



Unfinished business

Kenya's efforts to address displacement and land issues in Coast Region



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July 2014

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Cover photo: A Pokomo woman carries jerrycans with water back to her home in the village of Ozi in the Tana Delta of the Coast Province of Kenya. Credit: Siegfried Modola/IRIN, January 2013

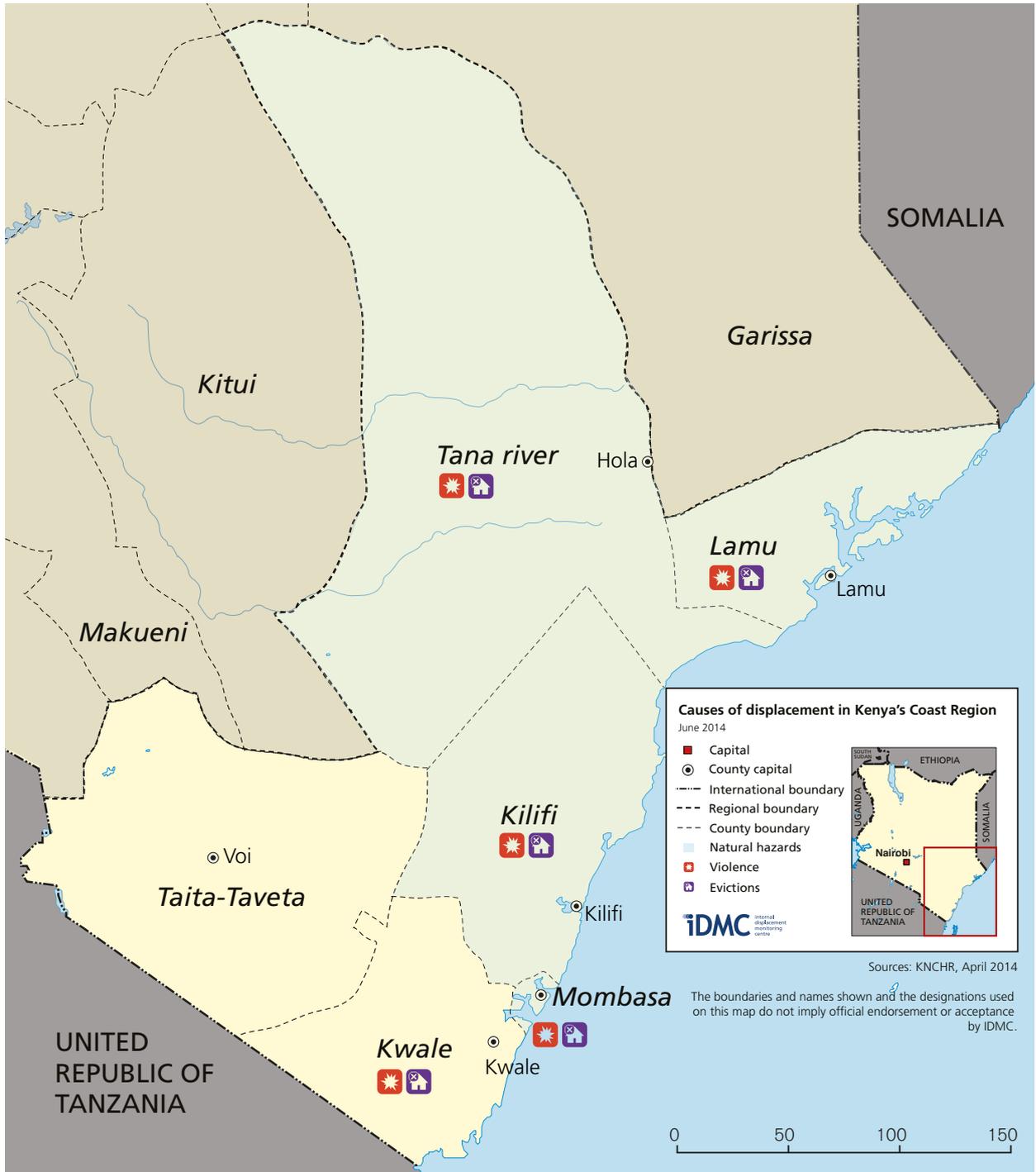
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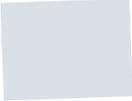


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Map





Summary

Since Kenya's independence in 1963, political, ethnic and land-related violence, disasters and development projects have all repeatedly caused internal displacement. This joint report by the Internal Displacement Monitoring Centre (IDMC) and the Kenya National Commission on Human Rights (KNCHR) focuses on Coast region, a highly complex area where internally displaced people (IDPs) have been less visible than in other parts of the country and rarely documented, despite the fact that many of its residents have been forced to flee their homes at some point in their lives.

The report analyses displacement in Coast region and identifies tensions over land tenure and poor land governance as key triggers, and obstacles to durable solutions. It provides examples of land issues underlying displacement caused by generalised violence, disasters and human rights violations, and establishes a close link between tenure insecurity and forced evictions. Disputes arise from competing land claims and incompatibility between statutory and customary tenure systems. Disasters meanwhile increase competition for limited resources, including land, and contribute to violence between herders and farmers.

The government has taken significant steps to fulfil its national responsibility to prevent, mitigate and resolve internal displacement. It has also tried to address land issues, particularly from a legal and policy perspective. The failure, however, to adopt or implement relevant laws and policies poses significant challenges, which this report also discusses.

Kenya should finalise and adopt a number of important bills and draft policies relevant to land issues and displacement as a matter of urgency. It should also step up efforts to implement those already adopted, such as the 2012 Act on internal displacement, the 2012 Land Act, Land Registration Act and National Land Commission Act, and the 2009 national land policy. Adoption is only a first, if fundamental step towards the assumption of national responsibility. Challenges to implementation include a lack of adequate stakeholder awareness about the instruments in question, delays in the establishment of the bodies mandated to oversee their implementation, funding shortages and weak land governance at national and county levels.

This report also identifies obstacles to durable solutions and opportunities for their achievement, and explores how an efficient and comprehensive response might be put in place. It highlights the importance of:

- adequate information and consultation with IDPs, affected communities and people at risk of displacement during the planning and implementation of processes that will affect them;
- better communication and cooperation between and within relevant government ministries, departments, commissions and other institutions;
- better coordination between national and county governments, particularly given the process of devolution that is underway;
- a holistic response to internal displacement, irrespective of its cause. The current response tends to be fragmented and ad hoc, and focuses heavily on the emergency phase at the expense of longer-term initiatives;
- the compilation of comprehensive and up-to-date data on internal displacement. As things stand, no organisation or authority consistently tracks IDPs' location and needs over time. Those outside camps are largely invisible, and any information that is available tends to be sparse and focus on new displacements.

The report makes recommendations to national and county authorities, the international community, civil society and businesses to better address IDPs' protection and assistance needs, and to prevent new displacement.

Recommendations

For the government

- Take immediate steps to implement the 2012 Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act. In particular:
 - establish the National Consultative Coordination Committee on Internally Displaced Persons (NCCC), so that it can begin the implementation process
 - conduct public awareness, education and information campaigns on the act and its provisions at the national and local level
 - restructure the national humanitarian fund as envisaged by the act
- Complete the establishment of a legal framework on internal displacement by:
 - adopting the Draft National Policy on the Prevention of Internal Displacement and the Protection and Assistance to Internally Displaced Persons in Kenya
 - ratifying the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)
- Urgently finalise pending legal frameworks on land tenure and disasters relevant to internal displacement by ensuring they are in line with national and international standards. Adopt them and take immediate steps to implement them. The following are particularly important:
 - the eviction and resettlement procedures bill
 - the community land bill
 - the national disaster management bill and draft policy
 - regulations on large-scale investments, land concessions and development projects, to be established in a way that minimises displacement, human rights violations and other negative effects, in line with the international guidance provided by the CFS-FAO voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security, the UN Basic Principles and Guidelines on development-based evictions and displacement, and the UN Guiding Principles on business and human rights.
- In terms of tenure issues, the government should:
 - implement the following recommendations contained in the final report of the Truth, Justice and Reconciliation Commission of Kenya:¹
 - The Commission recommends that the Ministry of Lands or other appropriate government authority immediately begins a process of surveying, demarcating and registering all remaining government lands, including those that were formerly owned or managed by local authorities, all protected wildlife areas and river banks, among other public lands
 - The Commission recommends that the National Land Commission commences work with the Ministry of Lands and settlement to undertake adjudication and registration exercises at the Coast and all other areas where the same has not been conducted. Measures shall be designed to revoke illegally obtained titles to and re-open all public beaches, beach access routes and fish landing beaches, especially at the Coast
 - The Commission recommends that the National Land Commission in furtherance of its mandate expedites the process of addressing and/or recovering all irregularly/illegally acquired land. Measures should be designed by the Ministry of Lands and settlement to encourage individuals and entities to surrender illegally acquired land
 - The Commission recommends that the Ministry of Land in conjunction with the National Land Commission design and implement measures to revoke illegally obtained titles and restore public easements
 - The Commission recommends that the National Land Commission develops, maintains and regularly updates a computerised inventory of all lands in Kenya, including private land that should be accessible to all Kenyans as required by law. Land registries countrywide should be computerised and made easily accessible as required by the law
 - The Commission recommends that the National Land Commission formulates and implements strict guidelines in terms of maximum acreage an individual or company can buy hold in respect of private land
 - ensure that the National Land Commission is adequately funded, and take steps to address the other challenges it faces, as identified in this report
 - implement the relevant recommendations made by the Kenyan National Commission on Human rights (KNCHR) in its public inquiry into allegations of human rights violations in Malindi²

- set up a clear framework for the planning and implementation of settlement schemes. Establish schemes strictly for indigenous communities without land or deeds as necessary, complete the ongoing resettlement of beneficiaries already identified and ensure plots are not appropriated by individuals with no right to such resettlement. Review existing schemes to ensure they meet the same standards and intervene where necessary
- establish new alternative dispute resolution mechanisms and strengthen existing ones in line with national and international standards, and encourage communities to use them, particularly in land disputes
- Institutionalise the meaningful consultation and participation of communities affected by displacement in all processes that have a bearing on their lives
- Collect accurate, comprehensive and disaggregated data on all categories of IDPs as a matter of urgency. Set up databases and registration systems with a view to establishing how best to identify, assess and respond to IDPs' needs in terms of assistance, protection and durable solutions, and paying particular attention to vulnerable groups.

For civil society

- Advocate for the adoption of pending legal frameworks relevant to internal displacement, land and disasters
- Advocate for and support the implementation of the 2012 Act on internal displacement and existing land frameworks. Activities should include:
 - awareness raising and capacity building targeting relevant national and county governments, authorities and the media
 - awareness raising with IDPs, affected communities and people at risk of displacement on their human and land rights
 - providing legal assistance to IDPs, affected communities and people at risk of displacement, particularly those at risk of eviction
 - facilitating alternative dispute resolution mechanisms including arbitration and mediation, particularly for land disputes
 - extending the network of community level monitors, human rights practitioners who assist IDPs and evictees
 - enhance existing national and regional forums on internal displacement

For the international community

- Advocate for and support the swift implementation of the 2012 Act on internal displacement and existing land laws
- Advocate for the adoption and implementation of pending legal frameworks relevant to internal displacement, land and disasters
- Advocate for and support the completion of Kenya's land reform
- Support the government in collecting comprehensive, up-to-date and accurate data on all categories of IDPs
- Promote the use of relevant international standards such as the UN Guiding Principles on business and human rights as a basis for business activities, and the CFS-FAO voluntary guidelines on the responsible governance of tenure as a guide to land registration processes and allocations to the private sector

For businesses

- Use the UN Guiding Principles on business and human rights and other relevant standards as tools to ensure transparent operations based on respect for human rights
 - Develop a human rights policy
 - Assess the actual and potential impact on human rights and tenure security of the company's activities
 - Integrate the findings into the company's decision-making processes and take action to address them
 - Monitor the implementation of findings of various institutions and ensure that information is shared with stakeholders
- Provide remedies for negative effects, for example in the case of a company that has not observed international good practice in resettling a community

1

Introduction

Since Kenya's independence in 1963, political, ethnic and land-related violence, disasters and development projects have all repeatedly caused internal displacement. With the exception of those displaced by the violence associated with the disputed December 2007 presidential election, however, few if any of those fleeing their homes have been officially registered as internally displaced people (IDPs). Return and resettlement programmes addressed most of the needs of those who fled the post-election violence and were registered, leaving some national authorities of the view that there are no longer any IDPs left in Kenya. This is in sharp contrast with the position of the UN Special Rapporteur on the human rights of internally displaced persons. At the end of his visit to the country in May 2014, Dr. Chaloka Beyani said: "Causes of internal displacement are many and recurrent, and solutions must be pursued more rigorously for all IDPs in an equal manner."³

This joint report by the Internal Displacement Monitoring Centre (IDMC) and the Kenya National Commission on Human Rights (KNCHR) focuses on Coast region, a highly complex area that was less affected by the post-election violence than other regions such as Nyanza, Western and Rift Valley.⁴ As a result, its IDPs have been less visible and rarely documented, despite the fact that people have

been displaced in all of its counties. The region has the largest number of people with undocumented land rights in the country,⁵ and poverty is widespread. Seventy per cent of its population is estimated to be living in poverty, compared with a national average of 47 per cent.⁶

The report analyses displacement in Coast region and identifies tensions over land tenure and poor land governance as key triggers, and obstacles to durable solutions. It provides examples of land issues underlying displacement caused by generalised violence, disasters and human rights violations, and highlights the challenges posed by the failure to adopt or implement relevant laws and policies. It identifies obstacles to durable solutions and opportunities for their achievement, and makes recommendations to local and national authorities, local and international organisations and businesses to better address IDPs' protection and assistance needs, and to prevent new displacement.

The report is based on extensive desk research and a joint IDMC-KNCHR mission to Coast region from 9 to 16 February 2014. The mission targeted the city of Mombasa and the Mwakirunge settlement in Mombasa County; the towns of Kwale and Msambweni settlement in Kwale County; the towns of Magarini and Malindi in



Reconstruction of destroyed Pokomo houses at Kilelengwani village. Photo: Patrick Bonyonte/KNCHR, February 2014

Kilifi County; Tana Delta sub-County and the village of Kililengwani in Tana River County; and the towns of Lamu, Witu and Mpeketoni in Lamu County. The team conducted semi-structured interviews with privileged informants such as local authorities and their partners, and specific groups including IDPs, returnees and people at risk of eviction.

The interviews were based on a list of questions covering different topics: the causes of displacement and the background to it; a description of population movements before, during and after any crisis; protection concerns; land disputes; and progress towards durable solutions and outstanding needs in terms of their achievement. The information gleaned from the interviews was cross-checked against desk research to produce a reliable analysis.⁷

The many facets of internal displacement in Kenya

In order to better understand internal displacement in Coast region, a brief overview of the phenomenon at the national level is required. There is no official, comprehensive and up-to-date national data on IDPs in Kenya. Data gathering tends to focus on new displacement caused by violence and rapid-onset disasters, and little scattered quantitative and qualitative information exists on dynamics after IDPs' initial flight. The UN Refugee Agency (UNHCR) provided the most recent informed estimate of the number of IDPs in the country in January 2013, but its figure of 412,000 does not include those displaced by disasters and development projects. Nor does it include displaced pastoralists, or so-called integrated IDPs who live with host communities in rural, urban and semi-urban areas.

The country's worst incidence of internal displacement took place during the post-election violence of late 2007 and early 2008, when nearly 664,000 people fled their homes and 1,300 lost their lives. Around 350,000 people took refuge in 118 camps, and 300,000 became "integrated" IDPs.⁸ Political, inter-communal and resource-based violence has continued to cause new displacement since.

Disasters induced by natural hazards such as drought and floods also cause significant displacement every year. Seasonal floods affect various parts of the country, particularly the flood plains of the Lake Victoria basin and the Tana river.⁹ Elsewhere, 89 per cent of the country is classified as arid or semi-arid. In these areas, which are home to around 14 million people and 70 per cent of Kenya's livestock, drought and the depletion of resources associated with it combine with other stressors.¹⁰ They have a severe impact on the mixed economy

of rain-fed and irrigated agriculture and agro-pastoralism in semi-arid areas, and on the mobile pastoralism prevalent in arid areas. The displacement of pastoralist communities, which is intrinsically linked to their loss of livestock and access to land, resources and markets, is common.¹¹ Evictions to make way for development and environmental protection projects have also displaced a significant number of people over the years, driving them off private, public and communally owned land in both urban and wilderness areas.

These causes of displacements are often interwoven, and tenure issues unresolved since the redistribution of land during colonial times complicate them further. Under British rule, the 1908 Land Titles Act effectively overrode the existing communal land tenure system by declaring all unregistered land Crown property, so denying indigenous communities access to their land. By 1934, European settlers who made up less than one per cent of the population controlled about a third of the country's arable land. Nearly every ethnic group suffered losses. In 1904 the Maasai were moved from their preferred grazing grounds in the central Rift Valley province onto two "reserves". Seven years later, boundary changes to one of the reserves imposed against the pastoralists' wishes meant the Maasai lost more than half of their customary territory.¹²

Kenya has maintained such arrangements based on colonial laws and policies since independence, leaving millions of people without title deeds to the land they work or live on. One local NGO puts the figure at 68 per cent of the country's population, or around 30 million people.^{13,14} Given their background, land issues are politically sensitive and culturally complex. More than 80 per cent of the population makes a living from agriculture, and there is a close relationship between the control of land and economic, social and political power.¹⁵

The complexities of Coast region

Coast region is made up of six counties - Mombasa, Kwale, Kilifi, Taita Taveta, Tana River and Lamu - and covers an area of 8,549 square kilometres. According to the 2009 census, it has a population of around 3.3 million people, or more than 731,000 households.¹⁶ The region is significantly different from Kenya's inland regions in cultural, linguistic, ethnic, historical and religious terms. The Mijikenda peoples are the main ethnic group, made up of nine interrelated subgroups.¹⁷ Some of them are farmers, and others are pastoralists or fishermen, as is the case with the region's indigenous communities. Most consider themselves Coastarians rather than Kenyans, not only on the basis of their different backgrounds, but also because of the numerous grievances they hold against the national

government over issues such as under-development, poverty and unemployment.¹⁸

Before Kenya's independence, land ownership and administration in coastal areas alternated between Persians, the Portuguese, Arabs and the British, laying a complex foundation for contemporary land issues. When the British arrived in the area, they recognised the authority of the Sultan of Zanzibar and granted him control over a ten-mile strip of land along the coast. In 1895, when they established the East Africa Protectorate, they reached a new agreement with the sultan under which he would cede administration of the coastal strip in exchange for an annual rent of £17,000. From that moment, large numbers of European settlers began to arrive on the Coast in search of land. They found plenty available, given that the agreement with the sultan only allowed his "subjects", mainly those with ancestral links to Oman, to register land as private property. African indigenous people were excluded, leaving up to 25 per cent of the Mijikenda population unable to register the land on which they had lived for generations.

When the British introduced the freehold system of land tenure under the 1908 Land Titles Act, it had the same effect in Coast region as in the rest of the country – to favour outsiders and deny indigenous communities access to their land. The region was left with the largest concentration of indigenous people displaced from their ancestral land or living on land for which they had no land title deeds. Absentee landlords also became a problem.¹⁹ In the period immediately after independence, there was an influx of people from elsewhere in the country, particularly central Kenya. The new arrivals had the money and power to acquire land, again excluding local communities.²⁰ This contributed to a build-up of ethnic tensions and fuelled local hostility toward those from elsewhere in the country.

The problem of people living on and working plots they do not formally own has got worse over the years as a growing population has increased the demand for land. There are also a number of obstacles to obtaining land title deeds. Many people are unaware of the importance of registering their land, they often have to travel long distances to do so, corruption is not uncommon²¹ and the processes involved are costly and time consuming. This combined with widespread poverty has driven large numbers of people to settle on private or government land. The same factors have also created an environment conducive to fraudulent land transfers. The overall upshot is that much of the land in Coast region is owned by a few wealthy individuals and groups, often absentee landlords from other areas.

The fact that the region has the largest number of undocumented land users in the country has played an important role in increasing tensions since the 1990s. Politicians have often used the land issue in their election campaigns, giving people false hope of recovering "grabbed" land even when they know that they will be unable to fulfil their promises. This in turn has increased frustration among local people. Slow adjudication processes and delays in settlement schemes have also denied many communities secure access to land.

Kenya's 2009 land policy sheds light on a number of other contemporary issues that add a final layer of complication to the situation. It acknowledges, for example, that "salt harvesting companies have acquired large tracts of land suitable for agricultural production but which they have left idle". Coast region is also home to strategic government institutions such as the Kenya Ports Authority, the Kenya Navy Base and the Kenya Marine and Fisheries Research Institute. The 2009 policy notes that some of the land they own has been allocated to private developers "without due consideration of the future development plans of the institutions".²²

2

Displacement caused by generalised violence

Violence has caused internal displacement throughout Coast region over the years, often sparked by inter-communal disputes over access to land and increasingly scarce resources. As a recent IDMC report on the displacement of pastoralists in Kenya noted: "Pastoral governance and range land management often involves communities pre-agreeing access to the same land and the use of its resources. The system, however, can tend to break down during times of stress. Rather than reaching agreements, communities compete for ever scarcer resources, potentially resulting in tensions, hostilities or conflict. Analysts argue that it is not the scarcity in itself, but failure to manage it that triggers conflict."²³

Most inter-communal clashes take place between farmers and pastoralists, and the increasing ethnicisation of territory at the same time as privatisation reduces the land available to pastoralists heightens the risk of violence and conflict.²⁴ Government irrigation projects, dam construction and large-scale commercial farming projects have made tensions worse, triggering evictions, putting greater pressure on available land and reducing

access to water and grazing areas. The risk of violence increases even further when farming and pastoralist communities try to access resources beyond their traditional areas (see next chapter). Both pastoralists and farmers would benefit from reaching prior agreement over the use of scarce resources during times of stress. Negotiation tends to help build trust, which is particularly important when there are conflicting historical claims to land.

The most recent large-scale displacement took place in Tana River County in two phases, in August and September 2012, and December 2012 and January 2013.²⁵ A hundred and eighty people were killed and more than 34,000 fled their homes²⁶ as a result of inter-ethnic violence between Pokomo (farmers) and Ormas (pastoralists). The violence was particularly intense in the village of Kilelengwani, which is home to segregated Orma and Pokomo communities, and from where around 200 households were displaced. The two communities have a history of disputes over access to pasture and water, aggravated by unclear land tenure system, and in recent years politics has played an increasing role in their feud.²⁷



Violence in parts of Tana River County has led to death and displacement. Photo: Jimmy Kamude/IRIN, Sept. 2012

The vast majority of those displaced fled and sought refuge within Tana River, Kilifi, Lamu and Mombasa Counties. For Instance in Kilifi County, most displaced families were found in Marereni, Magarini and Malindi areas, while in Lamu County several families sought refuge in Witu and Mpeketoni areas.²⁸ Relatively few gathered in camps. The camp of Riketa/Dide Waride in Tana River Country hosted 1,431 IDPs; Witu Assistant Deputy County Commissioner's compound in Lamu County 1,400; Mtangani in Kilifi County 1,238; and Vipingoni/Bulanazi, also in Kilifi, 600.

The Kenya Red Cross Society (KRCS) recorded 880 homes as burnt down, but estimates the actual number to be higher. The violence also disrupted essential services such as health care and education. School enrollment in Tana River County dropped by 23 per cent between 2012 and 2013.²⁹ There were reports of Pokomo staff at Witu dispensary refusing to attend Orma victims, and a large number of cattle were either killed or stolen. The government of Kenya, KRCS, Muslim Aid and other NGOs provided material assistance and psychosocial support to the affected communities. They helped those who chose to return³⁰ and conducted awareness-raising and peace-building activities to counter rising tensions between host communities and IDPs caused by the increased pressure on land and resources.³¹

By February 2014 an estimated 90 per cent of the IDPs had returned. Most did so between September 2012 and May 2013, though renewed clashes interrupted the process in December 2012. Many people returned in time to be able to vote in the March 2013 general election.³² As of February 2014, however, both Orma and Pokomo returnees still identified their most urgent needs as physical safety and security, livelihood support and better access to health care and education. The violence and displacement led to significant crop and livestock losses, leaving many returnees struggling to re-establish their livelihoods. All schools and health facilities had reopened, but were suffering from shortages of staff and learning equipment. Civil society organisations have organised peace meetings between the two communities,³³ but trade and the sharing of resources such as water points was still to resume.³⁴ Of those displaced from Kililengwani, only 20 Pokomo and seven Orma families had returned to their respective sides of the village.³⁵ Returnees said that they had not benefitted from the government's resettlement scheme, leaving them to rebuild their homes themselves.

Some IDPs chose to stay in their areas of refuge as they felt they had better economic and education opportunities there. Those who fled to Mombasa County are a case in point, but the number of people involved is not known. Others reportedly visit their areas of origin on a

regular basis, after failing to be included in the government's resettlement scheme. Some IDPs in Malindi and the surrounding area decided to stay put to allow their children to finish the school term.³⁶

Others have been reluctant to return because of security concerns. The mainly Orma IDPs in Vipingoni/Bulanazi have decided to stay in their camp and have converted it into a "permanent village",³⁷ despite receiving materials to rebuild their homes in their place of origin where sporadic outbreaks of violence continue.^{38 39} Tension and mistrust between the Orma and Pokomo communities are made worse by a perceived bias in the provision of relief and reconstruction aid, and the fact that pro-Orma parties dominate the political scene in Tana River County.⁴⁰ Menacing leaflets have also appeared, telling one community or the other to leave the area, but it is unclear how real the threats are.⁴¹

Some individuals and groups have sought to exploit the issue of land and resources, and the fear and mistrust between indigenous people and those from elsewhere in Kenya, to promote their own agendas. The Mombasa Republican Council (MRC), a separatist group formed in the late 1990s to counter the perceived marginalisation of indigenous coastal people, often refers to such issues and to the fact that in its view, successive governments have done nothing to address their grievances and needs.⁴² Mixed with public frustration about high unemployment levels among a predominantly young population, and in some cases religious narratives, such tactics create a dangerous breeding ground for violence and displacement.⁴³

In February 2014, clashes between the police and Muslim youths in Majengo, a neighbourhood of Mombasa, led to the preemptive displacement of an unknown number of young people. The clashes flared after the police arrested around 120 people and deployed forces in what it said were counter-terrorism operations.⁴⁴ Such outbreaks of violence are yet to lead to significant displacement, but they have the potential to do so and should be considered a major security threat.

3

Displacement caused by disasters

Land issues also arise in the context of displacement induced by disasters, either as part of the cause or when such events restrict access to land for people and livestock. Both sudden and slow-onset natural hazards cause displacement in Coast region, and recurrent floods and drought are common.⁴⁵

Kwale, Taita Taveta, Kilifi and Lamu Counties are considered semi-arid, and Tana River County arid. In such environments, people's access to and control over resources vital to their livelihoods is already insecure. They become more vulnerable still as weather patterns become increasingly unpredictable.⁴⁶ Kenya's draft policy on IDPs recognises that "internal displacement may be among the gravest effects of climate change". It also acknowledges drought as a cause of displacement, linked largely to loss of livestock and access to resources.

As access to pasture and water becomes increasingly difficult and contested, the potential for localised violence and conflict increases. It is heightened even further when pastoralist communities seek access to resources beyond their traditional areas. One interviewee for this report said such disputes were made worse by the arrival of Somali pastoralists who bring their livestock into northern Kenya during the drought season, and by pastoralists from drought-prone counties such as Garissa, Mandera and Wajir who graze their livestock along the Tana River corridor.⁴⁷ Recurrent floods have also forced pastoralists to move their livestock to areas worked by farmers, which in some cases has led to violent clashes and displacement. It may be that natural hazards and disasters trigger pastoralists' displacement, but a combination, sequence or accumulation of causes is likely to have led up to it.⁴⁸

Floods displaced nearly 180,300 people in Kenya in 2013, and Coast region was one of the worst affected areas.⁴⁹ The seasonal swelling of the Tana and the Sabaki rivers in April or May is the main cause of flooding in the region, the threat building up slowly until the rivers break their banks. KRCS has introduced an early-warning system,⁵⁰ but according to its staff in Kilifi County, people - and particularly those without title deeds - are often reluctant to leave pre-emptively for fear that others will occupy their land. Others stay put because of the cost of moving, they do not know where to go, they believe the government will eventually intervene or they see uncertainty about weather patterns as a reason to wait and see what happens.



Rescue operations arrive at Tana Delta, with non-food items issued by the Kenya Red Cross. Photo: KNCHR, August 2012

In April 2013, flooding displaced 12,000 people in Tana River district and nearly 10,000 in Tana Delta. The IDPs from Tana Delta took refuge in 15 camps in the area.⁵¹ KRCS's response to such events includes emergency evacuations,⁵² air rescues,⁵³ the distribution of food and water and the provision of health services. The lack of accurate and comprehensive data on IDPs is an obstacle to its efforts, however, as is the poor state of infrastructure in some areas. The fact that flooded areas may be inaccessible hampers both the delivery of assistance and the collection of data.

Displacement caused by flooding tends to be short-lived. People generally return as soon as possible after the floodwaters subside. They expose themselves, however, to the risk multiple displacements that aggravate their poverty and vulnerability. Given the risk, some IDPs may decide not to go back to their areas of origin. In Lamu County, where floods displaced 790 households in April and May 2013,⁵⁴ around 500 IDPs fled to Majembeni, where they occupied public land that is arable and not at risk of flooding. Majembeni is also near the township of Mpeketoni, which offers viable economic opportunities.⁵⁵

4

Displacement caused by human rights violations

Human rights violations linked to land disputes and development projects are a significant cause of internal displacement in Coast region, and they must be considered in the context of historical land injustices set out in the introduction to this report. Kenya's post-colonial governments have often leased communal Coast land to private companies⁵⁶ without ensuring that the people affected received alternative and equally valuable land or adequate compensation. Many communities are unaware of the legal status of the land they live on until companies or private owners evict them.⁵⁷

As the country's Truth, Justice and Reconciliation Commission (TJRC) noted, Coast residents invariably link their economic marginalisation to being dispossessed of their land. The commission heard many accounts of abuses by the police and local authorities, including extra-judicial killings, beatings, the arrest and imprisonment of those who demand restitution, and the eviction of people living on contested land, often accompanied by destruction of their property.⁵⁸

A history of dispossession stretching back to colonial times underlies such violations, as do the unclear tenure system it has produced and poor land governance characterised by corruption and political and ethnic bias. Local administrations have allocated some plots of land twice; there have been competing ownership claims between communities and private individuals or public authorities; land with unclear tenure status has been transferred, sometimes fraudulently; and there is a perceived prevalence of "professional squatters".⁵⁹ Evictions tend not to adhere to international standards, and the security forces often intervene to assist rather than prevent them. Sufficient notice is not always given, and the people to be affected are rarely consulted. Neither are they offered alternative land or compensation. In some cases, the agribusinesses and resource extraction companies that move in do environmental damage which causes further displacement.

Relatively few communities affected by evictions take their cases to court, either because they lack the legal literacy to do so, judicial institutions are too far away or in some cases because authorities were complicit in their eviction.⁶⁰ Without judicial recourse, compensation or relocation options, those affected are often left more vulnerable and pushed deeper into poverty.

The impact of unresolved land dispossession dating back to colonisation

A number of evictions linked to unresolved land disputes between different communities, or between communities and private owners, have been reported in counties such as Kilifi and Kwale. In Kilifi, there is an ongoing dispute between indigenous communities of mainly of Mijikenda descent and the Mazrui community over 3,172 acres of land near Takaungu village, Kikambala division. The land was registered to the Mazrui in 1914 and they have been the formal owner since, but the other claimants say they have been living there as long as the Mazrui and that their right to the land has been disregarded.

A second land dispute linked to historical grievances, also in Kikambala division, pits the ancestral Shariani community, which currently lives on a 400-acre plot, against the registered owner of the land. The owner intends to build a hotel on the plot, putting the Shariani community at risk of eviction. The Shariani, however, claim that the land in question was taken from them under the 1908 Land Titles Act, and that their ancestors were already living on it at the time.⁶¹

Evictions have also taken place in urban areas, as evidenced by two cases in Mombasa's informal settlements. More than 50 families have been living on two plots of land in the Tudor Kwa Makaa settlement for over 30 years, but since 2009 a contractor claiming to act on behalf of the owner has tried to evict them several times despite court orders to the contrary. In the Kibarani settlement, the land in question officially belongs to a number of companies and individuals, but the local community, which has suffered multiple evictions, claims to have settled there before it was registered to anyone.

Evictions by private companies

When private companies evict people without land title deeds or whose land issues remain unresolved, internal displacement is very often the result. Many communities in Kwale County live in villages on the edge of land acquired for development activities such as sugar cane cultivation, mineral extraction or tourism, and many of the county's evictions can be attributed to the former Ramisi Sugar Company, which used to own around 45,000 acres of land.



Boundary that has been allegedly altered by a salt company to extend land for extraction. Photo: Patrick Bonyonte/KNCHR

After the collapse of the company in 1988, the land was transferred to the Bank of India and was later bought back by the government. Between 2006 and 2007, 15,000 acres were leased to Kwale International Sugar Company Limited (KISCOL), which was founded in 2007.⁶² The other 30,000 acres were allocated for the settlement of squatters (see Box 1). The communities affected by the arrangement have, however, denounced a number of irregularities:

- Evictees not included in the government's resettlement scheme⁶³ claim their ancestral rights have been disregarded and demand access to land or compensation.
- Companies are alleged to have encroached on community land beyond that allocated by the government.
- Land meant for squatters under the government's resettlement scheme has reportedly been re-allocated to companies by the government.
- There are said to be disputes over ownership between local authorities and companies.

If the status of disputed land is ultimately unclear, it is more likely to lead to abusive behaviour from those hoping to benefit from it.

The following are examples of current cases linked to KISCOL and Ramisi:

- KISCOL claims that the Msambweni community has settled on land allocated to the company, while the community says the firm has illegally extended the boundaries of its allocation. The community also argues that as it was not included in the government resettlement scheme that accompanied the allocation of 15,000 acres to KISCOL, their land cannot belong to the company. The community claims both the authorities and the

company have carried out forced evictions, destroyed crops and harassed and intimidated its members.

- The Ramisi settlement scheme in Kinondo, Msambweni district, is based on former Ramisi Sugar Company land. Officials have been accused, together with land agents, of selling off land meant to settle squatters, or allocating it to private companies.
- The Kinondo community initially lost their land to Ramisi. After the firm collapsed, it was transferred to Emfil Company Limited. There is an ongoing ownership dispute between Emfil and the government.⁶⁴
- *Kassim Ali Kama (and others) vs Kwale International Sugar Company*: a petition was signed in 2011 on behalf of 610 residents of the Mabatini Nyumba Sita, Vidziani, Gonjora, Fahamuni and Kingwede areas of Msambweni district, according to which KISCOL's acquisition of the petitioner's ancestral land resulted in the dispossession of around 1,000 households without title deeds. KNCHR estimates that only around 100 have been affected. The first forced evictions took place in 2009 and those affected received some compensation. The group filing the petition, however, moved onto the land at a later stage, at a time when KISCOL was making no use of it. When the company noticed the new settlers were growing in number, it obtained an eviction order, but the order is yet to be implemented because of the current open case. On 29 March 2012 the high court in Mombasa ordered a temporary halt to the evictions until a final ruling is made. The affected communities say they have nowhere else to go, and that they are barely able to afford their lawyers' fees and transport costs to and from court hearings. The ongoing construction of dwellings on the land in question suggests that new people continue to arrive and settle there in anticipation of compensation.

Box 1. The right of 'squatters' to protection from forced evictions

The term “squatter” is not used or defined in international standards, but Kenyan authorities, civil society organisations, media and the general public apply it widely. Many, however, are not aware of its exact definition, and as a result its meaning has become blurred and it is often used inappropriately.

According to the 2012 Land Act and the 2009 land policy, squatters are defined as “persons who occupy land that legally belongs to another person without that person’s consent”. The eviction and resettlement procedures bill contains a slightly different definition. It describes a squatter as “a person who has occupied land without the express or tacit consent of the owner or person in charge for a continuous period of at least six years without any right in law to occupy such land and that person does not have sufficient income to purchase or lease alternative land”. The bill is also the only document to refer to “professional squatters”, whom it defines as “persons who reside on land without the owner’s consent 1) for speculative purposes or 2) despite already having been awarded land by the Government, but sold, leased or transferred the allocated land”.

The 2009 land policy recognises that squatters are present on all type of land, and that a defining characteristic of informal or squatter settlements is the absence of tenure security and land planning (3.6.9, 209). As such, it recommends the government “establish an appropriate legal framework for eviction based on internationally acceptable guidelines”. Article 160.2.e of the Land Act gives the National Land Commission the power to: “(i) establish appropriate mechanisms for their removal from unsuitable land and their settlement; (ii) facilitate negotiation between private owners and squatters in cases of squatter settlements found on private land; (iii) transfer unutilised land and land belonging to absentee land owners to squatters; and (iv) facilitate the regularisation of existing squatter settlements found on public and community land for purposes of upgrading or development.”

It is, however, the eviction and resettlement procedures bill, which is still to be adopted, that will set up adequate procedures and protect all people except “professional squatters” from forced eviction. According to the bill, “forced eviction means the permanent or temporary removal of persons, squatters or unlawful occupiers of land from their home or land which they occupy against their will without the provision of access to appropriate forms of legal or other protection”.

Many landless Kenyans will be unable to meet the bill’s six-year occupation requirement to qualify as a squatter, because they have been forced to move repeatedly, often as a result of eviction. That said, the bill also covers unlawful occupiers, who are defined as “person(s) who take(s) possession of land or structures without the tacit consent of the owner or without any right in law to take possession of such land or structure”. The definition reflects that of a squatter in the 2012 Land Act, and in order to avoid confusion over terminology, the two pieces of legislation should be harmonised.

In Kilifi County, the establishment and expansion of the activities of 11 salt mining companies along 40 km of coastline has been associated with evictions and other human rights violations since the early 1970s, and the situation is still ongoing. The security forces usually carry out the evictions, because the companies lease their land from the government. According to local civil society organisations (CSOs), as of February 2014 around 2,000 households had been evicted, of whom an estimated 1,500 have not yet recovered despite many of them having a good income level before their eviction.⁷⁵ Some of those affected returned to squat the same land, some moved to areas further inland and others joined the urban poor in towns such as Malindi.

Disputes tend to centre on the companies’ encroachment onto community land, and the pollution of water sources and the wider environment they cause. Some disputes have been taken to court, with CSOs providing the plaintiffs with legal support and advocating for their rights. On 4 December 2013, the Malindi Human Rights Forum, a local NGO, submitted a petition to the National Land Commission in connection with KNCHR’s public inquiry into allegations of human rights violations in Malindi district (see Box 2). The petition was raised because, seven years after the inquiry ended, nothing had been done to implement the recommendations it made.

The right of ‘squatters’ to protection from forced evictions under international law

Despite the fact that international standards do not define or specifically refer to squatters, they do stipulate that people generally are entitled to protection from arbitrary eviction, which must always be justified on the basis of specific and overriding public interest, and must respect the human rights of those affected.

The most important human rights rules that protect against forced eviction are set out in two key UN treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which Kenya has ratified. The stipulations of the two covenants are reinforced by a compatible set of rules in the African Charter on Human and Peoples’ Rights (ACHPR) and the Great Lakes Protocol on the Property Rights of Returning Persons.

Three rights enshrined in these instruments are particularly relevant to displacement situations:

- the right to freedom of movement and choice of residence, which protects against all forms of forced internal displacement⁶⁵
- the right to privacy, which protects all people from unlawful or arbitrary interference in their personal and family life, including their home - meaning “the place where a person resides or carries out his usual occupation”. In other words, even if individuals do not legally own their homes or workplaces, their possession and use of such property cannot be unlawfully or arbitrarily curtailed⁶⁶
- the right to adequate housing, including the right to be free from forced eviction, which also applies to residents of informal settlements.⁶⁷ This right focuses on protecting individuals’ domestic lives and livelihoods. It is linked so closely with the right to privacy under ICCPR that the UN Committee on Economic, Social and Cultural Rights has declared that the same set of principles should be used to guide the application of both.

ACHPR does not include either right, but the African Commission for Human and Peoples’ Rights has issued several rulings in which it identified an implied right to adequate housing and to be free from forced eviction in several of the charter’s other provisions.⁶⁸

The following human rights and development principles and best practices provide useful guidance on safeguards and processes to prevent or address forced displacement:

- The UN Basic Principles and Guidelines on development-based evictions and displacement⁶⁹
- The UN Guiding Principles on security of tenure for the urban poor⁷⁰
- The Committee on World Food Security-Food and Agriculture Organisation (CFS-FAO) voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security⁷¹
- The UN Guiding Principles on business and human rights⁷²
- The UN minimum principles to address the human rights challenge of large-scale acquisitions and leases⁷³

In the case of lawful evictions to make way for development projects, those affected should share the benefits of such development along with the wider public, or at least not suffer a deterioration of their living standards as a result.⁷⁴

In Mombasa County, the Dunga Unuse community has been repeatedly evicted from a three-acre plot of land registered to a private company. The community, however, has lived on the land for decades, and its members return after each eviction despite the destruction of their property.

Box 2. A public inquiry into allegations of human rights violations in Malindi district

KNCHR began a public inquiry in July 2005 into allegations of human rights violations, including forced evictions, associated with the activities of salt companies in the Magarini division of Malindi Sub-county. The inquiry also investigated claims that a number of public institutions had either colluded in the violations, or been complicit by their failure to act to stop them. The final report of the inquiry⁷⁶, which was published in 2006, presented four main findings about the land in question:

“Finding one - Post-colonial governments of Kenya perpetuated colonial injustices against the community by leasing their land to salt manufacturing companies without ensuring that the people had recourse to alternative and equally valuable settlements. The Inquiry found that the legal basis, which allowed the state not to compensate the people for land leased to the salt manufacturing companies, was unjust because the community had had de facto ownership and use of the land in question for many generations. This notwithstanding, the community was unaware that it was occupying the lands in question illegally.”

“Finding two - Some of the salt manufacturing companies have been breaching both the general and special conditions attached to their grants. These terms and conditions are, in many cases, far too generous to the salt companies, thereby giving them space to overstep their mandates. For example, Kurawa Salt Company sub-let its land to another company in disregard of the terms of its lease. Other companies have built dykes, which have interfered with the free flow of water from the sea. The Inquiry also found out that most of these companies do not utilise all the land leased to them, and land rates being charged are not commensurate with the current land value.”

“Finding three -Where the salt manufacturing companies sought to compensate the community, compensation covered only standing crops, permanent trees and houses and excluded land. However, the compensation was assessed at woefully inadequate levels. The Inquiry thus found the basis for the assessment of crops and property for purposes of compensation, grossly unjust. Many members of the community have, to date, not been compensated for crops or property that was destroyed or taken over.”

“Finding four - The settlement schemes instituted by the Government as a way of redressing the land question were themselves fraught with corruption. For example, well-connected individuals were allocated this land. The process of setting up schemes and settling the landless should however be finalised.”

Among KNCHR's recommendations were the following:⁷⁷

- The government should make an accurate inventory of communities or their descendants
- The process of adjudication under the Land Titles Act (now Cap. 282) should be reopened to enable indigenous communities or their descendants to present their claims
- Salt companies that have breached the terms and conditions of their grants must be penalised according to the law
- The rates paid by salt companies must be revised to reflect the current value of the land. The government should also renegotiate the terms and conditions of the companies' leases, including revising the size of plots granted to levels necessary for their core business
- All people or groups of people who have not been compensated for losses accruing on land from which they have been evicted or otherwise removed should be compensated
- Cases of people who declined compensation or who contested the amounts offered in lieu of their losses should be reviewed and appropriate redress offered
- The government must review the framework it uses to compensate for lost crops and align it with market values in accordance with article 75 of the constitution, which provides for “full and prompt compensation” for property taken over by the state
- Only genuine squatters should be resettled on land schemes for those removed from plots leased out to salt companies. The allocation of land to people suspected not to have been displaced should be investigated and such land reposessed and given to genuine squatters
- The government should establish new settlement schemes strictly for landless indigenous communities on land recovered from salt companies or elsewhere
- The government must ensure that settlement schemes designed to resettle such people or groups will not instead be appropriated by well-connected individuals with no right to such resettlement

The government's response to the evictions has been fragmented at best, and on the relatively rare occasions compensation has been paid it has been inadequate. Efforts have been made, however, to address the issue in a more strategic way. The National Environmental Agency (NEMA) has issued a call for the salt firms to comply with environmental management regulations or face sanctions that include their closure, and Kenya's president, Uhuru Kenyatta, has publicly voiced concern about the evictions. The task force formed in November 2013 to draft the community land bill and the evictions and resettlement bill put the Malindi evictions at the top of its list of investigations, and the land survey department in Kilifi is currently verifying boundaries and mapping out areas accordingly. Despite these initiatives, there have been no concrete outcomes to date.

Evanson Kamau Waitiki was forced to abandon the 940-acre farm he had bought in 1975. When he returned a few years later, he found that as many as 100,000 landless people had settled on the property in his absence. They had even built permanent structures such as shelters, schools and places of worship. Waitiki tried for years to reclaim his land, but was unable to evict those occupying it.⁷⁹ He obtained a court order in 2001, but it was never carried out, reportedly because there were too many people involved. He eventually agreed in 2013 to give his land up in return for compensation from the government, but as of May 2014 it was still unclear how the money would be raised.⁸⁰

Evictions associated with state development projects and secondary occupation of land

State development projects such as the Lamu Port - South Sudan - Ethiopia transport corridor (LAPSSET) have also led to evictions. A government assessment in early 2013 to determine the impact of LAPSSET identified 300 households without title deeds who would have to be evicted to make way for the construction of the port and a highway in the Kililana area. It proposed compensation of \$17,100 per acre of land lost to the project, plus alternative land on the Swahili settlement scheme. The announcement prompted a large influx of people hoping to benefit from the package, most of whom were forcibly evicted. The compensation process has been stalled since the March 2013 general elections, and as of February 2014 beneficiaries had received neither money nor land. Reported irregularities in the LAPSSET tender process have politicised the project, but the government has announced that it will go ahead as planned.

The secondary occupation of IDPs' land is also an issue in Coast region. The largest and best-known example is probably the so-called Waitiki case, which has its origins in politically-motivated ethnic violence that erupted along the coast in August 1997. Raiders launched attacks against non-locals and engaged in sporadic firefights with the security forces for weeks. Intermittent raids continued well into November 1997 and some raiders continued their attacks until December of the following year. Around 100,000 people were reportedly displaced by the violence.⁷⁸

5

Kenya's efforts to address displacement and land issues: unfinished business

Kenya has taken significant steps to assume its responsibility to ensure the security and welfare of the country's IDPs, and to prevent, mitigate and resolve internal displacement. It has also tried to address the land issues that lie at the heart of many displacement situations, particularly from a legal and policy perspective.

The country is a member state to the 2006 Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact) and its protocols. It is yet to sign and ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), but it has made significant progress in establishing a comprehensive legal and policy framework on internal displacement. A draft policy completed in March 2010 outlines institutional structures, roles and responsibilities for state and non-state parties during all phases of displacement. It also set out measures to prevent, manage and mitigate displacement risks, to protect IDPs and to help them achieve durable solutions. The cabinet eventually endorsed the national policy on the prevention of internal displacement and the protection and assistance to internally displaced persons in Kenya in October 2012.⁸¹

The draft policy was complemented by the 2012 Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.⁸² The act enshrines key protection principles throughout the displacement process and establishes an institutional framework for IDPs' protection and assistance. It is broadly based on international and regional instruments and standards, and provides for a comprehensive approach to addressing displacement caused by conflict, other forms of violence, disasters and development projects, irrespective of IDPs' location or ethnic affiliation.

The act also includes specific provisions on land. It provides special protection for IDPs, communities, pastoralists and other groups with a special dependency on and attachment to their land⁸³, and it refers to "access to effective mechanisms that restore housing, land and property" as one of the conditions for achieving durable solutions. It provides for the appointment of the principal secretary of the government department responsible for land matters, and the chair or a commissioner from the National Land Commission as members of its implementation committee, to ensure land issues relating to displacement are adequately addressed. The act also calls on the government to ensure that if displacement

takes place to make way for development projects, it happens in a way that respects the human rights of all those affected. It places particular emphasis on the protection of community land and the specific needs of women, children and people with special needs.⁸⁴

The adoption and implementation of both instruments is essential to improve the government's response to IDPs' needs, including those explored in the previous chapters, but unfortunately little progress has been made in this direction.⁸⁵ The implementing body for the act, the National Consultative Coordination Committee (NCCC), is still to be established, and there is a lack of knowledge about its provisions among authorities, the general public and IDPs themselves. IDMC and KNCHR interviews with stakeholders in Coast region confirmed this to be the case, despite the awareness-raising efforts of some national organisations. The lack of awareness among local authorities is of particular concern, given the ongoing devolution of power provided for by the 2010 constitution.⁸⁶ As the act makes clear, local authorities "bear responsibility for the administrative implementation of the provisions of this Act in accordance with their functions and powers".⁸⁷ They are also responsible for conducting "a public awareness, educational and information campaign on causes, impact and consequences of internal displacement as well as on means of prevention, protection and assistance to internally displaced persons within its area of jurisdiction".⁸⁸

The government's response to displacement caused by disasters has tended to be fragmented and ad-hoc, given that there is no institutional framework to coordinate it. A national disaster management policy was drafted in 2009, and a disaster management bill was still under discussion as of May 2014. There is, however, a national disaster response plan,⁸⁹ linked to the Vision 2030 development strategy for northern Kenya and other arid lands⁹⁰. The environment ministry's national climate change response strategy 2010⁹¹ refers to displacement caused by sudden and slow-onset disasters and predicts an increase in population movements. The country is also a participant in the programme of action for implementation of the Africa regional strategy for disaster risk reduction for 2006 to 2015.

Kenya's land reform

Kenya has made significant progress in developing a comprehensive land-related framework.⁹² The first step

was the adoption in 2009 of the national land policy⁹³, which addresses issues around land administration; access to land; sustainable land use planning, including productivity and conservation targets and guidelines; the restitution of historical injustices; environmental degradation; disputes; and the unplanned proliferation of informal urban settlements, including the establishment of a legal framework for evictions based on international guidelines.

The policy recognizes all Kenyans' need for tenure security, including women, pastoral communities, informal settlement residents and other marginalised groups. It also recognises and protects customary land rights. It refers to "coastal region land issues" as requiring special attention and interventions, and makes recommendations in terms of addressing them.

Chapter five of the 2010 constitution is dedicated entirely to land and the environment. According to article 60: "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: (a) equitable access to land; (b) security of land rights; (c) sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas; (f) elimination of gender discrimination in law, customs and practice related to land and property in land; and (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution". Articles 61 to 64 classify land in Kenya as either public, community or private. The constitution also explicitly protects private property from expropriation, unless justified and deemed necessary for security reasons or public interest, in which case fair and prompt compensation is guaranteed.

The next step in the land reform was the adoption of a series of new laws in 2011 and 2012 - the 2011 Environment and Land Court Act,⁹⁴ the 2012 Land Act,⁹⁵ the 2012 Land Registration Act⁹⁶ and the 2012 National Land Commission Act.⁹⁷ The Environment and Land Court Act provides for the establishment of a judicial body to resolve disputes relating to the environment, the use and occupation of land and titles. It also enables the court to resort to alternative dispute resolution mechanisms where appropriate. The Land Act reviews, consolidates and rationalises Kenya's land laws, and establishes a framework for the sustainable management and use of all categories of land. The Land Registration Act sets out extensive mechanisms and structures to regulate land registration and transactions.

The National Land Commission Act provides for the establishment of a body bearing its name, and county land management boards to represent it at the local level and

perform statutory functions. The National Land Commission (NLC)'s main functions are the administration and management of land. It is tasked with ensuring that all land is registered, historical injustices are attended to, and all grants and dispositions of public land are reviewed to guarantee their propriety and legality.⁹⁸

According to article 160 (2) of the Land Act: "The Commission shall have the powers to make regulations (a) to secure the land rights of the minority communities to individually or collectively access and use land and land based resources following an inventory of the existing minority communities to obtain a clear assessment of their status and land rights; (b) to prevent and manage land based disasters and to provide for settlement in the event of natural disasters; (c) to establish, plan and manage refugee camps; (d) to deal with issues that arise from internal displacement of persons and provide for the settlement of the internally displaced persons; (e) with respect to squatters (i) to establish appropriate mechanisms for their removal from unsuitable land and their settlement; (ii) to facilitate negotiation between private owners and squatters in cases of squatter settlements found on private land; (iii) to transfer unutilized land and land belonging to absentee landowners to squatters; and (iv) to facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading or development."

Under the Land Act, disputes arising from any issues covered by its provisions and those of the Land Registration Act are to be referred to the Land and Environment Court.⁹⁹ Some cases, however, are still handled by the land registry, which has led to confusion because not everyone is aware of the changes the new laws introduced.¹⁰⁰ Disputes that cause displacement, and those IDPs face when they return, also tend to be dealt with outside the court system. Those affected are not always aware of the court's existence and work, and others are unable to dedicate the time and money needed to pursue formal proceedings.¹⁰¹ NLC encourages recourse to traditional and other alternative resolution mechanisms when disputes involve individuals, clans or ethnic differences. Agreements reached are usually accepted and considered binding,¹⁰² as long as they are deemed constitutional.

The Land Act and policy provide for an independent, accountable and democratic system backed by law to adjudicate land disputes at all levels. They also recognise the important role of alternative mechanisms such as negotiation, mediation and arbitration in facilitating quick and cost-effective justice. The community land bill also gives priority to traditional and alternative dispute resolution mechanisms and other processes beyond formal judicial proceedings. These include customary law and practice of the locality.

Alternative mechanisms may not always fully resolve a problem, but they can complement formal proceedings.¹⁰³ In order for them to function well, public awareness of both formal and informal mechanisms needs to be raised, and those involved in administering them need to be properly trained to do so.¹⁰⁴

Some initiatives have focused specifically on Coast region. A presidential directive in 1978 called for the situation of people living undocumented on public land to be regularized, and since then settlement schemes have been established to provide squatters and those forcibly displaced with alternative land (see Box 3).

There have also been initiatives to issue title deeds. On 30 August 2013, the national government announced the allocation of 60,000 title deeds in Coast region in an effort to address the problem of unclear tenure. The president issued deeds to 28,898 plots on 26 settlement schemes in October of the same year - 9,300 in Tana

River County; 8,746 in Taita Taveta; 3,625 in Lamu; 2,520 in Kilifi and 2,290 in Kwale. The process of issuing the remainder is still ongoing.

The exercise, however, had many shortcomings, leading stakeholders to question its integrity. It caused local political divisions, and some governors put a stop to the allocations in their counties. No land survey or assessment was conducted before the deeds were issued, and some do not even specify the location of the allocated land. The allocations were also marred by corruption. The selection of beneficiaries was not transparent and led to the unfair distribution of deeds, with some receiving several while others received none. In some cases, community chiefs and district officials took advantage of the allocations to gain land. Deeds were mainly issued for plots on settlement scheme land for which most residents already held allotment letters, and the process was not consultative. Some people tried to sell the land they had been allocated. The president himself called a stop to

Box 3. Government settlement schemes

Part IX of the 2012 Land Act provides for the establishment of settlement schemes implemented by NLC and administered by county-level authorities with its assistance. Article 134 stipulates that such schemes include but are not limited to “provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement”.

NLC is mandated to allocate public land for their establishment, and if public land is not available to purchase private land for the same purpose. The act further specifies that “any land acquired in a settlement scheme established under this Act, or any other law, shall not be transferable except through a process of succession”, and that “upon planning and survey, land in settlement schemes shall be allocated to households in accordance with national values and principles of governance provided in Article 10 and the principles of land policy provided in Article 60(i) of the Constitution and any other requirements of natural justice”.

The act also established a land settlement fund, to be administered by NLC. The fund is intended to provide access to land for squatters, IDPs, development and conservation projects and other initiatives that might lead to displacement; to purchase private land for settlement schemes; and to provide shelter and livelihoods to those in need.

As such, the Land Act aims to address some of the issues raised by the 2009 land policy, which noted in article 151: “There are no clearly defined procedures for the allocation of land in settlement schemes under the Agriculture Act, leading to manipulation of the lists of allottees and exclusion of the poor and the landless. These problems are compounded by the lack of clearly defined procedures for identifying, and keeping records of genuine squatters and landless people. In addition there are numerous cases of underutilised land by allottees”.

Complaints about settlement schemes are heard frequently in Coast region.¹⁰⁵ In many cases, the plots allocated are neither suitable nor big enough to be economically viable. The schemes rarely build on pre-existing communal structures or take into account gender, age and other vulnerability markers. Some officials who were supposed to act as custodians of public land have become facilitators of illegal allocations. The Maganda settlement scheme, which was launched in 2009, is a case in point. The allocation process was marred by serious irregularities, with some people already settled on the land being left out, while plots were given to public officials, politicians and private companies. The size of plots available to those genuinely eligible also shrank significantly over time to accommodate the increasing corruption.¹⁰⁶

the distribution of deeds in Tana River County after complaints from Pokomo politicians that the process favoured Orma communities. The issue is still to be resolved.

There is currently no comprehensive data available on land allocation. Both NLC and the land ministry have information at their disposal, but there is a lack of efficient cooperation between them. This also led to cases of some plots being allocated to more than one person, and others in which the size of the plot on paper did not match the situation on the ground. As such, the exercise has led to more land disputes and eviction cases, defeating its original purpose.

Challenges in implementing the land reform

Good land governance is key to tenure security and contributes to sustainable development and food security. It unlocks economic potential and ultimately enhances political security. It is also essential in preventing disputes, forced evictions and violence that lead to displacement. Good governance depends on a robust legal framework and implementation strategy, and in May 2014, NLC published a five-year national strategic plan to guide the implementation of the 2009 land policy. It includes the devolution of land management to the county level, land registration, natural resource management, the development of a national information management system and the resolution of disputes.

The plan is both ambitious and welcome, but NLC has faced a number of challenges since it was established a year ago.¹⁰⁷ Lack of government funding is a significant obstacle. According to its 2013–14 progress report, the NLC requires KES 14.8 billion (\$168 million) for 2014/15, KES 15.4 billion for 2015/16 and KES 16.6 billion for 2016/17. As of January 2014, it was only three per cent funded for 2014/15. Other challenges include resistance to change by some public entities; the streamlining of functions between it and the land ministry; a lack of training and capacity building for NLC staff; a lack of office space; a lack of public awareness of land issues; limited access to justice on land issues; a gap in scientific research to shape practices; a lack of capacity for devolution; overwhelming expectations of change; and the need to bring some legislation into line with the constitution.¹⁰⁸ This makes implementation of many of the plans to promote land reform, such as the digitisation of records, extremely difficult.

Funding shortages have also affected KNCHR's operations, hampering its ability to monitor violations of housing and land rights in Coast region. After conducting hearings in Mombasa County, its taskforce set up to deal with residents' grievances had to abandon its work in June 2013 because financing from the deputy president's office dried up. Sessions in Kwale, Kilifi, Tana River, Lamu and Taita Taveta Counties were cancelled.¹⁰⁹

Despite the progress made on land reform, the process is still far from complete.¹¹⁰ Many communities are still without secure access to land, because of slow adjudication procedures and delays in finalising settlement schemes. Some civil society members have also voiced concern about contradictory provisions, particularly in terms of women's land rights.¹¹¹

Two important pieces of legislation needed to complete the reform are still pending. The current draft of the evictions and resettlement procedures bill¹¹² needs to be revised, because its terminology is not in line with the existing legal framework – among other issues it is the only legislation to refer to “professional squatters”- and some of its provisions are unclear. The community land bill¹¹³ is needed because, although the constitution and Land Act recognise community land as a category, it is not officially registered as such. That leaves people with communal and often customary rights to land powerless to resist concessions and authorities' granting of deeds to wealthy investors. In many cases, land has been sold and resold without the people living on it even being aware of the transactions.¹¹⁴

Clear laws on the exploitation of natural resources and binding regulations for the private sector along the lines of the UN Guiding Principles on business and human rights (see Box 4) are also needed to guard against tenure insecurity and evictions.¹¹⁵

Box 4. National responsibility and that of the private sector

The primary responsibility to assist and protect Kenya's IDPs lies with the country's national and local authorities, and they are accountable for doing so. The 2012 act on internal displacement also obliges the state to protect people from displacement caused by the private sector.¹¹⁶ Neither national nor multinational companies are duty bearers under international human rights law, however, and private sector activities increasingly threaten people's rights.

The dilemma is far from resolved, but voluntary guidelines introduced by CFS and FAO in 2012,¹¹⁷ and the 2011 UN Guiding Principles on business and human rights – also known as the Ruggie principles – provide frameworks to increase human rights compliance by the private sector. The first chapter of the Ruggie principles sets out the state's regulatory and policy functions to ensure businesses respect human rights, strengthen the human rights component when there is a state-business nexus and ensure policy coherence. Corporate responsibility in protecting human rights lies at the core of the principles, and chapter two identifies requirements for compliance in this sense, using the standard of due diligence. The third and final chapter calls for access to remedies to be ensured.

The UN Committee on the Rights of the Child (CRC) has used the Ruggie principles to develop a position on states' obligations in terms of the private sector's impact on children's rights.¹¹⁸ CRC's general comment 16 highlights the fact that business activities can affect a broad range of children's rights, and offers guidance for states on how to:

- a. ensure that the activities and operations of business enterprises do not adversely impact on children's rights
- b. create an enabling and supportive environment for business enterprises to respect children's rights
- c. ensure access to effective remedy for children whose rights have been infringed by a business enterprise acting as a private party or as a State agent."

Private sector activities can compromise children's right to life, survival and development, as set out in article 6 of the UN Convention on the Rights of the Child, in a number of ways. Environmental degradation and contamination arising from business activities can jeopardise the right of children, including those internally displaced, to health, food security and access to safe drinking water and sanitation. The sale or lease of land to private investors can also deprive local populations of access to natural resources linked to their subsistence and cultural heritage, which may put the rights of indigenous children at risk. As such, the obligation to make the best interests of the child a primary consideration, as set out in article 3.1 of the convention, becomes vital when states weigh up competing priorities such as short-term economic and longer-term development considerations.

Article 12 of the convention stipulates that children also have the right to be heard. This means that when a company consults communities that might be affected by a potential project, children's views should be sought along with those of adults. States should do likewise during assessments of private sector activities.

6

Conclusions

Multicausal internal displacement is a reality in Kenya, and Coast region exemplifies this very well, given that many of its residents have fled their homes to escape violence, disasters and human rights violations at some point in their lives. Land issues play a fundamental role. Forced evictions and violence are closely linked to tenure insecurity, which in turn arises from competing land claims and incompatibility between formal and informal tenure systems. Disasters such as droughts and floods increase competition for limited resources, including land, and contribute to violence between herders and farmers.

Both the national land policy and TJRC's final report recognise that these problems are particularly acute in Coast region. The latter also highlights the complexity of the issue given its historical origins, and describes landlessness as the main indicator of Coast people's marginalisation. Access to land is closely linked to identity and power. Tenure systems determine who can use which resources, for how long and under what conditions, and political agendas are also a major influence. Land allocations can alter the distribution of power and wealth, and as such have the potential to fuel or trigger violence, which in turn leads to displacement.

Without addressing all of these issues in a comprehensive and strategic way, it is unlikely the government will be able to facilitate durable solutions for Coast's IDPs, or prevent future displacement in the region. Efforts so far to help IDPs return, integrate locally or settle elsewhere have largely failed because underlying grievances over land have not been resolved.

The Kenyan government has taken significant steps to fulfil its national responsibility to prevent, mitigate and resolve internal displacement. It has also tried to address land issues, particularly from a legal and policy perspective. There are, however, a number of important bills and draft policies that should be finalised and adopted as a matter of urgency in order to close gaps in existing frameworks. These are the draft IDP policy, the eviction and resettlement procedures bill, the community land bill and the proposed national disaster management bill and policy. In doing so, care should be taken to harmonise the different laws and policies relevant to displacement, so as to avoid overlapping or potentially conflicting frameworks for IDPs' protection.

Clarifying notions and concepts, and ensuring that they are in keeping with international standards, should be a fundamental part of the exercise. The fact, for example,

that squatters can become displaced if they are evicted, or in some cases are already IDPs, is generally not recognised. Some national authorities' reluctance to recognise certain groups of people as IDPs, despite the very broad and inclusive definition in the 2012 internal displacement act, needs to be understood along with its political and financial implications. IDPs are often perceived as a reminder of the post-election violence of late 2007 and early 2008, which is why the government tends to avoid terminology associated with displacement and instead prefers to present the problem as solved. Politicians also often place undue focus on how addressing displacement might affect the allocation of resources, including land, and how potential resettlement initiatives might affect their electoral chances. Resistance to allowing IDPs to resettle in areas that might change voting patterns is not unheard of. These issues prevent the government from considering IDPs as rights holders, and from addressing their needs in terms of protection, assistance and durable solutions accordingly.

Kenya also needs to step up its efforts to implement the legal and policy frameworks relevant to displacement that have already been adopted. These include the 2012 act on internal displacement, the 2012 Land Act, Land Registration Act and National Land Commission Act, and the 2009 national land policy. Adoption is only a first, if fundamental step towards the assumption of national responsibility. Without implementation, the instruments in question remain simply words on a page. Arbitrary displacement, for example, is forbidden under the 2012 internal displacement act, but the information presented in this report shows that when evictions take place they often constitute exactly that. They are not carried out in accordance with appropriate standards, those affected suffer harassment and the destruction of their property, and they rarely receive adequate notice or compensation.

Lack of awareness is a serious obstacle to implementation. Unless stakeholders including central and local authorities, civil society, communities affected by displacement and the general public are familiar with their respective rights and duties, they will not be in a position to play their role. Field research for this report identified lack of awareness about the 2012 internal displacement act as a major gap in Coast region. The county authorities were not aware of their duties towards IDPs, and IDPs themselves were often unfamiliar with their rights, preventing them from speaking up and claiming them. It is also important that IDPs and people at risk of displace-



Focus group discussion with IDPs integrated into the community at Tarasaa. When their village of Kipao was attacked, they came to Tarasaa and sought refuge in the homes of local residents, fearing that if they erected tents, they might be an easy target for enemies. Photo: OCHA/Joseph Akure, January 2013

ment are properly consulted and informed during the planning and implementation of processes that will affect them. Otherwise, decisions taken are likely not to adequately reflect their needs or be appropriate to the local context. Authorities' and private organisations' failure to do so has increased discontent and the perceived marginalisation of the displaced population in Coast region. Consultation is vital too if durable solutions to IDPs' displacement are to be achieved. Without it a resettlement area, for example, is likely to have a low acceptance rate and little chance of being sustainable.

The bodies provided for by existing laws to oversee their implementation need to be established and properly resourced. The lack of progress in implementing the 2012 internal displacement act has much to do with the fact that the National Consultative Coordination Committee is still to be set up. The National Land Commission, which was established to implement the country's land reform, faces a vital and ambitious task, but lack of funding has severely hampered its activities.

The fact that Kenya's land reform is unfinished and land governance is weak at various levels means dispossession dating back to colonial times is still a source of disputes, secondary occupation, violence and forced evictions resulting in landlessness and recurrent displacement. Disputes affect and involve individuals, communities, private

companies exploiting natural resources on state allocated land, and state development projects. The government has put in place a progressive legal and policy framework on land, which, if implemented, would contribute greatly to resolving disputes. NLC's functions include securing the land rights of minority communities, reviewing all concessions of and titles to public land, addressing historical injustices and regularising squatter settlements on public land. The creation of settlement schemes to address the needs of those evicted or without clear land rights was also a welcome move, but alleged corruption and appropriation by individuals with no right to resettlement have been to the detriment of real beneficiaries.

Both Kenya's formal and informal dispute resolution mechanisms are acknowledged in the existing legal framework, but their roles and the rules governing their co-existence need to be clarified if the cycle of land disputes between formal and customary land holders is to be broken. The overwhelming majority of land in Kenya is held informally or customarily, and the courts are inaccessible, slow and expensive. As such, the use of alternative dispute resolution mechanisms such as mediation and arbitration, as envisaged by the National Land Commission Act, would facilitate speedy and cost-effective access to justice if designed in a way that ensures equity and impartiality for all parties, including vulnerable groups. Alternative mechanisms should, however, work

in tandem with their formal counterparts to ensure the possibility of appeal.

Despite the government's efforts to protect and assist IDPs, help in their search for durable solutions and address underlying land issues, a number of challenges still need to be addressed if an efficient and comprehensive response is to be put in place:

- Government ministries and commissions tend to take a siloed approach to their work. Better communication and cooperation between and within institutions is needed.
- The perception that the government's response to displacement is corrupt and influenced by political and ethnic bias needs to be countered. Even some humanitarian interventions have been seen as biased, such as those that followed the Tana River violence. This not only undermines the response, but can also trigger new inter-communal violence and lead to displacement.
- The government needs to adopt a holistic response to all internal displacement, irrespective of its causes. The current response tends to be fragmented and ad hoc, and focuses heavily on the emergency phase at the expense of longer-term initiatives. This shortcoming places a heavy burden on civil society organisations, whose interventions are often hampered by a lack of funding.¹¹⁹ KRCS is a fast and efficient first responder, but it is not responsible for providing the kind of comprehensive response needed to address displacement and support IDPs in the search for durable solutions.
- Neither does KRCS consistently track IDPs' location and needs over time. Indeed Kenya does not have comprehensive and up-to-date data on internal displacement. As things stand, IDPs outside camps are largely invisible, and any information that is available tends to be sparse and focus on new displacements. Some national, regional and international organisations collect data, but each according to their own methodologies. This is a major obstacle to an adequate response.
- The lack of coordination between central and local governments needs to be addressed, particularly given the process of devolution that is underway. Local authorities play an important role in assisting IDPs via their general social programmes, and through ad hoc responses to unexpected displacement. These efforts complement the work of the mandated national authorities, but displacement is rarely resolved by the time formal national interventions come to an end. Unless support for IDPs' needs is properly planned and budgeted for, there is a danger that they will be seen as synonymous with a backlog in social service delivery

and conflict with host communities. The data collection issue comes into play here too. Local authorities do not have reliable information on the people living within their jurisdiction, apart from that from the National Bureau of Statistics. This does not, however, include comprehensive data on IDPs, leaving them unable to carry out their planning, budgeting and social service delivery functions.

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About IDMC

The Internal Displacement Monitoring Centre (IDMC) is the leading source of information and analysis on internal displacement. For the millions of people worldwide displaced within their own country, IDMC plays a unique role as a global monitor and evidence-based advocate to influence policy and action by governments, UN agencies, donors, international organisations and NGOs.

IDMC was established in 1998 at the request of the Interagency Standing Committee on humanitarian assistance. Since then, IDMC's unique global function has been recognised and reiterated in annual UN General Assembly resolutions.

IDMC is part of the Norwegian Refugee Council (NRC), an independent, non-governmental humanitarian organisation.

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About KNCHR

The Kenya National Commission on Human Rights (KNCHR) is an autonomous National Human rights institution established under article 59 of the Constitution of Kenya 2010 with the core mandate of furthering the promotion and protection of human rights in Kenya. The KNCHR is established in accordance with the United Nations approved Paris Principles and operates guided by the United Nations-approved Paris Principles on the establishment, functioning of independent National Human Rights Institutions and has been accredited by the International Co-ordinating Committee of National Human Rights Institutions (ICC), as an 'A status' institution.

KNCHR; has broad mandate that include acting as a watch-dog over the Government in the area of human rights and provision of key leadership in moving the country towards a human rights state. The KNCHR is a cluster led of the National and regional Protection Working Group on internal Displacement; a consortium of government ministries and departments, international and national non- governmental organizations and faith based institutions that work with internally displaced persons; the major displacement being the politically instigated violence of 1992 and 1997.

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