Protection of development-induced internally displaced persons under the African Charter: the case of the Endorois community of Northern Kenya

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Abstract

The discourse on development-induced displacement has highlighted the enormity of problems faced by communities who are forcefully removed to create room for development projects, while at the same time, exposed the insularity of national and international legal frameworks for their protection. Using the case of *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya (*No 276/200), decided by the African Commission on Human and People's Rights in November 2009, this article analyses the support that regional and continental rights enforcement mechanisms could provide to the protection of IDPs, particularly those displaced by development projects. The article concludes that whereas there may be a need for expanding the reach of law in providing protection to development-induced IDPs, it may still be worthwhile to explore the possibility of reverting to the regional human rights protection mechanism to meet the shortfall in protection and assistance provided by the existing IDP laws.

INTRODUCTION

The existing legal frameworks for protection and assistance of internally displaced persons (IDPs) only marginally address the distinct needs of communities displaced by development projects.[1] Their shortfall could be

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[1] For a discussion of these frameworks see Juma 'Protection regimes for community displaced by development projects in Kenya: an overview of international regional and domestic frameworks' (paper presented at the 14th Conference of the International Association of the Study of Forced Migration (IASFM), held in Kolkata, India, 6–9 January 2013 (on file with the author)).

attributed to the invisibility of development-induced IDPs given that the discourse on internal displacement focuses more on displacements caused by armed conflict than on those caused by development projects.[2] This invisibility has obviously been compounded by the global logic of development which places a premium on the attainment of economic growth and 'modernisation' through the agency of the nation-state and transnational corporations. This logic has propounded the belief, though contestable, that all national development projects are in the public interest.[3] Apart from the foregoing, diminished protection for development-induced IDPs also arises from the assumption that mechanisms for safeguarding rights, including those that may be violated in the process of implementing projects, are available to all citizens. The argument is that since internally displaced persons remain within the territorial jurisdiction of one state, their physical access to national judicial structures is not inhibited by the fact of displacement. Although this argument treads the same tired path of sanctity of sovereignty, and its lustre may be slowly ebbing away, its effect of nudging policy, and even jurisprudence, in directions less sensitive to the rights of local communities has not dissipated.

Recently, however, there has been considerable effort to put in place normative frameworks for the protection of IDPs generally.[4] Within nascent

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2 The situation may be worse for marginalised communities, such as the indigenous and minority groups in Northern Kenya. See *eg* Sheek, Atta-Asamoah & Sharamo 'Kenya's neglected IDPs: internal displacement and vulnerability of pastoral communities in northern Kenya' ISS Situation Report 8 October 2012, available at: http://wardheernews.com/Organizations/ISS/Kenyas_neglected%20IDPs.pdf (last accessed 28 December 2012).

3 See *eg* Cernea 'Involuntary resettlement and development' (1988) 25 *Fin & Dev* 44; Patridge 'Involuntary resettlement in development projects' (1989) 2 *J of Refugee Studies* 373; Oliver-Smith 'Involuntary resettlement, resistance and political empowerment' (1991) 4 *J of Refugee Studies* 132.

4 See *eg Guiding principles on internal displacement* UN doc E/CN/add 2 noted in *Comm Hum Rts Res* 1998/50 (hereafter *Guiding principles*); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009, (hereafter Kampala Convention) available at: http://www.unhcr.org/refworld/docid/4ae572d82.html (last accessed 20 December 2012); Protocol on the Protection and Assistance to Internally Displaced Persons (2006) (hereafter Great Lakes Protocol), available at: http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/29D2872A54561F66C12572FB002BC89A/$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf, (last accessed 20 December 2012); Protocol on the Property Rights of Returning Persons, 30 November 2006, available at: http://www.lse.ac.uk/collections/law/projects/greatlakes/4.%20Humanitarian%20and%20Social%20Issues/4c.%20Protocols/Final%20protocol.PropertyRights%20-

normative architecture, there have been glimpses of reference to development-induced displacement, but none substantive enough to deal with the entire spectrum of the perverse pathologies arising from the implementation of development projects. Thus, dearth of normative framework for the protection of this category of IDPs, remains one of the greatest challenges of our time. In response to this challenge, however, this article suggests that whereas there may be need for expanding the reach of law in providing protection to development-induced IDPs, it may still be worthwhile to explore the possibility of reverting to the regional human rights protection mechanism to meet the shortfall in protection and assistance provided by the existing IDP laws. This suggestion is not something new. Indeed, The Great Lakes Protocol on Internal Displacement, and even the new Internally Displaced Persons Act (2012) recently passed by Kenya's parliament, have both alluded to the fact that IDPs could be encouraged to pursue a remedy through available regional and sub-regional rights protection mechanisms. What this article proposes to do, therefore, is to reflect on how rights litigation based on the African Charter for Human and Peoples Rights could canvass this important protection imperative. Though the article focuses on the *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*,[5] a case decided by the African Commission on Human and Peoples Rights in November 2009, its analysis is framed on the protection paradigm, and covers a wide variety of issues that have emerged as important for IDP protection, such as property, compensation or restitution, and achievement of durable solutions.

BACKGROUND

Most incidences of development-induced displacement adversely affect the urban poor, pastoralists, and indigenous communities in arid and semi-arid areas of northern Kenya. This is largely because the lands in these areas are either held within trust arrangements beholden to exploitative tenure systems established by the colonial rulers and wholly adopted at independence, or that their occupation is deemed 'illegal' as far as the existing land ownership regimes are concerned.[6] For these reasons, their displacement has

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En%20r.pdf (hereafter Great Lakes Protocol) (last accessed 20 December 2012).

5 See *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*, Comm'n No 276/2003, African Commission on Human & Peoples Rights (2006) (hereafter the *Endorois* case).

6 A series of land laws, beginning with the Native Trust Lands Ordinance of 1939 had vested community land on the British Crown. At independence, the government transferred these lands to Local Councils to hold in trust for communities. See Keeyah

implications for human rights in a variety of ways. For example, for the urban poor, arbitrary displacement in the form of evictions may have implications on their rights to adequate housing.[7] As for the pastoralists and indigenous communities, their rights to property and culture may be in issue. Undoubtedly, the link between human rights and displacement has a greater resonance in development-induced displacement than has hitherto been acknowledged. In my view, the decision in the *Endorois* case has affirmed this link by providing some vantage points from which to articulate a role for human rights litigation in the protection of IDPs displaced by development projects.

The *Endorois* case

It all started in the 1970s when the Kenyan government decided to develop the area around Lake Bogoria, in Kenya's Rift Valley province, into a game reserve. The area was then inhabited by members of the Endorois community, a sub-group of the larger Kalenjin ethnic group. In 1974, the government gazetted the land as a wildlife reserve and ordered the members of Endorois community to move out.[8] Coercive government action began immediately thereafter when some four hundred families were removed.[9] At the time, a meagre compensation was offered though it remains unclear whether payment was actually made. Another wave of expulsions came in 1983 when houses were set on fire and properties destroyed under the supervision of the provincial administration. To resist government action, the members of the community formed an organisation called the Endorois Welfare Council which resolved to seek redress in court. This resulted in a series of cases in local courts, culminating in a High Court decision in 2002. The court dismissed the claim thus shutting down virtually all legal avenues for resisting government action.[10] Assisted by a London based NGO,

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'Indigenous people's land rights in Kenya: a case study of the Maasai and Ogiek peoples' (2007) 15 *Penn. St. Envtl L. Rev.* 397, 414. A great deal of abuse has resulted from this trust arrangement. See Juma 'Private property, environmental and constitutional change' in Juma & Ojwang (eds) *In land we trust* (1996) 374.

7 See *eg* Juma 'Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya' (2012) 12/2 *Afr Hum Rts J* 470-507.

8 Kenya Government Gazette Notice No 239 of 1973. See also, Singoe & Shepherd 'In Land we trust: the Endorois communication and the quest for indigenous peoples rights in Africa' 2010 *Buffalo Hum Rts L Rev* 58.

9 Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and People's Rights and the Endorois' (2011) 111 *Afr Affairs* 24.

10 See *William Ngasia & Others v Baring*o *County Council & Others* High Court Misc Application No 183 of 2000 (High Court, Nakuru)(Application brought under section 84 of the 1963 Constitution, challenging their removal from land and the methods of

Minority Rights Group, and the Centre for Minority Rights Development (CEMIRIDE), the community took the case to the African Commission on Human and Peoples Rights in 2003.[11] Their claim was that their removal from traditional land violated, 'not only their property rights, but that their spiritual, cultural and economic ties to land were severed'.[12] The community sought restitution of their ancestral land as their main remedy, and monetary compensation.[13] The final decision came in 2009, effectively declaring the government action of removing members of the community from around Lake Bogoria to be in violation of their rights to free practice of religion (article 8), property (article 14), culture (article 17), and development (article 21), as guaranteed in the African Charter on Human and Peoples Rights.[14] This decision raises a number of issues that have implications for displacement. Before I examine the substantive issues, it may be useful to unravel what I consider to be the link between the rights and displacement paradigms.

Rights v displacement: whither, thither?

Although the complaint to the African Commission was based solely on the violation of rights under the African Charter on Human and Peoples Rights, the case offers a legitimate prism through which to reflect on how the IDP protection frameworks, from the Guiding Principles to the Great Lakes Protocol mentioned earlier, and human rights could converge to offer protection and assistance to development-induced IDPs in Kenya. In my view, the Commission's decision presents several possibilities of finding such a convergence. The basic premise is obviously the acknowledgment that the complaint represented a direct challenge against displacement by questioning the legality of the state's use of its power of eminent domain. This immediately reveals the linkage of human rights to the displacement event which can be couched in the proposition that if the act that causes displacement has violated rights, then its legality should be in doubt. While the Commission was put in a position where it had to decide on the contours of the powers of eminent domain, and make a pronouncement on the inherent limitations to such powers, based on the Charter, the underlying fact of displacement provided the vantage point from which to configure the full

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allocation of revenue collected from the park).

11 See Singoe & Shepherd n 8 above at 58.

12 *Endorois* n 5 above at par 19.

13 *Id* at par 22.

14 Singoe & Shepherd n 8 above at 80. The decision was finally ratified by the African Union in February 2010. See Lynch n 9 above at 24.

import of rights in these circumstances. The recognition of the status of the community as 'indigenous peoples', was instrumental in constructing the state's responsibility in this regard and exposing the weaknesses inherent in its exercise of the power of eminent domain. Then there was the question of violations of rights arising from the displacement event itself. And here rights to property, culture, and development, were implicated and therefore articulated within the rubric of a rights regime established by the African Charter and other international instruments. It is instructive that the violations of these rights were found to flow from the fact of displacement. The emphasis, for example, of the attachment to land and its spiritual and religious significance to the community, both reinforced the court's view of the magnitude of the state's culpability when they forced the community to leave the land.

On the other hand, the Guiding Principles, the Great Lakes Protocol, and even Kenya's Internally Displaced Persons Act 2012, affirm the availability of these rights to displaced persons. The human rights provisions in these laws could very well be an added arrow in the quiver, and a similar claim in the future could benefit accordingly. Despite the above, it is useful to acknowledge that the scope of protection for development-induced IDPs within the African Charter framework, is limited as compared to the instruments specific to IDPs. Although article 60 and of the Charter[15] may enable the Commission to stretch its jurisdiction, and perhaps rely on these instruments to find violations in respect of displacements, the range of mechanisms available, and the objectives of finding durable solutions are articulated much more specifically in the IDP instruments than in the Charter. Nonetheless, the linkage between the two paradigms exists, and it opens more than mere possibilities for litigating disputes implicating both

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[15] It provides that: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members.' Many commentators see this provision as allowing the Commission to apply other human rights instruments. See Viljoen *International human rights law in Africa* (2007) 332–334. Note also that the commission, in several of its decisions, has affirmed its willingness to do so. In *Media Rights Agenda v Nigeria* (2000) AHRLR 262 par 76, the Commission found that principle 5 of the UN Basic Principles on the Independence of the Judiciary had been violated.

rights and displacement. The linkage exists as an affirmation of the sanctity or rights, no matter the circumstances in which we find ourselves.

PROTECTION OF PROPERTY RIGHTS

Deprivation of property is undoubtedly one of the key issues that an IDP protection regime must tackle. It is not surprising that the relationship between property and displacement is canvassed in many studies.[16] In all displacement events, communities suffer the trauma of being separated from their physical possessions as well as their homes. As such, protection of their rights to property is of crucial importance. The guiding principles decree that IDPs should be assisted to 'recover, to the extent possible, their property and possessions which they left behind or were disposed of upon displacement'.[17] The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles),[18] state that displaced persons 'should be able to return and repossess and use their housing, land and property in similar manner to those possessing formal ownership rights'.[19] However, in international law the right to property remains a nebulous concept, and that is why instruments such as the European Convention on Human Rights merely guarantee 'peaceful enjoyment of property'.[20] The right often attracts immediate reference to the obligations to pay compensation or offer restitution, which states are reluctant to endorse as legally enforceable obligations. For these reasons scholars are uncertain whether the right to property envisaged in the Guiding Principles, or any other IDP law for that matter, is a civil and political right available to legally recognised owners of property, or merely a socio-economic right 'applicable to the customary claims of indigenous people who link land to their rights to food, housing work, and the right to life itself'.[21] Although the

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16 See *eg* Paglione 'Individual property restitution: from Deng to Pinheiro, and the challenges ahead' (2008) *IJRL* 391; Juma 'Normative and institutional approaches to the protection of property rights of IDPs in Kenya's Rift Valley Province' (2012) 20/2 *Afr J of Int'l & Comp L* 251–280.

17 Guiding Principles n 4 above, principle 29. This in turn facilitates the objectives of principle 28 which outlines the obligation to facilitate return.

18 UN Sub-Commission on the Promotion and Protection of Human Rights *Principles on Housing and Property Restitution for Refugees and Displaced Persons* 28 June 2005, E/CN 4/Sub 2/2005/17, available at: http://www.unhcr.org/refworld/docid/41640c874.html (last accessed 18 May 2011).

19 *Id* at principle 16.1.

20 See Singh 'India and internally displaced persons: current legal avenues and new legal strategies' (2012) 24/3 *Int'l J of Refugee L* 509, 514.

21 *Id* citing Bailliet 'Researching transnational approaches to IDP protection: legal perspective' 2003 *FMR* 10.

Commission did not draw a clear distinction between these two approaches, its deliberations on the right to property under article 14 of the Charter was conditioned by the claim before it, which largely rested on the indigeneity of the claimants and land as the principal object of the right. That it articulated the indigenous claims through the discourse of 'peoples' rights' may be uniquely African, but its import on the interpretation of rights that inure to minorities all over the globe is commendable. The foregoing notwithstanding, the Commission's construction of the content of the right to property in light of the displacement, has some obvious benefits for IDP protection that are worthy of further elucidation.

Meaning of property

The Endorois community claimed that their removal violated their rights to property in that they had been separated from their homes, general economic engagements such as cultivation, cattle grazing, and other livelihood activities around the lake.[22] As regards land, the community asserted that they had traditional rights, interests, and benefits in the land around the lake recognised under the national law – specifically under the Trust Land Act and the Constitution[23] – and that these rights inure to the community based on their recognition as a 'people', within the meaning of the Charter. Since their claim was based on article 14 of the African Charter, which guarantees the right to property, the question was whether such interests and benefits constituted rights protected under the Charter. The Commission observed that the right to property had previously been defined to include land, access to one's property, use and control, and even the right not to have one's property invaded or encroached upon, in the *Malawi African Association v Mauritania*.[24] In the latter case the Commission adopted a dynamic interpretation of the land rights of the indigenous community which, apart from land, included the effect of the displacement on homes. It affirmed that under article 14, states have an obligation not only to 'respect' the right, but also to 'protect' it. Thus, the forceful removal from homes and the destruction of houses was found to be in violation of property rights.[25] This

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22 *Endorois* n 5 above at par 87

23 See s 115 of Constitution of Kenya (1963), which gave the County Council in which the trust land was the authority to ensure that community enjoyed 'such rights, interests, or other benefits in respect of the land as may under African customary law, for the time be in force'.

24 Comm Nos 54/91, 61/91, 164/97. See *also*, *Endorois* n 5 above at par 186.

25 There is an interesting and perhaps vital connection that the Commission made between the rights to property and right to adequate housing (par 191). Relying on its decision on

finding has obvious implications for displacements, which are often accompanied by forceful and violent action involving the destruction of houses and other structures, and are all too common in Kenya.

Limitations on right to property

The guarantee of the right to property under article 14 of the Charter has limitations based on the 'public need' or the 'general interest of the community', and the requirement that it must conform to relevant laws. These limitations resonate with the limitation on the general powers of compulsory acquisition under the current and the former Kenyan constitutions.[26] Thus, it imports considerations that ordinarily revolve around the principle of eminent domain. It should be noted, however, that the land which was the subject of claim by the Endorois community was held under the Trust Land Act, which means that it was held in trust by the local council on behalf of the community. However, the problem was that the regime of ownership created by the Act was a precarious one, not only because the land was still subject to compulsory acquisition under the constitutional powers of eminent domain, but also as the Act established a modified procedure of direct acquisition that was relatively easier for the government and offered minimal safeguards for the community.[27] The procedure was known as 'setting apart', and could be triggered if the trust land was needed for *any government purpose* including prospecting for minerals, or vaguely for a company in which the government held shares.[28] There was no provision for consultation of or participation by the community, and neither was the purpose for acquisition required to meet the public interest threshold. Yet, when the procedure was activated, it extinguished all rights and interests hitherto held by the community or county council on that land. The only safeguard was the requirement that compensation be paid to those adversely affected in accordance with the procedure laid down by the Act. It is regrettable that so draconian a procedure was allowed to exist in Kenya for so long (the Act has since been repealed).[29] It cannot be denied that such

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the SERAC communication, the Commission asserted that although the right to adequate housing is not expressly provided for in the Charter, the same could be inferred from the guarantees in art 14.

26 For a discussion of the powers of the eminent domain in the 1963 Kenyan constitution, see Bhalla 'The effect of modernization on acquisition of property and the rules of compensation: a Kenyan case' (1990) 2 *Afr J Int'l & Comp L* 234.

27 Trust Land Act s 7.

28 See s 7 of the Trust Land Act and section 118(2) of the Constitution of Kenya (1963).

29 Three new legislations, the National Law Commission Act 2012, the Land Registration Act 2012 and Land Act 2012, have effectively repealed this Act.

a drastic abrogation of individual rights to property, such as is inherent in 'setting apart' or any form of compulsory acquisition, should only be justified in very compelling cases. Having found that the limitations in article 14 had not been satisfied, the Commission decreed the denial of the right of ownership under the trust system to be in violation of the Charter. Further, it decreed that the encroachment, even though mandated by the Act, was in violation of the community's rights. But what content did the court prescribe for the elements of these limitations so as to arrive at this conclusion?

What is public interest?

The Commission had to determine whether the public interest test had been met in order to reject the government's claim that its action did not violate any rights as it was within the law. There is no question that that the community's needs and their rights not to be displaced must be balanced against the state's responsibility to ensure that the exploitation of natural resources meets the national objectives. The Kenyan government had justified the acquisition of the land on the basis that the game reserve that was sought to be established would ensure that 'wildlife is managed and conserved so as to yield to the Nation in general and to individual areas in particular, optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation'.[30] The government claimed that this justified its encroachment onto the land on the basis of public interest. The Commission responded to this claim by advancing the proportionality test, which basically balances the public need to establish a game reserve around the lake, against the dignity and livelihood of those forcefully evicted and deprived of their cultural and spiritual rights to the land. The Commission's view was that the restriction on the right should be absolutely proportionate to the aim being pursued. It observed that human rights bodies have accepted 'reasonableness' as the standard against which government action must be measured, and that this demanded a fair and just 'relationship between a particular objective and the administrative or legislative means used to achieve that objective'.[31] Among the factors to be considered were, the extent of harm that the denial of right might cause, whether there are alternative and less restrictive measures that could have been pursued, public participation, and compensation paid. The Commission considered the effect

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[30] *Endorois* n 5 above at par 334.

[31] *Id* at par 15.

of the acquisition and displacement on the community and found that the 'upheaval and displacement' was disproportionate to 'any public need served by the game reserve'.[32]

As for alternative measures, the Commission found that even if the restriction on the right was in the public interest, there were less restrictive alternatives that the government could have pursued. One way in which such alternatives could be found is through the government's positive and meaningful engagement with the community towards finding a better and less restrictive way of establishing the game reserve. Since such alternative was not sought, the right was rendered illusory. The Commission observed that the respondent state has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a game reserve and subsequent eviction of the Endorois community from their own land, the Respondent state has violated the very essence of the right itself, and cannot justify such interference with reference to 'the general interest of the community' or 'public need'.[33]

The Commission considered other factors, such as the inescapable connection between deprivation caused by displacement and the violations of the right to life, and the idea that forced eviction of the community from the land amounted to a gross violation of human rights, to fortify its findings. In both situations the Commission found that the public interest test had not been met because the government's action was hardly in accordance with international law.

Public participation

African governments are under immense pressure to grow their economies, create jobs, and eliminate poverty, hunger, disease, illiteracy, and all other ills associated with underdevelopment. In their pursuit of these objectives, they rely almost exclusively on imported ideologies of development which expand the role of international bureaucracy while minimising the relevance of local communities. After all, most projects come with the blessing of the self-appointed priests of development sitting in Europe or North America and

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[32] *Id* at par 214.
[33] *Id* at par 215.

most recently, China.[34] This speaks to the dismal influence that local communities have on the implementation of development projects, a factor that adversely affects their long term sustainability. Often, local communities are presumed to lack the power or skills to improve their economic situation and their collective worth is seen as significant only as a symbol of underdevelopment and its malaise, and a mere justification for seeking external support. So from the onset, there is an ideological disconnect between the developmental agenda propagated by government, and the need to protect those adversely affected by the implementation of the agenda. Attendant upon this reality, has been the assumption that for every development project, the benefit which accrues to the local community, outweighs any undesirable consequences that the community might suffer as a result. This is the logic upon which the government of Kenya sought to defeat the claim by the Endorois community that they had not been consulted and had also not participated in the decision regarding their displacement.

Elsewhere, I have argued that public interest cannot be met if there is no participation by the community in the decision regarding their displacement or resettlement. The idea of participation has become the *sine quo non* for implementing development goals that have repercussions on community life. It follows, therefore, that if the project sought to be implemented is in the public interest, there is an immediate expectation that the public will be consulted and their input in the design and implementation taken into account. In this case, the Commission found that the Endorois community had not been allowed to participate effectively in the decision to convert their traditional land into a game reserve.[35] Moreover, given the significance of the land to the community, the absence of a guarantee of any tangible benefit from the project, could hardly be in the public interest.[36]

Compensation

A corollary to the issue of participation is the question of compensation. The emergent norms on displacement appear to place a greater emphasis on restitution rather than on compensation. For example, the Pinheiro Principles explicitly enjoin states to accord priority to restitution as a preferred means

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34 I borrow this characterisation from William Easterly 'Ideologies of development' *Foreign Policy* Washington DC July/August 2007 at 31 available at: http://laraloewenstein.typepad.com/files/kuehne-03-easterly.pdf (last accessed 15 January 2013).

35 *Endorois* n 5 above at par 228.

36 *Ibid*.

of safeguarding the IDPs rights to property.[37] The Principles further decree that compensation should be available in circumstances where restitution is not possible. Apart from IDP law, the UN Declaration on the Rights of Indigenous Peoples provides that 'indigenous peoples have the right to restitution of the lands, territories, and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without free and informed consent'.[38] When such restitution is not possible, 'they have a right to just and fair compensation'.[39] If the obligations of the state are stated in these terms, the obvious inference is that forced displacement is a heavy price that states might well be advised to avoid. Secondly, a scheme of compensation that would completely remedy the loss of the property in question is not easy to attain.[40] This may be so in cases where the property has value that is incapable of being quantified in monetary terms. This was indeed the dilemma in the *Endorois* case.

The documents before the Commission showed that about 170 members of the Endorois community had been paid Kshs3 150 (approximately £30), and the majority had received nothing.[41] The amount, which was paid thirteen years after their forceful removal, was allegedly intended to facilitate their relocation. It did not compensate them for loss of property, including land. The Commission found this to be woefully inadequate as it flew 'in the face of common sense and fairness'.[42] Its view was that as the state did not pay prompt and full compensation, it had failed to comply with domestic law in this regard. The Commission also considered the question of restitution, which in international law could be achieved by returning the land compulsory acquired to the indigenous community. However, since such measures were not employed by the state, it had a duty to allocate to the community alternative lands of 'equal extension and quality', the determination of which should be done in consultation with the community.[43]

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37 Pinheiro Principles n 18 above at principle 2.2.

38 See UN Declaration on the Rights of Indigenous Peoples E/CN 4/Sub 2/1994/2/Add1 (1994) preambular par 5.

39 *Id*.

40 Note that the UN Declaration on the Rights of Indigenous Peoples demands that the compensation should take the form of 'lands, territories and resources equal in quality, size and legal status' (see par 5).

41 *Endorois* n 5 above at par 230.

42 *Id* at par 236.

43 *Id* at par 234.

Because this had not been done, the government of Kenya was in violation of the right to property under article 14 of the Charter.

Some analysts have expressed reservations to the way in which the Commission dealt with the question of restitution and compensation generally.[44] They allege that the Commission failed to recommend that the Kenyan government should identify and demarcate the land belonging to the community.[45] They also argue that that there should have been a temporal limit to the restoration of the rights found to have been violated by the government.[46] While these criticisms are valid, they reflect the complexity of finding a suitable judicial remedy for violations in circumstances of displacement. Perhaps, the durable solutions approach, which integrates various schemes – including the participation of groups affected by displacement – that is now ingrained in IDP law, could be worth considering when courts are faced with such claims.

DEVELOPMENT AND DURABLE SOLUTIONS

The community's claim was that the displacement had separated them from vital natural resources in their land, and denied them the rights freely to dispose of their wealth and natural resources, contrary to article 21 of the Charter. In addition, they claimed that the creation of the game reserve and the refusal of the state to involve them in the development process, violated their rights to development as guaranteed in article 21. Both claims have implications in the construction of a proper understanding of durable solutions within the context of development-induced displacement. Durable solutions have been defined as 'the achievement of a durable and sustainable solution to the displacement of persons through a voluntary and informed choice of sustainable reintegration at the place of origin, sustainable local integration in areas of refuge, or sustainable integration … '.[47] From this definition, the search for durable solutions seems predicated on maintaining a workable balance between the development agenda and protection schemes for communities already displaced or in danger of being displaced. Undoubtedly, there is an emerging principle that natural resources occurring on land occupied by indigenous communities belong to that community, especially if those resources are 'traditionally used and are necessary for the

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44 Singoe & Shepherd n 8 above at 69.
45 *Ibid.*
46 *Ibid.*
47 See Internal Displaced Persons Act (2012), s 2.

very survival, development and continuation of such people's way of life'.[48] This principle was upheld by the Commission in *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*,[49]and by the Inter-American Court on Human Rights in *Saramaka People v Suriname*.[50] Displacement will, therefore, abrogate the possibility of the community enjoying this right, if the event causing displacement is not preceded by consultation with the community and all the safeguards are fulfilled. Thus, durable solutions are conceptualised as providing a link between a community's entitlement to the natural resources in their land, and the protection scheme established under existing legal frameworks. For example, although the Kampala Convention makes no direct reference to natural resources, the inference can be drawn from article 11(5) which enjoins states to 'take all reasonable measures to restore the lands of communities with special dependency and attachment to such lands upon their return, reintegration and reinsertion'. The idea seems to be that law should recognise that the community's livelihood depends on the land, and that its right of ownership extends to the natural resources available on that land. Therefore, for these communities to return to normal life, and for the effects of the displacement event to be completely remedied, there must be some kind of restitution that takes care of the lost wealth in natural resources, if restoration of land is no longer possible. Therefore, the right guaranteed under article 20 of the Charter could be seen as part and parcel of the broader scheme to attain durable solutions.

The claim under article 21 of the Charter related directly to the right to development. Similarly, the manner in which the Commission interpreted the right to development correlates with the principle of durable solutions as contained in IDP protection and assistance instruments. According to the Commission, the right to development was both 'constitutive and instrumental'.[51] Its view was that development required the fulfilment of five criteria, namely, that it is equitable, non-discriminatory, participatory, accountable, and transparent.[52] Notably, the Commission observed that the

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48 *Endorois* n 5 above at par 261.

49 The *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights Comm No 155/96 (2001).

50 Inter-American Court of Human Rights (IACtHR), case of *Saramaka People v Suriname* (Judgment 28 November 2007) Series C No 172.

51 Singoe & Shephered n 8 above at 93.

52 *Endorois* n 5 above at par 277. The criteria set out above are also embodied in art 2(3) of the UN Declaration on the Right to Development, UN GAOR, 41st Session Doc A/RES/41/128 (1986), which states that right to development includes, 'active, free and

right to development did not simply refer to the physical such as schools and roads, 'the result of the development should be the empowerment of the *Endorois* community. It is not sufficient for Kenyan authorities to merely give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.'[53] Given the position adopted by the Commission, it becomes apparent why participation is critical to the realisation of the right to development. This is also the key to finding durable solutions in circumstances of internal displacement. Even where there has been consultation, the Commission observed that there must be free and informed consent before community resources and traditional lands of indigenous communities can be exploited. The idea of a free and informed consent is now built into IDP protection frameworks, including Kenya's Internally Displaced Persons Act 2012.[54]

SPECIAL VULNERABILITIES

Although displacement events render all persons affected by them vulnerable, IDP protection instruments recognise special vulnerabilities in certain category of displaced persons. The Guiding Principles identify the special vulnerability of indigenous peoples, minorities, peasants, pastoralists, 'and other groups with a special dependency on and attachment to their lands', and enjoin states to protect against displacement.[55] The Great Lakes Protocol also imposes the duty on member states to 'provide special protection for displaced populations and other groups, with a special dependency on or attachment to their lands'.[56] Such protection must also be extended to 'women, children, vulnerable, and displaced persons with disabilities'.[57] This approach is not unique to international instruments or IDP law. At the domestic level, for example, the Constitution of Kenya imposes the duty on state organs to 'address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, the youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities'.[58] These special vulnerabilities impose higher standards for protection of rights and hence greater responsibility on states. As already

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meaningful participation in development'.

53 Singoe & Shephered n 8 above at 75.

54 See s 22(1).

55 Guiding Principles n 4 above at principle 9.

56 Great Lakes Protocol n 4 above at art 4(1)(c).

57 *Id* art 4(1)(d).

58 Constitution of Kenya (2010) art 21(3).

mentioned, most displacement arising from development projects in Kenya have affected mainly communities that fall into the category of the specially vulnerable groups and, therefore, they can claim protection through means other than IDP law. However, I do believe that the rights that these groups are entitled to and the methods of their enforcement, create opportunities for expanding the protection regime in all circumstances where displacement is caused by development projects, irrespective of the category of persons involved. It may, therefore, be useful to examine how some of these vulnerabilities were dealt with in the *Endorois* case.

Indigenous peoples

There are special vulnerabilities that are recognised by international treaties. One such vulnerability is 'indigeneity', recognised and affirmed by the UN Declaration on the Rights of Indigenous Peoples. The Declaration gives no definition of who an indigenous person is.[59] However, its regime indicates a bias towards recognition of the special vulnerability of beneficiaries of the rights protection framework it establishes. In Africa, the recognition of indigenous people has been controversial. The term does not even appear in the Charter.[60] However, since 2005 when the Working Group of Experts on the Rights of Indigenous Populations/Communities affirmed the existence of marginalised groups 'who are discriminated in particular ways because of their culture, modes of production and marginalised position within the state', the special vulnerability of these groups has been generally accepted.[61] In the *Endorois* case, the Commission acknowledged that although the criteria for identifying an indigenous person is not all clear, considerable emphasis has been placed on 'occupation of special territory, voluntary perpetuation of cultural distinctiveness, self-identification as a distinct group, an experience of subjugation, marginalisation, dispossession, exclusion or discrimination'.[62] According to the Commission, recognition of the vulnerability of indigenous people arises from the need to address 'historical and present day injustices and inequalities'.[63] Having found that the Endorois were a 'people' and therefore entitled to collective rights, the Commission

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59 Cook & Sarkin 'Who is indigenous? Indigenous rights globally, in Africa, and among the San in Botswana' (2004) 18 *Tulane J of Int'l & Comp L* 93 98–100.

60 Bojosi & Wachira 'Protecting indigenous peoples in Africa: an analysis of the approach of the African Commission on Human and Peoples Rights' (2006) 6 *Afr Hum Rts J* 382, 390.

61 Lynch n 9 above at 37–38.

62 *Endorois* n 5 above at par 150.

63 *Id* at par 149.

acknowledged their special vulnerability for which any protection measure must, as a prerequisite, begin by acknowledging that their rights, interests, and benefits in their traditional land, constituted 'property' under the Charter.[64] Therefore, the state had a duty to 'recognise the right to property of members of the Endorois community within the framework of a communal property system, and establish the mechanism necessary to give domestic legal effect to such right recognised by the Charter and international law'.[65] The Commission was particularly critical of the lack of a proper legislative framework for the protection of land rights of indigenous communities in Kenya, since the trust land system was inadequate.

Secondly, the Commission was of the view that encroachments which result in displacement of indigenous people must attract special consideration, and, therefore, the general test of 'public interest' must be much more stringent than in other cases:

> The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of the indigenous people.[66]

The Commission even suggested that the standards for determining such interest, especially where there has been forceful removal, would be in tandem with the Committee on Economic Social and Cultural Rights standards of 'exceptional circumstances and in accordance with the law', stated in their General Comment No 4 on Evictions.[67] In addition, the Commission seemed to have subscribed to the view that when land rights of indigenous communities are in issue, then the obligation to respect and protect those rights must be articulated within the framework of duties imposed on the state by international law. The most important duties in this regard would be the obligation to issue titles and guarantee tenure; the duty to establish a scheme for restitution or compensation in the event of violation of such rights; and the general duty to consult and invite participation by communities affected by any form of acquisition.

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64 *Ibid*.
65 *Id* at par 196.
66 *Id* at par 212.
67 *Id* at par 211.

The idea of culture

Displacements that affect groups with special vulnerabilities also interfere with their culture. Reference to culture in this regard, draws on both the ontological as well as the existential understanding of a community's distinct status which is demanding of recognition in law. But as argued elsewhere, culture as a normative concept faces considerable challenge in view of the differing perceptions of what its normative value ought to be.[68] The idea of cultural rights can thus be as controversial as seeking an objective assessment of the elements of a particular culture. This is perhaps the reason why the varied definitions of culture appear fluid and rather bloated at times. The safest approach for lawyers is often to lump even the most mystical and less understood characteristics of a community's way of life together under the rubric of culture, and then to seek protection of that community's way of life under that rubric. In this way, cultural rights may acquire very wide, and often contested, meanings, depending on the community and the values sought to be propagated. In this case, for example, the Commission defined culture as, that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.[69]

The precise content in the elements mentioned in this definition is not unique to the Endorois, and could very well be similar in a good number of the forty-two Kenyan ethnic groups. Indeed, you may very well find that the beliefs, art, language, and even the morals of the Endorois do not set them apart from other Tugen groups of Northern Kenya. So the definition is not intended to capture the uniqueness of a community's way of life, but to provide a legal avenue for protecting that way of life.

As far as displacement is concerned, the aspect of physical separation from one's habitual residence, and the disruptions to the rhythm of life necessarily implicate their culture. However, for the indigenous and minority communities, the forceful separation may have more serious implications on their way of life than in other communities. The claims made by the

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[68] See Juma 'Dignified existence: reflections on aspects of culture and cultural rights debate in Africa' (2008) 22(2) *Speculum Juris* 1–22.

[69] *Endorois* n 5 at par 241.

community based on the alleged violations of their rights to culture, therefore, reflect the nature of their special vulnerability. Further, they generally depict the patterns of cultural suffocation that indigenous people or minority groups often suffer in situations where they are pushed out of their land to make room for large-scale development projects.[70]

In this case, therefore, the community claimed that the forceful displacement had curtailed their access to cultural sites and damaged their pastoral way of life. This, they claimed, amounted to the violation of their right to freely take part in the cultural life of the community guaranteed under article 17 of the Charter. According to the Commission, the rights embodied in article 17 go 'beyond the duty not to destroy or deliberately weaken minority groups but requires respect for, and protection of, their cultural heritage essential to their group identity'.[71] Therefore, culture provided the connection between the community and their land. The Commission found that having been removed from the land, the community lost access to 'traditional medicines made form herbs found around the lake and resources such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralists way of life'.[72] By restricting access to Lake Bogoria, the community were denied access to an 'integrated system of beliefs, values, norms, mores, traditions and artefacts closely linked to access to the Lake'.[73]

The decision in this matter provides an interesting perspective on protection that is only marginally recognised in IDP law. For example, the Guiding Principles protect the right of IDPs to communicate 'in a language that they understand'.[74] It also provides that all forms of education must respect the 'cultural identity, language and religion' of IDPs.[75] The decision has now reaffirmed the importance of culture in making development decisions. Although it may be debatable whether cultural practices alone may defeat development goals, in circumstances where displacements arise, it may very well be a factor in determining rights' violations. In sum, the decision on this issue serves to illustrate that displacement is a mammoth event that affects the totality of people's lives.

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70 Report of the African Commissions Working Group on Indigenous Populations/Communites (2005) at 20.
71 *Endorois* n 5 above at par 241.
72 *Id* at par 131.
73 *Id* at par 250.
74 *Guiding Principles* n 4 above, art 22(e).
75 *Id* art 23(2).

WHAT THE FUTURE HOLDS

Having found that Kenya had violated the rights as briefly discussed in the preceding paragraphs, the Commission recommended that Kenya recognise the rights of the Endorois, and ensure restitution of their ancestral land, remove all restriction of access to Lake Bogoria and surrounding sites for religious and cultural purposes, pay adequate compensation, and provide royalties for existing economic activities on their land.[76] The commission also recommended that the Kenyan government report on the implementation of these recommendations within three months.[77] The composite of remedies recommended by the Commission fit readily into a scheme of protection for persons displaced in such circumstances: they recognise the need for the legitimacy (or maybe legality) of the decision to implement the project with the potential of causing displacement; outline the possibility of full restitution; impose the duty to pay adequate compensation; and, most importantly, create a framework for ensuring that the community's wealth, arising from the exploitation of their natural resources, are restored for their development. Consequently, in addition to addressing the particular circumstances of the Endorois community, the decision provides a template for responding to development-induced displacement through the instrumentality of a human rights mechanism.[78] And, indeed, a protection framework for displaced persons could very well be modelled on its terms.

What is perhaps disheartening, is the fact that implementation of the recommendations has not been possible to any degree that might vindicate our faith in a rights regime. Although the government's response to the decision has not been entirely belligerent – at least on the face of it or in the rhetoric of its leading politicians – from the point of view of repairing the wrongs committed and assisting the community to thread its fractured heritage into normalcy, little, if nothing, has been achieved. Immediately after the decision was delivered, there was great optimism, perhaps fuelled

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76 See Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Welfare Council v Kenya: a landmark decision from the African Commission' (2011) 55/2 *J of Afr L* 300, 311.

77 *Endorois* n 5 at par 298 (1)(g).

78 See Ashamu n 76 above at 312 (suggesting that the ruling will impact on other indigenous groups, such as the San of Southern Africa, Pygmies of central Africa and Maasai of Kenya, by providing a 'platform from which to voice their concerns and the opportunity to seek protection from dispossession of land and natural resources within the African human rights system').

by promises by high level government officials.[79] For example, the Minister for Lands, when attending the community's celebration of their victory at the Commission, pledged the government's commitment to ensuring that the recommendations made by the Commission were implemented.[80] However, three years down the line, nothing much has happened. Although the community has been allowed to graze their animals freely within the park and to access the spiritual and religious sites, this remains at the discretion of park authorities.[81] Moreover, there has been no effort to formalise their ownership rights. Frustrated by the inertia, suggestions have been made that the community should approach local courts to enforce these recommendations.[82] But such a move will necessarily implicate the newly passed Internal Displacement Act (2012), whose provisions enjoin the state to respect and protect rights in circumstances such as those of the Endorois community, and provide remedies similar to those recommended by the Commission (except restitution). The availability of domestic legislation is likely to embolden the move to seek recourse in local courts, a fact which may provide the opportunity for entrenching international standards of protection in Kenya's domestic law.

CONCLUSION

This article is a modest attempt to show how the link between displacement and human rights can work to the advantage of displaced person or communities. By focusing on the *Endorois* case, the article has shown that the vision embodied in IDP laws, which encourage the use of existing regional and continental mechanisms to effectuate rights, can indeed be realised. It also demonstrates that the mix of international, human rights, and humanitarian norms that informs the range of regimes that protect IDPs,

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79 Kiprotich 'Will the state respect community's land rights' *The Standard* 22 March 2010 available at: http://www.standardmedia.co.ke/?id=2000006073&catid=259&articleID=2000006073 (last accessed 9 February 2013).

80 See Wanyeki 'Endorois get their land back … what about you' *East African* available at: http://www.theeastafrican.co.ke/OpEd/comment/Endorois-get-their-land-back-what-about-you/-/434750/887972/-/view/printVersion/-/gxkln5z/-/index.html (last accessed 8 February 2013).

81 Singoe 'The Endorois legal case and its impact on state and corporate conduct in Africa' 27 (2011), available at: http://www.natureandpoverty.net (last accessed 8 February 2013).

82 Okoth 'Cheers turn onto tears in the Endorois waiting for land' *East African Standard*, 8 June 2011 available at: http://www.standardmedia.co.ke/?articleID=2000037356&pageNo=2&story_title= (last accessed 8 February 2013).

could be interpreted in way that empowers citizens to demand greater accountability from government when its development agenda result in adverse displacement (causes), and at the same time, articulate a range of responsibilities as regards the rights and physical needs of victims (consequences) that the government should bear. The *Endorois* case is in many ways a victory for human rights, but also gives an added boost to the protection framework of the development-induced IDPs.