



EVALUATION OF THE IMPLEMENTATION OF THE IDP ACT IN KENYA

REFUGEE CONSORTIUM OF KENYA

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Acronyms

AG – Attorney General

DPP – Director of Public Prosecutions

eKLR – Electronic Kenya Law Reports

IDP – Internally Displaced Persons

KES – Kenya Shilling

KNCHR – Kenya National Commission on Human Rights

NCCC – National Consultative Coordination Committee

NCLR – National Council for Law Reporting

NLC – National Land Commission

NPC – National Peace Committee

PEV – Post-election violence

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A. Introduction

1. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 (hereinafter IDP Act) was enacted in December, 2012. It however became operational in 2013. During that period there has been new displacement which the Act ought to have addressed. However the conversation around the rights of displaced people in Kenya has revolved around internally displaced persons (IDPs) emanating from the 2007/08 post-election violence (PEV) as will be demonstrated in this report.
2. Therefore this evaluation will seek to determine whether the objectives of the Act have been met. The purpose of the evaluation is to give crucial understanding on implementation issues and give recommendations on law reforms where necessary. The report therefore investigates the steps that have been taken thus far to prevent internal displacement and protect and assist internally displaced persons.

B. Method

3. This report employs a mix of desk top review and engaging key informants. The desk top review looks into the budgetary laws, case law as well as policies and bills that have an effect on the implementation of the Act. The latter two include the Peace building and Conflict Management Policy and the Disaster Risk Management Bill, 2018.
4. Appropriation laws were reviewed in this report as part of the budgetary laws. Laws passed between 2013 and 2018 were analysed to ascertain the amount of funds that were assigned to the National Consultative Coordination Committee (NCCC). The review of the laws was supplemented by a review of budget statements issued by the Ministry of Finance that make up Kenya's national budget between the said years.
5. A case law review was also used for this report. The cases reviewed were those between 2013 and 2018. The year 2013 was used as a starting point as this was the year that the IDP Act came into force. The latter year was chosen as the most recent year as at the month of September. The cases reviewed were the once published by the National Council for Law Reporting (NCLR) that shares them on the Kenya Law Reports on line platform. Invariably this has limitations. The first is that it only focuses on cases that have been reported which are cases from the High Courts, Court of Appeal or the Supreme Court. Cases adjudicated by other lower courts did not form part of the cases reviewed. Moreover, it included cases that were uploaded to the portal. There is a possibility that there are cases that have been decided that were not uploaded to the portal.

6. Finally, the information collected from the sources cited above will be augmented by key informant interviews. Key informants were selected based on their knowledge of the workings of the NCCC. Their names were anonymised for this report for ethical reasons.

C. Findings

C.1 Administration

7. Section 12 of the IDP Act established the National Consultative Coordination Committee (NCCC). The body has at least 13 members made up of five Principal Secretaries, Attorney General (AG), Director of Public Prosecutions (DPP), two IDP representatives, two non-state and donor representatives and representatives of the Kenya National Commission on Human Rights (KNCHR) and National Land Commission (NLC). The Principal Secretaries are to be drawn from ministries in charge of internal security, justice and constitutional affairs, finance, internal displacement issues and lands.
8. In the current government set up, there is no ministry in charge of justice and constitutional affairs.¹ These matters are handled by the AG. Moreover, the ministry in charge of internal security and internal displacement are one and the same. These two functions are currently being handled by the Ministry of Interior and Coordination of National Government.²
9. The NCCC was properly constituted on 9th December, 2014. The Chairman of the NCCC was appointed by His Excellency the President Uhuru Kenyatta.³ That was done after the Cabinet Secretary in charge of devolution – where IDP issues were being handled at the time – gazetted members of the NCCC on 19th November, 2014.⁴ This latter gazette notice revoked an earlier one that was issued by the Cabinet Secretary. Gazette Notice number 6852⁵ was revoked as it conflicted with an earlier appointment of the NCCC chair by the President.
10. On 19th of February, 2014 the President appointed Dr. Aden Wachu as the chairperson of the NCCC.⁶ However the IDP Act requires that the chairperson be nominated from among the members from the mentioned government ministries, agencies and independent

¹ Government of Kenya, *Kenya Gazette Notice Number 4961A*, Vol.CXV No.61 published on 18th April, 2013, p.1

² Key Informant 2 interview, 19th September, 2018

³ Government of Kenya, *Kenya Gazette Notice Number 9015*, Vol.CXVI No.146 published on 11th December, 2014, p.3331

⁴ Government of Kenya, *Kenya Gazette Notice Number 8405*, Vol.CXVI No.139 published on 21st November, 2014, p.3156

⁵ Vol.CXVI No.118 p.26

⁶ Government of Kenya, *Kenya Gazette Notice Number 1361*, Vol.CXVI No.30 published on 28th February, 2014, p.545

commissions and those appointed by the Cabinet Secretary. On 19th September, 2014 the Cabinet Secretary appointed members to the NCCC. The names of the members did not include that of Dr. Wachu who had earlier been appointed by the President in February, 2014. This meant that the appointment of Dr. Wachu was not regular and offended section 12(3)(a) of the IDP Act. This anomaly was eventually corrected vide Gazette Notice Number 8405⁷ which appointed Dr. Wachu as one of the two non-state representatives. His appointment as the chairperson of the NCCC was gazetted afresh vide Gazette Notice Number 9015.⁸ This means that the NCCC was properly constituted in December when the fresh notice appointing Dr. Wachu was published.

11. Currently the NCCC is not functional. The initial three year term for members of the NCCC as gazetted in 2014 lapsed. There has not been another gazette notice. Despite the reappointment of Dr. Wachu as the chair of the NCCC,⁹ there is no gazette notice that appoints him as a member. Therefore his appointment runs afoul to the requirement that the chair be an existing member of the NCCC. Owing to this legal technicality – the appointment of a chairperson by the President who has not been gazetted as a member of the NCCC by the Cabinet Secretary – the NCCC is not legally operational.
12. Moreover, the secretariat that supported the work of the NCCC has also been disbanded.¹⁰ It is the duty of the accounting officer to provide the NCCC a secretariat¹¹ that would assist the committee with the day to day fulfilment of their obligations under the Act. This responsibility falls on the Principal Secretary in charge of Interior and Coordination of National Government. This is because the NCCC falls under that Ministry and the Act prescribes that the accounting officer ‘means the Principal Secretary in charge of the government department for the time being responsible for matters relating to internally displaced persons.’¹²
13. The reappointed chairman is operating without other members of the NCCC and without a secretariat. As previously mentioned, terms of the NCCC members appointed – including the current chairman – ended in November, 2017. These terms have not been renewed and therefore the NCCC is not operational. Further, members of the NCCC secretariat have

⁷ Ibid, note 4

⁸ Ibid, note 3

⁹ Government of Kenya, *Kenya Gazette Notice Number 2188*, Vol.CXIX No.29 published on 10th March, 2017, p.1004

¹⁰ Key Informant 2 interview, 19th September, 2018

¹¹ Section 12 (4), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012.

¹² Section 2, The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012.

been reassigned to other departments thereby leaving the secretariat with no staff.¹³ This means that the NCCC only exists on paper and is not operational. In light of new displacements in Kenya that has displaced more than 300,000¹⁴ thus far, the lack of a functional NCCC defeats the realization of the objectives of the IDP Act.

C.2 Funding

14. Funding for the prevention, protection and assistance of IDPs and affected communities is difficult to track. This is because the appropriation laws seldom breakdown the figures to the level an observer can directly link the amount to IDP support. The amounts provided in the laws is lumped together under a ministry. This ministry is Devolution and National Planning. However, IDP policy enforcement is not the only function of the said ministry. Other functions include National Youth Service administration, drought management, and statistical services among others. Therefore, it is difficult to know the exact figure that Parliament allocated to IDP matters. To counter this, the report correlated the amounts promised to be allocated to IDP issues by the Cabinet Secretary through his budget statements that precede the formulation of the appropriation laws.

15. Money allocated to IDP policy can be found under two distinct categories. In the 2013/14 financial year, the money was allocated under the ‘IDP Policy’ general administration.¹⁵ For the remainder of the financial years the amount was placed under the ‘Special Initiatives’ category. Table 1 below provides a summary of the amounts allocated to IDPs over the five year period.

| FY | Initial | | Supplementary | | Amount in Budget speech |
|---------|------------------------------|-------------|---------------------------|-------------|---------------------------|
| | Recurrent | Development | Recurrent | Development | |
| 2013/14 | 16,319,349,903 ¹⁶ | - | 962,664,107 ¹⁷ | - | 300,000,000 ¹⁸ |
| 2014/15 | - | - | - | - | 600,000,000 ¹⁹ |

¹³ Key informant 1 interview, 8th August, 2018

¹⁴ Internal Displacement Monitoring Centre (2018), Internal Displacement in 2018: Mid-year figures, Geneva: Switzerland p.2

¹⁵ See Vote No. R103, The Appropriation Bill, 2013 and Vote No. R103, The Supplementary Appropriation Act (I), 2014

¹⁶ Vote No. R103, The Appropriation Bill, 2013

¹⁷ Vote No. R103, The Supplementary Appropriation Act (I), 2014

¹⁸ Institute of Economic Affairs. (2013). *Budget2013/14: The Onset of the Devolved Government and the Hurdles Ahead*. Nairobi, Kenya accessed at <https://www.ieakenya.or.ke/downloads.php?page=Budget-Guide-2013-Very-Final.pdf> on 19th October, 2018

¹⁹ Henry Rotich, Budget Statement for the Fiscal Year 2014/15, delivered on 12th June, 2014 accessed at https://africacheck.org/wp-content/uploads/2018/08/budget_statement_for_the_fiscal_year-2014-2015-2.pdf on 19th October, 2018

| | | | | | |
|----------------|-----------------------------|-----------------------------|-----------------------------|-----|-----------------------------|
| 2015/16 | - | 3,064,586,000 ²⁰ | - | - | 2,200,000,000 ²¹ |
| 2016/17 | 697,197,686 ²² | - | 6,908,235,247 ²³ | - | 6,000,000,000 ²⁴ |
| 2017/18 | 1,158,276,929 ²⁵ | - | 3,427,930,872 ²⁶ | - | - ²⁷ |
| 2018/19 | 1,735,751,791 ²⁸ | - | N/A | N/A | - ²⁹ |

Table1: Amount of money allocated to IDP matters

16. The amounts indicated on the far right column of the table show those that were mentioned in the budget speeches made by the Treasury Cabinet Secretary. The amounts were restricted to the resettlement of IDPs from the PEV of 20007/08.³⁰ Despite the lack of disaggregated amounts for IDP issues, the amounts in the appropriation laws were larger than what was mentioned in the budget speeches. This, at least, provides circumstantial evidence that the amount promised was included in the amounts that the ministry concerned was allowed to spend by Parliament.

17. It is important to point out that despite allocations to the Special Initiative budget vote, there is no corresponding promise to allocate any money for IDP issues in 2017/18 and 2018/19 budgets. This may mean that the amounts that appear in the respective appropriation laws may be meant for other tasks within the Ministry of Devolution. Moreover, the NCCC was moved from the Ministry of Devolution to the Ministry of Interior and Coordination of National Government in 2018.³¹ There is no indication from the Appropriation Act, 2018 that there is any money allocated for IDP issues under the ministries vote.

18. Additionally, it is difficult to ascertain whether the money appropriated was used for the purpose for which it was intended. This is due to the fact that there is no publicly accessible

²⁰ Vote No. D1032, The Appropriation Act, 2015

²¹ Henry Rotich, Budget Statement for the Fiscal Year 2015/16, delivered on 11th June, 2015 accessed at <https://africacheck.org/wp-content/uploads/2018/08/BudgetStatement2015-2016Kenya.pdf> on 19th October, 2018

²² Vote No. R1033, The Appropriation Act, 2016

²³ Vote No. R1033, The Supplementary Appropriation Act, 2017 as read with Vote No. R1033, The Supplementary Appropriation Act (No.2), 2017

²⁴ Henry Rotich, Budget Statement for the Fiscal Year 2016/17, delivered on 8th June, 2016 accessed at http://www.treasury.go.ke/component/jdownloads/send/7-budget-statement/2-2016-budget-statement.html?option=com_jdownloads on 19th October, 2018

²⁵ Vote No. R1033, The Appropriation Act, 2017

²⁶ Vote No. R1033, The Supplementary Appropriation Act (No.3), 2017

²⁷ Henry Rotich, Budget Statement for the Fiscal Year 2017/18, delivered on 30th March, 2017 accessed at http://www.treasury.go.ke/component/jdownloads/send/175-budget-statement/518-budget-statement-2017-18.html?option=com_jdownloads on 19th October, 2018

²⁸ Vote No. R1032, The Appropriation Act, 2018

²⁹ Henry Rotich, Budget Statement for the Fiscal Year 2018/19, delivered on 14th June, 2018 accessed at <http://www.treasury.go.ke/component/jdownloads/send/198-2018-2019/883-budget-speech.html> on 19th October, 2018

³⁰ See budget statements for between 2013 and 2016 cited above

³¹ Key Informant 2 interview, 19th September, 2018

comprehensive report on the use of the funds for IDP assistance. In 2014 the President in his annual report to Parliament³² mentioned that the government had resettled 8,282 households that had yet to be resettled.³³ These IDPs were among those that had been displaced during the PEV in 2007/08 and were given Kes.400,000 as part of the resettlement package. This is the only time that the President's annual report mentions the issue of IDPs. In the absence of any other document to verify how many people were assisted, there is little evidence to make a conclusion on the effectiveness of the government's response to internal displacement in Kenya.

19. Another glaring gap is the lack of a gazetted register for IDPs. Section 13 (d) part (ii) obligates the Cabinet Secretary for matters relating to IDPs to 'declare...through the issuance of a *Gazette* notice' the registration of all IDPs in Kenya. This report has been unable to find any such declaration made by the state. There is also evidence that such a register remains in the hands of the executive and that it is not publicly available. In the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR the court lamented that the government agency sued did not provide the list of verified IDPs even after being given ample time to do so. The judge in that case concluded the case for the petitioners arguing that in the absence of the register, it was difficult to ascertain that the petitioners were not bona fides IDPs. Therefore, the court gave the petitioners the benefit of the doubt.
20. In conclusion, there is evidence that resources have been allocated to address and redress IDP situation in the country. However there is a gap in publicly available evidence on how the funds were used and whether they were used effectively. Without this latter evidence, it is difficult to conclude that the resources were sufficient to fulfil government's obligations under the IDP Act.
21. In the same breath, the funds appear to be limited to addressing PEV IDPs from 2007/08. The budget speeches only mentions IDP resettlement as the rationale to allocate the funds indicated in table one above. The President's speech in 2014 also only mentions the success of resettlement of displaced persons.
22. However, this is not the only obligation under the Act. There is the obligation on prevention and protection as evidenced in the title of the IDP Act. To achieve this, the Act mandates

³² Government of Kenya, *Kenya Gazette Notice Number 4559*, Vol.CXVI No.79 published on 4th July, 2014, p.1648

³³ Ibid

the two levels of governments to raise awareness and build the capacity of other government agencies on prevention, protection and assistance of IDPs. Furthermore, there is an obligation of setting up an early warning system to identify areas where potential displacement could occur. The linking of IDP issues to resettlement of 2007/08 PEV victims to the exclusion of other obligations through government official speech creates the impression that the Act was passed to merely address the issue of resettlement for this specific category of IDPs.

C.3 Case law

23. A review of case law shows that the Act is seldom used to address IDP rights. As mentioned in the methodology section, reported cases decided between 2013 and September, 2018 were included among those that were reviewed. Out of the numerous cases that have been reported in the past five years, only one³⁴ specifically mentions the IDP Act. However the case did not address substantive IDP rights issues. The petitioners in that case claimed to be victims of the post-election violence (PEV) that occurred between 2007 and 2008. However they failed to adduce any evidence to prove that they were affected by the PEV and thus their case was dismissed.³⁵
24. There were three other cases that involved displacement but the petitioners in those cases did not invoke the provisions of the IDP Act. In *Simion Kiprotich & 2 others v. Principal Secretary, Ministry of Devolution and Planning & 4 others* [2018] eKLR, the petitioners petitioned the High Court to prevent the government from evicting them from the Embobut forest. They alleged that they have no other place to go and that this move would make them IDPs. However the government adduced evidence that the evictees had illegally settled on the land and therefore needed to be removed. The court agreed with the government and dismissed the petition.
25. In another case, PEV victims sought the High Court's intervention to be included on the list of people to be compensated by the Government. The case of *Internally Displaced Persons Initiative Support v Permanent Secretary Ministry of Devolution & Planning* [2017] eKLR involved a group of IDPs that alleged they had been locked out of a Kes.6 billion compensation package. They alleged that they had been discriminated against and sought courts orders to compel the government to include them in the list of beneficiaries.

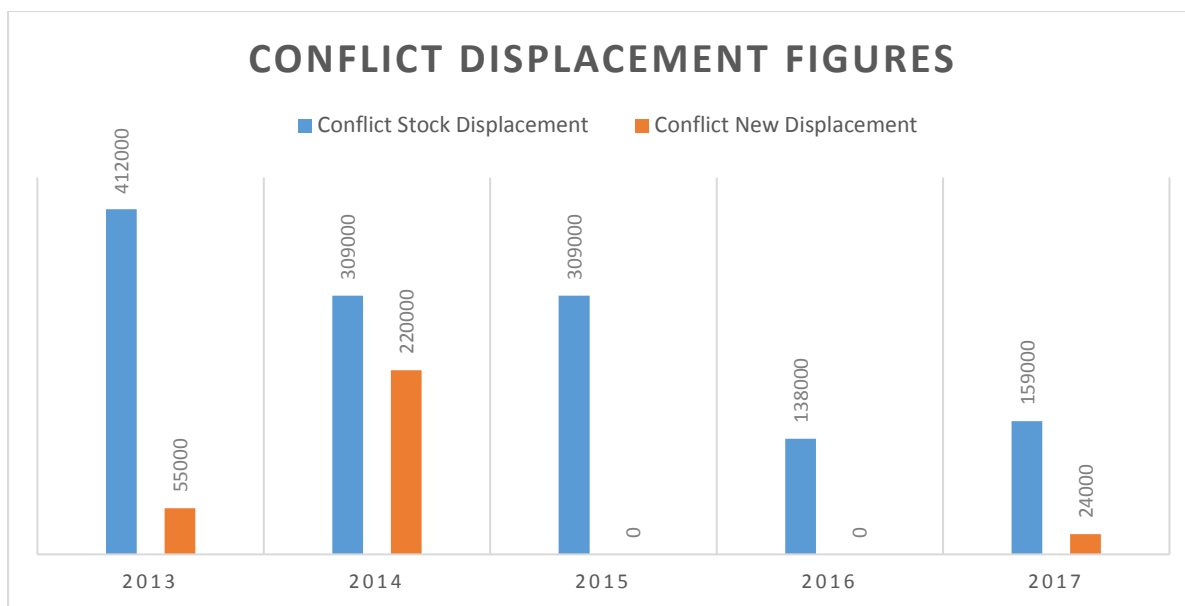
³⁴ *Internally Displaced Persons & Kisii Steering Committee v Cabinet Secretary, Ministry of Devolution & Planning of National Government* [2016] eKLR

³⁵ *Ibid*

The court allowed their application and ordered the government to profile them and include them in the compensation package.

26. Finally there was the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR. In this case, the petitioners who had been displaced by the PEV of 2007 and 2008 claimed that the government had discriminated against them when compensating other PEV victims from an IDP camp located at Saw Mill in Molo and left them out. The court allowed the petition after the government failed to respond to any of the allegations made by the respondents.
27. Interestingly, the petitioners invoked the provisions of the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons and the United Nations Guiding Principles on Internal Displacement to support their petition. These two instruments have been domesticated through the IDP Act and they have been annexed to the Act. Therefore, one conclusion that can be made from this is that the petitioners may not have been aware of the IDP Act at the time they presented their petition in 2015 otherwise they would have cited the Act.
28. These cases provide evidence that the Act has not been frequently used in court to assert the rights of IDPs. In the period between 2013 and 2018 there have been more than 500 cases decided at the courts of record.³⁶ However, only four cases involved internally displaced persons. Out of the four cases, only one specifically mentioned the IDP Act. This is evidence, at the very least, of a lack of awareness of the Act among the petitioners.
29. Further evidence of the infrequent use of the Act is the lack of criminal prosecution of individuals causing displacement. In the period between 2013 and 2017 there have been at least 299,000 cases of conflict based displacement (see graph 1 below). This amounts to arbitrary displacement that offends section 23 of the IDP Act. However, at the level of the High Court, Court of Appeal and Supreme Court, there has not been any publicly available evidence that individuals have been charged with the offence of causing arbitrary displacement. Individuals found guilty of such an offence are liable upon conviction to a fine of up to Kes.5 million or a prison term of not more than 10 years.

³⁶ High Court, Court of Appeal and Supreme Court



Graph 1: Conflict displacement distribution between 2013 and 2018 (Source: IDMC)

30. It is doubtful that the IDP Act is being used to punish arbitrary displacement in cases heard in lower courts.³⁷ In a recent case in Solai, owners of a dam did not take serious precautions to prevent the dam from bursting and thereby causing death, destruction and displacement. Despite warnings issued by authorities concerning the lax safety precautions taken by the owners of the dam, they did nothing to mitigate the risk of the dam bursting its confines. The owners are currently in court having been charged with manslaughter³⁸ of 48 people that died in the incident. They were not however charged with the offence of causing arbitrary displacement even though their actions offend section 23 of the IDP Act. Granted that this one case is not representative of the entire judicial decisions in the lower courts, it is indicative of the infrequent use of the Act even in high profile cases such as the Solai Dam incident.

C.4 New developments

C.4.1 National Peacebuilding and Conflict Management Policy, 2014

31. In 2014, the National Assembly chamber of the Kenya's Parliament debated and passed the National Peacebuilding and Conflict Management Policy as Sessional Paper No.5. The policy has ten objectives that revolve around conflict prevention and resolution. It creates structures at the national and county level to address conflict management. It provides for

³⁷ This term refers to courts below the High Court. They include the Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate and the Resident Magistrate Courts.

³⁸ Daily Nation, Patel Dam Owners Charged with Manslaughter, Thursday July 5th 2018 accessed at <https://www.nation.co.ke/counties/nakuru/Patel-dam-owners-charged-with-manslaughter/1183314-4648376-nrn2qh/index.html> on 17th October, 2018

early warning data collection, development of strategies on early prevention and also creates a peacebuilding fund to provide resources for the interventions that the policy provides.

32. The policy recognizes that an outcome of conflict is displacement. It defines an IDP with reference to the Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention). Interestingly, it does not mention the IDP Act that domesticates the guiding principles. It further references the Kampala Convention despite the fact that Kenya is not a signatory. Moreover, it leaves out the Great Lakes Protocol on the Protection of the Internally Displaced Persons which Kenya is a signatory to. This gap means that there is no recognition of the structures created in the IDP Act and therefore no provision of concrete coordination between the structures under the policy and that under the IDP Act.
33. A National Peace Council (NPC) is created under the policy. The work of the council includes, inter alia, monitor and intervene in conflict situations in Kenya. This is strikingly similar to the mandate of the NCCC under the IDP Act. The policy mandates the NPC to ‘spell out the membership of the council and its relationship to other existing bodies and institutions, and in particular the National Security Council and its attendant structures.’³⁹
34. However the lack of a direct reference to the IDP Act and the obligation to prevent displacement contributes to lack of coordination. In an interview held in Nakuru County, it emerged that this lack of reference contributed to a lack of awareness of the Act thereby resulting in duplication of roles. A key informant with knowledge of the processes of the County Peace Council acknowledged that he has no awareness of the IDP Act.⁴⁰ He was also unaware that there was the NCCC which has similar roles in the prevention of conflict induced displacement. The informant confirmed that there was no interaction between the peacebuilding structures and those under the IDP Act.

C.4.2 National Disaster Risk Management Bill, 2018

35. Kenya has experienced an increase in displacement caused by floods. By September 2018 there have been 326,000 recorded displacement incidences.⁴¹ These were caused by the heavy rainfall experienced in different parts of the country.⁴² The number of displaced

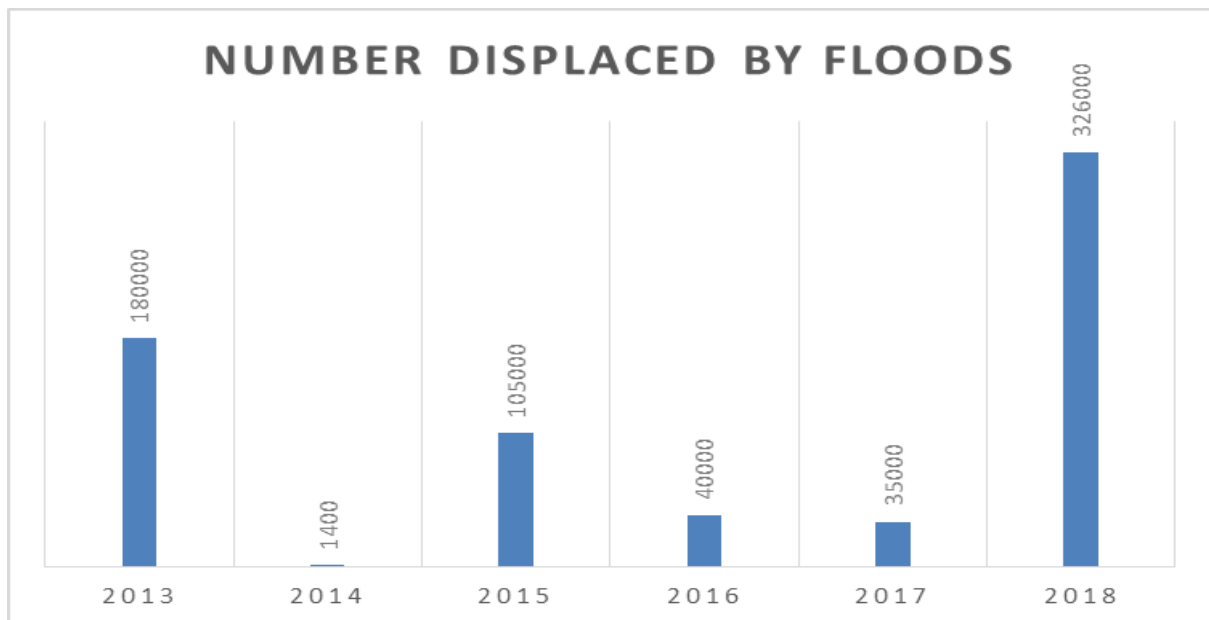
³⁹ Government of Kenya. (2015). *Sessional Paper No.5 of 2014 on National Policy for Peace Building and Conflict Management*, Ministry of Interior and Coordination of National Government, Nairobi p. 22

⁴⁰ Key Informant 3 interview, 26th September, 2018

⁴¹ Ibid, note 14

⁴² Ibid, note 14

persons as a result of floods in 2018 shot up drastically as compared to other years (see graph 2 below). The lack of a regulatory framework to address disaster management prompted two members⁴³ of the Senate Assembly of Parliament to introduce a bill to address this. The name of the bill is the National Disaster Risk Management Bill, 2018.



Graph 2: Distribution of number of flood induced IDPs per year (source: IDMC)

36. The stated aim of the Bill is to provide a legal framework for the coordination of disaster risk management activities and for connected purposes.⁴⁴ The main focus of this Bill is to create institutions that will deal with disaster management at the national and county levels. To this effect, it creates the National Disaster Risk Management Authority⁴⁵ and the County Risk Management Committees⁴⁶ for each of the 47 counties. The Authority and Committees are mandated by the Bill to undertake disaster preparedness, recovery and response at their respective levels.

37. The key difference noted between the Bill and the IDP Act is a human rights based approach lacking in the former. The Bill blandly addresses institutional framework and does not enumerate any rights of people affected by disasters. However the IDP Act approach is much more comprehensive. It details the rights of the IDPs as provided by the UN Guiding Principles and the Great Lakes Protocol.

⁴³ Senator Johnson Sakaja (Nairobi County Senator) and Senator Mutula Kilonzo Jr. (Makueni County Senator)

⁴⁴ Preamble, The Disaster Risk Management Bill, 2018

⁴⁵ Section 3, The Disaster Risk Management Bill, 2018

⁴⁶ Section 18, The Disaster Risk Management Bill, 2018

38. Another difference is the recognition of displacement on account of development projects. The IDP Act has a clear reference for the assistance of people displaced by development projects in Kenya. This ideation is not covered by the Bill. However, where the development project cause a hazard, then the application of the Bill (should it be approved as is) would be imminent. On the whole, the IDP Act provides more protection for the displaced than does the Bill.
39. Be that as it may, the body proposed in the Bill is much stronger than the one established under the Act. The NCCC is established as an unincorporated body.⁴⁷ This means that it cannot sue or be sued in its name, neither can its own assets. The situation is different for the proposed National Disaster Risk Management Authority. The Authority is established as an incorporated body.⁴⁸ It has a legal personality wherein it can be sued and sue in its own name. It can also acquire, hold and dispose assets.
40. Disaster is defined as ‘a serious disruption of the functioning of a community or society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources.’⁴⁹ Disasters are caused by Hazards. A hazard has been defined as ‘a damaging physical event, phenomenon, or human activity likely to cause the loss of life or injury, or other health impact, property damage, loss of livelihoods and services, social and economic disruption, or environmental damage.’⁵⁰
41. The definition of these concepts creates overlaps with the definition of an IDP under the IDP Act. An IDP according to the Act is
- ‘a person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, *situations of generalized violence*, *violations of human rights or natural or human-made disasters*, and who have not crossed an internationally recognized State border’ (emphasis added).⁵¹
42. The Act recognizes the fact that displacement can be triggered by natural or human-made disasters. This means that both instruments address people that have been displaced by this

⁴⁷ Section 12 (2), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

⁴⁸ Section 3 (2), The Disaster Risk Management Bill, 2018

⁴⁹ Section 2, The Disaster Risk Management Bill, 2018

⁵⁰ Ibid

⁵¹ Section 2, The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

phenomenon. Moreover, the way the term hazard has been defined by the Bill can reasonably include conflicts as a hazard that the Authority and county committees are mandated to address. Conflicts can fall in the category of events that are ‘likely to cause loss of life or injury.’⁵² This provides further evidence that there is an overlap of addressing IDP issues in the context of disaster risk management.

43. Further overlap can be discerned from the responsibilities of the respective bodies created to implement the Act and the Bill. The Act created the NCCC. The mandate of the NCCC includes to ‘coordinate prevention and preparedness efforts, protection and assistance to internally displaced persons throughout their displacement until a durable and sustainable solutions is found, and to host communities as needed, among relevant Government Departments, the United Nations, and non-state actors.’⁵³ It also responsible for the registration of IDPs,⁵⁴ raising awareness on effects of displacement⁵⁵ and monitor and supervise the operational implementation of Kenya’s IDP international obligations.⁵⁶
44. These NCCC functions highlighted in paragraph 39 above are strikingly similar to those of the Authority and county committees. The Bill proposes that the Authority prepare and co-ordinate disaster risk management measures in the country⁵⁷ and co-ordinate and support public awareness campaigns and civic education programmes on disaster risk management.⁵⁸ Although it is to take an inter-agency coordination approach,⁵⁹ it is the central agency⁶⁰ on matters disaster management. The work of the Authority would include disaster preparedness, prevention, response and recovery.
45. The functions of the proposed Authority in disaster prevention, response and recovery are similar to those of the NCCC. Disaster prevention entails the avoidance of adverse impacts of hazards and related disasters.⁶¹ This is similar to the function of the NCCC which is meant to coordinate the internal displacement prevention efforts.⁶² Disaster response refers

⁵² Ibid, note 51

⁵³ Section 13 (c), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

⁵⁴ Section 13 (d), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

⁵⁵ Section 13 (e), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

⁵⁶ Section 13 (h), The Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act, 2012

⁵⁷ Section 5 (c), The Disaster Risk Management Bill, 2018

⁵⁸ Section 5 (h), The Disaster Risk Management Bill, 2018

⁵⁹ Section 5 (a), The Disaster Risk Management Bill, 2018

⁶⁰ Section 5 (b), The Disaster Risk Management Bill, 2018

⁶¹ Section 2, The Disaster Risk Management Bill, 2018

⁶² Ibid, note 53

to the provision of emergency services and public assistance during or immediately after disaster in order to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected.⁶³ The NCCC too has such a mandate on response to incidences of internal displacement.⁶⁴ Finally the definition of recovery under the Bill corresponds to that of durable solutions under the IDP Act.⁶⁵

46. The overlap of these functions will have an impact on the funding that each of these bodies will receive. Both documents provides for a fund through which the objectives of the instruments would be implemented. The IDP Act creates a Fund and the Bill creates a Disaster Risk Management Fund. The funds (should the Bill be passed by Parliament as is) would draw from the Consolidated Fund. With national financial resources being outpaced by the needs in Kenya, it would be foolhardy to expect that the two funds will receive funds. This creates unnecessary competition which may be detrimental for addressing IDP rights in Kenya under the IDP Act.

D. Conclusion

47. The following are the concluding observations which were derived from the findings discussed above:

- a. **Limited awareness:** There is little evidence that awareness raising was done for the prevention, protection and assistance of IDPs and affected communities. The funding that was provided between 2013 and 2016 appears to have been restricted to resettlement of IDPs from the PEV of 2007/08 and nothing more. The lack of public evidence of how the money was utilized by the NCCC or other government complicates a clear finding on application of resources to awareness raising.
- b. **Weak institution:** the NCCC is not operational. Whereas the President has appointed a Chairperson of the NCCC, that person is not properly in office. This is because, to date, members of the NCCC have not been gazetted by the Cabinet Secretary for Interior and Coordination of National Government. The term of those who had been serving it the NCCC from 2014 has expired and needs either to be renewed or their positions filled by other individuals.
- c. **Weak enforcement:** there is limited application of the Act in civil and criminal cases. Out of the thousands of cases reported by the Kenya Law Reports, only four

⁶³ Ibid, note 61

⁶⁴ Ibid, note 53

⁶⁵ See section 2 of the National Disaster Risk Management Bill, 2018 and Section 2 of The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012

cases related to IDP issues. Of the four, only one specifically mentioned and relied on the provisions of the IDP Act. Moreover, those responsible for causing arbitrary displacement are not being held criminally liable. This leads to the conclusion of a weak judicial and executive enforcement that can be linked to a lack of awareness among government agencies and citizenry.

- d. **Limited funding scope:** despite the huge amounts of money provided to address IDP issues in Kenya, the funding is limited. This is because, at least from available data sources, the funding was exclusively tied to resettlement of IDPs displaced by the PEV of 2007/08. Therefore, the money was not used – as far as the report can verify – to support the work of the NCCC as far as raising awareness and building capacity of state and non-state actors on IDP issues.
- e. **Potential overlap with other sectors with limited coordination:** the conflict management policy already in force and the disaster risk management bill in the Senate have the potential of creating overlapping structures that would negatively affect the implementation of the IDP Act. The general intent of the policy, bill and IDP Act is similar but they all have different implementation mechanisms. These documents do not acknowledge the existence of each other but create funds that are to be applied to arguably the same work: the prevention, protection and assistance of IDPs in Kenya.

E. Recommendations

48. This report makes the following recommendations:

- a. That the Cabinet Secretary in the Ministry of Interior and Coordination of National Government gazette the members of the NCCC;
- b. That the President of the Republic of Kenya reappoint a Chairperson from among members of the NCCC after the Cabinet Secretary in the Ministry of Interior and Coordination of National Government has appointed them as required by the IDP Act;
- c. That the Cabinet Secretary in the Ministry of Interior and Coordination of National Government work with the Chairperson of the NCCC to lobby the Treasury to allocate funds for awareness raising, education and capacity building on prevention, protection of internal displacement and the assistance to internally displaced persons and the affected communities;

- d. That the Cabinet Secretary in the Ministry of Interior and Coordination of National Government work with the Chairperson of the NCCC engage the bodies created in the National Peacebuilding and Conflict Management Policy to create a framework of collaboration and that this framework be annexed to the policy;
- e. That the Cabinet Secretary in the Ministry of Interior and Coordination of National Government work with the Chairperson of the NCCC engage the Senate on the potential implications of creating parallel systems in disaster management that address the same issue and propose an amicable way forward that address the need for disaster management without whittling down the human rights protection afforded to IDPs under the IDP Act;
- f. That the Senate Assembly of Parliament harmonise its National Disaster Risk Management Bill, 2018 with the provisions of the IDP Act, 2012 with the aim of strengthening protection of IDPs displaced by disasters.