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AN ANALYSIS OF THE INTERNATIONAL, REGIONAL AND NATIONAL LAWS FOR THE SUBSTANTIVE RIGHTS OF INTERNALLY DISPLACED PERSONS IN KENYA

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Abstract

Internal Displacement (ID) remains the major ripple effect of generalized violence, armed conflicts, violations of human rights, and disasters in the horn of Africa and Kenya is no exception. When ID occurs, Internally Displaced Persons (IDPs) substantive rights to life, food, and property are affected leading to loss of livelihood which threatens or leads to their loss of lives, disrupts their food systems, and destroys their properties respectively depending on the cause of ID. This contradicts the provisions of the International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples Rights among other fundamental human rights instruments. Kenya is a signatory to these key human rights covenants. The Constitution of Kenya 2010 backed up by its IDP Act is a reflection of Kenya's commitment to ensuring prevention protection and assistance to IDPs in the country. However, there are implementation deficits in these laws with regard to the substantive rights of IDPs leading to IDP vulnerability and being at the mercy of Non-Governmental Organizations and well-wishers contrary to their legitimate expectations of the roles of the Government in relation to ID.

This paper analyses the present national, regional, and international legal regimes for the substantive rights of IDPs in Kenya. It examines whether the said current legal framework contributes to the actualization of the substantive rights of IDPs in Kenya. It evaluates the feasible benefits that Kenya stands to gain after ratifying the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa while at the same time drawing best practices from Rwanda, Zambia, and Somalia.

Keywords: *Internal Displacement, Internally Displaced Persons, Protection, Prevention, and Assistance, the right to life, the right to property, and the right to food.*

A. INTRODUCTION

Internal Displacement (ID) is the involuntary relocation of people within internationally recognized state borders.² Each year, people worldwide are confronted with the distressing impacts of conflicts, violence, disasters, and the effects of climate change.³ Internally Displaced Persons (IDPs) are people forced to flee from their habitual residence due to armed conflict, violence, abuse of human rights, or disasters and have not crossed an internationally recognized State border.⁴

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² African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Adopted 23rd October 2009 Entered into force 6th December 2012) 49 ILM 86 (hereinafter Kampala Convention) Art 1.

³ IDMC, 'Children and Youth in internal displacement' (GRID 2022) (hereinafter GRID 2022) <www.internal-displacement.org/sites/default/files/publications/documents/IDMC_GRID_2022_LR.pdf> accessed 25th April 2023.

⁴ Kampala Convention (n 2) Art 1.

According to the Internal Displacement Monitoring Centre (IDMC), 53.2 million and 5.9 million people worldwide were displaced due to violence, and disasters, respectively, as of 31st December 2021.⁵ Notably, nearly 60 million IDPs, 25.2 million are children under 18.⁶ In Sub-Saharan Africa, 11.6 million and 2.6 million IDPs existed as of the year 2022 as a result of violence, and disasters, respectively.⁷ There were 36,000 IDPs associated with disasters in Kenya as of December 2020.⁸

ID is a global crisis because of the rapid growth of the number of IDPs over the past two decades.⁹ It comes along with increased human rights violations exposing women and girls to sexual and gender-based violence, denying children access to formal education, and making them vulnerable to recruitment into armed groups and losing IDPs livelihood.¹⁰ The ripple effects of the adverse impacts of ID contribute to the sluggish development and stability of the hosting societies in attaining their United Nations Sustainable Development Goals (UNSDGs) due to increased poverty and economic recession.¹¹

States have taken substantial initiatives to address the menace of ID which include but are not limited to legislative measures which shall be discussed shortly in brief and extensively in the coming sections.¹² To begin with, the 1998 UN Guiding Principles on Internal Displacement (GPID) is the first global instrument for IDP protection.¹³ These are the thirty (30) standards that outline protections available to IDPs structured around the three phases of ID namely protection from, during, and after displacement.¹⁴ The Protocol on the Protection and Assistance to IDPs (GLP) is the first-ever subregional binding instrument regarding IDPs adopted in the International Conference on the Great Lakes Region (ICGLR), held between 14th and 15th December 2006 in Nairobi, Kenya.¹⁵ It creates the scope of responsibility for the Member States to protect IDPs, sets out the relevant principles for their protection and assistance, and establishes the mandate of State parties to adopt and implement the GPID.¹⁶

The adoption of the African Union Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention) in 2009 was momentous because it is the first continental binding agreement on the protection of IDPs.¹⁷ It sets out the State parties' obligations regarding before, during, and after ID, as well as other appropriate provisions, as will be discussed in the subsequent sections of this paper. The African States have

⁵ GRID 2022 (n 3).

⁶ Ibid.

⁷ Ibid.

⁸ World Bank, 'Internally Displaced Persons, new displacement associated with disasters (number of cases)' <<https://data.worldbank.org/indicator/VC.IDP.NWDS>> accessed 25th April 2023.

⁹ United Nations 'Shining a Light on Displacement: A vision for the Future' (UN Secretary General's High-Level Panel on Internal Displacement, September 2021) (hereinafter HLP Report) <<https://internaldisplacement-panel.org/wp-content/uploads/2021/09/HLP-report-WEB.pdf>> accessed 25th April 2023.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ramola Adeola, 'Climate Change, Internal Displacement and the Kampala Convention' (Africa Portal, 27th May 2020) <www.africaportal.org/publications/climate-change-internal-displacement-and-kampala-convention/> accessed 25th April 2023.

¹⁴ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Guiding Principles on Internal Displacement (11th February 1998) (hereinafter Guiding Principles) UN DOC E/CN.4/1998/53/Add.2.

¹⁵ AM Abebe, 'Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa' (2009) 22 *Journal of Refugee Studies* 155, 165.

¹⁶ Chaloka Beyani, 'Recent Developments. The Elaboration of A Legal Framework for the Protection of Internally Displaced Persons in Africa' (2006) 50 *Journal of Africa Law* 187, 192.

¹⁷ Adeola (n 13).

been urged to ratify the Kampala Convention and incorporate practical measures to realize its potential, which will positively impact the lives of IDPs in the continent.¹⁸

This paper will discuss the legal framework of IDPs' substantive right to life, property, and food. It will then examine the efforts made by Kenya to implement the said legal regime using the case of *African Commission on Human and Peoples' Rights v Republic of Kenya* (Ogieks' case) as a yardstick because it concerned these IDP rights and the Court ruled in favour of the Ogiek community.¹⁹ It will then analyze the salient features of the Kampala Convention and recommend its adoption drawing from the best practices of Somalia and Zambia, which are already its member States. Kenya is a State party to the international bill of human rights (Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR), International Convention on Economic Social and Cultural Rights (ICESCR)), which forms the basis of this research.²⁰

1. Statement of the Problem

ID in Kenya was spurred by 2007/2008 Post-Election Violence (PEV), which displaced more than 650,000 people.²¹ Over 1000 people were killed, and the economic costs of the crisis were more than 1.5 billion USD.²² Elhawary points out that more than half of the IDPs sought refuge with host families in their ancestral homelands.²³ Moreover, pre-existing IDPs were due to the clashes in the 1990s in the Mount Elgon, Molo, Kuresoi, and Burnt Forest regions.²⁴ To resolve this status quo, the Government of Kenya (the Government) led a humanitarian response through the Ministry of Special Programmes with the National Disaster Operations Centre as the coordinating agent and the Kenya Red Cross Society (KRCS) as the implementing partner.²⁵ This move was also supported by the National Council of Churches of Kenya and Non-Governmental Organizations (NGOs).²⁶

Kenya also faces disasters that lead to ID.²⁷ Its short and long rain seasons leave thousands of people temporarily displaced to schools, churches, and host family homes.²⁸ According to the International Federation of Red Cross, since the start of the long rains in 2021, more than 39,054 people from 6,580 households have been displaced across 16 counties.²⁹ Resource-based conflicts and insecurity also contribute to ID.³⁰ This is, for example, disputes over access to water and pasture, which are prevalent in the Northern

¹⁸ International Committee of the Red Cross, 'Translating the Kampala Convention into Practice: A stock-taking exercise' (2017) 99 *International Review of the Red Cross* 365, 374.

¹⁹ *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) African Court of Human and Peoples' Rights, (Ogieks' case) Application No. 006/2012, May 2012.

²⁰ UDHR (Adopted 10 December 1948 UNGA Res 217 A (III)) (Ratified on 31st July 1990), ICCPR (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 177 (Ratified in 1st May 1972) and the ICESCR (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (Ratified in 1st May 1972).

²¹ Refugee Consortium of Kenya (RCK), 'Internally Displaced Persons' <www.rckkenya.org/internally-displaced-persons/> accessed 25th April 2023.

²² Samir Elhawary, 'Post-Election Kenya: Land, Displacement and the Search for "Durable Solutions"' (2009) 36 *Review of African Political Economy* 130.

²³ *Ibid.* 131

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ RCK (n 21).

²⁸ *Ibid.*

²⁹ Richard Davies, 'Kenya – 40,000 displaced by Recent floods Says Red Cross' (Floodlist, 26th May 2021) <<https://floodlist.com/africa/kenya-floods-update-may-2021>> accessed 25th April 2023.

³⁰ Kenya National Commission on Human Rights, 'Our work: Internal Displacement' <www.knchr.org/Our-Work/Displacement-and-Forced-Evictions/Internal-Displacement> accessed 25th April 2023.

region of Kenya, and cattle rustling and banditry that are predominant in the North Rift, parts of Eastern and North Eastern sections.³¹

To give effect to the GPID and the GLP provisions, Kenya enacted the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012 (IDP Act).³² It is tailored to the emerging needs of the country as a result of IDP but falls short of paramount implementation structures.³³ Moreso, Kenya is not a member State of the Kampala Convention. IDPs are bona fide citizens of their countries and have a legitimate claim to all existing safeguards provided under the International Human Rights Law (IHRL) and, in cases of armed conflicts, International Humanitarian Law (IHL) treaties in which their countries are members without discrimination.³⁴

It has been ten (10) years since Kenya enacted the IDP Act. The Constitution of Kenya 2010 (CoK) contains the bill of rights, a fundamental part of Kenya's democratic state, and the basis for Economic, Social, and Cultural (ESC) policies.³⁵ Its purpose is to promote social justice, recognize and protect human rights and fundamental freedoms by preserving the dignity of individuals so that they can fully realize their potential as human beings.³⁶ It applies to all laws and binds all State organs and persons in Kenya, including IDPs.³⁷ Remarkably, all the rights enshrined under the international bill of rights are also incorporated into the CoK.

Therefore, the Government has the mandate of ensuring the Prevention, Protection, and Assistance (PPA) of all the people in Kenya before, during, and after ID. The enactment of the IDP Act was among the recommendations by Beyani, the then Special Rapporteur on human rights of IDPs, in his mission to Kenya conducted in September 2011.³⁸ It establishes the National Consultative Coordination Committee (NCCC), whose mandate is to coordinate the PPA efforts of IDPs during their displacement until durable solutions are found.³⁹

According to the Refugee Consortium of Kenya (RCK), NCCC was adequately constituted in December 2014.⁴⁰ It is currently not operational because of its members' initial three-year tenure lapse.⁴¹ It is only the chairman whose term was renewed; therefore, it cannot be functional without the secretariate and other members.⁴² Considering the new ID each year, the lack of a functional NCCC defeats the realization of the spirit behind the bill of rights and the IDP Act.⁴³ One of the reasons that might be attributed to the sluggish implementation of the IDP Act could be the failure to acknowledge and take responsibility for ID.⁴⁴ By not being a Member of

³¹ Ibid.

³² The Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012 Laws of Kenya (hereinafter IDP Act).

³³ IDMC, 'Towards a comprehensive response to internal displacement in Kenya: A road map for action' (Policy Paper 21st August 2015) <www.internal-displacement.org/sites/default/files/publications/documents/201508-af-kenya-towards-a-comprehensive-response-to-internal-displacement-en.pdf> accessed 25th April 2023.

³⁴ Adama Dieng, 'Protecting Internally Displaced Persons: The Value of the Kampala Convention as a Regional Example' (2017) 99 *International Review of the Red Cross* 263, 266.

³⁵ Constitution of Kenya 2010 (hereinafter CoK) Art. 19.

³⁶ Ibid.

³⁷ Ibid. Art 20.

³⁸ UN Human Rights Council 'Report of the special rapporteur on the human rights of internally displaced persons, Chaloka Beyani: Mission to Kenya' (6 February 2012) A/HRC/19/54/Rev.1/Add.2.

³⁹ IDP Act (n 32) Sec 12 and 13.

⁴⁰ Refugee Consortium of Kenya, 'Evaluation of the implementation of the IDP Act in Kenya' (Resource Centre) <www.rckkenya.org/resource-center/> accessed 25th April 2023.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ HLP Report (n 9).

the Kampala Convention, Kenya also waives its accountability obligations to the PPA to IDPs at the regional level.

Apart from the execution deficits of the IDP Act, non-state actors who play vital roles in various phases of displacement are marginally recognized despite the GPID granting them the right to offer services to IDPs.⁴⁵ Also, the IDP Act proposes the restructuring of the existing national Humanitarian Fund (HF) without any methodology of devolving these funds into all the forty-seven counties in Kenya.⁴⁶ There is a duplication of mandate among NCCC, the National Drought Management Authority (NDMA), and the proposed National Disaster Risk Management Authority (NDRMA) since they are all responsible for monitoring disaster risks.⁴⁷

Moreover, there is no up-to-date data on pre-existing IDPs, and what is disheartening is that there are no official records of IDPs who have been settled after the 2007/8 PEV.⁴⁸ The compensation process initiated by the Government is said not to have been completed.⁴⁹ Ultimately, these inadequacies affect IDP's substantive rights and Kenya's fulfilment of its international legal obligations relating to safeguarding IDP rights.

(a) *Research questions and objectives*

This study answered the following questions:

1. What is the current legal framework for the substantive rights of IDPs in Kenya?
2. What are the effects of the existing legal framework for the substantive rights of IDPs in Kenya?
3. What are the potential benefits for Kenya upon signing and ratifying the Kampala Convention?

The paper was based on the following objectives:

1. To analyze the current domestic, regional, and international legal framework for the substantive rights of IDPs in Kenya.
2. To examine whether the present legal regime contributes to the realization of the substantive rights of IDPs in Kenya.
3. To evaluate probable benefits Kenya could gain after ratifying the Kampala Convention, among other best practices for IDP protection.

Throughout the paper, it is argued that Kenya should prioritize implementing IDPs' substantive rights as envisaged under the Constitution of Kenya 2010.

2. Justification of the Study

This paper was necessitated by the nature of ID as a global crisis and the need to ensure that IDPs in Kenya are 'not left behind' as per the transformative promise of the 2030 Agenda for UNSDGs. There's a need to go beyond addressing ID as a humanitarian crisis and comprehend that it is directly linked to the broader challenges of governance, development, human rights, peace, and climate change.⁵⁰ It is the responsibility of

⁴⁵ Lawrence Juma, 'Protection of Internally Displaced Persons in Kenya under the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act: An Appraisal' (2018) 51 *Comparative and International Law Journal of South Africa* 44, 56.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Joseph Openda, 'IDPs Appeal to Uhuru: Resettle us before your term ends' (Nation, 19th October 2021) <<https://nation.africa/kenya/counties/nakuru/idps-appeal-to-uhuru-resettle-us-before-your-term-ends--3589024>> accessed 25th April 2023.

⁵⁰ HLP Report (n 9).

every State to ensure the respect, protection, and fulfilment of such rights.⁵¹ This is a function of state sovereignty.⁵² The role of the regional and international actors is to reinforce rather than replace the national responsibility.⁵³

The IDP Act's implementation lacuna has prompted this research. It intended to demystify the drawbacks of the IDP Act generally, which hinder the realization of its objectives, for example, the role of non-state actors in addressing ID, inadequate financial allocation, devolution structures, and monitoring compliance. It also measured the efficacy of the current legal and institutional measures for IDPs' substantive rights in Kenya. This was done by evaluating the accountability arrangements that Bovens opine stimulate public officials and agencies to constantly focus on achieving desirable societal outcomes.⁵⁴ It also offered advantages that the Government stands to garner for its IDPs by signing up for the Kampala Convention drawing best practices from countries that have already ratified it, for example, Somalia and Zambia.

3. Research Methodology

This project was conducted through desk research of both primary (relevant legislation and case laws) and secondary research sources (the Government and NGO documents and scholarly works). At the national level, it evaluated the provisions of the CoK, the IDP Act, the National Disaster Risk Management Bill 2021 (NDRM), and the National Drought Management Authority Act 2016 (NDMAA), against the realization of IDPs' substantive rights at the regional level, it explored the provisions of the African Charter on Human and Peoples Rights (Banjul Charter), the GLP, and the Kampala Convention. It examined the UDHR, ICCPR, ICESCR, and GPID in the global arena. It is also a persuasive study as it recommends an appropriate response for upholding IDPs' substantive rights.

4. Scope and Limitation of the Study

This research covered Kenya's existing legal and institutional framework regarding IDPs' substantive rights. It examined the impacts of the current regime in implementing the same. It also scrutinized the Kampala Convention, advocated for its adoption by the Government, and persuaded Kenya to embrace the best practices for guaranteeing IDPs' substantive rights espoused by NGOs and experts in the field.

This research encountered the following limitations; first of all, it relied on secondary data from credible sources other than primary data, which would have been helpful in up-to-date information on the ground. This is because of the geographical location of the study, which presents financial challenges as it is costly to travel and conduct primary data collection in Kenya. Also, the IDP data is sensitive and unavailable to the public. Secondly, the outcomes of this study are custom-made for Kenya. Therefore, any effort to apply them in another African region should be made with caution due to different legal, economic, and political dynamics.

Despite the above challenges, deliberate efforts were made to this study to make its recommendations valid and credible for the benefit of Kenya.

⁵¹ Ibid.

⁵² UNHCR, 'Handbook for the protection of Internally Displaced Persons' (hereinafter UNHCR IDP Handbook) <www.unhcr.org/en-ie/protection/idps/4c2355229/handbook-protection-internally-displaced-persons.html> accessed 25th April 2023.

⁵³ Ibid.

⁵⁴ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 466.

B. LEGAL FRAMEWORK FOR THE SUBSTANTIVE RIGHTS OF IDPs IN KENYA

1. Introduction

The menace of ID worldwide led the UN Commission on Human Rights to request the then Secretary-General to appoint a representative of IDPs in 1992 (Francis M Deng).⁵⁵ His mandate was to study the causes and effects of ID, evaluate the extent to which the existing international law provided for PPA of IDPs, evaluate the existing institutional arrangements and make recommendations for improvement of the international response towards PPA of IDPs.⁵⁶ Noteworthy, this contributed to the inception of the Guiding Principles in 1998.

The UN Special Rapporteur on the human rights of IDP (firstly appointed by the UN Human Rights Council in September 2010) mandate (renewed in 2019 through Resolution A/HRC/RES/41/15) was established to address the dangers of ID by mainstreaming the rights of IDPs into all the relevant parts of the UN system and to engage in coordinated international advocacy and action for refining the protection and respect for IDPs' rights.⁵⁷ The mandate holder is an independent expert appointed by the UNHRC and is also charged with working towards strengthening the global response to the complex problem of ID, indicating the international community's dedication to preventing ID.⁵⁸

Human rights are entitlements innate to all human beings regardless of race, gender, nationality, or any other status, including grounds of being or having been internally displaced.⁵⁹ They are found under IHRL (which comprises both customary and treaty law), regional instruments such as the Banjul Charter, and at the national level, the CoK, among others, as will be discussed below concerning IDPs' right to life, land, and food.

2. The Right to Life

The right to life is provided under the UDHR, ICCPR, the Banjul Charter, the CoK, the Protocol to the Banjul Charter on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.⁶⁰ General Comment (GC) 36 by the UN Human Rights Committee (UNHRC) stipulates that everyone is entitled to be free from acts and omissions that are projected or may be expected to cause their premature death or interfere with the enjoyment of a life with dignity.⁶¹ These points out two dimensions of the right to life, namely, existence and dignity.⁶² It is interlinked with our right to exist and survive and the right to enjoy life with dignity.⁶³ Article 4 of the Banjul Charter provides that human beings are inviolable and are entitled to respect for their life and integrity, and no one may be arbitrarily deprived of this right.⁶⁴ Article 5 further

⁵⁵ Francis M Deng, 'Internal Displacement: A Global Overview' (Brookings, 22nd February 2000) <www.brookings.edu/on-the-record/internal-displacement-a-global-overview/> accessed 25th April 2023.

⁵⁶ Ibid.

⁵⁷ United Nations Office of the High Commissioner for Human Rights, 'Special Rapporteur on the Human Rights of Internally Displaced Persons' (United Nations Human Rights Special Procedures) <www.ohchr.org/en/special-procedures/sr-internally-displaced-persons> accessed 25th April 2023.

⁵⁸ Ibid.

⁵⁹ United Nations, 'Human Rights' (Global Issues) <www.un.org/en/global-issues/human-rights> accessed 25th April 2023.

⁶⁰ Articles 3, 6, 4, 26, 4, 5 and 30 respectively.

⁶¹ UN Human Rights Committee (HRC), 'General Comment No.36: Article 6 Right to Life', (hereinafter GC on Article 6 of ICCPR) (3rd September 2019) CCPR/C/GC/36 Para 3.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ African Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force 21 October 1986) 1982 21 ILM 58 (Banjul Charter) art 4.

provides that everyone has the right to respect the dignity inherent in a human being and to the recognition of their legal status.⁶⁵ These two articles indicate that human life has a distinct value and dignity that require legal protection.⁶⁶

ID exposes IDPs to human rights violations such as separation from their sources of livelihood and family members as well as poor health conditions, which in turn deprives their right to life and to enjoy a life with dignity. GC 36 states that deprivation of life is arbitrary if it is contrary to international or domestic law.⁶⁷ It states that 'arbitrariness' must be broadly interpreted to comprise aspects of inappropriateness, injustice, lack of predictability, due process of law, fairness, necessity, and proportionality.⁶⁸ These elements depend on each other. For instance, Development Induced Displacement (DID) would be arbitrary if the due process of the law was not followed, thereby prompting other components.⁶⁹

(a) *Positive obligations regarding the right to life*

States must protect the right to life by taking extraordinary measures of protection towards persons inclusive of IDPs, in situations of vulnerability.⁷⁰ This includes the assignment of round-the-clock police protection, issuance of protection and restraining orders against potential aggressors, and placing threatened individuals under protective custody only after obtaining their Free, Prior, and Informed Consent (FPIC).⁷¹ Similarly, the heightened duty of care is owed to people in private incarceration who have been deprived of their liberty, such as IDPs living in camps.⁷²

Both GC 36 and GC 3 by the UNHRC and the African Commission on Human and Peoples Rights (African Commission) respectively on the right to life impose on States the responsibility to respect and protect the right to life and refrain from engaging in conduct or creating a conducive environment leading to arbitrary deprivation of life.⁷³

The Inter-American Court of Human Rights has held that the right to life does not stop at the right of every human being not to be deprived of their life arbitrarily but also means that they will not be prohibited from having access to the circumstances that guarantee a dignified existence.⁷⁴ GC 36, therefore prohibits the return of IDPs to residences where there are substantial reasons to believe that they may face a real risk to their lives because it violates the right to life.⁷⁵ States are obliged to enact protective legal frameworks and measures that do not impose an unequal burden on them in response to reasonably conceivable threats to life emanating from private persons and entities whose conduct is not attributable to the State.⁷⁶

⁶⁵ Ibid, Art 5.

⁶⁶ Elizabeth Wicks, 'The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties' (2012) 12 *Human Rights Law Review* 199, 204.

⁶⁷ Ibid, para 8.

⁶⁸ Ibid, para 12.

⁶⁹ Ibid.

⁷⁰ Ibid, para 23.

⁷¹ Ibid, para 23.

⁷² Ibid.

⁷³ Ibid. and the African Commission on Human and Peoples' Rights, 'General Comment No.3 of the African Charter on Human and Political Rights: the Right to Life (Article 4) (8th November 2015).

⁷⁴ *Vilagrán Morales et al v Guatemala* (Judgment merits) Inter-American Court of Human Rights Series C no. 63 (19 November 1999).

⁷⁵ GC on Art 6 of ICCPR (n 61) para 54.

⁷⁶ Ibid, para 7.

In the Kenyan context, the GPID and the GLP expressly recognize the right to life of IDPs during displacement.⁷⁷ It is inherent, and they must be protected against genocide, murder, summary execution, enforced disappearances, and any threats to commit such acts.⁷⁸ IDPs who are not or no longer contribute to hostilities are protected from acts of violence which include starvation as a combat technique, attacks against their settlements, the use of antipersonnel landmines, and their use to shield military objectives.⁷⁹ Kenya's draft IDP policy underscores the Government's duty to respect and protect the right to life of IDPs.⁸⁰ The mandate includes ensuring they are not capriciously deprived of this right and protecting IDPs against assaults on their dignity and physical, mental, and moral integrity.⁸¹

Kenya's draft IDP policy advocates for appropriate measures to be taken to ensure internally displaced children, women, and Persons living With Disabilities (PWD).⁸² It also prohibits and protects against all acts and threats to commit acts violating the right to life, including times of armed conflicts and recruitment of internally displaced child soldiers.⁸³ It puts in place measures to protect IDPs' location and site, such as creating an environment that is not conducive to violence such as avoiding overcrowding, and ensuring access to protective services, for example, psycho-social support for victims of violations and assaults on their life, medical treatment and legal services among others.⁸⁴ Noteworthy, the draft IDP policy is yet to be adopted.⁸⁵ The IDP Act does not explicitly provide for the right to life but also endorses the rights and freedoms set out in the bill of rights under the CoK and the provisions of the GPID and the GLP.⁸⁶

The enactment of the IDP Act was a positive legal measure by Kenya per its obligation under article 6 of ICCPR about IDPs. It places responsibility on the Government and any relevant organization or individual to guard against factors and prevent conditions conducive to ID.⁸⁷ The Government is charged with undertaking public sensitization on the causes, impact, and ways of preventing ID.⁸⁸ It shall also establish a prevention strategy for monitoring areas at risk of ID.⁸⁹ However, the mode of operation and who will be in charge of this mechanism is unclear.⁹⁰ It only mentions that the mechanism will report to the Cabinet Secretary and the NCCC for further action to prevent ID.⁹¹ It establishes the NCCC, which plays a vital role in the PPA of IDPs, which guarantees their right to life; for example, it is supposed to create and maintain the IDP register without, which makes protection strategies a nightmare.⁹² Its impacts on IDPs will be evaluated in section C.

Preparedness and mitigation are also depicted in the draft IDP policy.⁹³ These two factors are imperative to monitor and promote early actions in areas at risk of ID thereby saving the lives of people who would

⁷⁷ Guiding Principles (n 14) principle 10.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Republic of Kenya, 'National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya (hereinafter IDP Policy) <www.refworld.org/pdfid/5a8412554.pdf> accessed 25th April 2023.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Sara Nyakio, 'UPR is an opportunity to report the state of Human Rights in Kenya' (International Commission of Jurist: Kenyan Section, Latest News 29 July 2019) <<https://icj-kenya.org/news/upr-is-an-opportunity-to-report-the-state-of-human-rights-in-kenya/>> accessed 25th April 2023.

⁸⁶ IDP Act (n 32) sec 3 and 4.

⁸⁷ Ibid sec 5.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Juma (n 45) 48.

⁹¹ IDP Act (n 32) Act 5.

⁹² Ibid. sec 13.

⁹³ IDP Policy (n 80) chapter 6.

otherwise be IDPs. They entail undertaking exigency planning, arranging for effective disaster management in vulnerable areas of ID, disseminating relevant information to populations at risk of displacement, and developing a comprehensive Early Warning System (EWS) that allows the collection of pertinent data for effective preparedness.⁹⁴ The NDMAA, which establishes the NDMA, can be inferred as the ‘mechanism’ anticipated by the IDP Act and the draft IDP policy in terms of disaster management, although it is limited to ‘drought’ as the disaster leaving floods and storms, which are also a major cause of displacement in Kenya.⁹⁵

Notably, the NDMAA neither acknowledges drought as the cause of displacement nor mentions the life-threatening effects of drought. Drought causes water shortage which directly impacts our activities such as growing food and accessing drinking water. It also possesses economic, environmental, and social impacts; for example, farmers may have to spend more money on irrigation, poor soil quality, and health problems related to low water flows, respectively.⁹⁶ GC 36 points out that disasters (such as drought) may lead to direct threats to life or prevent individuals from enjoying their right to life with dignity.⁹⁷ Nevertheless, this can be inferred from NDMA’s drought response which made a budget provision for food aid, promotion of hygiene and sanitation in learning institutions, and rehabilitation and maintenance of water facilities.⁹⁸

The KNCHR is the foremost National Human Rights Institution (NHRI) charged with the duty of promoting the Republic’s protection, observance, and respect of human rights.⁹⁹ It also monitors, investigates, and reports on the compliance of human rights in all domains of life in the country.¹⁰⁰ It has been involved in IDP issues since 2004, and it amplified its participation in 2009 when it established IDP focal point and put in place a mechanism for maintaining and documenting IDP human rights and protection concerns.¹⁰¹

Despite the decrease in national attention and funding for IDP issues, KNCHR continues to consider IDPs as one of the various ‘special groups’ under its mandate through its regional offices.¹⁰² It also contributed to the development of the IDP Act as well as to the establishment of the Truth Justice and Reconciliation Commission to address historical injustices, among various duties.¹⁰³ Nonetheless, more efforts need to be seen in the actual execution of the IDP Act. KNCHR cannot be said to have fulfilled its mandate as an NHRI when 2007/2008 PEV IDPs in the country are yet to be compensated.¹⁰⁴

⁹⁴ Ibid.

⁹⁵ Carey Baraka, ‘A drowning world: Kenya’s quiet slide underwater’ (The Guardian, 17th March 2022) <www.theguardian.com/world/2022/mar/17/kenya-quiet-slide-underwater-great-rift-valley-lakes-east-africa-flooding> accessed 25th April 2023.

⁹⁶ National Drought Mitigation Centre, ‘How does drought affect our lives’ (University of Nebraska-Lincoln) <<https://drought.unl.edu/Education/DroughtforKids/DroughtEffects.aspx>> accessed 25th April 2023.

⁹⁷ GC on article 6 of ICCPR (n 61) para 26.

⁹⁸ National Drought Management Authority, ‘Brief on drought and food security situation in ASAL areas and Necessary Response Activities: November 2021’ <www.ndma.go.ke/index.php/resource-center/drought-status-and-response-updates/send/63-drought-response-updates/6254-drought-response-update-november-2021> accessed 25th April 2023.

⁹⁹ Kenya National Commission on Human Rights Act No. 14 of 2011 Sec 8.

¹⁰⁰ Ibid.

¹⁰¹ UNHCR, ‘Protecting Internally Displaced Person: A Handbook for National Human Rights Institutions’(2021) <https://ganhri.org/wp-content/uploads/2022/02/Handbook-on-IDPs_EN.pdf> accessed 25th April 2023.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ KNA, ‘Nyanza IDPs Plead for Ksh4bn Compensation from Government’ (Capital FM 26th May 2022) <www.capitalfm.co.ke/news/2022/05/nyanza-idps-plead-for-sh4bn-compensation-from-government/> accessed 25th April 2023.

(b) Translucent right to humanitarian assistance

According to the Bruges Resolution on Humanitarian Assistance, not offering humanitarian assistance to disaster victims institutes a risk to human life and an offense to human dignity resulting in an infringement of fundamental human rights.¹⁰⁵ Various non-state actors have internalized this general right in all humanitarian crises, such as through their adherence to the sphere standards.¹⁰⁶ The International Law Commission draft articles on the protection of persons in situations of disasters recognize the inherent dignity of the human person, which needs to be protected in the event of a catastrophe.¹⁰⁷ The International Convention on the Rights of PWD obliges State parties to take all necessary measures under IHRL and IHL to ensure the protection and safety of PWD in situations of risk including in humanitarian emergencies and disasters.¹⁰⁸

Nevertheless, there is no express recognition of the right to humanitarian assistance in an inclusive and universally binding agreement.¹⁰⁹ Customary international law seems to point towards this right even though Yoram Dinstein indicates that no customary norm has crystallized so far in this regard because provisions are scarce.¹¹⁰ For a norm to be considered as such, there must be consistent and uniform State practice over time.¹¹¹ States take action to support their people after an occurrence of a disaster, as well as accept aid from the international community and non-state actors.¹¹²

For example, 129 Governments assisted Haiti in 2010 following an earthquake, and 134 States helped Japan in 2011 following an earthquake and tsunami.¹¹³ Not all States neither consider there to be a duty to provide humanitarian assistance to other people after a disaster nor accept the relevant reliefs to attain the purpose.¹¹⁴ A case in point is the extreme constraints by Myanmar on humanitarian access by restricting humanitarian actors' ability to travel to the people in need depriving them the lifesaving aid.¹¹⁵

Even though international law is unclear on this subject, it can be argued that a legal right to humanitarian assistance exists under the Kenyan legal system. This is because IDP Act adopts the rights-based approach to humanitarian action, which obliges the Government or any other authority responding to a situation of ID and the needs of IDPs to take into account their rights and freedoms as set out under the CoK.¹¹⁶ It also

¹⁰⁵ Institute of International Law, 'Bruges Session-2003: Humanitarian Assistance' (hereinafter Bruges Resolution) (6th Commission, 2nd September 2003) Art 2.

¹⁰⁶ Dug Cubie, 'Crystallisation of a General Right to Humanitarian Assistance' in Dug Cubie *The International Legal Protection of Persons in Humanitarian Crises: Exploring the Acquis Humanitaire* (Hart Publishing 2017) 1.

¹⁰⁷ International Law Commission, 'Draft Articles on the Protection of Persons in the event of disasters' (68th Session 2016) Art 4.

¹⁰⁸ Convention on the Rights of Persons with Disabilities (Adopted 13th December 2006, Entered into force 3rd May 2008) 2515 UNTS 3 Art 11.

¹⁰⁹ Maria Giovanna Pietropaolo, 'A Human Rights-Based Approach to Humanitarian Assistance: Current and Prospective Scenarios' (2016) 7 *Journal of International Humanitarian Legal Studies* 257, 263.

¹¹⁰ Yoram Dinstein, 'The Right to Humanitarian Assistance' (Autumn 2000) *Naval War College Review* 77, 79.

¹¹¹ Charlesworth H, 'Law-Making and sources' in Crawford and Marti Koskeniemi (eds), *The Cambridge Champion to International Law* (Cambridge University Press 2012) 193.

¹¹² Pietropaolo (n 109) 264.

¹¹³ Ibid.

¹¹⁴ Pietropaolo (n 109) 265.

¹¹⁵ International Rescue Committee, 'Crisis in Myanmar: violent deadlock leaves millions in need' (Watchlist 2022, 24 January 2022) <www.rescue.org/article/crisis-myanmar-violent-deadlock-leaves-millions-need#:~:text=A%20free%20falling%20economy%20plunges,fuel%20and%20other%20essential%20goods> accessed 25th April 2023.

¹¹⁶ IDP Act (n 32) Sec 4.

mandates the Government to put in place measures for PPA to IDPs while recognizing displaced communities with a particular dependency on their land.¹¹⁷

The IDP Act also incorporates the needs-based approach by urging the Government to offer PPA to IDPs based on their needs.¹¹⁸ The uses of the proposed fund that justifies this approach include meeting the expenses incurred in the provision of durable solutions, including the replacement of their elementary household effects, enabling them to re-start their primary livelihood, returning them to their previous homes or alternative settlement sites, and the reconstruction of destroyed basic housing and restoration of community utilities and institutions.¹¹⁹ It integrates the provisions of the GPID relating to humanitarian assistance principles, including humanity and impartiality.¹²⁰

International Humanitarian Organizations (IHO) have the right to offer such service.¹²¹ In so doing, States must grant persons engaged in providing such assistance unimpeded access to IDPs, and they have the right to be respected and protected while carrying out their duties.¹²² While providing such assistance, IHOs and other relevant actors must have due regard to the protection needs and human rights of IDPs by the applicable international standards and codes of conduct.¹²³ Even though there is no explicit right to humanitarian assistance under international and Kenyan laws, the duties imposed on the national authorities under the IDP Act create this corresponding right.

3. The Right to Property

The right to property includes moveable and immovable property and is a component of the right to an adequate standard of living guaranteed under the ICESCR, the UDHR, and the CoK.¹²⁴ There is no explicit provision of this right under the Banjul Charter, although articles 14, 16, and 18(1) can be said to create it.¹²⁵ They provide that every person has the right to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and constant enhancement of living conditions.¹²⁶ GC no. 4 by the Committee on Economic, Social and Cultural Rights (CESCR) affirms that the human right to adequate housing is vital to enjoying ESC rights.¹²⁷ It defines adequate housing as passable privacy, space, security, lighting, and ventilation.¹²⁸ It also guides State to appreciate how 'adequate' qualifies the right.¹²⁹ It entails the legal security of tenure, availability of services, materials, facilities, infrastructure, habitability, accessibility, location, and cultural dependency.¹³⁰

The 2016 report of the Special Rapporteur on adequate housing as a component of the right to an acceptable and on the right to non-discrimination illustrates that the right there is a nexus between the right to life and

¹¹⁷ Ibid. sec 8.

¹¹⁸ Ibid.

¹¹⁹ Ibid. sec 15.

¹²⁰ General Principles (n 14) Principle 24.

¹²¹ Ibid Principle 25.

¹²² Ibid. Principles 25 and 26.

¹²³ Ibid. Principle 27.

¹²⁴ Articles 11, 22-26 and 43 respectively.

¹²⁵ Ralph Wolf, 'Participation in the Right of Access to Adequate Housing' (2007) 14 *Tulsa Journal of Comparative & International Law* 269, 274.

¹²⁶ International Covenant on Economic Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹²⁷ Committee on Economic Social and Cultural Rights, 'CESCR General Comment No. 4: The Right to Adequate Housing (Article 11(1) of the Covenant)' (hereinafter CESCR GC No. 4) (6th Session, 13th December 1991) E/1992/23.

¹²⁸ Ibid.

¹²⁹ Wolf (n 125) 273.

¹³⁰ CESCR GC No. 4 (n 127).

the right to live in a secure place in that the latter only has a meaning when the former is guaranteed with dignity, security and free of violence.¹³¹ The basic principles and guidelines on DID by the Special Rapporteur on adequate housing reflect the GPID in a broader sense and outlines principles that must be followed before, during, and after evictions.¹³² Most importantly, it places the responsibility for monitoring, evaluating, and following up to determine the number, type, and long-term effects of displacements on States.¹³³

ID interferes with the enjoyment of property rights that are recognized statutorily and customarily.¹³⁴ The African Commission recognized these rights in a case where the complainant alleged that the removal of the Endorois community from their ancestral land violated their property rights, spiritual, cultural, and economic ties to the land.¹³⁵ The Government was found to violate the rights guaranteed under the Banjul Charter, namely, the right to freedom of conscience, the right to property, the right to education, the right to free disposal of wealth and natural resources, and the right to ESC development.¹³⁶

The GPID provides that everyone has the right to be protected against being arbitrarily displaced, which may occur in various contexts, including in armed conflict situations, in cases of disasters, when it is based on policies on apartheid, or similar practices, where there are unjustified large-scale development projects and when it is used as joint punishment.¹³⁷ All alternative measures must be explored to avoid ID, and where there are none, steps must be taken to minimize its adverse effects.¹³⁸ States must ensure that IDPs have proper accommodation, satisfactory safety, nutrition, and health conditions and that family members are not separated.¹³⁹

State parties must affirmatively protect IDPs from arbitrary deprivation of property in several circumstances.¹⁴⁰ These include looting, direct or indiscriminate acts, or other violent acts, being used to shield military operations or objectives, being made the object of retaliation, and being destroyed or appropriated as a form of joint punishment.¹⁴¹ Properties left behind by IDPs must be safeguarded against destruction and arbitrary seizure.¹⁴² In cases of ID as a result of armed conflicts or disasters, member States must provide the IDPs with complete information on the details and procedures for their displacement and on compensation and relocation where necessary.¹⁴³ They must also obtain FPIC of those to be displaced and involve them, especially women, in the planning of their relocation.¹⁴⁴

¹³¹ UNGA, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' (8th August 2016) 71st session UN Doc A/71/310.

¹³² United Nations, 'Basic Principles and Guidelines on Development based evictions and displacement' (Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living) UN Doc A/HRC/4/18 Parts III, IV, V.

¹³³ *Ibid.* para 69 and 70.

¹³⁴ IDMC and Norwegian Refugee Council, 'A Review of the Normative Framework in Kenya Relating to the Protection of IDPs: In the Context of Kampala Convention and Other Supranatural Framework' (IDMC 2015) para 69.

¹³⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya* Communication 276/03 (African Commission on Human and Peoples Rights 2009) (hereinafter Endorois Case) 19.

¹³⁶ *Ibid.*

¹³⁷ Guiding Principles (n 14) Principle 6.

¹³⁸ *Ibid.* Principle 7.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* Principle 21.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.* Principle 7.

¹⁴⁴ *Ibid.*

The IDPs have the right to an effective remedy which includes but is not limited to a review of the decision for their relocation by a competent legal authority.¹⁴⁵ The displacement procedure must not violate IDPs' rights to life, dignity, liberty, and security.¹⁴⁶ States must ensure special protection against displacing indigenous people, minorities, peasants, and pastoralists with special attachments to their lands.¹⁴⁷ The CoK and the IDP Act recognize the safety of the right to property by requiring prompt payment in full of just compensation to any person whose land has been compulsorily acquired by the State.¹⁴⁸

In the words of the GLP, the IDP Act urges the Government to take all feasible measures to avoid arbitrary DID.¹⁴⁹ Where there are no such alternatives, the Government must obtain FPIC from those displaced, provide complete information on the procedures involved, provide adequate and habitable sites for relocation, provide compensation and ensure effective participation of IDPs, particularly women, in the planning of their return, relocation, and reintegration.¹⁵⁰

The Land Act bestows upon the National Land Commission (NLC) ensuring the effective and efficient process of compulsory acquisition of land from the initial stage of requesting acquisition from the Cabinet Secretary or the County Executive Committee to the payment of such compensation.¹⁵¹ In determining the value of the land to be compensated, the LA refers to the Land Value (Amendment Act) 2019, which defines 'prompt payment' as compensation within a reasonable time after taking possession of the land, not being more than one year after the undertaking of the appointed dates.¹⁵²

Compensating the affected communities within one year envisions a situation where families may be left homeless for some time before receiving compensation, thereby jeopardizing them to ID and its risks within a blink of an eye. Wily observes that the said law does away with the requirement of FPIC, thereby amending the IDP Act's provision on the DID procedure.¹⁵³ At the same time, the Mining Act prohibits compensation that cannot be assessed based on legal principles.¹⁵⁴ The Act neither protects nor seeks to identify sensitive cultural assets such as medicinal plants and spiritual sites owing to the emotional reactions they trigger when tempered with.¹⁵⁵ It also contradicts the GPID, which mandates State parties to protect communities with a special attachment to their land due to specific cultural or spiritual beliefs save for compelling and overriding interests.¹⁵⁶

4. The Right to Food

The right to food is also a strand of the right to an adequate standard of living as articulated in the ICESCR.¹⁵⁷ Member States have the mandatory duty individually and through international cooperation to implement

¹⁴⁵ Ibid.

¹⁴⁶ Ibid. Principle 8.

¹⁴⁷ Ibid. Principle 9.

¹⁴⁸ CoK (n 35) Art 40 (3) and Part IV respectively.

¹⁴⁹ IDP Act (n 32) Sec 21.

¹⁵⁰ Ibid.

¹⁵¹ Land Act No.6 of 2012 Laws of Kenya (hereinafter LA) Part 8.

¹⁵² Land Value (Amendment) Act 2019 (hereinafter LVA) Sec 2.

¹⁵³ Liz Alden Wily, 'Analysis of the Land Value (Amendment) Act 2019' (Natural Justice, 9th October 2019) <<https://naturaljustice.org/wp-content/uploads/2020/01/Analysis-of-the-Land-Value-Amendment-Act.pdf>> accessed 25th April 2023.

¹⁵⁴ Mining Act No.12 of 2016 Laws of Kenya (hereinafter MA) Sec 153.

¹⁵⁵ Benard Ochieng, 'Time to address compensation and resettlement issues in Kenya's mining in Kenya's Mining Sector' (The Elephant, 18th November 2020) <www.theelephant.info/reflections/2020/11/18/time-to-address-compensation-and-resettlement-issues-in-kenyas-mining-sector/> accessed 25th April 2023.

¹⁵⁶ Guiding Principles (n 14) Principle 6.

¹⁵⁷ ICESCR (n 124) Art 11.

specific programs needed to improve the means of production, conservation, and distribution of food by using technical and scientific knowledge.¹⁵⁸ This must be done by considering the problems of food-importing and exporting countries to ensure a need-based equitable distribution of world food supplies.¹⁵⁹ Similar formulations are found under the UDHR, the Convention on the Rights of the Child, and the CoK.¹⁶⁰

CESCR's GC 12 on the right to food recalls the importance of this right for the enjoyment of all human rights.¹⁶¹ It insists on the progressive realization of this right and places on States the principal obligation to take necessary actions to ease hunger.¹⁶² 'Adequacy' is the significant determinant of this right, implying the availability of food in quality and quantity enough to satisfy people's dietary needs, without adverse substances, and is acceptable within a given culture.¹⁶³ It also means the sustainable availability of food in a manner that does not hinder the enjoyment of other human rights.¹⁶⁴

According to the report submitted by Kenya in 2013 to the CESCR, over 80% of the population relies on agriculture for food.¹⁶⁵ It sets out intervention measures by the Government to improve access to food and promote food security in the Arid and Semi-Arid Lands (ASALs) and other marginalized areas.¹⁶⁶ Measures range from support to small-scale farmers to diversifying beyond the staple crop.¹⁶⁷ The Kenya Agri-Nutrition Implementation Strategy (2020-2025) is set to increase access to safe, assorted, and nutritious food by solidifying the national food chain.¹⁶⁸ That notwithstanding, drought was declared a national disaster in September 2021.¹⁶⁹

According to the World Food Programme (WFP), while the on-set long-rains in April-May 2022 in ASALs counties were welcome, drought conditions remain critical affecting food security, water, education, and health.¹⁷⁰ WFP observes that the number of its Integrated Food Security Phase Classification phase 3 had risen from 739,000 in June 2020 to an estimated 3.5 million in April 2022.¹⁷¹ This depicts the critical role of NGOs in the IDP PPA. Remarkably, there are calls to enact the NDRM bill, which is a positive move because the proposed authority will deal with all kinds of disasters that may lead to ID. However, it does not acknowledge that disasters cause ID and therefore lacks provisions on coordination with NCCC and relevant authorities.

¹⁵⁸ Ibid Art 11(2) (a).

¹⁵⁹ Ibid. Art 11 (2 b).

¹⁶⁰ Art 25, 24(2) (c) and 43 respectively.

¹⁶¹ Committee on Economic Social and Cultural Rights, 'CESCR General Comment No. 12: The Right to Food (Article 11(1) of the Covenant)' (hereinafter GC No.12 on the right to food) (12th Session, 12th May 1999) E/C.12/1999/5.

¹⁶² Ibid.

¹⁶³ Ibid. para 8.

¹⁶⁴ Ibid.

¹⁶⁵ Committee on Economic Social and Cultural Rights, 'Consideration of reports submitted by State Parties under Article 16 and 17 of the International Covenant on Economic Social and Cultural Rights; Combined second to fifth Periodic reports of State Parties due in 2013 (Kenya)' (1st July 2013) E/C.12/KEN/2-5.

¹⁶⁶ Ibid. para 123.

¹⁶⁷ Ibid. para 125 to 135.

¹⁶⁸ Ministry of Agriculture, Livestock Fisheries and Cooperatives, 'Kenya-Agri-Nutrition Implementation Strategy (2020-2025)' <<https://familyhealth.go.ke/wp-content/uploads/2020/10/Agri-Nutrition-Implementation-Strategy.pdf>> accessed 25th April 2023.

¹⁶⁹ CGTN, 'Kenya's President Kenyatta declares Drought a national disaster' (Africa, 8th September 2021) <<https://newsaf.cgtn.com/news/2021-09-08/Kenya-s-President-Kenyatta-declares-drought-a-national-disaster-13oIWE3mDkc/index.html>> accessed 25th April 2023.

¹⁷⁰ World Food Programme, 'WFP Kenya country brief; Food security situation' (April 2022) <<https://reliefweb.int/report/kenya/wfp-kenya-country-brief-april-2022>> accessed 25th April 2023.

¹⁷¹ Ibid.

Seff et al. consider food security as a domain of measuring self-reliance among IDP households.¹⁷² According to their research conducted in Kenya between 2017 and 2020, all interviewed households reported not having had a full meal during the previous day, thereby lowering their level of self-reliance.¹⁷³ 94% of IDPs households in Nakwamekwei IDP camp in Turkana, Kenya, are food insecure, leading to poor mental and physical health.¹⁷⁴ Prolonged drought in the North Eastern region of Kenya has forced residents to flee from their homes in search of food, water, and pasture forcing hundreds of children to drop out of school.¹⁷⁵ Most recently, UNHCR has appealed for life-saving aid for millions of people affected by the horn of Africa (Ethiopia, Kenya, and Somalia) drought.¹⁷⁶

GC 12 was meant to provide State authorities with guidance in implementing the fundamental right to food. Nevertheless, there's a notable lack of a positive culture of respect for this right in the various MS, Kenya being one of them. The bare minimum for compliance with ICESCR entails the submission of progress reports by States outlining the measures put in place to achieve the observance of this right.¹⁷⁷ Kenya's latest submission of the said report was made in 2013.¹⁷⁸ This can be attributed to the failure to guarantee institutional commitment to positive compliance with this right.¹⁷⁹ Nonetheless, drought in the ASALs region in Kenya is attributed to the impacts of climate change that can be averted by strengthening policies advocating for climate change adaptations.¹⁸⁰

5. Conclusion

An intrinsic link among the right to life, the right to property, and the right to food is self-evident. IDPs are vulnerable members of the community whose substantive rights and fundamental freedoms must be protected. Kenya's legal framework on IDPs' substantive rights measures up to the international legal instruments on IDP PPA. Nevertheless, the implementation of these laws is imperative in order to live up to their terms. The NCCC plays a focal role in IDP PPA; therefore, its reconstitution will be a step forward. Operationalization of the draft IDP policy will guide the NCCC in fulfilling its mandate under the IDP Act. There should be an amendment to the laws that jeopardize these rights to guarantee their maximum enjoyment.

¹⁷² Ilana Seff, Kellie Leeson and Lindsay Stark, 'Measuring Self-Reliance among Refugee and Internally Displaced Households: The Development of an Index in Humanitarian Settings' (2021) 15 *Conflict and Health* 56.

¹⁷³ Ibid. 8.

¹⁷⁴ Catherine Gichunge et al, 'Predictors of Social Support, Physical Health and Mental Health among Food Insecure Internally Displaced Persons in Turkana, Kenya' (2020) 14 *Conflict and Health* 58.

¹⁷⁵ Asenath Niva, 'Human Lives at Stake as Drought Ravages Kenya' (Welthungerhilfe, 19th January 2022) <www.welthungerhilfe.org/news/latest-articles/2022/human-lives-at-stake-due-to-drought-in-kenya#:~:text=Marsabit%20County%20has%20made%20a,acute%20food%20and%20water%20shortage> accessed 25th April 2023.

¹⁷⁶ UNHCR, 'UNHCR Appeals for Life-Saving Aid for Millions Affected by Catastrophic Horn of Africa Drought' <www.unhcr.org/news/briefing/2022/6/62babf6b4/unhcr-appeals-life-saving-aid-millions-affected-catastrophic-horn-africa.html> accessed 13th April 2023.

¹⁷⁷ ICESCR (n 125) Art 16 and 17.

¹⁷⁸ United Nations Human Rights Treaty Bodies 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 25th April 2023.

¹⁷⁹ Francesco Seatzu, 'The UN Committee on Economic Social and Cultural Rights and the Right to Adequate Food' (2011) 27 *Spanish Yearbook of International Law* 573.

¹⁸⁰ S. Wagura Ndiritu and Geoffrey Muricho, 'Impact of Climate Change Adaptation on Food Security: Evidence from Semi-Arid Lands, Kenya' (2021) 167 *Climatic Change* 24.

C. EFFECTS OF THE CURRENT LEGAL FRAMEWORK ON THE SUBSTANTIVE RIGHTS OF IDPs IN KENYA

1. Introduction

This section begins by analyzing the case of the Ogieks' case in relation to the substantive rights of IDPs discussed in section two. It will then examine efforts being made to ensure the realization of the guaranteed rights and freedoms. The author chose this case because community displacement is prevalent in Kenya. This case was successfully litigated before the African Court of Human and Peoples' Rights (ACHPR), and in her opinion, it not only acts as a strong precedent for future cases but is also a measuring scale of the efforts of the relevant actors to ensure that IDP substantive rights are upheld as will be illustrated below.

2. The Ogiek Case: Background

The African Commission received a communication from the Centre for Minority Rights Development and the Minority Rights Group International acting on behalf of the Ogiek Community of the Mau Forest on 14th November 2009.¹⁸¹ It related to the eviction notice issued by the Kenya Forest Service in October 2009, which required the Ogiek Community, together with other settlers of the Mau Forest, to vacate the area within 30 days.¹⁸² Due to the unresponsiveness of the Respondent, the Commission seized the ACHPR with the application on 12th July 2012.¹⁸³

The Ogiek are an indigenous minority ethnic group in Kenya, including about 20,000 members, about 15,000 of whom reside in the Mau Forest complex, which covers about 400,000 hectares spanning seven administrative districts in Kenya.¹⁸⁴ The issues for determination included whether the Respondent infringed the Ogieks' rights under Articles 4 (right to life), 14 (right to property), and 21 (freedom to the disposal of wealth and natural resources), among others (which are not relevant to this discussion) of the Banjul Charter.¹⁸⁵

3. The Ogiek Case: Analysis

(a) *The right to property*

Roesch notes that the Banjul Charter does not explicitly provide the right to land.¹⁸⁶ Nevertheless, this right can be derived from the right to property, religion, and culture.¹⁸⁷ The Applicant contended that the Ogiek's eviction without their consent nor adequate compensation led to the encroachment of their land and their subsequent denial of the benefits deriving from there.¹⁸⁸ They also averred that for the laws concerning community land rights to be effective, the CoK and the LA must be reconciled as well as the Forest Conservation Bill did not provide for the procedure of identifying community-owned forests.¹⁸⁹ The

¹⁸¹ Ogieks' case (n 19) Para 3.

¹⁸² Ibid Para 3.

¹⁸³ Ibid Para 5.

¹⁸⁴ Ibid para 6.

¹⁸⁵ Ibid Para 10.

¹⁸⁶ Roesch Ricarda, 'The Ogiek Case of the African Court on Human and People's Rights: Not So Much News After All' (16th June 2017) *European Journal of International Law* 4.

¹⁸⁷ Banjul Charter (n 62) Art 14,8, 17 respectively.

¹⁸⁸ Ogieks' case (n 19) Para 114.

¹⁸⁹ Ibid. Para 115 (now an Act of Parliament).

Respondent submitted that the Ogiek were informed that the Mau forest was protected conservation since the colonial administration.¹⁹⁰ They also contended that community forest users are granted rights, including collecting medicinal herbs under Kenyan law.¹⁹¹

The Court echoed that the right to property under the Banjul Charter can be enjoyed individually or collectively.¹⁹² It explained that the right to property contains three elements: the right to use the subject matter, enjoy its fruits, dispose of and transfer it.¹⁹³ It interpreted this right in light of Article 26 of the UNGA Declaration 61/295 on the Rights of Indigenous People (UNDRIP), which insists on the rights of occupation, possession, and utilization of land.¹⁹⁴ It also observed that the Respondent did not prove that the Ogiek's constant stay in the area was the major reason for the diminution of the natural environment in the Mau forest.¹⁹⁵ It subsequently held that the Ogiek had the right to occupy, use and enjoy their ancestral land.¹⁹⁶ It also held that their expulsion against their will, without prior consultation, and without respecting the requirements of the eviction infringed their right to land guaranteed under the Banjul Charter and the UNDRIP.¹⁹⁷

(b) Measures put in place to ensure enjoyment of the right to land

The crux of Ogiek's allegation revolves around the principle of FPIC and Compensation, which are interlinked. The Ogiek case instigated the adoption of FPIC into Kenyan laws starting with the CoK, the Land Act, and the Community Land Act of 2016, which provides that an agreement relating to an investment in community land shall only be made after a free and open consultative process.¹⁹⁸ The contract must contain various aspects, including payment of compensation and royalties, an environmental and ESC impact assessment, relevant measures put in place to alleviate any adverse effects of the investment, and continuous assessment of the impacts of the investment on the community.¹⁹⁹

The Community Land Act recognizes customary land rights as equal to freehold or leasehold rights acquired through registration, allocation, or transfer.²⁰⁰ It prohibits (unless it is for a public purpose) compulsory acquisition of rights over community land except unless upon prompt payment of just compensation to the affected persons in full or by a negotiated settlement.²⁰¹ Notable, these laws are barely implemented. The Land Value (Amendment) Act 2019 does not cover community land, which is the dominant tenure in the dry land area, which covers more than 50% of Kenya's land mass.²⁰² This renders compensation of affected communities an uphill task.

¹⁹⁰ Ibid. Para 120.

¹⁹¹ Ibid. Para 121.

¹⁹² Ibid. Para 123.

¹⁹³ Ibid. Para 124.

¹⁹⁴ Ibid. Para 127.

¹⁹⁵ Ibid. Para 120.

¹⁹⁶ Ibid. Para 128.

¹⁹⁷ Ibid. Para 131.

¹⁹⁸ Community Land Act No.27 of 2016 Laws of Kenya sec 36.

¹⁹⁹ Ibid.

²⁰⁰ Ibid. Sec 5.

²⁰¹ Ibid.

²⁰² Fatuma Huka, 'Rights Violation in Isiolo International Airport Land Expropriation' (The Elephant 4th June 2021) <www.theelephant.info/op-eds/2021/06/04/rights-violations-in-isiolo-international-airport-land-expropriation/> accessed 25th April 2023.

The case of the Isiolo Airport Project is illustrative.²⁰³ The displaced residents were relocated to alternative pieces of land which were occupied.²⁰⁴ It is also alleged that there was no public participation in the compensation arrangement, thereby causing confusion.²⁰⁵ The residents were left homeless, deprived of their ancestral land even when the law and the Ogiek case precedent is evident on the procedure to be followed in such situations.²⁰⁶ Reports by the Economic and Social Rights Centre and the Environmental Justice Atlas conclude that the said project failed to uphold human rights, including access to information and housing, because residents were neither informed about the impacts of the project on their lives nor some of them had not been compensated at the beginning of the project respectively.²⁰⁷

In 2018, a private dam in Nakuru County-Kenya collapsed, killing more than 40 people, displacing hundreds of families, and destroying properties worth millions of shillings.²⁰⁸ According to the preliminary report by the Kenya Human Rights Commission, the private developer operated without the required licenses and ignored the early warning signs.²⁰⁹ It observed several gaps in the disaster response, such as the diversion of material supplies meant for the victims and farmers whose farm produce and soil were washed away were not yet assisted.²¹⁰

Mwache Dam Construction Project in Kwale County seems to have followed the Government's proper procedure of compulsory land acquisition.²¹¹ The project led to the displacement of approximately 12,000 people whose assets and livelihoods were affected.²¹² According to the project's Environmental and Social Impact Assessment (ESIA) study report, the affected communities were consulted and informed about the acquisition of their land by the Government.²¹³ Their concerns were also responded to adequately.²¹⁴ Most importantly, 75% of the affected communities had already been compensated by the time the project commenced.²¹⁵

Even though this is commendable, 25% of the affected communities were at risk of ID because they relied on such compensation to rebuild their lives. Moreso, it is in contravention of the CoK, and the Land Act, which emphasizes that just and the acquiring body must deposit prompt compensation in full to NLC before taking possession of the land.²¹⁶ The Court reiterated this position in a case where Kenya Railways Corporation compulsorily acquired the Petitioner's land for the construction of the standard gauge railway.²¹⁷ The

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Joseph Openda, 'Solai dam tragedy victims still in pursuit of justice three years on' (Nation, 10 May 2021) <<https://nation.africa/kenya/counties/nakuru/ghosts-of-solai-dam-tragedy-haunt-victims-three-years-later-3395346>> accessed 25th April 2023.

²⁰⁹ Kenya Human Rights Commission, 'Solai Dam Tragedy' (Media Centre 28 May 2018) <www.khrc.or.ke/2015-03-04-10-37-01/press-releases/653-solai-dam-tragedy.html> accessed 25th April 2023.

²¹⁰ Ibid.

²¹¹ KBC Digital, 'Construction of Kshs. 20B Mwache Dam Gather Space' (Kenya Broadcasting Corporation 6th December 2022) <<https://kbc.co.ke/local-business/article/33768/construction-of-ksh-20b-mwache-dam-gathers-pace>> accessed 25th April 2023.

²¹² Ibid.

²¹³ Coast Water Works Development Agency, 'Environmental and Social Impact Assessment for the Proposed Mwache Trunk Main and South Mainland Water Transmission Pipeline' (Study Report 2021).

²¹⁴ Ibid.

²¹⁵ KBC Digital (n 211).

²¹⁶ Cok (n 35) Art 40 (3) (b) (i) and LA (n 149) Sec 111 respectively.

²¹⁷ Petition E 007 of 2020 *Modern Coast Builders and Contractors Limited v National Land Commission* [2021] Electronic Kenya Law Report.

Government took possession of the land without compensating the Petitioner.²¹⁸ The Court ruled in favour of the Petitioner.²¹⁹

(c) *The right to food*

The Court derived the right to food from Article 21 of the Banjul Charter, which provides that all peoples shall freely dispose of their wealth and natural resources.²²⁰ It further states that this right shall be exercised in the people's special interest and prohibits its deprivation save for adequate compensation.²²¹ It also provides a remedy of lawful recovery of the property where there is dispossession.²²² The Applicant contended that the Respondent infringed these rights of the Ogiek by evicting them from the Mau Forest and depriving them access to essential resources therein as well as by granting logging concessions on their ancestral land without their FPIC thereby excluding them from the benefits of those resources.²²³

The Respondent denied the violation of these rights.²²⁴ It argued that in as much as the right of ownership and control of natural resources rests with the people; eventually, States are eligible to exercise the enjoyment of the right for their benefit.²²⁵ The Court noted that the reason why the Banjul Charter does not define 'people' is to allow flexibility in application and interpretation by its future users.²²⁶ It reasoned that the 'people' also comprise ethnic groups and communities entitled to enjoy the rights and freedoms guaranteed under the Banjul Charter, such as the right to development.²²⁷

Recalling the provisions of Article 21 of the Banjul Charter and that it had recognized the Ogiek's right to use and enjoy the produce of their land, it held the Respondent to violate the said article because the Ogiek had been deprived of the right to enjoy and freely dispose of the wealth of food produced by their ancestral land.²²⁸ This decision indicates the significance of the right to food for the IDPs (not only the indigenous communities) in Kenya and the need for the State to safeguard it.

(d) *Efforts toward the actualization of the right to food*

According to a WFP study conducted in 2017, countries with a high level of food insecurity experience high levels of population movement.²²⁹ Kenya is no exception owing to its increased drought levels. Russel points out that in current hunger situations, a rights-based framework such as the GPID serves as a reminder that a response programme must go beyond the current needs of IDPs.²³⁰ It must constitute preventative action to avoid ID, protection during ID, and solutions for ID, including addressing the root causes.²³¹ In the same vein and in line with CESCRC GC 12, which requires States to take necessary actions to mitigate and alleviate hunger,

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Banjul Charter (n 62) Art 21.

²²¹ Ibid.

²²² Ibid.

²²³ Ogieks' Case (n 19) Para 191.

²²⁴ Ibid. Para 194.

²²⁵ Ibid.

²²⁶ Ibid. Para 196.

²²⁷ Ibid. Para 199.

²²⁸ Ibid. Para 201.

²²⁹ WFP, 'At the root of Exodus: Food Security, Conflict and International migration' (May 2017) <https://docs.wfp.org/api/documents/WFP-0000015358/download/?_ga=2.140671794.1213141845.1659094606-731168212.1659094606> accessed 25th April 2023

²³⁰ Simon Russell, 'The Operational Relevance of the Guiding Principles on Internal Displacement' (2018) 30 *International Journal of Refugee Law* 307, 309.

²³¹ Ibid.

Kenya has made various strides towards accomplishing the same. To begin with, they include the inclusion of food security in the big 4 agender with the aspirations of ensuring a 50% reduction in the number of food insecure Kenyans and a 34% increase in the average daily income of farmers.²³²

Some of the flagship projects initiated by the Government to make food cheap and available to all Kenyans include the fertilizer subsidy, where the Government subsidized fertilizer prices to lower the small-scale farmer's cost of production while at the same time improving their earnings.²³³ The programme was initiated in 2013, and as of 2017 (based on the available data), 1.5 million farmers had access to the subsidized fertilizer.²³⁴ Nevertheless, the increasing drought and hunger in the country led to Kenya receiving the Kenya African Emergency Food Production Facility from the African Development Bank worth 7.3 Billion Kenya Shillings.²³⁵ The facility aims at benefiting 650,000 and increasing food production to 1.5 million tonnes which are expected to feed 2.8 million people.

The introduction of the Kenya Livestock Insurance Programme in 2015 under the food security pillar was welcomed.²³⁶ This is because, as Miller et al. observe, over 80% of the country is classified as ASAL and contains 20% of the country's population and 60% of the livestock.²³⁷ It is Index-Based Livestock Insurance (IBLI) that uses satellite technology to trigger payments to pastoralists to aid them in the maintenance of their livestock in the face of severe forage scarcity.²³⁸ This project is important because pastoralists depend on the ASALs depend on weather conditions to produce water and pasture for their herds, without which causes ID.²³⁹

According to the study conducted by the International Livestock Research Institute (ILRI), since 2010, close to 50,000 individual pastoralists' IBLI policies were sold in Kenya.²⁴⁰ Due to droughts from 2011-2019, insured pastoralists received IBLI payouts indicating the positive impacts of keeping animals alive and maintaining pastoralists' livelihood despite the ravaging effects on their lives.²⁴¹ Nevertheless, Lung observes that limited demand due to lack of information among pastoralists is a significant drawback.²⁴² Many of them are not acquainted with the concept of paying premiums and payouts.²⁴³

Remarkably, the said study by ILRI also indicates that the only commercial insurer in Kenya discontinued its participation in the programme in 2020 due to high operational costs for distribution channels to remote

²³² Office of the President of Kenya, 'The Big 4: Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25th April 2023.

²³³ Ministry of Agriculture and Livestock Development, 'Fertilizer subsidy 2022' <<https://kilimo.go.ke/fertilizer-subsidy-2022/>> accessed 25th April 2023.

²³⁴ Ibid.

²³⁵ African Development Bank Group, 'Kenya: Africa Development Bank approves €63 million loan to increase cereals and oil seed production' (Kenya Broadcasting Corporation, 15th July 2022) <www.afdb.org/en/news-and-events/press-releases/kenya-african-development-bank-approves-eu63-million-loan-increase-cereals-and-oil-seed-production-53306> accessed 25th April 2023.

²³⁶ World Bank, 'Kenya's Pastoralists Protect Assets From Drought Risk With Financial Protection' (25th November 2018) <www.worldbank.org/en/news/feature/2018/11/05/kenyas-pastoralists-protect-assets-from-drought-risk-with-financial-protection> accessed 25th April 2023.

²³⁷ Miller et al., 'Assessment of a Spatially and Temporary Consistent MODIS Derived NDVI Product for Application In Index based Drought Insurance' (2020) 12 *Remote Sense* 1, 2.

²³⁸ Index Based Livestock Insurance, 'Kenya' <<https://ibli.ilri.org/ibli-kenya/>> accessed 25th April 2023.

²³⁹ Miller (n 237).

²⁴⁰ Felix Lung, 'After 10 years in Kenya and Ethiopia, Are we ready to Scale up Livestock Insurance in the Horn of Africa' (ILRI 9th July 2021) <www.ilri.org/news/livestock-insurance-schemes-pastoralists-there-future-regional-approach-horn-africa> accessed 25th April 2023.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

pastoralist areas in the country.²⁴⁴ However, according to the president's delivery unit, since the program's inception, Kshs. 220 million covering approximately 100,000 households have been paid by the Government to insurance companies.²⁴⁵ Owing to the ongoing life-threatening effects of drought in the country, it is justifiable to question the viability of this scheme.

Secondly, the NDMA is committed to ending the drought crisis.²⁴⁶ It does this by proactively monitoring and managing droughts through its EWS and publishing and disseminating information via monthly bulletins and manuals.²⁴⁷ Its mandate geared towards drought resilience includes mainstreaming drought risk reduction and climate adaptation into planning, implementing social protection programmes for food insecure populations, as well as strategic projects aimed at averting the risks or strengthening drought preparedness.²⁴⁸ It successfully operationalized the Drought Contingency Fund funded by the European Union (EU) during the 2016-2017 drought, thus mitigating loss of lives and livelihoods.²⁴⁹

Currently, NDMA administers the National Drought Emergency Fund (NDEF), which acts as a common basket emergency fund meant to facilitate the efficient, predictable, and responsible release of funds for drought risk management.²⁵⁰ Other uses of the NDEF are to build resilience, preparedness, and timely response to drought while minimizing its effects.²⁵¹ In its recent drought resilience newsletter, NDMA acknowledges that the below-average performance of rains in Kenya has negatively affected crops and livestock across the ASALs leading to an increased number of people in need of relief assistance from 3.5 million in February 2022 to 4.1 million in June 2022.²⁵²

It also disbursed Kshs. 667 million to cushion drought-affected communities under its Hunger Safety Net Programme (HSNP).²⁵³ This was done in four ASAL counties through cash transfer to secure food security to approximately 149, 699 vulnerable people.²⁵⁴ At the moment, NDMA is registering more drought-affected households under the HSNP to benefit from the routine bimonthly cash transfer scheme.²⁵⁵ Subsequently, social and humanitarian assistance will be based on the data in the social register.²⁵⁶

While this is commendable as a short-term solution, the NDMA must come up with other long-term drought-resilience programmes that will contribute to assuring Kenyans of a food secure State. An example of this is the water pan project that NDMA has successfully implemented in Tana River County, which receives 600mm of rainfall annually.²⁵⁷ The water pans and natural ponds constructed by NDMA provide an unlimited water supply to residents and their livestock, thereby preventing the need to migrate to the delta hence curbing

²⁴⁴ Ibid.

²⁴⁵ PDU (n 238).

²⁴⁶ NDMA, 'Committed to ending drought emergencies' <www.ndma.go.ke/index.php> accessed 25th April 2023.

²⁴⁷ The National Drought Management Authority Act (NDMAA) Chapter 388 of the Laws of Kenya Sec 5.

²⁴⁸ NDMA, 'What we do' <www.ndma.go.ke/index.php/features/typography> accessed 25th April 2023.

²⁴⁹ Reliefweb, 'Kenya: Cabinet Approves the NDEF 2018 Regulations' (30th May 2018) <<https://reliefweb.int/report/kenya/kenya-cabinet-approves-ndef-2018-regulations>> accessed 25th April 2023.

²⁵⁰ Public Finance Management (National Drought Emergency Fund) Regulations 2021 Legal Notice No.27 (Kenya Gazette Supplement No.21) of 5th March 2021 Regulation 10.

²⁵¹ Ibid.

²⁵² NDMA, 'Drought Resilience Newsletter: May-June 2022 Issue' <<http://ndma.go.ke/index.php/resource-center/send/47-ndma-activity-newsletter/6525-drought-resilience-newsletter-may-june-2022>> accessed 25th April 2023.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

ID.²⁵⁸ This is a sustainable way of disaster risk management because the residents become independent by adequately growing their crops and feeding their animals, thus contributing to food security.

(e) *The right to life*

The Applicant submitted that the Ogiek's eviction infringed on their right to life because it generated circumstances that hampered their access to a decent existence.²⁵⁹ They argued that because of their distinct connection with and reliance on their land, their forceful eviction exposed them to circumstances affecting their decent way of life.²⁶⁰ They submitted that they rely on the Mau forest for the continuous supply of food, shelter, traditional medicines, and as an area for cultural rituals and religious ceremonies.²⁶¹ The Respondent based their argument on the principle of proportionality.²⁶² It argued that the Mau forest complex is significant for all Kenyans, and the Government is eligible to develop it for the advantage of all citizens even though it may affect the Ogiek.²⁶³

The Court noted that the Banjul Charter establishes a nexus between the right to life and inviolable nature and the integrity of a human being.²⁶⁴ It reiterated that individuals' right to life must be enjoyed irrespective of the group they belong to.²⁶⁵ It observed that while the violation of ESC rights, including through forced evictions, may generally endanger conditions unfavourable to a decent life, it was of the view that only eviction and deprivation of ESC rights may not necessarily result in the infringement of the right to life under article 4 of the Banjul Charter.²⁶⁶ Consequently, it held that the Applicant had not established the causal nexus between the eviction and the deaths alleged to have occurred; as a result hence there was no violation of article 4.²⁶⁷ Claridge opines that the Court was reluctant to interpret the right to life in an expansive way because of the lack of opportunity to discuss the same right in its earlier established jurisprudence.²⁶⁸ Nevertheless, the author contends that the Court should have been guided by GC 36 on article 6 of ICCPR, which clearly sets out measures for addressing adequate conditions for protecting the right to life.²⁶⁹ They include standards designed to facilitate prompt access by the people to indispensable goods and services, including food, water, shelter, and sanitation, together with other measures designed to promote adequate general living conditions, for example, social housing programs.²⁷⁰ Roesch underscores that the right to food is often discussed as an aspect of the right to life.²⁷¹ This thesis adopts an extensive interpretation of the right to life, particularly concerning the Government's efforts to ensure access to food by all people in Kenya.

The African Commission applied this expansive approach in the case where the applicants alleged that oil exploitation by the Government of Nigeria caused environmental degradation and health problems due to pollution of the environment among the Ogoni community.²⁷² It also destroyed their food sources (land), and

²⁵⁸ Ibid.

²⁵⁹ Ogiek's Case (n 19) Para 147.

²⁶⁰ Ibid.

²⁶¹ Ibid. Para 148.

²⁶² Ibid. Para 150.

²⁶³ Ibid.

²⁶⁴ Ibid. Para 152.

²⁶⁵ Ibid. Para 153.

²⁶⁶ Ibid.

²⁶⁷ Ibid. Para 155 and 156.

²⁶⁸ Lucy Claridge, 'The Approach to UNDRIP within the African Regional Human Rights System' (2019) 23 *The International Journal of Human Rights* 267. 276.

²⁶⁹ GC on Art 6 of ICCPR (n 61) para 26.

²⁷⁰ Ibid.

²⁷¹ Roesch (n 186). 3.

²⁷² *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* Communication 155/96 (African Commission on Human and Peoples Rights 2020) para 1.

the Ogonis were forcefully evicted from their land to pave the way for oil exploitation.²⁷³ It noted that the survival of the Ogonis rested on their land that was destroyed by the Government, and the brutalities of the forced evictions affected the Ogoni society as a whole.²⁷⁴ Accordingly, it held that the Nigerian Government violated the right to life of the Ogoni community.²⁷⁵ This implies that Kenya could have been held liable for infringing the right to life of the Ogiek if the Petitioners could have provided more evidence to that effect.

4. Overall Effects of the Legal Framework on the Substantive Rights of IDPs

The IDP Act is the overarching legislation dealing with IDP rights. Research conducted by RCK indicates that the IDP Act is occasionally used to address IDP rights.²⁷⁶ Out of the several cases reported between 2013-2018, only one mentioned the IDP Act but did not address substantive IDP rights matters.²⁷⁷ The Petitioners, in that case, alleged that the Respondent infringed their rights to freedom from discrimination under the CoK and IDP Act by closing the IDP camps where they stayed as a result of the PEV.²⁷⁸ They did not produce any evidence to prove that they were victims of PEV, and thus their petition was dismissed with costs to the Respondent.²⁷⁹

The RCK study further points out that other case laws involved ID, but the Petitioners did not base their arguments on the IDP Act.²⁸⁰ This is, for example in a matter where a group of IDPs claimed to have been discriminated against by not being included in the Kshs. 6 billion compensation packages.²⁸¹ The Court agreed with their petition and compelled the Government to profile and comprise them in the compensation package.²⁸² In the *Peter O Nyakundi and 68 Others'* case, the Petitioners cited the provisions of the GLP and GPID in alleging that they had been displaced following the 2007/2008 PEV.²⁸³ They alleged to have been discriminated against by the Government when it compensated others in the same camp where they stayed in.²⁸⁴ The Court allowed the petition compelling the Government to register them as such and compensate them as well.²⁸⁵

The IDP Act creates the NCCC, which is the focal body responsible for liaising with relevant Government departments, the UN, non-State actors, the Secretariat of the ICGLR, and, where appropriate, the African Union (AU).²⁸⁶ This means that when an ID situation occurs in the country, NCCC is the first body meant to take charge in ensuring an effective response to ID in coordination with the already mentioned actors. It is responsible for ensuring that the substantive rights of IDPs discussed in section B are respected, protected, and fulfilled. Nevertheless, RCK's study concludes that the NCCC is currently not operational.²⁸⁷ It was

²⁷³ Ibid. para 63.

²⁷⁴ Ibid. para 67.

²⁷⁵ Ibid.

²⁷⁶ RCK (n 40).

²⁷⁷ Ibid.

²⁷⁸ *Patron Internally Displaced Persons & Kisii Steering Committee v Cabinet Secretary Ministry of Devolution and Planning of National Government* [2016] Electronic Kenya Law Reports Para 1.

²⁷⁹ Ibid Para 51-58.

²⁸⁰ RCK (n 40).

²⁸¹ *Internally Displaced Persons Initiative Support v Permanent Secretary Ministry of Devolution and Planning* [2017] Electronic Kenya Law Reports.

²⁸² Ibid.

²⁸³ *Peter O Nyakundi and 68 Others' v Principal Secretary State Department of Planning, Ministry of Devolution and Planning and another* (hereinafter *Peter O Nyakundi and 68 Others' case*) [2016] Electronic Kenya Law Reports.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ IDP Act (n 32) Section 13.

²⁸⁷ RCK (n 40).

adequately constituted in 2014, two years after the enactment of the IDP Act; it was disbanded after the three years period of appointment of committee members.²⁸⁸

In an interview session conducted in August 2022 with one of the then NCCC appointed committee members representing the IDPs, Guchu notes that the NCCC started its work in April 2015 by vetting IDPs who then lived in camps across the country.²⁸⁹ This was accomplished in mid-2016 and was done with the aim of compensating them and shutting down the camps.²⁹⁰ The next task was to compensate the integrated IDPs, who were 193,000, according to the Government records.²⁹¹ 30,000 households were never paid because the Government recalled the money from the expending banks.²⁹² More disheartening is that years after, IDPs who were allocated alternative pieces of land are still living in hovels lacking the basic needs for their survival.²⁹³

The lack of a central Government body dealing with IDP rights jeopardizes IDPs' substantive rights. The IDP Act mandates the NCCC to restructure the HF.²⁹⁴ The uses of the fund go into fulfilling the substantive rights of IDPs. They include; meeting the capital and expenditure involved in the provision of durable solutions such as replenishing their basic household effects, empowering them to restart their basic livelihood, rebuilding their destroyed basic housing, and rehabilitation of community institutions.²⁹⁵ However, these functions cannot be fully implemented because there is barely a budget line for IDP rights issues in the national budget.²⁹⁶

RCK's research observes that even though there is evidence that funds have been allocated to deal with IDP issues, there is no publicly available evidence of how they were used and whether they were utilized according to the intended purpose.²⁹⁷ Further, budget speeches by relevant Government officers associate the allocation of funds to IDP resettlement other than PPA as envisaged under the IDP Act, GLP, and the GPID.²⁹⁸ Currently, the directorate of special programmes under the Ministry of Devolution offers relief assistance to disaster and drought-affected persons in the country.²⁹⁹ Nevertheless, it focuses majorly on drought-affected persons in the ASAL by providing food and non-food assistance monthly.³⁰⁰ While this is creditable, it locks out IDPs displaced by other causes like floods and conflicts.

Moreso, noting the pivotal role of the non-state actors in ID response, Juma hypothesizes that the IDP Act does not clearly state the methodologies and strategies for involving them in ensuring that the substantive rights of IDPs are adhered to by the Government.³⁰¹ It also falls short of the rights of non-state actors involved

²⁸⁸ Ibid.

²⁸⁹ Betty Guchu, 'Kenya's Internally Displaced: An Enduring Colonial Legacy' (The Elephant, 5 August 2022) <www.theelephant.info/features/2022/08/05/kenyas-internally-displaced-an-enduring-colonial-legacy/?print=pdf> accessed 25th April 2023.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ IDP Act (n 32) Section 14.

²⁹⁵ Ibid Section 15.

²⁹⁶ Juma (n 45) 57.

²⁹⁷ RCK (n 40).

²⁹⁸ Ibid.

²⁹⁹ Republic of Kenya, 'Special Programmes' (Ministry of Devolution) <www.devolution.go.ke/special-programmes/#:~:text=The%20section%20provides%20relief%20assistance,with%20relief%20food%20assistance%20monthly.> accessed 25th April 2023.

³⁰⁰ Ibid.

³⁰¹ Juma (n 45) 56.

in rendering PPA to IDPs during and after ID.³⁰² These rights can be said to be in place because they are well stated in the GPID. However, it will be useful to have them together with the guidelines on the modes of interaction between the Government and the non-state actors under the IDP Act regulations.

Another glaring challenge is the lack of an up-to-date gazetted register of IDPs in Kenya.³⁰³ This negatively affects the planning and management of IDP protection systems.³⁰⁴ The NCCC is responsible for ensuring the registration of all IDPs in the country to maintain their national database.³⁰⁵ The IDP Act further specifies that such registration must begin and finalize within 30 days of ID and must only be for the purposes of determining, identification, profile, conditions, and numbers of IDPs for PPA pursuant to Article 3(4) of the GLP.³⁰⁶ The said register is not publicly available. Rasmusson argues that Governments may be reluctant to collect IDP data due to political reasons to acknowledge the actual scale of ID.³⁰⁷ In *Peter O Nyakundi and 68 others'* case, the Court observed that the Government did not provide the register of IDPs despite being given sufficient time to do so.³⁰⁸ The Court gave the Petitioners the benefit of doubt, noting that it was difficult to determine whether they were legitimate IDPs.³⁰⁹

5. Conclusion

The ACHPR's judgment and its subsequent ruling on reparations were hailed for being unprecedented because of the strong signal they sent for the protection of land and cultural rights for the Ogiek and other indigenous communities worldwide.³¹⁰ Kenya was ordered to pay the Ogiek Kshs. 57,850,000 and 100,000,000 for material and moral damages, respectively on 23rd June 2022.³¹¹ Moreover, Kenya is supposed to publicly report on the implementation of the judgment.³¹² This judgment underscores the relevance of the need for States to uphold the substantive rights of IDPs before, during, and after ID. Kenya's efforts toward the implementation of these rights are laudable. However, the relevant laws need to be followed to the latter for a conclusion that Kenya is fulfilling IDP rights to be made. The lack of a functional NCCC can be attributed to these challenges. As a result, this thesis seeks to offer Kenya various options to resolve the stalemate.

D. NEW HOPES FOR KENYA UPON RATIFYING THE KAMPALA CONVENTION

1. Introduction

The Kampala Convention is celebrated because it has shaped the regional understanding of ID, evident through scholarly works and policy frameworks of various African Governments.³¹³ It adequately responds to

³⁰² Ibid.

³⁰³ RCK (n 40).

³⁰⁴ Juma (n 45) 60.

³⁰⁵ IDP Act (n 32) sec 13.

³⁰⁶ Ibid.

³⁰⁷ Elisabeth Rasmusson, 'Improving IDP data: Prerequisite for more effective protection' (Forced Migration Review Online) <www.fmreview.org/brookings/rasmusson> accessed 25th April 2023.

³⁰⁸ *Peter O Nyakundi and 68 Others'* case (n 283).

³⁰⁹ Ibid.

³¹⁰ United Nations Office of the High Commissioner for Human Rights, 'Kenya: UN expert hails historic ruling awarding reparations to Ogiek indigenous people' (Press releases, Special Procedures, 18th July 2022) <www.ohchr.org/en/press-releases/2022/07/kenya-un-expert-hails-historic-ruling-awarding-reparations-ogiek-indigenous> accessed 25th April 2023.

³¹¹ Ogieks case; Reparations.

³¹² Ibid.

³¹³ Romola Adeola, 'The Kampala Convention and the Protection of Persons Internally Displaced by Harmful Practices in Africa' (2021) 65 *Journal of African Law* 101, 102.

the widely held opinion that IDPs have been the most neglected vulnerable group in the international law's protection regime.³¹⁴ It also presents a unique legally binding framework that considers African specialties in ID while being mindful of the importance of the GPID.³¹⁵ Noteworthy, Kenya's IDP Act is not new to some of the provisions of the Kampala Convention (for example, the definition of IDPs) because it mirrors the GPID and the GLP provisions, which are the foundational instruments for IDPs.

Besides converting the GPID into binding provisions, the Kampala Convention portrays a legal regime that governs all aspects and types of ID, as will be discussed below.³¹⁶ The first part of this section will examine the salient features of the Kampala Convention that will act as incentives for Kenya to ratify it. The second part will respond to the challenges faced by Kenya in implementing its legal framework, as discussed in section three, drawing from the best practices of countries that have already signed and ratified it.

2. Salient Features

(a) States' obligations and the role of the AU

It reiterates the member States' primary duty to respect, protect and fulfil the human rights of IDPs without discrimination.³¹⁷ It stipulates the general responsibilities of the States as well as specific obligations regarding various phases of displacement. To start with the former, States are mandated to ensure assistance to IDPs by meeting their basic needs (food and housing being among them), facilitating accountability of non-state actors engaged in the exploitation of natural resources leading to ID, and ensuring respect for IHL and International Criminal Law in the protection and assistance of IDPs, as well as promote self-reliance and sustainable livelihoods among IDPs.³¹⁸ States are also mandated to incorporate the provisions of the Kampala Convention into their domestic law or amend (for example, Kenya) their existing law on IDPs, designate a body responsible for coordinating IDP activities, and set aside funds for the protection and assistance of IDPs without prejudice to receiving international support and incorporate its principles into peace negotiations to find sustainable solutions to ID.³¹⁹

Regarding the prevention of ID, States must implement disaster risk reduction strategies and provide immediate protection and assistance to IDPs'.³²⁰ They also must protect everyone against arbitrary displacement, which may be a result of policies of racial discrimination or similar practices, armed conflicts, warfare, violations of human rights, harmful practices, or forced evacuations as a result of disasters, among others.³²¹ During displacement, they must protect the IDPs regardless of the cause of ID by refraining from and preventing various acts, including discrimination against such persons to enjoy their rights because they are IDPs, arbitrary killing, and starvation.³²² This affirms the importance of the three substantive rights of IDPs discussed in the previous sections. Notable, States must create and maintain an up-to-date register of IDPs and replace any lost documents during displacement.³²³

³¹⁴ Mehari Taddele Maru, *The Kampala Convention and its contribution to International Law: Legal Analyses and Interpretations of the African Union Convention for the Protection and Assistance of Internally Displaced Persons* (Eleven International Publishing 2014) 2.

³¹⁵ Kampala Convention (n 2) Preamble.

³¹⁶ Maru (n 314) 7.

³¹⁷ Kampala Convention (n 2) Preamble para 11.

³¹⁸ *Ibid* Art III (1).

³¹⁹ *Ibid* Art III (2).

³²⁰ *Ibid* Art IV.

³²¹ *Ibid*.

³²² *Ibid* Art IX.

³²³ *Ibid* XIII.

State Parties have been assigned a pivotal role to the AU.³²⁴ AU's roles reflect it as a substitute for State action in that it can intervene in a member State according to the decision of the Assembly in severe circumstances of war crimes, genocide, and crimes against humanity.³²⁵ It is a coordination mechanism because it supports the efforts of the State parties to protect and assist IDPs by coordinating the mobilization of resources for the PPA to IDPs, collaborating with the African States and the IHOs, CSO, and other relevant actors concerning the protection and assistance of IDPs.³²⁶ Conference of Parties (CoP) convened regularly and facilitated by the AU shall monitor and review the execution of the Convention.³²⁷ While presenting their reports under article 62 of the Banjul Charter and under the African Peer Review Mechanism, State Parties shall stipulate necessary actions taken to effect the Kampala Convention.³²⁸

Tesfaye criticizes its enforcement mechanism for not indicating the specific roles of the CoP.³²⁹ It fails to clarify what 'regularly' means, and the designation of a political body (CoP) as a treaty monitoring body will compromise the impartiality of its members, which is crucial to secure full observance of IDP rights guaranteed under the Kampala Convention.³³⁰ I contend that this anomaly can be cured by member States sharing the same vision of positively dealing with ID in Africa and having the political will to implement the provisions of the Kampala Convention. The CoP is also expected to develop rules and procedures for its operations to address how frequently they meet, among other aspects not indicated in the Kampala Convention. Remarkably, the first CoP was convened for the first time in Zimbabwe in 2017, where the Harare Plan for implementing Kampala Convention was adopted.³³¹

(b) Causes of arbitrary displacement

Other than ID caused by discriminatory policies, conflicts, large-scale development projects, disasters, and collective punishment as set out in the GPID, the Kampala Convention goes further to include violations of human rights, harmful practices, and violations of IHL in situations of armed conflicts.³³² It defines harmful practices as all attitudes that negatively affect the fundamental rights of persons, including but not limited to life, health, and dignity.³³³ This protects IDPs from any behaviours that cause infringe on their substantive right to life, land, and food. These practices (for example, Female Genital Mutilation (FGM)) are predominant forms of violence, manifest in various ways across many societies in Kenya, and have longstanding effects.³³⁴ According to United Nations International Children's Emergency Fund, 14 of the 23 counties affected by drought are FGM hotspots leaving girls vulnerable while others move to other places for safety.³³⁵

When it comes to DID, which is prevalent in Kenya, member States are required to as much as possible prevent ID caused by projects carried out by both public and private actors.³³⁶ It should be noted that neither

³²⁴ Ibid VIII.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid Art XIV.

³²⁸ Ibid.

³²⁹ Amare Tesfaye, 'Internally Displaced Persons in Africa: a Glimpse View of the Protections Accorded in the Kampala Convention' (2017) 9 *Jimma University Journal of Law* 1, 20.

³³⁰ Ibid.

³³¹ Chaloka Beyani, 'A View from Inside the Kitchen of the Kampala Convention: the modernization of the International Legal Regime for the protection of internally displaced persons' *LSE Law, Society and Economy Working Papers 17/2020* p.15.

³³² Guiding Principles (n 14) Principle 6 and Kampala Convention (n 1) Art IV respectively.

³³³ Kampala Convention (n 2) Art 1.

³³⁴ Adeola (n 313)103.

³³⁵ UNICEF, 'Child Marriage on the rise in the horn of Africa as drought crisis intensifies' (Press Release 8th June 2022) <www.unicef.org/press-releases/child-marriage-rise-horn-africa-drought-crisis-intensifies> accessed 25th April 2023.

³³⁶ Kampala Convention (n 2) Part X.

the Kampala Convention nor the Model Law for its implementation defines the meaning of ‘as much as possible.’³³⁷ Nevertheless, it is contended that the said phrase implies that SP must ensure that DID follows the due process of the law.³³⁸

State parties must ensure that these actors explore all viable alternatives with complete information and in consultation with the persons likely to be displaced.³³⁹ This must be done by conducting an ESIA of the proposed development before its commencement.³⁴⁰ Even though an ESIA is crucial in ensuring the viability of projects, the Human Rights Impact Assessment is preferred for being all-inclusive comprising of a feasibility appraisal, general impacts on human rights, and ESIA.³⁴¹ The Member States must create an adequate legal framework for just and fair compensation and other types of reparation for damages occasioned by displacement based on the global standards.³⁴² To ensure compliance, the Kampala Convention stipulates that they must be held liable if they do not protect and assist IDPs in the event of disasters.³⁴³

Notably, the Kampala Convention does not include DID directly as a cause of arbitrary displacement compared to the GPID, which does.³⁴⁴ Maru further observes that it does not include the conditions of ‘compelling and overriding public interests’; it only mentions this requirement regarding projects carried out on lands where communities have special attachment and dependence.³⁴⁵ It also does not contain judicial review provisions for all DID-related decisions.³⁴⁶ These constitute significant flaws that weaken the protection from arbitrary displacement due to development projects.³⁴⁷ The GPID cures these defects by providing procedural conditions for all DID decisions, review by judicial bodies, and provision of effective remedies to all persons affected by such decisions.³⁴⁸

(c) *Humanitarian assistance and protection*

States have the key duty to provide protection and humanitarian assistance to IDPs.³⁴⁹ This reassures States that their sovereignty is valued.³⁵⁰ Giustiniani describes article 5 of the Kampala Convention as unprecedented in the IHRL treaty because the contentious issue of humanitarian access can only be found in the law of armed conflict.³⁵¹ States have the responsibility to organize humanitarian relief action.³⁵² They do this by allowing speedy and unconstrained passage of all relief consignments, equipment, and personnel to IDPs, enabling and facilitating the role of non-State actors, and prescribing the technical procedures for the same.³⁵³ Unlike the GPID, the Kampala Convention obliges States to extend assistance to the host

³³⁷ Romola Adeola and Frans Viljoen, ‘Climate Change, Development Projects and Internal Displacement in Africa’ (2018) 62 *Journal of African Law* 333, 341.

³³⁸ *Ibid.*

³³⁹ Kampala Convention (n 2) Art. X.

³⁴⁰ *Ibid.*

³⁴¹ Maru (n 314) 180.

³⁴² *Ibid* Art XII.

³⁴³ *Ibid.*

³⁴⁴ Maru (n 314) 180.

³⁴⁵ *Ibid* 182.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ Guiding Principles (n 14) Principle 7(3).

³⁴⁹ Kampala Convention (n 2) Art V.

³⁵⁰ Dieng (n 34) 279.

³⁵¹ Flavia Zorzi Giustiniani, ‘New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa’ (2011) 39 *Denver Journal of International Law and Policy* 347, 361.

³⁵² Kampala Convention (n 2) Art V.

³⁵³ *Ibid.*

communities.³⁵⁴ This recognizes that not all IDPs flee to stay in camps.³⁵⁵ Moreso, States must maintain civilian and humanitarian character in places where IDPs are accommodated.³⁵⁶ This is unlike the GPID, which merely stipulates that acts of violence against IDPs that do not partake in hostilities are proscribed.³⁵⁷

(d) Responsibilities of armed groups

By clearly setting out the obligations of armed groups in situations of armed conflict, the Kampala Convention recognizes domestic conflicts as one of the root causes of ID in Africa, Kenya not being an exception.³⁵⁸ This is ground-breaking because parties to internal armed conflicts usually are reserves of international obligations under IHL.³⁵⁹ Members of armed groups are prohibited from denying IDPs the right to live in reasonable conditions of dignity, food, sanitation, and security, impeding humanitarian assistance to IDPs, carrying out arbitrary displacement, as well as violating civilian and humanitarian character in places where IDPs are sheltered.³⁶⁰ To guarantee accountability, the members of armed groups are criminally responsible for violating any IDP rights under international and national law.³⁶¹

(e) Durable solutions

Other than reaffirming the conditions of durable solutions outlined in the GPID, the GLP, and the IDP Act, it sets out the modalities of such return or relocation.³⁶² States must respect and ensure the right of IDPs to seek protection in another part of the country and to be shielded against aggressive return/ resettlement where their life, safety, liberty, and health would be in danger.³⁶³ This guarantees IDPs' right to life. Importantly, it further identifies duty bearers who should facilitate sustainable DS to IDPs, unlike the GPID, which generally places this mandate on competent authorities.³⁶⁴ Member States must seek lasting solutions to the menace of ID in collaboration with the AU and other relevant actors.³⁶⁵ Mindful of IDPs' property rights, States also must establish mechanisms with simplified procedures to resolve disputes relating to the property of IDPs and take all relevant measures to restore lands of communities with an exceptional dependency upon their return, reintegration, or relocation.³⁶⁶

3. Overcoming the Challenges Affecting the Implementation of the Legal Framework for the Substantive Rights of IDPs in Kenya

(a) Ratification of the Kampala Convention

Kenya will demonstrate its commitment to preventing and addressing ID by ratifying the Kampala Convention.³⁶⁷ It will also ensure the domestication of the essential aspects of the Kampala Convention,

³⁵⁴ Ibid.

³⁵⁵ Giustiniani (n 349) 365.

³⁵⁶ Kampala Convention (n 2) Art IX.

³⁵⁷ Guiding Principles (n 14) Principle 10.

³⁵⁸ Giustiniani (n 351) 358.

³⁵⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609.

³⁶⁰ Kampala Convention (n 2) Art VII.

³⁶¹ Ibid.

³⁶² Giustiniani (n 351) 386.

³⁶³ Kampala Convention (n 2) Art 9 (2) (e).

³⁶⁴ Dieng (n 34) 278.

³⁶⁵ Kampala Convention (n 2) Art XI.

³⁶⁶ Ibid.

³⁶⁷ ICRC (n 8) 389.

which are not in the IDP Act, for example, the responsibilities of armed groups as explained above.³⁶⁸ Most importantly, the compliance mechanism under the Kampala Convention will ensure Kenya improves its IDP frameworks.³⁶⁹

(b) Operationalization of the NCCC

For IDPs' substantive rights to be guaranteed, the IDP Act must be functional through its administrative units, the major being the NCCC. As elaborated in the previous chapters, NCCC is a crucial body mandated to handle IDP issues.³⁷⁰ The President of Kenya has the mandate to appoint members of NCCC.³⁷¹ At the basic level, without an IDP register (which NCCC is obligated to come up with and maintain), there will be no reliable data on vulnerable individuals, thereby becoming a stumbling block to the PPA strategies.

Rasmusson discusses elementary principles that must govern IDP data collection exercises.³⁷² They are inclusiveness; it must include all IDPs, whether in camps, staying with host families or other settlements, and protection; risk analysis must be carried out at every stage of the data collection process.³⁷³ This is because it may not be in their best interest to be identified.³⁷⁴ There must be a collaboration of all the relevant stakeholders, including IDP themselves, and measures must be implemented to ensure that the collected data is regularly updated.³⁷⁵ To this extent, the newly constituted NCCC should spearhead the registration of all IDPs in Kenya, being mindful of these principles.

After that, the members of NCCC should sensitize the national treasury to allocate funds (through the national budget) for awareness raising and capacity building on the PPA of IDPs and affected communities.³⁷⁶ Together with other Government offices, CSOs and IHO, the NCCC should design and implement an annual awareness-raising plan that covers different aspects of the response to ID.³⁷⁷ For these capacity-building activities to be meaningful, they must involve the IDPs and host communities.³⁷⁸ Information campaigns should also be on the importance of the Kampala Convention in dealing with the IDP issues even though Kenya is not its State party.³⁷⁹ Research shows that increased public knowledge of the Kampala Convention could help expedite the process of its ratification and implementation.³⁸⁰

The newly constituted NCCC should undertake the actual restructuring of the HF as outlined in the IDP Act.³⁸¹ An oversight mechanism should be set out to monitor and evaluate the use of the said fund.³⁸² It must develop guidelines for coordination (setting out specific roles) between the county and national Government regarding the PPA to IDPs and host communities.³⁸³ This is because the IDP Act places responsibility for its administrative execution on both levels of Government.³⁸⁴

³⁶⁸ Juma (n 45) 64.

³⁶⁹ Ibid.

³⁷⁰ IDP Act (n 32) Sec 12.

³⁷¹ Ibid.

³⁷² Rasmusson (n 307).

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ RCK (n 40).

³⁷⁷ IDMC (n 33).

³⁷⁸ ICRC (n 8) 393.

³⁷⁹ Ibid 392.

³⁸⁰ Ibid 393.

³⁸¹ IDP Act (n 32) Sec 14.

³⁸² IDMC (n 33).

³⁸³ Ibid.

³⁸⁴ IDP Act (n 32) Sec 11.

NCCC must establish channels and procedures between the Government, CSOs, and IHOs.³⁸⁵ These actors play a crucial role in PPA to IDPs where national capacities or willingness are lacking.³⁸⁶ Kenya should emulate Somalia's Humanitarian Response Plan (HRP) of 2019 is worth emulating.³⁸⁷ It manages the activities of human rights clusters.³⁸⁸ It focuses on humanitarianism and depicts avenues for streamlining and facilitating durable solutions into the humanitarian realm.³⁸⁹ Most importantly, all projects within HRP are assessed to determine whether and how a nexus between resilience and durable solutions can be found.³⁹⁰

(c) *Harmonization of laws*

To create a coherent institutional framework, there is a need to harmonize all related legislations to establish collaborative institutions.³⁹¹ In safeguarding IDPs' right to land, there is a need to ensure that the current frameworks and policies related to forced evictions (for example, the land and mining laws) align with the relevant international standards.³⁹² To avoid institutional fragmentation among NCCC, NADIMA, and NDRMA, which are all responsible for monitoring disaster risk, there is a need to assign this crucial duty to only one body, for example, the proposed NDRMA.³⁹³ This will ensure a transparent chain of command and accountability. For instance, Zambia's general implementation and coordination of all disaster management activities are done through the Disaster Management and Mitigation Unit (DMMU).³⁹⁴

Like Zambia, Kenya must develop standard comprehensive guidelines for the compensation and resettlement of IDPs that stipulate the duty bearers at both county and national levels for accountability.³⁹⁵ Adeola notes that the provisions of these guidelines draw from the Kampala Convention relating to the PPA to IDPs.³⁹⁶ Notably, Zambia's guidelines categorically outline coordination mechanisms for their implementation.³⁹⁷ It sets out the specific authority (unlike under the IDP Act, which generalizes the Government institution) responsible for all activities relating to IDPs and the relevant stakeholders.³⁹⁸

(d) *Amendment and adoption of the draft IDP policy*

There is an urgent need to adopt an amended version of the IDP Policy, which has remained a draft since August 2011.³⁹⁹ Interestingly, the IDP Policy also references the Kampala Convention and incorporates its root causes of ID.⁴⁰⁰ It contains elaborate provisions on preventing ID by setting out the general principles

³⁸⁵ IDMC (n 33).

³⁸⁶ Nina Schrepfer, 'Addressing International Displacement through National Laws and Policies: A Plea for a Promising Means of Protection' (2012) 24 *International Journal of Refugee Law* 667, 675.

³⁸⁷ Charlotte Mohn, 'Facilitating Durable Solutions in Somalia-Experiences from Midnimo-I and the Application of Human Security' (2020) *United Nations Human Settlement Programmes Working Paper* 15.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ IDMC and NRC (n 132) 42.

³⁹² *Ibid* 109.

³⁹³ *Ibid* 42.

³⁹⁴ Office of the Vice President, 'Disaster Management and Mitigation Unit < https://www.ovp.gov.zm/?page_id=1084> accessed 25th April 2023.

³⁹⁵ Zambia, 'Guidelines for the Compensation and Resettlement of IDPs' (2013).

³⁹⁶ Ademola Adeola, *Compliance with International Human Rights Law in Africa: Essays in honor of Frans Viljoen* (Oxford University Press 2022) 110.

³⁹⁷ Zambia (n 393) Part 7.

³⁹⁸ *Ibid.*

³⁹⁹ Adeola (n 396) 110.

⁴⁰⁰ *Ibid.*

guiding the prevention of ID and mechanisms of achieving the same.⁴⁰¹ It provides disaster preparedness measures which include but are not limited to designating roles for response at national and county levels, procuring and storing in areas at risk goods necessary for survival, including food, water, and shelter.⁴⁰²

Other measures include preparing the requisite logistics to transport humanitarian goods and upscaling services to probable host communities.⁴⁰³ These measures go into the realization of IDPs' substantive rights to life and food. Therefore, the disaster management office must be adequately funded for these measures to be implemented. For example, Zambia's DMMU (accountable to the office of the vice president) receives funds annually.⁴⁰⁴

Protection from arbitrary displacement is also provided for under the draft IDP Policy.⁴⁰⁵ It contains all the causes of arbitrary displacement under the Kampala Convention, save for those instigated by harmful practices and human rights violations.⁴⁰⁶ It advocates for criminal, civil, and administrative accountability of persons responsible for actions of arbitrary displacement.⁴⁰⁷ The investigation, prosecution, and punishment of such crimes will be carried out under the Penal Code.⁴⁰⁸ Markedly, the IDP Act criminalizes such acts, but there are no such offences under Kenya's Penal Code.⁴⁰⁹ This individual responsibility is one of the general obligations of State Parties as espoused under the Kampala Convention.⁴¹⁰ To this extent, Rwanda's penal code includes offences and penalties involving arbitrary displacement.⁴¹¹

The IDP Policy further explains evacuation conditions and procedures similar to those under GPID for development projects.⁴¹² It emphasizes that evacuations be carried out in a manner that is consistent with human rights standards, including; ensuring that evacuees are protected from discrimination during the evacuation, at the evacuation site and that the immediate needs of evacuees for security, housing, food, water, and healthcare are promptly addressed at the evacuation site.⁴¹³ It also references the UN Basic Principles and Guidelines on DID and the World Bank's Operational Policy on Involuntary Resettlement.⁴¹⁴ It insists on the Government ensuring that just and fair compensation for any economically assessable damage commensurate to the gravity of the violation, either in cash or kind.⁴¹⁵

The IDP policy's durable solutions framework seeks to incorporate a long-term strategy of implementation and adherence to the general obligations of State parties under article III of the Kampala Convention.⁴¹⁶ It dedicates itself to addressing the need for institutional, legal, and policy reforms to address the root causes

⁴⁰¹ IDP Policy (n 80) Chapter 4.

⁴⁰² Ibid Chapter 6.

⁴⁰³ Ibid.

⁴⁰⁴ ICRC (n 8) 397.

⁴⁰⁵ IDP Policy (n 80) Chapter 5.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ IDP Act (n 32) Sec 3 and 24.

⁴¹⁰ Kampala Convention (n 2) Art VII.

⁴¹¹ ICRC (n 8) 385.

⁴¹² IDP Policy (n 80) para 55.

⁴¹³ Ibid Para 58.

⁴¹⁴ Ibid Para 58.

⁴¹⁵ Ibid Para 65.

⁴¹⁶ Dan Kuwali, 'From Durable Solutions to Holistic Solutions: Prevention of Displacement in Africa' (2013) 6 *Africa Journal of Legal Studies* 265, 277.

of ID to attain sustainable, durable solutions.⁴¹⁷ To prevent drought in Kenya's ASALS as a cause of ID, there is the need to adopt longer-term adaptation strategies that are climate change adaptive.⁴¹⁸

Such strategies include herd management through commercial destocking to enable the pastoralist to reduce the number of livestock before they succumb to drought while preserving stronger animals as assets to continue producing milk which is a significant source of food security.⁴¹⁹ Strengthening the community-based water management supply system is also crucial in preventing the distressing effects of drought.⁴²⁰ This can be done by drilling and maintaining more contingency boreholes to facilitate grazing during drought.⁴²¹ Developing supplementary livestock feeding programs where the Government supplies industrial by-products such as oil-seed cakes to communities and encourage them to grow fodder plants for their livestock will alleviate food insecurity.⁴²²

Other than stipulating the conditions for durable solutions, which are also evident in the IDP Act (they include: long-term safety and security, enjoyment of an adequate standard of living without discrimination, and access to effective mechanisms that restore housing, land, and property), the IDP policy identifies itself with the Inter-Agency Standing Committee (IASC) framework on IDPs' durable solutions.⁴²³

The Policy recognizes that for a right-based process to support durable solutions, the Government must work with the relevant actors to ensure that IDPs are well positioned to make an informed and voluntary decision on the durable solutions they would like to follow.⁴²⁴ These will be done through campaigns and go-and-see visits.⁴²⁵ IDPs must participate in the planning and management of durable solutions to ensure that their rights are considered in the recovery and development strategies.⁴²⁶ They must also have access to all actors supporting the achievement of durable solutions and effective mechanisms that monitor the whole process on the ground.⁴²⁷

Somalia's projects and activities for durable solutions are worth emulating.⁴²⁸ To begin with, it signed and ratified the Kampala Convention in 2019.⁴²⁹ Under the Government's leadership and technical support of IHOs, it carried out IDPs' data collection exercise, which helped to account for the exact number of IDPs, enabled them to comprehend their vulnerabilities, and formulate coping mechanisms to formulate their durable solutions.⁴³⁰ It developed the Drought Impact and Needs Assessment with humanitarian partners to quantify drought's physical, economic, and human impacts on the affected population.⁴³¹ It has developed the Somalia Aid Information System, a platform where data on development and humanitarian aid is shared to improve transparency.⁴³²

⁴¹⁷ IDP Policy (n 80) Para 177.

⁴¹⁸ Ndiritu and Muricho (n 180) 24.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ IDP Policy (n 80) Chapter 9.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Samundra Acharya, 'Durable Solutions for Internally Displaced Persons in Sudan and Somalia' (2021) *Researching Internal Displacement Working Paper No.7*, p.15.

⁴²⁹ Ibid 13.

⁴³⁰ Ibid 15.

⁴³¹ Ibid.

⁴³² Ibid.

In partnership with NGOs, Somalia has implemented various area-based projects such as *'Midnimo,'* which means *'unity,'* which focuses on community empowerment and urban resilience related to evictions and livelihoods.⁴³³ Adopting similar measures and projects will ensure that Kenya has a centralized framework for data collection, early engagement with all the relevant stakeholders, define common indicators that are customized to areas of intervention and avoid duplication of structures responsible for addressing IDP prevention and assistances. Ultimately, this will help identify the root causes of ID and build resilience.

4. Conclusion

The Kampala Convention remains a ground-breaking regional treaty for the PPA for IDPs and for attaining their durable solution.⁴³⁴ Its multifaceted obligations depict that the ID problem is not only the responsibility of SP but also non-state actors.⁴³⁵ If well implemented, its accountability mechanism will be instrumental in guaranteeing the PPA of IDPs in Africa. Ten years after entering into force, its domestication and execution have been pedestrian.⁴³⁶

The IDP Act is not a stranger to some of its provisions. Kenya has been praised by scholars worldwide for incorporating the GLP and GPID provisions into its laws.⁴³⁷ Nonetheless, the IDP Act and IDP Policy adoption and implementation has been indolent, thereby defeating their objectives. Due to the noticeable aspects of the Kampala Convention discussed above that are not present in the IDP Act and its policy Kenya's ratification of the Kampala Convention and its practical implementation will ensure that it is free from ID and that her IDP rights are upheld.

E. NEW HOPES FOR KENYA UPON RATIFYING THE KAMPALA CONVENTION

The consequences of the adverse effects of ID on IDPs' substantive right to life, property, and food cannot be overemphasized. Kenya's legal framework for these rights measures up to the international standards for IDP PPA. It reflects some of the provisions of the Kampala Convention even though it is not a member State. Translating these laws into practice has proven to be a tall order not only for Kenya but also for other African States which are still grappling with ID.⁴³⁸ It is evident that Kenya has taken considerable measures to address ID, but its best is not good enough. This can be attributed to the lack of political will and accountability structures to monitor compliance with these laws.⁴³⁹

IDPs end up bearing the costs of such inaction. This study demonstrates that Kenya is taking steps both forward and backward in implementing IDPs substantive rights. Amid the new cases of ID each year, the mentality that dealing with ID is a temporary act that stops at only compensating IDPs must be renounced. Kenya must fulfil all of its obligations prior to, during, and after ID. Properly constituting the NCCC must be the starting point for Kenya so as to guarantee IDP substantive rights. This is because of NCCC's critical role in the three phases of displacement. Kenya should strive to adopt a holistic approach to address the menace of ID through a three-tiered mechanism, namely; a short-term strategy to protect IDPs safety and security, a mid-term strategy that restores their dignity and adequate living conditions through sustainable durable

⁴³³ Ibid 16.

⁴³⁴ Beyani (n 331) 2.

⁴³⁵ Ibid 8.

⁴³⁶ Ibid.

⁴³⁷ ICRC (n 8) 384.

⁴³⁸ Beyani (n 331) 17.

⁴³⁹ HLP Report (n 9).

solution, and a long-term strategy that eradicates the root causes of ID and upholds respect for human rights and endorses good governance.⁴⁴⁰

The Kampala Convention offers this all-inclusive mechanism that Kenya should take advantage of by ratifying it, amending its IDP Act, revising and adopting its IDP Policy. Benchmarking with the member States of the Kampala Convention that experiences the exact causes of ID as Kenya is important in customizing Kenya's response to ID. Zambia, Rwanda and Somalia's approaches to protecting, respecting, and fulfilling IDPs' substantive rights are worth drawing inspiration from. Since ID is a matter of State sovereignty, the Government must be willing to live up to its responsibility to PPA to IDPs and affected communities as envisaged under the IDP Act. There must be proper accountability structures for the newly constituted NCCC in order to ensure its effectiveness, thereby guaranteeing IDPs' substantive rights.

⁴⁴⁰ Kuwali, (n 416) 265.