



ENVIRONMENTAL DISPLACEMENT WITHIN KENYA: A SEARCH FOR LEGAL PROTECTION FRAMEWORKS

Michèle Morel, PhD Candidate

Abstract

Human displacement is expected to be one of the main impacts of environmental change in the years to come. This article examines the applicable legal frameworks at the international, (sub-)regional and national levels that serve as protection mechanisms for persons residing in Kenya who have been forced to leave their homes due to environmental problems or changes, but remain within the borders of the country. The second part of the article discusses three specific categories of environmental displacement that occur in Kenya: (i) displacement due to natural disasters, (ii) development-induced displacement, and (iii) displacement as a result of environmental conservation programmes. The article concludes with some recommendations on appropriate strategies for the protection of persons environmentally displaced within Kenya.

Keywords: environmental displacement, Kenya, development induced displacement

Email Alerts/Reprints/Permission: jid@evresearch.ca

Subscription: JID is a Free Open Access Journal

Archives: <http://journalinternaldisplacement.webs.com/archives.htm>

Submission (July 2011 Edition): <http://journalinternaldisplacement.webs.com/announcements.htm>

JID is produce and published by EV Research Inc. – www.evresearch.ca

Author's Affiliation

Michèle Morel is a Ph.D. Researcher Ghent University, Belgium, Faculty of Law, Department of Public International Law. The author thanks the Research Foundation Flanders (FWO) for funding her research. This paper was prepared for UNU-EHS Summer Academy on Social Vulnerability, Hohenkammer, Germany, 25-31 July 2010.

ENVIRONMENTAL DISPLACEMENT WITHIN KENYA: A SEARCH FOR LEGAL PROTECTION FRAMEWORKS

Michèle Morel, PhD Candidate

The frequency of heat waves is increasing. Temperatures are generally more extreme, water is evaporating faster and the wells are drying. Larger areas are being affected by droughts, and flooding is now more serious.

Leina Mpoke, Concern Worldwide

Introduction

Background

Since several years, climate refugees, environmental refugees or environmental migrants have reached the top of the agenda of policymakers, non-governmental organizations and academics. Human displacement is expected to be one of the main impacts of climate change in the years to come.¹ Humans and other animals have always used migration as a strategy to respond to global or local changes in their environment. However, the current increase in the intensity and scale of environmental disruptions justifies the growing attention to the issue of environmental migration and displacement.

This article examines the applicable legal frameworks at the international, (sub)-regional and national levels that serve as protection mechanisms for persons residing in Kenya who have been forced to leave their homes due to environmental problems or changes, but remain within the borders of the country. Before carrying out this examination, it is pertinent to define and analyse the object of this study, (i.e. “internal environmental displacement”). The second part of the article discusses three specific categories of environmental displacement that occur in Kenya: (i) displacement due to natural disasters, (ii) development-induced displacement, and (iii) displacement as a result of environmental conservation programmes. Both general and specific rules contained in the legal instruments analysed in the first part and applicable to these three types of environmental displacement, are examined. The article concludes with some recommendations on appropriate strategies for the protection of persons environmentally displaced within Kenya. The introduction to the article presents some relevant characteristics of Kenya’s environment and population.

¹ This was stated by the Intergovernmental Panel on Climate Change (IPCC) as early as in 1990 in its First Assessment Report.

Environmental Issues in Kenya

Kenya faces several environmental problems, one of which is the pressure on the country's water resources due to a number of reasons: (i) degradation of water quality due to the use of agricultural chemicals, (ii) water pollution as a result of urban and industrial wastes, and (iii) water shortage, which is expected to remain a significant problem in the years to come. Kenya's other environmental problems include deforestation, soil erosion, desertification, and biodiversity loss.²

Kenya's climate varies considerably, from tropical along the coast, to arid in the interior. According to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), climate change has affected the country in several ways,³ including the increase in the frequency and intensity of natural hazards such as recurrent periods of drought and flooding during the rainy seasons.

In 2009, a severe drought resulted in millions of people facing food shortages.⁴ In Northern Kenya, there are increasing reports of violent conflicts over water resources among pastoralist communities, who are losing their livestock as a result of drought conditions.⁵ Between January and March 2010, 2010, thousands of households were affected by floods, which forced people to flee, destroyed property and crops, and created fears of an outbreak of waterborne diseases.⁶

There are two other serious environmental problems occurring in Kenya that may lead to human displacement. Firstly, there are environmental changes due to the execution of development projects, such as the construction of dams, infrastructural development, improvements in transportation, and natural resource exploitation. Secondly, environmental conservation programmes may force groups of people to move from their traditional lands to often less-habitable areas of land. These environmental changes are detrimental to the livelihoods of traditional communities in Kenya (e.g. pastoralists and forest dwellers). This article covers all of the environmental problems mentioned above.

Kenya's Demographic Structure

Kenya has a population of nearly 40 million people.⁷ But due to a rapid population increase, more than 70 % of all Kenyans are aged under 30 years.⁸ Seventy-five to 80 % of the total population live in rural areas and are engaged in agriculture, and thus less than one out of four Kenyans live in urban areas. Approximately one third of those living in cities (i.e., in

² CIA The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

³ Intergovernmental Panel on Climate Change (IPCC), 'Climate change 2007: The AR4 Synthesis Report' (IPCC, Geneva, 2007), [1.3.2.3] and [9.2.1.4].

⁴ Action by Churches Together (ACH), <http://www.act-intl.org/alerts.php?uid=79>.

⁵ Foundation for Sustainable Development, <http://www.fsdinternational.org/ntlopps/country/kenya/environment>.

⁶ IRIN Humanitarian News and Analysis, <http://www.irinnews.org/Report.aspx?ReportId=88384> and <http://www.irinnews.org/Report.aspx?ReportId=87863>.

⁷ CIA The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

⁸ The Christian Science Monitor, <http://www.csmonitor.com/Money/2008/0114/p17s01-wmgn.html>.

absolute terms more than three million out of 10 million people) reside in the capital city Nairobi.⁹

There are approximately 40 ethnic groups in Kenya, giving the country a great ethnic diversity. Among the largest ethnic groups are the Kikuyu, Luhya and Luo. Ethnic tensions have always existed in Kenya, but reached their climax with the post-election violence at the end of December 2007,¹⁰ which displaced between 250,000 and 400,000 people within the borders of Kenya¹¹ This post-election displacement is said to be related to 'unresolved land grievances, in a context of poor governance and socio-economic insecurity'.¹² Remarkably, the majority of persons internally displaced from their rural environments, are not likely to return there, and end up living in informal urban settlements, marginalized amongst the urban poor.¹³ Apart from its internally displaced population, Kenya hosts approximately 174,000 Somali refugees, 73,000 Sudanese refugees and 16,000 Ethiopian refugees,¹⁴ all of whom have fled violent conflict in their countries of origin.

In northern Kenya, more than three million people are pastoralists, herding their livestock in arid and semi-arid lands. Such pastoralist communities are among those sections of the population most severely affected by the changes in weather patterns,¹⁵ which increasingly force them to abandon their pastoralist lifestyles.¹⁶ The livelihoods of such communities are also highly vulnerable to effects of development projects and environmental conservation programmes. This vulnerability is linked to their dependency on the natural environment for their survival as well as their socio-cultural and religious practices. Because of their special attachment to their lands, any negative changes to these lands constitute threats to their culture. Also, pastoralist and other traditional communities often endure political marginalisation, discrimination and human rights violations.

Internal Environmental Displacement: Applicable Legal Frameworks

Research Object

- Internal *versus* Cross-border Movement

The decision of individuals fleeing from a natural disaster, extreme drought or any other environmental disruption to remain within the borders of their country or to cross a border to a neighbouring or other country, depends on several factors such as financial means, means of transport and the presence of social networks. Nevertheless, irrespective of the

⁹ UNICEF, www.unicef.org/kenya/overview_4616.html.

¹⁰ The New York Times, <http://www.nytimes.com/2008/01/29/world/africa/29iht-29kenya.3.9573688.html> and BBC, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7172038.stm.

¹¹ UN News Centre, <http://www.un.org/apps/news/story.asp?NewsID=25209&Cr=kenya&Cr1>.

¹² Humanitarian Policy Group (HPG), 'Crisis in Kenya: land, displacement and the search for 'durable solutions'', Policy Brief No. 31, April 2008, <http://www.odi.org.uk/resources/download/1522.pdf>, 1.

¹³ *Ibid*, 6.

¹⁴ CIA The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

¹⁵ African Conservation Foundation, <http://www.africanconservation.org/content/view/full/1073/406/>.

¹⁶ M. Adow, 'Pastoralists in Kenya' (October 2008), *Forced Migration Review* 31 - *Climate change and displacement*, <http://www.fmreview.org/FMRpdfs/FMR31/34.pdf>. See also N. Mushtaq, 'Threat to pastoralists' way of life', <http://www.ipsnews.net/news.asp?idnews=44142>.

distance they travel, these individuals are affected by the same/similar circumstances, suffer in a similar way and therefore have similar humanitarian needs.

From a legal point of view, however, there is a fundamental difference between the situation of those remaining within their country of origin (or habitual residence) and that of those crossing internationally recognized borders. Internally displaced persons (IDPs) fall under the legal system of their country of origin or habitual residence, even if *de facto*, they lack any protection from their government. Cross-border migrants, on the other hand, having left the territory of their country of origin or habitual residence, now depend on the legal system of the country to which they fled. Some categories of cross-border migrants, such as refugees in the sense of Article 1 of the 1951 Convention relating to the Status of Refugees,¹⁷ are granted a right to stay (and other rights) in the host country. Other cross-border migrants, among whom are many of the individuals fleeing environmental disruptions, end up in a legal vacuum. They have no right to stay or work in the country of arrival and live with the constant fear of deportation.

Individuals who have crossed a border are thus within the reach of foreign states, or, stated differently, within the reach of the international community. The international community is able to provide humanitarian assistance to those individuals without requiring permission from the country of origin, and foreign states can grant them legal protection, whether based on legal obligations or on goodwill. By contrast, internally displaced persons, since they fall under the legal system of their country of origin or habitual residence in the same way as do non-displaced persons, cannot be granted foreign legal protection. This is the case, as indicated above, even if their human rights are not respected in practice. Moreover, in accordance with the Charter of the United Nations,¹⁸ to provide humanitarian assistance to individuals within an “affected” state (e.g. by a natural disaster), the international community in principle requires the consent of that state.¹⁹ Internally displaced persons are thus physically less within the reach of the international community than are cross-border migrants.

This article deals with *internal* environmental displacement in Kenya only; it excludes cross-border environmental displacement.

¹⁷ Convention relating to the Status of Refugees of 28 July 1951, 189 UNTS 137. Amended by the Protocol relating to the Status of Refugees of 31 January 1967, 606 UNTS 267. According to Article 1, a refugee is any person who ‘... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

¹⁸ Charter of the United Nations, signed on 26 June 1945, 1 UNTS XVI. Reference can be made in particular to the provisions on the sovereignty and territorial integrity of states.

¹⁹ See in this context the question of humanitarian intervention and the responsibility to protect.

- Displacement *versus* Migration

The terms “migration” and “displacement” have no universally accepted definition. “Migration” can be thought to relate to voluntary movement, while “displacement” denotes forced movement. Alternatively, “migration” could refer to a cross-border movement, while “displacement” relates to internal movement. Finally, “migration” can be said to reflect the act of moving, while “displacement” would emphasize the consequences of forced movement.

In this article, the two terms are used in the sense that they reflect the free will *versus* the coercion to move. However, the term “migration” is here considered to include any type of movement, whether voluntary or forced. Therefore, the distinction is made, not between “displacement” and “migration”, but between “displacement” (or, alternatively, “forced migration”) and “voluntary migration”.

The distinction in practice between forced and voluntary movement is not always easy to make. Examples of clear cases are the situation of a sudden natural disaster such as floods (resulting in forced movement) *versus* the situation of an Italian citizen moving to London, England, for a better paying job. It is difficult, however, to categorize a Kenyan farmer who anticipates the future non-viability of agriculture in his area because of desertification, and thus abandons farming and moves to Nairobi. It is also not easy to classify a member of a pastoralist community (e.g. Maasai) who exchanges his traditional life for a job in the tourism sector in the capital city, because periods of extreme drought make pastoralism increasingly difficult.

Movements of people occur along a fluid *continuum* from voluntary to forced cases and cannot correctly be classified in two sharply contrasting categories.²⁰ This article focuses on forced movement (“displacement” or “forced migration”), including clear-cut cases as well as cases where the element of coercion in the decision to move is only subtly discernable.

- Environment *versus* Climate

Writing or speaking about environmental displacement brings up the question of the meaning of the term “environmental”. As a result of the increasing attention paid to climate change in recent years, many authors in the field of environmental displacement focus on climate change, while sometimes using the term “global environmental change”. However, several other environmental disruptions exist, at the local level, which may cause displacement. Examples of local environmental changes potentially detrimental to the livelihoods of people are those due to (i) environmental conservation programmes, (ii)

²⁰ A. Richmond, ‘Reactive migration: sociological perspectives on refugee movements’ (1993) 6(1) *Journal of Refugee Studies* 7-24; P. Boncour, ‘Climate Change, migration and forced displacement: the new humanitarian frontier?’ (2008) Paper presented at a side event of the 14th Conference of the Parties to UNFCCC by UNHCR in association with IOM and UNU, 8th December 2008, Poznan. Available at www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/webcast.pdf (30 March 2010).

development projects, (iii) deforestation, (iv) industrial accidents, and (v) pollution. In this article, the term “environment” is defined *sensu lato*, and thus includes any type of environmental change negatively affecting people’s livelihoods.

Forced movement is generally characterized by multi-causality.²¹ In many cases it is hard, if not impossible, to isolate one (e.g. environmental, political, economic or social) factor as the only cause of displacement. Therefore, while using the term “environmental displacement”, it is necessary to bear in mind the complex causal relationships linked to migration decisions. Environmental elements pushing people to leave their homes are often accompanied by other factors (e.g. population pressure, conflict or economic crisis) that also play a role in causing displacement.

Legal Framework

- International Legal Framework

As explained above, internally displaced persons fall under the legal system of their country of origin or habitual residence. In the 1990s, the number of IDPs increased dramatically as a result of armed conflicts and gross human rights violations. In 1996, the United Nations Secretary-General Boutros Boutros-Ghali stated that ‘it is inadmissible that persons who are able to cross a border benefit from the rules of international law while those who have not been able to leave their country and may be just a few 100 meters away should remain without protection.’²² Two years later, his successor, Kofi Annan, described internal displacement as ‘... one of the great human tragedies of our time’.²³

The growing attention paid to the problem of internal displacement led to the appointment of a United Nations Secretary-General High Representative for Internally Displaced Persons, Francis M. Deng, who was to examine the extent to which existing international law was applicable to the situation of IDPs, and to develop an appropriate normative framework for such IDPs. In this context, the *Guiding Principles on Internal Displacement* document was developed, and in 1998 taken note of with appreciation by the United Nations Commission on Human Rights (replaced in 2006 by the United Nations Human Rights Council) and afterwards by the United Nations General Assembly in a (legally non-binding) resolution.²⁴ The *Guiding Principles* have existed for the past 12 years, but since they were not formally adopted by states in a binding way, are not legally binding upon states as international instruments. They are however mainly based on international

²¹ S. Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’ (2002) *New Issues in Refugee Research*, Working Paper No. 70, UNHCR, Geneva, 3-5; R. Black, ‘Environmental Refugees: Myth or Reality?’ (2001) *New Issues in Refugee Research*, Working Paper No. 34, UNHCR, Geneva.

²² B. BOUTROS-GHALI, 9 January 1996, as cited in R. COHEN and F. M. DENG, *Masses in flight: the global crisis of internal displacement*, Washington DC, Brookings Institution, 1998, xxi + 414p. (R. COHEN and F. M. Deng, 1998), 126.

²³ K. ANNAN, foreword in R. COHEN and F. M. Deng, 1998, xix.

²⁴ *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (UN Commission on Human Rights) and A/RES/54/167 (UN General Assembly).

human rights (applicable in any situation to each person)²⁵ and humanitarian law (applicable in situations of armed conflict), and therefore their content is legally binding upon states to a large extent.

The 30 *Guiding Principles* list a number of rights of IDPs and offer protection against arbitrary displacement, protection and assistance during displacement and during return or internal resettlement and reintegration. Paragraph 2 of the Introduction defines IDPs as

persons 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. (personal emphasis)

The words 'in particular' indicate that the list of causes of internal displacement is not exhaustive. Persecution, war and conflict, systematic violations of human rights, natural disasters, development projects such as the construction of a dam, industrial accidents and socio-economic catastrophes are all included, as long as one has fled his or her place of habitual residence against his or her will. Consequently, the *Guiding Principles* apply to all types of environmentally displaced persons.

The *Guiding Principles*, while not being legally binding upon states as an international instrument, serve as guidelines for states in the protection of their displaced populations, as well as for the United Nations Secretary-General's Representative for IDPs in carrying out his mandate, and for intergovernmental and non-governmental organizations and other authorities in their activities with regard to IDPs.²⁶ The *Guiding Principles* emphasize the primary responsibility of national authorities for protecting and providing humanitarian assistance to IDPs within their jurisdiction.²⁷ It also stipulates that: (i) they must be applied without discrimination on whatever ground,²⁸ (ii) people have the right not to be arbitrarily displaced, and (iii) displacement based on ethnic, religious or racial grounds is prohibited.²⁹ With regard to the return of IDPs, the *Guiding Principles* emphasize the importance of voluntary and safe return, and the need to assist IDPs in recovering their property and possessions.³⁰

Given the legally non-binding character of the *Guiding Principles*, the question arises to what extent states comply with them in practice. Currently, approximately 20 states have

²⁵ Kenya is party to many of the international human rights instruments including the 1966 International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 UNTS 171 and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 19 December 1966, 993 UNTS 3.

²⁶ Introduction (3)(a)(b)(c) en (d) of the *Guiding Principles on Internal Displacement*.

²⁷ Principle 3(1) of the *Guiding Principles on Internal Displacement*.

²⁸ Principle 4(1) of the *Guiding Principles on Internal Displacement*.

²⁹ Principle 6 of the *Guiding Principles on Internal Displacement*.

³⁰ Principle 28(1) en 29(2) of the *Guiding Principles on Internal Displacement*.

incorporated the *Guiding Principles* in their national legislation and policy,³¹ and/or have drawn inspiration from them. In this context, the *Guiding Principles* can be considered to be a powerful instrument for the promotion of the rights of IDPs. However, while six of the approximately 20 states referred to above are African (Angola, Burundi, Liberia, Sierra Leone, Sudan and Uganda), Kenya is not included in the list. The *Guiding Principles* are however relevant for IDPs in Kenya, as explained below.

- Sub-regional and Regional Legal Frameworks

The Great Lakes Pact

On the sub-regional level, the International Conference on the Great Lakes Region (ICGLR) in Africa culminated in 11 African states³², including Kenya, signing the Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact) in December 2006.³³ One of its 10 protocols deals with the protection of IDPs: the *Protocol on the Protection and Assistance to Internally Displaced Persons* (the Protocol on IDPs).³⁴ The Great Lakes Pact, together with its protocols, went into force in June 2008 and has since been ratified by all of the 11 states of the ICGLR. Consequently, the instrument and its protocols are legally binding upon those states, Kenya included.

The Great Lakes Pact, through the Protocol on IDPs, commits the 11 states to adopt and implement in domestic law the *Guiding Principles on Internal Displacement* as a regional framework for providing protection and assistance to IDPs in the Great Lakes Region.³⁵ The Great Lakes Pact is thus the first multilateral instrument in the world legally obliging states to enact national legislations to “domesticate” the *Guiding Principles*.

Like the *Guiding Principles*, the Protocol on IDPs defines protection measures for IDPs (i) due to all possible causes and (ii) in all phases of displacement.³⁶ Additionally, the Protocol on IDPs addresses or emphasizes several issues that are linked with the specific situation of internal displacement in the Great Lakes Region. Examples are the: (i) obligation to provide special protection for families of mixed ethnic identity,³⁷ (ii) duty to extend the protection and assistance to host communities,³⁸ and (iii) obligation to provide special protection for communities with a special attachment to their lands, such as pastoralists.³⁹

³¹ See the Brookings-Bern Project on Internal Displacement, www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx.

³² Angola, Burundi, Central African Republic, Democratic Republic of Congo, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia.

³³ For the text of the Pact on Security, Stability and Development in the Great Lakes Region, see www.brookings.edu/~media/Files/Projects/IDP/Laws%20and%20Policies/Great%20Lakes/GreatLakes_Pact2006.pdf.

³⁴ For the text of the Protocol on the Protection and Assistance to Internally Displaced Persons, see www.brookings.edu/~media/Files/Projects/IDP/Laws%20and%20Policies/Great%20Lakes/GreatLakes_IDPprotocol_2006.pdf.

³⁵ Article 2 and 6 of the Protocol on IDPs and Article 12 of the Great Lakes Pact.

³⁶ Article 1 and 3 of the Protocol on IDPs.

³⁷ Article 4(1)(h) of the Protocol on IDPs.

³⁸ Article 4(1)(e) of the Protocol on IDPs.

³⁹ Article 4(1)(c) of the Protocol on IDPs.

Interestingly, the Protocol on IDPs defines IDPs slightly differently from the *Guiding Principles*. While the first part of the definition is identical to that in the *Guiding Principles* (implying that the Protocol applies to all types of environmentally displaced persons, as indicated above), the Protocol in addition states that IDPs also mean ‘... persons 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 *large scale development projects*, and who have not crossed an internationally recognized State border.’ (own emphasis).⁴⁰ While this category of environmentally displaced persons (displaced by a human-made disaster) can be said to be already included in the first part of the definition, this addition indicates that the 11 states wished to give special attention to development-induced displacement. Indeed, further in the Protocol is a full article dedicated to this type of displacement.⁴¹

Until today, Kenya has not incorporated the *Guiding Principles on Internal Displacement* in its national law as required by the Protocol on IDPs, and thus lacks legal and institutional frameworks recognizing and protecting IDPs. However, on March 17, 2010, a draft policy on IDPs was unveiled in Nairobi. This recent and potentially important evolution will be discussed below.

The Kampala Convention

At the regional level, the African Union adopted in October 2009 the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),⁴² which is the first legally binding instrument at the level of a continent that recognizes the suffering and vulnerability of IDPs. The text of the Kampala Convention clearly indicates that it is inspired by the *Guiding Principles on Internal Displacement*. Its preamble explicitly refers to the *Guiding Principles* as an important international framework for the protection of IDPs, and its definition of IDPs is identical to that of the *Guiding Principles*.⁴³ The Kampala Convention thus strengthens the existing international standards for the protection of the human rights of IDPs and contributes to the universal authority of the *Guiding Principles*. The Kampala Convention affirms the rights IDPs enjoy under international human rights and humanitarian laws, among which are the right of each individual not to be arbitrarily displaced as well as the right to request protection and assistance in case of displacement. Interestingly, apart from discussing individual rights, the Kampala Convention emphasizes responsibilities of states in: (i) preventing displacement, (ii) protecting and assisting during displacement, and (iii) facilitating durable return, local integration or resettlement of IDPs. To this end, concrete measures must be undertaken at the national level, such as ensuring respect for international human rights law and international humanitarian law and the

⁴⁰ Article 1(4) and 1(5) of the Protocol on IDPs.

⁴¹ Article 5 of the Protocol on IDPs. See also Article 6(4)(b). The *Guiding Principles on Internal Displacement* explicitly refer to development-induced displacement only once: Principle 6(2)(c).

⁴² The text of the Convention can be found on the African Union website, www.africa-union.org.

⁴³ Compare Article 1(k) of the Kampala Convention with Paragraph 2 of the Introduction of the *Guiding Principles on Internal Displacement*.

development of early warning and disaster management systems.⁴⁴ Furthermore, national governments are obligated to provide compensation, where appropriate, for those who have suffered losses due to the displacement.⁴⁵

The Kampala Convention makes it mandatory upon state parties to ensure individual responsibility for acts of arbitrary displacement, in conformity with national and international criminal law.⁴⁶ Also, non-state actors, such as private military or security and multinational companies, must be held accountable for possible acts of arbitrary displacement or complicity in such acts.⁴⁷ In addition to state parties to the Kampala Convention and non-state actors, the Convention also imposes obligations on the African Union and international humanitarian and other organizations.⁴⁸

Since the Kampala Convention definition of IDPs is identical to that of the *Guiding Principles on Internal Displacement*,⁴⁹ the Convention applies to all types of environmentally displaced persons (see above). Moreover, the Kampala Convention explicitly states that its provisions are applicable to all situations of internal displacement regardless of their causes.⁵⁰ Similar to the Protocol on IDPs and particularly relevant for environmentally displaced persons, the Kampala Convention pays special attention to displacement due to projects carried out by public or private actors⁵¹ (i.e. human-made disasters such as in the case of dam constructions). This type of displacement is discussed below.

Like other Treaties or Conventions, the Kampala Convention has its weak points, notably (i) the enforcement or implementation of its provisions since there is no effective enforcement mechanism,⁵² and (ii) its ratification. Currently 26 nations (nearly half of all

⁴⁴ Article 4(1) and (2) of the Kampala Convention.

⁴⁵ Article 12 of the Kampala Convention.

⁴⁶ Article 3(1)(g) of the Kampala Convention.

⁴⁷ Article 3(1)(h) of the Kampala Convention. It is remarkable that several obligations are imposed on armed non-state actors just as on state parties to the Convention, e.g. the duty to protect and assist IDPs who find themselves in areas under effective authority of the armed group. The Kampala Convention also prohibits armed groups to refuse to humanitarian organizations access to IDPs as well as to limit the freedom of movement of IDPs (Article 7). The inclusion in the Convention of provisions relating to armed groups could lead to the criticism that legitimacy, recognition or a legal status is provided to those armed groups. However, the Convention explicitly states that 'in no way whatsoever' this can be the consequence of the provisions referred to (Article 7(1)).

⁴⁸ Article 6 and 8 of the Kampala Convention.

⁴⁹ See note 44.

⁵⁰ Article 15(1) of the Kampala Convention.

⁵¹ Article 10 of the Kampala Convention.

⁵² Article 22(1) and 22(2) of the Kampala Convention: '(...) In the event of failure to settle the dispute or differences, either State may refer the dispute to the African Court of Justice and Human Rights (...) Until such time as and when the latter shall have been established, the dispute or differences shall be submitted to the Conference of the States Parties (...)'. Compare with the enforcement mechanism in the case of the Great Lakes Pact, Article 29: 'The Member States agree to submit any dispute (...) to the African Court of Justice (...)'. The African Court of Justice and the African Court on Human and Peoples' Rights are in the process of being merged. The new court would be the African Court of Justice and Human Rights. However, at this moment only two countries have ratified the Protocol on the Statute of the African Court of Justice and Human Rights (out of fifteen ratifications needed for its entry into force).

member states of the African Union) have signed the Convention, but only one nation (Uganda) has ratified it,⁵³ out of the 15 ratifications needed to bring the Convention into force.⁵⁴ When this is achieved, the national governments need to implement the provisions of the Convention in their national legislations and policies. The actual realization of those provisions in practice will require considerable capacity and sufficient financial means. Kenya has not (yet) ratified or signed the Convention, and is thus not bound by its provisions.

The above analysis of the international, regional and sub-regional legal frameworks for the protection and assistance of (environmentally) displaced persons within the borders of Kenya, would indicate that currently only the Great Lakes Pact, at the sub-regional level, offers a legally binding framework with clear obligations for Kenya.

- National Legal and Policy Framework

As indicated above, with Kenya yet to implement the Protocol on IDPs, including the *Guiding Principles on Internal Displacement*, in its national law, there is, amongst other things, insufficient access to basic facilities like health care in IDP camps. The awareness of the existence of the *Guiding Principles* is however growing, and the government asserts that its existing policies reflect them.⁵⁵ The situation of lack of implementation of the *Guiding Principles* might however change, with the introduction of a draft policy on IDPs in March 2010. This policy is expected to (i) fulfil Kenya's international obligations with regard to internal displacement, (ii) enhance the protection and assistance for IDPs, (iii) prevent future displacement, and (iv) provide appropriate durable solutions. The policy covers situations of internal displacement due to political and resource-based conflict, natural disasters and development projects, and is largely based on the Kampala Convention.⁵⁶ It might thus engender positive changes to the plight of environmentally displaced persons within Kenya, with clear roles assigned to stakeholders, and the establishment of an IDP fund to meet the needs of IDPs. The policy also calls attention to the criminality of arbitrary displacement, and insists on the adoption of laws that deal with historical injustices related to land, which have often played a substantial role in causing conflict and displacement in Kenya.⁵⁷

Apart from this IDP-specific draft policy, other frameworks exist in Kenya which, though not IDP-specific, are relevant for, and contribute to, the protection of certain types of environmentally displaced persons. Three types of environmental displacement and the applicable legal frameworks are discussed below.

⁵³ See http://www.unhcr.org/Conference_Special_Events/Docs/Signatories_Kampala_Convention.pdf.

⁵⁴ Article 17(1) of the Kampala Convention.

⁵⁵ J. Klopp and N. Sheekh, 'Can the Guiding Principles make a difference in Kenya?' (December 2008) *Forced Migration Review* Special Issue – *Ten Years of the Guiding Principles on Internal Displacement*, <http://www.fmreview.org/FMRpdfs/GP10/19-20.pdf>.

⁵⁶ IRIN Humanitarian News and Analysis, <http://www.irinnews.org/Report.aspx?ReportId=88485>.

⁵⁷ *Ibid.*

Natural Disasters, Development Projects and Environmental Conservation in Kenya

This part of the article focuses on three categories of environmental displacement that occur in Kenya on a considerable scale: (i) displacement due to natural disasters, (ii) development-induced displacement, and (iii) conservation-induced displacement. The rules applicable to each of these displacement types, as stipulated in the international, regional, sub-regional and national instruments discussed above, are examined. The previous part concisely discussed the general content of the legal instruments, some of which relate to all types of internal displacement, while others deal specifically with one type or another. Before examining the specific rules applying to each of the three categories of environmental displacement, it is useful to glance through the most relevant general rules. States undertake to refrain from, prohibit and/or prevent arbitrary displacement as well as to eliminate the root causes of displacement. To this end, they must respect their obligations under international (human rights and humanitarian) law.⁵⁸ Before any decision on the necessity of displacement of persons is taken (e.g. in the case of a natural disaster) all feasible alternatives must be explored by the authorities in order to avoid displacement.⁵⁹ States bear the primary responsibility to protect and assist IDPs both during and after displacement, but in case of failure they must accept the provision of protection and assistance by the international community.⁶⁰ States must ensure that IDPs have safe access to food, water, shelter, housing, clothing, sanitation and essential medical services. Members of the same family should not be separated, and the special needs of women, children and other vulnerable groups of persons should be taken into account.⁶¹

IDPs must be guaranteed the same rights and freedoms under international and domestic law, as are other persons in their country. They must not be discriminated against on grounds that they are internally displaced.⁶² Unless exceptional circumstances so demand, IDPs shall not be confined to camps.⁶³ States are under obligation to ensure freedom of movement and choice of residence for IDPs within designated areas of location, except when restrictions are necessary, justified and proportionate.⁶⁴ They have the right to move freely in and out of camps.⁶⁵ With regard to solutions after displacement, states have the duty to seek durable solutions in the form of voluntary and safe return, local integration or resettlement. IDPs must be able to make a free choice in this respect and should be given the opportunity to participate in finding lasting solutions.⁶⁶

⁵⁸ Principle 5 of the *Guiding Principles on Internal Displacement*; Article 3(1) of the Protocol on IDPs; Article 3(1)(a) and 4(1) of the Kampala Convention.

⁵⁹ Principle 7 of the *Guiding Principles on Internal Displacement*.

⁶⁰ Principle 25(1) of the *Guiding Principles on Internal Displacement*; Article 3(3) and 3(10) of the Protocol on IDPs; Article 5(1) of the Kampala Convention.

⁶¹ Principle 7(2) and 18(2) of the *Guiding Principles on Internal Displacement*; Article 4(f) of the Protocol on IDPs; Article 9(2)(b) of the Kampala Convention.

⁶² Principle 1 of the *Guiding Principles on Internal Displacement*; Article 9(1)(a) of the Kampala Convention.

⁶³ Principle 12(2) of the *Guiding Principles on Internal Displacement*.

⁶⁴ Article 4(1)(g) of the Protocol on IDPs.

⁶⁵ Principle 14(2) of the *Guiding Principles on Internal Displacement*.

⁶⁶ Principle 28 of the *Guiding Principles on Internal Displacement*; Article 11(1) and 11(2) of the Kampala Convention.

Finally, states have the duty to assist returned, locally integrated or resettled IDPs in recovering their property and possessions. Where this is impossible, IDPs must be provided with effective remedies or appropriate compensation.⁶⁷

Natural Disasters

In addition to the above general rules applicable to all types of internal displacement, specific rules also exist for the category of displacement due to natural disasters. The Protocol on IDPs as part of the Great Lakes Pact, which is currently Kenya's only legally binding framework for the protection and assistance of IDPs, states that "Member States shall, to the extent possible, mitigate the consequences of displacement caused by natural disasters and natural causes,"⁶⁸ and that,

Member States shall establish and designate organs of Government responsible for disaster emergency preparedness, coordinating protection and assistance to internally displaced persons, as well as the focal structures responsible for cooperating with international agencies and civil society responsible for internally displaced persons.⁶⁹

Moreover, with regard to the obligation of Member States to enact legislation to domesticate the *Guiding Principles on Internal Displacement*,⁷⁰ they undertake to ensure that such legislation shall

specify the organs of government responsible for providing protection and assistance to internally displaced persons, disaster preparedness and the implementation of the legislation incorporating the Guiding Principles.⁷¹

The *Guiding Principles* stipulate that displacement in cases of disasters is considered arbitrary and therefore is prohibited, "unless the safety and health of those affected requires their evacuation".⁷²

The Kampala Convention also contains several provisions specifically dealing with displacement due to natural disasters:

States Parties shall devise early warning systems, in the context of the continental early warning system, in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons.⁷³

⁶⁷ Principle 29(2) of the Guiding Principles on Internal Displacement; Article 12 of the Kampala Convention.

⁶⁸ Article 3(2) of the Protocol on IDPs.

⁶⁹ Article 3(5) of the Protocol on IDPs.

⁷⁰ Article 6(3) of the Protocol on IDPs.

⁷¹ Article 6(4)(c) of the Protocol on IDPs.

⁷² Principle 6(2)(d) of the *Guiding Principles on Internal Displacement*.

⁷³ Article 4(2) of the Kampala Convention.

Similar to the *Guiding Principles on Internal Displacement*, the Kampala Convention, after declaring the right of all persons to be protected against arbitrary displacement, states that the prohibited categories of arbitrary displacement include “forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected.”⁷⁴ Where prevention of displacement is not possible, “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”⁷⁵ Finally, with regard to compensation,

a State Party shall be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.⁷⁶

Kenya does not currently have a comprehensive disaster preparedness policy, resulting in the country’s response to natural disasters such as droughts and floods being rather ‘slow, poorly coordinated and unnecessarily expensive’, ‘ad-hoc, short term’ and ‘mainly comprising emergency relief’.⁷⁷ Nevertheless, the Kenyan government is aware of the need for a legal, policy and institutional framework for the effective management of disaster risk and preparedness. For the past several years, the drafting of a national policy on disaster management has been ongoing, and in September 2009 a new draft was forwarded to the Cabinet and is now due for discussion in Parliament.⁷⁸ This policy framework is expected to make disaster response faster and more coordinated.⁷⁹ According to the Deputy Director of the National Disaster Operations Centre of Kenya (NDOC), Col. Joseph Kingori, ‘a need exists to (i) harmonize disaster management programmes at all levels, (ii) have the right allocation of resources, (iii) implement the use of early warning systems, (iv) map disaster-prone areas, (v) strengthen disaster management institutions countrywide, and (vi) enforce laws and by-laws’.⁸⁰ A case study on the 1999-2001 drought crisis in Kenya⁸¹ revealed that the cost of emergency aid associated with the drought, which

⁷⁴ Article 4(4)(f) of the Kampala Convention.

⁷⁵ Article 5(4) of the Kampala Convention.

⁷⁶ Article 12(3) of the Kampala Convention.

⁷⁷ IRIN Humanitarian News and Analysis , <http://www.irinnews.org/Report.aspx?ReportId=88067>. Over the years, many different agencies (among whom the Kenya Food Security Meeting, the Arid Lands Resource Management Project, the National Disaster Operations Center, the Crisis Response Centre, the Kenya Humanitarian Forum and the Kenya Red Cross Society) have developed partnerships and collaborated reasonably well in disaster situations. See <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1135560>.

⁷⁸ For the text of the final draft of the National Disaster Management Policy, September 2009, see <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1160523>. The new policy ‘seeks to establish the guiding principles and architecture for disaster management in Kenya by presenting the institutional structures, roles, responsibilities, authorities and key processes required to achieve a coordinated, coherent and consistent approach.’ ‘The policy provides overarching frameworks for decision-making and coordination across disaster management sectors and actors, including government ministries, civil society organizations, international organizations and the private sector.’ (Policy Objective 1.1).

⁷⁹ IRIN Humanitarian News and Analysis , <http://www.irinnews.org/Report.aspx?ReportId=88067>.

⁸⁰ *Ibid.*

⁸¹ M. Wekesa and H. Bushell, ‘Case Study: The Early Warning / Response Interface and the Cost of Delayed Response during the 1999-2001 Drought Crisis in Kenya’, in *Proceedings from the Workshop on JID (2011), Vol 1 No. 1, 164-185*

killed 60% of the livestock and resulted in crop failures in several parts of the country, was twice the amount that would have been required if there had been an effective disaster management system in place at that time.⁸²

According to the Architectural Association of Kenya, 70% of buildings with poor structural stability located outside the centre of the capital, would collapse if a five-degree earthquake struck the region. This would require Kenya to request for humanitarian assistance from other countries.⁸³ Ironically, Kenya's neighbour Ethiopia, ranked below Kenya in the Human Development Index,⁸⁴ has had a policy on disaster risk reduction since 1974...⁸⁵

Development Projects

As earlier indicated, development-induced displacement receives considerable attention in both the Protocol on IDPs and the Kampala Convention, the former explicitly including persons displaced by large-scale development projects in the definition of IDPs,⁸⁶ and stipulating that

Member States shall ensure that displacement owing to large-scale development projects shall be justified by compelling and overriding public interest and development. Member States shall therefore ensure that all feasible alternatives of development are explored in order to avoid development induced displacement altogether.⁸⁷

Where no alternatives exist, Member States undertake to avoid arbitrary displacement and shall take all measures necessary to minimize displacement and to mitigate the adverse effects of development-induced displacement.⁸⁸

Where displacement is the only option, states have the obligation to obtain, as far as possible, the free and informed consent of the persons affected by the displacement. States have an information duty towards those persons on the reasons of the displacement, the relevant procedures, possible compensation and relocation. States must provide proper accommodation on adequate relocation sites and guarantee the participation of the displaced in the planning of the relocation.⁸⁹

The Protocol on IDPs finally requires states to outline their procedures for carrying out development-induced displacement in national legislation implementing the *Guiding*

Pastoral Early Warning and Early Response Systems in the Greater Horn of Africa, 13-15 November 2001, Mombasa, Kenya, http://pdf.usaid.gov/pdf_docs/PNADK526.pdf, 47-49.

⁸² IRIN Humanitarian News and Analysis, <http://www.irinnews.org/Report.aspx?ReportId=88067>.

⁸³ *Ibid.*

⁸⁴ The Human Development Index (HDI) is a statistic used as an index to rank countries by level of "human development", see <http://hdr.undp.org/en/statistics/>.

⁸⁵ IRIN Humanitarian News and Analysis, <http://www.irinnews.org/Report.aspx?ReportId=88067>.

⁸⁶ Article 1(5) of the Protocol on IDPs.

⁸⁷ Article 5(1) of the Protocol on IDPs.

⁸⁸ Article 5(2) of the Protocol on IDPs.

⁸⁹ Article 5(3), 5(4), 5(5) and 5(6) of Protocol on IDPs.

*Principles on Internal Displacement.*⁹⁰ The model legislation on the implementation of the Protocol on IDPs, attached to the Protocol as an annex, stipulates, among other things, that 'public and private sectors engaged in large-scale development projects (...) shall bear the costs for relocating and/or compensating persons displaced by such projects.'⁹¹

The provisions laid down in the Protocol on IDPs on development-induced displacement are unmistakably based on the relevant provisions included in the *Guiding Principles on Internal Displacement*.⁹² Both instruments additionally require states to provide special protection against the displacement of certain categories of persons who have a special attachment to their lands, such as indigenous people, peasants and pastoralists.⁹³ Given the particular vulnerability of those categories of people to changes in their environment, these provisions are highly important.

The provisions of the Kampala Convention on development-induced displacement largely overlap with those contained in the Protocol on IDPs and the *Guiding Principles on Internal Displacement*.⁹⁴ The Convention furthermore explicitly refers to socio-economic and environmental impact assessments and imposes on states the obligation to undertake such assessments before carrying out any proposed development projects.⁹⁵

As indicated above, the Kenyan draft policy on IDPs covers persons who are forced from their homes as a result of the execution of development projects without proper relocation. The Kenyan Environmental Management and Coordination Act (the Act) adopted in 1999 is also of particular relevance,⁹⁶ since it obliges the proponent or executor of any environment-related project, programme or policy, to undertake an Environmental Impact Assessment (EIA) study and submit a report thereof to the National Environment Management Authority.⁹⁷ The Authority then issues an EIA license 'on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management'.⁹⁸ The Environmental Impact Assessment and Audit Regulations (the Regulations) of 2003 clarify that an EIA study should include:⁹⁹ (i) environmental, social, cultural, economic and legal considerations,¹⁰⁰ (ii) identify the anticipated environmental impacts, (iii) examine alternatives to the project, and (iv) put forward mitigation measures if the project is implemented.¹⁰¹ With regard to public

⁹⁰ Article 6(4)(b) of the Protocol on IDPs.

⁹¹ S(3)(5) of the Annex to the Protocol on IDPs on the implementation of the Protocol.

⁹² See Principle 6(2)(c) and Principle 7(3) of the *Guiding Principles on Internal Displacement*.

⁹³ Principle 9 of the *Guiding Principles on Internal Displacement* and Article 4(1)(c) of the Protocol on IDPs.

⁹⁴ See Article 4(4)(f), 4(5), 5(4) and 10 of the Kampala Convention.

⁹⁵ Article 10(3) of the Kampala Convention.

⁹⁶ The Environmental Management and Coordination Act entered into force on 14 January 2000. For the text of the Act, see http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

⁹⁷ Article 58(2) of the Act.

⁹⁸ Article 63 of the Act.

⁹⁹ For the text of the Regulations, see http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

¹⁰⁰ Article 16 of the Regulations.

¹⁰¹ Article 16(a), 16(b) and 16(c) of the Regulations.

participation, the proponent of the study is required to seek the views of persons who may be affected by the project.¹⁰² The Act also more importantly provides that any person 'who has a legal interest in land which is the subject of an environmental easement' shall 'be entitled to compensation commensurate with the lost value of the use of the land'.¹⁰³ Depending on whether the environmental easement is of national importance or not, the court may order the government or the project applicant to bear the cost of compensation.¹⁰⁴

Theory and practice often present different stories, and Kenya is no exception. The enforcement of the above-explained rules in Kenya has not been without problems. In 2008, the Kenyan government launched an economic development plan, called "Kenya Vision 2030" which aimed to develop several economic zones in various parts of the country,¹⁰⁵ likely resulting in forced evictions on a considerable scale. The Geneva-based Centre on Housing Rights and Evictions (COHRE)¹⁰⁶ observed that 'eviction guidelines often referred to in government documents are not adhered to when government agents carry out evictions'.¹⁰⁷ For example, in March 2010, Kenya Railways gave 50,000 people living alongside the country's railway lines, 30 days to vacate the location or risk prosecution. This directive was implemented without any resettlement or compensation plan or consultation with affected communities by the government. While guarantees were given by the government that, eviction guidelines would follow, nothing has happened so far.¹⁰⁸

Environmental Conservation

None of the three instruments discussed above (the *Guiding Principles on Internal Displacement*, the Protocol on IDPs and the Kampala Convention) contains any explicit reference to displacement related to environmental conservation programmes, even though each of the provisions could be relevant to victims of conservation-induced displacement. Environmental conservation programmes often gravely affect traditional communities like pastoralists and forest dwellers. It is therefore the special duty of states to protect groups of people with particular dependencies on their lands, as stated in all of the three instruments.¹⁰⁹ Additionally, the guarantees laid down in the *Guiding Principles on Internal Displacement*, which must be complied with when displacement occurs 'in situations other than during the emergency stages of armed conflicts and disasters', are useful.¹¹⁰ These guarantees, among other things, deal with the obligation to provide the persons concerned

¹⁰² Article 17 of the Regulations.

¹⁰³ Article 116(1) of the Act.

¹⁰⁴ Article 116(3) and 116(4) of the Act.

¹⁰⁵ See the official website of the Kenya Vision 2030 Program: <http://www.nesc.go.ke/News&Events/KenyaVision2030Intro.htm>.

¹⁰⁶ See <http://www.cohre.org/index.php>.

¹⁰⁷ COHRE, http://www.cohre.org/view_page.php?page_id=384.

¹⁰⁸ Amnesty International, <http://www.amnesty.org/en/news-and-updates/more-50000-people-kenya-risk-imminent-forced-eviction-2010-04-15>.

¹⁰⁹ Article 4(1)(c) of the Protocol on IDPs; Principle 9 of the *Guiding Principles on Internal Displacement*; Article 4(5) of the Kampala Convention.

¹¹⁰ Principle 7(3) of the *Guiding Principles on Internal Displacement*.

with information (on the reasons of displacement, procedures, compensation and relocation), the duty to seek their consent and the duty to provide them the possibility to be involved in the management of their relocation. Finally, the Kampala Convention requires states to 'take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion.'¹¹¹

It remains to be seen to what extent the Kenyan draft policy on IDPs will result in a legal framework that offers protection to conservation-IDPs. Apart from this, the above-mentioned Environmental Management and Coordination Act is relevant to conservation-induced displacement as much as it is to development-induced displacement. Programmes undertaken with the aim of conserving the environment (e.g. the creation of national parks, game reserves, and wilderness areas) are included in the list of projects that require Environmental Impact Assessments in accordance with the Act.¹¹² Consequently, the rules and principles in this regard set out above apply equally to conservation-IDPs.

The Mau forest in the Kenyan Rift Valley serves as an example of a current conservation programme in the country. Kenya's largest forest ecosystem has been encroached upon and destroyed on a significant scale during the past years as a result of, among other things, tea plantations and activities of logging firms. This might lead to the disappearance of rivers and lakes, a decline of agricultural productivity and the endangering of wildlife.¹¹³ A task force set up by Prime Minister Odinga noted in 2009 that 'most, if not all, the acquisitions of land in the area were illegal'. In addition, the task force 'recommended that all settlers be evicted from the Mau complex as soon as possible'.¹¹⁴ So far, the government has repossessed about 21,000 hectares of forest land, involving the removal of people without documentation to support their occupation of the forest ("illegal squatters") and therefore without a right of compensation. Such "illegal squatters" left voluntarily and no violence was involved in the exercise. Unfortunately, many of them are currently living along major roads because they have nowhere else to go, and the promise by the government of plans to resettle some of them has not materialised.¹¹⁵ The situation is different for the Ogiek, a forest community of hunters and gatherers who have lived in harmony with the Mau forest since time immemorial, though most of them are without official land titles. The Ogiek have always striven to preserve the forest, and even though

¹¹¹ Article 11(5) of the Kampala Convention.

¹¹² Article 13 of the Second Schedule (containing the list of projects to undergo an environmental impact assessment in accordance with the Environmental Management and Coordination Act), see http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

¹¹³ The Africa Report, <http://www.theafricareport.com/archives2/frontlines/3284510-the-mau-forest-a-the-task-force-report.html>.

¹¹⁴ *Ibid.*

¹¹⁵ See the following news release on Phase III of the repossession of forestland in the Mau Forests Complex, with focus on the Maasai Mau trust land forest, http://www.kws.org/export/sites/kws/info/news/2010/2010_download/ICS-News_release_03_final_4Feb10.pdf and Wildlife Direct, <http://baraza.wildlifedirect.org/category/mau-forest-complex/>.

the government had promised them that they would not be evicted, their homes were violently attacked in April 2010.¹¹⁶

Recently, there was an interesting legal development with regard to conservation-induced displacement in Kenya. On February 4, 2010, the African Union adopted a decision by the African Commission on Human and Peoples' Rights issued in May 2009¹¹⁷ to rule in favour of the Endorois, a traditional community of nomadic pastoralists in Kenya. The Endorois had been evicted by the Kenyan government in the 1970s from their lands, with which they have had a special connection as the centre of their religion and culture as well as their ancestral burial site. The reasons for the displacement were the creation of a nature reserve and tourist facilities. The African Commission found violations of several articles of the African Charter on Human and Peoples' Rights,¹¹⁸ and called on the Kenyan government to recognize rights of ownership by the Endorois, to restore their historic land, and to pay adequate compensation to the community for the loss suffered. With the adoption of this decision by the African Union, the African Commission's verdict has become legally binding upon the Kenyan government. While the decision is a victory for the Endorois in particular, it may also set a legal precedent for future court decisions. From now on, Kenya might hesitate to implement tourism programmes that are detrimental to the livelihoods of its traditional communities.

Conclusions and Recommendations

This article discussed the currently existing legal protection for environmentally displaced persons within Kenya, and dealt with legal frameworks at international (the *Guiding Principles on Internal Displacement*), regional (the Kampala Convention), sub-regional (the Protocol on IDPs, as part of the Great Lakes Pact) and national levels (the Kenyan draft policy on IDPs, the Kenyan draft policy on disaster management and the Kenyan Environmental Management and Coordination Act).

The analysis led to the following conclusions:

- The Protocol on IDPs is currently the only legally binding framework upon Kenya specifically dealing with the protection and assistance of (environmentally) displaced persons within the country; and
- Kenya is in the process of adopting new policies and laws that aim to implement its international obligations with regard to the protection and assistance of IDPs and that may bring about significant, positive changes for those environmentally displaced in the country.

¹¹⁶ Wildlife Direct, <http://mau-mandala.wildlifedirect.org/2010/04/13/business-as-usual-in-the-mau-forest/>.

¹¹⁷ UNHCR, www.unhcr.org/refworld/publisher/ACHPR,,4b8275a12,0.html.

¹¹⁸ I.e. Article 8 (right to religious freedom), Article 14 (right to property), Article 17(2) and (3) (right to culture), Article 21 (right to freely dispose of one's wealth and natural resources) and Article 22 (right to development). Kenya ratified the African Charter on Human and Peoples' Rights in 1992.

Several steps remain to be taken by Kenya as to enhance the protection of its displaced population:

- The Protocol on IDPs should be included in national legislation as soon as possible, through domesticating the *Guiding Principles on Internal Displacement*. The Kenyan draft policy on IDPs is a welcome starting point in this regard.
- Kenya should sign and ratify the Kampala Convention without further delay. The entering into force of this Convention would strengthen the existing standards for IDP protection and assistance, with civil society and national human rights organizations having important roles to play by encouraging the ratification of the Convention and raising awareness among the internally displaced about their rights under the Convention. Kenya's future policy on IDPs should reflect, in addition to the Protocol on IDPs, the provisions of the Kampala Convention. Currently, the Kampala Convention is a *potentially* effective instrument for the protection of IDPs.
- The Kenyan government should continue working on the development of its draft policy on disaster management without delay.
- Efforts should be made to harmonize existing and future legislation and policies relevant to the protection of IDPs (i.e. the future legal framework on IDPs and disaster management, the new constitution, the Protocol on IDPs, and the Kampala Convention).
- To effectively realize the legal standards on IDP protection, it is crucial for Kenya to develop the necessary capacity and to allocate sufficient funding.

Finally and above all, Kenya must respect its international obligations laid down in human rights treaties and conventions to which it is a party, irrespective of the existence of IDP-specific frameworks at the international and regional level. These human rights obligations must be respected towards all of Kenya's citizens, including the displaced.

Reference

- Adow, M., 'Pastoralists in Kenya' (October 2008), *Forced Migration Review* 31 – *Climate change and displacement*, <http://www.fmreview.org/FMRpdfs/FMR31/34.pdf>.
- Black, R., 'Environmental Refugees: Myth or Reality?' (2001) *New Issues in Refugee Research*, Working Paper No. 34, UNHCR, Geneva.
- Boncour, P., 'Climate Change, migration and forced displacement: the new humanitarian frontier?' (2008) Paper presented at a side event of the 14th Conference of the Parties to UNFCCC by UNHCR in association with IOM and UNU, 8th December 2008, Poznan. Available at www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/webcast.pdf.
- Castles, S., 'Environmental Change and Forced Migration: Making Sense of the Debate' (2002) *New Issues in Refugee Research*, Working Paper No. 70, UNHCR, Geneva.
- Cohen, R. and Deng, F. M., *Masses in flight: the global crisis of internal displacement* (Brookings Institution, Washington DC, 1998).
- Humanitarian Policy Group (HPG), 'Crisis in Kenya: land, displacement and the search for 'durable solutions'', Policy Brief No. 31, April 2008, <http://www.odi.org.uk/resources/download/1522.pdf>.
- Intergovernmental Panel on Climate Change (IPCC), 'First Assessment Report' (IPCC, Geneva, 1990).
- Intergovernmental Panel on Climate Change (IPCC), 'Climate change 2007: The AR4 Synthesis Report' (IPCC, Geneva, 2007).
- Klopp, J. and Sheekh, N., 'Can the Guiding Principles make a difference in Kenya?' (December 2008) *Forced Migration Review* Special Issue – *Ten Years of the Guiding Principles on Internal Displacement*, <http://www.fmreview.org/FMRpdfs/GP10/19-20.pdf>.
- Richmond, A., 'Reactive migration: sociological perspectives on refugee movements' (1993) 6(1) *Journal of Refugee Studies* 7-24.
- Wekesa, M. and Bushell, H., 'Case Study: The Early Warning / Response Interface and the Cost of Delayed Response during the 1999-2001 Drought Crisis in Kenya', in *Proceedings from the Workshop on Pastoral Early Warning and Early Response Systems in the Greater Horn of Africa*, 13-15 November 2001, Mombasa, Kenya, http://pdf.usaid.gov/pdf_docs/PNADK526.pdf.