 2007-2008.

A report by the **Internal Displacement Monitoring Centre (IDMC) *Kenya: No durable solutions for internally displaced yet (2008)*** analyses the effectiveness of the IDP return programme dubbed “Operation Rudi Nyumbani” launched by the Kenyan government as a means of resettling IDPs who had been displaced due to widespread violence following the 2007 elections.

The report also assesses the status of IDPs who were displaced due to violence unrelated to elections in 2008. The displacement of up to 100,000 persons occurred after security operations by the government against the Sabaot Land Defence Forces (SLDF). The content of the report

focuses mainly on analyzing the welfare of IDPs, the effect of political reconciliation in quelling the post election violence and the national and international responses to internal displacement. The role played by non-state actors in holding the government into account by advocating for better protection of IDPs is commended. On the other hand the report criticizes the government's approach in implementing the "*Operation Rudi Nyumbani*". The government initiative involved putting pressure on IDPs to leave camps without provision for essential services like water and sanitation in the new sites of relocation. Further, the government contravened the standards in the Guiding Principles having failed to meet the conditions for voluntary and safe return of IDPs to their homes. The government did not pursue reconciliation initiatives between the displaced and those that remained behind.

The report is useful to this study as it gives an account on the status of IDPs in Kenya at the end of 2008. It gives an insight on the welfare of IDPs and the details of the operation. However it is a largely situational analysis of IDP resettlement programme and their welfare. Although it does prescribe some solutions, they are short-term approaches and ignore the significance law can play in addressing IDP protection. This study aims to bridge this gap by exploring provision for long-term solutions to IDPs through a legal framework.

In the article by **Marc Vincent** *IDPs: Rights and Status* (2004) the author provides an analysis of the uses and limitations of the Guiding Principles on Internal Displacement. He also explores the subtle technical differences between "definition" of IDPs and "description" of IDPs. There is no reference to a definition of IDPs in the Principles. Vincent reveals the reason for exclusion of a definition of IDPs in the Guiding Principles as a deliberate act of the legal drafters who

“...studiously avoided the use of the term “IDP definition”. The rationale behind having a “description” rather than a “definition” is to leave provide a window for inclusion of other possible reasons for displacement that were not incorporated in the definition. As much as he accepts that having a broad description enables flexibility for inclusion of other categories of displaced person or other issues that may not be contemplated, Vincent advocates for precision in defining IDPs in international legal instruments. This he states would facilitate a better conceptualization of the IDP phenomenon and better use of terminology which enables understanding the limits and possibilities on protection of IDPs. Secondly precision in defining IDPs will provide a basis for holding actors into account.

Although, Vincent points out the weaknesses of lack of precise definition of IDPs in the Guiding Principles, he acknowledges the prospects of their utility in IDP protection. He concedes that although they are not legally binding, actors are enabled to draw the world’s attention to the plight of IDPs and can mount pressure for action to be taken based on the principles. Further, the principles can be used as an advocacy tool on implementation of existing International legal principles on human rights and humanitarian action which are binding.

**Prisca Kamungi (2001)**<sup>21</sup> examines the status of displaced persons four years after the tribal clashes associated with the 1997 multi-party elections. The report establishes the number of IDPs in Kenya in 2001, assesses the human rights situation, peace situation in affected areas of IDPs, causes of intrastate conflict and displacement and makes recommendations on measures that would prevent recurrence of conflict and displacement of populations. In the report findings, it is stated that number of IDPs remains elusive and it is not clear how many displaced persons were

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<sup>21</sup> Kamungi P., “The Current Situation of Internally Displaced Persons in Kenya” 2001 Jesuit Refugee Service

resettled. She also identifies new causes of conflict and emerging incidents of displacement due to government's non-intervention or slow response. Kamungi recommends that the IDP challenge may be tackled through continued humanitarian assistance, sustained research, advocacy and raising awareness by civil society.

For purposes of this study, the report is commendable in basing its analysis and recommendations on the Guiding Principles. However, in its recommendations it falls short of proposing addressing the problems faced by IDPs through adoption of a specific legal framework by urging civil society to "...support more aggressively the current international efforts to strengthen the capacity of the United Nations to respond more effectively to IDPs, including debates on improvements to be made to expand the UNHCR mandate". While it is acknowledged that IDP protection can draw parallels from the protection of refugees, the objectives to this study proposes the adoption of a specific framework for IDPs to deal with problems peculiar to their status.

**Roberta Cohen and Francis M. Deng (2001)**<sup>22</sup> note that there are shortfalls of the structures that would under normal circumstances regulate matters pertaining to IDPs. The international human rights system set up in the 20<sup>th</sup> Century was not sufficient to actually protect people under assault. The explosion of civil wars in the 1990s brought into view millions of persons forcible uprooted within their own countries without food, shelter, medical care or protection from human rights abuse or atrocity. When first counted in 1982, there were only 1.2 million internal

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<sup>22</sup> Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution Press, 2001

refugees in 11 countries. By 1997, 20 to 25 million were to be found in 40 countries because of the increase in the number of civil wars emerging from or following the cold war<sup>23</sup>.

In addition to perusing the writings of these two scholars, it has been useful to read a variety of journals on the topic. The Forced Migration Review and its contributors have proved a valuable source of research material. It contains numerous perspectives on the subject, most notable, the questionable distinction between IDPs and refugees. Priyanca Mathur Velath warns of the risk of creating artificial distinctions whereas the status of both refugees and IDPs is involuntary<sup>24</sup>. Reading from the same script, Maria Camilleri suggests that the UNHCR's mandate ought to extend to offer protection to IDPs<sup>25</sup>.

**United Nations: The Guiding Principles on Internal Displacement (1998)**<sup>26</sup> is the principal reference point for the legal status of IDPs and protection of their welfare in international relations. Under the auspices of the Brookings Institution Project on Internal Displacement and the UN Special Representative on Internally Displaced Persons, the Guiding Principles ("the Principles") were developed by international legal experts concerned about the well-being of IDPs with particular focus on how best to provide an international legal framework for protection and assistance of IDPs. The Principles restate existing international human rights and humanitarian standards which generally relate to respect, protection and promotion of human rights of IDPs. Based on the international standards they also cover issues of assistance that IDPs

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<sup>23</sup> Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution Press, 1998, p.33

<sup>24</sup> *Researching Internal Displacement: State of the Art Conference Report 7-8 February 2003 Trondheim, Norway*

<sup>25</sup> *Researching Internal Displacement*, Supra

<sup>26</sup> E/CN.4/1998/53/Add.2

are entitled to as a matter of right. Despite the much needed guidance that they provide to laying a good foundation to establishment of an effective IDP protection regime, the Principles are not binding on states as they have not received wide recognition from international community and therefore not achieved the force of law similar to Convention of Refugees or Universal Declaration of Human Rights. The Principles lack the certainty and predictability that is required of legal rules and principles to guarantee IDP protection and welfare where such entitlements have been denied, neglected or contravened.

By themselves, they do not provide adequate solutions to the IDP situation in international relations. Nonetheless, the uses of the Principles to this study are two-fold. Firstly, although they have not gained binding force, the Principles have gained a moral authority amongst state and non-state actors involved in safeguarding the protection of IDPs. Secondly, they form a good reference point on the relevant legal issues that affect IDPs and intimate to the objective of this study is to recommend enhanced negotiations to the adoption and ratification of a Convention or treaty on IDPs by a significant majority of the international community including Kenya based on the Principles.

Addressing the IDP problem through establishment of a legal framework is an objective to this study. The study therefore seeks to offer alternative perspective to resolving recurrence of tribal clashes and internal displacement different from the approach pursued by the government in the Akiwumi Inquiry.

## **1.12 SCOPE AND LIMITATIONS OF THE STUDY**

The scope of the study extends to the adequacy of legal mechanisms in place for protection of IDPs. It places emphasis on the need for addressing the plight of IDPs through a strengthened legal framework. In this sense it is limited to exploring legal solutions and therefore does not comprehensively address the importance of political initiative and social and economic empowerment as solutions to the IDP problem. The assumption made here is that legal solutions take precedence over other non-legal solutions. It is however, convenient to the purposes of the setting the scope and delimitation of study.

Another limitation to the study is attributed to the use of interviews in collecting information from IDPs. It occurs to me that the information gathered from the IDPs themselves will be limited to the confirmation of their status as displaced persons. It has also been noted that many of the IDP camps have been, for lack of better terminology, wound up, so to speak many of the IDPs have actually moved on and may not be available for comment. They are unlikely to shed much light on the shortcomings of the international legal system. However, library research on international instruments and articles and journals from academic commentators will be useful in offering much needed insight into the status of IDPs in international law.

## **1.13 CHAPTER OUTLINE**

### **CHAPTER ONE: BACKGROUND TO THE STUDY**

The first chapter of this project will introduce the study and detail the background to the study; the research problem, research objectives, justification of the study, conceptual framework, hypothesis, research methodology and the literature review.

## **CHAPTER TWO: OVERVIEW OF INTERNATIONAL LEGAL FRAMEWORK ON INTERNALLY DISPLACED PERSONS**

This chapter examines the overview of the international legal framework in addressing issues of protection and welfare of Internally Displaced Persons (IDPs) recurring causes of displacement in Kenya with special attention to displacement immediately following general elections. Care shall be taken to steer clear of the politics surrounding the factors of displacement.

## **CHAPTER THREE: STATUS OF INTERNATIONAL DISPLACEMENT PERSONS IN KENYA: A CASE STUDY**

Chapter three contains an analysis of the existing legal regimes. By evaluating the current legal framework, shortcomings in the law on protection of IDPs may be identified. In effect, the growing number of IDPs is proof sufficient of existing inadequacies and an assessment of these laws will enable the student to make certain findings.

## **CHAPTER FOUR: STATUS OF IDPs IN INTERNATIONAL LAW**

Chapter four aims at bridging the gap between the existing framework and the ideal legal infrastructure for addressing the concerns of internally displaced Kenyans. By identifying the loopholes that expose IDPs to neglect, it is hoped that appropriate measures shall be taken to bring them under lawful protection. To achieve this it shall be essential to benchmark the unique Kenyan experience of displacement against a backdrop of international best practices in resolution of the IDP crisis.



## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

The chapter will conclude the study and propose certain recommendations that should be implemented to establish a specific legal regime for IDP protection.

## **CHAPTER 2: OVERVIEW OF INTERNATIONAL LAW ON IDPs**

### **2.1 INTRODUCTION**

IDPs often experience violation of their human rights immediately upon displacement. The subsequent deprivation of lives, shelter, property, livelihood and so on means it would only be natural to look to the existing international law as a source of protection. It is presumed that the status of displacement means that the government of IDPs' parent state has failed to ensure that their fundamental rights and freedoms are preserved. Traditionally, International Law governs the conduct of independent nations in their relations with other independent nations. Some branches of International Law, however, go further to create rules binding governments in their relations with individuals. In the present discussion, the international laws which could be said have some implications on the treatment of IDPs include International Human Rights Law, International Humanitarian Law and Refugee Law. This chapter evaluates the development of international legal principles with specific attention to the needs of IDPs.

### **2.2 INTERNATIONAL HUMAN RIGHTS LAW**

It would appear that displaced persons have more than adequate reasons to expect their fundamental rights to be protected under International Human Rights Law by virtue of Kenya's subscription to the 1948 Universal Declaration on Human Rights. Additionally, Kenya is a signatory to the 1981 African Charter on Human and Peoples' Rights<sup>27</sup> and one may be persuaded to seek protection from displacement, and its consequent effects, from those instruments of International Law.

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<sup>27</sup> Adopted by the eighteenth Assembly of Heads of State and Government in June 1986 at Nairobi, Kenya.

International Human Rights Law refers to a body of legislation, established by treaty or custom, on the basis of which individuals and groups can demand certain benefits from governments. As the name suggests, entitlement to benefits from International Human Rights Law is inherent for every person simply by reason of being human. International Human Rights Law is applicable at all times and has no requirement for a particular set of circumstances to trigger its operation. There are numerous treaties espousing various aspects of International Human Rights Law, but the pioneer document is The 1948 Declaration on Human Rights. Others include Covenants on Civil and Political Rights, Covenants on Social and Cultural Rights and Conventions Discrimination.

The 1948 Declaration on Human Rights was formulated as the ashes of World War II (1939-1945) cooled. Its aim was to set out a list of fundamental rights and freedoms that could be universally sought and enforced. Of the document's thirty (30) Articles, a significant proportion may be directly applicable to the IDP situation. For instance, the declaration that '*everyone has the right to life, liberty and security of person*' found under Article 3 of The Universal Declaration of Human Rights would be of particular significance to displaced persons in view of the extreme dangers they habitually encounter. Starting with the right to life, it is estimated that more than 1,000 people lost their lives in the violent post-election conflict of 2007-2008. This statistic was confirmed by Dr. Naomi Shaban, Minister of State for Special Programmes<sup>28</sup> at the time. Evidently, the law did not avail this unfortunate demographic of people who died during those skirmishes. It is also reported that following the eruption of violence in Kenya on or about

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<sup>28</sup> Speech of 17<sup>th</sup> March 2010 at opening of Review Workshop on IDP Policy

31<sup>st</sup> December 2007, more than half a million people fled their homes in the face of threats to their lives, liberty and security of person<sup>29</sup>.

Another provision stipulates that *'everyone has the right to own property alone as well as in association with others'* and that *'no one shall be arbitrarily deprived of his property'*<sup>30</sup>. This is an absolutely crucial issue as it represents one of the most serious afflictions suffered by the internally displaced. The hasty departure for safer locations forces IDPs to abandon property and in many cases it is looted, burnt or otherwise destroyed. According to Kenya's Ministry of Special Programmes, a total of 78,254 households were burnt or destroyed during the post-election violence of 2008<sup>31</sup>.

Of particular relevance to this paper is the recognition of the rights of persons fleeing persecution to seek refuge in other countries<sup>32</sup>. It shall become apparent later in this discussion that this provision formed the basis for developing International Refugee Law<sup>33</sup> as espoused in the United Nations 1951 Convention on the Status of Refugees.

### **African Charter on Human and Peoples' Rights**

A significant proportion of the 1948 declaration is echoed in the even more expansive 1981 African Charter on Human and Peoples' Rights<sup>34</sup>. This Charter was developed under the auspices of the Organization for African Unity (OAU) with Kenya being a prominent state member of the organization. It was adopted by the eighteenth Assembly of Heads of State and Government in

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<sup>29</sup> OCHA Kenya: Frequently Asked Questions on IDPs, United Nations Office for the Co-ordination of Humanitarian Affairs, 16 July 2009.

<sup>30</sup> Article 17 of The Universal Declaration of Human Rights 1948

<sup>31</sup> OCHA Kenya: Frequently Asked Questions on IDPs, *ibid*.

<sup>32</sup> Article 14 of The Universal Declaration of Human Rights 1948

<sup>33</sup> Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR), Text of The 1951 Convention on the Status of Refugees.

<sup>34</sup> African (Banjul) Charter on Human and Peoples' Rights 1981

June 1981 at Nairobi, Kenya and should be of particular significance to this study as the events being reviewed all took place in Kenya. In its preamble, the African Charter recognizes the Charter of the United Nations and has due regard to the Universal Declaration of Human rights.

Its first article reveals the intention of Member States not only to recognize the rights, duties and freedoms of the Charter but also adopt legislative or other measures to give effect to the provisions contained therein.

Starting with Article 2 where *every individual* is entitled to all rights and freedoms recognized and guaranteed without distinction on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. In Kenya's case, the displacement was a result of many factors including, but not limited to, ethnic conflict between communities in the Rift Valley province. Worse still, the violence was fuelled by political dynamics where one community was perceived as an extension of the government regime at a time when presidential elections results were hotly contested. The results of those elections were bitterly disputed, in particular, by the local contingent. As a result of the hostilities, the minority occupants of areas that were predominantly occupied by the aggrieved communities became targets.

Equally regrettable is the fact that IDPs in Kenya have not received equal protection of the law as if they were lesser beings before the law. This is a far cry from the position asserted under Article 3 of the African Charter on human rights. Kenyan law is awash with provisions enacted to ensure respect for the rule of law where every citizen is equal before the law. There is no shortage of laws that go to the protection of citizens. Not least the Constitution that was in force

at the time of conflict. This aspect will be addressed in greater detail at a later stage in this thesis once evaluation of the international legal instruments has been exhausted.

Under the same Charter, Article 4 states that *every human being shall be entitled to respect for his life and the integrity of his person*. There were many deaths following the conflict of 2007-2008 and it was clear that no regard was shown for the victims' entitlement to respect for their lives. Those that escaped with their lives suffered the indignity that accompanies forced migration, where victims flee with no decorum and settle in makeshift homes, this provision of law ought to have afforded IDPs some protection. Instead, many IDPs remain in decrepit camps – the integrity their person in tatters.

The political environment in 2007-2008 played a massive role in the escalation of tensions resulting in violence. It became clear that communities associated with certain political parties were targets of violent attacks. Under normal circumstances, every individual should be free to exercise his political rights by associating with any group as long as that association was within the law. That is what Article 10 of the African Charter strives to protect, individuals' right to free association. Many Kenyans were, undeniably, victimized for their political association contrary to what is enshrined in the law.

Kenya is a country of diverse cultures with communities spread out all across the nation. Movement and residence had, prior to 2007, been generally unhindered. The violence that erupted during that time led to expulsion of people from their homes owing simply to their location in regions predominantly inhabited by other communities. In other instances, the victims were unable to move, especially when there was desperate need to escape the violence. In a paradox of displacement, victims were at once expelled as well as prevented from escaping the

violence. Article 12 of the African Charter ensures people's right to freedom of movement and residence within the borders of a state.

Another example is the right to property .Not only is it guaranteed by the African Charter on Human and Peoples' Rights, the circumstances under which that right may be encroached upon are also articulated. A perusal of Article 14 reveals that the right to property is guaranteed and may only be encroached upon in the interest of public need or in the general interest of the community. Furthermore, any encroachment on peoples' right to property must be in accordance with the law. What is envisaged by this part of the law is that, even where citizens may be deprived of their property, it must not only be for the greater good, it must also follow lawful provisions relating to such deprivation. It is likely that this Article may have been drafted to account for forced migration where, for instance, the state wished to undertake a project for the welfare of the community thereby necessitating compulsory acquisition of property (read land). However, a broader interpretation would seem to guarantee victims of displacement the right to their land. In practice, IDPs land is often taken over by the perpetrators of the violence.

So why haven't IDPs enjoyed the protection of The 1948 Declaration on Human Rights, or its regional clone The 1981 African Charter on Human and Peoples' Rights? To begin with, the concept of internal displacement is a relatively new phenomenon: if not as a matter of fact, then as a matter for legal contemplation. Therefore, the treaties on international human rights law do not contain provisions for any class of people that may be identified as IDPs. Additionally, the drawers of these instruments appear not to have envisioned domestic strife in the nature of internal displacement. Worse still, they may have perceived it as a national issue for member states to resolve internally in the time-honoured tradition of respecting sovereignty.

### 2.3. INTERNATIONAL HUMANITARIAN LAW

In International Humanitarian Law, protection is afforded to victims of both international and non-international conflicts. As is often the case, displacement of persons is a direct result of fleeing armed conflict. This is precisely what happened in Kenya following the eruption of violence from December 2007 into the early months of 2008. Areas such as the Rift Valley Province had experienced violence in 1992 and 1997, years which coincided with general elections. By 2007, the nature and degree of such violence had intensified<sup>35</sup>.

International Humanitarian Laws are described as rules which seek, for humanitarian reasons, to limit the effects of armed conflict<sup>36</sup>. It is widely acknowledged that the conflict in Kenya around the election period from December 2007 to early 2008 was executed through application of weapons. According to the report submitted by the Commission of Inquiry into Post-Election Violence (CIPEV) following investigations, it is documented that the violence entailed large marauding gangs of youth brandishing machetes, bows and poisonous arrows, occasional firearms, matches and projectiles filled with petrol<sup>37</sup>. Whether this constitutes the **armed conflict** envisioned by the 1949 Geneva Conventions is debatable as there is no definition of “armed conflict” in the Conventions. It has been suggested that this was deliberately omitted to permit the broadest practicable interpretation<sup>38</sup>. For the purpose of this study, one may consider the violence described in the CIPEV report as constituting armed conflict.

The subsequent displacement of humans was, by implication, a humanitarian problem arising from that conflict. In the circumstances, it would not be unreasonable to expect the laws

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<sup>35</sup> Kenya: Commission of Inquiry into Post-Election Violence (CIPEV) final report.

<sup>36</sup> International Committee of the Red Cross Advisory Service on International Humanitarian Law, July 2004.

<sup>37</sup> Kenya: Commission of Inquiry into Post-Election Violence (CIPEV) final report.

<sup>38</sup> Derek Jinks, *The Temporal Application of International Humanitarian Law in Contemporary Conflicts* January 2003



enshrined in The Geneva Conventions of 1949 to come into effect automatically. There were four (4) Conventions in total in the year 1949, all dealing with various aspects of regulating the conduct of armed conflict with a view to limiting its effects.

The first Convention relates to wounded and sick members of armed forces in the field. The second Convention applies to wounded, sick and shipwrecked fighters at sea. The third Convention pertains to the treatment of Prisoners of War and the fourth Convention protects civilians during war.

Later, in 1977, two additional protocols were made to these Conventions. These were international treaties intended to complement the 1949 Conventions by enhancing the level of protection afforded to civilians. Additional Protocol I protects victims of international armed conflict whilst Protocol II protects victims of non-international armed conflict.

The International Committee of the Red Cross (ICRC) is a key player in the promotion of International Humanitarian rights. It derives its mandate from the 1949 Geneva Conventions and is charged with the responsibility of ensuring humanitarian protection and assistance for victims of war and armed conflict. International Humanitarian Laws primarily apply to *international armed conflicts* where at least two countries are pitted against each other. They do not appear to cover internal conflicts restricted to the territory of a single country. Indeed, one publication<sup>39</sup> indicates that International Humanitarian Law applies only to armed conflict and *not* internal tensions or disturbances such as isolated acts of violence. The post-election violence experienced in Kenya at the close of 2007 possibly falls within this latter category. What remains unclear is

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<sup>39</sup> International Committee of the Red Cross Advisory Service on International humanitarian Law, July 2004

whether this and automatically disqualifies the victims from protection under International Humanitarian Law.

It is, consequently, puzzling to find that according to another ICRC Advisory on Human Rights published in January 2003, International Humanitarian Laws are described as dealing specifically with humanitarian problems arising from international as well as *non-international armed conflicts*. This is clearly a more expansive definition of International Humanitarian Laws and one that would certainly avail IDPs. That this contradictory publication is made by the same organization merely highlights the degree of uncertainty regarding what structures are in place for the protection of IDPs. Even the ICRC themselves appear unsure whether their mandate extends to non-international armed conflicts. This shouldn't be the case since the Additional Protocols protect victims of armed conflict and, in particular, Protocol II of 1977 which proclaims the protection of victims of non-international armed conflicts such as that experienced in Kenya.

## **2.4 INTERNATIONAL REFUGEE LAW**

International refugee law may be described as rules and procedures that aim to, firstly, protect asylum-seekers from persecution and, secondly, protect persons recognized as refugees under the relevant legal instruments<sup>40</sup>. The primary sources of refugee law are treaties and customary international laws which apply to all states irrespective of whether the said states are parties to the relevant treaties. Foremost among these is the 1951 Convention Relating to the Status of Refugees which came into force on April 22 1954. It was based on Article 14 of the Universal Declaration of Human Rights 1948, which recognizes the right of persons to seek asylum in

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<sup>40</sup> Rule of Law in Armed Conflicts Project, International Refugee Law by Gilles Giacca

other countries when victimized by persecution. It will be recalled that these developments came about in the aftermath of the Second World War where it became necessary to afford protection to victims of that conflict in countries outside their own.

One may be tempted to draw comparisons between the circumstances of a refugee and those of an IDP. Both groups are usually victims of armed conflict and both groups are consequently displaced when they move to escape the effects of such conflict. In terms of International Law, the comparison ends there. Whereas IDPs still do not have an internationally recognized legal definition, refugees (an arguably special class of “internationally” displaced persons) have had a legal status since 1951 under the United Nations Convention Relating to the Status of Refugees. Article 1 (A)2 provides that the term “refugee” shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.

The similarity of circumstance between an IDP and a refugee (save for the crucial element of traversing an internationally recognized border in the case of a refugee) may lead one to seek guidance from Refugee Law<sup>41</sup>.

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<sup>41</sup> The 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

### **Convention Governing Specific Aspects of Refugee Problems in Africa**

In 1969, Africa took steps to address certain aspects of refugee problems in the continent. Under the auspices of the Organization of African Unity (OAU), member states sought to find solutions to specific concerns arising from the refugee problem in Africa. Prime amongst those concerns was the increasing number of refugees within Africa at the time. Member states were also keen to make a distinction between genuine refugees and those who fled their home countries only to engage in subversive activities against the governments of their states of origin. The OAU recalled the spirit of the 1951 UN Declaration as amended by the 1967 Protocol in creating its own legal framework under the Convention Governing Specific Aspects of Refugee Problems in Africa<sup>42</sup>. With specific reference to Kenya, the country's subscription was testimony to the country's willingness to abide by international legal standards on the protection of persons compelled to leave their habitual residences in pursuit of refuge, albeit outside their country of origin. However, the unique nature of violation experienced by IDPs suggests the necessity for specialized attention to their fundamental rights.

There exists a fundamental distinction between refugees and IDPs. According to the 1951 United Nations Convention Relating to the Status of Refugees a refugee is defined as "any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or 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"<sup>43</sup>. In fact, the position adopted by those charged with the protection of refugees is one of reluctance to merge the issues affecting IDPs with those affecting refugees. The concern is that whereas

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<sup>42</sup>Organization of African Unity, Addis Ababa, 10<sup>th</sup> September 1969.

<sup>43</sup> Article 1 1951 United Nations Convention Relating to the Status of Refugees

refugees have a special legal regime, IDPs are in their own country and remain fully entitled to the full range of protection provided by international human rights law, humanitarian law as well as domestic law. It is asserted that there may be no valid basis for assimilating the status of internally displaced persons with that of aliens, as is often done in the case of refugees<sup>44</sup>. In summary, IDPs are not refugees and, therefore, not entitled to protection available under refugee law.

## **2.5 GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT**

Internal displacement only emerged as an issue on the international agenda in the late 1980s<sup>45</sup>. This goes some way to explain the delayed reaction to the growing phenomenon of internal displacement. In 1992, the United Nations Secretary-General appointed a Representative, Dr. Francis Deng, to formulate international standards as the basis for a legal framework on internal displacement. He developed the principles over several years exercising the mandate conferred upon him by the UN Commission on Human Rights as well as the General Assembly. The task involved collaborating with international legal experts to examine the extent to which displaced persons received protection under international law. By 1995, the team had produced an exhaustive analysis<sup>46</sup> of existing law with emphasis on the areas where existing international law responded inadequately to the needs of IDPs. The analysis employed a “working definition” of IDPs that had been previously presented in a Comprehensive Study<sup>47</sup> by Mr. Francis M. Deng. It described IDPs as “persons who have been forced to flee their homes suddenly or unexpectedly

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<sup>44</sup> Internal Review of the Red Cross No. 838, p. 491-500

<sup>45</sup> Internal Displacement Monitoring Centre *Internal Displacement, Global Overview of Trends and Developments in 2006*, Norwegian Refugee Council, April 2007.

<sup>46</sup> Compilation and Analysis of Legal Norms 5<sup>th</sup> December 1995

<sup>47</sup> Representative’s Comprehensive Study of 21 January 1993

in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.”

The analysis also set out the applicable sources of international law and their relevance to displacement in recognized situations. It drew from Human Rights Law, Humanitarian Law and Refugee Law. One can already see the inspiration drawn from these three branches of international law in the working definition of IDPs where it makes reference to persons forced to flee home (Refugee Law), armed conflict (Humanitarian Law) and violation of human rights. In conclusion, the analysis found that whereas IDPs are protected by international laws, their rights continue to be violated. Not necessarily on account of gaps in the law, but through shortcomings in the effective implementation of existing norms. It was, consequently, recommended that future international instruments should explicitly include the legal status of internally displaced persons. Furthermore, it should expressly afford full protection for IDPs against discriminatory violence.

The team’s laudable efforts resulted in what are known today as the **Guiding Principles on Internal Displacement** which principles were presented to the UN Commission on Human Rights in 1998. As earlier stated, these principles are founded upon existing International Humanitarian Law as well as International Human Rights Law instruments. It is for this reason that this study has evaluated the provisions of both the 1948 and 1951 declarations in the preceding sections. They are intended to serve as an international guide for states, NGOs, international agencies and all other authorities in the provision of assistance and protection to IDPs. The principles identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during

return or resettlement and reintegration<sup>48</sup>. In simple terms, they are the closest thing we have to a legal framework designed exclusively for the protection of displaced persons.

The Guiding Principles reiterate many of the settled rules of international law, in particular, international human rights law and international humanitarian law. They are set out in five (5) sections;

1. General Principles
2. Principles relating to protection from displacement
3. Principles relating to protection during displacement
4. Principles relating to humanitarian assistance
5. Principles relating to return, resettlement and reintegration

This segment of the study comprises an overview of the more pertinent sections of the Guiding Principles. The Principles make an admirable effort to describe, if not define, what constitutes a displaced person. In the introductory section, the scope and purpose of the Guiding Principles is declared. Paragraph 2 states that *“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 generalized violence, violations of human rights or human made disasters, and who have not crossed an internationally recognized State border.”*

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<sup>48</sup> Introduction to the Guiding Principles on Internal Displacement.

It remains a point of debate whether what is contained in introduction paragraph 2 of the Guiding Principles is a definition. Some scholars assert that rather than define IDPs, the Guiding Principles merely give a descriptive identification of displaced persons<sup>49</sup>. This is best illustrated when one dissects that definition and analyzes the key components. For instance, the definition talks about people who have been forced to flee their homes in order to avoid various manifestations of violence. The manner in which the definition is crafted places greater emphasis on describing a displaced person rather than defining his or her status. The result is that, one is able to identify a displaced person based on the description of how an IDP may appear –fleeing home to avoid violence- rather than an appreciation of the conditions he or she is under. Furthermore, becoming displaced does not confer a special legal status upon the victim in the manner that would perhaps avail a refugee under International Refugee Law<sup>50</sup>. This bizarre situation is attributable to the fact that IDP rights attach principally to their unique circumstances and are activated by the occurrence of their displacement. Notably, the definition is not contained in the main body of the Guiding Principles but in the introductory segment of that document. This lends credence to the assertion that the definition is not intended as such and its greatest attribute is to merely describe the displaced person.

Another natural focal point in the analysis of the Guiding Principles would be to identify the party responsible for enforcing these Principles. Under the first general section, national authorities are identified as the entity vested with the duty to provide protection and humanitarian assistance to displaced persons within their jurisdiction<sup>51</sup>. As stated above, these Principles serve merely to guide and may not be enforceable as against an organ of responsibility

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<sup>49</sup> Vincent, P. Forced Migration Review Number 21

<sup>50</sup> Guiding Principles on Internal Displacement, Annotations, Walter Kalin

<sup>51</sup> Guiding Principles 3(1) on Internal Displacement



such as a government. It is an indisputable fact -supported by international law- that the obligation to protect citizens, especially IDPs, lies with the individual state. However, some states, owing to political, economic or other motivations, are complicit in the forcible migration of its people. Alternatively, although no less disheartening, a state may simply lack the capacity to protect its IDPs. For these reasons, it would then seem that vesting the primary duty and responsibility for protection and assistance of IDPs in the national authorities under Principle 3 of the Guiding Principles may not be very effective in some cases. To drive this point home, one only needs to reflect on the violence experienced in Kenya in 2008 and the government's response to the crisis. As a state, Kenya was unable to provide the safeguards guaranteed to its citizens as they fled from conflict. It is most unfortunate that five years later, persons displaced by the violence of 2008 are still in camps owing to fear of returning to their homes which were the scenes of conflict. To make matters worse, the Kenyan Government has not satisfactorily resettled the displaced victims of violence with thousands still unsettled<sup>52</sup>.

Having been entrusted with the responsibility to protect citizens from displacement, the government is also required, under Section III of the Guiding Principles, to protect those citizens when displacement occurs. This is intended to prevent loss of life, attacks or other acts of violence. The third section of the Guiding Principles also aims to ensure the dignity, liberty and security of displaced persons through state protection from, among other atrocities, rape, mutilation, torture and slavery.

Apart from state protection, the Guiding Principles place further obligation on national authorities to provide humanitarian assistance under Section IV. This includes granting free access to international humanitarian organizations and other actors to assist displaced persons. It

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<sup>52</sup> Report of the Parliamentary Select Committee on the Resettlement of Internally Displaced Persons in Kenya 2012

is well documented that numerous organizations, not least the International Committee of the Red Cross, were on hand to assist Kenyan IDPs since eruption of violence from the end of 2007 into early 2008 and have continued to do so<sup>53</sup>.

## **2.6 GREAT LAKES PACT 2006**

The Republic of Kenya remains the principal entity charged with the responsibility for its internally displaced citizens. However, its existent is to a great extent dependent on its relationship with its neighbours. Kenya finds itself driven to enter agreements with neighbouring countries on a wide variety of issues to ensure peace and security, political stability economic growth and development<sup>54</sup>. As a member state of a number of regional organizations such as the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) among others, Kenya displays a willingness to cooperate with other countries in the realization of its national goals.

A prime example of this spirit of cooperation, particularly in relation to protection of IDPs, is Kenya's subscription to the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact)<sup>55</sup>. Comprising eleven (11) Members of the International Conference on the Great Lakes Region (ICGLR), the Pact is basically an agreement between states covering various aspects of regional coordination that had been. The Pact was entered into as a reaffirmation of the member states' earlier deliberations on state relations. It was intended that member states would develop a framework for their common destiny with regard to durable peace and security, political and social stability and economic growth. These discussions resulted

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<sup>53</sup> ICRC Annual Report Nairobi 2011

<sup>54</sup> Preamble to the Great Lakes Region Pact

<sup>55</sup> Nairobi, Kenya on 15<sup>th</sup> December 2006

in the Dar es Salaam declaration of 2004 which formed the basis of the Great Lakes Pact of 2006. Its signature heralded an era of enhanced collaboration on matters ranging from democracy and good governance to reconstruction and development. Chapter II of the Pact contains a Protocol on the Protection and Assistance to Internally Displaced Persons (IDP Protocol) that was crafted in line with the Guiding Principles referred to in previous segments of this paper. The Protocol, as set out under **Article 12** of the Pact, directs Member States to “*provide special assistance to internally displaced persons and in particular to adopt and implement the Guiding Principles on Internal Displacement as proposed by the United Nations Secretariat.*”

Interestingly, the Pact goes one step further with the Member States undertaking to provide legal protection for the property of internally displaced persons and refugees in their country of origin. **Article 13** of the Pact states that “*Member States shall ensure that refugees and internally displaced persons, upon returning to their areas of origin, recover their property with the assistance of the local traditional and administrative authorities.*” The word “shall” is underlined to lay emphasis on the mandatory nature of that particular protocol. There is a clear and highly encouraging demonstration of commitment from the Member States to ensure that returning IDPs find their property intact. This innovative Protocol is evidence of a new regional mechanism to promote peace, security and development. The 11 countries that came together in 2006 to enter the Pact were, in alphabetical order, **Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Swaziland, Tanzania, Uganda and Zambia**. So far, the only addition to this esteemed group is the youngest nation in Africa, the Republic of **South Sudan** which gained its independence from Sudan in 2011. South Sudan formally applied for membership to the International Conference on the Great Lakes

Region in 2012<sup>56</sup>. For completeness of record, it is important to note the contributions of some states that were involved in the negotiations leading up to the creation of this framework. **Botswana, Egypt, Ethiopia, Malawi, Mozambique, Namibia and Zimbabwe** can be counted on to continue their support without necessarily being bound by the Pact. These states have acquired the status of International Conference on the Great Lakes Region (ICGLR) co-opted countries.

The Great Lakes Pact was viewed as a process – one that would afford Member States a new path to chart their destinies with regard to peace, security and development. At the time of inception, the Pact was considered to be the world's first legally binding international instrument devoted to IDPs<sup>57</sup>. It will be recalled that the primary responsibility for IDP protection still lies with the state and the appeal of this Pact lies in the explicit definition of state obligations towards IDPs.

Despite all the encouraging signs that the Great Lakes Pact would go a long way to alleviating the plight of displaced persons, it omits a very crucial factor in failing to define IDPs. This could be either by design or by default but in remains, nevertheless, a glaring omission. The definition of IDPs becomes conspicuous for its absence.

## **2.7 AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA 2009**

As the drive towards a comprehensive legal framework to protect IDPs gathered steam, Africa took the lead in this process leaving the rest of the world in its wake. Soon after the Great Lakes

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<sup>56</sup> Extraordinary Summit of the International Conference on the Great Lakes Region Heads of State 8.9.2012

<sup>57</sup> Bernstein J, Bueno O. The Great Lakes Process: new opportunities for protection, Internal Displacement Monitoring Centre 2007.

Pact of 2006 was signed and ratified by about a dozen African states, the rest of the “dark continent” took a step further towards realizing the dream of an internationally binding legal framework on IDP protection.

Under the auspices of the African Union (AU) reborn, the continent took a giant leap for mankind by developing a Convention to address the peculiar conundrum of displacement. It must, however, be pointed that the journey began decades before with the African Union’s predecessor, the Organization for African Unity (OAU). Established in Addis Ababa<sup>58</sup>, the heads of 32 African states at the time appeared to be mainly concerned about charting the course for their newly independent nations. Nowhere is this better demonstrated than under the list of purposes under Article II of the Organization’s Charter which included the eradication of all forms of colonialism from Africa. Additionally, the Organization was keen to protect the fragility of its infant states and determined to protect their sovereignty, territorial integrity and independence.

The OAU enjoyed only moderate success in its aspirations as it stumbled through three decades of post-colonial independence reaching its lowest ebb in the 1980s. By the 1990s, it was evident that there had to be a change in approach occasioned by the failures of what became known as the lost decade<sup>59</sup>. Fundamental changes across the world after the Cold War and the emergence of globalization with its inherent opportunities and threats meant things had to be done differently.

In 1999, the African Union (AU) as we now know it was created in Sirte, Libya and by 2001 the OAU had been legally transformed<sup>60</sup> into the AU. The new African Union was unveiled to the

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<sup>58</sup> OAU Charter 25.5.1963

<sup>59</sup> From the OAU to the African Union, Abdalla Bujra 2002

<sup>60</sup> Constitutive Act of the African Union, Lome, Togo, 11<sup>th</sup> July 2000

world at an inauguration ceremony held the following year (2002) in Durban, South Africa. This speed in establishment is replicated in the manner in which the AU resolved to address the IDP problem in Africa. Following hot on the heels of the 2006 Great Lakes Pact, the 53 AU member states entered into a Convention for the Protection and Assistance of Internally Displaced Persons. Popularly referred to as the Kampala Convention<sup>61</sup> the document represents the world's premier binding legal and institutional framework on IDP protection.

In its preamble, we find the rhetoric that is a common feature of such conventions. It is refreshing, however, to find that the Kampala Convention pays homage to all prior attempts at creating a framework for the protection of IDPs. There are honourable mentions of the 1948 Universal Declaration of Human Rights, the four Geneva Conventions of 1949, the Refugee Conventions, the 1981 African Charter on human Rights, the guiding Principles among others.

Of greater significance to any scholar, is the inclusion of a definition for "Internally Displaced Persons" under **Article I** which is reproduced here:-

*"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 generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*

This definition harks back to the working description contained in the 1998 Guiding Principles. In fact, the definition of internally displaced persons contained in the Kampala Convention is a word-for-word replication of the Guiding Principles on Internal Displacement. It mirrors all the

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<sup>61</sup> Adopted 22<sup>nd</sup> October 2009

ingredients of the descriptive identification of displaced persons contained in the introductory segment of the Guiding Principles, thereby anchoring itself to an important part in the history and development of a framework for the protection of IDPs. Whereas the Guiding Principles merely stated the descriptive features of an IDP they stopped short of defining IDPs. The Kampala Convention, on the other hand, goes further to *define* internally displaced persons. For the first time in the history of mankind, internally displaced persons became an internationally recognized class of people requiring the protection of the law. As has been recently demonstrated in various other fields, Africa emerges at the forefront as a pioneer in legislative growth and development.

Another example of how the Kampala Convention draws inspiration from earlier documents is seen in the title. No sooner had the International Conference on the Great Lakes Region concluded its praiseworthy conception of the 2006 Great Lakes Pact than the AU emerged with its own brainchild, the Kampala Convention or, to give it its full title, the Convention for the Protection and Assistance of Internally displaced Persons in Africa. This is strikingly similar to the 2006 IDP protocol entitled the Protocol on the Protection and Assistance of Internally displaced Persons in Africa. This similarity has not escaped the attention of many a scholar and has given rise to no small amount of commentary on the matter. It is asserted that “the strong similarity in the titles of the two documents reflects their common vision and parallel purpose”<sup>62</sup>.

Similarities abound in the two frameworks, however, it must be pointed out that academic over exuberance may have resulted in some hyperbole regarding their likeness. One writer<sup>63</sup> suggests

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<sup>62</sup> Briefing Note by the International Refugee Rights Initiative, January 2014

<sup>63</sup> David Kigozi in Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact.

that both documents contain a definition of IDPs yet a perusal of the 2006 Great Lakes Pact, in particular, its IDP Protocol confirms that there exists no such thing. Article 1 of the 2006 Pact sets out a list of definitions but does not contain a definition for the term “internally displaced persons”. In another illustration of factual inaccuracy, the same publication states that all twelve (12) signatories to the IDP Protocol of the 2006 Great Lakes Pact would do well to also ratify the Kampala Convention. This would, ostensibly, be made easier for the 12 states on account of the many similarities apparent in the two documents. Sadly, what started off as a sound postulation is diluted by the incorrect assertion that of the 12 states that ratified the Great Lakes Pact, 5 have also ratified the Kampala Convention. That is simply not true. Of the 12 states that ratified the Great Lakes Pact, only three (3) have also ratified the Kampala Convention. These are Central African Republic (CAR), Uganda and Zambia.

Hope springs eternal however. One must remain optimistic that the 12 Great Lakes members will all soon ratify the Kampala Convention and encourage the co-opted states to also ratify it. At the time of writing this paper, only Malawi from the co-opted countries has ratified the Kampala Convention. This paper laments especially the failure and/or refusal of the Republic of Kenya to ratify the AU IDP Convention more than 3 years down the line. Particularly when one considers the severity of the Kenyan IDP situation following the violence that accompanied presidential elections in the year 2007 and soon thereafter.



## **CHAPTER 3: CASE STUDY OF KENYA**

### **3.1 BACKGROUND**

This chapter of the study aspires to establish, as accurately as possible, the extent of the IDP crisis in Kenya. This shall be achieved by empirical means involving the collection of data and the conduct of interviews. However, before considering all the data capable of collection, it is important to cast our academically inquisitive minds back to the earliest known instances of displacement in Kenya. By doing so, it is hoped that the scholar may identify a pattern to the forced migration and highlight the weaknesses apparent in the legal framework for dealing with IDPs.

Internal displacement is hardly a novel phenomenon in Kenya. Indeed, there are numerous reported instances of displacement stretching back into Kenya's history<sup>64</sup>. As early as 1934, there are documented instances of displacement when the colonial Government evicted the Talai community from their ancestral lands. An imperial document<sup>65</sup> was crafted to facilitate and legalize deportation of the entire Talai community which comprised some 1,867 homesteads located in the Kericho and Kipkelion. The households were all moved to Gwasssi where the community continues to pursue its rights as displaced persons.

Other contemporaneous examples include the displacement of squatters in Marakwet where massive landslides in 1951 and 1961 affected an estimated 907 households forcing them to move to Embotut Forest. The forest was later reclaimed by the government of Kenya and the displaced occupants remain without any proprietary claim to the land. They also remain at risk of eviction

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<sup>64</sup> Policy Dynamics of IDP Resettlement and Peace Building in Kenya: An Evolution of the Draft National IDP Policy

<sup>65</sup> The Olaibons Removal Ordinance, of 1934

by the Government for conservation purposes and, alarmingly, numbers of displaced persons from Embotut forest have started swelling. Whereas this example is not one of displacement resulting from violence, it is no less significant in the evaluation of the conditions prevailing where IDPs are concerned, more so, in the absence of a suitable, comprehensive legal framework.

It is widely acknowledged too, that farm land in Kenya's Rift Valley Province was at the heart of clashes that took place in the 1990s. The farms in question had been purchased by large numbers of persons hailing from the neighbouring communities. Acquisition commenced at about the same time Kenya attained its independence from Great Britain in the 1960s and went through the 1970s under Government land settlement schemes. The schemes were highly effective as evinced by the influx of other ethnic groupings into the Rift Valley Province. However, the success of the schemes came at the expense of resident Maasai and Kalenjin pastoralist groups. By the 1990s, the discomfiture of historically resident communities would rise to the surface courtesy of some ethnic manipulation for political expediency. The 1990s were the dawn of multi-party politics in Kenya as the country geared itself towards general elections in 1992. Community grievances were exploited and sensitivities heightened during this new era of multi-party politics with groups aligning themselves along tribal and party lines. In most instances the tribal and party affiliations were interchangeable, as though they were one and the same. This trend continues to bedevil present-day politics.

In this segment of the research problem, the most logical starting point would be to ask; **how many IDPs are there in Kenya?** It appears a simple enough enquiry but proves to be somewhat

more complex as the data is analyzed qualitatively. The first complication appears to be the fact that the Government of Kenya has paid scant attention to persons displaced by violence prior to 2007/2008<sup>66</sup>. There is also a largely ignored category of IDPs that were displaced by factors other than violence. As already mentioned, there are people who were displaced by mudslides decades ago. Now, that same group of displaced persons is staring the spectre of displacement in the face once more as the Government attempts to conserve the Embotut Forest. It remains unclear how many IDPs were in this country as of 2007/2008 when, as a result of electoral violence, new IDP camps started mushrooming across Kenya. That notwithstanding, the Government made a commendable effort in 2008 to come up with statistics on IDPs in the report prepared by the Commission of Inquiry into Post Election Violence (CIPEV).

CIPEV reported that in 1992 and 1997, election related “ethnic” clashes resulted in displacement of thousands of people. According to the Kiliku Report, an estimated 54,000 people were displaced in the 1992 clashes. The Justice Akiwumi led Commission, which was appointed in 1998 to inquire into the tribal clashes that rocked the country since 1991 did not make any findings as to the number of persons displaced as a result of the clashes either in 1992 or 1997<sup>67</sup>. Multiple causes of displacement made it very difficult to come up with accurate statistics in 2008. At the time, it was reported that by the government there were 350,000 persons displaced as a result of violence after the 2007 elections. Of relevance to this study is the fact that some of the IDPs had suffered successive displacements as a result of previous election related violence. Several witnesses testified to CIPEV that they had suffered multiple evictions in each of the following election years; 1992, 1997, 2002 and 2007.

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<sup>66</sup> Prisca Kamungi and Jacqueline M. Klopp. 2007. "Failure to Protect: Lessons from Kenya's IDP Network", *Forced Migration Review*, 28, 52-53

<sup>67</sup> CIPEV Report 2008, 286

It must be recalled that the 2007 elections essentially pit the two strongest political foes against each other. These were the Party of National Unity (PNU) and the Orange democratic Movement (ODM). The conflagration that ensued necessitated external/international intervention. As a result, international mediation was initiated under the auspices of the African Union's (AU) Panel of Eminent African Personalities. The panel comprised Kofi Annan (Chair), Benjamin Mkapa and Graca Machel. They brought the two main parties -- the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM) -- into the Kenya National Dialogue and Reconciliation (KNDR) forum for dialogue and mediation. The overall goal of the KNDR process was to *achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights*<sup>68</sup>.

In an attempt to bridge the bitter chasm between the factions competing to rule Kenya in 2007, the Panel bound the parties to end the violence and to identify long-standing issues that had caused the crisis. By way of resolution, the parties ultimately signed a new piece of legislation in the form of the National Accord and Reconciliation Act 2008.

The parties committed themselves to a four-point agenda:

- **Agenda Item 1:** Immediate action to stop the violence and restore fundamental rights and liberties;
- **Agenda Item 2:** Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
- **Agenda Item 3:** How to overcome the political crisis;

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<sup>68</sup> Kenya National Dialogue and Reconciliation: Building a Progressive Kenya, 2011

- **Agenda Item 4:** Addressing long-term issues, including undertaking constitutional, legal and institutional reforms; land reform; tackling poverty and inequality as well as combating regional development imbalances; tackling unemployment, particularly among the youth; consolidating national cohesion and unity; and addressing transparency, accountability and impunity.

Under Agenda Item 3, the parties entered a power-sharing agreement in an effort to resolve the prevailing political crisis. The outcome of that arrangement was the formation of a Coalition Government where public sector positions were distributed between the two camps<sup>69</sup>. With regard to the people displaced by violence in that period, responsibility was assigned to the newly created Ministry of State for Special Programmes and its Minister Dr. Naomi Namisi Shaban.

### **3.2 NUMERICAL INCONSISTENCIES**

The Ministry of State for Special Programmes has a website<sup>70</sup> which puts the total number of IDPs following the election violence of 2007-2008 at 500,000. Already we see an inconsistency with the number of IDPs previously reported by Government which put the figure at 350,000.

The Internal Displacement Monitoring Centre (IDMC), established in 1998 by the Norwegian Refugee Council (NRC), claims to be the leading international body monitoring internal displacement worldwide. It estimates that the violence of 2007 displaced up to 600,000 people. This is yet another departure from the figures reported.

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<sup>69</sup> The Kenya National Dialogue and Reconciliation Monitoring Project, Agenda Item 3, Resolving the Political Crisis (Power Sharing), Report on Status of Implementation, January 2009

<sup>70</sup> <http://www.sprogrammes.go.ke>

The United Nations Office for the Coordination of Humanitarian Affairs cites a larger figure of 663,921 IDPs<sup>71</sup>. This number was confirmed by the Kenya Human Rights Commission (KHRC) as of December 2008. This latter and larger figure is more likely to represent the true state of affairs as it was arrived at following an extensive profiling exercise. The Government of Kenya through the Ministry of State for Special Programmes and National Bureau of Statistics (NBS) and in partnership with the United Nations High Commissioner for Refugees (UNCHR) made a fair attempt in the profiling the IDPs. According to the March and July 2010 State Reports, 663,921 persons were displaced and 78,254 houses destroyed across the country. An additional 640 households fled into Uganda. A total of 350,000 IDPs sought refuge in 118 camps whereas about 331,921 IDPs were integrated within the communities across the country<sup>72</sup>. For ease of reference, a table containing a breakdown of the various statistics regarding internally displaced persons was prepared. That data has been reproduced for purposes of this project research in the table below:-

<b>Provinces</b>	<b>Households</b>	<b>Individuals</b>
Nyanza	24,981	<b>547</b>
Western	12, 385	<b>58, 667</b>
Rift Valley	84,947	<b>408,631</b>
Central	10,092	<b>46,959</b>
Eastern	1,438	<b>6,769</b>
Coast	1,241	<b>4,774</b>

<sup>71</sup> OCHA Kenya: Frequently Asked Questions on IDPs

<sup>72</sup> Gains and Gaps: A Status Report on IDPs in Kenya 2008-2010, Kenya Human Rights Commission

North Eastern	26	<b>148</b>
Nairobi	5,349	<b>19,416</b>
<b>Totals</b>	<b>140,459</b>	<b>663,921</b>

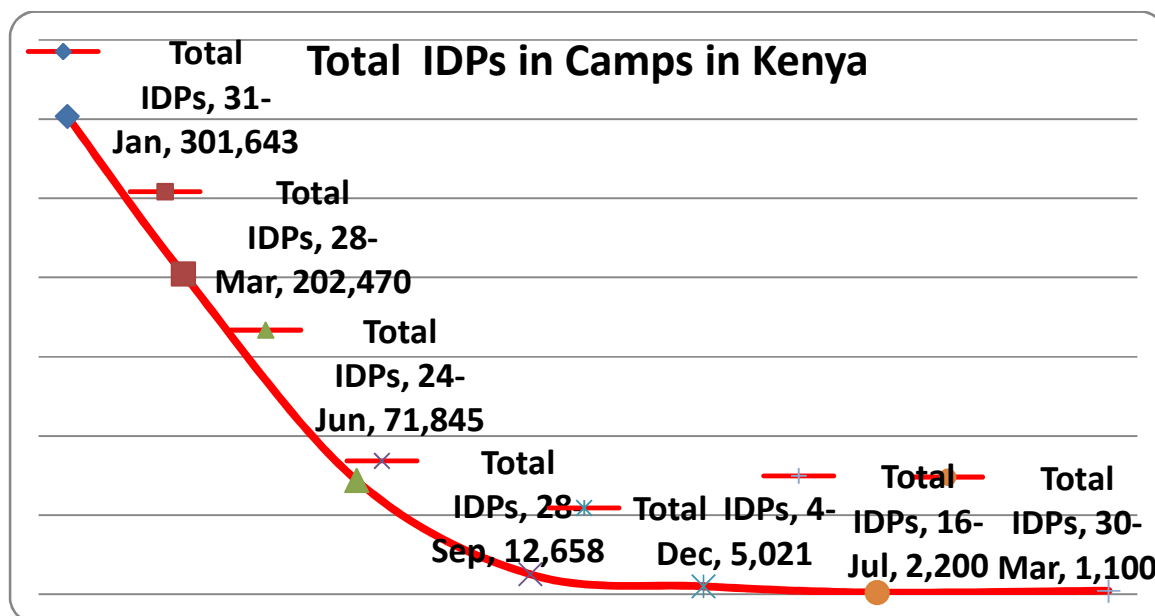
- **Source:** Government of Kenya; Ministry of State for Special Programmes; “IDPs Status Brief as at 3<sup>rd</sup> March 2010”

The Ministry of State for Special Programmes website also confirms that out of the earlier estimated half a million IDPs, a staggering 350,000 had taken refuge in 244 camps across the country as of March 2008. The Government of Kenya initiated a project to resettle IDPs dubbed “Operation *Rudi Nyumbani*”. Coined in Kenya’s national language, the Swahili words “*Rudi Nyumbani*” mean “*Return Home*”. The operation was executed by the Government through its Ministry of State for Special Programmes. It purportedly resettled all but 4,211 of the 350,000 IDPs who were in camps.

In 2009, the United Nations Office for Coordination of Humanitarian Affairs (OCHA) reported<sup>73</sup> that an estimated 663,921 people were displaced during the violence of 2007/2008. Further, OCHA reported that out of the **663,921** displaced persons, An estimated **350,000** of the IDPs sought refuge in **118** camps spread all over the country while the remaining **313, 921** IDPs either integrated within communities or moved to their ethnic homelands for security, despite the fact that there may not have been adequate services to meet the needs of the displaced. The data was reproduced in the two tables below:-

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<sup>73</sup> OCHA Kenya IDP Fact Sheet 16 July 2009



- Source: United Nations Office for Coordination of Humanitarian Affairs (OCHA)IDP Fact Sheet 16 July 2009

Straight away, one can see similarities in the aggregate number of IDPs reported but an inconsistency in the number of IDPs within camps. One way of looking at it is that the data is inconsistent, particularly, when one considers that OCHA cites the Ministry of State for Special Programmes as the principal source of its data. Under the circumstances, there ought not to be any discrepancies in the figures reported. Another way of evaluating the statistics is to consider the divergence in figures as nominal and to look at the broader picture. That is to say, where the difference in the numbers reported by several sources is minimal, one first accepts the fact of displacement before moving on to discuss the underlying issues. In any event, Kenya ranks comparatively average in terms of IDPs globally. Its displaced are nowhere near as many as those in Colombia where it is reported that some 3.9 million people were displaced, according to the government; a non-governmental observer placed the figure closer to 5.3 million<sup>74</sup>.

<sup>74</sup>Global Overview 2011 People Internally Displaced by Conflict and Violence Internal Displacement Monitoring Centre, Norwegian Refugee Council, April 2012



As recently as 2011, there was no national data on IDPs available, the Government had not carried out an exercise to profile their number and locations in most parts of the country. The profiling process that had taken place was most likely flawed and affected by corruption. Many IDPs, in particular the so-called “integrated IDPs”, had been excluded from the figures and thus the assistance due to them.

### **3.3 IDP CAMP MANAGEMENT**

This kind of data sometimes raises more questions than answers when one attempts to address the matter of IDPs empirically. Take, by way example, the Government of Kenya touting its achievements in resettlement of IDPs scattered in camps all over the country as recently as September 2013. According to media reports, the Government embarked on what was described as the final leg of resettling IDPs<sup>75</sup>. It was reported that 3.3 Billion Kenya Shillings had been set aside to resettle the remaining 8,298 households by end of September 2013.

The money was intended to be apportioned in a manner that would permit the IDPs to firstly secure temporary housing as they searched for land to purchase. According to the Cabinet Secretary for Planning and Devolution Anne Waiguru, a sum of Kenya Shillings 400,000/= would be given to the IDPs to buy land. The money would be deposited in bank accounts opened on behalf of the displaced families and the heads of the households as well as their spouses would become signatories. An additional sum of Kenya Shillings 10,000/= was given to the families to help them find a place to stay in the period intervening the receipt of resettlement cash and actual purchase of land for resettlement. Presumably, this would have signaled a close of the camps which had been in existence for over six years. At the time of publication of the

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<sup>75</sup> Daily Nation, Thursday 5<sup>th</sup> September 2013 as reported by Jeremiah Kiplang’at

news report, the remaining camps were situated in Maai Mahiu, **Nakuru**, Eldoret, Kikopey, Kiambu, Trans Nzoia, Elgeyo Marakwet and Uasin Gishu.

Barely two months later, a Tanzanian news website published a story to the effect that Kenya's Parliament had been informed that over 62,000 IDPs were yet to be resettled<sup>76</sup>. The story went on to describe how the National Assembly was informed that were 62,784 IDP families were still in camps awaiting resettlement following a report presented by Honourable Nelson Gaichuchie, Member of Parliament for Subukia Constituency in Nakuru County. A keen eye will detect that there appears to be a disparity between the introductory segment of the publication which talks about 62,000 IDPs and the body of the story which talks about 62,748 IDP families. That notwithstanding, there is a point to be made here; there are thousands of IDPs still in camps and this is the true position acknowledged by the Legislature.

### **3.4 DATA COLLECTION**

This stage of the research problem demands presentation of current data for quantitative and qualitative analysis. In an effort to collate relevant data for this segment of the project, interviews were carried out at two IDP camps located in Gilgil, **Nakuru** County. The interviews were carried out on diverse dates in the month of May 2014. This is the same Nakuru which was expected to have closed down all its IDP camps by 30<sup>th</sup> September 2013. The information was gathered from camps known as Vumilia IDP Camp "A" and Vumilia IDP Camp "B" both established in 2008. The interviews were guided by pre-designed questionnaires that are contained in the Appendices section of this paper. Appendix One is a template for the questionnaire addressed by IDPs themselves. Appendix Two, on the other hand, is a template of

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<sup>76</sup><http://www.24tanzania.com/kenya-over-62000-idps-yet-to-be-resettled-parliament-told/> November 6 2013

the questionnaire responded to by the IDP camp administrator in each of the two Vumilia camps visited. It was not lost on the author that the Swahili word *Vumilia* translates to “Endure” in the English language.

The picture that greets the interviewer at the IDP camps is one of abject poverty and great suffering. The residents of both Vumilia Camps still inhabit tattered tents that have lost the battle against the elements. The shelter is terrible as is the food. In days gone by, both the Government and some NGOs would regularly deliver foodstuffs, among other items, to the IDPs. In the year 2011, the International Commission of the Red Cross provided food to 6,096 IDPs in Kenya<sup>77</sup>. Enquiries revealed that in the early years food relief was delivered on a regular basis, some say, on a quarterly basis. Unfortunately, the eagerly anticipated visits by benefactors diminished in frequency over the years, so much so that after 2011, their quarterly arrivals became an annual event. It does not take a specialist to discern that the poor nutrition has led to deterioration in health. A similar fate befell the provision of medical supplies by both the Government and non-state actors. It is an infinitely pitiable situation that has been painfully endured by the IDPs.

It had been anticipated, in Chapter 1 of this paper, that a total of 20 interviews would be carried out. The data that has in fact been collected amounts to a dozen interviews made up of 10 questionnaires completed by five (5) IDPs families/households from each camp and two questionnaires completed by the camp administrator in each of the camps. A number of challenges were encountered during this stage of research. The hurdles faced were, principally, logistical in nature. The author resides and works for gain in the port town of Mombasa situated approximately 600 kilometres from the IDP camps in question. There were constraints of time

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<sup>77</sup> ICRC Annual Report, Nairobi, 2011

within which to conduct the interviews as it detracted from the researcher's contractual obligations with his employers in Mombasa. The challenge of time is also experienced in another way; the passage thereof. This data was collected in May 2014 - seven years after the violence broke out and six years after the camps were established. There have been many changes in the intervening period. To give an illustration of such a scenario encountered on the ground, it was discovered that there are IDPs who arrived in the camps in circa 2008 whilst in their late teens. By the time these interviews were carried out, the said IDPs had married and/or sired children thereby starting nuclear families of their own. This resulted in a distortion of the number of IDP families known to inhabit the two Vumilia camps and, by extension, countrywide.

Apart from time, there were also budgetary constraints. The data presented here was collected at no small cost in terms of money for transport, accommodation, food and other incidental expenses.

The data collected, particularly the segment seeking an opinion on Government efforts to resettle IDPs, may have been tainted by bias. Bias fuelled by bitterness of IDPs who are still stuck in camps with no end in sight. Some IDPs are still harbouring bitterness over loss of loved ones and property during the violence that rocked this country in 2007/2008. To counter this element of bias, a few group discussions were conducted with the local community neighbouring the IDP camps. Through this, it was hoped that some degree of objectivity would be achieved. Perhaps the writer expected too much, as another form of bias was introduced into the discussion. The local community has a very low opinion of the IDPs and little sympathy for their plight. Feelings of resentment are directed to the IDPs for their perceived laziness in sitting in the camps for

years while waiting for hand-outs from the Government. The perception of laziness is increased when one considers that the local community, mostly subsistence farmers, has managed to clear the surrounding forest of bush in order to cultivate. The locals have managed to support themselves without any intervention from the Government and they, consequently, view the IDPs as freeloaders undeserving of all the fuss being made by Government.

The IDPs are not themselves entirely blameless in all this. There is anecdotal evidence of IDPs selling relief items such as the Ultra Heat-Treated (UHT) milk provided to last each family at least three months. Ditto the flour and the cooking oil. Also sold were the blankets provided to give succour against inclement weather. Some IDPs, it would appear, prefer to have cash in hand rather than wait for the quarterly cycle of relief provisions from the state and non-state agencies. This points to deeper underlying issues beyond the oversimplified accusations of lust for cash.

Out of the ten families/households interviewed, two men were widowed. A father of 6 who came from Eldoret, and a father of 7 who escaped violence in Kuresoi. There was also one divorcee who came from Kericho and she had three children. Only one single man of 25 years in age was encountered but even he had one child. In total, the ten households/families interviewed had 36 children. This brief description of the interviewees illustrates the cross-section of people spoken to within the IDP camps.

### **3.5 COLLATION AND INTERPRETATION OF DATA**

Without exception, all IDPs spoken to acknowledged intervention by the Government through provision of relief food, water, tents and medical aid. The provision of relief food, water, tents

and medical aid can also be seen as being consistent with the Guiding Principles<sup>78</sup> where it is stated that:-

“At the minimum, regardless of the circumstances, and without discrimination competent authorities shall provide internally displaced persons with and ensure safe access to:

- (a) Essential food and potable water;
- (b) Basic shelter and housing;
- (c) Appropriate clothing; and
- (d) Essential medical services and sanitation.”

Added to that, some interviewees confirmed that they received money from the Government. In three of the households, the figure quoted was a sum of Kenya Shillings 15,000/=. In three other families, the amount received was Kenya Shillings 10,000/=. It was established that where a family/household had children below the age of eighteen (18), the amount of money given to them was Kenya Shillings 10,000/= only. Where a family/household had children above the age of eighteen (18), the amount of money given to the parents was Kenya Shillings 15,000/= whilst each of the adult children, that is those over eighteen, was given an equal sum of Kenya Shillings 15,000/=. This is perhaps a demonstration of how a state can meet its legal obligations to towards internally displaced persons on the premise that “*National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction*”<sup>79</sup> This position was later reflected in the Prevention, Protection

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<sup>78</sup> Principle 3.1 Guiding Principles *supra*

<sup>79</sup> Principle 18.2 Guiding Principles *ibid*

and Assistance to Internally displaced Persons and Affected Communities Act of 2012 which came into force in January 2013.

It must be noted that the IDP families interviewed were those still inside the Vumilia camps as other had been relocated by the Government whilst others moved in with their families or became integrated with local communities. Discussions with the administrators of the IDP camps revealed that there were one hundred and twenty (120) IDP families as at the date of establishment of Vumilia camps “A” and “B”. The provision of relief food, water, tents, medical aid and money was confirmed. However, it was pointed out that for those IDPs who could prove that they owned land in areas of conflict that led to their displacement, the arrangement for compensation was different. Apparently each IDP family that had evidence of title to land before violence were compensated with alternative land and a cash amount of approximately Kenya Shillings 30,000/=. This group of IDPs was relocated to areas such as Solai, Laikipia and Mawingo where they were given new properties.

This amount of Kenya Shillings 30,000/= was paid to IDPs in addition to initial Kenya Shillings 10,000/= given to a family/household that had children below the age of eighteen (18) or the Kenya Shillings 15,000/= given to a family/household with children above the age of eighteen (18).

According to the camp administrators fifty (50) families returned home with Kenya Shillings 10,000/= each under the *Operation Rudi Nyumbani* initiative driven by the Government. Another nineteen (19) families were relocated after payment of a cash amount of approximately Kenya

Shillings 30,000/= per family. At the time of interviews with the administrators of the two camps, about fifty one (51) IDP families/households remained at both Vumilia camps. Viewed against the number of IDP families/households at establishment of the camps, the Government of Kenya has either returned or relocated more than half of all IDPs therein (69 out of 120). The Government's score may improve significantly if one factors the very likely distortion of figures occasioned by penetration into the camps by "opportunistic IDPs."

There is more than adequate motivation for people to masquerade as IDPs in order to benefit from Government monetary interventions. Not least the money promised by government to IDPs in 2013 in order to finally close all camps. Reports in media<sup>80</sup> announced that internally displaced persons would receive Kenya Shillings 400,000/= per household to buy land elsewhere as the government said all camps will be closed by end of September. Each of the families would also receive a further Kenya Shillings 10,000/= for logistics to leave the camps. What transpired, however, was nothing short of farcical. The IDPs, in particular those resident at Vumilia camp and Eldoret, declined the Kenya Shillings 400,000/= on offer on the grounds that it would not be adequate. In fact, the camp chairman Stephen Mbugua was quoted as saying that the amount was not enough for them to purchase alternative land. They demanded Kenya Shillings 700,000/= citing better offers that were made to IDPs who quit the camps earlier. Unsurprisingly, this raised no small furore, from ordinary Kenyans who reacted with anger and disbelief at their chutzpah<sup>81</sup>.

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<sup>80</sup> Daily Nation, Thursday 5 September 2013 by Jeremiah Kiplang'at

<sup>81</sup>The Kenyan DAILY POST [County News](#) 10:47 **Thursday 5<sup>th</sup> September 2013** - Internally Displaced Persons from Vumilia Camps in Mai Mahiu and Eldoret have rejected the Government's offer of Sh 400,000.



A final observation made from interaction with IDPs at Vumilia was their familiarity with *Operation Rudi Nyumbani*. Unfortunately, this scheme did not avail some IDPs as they were all too aware of lingering hostilities in the regions they fled. Those families that were forced to flee areas such as Kuresoi, to give an example, were unable to return home. Some rifts were too wide to bridge and wounds too deep to heal.

### **3.6 SUMMATION**

As of December 2013, IDMC estimated that there were 412,000 internally displaced people (IDPs) in Kenya. The reason this figure remains an estimate is because there is no comprehensive and up-to-date national data on displacement is available for Kenya. Further, Kenya has no real centralized IDP-related data collection system and the government has never carried out an exercise to properly profile their numbers and locations throughout the country. Therefore, any evaluation of the status of IDPs is greatly hampered by the nature of data available for research.

In order to mitigate these challenges, it becomes necessary to make reference to, and in some cases, borrow from practices in other jurisdictions. This exercise in benchmarking will assist in charting a path for the objectives of this research in the following chapter. For instance, there may be a need to adopt and implement complementary policy and legal frameworks which have a bearing on the protection and provision of assistance to IDPs<sup>82</sup>. In Chapter 4, the author attempts to establish the status of IDPs in International Law whilst contemplating practices in other parts of the world. It is expected that this will shed more light on the methods employed to deal with the issue of displacement across the globe.

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<sup>82</sup> Behind the Scenes – Lessons Learnt from Developing a National Policy Framework on Internal Displacement in Kenya, January 2013. Refugee Consortium of Kenya (RCK) and the Danish Refugee Council's Great Lakes Civil Society Project.

## CHAPTER 4: STATUS OF IDPS IN INTERNATIONAL LAW

### 4.1 INTRODUCTION

Of all statistics gathered in the course of this research paper, the most damning (and most obvious) is that Kenya still has thousands of IDPs stuck in camps littered across the country more than six years after the post-election violence ended in 2008. Whereas huge strides have been made towards ameliorating the IDP situation, the majority of these developments are merely seen on paper but not felt on the ground.

One school of thought was premised on the assumption that things would improve if only Kenya were to adopt, by ratification, the already existing international legal instruments. It was also assumed that IDPs would be better off if Kenya, through its Parliament, enacted legislation to protect IDPs<sup>83</sup>. At the time, it was believed (erroneously in my view) that the establishment of some legal and institutional frameworks would be a panacea for the ills that have bedeviled this nation with regard to displacement. Unfortunately, that may not have been sufficient. In the intervening period – between the election related violence of 2007-2008 and the preparation of this paper - Kenya promulgated a new Constitution following a referendum that was conducted in 2010. Kenyans turned out in their millions to vote, overwhelmingly, for a new Constitution ushering in an entirely different dispensation.

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<sup>83</sup>Kamungi, P.M. and J.M. Klopp (2008) *Failure to Protect: Lessons from Kenya's IDP Net-work*. Nairobi: IDP Network.

## **4.2 THE CONSTITUTION OF KENYA 2010**

The Constitution of Kenya 2010 provides that the general rules of international law shall form part of the law of Kenya<sup>84</sup>. Further, it states that any treaty or convention ratified by Kenya shall form part of the law of Kenya<sup>85</sup>. The nexus to international law acts as an umbilical cord critical in nourishing domestic legislation while at the same time keeping Kenyan municipal law anchored to international law. One of the pleasant outcomes of promulgating the 2010 Constitution is an expansive Bill of Rights that includes, but is not limited to, the right to life, equality and freedom from discrimination, human dignity, freedom and security of the person, freedom of movement and residence as well as the right to property<sup>86</sup>. On the face of it, these would be the more pertinent issues to victims of displacement.

## **4.3 THE PREVENTION, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS AND AFFECTED COMMUNITIES ACT, 2012 NO. 56 of 2012**

In addition, Parliament passed a new law<sup>87</sup> in 2012 to deal specifically with IDPs. The IDP statute is described as an Act “to make provision for the prevention, protection and provision of assistance to internally displaced persons and affected communities and give effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement and for connected purposes.” Reassuringly, the IDP Act of 2012 reaffirms the position espoused by the 1998 Guiding Principles. The acknowledgement of our obligations under the Great Lakes Protocol of 2006 is also

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<sup>84</sup> Article 2(5) Constitution of Kenya 2010

<sup>85</sup> Article 2(6) Constitution of Kenya 2010

<sup>86</sup> Chapter Four, Bill of Rights, Constitution of Kenya 2010

<sup>87</sup> The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 No. 56 of 2012

commendable. In the interpretive segment found under Section 2 of the IDP Act, we find the definition of IDP in the terms below:-

***“internally displaced person” means a person or group of persons who are 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 generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.”***

The definition above is a word for word reproduction of the widely known definition contained in the Guiding Principles on Internal Displacement of 1998. In the years that followed, that definition served little more than to describe the features or characteristics of an IDP. One major weakness that was highlighted was the fact that, at the time, there was no international legally binding document that defined IDPs<sup>88</sup>, therefore, the definition contained in the Guiding Principles was of little legal consequence. This is not to suggest that the Guiding Principles did not serve their purpose. In fact, the Guiding Principles were the proverbial first step in the journey of a thousand miles. It must be recalled that in years gone by, not many states were prepared to adopt a legally binding document that matched the protection levels assured under the Guiding Principles. It was argued that until such time as states developed national or domestic laws for the protection of IDPs, it was preferable to rely on the Guiding Principles rather than attempt a binding instrument prematurely<sup>89</sup>. It must be remembered that not all states welcome the signature and ratification of international treaties that introduce high standards of accountability.

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<sup>88</sup> E. Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", in: Refugee Survey Quarterly, Volume 24, Issue 3, 2005.

<sup>89</sup>Walter Kalin, Forced Migration Review, vol. 23, May 2005, p.4

Even the mighty United States of America and its widely acclaimed democratic history is reluctant to enter certain international legal commitments including but not limited to the Rome Statute of the International Criminal Court, but more on that later.

Still on America, the US government never formally designated the survivors of Hurricane Katrina internally displaced persons, although President Bush at one point did refer to them as “displaced Americans.” Nonetheless, the Guiding Principles on Internal Displacement should have served as a framework for them.<sup>90</sup>

A growing number of governments are basing laws and policies on the Principles, which make them enforceable at the domestic level. In 2001 the government of Angola based its law concerning the resettlement of the internally displaced on the provisions in the Guiding Principles; in 2004 the government of Peru adopted a law based on the Principles that provides material benefits to IDPs. Similarly, in Colombia the government announced more aid to IDPs in response to a Constitutional Court decision based on the Guiding Principles, while the government of Georgia brought its laws on voting rights into line with them. In Burundi, Liberia, the Philippines, Sri Lanka, and Uganda, governments have based their national policies on the Principles, with gains reported for IDPs

Several other countries had already passed domestic legislation providing for the creation of a national status for IDPs. For example, Azerbaijan, Bosnia and Herzegovina, Colombia, Croatia, Georgia and the Russian Federation have all developed a **national status** for their IDPs through

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<sup>90</sup> Roberta Cohen, “Time for the United States to Honor International Standards in Emergencies,” Opinion, the Brookings Institution, 9 September 2005

domestic legislation. It is hardly surprising that out of the seven countries offered by way of example, six were products of fragmentation of much larger states. Bosnia-Herzegovina and Croatia owe their existence to balkanization of the former Yugoslav Republic between 1991 and 2001<sup>91</sup>. Azerbaijan, Georgia and Russia were all part of the former Union of Soviet Socialist Republics (U.S.S.R) until 1991.

In the six countries mentioned, the national status developed domestically has conferred upon IDPs certain benefits that may not be obtained under international law. For example, such a status usually provides for the registration of those entitled to the status and provides beneficiaries with social, economic and legal assistance to safeguard rights endangered by displacement and support the implementation of durable solutions. Such a national status would not under normal circumstances deprive IDPs of their rights under human rights or humanitarian law<sup>92</sup>.

What we are witnessing now in Kenya and across the world was foretold. There is a trend for states to develop domestic laws and policies for the protection of IDPs and this may, ultimately, pave the way for the creation of a treaty. It remains to be seen whether the “treaty way” is the way to go in future and this paper shall attempt to expand debate along those lines. Back home, we find that the Kenyan IDP statute established a National Consultative Coordination Committee on Internally Displaced Persons in an attempt to create the institutions needed to address the IDP crisis in Kenya. These recent changes notwithstanding, Kenya still has IDPs languishing in

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<sup>91</sup>Michel Chossudovsky, *Dismantling Former Yugoslavia, Recolonizing Bosnia-Herzegovina*. Global Research: February 19, 2002: <http://globalresearch.ca/index.php?context=va&aid=370>

<sup>92</sup> Who is an Internally Displaced Person? Training on the Protection of IDPs, Internal Displacement Monitoring Centre 2005

camps as revealed in earlier sections of this project paper. The question that must now be asked is, “Why?”

It must be recalled that the violence that resulted in displacement - as discussed in this paper - began in December 2007 and spilled over to the early part of 2008. As has already been pointed out, that is over six (6) years ago. Human recollection of those events may have been affected by the passage of time; such that our attention to the plight of those afflicted has diminished. It is entirely possible that many people are operating under the belief – misguided or otherwise – that the IDP crisis is over. The Internal Displacement Monitoring Centre (IDMC) operating under the auspices of the Norwegian Refugee Council highlighted this particular concern<sup>93</sup>. It appears that there are many who mistakenly assume the IDP emergency has ended. This is partly attributable to Government pronouncements through various media to the effect that IDPs have been attended to either by returning home, resettlement or integration. The Government has gone so far as to suggest that those still in camps are impostors who are attempting to defraud the state by seeking financial aid undeservedly. It is hard to blame the Government if some of the news reports published are anything to go by. On 5<sup>th</sup> November 2013, the National Assembly’s House Committee on Finance, Planning and Trade was told that there remained 62,784 IDP families yet to be resettled<sup>94</sup>. It was also reported that imposters benefitted from the compensation paid out by Government for IDPs. One Member of Parliament was keen to point out the vicious cycle where as soon as one group of IDPs is resettled, another comes to take their place. Clearly, the Government has not succeeded in resettling all IDPs but it also appears that there are some who have no scruples about taking advantage of the situation to receive money unjustifiably.

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<sup>93</sup>IDP’s Significant Needs Remain as Inter-Communal Violence Increases, IDMC, 28 December 2012

<sup>94</sup> The Standard, Wednesday 7<sup>th</sup> November 2013 as reported by Alphonse Shiundu

More recently, a Deputy County Commissioner in Nyandarua County issued a stern warning to a group of IDPs who sought compensation under the guise of displacement<sup>95</sup>. The group, comprising 260 families in Kidipa Farm, Ndaragwa Constituency was allegedly not registered by the Ministry of State for Special Programmes as IDPs when the exercise was underway. They are merely trying to defraud the Government of the 400,000/= promised to every remaining displaced family. Imagine what a colossal sum of money would be lost through fraud if all the 260 families were to be paid that money. It would amount to an unmitigated loss of 104 Million Kenya Shillings. To put it into perspective, that amount is approximately 1 Million Euros; it is not small change.

In the mind of the general public a certain picture has been painted and our thoughts have been coloured to believe that the IDP issue has been dealt with. Following the formal closure of IDP camps in 2010, it was widely presumed that those still in the camps are fake IDPs<sup>96</sup>. The majority of IDPs live outside IDP camps

Matters are not made any easier by the absence of reliable data on the number of IDPs in Kenya, their location within the country, and their status in terms of those who returned to residences of origin, those who resettled elsewhere or those that were integrated locally. A number of those displaced by post-election violence in 2007-2008, particularly those hailing from Western Kenya, found their way into Kenya's neighbour Uganda. Technically speaking, those people would be termed as refugees rather than IDPs notwithstanding that the cause of their

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<sup>95</sup> <http://www.kenyanewsagency.go.ke>

<sup>96</sup> Municipalities and IDPs Outside of Camps: The case of Kenya's 'integrated' displaced persons, Prisca Kamungi May 2013



displacement was the same. As seen from the previous chapter, various sources give various responses to the query of number and status of Kenyan IDPs.

However, the enactment of the 2012 IDP Act in Kenya has conferred a “national status” upon internally displaced persons in this country. This is apt, more so when one recalls the title of this paper and appreciates that the writer seeks to establish the status of IDPs in International Law. The case study of Kenya is an effort to address this query. At this juncture, it is possible to assert that in Kenya, the law has conferred upon IDPs some nominal status as a special demographic. Further, Kenyan law has laid down the principles of prevention of displacement, protection from displacement and assistance to IDPs<sup>97</sup>. Having established the position in Kenya, it becomes necessary for the purposes of this study to look at what the rest of the world has done to protect internally displaced persons.

The approach towards affording IDPs protection has undergone quite some transformation in the last few decades. There was a time when IDPs were not recognized as a special class of victims and they were lumped together with refugees. It is perhaps for this reason that there was a drive to expand the mandate of the UNHCR to include provision for the needs of IDPs on account of its experience with refugees. Calls for the UNHCR to take on greater responsibility by affording protection to IDPs in addition to refugees did not go unopposed. Other UN agencies that were unwilling to yield jurisdiction or resources to the UNHCR resisted the proposal; the cause for disharmony? An apparent overlap in mandate between several UN agencies that were also engaged in the provision of relief and protective services to IDPs worldwide.

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<sup>97</sup>Part II, The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 No. 56 of 2012 *supra*

It is easy to see the cause for disagreement when we have agencies such as UN Children's Fund (UNICEF), the World Food Program (WFP), the World Health Organization, the UN Development Program (UNDP), the Office of the High Commissioner for Human Rights (OHCHR), the International Organization for Migration, and a myriad of NGOs all attempting to address some aspect of relief from violent displacement. Add to this, the prominent role taken by the UN High Commissioner for Refugees (UNHCR) in matters related to internal; displacement and you get a powder keg for disagreement on many levels. These agencies were expected to work together to meet the assistance, protection, reintegration, and development needs of the internally displaced. Their activities were coordinated by the Emergency Relief Coordinator at headquarters and by Resident/Humanitarian Coordinators in the field<sup>98</sup>. This would suggest some degree of collaboration but it would prove ineffectual.

#### **4.4 THE COLLABORATIVE APPROACH**

By the 1990s, the UNHCR had become deeply engaged in the provision of protection and assistance to IDPs notwithstanding long-held views that the accepted practice was to leave IDP matters to individual states. As the IDP crisis grew, it became clear that individual states could not give adequate protection and assistance to IDPs by themselves and that an international response was needed. At the turn of the 21<sup>st</sup> century, the world found itself desperately trying to stem the flood of displacement though inter-agency collaboration as illustrated above but challenges abound. In the field, it remained unclear who was ultimately responsible for operations to protect and assist IDPs. Without one centre of accountability, it became impossible to say where the buck stopped.

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<sup>98</sup> Roberta Cohen Strengthening Protection of IDPs The UN's Role 2006

Another complication that arose from the collaborative approach of various agencies was the lack of predictability of action. It transpired that the agencies concerned with IDP protection and assistance would pick and choose when and where to become involved on the basis of their respective mandates, resources and interests. No one could anticipate which agency would respond to which displacement crisis with any degree of certainty or whether they would respond at all. An example is given that “Whereas most rushed to South Asia to help those displaced by the tsunami, only limited international engagement is to be found in northern Uganda where tens of thousands of children flee every night to cities and villages to escape abduction and maiming by rebels. Nor does the Emergency Relief Coordinator have the authority to tell the powerful, billion-dollar operational organizations what to do. In Darfur, UNHCR declined to take on the management of IDP camps, while in Uganda, despite the coordinator’s pleas, UNICEF took until 2005 to deploy a mere three additional child protection officers. The agencies support coordination in theory, but no one likes to be “coordinated” in practice.”<sup>99</sup>

#### **4.5 THE CLUSTER/SECTORAL APPROACH**

In the sage words of former United States Ambassador to the United Nations Richard Holbrooke “Co-heads are no heads.”<sup>100</sup> This was an aptly summarized observation regarding inter-agency response without any single agency taking a lead role and being held to account for its acts or omissions. Owing to the shortcomings of the collaborative approach, it became necessary to formulate a new way to deal with international agency response to the issue of displacement. In the year 2005, the office of the United Nation’s Emergency Relief Coordinator came up with a sectoral approach. Under this new arrangement, agencies would be expected to identify, from the

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<sup>99</sup>Roberta Cohen Strengthening Protection of IDPs The UN’s Role 2006

<sup>100</sup> Richard Holbrooke, “A Borderline Difference,” Washington Post, 8 May 2000.

outset, their areas of responsibility on the basis of their expertise. Having done so, the agencies would execute their respective roles on a regular basis during emergencies.

Across the globe, concerted efforts have been made to address **institutional gaps** in humanitarian response, including in situations of internal displacement. The reform of the humanitarian system initiated in 2005 identified protection as a persistent gap and created institutional mechanisms to ensure that protection is a core component, and cross-cutting element of humanitarian response. The key mechanism introduced to help fill the gap is what we refer to as the "cluster" approach.

This approach was approved in September by the UN's Inter-Agency Standing Committee (IASC), composed of the heads of the major relief and development agencies, the Red Cross, and NGOs and set to begin in January 2006. UNHCR agreed to assume the lead for the protection of IDPs, the management of IDP camps, and emergency shelter for IDPs who are victims of conflict. This is sometimes referred to as (CCCM) which stands for camp coordination and camp management and represented a substantial enlargement of UNHCR's role. It also signified a shift in attitude from what was a conditional response to one that is almost obligatory. One commentator described the UNHCR's new level of involvement with IDPs as having evolved from an attitude of "no, unless certain conditions are met" to one of "yes, unless specific

conditions arise.”<sup>101</sup> Another scholar had earlier argued that ‘the cluster approach is essentially about transforming a “may respond” into a “must respond” attitude.’<sup>102</sup>

Say, for example, if the World Food Programme, during a crisis of displacement, elected to focus its activities to provision of food as its area of expertise. WFP would, on a regular basis, ensure that the IDPs are given food and limit itself to those functions it is capable of discharging. Same goes for UNICEF where children are concerned and so on and so forth for each agency. This sectoral approach came to be referred to as the “cluster approach” and was seen to be the most progressive of all reforms. It entailed a departure from the narrow focus on agency mandates of the past to a broader focus on sectors, with genuinely inclusive sectoral groups (‘clusters’) working under clearly designated cluster leads. “The Cluster Approach requires a fundamental shift in cultures and mindsets...The broad focus on sectors and clusters, rather than on individual mandates, is here to stay.”<sup>103</sup> There remains, however, a genuine fear that IDP protection may be compromised by UNHCR’s attention being diverted by the agency’s primary responsibilities towards refugees. Ideally, IDP protection should not be undermined because of refugee commitments. In situations where States require support or where national protection is not ensured, a critical protection role falls to the **international community**. It has been difficult to address this “protection gap” not only because of the sensitivity of the subject within the country concerned, but also because of various gaps within the international framework.

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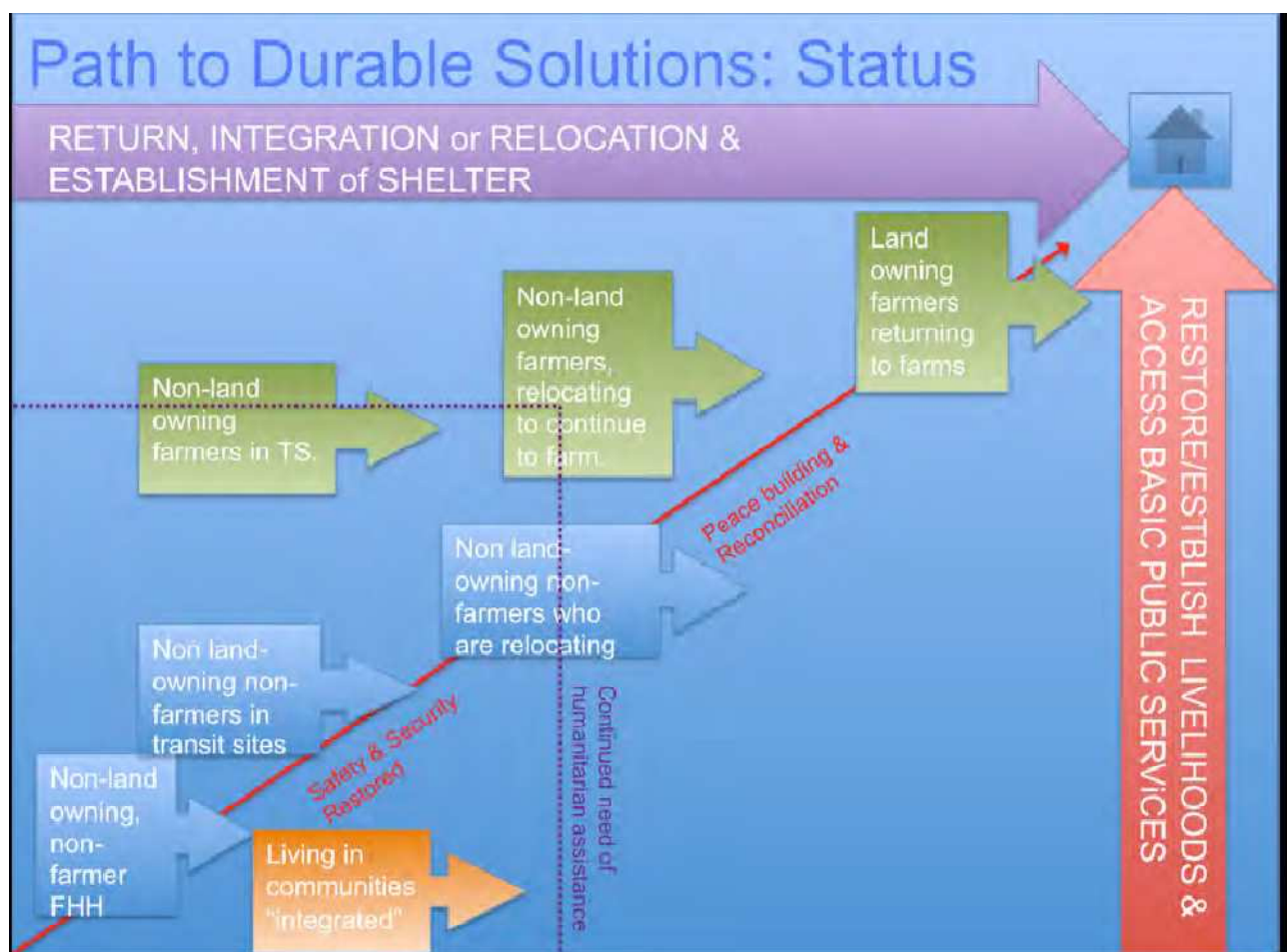
<sup>101</sup>Feller, E. (2006) UNHCR’s role in IDP protection: opportunities and challenges. *Forced Migration Review*, December 2006: 11-13

<sup>102</sup>McNamara, D. (1998) UNHCR’s Protection Mandate in Relation to Internally Displaced Persons, 53-62 in Davies, W. (ed.) *Rights Have No Borders. Internal Displacement Worldwide*, Oslo and Geneva, Norwegian Refugee Council and The Global IDP Survey.

<sup>103</sup>Holmes, J. (2007) Humanitarian action: a Western-dominated enterprise in need for change. *Forced Migration Review*, 29: 4-5.

#### 4.6 DURABLE SOLUTIONS

In 2008, the UN Office for the Coordination of Humanitarian Affairs (OCHA) referenced durable solutions as part of international best practices to resolve the issue of displacement<sup>104</sup>. The article cited Kenyan Government authorities' pledge to leverage the initiative of the self-help groups by paying Kshs 25,000/= per household, in support of shelter. According to UN OCHA the shelter project, designed to rebuild the estimated 500,000 houses destroyed in the PEV, is playing a critical role in facilitating durable solutions. Below is a diagram illustrating the path to resettlement of IDPs:-



<sup>104</sup> The Path to Durable Solutions in Kenya UN Office for the Coordination of Humanitarian Affairs (OCHA) 2008

Soon thereafter, in October 2010 to be precise, Operational Guidelines on the Protection of Persons in Situations of Natural Disasters were formally endorsed by the Inter-Agency Standing Committee (IASC). The aim of the Guidelines is to assist Governments, as well as international and non-government humanitarian organizations to ensure that disaster relief and recovery efforts are conducted within a framework that protects and furthers the human rights of affected persons. The IASC published its Framework on Durable Solutions for Internally Displaced Persons in April 2010. The present Framework on Durable Solutions for Internally Displaced Persons aims to provide clarity on the concept of a durable solution and provides general guidance on how to achieve it. This Framework was an improvement on a pilot version released in 2007, which the Inter-Agency Standing Committee welcomed and suggested be field-tested. The Framework was revised and finalized in 2009, taking into account valuable feedback from the field on the pilot version and subsequent drafts<sup>105</sup>. It was noted that protection for internally displaced persons entailed ensuring a **durable solution** to their plight. However, the difficulties encountered in pursuit of durable solutions could not be underestimated because they are usually linked to larger struggles for peace, security, territorial control, equal treatment and an equitable distribution of resources<sup>106</sup>.

In the introductory segment of the 2010 IASC document, it is stated that the objectives of the framework are three-fold:-

- to foster a better understanding of the concept of durable solutions for the internally displaced;

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<sup>105</sup> Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development, Report Of The Representative of The Secretary-General on The Human Rights of Internally Displaced Persons, Walter Kälin, 29 December 2009

<sup>106</sup> IASC Framework on Durable Solutions for Internally Displaced Persons The Brookings Institution – University of Bern Project on Internal Displacement April 2010

- to provide general guidance on the process and conditions necessary for achieving a durable solution; and
- to assist in determining to what extent a durable solution has been achieved.

In terms of applicability, it is intended to be complementary to the more detailed operational guidelines adopted by humanitarian and development actors or national and local authorities. So, what constitutes a durable solution? The IASC documents that a durable solution is achieved when IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement. To do this, it is obligatory to ensure the following:-

- Sustainable reintegration at the place of origin (hereinafter referred to as “return”);
- Sustainable local integration in areas where internally displaced persons take refuge (local integration);
- Sustainable integration in another part of the country (settlement elsewhere in the country).

These three elements are now repeated throughout discussions related to the amelioration of the challenge of displacement worldwide. We readily cite **return, local integration and relocation** as solutions to displacement.

In terms of international best practices, durable solutions appear to be the way forward. But they are hardly a new concept in discussions regarding IDPs. For example, about ten years ago, the Danish Refugee Council expanded its mandate in response to the increasing number of IDPs globally. In its revised mandate, the Danish Refugee Council pronounced its aim to provide “Protection and promotion of **durable solutions** to refugee and displacement problems on the basis of humanitarian principles and human rights, including to provide refugees, internally



displaced and other affected groups in situations of war and conflict with assistance according to their rights”.

In its Position Paper on IDP Protection<sup>107</sup>, the Danish Refugee Council reiterated its commitment to “continuously increasing our efforts in support of protection of IDPs and finding **durable solutions** to their situation.” Here we see the concept of durable solutions being mentioned again. At the time, there were grave concerns regarding the future of IDP protection in light of the fact that IDPs remained a neglected group of “at risk” persons. Most attempts at resolution of the problem were largely ineffective. The Council noted that “unlike refugees who cross an international border, those who stay within their own country must rely upon their own governments to uphold their rights. Paradoxically, it is often the same government that has caused the displacement in the first place and in addition often prevent international organizations access to their citizens.

Furthermore, as IDPs remain within their country, they are frequently to be found in close proximity to areas of armed conflict and ongoing violence. For that reason, combatants and political actors are often hostile to the presence of international organizations. If the state concerned chooses not to invite external assistance, the international community has limited options to protect the people who are internally displaced.”

Slowly, the response to displacement is transforming from a reactive one to a proactive one. This is the reason there appears to be a lot of focus on lasting solutions. Not least, in the Kenyan IDP Act of 2012 which defines durable solutions<sup>108</sup> as:-

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<sup>107</sup> The Danish Refugee Council, Programme Handbook 2008, Annex 10 DRC Position Paper on IDP Protection

<sup>108</sup> Section 2(1) The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 No. 56 of 2012 supra

*“the achievement of a durable and sustainable solution to the displacement of persons through a voluntary and informed choice of sustainable reintegration at the place of origin, sustainable local integration in areas of refuge, or sustainable integration in another part of Kenya.”*

The drafters of this piece of legislation have drawn praise from commentators with one, in particular, noting the integration of the principles of voluntariness and informed choice to the very definition of durable solution. This means that any mention of durable solution throughout the legislation thereby incorporates the obligation on public authorities in Kenya to ensure participation and the provision of information in relation to any decision made to effect return, resettlement, or integration<sup>109</sup>. An IDP may not, therefore, be forced to accept disagreeable terms of return, resettlement, or integration whether the government of the day insisted upon them or not. It elevates the (human) rights of IDPs thereby permitting them to make voluntary and informed decisions rather than forced ones with respect to their durable solution. This is perhaps one of the better illustrations of a rights based approach to displacement.

#### **4.7 THE RIGHTS BASED APPROACH TO DISPLACEMENT**

This approach is based on the presumption that the protection of internally displaced persons is closely linked to the protection of their human rights as discussed in Chapter 2 of this paper. It is useful to interrogate the significance of human rights become to the protection of IDPs – Why are their human rights important? In an impressive effort to address this query, Prof Walter Kalin<sup>110</sup> points out that human rights matter most to the IDP owing to the deprivation thereof. The universally declared and acknowledged human rights to housing, food, and property are taken away from IDPs instantly. Other human rights and freedoms are steadily whittled away in

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<sup>109</sup> Kenya: Internally Displaced Persons Bill, 2012. Legal Analysis by Article 19, July 2012

<sup>110</sup> Working with the Rights Based Approach in the Field of Migration Prof. Walter Kälin, Bern, 16 September 2013

the aftermath of displacement, for example, the right to work, the freedom of association and so on. The efficacy of the rights based approach is that it goes to the root of the IDPs greatest source of concern.

In recent times, the rights based approach has found favour with advocates of protection for those displaced by environmental or climatic changes. The Head of the Internal Displacement Monitoring Centre<sup>111</sup> (IDMC) employed the example of Kenya's displaced pastoralists in explaining how a rights based approach might avail them. Another proponent of the rights based approach noted that the persons likely to be displaced due to climate change are entitled to enjoy the full range of civil, political, economic, social and cultural rights that are enunciated in international and regional human rights treaties and customary international law<sup>112</sup>.

Kenya is really not a pioneer on the continent in enacting domestic IDP legislation based on the Guiding Principles. Indeed, many countries have adopted IDP laws or policies to implement the UN Guiding Principles. For instance, Angola led the way by incorporating the UN Guiding Principles as early as the year 2000. This was barely 2 years after the principles were first presented to the UN Commission on Human Rights in 1998. Angola was quickly followed by Burundi who took steps to do the same in 2001. The following year, 2002, it was the turn of Sierra Leone. Liberia and Uganda both took on board the Guiding Principle in 2004. The list of African nations who adopted the guiding Principles was completed by Sudan in 2009.<sup>113</sup>

Of these nations, Uganda is closest to Kenya in terms of cultural and geographical proximity among other attributes. Uganda was seen as a pilot for the UN's 'Cluster Approach' during

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<sup>111</sup> Kate Halff, Internal Displacement in the Context of Climate Change Research Results, Berlin January 2013

<sup>112</sup> Mostafa Mahmud Naser, Protection of Climate-Induced Displacement: Towards A Rights-Based Normative Framework

<sup>113</sup> Kenya: Internally Displaced Persons Bill, 2012. Legal Analysis by Article 19, July 2012

attempts to resolve the conflict between the government and the Lord's Resistance Army (LRA). The UN Secretary-General's Representative on Internally Displaced Persons, F.M. Deng, was deployed to supervise the process of reconciliation and in so doing stem the flow of displacement. In his report<sup>114</sup>, Mr. Deng called upon the government of Uganda to "adopt, as a matter of priority, its draft policy on internal displacement and ensure that it is quickly and effectively implemented, including by mobilizing needed resources to address the needs of the internally displaced." Thereafter, there was been notable progress in the creation and development of a national IDP Policy. By August 2004, Lt. Gen (Rtd) Moses Ali, the First Deputy Prime Minister and Minister for Disaster Preparedness and Refugees signed **The National Policy on Internally Displaced Persons** which was adopted by the cabinet prior to its official launch in February 2005.

In an exercise not too dissimilar to the one conducted in a previous chapter of this paper, measurement of perceptions of the Ugandan IDP Policy was carried out by IDMC. It was noted that while many people were aware of the policy National Policy on Internally Displaced Persons within the IDP camps – many others did not, including individuals holding leadership positions within those settlements. The lack of awareness highlighted that Uganda had failed to implement their obligation to disseminate its IDP policy broadly in local languages and to educate IDPs on their rights. IDMC report that the government of Uganda had acknowledged these problems. These problems regarding the availability of information to IDPs on how to assert their rights is also reflected in the views of many IDPs interviewed by IDMC who complained of the lack of clarity on how to report human rights violations to the authorities.

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<sup>114</sup> Update on the Implementation of the Recommendations made by the UN Representative on IDPs Internal Displacement Monitoring Centre 2<sup>nd</sup> Edition, October 2006

In his capacity as Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, supported the development of a draft national policy on internal displacement in Kenya by providing technical support to the Government-led Protection Working Group on Internal Displacement (PWGID), under whose auspices the policy was developed<sup>115</sup>. The Representative was impressed by the variety of different actors actively participating in the process, including representatives from the IDP community, and commended the Government of Kenya for its efforts to incorporate the Guiding Principles on Internal Displacement (Guiding Principles) into its domestic legislation and for striving to meet its obligations under the 2006 Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol). He further encouraged the Government of Kenya to adopt the draft policy and begin the process of its implementation.

At this critical stage in the implementation of Guiding Principles as echoed in the Kenyan IDP Act of 2012, the Government would be well to consult with countries that have also implemented IDP policies to learn best practices for protecting the rights of IDPs. This would assist the party with prime responsibility for IDPs (read the Government of Kenya) to iron out any kinks that may exist in the legal document or policy. Further, it will help the state to avoid the many pitfalls that other states have encountered during the implementation stage. In Chapter 3 of this paper, it emerged that most, if not all, IDPs within the camps were fully aware of Operation Rudi Nyumbani. However, the general consensus was that it was not entirely successful. In addition, it remains to be seen whether the rest of the citizenry has been adequately informed of what the government is attempting to do in securing the rights of IDPs.

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<sup>115</sup> Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, 20.12.2010

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 INTRODUCTION

**“For the first time since the World War II era, the number of people forced from their homes worldwide has surged past 50 million.”**

The caption above is lifted from a news report<sup>116</sup> published on 20<sup>th</sup> June 2014. The quote is attributed to the United Nations High Commissioner for Refugees (UNHCR) Mr. Antonio Guterres. According to the Commissioner’s Global Trends Report, 51.2 million people had been forcibly displaced by the end of 2013. This represents an increase of 6 million more displaced persons than at the end of the previous year. The data was drawn from government, nongovernment partner organizations and the UNHCR's own records.

It must be pointed out, however, that this figure relates to victims of ALL forms of displacement whether internal or external. This student’s appreciation of the UNHCR statistics is that the reference to displacement means both IDPs and refugees too. Therefore, if the figure of 51.2 Million displaced persons appears exaggerated or inflated it is attributable to the understandable inclusion of both IDPs and refugees. In practical terms, the two sets of victims suffer in much the same way as envisaged by the internationally recognized Guiding Principles. That is to say, they are both forced or obliged to flee or to leave their homes or places of habitual residence.

There is no greater evidence of a gap in the protection of internally displaced persons than the damning statistics reported recently. This paper posits that a key factor in the continued existence of a protection gap is the diminished status of IDPs in international law. This is not to ignore the

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<sup>116</sup> <http://america.aljazeera.com/articles/2014/6/20/un-number-of-worldsdisplacedhighestsincewwii.html>

strides made so far in alleviating the condition of displacement worldwide. It is more an assessment of IDPs as juxtaposed with other at risk groups, in particular, refugees. The reason we cannot resist this comparison – of IDPs to refugees – is the remarkable similarity of circumstance. In reality, there remains only one point of distinction between the two sets of “at risk persons.” For IDPs to remain lesser victims of displacement on account of the fact that they have not crossed an international border seems absurd in the extreme.

In order to formulate an orderly method for the resolution of the conundrum that is internal displacement, this research paper proposes a multi-faceted approach. This means dissecting the topic of research in terms which parties are best placed to resolve it. For starters, it is generally accepted that the responsibility for attending to IDPs rests with the Government of the state within whose borders the said displacement occurs. Therefore, this thesis will begin by looking at what the Government of Kenya can do as the dissertation reaches conclusions and makes recommendations. Thereafter, focus shall be shifted to the other non-state actors that are habitually concerned with matters pertaining to displacement. For instance, it will be worthwhile to explore what role the civil society in Kenya will have in this process of addressing displacement.

## **5.2 STATE INTERVENTION**

The state is nothing without its structural and political components. When discussing state interventions, it is vital to examine the Government that was in power when the displacement took place; in the wake of Presidential elections in December 2007. As stated in previous chapters, the announcement of Mwai Kibaki as the winner of the Kenyan general elections on 29<sup>th</sup> December 2007 triggered acts of violence across the country. To address the eruption of

violence and consequent displacement, the Government deployed its security forces in the hope of quelling the growing crisis. With specific regard to IDPs, the **Executive** arm of government made efforts to deal with their situation under the Ministry of State for Special Programmes. Unfortunately, at the time of displacement, the Government did not have any policy guidelines regarding the resettlement and compensation of IDPs. As a result, the process of resettlement and compensation was chaotic and unplanned<sup>117</sup>.

To make matters worse, in 2008 the Government was yet to domesticate and adhere to the provisions of the Great Lakes Protocol<sup>118</sup>. The Pact on which International Conference on the Great Lakes Region (ICGLR) was built was signed on 15th December 2006, and the Secretariat effectively came into existence in May 2007, and was fully operational in 2008. It is therefore an organization that spent much of its activity on establishing itself<sup>119</sup>. This has clearly limited its impact on the region it is supposed to serve, in particular, the Republic of Kenya which suffered so much during this period of procrastination. Such bureaucracy must be taken into consideration when analyzing the failures of institutions like ICGLR at a time when their services were most in need by the victims of displacement. This kind of failure is further evidenced by the fact that Kenya did not enact legislation incorporating the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons or even the Guiding Principles until five years after the violence erupted in December 2012. The government and its partners only enjoyed some breakthrough in 2011 when they moved towards implementing a national IDP policy. After the government and the Protection Working Group presented a draft policy in March 2010, the Parliamentary Select Committee on the Resettlement of IDPs prepared a bill for its adoption, to

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<sup>117</sup> Internal Displacement in the Kenyan Context: Challenges of Justice, Reconciliation and Resettlement, Charles Cleophas Makau Kitale, 2011

<sup>118</sup> Humanitarian Policy Group Reports; 2008

<sup>119</sup> The International Conference on the Great Lakes Region (ICGLR)—review of Norwegian support to the ICGLR Secretariat, June 2009.



go before parliament in 2012. Incorporating the Guiding Principles into domestic legislation and policies was an obligation for Kenya as a signatory to the Pact on Security, Stability and Development in the Great Lakes Region and to its Protocol on the Protection and Assistance to Internally Displaced Persons<sup>120</sup>.

There were glaring weaknesses in the systems and structures that could have mitigated the tragic situation that Kenyans found themselves in after being displaced by the violence of 2007-2008. According to Ndungu Wainaina, Executive Director for The International Centre for Conflict and Policy, Kenya had no specific policy on internal displacement at the time; nor did it have any domestic law on protection and resettlement of IDPs<sup>121</sup>.

For obvious reasons, the Government did not take those sentiments too kindly. In an interview with Integrated Regional Information Networks (IRIN), Ali Mohamed, Permanent Secretary in the Ministry of State for Special Programmes countered by stating that the government “applied every letter and spirit” of the Guiding Principles during the recent resettlement of IDPs in the country<sup>122</sup>. This remains debatable seeing as the IDPs are still in camps years after the violence that caused of their displacement abated. The prudent thing to do is to ask, “What steps can the government as the prime holder of responsibility for its IDPs take to avert future calamities of displacement?”

#### **a) Data Collection**

As pointed out in the third chapter of this paper, there was a dearth of statistics regarding those afflicted by post-election violence in 2007-2008. To bridge this information gap, it is advisable

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<sup>120</sup>Global Overview 2011 People Internally Displaced by Conflict and Violence Internal Displacement Monitoring Centre, Norwegian Refugee Council, April 2012

<sup>121</sup>Integrated Regional Information Networks (IRIN), 2008

<sup>122</sup> Kenya Government Violated Guiding Principles in IDP Resettlement, Integrated Regional Information Networks (IRIN)16 October 2008,Nairobi

for the Government to regularly collect, preserve and update data on IDPs: It will be recalled that the Ministry of State for Special Programmes reckoned that there were 500,000 people displaced by the violence of 2007-2008. This was around the same time when the Government was advised by the Commission into the Post-Election Violence (CIPEV or Waki Commission) that 350,000 had been displaced. The central government and its relevant ministerial departments ought to have been more certain of its statistics.

In view of the difficulties experienced in the past, municipal authorities and civil society would do well to develop and maintain effective information-sharing channels. The reason for this is that municipal authorities have little in the way of reliable information regarding the number of people inhabiting in their localities at any given time. Yet, reliable data on the population as well cannot be gainsaid. It is a critical factor in planning and budgeting for delivery of social services. In order to understand forced migration trends or patterns, local authorities are advised build internal capacity for data collection, management and sharing data with other government entities. This would go a long way to reducing the margin of error in enumerating IDPs in all their categories. In this regard, it is essential that the IDPs are not just lined up and counted, but that they are also accurately and continuously profiled.

As already noted, there is a high likelihood that the number of IDPs reported fell well short of the true figure on account of certain omissions, including, but not limited to, IDPs who integrated into already established settlements. This is a particular concern in urban settings where the IDPs simply blended into the community. Prisca Kamungi, a notable scholar on the subject of displacement commented that the number of ‘integrated’ IDPs should be established and feasible

strategies to assist vulnerable IDPs living among slum dwellers explored<sup>123</sup>. Her concerns only serve to highlight the problems emanating from a lack of adequately profiled data.

We may still be quite some distance from achieving this as the 15-member National Consultative Coordination Committee on Internally Displaced Persons established by the IDP Act was expected to list all IDPs by the March 2013 and submit to Parliament a report on internal refugees. This report was not completed until November 2013, thereby exacerbating the suffering of IDPs.

#### **b) Enhance Inter-Ministerial Coordination**

It has been opined that the exclusion of the Ministry of Local Government from central government programs to address IDPs locked out an important actor since the location and specific needs of IDPs lay within the mandate of municipalities. Certainly, there has been no indication that the government ever contemplated an inter-ministerial committee to address the crisis of internal displacement as it emerged. Perhaps we should borrow a leaf to our close neighbours and biggest trade partners in Uganda. The Office of the Prime Minister's Department of Disaster Management and Refugees in Uganda is charged with coordinating, monitoring and supervising the implementation of the national IDP policy. Two national level committees, the Inter-Ministerial Policy Committee and the Inter-Agency Technical Committee, which may include members of the humanitarian community, are also responsible for policy formulation and oversight. At the local level, District Disaster Management Committees are tasked to implement the national policy<sup>124</sup>. This seems to be a comprehensive approach to the issue of displacement, and why stop there? The system can be cascaded further downwards to the people on the ground.

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<sup>123</sup> Municipalities and IDPs Outside of Camps: The case of Kenya's 'integrated' displaced persons, Prisca Kamungi, The Brookings Institution – London School For Economics Project On Internal Displacement May 2013

<sup>124</sup> Brookings-Bern Project on Internal Displacement, Workshop on the Implementation of Uganda's National Policy on Internally Displaced Persons: Background Paper (2006).

There is no bar to implementing a more inclusive process that encourages the participation of the IDPs themselves in decision-making processes. If this were to be adopted, it would contribute significantly to sealing the cracks through which IDPs fall in terms of protection.

### **c) Plan And Budget For IDPs**

In all honesty, it did not appear that the Government of Kenya had anticipated the magnitude of the IDP problem. The state was caught flat footed; totally unprepared for the unique needs of people displaced by the violence of 2007-2008. By extension, local authorities in the hinterlands of Kenya did not have plans in place for internal displacement despite the fact that some major towns like Nakuru and Eldoret had in the past been affected by cycles of violence and displacement<sup>125</sup>. It is now apparent that some lessons were learned with the Government taking measures to ensure that funds are set aside to assist IDPs. The Government has put in place a Humanitarian Fund for this purpose. This kitty has some degree of permanence, in that, is embedded into legislation under The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 No. 56 of 2012. The Internally Displaced Persons Act establishes a fund<sup>126</sup> that will draw money from the Treasury and be channeled towards food, housing, medical supplies and grants for IDPs to help them restart their livelihoods. The newly-created fund will be applied towards the relocation, reintegration and resettlement of IDPs. In addition, it will be spent to prevent future instances of displacement.

The only downside is that this burden will be borne by ordinary Kenyans who will be expected to pay more in the way of taxes to sustain this fund. It is estimated that Kenya has already spent

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<sup>125</sup>CIPEV Report 2008, page 51

<sup>126</sup> Section 14 The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 No. 56 of 2012

about Kshs15 Billion on IDPs' resettlement since the post-election violence<sup>127</sup>. With no end in sight to this problem, it is disconcerting to imagine that Kenyan citizens will continue to pay the price for the failure of the state.

The conduct of the central and localized authorities still smacks of a reactive approach rather than a proactive one. The government's responses to recurrent humanitarian crises appeared to ad hoc in nature. It reflected an inherent reluctance to plan for and take a more active role in the management of IDP affairs. Officials interviewed for this study observed that local authorities did not participate in IDPs response programs due to institutional arrangements that excluded the Ministry of Local Government and the fact that they did not plan or budget for IDPs. Some observed that they have served IDPs in their general programs, and that they have had to scale up services to absorb the sudden influx of displaced people. While municipalities do not collect demographic data, statistics from health clinics, schools and offices that collect taxes and rates can be used to supplement information used for projections and planning for social service delivery and development. Addressing internal displacement needs to be an important feature in their annual plans and longer-term strategic objectives.

#### **d) Research**

No proper planning can be carried out without conducting extensive research on the causes of displacement. It may be possible to legislate in anticipation of factors that give rise to a situation where people are forced out of their areas of habitation. In Kenya, one of the oft cited reasons for displacement is ethnic conflict. Kenya boasts 42 ethnic communities, among the largest being the Kikuyu, Luo, Kalenjin, Luhya Kamba, Kisii, Mijikenda, Somali and Meru. The smallest ethnic

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<sup>127</sup>Taxpayers to bear burden of IDPs in new law Business Daily, By David Herbling, Tuesday, January 1 2013

group, the El Molo, is estimated to number about 400<sup>128</sup>. According to the Kenya National Bureau of Statistics (KNBS), the population in Kenya, based on the Census figures of 2009<sup>129</sup>, is stratified as follows:

- Kikuyu 22%
- Luhya 14%
- Luo 13%
- Kalenjin 12%
- Kamba 11%
- Kisii 6%
- Meru 6%
- other African 15%
- non-African (Asian European, and Arab) 1%

Whereas Kenyans take great pride in their ethnic diversity, it remains the single biggest cause of misplaced hatred and animosity. Many conflicts, such as those witnessed in 2008, are attributable to differences between communities over varied reasons. To mitigate the instances of conflict that result in displacement, it would be advisable to conduct research into the underlying factors and take steps to avert it. In addition, the Government can research the long-term impacts of displacement on livelihoods, social cohesion and durable solutions for IDPs. Amelioration of socio-economic circumstances for displaced persons can go a long way to prevent future calamities.

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<sup>128</sup> Kenya Population Situation Analysis, National Centre for Population and Development (NCPD) July 2013.

<sup>129</sup> Kenya National Bureau of Statistics, Volume 1A – Population Distribution by Administrative Units 2009.

In summing up what the Government of Kenya can do, it is observed that we may do well to create more effective institutions and allocate adequate resources (human and financial resources) for protection of their legally assured rights and assistance in times of needs.

### 5.3 LEGISLATURE

The new Kenya Constitution created a two-chamber (Bicameral) Parliament; the **National Assembly** (Lower House) and the Senate (Upper House). The National Assembly has 290 members elected from constituencies, 47 women each elected from the counties and 12 members nominated by parliamentary political parties according to their strength in the National Assembly to represent special interests: the youth, people with disabilities and workers. The other member of the National Assembly, in ex officio capacity, is the Speaker. The **Senate** has 47 members each elected from a county, 16 women members nominated by political parties according to their strength in the senate, two members (a man and a woman) representing the youth, two members (a man and a woman) representing people with disabilities), and the Speaker who is an ex officio member.

The first function of a bicameral parliament is to enhance the quality of representation. The need for a second chamber was based on the desire to represent interests for certain specified groups<sup>130</sup>. Of particular concern to this research is the role of the National Assembly; to enact legislation, determine the allocation of revenue between the levels of Government, oversee national revenue, expenditure and State organs and approve declaration of war and extensions of states of emergency.

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<sup>130</sup> The Legislature: Bi-Cameralism under the new Constitution, Kipkemoi arap Kirui and Kipchumba Murkomen, Society for International Development (SID)

One piece of legislation enacted in this regard is the **National Cohesion and Integration Act, No. 12 of 2008** which came into being after the unfortunate events of the 2007 post-election violence. This statute established the National Cohesion and Integration Commission (NCIC). The drive to establish NCIC was in recognition of the fact that Kenya had many communities with diverse cultural practices and as many political affiliations. It became necessary to establish a common strategy to rally Kenyans so as to enhance cohesion amongst and across them.

In efforts to achieve this, the NCIC has singled out broadcasts or publication of ethnocentric comments that are hateful as a primary cause of tension and, in many cases, violent conflict. A clear example of this is the Post-election violence of 2007-2008 which foregrounded effects of hate speech. Although hate speech on ethnic and racial grounds was cited as a crime in the Penal Code (Cap 63) Laws of Kenya, the National Cohesion and Integration Act, No. 12 of 2008 provided ground for prosecution for hate speech mongers. Therefore, hate speech either through print or electronic media including Short Messaging Services (SMS) has been criminalized, leading to a media that is sensitive to conflict reporting, as well as reduced perpetration of hate speech. Specifically the Commission has engineered development of media guidelines which provide criterion for monitoring hate speech<sup>131</sup>. This is an excellent example of Parliament endeavouring through its constitutional functions to establish a legal framework for addressing displacement<sup>132</sup>. We are yet to see how successful the application of this law will be. In recent times, a number of politicians have been asked to record statements with the NCIC in connection with public utterances that may constitute hate speech. Some, including a serving Senator, have

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<sup>131</sup> Consolidating the Foundations of a Cohesive Nation within a Devolved System of Governance, National Cohesion and Integration Commission Strategic Plan 2013-2016

<sup>132</sup> Article 95 Constitution of Kenya 2010.



gone as far as to be charged in court with the offence of hate speech<sup>133</sup>. What is notable, however, is the absence of heightened tensions or violence in the National Elections held in Kenya in March 2013. Things were relatively peaceful and it is possible that the steps already taken have had some effect.

In addition to the foregoing, Parliament must ensure that the Parliamentary Select Committee on IDPs established in December 2010 achieves its mandate of investigating the support given to IDPs and the existing governance systems. It can also accelerate the process through which the draft and existing policy and legal frameworks for durable solutions can be adopted and implemented. Finally, the Legislature must display fidelity to the Constitution of Kenya and hold the state to account on the progress made in addressing both the immediate and long term needs of IDPs.

#### **5.4 CIVIL SOCIETY ORGANIZATIONS**

Civil Society Organizations (CSOs) have been described as citizens, associating neither for power nor for profit. They constitute the third sector of society, complementing government and business. These organizations fall in between the family and the state and they operate autonomously outside the state. One may query the positions of Non-Governmental Organizations (NGOs) in all this but it has been observed that while NGOs form but a small segment of the CSOs they have become the face of CSOs. For purposes of this research, it shall not be adequate to talk solely about NGO actions as it would limit the study to a very small sector of civil society. The more holistic view is the one that encompasses all citizens driven by values that reflect a desire to improve lives. Their organizations contain elements of voluntarism

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<sup>133</sup> Republic –v- Dr. Machage & Others 2013

and have private and independent governance structures. Normally, they will have clearly stated and definable public purposes to which they hold themselves accountable and are formally constituted in law or have an accepted identity in the culture and tradition of the country<sup>134</sup>.

Fresh from discussing the Legislature, it is important to consider the manner in which civil society can contribute to the expansion and strengthening of the legal framework for IDPs. A good start would be for civil society organizations to lobby for adoption and implementation of institutional, policy and legal frameworks for durable protection and assistance. In practical terms, for instance, civil society could exert positive pressure on the Government to ensure that the laws already passed such as the IDP Act of 2012 are fully implemented. This will also ensure Government compliance with international and regional instruments on human rights, international humanitarian law, as applicable to internally displaced persons. It has already been noted that one crucial organ established by the IDP Act, the National Consultative Coordination Committee on Internally Displaced Persons, is yet to start executing its assigned functions. This is an ideal springboard for civil society to spur Government into activity. This can be described as legislative advocacy around ratification of international legal instruments on IDP protection followed by adoption of implementing legislation. One such law is the AU Convention which Kenya is yet to ratify. For the time being, the protections contained therein do not form part of Kenyan law as provided for under Article 2(6) of the Constitution of Kenya.

Other ideas for action by civil society include raising public awareness to increase the general public's understanding of the issues surrounding internal displacement.<sup>135</sup> This can be achieved by engaging in awareness programmes rolled out across the country to teach Kenyans about the

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<sup>134</sup> Enhancing the Competence and Sustainability of High Quality CSOs in Kenya Report Of An Exploratory Study Commissioned By Aga Khan Development Network (AKDN) May 2007

<sup>135</sup> The Great Lakes Pact and the rights of displaced people; A guide for civil society - Internal Displacement Monitoring Centre and the International Refugee Rights Initiative, 2008.

particular factors that give rise to displacement and how they can be avoided. Whilst doing so, civil society must continue to monitor and support the programmes by the Government to ensure accountability and a positive impact to the IDPs. For instance, civil society could bolster the capacity for institutional, policy and legal frameworks for both immediate and durable solutions.

Another good example of civil society intervention is **ARTICLE 19** which is a London-based human rights organization with a specific mandate and focus on the defense and promotion of freedom of expression and freedom of information worldwide founded in 1987.<sup>[1]</sup> The organization takes its name from Article 19 of the Universal Declaration of Human Rights. In its legal analysis of Kenya's IDP Act, it recommends a number of reforms to enhance the effectiveness of the Kenyan government's response to internal displacement. At the international level, this includes the ratification of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("the Kampala Convention"), which Kenya was instrumental in drafting.

## **5.5 INTERNATIONAL INTERVENTION**

Primary responsibility for IDPs remains the preserve of the state. However, on occasion, foreign governments have stepped in to assist afflicted nations. In Kenya, The Danish Government through its Refugee Council (DRC) is well positioned to do intervene in matters of this nature. DRC has operations in 27 countries, the majority of which are humanitarian programmes targeting IDPs, and has many years of experience working with legal aspects and protection of the rights of refugees and IDPs. Moreover, DRC applies a long-term, regional and rights-based approach to protection and assistance in order to facilitate a coherent and effective response to the challenges faced by IDPs in present day conflicts.

## **5.6 POLITICAL CLASS**

The dynamics of party affiliation in Kenya are fluid at best with politicians defecting from party to party with no apparent practical or conscientious difficulty. In the run-up to the 2013 elections, Kenyans listened attentively as their politicians promised heaven and earth. One medium through which the political elite announced their grand designs was the respective party manifestos. In the end, there were only two real contenders for the Presidency of the Republic of Kenya. The first was a coalition between The National Alliance (TNA), The United Republican Party (URP), the National Rainbow Coalition (NARC) and the Republican Congress Party of Kenya (RC) – popularly known as the Jubilee Coalition. The other was The Coalition for Reforms and Democracy (CORD). Sadly, only the Jubilee Coalition manifesto made any reference to IDPs. It spoke of national cohesion and eliminating ethnic divisions and undertook to “Make sure that all IDPs (Mau Forest Evictees, PEV IDPs, squatters in the Coastal counties) are settled and where possible return to their homes in accordance with the law and have a decent place to live when they do<sup>136</sup>.” As it turned out, the Jubilee Coalition won the 2013 elections and it remains to be seen whether they are committed to concerns facing IDPs.

## **5.6 CONCLUSION**

What cannot be denied is the drastically reduced levels of violence experienced during those 2013 elections and, by extension, hardly any forced migration thereafter. One may be tempted to claim some degree of maturity in the general populace but there is an even more intriguing factor behind the uneasy peace. The victors of that political contest Uhuru Kenyatta and William Ruto of the Jubilee Coalition have both been charged, alongside others, by International Criminal

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<sup>136</sup>The harmonised manifesto of the new coalition between The National Alliance (TNA), The United Republican Party (URP), the National Rainbow Coalition (NARC) and the Republican Congress Party of Kenya (RC)

Court (ICC) with crimes against humanity. International law as incarnated in the Rome Statute of the International Court criminalizes certain actions and in the case of Kenya's current serving President, Uhuru Muigai Kenyatta, the allegations levelled against him are that Mr. Kenyatta is allegedly criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the **crimes against humanity** of murder, deportation or forcible transfer, rape, persecution, and other inhumane acts<sup>137</sup> in connection with the 2007-2008 post-election violence.

As for the current Deputy President, William Samoei Ruto, is accused of being criminally responsible as an indirect co-perpetrator pursuant to article 25(3)(a) of the Rome Statute for the **crimes against humanity** of murder, deportation or forcible transfer of population, and persecution arising from the same elections of 2007.

International Law may have, inadvertently or by design, assured some of the rights of internally displaced persons in the case of Kenya, for the time being.

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<sup>137</sup> Article 7 Rome Statute of the International Court

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