

**EFFECTIVENESS OF THE LAW IN PROTECTION OF  
INTERNALLY DISPLACED PERSONS IN KENYA**

**BY**

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**A RESEARCH REPORT SUBMITTED TO THE SCHOOL OF LAW IN  
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
AWARD OF A BACHELORS DEGREE IN LAW FOR  
KAMPALA INTERNATIONAL UNIVERSITY**

**NOVEMBER 2010**

## DECLARATION

I Ochieng Chrissy Owenga, declare that, this research report on the “Effectiveness of the Law in Protection of Internally Displaced Persons” carried out in Kenya is my entire effort and has not been submitted to any other institution of learning for any form of award.

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## APPROVAL

This piece of work on the “Effectiveness of the Law in Protection of Internally Displaced Persons” has been supervised by me, and is ready for submission.

**Supervisor: Mr Joseph Kalinaki**

**Signature:**

  
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**Date:**

  
.....

## **DEDICATION**

I dedicate this piece of work to my dear parents Mr. and Mrs Ochieng and to my brother Charles Ochieng for their great encouragement care, spiritual guidance and financial support in my academic life.

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## ACKNOWLEDGEMENT

I am greatly indebted to my supervisor Mr. Kalinaki Joseph who tirelessly read through this piece of work and guided me where necessary. I appreciate him for his great contribution in the accomplishment of this piece of work. Nevertheless, I cannot fail to recognize the effort of other lecturers in the Faculty of Law, for the professionalism that they imparted in me, without which, the accomplishment of this work would not have been possible.

My special appreciation goes to my family, Mr. and Mrs Ochieng for their great support both spiritual and financial in my career. To my brothers Charles, Mike, Elisha, Barack, Derril and Leslie and to my sisters, Happiness and Laurine, thanks for your support, you were such a great inspiration. Thank you all.

I also owe my appreciation to my dear friends, Faith and Shem for their spiritual and moral encouragement in my studies, it was nice studying with you.

Last but not least, I appreciate the staff of Kampala International University Library, Law Development Center for allowing me to access information from their libraries.

God Bless you All.

## **ABSTRACT**

This study “Effectiveness of the Law in Protection of Internally Displaced Persons’ was carried out in Kenya with specific aims of; establishing the circumstances that lead to formation of IDPs in camps; effectiveness of the law protecting IDPs; the legal challenges faced in protecting of IDPs and possible interventions to improve on the position of the IDPs. To comprehend this, the study reviewed literature from various scholars on the specific aims as well as different international principles that govern the protection of IDPs. The study also focused on desk review as well as depended on materials and statistics posted in the internet on the current trends of Internal Displacement with references to various sources of Law at both the domestic and international level.

The study findings indicated that, the circumstances leading to the establishment of IDPs was due to the factors such as, political wrangles, ethnic differences, land disputes, inequalities in economic and political spheres.. The study also established the principles regulating the protection of IDPs to be the Constitution and the CEDAW. However, the challenges experienced in the protection of IDPs included; underdevelopment, inadequate aid, lack of specific legal instruments, violation of; security rights, educational rights, housing, right of property ownership, whereas possible interventional measures that help to curb the challenges experienced were suggested as; Resettling disputes, planning and providing security during resettlement, and considering addressing gender issues apart from providing humanitarian assistance.

The study concluded that, humanitarian law provides for opportunities in the protection of IDPs, but the Guiding Principles are not binding. The study recommended the following; reforms and incorporation of IDP laws , observing responsibilities; Profiling IDPs; Security and inter-communal relations with IDPs; coordination and leadership; redress all categories of IDPs; protection of women, children and other especially vulnerable groups; enhancing recovery schemes, support durable solutions; Developing capacities of IDPs; promoting estoppels; promote diversified income options

## **LIST OF STATUTES AND INSTRUMENTS**

The Constitution of the Republic of Kenya 2008

Convention on the Elimination of All Forms of Discrimination against Women  
(CEDAW) 1979.

The Guiding Principles on Internal Displacement 1997/39.

## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
GEMA	Gikuyu Embu Meru Association
HLP	Housing Land and Property
ICRC	International Committee of the Red Cross
IDMC	Internal Displacement Monitoring Centre
IDP'S	Internally Displaced Persons
KAMATUSA	Kalenjin Maasai Turkana Samburu Association
KHRC	Kenya Human Rights Commission
NRC	Norwegian Refugee Council
OCHA	Office for Coordination of Humanitarian Affairs
SGBV	Sexual Gender Based Violence
UN	United Nations
UNDP	United Nations Development Program
WFP	World Food Program

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.0 Introduction

The research discusses “Effectiveness of the Law in Protection of Internally Displaced Persons in Kenya. This chapter will cover the background of the study, statement of the problem, purpose of the study, objectives, research questions, scope of the study, methodology and the significance of the study. The study was carried out in different human rights organizations in Kenya.

The problem of internal displacement is a rampant global phenomenon. It has become one of the most pressing humanitarian, human rights and security problem confronting the international community particularly Africa today. The phenomenon is not new at all. What has changed is the number and severity of the plight of IDP's and the corresponding increase in the presence and coverage given to forced migration by the various actors, mainly the media and international community.<sup>1</sup> This, coupled with a better understanding of the acute suffering endured by the millions affected and the lack of a comprehensive international regime providing for the protection and assistance of IDP's has resulted in a growing concern within the international community.

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<sup>1</sup> Bennet' Forced migration within national borders: the IDP agenda' (1998) Forced Migration Review

## 1.1 Background of the Study

Internally displaced persons are defined as 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, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.'<sup>2</sup>

The concern about IDP's is amply justified, all too often, IDP's suffer extreme deprivation that threatens their very survival, and they are all too often exposed to considerable danger- during their flight, while they are displaced and even upon their return or resettlement

As of December 2006, there were about 24.5 million people uprooted within their own country, commonly referred to as IDP's by armed conflicts, internal strife or systematic human rights violations.<sup>3</sup> It is worthy noting that there are also millions of people who have been internally displaced by natural disasters and many more evicted from their homes due to development projects<sup>4</sup> The year 2006 saw a sharp increase in the number of people newly displaced by conflict and the number continues to rise. At least 52 countries are affected – Africa being the most affected with 11.8 million IDP's in 21 countries and

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<sup>2</sup> The Representative of the Secretary-General, further Promotion and Encouragement of Human Rights and Fundamental freedoms, Including the Question of the Program and Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum, Guiding Principles on Internal displacement, Intro. Delivered to the Economic and Social Council, Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (hereinafter Guiding Principles). Compare refugees and IDPs. See Convention related to the status of the refugees, Art 1 July 28 1951.

<sup>3</sup> See report by the Norwegian Refugee Council (NRC) and Internal Displacement Monitoring Centre (IDMC) Internal Displacement: Global Overview of Trends and Development in 2006, April 2007 (NRC and IDMC report) 6, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFlies\)925150E3E5B8FC3C12572BF0029C267/\\$file/Global-Overview\\_2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFlies)925150E3E5B8FC3C12572BF0029C267/$file/Global-Overview_2006.pdf) (accessed 3 July 2007)

<sup>4</sup> See NRC and IDMC report, Supra note 3

Sudan tops in Africa with 5 million IDP's.<sup>5</sup> According to a news alert issued by IDMC on 7 January 2008, the UN reported that 250,000 people had been displaced in Kenya in less than a week following post elections violence and their situation remained critical.<sup>6</sup> There were reports of food shortage and deteriorating health care leading to death of children. Health workers also expressed concern on the security of women and children, who remain at risk of sexual attacks in the poorly protected camps, especially given that the referral systems that would exist normally to handle sex attacks have broken down.<sup>7</sup>

Unlike refugee, IDP's do not cross a state border, but rather seek refuge in another part of their country, which renders their situation intrinsically complicated and unique.<sup>8</sup> It is widely acknowledged that IDP's face more risks with regard to their basic human rights and in particular their physical safety and material security, as well as various forms of legal vulnerability than the rest of the population and are generally perceived to be a high risk group.<sup>9</sup> More than 70% of IDP's are either women and/or children, who are particularly vulnerable to abuse.<sup>10</sup> The estimated number of IDP's exposed to serious threats to their physical safety is estimated at 15.6 million.<sup>11</sup> Since 2001, the global number of IDP'S has remained almost unchanged, hovering around the 25 million mark<sup>12</sup> From this, one can deduce that neither the increased international attention to the plight

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<sup>5</sup> Supra note 3

<sup>6</sup> IDMC Kenya: 250,000 displaced by post-election violence, IDMC News Alert, 7 January 2008, available at [http://www.internal-displacement.org.8025708F004D31AA/\(http IDP News Alerts\)/CD0E4E9AFE9F2F86C22573C4004900A4](http://www.internal-displacement.org.8025708F004D31AA/(http%20IDP%20News%20Alerts)/CD0E4E9AFE9F2F86C22573C4004900A4) Open Document (accessed 15 January 2008)

<sup>7</sup> See report by UNOCHA Kenya: Health workers grappling with conflict-related sexual violence, IRIN, 16 January 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=76247> (accessed 16 January 2008).

<sup>8</sup> N Geissler "the international protection of internally displaced peoples" (1999) 11 (3) International Journal of Refugee Law 451, 451-2

<sup>9</sup> As above, 452

<sup>10</sup> See NRC and IDMC report, Supra note 3

<sup>11</sup> Supra note 3

<sup>12</sup> See NRC and IDMC report, Supra note 3



of IDP's nor state pledges, to protect civilians from arbitrary displacement and other human rights violations has resulted in a tangible reduction of the global IDP population. Even more troubling is the findings of the NRC and IDMC report which suggest that the number of IDP's exposed to violence went up in 2006.<sup>13</sup> A case is point highlighting the plight of IDP's is the current IDP crisis in Kenya, which has been widely reported by the media. A local newspaper reported that 'life in camps hosting displaced people in Eldoret and other places in the North Rift (in Kenya) is one of suffering, misery and frustration. It is a story of disease, adverse weather and inadequate food rations and that desperate young girls at the camp have turned to prostitution.'<sup>14</sup>

Under international law the obligation to prevent arbitrary displacement and to protect and assist those who have been displaced falls squarely within the purview of states. However, in several countries the very governments responsible for the protection of the displaced were/are either directly or indirectly the force behind arbitrary displacements.<sup>15</sup> At least 18 governments were involved in the arbitrary displacement of civilians.<sup>16</sup>

Whereas in Kenya, the Refugees are protected under the Geneva Conventions Act<sup>17</sup> and the Refugees Act of 2006 at the national level and the Geneva Convention IV at the International level, the UN Guiding Principles on Internal Displacement (Guiding Principles)<sup>18</sup> offer a comprehensive and authentic basis for providing protection and assistance to IDP's. Despite the high powered extortion, the Guiding Principles just

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<sup>13</sup> Supra note 3

<sup>14</sup> S Makabila 'Displaced people face tough times in the camps' The standard, 8 February 2008, available at <http://www.eastandard.net/news?i.d=1143981578> (accessed on 8 February 2008).

<sup>15</sup> See NRC and IDMC report supra note 3

<sup>16</sup> As above

<sup>17</sup> Geneva Conventions Act Cap 198 Laws of Kenya

<sup>18</sup> UN Commission on Human Rights, Guiding Principles of Internal Displacement, UN DocE/CN.4/1998/53/Add.2, 17 April 1998

remain that: they do not by themselves establish legally binding obligations thus, not affording IDP's comprehensive, effective and adequate protection. The study argues that given the heightened awareness of the similar suffering endured by IDP's and Refugees, it is time for the international community to address this problem from a legal standpoint by coming up with a single binding treaty to afford IDP's equal protection in law as the Refugees

This study argues that the issue of internal displacement is not merely a humanitarian problem, but needs to be discussed within a wider human rights context. Thus any proposed legal solutions to the plight of IDP's legal identity, rights, humanitarian assistance, and protection in law.

The study traces the development of international legal framework for IDP's and its current state of coverage and protection. It offers suggestions to overcome the inadequate legal coverage and uncertain protection. It posits that the marginalization of IDP's needs to be addressed in a holistic manner as integral part of the international protection of human rights and the enforcement of humanitarian law.

The legal framework for the protection of the IDP's should proceed on the basis of state responsibility and the non-state actors during all phases of displacement. Owing to the diversity of challenges on a case to case basis, not only should there be a global treaty, but also at regional and national levels for coordinating protection and assistance to IDP's.

It should further provide a means for assistance and for monitoring such protection as well as for ensuring compliance by the member states. These laws should not only address the issues of humanitarian assistance but also address the causes of displacement. The study analyses the phenomenon of internal displacement, responses to the problems and what needs to be done to improve the legal framework for the protection and assistance of IDP's at national and international level. It is based on the assumption that states can no longer hide behind the veil of sovereignty and non- intervention principles and claim that their treatment of their citizens is solely a domestic matter.

In Kenya the law governing protection of rights is not systematically being observed and practiced and thus the right of IDPs are not adequately being emphasized the reason for which security organs in Kenya may sometimes tend to violate the rights of IDPs. It is therefore, upon this background that the researcher sought to examine the effective contribution of the law in the protection of IDPs in order to improve on the treatment of IDPs in Kenya.

## 1.2 Statement of the Problem

Lack of a specific legal instrument and defined institutional protection and assistance for IDP's has come to be known as the ' protection gap' or *lacunae* in protection of IDPs and is one of the major problems faced by millions of IDPs around the world- what exists is only a little coordinated *ad hoc* response.<sup>19</sup> Although IDPs out number refugees almost by a two- to- one ratio, unlike refugees, they do not benefit from a specific international

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<sup>19</sup> C. Beyani ' Recent developments the elaboration of a legal framework for the protection of internally Displaced Persons in Africa' (2006) 50 (2) Journal of African Law 187,190

regime or treaty exclusively devoted to ensuring their protection and assistance.<sup>20</sup> While refugees are entitled to seek international protection under the 1951 UN Convention on Status to Refugees<sup>21</sup> and its 1967 protocol<sup>22</sup> (1951 UN Refugee Convention) the international community is not under the same legal obligation to protect IDPs, a situation which calls for global concern.

It is therefore imperative to state that, although there are international laws governing the protection of IDPs, there is no effective law and procedure in Kenya and this creates room for violation of the rights of IDPs due to absence of an effective law. There is need to fully incorporate the regulations that govern the protection of IDPs for improvement of the observation of rights of IDPs.

### **1.3 Justification of the Study**

Kenya urgently demands a legal framework for protection of IDPs should there be a recurrence of conflict. The absence of a statute at the national level and a binding treaty at the international level has proven to be disastrous to the plight of IDP's. Even though National governments have the responsibility for the security and well-being of all displaced people on their territory, more often than not, they are unable or unwilling to

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<sup>20</sup> See report by NRC and IDMC Internal Displacement, Supra note 3

<sup>21</sup> The convention Relating to the status of Refugees, adopted on 28 July 1951 under GA res 429(V) OF 14 December 1950. Text of the 1951 Convention and 1967 Protocol available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10>(accessed 22 November 2007).

<sup>22</sup> The Protocol Relating to the Status of Refugees adopted on 31 January 1967 and entered in to force on September 1967 pursuant to GA res 2198(XXI) of December 1966

<sup>25</sup> See article 1A(2) of the 1951 UN Refugee Convention and article 1 of the 1967 Protocol on definition of term "refugee"

live to this obligations and in some instances are the perpetrators of internal displacement.

In such a situation, the Guiding Principles are insufficient as they do not legally bind the government in addressing the issue of displacement. These principles are mere field guidelines that may only be morally or politically binding. The question of IDPs is a tragic phenomenon in the contemporary world that demands a clear legal framework and not soft law.

In this paper, proper consideration has been given to the current situation of IDPs in Kenya. It is against the foregoing that I seek to propose for an enactment of an Act of Parliament to equally protect the IDPs as Refugees. It is the primary duty of a state to protect its citizens and this responsibility should be expressly outlined in law or else there is likely to be a state neglect as is apparently the case in Kenya today.

At regional level, there is need for regional treaties crafted in a manner peculiar to the existing circumstances and challenges in various war torn regions. The peculiarity of circumstances is a necessary consideration because they are a determinant to the challenges that are likely to confront the displaced in those regions.

At international level, the provisions of Article 2(7) of the UN CHARTER <sup>23</sup> which imposes an obligation on the international community to respect the sovereignty of a state on matters falling within its jurisdiction is a great impediment when it comes to

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<sup>23</sup> Nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the Charter.

responding to the humanitarian needs and protection of the IDPs. There is an assumption that protection of IDP's is the primary responsibility of a state. Even though this is true with regard to the concepts of sovereignty, territorial integrity and statehood, the international community should be in a position to intervene especially where the state has lost the capacity to protect the victims of displacement. A perfect example arises where there is a total failure of the state. Where there is no proper government to discharge this responsibility or where the economic situations are not conducive for this undertaking.

The absence of a single binding Global Treaty to guarantee this protection is the main challenge. In this paper, I take cognizance of the fact that the challenges facing the refugees and the IDP's are congruent despite the fact the two may be on the opposite sides of the borders. For this reason, in drafting the treaty, be it at global or regional level, divergence should only appear in the definition of the two categories of person (IDPs and Refugees but not in treatment. IDPs deserve equal treatment as Refugees at Global, Regional and National level.

#### **1.4 General Objective of the Study**

The study examined the effectiveness of the law governing protection of IDPs in camps in Kenya in order to find out its weaknesses as regards the rights of the IDP. The researcher intended to carry this study with an aim of providing possible solutions to curb possible abuses of rights of IDPs.

## **1.5 Specific Objectives**

- i. To establish the circumstances that lead to settlement of IDPs in camps.
- ii. To find out the effectiveness of the law governing protection of IDPs.
- iii. The examine the legal challenges faced in protecting of IDPs.
- iv. To identify possible interventions to improve on the observation of rights of the IDPs.

## **1.6 Research Questions**

- i. What are the circumstances that lead to settlement of IDPs in camps.
- ii. How effective is the law in the governing of IDPs protection?
- iii. How have the loopholes in the law governing protection of IDPs contributed to violation of the rights of IDPs?
- iv. What are the possible solutions that lead to improvement of the treatment of IDPs?

## **1.7 Scope of the Study**

The study was centered on the protection of IDPs in Kenya and was restricted to the circumstances that lead to settlement of IDPs in camps and the legal procedures taken into consideration while protecting IDPs with a view of identifying the challenges experienced in the protection of IDPs in order to recommend the possible interventions to improve on the treatment of IDPs in camps.

The study was conducted for two months thus took place from September to November 2010 as this was enough time for researcher to analyze reliable information from various sources.

## **1.8 Significance of the Study**

It is expected that if the study will be of a considerable contribution to the awareness on the absence of proper regulatory measures on the treatment of IDPs and the loopholes of the law governing protection of IDPs issues in the camps to concerned practitioners on issues pertaining to abuses and violations of rights..

The study is expected to contribute towards the effecting and incorporation of the law governing protection of IDPs in order to for authority to accord considerable treatment to the IDPs and thus will be a way forward to provide proper and appropriate immediate solutions to human rights protective arrangements for IDPs by concerned agencies.

The study is expected to provide a foundation for the future research which will help to narrow down the existing gaps on protection of the IDPs in camps.

## **1.9 Theoretical Framework**

This paper takes cognizance of the fact that the issue of IDPs is at the core of Human Rights Human Rights borrow a lot from morality.

Modern natural law theorists like Lon L. Finnis focus on the proper understanding of law as a social institution or as a social practice. For instance, Lon Fuller in the Hart- Fuller debate invokes the issues of fidelity to law where law where he says that morality can not be separated from the law.<sup>24</sup>

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<sup>24</sup> Lon Fuller, Positivism and fidelity to Law: A reply to Hart, 71 Harvard L. Rev 630 at 666



He says that any legal system must have certain inner aspects of morality in order to command the fidelity of a right thinking person. For instance, there should be congruence between law as announced and applied.<sup>25</sup> The plight of IDPs is a great concern of humanity. After reading and witnessing the circumstances surrounding their lives, it is important to note that the law concerning the protection of the IDPs is a moral question. The existing law should be interpreted in a manner that is not prejudicial to the fate of the internally Displaced Persons.

In his book 'Morality of Law', Fuller alluded to the concept of 'purpose' and argued that we can not know what the law is unless we know what it was intended for. We should view law as a purposive enterprise and it can not exist unless there is has some moral quality.<sup>26</sup> To this extent, the purpose of the IDPs law is to provide adequate protection to the Internally Displaced and to ensure that their humanitarian need are adequately met by the government and other non- state actors. The law on the protection of the IDPs should therefore be reviewed to eliminate all the obstacles to achieving this objective.

**John Finnis** on his part view the law with an ethical approach.<sup>27</sup> He says that the law relates to values of human existence and the principles of all practical reasoning. He says that the law is the means through which human goods are secured. Therefore there should be no hierarchy or priority. In his view, the function of the law is to facilitate the common goods by providing authoritative rules that solve coordination problems that arise in connection with the common pursuit of these basic goods for the common good of the community. Man made rules should therefore facilitate acquisition by human beings of

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<sup>25</sup> Supra note 20, at 654

<sup>26</sup> Lon Fuller, *The Mortality of Law*, (Revised Edn, 1969) pp 53, 74 and 91

<sup>27</sup> John Finnis, *Natural law and Natural Rights* (Oxford: Clarendon Press, 1980) Pgs. 23-24

these goods since they are necessary for human furnishing.<sup>28</sup> Every citizen has the right to life as provided for in the constitution<sup>29</sup>. Life itself in a broad concept which includes comfort and clean environment. Taking this in to mind, the government has the duty to protect lives of the IDPs by providing all the necessities of life i.e. security, clean environment and the needs necessary for survival. All these should be captured in the law protecting IDPs.

### **1.10 Literature Review**

Literature review covered what previous authors and scholars have written about the subject in order to have a handle on the study. This was a secondary examination of the available information that has been previously published. Under this chapter a guided analysis of some of the major issues of the existing literature will be made on the law governing fiduciary arrangements and how fiduciary issues are decide, its impact on the position of the bank and that of the trustee as well as on solutions to the existing gaps as noted from numerous authors.

Many writers and commentators have had occasional to discuss the concepts of internal displacement and the human rights situation of internally displaced persons. Views vary as to who should be considered to be an IDP, whether people displaced by natural disasters or development projects qualify as IDPs or not, whether or not IDPs should be legally equated to refugees or singled out a special category of people in need of protection, if at all; what situations require international action; and in what form, if any, what form should institutional response take, how issues on sovereignty should be

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<sup>28</sup> John Finnis: Natural Law and Natural Rights(1980) pp 435

<sup>29</sup> Sec. 72 of the Constitution of Kenya

resolved and noninterference and whether there should be an international treaty and machinery protecting IDPs

**Luke lee**<sup>30</sup> proposes the idea of a legal synthesis between IDPs and refugees and proposes to achieve this, deleting to the border crossing element from the definition of a refugee. He argues that requirement of border-crossing has lost its relevance in the post-Cold War era and it must be dropped in order to give states, international organization and NGO's the legal capacity to address the problem of internal displacement. Lee finds support in Ambassador Richard Holbrooke, former US Permanent Representative to the UN, and others who have called for eradication of the distinction between refugees and IDPs<sup>31</sup>

The root of his argument for dropping the border-crossing requirement, however, relates to human rights that the maintenance of an artificial distinction between refugees and IDPs creates an unfair difference in the standard of human rights protection between the two groups<sup>32</sup>. Lee proposes that a remedy for existence of such inequality of protection would be to merge the two groups and create a single legal status for both<sup>33</sup>

However, this view is opposed by several commentators in the field of forced migrations (Goodwin- Gill (1986); J. Hathaway (1993); and C. Phuong (2004). Goodwin Gill argues that the element of border-crossing (or alien age as is sometimes referred to) has

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<sup>30</sup> LT 'Internally displaced persons and refugees: Towards a legal synthesis?' (1996) 9 (1) Journal of Refugee Studies 27,31

<sup>31</sup> See MZard 'Towards a comprehensive approach to protecting refugees and internally

<sup>32</sup> See LT Lee 'internally displaced persons and refugees: Towards a legal synthesis?'

<sup>33</sup> Supra note 33

always been implicit requirement and therefore no refugee definition has ever included IDPs in its provisions.

This study was inclined to maintaining a distinction between refugees and IDPs and same time comprehensively re- evaluate the situation of IDPs with an aim of formulating an international framework for the protection and assistance of IDPs

**Michael Barutciski** in *'tensions between the refugee concept and the IDP debate'*

<sup>34</sup>states that the idea of expanding the refugee definition to include IDPs simple does not make sense because the term 'refugee' addresses a particular situation that is characterized by being a foreigner in a host country. He says that there is not one specific right found in the 1951 Geneva Convention relating to the status of Refugees that could logically be applied to displaced persons who have not escaped their own country. The whole convention is based on the notion of having fled one's country. This study however, seeks to classify those displaced during occupation as refugees. This is because the victims in this case have lost the protection of their government and are in the hands of the adverse government. Even though they have not crossed the borders of their country, they are not under protection of their government. Conventionally, they may be referred to as IDPs. However, considering the foregoing, they are refugees.

On his part, **Hathaway** seeks to distinguish refugee protection and the rights afforded to refugees *as a result of crossing an international border'* <sup>35</sup>as specific to refugees and sharply distinct from those rights of protection and assistance that should be afforded to

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<sup>34</sup> Barutciski, Micheal (1998). "Tensions between the refugee concept and the IDP debat," Forced Migration Review, Vol 3, p.11-14

<sup>35</sup> Hathaway, James C.(2006). "Forced Migration Studies: Presentation at 10<sup>th</sup> Biennial Meeting of the International Association for the study of Forced Migration, York University, Toronto, June 2006

internally displaced persons. Protection and assistance that should be afforded to internally displaced persons. Protection of refugees, Hathway argues, is needs-based, and refugees' needs are distinct from those of internally displaced persons. A particular vulnerability that many internally displaced persons suffer is that of a lack of government protection. Their government may be unable, or in fact, unwilling, to afford them the basic human rights of citizens in that country.

In this paper, is submitted that the rights concern ought not to be because a person is internally displaced *per se* but by analogy with the underlying concern for refugees because a person who is internally displaced lacks the protection of their government and, owing to fear of persecution is unable to access that protection

According to various scholars, the element of border-crossing is very central to the refugee definition because it derives from the principle of state sovereignty, which remains the basis of international refugee law<sup>36</sup>. It has been argued that border-crossing has always constituted a crucial element in refugee definitions and that this element is so fundamental to the refugee definition that it can't be dropped<sup>37</sup>. Goodwin – Gill argues that alienation has always been an implicit requirement and that no refugee definition has ever included IDPs in its provisions.<sup>38</sup> Hathway also believes border-crossing constitutes a crucial element of the refugee definition even though he acknowledges that it does not constitute a conceptual requirement.<sup>39</sup> Presence outside the country represents the manifestation that the bond between state and the citizen has been severed.<sup>40</sup> James

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<sup>36</sup> See C Phuong The International protecting of internally displaced persons, pg 21

<sup>37</sup> See LT Lee, 'Internally Displaced Persons and refugees: Towards a legal Synthesis?' note 37 above 31

<sup>38</sup> See Goodwin-Gill the refugee in international law (Oxford: Clarendon Press, 1996, 2<sup>nd</sup> ed) 4

<sup>39</sup> See J Hathaway the law of refugee status (Toronto: Butterworth's, 1991) 29.

<sup>40</sup> See P Tuitt False image: *The law's reconstruction of the refugee* (London: Pluto Press, 1996) 11.

Hathaway lists two reasons for non- inclusion of IDPs in the refugee definition. <sup>41</sup>First states should not address the problem of internal displacement by extending the refugee definition to seek to include the internally displaced because it remains the primary duty of the state to protect its own population.

Secondly, it would constitute a violation of national sovereignty as the problem raised by IDPs are invariable part of the internal affairs of the state. In contrast, the refugee is situated within the reach of the international community. It seems that the historical importance of the border- crossing element is imposed by what remain the cardinal principles of international law i.e. state sovereignty, and the closely related principles of territorial integrity and non- intervention.<sup>42</sup> The border-crossing element establishes a clear legal distinction between refugees and IDPs, which should be maintained for a number of reasons.

Hathaway further argues that however similar their situations may be, IDPs and refugees require protection that is different in nature. In the case of refugees they are out of their country thus cannot enjoy national but international protection whereas for IDPs the protection that is required is complementary which exists in parallel with national protection, unless national protection is not available.<sup>43</sup>

This study sought to challenge these arguments. The first reason forwarded by Hathaway is valid. However, it can not stand where the state is inclined to neglect the IDPs. Much

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<sup>41</sup> See J Hathaway The law of refugee status, note 123 above, 30-1

<sup>42</sup> See for instance Declaration on principles of International Law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations, GA res 2625 (XXV), 24 NR034890.pdf? Open Element (accessed 30 November 2007)

<sup>43</sup> Supra note 40

as it is the primary responsibility of the state to take care of the IDPs this responsibility can not be fulfilled where the state has lost the capacity to protect or to provide assistance to the victims of displacement. It is at this point that the international protection, equal to that afforded to the refugees should apply to the IDPs to avert human suffering.

Hathaway's second argument is in support of an unnecessary barrier. As indicated earlier, the barrier brought about by Article 2(7) of the UN Charter should not apply when it comes to making a decision to provide humanitarian assistance. This study seeks to challenge the principle of sovereignty where the human of IDPs hang on a balance. Existence of this barrier is a recipe for human rights abuses by the state.

Considering the foregoing arguments, it can be argued that the IDPs, at international level, deserve equal protection as refugees. As the municipal level, Kenyan situation demands a clear legal framework for the protection of the IDPs.

### **1.11 Methodology**

Owing to the peaceful history of Kenya, there is less literature that has been written with focus on internal displacement. However, in this thesis, the researcher used the desk review. This was mainly the available literature and articles written on the issue of displacement. Besides, the researcher also depend on materials and statistics posted in the internet on the current trends of Internal Displacement in Africa and the world. References was also made to various sources of Law at both the domestic and international level. These included the Constitution, Acts of Parliament, Treaties, Protocols, Convention Regional Agreements, UN Resolutions and other international Agreements.

## **1.12 Synopsis**

Chapter one covered the background to the study, statement of the problem, objectives of the study, scope of the study, significance, methodology and literature review as well as hypothesis and chapterization. Chapter two focused on the exploration of the legal protection of IDPs, and circumstances under which it can be incorporated and put to effect to improve on the observation of the rights of IDPs. Chapter three critiqued and gave an overview on the available legislation on IDPs' protection in Kenya in attempting to put into effect the protection of the IDPs and the role played by government in the protection of IDPs. Chapter four revealed the research findings about the factors that lead to Internal Displacement of IDPs, why the campaign for bettering the position of IDPs is made, the effectiveness of the present legal protection as provided to IDPs, challenges experienced in during the protection of IDPs as well suggested opinions of participants and book reviews on how to curb challenges experienced in improving on the lives of IDPs and Chapter five drew conclusions as well as made recommendations in view of the study findings.



## CHAPTER TWO

### INTERNALLY DISPLACED PERSONS AND THE LEGAL PROTECTIVE CONSIDERATIONS

#### 2.0 Introduction

Internally Displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border<sup>44</sup>

In other words, an internally displaced person (IDP) is someone who is forced to flee their home but who, unlike a refugee, remains within their country's borders.

According to **Kamungi**<sup>45</sup> internal displacement is a complex phenomenon, motivated by many reasons and to which there are no simple solutions. But whatever the solutions, they should be taken in conformity with the requirements of international law. There is indeed a strong but fragmented legal framework governing the phenomenon of displacement, including international human rights law, international humanitarian law, the Guiding Principles on Internal Displacement, and domestic law, still with Kamungi the year 2008 is an important year for leaders in Africa considering the AU Special

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<sup>44</sup> Deng, Francis. "The guiding principles on internal displacement". *New York, NY: United Nations*. New York: United Nations. [http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html).

<sup>45</sup> Kamungi, P. 2009. 'The Politics of Displacement in Multi-party Kenya' in *Journal of Contemporary African Studies* (Forthcoming)

Summit on Refugees, Returnees and Internally Displaced Persons in Africa and the AU Convention on Protection and Assistance for Internally Displaced Persons in Africa that the Commission of the African Union is working on. For this to the AU-ICRC joint seminar aims at contributing to the current debate on the problem of internal displacement in Africa with a focus on armed conflict and other situations of violence.

## **2.1 International Instruments**

### **2.1.1 Guiding Principles on Internal Displacement (Displacement 1998/53/Add.2)**

**Principle 1** provides that, *“Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”*

The purpose of this law is to ensure that the IDPs enjoy exactly the same freedoms and rights as do other citizens, in other words, living in camps does not change their status of nationality.

Subject to **Principle 3**<sup>46</sup> *“National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction”*.

This law holds the authority as entirely responsible for the provisions of protection to the internally displaced as well as for their provision of humanitarian assistance in form of food, shelter, clothing, medical care among others.

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<sup>46</sup> Guiding Principles on Internal Displacement 1998/53/Add.2

Owing to the duty of sovereignty as responsibility, **Principle 6**<sup>47</sup> provides for the Right not to be arbitrarily displaced and thus states under Rules 1 – 2 that;

*“Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence”.*

This law was laid out to stop any illogical displacement of people from their habitual homes to areas of suffering, in other words it prevents against displacement which can be avoided, for instance displacement that is caused by human beings through political turmoil like the 2007 political violence in Kenya in other words if people are to be displaced it should be with a logical rhyme or reason to the certainty of the occurrence of the displacement or else the state owes those within its boundary a duty not to be displaced.

This is as emphasized in **Rule 2 Principle 6** that Displacement is arbitrary if in particular it is said to be caused by such factors as a) ethnic cleansings, b) armed conflict, unless the security of the civilians involved or imperative military reasons so demand, c) cases of large-scale development projects, whose justification cannot be through compelling and overriding public interests and where it is used as a collective punishment.

In respect to the above cases, the Guiding Principles<sup>48</sup> holds the state responsible for failure to protect the people from arbitrary displacement.

**Principle 18**<sup>49</sup> is to the assistance of those that have been subjected to arbitration. Under Rule 1 entitles the internally displaced to an adequate standard of living, that is to say,

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<sup>47</sup> Ibid

<sup>48</sup> Guiding Principles on Internal Displacement 1998/53/Add.2

<sup>49</sup> Ibid

one that has a proper hygiene, with good sanitation among others for good health maintenance. Subject to **Rule 2** this assistance is expected to be at the minimum, irrespective of the circumstances and without discrimination for competent authorities to provide internally displaced persons with and ensuring their safe access to such basics as (a) essential food and potable water, (b) basic shelter and housing, (c) appropriate clothing; and (d) essential medical services and sanitation.

The purpose of which is to ensure that, even while in their respective areas of displacement, people still have access to the basic necessities of life as named in Rule 2.

**Principle 25** is to the effect that the provision of the humanitarian assistance as named in **Rule 2 of Principle 18** is bound to national authorities, but the assistance from international humanitarian grounds cannot be denied on subjective grounds. Thus subject to **Rule 3** of this Principle all authorities concerned are expected to cooperate in the granting and facilitation of the free passage of the humanitarian assistance and the authorities are also expected to grant rapid and unimpeded access of persons participating in the provision of such assistance, to the internally displaced.

To effect the provisions in **Principle 25**, of the same principles, **Principles 26**<sup>50</sup> obliges the states to respect and protect all persons engaged in humanitarian assistance, their transport and supplies and thus states are not expected to subject them to any attack or other acts of violence. because doing so implies that state is against support of humanity.

Yet under **Principle 28** competent authorities are of a primary duty and responsibility to establish conditions and devising of means which can enable the internally displaced

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<sup>50</sup> Guiding Principles on Internal Displacement 1998/53/Add.2

persons to (a) return voluntarily, in safety and with dignity, to their homes or places of habitual residence and (b) to resettle voluntarily in another part of the country.

This implies that state should not prevent the displaced persons from relocating or re-assuming ownership of their habitual residence.

For fulfillment of such purposes as named in **Principle 28, Principle 15**<sup>51</sup> provides for the free movement of the Internally displaced persons to have: (a) the right to seek safety in another part of the country and (b) the right to leave their country (c) The right to seek asylum in another country as well as (d) 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. It is to the responsibility of the state that, the internally displaced persons are left to access areas safe for their liberty and health.

**Principle 29**<sup>52</sup> is for purposes of;

**Under Rule 1;** non discrimination from full participation in public affairs by the internally displaced and neither should they be discriminated from accessing public and thus have a right to participate fully and equally in public affairs at all levels and have equal access to public services.

**Under Rule 2;** Competent authority to assist returned or resettled internally displaced persons to recover, to the extent possible, their property and possessions which were dispossessed of upon their displacement upon which if there has been failure of recovery, then the state is obliged to provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

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<sup>51</sup> Ibid

<sup>52</sup> Ibid

However, in review of the above principles and their humanitarian provisions, Kenya although not a signatory to the principles, may be bound by a duty to respect humanity, just as it provides for humanity in its constitution.

#### **1.1.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979**

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. Kenya became a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984. This Convention which was adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 Articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The Convention<sup>53</sup> defines discrimination against women as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

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<sup>53</sup> Convention on the Elimination of All Forms of Discrimination against Women 1979 Part I Article 1

Thus by accepting this Convention, Kenya as a state committed itself to undertake a series of measures to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; as well as to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

Subject to **Article 4**<sup>54</sup> provides for equality between women and men by ensuring equal access to, and equal opportunities in, political and public life including the right to vote and to stand for election as well as education, health and employment, but despite Kenya's incorporation of this convention, there are still difficulties and non participation of women (IDPs) in the political, economic and social spheres, thus violating the provisions undersigned and yet as states parties, agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.

It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

## **2.2 The Constitution of the Republic of Kenya as Amended (2008) Cap 5**

**Article 70** of **Cap 5** provides for the protection of Fundamental Rights and Freedoms of the Individual. Subject to **section (a)** every person is entitled to life, liberty and security

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<sup>54</sup> The Convention on the Elimination of all Forms of Discrimination against Women (1979)

of the person and the protection of the law; whereas **Section (c)** accords people the right to protection of home and other property and from deprivation of property without compensation.

**Section 74** provides for protection from inhuman treatment, thus under **Sub Section (1)** holds that “*No person shall be subject to torture or to inhuman or degrading punishment or other treatment*”. Whereas in **Section 75**, the law protects the people from deprivation of property and subject to **Sub Section (1)** no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, unless a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit, (b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

The constitution also provides for the protection of freedom of expression under **Article 79** unless under circumstances where it is upon one’s consent (1) to be hindered from enjoyment of one’s freedom of expression for instance in holding opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be



to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

**Article 81** accords citizens with protection of freedom of movement where under **Section (1)** no citizen will be deprived of his freedom of movement throughout Kenya as well as the right to reside in any part of Kenya and to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya. Where subject to **Section (2)** any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

The provision under **Article 82** is to the effect of protecting from discrimination on racial grounds. The purpose of which is to treat all citizens indiscriminately of race and traditions.

## **2.3 Conclusion**

Kenya is not a party to the international guiding principle on the treatment of IDPs' but although the principles and policies may not be binding to the government it is no excuse for it not to deliver on them. International bodies, movements and organizations such as the International Committee of the Red Cross (ICRC), the World Food Program (WFP), United Nations Development Program (UNDP) and the Office for Coordination of Humanitarian Affairs (OCHA) among others, are making strides to relieve the IDP crisis. However, they can not manage such an arduous task alone. There has to be a collaborative approach between them and the government for real progress on this front to be made.

## CHAPTER THREE

### CRITIC OF THE PRINCIPLES GOVERNING IDPS IN KENYA

#### 3.0 Introduction

The issues of IDPs protection can be traced from international legislations and different humanitarian rules as the Guiding Principles for the observation of the rights of displaced persons.

#### 3.1 Government Role in Protecting of the IDPs

Government has exerted some effort in the aiding of IDPs subject to the obligations conferred to it under **Principle 3**<sup>55</sup> to provide humanitarian assistance to IDPs. However, this effort is proving to be futile while they still continue to habitate the IDP camps. The situation is aggravating because the aid is inadequate to alleviate most of the urgent humanitarian needs of all the IDPs leading them search for alternative means such as odd jobs. According to FIDH journal on line, parents end up leaving their children in the camps to find odd jobs so that they can fend for their families. On one hand, mothers in desperation engage in prostitution to provide for their families as the children who are left unattended to in the camps get taken advantage of. These instances lead to pregnancies, *ipso facto* subsequent population increases which end up weighing heavily on the limited resources, thus the longer the IDPs stay in the camps, the worse the situation gets.<sup>56</sup> Yet

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<sup>55</sup> Guiding Principles on Internal Displacement 1998/53/Add.2

<sup>56</sup> Massive internal displacements in Kenya (FIDH)

the law under **Principle 6**<sup>57</sup> provides for protection from arbitrarily displacement and yet hundreds still live in arbitration.

However, contrary to **Principle 3** of the Guiding Principles on Internal Displacement it is mentioned that, in true Kenyan fashion, the government would rather spend obscene amounts of money on premature campaigns, irrelevant and unnecessary retreats and their never-ending undeserved pay hikes in a bid to try and satisfy their insatiable greed than to fund the re-settlement of IDPs. Their culture of corruption hinders any progress and threatens to leave the IDPs in this dire state of affairs<sup>58</sup>. According to him, the only progress made happened when a group of IDPs collectively accumulated a pitiable government compensation with which they bought community land to attempt to start anew. It was not exactly back to their former standards of living, but it was a step in the right direction. A pity that these IDPs had to aggressively demand these monies; instead of the government making the initial initiative. Even so, a majority are still living in a quandry in the camps.

Government needs to throw its weight and resources behind the formulation and implementation of sustainable solutions to save the IDPs from this disaster. The government really needs to step up to the plate and assume their role in all this. They need to make good on the draft policy which has mentions of an IDP fund and start injecting much needed funds into it in order to get the IDPs out of the inconsolable state. Because it would be a colossal fail on the governments part if discouraging stories about the IDPs headlining the news another two years from now are still read. However,

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<sup>57</sup> Ibid

<sup>58</sup> Massive internal displacements in Kenya (FIDH)

researcher implores the government to engage in this exercise, to erase the fears of its nationals to be taken for the same ride.

Despite the provisions in the **Principle 29**<sup>59</sup> which oblige the state as competent authority to assist the IDPs in obtaining appropriate compensation or just reparation of their dispossessed property which they have failed to recover. IDPs still suffer enough and it is about time that real measures be made to re-settle them and restore their lives to some semblance of normalcy or at the very least, stability, a desiderata for peace and security that cannot be provided in these camps and yet **Principle 28** empowers competent authorities to establish conditions which can enable the IDPs to return voluntarily, in safety and with dignity, to their homes or places of habitual residence.

It is an outrage that the IDP situation still prevails to date, tens of thousands of men, women and children are still living under sordid conditions in congested IDP camps which is morally repulsive. Even as the rest of the population stabilized, the lives of IDPs are still trapped in a choked and grave existence in the dilapidated camps. Their requisite human needs: food, shelter and medical care are neither prioritized nor provided for.

In face of the Constitutional provisions to protect citizens from discrimination on racial grounds as conferred by **Article 82**, too much racism was exhibited during the general elections in 2007. This can clearly be seen from Gichu Njururi's assertion on the days which followed the general elections in 2007 as being a dark time in the country's history whereupon, Kenya's *hakuna matata* became just a moniker through the ethnic rivalry,

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<sup>59</sup> Guiding Principles on Internal Displacement 1998/53/Add.2 Under Rule 1.

violence, insecurity and death that shocked the masses to the core. Communities which had co-existed for generations in harmony turned against each other, and for years hostilities were slowly boiling to the surface as the country failed to address cultural-political tensions.<sup>60</sup>

### 3.2 Why Campaign for IDP Protection?

Conflict-induced internal displacement has its own features which are most often not related to the causes and purposes of the conflict itself. Whatever the conflict is in its own, displacement becomes a by-product in accordance with the intensity of violence, atrocities, fear and harassment. Unlike the case of refugees, there is no international treaty which applies specifically to IDPs. Recognizing the gap, the UN Secretary-General, Boutros-Ghali appointed Francis Deng in 1992 as his representative for internally displaced persons. Besides acting as an advocate for IDPs, Deng set out in 1994, at the request of the UN General Assembly to examine and bring together existing international laws which relating to the protection of IDPs. The result of this work was the document, *Guiding Principles on Internal Displacement*.

The Guiding Principles lay out the responsibilities of states before displacement that is, to prevent displacement during and after displacement. They have been endorsed by the UN General Assembly, the African Commission on Human and People's Rights (ACHPR) and by the signatories to the 2006 Pact on Security, Stability and Development in the Great Lakes Region, which include Sudan, DRC and Uganda. In September 2004

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<sup>60</sup> GICHU NJURURI A stronger resolve for Kenya's internally displaced persons  
[http://www.kenyaimagine.com/index.php?option=com\\_content&view=article&id=3605:a-stronger-resolve-for-kenyas-internally-displaced-persons&catid=265:politics&Itemid=223](http://www.kenyaimagine.com/index.php?option=com_content&view=article&id=3605:a-stronger-resolve-for-kenyas-internally-displaced-persons&catid=265:politics&Itemid=223)

the Secretary-General of the UN showed the continuing concern of his office by appointing Walter Kälin as his Representative on the Human Rights of Internally Displaced Persons. Part of his mandate includes the promoting of the Guiding Principles. The Guiding Principles, however, are non-binding, “the absence of a binding international legal regime on internal displacement is a grave lacuna in international law.

In Kenya, the 1990s and 2007 post-election violence led to the displacement of so many people both young and old including children without proper resettlement for these people. The inability of the government to address the key issues e.g. security, and the threat posed by tribal militias against others made some displaced people too scared to return. This is violation of their right to return to their homes. Besides, the response of the government to the plight of the displaced was grossly inadequate and did not meet the minimum needs of the internally displaced persons. As of date, some families displaced by post-election violence have not returned home, whilst those that have are concerned about safety and insecurity, state officials have been accused of mismanaging and embezzling funds intended for the resettlement of those displaced by post election violence. Meanwhile, the situation of people displaced by earlier violence in various areas has not been adequately addressed, and in 2009 violence over access to natural resources, often involving government security forces, resulted in further displacement. Finally, the gross violations of human rights of the Internally Displaced Persons should not be left unaddressed.

### **3.4 Guiding Principles of the Internally Displaced People**

Despite the provisions discussed in under principle 1, 2, 3, 6, 8, 28 and 29, internally displaced persons have departed from their homes but unlike refugees they have not left the country whose citizens they normally are, they can invoke all human rights and IHL guarantees available to the 1,citizens of that country and yet applicability of refugee law is not possible and would be dangerous. Internally displaced person experience a very special factual situation and, therefore, have specific needs. However, the Guiding Principles of IDPs is not a binding instrument but a highly authoritative document. Although there is no single UN agency with an IDP mandate, there is cooperation of several UN agencies (UNDP, UNHCR, WFP, UNICEF, WHO, etc) and other relevant organizations (ICRC, IOM, INGOs).

The protection concerns may be said to be serious but there is no protection crisis; major issues are conditions in camps (creating opportunities for exploitation, eroding social capital etc) and the need to identify durable solutions. Primarily responsibility rests with GOK, with Red Cross taking a lead but bear in mind multiplicity of actors working on issues such as SGBV, child protection and psychosocial needs. Humanitarian situation is evolving quickly and potential for exploitation of conditions to achieve other ends (e.g. ethnic cleansing) and to ignore rights (property restitution, compensation, culture of impunity generally).

### **3.5 Circumstances that Lead to Breach of International Protective Laws of IDPs**

Right of Return; in so-called post-conflict situations, there has traditionally been an emphasis in the international community to seek to return to the pre-war status-quo. However, opinions are gradually changing, because violent conflict destroys political,

economic and social structures and new structures develop as a result, quite often irreversibly. Furthermore, returning to the pre-war status-quo may actually be undesirable if pre-war structures led to the conflict in the first place, or prevented its early resolution. IDPs' and refugees' right of return can represent one of the most complex aspects of this issue.

Normally, pressure is applied by the international community and humanitarian organization to ensure displaced people are able to return to their areas of origin and the same property. The UN Principles for Housing and Property Restitution for Refugees and IDPs, otherwise known as the Pinheiro Principles, provides guidance on the management of the technical and legal aspects of housing, land and property (HLP) restitution. Restitution rights are of key importance to IDPs and refugees around the world, and important to try preventing aggressors benefiting from conflict. However, without a clear understanding of each local context, full restitution rights can be unworkable and fail to protect the people it is designed to protect for the following reasons, refugees and IDPs.

Some may never have had property and for others it may be difficult to access what property they have. On top of this ownership may be unclear as families expand or split and division of the land becomes an issue.

On other occasion death of owner may leave dependents without clear claim to the land and people settle on the land well knowing it belongs, but have nowhere else yet others have competing claims including the state and its foreign or local business partners. This requires humanitarian organization to develop a greater expertise in these issues, using



experts who have knowledge in both humanitarian and land and property issues and so provide better advice to state actors seeking to resolve these issues. Legal advice needs to be provided to all parties involved even if a framework is created in which to resolve these issues.

## CHAPTER FOUR

### RESEARCH FINDINGS INTERPRETATION AND DISCUSSION

#### 4.0 Introduction

This chapter defines suggestions acquired through book reviews and self guided interview on the IDPs situation and the fundamental principals that can be viable in the protection of IDPs in case of review on the diverse instruments and principles that may help in protecting IDPs.

Kamungi and Kloop define internally displaced persons as persons "forced or obliged to flee or leave their homes or places of habitual residence for an array of reasons, such as conflict and civil strife, as well as "human-made and natural disasters."<sup>61</sup> Just as Deng envisaged that internally displaced persons are those who are forced to flee their homes to run away from effects of conflict, violence, as well as natural disasters without having to cross international borders.<sup>62</sup>

It can thus be submitted that, IDPs are people who being nationals are habitually, forced to situations of displacement from their own homes and villages to escape likely effects of disaster natural or man made which threatens their lives.

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<sup>61</sup> Kamungi P., and Kloop, J, 'Failure to Protect: Lessons from Kenya's IDP Network', *Forced Migration Review* 53, Pg 58, 2007.

<sup>62</sup> The Representative of the Secretary- General, further Promotion and Encouragement of Human Rights and Fundamental freedoms, Including the Question of the Program and Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary- General, Mr. Francis M.Deng, submitted pursuant to Commission resolution 1997/39, Addendum, Guiding Principles on Internal displacement, Intro. Delivered to the Economic and Social Council, Commission on Human rights, U.N Doc. E/CN.4 /1998/53/Add.2 (Feb. 11, 1998) ( hereinafter Guiding Principles). Compare refugees and IDPs. See Convention related to the status of the refugees, Art 1 July 28 1951.

#### 4.1 Causes of Internal Displacement of Persons

As will be discussed, there are various causes of internal displacement of persons in Kenya, where the most significant contributory factor has been the election violence, land wrangles, tribal differences as well as many others.

Kamungi, and Klopp,<sup>63</sup> attribute displacement to political wrangling, and to some extent ethnic animosity, unemployment, poverty, illiteracy, ignorance, poor security system and a general lack of political will to address the root causes of the violence all of which lead to displacement. In their assertion, it was the introduction of multi-party politics in the 1990s that the age- old rivalry was rekindled thereby providing new frontiers for the manifestations. It was to their observation that, Kenya's political landscape is marked by party zones and that each party's support and affiliation remains confined in particular area, and is ethnically specific. Just as they noted that, the clashes in 1992 affected more than 300,000 people and left thousands of people displaced a situation which elaborates the recurrent traceable violence right from the 1990s.

This same situation was earlier on envisaged in the Human Rights Watch report<sup>64</sup> of how such violent history which is not in the too distant past memories of the 1992 crisis could serve as a reminder of the ethnic tensions underlying Kenya's political process. Obonyo<sup>65</sup> also held the same view when he anticipated the same when the 2007 elections drew nearer. This he established as a matter of fact that, as far back as 1993 violent struggles over land characterized Kenya political life and the announcement of Kenya parliamentary elections in the month of December, 2007 amounted to disagreements

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<sup>63</sup> Kamungi P., and Klopp, J, 'Failure to Protect: Lessons from Kenya's IDP Network', *Forced Migration Review* 53, Pg 58, 2007.

<sup>64</sup> Human Rights Watch, Africa (1997). *Failing the Internally Displaced: The UNDP Displaced Persons Program in Kenya*, Human Rights Watch: New York.

<sup>65</sup> Obonyo 'The Politics of Displacement in Multi-party Kenya' in *Journal of Contemporary African Studies* (Forthcoming), 2008.

between the parties involved. During this time when Kibaki was re-elected as president communal clashes broke up claiming over 1,000 deaths and displacing over 600,000. According to Obonyo, this has been described as the worst political violence in Kenya's history because the crises involved inhumane killings of fellow human beings, abuse of women and children especially girls.

It is therefore right to submit that, at such a time the rule of law and human rights were considered as alien to the citizens when Kenyans trampled rights and freedom with impunity. The wrangles and misunderstandings had long existed and required just a mere spark to blow it off and indeed the electoral differences did.

In addition ethnic differences are another cause of displacement in Kenya as explained in the KHRC Report <sup>66</sup> that the ethnic differences between the Kalenjins and Kikuyus were fuelled by the results of December 2007 elections. According to the report, the Kalenjins have an inferiority complex and they assume that Kikuyus have marginalized them for far too long by dominating the major sectors of the economy of the country at their own expense, upon which announcement of the elections results, immediately sparked off violence fueling pace of displacement of many people. This is in contention with the NRC report on how the year 2006 saw a sharp increase in the number of people newly displaced by conflict and how the number continued to rise.

In the researcher's opinion, it can therefore be submitted that, with or without winning elections, given the nature of racial differences that had for long existed, neither the Kalenjins nor the Kikuyus, would be willing to submit under the rule of the other, thus violence was bound to lead to such displacements.

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<sup>66</sup> KHRC, 2008. "A Tale of Force, Threats and Lies: Operation Rudi Nyumbani in Perspective", KHRC 2008.

Further still the violence was attributed to conflicts arising from land as supported by Rutinwa.<sup>67</sup> According to him, land disputes in Kenya date far back to pre-colonial period when powerful communities acquired the land of the less-privileged through conquest. Just as the time almost equivalent to the Hobbesian state of nature where the most powerful takes all. In Kenya the Kikuyu as the most powerful group had to dominate the Kalenjini. According to Bayne, the allocation of land after independence was disproportionate and marginalized certain ethnic groups, the Kalenjins in particular felt that they had been schemed out in the land redistribution exercise and reacted violently displacing many Kikuyus in the process. The Kalenjins were of the view that the Kikuyus were allocated some of their fertile lands and the Kalenjins promised to return to **majimbo** constitution in order to uproot the Kikuyus and reclaim their ancestral lands. However, at the time the land wrangles were not that severe only to come to their peak by 2007 post – election violence sending many to seek refugee in neighbouring areas. Kenya’s land problem is politically oriented, and fuelled the 2007 post-election violence because one ethnic group wanted the other to move out.

Just as Frelick, Bill<sup>68</sup> argued that since 1990s certain leaders had taken to exploiting ethnic grievances over perceived historical injustices<sup>69</sup> and that a struggle over land is characteristic of Kenya political life according to Bayne politicians in Kenya politicized

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<sup>67</sup> Rutinwa, Bonaventure (1999). “How tense is the tension between the refugee concept and the IDP debate?” *Forced Migration Review* Vol. 4, pp. 30-33

<sup>68</sup> Frelick, Bill (2003). “Displacement without end: internally displaced who can’t go home,” *Forced Migration Review*, Vol 17, pp. 10-12

<sup>69</sup> Bayne C. 2008. ‘Introductory Note on the Pact on Security, Stability and Development in the Great Lakes region’ *International Legal Materials*, American Society of International Law, 46 (1), pp. 173-175

the existing differences between the ethnic groups leading to the violence that occurred at Rift Valley, Western, and Coast Provinces.

It can therefore be submitted that the quest for land control is instrumental in the political life of Kenya, thus their perceived injustices and deprivations manifested themselves in times of election and led to displacement of people.

In view of the IDMC report, another cause of displacement is noted to be inequalities in economic and political spheres, where according to the report, belonging to the superior and government favoured ethnic tribes, gives one an edge over the less privileged tribes in accessing the political and economic resources of the country. This dominance resulted into violence due to a feeling of marginalization that it had created to the less-privileged group. According to the report, Kenya had for all this material time been a time bomb waiting to explode and only had, what may, at best be described as a lull or an uneasy peace, thus its explosion saw many displaced. The attempt to correct the economic and political differences of Kikuyu over the Kalenjin and Luo resulted in violence. Just as is evidenced between the Gikuyu Embu Meru Association (GEMA) who according to the report are tribes which occupy the most productive areas of the country while the Kalenjin Maasai Turkana Samburu Association (KAMATUSA) occupy the less productive area. The resulting inequity and injustice, frustration and animosity are what have haunted Kenya every other few years in the form of violent conflicts.

Thus the report attributes the economic and political inequalities to the post election violence as a way of resentment of the regime in power, thereby sending many into displacement.

Similarly, FIDH and KHRC report considered it a class war in respect to the vandalism of the post-elections according to this combined report, it was due to the margin between the rich and the poor in terms of unemployment, illiteracy, and impoverishment which fueled youth to engage in crimes and violence this active. This active involvement was geared by the harsh socio-economic conditions of many youths who were involved directly in the incitement of violence with politicians and vandalization of properties, displacing the masses from their homes.

This implies that the discontentment in the economic and political differences can be very influential in creating racism. This may end up in revolts and use of violence thereby displacing people from their homes.

According to Obonyo, it is pointed out that some media houses can be influential in the fueling of conflicts and tensions, and yet once fueled it becomes very hard to cool them down since this happens at a time when other pressing issues are already at heart, thus masses find it easy to take up to revolting and destroying property and beating up others sending them into displacement. According to him this was experienced in 2007 when some media house played a positive role by calling for peace but some indigenous and vernacular media houses fuelled the ethnic tensions by encouraging violent acts especially at the height of the violence.<sup>70</sup>

This implies that media due its wider coverage can be very influential in mobilizing riots and encouraging violence, thus calls for strict regulation.

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<sup>70</sup> Obonyo 'The Politics of Displacement in Multi-party Kenya' in *Journal of Contemporary African Studies* (Forthcoming), 2008.

According to Cohen<sup>71</sup> impunity led to displacement of people in Kenya when it resulted into an outbreak of violence. In his assertion, Cohen emphasizes that, Kenyans have been experiencing a political transition from authoritarian or dictatorial regimes to multi-party democracy. Such transitions are characterized with impunity and thus breed a lot of resentment because the government fails to hold accountable the perpetrators of violence. According to Cohen a very a suitable example is that of Kibaki who despite his indictment of many senior politicians bred a culture of impunity in Kenya's political violence history, this impunity encouraged politicians to incite violence, manipulate electoral process without ever being prosecuted, the end result of which is displacement when the situation turns violent.

#### **4.2 Challenges Faced in the Protection of Internally Displaced Persons**

According to Mooney<sup>72</sup> underdevelopment is one of the challenges experienced in trying to protect Internally Displaced Persons. In Mooney's assertion, disorderliness, threat to life and resources due to violence hinder development and prevent people from returning to their previously deserted homes according to him this is not only an effect but may turn out to be a causative factor in the end in a continued circle of chaos and anarchy.

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<sup>71</sup> Cohen, Roberta (2001), Exodus within borders: The global crisis of internal displacement, Speech at UNCHR Bulgaria, at [http://www.unhcr.bg/lecture/Roberta cohen.html](http://www.unhcr.bg/lecture/Roberta%20cohen.html).

<sup>72</sup> Mooney, Erin (2003). "Bringing the End in Sight for Internally Displaced Persons," Forced Migration Review, Vol. 17,pp. 4-7



In the researcher's opinion this is indicative of the fact that, there cannot be meaningful development where insecurity is the order of the day. This is particularly true because resources are directed towards the attainment of security as well as humanitarian assistance yet developmental and profitable projects are left at a standstill when monies are diverted. In other words it interferes with the country's budget.

According to Rutinwa Bonaventure he relates the outcomes of protection of IDPs to a militarized society under which there are so many firearms in circulation arising from the need to be equipped against ethnicity and political violence. This illegal possession of firearms hinders conflict management and prevents IDPs from returning to their homes for fear of further attacks and other related social ills as bred by violence.

This implies that, responsible authority is limited from effectively protecting IDPs when the civilian populace is armed and yet this threatens the IDPs from returning to their home, thereby further constraining the country's resources.

Another challenge experienced as emphasized in the KHRC report<sup>73</sup> is that of the women selling their bodies to feed their children. According to report, prostitution at the camps is no news and that when women find themselves all at once in a place where they can't take care of their children, they get desperate, at times children are raped in the absence of their mothers while they go out to practice prostitution and leave the children unattended to. Yet according to Kamungi P., and Klopp,<sup>74</sup> many men whose wives were raped abandoned them and women have also decided to leave their husbands for those

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<sup>73</sup> KHRC, 2008. *"A Tale of Force, Threats and Lies: Operation Rudi Nyumbani in Perspective"*, KHRC 2008.

<sup>74</sup> Kamungi P., and Klopp, J., 2007, p. 58. 'Failure to Protect: Lessons from Kenya's IDP Network', *Forced Migration Review*, 53.

that are in a better position to cater for their children especially the truck drivers who find it easy to purchase these women for the night spent within their locality. To make matters worse Kamungi and Klopp reveal that some of these women go as far as contracting pregnancies, regardless of their economic status.

In the researcher's opinion, it can be submitted that, because of the limitedness of the resources provided in form of humanitarian assistance, IDPs (mothers) find it necessary to look for alternative means of securing essentials for their children, and yet in the course of doing so may easily encounter other problems such as contracting sexually transmitted diseases and having their children following the same paths yet this should solely be government's responsibility to provide food and assistance in times of disaster to those that are affected.

Another challenge as expressed by Obonyo is that<sup>75</sup> there is no regime guiding the affairs of the internally displaced persons but the Guiding Principles on Internal Displacement identify rights and guarantees relevant to the protection of IDPs during displacement and resettlement. Obonyo observed that this right was compromised by Kenyan authorities after losing the control of the state or territory to rebels or militia groups like the Kalenjin warriors where part of the population was being victimized as enemies of the state and yet evacuations were carried out with extreme brutality, with reports of severe human rights violations, such as rape, property destruction, beatings and extrajudicial executions

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<sup>75</sup> Obonyo 'The Politics of Displacement in Multi-party Kenya' in *Journal of Contemporary African Studies* (Forthcoming), 2008.

Obonyo's view is in line with Bayne, who noted that, lack of a specific legal instrument and defined institutional protection as well as assistance for IDP's is one of the major problems faced by millions of IDPs around the world, when what exists is only a little coordinated *ad hoc* response.<sup>76</sup> According to Obonyo, although the major human rights treaties upon which the Principles are based do not directly refer to internal displacement, the protection these instruments provided certainly apply to displaced persons, including those displaced by natural disasters.

However, this is implicative of the fact that despite the availability of principles that can be relied upon to protect IDPs, they are legally not covered because of the rebel factions from the ethnicities to which they belong. Yet, just like every other human being, the internally displaced people have fundamental human rights and it is the responsibility of the Kenyan government to take care of her citizens.

According to FIDH and KHRC<sup>77</sup> there has been a dramatic increase in rape and sexual abuse in camps which necessitates a rapid and timely action by the government to reduce vulnerability of IDPs to rape and other forms of sexual. On top of this the report asserts that the gender-based violence cannot be overstated. According to the report, the rights of Kenya's women and girl IDPs were being violated, although they are protected under CEDAW as ratified by Kenya in 1984.

This implies that despite the ratification of certain instruments that can be relied upon to protect the IDPs, the government has not effectively executed its roles in protecting its nationals (in camps) women and girls are raped in the presence of supportive laws and

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<sup>76</sup> C. Bayne 'Recent developments the elaboration of a legal framework for the protection of internally Displaced Persons in Africa' (2006) 50 (2) Journal of African Law 187,190

<sup>77</sup> FIDH and KHRC, 2007. *Massive Internal Displacements in Kenya due to politically instigated clashes* Nairobi: KHRC/FIDH.

thus challenge poses human rights questions when the rights of women and girls are infringed upon.

Another challenge as expressed by Bayne<sup>78</sup> is the violation of security rights according to Bayne, this comes about as a result of a feeling of insecurity to be pervasive which culminates from the failure of the government to provide security for its citizens.

It can thus be submitted that, without government security, IDPs are left with no hope of going back home because home sounds more insecure than they already are.

Kamungi,<sup>79</sup> addresses the issue of violation of educational rights when he points out that, violence disrupts the education of students. He quotes this from the North Rift valley where 35 primary schools closed as people moved due to the violence and the schools in South Rift refused to take the children of IDPs. He also emphasizes that displaced children lack access to school, as a result of destruction and damage to schools, difficult transport conditions, lack of school uniforms and lack of teachers.

This is indicative of the fact that children at camp are denied their right to education when schools refuse to enroll them, which calls for government attention to take initiative in securing this right through devising alternative means of enforcing their enrolment because being at camp does not take away their right of being treated equally as other children.

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<sup>78</sup> . Bayne 'Recent developments the elaboration of a legal framework for the protection of internally Displaced Persons in Africa' (2006) 50 (2) Journal of African Law 187,190

<sup>79</sup> Kamungi, P, 2009. 'What Pact, What Protocol? The Irrelevance of the Great Lakes Protocols in Responding to Kenya's Post-Election Humanitarian Crisis' Paper presented at the London School of Economics, May 2009

Additionally, Kamungi<sup>80</sup> also addresses the challenge of inadequate housing, according to him this violates the right of citizens to adequate housing when people find themselves rocked up in a situation under which they cannot return to their own homes. When people are forced to move out of their habitual residence due to the violence and are encamped in big numbers under small structures causing congestions, overcrowding, according to Kamungi this is a potential danger of outbreaks and spread of diseases, contrary to the provision of the Constitution on the adequate housing.

In the researcher's opinion this implies that, the law has not effectively protected IDPs as citizens when it fails to secure them adequate housing in the times of havoc. It is the duty of the state to ensure that whether displaced or not, all people are adequately housed.

Further still the KHRC report<sup>81</sup> comments on the challenge of violation of the right to own property, According to the report, many houses were burnt, looted and vandalized during the political insurgences which left so many people homeless and yet no effective steps have been taken by government to provide for redress. In addition to this the report also notes that IDPs are prevented from returning home to areas declared security zones or exclusion zones, where reconstruction is forbidden and yet no adequate alternative is being provided and yet for those that have lost their documentations landmarks for demarcation have been wiped out, or when property records have been destroyed.

This implies that, for IDPs who lost their properties, are hindered by so many obstacles to reclaiming such properties without rightful documentations upon which to place the claim. Thus people in camps are not protected by the law despite the constitutional

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<sup>80</sup> Ibid

<sup>81</sup> KHRC, 2008. *"A Tale of Force, Threats and Lies: Operation Rudi Nyumbani in Perspective"*, KHRC 2008.

provisions which entitles them to a right to own property. This therefore calls for government intervention to ensure that those that can identify their property are helped to recover it as well as organize for redress of those whose property has been completely damaged.

According to Obonyo<sup>82</sup> support agencies are finding it hard to protect children against child labour because of the poor conditions in the camps which necessitate children to work. According to him, IDPs and their children are used as source of cheap labour by agricultural companies.

This implies that, due to the poor living conditions, children are forced to join the labour force to supplement on the family resources otherwise, no adequate provision of resources will be made and to make matters worse, because there is need to work due to scarcity of resources, children organisations are not in position to stop them from working.

#### **4.3 Possible intervention Measures that can be Taken to Improve on the Protection of the Displaced Persons**

Kamungi,<sup>83</sup> suggests that there is need to resettle the displaced because the unresponsiveness to the plight of the displaced persons simply contributes to handicapping the humanitarian support organization by the ever increasing IDPs. This he

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<sup>82</sup> Obonyo 'The Politics of Displacement in Multi-party Kenya' in *Journal of Contemporary African Studies* (Forthcoming), 2008.

<sup>83</sup> Kamungi, P, 2009. 'What Pact, What Protocol? The Irrelevance of the Great Lakes Protocols in Responding to Kenya's Post-Election Humanitarian Crisis' Paper presented at the London School of Economics, May 2009

expresses with the faith based and relief organization that have been handicapped because of the ever increasing aid that they need to provide, and yet resources are limited.

According to Kamugi<sup>84</sup> he further points out that the government of Kenya and KRCS although supported by some NGOs and international organizations tried to plan for resettlement of the IDPs after the violence, the government did not take any effective measures to ensure that it maintains the security in the homes of the people it is resettling and for such a weakness, Kamugi portrays the failure of IDPs to go back to their homes as a result of threats for instance according to him, whenever the Kikuyus at Rift Valley made an advance back to their homes, the Kalenjin youths did tell them to go back and threatened to kill them, thereby failing to resettle.

This implies that if measures are not taken to resettle the IDPs then the more they will disable the relief organisations when they constrain their few resources than when they are provided with assistance to resettle once and for all and if such measures are taken then government ought to address the causes of the violence and ensure the security of those displaced while they resettle.

The UNHCR<sup>85</sup> report proposed for a consideration for the acts of gender based violence to be addressed because many organizations overlook them when they perceive them as a preserve of culture and therefore outside the humanitarian intervention scope. According to the report, this renders the non-governmental organizations helpless in the face of no policy on their part touching on Gender Based Violence. Moreover during crises, situations of scarce food, water or shelter human, rights which is a secondary factor is

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<sup>84</sup> Ibid

<sup>85</sup> UNHCR (2005). "UNHCR's role in LASC Humanitarian Reform Initiatives and in the Strengthening of the Inter- Agency Collaborative Response to Internally Displaced Persons Situations," [www.unhcr.org](http://www.unhcr.org)

usually perceived as a non-essential luxury. According to the report, self professed counselors most of whom were from faith based could be seen distributing clothes and food but lacked the trauma counseling techniques and methodology to professionally assist the victims to do self disclosure of what they were psychologically going through at the time.

This implies that if issues of violence are overlooked and not tackled under humanitarian aid provided, then with the absence of the well articulated policies not much help will be done either.

#### **4.4 Conclusion**

The fact that more people are displaced reflects a range of factors, overall numbers of displaced persons is growing driven by political insurgencies, land wrangles, fear to return to home, high birth rates among the IDPs, combined with unplanned development thus putting more people at risk. The displacement of people within their own country induced by armed conflicts, land wrangles, development projects and/or lack of development is a recurrent and urgent problem requiring careful consideration.



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

Although humanitarian law provides for opportunities in the protection of Internally Displaced Persons, the IDPs are still undergoing enormous challenges due absence of observation and practice of the legal protection accorded to them. IDPs are held in abusive situation yet with an incorporation of the Guiding Principles into and other international instruments the Kenya legal system, such situations may be overcome.

Although the primary responsibility to address the concerns of the internally displaced lies with the national authorities and in armed conflicts with all parties to the conflict - the demands often exceed their capacity to respond effectively; and thus humanitarian actors may be relied upon to address urgent and life-threatening needs. Given the scope and magnitude of the phenomenon of internal displacement, it is generally recognised that it is beyond the capacity of a single organisation to provide an effective and comprehensive response to the needs of IDPs and returnees. Thus, several operational contexts require the intervention of a wide range of organisations to work together to provide an operational response to alleviate the plight of IDPs.

Despite the violence that rocked the 1990 and 2007, Kenya post-election causing displacement of so many young generations, including adults and children without adequate resettlement, the government's response to the plight of displaced persons is

clearly inadequate and does not meet the minimum needs of internally displaced persons. The government has failed to address key issues concerning IDPs' protection for instance the security and the threat posed by the tribal militias against other displaced persons causes some to become too frightened to return, this violates their right to return to their homes. To sum it up, massive violations of human rights of internally displaced persons must not go unpunished.

## **5.2 Recommendations**

Upon the summary of the findings and conclusion drawn, the following recommendations have been proposed to the international community, concerned agencies, government and community.

### **5.2.1 Reforms and Incorporation of IDP laws**

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 suffer loss of lives, property and livelihoods. The Government must also appreciate the difference between the current facilitation and the legitimate claims of IDPs for comprehensive reparations, including financial compensation.

In seeking to address the problem of internal displacement in Kenya, an ideal policy should envision the preservation and realization of the human dignity and human development for all IDPs. This vision should be realized with a mission to provide a

comprehensive prevention and response framework for protection, assistance and remedy for IDPs. This mission should be guided by the following principles and objectives: *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* ensuring timely and sustainable response to humanitarian needs of IDPs in line with international humanitarian law. *The Right to Remedy* putting in place legal and policy measures for reparations to IDPs in line with international law.

### **5.2.2 Observing Responsibilities**

There is need to form a prevention consortium global coalition of governments, international organizations, academic institutions, the private sector and civil society organizations dedicated to increasing the safety of vulnerable communities and to reducing the impact of disasters in developing countries.

### **5.2.3 Profiling 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. 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.

### **5.2.4 Security and inter-communal relations with IDPs**

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 should also address the issues of landless tenants and squatters, who constitute the largest number of IDPs unable to find durable solutions. Moreover, the Government needs to identify and eliminate the root causes of internal displacements and to develop effective early warning systems to curb eruption of conflicts and violence.

#### **5.2.5 Coordination and leadership**

The government should be at the forefront in providing leadership on all the short, medium and long-term interventions on IDPs. In cases where other development partners offer to coordinate different initiatives individually or collectively, the partners should put in place appropriate measures to ensure sustainable and systematic transition to allow the relevant Government departments to continue. Nevertheless, the partners should sustain their support, monitoring and evaluation initiatives. The Government should effectively involve other stakeholders e.g. CBOs and NGOs in the Resettlement Programme, and consider making the composition and operations of the Advisory Board more participatory, independent, accountable and effective.

#### **5.2.6 Redress all categories of IDPs**

The government should put in place measures to ensure expeditious protection and assistance to IDPs displaced before and after the 2007 post-election violence.

### **5.2.7 Protection of women, children and other especially vulnerable groups**

The Government should put in place mechanisms for the protection of IDPs with special needs and interests. This includes protection and assistance to women and girls, children, persons with disability, the sick, among vulnerable persons such as HIV/AIDS patients.

### **5.2.8 Enhancing Recovery Schemes**

There is a need to strengthen the implementation of mechanisms to assist the poor, the elderly and the disabled, and other populations displaced by disasters. This can be through enhancement of recovery schemes including psycho-social training programmes in order to mitigate the psychological damage of vulnerable populations, particularly children, in the aftermath of war atrocities and other related disasters as may lead to displacement. However an endeavour must be taken to ensure, as appropriate, that programmes for displaced persons do not increase risk and vulnerability to hazards.

### **5.2.9 Support durable solutions**

The government should develop effective structures for supporting early recovery and durable solutions. It should put in place necessary legal and policy measures to deal with the root causes and the manifestations of injustices facing IDPs. Actions towards this end include but are not limited to:

*a) Disaster Policy:* A disaster policy is required to provide a mechanism for disaster preparedness in order to deal with humanitarian crises and other emergencies related to internal displacement. The Ministry of State for Special Programmes' Strategic Plan must include specific benchmarks and performance indicators on IDP-related issues.

- b) National security, peace and conflict transformation policies:* Consultative formulation and effective implementation of these policies can help the Government deal with insecurity and conflict in a sustainable and coordinated manner. Security components should be added to the draft Peace and Conflict Transformation Policy to avoid duplication of governance frameworks on related issues.
- c) Transitional justice, constitutional and institutional Reforms:* An effective and victim centred TJRC, a people-centred human rights plan of action, democratic constitution and progressive judicial and electoral reforms are essential to pre-empt displacement. They are also important mechanisms for providing remedy to victims.
- d) Justice and accountability concerns:* Action should be taken against persons who use hate speech and incite communities against each other. Perpetrators of violence and internal displacement should be held accountable. The Government must implement the recommendations of the Commission of Inquiry into the Post-election Violence (CIPEV), the Independent Review Commission (IREC) and of the 1999 Commission of Inquiry into Ethnic Violence in Kenya.
- e) Land Policy:* there is need to expedite the formulation and implementation of the draft national land policy in order to deal with historical land injustices and repugnant land governance systems. These injustices and systems are the basis for conflicts and displacements in many parts of the country.
- f) Policy on IDPs:* The Government should hasten the process of formulation, enactment and implementation of a policy to deal with matters related to protection and assistance to IDPs, as well as their property rights. The policy should be elaborate and progressive in view of the centrality of politics and the land question in Kenya.

#### **5.2.10 Developing Capacities**

There is need to develop capacities of the internally displaced persons by incorporating disaster risk reduction measures into post-disaster recovery and rehabilitation processes and use opportunities during the recovery phase while developing capacities that reduce disaster risk in the long term, including through the sharing of expertise, knowledge and lessons learned.

#### **5.2.11 Promoting Estoppels**

There is a necessity to promote food security as an important factor in ensuring the resilience of communities to hazards, particularly in areas prone to drought, flood, cyclones and other hazards that can weaken agriculture-based livelihoods.

#### **5.2.12 Promote Diversified Income Options**

There is need to promote diversified income options for populations in high-risk areas to reduce their vulnerability to hazards, and ensure that their income and assets are not undermined by development policy and processes that increase their vulnerability to disasters.

### **5.3 Conclusion**

For these recommendations to be given adequate attention, it necessitates government to take initiative as lead agency to assume the position of sole responsibility to steer the campaign for the betterment of the conditions of the IDPs. It is crucial, therefore that the guiding principles for IDPs be adopted in addition to generating of more supportive laws.

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## INTERVIEW GUIDE

### SPOT INFORMATION

A) Ochieng Chrissy Owenga

Date of Interview:.....

B) Self guide

### Background

Despite the provisions of Humanitarian Law and existence of IDPs in Kenya, no effective law is in place to protect the rights of IDPs and for this reason, the rights of IDPs is violated in camps. This however calls for an international immediate concern to address the violation of rights of IDPs to bring about a more effective way of providing protection to IDPs on internationally acceptable standards as guided by Humanitarian Law.

### Guiding Issues

1. Who are the Internally Displaced Persons?
2. What is the cause of Internal Displacement of Persons?
3. What are the Rules and regulations protecting Internally Displaced Persons?
4. What are the challenges experienced in the protection of internally displaced persons?
5. Is there need for the incorporation of IDPs laws?
6. What possible assumptions can be put forward for (5) above?
7. What is the problem with the current status of IDPs?
8. What steps can the government take to ensure exercising of rights of IDPs?

