

# Protection of Internally Displaced Persons in Kenya under the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012: An Appraisal

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## **Abstract**

This article discusses Kenya's Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012, which is among the very few national legislations globally that addresses the plight of internally displaced persons. While it records the momentous achievement in creating a viable and legally enforceable legislative framework for the protection of IDPs, the article highlights some of the areas that could be improved for the Act to realise its promise. It notes for example the inchoate manner in which institutions are created and the lack of resources. The article while isolating these challenges also suggests numerous ways in which such challenges can be overcome. It underscores the need for harmonised legal regimes, improvement of data collection and proper monitoring programmes, all which can be achieved and strengthened by a supportive political establishment as well as strategic amendments to various provisions of the Act.

## **INTRODUCTION**

This article is an appraisal of the Internally Displaced Persons (IDP) protection framework established by the much acclaimed Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012.<sup>1</sup> The Act, which came into operation in December 2012, establishes an institutional framework for the protection of IDPs and affirms the national commitment to key principles set out in regional and international instruments. However, its implementation and general operation has been fraught with difficulties. Studies have pointed

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<sup>1</sup> Act No 56 of 2012.

to the weakness of its provisions and the inept institutional framework as among the reasons why the Act has not made an impact on the lives of the over 300 000 IDPs in Kenya.<sup>2</sup> Specifically, it fails to define the role of the National Consultative Coordination Committee (NCCC) and its relationship with other entities responsible for IDP matters and to clarify the role of county governments in the protection of IDPs. Most importantly, it fails to guarantee resources for IDP management. This article will endeavour to explain how these challenges have impeded the operationalisation of the Act and how they can be resolved bearing in mind the IDP protection standards established by regional and international instruments. It will also debate possible responses to these challenges.

The discussions in this article are based on the assumption that Kenyan IDPs can benefit from a robust protection framework underwritten by an effective legislative regime, and that the need to strengthen domestic law and improve the efficiency of its institutions is an important protection imperative for IDPs. This assumption underscores the need to evaluate the efficacy of the domestic legal framework for IDP protection established by the Act against international and regional normative standards. Obviously, the IDP phenomenon has broad implications that cannot be fully addressed in a single legislative fiat. However, given the expectations at the time the Act was promulgated and the claim by the Act that it will ‘give effect to the Great Lakes Protocol on the Assistance to Internally Displaced Persons and the United Nations Guiding Principles on Internal Displacement’,<sup>3</sup> there is sufficient ground for making this enquiry. Moreover, it is imperative that the efficacy of the law be assessed to ascertain where Kenya stands in relation to its goals of protection and assistance to IDPs. The article undertakes this assessment by firstly analysing the structure of the Act and identifying both the strengths and areas of concern. This assessment is based on the understanding that Kenya should strive to domesticate standards established by regional instruments such as the Kampala Convention and the Pact on Security and Development of the Great Lakes Region (Great Lakes Pact), a goal acknowledged in the preamble to the Act.<sup>4</sup> Secondly, it will highlight

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<sup>2</sup> See IDMC, ‘Kenya IDP Figures Analysis’ <<http://www.internal-displacement.org/sub-saharan-africa/kenya/figures-analysis>> accessed 10 June 2016; Article 19, *Kenya: Internally Displaced Persons Bill 2012—Legal Analysis* (2012) <<https://www.article19.org/data/files/medialibrary/3362/12-10-08-LA-kenya.pdf>> accessed 20 February 2016.

<sup>3</sup> Preamble to the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012 (hereinafter IDP Act).

<sup>4</sup> The Pact, which entered into force in 2008, is a product of the International Conference on Great Lakes Region (ICGLR) held in Nairobi in 2006. It is a holistic framework for dealing with all main security issues in the region. It has ten Protocols and four Programmes of Action. The Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons in Art 6(3) requires member states to ‘enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal system.’

the challenges or gaps arising from the inadequacy of the Act and then put forth some proposals on how to improve the legal framework for the assistance and protection of IDPs established by the Act.

### **THE PREVENTION, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS AND AFFECTED COMMUNITIES ACT**

Apart from Angola, Burundi, Sierra Leone, Liberia, Uganda and Sudan, Kenya is the only other African nation that has enacted a national IDP legislation. In October 2012, parliament passed the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act. This was a culmination of a process which began in 2008 when the government set up programmes to assist the IDPs under the then Ministry of State for Special Programmes,<sup>5</sup> and also became a member of the Great Lakes Pact. Upon intense lobbying by the civil society groups and humanitarian groups, parliament in 2010 set up a Select Committee on the Resettlement of Internally Displaced Persons and entrusted to the committee, the responsibility to ‘examine policies and law governing all forms of forced displacements with the aim of promoting protection and improving the well-being of forced migrants’ and to ‘come up with a draft Bill on forced migrants’.<sup>6</sup> This committee prepared a draft bill, which was tabled before parliament, and passed in October 2012.<sup>7</sup> The promulgation of the Act came at a time when there was much confusion on how to address IDP concerns and the fragmented institutional frameworks needed some kind of normative order to be effective. The Act was thus a welcome development given that, at the time of its promulgation, there were over 600 000 IDPs spread all across the country.<sup>8</sup>

The overall purpose of the Act is to prevent arbitrary displacement, and offer protection and assistance to IDPs.<sup>9</sup> It has twenty-five sections that define this mandate and establish a legal framework aimed at achieving them. These provisions broadly set out the vision and purpose of the Act;

<sup>5</sup> Jacqueline Klopp and others, ‘Internal Displacement and Local peacebuilding in Kenya: Challenges and Innovations’ Special Report, United States Institute of Peace (2010).

<sup>6</sup> See Kenya National Assembly, ‘Report of the Parliamentary Select Committee on the Resettlement of Internally Displaced Persons in Kenya’ (April 2012) <<http://www.knchr.org/Portals/0/Reports/PSC%20Final%20IDPs%20report%202012-2.pdf>> accessed 20 February 2016.

<sup>7</sup> See IRIN, ‘Kenya: IPD Law in the Works’ (22 June 2012) <<http://www.irinnews.org/report/95706/KENYA-IDP-law-in-the-works>> accessed 15 July 2014. See also Laurence Juma, ‘An Overview of Normative Frameworks for the Protection of Development-induced IDPs in Kenya’ (2013) 6 African J of Legal Studies 17.

<sup>8</sup> Laurence Juma, ‘Normative and Institutional Approaches to the Protection of Property Rights of IDPs in Kenya’s Rift Valley Province’ (2012) 20(2) African J of Intl and Comparative L 251.

<sup>9</sup> For further discussion on ‘arbitrary displacement’ see Romola Adeola and Frans Viljoen, ‘The Right not to be Arbitrarily Displaced in Africa’ (2017) 25(4) African J of Intl and Comparative L 459.

define its operational contours by affirming the principles of prevention and protection; and establish an institutional framework to manage displacement.

### **Vision and Purpose of the Act**

The vision and purpose of the Act are fairly robust, at least on paper. The opening provisions indicate in all certainty that the intentions of the drafters were noble. This is evident even from the title. Indeed, a key feature of the Act is that it domesticates the Great Lakes Protocol on Protection and Assistance to the Internally Displaced Persons and the UN Guiding Principles on Internal Displacement.<sup>10</sup> This is indeed useful because it ensures that international standards of protection and assistance to IDPs are maintained in the domestic sphere. While the provisions of the Act give effect to the general philosophy of protection and assistance espoused by these two instruments, its approach is rather soft. The provisions are expressed in general terms as if the Act were an international treaty that relies on the goodwill of states. Secondly, the application of the two instruments is limited only by the Constitution and the Act.<sup>11</sup> However, given the manner in which the Guiding Principles have been adopted by the Act, it is unlikely that any of its provisions are contrary to the Constitution. Moreover, the Guiding Principles are now widely implemented as the benchmark to any IDP protection and assistance regime.<sup>12</sup> Thus, despite its lack of a binding quality the Guiding Principles has gained substantial international acceptance and authority.<sup>13</sup>

There is something to be said about the interpretation section, especially the part that deals with the status of IDPs.<sup>14</sup> There is no question that a normative response to the phenomenon of displacement has finely demonstrated the differences that exist between IDPs and refugees. However, it is debatable whether IDPs have a distinct status in international law compared to refugees.<sup>15</sup> Further, there are doubts as to whether IDPs have been legally defined, given that all we have are soft-law instruments that are not legally binding. Some scholars consider what we have in the Guiding Principles and other instruments as merely descriptive of a condition that

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<sup>10</sup> IDP Act 2012 s 10.

<sup>11</sup> Id s 3.

<sup>12</sup> UN Commission on Human Rights, Addendum 'Guiding Principles on Internal Displacement' Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights Resolution 1997/39, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) (hereinafter UN Guiding Principles).

<sup>13</sup> Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10(4) *Global Governance* 459.

<sup>14</sup> Id s 2.

<sup>15</sup> See eg Bonaventure Rutinwa, 'How Tense is the Tension between the Refugee Concept and the IDP Debate?' (1999) 4 *Forced Migration Review* 29–31; Michael Barutciski, 'Tensions between the Refugee Concept and the IDP Debate' (1998) 3 *Forced Migration Review* 11–14.

displacement renders rather than a definition.<sup>16</sup> Nonetheless, the IDP Act describes an IDP as:

A person or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.<sup>17</sup>

This description is adopted from the UN Guiding Principles. It incorporates displacement caused by violence as well as those caused by development projects. Whether this is a definition or a description, it is indeed very broad and covers a wide range of situations associated with displacement. Although this may present an operational problem, the fact that it covers many of these situations means that IDPs may not be discriminated against based on the cause of their displacement. The definition also recognises that the fact of displacement creates a vulnerable class of citizens who will often be discriminated against, suffer human right violations and may be unable to access legal protection as other citizens. This heightens the need for special protection mechanisms that the Act is supposed to deliver.

## **Operative Provisions**

### ***Prohibition of Arbitrary Displacement***

The Act sets out some key operative features to the protection and assistance framework that it establishes. These operative features are contained in part II of the Act (sections 3 to 10 of the Act). To begin with, it recognises prevention of displacement as a key element in this framework. Section 5 provides that the government must ‘guard’ against factors that may cause displacement and prevent displacement. States also have an obligation to provide information and raise public awareness on the ‘causes, impact and consequences of internal displacement and means of prevention.’<sup>18</sup> In addition, the government has an obligation to establish a prevention mechanism with the responsibility of monitoring areas that are at risk.<sup>19</sup> This provision envisages the establishment of an early warning system that would help the government prevent displacement. However, it is not clear how this mechanism would work and who would be in charge. It is merely mentioned that the mechanisms will report to the Cabinet Secretary of the ministry responsible for matters relating to IDPs.

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<sup>16</sup> See eg Marc Vincent, ‘IDPs: Rights and Status’ (2000) 8 *Forced Migration Review* 29.

<sup>17</sup> IDP Act s 2.

<sup>18</sup> Id s 5(3).

<sup>19</sup> Id s 5(4).

The protection against arbitrary displacement is provided for in section 6. Its wording takes on a human rights flavour, thus affording protection to every human being irrespective of their nationality, sex, religion and even political persuasion. Although the elements of arbitrary displacement are not specified as in the Guiding Principles, it is indicated that it can only arise in acts which amount to genocide, crimes against humanity and war crimes, and therefore, punishable under international criminal law and the International Crimes Act of 2008.<sup>20</sup> However, arbitrary in this context must extend beyond acts that ordinarily constitute international crimes. Any act that results in injustice of any kind should be arbitrary. Likewise acts that offend the general principles of the rule of law, such as acts of government that do not follow laid down procedures, are unpredictable, and meant to further the selfish interests of those in power must be considered arbitrary.<sup>21</sup> The same would go for acts that are generally unreasonable or disproportionate.<sup>22</sup> The Act seems to favour this definition of the arbitrariness. For example, it provides that displacement and relocation due to development projects shall only be lawful if justified by compelling and overriding public interest and in accordance with conditions and procedures in article 5 of the Protocol, principles 7 to 9 of the Guiding Principles and as specified in sections 21 to 22 of this Act.<sup>23</sup> The ‘public interest’ condition infers that a proportionality test be conducted. According to Vinai Singh the test has roots in the ‘concept of equity in international law’.<sup>24</sup> It has invariably been used by human rights tribunals to determine whether states have abdicated their duties in cases where the public have been deprived of their rights to access public land or property. The African Commission on Human and People’s Rights applied the test in the *Endorois*<sup>25</sup> matter and held that any restrictions must be proportionate to the pursued objective. Upon weighing and considering all pertinent factors (such as extent of harm, alternative measures that could have been pursued, and even compensation) the Commission came to the conclusion that the displacement was disproportionate to the need for which the government sought to acquire the land, which was to establish a game reserve.<sup>26</sup>

<sup>20</sup> IDP Act 2012 s 23(1).

<sup>21</sup> In addition, see Adeola and Viljoen (n 8).

<sup>22</sup> See eg Laurence Juma, ‘Protection of Development-induced IDPs Under the African Charter: The Case of the *Endorois* Community of Northern Kenya’ (2013) XLVI (2) CILSA 211, discussing the decision of the African Commission on Human and People’s Rights in *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*, Comm’n No 276/200.

<sup>23</sup> Id s 6(3).

<sup>24</sup> Vinai Singh, ‘India and Internally Displaced Persons: Current Legal Avenues and Legal Strategies’ (2012) 24(3) Intl J of Refugee Law 505, 513.

<sup>25</sup> See *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*, Comm’n No 276/200.

<sup>26</sup> Id para 15.

### Public Engagement

The Act promotes the ideas of engagement, consultation and consent. The twin principles of participation and accountability are regarded as the bedrock of a human-rights-based protection framework. This is one aspect, which affirms the view that unlike the UN Guiding Principles which was needs-based, the Act blends both the needs-based approach and the human-rights-based approach. It distributes responsibility accordingly and ensures that IDPs become part of the wider solution to their protection problems. The Act requires government to engage in consultations in respect of any development project that is likely to cause displacement. Such engagement and consultation should occur before the project is implemented and must aim at seeking free and informed consent of affected persons.<sup>27</sup> The intention here is that IDPs must have the chance to participate in the design and implementation of programmes that affect them. The Act goes further to prescribe public hearing as one of the methods for seeking such consent. Generally, the idea of engagement and public participation in decision-making is gaining currency in many discourses.<sup>28</sup> As far as displacement is concerned there is no doubt that participation of IDPs in the design of policies will ensure that programmes designed for their welfare are more realistically grounded on their preferences. This will in turn make them more receptive to hard decisions that government administrators may make from time to time under the Act. It may also improve their support of such programmes.

### Durable Solutions

Connected to the idea of engagement and consultation is the requirement that all protection and assistance goals must aim at finding durable solutions. The Act defines durable solutions as ‘the achievement of a durable and sustainable solution to the displacement of persons through voluntary and informed choice of sustainable reintegration in places where they chose to live.’<sup>29</sup> The Act requires the government, in its effort to seek durable solutions to displacement, to respect the rights of IDPs to make voluntary and informed decisions about their resettlement and integration.<sup>30</sup> It must also ensure that IDPs are consulted regarding the formulation of any project

<sup>27</sup> See Id s 22(1)(a). This provision echoes the language of Art 32(2) of the UN Declaration on the Right to Development.

<sup>28</sup> See eg Kiyoteru Tsutsui and Christine Wotipka, ‘Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations’ (2004) 83(2) *Social Forces* 587; Gene Rowe and Lynn Frewer, ‘Public Participation Methods: A Framework for Evaluation’ (2000) 25(1) *Science, Technology & Human Values* 3; Laurence Juma, ‘Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya’ (2012) 12(2) *AHRLJ* 475.

<sup>29</sup> IDP Act s 2(1).

<sup>30</sup> Id s 9(1).



in this regard.<sup>31</sup> This underscores the importance of IDP involvement in programmes aimed at resolving the problems associated with displacement. The Act then goes ahead to list ‘conditions for durable solutions’, which include the protection of rights such as freedom of movement, adequate standards of living and, employment without discrimination.<sup>32</sup> They also include access to documentation for family reunification, equal participation in public affairs and equal justice. Obviously, achieving durable solutions for all IDPs in Kenya is one key objective for enacting this law. It may be useful to mention that the efficacy of the mechanisms established by the Act for protection and assistance of IDPs must be measured against the general purpose of attaining durable solutions.

The definition of durable solutions under the IDP Act accords to article 28 of the UN Guiding Principles, article 11 of the African Union Convention for the Protection and Assistance to the Internally Displaced Persons (Kampala Convention), and to the Inter Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons.<sup>33</sup> According to the IASC framework, durable solutions are achieved when IDPs ‘no longer have specific assistance and protection needs linked to their displacement and can exercise their human rights without discrimination linked to their displacement.’<sup>34</sup> Indeed, durable solutions infer that there will be demonstrable efforts to ensure that displacement does not last longer than required under the circumstances, at least in the wording of principle 6.3 of the Guiding Principles. In addition, the search for durable solutions should be a collaborative effort that involves not only the government but humanitarian agencies, development actors and the IDPs themselves.

### **Institutional Framework**

The Great Lakes Protocol invites states to enact legislation that domesticate the protection and assistance rules and framework that are set out in the UN Guiding Principles and the Protocol itself. It requires member states to domesticate the Guiding Principles and provide a legal framework for their implementation within the national legal system.<sup>35</sup> Key to this requirement is the establishment of organs responsible for the implementation of the domestic legislation made for this purpose. The legislation must therefore ‘specify organs of government responsible for providing protection and

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<sup>31</sup> Id s 9(4).

<sup>32</sup> Id s 9(2).

<sup>33</sup> See The Brookings Institution, ‘IASC Framework on Durable Solutions for Internally Displaced Persons’ (2010) <[https://www.brookings.edu/wp-content/uploads/2016/06/04\\_durable\\_solutions.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/04_durable_solutions.pdf)> accessed 10 March 2016.

<sup>34</sup> Id para A 1.

<sup>35</sup> Great Lakes Protocol, Art 6(3).



assistance to the internally displaced persons.<sup>36</sup> The IDP Act responds to this requirement in two ways. Firstly, it recognises the role of government, since the primary responsibility of assistance and protection of IDPs rests with the state.<sup>37</sup> This role speaks to the sovereignty and responsibility of the state, after all IDPs are citizens. Therefore, government must be viewed as core to the institutional framework for provision of assistance and protection to IDPs. The Act makes reference to this role of government in section 11 and confers the power and duty or function for the time being, on the Ministry in charge of IDP issues. There is also the recognition of the role of the County governments that must be exercised in accordance with their constitutional mandate.<sup>38</sup>

Secondly, the Act creates the National Consultative Coordination Committee on Internally Displaced Persons (NCCC), a body that was finally constituted in 2015, about three years after the Act was promulgated. The NCCC is an administrative body that coordinates all IDP matters. It has thirteen committee members representing government, civil society groups and non-state actors. Its functions are set out in article 13 of the Act and include coordinating prevention efforts, protection and assistance to IDPs. The NCCC has a further role in advising the cabinet secretary on the exercise of his or her powers and functions under the IDP Act, which includes making rules to prescribe what is required under the IDP Act. Within government, the key unit is the Ministry of Devolution and Planning. The NCCC is supposed to support the work of the Ministry and especially the Directorate of Special Programmes. Thus, its independence may be questionable.

### **Criminal Offences**

It is worth noting the strong criminal element in the Bill that criminalises various acts. Such acts include pretending to be an IDP and providing false information in the processes of verifying and profiling of IDPs.<sup>39</sup> Thieving bureaucrats are cautioned that if they interfere with the protection and assistance of IDPs, obstruct humanitarian assistance, or misappropriate supplies meant for IDPs, they would go to jail.<sup>40</sup> Taking into account the newspaper reports about misappropriation of funds designated for IDP

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<sup>36</sup> Id Art 6(4)(c).

<sup>37</sup> Guiding Principle (n 12), Principle 3(1) and Great Lakes Protocol Art 3.

<sup>38</sup> IDP Act s 11(3).

<sup>39</sup> IDP Act s 23.

<sup>40</sup> Id. See also, Francis Mureithi, 'Kenya: New Law to Create IDP Register' (AllAfrica.com, 5 October 2012) <<http://allafrica.com/stories/201210051636.html>> accessed 15 June 2016.

settlement,<sup>41</sup> and the grabbing of resettlement lands, this inclusion of offences directly related to IDPs is indeed a welcome development.<sup>42</sup>

### Rights of IDPs

The IDP Act does not in itself specify or elaborate any rights. Instead, it adopts wholesale the description of these rights in the UN Guiding Principles.<sup>43</sup> This means that whereas the Guiding Principles in itself is not a binding international instrument, it has been domesticated and is now part of national law in Kenya. It may be useful to note however that the Guiding Principles too is a restatement of rights that are already established under international law. It does not create any new rights.<sup>44</sup> Instead, it describes how the existing rights may be elaborated in the context of displacement. This makes it easier for domestic legislations such as the IDP Act to adopt it wholesale. It is also important to note that the achievement of durable solutions is only possible when these rights are respected. Therefore the institutions that are charged with the responsibility of assisting and protecting of IDPs must respect these rights while performing their functions. The idea that IDPs are vulnerable due to the conditions in which they find themselves elevates the need for the respect of their rights. It needs to be emphasised that since the Act is an enforceable instrument, it rises above the needs-based-approach of the UN Guiding Principles and establishes a firm basis for enforcing rights associated with displacement.

The Guiding Principles have three sets of rights. The first are those that relate to conditions before displacement. These include the right of protection against arbitrary displacement and the requirement that any programme or action that may result in displacement should only be implemented after all other alternatives have been explored.<sup>45</sup> In addition, it requires that authorities ensure that alternative accommodation is provided to the displaced persons. The second set of rights occur during displacement and here the Guiding

<sup>41</sup> Eric Abuga, 'No End in Sight for IDP Money Row' (EA Standard, 19 June 2017) <<https://www.standardmedia.co.ke/article/2001244023/no-end-in-sight-for-idp-money-row>> accessed 15 June 2016.

<sup>42</sup> Jordan Wilson, 'Kenyan IDPs Still Waiting for Promised Land, Money' (Pulitzer Centre, 16 December 2009) <<https://pulitzercenter.org/reporting/kenyan-idps-still-waiting-promised-land-money>> accessed 15 June 2016; Edwin Mutai, 'MP wants Parliament to Approve Fresh IDP Funds Probe' *Business Daily* (Nairobi, 12 October 2014) <<https://www.businessdailyafrica.com/news/MP-seeks-fresh-IDP-funds-probe/539546-2484264-14h5012/index.html>> accessed 15 June 2016.

<sup>43</sup> See IDP Act s 3.

<sup>44</sup> See UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr Francis Deng, submitted pursuant to Commission Resolution 1997/39. Addendum, Guiding Principles on Internal Displacement' 11 February 1998, E/CN.4/1998/53/Add.2.

<sup>45</sup> Guiding Principles (n 12), Principles 6 and 7.

Principles merely restate international human rights standards.<sup>46</sup> It should be noted, nonetheless, that human rights applies all the time and not just during displacement. The rights in this category include the right to life, dignity, liberty, security, family life, adequate standard of living,<sup>47</sup> equal protection of the law,<sup>48</sup> discrimination,<sup>49</sup> education, and the right not be deprived of property.<sup>50</sup> The need for protection of these rights coincide with important humanitarian responses that should also be considered during displacement. For that reason the Guiding Principles also prescribe sets of humanitarian obligations that government and humanitarian agencies working in these contexts must bear. These include the primary duty to offer humanitarian assistance impartially and without discrimination,<sup>51</sup> prohibition of attacks or violence against IDPs,<sup>52</sup> and even the duty to provide medical care to the sick and wounded IDPs.<sup>53</sup> Importantly, those humanitarian agencies providing assistance to IDPs have the right to offer such services and states' consent shall not be arbitrarily withheld.<sup>54</sup> Although the IDP Act does not mention such rights for humanitarian agencies, it underscores the role of government in ensuring that basic social and health services are provided to IDPs.<sup>55</sup> Nonetheless, the Act obligates government to protect humanitarian personnel, transport and goods, and to ensure that access is not impeded.<sup>56</sup>

The third set of rights provided for in the Guiding Principles relate to the period after displacement—return, resettlement and reintegration. Here authorities have the responsibility to ensure that IDPs 'return voluntarily, in safety and with dignity, to their habitual residences, or to resettle on other parts of the country.'<sup>57</sup> The IDP Act is elaborate on the role of government in this regard. It will bear the primary duty of designating areas of resettlement and providing administrative support for resettlement.<sup>58</sup> In this respect, the Guiding Principles seem to be establishing new standards, since there are no similar obligations under international law.<sup>59</sup>

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<sup>46</sup> See Paul Schmidt, 'The Prospects for the UN Guiding Principles on Internal Displacement to become Customary International Law: A Preliminary Assessment (2003/4) *Geo J Intl L* 488.

<sup>47</sup> Guiding Principles (n 12), Principle 18.

<sup>48</sup> *Id* Principle 20.

<sup>49</sup> *Id* Principle 22.

<sup>50</sup> *Id* Principle 21.

<sup>51</sup> *Id* Principle 24.

<sup>52</sup> *Id* Principle 10(2).

<sup>53</sup> *Id* Principle 19.

<sup>54</sup> *Id* Principle 25(2).

<sup>55</sup> IDP Act s 11(5).

<sup>56</sup> *Id* s 11(6).

<sup>57</sup> Guiding Principles (n 12), Principle 28.

<sup>58</sup> IDP Act s 11(5).

<sup>59</sup> Schmidt (n 46) 489.

## THE CHALLENGES

As already mentioned, there is no binding international treaty protecting IDPs. By adopting the UN Guiding Principles, national policies and domestic law, such as the IDP Act, becomes key to the protection and assistance of IDPs.<sup>60</sup> In fact, according to Kälin, national laws and policies will become the future of the Guiding Principles.<sup>61</sup> Therefore, there is no doubt that the IDP Act, which establishes the IDP protection and assistance framework in Kenya, fulfils an important role. No wonder its enactment was met with wide acclaim both locally and internationally.<sup>62</sup> However, the Act also has major flaws that in the long run may hinder the dynamic growth of internal capacity to offer the best possible protection and assistance to IDPs. This indicates an unfortunate trend where efforts to improve the mechanisms for assistance and protection of IDPs may be stifled through legislative bungling. This aside, the rush to put in place a legal framework to address the imploding IDP situation after the post-election violence of 2007/8 masked many underlying problems, some of which are now emerging in a manner that is difficult to ignore.

### Internal Challenges

#### *Role of Non-state Actors*

It has long been recognised that the protection of, and assistance to IDPs, and the search for durable solutions need to be a collective effort of all stakeholders including the IDPs themselves.<sup>63</sup> Thus comprehensive inclusion and participation of the stakeholders in the design as well as operationalisation of legal and policy frameworks is key to their success. Non-state actors are stakeholders because they participate at various phases of displacement. The most visible is the humanitarian assistance during and after displacement. The recognition of this vital role that they play has attracted normative as well as policy response. The UN Guiding Principles have perhaps the most elaborate provisions protecting the rights of non-state actors involved in protection as well as assistance roles during and after displacement. These rights are mostly defined in the context of

<sup>60</sup> Nina Schrepfer, 'Addressing Internal Displacement through National Laws and Policies: A Plea for a Promising Means of Protection' (2012) 24(4) *Intl J of Refugee L* 667.

<sup>61</sup> Walter Kälin, 'The Future of the Guiding Principles' (2008) 39 *Forced Migration Review* (Special Issue on Ten Years of the Guiding Principles on Internal Displacement).

<sup>62</sup> Juma (n 8) 17; Caroline Wafula, 'Parliament Passes the Bill to Improve the Lot of IDPs' *Daily Nation* (Nairobi, 6 October 2012) <<https://www.nation.co.ke/news/politics/Parliament-passes-Bill-to-improve-the-lot-of-IDPs-/1064-1526886-94qhrr/index.html>> accessed 22 May 2018.

<sup>63</sup> Niels Harold and Asger Christensen, 'The Development Challenges of Finding Durable Solutions for Refugees and Internally Displaced Persons' (World Development Report 2010) <<http://www.humanitarianinnovation.com/uploads/7/3/4/7/7347321/wdr-background-note-development-challenge-displacement.pdf>> accessed 15 February 2016.

humanitarian assistance and relate to their right of access.<sup>64</sup> As already mentioned, the most explicit reference to this right is in principle 25, which states that ‘international humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced.’ States are therefore under an obligation to grant access to such organisations for purposes of doing humanitarian work. Moreover, states cannot withhold consent arbitrarily, especially when the states concerned cannot provide such assistance.<sup>65</sup> Further, it provides that:

All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination... International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced... Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected... International humanitarian organizations... should respect relevant international standards and codes of conduct... All authorities concerned shall grant and facilitate... rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.<sup>66</sup>

This panoply of the roles of non-state actors cover situations from the time of displacement to eventual return and resettlement. It shows how cooperation between government and non-state actors is important and needs to be protected and fully enabled by domestic law.

The IDP Act recognises the role of non-state actors marginally.<sup>67</sup> It does so in the context of humanitarian action but specifically with reference to the functions of the NCCC. In detailing the functions of the NCCC, the Act mandates the administrative body to liaise with the UN and non-state actors in providing humanitarian assistance to IDPs.<sup>68</sup> In addition, it should determine procedures and channels of engagement between government and non-state actors.<sup>69</sup> The NCCC is also required to coordinate prevention and preparedness efforts, protection and assistance of IDPs among all stakeholders.<sup>70</sup> While the role of non-state actors are recognised as such and the NCCC is called upon to involve them, there are no clear methodologies or strategies for doing this. Moreover, it is not clear how the involvement could be necessary for purposes of enhancing central government planning.

<sup>64</sup> Won Kedane, ‘Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention’ (2011) 44(1) *Vanderbilt J of Transnational L* 1.

<sup>65</sup> Guiding Principles (n 12), Principle 25.

<sup>66</sup> *Id* Principles 24–27, 30.

<sup>67</sup> Section 2 of the IDP Act defines non-state actors as ‘person or organisation who are not attributable to the state and whose action are generally not attributable to state.’

<sup>68</sup> IDP Act s 13(a).

<sup>69</sup> *Id* s 13(b).

<sup>70</sup> *Id* s 13(c).

However, much more significant is that the Act does not expressly recognise the rights of non-state actors in the same way that the UN Guiding Principles does. The Act does not guarantee rights of access neither does it uphold the rights of the non-state actors to perform their functions in accordance with international standards. For these reasons, it may be difficult for non-state actors who suffer rights violations to seek remedy. It may also be difficult for non-state actors to support IDPs who may want to seek judicial remedy against infringements outlawed by the Act such as arbitrary displacement.

### ***Streamlining Finances***

The Act adopts the national humanitarian fund, which was established after the 2007/2008 post-election violence but restructures it so that it can finance the protection and assistance to IDPs and the provision of durable solutions.<sup>71</sup> According to the Act, the fund consists of

- (a) any balance existing in the Humanitarian Fund as at the commencement of this Act; (b) donations by bilateral and multilateral donors, without prejudice to their possibility to directly fund activities to assist and protect internally displaced persons in Kenya; (c) sums received, including grants, donations, contributions or gifts from any person or institution; (d) moneys earned or arising from any investment of the Fund; (e) funds from the exchequer; and (f) all other sums which may in any manner become payable to, or vested in, the Fund.<sup>72</sup>

In addition the fund will supplement capital and recurrent expenditure of county governments ‘that exceed the resources available... in accordance with their responsibility for the administrative implementation of the provisions of this Act in accordance with their functions and powers accorded by Article 186 and the Fourth Schedule of the Constitution.’<sup>73</sup> The structure and methodology of devolving these funds have not been worked out.

Despite the establishment of the fund, there is no budget line for IDP protection and assistance in the Kenyan national budget. This hinders proper planning. In the past the government has financed IDP needs through the exchequer. Government money has been used to support IDP profiling, ex-gratia payments, house construction, farm infrastructure, burial expenses, counselling, transport, peace-building activities and other related costs. These come at a huge price. There is an obvious need to set up oversight mechanisms to monitor the use of the exchequer’s apportion to the fund.

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<sup>71</sup> Id s 14.

<sup>72</sup> Id.

<sup>73</sup> Id s 15(2).

### *Dealing with Devolved Structures*

The establishment of institutions responsible for managing IDP issues is an essential element of any national legal framework. These institutions must provide governance in the prevention mitigation and resolution of displacement. They must function within a structure, which allows for organised response to internal displacement and not merely as clusters that are uncoordinated and competing against each other. Thus, legal frameworks must establish an apex institution that is the focal point of all IDP activities. This institution must be supported by peripheral structures with different levels of responsibility down to the local level. Despite the foregoing, the division of responsibilities is not clear. There is much overlap of functions. The greatest challenge is devolution. The 2010 Constitution has set up a devolved government, which has transferred certain functions to county governments. It is a federal system that now relieves the central government of the responsibilities to provide certain kinds of services to the people. The IDP Act recognises this structure of governance and attempts to assign roles in that regard. It affirms that while the national government will have the ultimate authority and responsibility for the administrative implementation of the Act, the county governments will also ‘bear responsibility for the administrative implementation of the provisions of this Act in accordance with their functions and powers accorded by Article 186 and the Fourth Schedule of the Constitution.’<sup>74</sup> Nonetheless, it is not clear how the NCCC and other institutions created by the Act will function at the county level. There is no clear demarcation of responsibilities especially with regard to implementation of the Act.

In addition, counties may not have resources for the type of work and cannot be expected to support the preventive as well as responsive action on internal displacement. No specific funding is provided to municipalities for IDP protection and assistance programmes despite the influx of IDPs into urban areas. Municipalities, as opposed to counties, are responsible for governance in urban areas only.<sup>75</sup> They regulate the provision of education services, public health, physical planning, social services and sanitation among others. Ideally, they shoulder the burden of internal displacement and should be enabled to discharge their responsibilities. The IDP Act provides that government bear all the responsibility for the provision of services to the IDPs. It also provides that the NCCC may appoint a sub-committee at the county level ‘to perform such functions and responsibilities as it may determine.’<sup>76</sup> From the IDP management point of view, the municipalities are supposed to coordinate their functions with the line ministries concerned.

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<sup>74</sup> Sections 11(1) and 11(3) respectively.

<sup>75</sup> Section 184 of the Constitution (2010) contemplates the establishment governance and management systems for urban areas and cities separate from the counties.

<sup>76</sup> See Third Schedule to the IDP Act s 5.



However, there is no funding given to the municipalities for purposes of ensuring protection and assistance to IDPs.

Urgent humanitarian assistance is often required when displacement occurs. Often international organisations provide such assistance and a high level of coordination is required in these circumstances. The IDP Act assigns this responsibility to the NCCC. Its task is to

determine and establish procedures and channels of engagement and cooperation between government departments, the United Nations, non-state actors, the secretariat of the Conference of the Great Lakes Region and where appropriate the African union in order to enhance the effectiveness of the response to internal displacement.<sup>77</sup>

The Act also imposes responsibility on the government to ensure that humanitarian organisations have access to IDPs in difficulty.<sup>78</sup> It also imposes criminal sanction against any persons who impede the work of such organisation.<sup>79</sup>

### ***Monitoring Compliance***

The NCCC, the National Disaster Management Agency (NADIMA) and the NSC are responsible for monitoring disaster risk. There is a level of fragmentation that is likely to hinder their functions. As already mentioned, the Act establishes the NCCC.<sup>80</sup> The membership of the Committee shall be made up of five Principal Secretaries of designated Ministries, the Attorney General, Director of Public Prosecutions, Kenya National Commission of Human Rights, Kenya Red Cross Society and three representatives of the international community.<sup>81</sup> The Committee is the focal point for coordination of all humanitarian action among the government departments, external governments and donor community and the United Nations. Furthermore, it is tasked with carrying out registration of all IDPs; raising awareness; monitoring implementation of the Protocol, Guiding Principles and the Bill; and advising the government on the exercise of its powers under the IDP Act. To enable the Committee to carry out its functions, the Bill creates a fund known as the Protection and Assistance to the Internally Displaced Persons Fund.<sup>82</sup>

As history demonstrates, the impetus to do something positive about IDPs has always come from political expediency. No wonder the talk about resettlement, humanitarian assistance and even compensation given to IDPs

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<sup>77</sup> IDP Act s 13(b).

<sup>78</sup> Id s 11(6)(b),(c) and (d).

<sup>79</sup> Id s 23(2)(d)–(h).

<sup>80</sup> Id s 12.

<sup>81</sup> Id s 12(3).

<sup>82</sup> Id s 15.

is heightened when general elections are pending. In Kenya, politics has a great influence on what the government can or cannot do. It is not clear from the Bill how the Committee will be able to retain its independence from government given that it will be incorporated into the ministry in charge of IDP matters. Apart from the foregoing, economic development and job creation is a priority for the Kenyan government. Since the Committee is largely composed of representatives of government its activity may be hamstrung by the overarching need to further government policies, even at the expense of IDPs. Unfortunately, the development-induced IDPs are likely to be disadvantaged and directly affected by policies that put much emphasis on economic development rather than on the human rights of communities.

### ***Data Collection***

The greatest hindrance to effective planning and management of IDP protection systems is the lack of proper data.<sup>83</sup> Legal framework and policy that are designed based on evidence can be more effective. The nature of internal displacement often makes it difficult to accurately record the number of persons affected. This is because of sporadic movements and intervening factors such as the eruption of new violence that force IDPs to flee. Moreover, it is not always easy to determine who is an IDP when there is mass movement of people. What should a reliable system of data collection hope to achieve? According to Rasmusson, the basic principles that should govern data collection are: inclusivity (all IDPs whether in camps should be accounted for); protection (availability of data or information should not put IDPs at risk); collaboration (all parties, stakeholders, including agencies, government departments must work together both in the design of the data collection system and their maintenance); and sustainability (regular updating of data is essential to ensure reliability).<sup>84</sup>

Difficulties that arise in the absence of accurate data are exacerbated by political interference, which make access to protection systems difficult. Nevertheless, here are inherent problems with certain modalities and mechanisms for collection of data that persons must pay attention to working in this area. Until recently, the most preferred method of data collection has been through registration. As already mentioned there are problems with this method that need to be overcome. For example as displacement occurs, documents are destroyed or lost and officers responsible for registration may not be well trained to deal with such intricacies. Overall, Kenya has

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<sup>83</sup> See The Brookings Institution, University of Bern Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility' (2004) 14. See also Elisabeth Rasmusson, 'Improving IDP Data: Prerequisites for More Effective Protection' (FMR/Brookings-Bern Special Issue No 17) <<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/BrookingsSpecial/10.pdf>> accessed 20 June 2016.

<sup>84</sup> Id.

no up-to-date data on IDPs, and what is available are just estimates. It is equally disheartening that there are no official figures of IDPs who have been settled or who have returned to their homes. Some estimates place this figure at 309 200 persons. When the UN Special Rapporteur on IDPs, Chaloka Beyani, visited Kenya in 2013, he recommended that the Kenyan government should establish a database or registration system that is accurate, comprehensive and disaggregated and inclusive of all IDPs.

This is one area where the IDP Act needs to be amended. The Act establishes the NCCC and invests it with the power to collect information on IDPs. However, it does not establish institutions within and outside the NCCC with clear roles of collecting data. It also does not specify the methodology for such collection. The Act should have been more specific on how the NCCC will interact with institutions such as the Kenya National Bureau of Statistics, which is mandated by the Statistics Act, 2006 to be the principle agency for collection and analysis of statistical data. The Act limits the collection of information to the first thirty days after displacement. It is not clear what happens thereafter. What Kenya does require is a comprehensive audit of all IDPs to ascertain the current state of affairs, something akin to what was suggested by the Truth, Justice and Reconciliation Commission of Kenya in 2013.

The Kampala Convention imposes on member states the obligation to assess the needs and vulnerability of IDPs and to create and maintain an up-to-date register of all IDPs. The UN Guiding Principles are not explicit. However, inferences can be drawn from the principle calling on states to identify needs of individuals or groups that could result in displacement.<sup>85</sup>

### External Challenges

It is useful to begin this appraisal by contextualising the evolution of the IDP protection agenda in Kenya. As we know, resettlement of IDPs in Kenya or indeed any other official responses to the plight of IDPs have been political rather than legal. Even when legal interventions began to emerge soon after the 2007/2008 post-election violence that unleashed a wave of displacements, the role of government loomed large in the form of the Ministries of Special Programmes and that of Justice and Constitutional Affairs. It was with their support and collaboration that bodies such as the Legal and Advocacy Sub-Working Group (LASWG) and the Protection Working Group on Internal Displacement (PWGID) were able to push for the National Policy on Prevention of Internal Displacement and Assistance to Internally Displaced Persons in Kenya (IDP Policy)<sup>86</sup> and the passing of the IDP Act in 2012. Nonetheless, government intervention has resulted in other legal frameworks such as the National Disaster Management Policy,

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<sup>85</sup> Guiding Principles (n 12), Principle 5.

<sup>86</sup> The policy was endorsed by cabinet in October 2012 but has not been officially adopted.

the Land Act, the Land Registration Act and the National Land Commission Act. Government policy and the implementation thereof have been largely influenced by political considerations, leaving little room for the objective and transparent implementation of the frameworks established under the national IDP legislation and treaties.

The creation of a comprehensive legal framework for dealing with all problems of internal displacement depends on the existence of a number of complementary factors. The first is the need for government officials to prioritise IDP issues. The other, which is perhaps most important is the creation and sustenance of a reliable system of political governance based on democratic principles and respect for the rule of law. The political establishment in Kenya reeks of old sores generated by decades of poor governance, active tribalisation of politics, and corruption. The turbulent political history has bred political discrimination, which has now spilt over to the IDP management programmes. In the IDP context, discrimination can occur in two ways. IDPs may be discriminated against because they are IDPs. In other situations, however, IDPs have been discriminated against based on their ethnicity. In the former, discrimination has occurred due to gaps in the implementation of assistance programmes. For example poor registration resulted in the exclusion of some IDPs, while others were simply forced to flee because of violence. The tribalisation of Kenyan politics have led to IDPs from certain communities being favoured. For example, according to a 2013 Human Rights Watch report, government officials in North Rift offered preferential treatment to IDPs from Kikuyu communities over others, and this caused huge tensions in the area.<sup>87</sup> Such discrimination is against the law. Article 5(1) of the Kampala Convention requires member states to provide protection to IDPs within their territory without discrimination of any kind.<sup>88</sup> There are no explicit provisions in the IDP Act that deals with discrimination. However, prohibition of discrimination can be inferred in many instances. For example, it provides that IDPs shall enjoy adequate standards of living without discrimination.<sup>89</sup> In addition, article 3(6) applies UN Guiding Principles as part of the law in Kenya and this means that the international standards can directly be enforced. It should also be noted that the Kenyan Constitution prohibits discrimination and this sets the standards for all.<sup>90</sup>

The divisive and chaotic nature of Kenyan politics lends to the argument that the political context has a bearing in the prevention of displacement. The IDP issue has been used as political bait to lure communities to vote for

<sup>87</sup> See HRW, 'Kenya: Discrimination Against Rift Valley Displaced' (17 January 2013) <<https://www.hrw.org/news/2013/01/17/kenya-discrimination-against-rift-valley-displaced>>

<sup>88</sup> See also Art 3(1)(d) and 9(1)(a) of the same Convention.

<sup>89</sup> IDP Act s 9(2).

<sup>90</sup> See Constitution of Kenya (2010) Art 27.

political parties. This trend is unlikely to abate since there is no appetite in government circles to embrace the rule of law generally.

### **RESPONDING TO CHALLENGES**

While it is not disputed that in its current form the implementation may be in fits and starts, the government and other stakeholders in charge of IDP management could look at some key areas to improve protection and assistance of IDPs .

#### **Harmonisation of Laws**

There can be no denying that by enacting the IDP Act, Kenya has demonstrated a commitment to improve the conditions of IDPs in the country. Moreover, since it adopts the UN Guiding Principles and the Great Lakes Protocol, the Act is intended to be fairly comprehensive. However, it should not be expected that the Act would cover all the matters related to IDPs. There will necessarily be other laws dealing with sectoral issues such as housing, land, social welfare, education, health and so forth, and the Act should offer a framework for protection and assistance that complements all these other laws. The challenge is whether the other sectoral legislations are compatible with the IDP protection framework in the Act. Currently, in terms of policy and legal frameworks, there have been several initiatives that respond to the issues that affect IDPs. These responses were spurred by the big wave of displacement that occurred immediately after the 2008 post-election violence.<sup>91</sup> These include the policy and proposed legislations on disaster preparedness, evictions, and land reform.<sup>92</sup> The concern however is the potential overlap, inconsistencies and gaps. For example, despite the numerous instruments, there is no coherent definition of IDPs that encompasses all forms of displacement including those resulting from natural disasters.<sup>93</sup> In addition, displaced persons not living in camps are rarely viewed as IDPs for purposes of protection and assistance. This is why there is great need for harmonisation of these legal and policy frameworks so that they can speak to one another.

#### **Creating Awareness**

There is no doubt that a useful appraisal of the Act must begin by understanding what it is all about and how it falls short of its stated objectives. The need for training on IDP rights and the raising of awareness has been identified

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<sup>91</sup> Juma (n 8).

<sup>92</sup> See eg National Policy on Disaster Management in Kenya (2009); Land Act 2012; Land Registration Act 2012, and The National Land Policy (2009).

<sup>93</sup> Harold (n 63).

as a crucial factor in the implementation of IDP protection frameworks.<sup>94</sup> The IDP Act recognises this as an important protection and assistance imperative. Therefore, it empowers the NCCC to raise awareness among all stakeholders, sensitise, as well as facilitate and coordinate training and education on the causes, impact and consequences of internal displacement and means of prevention, protection and assistance.<sup>95</sup> This responsibility should be taken seriously. The NCCC must set aside resources to be able to run workshops and generally undertake programmes that will educate the public on the need to be aware of the phenomenon of displacement and encourage assistance of the vulnerable.

### **Amendments**

One way of correcting the gaps in the Act that have been identified in this article may be through targeted amendments to the Act. Unfortunately, the process of amending legislation in any country has its challenges. Apart from being very slow, the whole process often takes time to complete. It should also be remembered that in this case, the Act was created in a political atmosphere that viewed displacement as an immediate key imperative to building peace after the post-election violence of 2008. It is doubtful that sufficient political goodwill can be accumulated to enable government to initiate any amendments to the Act in the present time because in its view, the IDP phenomenon was temporary and it will be sufficiently resolved through compensation and resettlement. Rather than focus solely on amendments to the Act perhaps greater emphasis should be placed on achieving implementation goals within the IDP protection and assistance framework that currently exists. This means greater effort must be put in harmonising these frameworks and consolidation of the rights protection regimes that are supported by the Constitution. In any event, the Constitution guarantees rights and therefore implementation of the Act's framework for IDP protection and assistance must ostensibly be compliant with the Constitution.

### ***Ratification of Regional Treaties***

Ratification of regional instruments and in this case the Kampala Convention is important because it will bring aspects that are dealt with in the Convention but missing in the Act such as the position of armed groups, into domestic law. It will also allow for an improved compliance mechanism that benefit from the concert of states working through the Conference of

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<sup>94</sup> See eg Brookings Institution, University of Bern Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility' (April 2005) (n 83); IDMC, 'A Review of the Legal Framework in Zimbabwe Relating to the Protection of IDPs' <national%20responsibility%20framework/04\_national\_responsibility\_framework\_eng.pdf> accessed 22 June 2016.

<sup>95</sup> Article 13(e) of the IDP Act.

Parties established by the Convention. Indeed, the compliance monitoring mechanisms established by the Convention could be useful in ensuring that Kenya enhances its own frameworks.

## CONCLUSION

It is an exercise of sovereignty when states take responsibility for the protection of a vulnerable section of their population.<sup>96</sup> Creating legal institutions that enable the state to discharge this function is therefore necessary if not mandatory. While this is desirable, enacting law that establishes institutions for protection and assistance to IDPs and embedding suitable agendas into its protection framework, may not be enough. As discussed in this article, many other factors compete with the legislative framework to render the attainment of protection goals illusory. The efficacy of this law must therefore be evaluated in the context of factors such as the political environment, the socio-economic conditions and the changing manifestations of the phenomenon of displacement itself. There are far too many instances in Africa where appropriate legislation are passed but rarely implemented and the reasons for this could be located elsewhere than in the Act itself.

It may be rather too soon to judge the success of the Act—whether its intended purposes have fallen short of its mark. Be that as it may, the efforts which culminated in the enactment of this legislation should not lose momentum as problems and challenges arise. In this article we have drawn attention to some of these challenges and have suggested some of the measures that could be employed to overcome them. In the end, it will be up to those institutions that have been created and those in authority to ensure that the noble goal of ensuring protection for the most vulnerable sections of the Kenyan population is not circumvented.

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<sup>96</sup> Susan Carr, 'From Theory to Practice: National and Regional Application of the Guiding Principles' (2009) 21 *Intl J Refugee L* 46.