

Kenya: Internally Displaced Persons Bill, 2012

July 2012

Legal analysis

Executive summary

In July 2012, ARTICLE 19 analysed the Draft Internally Displaced Persons Bill, 2012 (“the Draft Bill”) of Kenya, which is currently under consideration by the Parliamentary Select Committee on Labour and Social Welfare. This analysis focuses on the extent to which the Draft Bill complies with international standards on the right of access to information. ARTICLE 19 welcomes the initiative to institutionalise protections for internally displaced persons in Kenya, including measures to increase information flows to and from IDPs. While these provisions are robust, there is scope to improve the Draft Bill further to better protect the right of access to information in the process of addressing internal displacement.

ARTICLE 19 believes that empowering internally displaced persons (IDPs) to claim their information rights is essential for enabling them to assert their other rights, in particular their economic and social rights. The underlying concept of this analysis is the assertion that policies and regulations related to protecting IDPs in Kenya can be greatly enhanced by maximising the public availability of information. Access to information ensures public participation in decision-making and facilitates full public debate on public policy. A lack of respect for these rights has been identified as a weakness in Kenya’s response to internal displacement to date. There has been insufficient information about IDPs to inform policy; a lack of transparency around policy making related to IDPs and a failure to consult with IDPs on issues affecting them, and opacity has led to numerous instances of corruption.

The Draft Law is a positive step towards addressing these concerns. In particular, we welcome the initiative by the Kenyan government to domesticate the UN Guiding Principles and the Great Lake Protocols through legislation that largely emphasises the efficacy of a rights-based response to the problem of internal displacement. The establishment of the National Consultative Coordination Committee on Internal Displacement (“the NCCC”) is positive, since it has the mandate to compile a database on IDPs that will inform the formulation and effective implementation of projects.

There are strong obligations for the State to seek the informed consent from individuals likely to be displaced by development projects, with a positive emphasis on access to information and participation in decision-making. This is also reflected in provisions related to durable solutions – ensuring that the informed consent is sought of individuals in decisions regarding their return, resettlement or integration.

The analysis also welcomes the obligation to initiate a campaign to raise awareness, sensitization, training and education on the causes, impact and consequences of internal displacement. This campaign will, if adequately funded and properly implemented, increase dialogue on the realities of displacement across the country and forestall future instances of displacement. It also prepares individuals for the worst case scenario – so that they know their legal rights should they find themselves forced to flee their homes.

ARTICLE 19 recommends a number of reforms to enhance the effectiveness of the Kenyan government’s response to internal displacement. At the international level, this includes the ratification of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”), which Kenya was instrumental in drafting.

ARTICLE 19 expresses concern that there is an absence of provisions in the Draft Bill to address the information needs of existing IDPs. At present, references to the right to information and participation focus on prevention and durable solutions, leaving a significant gap in relation to protection and assistance of IDPs during their displacement. The analysis recommends the addition of a stand-alone guarantee for the right to access information and public participation – making it clear that respect for this right is crucial at all stages of displacement. There should be additional obligations to provide information to IDPs on the provision and distribution of humanitarian assistance during displacement, and for IDPs to be consulted in the process of planning such assistance.

The analysis also recommends that further measures be taken to maximise the utility of the NCCC as an institution and to ensure its transparency. In addition to collecting information about IDPs for its database, the NCCC should also produce and disclose accessible, credible and disaggregated data to the public about the IDP situation. Such information would promote dialogue on IDP issues, it would inform public debate and ensure that public authorities be held to account where they are underperforming. In the same regard, we advise that the NCCC should be required to publicly disclose and disseminate its yearly reports, rather than simply submitting them to Parliament.

ARTICLE 19 urges the Parliamentary Select Committee to review the Draft Bill in light of the recommendations submitted in this analysis. The Committee must impress upon Parliament that the right of access to information and participation in decision-making for IDPs is crucial for moving towards a durable solution to displacement – and for pre-empting further instability and violence in Kenya.

Recommendations

- Kenya must enact a legislative framework for the ratification of treaties in order to enable the ratification of the Kampala Convention;
- The right of access to information should be guaranteed in a stand-alone provision within the Draft Bill;
- Discussions on passing the Freedom of Information Bill to implement Article 35 of the Constitution should be prioritised;
- An awareness-raising, sensitisation, training and education programme should be tailored to the needs of existing IDPs and target IDPs remaining in camps and other settlements;
- The Draft Bill should make clear that the government is obliged to provide full information to IDPs on issues pertinent to them during their displacement, and must seek their participation in decisions on the provision of protection and assistance during this time;
- Information collected about IDPs must be held in a manner that complies with international standards on data protection. The Data Protection Bill (currently under stakeholder review) must be reformed to comply with international standards and its adoption prioritised;
- The NCCC must publicly disclose information on its activities, including disaggregated data on the situation of IDPs in Kenya and ensure that its annual reports are disseminated widely;
- The right of access to information and participation in decision-making should be expressed as a necessary condition of “informed consent” to durable solutions.

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About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, Comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the work of ARTICLE 19 in Kenya, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa at henry@article19.org

Introduction

The Internally Displaced Persons Bill 2012 (“the Draft Bill”)¹ intends to give domestic legal effect in Kenya to the UN Guiding Principles on Internal Displacement and the Great Lakes Protocol on the Protection and Assistance of Internally Displaced Persons.

The Draft Bill was tabled before the Kenyan Parliament on 13th June 2012, and is now under consideration by the Parliamentary Select Committee on Labour and Social Welfare before it receives its second reading in the House. It is of utmost importance that the discussion of the Draft Bill is prioritised so that the Bill can be passed into law prior to the House being dissolved ahead of the next Presidential election.

ARTICLE 19 believes that empowering internally displaced persons (IDPs) to claim their information rights is essential to enabling them to assert their other rights, in particular their economic and social rights. The underlying concept of this analysis is the assertion that policies and regulations related to protecting IDPs in Kenya can be greatly enhanced by maximising the public availability of information. Access to information ensures public participation in decision-making and facilitates full public debate on public policy. This analysis, therefore, focuses on the extent to which the Draft Bill complies with international standards on the right of access to information.

ARTICLE 19 East Africa has been working on access to information issues in Kenya since 2006, including extensive work with Parliamentarians towards the adoption of a comprehensive Freedom of Information Act² and promotion of the London Declaration for Transparency, the Free Flow of Information and Development.³ From this perspective, we identified that a significant failing of IDP interventions in Kenya has been a lack of information flowing to and from IDPs. Trainings held with IDPs in the Rift Valley, Western, Nyanza and Coast regions in the first half of 2012 have pinpointed three primary concerns:

- Insufficient documentation of information about IDPs means that there is little understanding of how interventions designed to assist and protect them can reach them.
- A lack of transparency around policy making related to IDPs, and a failure to consult with IDPs on key decisions affecting them, explains the ineffectiveness of many of these interventions.
- A lack of transparency has opened the resettlement programme to corruption. The government itself estimates that roughly \$250,000 has been embezzled.

The Draft Law is a positive step towards addressing these concerns. In particular, we welcome the initiative by the Kenyan government to domesticate the UN Guiding Principles and the Great Lake Protocols through legislation that largely emphasises the efficacy of a rights-based

¹ Copy of the Draft Bill is available upon request from ARTICLE 19.

² The latest ARTICLE 19 analysis of Kenya’s Freedom of Information Bill, from January 2012, is available at: <http://www.article19.org/resources.php/resource/2940/en/kenya-freedom-of-information-bill>

³ The London Declaration for Transparency, the Free Flow of Information and Development, 25 August 2010; available at: <http://www.article19.org/data/files/medialibrary/1798/London-Declaration.pdf>

response to the problem of internal displacement. These instruments emphasise the importance of maximising information flows to and from IDPs and consulting IDPs on decisions that affect them.

The analysis finds that provisions of the Draft Bill aimed at preventing displacement largely comply with international standards on access to information. There are robust protections for individuals who are facing displacement due to development projects – requiring that they are given full information and consulted with before decisions leading to displacement are made, and ensuring the full participation of affected persons in decisions for resettlement (Sec. 6.3, Sec. 21 – 22). Provisions relating to durable solutions are similarly strong, requiring that the informed consent of IDPs be sought prior to decisions regarding their return, resettlement or integration being made (Sec. 9.1).

ARTICLE 19 also welcomes the obligation to initiate a campaign to raise awareness, sensitization, training and education on the causes, impact and consequences of internal displacement. This campaign will, if adequately funded and properly implemented, increase dialogue on the realities of displacement across the country and forestall future instances of displacement. It also prepares individuals for the worst case scenario – so that they know their legal rights should they find themselves forced to flee their homes.

The analysis also applauds the establishment of the National Consultative Coordination Committee on Internally Displaced Persons (“the NCCC”) and its task of creating a national database on IDPs will ensure that more information is collecting on the scale and nature of internal displacement in Kenya. This will assist the government in understanding the scale and nature of displacement in Kenya, and inform the formulation and effective implementation of projects.

Despite numerous strengths in the Draft Bill, ARTICLE 19 recommends several reforms to enhance the effectiveness of the Kenyan government’s response to internal displacement.

At the regional level, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”)⁴, which Kenya was instrumental in drafting, must be ratified - both to enhance protections for IDPs in Kenya and reassert the role of Kenya as a leader on IDP issues within the African Union.

In relation to the Draft Bill, it is of particular concern to ARTICLE 19 that there is an absence of provisions requiring the government to address the information needs of existing IDPs. At present, references to the right to information and participation focus on prevention and durable solutions, leaving a significant gap in relation to protection and assistance of IDPs during their displacement. This omission leaves existing IDPs particularly vulnerable. The analysis recommends the addition of a stand-alone guarantee for the right to access information and public participation to the Draft Bill – making it clear that respect for this right is crucial at all stages of displacement. There should be additional obligations to provide information to IDPs on the provision and distribution of humanitarian assistance during displacement, and for IDPs to be consulted in the process of planning such assistance.

The analysis also recommends that further measures be taken to maximise the utility of the NCCC as an institution and to ensure its transparency. In addition to collecting information

⁴ The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted at the first African Union Summit in October 2009 in Kampala; available at www.africa-union.org.

about IDPs for its database, the NCCC should also produce and disclose accessible, credible and disaggregated data on this information. Such information would promote dialogue on IDP issues, it would inform public debate and ensure that public authorities be held to account where they are underperforming. In the same regard, we advise that the NCCC should be required to publicly disclose and disseminate its yearly reports, rather than simply submitting them to Parliament.

ARTICLE 19 urges the Parliamentary Select Committee to review the Draft Bill in light of the recommendations submitted in this analysis. The Committee must impress upon Parliament that the right of access to information and participation in decision-making for IDPs is crucial for moving towards a durable solution to displacement – and for pre-empting further instability and violence in Kenya.

International Standards on the Right of Access to Information

The right to freedom of expression and freedom of information is widely held to be a “cornerstone” right, crucial both in its own regard, for the functioning of democracy and for the attainment of the millennium development goals. The right to freedom of expression and freedom of information is a condition for engagement in public governance and debates on issues of public interest. It is fundamental to the ability of individuals to hold government to account for wrongdoing, and to enable people to assert their civil, political, social and economic rights.

The principle of access to information reflects the fundamental premise that government is supposed to serve the people; and that they hold information not for themselves but on behalf of the public. The right has been described as the “oxygen of democracy” – as the ability of individuals to participate effectively in decision-making that affects them depends, in many obvious ways, on information. Access to this information also enables individuals to scrutinise the actions of their leaders and hold them to account through full and open debate. Access to information is therefore a key tool for asserting rights, combatting corruption and exposing wrongdoing.

The right of access to information is therefore an indispensable tool to enable IDPs to assert their rights to protection and assistance. This section identifies a number of legal instruments that guarantee the right of access to information and provide guidance on how the right should properly be safeguarded. The Kenyan government should consider these standards when integrating the principle of access to information into its IDP assistance and protection strategies.

Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights (“the UDHR”)⁵ recognises access to information as integral to the right to freedom of expression:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁶

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“the ICCPR”) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 states party to respect its provisions and implement its framework at the national level.⁷

⁵ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁶ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

⁷ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999

Kenya acceded to the ICCPR on 1 May 1972 and is therefore legally bound to respect and to ensure the right to freedom of expression and information as contained in Article 19 of the ICCPR:

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

In 1998 the UN Special Rapporteur on Freedom of Opinion and Expression stated that “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government”.⁸ Since 2000 the Special Rapporteur has recognised that the right is fundamentally important to the right to development.⁹

In General Comment No.34, the UN Human Rights Committee (“the HR Committee”) elaborated upon the application of Article 19 of the ICCPR as including the right of access to information. The General Comment emphasises that “[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.” The General Comment specifies the duties of governments to proactively put in the public domain Government information of a public interest and to “make every effort to ensure easy, prompt, and effective and practical access to such information.”¹⁰

The right of access to information also encompasses the right to access information held about oneself, and to have erroneous information corrected:

Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified.¹¹

Article 27 to the ICCPR also requires that a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.

While the right to freedom of expression and information is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following respects:

UNTS 171; 6 ILM 368 (1967).

⁸ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

⁹ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.

¹⁰ CCPR/C/GC/34, at para. 19.

¹¹ *Ibid.*, at para. 18.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, public health or morals.

Restrictions on the right to freedom of expression and information must be strictly and narrowly tailored and may not put in jeopardy the right itself. Determining whether a restriction is narrowly tailored is often articulated as a three-part test. It is required that restrictions are i) provided by law, ii) pursue a legitimate aim; and iii) that they conform to the strict tests of necessity and proportionality.¹²

In relation to the right of access to information, the requirements of Article 19(3) also translate into a three-part test. A public body must disclose any information that it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;¹³
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public's interest in having the information.¹⁴

Any attempt by a government to suppress or withhold from the public information of a legitimate public interest must therefore be justified according to this three-part test.

Convention Against Corruption

The United Nations Convention Against Corruption ("the UNCAC"), the ratification of which is recommended in the London Declaration (below), was ratified by Kenya on the 3 December 2003.¹⁵ The treaty entered into force on 14 December 2005.

As a State Party to the UNCAC, Kenya is under a clear obligation to facilitate the right of access to information held by public bodies. Empowering IDPs with the right of access to information is essential for ensuring that those most affected by displacement, and those who are the intended beneficiaries of government initiatives to protect and assist displaced persons, have the tools necessary for holding officials to account and exposing wrongdoing where it exists.

Chapter II of the UNCAC concerns preventative measures, and provides at Article 5(1) that:

Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper

¹² *Velichkin v. Belarus*, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

¹³ For an example of legitimate interests see Articles 38-45 of the Draft African Model Law for African Union Member States.

¹⁴ The Public's Right to Know: Principles on Freedom of Information Legislation (ARTICLE 19 Principles), London, 1999, at Principle 4; available at: <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>

¹⁵ The UN Convention against Corruption signature and ratification status website; available at: <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

management of public affairs and public property, integrity, transparency and accountability.

Article 10 of the UNCAC concerns the practice of “public reporting”:

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision making processes, where appropriate.

Subsection (c) to Article 10 provides that the proactive publishing of information by public bodies is integral to reducing the risk of corruption in public office.

Article 13 to the UNCAC concerns the promotion of participation of society. This includes at Article 13 (b) the obligation to ensure that the public has effective access to information and at (d) the obligation to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.

Article 33 of the UNCAC obliges States party to the convention to consider incorporating to their domestic legal systems appropriate measures “to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

The London Declaration For Transparency, the Free Flow of Information and Development

The London Declaration for Transparency, the Free Flow of Information and Development (“the London Declaration”) was adopted in August 2010 at a conference convened by ARTICLE 19 and attended by leading members in the international human rights, development and transparency communities.¹⁶

The London Declaration advances four inter-connected principles for enhancing the effectiveness of measures for achieving the Millennium Development Goals (MDGs). These are:

First, the free flow of information, transparency and civic engagement are fundamental to the achievement of the MDGs, and the global fight against poverty;

Second, the free flow of information includes protecting and strengthening the right of all to seek, receive, and impart information and ideas related to the MDGs and development, and the existence of a free, diverse and professional media;

Third, transparency requires collecting, producing, and disclosing accessible, credible and disaggregated data on MDG indicators and targets, as well as on budgets, aid assistance and revenues from natural and other resources;

Fourth, civic engagement requires establishing and protecting an enabling environment for civil society organisations (CSOs) and the media, and active participation by all, in particular people living in poverty and those discriminated against, or marginalised.

¹⁶ The London Declaration for Transparency, the Free Flow of Information and Development, 25 August 2010; available at: <http://www.article19.org/data/files/medialibrary/1798/London-Declaration.pdf>

Elaborating upon these principles, a number of recommendations in the London Declaration are pertinent to the protection and assistance of IDPs and their right of access to information, including:

Take all necessary measures to ensure that all sectors of society –including women and vulnerable groups– are able to exercise their right to impart and access information without discrimination, including through the media and information and communication technologies (ICTs)

Remove all obstacles preventing people living in poverty from accessing information on development policies and take proactive measures to promote their effective participation in the design and execution of development strategies

Ensure that national, sub-national and local bodies make available and accessible all development-related information, including information on development assistance received and expended, strategies for development, MDG targets and indicators.

Regional Standards on the Right of Access to Information

African Charter on Human and Peoples' Rights

As a state party to the African Union, Kenya is bound by the freedom of information obligations imposed by the African Charter on Human and Peoples' Rights (the Charter),¹⁷ and the Declaration of Principles on Freedom of Expression in Africa (the Declaration).¹⁸ Article 9 of the Charter states:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Principle IV of the Declaration states:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on

¹⁷ African Commission on Human and Peoples' Rights, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, available at http://www.achpr.org/english/_info/charter_en.html.

¹⁸ African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, adopted by Resolution of the Commission at the 32nd Ordinary Session, 2002, available at <http://www.achpr.org/sessions/32nd/resolutions/62/>.

wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

AU Convention on Preventing and Combating Corruption

Kenya is a signatory to the AU Convention on Preventing and Combating Corruption.¹⁹ This Convention requires states to adopt legislative and other measures to prevent, detect, punish and eradicate corruption and related offences in the public and private sector.

African Platform on Access to Information

In September 2011 the Pan-African Conference on Access to Information adopted the African Platform on Access to Information (“the APAI”),²⁰ a regional declaration indicating support for right to information principles, drafted by nine African groups working on freedom of expression, access to information and the media, including ARTICLE 19. The APAI elaborates on the right to freedom of information, and sets out minimum standards for access to information at a national level.

This landmark regional declaration declares that: “access to information is instrumental to fostering access to education and health care, gender equality, children’s rights, a clean environment, sustainable development and the fight against corruption”. The APAI also recognizes the “particular obligation” incumbent upon states to facilitate free access to information for disadvantaged minority groups. In this respect states party are encouraged to:

Engage with civil society and other stakeholders to ensure widespread information demand and effective implementation of laws and policies to advance access to information by all persons, especially marginalised groups.

There is no question that IDPs in Kenya constitute a marginalized group in the sense intended by the APAI. The need to promote information demand among IDPs, and need to encourage further participation by these groups in policy formulation is acute.

Comparative National Law

Furthermore, ten African countries have now adopted a law or national regulation establishing the right to freedom of information.²¹ President Ellen Johnson Sirleaf signed the Liberian Freedom of Information Act in October 2010, the first country in West Africa to adopt a right to information law and after almost two decades of delay, President Goodluck Johnson signed Nigeria’s 2011 Freedom of Information Act in May 2011. New national ordinances on access to information have also been adopted in the Republic of Guinea and Niger. After years of

¹⁹ The AU Convention on Preventing and Combating Corruption, adopted in Maputo on 11 July 2003, signed by Kenya on 17 December 2003 and ratified on 3 February 2007; available at: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

²⁰ African Platform on Access to Information; available at <http://www.article19.org/resources.php/resource/2740/en/pan-africa:-landmark-regional-declaration-paves-way-for-access-to-information>.

²¹ These are South Africa, Liberia, Uganda, Nigeria, Ethiopia, Tunisia, Guinea-Conakry, Niger, Angola and Zimbabwe.

inaction, Uganda passed its Access to Information Regulations in April 2011, implementing the 2005 Access to Information Act. While Kenya recognises the right of access to information in its Constitution, a legislative framework for implementing that right has not yet been enacted, although the process of drafting a Freedom of Information Bill has begun.²² ARTICLE 19 urges the Kenyan government to prioritise enacting the Freedom of Information Bill before Parliament is dissolved prior to the next Presidential election.

The Constitution of Kenya

The Bill of Rights, contained in the 2010 Constitution of Kenya, guarantees the right of access to information in the following terms at Article 35:

Every citizen has the right of access to (a) information held by the state; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The State shall publish and publicize any important information affecting the nation.

The right to freedom of information is therefore recognised as integral to the exercise or protection of *any* right or fundamental freedom – including those held by IDPs before they are displaced, during their displacement, and in the process of return, resettlement, or integration.

²² Kenya: Draft Freedom of Information Bill 2012, Legal Analysis, ARTICLE 19, January 2012; available at: <http://www.article19.org/resources.php/resource/2940/en/kenya:-freedom-of-information-bill>

International Standards on Protection and Assistance for Internally Displaced Persons

The obligation on Kenya to provide protection and assistance to internally displaced persons (IDPs) is well established in international law. Three international human rights instruments are particularly relevant: the United Nations Guiding Principles on Internal Displacement; the Great Lakes Pact including its Protocol on Protection and Assistance to Internally Displaced Persons, and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”).

These instruments each recognise that to maximise the effectiveness of protection and assistance for IDPs, the state must: collect information about the needs of IDPs; seek the participation from IDPs in all policy and decision-making affecting them, and disseminate information to IDPs about their rights and allow access to publicly held information.

The United Nations Guiding Principles on Internal Displacement

The United Nations Guiding Principles on Internal Displacement (“the Guiding Principles”) were presented to the UN Commission on Human Rights at its 54th session in 1998.²³ Although not legally binding, in September 2005 heads of state and governments assembled at the World Summit in New York recognised the Guiding Principles as “an important international framework for the protection of internally displaced persons.”²⁴

The Guiding Principles form the basis of the Great Lakes Protocol and the Kampala Convention. The Principles not only reflect binding international human rights law, but have also come to shape the regional and continental framework for the protection of IDP rights in Africa. The Draft Bill expressly states that its purpose is to give effect to the Guiding Principles.

IDPs are recognised in paragraph 2 of the introduction to the Guiding Principles as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

Three protective phases of managing displacement are identified: protection from displacement; protection during displacement; and the return, resettlement or integration of IDPs following displacement. Maximising the flow of information to and from IDPs is recognised as integral to the fulfilment of state obligations to protect and assist IDPs under each of these three phases.

Principle 1 to the Guiding Principles ensures that displacement is not used as a basis for States to derogate from their human rights responsibilities. It provides that IDPs “shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do

²³ E/CN.4/1998/53/Add.2

²⁴ UN General Assembly Resolution 60/L.1, ¶132, U.N. Doc. A/60/L.1

other persons in their country.” In this respect, IDPs in Kenya should be guaranteed, at a minimum, the same human right of access to information as any other individual in the country.

Protection from Displacement

The obligation to protect all individuals from displacement is outlined in Section II of the Guiding Principles. Principle 5 reiterates the need to ensure respect for human rights law to prevent and avoid conditions that might lead to displacement of persons. The right to freedom of expression and information is particularly important in this regard. As the Great Lakes Protocol on Democracy and Good Governance (below) recognises, maximising dialogue is an essential condition for pre-empting the sorts of conflict that give rise to displacement. Where authorities are engaged in practices that will cause displacement, particularly in the context of large-scale development projects, the Guiding Principles require consultation with people whose displacement is expected. This includes the provision of “full information.”

Principle 7 (3), which applies in contexts other than conflict or natural disasters, requires of the state:

- (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and where applicable, on compensation and relocation.
- (c) The free informed consent of those to be displaced shall be sought.
- (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation.

Protection during Displacement

Section III of the Guiding Principles concerns protection during displacement. A number of these principles anticipate Member States playing a key role in collecting information about IDPs and disseminating information to them as a necessary condition for providing effective assistance and protection during this time.

Principle 22 emphasises again that IDPs will not be discriminated against in the enjoyment of their rights; the importance of the right to freedom of expression and the right to participate in government and public affairs are specifically stressed. The right of access to information is at the heart of each of these rights.

“The right to know” is also specified in relation to the reunification of families following displacement (Principle 16). Principle 17 (3) further provides that the “responsible authorities shall facilitate inquiries made by family members” in respect of missing persons. This requires the collection of information on missing persons, and ensuring that a framework is in place for facilitating information requests regarding such persons.

The participation of IDPs in planning and managing resource allocation during displacement is also stressed. Principle 18 (3) requires that “special efforts” be taken to ensure the full participation of women in the planning and distribution of basic supplies. This seems to presuppose the involvement of men in these processes. Principle 23 (4) similarly requires special efforts to ensure the full and equal participation of women and girls in educational programmes. Facilitating participation in these processes necessarily requires disseminating information to IDPs on the nature of assistance available to them, and ensuring through consultation that this assistance is adequate and deployed effectively.

Principle 20 is targeted at ensuring that IDPs are issued with documents necessary for the enjoyment and exercise of their legal rights, such as passports, birth certificates and marriage certificates. This is premised on the right of all human beings to recognition everywhere as a person before the law. The framework must therefore be put in place for individuals to request information from public bodies about themselves. However, this principle should not be used as a basis for denying human rights protections to individuals who do not have identifying documentation.

Principles relating to Return, Resettlement and Reintegration

Section V of the General Principles concerns facilitating the safe return, resettlement or reintegration of IDPs – popularly known as “durable solutions” to displacement.

Principle 28 (1) provides that competent authorities have the primary duty and responsibility to establish conditions and to provide the means for durable solutions to displacement. Principle 28 (2) makes clear that consultation with IDPs and the provision of information to them is integral to the process of return, resettlement or reintegration:

Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

ARTICLE 19 emphasises that respect for Principle 28 (2) must be at the heart of all interventions with IDPs – as it is key to securing the dignity of displaced persons as well as ensuring the most effective solutions to displacement.

The Great Lakes Pact on Security, Peace and Development

The Great Lakes Pact on Security, Peace and Development (“the Great Lakes Pact”) was born out of the International Conference on the Great Lakes Region, and adopted by Member States of the International Conference on 15 December 2006. The Pact comprises not just the primary instrument of the Pact itself but the Dar es Salaam Declaration, ten protocols, four programmes of action (comprising 33 priority projects), and a set of implementing mechanisms and institutions. The Pact, and each of the ten protocols attached to it, are legally binding. They came into force following ratification of the instruments by eight countries, including Kenya, on 21 June 2008.

The Great Lakes Protocol on Democracy and Good Governance is one of the ten protocols that form an “integral part” of the Great Lakes Pact. Although it is although not cited in the Draft Bill, this Protocol makes clear that the right to freedom of expression and the right to public participation in all decision-making processes should be considered as fundamental constitution principles (Article 2). Furthermore, this Protocol asserts that the promotion of dialogue across all sectors of society goes hand-in-hand with eradicating poverty to secure peace and stability (Articles 26 – 28). The independence of the media and the promotion of responsible values in the media are recognised principles that State Parties are bound to promote, as is the right of access to information (Article 41). Several references are made throughout the Protocol to the importance of transparency, in particular to the fight against corruption in the management and equitable distribution of resources.

The Great Lakes Protocol on Management of Information and Communication is another of the ten protocols that form an “integral part” to the Great Lakes Pact. While it is not cited in the Draft Bill, it is legally binding and lends further weight to the importance of the right to freedom of expression and information in achieving regional peace and security. At Article 3, the right to freedom of expression and information is recognised in similar language to Article

19 (2) and (3) of the ICCPR, together with provisions for supporting a free and responsible media.

This Protocol also envisages the establishment of the independent Regional Council of Information and Communication of the International Conference on the Great Lakes (Article 4). The purpose of this Council is to promote and monitor press freedom. The functions of the Council include the promotion through the media of national and regional policies and strategies aimed at promoting democracy and good governance and the promotion of human rights; training and educating people in order to ensure their participation in the economic and social development of the country; and disseminating information on access to medical interventions (Article 5). The Protocol would therefore anticipate the media playing a key role in disseminating information pertaining to assistance and protection measures for IDPs.

The Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons (“the Protocol”) has been in force in Kenya since 21 June 2008 and has been ratified by ten member states of the International Conference on the Great Lakes Region.

The Protocol is the first binding multi-lateral treaty providing a legal basis for the domestication of the UN Guiding Principles, and contains much of the same substance regarding participation and access to information. It is therefore a significant milestone in recognising the interdependence of protecting the rights of IDPs and achieving peace and stability in the Great Lakes Region. The Protocol is annexed to the Draft Bill, which is intended to domesticate this Protocol.

The Protocol defines IDPs in Article 1 (4) in the same language as the General Principles, but adds at Article 1 (5) persons or groups of persons forced to leave their homes as a result of or in order to avoid large-scale development projects.

The Protocol specifically requires the domestication of the Guiding Principles at Article 6 (3). Article 6 (5) further requires that Member States “ensure the effective participation of IDPs in the preparation and design of the said legislation.” The legislation must also be clear and accessible. Article 6 (4) advances provisions requiring that procedures for undertaking development induced displacement are prescribed, and that the organs of government responsible for providing protection and assistance to IDPs are specified.

The Protocol also places obligations on Member States to collect data from IDPs in order to maximise the effectiveness of any protective interventions. This necessarily entails consulting with IDPs to assess needs, as well as assisting individuals – through the provision of information and other means – with registering as IDPs so that their needs may be met. Article 3 (4) provides:

Member States shall be responsible for assessing the needs of internally displaced persons and shall, to the extent necessary, assist them with registration and, in such cases, Member States shall maintain a national data base for the registration of internally displaced persons.

The collection of information on the needs of IDP ensuring registering of IDPs serves three primary functions. Firstly, it enables Member States to appreciate the scale of displacement and the needs of IDPs – allowing interventions to be tailored and continually assessed for effectiveness. Secondly, It serves as a basis for disseminating information to IDPs regarding

the protection and assistance they are eligible for. Thirdly, It leads to the creation of a database of information that IDPs have the right to access to hold authorities to account.

Development-induced Displacement

In Article 5, further obligations on Member States are specified in relation to development-induced displacement. In these circumstances, given the control the State is assumed to have over decisions that lead to displacement, there are heightened obligations to consult with communities whose displacement is anticipated. Article 5 of the Protocol essentially reflects Principle 7 of the Guiding Principles.

Article 5 (3) requires Member States to seek and obtain the free and informed consent of communities intended to be displaced prior to the undertaking of that displacement. Free and informed consent implies that a genuine choice must be presented to communities facing potential displacement, and that choice must be given following provision of all relevant information held by the Member State or private party proposing the development.

Article 5 (4) of the Protocol requires Member States to:

[P]rovide full information on the reasons and procedures concerning development induced displacement and, where applicable, on compensation and relocation.

Where displacement is consented to, Article 5 (6) the Protocol requires that:

Member States shall ensure the effective participation of internally displaced persons, particularly women, in the planning and management of their relocation, as well as their return and reintegration or resettlement.

Assistance for Vulnerable Populations

The Protocol identifies vulnerable individuals and groups of IDPs that require special attention during times of displacement. Article 4 of the Protocol recognises these individuals and groups in subsections (c) and (d) as those displaced populations, communities, pastoralists and other groups, with a special dependency on and attachment to their lands, as well as women, children, the vulnerable, and displaced persons with disabilities. Assisting these populations necessarily requires seeking information from IDPs identified as vulnerable on their needs, and ensuring that information targeting IDPs is made clear and accessible to these people.

The Kampala Convention

The Kampala Convention was adopted by the African Union on 23 October 2009. It will come into force and become legally binding on those parties that have ratified 30 days after the fifteenth ratifying party has deposited its instruments of ratification with the African Union.

Kenya is a signatory to the Kampala Convention but has not completed its internal ratification processes. To date, 14 countries have completed their internal ratification processes, but only 11 of these have completed the African Union ratification process. Since Kenya was closely involved in the drafting process for the Convention, its ratification would send a strong message to IDPs across Africa that it is committed to leading on providing a durable solution to displacement.

The Kampala Convention is continental in its scope, covering the entirety of Africa and not only the Great Lakes region. As a Convention overseen by the African Union and the African

Commission for Human and Peoples' Rights, ratification would open doors to additional forms of assistance and information sharing on issues of IDP protection and assistance (Article 8 (3)). Co-operation and "mutual support" between Member States would also be encouraged through the creation of a "Conference of States Parties" to the Convention (Article 14). This process is supported by the commitment made by Member States to report on measures taken to give effect to the Kampala Convention when presenting their reports under Article 62 of the African Charter and, where applicable, to the African Peer Review Mechanism (APRM). Kenya is a state party to the APRM.

The definition of IDPs in the Kampala Convention (Article 1 (k)) is identical to that contained in the UN Guiding Principles (above). Also reflecting the UN Guiding Principles and the Great Lakes protocol, the Kampala Convention emphasises that the human rights of IDPs must be respected at all times throughout all phases of displacement.²⁵

The Kampala Convention emphasises that States Parties must collect information regarding IDPs to inform assistance and protection interventions. Article 5(5) of the Kampala Convention requires States Parties to assess the needs of IDPs in cooperation with international organisations or agencies. Article 13 (1) further provides that States Parties shall create and maintain an up-dated register of all IDPs within their jurisdiction or effective control. In doing so, States Parties may collaborate with international organisations or humanitarian agencies or civil society organisations.

As well as collecting this information, Article 9 (2) (m) requires that Member States put in place measures for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to IDPs in accordance with relevant practice. This process will ensure the creation of publicly held information, access to which by IDPs will be essential for holding authorities to account.

The Kampala Convention is emphatic that states must consult with IDPs and allow them to participate in decisions related to their protection and assistance:

- *Prior to displacement* created by development projects, Article 10 (2) requires States Parties to ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects.
- *During displacement*, Article 19 (2) (k) provides that States Parties must always consult IDPs and allow them to participate in decisions relating to their protection and assistance. Article 9 (2) (l) further provides that States Parties must take necessary measures to ensure that IDPs who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office;
- *For the sustainable return, local integration or relocation* of IDPs, Article 11(2) obliges States Parties to enable IDPs to make a "free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions."

²⁵ Kampala Convention, Articles 3(1)(d); 4(1); 5(1); 9(1)(a), and 9(2)(a).

Comparative Perspectives

Many countries have adopted IDP laws or policies to implement the UN Guiding Principles. Angola was the first in 2000, followed by Burundi (2001), Sierra Leone (2002), Liberia (2004), Uganda (2004) and Sudan (2009).

The implementation of the Ugandan IDP policy was reported on by the Internal Displacement Monitoring Centre (IDMC) and the Refugee Law Project (RLP) in its report, “Only Peace Can Restore the Confidence of the Displaced” (March 2006).

In measuring perceptions of the Ugandan IDP Policy, IDMC and RLP noted that while many people knew of the policy within the IDP camps – many others did not, including individuals holding leadership positions within these settlements. The lack of awareness highlighted that Uganda had failed to implement their obligation to disseminate its IDP policy broadly in local languages and to educate IDPs on their rights. IDMC and RLP report that the government of Uganda had acknowledged these problems.²⁶ These problems regarding the availability of information to IDPs on how to assert their rights is also reflected in the views of many IDPs interviewed by IDMC and RLP who complained of the lack of clarity on how to report human rights violations to the authorities.

The Kenyan Government should consult with countries that have implemented IDP policies to learn best practices for protecting the right of access to information and participation for IDPs.

²⁶ Office of the Prime Minister, “Operationalising the National Policy for IDPs.” Office of the Prime Minister, Department of Disaster Management and Refugees, Kampala, Uganda, April 2005 (OPM RA 01 Draft).

Analysis of the Internally Displaced Persons Bill, 2012

The Legislative Process

The Draft Bill was tabled by Hon Ekwee Ethuro, the Chairperson of the Parliamentary Select Committee on Resettlement, on 13th June 2012, and is now under the review of the Parliamentary Select Committee on Labour and Social Welfare. This committee will have the opportunity to make amendments to the Bill before it receives its second reading in Parliament.

ARTICLE 19 urges Parliament to prioritise the discussion of this critical legislation to ensure that it is enacted into law before the House is dissolved preceding the next Presidential election. It is of utmost importance that a legal framework is put in place to address the on going problem of internal displacement in Kenya, and to ensure that preventative measures against future displacement are operationalized as soon as possible.

Structure and Purposes of the Bill

The Draft Bill contains 24 provisions divided between six parts: ‘preliminary’; ‘principles of prevention, protection and assistance’; ‘administration’; ‘public awareness, sensitization, training and education’; ‘provisions relating to development and displacement’, and ‘miscellaneous provisions’.

An introductory paragraph to the legislation explains the purpose of the Draft Bill in the following terms:

An Act of Parliament to make provision for the protection and assistance to internally displaced persons and give effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons and the United Nations Guiding Principles on Internal Displacement and for connected purposes

ARTICLE 19 welcomes the objectives of the Draft Bill to give effect to the Great Lakes Protocol and the UN Guiding Principles. As outlined above, both of these instruments stress the importance of increasing information flows to and from IDPs, and maximising the participation of IDP communities in decision-making that affects them.

ARTICLE 19 believes that protection and assistance for IDPs in Kenya and across the African Union would be strengthened if Kenya ratified the Kampala Convention. Ratification of the Kampala Convention would demonstrate Kenya’s willingness to play a leading role in protecting and assisting IDPs in the region – and lead to greater international cooperation on best practices for attaining a durable solution to displacement. Ratifications of international treaties in Kenya is currently at a stand-still due to the lack of a legislative ratification framework. ARTICLE 19 urges the Kenyan Parliament to prioritise the enactment of a legislative framework for the ratification of treaties. This is essential for ensuring that the Kampala Convention is ratified.

Recommendations:

- Kenya must enact a legislative framework for the ratification of international treaties. The Kampala Convention should then be ratified as a matter of priority.

Rights Based Approach to Displacement

Part II of the Draft Bill, “Principles of Prevention, Protection, and Assistance”, generally reflects the UN Guiding Principles and the obligations of the Great Lakes Proclamation that bind Kenya in respect of protecting and assisting IDPs. Sec. 4 characterises the Draft Bill as a “rights-based response to internal displacement”; it requires the governments or any other organisation, body or individual responding to “a situation of internal displacement and the needs of internally displaced persons” to “take into account their rights and freedoms as set out in the Bill of Rights of the Constitution.”

The definitions provided for the terms “protection” and “durable solution” in Sec 2.1 of the Draft Bill also feature rights-based language. “Protection” means “all activities aimed at obtaining full respect of the rights of IDPs in accordance with the letter and spirit of the fundamental rights and freedoms under the Bill of Rights of the Constitution of Kenya and applicable regional and international human rights and humanitarian law instruments.” The definition of “durable solution” also refers to the need for voluntariness and information in the attainment of a sustainable solution to internal displacement.

Sec. 3 of the Draft Bill states that the duties set out in the legislation should be interpreted in line with the Constitution of Kenya, the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons, and the UN Guiding Principles on Internal Displacement. Sec. 10.1 of the Draft Bill requires every person involved in providing protection and assistance to IDPs to act in accordance with the Guiding Principles and the Protocol. Sec. 10.2 requires the same of armed groups and non-state actors. Both the Guiding Principles and the Great Lakes Protocol are annexed to the Draft Bill in two schedules.

ARTICLE 19 commends the adoption of a rights based approach towards reaching a durable solution for displacement in Kenya. As outlined above, the right of access to information and the right of IDPs to participate in decisions affecting them is integral to a rights-based approach to development – including for addressing issues of displacement. We recall that the right of access to information and participation is guaranteed in the Constitution of Kenya, the Guiding Principles and the Great Lakes Protocol. As the London Declaration emphasises, protection of the right to information should be central to any development initiative. State Parties must:

Remove all obstacles preventing people living in poverty from accessing information on development policies and take proactive measures to promote their effective participation in the design and execution of development strategies.

While a rights-based approach to addressing displacement is lauded in the Draft Bill, the centrality of the right of access to information to this approach is not specifically affirmed. Instead, the right of access to information is guaranteed in specific contexts (Sec 5.3, Sec 9.1, Sec 9.2.h, Sec 22, Part IV, Sec 24.e) and sometimes only implicitly. These piece-meal guarantees, while individually strong and commendable, leave potential gaps where the obligation to protect and promote these rights is not clearly a priority. One such gap exists for IDPs during their displacement, either where protection and assistance has not been forthcoming or progress on reaching a durable solution has stagnated without information being provided. No provision recognises the right as applicable at all times and at all stages of displacement.

ARTICLE 19 believes that the Draft Bill should recognise, in a stand-alone provision, the general applicability of the right of access to information, and the government's obligation to promote and protect this right at all times. Such a guarantee would give IDPs and other concerned parties a firm legal footing on which to request and receive information from public authorities on issues that matter most to them during any stage of displacement. It would also provide an effective legal tool for IDPs and other information-requesters to hold public authorities to account where their rights have not been respected. In this respect, the Draft Law should reference the importance of the Great Lakes Protocol on Democracy and Good Governance, and the Great Lakes Protocol on Management of Information and Communication – which more explicitly recognise the general application of the right of access to information.

It is also noted that the Kenyan Parliament has committed to passing the Draft Freedom of Information Bill before the House dissolves ahead of the next Presidential election. This Bill would implement Article 35 of the Constitution, which guarantees the right of access to information. ARTICLE 19 urges the Kenyan Parliament to prioritise enacting this Bill, in line with the recommendations we outlined in January 2012.²⁷

Recommendations:

- Part II of the Draft Bill should explicitly guarantee the right of access to information in a stand-alone provision, in line with Article 19 (2) of the ICCPR, the African Declaration, and Article 35 of the Constitution of Kenya.
- The Draft Bill should specifically reference the importance of the right to freedom of expression and information as emphasised in the Great Lakes Protocol on Democracy and Good Governance, and the Great Lakes Protocol on Management of Information and Communication.
- The Kenyan Parliament should prioritise the enactment of the Freedom of Information Bill.

Prevention from Displacement, Preparedness and Mitigation

ARTICLE 19 welcomes the extensive mechanisms put forward by the Draft Bill to prevent displacement, in addition to measures for preparing individuals for displacement and mitigating its effects in advance.

Development-induced Displacement

Where states have control over development projects that are anticipated to cause displacement, additional obligations are incumbent on them to provide information and engage in consultation prior to decisions leading to displacement being made.

Sec. 6 of the Draft Bill concerns the government of Kenya's obligation to "protect every human being against arbitrary displacement." At Sec 6.3 the Draft Bill provides:

Displacement and relocation due to development projects shall only be lawful if justified by compelling and overriding public interests and in accordance with the conditions and procedures in Article 5 of the Protocol, Principles 7 – 9 of the Guiding Principles, and as specified in sections 21 – 22 of this Act.

²⁷ The latest ARTICLE 19 analysis of Kenya's Freedom of Information Bill, from January 2012, is available at: <http://www.article19.org/resources.php/resource/2940/en/kenya:-freedom-of-information-bill>

Sec. 21 – 22 of the Draft Bill reflects and in some respects goes beyond the requirements of Article 5 of the Protocol and Principles 7 – 9 of the Guiding Principles. Sec. 22 of the Draft Law requires that the informed consent of individuals facing displacement must be sought prior to decisions on development being made:

- (1) Subject to the Constitution and section 22(2) of this Act and prior to the decision to give effect to the displacement of persons due to development projects or projects to preserve the environment, the Government shall –
- (a) seek the free and informed consent of the affected persons;
 - (b) hold public hearings on the project planning.”

ARTICLE 19 approves of the requirement to gain the free and informed consent of affected persons, and believes that the holding of public hearings is a particularly useful tool to maximise the number of people who can directly access information to inform their choices. It is implicit in this guarantee that the government will collate information on development projects to publicly disseminate, and will facilitate any requests for further information from communities during consultation.

Where a decision to continue a development project that will cause displacement is made, Sec. 22.2 requires that the decision will be accompanied by a justification for this displacement – demonstrating that it is unavoidable, detailing the alternatives that were explored and why those alternatives were not feasible. ARTICLE 19 supports the inclusion of this obligation, noting that it reflects Article 10 (2) of the Kampala Convention.

Sec. 22.3.a further provides that “reasonable time” be given to affected persons to review the decision and challenge it before an independent body on the grounds that the conditions in Sec. 21.2 are not adhered to. Effective remedies under Articles 46 and 47 of the Constitution must be available to those so affected. ARTICLE 19 commends this provision for providing additional safeguards to ensure that the requirements of the Guiding Principles and the Great Lakes Protocol are complied with. However, it is unclear which “independent body” will be responsible for adjudicating complaints, what mechanisms guarantee that body’s independence, and what power they will have. The provision should therefore specify this body, and ensure that they are truly independent.

Lastly, Sec. 22.4 provides that where development-induced displacement does transpire, the Government shall ensure that the displacement is carried out in a manner that is “respectful of the human rights of those affected.” In particular, subsection (a) requires:

- (F)ull information of those affected and their effective participation, including by women, in the planning, management of the displacement, and in defining suitable durable solutions.

ARTICLE 19 endorses this provision as it fully complies with Article 5 (4) and (6) of the Great Lakes Protocol. It is also noteworthy and commendable that where displacement and relocation occurs, Sec. 22.5 requires an independent body to monitor that process.

Public Awareness, Sensitization, Training and Education

Sec 5.3 of the Draft Bill, under the heading “prevention of displacement”, requires the government to “raise public awareness, undertake sensitization, training and education on the causes, impact and consequences of internal displacement and means of prevention as provided for in sections 17 to 20 of this Act.”

Part IV of the Draft Bill (Sec. 17 – 20) concerns the implementation of the public awareness, education and information campaign by the national government. These measures target the population of Kenya at large, seeking to prevent conditions from arising where displacement is likely to occur, and informing individuals as to their rights to assistance and protection should they be displaced.

Sec. 17.1 provides that the campaign will focus on the causes, impact, and consequences of internal displacement as well as on means of prevention, protection and assistance to IDPs. Section 17.2 emphasises that this campaign will not only be in schools and other institutions of learning, but also prisons, remand homes and other places of confinement, as well as the disciplined forces, at places of work and in all communities throughout Kenya. Section 17.3 identifies those individuals, including public officials and the media, that will benefit from these awareness-raising activities.

The rolling out of the awareness-raising campaign is to involve: amendments to the national school curriculum in public and private schools at all levels (Sec. 18); campaigns that have been locally tailored, conducted by county executive committees (Sec. 19), and awareness raising in urban communities (Sec. 20). ARTICLE 19 welcomes each of these initiatives, but notes that their impact will depend largely on their being adequately funded and effectively implemented.

Notably, Sec. 17.4 requires the government to “ensure” the involvement and participation of individuals “affected by internal displacement” in the education and information campaign, without endangering their safety. It is unclear whether this provision seeks to employ the experiences of IDPs in raising the awareness of the general population on IDP issues, or whether it sees IDPs as targets prioritised for receiving information under this programme. This must be clarified.

ARTICLE 19 notes that while the preventative nature of the awareness-raising campaign is positive, it is of concern that this focus is promoted absent any equivalent programme targeting the needs of existing IDPs. A curriculum aimed at addressing these immediate needs would be quite different from one aiming to raise awareness in the population at large. The Draft Bill should therefore require the Government to develop a campaign tailored towards the legal rights of existing IDPs, how they should access protection and assistance in the immediate term, and how they can participate in decisions regarding their future. This campaign should target IDP camps and other areas where IDPs are living but have not been fully integrated. Failure to address this gap could pose real dangers, since further unrest is most likely to be instigated by populations who feel marginalised and disempowered. The prevention of future displacement therefore requires engagement with these individuals and ensuring that they are empowered to address issues relating to their displacement.

Rules regarding the Dissemination of Information under the Act

Sec. 24.2.e gives the Cabinet Secretary power to make rules regarding the dissemination of information under the Act.

ARTICLE 19 urges the Cabinet Secretary to ensure that the information contained in this Bill is disseminated as broadly as possible – particularly to existing IDP populations and areas identified as being vulnerable to future instances of displacement. Information must be disseminated in a format and language that people can understand. To this end, the Cabinet Secretary must seek the translation of the Draft Bill, once it is enacted into law, into as many local languages as possible. Alternative formats of the Draft Bill should be available where

target communities are largely illiterate. In respect of people with disabilities, the Act should be made available in a range of formats so that it is as accessible as possible.

Recommendations:

- Sec. 22.3.a of the Draft Bill should allow for review of development decisions by the High Court of Kenya where Sec. 21.2 is violated.
- Part IV of the Draft Law should be supplemented with measures to ensure that the awareness-raising, sensitisation, training and education programmes specifically target the information needs of existing IDPs in addition to those of the general population. IDP camps and other settlements should be specified as target areas of this campaign.
- Sec. 24.2.e should oblige the Cabinet Secretary to ensure that information under the Act is disseminated as broadly as possible, in multiple languages and formats to ensure its accessibility.

Protection and Assistance during Displacement

Sec. 8 of the Draft Law concerns protection and assistance for displaced persons based on need. The government shall put in place measures for assistance and protection of IDPs, with particular regard to displaced communities with a special dependency on and attachment to their lands and the protection needs to women, children, the disabled, the elderly and other persons with special needs. Sec. 5 and Sec. 6 provide greater details on these obligations in respect of forms of protection and assistance.

IDP Registration Database

The National Consultative Coordination Committee on Internally Displaced Persons (“the NCCC”) is required in Sec.13 to coordinate protection and assistance measures. This includes the obligation to maintain a national database of IDPs. Registration of individuals to this database must commence and conclude within 90 days of the occurrence of displacement. Registration processes must be declared by the Cabinet Secretary through the issuance of a Gazette notice. Registration shall only record the identity, profile, conditions and numbers of IDPs for the sole purpose of protection and assistance.

ARTICLE 19 welcomes the establishment of the NCCC and its role in collecting information about IDPs for the purpose of providing protection and assistance. The development of an IDP database will ensure the government has available to it information about IDPs that will assist in the formulation and effective implementation of its interventions. However, this process will only succeed if IDPs are fully aware of the requirement to register with the government, the timing and place where registration is taking place, the rationale for the government requiring registration, and the forms of assistance and protection registration will lead to. This information should be provided through outreach initiatives to IDP settlements and also channelled through local media, particularly radio, and international organisations and civil society organisations working with IDPs.

ARTICLE 19 also recommends that further measures be taken to maximise the utility of information collected by the NCCC. It is recalled that the London Declaration and the UNCAC requires public authorities to hold development-related information transparently. In addition to the obligation to collect information, public authorities must also produce and disclose accessible, credible and disaggregated data in relation to that information. In the context of the IDP database, disaggregated data on all aspects of internal displacement should be disclosed publicly, including quantitative data relating to the number and profile of displaced

persons, and data related to the assistance allocated to those individuals, and, at a later date, an evaluation of the effectiveness of those interventions. This would ensure that any person, including IDPs themselves, could access information in respect of what the government is doing to address the issue of displacement. These disclosures will also be useful for informing further information requests for holding public authorities to account where they have not fulfilled their obligations.

The sharing of any information contained in the IDP database must be done in a manner that does not jeopardise the safety or privacy of any displaced person. In November 2011, ARTICLE 19 raised concerns that the Draft Data Protection Bill for Kenya was critically limited.²⁸ ARTICLE 19 urges that any information collected about IDPs by public or private entities is held under conditions that comply with international standards on the right of access to information and the right to privacy.

Information Dissemination and Participation

The Draft Bill contains no provisions requiring that information pertinent to IDPs be proactively disclosed to them during their displacement, nor any guarantee that consultations be held with IDPs in respect of any decision affecting the provision of assistance and protection to them during this time.

ARTICLE 19 recalls that the UN Guiding Principles require at Principle 18 (3) that “special efforts” be taken to ensure the full participation of women in the planning and distribution of basic supplies. This includes the provision of essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation. Similarly, Article 19(2)(k) of the Kampala Convention obliges states to always consult IDPs and allow them to participate in decisions relating to their protection and assistance.

It is of concern to ARTICLE 19 that the Draft Bill does not address the fundamental issue of providing information to IDPs during their displacement and involving them in key decisions affecting them during this time. Lack of information and lack of consultation have both been identified as key reasons for inadequate protection and assistance – as well as a reason why a durable solution to existing IDPs has not been effectuated. It is a significant failure of the current Draft Bill that these problems have not been addressed.

ARTICLE 19 strongly recommends that the Draft Bill is amended to make clear that IDPs will be given full information on issues pertinent to them during their displacement, and that their participation will be sought in relation to decisions relating to their protection and assistance. Facilitating participation in these processes necessarily requires disseminating information to IDPs on the nature of assistance available to them, and ensuring through consultation that this assistance is adequate and deployed effectively.

Family Reunification

It is recalled that the UN Guiding Principles contain guarantees for any individual’s “right to know” the whereabouts of missing persons (Principle 16) and the obligation incumbent on authorities to facilitate information requests made by family members in respect of their missing relatives (Principle 17(3)).

Sec. 9.2.g of the Draft Bill provides that the government will take responsibility for family

²⁸ ARTICLE 19, “Kenya: Draft Data Protection Bill Critically Limited”, 7 November 2011, Available at: <http://www.article19.org/resources.php/resource/2825/en/kenya:-draft-data-protection-bill-critically-limited>

reunification and the establishment of the fate and whereabouts of missing relatives. This provision would be strengthened by the addition of measures to ensure that information is collected in respect of missing persons and a framework implemented to ensure that this information is made accessible to concerned relatives.

Recommendations:

- The Draft Bill must provide information to IDPs not only on the requirement to register with the NCCC, but also the timing and place where registration is taking place, the rationale for the government requiring registration, and the forms of assistance and protection that registration will lead to.
- The Draft Bill must specify how information collected about IDPs during registration will be collected, and ensure that any analysis of this data is publicly disclosed.
- The Draft Bill must be amended to make clear that the government is obliged to provide full information to IDPs on issues pertinent to them during their displacement.
- The participation of IDPs, particularly women, should be sought in relation to decisions relating to resource allocation, which affect them.
- Information regarding missing persons must be collected, and authorities must facilitate information requests made by family members in respect of their missing relatives.

Durable Solutions to Displacement

Definition of “Durable Solution”

ARTICLE 19 welcomes the inclusion, within the definition of “durable solution” in Sec. 1.2 of the Draft Bill, the principle of participation – in particular the emphasis given to voluntariness and information sharing:

[D]urable solution” means the achievement of a durable and sustainable solution to the displacement of persons through a voluntary and informed choice of sustainable integration to the place of origin, sustainable local integration in areas of refuge, or sustainable integration in another part of Kenya.

The requirement of voluntariness indicates that any recommended solution to displacement offered to IDP communities must present those communities with a genuine choice, and that consent is sought prior to the implementation of any action. That his choice must be informed presupposes a process of consultation between the public authorities or humanitarian agency proposing the solution and the IDP population concerned.

By integrating the principles of voluntariness and informed choice to the very definition of durable solution – any mention of durable solution throughout the legislation thereby incorporates the obligation on public authorities in Kenya to ensure participation and the provision of information in relation to any decision made to effect return, resettlement, or integration.

Participation and Information

Sec. 9.1 of the Draft Bill again affirms the requirement that any decision taken in respect of durable solutions for IDPs requires the informed consent of the IDPs concerned. Equal participation in public affairs and access to justice without discrimination are identified in

Sec. 9.2.h and Sec. 9.2.i as necessary conditions for a durable solution to displacement to be reached.

ARTICLE 19 again welcomes the inclusion of the principle of voluntariness and the principle of informing IDPs before decisions are taken. However, this provision could be made stronger still if the right of access to information and public participation were expressly guaranteed. The emphasis given to “informed consent” is important, but this formulation only implies rather than guarantees full enjoyment of the right of access to information and participation. Without an express guarantee of this right, it may be easier for public authorities to evade their responsibilities for providing full information to IDPs or fully involving them in consultative processes.

Recommendations:

- The right of access to information and participation should be expressly incorporated as necessary for gaining IDPs’ informed consent to their return, resettlement, or integration.

The Committee and Reporting Obligations

Part III of the Draft Bill establishes the National Consultative Committee on Internally Displaced Persons (“the NCCC”), with broad responsibilities for coordinating and overseeing the implementation of the Draft bill.

The functions of the NCCC are enumerated in Sec. 13 of the Draft Law. Duties include the obligation to prepare an Annual Report for tabling before Parliament on the situation of internally displaced persons. ARTICLE 19 welcomes the requirement that reports on the activity of the NCCC be compiled and tabled before Parliament, as this is an important mechanism for ensuring transparency and accountability of the executive to Parliament. However, the utility of the report would be enhanced greatly if it were published publicly, for example on the relevant ministry’s website, and disseminated broadly to civil society organisations and media outlets. Complying with the principle of maximum disclosure in this manner will ensure that IDPs and other concerned parties will have access to information on the scale and effectiveness of measures implemented by the NCCC, and ensure that their operations are fully transparent and that the public are able to hold them to account directly.

Recommendations:

- The annual report submitted by the NCCC to the Parliament must be published publicly on-line and disseminated to media outlets and civil society organisations.