

**KAMPALA INTERNATIONAL UNIVERSITY
FACULTY OF LAW**

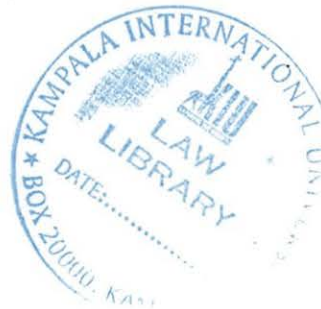
**ROLE PLAYED BY MINISTRY OF STATE FOR SPECIAL PROGRAMMES
TO PROTECT AND PROMOTE RIGHTS OF INTERNALLY DISPLACED
PERSONS IN KENYA, A CASE STUDY OF UASIN GISHU COUNTY.**

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DECLARATION

I , Antony Murimi Miti hereby declare that this research is my original work and to the best of my knowledge, has never been submitted to any university or institution for any academic award.

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I thank God for enabling me ascend this far in my academic life. In fact, without His profound protection and guidance, I would not have made it.

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ABSTRACT

Internal displacement of persons is not a new phenomenon in the world, this has led to international attention towards the plight of displaced persons and Kenya is no exception. This research is on the situation of IDPs in Kenya specifically those who were displaced in Rift Valley, Uasin Gishu by post election violence and other man made or natural causes. The study investigates the challenges faced by the IDPs in Uasin Gishu and specifically examines the existing legal framework protecting internally displaced persons in Kenya. It also aims to establish the steps, if any, taken by government to address the plights of internally displaced person, especially the role played by Ministry of State for Special Programmes in charge of IDPS.

Through the course of the study, the researcher discovered that the situation of many IDPs reveal many vulnerabilities and an urgent humanitarian need to address their deplorable living conditions and other human rights conditions of displaced persons. It also came to the knowledge of the researcher that the current Kenyan laws are not sufficient enough to adequately cater for the rights of IDPs as it is yet for the Kenyan parliament to pass the Internally Displaced Bill into law and adopt the draft national IDP policy not also mentioning ratifying the Kampala Convention at the earliest opportunity in a bid to enhance the protection of their rights of IDPs. This research suggests solutions to the government on how best to handle IDPs including propounding the view of embracing durable solution such as maintain peace in the country to ensure that conflicts that result to displacement ceases and do not recur in the future.

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LIST OF ACRONYMS (ABBREVIATIONS)

AU	African Union
DC	District Commissioner
FHRI	Foundation for Human Rights Initiative
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDMC	Internal Displacement Monitoring Center
IDPS	Internally Displaced persons
IRIN	Integrated Regional Information Network
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KRCS	Kenya Red Cross Society
MOSSP	Ministry of State for Special Programmes (Kenya)
NCIC	National Cohesion and Integration Commission
PEV	Post Election Violence
PWGID	Protection Working Group on Internal Displacement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission for Human Rights
UNGPID	United Nations Guiding Principles on Internal Displacement
UNHCR	United Nations High Commission for Refugees

LIST OF STATUTES

African Chapter on Human and Peoples Rights

African Union Convention for the Protection and Assistance of Displaced Persons in Africa (Kampala convention)

Constitution of Republic of Kenya 2010

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

United Nations Convention Relating to the Status of Refugees (1951 Convention)

United Nations Guiding Principles on Internal Displacement

United Nations Minorities Declaration

CHAPTER ONE

1.0 Introduction

Internal displacement of persons has become a notorious phenomenon in the world today and no longer is an alien terminology. It is rampant, with Africa and Asia recording the highest number of internally displaced persons. The corresponding increase in presence and coverage given to forced migration by various actors, specially the media and international community¹ has facilitated the awareness of this menace of internal displacement throughout the world. In Kenya, the Internally displaced persons camps significantly increased in numbers as an aftermath of the post election violence in 2008 where an estimated 650,000 Kenyans were displaced and 1300 lost lives². The areas which were severally affected include Uasin Gishu county, Molo, Nakuru and Burnt forest which are the larger part of Rift valley province.

1.1 Background of the study

Internally displaced persons (IDPS) are defined as “persons or groups of persons who have been forced or obliged to flee or leave their homes or place of habitual residence in particular, as a result of, or in order to avoid effects of armed conflict, situations of generalized violence, violation of human rights or natural or human made disasters who have not crossed an internationally recognized border”.³ **The Internal Displacement Monitoring centre (IDMC)** breaks down the definition of IDPS to have two major elements. Firstly, is element of coerciveness or otherwise involuntary character of movement most commonly caused by armed conflict, violence, human rights violations and disasters. Secondly, is the fact that the involuntary movement takes place within national borders.

IDPS have same rights and freedom with the rest of the population which therefore means they should enjoy all such accorded rights.

¹ J. Bennet, “Forced Migration Within National Borders: the IDP agenda” (1998) 1 Forced Migration Review

² IDMC Internally Displaced Monitoring Centre Report Feb 2008

³ W. Kalin, Guiding Principles on Internal Displacement: Annotations, Brooking institution press (2000) page 28

The term Human Rights has no set universal definition, nevertheless, human rights may be said to be fundamental rights that inherently belongs to a person by virtue of him or her being a human being. A fundamental right is “a right which stands above the ordinary laws of the land and which is antecedent to the political society”.⁴

Every person is entitled to equal access to human rights whether they fall under minority or marginalized groups like the IDPS. Thus as stated by Kofi Annan *“Whether a person belongs to the minority or majority, the person human rights and fundamental freedoms are scared.”*⁵

The Republic Of Kenya 2010 Constitution, provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Further it stipulates that every person has inherent dignity and the right to have that dignity respected and protected.⁶ The state has the responsibility to put in place affirmative action programmes designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economical fields and most importantly, they are provided with reasonable access to water, health services and infrastructure⁷. It therefore follows that IDPS have their rights recognized in the ground norm of Kenya (the Constitution) and therefore should enjoy this rights without interference of any person or authority.

As of June 1999, there were 20 million IDPS worldwide of these, an estimated ten million were in Africa⁸. As at December 2006, there were 24.5 million IDPS displaced from their homes by reasons ranging from armed conflict, violence and natural disasters. Africa was the most affected with 11.8million IDPS in 21 countries, and with Sudan (as it then was before cessation of the South Sudan) having five million IDPS.⁹

⁴ Kuti Vs AG of the Federation (1985) 2 NWLR 211 at part 6

⁵ Former United Nations Secretary General, in a publication, Moving From Inspiration to Impact, St. Martins Press New York

⁶ Article 28, 2010 Constitution of Republic of Kenya

⁷ Article 56 (IBID)

⁸ FRHI, The Foundation For Human Rights Initiative, the Defender Volume 7 Issue No 2 2002

⁹ See report by Norwegian Refugee Council

According to reports by IDMC the post election violence in Kenya displaced an estimated 650,000 families. In Mali tens of thousands have been displaced in the Northern part of Mali. New displacement have been caused in Somalia by the Al-shabaab terror group¹⁰. In Democratic Republic of Congo since 2006 thousands of families have been displaced and are living in camps in parts of Northern Kivu and in camps in Bihito, Kalinga and Lushebere, located in Masisi, a territory especially affected by displacement. As of 2011 IDPS have increased to almost 50 million worldwide. Gathered reports indicate that living standards in most IDPS camps are deplorable and below the acceptable set standard by the international community. According to Peter Gitai an IDP representative Nyeri, Kenya the District Commissioner has failed as he asserts that relief food has been distributed to IDPS whereas there is none.¹¹ Further Mr. Odende Lumumba of Kenya Land Alliance stated that the National IDP land policy need to be speedily adopted and implemented in line with the land policy and the 2010 Kenya constitution^{9b}.

IDPS seek safer grounds within a country borders which makes the situation to some extent complicated. In fact, they flee their homes as a result of armed conflict between communities either because of political differences, violence or natural disasters and in most cases, the resettlement process requires communities to co-exist peacefully and let go their past differences and preach peace and reconciliation which has overtime proved to be daunting task. This therefore subject the IDPS to live for longer periods of time in congested camps where they are vulnerable to both diseases and physical danger. More than 70 percent of IDPS are women and children who are more exposed to poor living standards¹². In a report by citizen news¹³, women living in IDPS camps all over Kenya are at risk of being raped as the camps are insecure and also lack basic needs such sanitary pads.

In an effort to resettle IDPS who fled their homes during Post Election Violence (PEV) in 2008 and those that were forcefully evicted from Mau forest, the Grand Coalition Government of Kenya under the joint leadership of President Mwai Kibaki and Prime Minister Raila Odinga freshly reconstituted the Ministry of State and Special programmes.

¹⁰ IDMC report available at <http://www.Interantional Dispalcment.org>(accessed 20 Feb2012)

¹¹ Speaking to citizen News at One, on 1st April 2012. (9b) see note 9

¹² Internally Displacement Monitoring Committee Report 2012

¹³ Citizen At One available at www.citizen.co.ke reported 1st April 2012

The ministry is headed by Honorable Esther Murungi (Minister) deputized by Honorable Mohammed Gabbow (ass. minister) and Andrew A.Mondoh as the permanent secretary. The mission of the ministry is to provide leadership in the development of risk reduction, to provide measure of prevention of disaster and disaster management. The vision is to provide a safer, sustainable and resilient society¹⁴.

The Ministry shoulders the responsibility to ensure Kenya abide by the standards to protect and promote rights of internally displaced person. The UN Guiding Principles On Internal Displacement affords the guidelines to be followed by states in protection and promotion of the rights of IDPS¹⁵. The International Covenant On Economic, Social And Cultural Rights¹⁶ (ICESCR) stipulates international obligations for every state in light with maintenance of minimum living standards of its citizens, this include even IDPS. However these well established rights and obligations remain in form rather than substance. The government through the ministry of special programmes has continuously failed to observe these covenants to which Kenya is party. IDPs continue to live in congested camps where they are prone to all risks of insecurity and health conditions. The IDPS live in demeaning environment exposed to harsh weather conditions as the houses in the camps where they live in, are made of temporary tents with leaking roofs.

Additionally, the resettlement process of the IDPS has been a subject of controversy with others alluding unequal distribution of resources meant for resettling IDPS. According to Honorable Munyes, Turkana North MP¹⁷ there should be fairness in the resettlement of IDPS in the Kenya, he regrets that IDPS in Turkana District have been ignored in the ongoing resettlement programmes. Corruption has been rampant on the funds set aside for resettlement of IDPS. **The standard newspaper**¹⁸ reported that government officials have taken millions of shillings meant for resettling IDPS and claimed that the funds have been disbursed to beneficiaries.

¹⁴ Ministry Of State and Special Programmes Official Page, Government Of Kenya

¹⁵ UN Commission on Human Rights (UNCHR), Guiding Principles on Internal Displacement

¹⁶ International covenant on economic, social and cultural rights **Article 11** provides that state parties to the covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The state will take appropriate steps to ensure realization of this right.

¹⁷ KBC News written by VPPS posted Sunday April 24, 2011 (accessed on 12 March 2012)

¹⁸ The Standard Newspaper, 14 January 2010 .available at <http://www.standard.net/news>

More than 500 IDPS at Nakuru Pipeline Camp were shocked when they were shown documents purporting that they had been paid. In the same vein a district commissioner was charged with embezzling shilling 8.75m earmarked for IDPS. Corrupt officials working for the Rift Valley Land Adjudication and Resettlement Office auctioned land bought by government to resettle IDPS.

This study therefore is centered on the plights of IDPS in Kenya and aims at exploiting all available solutions to the injustices facing IDPS. Having satisfactorily established that the IDPS rights are fundamental rights, it is therefore logical herewithin to suggest legal solutions that are in line with the set international human rights. This study further look at the steps taken by the Ministry of State and Special Programmes in promoting and protecting the rights of this marginalized groups. Further the study examines if the Government of Kenya has established any laws in line with international instrument which are designed in enhancing IDPS rights.

1.2 Statement of the problem

To measure the standards and to equal the challenges within the internally displacement person camps, the Ministry of State and Special Programmes has been very vocal and supportive. The ministry has played a significant role to ameliorate the problems within the IDP camps premised on the fact that it is the main reason why the ministry was formed.

However of recent the situation within the IDP camps has deteriorated. This state of affairs is attributed to increased insecurity witnessed within the heavily congested camps. The most affected persons within the camps are women and children. Rape and defilement of women and young girls has been reported with culprits going caught free. According to Peter Gitai¹⁹ IDPS representative in Nyeri, says that insecurity within the camps is a major concern. Additionally, deplorable living standards are high in the camps, medical and healthcare has been neglected. The quality of education offered to children in the camps is considerably low compared to the rest of the country.

¹⁹ See note no.11

Other human rights violations have been reported such as arbitrary arrests and unfair treatment. The IDPS lack basic needs such as sufficient food and clean drinking water; they live in temporary tents that are prone to extreme weather conditions. The main challenge and best solution is the resettlement of these internally displaced Kenyans but the big question is where do we start since our institutions are weak? The lack of a specific legal instrument and defined institutional protection and assistance of IDPS which is the “protection gap” in promotion and protection of IDPS is still a major challenge facing IDPS.

1.3 Purpose of the study

To highlight the status of the IDPs in Kenyan camps and to investigate whether the government has put measures on the ground to implement its coalition policies.

1.4. General Objective

This study is focused on investigating the role played by the Ministry Of State for Special Programmes to protect and promote the rights of internally displaced persons.

1.4.1 Specific Objectives

This study will be guided by the following objectives;

1. To examine the existing legal framework protecting Internally displaced persons and to establish the steps taken by government in addressing the plights of internally displaced person.
2. To examine the legal role played by Ministry of State for Special Programmes in-charge of IDPS.
3. To find out the gap that exist when the Ministry of State and Special programmes execute their mandate
4. To explore the status of IDPS in reference to human rights.

1.5 Research Questions

1. Are the current laws of Kenya sufficient enough to protect and promote the rights of IDPS?
2. What are the roles played by the Ministry of State for Special Programmes in protecting and promoting the rights of IDPS?

3. To what extent is the promotion and protection of rights of internally displaced persons in Kenya.

4. Are armed conflicts the major cause of internal displacement

1.6 Justification of the study

- a) The current laws of Kenya are not sufficient enough to protect and promote the rights of IDPS
- b) The ministry of state and special programmes is not playing effective roles as far as IDPS rights are concerned
- c) The promotion and protection of rights of IDPS in Kenya have lacunae hence need to be addressed.
- d) Armed conflicts in most cases result into internal displacement.

1.7 Significance of the study

The following disciplines will benefit from this study;

- a) The Ministry of State and Special Programmes will be able to monitor IDP programmes which in turn will facilitate the government to formulate guiding principles.
- b) This study will echo the voice of Kenyans whose interests is to ensure that IDPS are resettled.
- c) The government will be able to design durable resettlement patterns and programmes
- d) The legislature will be guide to formulate a substantial land bill to cater for IDP issue
- e) The Non Government Organizations concern with IDPS will be facilitated in monitoring IDPS in camps.

1.8 Scope of the study

This study will be done in Rift Valley and Central province precisely Uasin Gishu county. The research area of interest includes Eldoret, Nakuru Molo, Nyeri, Kisumu and Nairobi. This research is scheduled to complete June 2012 to enable get ample time to involve all stakeholders.

1.9 Theoretical Framework

Internally displaced persons rights are fundamental human rights. Every persons including those in marginalized groups like the IDPS are entitled to Human Rights as a matter of law. These are rights inherently granted to every human being in every society and hence show a connection between the rights and morals as articulated in the modern natural law theory which elaborates that law cannot be divorced from morals.

The ancient natural law school Cicero²⁰ Propounds that true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting, it summons to duty by its commands, and averts from wrongdoing by its prohibitions. IDPS rights all revolve around the law. According to Cicero²¹ Law and morals are inseparable. The modern natural law scholars have departed from the ancient natural law as per **L.L Fuller**,²² ancient natural law “Spoke of the rule of law in the archaic tongue of another age”. According to Fuller Natural laws have nothing to do with any “brooding omnipresence in the skies”. The modern school of Natural law abandons the view of God being involved in law but bases its focus on understanding of law as a social institution which imports the issue of fidelity of law where he asserts that morality cannot be separated from law.²³

The IDPS menace is a major issue of great humanity concern, the protection and promotion of their rights as much as it's a legal issue also is a moral question and law and morals are intertwined. **John Finnis**²⁴ another modern natural law theoretic propounds in the article the first moral principle that to understand law and what is right and wrong in a society, one must bear two things in mind “first, the possibilities of fulfillment are always unfolding, for there are several basic human goods, and endless ways of serving and sharing in them. Second, human beings, even when they work together, can only do so much no one can undertake every project, or serve in every possible way. Nor can any community. Choices must be made” Finnis emphasize that the law relates to values of

²⁰Cicero, De Re Publica, cited by M.D.A Freedman, Introduction to Jurisprudence, 8th Edition (2008)Page 137

²¹ See note 18

²² LL Fuller, The Morality Of Law (1969) quoted by M.D.A Freedman, Introduction to jurisprudence, 8th edition (2008) page 137

²³ Lon Fuller, Positivism and Fidelity to Law: Reply to Hart, 71 Harvard L. Rev 630 at 666

²⁴ John Finnis, J.Boyle, G.Grisez, The first Moral Principle (1987) (from Nuclear Deterrence, Morality and Realism) cited by M.D.A Freedman Introduction to Jurisprudence, 8th edition p.188

human coexistence propelled by principle of reasoning. The purpose of law he adds is to facilitate common /basic goods and provide laws that guide in solving problems in common good of the community. Man made laws should therefore facilitate acquisition by human beings of these goods as they are necessary for human survival²⁵. It therefore follows that it's the duty of the state in conjunction with the ministry of state and special programmes (Kenya) to provide laws and policies that will ensure the provision of basic needs to the IDPS living in camps in Uasin Gishu County. There are other available schools that touch on this area but the modern natural law school of thought is more compelling.

1.10 Literature Review

The challenge of internally displacement has sparked curiosity all over the globe which has fuelled many scholars/writers to conduct research on this topic ranging from the cause of internal displacement, to challenges faced by IDPS. Some writers have even extensively researched as to what is the proper definition of IDPS whether a person displaced by a natural calamity qualifies as IDPS.

Internal displacement in most instances other than those of natural disasters is caused by armed conflict and violence. **R. David**²⁶ in his encyclopedia of comparative law observes "Conflicts, when they occur must not be resolved but dissolved by harmony among men ... is something which must be ensured if its desired that the world live in peace according to the natural orders". Conflict situations may be termed as situations within a state where there is use of force so as to necessitate the protection envisaged or in the pursuit of incompatible goals by different groups²⁷. Professor Hizkias Assefa²⁸ said addressing the root cause of a conflict is essential to a successful and lasting resolution. Conflict result to suffering and destruction. The post election violence witnessed in Kenya brought with it unprecedented suffering, destruction, injuries, deaths and internal displacement²⁹.

²⁵ John Finnis, Natural Law and Natural Rights(1980)pp435

²⁶ R. David, An Introduction in International Encyclopedia of Comparative Law pg3

²⁷ Lyn Chiwandamira, Lilah Farely, Understanding Armed Conflicts and Peace Building in Africa, 2006

²⁸ Prof .Hizkias Assefa, African peace building and Reconciliation Network

²⁹ DR. Boaz Otieno Nyunga, Moi University, Health Rights Today, A Health Rights Advocacy Forum Quarterly Newsletter, 3rd edition, 2008

Displacements a life changing event, and often the traumatic experiences of displacement cannot be undone, IDPS need to be able resume a normal life by achieving a durable solution.³⁰ As articulated in Guiding Principle³¹ IDPS have a right to durable solutions and often need assistance in their efforts to avert the challenges they face.

Scholars have advanced various schools of thought as to who properly qualifies to be an IDP. The Guiding Principles On Internal Displacement³² defines IDPS as persons or groups of persons who have been forced or obliged to flee or to leave their homes or place of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border. Attempts have been made to incorporate the definition of IDP to that of refugee Lee L T³³ propounds that the definition of IDP should drop the requisite of border crossing, according to him it has lost meaning . However international law confers refugee status only upon those who cross international borders to flee violent persecution³⁴. Goodwin Gill³⁵ differs with Luke Lee, and instead agrees with international law. He states that requisite of crossing the border is cardinal requirement and cannot be discarded as it distinguishes between IDPS and refugees.

Hathaway³⁶ reasons that refugees and IDPS are two separate entities. He urges that the rights of refugees and those of IDPS require different protection. In the case of IDPs, It's the failure of state to ensure stability in some parts of the country whilst refugee situation denotes a situation of generalized violence across the country that forces people to cross international borders. The issue of crossing the borders is central to refugee definition and hence cannot be disregarded³⁷. The idea of fusion between IDPS and refugee does not add

³⁰ IASC Framework on durable solution for IDPs, Bern Project on Internal Displacement Report 5 March 2010(accessed 31st may 2012)

³¹ Principle 28 of The Guiding Principle on Internal Displacement

³² Principle 2(IBID)

³³ Lee LT "Internally Displaced persons and Refugees: Towards A Legal Synthesis?"1996(9)(1) Journal of Refugees Studies pg 27

³⁴ Black Richard "Forced Migration and Environmental change: The Evidence."Chapter 2 in refugees . New York:Addison Wesley Longman,1998

³⁵ G.Goodwin –Gill "UNHCR and Internal Displacement"(2000)

³⁶ Harthaway, James C "Forced Migration Studies" June 2006

³⁷ C Phuong, The International Protection of IDPs 2006

up according to Barutciski³⁸, he urges that refugee connotes a foreigner residing in a country other than his/hers for purposes of averting situations of generalized violence in his home country. Refugee are out of their country therefore cannot enjoy the protection of national laws, they are mostly under protection of international laws whilst IDPS are covered under national laws and to some extent international principles (The Guiding Principles on Internal Displacement)

The plights of IDPS remain a national issue and hence the diffusion of the definition of IDPS and refugees into one is a violation of the international recognized principle of sovereignty of state. Intervention in plight of IDPS by international community is only available when the national protection by a state is inadequate. **The Geneva Convention**³⁹ provides for protection of refugees and hence inapplicable to IDPS. **The Guiding principles On Internal displacement**⁴⁰ are instead applicable to IDPS. It therefore follows that the argument propounded by Luke Lee⁴¹ has no merit as it would amount to violation of principle of sovereignty of a nation. In my considered opinion, the issue of IDP remains significantly different with refugee and should be treated at national level. Kenya therefore needs to promote and protect the rights of internally Displaced persons living in camps in Uasin Gishu County as it remains a national duty.

1.11 Methodology

The researcher premises this study on qualitative analysis mode of collection of data. This will rely on available literature on internal displacement. This includes and is not limited to, written articles /journals and other articles posted on the internet that touch on internal displacement in Kenya, Africa in general and the world. The researcher will also rely on available laws that cover international plane. At national level, the laws regarded will include the 2010 Kenyan constitution, Acts of parliament, statutes, and other government policies. At International level the researcher will look at conventions, protocols treaties UN principles and Regional instruments.

³⁸ Barutciski, Michael "Tensions between the Refugees concept and the debate"(1998) p11-14(accessed 1 May 2012)

³⁹ 1951 Geneva Convention

⁴⁰ See note 30(IBID)

⁴¹ NOTE 31 (IBID)

CHAPTER TWO

2.0 Introduction

Every person is entitled to fundamental rights by virtue of being human. On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights⁴² (UDHR). Following this historic act, the assembly called upon all member countries to publicize the text of the Declaration and to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on political status of countries or territories.

2.1 Definition of Rights

According to Black's law Dictionary⁴³ a right is defined as something that is due to a person by just claim, legal guarantee or moral principle. A right is also privilege, power secured to a person by law. It is a legally enforceable claim, a recognized and protected interest the violation of which is a wrong.

Rights are legal, social or ethical principles of freedom or entitlement, that is, rights are the fundamental normative rules about what is allowed of people or owed to people, according to some legal system, social convention, or ethical theory.⁴⁴ Rights are of essential importance in such disciplines as law and ethics, especially theories of justice.

2.1.1 Natural rights versus legal rights

Natural rights are rights which are "natural" in the sense of "not artificial, not man-made", rights deriving from deontic logic from human nature, or from the edicts of a god. They are universal; that is, they apply to all people, and do not derive from the laws of any specific society. They exist necessarily, inhere in every individual, and can't be taken away. For example, it has been argued that humans have a natural *right to life*. They're sometimes called *moral rights* or *inalienable rights*⁴⁵.

Legal rights, in contrast, are based on a society's customs, laws, statutes or actions by legislatures. An example of a legal right is the *right to vote* of citizens. Citizenship, itself,

⁴² The Universal Declaration of Human Rights 1948

⁴³ Bryan A. Garner, Blacks law dictionary, 8th edition, (2004) pg 1347

⁴⁴ <http://en.wikipedia.org/wiki/rights>

⁴⁵ http://en.wikipedia.org/wiki/Natural_and_legal_rights

is often considered as the basis for having legal rights, and has been defined as the "right to have rights". Legal rights are sometimes called *civil rights*⁴⁶ or *statutory rights* and are culturally and politically relative since they depend on a specific societal context to have meaning.

Some thinkers see rights in only one sense while others accept that both senses have a measure of validity. There has been considerable philosophical debate about these senses throughout history. For example, Jeremy Bentham⁴⁷ believed that legal rights were the essence of rights, and he denied the existence of natural rights; whereas Thomas Aquinas⁴⁸ held that rights purported by positive law but not grounded in natural law were not properly rights at all, but only a facade or pretense of rights.

2.1.2 Positive rights versus negative rights

In one sense, a right is a permission to do something or an entitlement to a specific service or treatment, and these rights have been called *positive rights*. However, in another sense, rights may allow or require inaction, and these are called *negative rights*; they permit or require doing nothing. Accordingly, positive rights are permissions to do things, or entitlements to be done unto. One example of a positive right is the purported "right to welfare." Negative rights are permissions not to do things, or entitlements to be left alone. Often the distinction is invoked by libertarians who think of a *negative right* as an entitlement to "non-interference" such as a right against being assaulted.⁴⁹ Though similarly named, positive and negative rights ought not be categorized with active rights which encompass privileges and powers and passive rights which encompass claims and immunities.

⁴⁶ http://en.wikipedia.org/wiki/civil_rights

⁴⁷ Jeremy Bentham, "Critique of doctrine of Inalienable Natural Rights," In *Anarchical Fallacies*, vol 2 of Browning Edition 1843

⁴⁸ Davies, Brian (1993), *The Thought of Thomas Aquinas*, Oxford University Press ISBN 0-19-826753-3

⁴⁹ Stanford Encyclopedia of Philosophy". *Stanford University*. July 9, 2007. Retrieved 2009-12-21 (accessed 6 June 2012). "A distinction between negative and positive rights is popular among some normative theorists, especially those with a bent toward libertarianism. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service. A right against assault is a classic example of a negative right, while a right to welfare assistance is a prototypical positive right."

2.2 The Notion of Human Rights

Human rights are at the core of international law and international relations. They represent basic values common to all cultures, and must be respected by countries worldwide.

Rights are often considered fundamental to civilization, being regarded as established pillars of society and culture, and the history of social conflicts can be found in the history of each right and its development. According to the Stanford Encyclopedia of Philosophy⁵⁰, "rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived." The connection between rights and struggle cannot be overstated, rights are not as much granted or endowed as they are fought for and claimed, and the essence of struggles past and ancient are encoded in the spirit of current concepts of rights and their modern formulations.

2.3 The Importance of Human Rights

On December 10, 1948 the General Assembly, adopted the Universal Declaration of Human Rights (UDHR) one of the first major achievements of the United Nations where Kenya is a charter member. While itself a non-binding document, the UDHR arguably is part of customary international law, reflecting the almost universal vision of nations about the universal human rights of all the people. The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR), its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), form what is known as International Bill of Human Rights. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights in their respective jurisdictions.

The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties, Governments undertake to put into place

⁵⁰(Ibid 47)

domestic measures and legislation compatible with their treaty obligations and duties. Universal human rights should be applied to all persons without distinction of any kind: we are all human beings, so we are all entitled to enjoy these rights. This include even the internally displaced persons whose rights in most occasions are abandoned by the government which is a clear violation of the government obligation under the UDHR. In the words of Kofi Annan⁵¹, “Human rights are what reason requires and conscience demands. They are us and we are them. Human rights are rights that any person has as a human being. We are all human beings; we are all deserving of human rights. One cannot be true without the other.”

2.4 The Universal Declaration of Human Rights 1948

The preamble of the Universal Declaration of Human rights sets out the foundation of human rights in the world, it stipulates *“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms...

⁵¹ Kofi Annan, Former Secretary-general of the United Nations

Whereas a common understanding of these rights and freedoms is of the greatest importance in the full realization of this pledge” the General Assembly proclaimed UDHR as a common standard of achievement for all people and for all nations.

Articles of national Constitutions worldwide resemble the values captured in the Declaration, often incorporating many of the rights inherent therein. Chapter Four of the 2010 Kenyan constitution has reflected the spirit of the Declaration it provides largely the rights and fundamental principles relating to the Bill of Rights. As such, the Declaration had, and still has a remarkable impact on today's societies and states, especially in the protection of the rights of minority groups such as IDPs whose rights are more vulnerable to violations.

Human rights are inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being. UDHR provides that all human beings are born free and equal in dignity and rights⁵². They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This article creates an international obligation to ensure that no person rights are violated in any state as the international community is bound to intervene incase such a violation occurs.

The principle of equality and non-discrimination is also as stipulated therein and is the cornerstone of the human rights protection system, enshrined in every human rights instrument. It provides that *everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty*⁵³. This provision is reflected under the Kenyan constitution⁵⁴ and forms the bases of all rights, it calls for equal treatment for all person including the IDPs.

*It also provides that everyone has the right to recognition everywhere as a person before the law.*⁵⁵ It is therefore a clear infringement of the rights of IDPs when they are subjected to deplorable living conditions and treated like second class citizen. UDHR further

⁵² Article 1 of Universal Declaration Of Human Rights

⁵³ Article 2 Universal Declaration of Human Rights

⁵⁴ Article 27 2010, Constitution of Kenya

⁵⁵ Article 6 UDHR

stipulates that everyone has the right to freedom of movement and residence within the borders of each state⁵⁶. IDPs all over the world have been denied this right as they are forced to move from one place to another within the boundaries of their country mostly by situation of violence or armed conflict. Additionally UDHR provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁵⁷

Most importantly UDHR⁵⁸ ensures that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. UDHR creates the foundation of human rights in the world and largely facilitates the protection and promotion of the rights of IDPs especially in Kenya.

2.5 Exercising the modern notion of human rights

Human rights violations occur within states rather than on the high seas or in outer space outside the jurisdiction of any one state.⁵⁹ Thus, it follows that effective protection and enjoyment of human rights has to come from within the state.

True, the international human rights system does not place human rights abusers in political bankruptcy, nor does it take over the administration of recalcitrant states in order to assure the enjoyment of rights and/or compensate the victims of

⁵⁶ Article 13(1)

⁵⁷ Article 25(1)

⁵⁸ Article 26 (1)

⁵⁹ Steiner, HJ, P Alston & R Goodman (Eds.). 2000. *International human rights in context: Law, politics, morals* (Second Edition). Oxford: Oxford University Press, p 987.

human rights violations. On the contrary, the international human rights system seeks to persuade or put pressure on member states to meet their international obligations under human rights instruments that they have ratified or to which they have acceded. There are only two ways through which states can comply with their legal international obligations as contained in treaties: firstly, by observing or respecting their national laws (constitution or statute law) which are consistent with international norms; and secondly, by making those international norms or obligations part of the national legal or political order, to wit, they become domesticated.

2.6 Domestication of international human rights law

The onus is upon a national legal system to determine the status and force of law which will be accorded to treaty provisions within such a legal system. Indeed, it is only when a human rights instrument and its provisions have become part and parcel of domestic law that national courts and quasi judicial bodies will be able to apply them to cases brought before them by private individuals or organizations.

Traditionally, scholars posit two approaches in respect of the reception of international law into the national legal system, characterizing countries as either monist or dualist⁶⁰. Monists view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation. International law is immediately applicable within national legal systems. Indeed, to monists, international law is superior to national law. On the other hand to dualist international law and national laws are two distinct entities.

2.7 Who are minorities under international law?

According to a definition offered by Francesco Capotorti⁶¹ a minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position,

⁶⁰ McDougal, Myres. 1959. "The impact of international law upon national law: A policy-oriented perspective". *South Dakota Law Review*, 4, 25:27-31.

⁶¹ Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on prevention of Discrimination and protection of Minorities 1977

whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

The United Nations Minorities Declaration (UNMD) was adopted by consensus in 1992. It refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides further that the States should protect their existence⁶². There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors such as the existence of a shared ethnicity, language or religion and subjective factors including that individuals must identify themselves as members of a minority.

The difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history others retain only a fragmented notion of their common heritage. All States have one or more minority groups within their national territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that of the majority population. IDPs fall under this category of minority groups since they form the lesser part of the population and often have fled their homes to seek safety in other areas but within their country which cause them to be in most cases disadvantaged compared to the rest of the population.

⁶² Article 1

CHAPTER 3

3.0 Introduction

The plight of Internally Displaced Persons is a main concern of human rights today mostly as the world strives to foster unity and peaceful co-existence of mankind through the United Nations. States have national responsibility to ensure that IDPs are resettled back and their security guaranteed. The Kenyan government has recently been struggling with the resettlement process of those that were uprooted from their homes during the post election violence but in the meantime the IDPs continue to live in deplorable state in the camps especially those in Uasin Gishu county larger part of Rift Valley province.

3.1 Definition of Internally Displaced person

In 1992 The United Nations⁶³ defined the term *IDPs as persons who have forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or manmade disasters, and are within the territory of their own country*. Over the years this definition has generated debate and was found to be wanting;

Firstly, as per this definition, it limits IDPs to those persons that flee their homes in large numbers as a result of sudden armed conflict, natural or manmade disasters. It therefore follows that persons who flee their homes as a result of armed conflict and not in large numbers are not qualified to be termed IDPs as per the 1992 definition. It is evident that not every internal displacement occurs in large numbers and hence the operation of this definition locked out many displaced persons to be regarded and accorded the rights of an internally displaced persons.

Secondly, The 1992 UN definition of IDPs insists that an IDP is a person who has been 'forced to flee' from their homes by situations of armed conflicts or generalized violence, this excludes those persons who are not forced out of their homes by violence but are rather 'obliged to' leave their homes either by change of government policies or other reasons. For instance, the Mau forest evictees in Kenya who were forced out of the Mau forest by the Government of Kenya in abide to increase forest cover in Kenya and preserve

⁶³ Secretary General Boutros Ghali, Analytical Report 1992 United Nations, 1992/73 UN DOC E/CN.4/1993/35

water catchment areas, this displaced Kenyans were later bundled in congested camps.⁶⁴ Further the 1992 definition insisted that internal displacement of persons must be ‘sudden and unexpected in large numbers.’ This is not always the case when it comes to internal displacement, some people leave their homes if they anticipate violence is bound to occur in a future date and hence need not be sudden or unexpected as set by this definition. As a result of all these shortcomings of the 1992 definition of IDPs, the International Community through the United Nations felt obliged to revise the definition in order to capture all possible elements of an IDP.

The term IDPs therefore has been defined presently in various statutes, international conventions and scholars. Firstly, The United Nations Guiding Principles on Internal Displacement⁶⁵ (UNGPID) defines Internally Displaced Person to mean, *“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.”*

The African Union Convention for the Protection and Assistance of IDPs in Africa⁶⁶ has equally defined IDPs in the same wording with the Guiding Principles. Further the Convention has gone further to define the term “Internal displacement” to mean the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders. Similarly scholars such as Francis Deng⁶⁷ have also defined IDPs in the same vein with the conventions and the Guiding principles.

⁶⁴ www.irinnews.org/report/90950/KENYA-mau-forest-evictees (accessed 11th June 2012)

⁶⁵ Principle 2, Guiding Principle on Internal Displacement

⁶⁶ Article 1(k) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted by Special Committee of the African Union held in Kampala, Uganda, 2009.

⁶⁷ Francis Deng, The Guiding Principles on Internal Displacements; E/CN.4/1998/53/ADD. 1, February 11. New

York, NY; United Nations, New York, United Nations defined IDPs as, *“persons or groups of persons who have been forced or obliged to flee or 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, violation of human rights or natural or human-made disaster, and who have not crossed an internationally recognized state border*

3.1.1 Components of the IDP definition

The definition of IDPs as entailed in the Guiding Principles⁶⁸ postulates two outstanding elements⁶⁹;

1) The coercive or otherwise involuntary character of movement;

The definition mentions some of the most common causes of involuntary movements, such as armed conflict, violence, human rights violations and disasters. These causes have a common factor, that they give no choice to people but to leave their homes and deprive them of the most essential protection mechanisms, such as community networks, access to services, livelihoods. Displacement severely affects the physical, socio-economic and legal safety of people and should be systematically regarded as an indicator of potential vulnerability.

2) The fact that such movement takes place within national borders;

Unlike refugees, who have been deprived of the protection of their state of origin, IDPs remain legally under the protection of national authorities of their country of habitual residence. IDPs should therefore enjoy the same rights as the rest of the population. The Guiding Principles on Internal Displacement remind national authorities and other relevant actors of their responsibility to ensure that IDPs' rights are respected and fulfilled, despite the vulnerability generated by their displacement.

3.2 IDPs and Refugees

Initially Refugees were defined as a legal group in response to the large numbers of people fleeing Eastern Europe following World War II. The concept of a refugee was expanded by conventions in Africa and Latin America to include persons who had fled war or other violence in their home country. However with the quest of defining a refugee growing bigger, the United Nation was compelled to properly define the term refugee. This resulted to the United Nations Convention Relating to the Status of Refugees 1951⁷⁰, under this convention the United Nations defined a refugee as a person who "owing to a 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

⁶⁸ IBID note 54

⁶⁹ IDMC. [http:// www. internal-displacement.org/.../cc32d8c34ef93c88025](http://www.internal-displacement.org/.../cc32d8c34ef93c88025) (accessed 8th June 2012)

⁷⁰ Article 1(A) The United Nations Convention Relating to the Status of Refugees and 1967 protocol

nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country".

The term refugee has further been expounded to include a person seeking asylum in a foreign country in order to escape persecution. Some regional legal instruments further include those seeking to escape generalized violence in the definition of a refugee. Those who seek refugee status are sometimes known as asylum seekers and the practice of accepting such refugees is that of offering political asylum. The most common asylum claims in industrialized countries are based upon political and religious grounds.

Whereas IDPs remain the responsibility of a state, refugees are offered international protection and all members of the United Nations have the obligation to assist and offer protection to refugees. Under the 1951 United Nations Convention Relating to the Status of Refugees and 1967 Protocol, a signatory nation must grant asylum to refugees and cannot forcibly return refugees to their nations of origin. However, many nations routinely ignore this treaty. The United Nations High Commissioner for Refugees (UNHCR) is on the other hand dedicated to protecting the rights and wellbeing of refugees. As of 31 December 2004, the agency reported a total of 9,236,500 official refugees⁷¹

The first international action concerning refugee was by the League of Nations' Commission for Refugees. Led by Fridtj of Nansen, the Commission oversaw the repatriation and, when necessary the resettlement, of 400,000 refugees and ex-prisoners of war, most of whom were stranded in Russia at the end of World War I. It established camps in Turkey in 1922 to deal with a refugee crisis in that country and to help prevent disease and hunger. It also established the Nansen passport as a means of identification for stateless peoples. In 1938, the Nansen International Office for Refugees was awarded the Nobel Peace Prize for its efforts to establish the Nansen passports.

3.2.1 The United Nations High Commissioner for Refugees

The Office of the UN High Commissioner for Refugees (UNHCR) is mandated with the responsibility of ensuring the protection of refugees in the world. It has its headquarters in Geneva Switzerland, established in 1950 to protect and support refugees at the request of a government or the United Nations and assists in their return or resettlement. It succeeded

⁷¹ <http://www.unhcr.ch/cgi-bin/texis/vtx/events/tbl=statistic>

the earlier International Refugee Organization and the even earlier United Nations Relief and Rehabilitation Administration (which itself succeeded the League of Nations Commissions for Refugees. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.

UNHCR's mandate has gradually been expanded to include protecting and providing humanitarian assistance to what it describes as other persons "of concern", including internally-displaced persons (IDPs) who would fit the legal definition of a refugee under the Refugee Convention and 1967 Protocol, the 1969 Organization for African Unity Convention, or some other treaty if they left their country, but who presently remain in their country of origin.

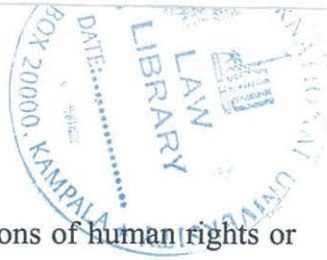
3.3 Difference between Internally Displaced Persons and a refugees

The difference between IDPs and refugees has proved to be of great essence in the realization of the rights of both groups. The United Nation has over the years distinguished IDPs from refugees and has regarded the two groups differently as opposed to the opinion of some players to consider and treat the two in a similar manner. The objective of separating them is to provide each group with its own suitable policies and laws to ensure that their rights are adequately protected.

According to the 1951 Convention on the Status of Refugees, a "refugee" is a 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, is unwilling to return to it."

On the other hand, the Guiding Principles on Internal Displacement⁷² defines IDP as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the

⁷² See note 56 and 58



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.”

A crucial requirement to be considered a refugee is *crossing an international border*. Persons forcibly displaced from their homes who cannot or choose not to cross a border, therefore, are not considered refugees even if they share many of the same circumstances and challenges as those who have been forcibly displaced and have crossed an international border. Like the IDPs, the refugees have left their homes because of conflict and violence in their homes.

However as correctly put by Nanda Champassak spokespersons UNHCR⁷³, the difference between them is that “a refugee has crossed an international border and has sought refuge in a country other than his own, whereas an IDP is trying to find safety and refuge within his country”. Once they cross an international border, Walter Kalin⁷⁴ says “their plight is still difficult, yet it’s not as bad as it would have been if they had stayed in their own country”.

Secondly in the legal sense, IDPs differ with refugees a great deal in that, once those seeking refuge cross an international border, they are under the protection of the UNHCR, an agency established by the United Nations in 1951 with the mandate of leading and coordinating international action to protect and assist refugees worldwide. For instance, Sudanese refugees arrive in Chad, they are directed to the refugee camps that are organized and run by the UNHCR. In contrast, the IDPs in Darfur are not eligible for protection under international refugee law because they remain within their country and under the control of the Sudanese government⁷⁵.

In most cases, refugees are more protected because the obligation to offer them adequate protection by a state stems out of international convention on refugees unlike IDPs whose rights are under national law. The world assumes that people who are displaced within

⁷³Nanda Na Champassak, spokesperson for the Ottawa, Ontario, branch of the United Nations High Commission for Refugees (UNHCR).

⁷⁴ Walter Kälin, representative of the UN Secretary-General on the human rights of internally displaced persons, and a professor at the University of Bern (Switzerland). Statement available at <http://www.unhcr.ch/cgi-bin/texis/vtx/events/tbl=statistic> (accessed on 8th April 2012)

⁷⁵ Walter Kalin (IBID)

their countries, who have not been forced outside to become refugees are being protected by their own government, and therefore there is no international assistance or protection for them. The irony is that their own government is usually the one displacing them and seeing them more or less as part of the enemy.⁷⁶

In addition, as the definition in the Convention on the Status of Refugees highlights, refugees are forcibly displaced as a result of persecution. Such persecution may be associated, for example, with ethnic or religious conflict. While internally displaced persons may flee for the same reasons, they, in contrast may also be displaced as a result of generalized violence or natural or human-made disasters and even development projects.

Unlike refugees, internally displaced persons do not need to undergo any process to determine their legal status as an internally displaced person. The term 'internally displaced person' is descriptive, reflecting the fact of their displacement and that they have not crossed an international border. Refugees, in contrast, have a special status in international law with rights specific to this status. In general, their entitlement to access these specific rights is based on a formal process to determine their status as refugees, this creates a major distinction between IDPs and refugees. Finally, the Convention on the Status of Refugees provides for individuals who meet particular characteristics to be excluded from the status of refugee. While the notion of 'exclusion' is a concept that exists in the field of international refugee law, it does not exist in international human rights law and not in relation to IDPs.

3.4 Protection of rights of IDPs

While no international convention on the rights of internally displaced persons exists, they enjoy the same human rights as all other people within their own country of citizenship or residence. These rights may be articulated in the domestic constitution and legislation as well as international human rights instruments and customary law. In situations of armed conflict, moreover, they enjoy the same rights as other civilians to the various protections provided by international humanitarian law. *The Guiding Principles on Internal Displacement* provide in explicit terms the rights of IDPs that are envisaged implicitly in existing international human rights and humanitarian law. The Principles identify rights

⁷⁶ Francis Deng, research professor at Johns Hopkins University and Kälén's predecessor at the UN

and guarantees relevant in the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.

In Kenya, IDPs enjoy in addition to the principles, protection provided by other national and regional human rights instruments. This includes the 2010 Constitution of Kenya which provides comprehensively the Bill of rights⁷⁷ and regional instruments such as the African Charter, The Great Lakes Protocol where Kenya is a signatory and most recent The Kampala Convention⁷⁸ which all provide rights to marginalized groups such as the IDPs. It is important to note that though Kenya signed the Kampala Convention it has not yet ratified or domesticated the same in its national laws.

3.5 The genesis of Guiding Principles on Internal Displacement

The Guiding Principles is a document that unequivocally provides for rights of IDPs and stipulates principles to be observed by members of the United Nations when addressing the issue of IDPs in their respective countries. Initially, the international community had become increasingly aware of the plight of the internally displaced and took steps to address their needs. In 1992, at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative of internally displaced persons to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded to them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Governments and other pertinent actors⁷⁹.

Accordingly, the Representative of the Secretary-General⁸⁰ focused the activities of his mandate on developing appropriate normative and institutional frameworks for the

⁷⁷ Chapter Four, The 2010 Kenya Constitution

⁷⁸ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted by the Special summit of the Union held in Kampala, 22nd October 2009

⁷⁹ United Nations Economic and Social Council Distr. GENERAL E/CN.4/1998/53/Add.2 11 February 1998 COMMISSION ON HUMAN RIGHTS Fifty fourth session

⁸⁰ The Representative of the UN Secretary-General on internally displaced persons, Francis Deng, assisted by other experts including; Walter Kälin of the Faculty of Law at the University of Bern (Bern, Switzerland),

protection and assistance of the internally displaced, undertaking country missions and engaging Governments in dialogues and others concerned players, and promoting a systemic international response to the plight of internally displaced populations. One area in which the mandate of the Secretary-General's Representative made significant progress was in the development of a normative framework relating to all aspects of internal displacement. Working in close collaboration with a team of international legal experts, the Representative prepared a 'Compilation and Analysis of Legal Norms' applicable to internal displacement⁸¹ with a supplement in 1998.⁸² This was the first step of coming up with the Guiding Principles on Internal Displacement because it was in this document that a conclusion was made by the experts that a restatement of the law would be needed to make it more relevant to IDPs and to clarify gaps and grey areas in the protection of IDPs rights. The Guiding Principles were then developed in response to the conclusion.

Earlier in 1996, a study conducted by the Representative and a team of independent legal experts found that while existing human rights and humanitarian law provides substantial coverage for the internally displaced, there are significant areas in which the international humanitarian law and human rights failed to provide an adequate foundation for the protection and assistance of the IDPs⁸³. The Guiding Principles were then developed, reflecting the existing norms, and were exclusively designed to protect and promote of rights of IDPs.

The Guiding Principles were presented by the Representative of the Secretary-General on internally displaced persons to the UN Commission on Human Rights (UNCHR) at its fifty-fourth session in 1998⁸⁴ as an addendum to his annual report. A series of meetings were organized to bring together a wide range of experts from regional and international organizations, humanitarian and human rights NGOs, women's and children's advocacy groups, legal associations, and research institutions. It was at a conference of fifty international experts in Vienna in 1998, hosted by the government of Austria, that the Guiding Principles were finalized. Since then, the heads of state and governments

Manfred Nowak of the Ludwig Boltzmann Institute of Human Rights (Vienna, Austria), and Robert Goldman of the Washington College of Law at American University (Washington DC, USA).

⁸¹ This compilation were presented to the Commission on Human Rights in 1996 (E/CN.4/1996/52/Add.2)

⁸² see (E/CN.4/1998/53/Add.1)

⁸³ (E/CN.4/1996/52/Add.2)

⁸⁴ (E/CN.4/1998/53/Add.2)

assembled at the World Summit in New York in September 2005 have recognized the Guiding Principles as "an important international framework for the protection of internally displaced persons."⁸⁵ However, it is important to note that Guiding Principles on Internal Displacement is not a binding instrument or treaty that could be ratified by States.

The Principles only reflect and are consistent with international human rights law, international humanitarian law and the respective international covenants that provide for human rights. Only States that have ratified the human rights and humanitarian instruments, upon which the Guiding Principles are based, are bound by the corresponding principles. States can opt to make them binding by incorporating them into their domestic law.

3.5.1 The provisions of the Guiding Principles on Internal Displacement

As stated hereinabove the Guiding Principles set the minimum standards that ought to be observed when dealing with IDPs, the principles are cardinal in the protection and promotion of the rights of internally displaced persons. The introduction of the Guiding principles⁸⁶ provides that the principles address the specific needs of internally displaced persons worldwide. They 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. The Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to;

- (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
- (b) States when faced with the phenomenon of internal displacement;
- (c) All other authorities, groups and persons in their relations with internally displaced persons; and
- (d) Intergovernmental and non-governmental organizations when addressing internal displacement

⁸⁵ See G.A. Res. 60/L.1(132, U.N. Doc. A/60/L.1)

⁸⁶ Guiding Principles on Internal Displacement introduction: scope and purpose, I and 3.

The General principles on Internal Displacement are divided into five sections; The first section covers general principle. It stipulates that internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.⁸⁷ Further it provides that principles shall be applied without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.⁸⁸

The Guiding principles stipulates that the Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction.⁸⁹ This is of great importance to IDPs since most of them flee their homes as a result of violence at times instigated by political leaders and hence require protection from such people who hold power or control certain authorities in a country. For instance, IDPs in Kenya who fled their homes as a result of violence caused by the disputed presidential elections. The Guiding Principles⁹⁰ create an obligation for a nation to observe IDPs rights. It provides that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction. Internally displaced persons in addition have the right to request and to receive protection and humanitarian assistance from these authorities and they shall not be persecuted or punished for making such a request.

Section II covers *principles 5 to 9* of the Guiding Principles on Internal Displacement which are centered on *protection against displacement*. It stipulates that all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.⁹¹ Every human

⁸⁷ Principle 1, contained in the addendum no. E/CN.4/1998/53/Add.2 at page 6

⁸⁸ Principle 4

⁸⁹ Principle 2

⁹⁰ Principle 3

⁹¹ Principle 5

being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence. States are mandated that prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether and where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

The authorities undertaking such displacement shall ensure, to the greatest practicable extent that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.⁹²

Section III of the Guiding Principles covers *principles 10 to principle 23*. It stipulates principles relating to *protection during displacement*. It protects the inherent right to life of internally displaced persons against genocide, murder, summary or arbitrary executions and enforced disappearances, including abduction or un-acknowledged detention, threatening or resulting in death.⁹³ Internally displaced persons shall be protected by states, against direct or indiscriminate attacks or other acts of violence, including starvation as a method of combat and attacks against their camps or settlements. Additionally they shall be protected in particular against rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault. Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labor of children are equally condemned by the principles together with the recruitment of displaced children to take part in the hostilities or the discriminatory practices of recruitment into any armed forces of internally displaced persons.

Most importantly, the Guiding Principles⁹⁴ provide that internally displaced persons have the right to seek safety in another part of the country, the right to leave their country, the

⁹² Principle 7(1)

⁹³ Principle 10 E/CN.4/1998/53/Add.2 page 9

⁹⁴ Principle 15

right to seek asylum in another country and the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk. The principles also ensures that the right to respect family life is provided to IDPs, families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly where children are involved.⁹⁵

The principles further provides for one of the most important provision in the protection and promotion of IDPs rights which is often ignored by many states including Kenya. It provides that all internally displaced persons have the *right to an adequate standard of living at the minimum*, regardless of the circumstances, and without discrimination. The competent authorities in a state where people have been displaced, shall provide the internally displaced persons with and ensure safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation.⁹⁶ Medical services to displaced persons is also a key feature captured in the Principles⁹⁷. The right to own property by IDPs is also guaranteed, it stipulates that no one shall be arbitrarily deprived of property and possessions, the property and possessions of internally displaced persons shall in all circumstances be protected.⁹⁸ Other civil and political rights of IDPs are also catered for in Guiding principles including the right to vote, and the right to education⁹⁹

Section IV of the Guiding Principles relates to *humanitarian assistance and is covered from principle 24 to 27*. It provides that all humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.¹⁰⁰ The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities therefore creating obligations to states to ensure humanitarian service are adequately provided. International humanitarian organizations and other appropriate actors have the

⁹⁵ Principle 17 at page 11

⁹⁶ Principle 18

⁹⁷ Principle 19

⁹⁸ Principle 21

⁹⁹ Principle 23

¹⁰⁰ Principle 24

right to offer their services in support of the internally displaced. Such offers shall not be regarded as unfriendly acts or as interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.¹⁰¹

Section V covers *principles 28 to 30*. The principles relate to *return, resettlement and reintegration of internally displaced persons*. The competent authorities in a state have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration. IDPs who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.¹⁰²

Again competent authorities have the duty and responsibility to assist, return and/or resettle internally displaced persons and also to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. Where recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation. All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration¹⁰³

¹⁰¹ Principle 25 E/CN.4/1998/53/Add.2 , page 14

¹⁰² Principle 29

¹⁰³ Principle 30

3.5.2 Conclusion

Having analyzed the Guiding Principles on Internal Displacement in details above, it is correct to conclude that the purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, and apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration.

The legal basis for each of the principles contained in the Guiding Principles is set out in the Annotations to the Guiding Principles.¹⁰⁴ It is therefore the responsibility of the states with IDPs to ensure that they adhere to the standards set by the principles when addressing the plight of displaced persons. The Guiding Principles on Internal Displacement also provides guidance to the Representative of the Secretary-General on internally displaced persons in carrying out his mandate, to States when faced with the phenomenon of internal displacement, to all other authorities, groups and persons in their relations with internally displaced persons and to intergovernmental and non-governmental organizations when addressing internal displacement.

The Principles can also be used in the development of a national legal or policy framework for the protection of IDPs. They can be used as an advocacy tool to inform national authorities of their general and specific obligations towards the internally displaced, to frame assessment and monitoring activities, as a tool to train all relevant actors in the rights of IDPs and the role of different actors in promoting and protecting those rights.

¹⁰⁴ Annotation to the Guiding Principle, Walter Klain available at http://www.law.georgetown.edu/idp/gp_legal_annotations.html

CHAPTER 4

4.0 Introduction

This chapter examines the background, causes and effects of internal displacement in Uasin Gishu County and other places in Kenya and will seek to analysis the challenges faced by the displaced persons living therein. The chapter will also seek to critically examine the role played and the steps taken, by the Kenyan government specifically the Ministry of State for Special programmes in ameliorating the plight experienced by IDPs. The chapter will also explore the efforts made, if any, to resolve the plight of IDPs and will further tackle the existing gaps present in the internal displacement framework in Kenya.

4.1 Background and nature of Displacements in Kenya since 1991

The history of politically-instigated ethnic clashes and internal displacements in Kenya can be traced to the emergence of multi-party democracy in the early 1990s. During this time, the ruling party Kenya African National Union (KANU) led by the former President Daniel Arap Moi, used violence to frighten and suppress individuals, parties and communities perceived to oppose KANU. As such, State-sponsored ethnic violence targeted opposition-leaning groups such as the Luo, Kikuyu, Luhya and Kisii among others¹⁰⁵. Most of the violence occurred in the run up to the general elections in 1992 and 1997. It is believed that this was aimed at creating animosity between communities to disenfranchise them or force them to vote for KANU. The events that preceded the general elections of 2007 and the violence that subsequently erupted after the announcement of the Presidential election results affirm that the same tactics, patterns and trends of politically instigated displacements are still practiced.¹⁰⁶

While the displacements of people after the 2007 post-election violence attracted incomparable national and international attention, it is important to note that electoral violence and its concomitant internal displacement are not new phenomena in Kenya.

¹⁰⁵ Human Rights Watch, 1996, page 6

¹⁰⁶ 'Out in the Cold, The fate of IDPs in Kenya,' KHRC 2008-2009 report pg 13

According to Kenya Human Rights Commission (KHRC) and International Federation for Human Rights (IFHR), there were already over 360,000 IDPs in Kenya by May 2004.¹⁰⁷ Other sources indicate that the figure had risen to about 450,000 by 2006¹⁰⁸. This led Kenya to be ranked 7th amongst countries with high numbers of IDPs in Africa. Other reports by the UNOCHA indicate that at the end of 2007, there were still 380,000 IDPs from clashes that had been experienced in the 1990s.

4.1.1 The Post-Election Violence and Internal Displacement in Kenya

The violence was sparked by the announcement of the disputed presidential election results in Kenya on 30th December 2007 led and to massive displacement and loss of lives and livelihoods. Reports provided by local and international organizations indicate that an estimated 600,000 persons were internally displaced in various parts of the country. About 1,300 lost their lives in the violence¹⁰⁹. The United State Institute of Peace estimated that about 600,000 persons were displaced during the 2007, while the Government Humanitarian Services Committee reported on 19th February 2008 that 351,000 were displaced.

To harmonize these disparate figures, in July 2008 the Ministry of Special Programmes, the National Bureau of Statistics and UNHCR carried out a profiling exercise which found that there were 663,921 IDPs caused by the post election violence across the country. The Minister Hon Esther Murugi in a speech said “ *the 2007 Post Election Violence resulted in the displacement of a total population of 663,921 people. Out of this, 350,000 people sought refuge in 118 camps, while 313,921 persons were integrated within communities countrywide. Further, 640 households fled to Uganda while 78,254 houses were destroyed country wide. The violence also led to the loss of 1,300 lives. Indeed, the violence precipitated what can easily pass as the largest wave of internal displacement our country has ever witnessed.*”¹¹⁰

The IDP camps are mainly found in Agricultural Society of Kenya (ASK) show grounds, schools, church compounds, police stations, chief's camps and prison compounds.

¹⁰⁷ International federation for Human Rights, Kenya Human Rights commission report, 2007, page 17

¹⁰⁸ Internal Displacement Monitoring Centre (IDMC), 2007

¹⁰⁹ Report by Commission of Inquiry into the Post Election Violence (Waki Commission), 2008, p. 273

¹¹⁰ Hon. Esther Murugi during the Forum on the Internal Displacement Situation in Kenya held at the Sun and Sand hotel on 23rd May 2011 available at www.sprogrammes.go.ke

4.2 Causes of internal displacement in Kenya

There are numerous causes of internal displacements in Kenya including natural disasters such as floods, drought and mudslides, and human-made causes such as forceful evictions, resource-based conflicts, politically-instigated violence, land and boundary disputes and development projects.

Most scholars on Kenya concur that internal displacements is occasioned by the politics of displacement where use of force migration is embedded in political strategy and infused with grievances over inequality in land distribution and access to political power and patronage resources. Displacement also results from manipulation of ethnic differences by political class, especially during electoral periods when hostile voters are disenfranchised. In addition, there have been various other causes of internal displacement in Kenya over the years. Some of these displacements affect relatively few people and are short lived (for example, over a few days), while others are large-scale and prolonged. Causes of these displacements include, inter alia: resource-based conflicts between communities, evictions related to development or environmental conservation projects, insecurity, urban disasters (such as fires), and natural disasters, including due to the effects of climate change.¹¹¹

Some displacements in Kenya are due to a complex combination of causes. It is estimated, for example, that over the decades, thousands of pastoralists have been forcibly displaced from their homes in northern Kenya due to numerous causes, including violence, cattle raiding, land conflicts, natural and climatic disasters, human rights violations, border issues, activities of militant groups and the proliferation of small arms.¹¹² Mass evictions, both from forest areas and urban centres, have also displaced significant numbers of persons, often leaving them without housing, humanitarian assistance or durable solutions being planned beforehand. In June 2005, up to 50,000 persons were reported to be forcibly evicted from the Mau Forest¹¹³ and a further 12,000 persons were evicted in the later part of 2009 from the forest.

¹¹¹ UN Human Council Report on the Human Rights of Internally Displaced Persons, mission to Kenya, pg 7, available at <http://www.unhcr.org/refworld/docid/4f3936682.html> (accessed 13th June 2012)

¹¹² Internal Displacement Monitoring Centre (IDMC), "Summary report of breakfast meeting on pastoralist displacement in northern Kenya: findings of a scoping study", 15 November 2011, pp. 1 and 3.

¹¹³ Centre on Housing Rights and Evictions (COHRE), "Submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of Pre-sessional Working Group discussion, Kenya", p. 2, 5 November 2007.

4.3 Internal Displacement in Uasin Gishu county

The examination of internal displacement in Uasin Gishu county and the North Rift Valley province is by and large dependent on the Honorable Justice Waki Report¹¹⁴, which analysis displacement in Rift valley. The North Rift region comprises the districts of Uasin Gishu, Trans Nzoia West, Trans Nzoia East, Nandi North, Nandi South, Marakwet, Keiyo, Baringo North and Baringo South. Uasin Gishu and Trans Nzoia experienced the epicenter of the post election violence in this region.

The Uasin Gishu county covers an area of 3218 square kilometers. Politically, it has 3 constituencies namely Eldoret North, Eldoret East and Eldoret South. It has three local authorities, the Municipal Council of Eldoret, the County Council of Wareng and the Town Council of Burnt Forest. At an annual growth rate of about 4%, the population of Uasin Gishu, is estimated at 744,083 in 1999, and is currently close to one million people with a fair mix of all Kenyan communities¹¹⁵ mostly Kalenjin, Kikuyu and Maasai all who highly value land which often is a cause of conflict.

The district's economy is agricultural based which makes land precious and valuable to the residents. Eldoret, is the district headquarters and the commercial hub of the North Rift region. More than in any other part of the country, with the exception of the Molo district in Central Rift, violence in North Rift largely Uasin Gishu bore resemblance to previous cycles of election related ethnic violence. It is worth therefore researching the pattern, actors and consequences of the 2007 post election violence in this region in the general context of the legacy of ethnic clashes experienced during previous election periods and to what extent it contributed to the current plight of IDPs.

Previously, the North Rift had experienced serious violence before the presidential and parliamentary elections of 1992 and 1997. In 2007, the main difference was that the violence was more intense, more widespread, was in urban areas as well as rural areas, lasted longer, and occurred after rather than before the elections. According to the Waki Report¹¹⁶ the 2007 post election violence severely hit Rift Valley where as a province, it registered 744 deaths out of which, 230 occurred in Uasin Gishu county and 104 occurred

¹¹⁴ Waki Report available at www.kas.de/Kenia/en/publications/16094/ _ (Accessed June 2012)

¹¹⁵ Waki Report page 37

¹¹⁶ See page 308

in Trans Nzoia, many people were displaced as a result of the attacks and fled to the ASK show grounds in Eldoret town, centre of Uasin Gishu where they established the largest IDP camp in Kenya.

4.4 Challenges faced by IDPs in Kenya

According to the KHRC report¹¹⁷ IDPs experience precarious and deplorable conditions that stripped them of their human rights and dignity. Majority lack security, adequate food, quality health care, safe drinking water and proper educational services and facilities. IDPs families lack decent shelter thus languish in worn-out tents in the camps, moreover, they are exposed to sexual violence and harassment amongst other human rights violations.

Internally displaced persons experience major challenges even during the resettlement process. According to a report by IRIN¹¹⁸ hundreds of internally displaced persons camped outside Subukia district commissioner's office, demanding resettlement before Christmas 2011, the IDP families, who had moved out of transit camps on 16 December to Mumoi farm in Subukia bitterly complained of deplorable living conditions. Wangui, 80, complained of sleeping in the open. She said "If sleeping in the cold will help me to get a piece of land, so be it; after all, even the tents we had were too tattered to make a roof, let alone the walls."¹¹⁹

Another IDP, Lucia Wairimu, a diabetic, said she had not taken her insulin injections in the past two days as she had to eat before injecting herself and had no food. "Upon hearing the announcement by the camp's leaders that people would be moving to a piece of land bought by the government, I packed hurriedly; I had no food to carry," Wairimu, 55, said. "I am ready to do anything, even risk my health, for a place I will call home."¹²⁰ Wairimu, who was evicted from her home in Kericho in December 2007 said the government should fulfill its promise of resettling all IDPs.

According to the Kenya Red Cross Society (KRCS), Nakuru branch manager, Patrick

¹¹⁷ Out in the Cold, the fate of IDPs, KENYA Human Rights Commission (2008-2009) Report, page 23

¹¹⁸ Integrated Regional Information Networks (IRIN), *Kenya: IDPs camp outside government office seeking resettlement*, 20 December 2011, available at: <http://www.unhcr.org/refworld/docid/4f0c3cd42.html> [accessed 4 June 2012]

¹¹⁹ See note 107

¹²⁰ "Out in the Cold, The fate of IDPs in Kenya," KHRC 2008-2009 report pg 13

Nyongesa,¹²¹ IDPs were in urgent need of humanitarian aid. "There are [IDPs] living in [the bush] at Mumoi farm in Lower Subukia, sleeping in the open with no sanitation," Nyongesa said, adding that waterborne diseases were likely to break out as the people were relieving themselves in the open and drinking water from a nearby water stream. As Kenya enters 2013, an election year, there are still thousands of Kenyans languishing in temporary settlements, having been displaced by the violence of the last elections in late 2007 these Kenyans are calling for the government to resettle them once and for all.

4.5 Gaps present in the protection and promotion of Rights of IDPs

4.5.1 Legal and policy Gap

Kenya does not have a specific law designed for the protection of the Internally Displaced Persons, instead it depends on the available international principles¹²² and regional instruments to cater for the rights of IDPs. As a result, this has created a legal gap in protection of IDPs in Kenya, a situation that has called for immediate redress. The government was then compelled by circumstances to draft The Internally Displaced Persons Bill (draft IDP bill), under the leadership of the Parliamentary Select Committee, but since its creation it has been deliberately delayed to presented in parliament for necessary debate and passing into law and as a consequence, it still remain a mere Bill without any legal binding force.

Equally, The 2010 draft National Policy on the Prevention of Internal Displacement and the Protection and Assistance to Internally Displaced Persons in Kenya (draft IDP policy) which was drafted in early 2010 has also experienced delay and was eventually finalized in December 2011 by the relevant stake holders. The policy and the Bill hitherto have not yet been presented in parliament for necessary debate and passing into law. It therefore appears that there is a deliberate act by the Government to delay the Bill and the policy from being passed into law until the next general elections scheduled for 2013. The government anticipates more displacements during the election as it has been since the historicity of elections in Kenya¹²³ and oversees a situation where the resettlement of the

¹²¹ IRIN report available at: <http://www.unhcr.org/refworld/docid/4f0c3cd42.html> [accessed 4 June 2012]

¹²² The United Nations Guiding Principles on Internal Displacement

¹²³ See sub topic 4.1

IDPs will be a costly affair if the Bill and the policy are to pass into law because they provide for decent compensation to IDPs.

The draft IDP policy, which was elaborated through a process of collaboration between the Ministry of State for Special Programmes (MOSSP), the Ministry of Justice, National Cohesion and Constitutional Affairs, and the PWGID, was unveiled in March 2010, is largely based on existing international and regional instruments and standards on internal displacement. The policy, which is comprehensive in scope, encompasses all locations, phases of internal displacement and all its major causes, including displacement due to natural disasters politically instigated or inter communal hostilities and forced evictions due to development or environmental conservation projects. Other central aspects covered by the policy, which has been delayed since March 2010, include, data collection on IDPs, principles applicable to the prevention of internal displacement, and protection from arbitrary displacement, displacements occurring both outside and within an emergency context, protection and assistance during displacement; and durable solution. All these pending legislations create a huge legal gap which acts as a hindrance in the realization of rights of IDPs.

In addition, the legal gap has been made wider by the fact that Kenya is yet to ratify and domesticate the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala convention). This non commitment attitude by the Kenyan government to important regional instruments that seek to enhance the rights of IDPs, increasingly widens the legal gap in protection of IDPs.

4.6 The Ministry of State for Special Programmes (MOSSP), Kenya

Kenya did not formally recognize or register IDPs until the 2007/2008 post-election violence, when it freshly constituted the Ministry of state for Special Programmes (MOSSP) and designated it as the institutional point responsible for internal displacement, including the mitigation and resettlement of IDPs, and the coordination of disaster risk reduction programmes.

MOSSP was specifically constituted to implement government programme on resettling IDPs. In the aftermath of the 2007/2008 post-election violence, the Government in May 2008, five months after the violence had slowed down, launched "Operation Rudi

Nyumbani” which mean Operation “Return Home”. This operation was launched in order to close the IDPs camps and facilitate the return of 600,000 IDPs back to their pre-displacement areas. The National Humanitarian Fund was also established under the ministry in order to support this process, through funds for the logistical movements, the reconstruction of IDPs homes where every households was entitled to KShs 25,000 and the replacement of basic household and farming items. As of February 2011, MOSSP, with the support of the African Development Bank, was still running a four-year project to reconstruct houses in return areas and provide fertilizers and farm inputs to returnees, and a project with UNDP on sustainable livelihoods in violence-affected regions¹²⁴

Despite these initiatives, the MOSSP faces many challenges, a significant number of IDPs remain in IDP camps, especially those who could not effectively take part in the 2008 Operation Return Home, which was directed primarily at land-owning farmers who were displaced during the post election violence. This, as well as other factors, sparked controversy with regard to Operation Return Home, including criticisms that it favoured land owning IDPs. The ministry is also accused of applying undue pressure and incentives to move IDPs out of the camps and return them back on their land, raising questions about the voluntariness of returns. In addition there are allegations regarding the misappropriation of funds from the National Humanitarian Fund.¹²⁵

MOSSP works closely with the Ministry of Lands, in the framework of the Inter-Ministerial Committee on IDPs, for the identification and purchase of land for the resettlement of IDPs, the Ministry of Finance, which makes the budgetary allocation for the purchase of the land and the Ministry of State for Provincial Administration and Internal Security, which implements resettlement programme activities at the local level.

Within MOSSP, the Department of Mitigation and Resettlement is responsible for the assistance and resettlement of IDPs and the implementation of the National Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of post election violence. MOSSP has set up regional offices in Central Province and in the north and south of the Rift Valley Province, where District Commissioners are responsible for coordinating IDP protection and assistance needs at their respective levels with relevant Regional

¹²⁴ Ferris, Mooney and Stark, *From Responsibility*, p. 250.

¹²⁵ Kenya Human Rights Commission, *Tale of Force, Lies and Threats: 'Operation Rudi Nyumbani' in Perspective* (Nairobi, KHRC, 2008) p.252-252

Commissioners. MOSSP further works to address potential displacement related to natural disasters, and implements disaster relief and rehabilitation programmes, through the distribution of food and emergency shelter.

CHAPTER 5

5.0 Conclusion

In Kenya, it is evident that internal displacement is largely caused by waves of disputed elections and tension that exists between communities as a result of ethnic and political differences. Addressing the root causes provoking many of these displacements is essential to the prevention of forced displacement in the future, including the repeated post-election violence displacement episodes that have impacted Kenya in the last two decades. However still, the Kenyan population is also affected by other multiple factors likely to exacerbate internal displacements, including, inter alia, more severe and frequent natural disasters, both sudden and slow onset caused by the effects of climate change and other factors, environmental conservation and development projects that result to displacement, together with land and resource-based conflicts and forced evictions, especially in urban areas.

Moreover, pre existing conditions, such as the high percentage of persons living below the poverty line, poor access to rights and services, and important challenges related to governance, render populations less resilient and more vulnerable to internal displacement. The situation of many IDPs currently displaced has revealed many vulnerabilities, important gaps in data collection and institutional responses, and an urgent humanitarian need to address their dire living conditions and human rights of displaced persons in Kenya. Some of dynamics of internal displacement in the country have also pointed to a risk of multiple and secondary displacements. While the Government of Kenya, with the support of the international community and civil society, has taken significant steps to address internal displacement, the magnitude and variety of internal displacement challenges in the Kenya underline the need for a more concerted, effective and comprehensive response, with a view to resolving current displacement situations and preventing and managing future ones.

The researcher premised on the previous chapters has ably found that the current existing Laws of Kenya and the policies in regard to IDPs are not fully catering for the rights of the internally displaced and hence the need to put in place such laws and policies for the purpose of enhancing the rights of the internally displaced persons. The Government of

Kenya is putting in place frameworks, mechanisms and institutions to address the root causes of displacement in the country. It has in an effort to enhance the rights of IDPs designed a draft Bill and policy that is yet to become law meant for the protection of IDPs. The policy embeds the preservation and realization of the human dignity and human development for all IDPs. The existence of the policy will be instrumental to ensuring compliance with international standards set for IDPs in local contexts and to find a durable solution to the plights of IDPs.

On the other hand, the objectives of the Ministry of State for Special Programmes should be realized with a mission to provide a comprehensive prevention and response framework for the protection, assistance and remedy for IDPs. This mission should be guided by the Right to Protection responding to all the human rights concerns of IDPs in all phases of displacement in line with international human rights law. The Right to Assistance to wit ensuring timely and sustainable response to humanitarian needs of IDPs and the Right to Remedy that is putting in place legal and policy measures for reparations to IDPs in line with international law.

Lastly, it is also important for the Ministry of Special programmes to clearly identify and appreciate when it can be conclusively stated that situation of internal displacement has ended. Internal displacement in Kenya can be considered as determined where the ministry and other relevant authorities have taken appropriate measures to consult with IDPs and ensure their full participation in decisions regarding return or resettlement, also when the government establishes conditions conducive to safe and dignified voluntary return or resettlement of IDPs. Further situation of internal displacement in Kenya will consider as fully determined when formerly displaced persons are able to assert their rights on the same basis as other nationals and when durable solutions are implemented and sustained.

5.1 Recommendations

It is evident on the examination of the previous two chapters that there are several lacunas present in the protection of IDPs in Kenya. Firstly, for every government policy to be successful, the government is required to develop a strategic plan/policy and commit enough funds for the implementation of the policy. It is therefore recommendable for the

government of Kenya to develop a comprehensive national strategy on internal displacement based on a human rights based approach, supported by sufficient financial allocations, which includes capacity-building, including in technical aspects such as registration, data collection, assistance and protection programme management, the strategic policy should also be designed to prevent and mitigate internal displacement in Kenya

Another main concern in the protection of IDPs in Uasin Gishu County is the lack of a specific laws in Kenya that seeks to protect and promote the rights of IDPs. The proposed laws are still pending in parliament as Bills which have not yet been passed into law. It is therefore recommendable that the parliament of Kenya should regard the plight of IDPs as urgent and speedily pass the pending IDPs Bill into law.

The government should additionally adopt the draft national IDP policy and ratify the Kampala Convention at the earliest opportunity in a bid to enhance the protection of their rights and provide the IDPs with a larger legislative base. In this vein, government should also ensure that implementing legislation is in place, as well as relevant protocols and guidelines. Additionally, government ought to strengthen national institutional frameworks and coordination mechanisms, including through inter alia, the allocation of sufficient financial and human resources, capacity-building, strengthening participatory mechanisms for displacement-affected communities and maintaining inter-agency mechanisms such as the Protection Working Group on Internal Displacement (PWGID). Adopt a national disaster management policy (currently in draft form) and strengthen relevant institutional and coordination mechanisms.

Another equally important area that the government should give first consideration is in the collection data and the maintenance of records of IDPS. There is need to take proper and accurate census of IDPs in view of the specific causes of displacement, time of displacement, type of needs amongst other essential concerns. The government in cooperation with international community and civil society should develop accurate, efficient and disaggregated data-collection and database registration systems which are comprehensive and inclusive of all categories of IDPs. Data collection systems must be

timely and adapted to the context to facilitate assistance, protection and durable solutions of the IDPs issue in Kenya.

In relation to the IDPs currently displaced but not yet included in any present registration/database system, government should undertake at the earliest opportunity, a comprehensive data-collection exercise with a view to consider how best to identify, assess and respond to their assistance, protection and durable-solution needs, with particular attention to vulnerable groups. With regard to Post-Election Violence (PEV) IDPs in particular, government should include in this exercise vulnerable groups and other persons who registered as PEV IDPs locally but were not accepted in the central data bank, those were unable to register before the cut-off date, and also those referred to as “integrated IDPs”¹²⁶

Premised on the presentation in the previous chapters, one thread strive for mastery that internally displaced persons in Kenya go through rough times in camps with deplorable living conditions that defile their rights as embedded in various human rights instruments. It is therefore prudent that the government address urgent humanitarian needs of current IDPs in camps. It should review and address on an urgent basis the assistance and protection of the needs of persons currently displaced, with a view to ensuring their immediate humanitarian needs and human rights, are protected and promoted. Many IDPs in Uasin Gishu and even other parts of the country receive inadequate assistance, and continue to live in poor conditions likely to have a detrimental impact on their health and general welfare unless their living conditions are improved. The government should in particular, assess and respond to the urgent needs of vulnerable groups, including children, many of whom are too exposed to hazardous environment in the IDPs camps, are at risk of malnutrition or suffer from a variety of diseases, and have little or no access to education. Where IDPs live in remote or difficult to access areas such as the rural areas of Uasin Gishu, mechanisms should be put in place by the government to ensure regular monitoring and response to their humanitarian situation, and their access to information and participatory processes. A similar exercise to address the urgent humanitarian needs should also be established for IDPs outside camp settings, including for post-election violence IDPs and other IDPs in a particularly vulnerable position, such as separated or

¹²⁶ See note 112

unaccompanied children and child-headed households. In addition, IDPs must be incorporated in decision making at all levels and their concerns about what the government should prioritize in the resettlement process taken into account.

The government should further invite NGOs and other pertinent actors proposals as regard the plight of displaced persons and assimilate some of their applicable recommendations in the national policy of IDPs. It should adopt a broader, more flexible approach to durable solutions comprised of resettlement, return and local integration, which includes but is not limited to political and land-based solutions, with a greater emphasis on livelihoods, documentation and access to basic services. Further the state should ensure that the choice of durable solutions by IDPs is well informed based on analysis of the situations, is voluntary and safe and that the IDPs are provided with a meaningful opportunity for consultation and the opportunity to visit sites of return or potential resettlement before making a decision and most importantly, a process of consultation and sensitization with host or return communities is undertaken before any resettlement is done in order to ensure sustainable durable solutions and a community-based approach resolution. The Government must guarantee security to IDPs who are willing to go back to their homes. In this respect, the government must step up peace building and reconciliation initiatives as a precondition for the sustainable return of IDPs.

The government also has the responsibility of ensuring that peace prevails all over the country. It should therefore strengthen community peace building and reconciliation activities at the national and local levels, with an emphasis on sites of return and resettlement of PEV IDPs especially in Rift Valley province. These activities continue to be critical to sustainable solutions and the prevention of future internal displacement. The State should continue supporting and strengthening other mechanisms, such as the National Cohesion and Integration Commission and early warning monitoring systems, and put in place contingency plans, as part of preparedness planning in advance of the 2012 national elections. In sites of return and resettlement, government should address the lack of basic services, such as sanitation facilities, review and address cases of uneven application of compensation, housing and land allocation to post-election-violence IDPs, the State should further identify potential beneficiaries who may have been excluded for various reasons.

With regard to unregistered IDPs, and with the support of the international community and civil society the government of Kenya should undertake, non-discriminatory programmes to facilitate durable solutions for IDPs, many of whom have been displaced for several years, such as the Mau forest evictees taking into consideration the claims of IDPs with a particular attachment to their land and area of origin. In addition, the State should make efforts in the areas of urban planning, national development strategies and land reforms by recognizing internal displacement issues, and the rights of IDPs by giving it a more comprehensive approach.

It being evident that one of the cause of internal displacement is natural disasters, the Government of Kenya should strengthen the overall national capacity with regard to natural disasters and the prevent some of these catastrophes that lead to internal displacement. This is to be achieved through research and monitoring of disaster risk reduction and early warning operational and policy responses for instance, relating to livelihoods and food security and related regional and international cooperation, including in the context of adaptation and responses to climate change.

Government should also support vulnerable groups of women and children living in camps. Internally displaced women require protection against discrimination in respect to the right to information, participation, documentation, and all other entitlements and also protection against sexual and gender-based violence. Internally displaced children require special care to prevent illness and those that are chronically ill and/or disabled or older persons. The Government should broaden the definitions of vulnerable groups/persons to match the standards of the international community.

The researcher recommends basing on the report of the UN¹²⁷ that the International community should continue to support the Government of Kenya, through capacity-building, technical assistance, financial commitments, and participation in inter-agency IDP mechanisms and processes, with a view to strengthen national protection and response mechanisms on internal displacement addressing the immediate humanitarian and

¹²⁷ Chaloka Beyani, UN Human Council Report on the Human Rights of Internally Displaced Persons, mission to Kenya ,available at <http://www.unhcr.org/refworld/docid/4f3936682.html> (accessed 13th June 2012)

protection needs of IDPs and promoting durable solutions.

In close collaboration with the Government and affected populations, the International Community should continue to support peace building and reconciliation activities, and contingency plans ahead of the 2013 national elections. Ensure the inclusion of IDP-related issues in development programmes of the United Nations and the international donor community. Lastly, according to the UN Basic Principles and Guidelines on the right to remedy, the Government of Kenya must develop an elaborate and accountable framework for the payment of reparations to IDPs who suffered loss of lives, property and livelihoods.

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