

**State responsibility to prevent development-induced displacements –
implementing article 10 of the Kampala Convention**

**Submitted in partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

By

Romola Adeola

**Prepared under the supervision of Professor Elina Pirjatanniemi
At the Institute of Human Rights, Åbo Akademi University, Finland**

31 October 2012

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Dedication

To the Divine Trinity: GOD JEHOVAH, JESUS and THE HOLY SPIRIT

Acknowledgement

I sincerely thank THE ALMIGHTY GOD for HIS goodness, love and abundant mercy; my sincere gratitude to JESUS for leading me through those times when my humanness was just not enough. I thank the HOLY SPIRIT for HIS eternal love.

I thank my parents for their kind support. My father, I thank, for teaching me vital lessons about life and encouraging me to do better in every way. I thank my mother for her love and for filling those solitude moments in which the reality of life seemed far too imposing on me.

I am indeed grateful to Professor Elina Pirjatanniemi for her kind supervision, directions and valuable comments. I appreciate the kind contributions of Professor Frans Viljoen, Dr Magnus Killander and Professor Bradlow during the dissertation discussions. I thank Professor Markku Suksi and Professor Hansungule for their helpful guidance in respect of this research.

I thank my academic tutors particularly Ms Melhik Bekele, Mr Ademola Jegede, Mr Adem Kassie Abebe, and Mr Ally Possi. I thank Martin, Eric, Kati and Harriet for all the kind assistance rendered. Finally, I must not forget the LLM class of 2012 for the good times together. Thank you all.

Abbreviations

ADB	-	African Development Bank
APRM	-	African Peer Review Mechanism
AU	-	African Union
DID	-	Development-induced displacements
EIA	-	Environmental Impact Assessment
HRBA	-	Human rights-based approach to development
IAIA	-	International Association for Impact Assessment
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IDPs	-	Internally Displaced Persons
OECD	-	Organisation for Economic Cooperation and Development
SEIA	-	Socio-Economic Impact Assessment
UN	-	United Nations
UNEP	-	United Nations Environment Programme
UNTS	-	United Nations Treaty Series
VCLT	-	Vienna Convention on the Law of Treaties
WB	-	World Bank

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Chapter One

Platform – article 10 of the Convention

1.1 Background

Development-induced displacements (DID) have become a global cause of serious human rights violations. Yearly, about 15 million individuals are left impoverished as a result of the effect of development projects,¹ some of which are sponsored by international financial institutions such as the World Bank (WB), the Inter-American Development Bank, the Asian Development Bank and the African Development Bank (ADB). Some of these development projects include the creation of dams, construction of roads, oil exploration, and mining.² Although the economic benefits of these projects are enormous, the resultant human rights implications are often massive.

These human rights implications trigger a series of issues, inclusive among which are environmental, economic and social in nature.³ In furtherance, these effects question state obligation significantly with respect to human rights commitments. But while the obligation of states has largely been discussed in the context of the responsibility to respect, protect and fulfil, article 10 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Convention)⁴ places an obligation on states to prevent displacement caused by development. This research explores the nature of this obligation both in content and enforcement.

1.2 Problem statement

In the wake of independence and increased political will to economically position Africa with the rest of the world, African countries swiftly embarked on development projects. The displacements caused by these projects were often considered as inconsequential in terms of the national interest that would accrue to the state. As a result, persons displaced by these projects were often regarded as necessary sacrifices for an economic future. For decades, even with the rise in global figures on DID, actual responses revolved in the same circles of civil society activism, academic writings and media attention.

But in 2009, Africa introduced a unique position to the discourse by adopting the first binding legal convention on internally displaced persons (IDPs).⁵ But while the Convention changes the rhetoric on the place of human rights in development policies, its innovation requires contextual placement both in the realm of international human rights law and nascent regional development. And as earlier noted this is the gap which this research intends to fill.

¹ JK Maldonado 'A new path forward: researching and reflecting on forced displacement and resettlement' (2012) 25(2) *Journal of Refugee studies* 193 194.

² See M Leben 'Oil development induced displacement in the Sudan' Sir William Luce Fellowship, Durham Middle East Papers 10 (September 2009) <http://dro.dur.ac.uk/6232/1/6232.pdf> (accessed 2 September 2012); K Hoshour & J Kalafut 'A growing global crisis: development-induced displacement and resettlement' International Accountability Project Issue Paper (August 2010) 1 <http://accountabilityproject.org/downloads/IAP%208.10%20Briefer.pdf> (accessed 10 June 2012).

³ S Parasuraman 'Development projects, displacement and outcomes for displaced: two case studies' (1996) 31(24) *Economic and Political Weekly* 1529.

⁴ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted at the Special Summit of the African Union Heads of States and Government in Kampala, Uganda (19-23 October 2009).

⁵ AB Birganie 'An African initiative for the protection of the rights of internally displaced persons' (2010) 10(1) *Human Rights Law Review* 179 182-183.

1.3 Research questions

This research would focus on the following questions:

1. What is the normative content of state responsibility to prevent development-induced displacements?
2. How can the enforcement of the normative content of state responsibility to prevent development-induced displacements be realised?

1.4 Significance of the study

There are three main reasons why article 10 of the Convention is significant. First, it alters the regional dialogue on state obligation with respect to DID in that it focuses on prevention. Secondly, it is binding on African states as opposed to the United Nations Guiding Principles on Internally Displaced Persons (Guiding Principles)⁶ which, globally, is non-binding on states. Thirdly, an inquiry into the normative content of the provision contributes to the discourse on the growing norm of the human right-based approach to development (HRBA) which recognises the essence of human rights as the locomotive that should drive the wheels of global discussions on global issues.

1.5 Definition of terms

Before proceeding with the research, it is needful to define key terms that are relevant to the subject in focus. These definitions would create a definite platform on which to begin an engagement of the subject. These relevant terms are: state responsibility, DID and the HRBA.

1.5.1 State responsibility

According to Crawford, ‘...the international law of [s]tate responsibility proceeds on the basis that [s]tates have, generally speaking, the prerogative of responsibility.’⁷ State responsibility implies the duty on a state to act in conformity with the obligation imposed by the provision of a treaty that has been ratified by that state. Article 12 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that a state breaches an international obligation when ‘...an act of that [s]tate is not in conformity with what is required of it by that obligation, regardless of its origin or character.’⁸

Even when a state only signs a treaty, it accepts responsibility to desist from acts which are contrary to the aims of that treaty.⁹ In essence, the fact that such state has not ratified the treaty does not obviate responsibility. As a result, any act done in contravention of its obligation, although assumed in good faith, necessarily incurs responsibility.

In light of this research, it is needful to describe the nature of state responsibility for acts of non-state actors which resonates from article 10(1) of the Convention. In this context, the African

⁶ Guiding Principles on Internally Displaced Persons, endorsed by the UN General Assembly Resolution 54/167, UN Doc A/RES/54/167 (25 February 2000).

⁷ J Crawford ‘Human rights and state responsibility’ 12th Raymond & Beverly Sackler Distinguished Lecture Series (October 2006) <http://doddcenter.uconn.edu/dd/events/sackler/Crawford%20transcript.pdf> (accessed 26 August 2012).

⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, considered by the UN General Assembly Resolution 56/83, UN Doc A/RES/56/83 (28 January 2002).

⁹ Vienna Convention on the Law of Treaties 1969 1155 UNTS 331 (VCLT) art 18.

Commission on Human and Peoples' Rights (the Commission) has offered a valuable jurisprudence.¹⁰ The Commission in the *Ogoniland* case emphasised that states possess '...a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties.'¹¹ The Commission has also enunciated that states can incur responsibility for acts of non-state actors as a result of '...lack of due diligence.'¹² One crucial point which resonates from the definition of state responsibility discussed in this section is that the concept applies not only to instances where states fail to conform with international obligations but also when states fail to ensure compliance by non-state actors as required by these obligations.

1.5.2 Development-induced displacements

It would be inchoate to proceed with a definition of DID without first describing who IDPs are. Though a consensus definition on IDPs have been contentious, there are two basic requirements that must exist for persons to fall within the category of IDPs.¹³ First, such persons must have fled or been forced to leave their places of habitation. Secondly, such persons, in forcefully leaving or fleeing, must not have crossed international borders. Both the Guiding Principles and the Convention recognise similar situations that can give rise to internal displacement and, '...in particular, armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters...'¹⁴

While it may appear that DID is not included in the category, a closer look at the provision reveals that it is not all-inclusive. Before this list, the words 'in particular' is mentioned which, has noted by the former Representative of the United Nations Secretary-General on the human rights of IDPs, reveals that '...the listed examples are not exhaustive.'¹⁵ As a result, DID, contained in article 6(2)(c) of the Guiding Principles and article 10 of the Convention, falls within the category of those situations that can give rise to internal displacement. Alternatively, Cohen and Deng – using the paradigm of the resultant effect of dam-induced displacement – have argued that DID may qualify as a human-made disaster,¹⁶ hence, falling within the scope of article 1(k) of the Convention.

But before defining DID, it is essential to assert that indigenous people, when displaced, may also fall in the category of IDPs. But this research does not focus on indigenous people but on the broad category of persons displaced by development projects, however, where appropriate, relevant standards applicable to indigenous people would be engaged to the extent of its relevancy in this research. Having described who IDPs are, it is needful to define DID.

¹⁰ See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoniland* case).

¹¹ as above, para 57.

¹² *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) (*Zimbabwe Human Rights NGO Forum* case) para 143.

¹³ DA Korn *Exodus within borders: an introduction to the crisis of internal displacement* (1999) 11.

¹⁴ Guiding Principles (n 6 above) art 2; Convention (n 4 above) art 1(k).

¹⁵ W Kälin 'Guiding principles on internal displacement: annotations' *Studies in Transnational Legal Policy* 38, American Society of International Law (2008) 4 <http://www.asil.org/pdfs/stlp.pdf> (accessed 24 September 2012).

¹⁶ R Cohen & FM Deng *Masses in flight: the global crisis of internal displacement* (1998) 17.

Identifiably, there are two different reasoning on DID capable of altering the course of its rhetoric.¹⁷ First is the conception that this form of displacement is an unavoidable consequence of development, and as earlier noted, those affected should be considered as necessary sacrifices for a national goal. The other reasoning conceives of displacement as a defect of development discountenancing the economy-oriented model. Though the focus of this research is not to engage in this debate, it is pertinent to sieve out of these positions an axiomatic truth which is that the subject in focus is a problem. As observed by Eguavoen and Tesfai, '[d]isplacement of people in the context or as a result of development interventions has been identified as the most important forced migration problem worldwide of our time.'¹⁸

According to Vesalon and Cretan, DID '...is a problem-driven approach to the phenomenon of forced migration caused by big development projects, such as dams, mines and other industrial enterprises.'¹⁹ Article 1(l) of the Convention provides that "[i]nternal displacement" means the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognised state borders.²⁰ Hence, DID is any form of forced removal of individuals, group of persons or communities for the purpose of development projects intended for economic gain and executed under the auspices of a state or private actor. Within the space of this defined parameter, this research would be advanced.

1.5.3 Human rights-based approach to development

For very long, human rights and development were considered as distinct and unrelated concepts. In spite of the fact that in 1945, the Charter of the United Nations²¹ recognised human rights and development as related pillars of the United Nations (UN), these two were not considered as interconnected concepts till around the 1980s. One prominent factor that accounted for this separation was the Cold War and the ideological disparities at the time which influenced discussions around global issues, inclusive among which was human rights.²² This disparity led to the adoption of two separate covenants.²³ Post-Cold War, with the advent of globalisation and the failure of the dominant western conception of human rights to redress social injustice, states began to reconsider their ideological alignments with the West.²⁴

¹⁷ R Dwivedi 'Models and methods in development-induced displacement' (2002) 33(4) *Development and Change* 709 711.

¹⁸ I Eguavoen & W Tesfai 'Social impact and impoverishment risks of the Koga irrigation scheme, blue Nile basin, Ethiopia' (2012) 25(1) *Afrika Focus* 39 40.

¹⁹ L Vesalon & R Cretan 'Development-induced displacement in Romania: the case of Roşia Montană mining project' (2012) 4(1) *Journal of Urban and Regional Analysis* 63 64.

²⁰ The Convention (n 4 above) art 1(l).

²¹ Charter of the United Nations (1945) 1 UNTS XVI.

²² DG Evans 'Human rights and state fragility: conceptual foundations and strategic directions for state-building' (2009) 1(2) *Journal of Human Right Practice* 181 186.

²³ International Covenant on Civil and Political Rights, adopted by the UN General Assembly Resolution 2200A (XXI), UN Doc A/6316 (16 December 1966) (ICCPR); International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly Resolution 2200A (XXI), UN Doc A/6316 (16 December 1966) (ICESCR).

²⁴ E Filmer-Wilson 'The human rights-based approach to development: the right to water' (2005) 23(2) *Netherlands Quarterly of Human Rights* 213 214-215; SP Mark 'The past and future of the separation of human rights into categories' (2009) 24 *Maryland Journal of International Law* 208 242.

Congruently, reasoned discourses on the relationship between human rights and development evolved. When the African Charter on Human and Peoples' Rights (African Charter)²⁵ was adopted in 1981, not only did it provide for the indivisibility of rights, it also recognised a nexus between human rights and development in providing for the right to development.²⁶

In 1986, there was a similar recognition at the UN level which was strengthened at Austria in 1993.²⁷ Ever since, the relationship between human rights and development has advanced.²⁸ There is now an emerging consensus that at the nucleus of development policies, agendas, issues, decisions and activities must be human rights; and it is this position that the HRBA reinforces.

The HRBA recognises human rights at the centre of development.²⁹ It implies that all activities carried out for the purpose of human development must necessarily conform to human rights standards. The HRBA recognises certain cardinal principles, namely, '...universality and inalienability, indivisibility, inter-dependence and inter-relatedness, non-discrimination and equality, participation and inclusion; accountability and the rule of law.'³⁰ These principles are emphatic on the position that human rights and development are reinforcing. What this implies for DID and invariably article 10 of the Convention is that when a state, for instance, intends to construct dams in view of creating hydropower energy geared towards improving the socio-economic conditions of individuals in that state, it must also recognise and protect the rights of persons likely to be affected negatively by the development project.

1.6 Research methodology

A descriptive approach would be advanced in this research primarily because the normative content of state responsibility to prevent DID has not been previously defined. This research would rely on primary and secondary sources and in particular, desktop information and library resources that are pertinent to the study. In discussing the provisions of article 10 of the Convention, the HRBA would be utilised. Furthermore, policies of regional and international financial institutions, such as the ADB and the WB would be discussed in the context of articles 10(2) and 10(3) of the Convention.

1.7 Delineation of study

As earlier stated, this research focuses primarily on displacements within the scope of development projects and not conflict-induced or disaster-induced displacements. Furthermore, this research is

²⁵ African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981).

²⁶ as above, art 22; F Viljoen *International Human Rights Law in Africa* (2011) 226.

²⁷ Declaration on the Right to Development, adopted by the UN General Assembly, Resolution 41/128, UN Doc A/RES/41/128 (4 December 1986) (Development Declaration); Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights, Vienna, Austria on 25 June 1993 (A/CONF 157/23).

²⁸ Filmer-Wilson (n 24 above) 215.

²⁹ Office of the High Commissioner for Human Rights 'Frequently asked questions on a human rights-based approach to development cooperation' (2006) 16 <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed 17 September 2012).

³⁰ 'The human rights based approach to development cooperation: towards a common understanding among UN agencies' (UN Common Understanding) *HRBA Portal* <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (accessed 17 September 2012).

limited to state responsibility with respect to the prevention of displacements and not post-displacement obligation of states.

1.8 Literature review

The discourse on displacement as a human rights issue has centred majorly on conflicts.³¹ In relation to DID, there have been attempts to define the issue as a human rights concern. In this regard, the work of Pettersson is instructive. Pettersson argues that existing international human rights norms may be used to hold states accountable for violations that are related to DID.³² Though this approach is plausible, its efficiency is questionable in view of the lack of a strong international mechanism. This is related to the fact that there is no actual binding global obligation on states in respect of DID.

Other scholars like Cernea, Eriksen, McDowell, Scudder, De Wet, Downing and Oliver-Smith have discussed DID from other disciplines such as anthropology and sociology.³³ Though they have mapped guidance for states from their respective angles of discourse, the fact still remains that states possess the final discretion which they may decide to exercise in good faith. However, this research argues otherwise and situates DID in the context of the binding obligation on states to prevent DID within the scope of article 10 of the Convention.

Although the Convention is not yet in force,³⁴ it sets an ambition for the rest of the world. However, the existence of a law without an understanding of its content would erode its axiom, hence the necessity of an inquiry into the normative content of article 10 of the Convention. It is within this definite space that this research is situated.

1.9 Outline of Chapters

Chapter one briefly introduces DID, defining key terms of the study and setting out the platform for the research which is article 10 of the Convention.

In chapter two, the principle in article 10(1) of the Convention would be discussed. In the first part of the chapter, the justification for the principle in article 10(1) of the Convention would be explored. Afterwards, the content of the principle would be described along with realising its enforcement.

³¹ See J Hampton *Internally Displaced Persons: a global survey* (1998) 41-77; Korn (n 13 above) 11-33.

³² B Pettersson 'Development-induced displacement: internal affair or international human rights issue?' (2002) 12 *Forced Migration Review* 16-19.

³³ See 'M Cernea 'Understanding and preventing impoverishment from displacement – reflection on the state of knowledge' in C McDowell (ed) *Understanding impoverishment: the consequences of development-induced displacement* (1996) 13-32; JH Eriksen 'Comparing the economic planning for voluntary and involuntary resettlement' in M Cernea (ed) *The economics of involuntary resettlement: questions and challenges* (1999) 83-146; M Cernea & C McDowell 'Reconstructing resettlers' and refugees' livelihood' in M Cernea & C McDowell (eds) *Risks and reconstruction: experiences of resettlers and refugees* (2000) 1-8; T Scudder *The future of large dams: dealing with social, environmental, institutional and political costs* (2005); C De Wet 'Risk, complexity and local initiatives in forced resettlement outcomes' in C De Wet (ed) *Development-induced displacement: problems, policies and people* (2006) 180-202; T Downing & C Garcia-Downing 'Routine and dissonant cultures: a theory about the psycho-socio-cultural disruptions of involuntary displacement and the ways to mitigate them without inflicting even more damage' in A Oliver-Smith (ed) *Development and Dispossession: The anthropology of displacement and resettlement* (2009) 225-254; A Oliver-Smith *Defying displacement: grassroots resistance and critique of development* (2010).

³⁴ As of 14 August 2012, there were 14 ratifications. One more ratification is required for the Convention to enter into force. See List of countries which have signed, ratified/acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf (accessed 3 September 2012).

In the opening section of chapter three, the link between articles 10(1) and 10(2) of the Convention would be established. Afterwards, the concept of participatory development as envisioned by article 10(2) of the Convention would be defined through an investigation of the key components of article 10(2) of the Convention.

In chapter four, article 10(3) of the Convention would be examined. The nature of the prior-impact assessments required by this section would be discussed. Also, the relevance of this provision to the principle in article 10(1) of the Convention would be established. In the discourse, standards of international institutions such as the WB, the International Association for Impact Assessment, ADB and the UN Environment Programme (UNEP) would be explored.

Chapter five would be a summary of the arguments in this research. Additionally, recommendations would be made on the ways in which different institutions recognised in the Convention can ensure that the enforcement of article 10 of the Convention is realised. Furthermore, in light of article 14(4) of the Convention, specific questions would be proposed for the Commission's constructive dialogue with states during the state reporting exercise. Finally, a general comment on article 10 of the Convention would be proposed for adoption by the Commission.

Chapter Two

Principle – article 10(1) of the convention

2.1 Introduction

It is an axiomatic truth that a norm is justified by its essence. In relation to this discourse, it would be inchoate to begin with unpacking the content of the principle without a background on its justification. For this purpose, the next section would engage facts detailing some development projects that have caused displacements in Africa. In the subsequent sections, the content of the principle and means of realising its enforcement would be discussed.

To begin, it is needful to set out the provision of the principle. Article 10(1) of the Convention provides that '[s]tates parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors.'³⁵

2.2 Justification for the principle

In examining the principle in article 10(1) of the Convention, it is pertinent to consider its justification in the context of African realities. An inquiry into this justification would be advanced on dam-induced displacements which have, over the decades, gained notoriety.

The 2000 report of the World Commission on Dams stated that the global figure of displacements occasioned by the creation of dams were between '...40 to 80 million.'³⁶ Owing to the socioeconomic deprivations that often flow from these displacements – either as a result of flawed compensation plans or improper resettlements – the nature of the problem is much more apparent. And it within this space that DID in Africa is heavily pronounced.

In Central Africa, the consequences of the Inga dams I and II created in 1972 and 1973 are instructive. Those displaced by the construction of these dams along the Congo river in the Democratic Republic of Congo (DRC) have neither been compensated nor properly reinstated.³⁷ Yet, a grand Inga dam (Inga III) – a project which is likely to surpass China's three gorges dam and capable of displacing over 8, 000 persons – has been planned for the near future in the DRC.³⁸

In the western region of the continent, when the Akosombo dam in Ghana's lake volta was constructed in 1965, 80, 0000 persons were displaced.³⁹ Though resettlement was recorded, it did not conform to the demands of their dependence on farming.⁴⁰ According to Tamakloe, '...in the case of the Akosombo [d]am resettlement, planners overemphasized the national interest of the [v]olta [r]iver

³⁵ The Convention (n 4 above) art 10(1).

³⁶ World Commission on Dams *Dams and development: a new framework for decision-making* (2000) 104.

³⁷ T Hathaway 'Field report from Inga, DRC' *International Rivers* 23 May 2008

<http://www.internationalrivers.org/resources/field-report-from-inga-drc-3973> (accessed 1 September 2012).

³⁸ T Hathaway 'Scramble to dam the Congo keeps Africans in the dark' *International Rivers* 23 April 2008 <http://www.internationalrivers.org/resources/scramble-to-dam-the-congo-keeps-africans-in-the-dark-1867> (accessed 1 September 2012); 'Africa's grand Inga could be online by 2025: official' *Reuters* 23 April 2009 <http://af.reuters.com/article/investingNews/idAFJJOE53M03C20090423> (accessed 1 September 2012).

³⁹ See J Stanley 'Development-induced displacement and resettlement' (undated) <http://www.forcedmigration.org/research-resources/expert-guides/development-induced-displacement-and-resettlement/fmo022.pdf> (accessed 25 October 2012).

⁴⁰ MA Tamakloe 'Long-term impacts of resettlement: the Akosombo dam experience' in CC Cook (ed) *Involuntary resettlement in Africa: selected papers from a conference on environment and settlement issues in Africa* (1994) 99 101-102.

[p]roject, as against the local interest of the resettlers.’⁴¹ In Nigeria, the construction of the Kainji dam along the river Niger between 1964 and 1968 was recorded to have occasioned the forced relocation of about 50, 000 persons.⁴² According to a 2005 report by Abdullahi, ‘...after the displaced people have lost their arable farmlands, they were provided houses that do not conform to the social-cultural pattern of their lives with inadequate sizes and functionality.’⁴³ Furthermore, the Manantali dam, constructed in 1988 along the Bafing river in western Mali which flows into the Senegal river, displaced between 10, 000 to 11, 000 persons.⁴⁴ Though resettlement was executed, it has been revealed that this process did not provide proper rehabilitation of the living conditions of those resettled.⁴⁵

In the southern region of Africa, the construction of the Kariba dam along the Zambezi river in the late 1950s displaced about 57, 000 persons belonging to the Tonga tribe.⁴⁶ Though resettlement was recorded, facts have indicated that the process was questionable.⁴⁷ In Mozambique, the creation of the Cahora Bassa dam in the 1970s accounted for thousands of displacements. As noted by Isaacman and Sneddon, it was ‘... initially claimed that only 25,000 Africans would be displaced, by the end of 1973 the number had jumped to over 42,000.’⁴⁸

In furtherance, the Lesotho Highlands Water Project (Lesotho water project) presents a classic paradigm for the justification of article 10(1) of the Convention. The Lesotho water project was birthed by a 1986 agreement between South Africa and Lesotho.⁴⁹ As part of its execution, a multi-dam plan was adopted. The primary objective of the project was to provide electricity for Lesotho and water for South Africa. According to Hoover, ‘Katse and Muela [dams] alone dispossessed nearly 20,000 persons of land and resources...’⁵⁰ In 2012, it was reported that over 30, 000 persons had been displaced⁵¹ and with the creation of more dams, more individuals are bound to be displaced.⁵²

⁴¹ Tamakloe (n 40 above) 108.

⁴² S El-Zarka ‘Kainji lake, Nigeria’ in GF White *et al* (eds) *Man-made lakes: their problems and environmental effects* (1973) 205.

⁴³ MZ Abdullahi ‘A cry for justice: the impact of the Kainji hydroelectricity dam project on the people of Yauri emirate, Kebbi state’ (2005) quoted in S Umar *et al* ‘Kainji dam resettlement and housing compensation: a review of outcomes in Yauri Emirate, Kebbi state’ (2011) 6-7 www.abu.edu.ng/publications/2011-03-28-132030_3318.pdf (accessed 1 September 2012).

⁴⁴ A DeGeorges & BK Reilly ‘Dams and large scale irrigation on the Senegal river: impact on man and the environment’ Human Development Report Office Occasional Paper 38, United Nations Development Programme (2006) 2 <http://hdr.undp.org/en/reports/global/hdr2006/papers/degeorges%20andre.pdf> (accessed 1 September 2012).

⁴⁵ T Scudder & J Gay ‘A comparative survey of dam-induced resettlement in 50 cases’ (undated) <http://www.hss.caltech.edu/~tzs/50%20Dam%20Survey.pdf> (accessed 20 October 2012).

⁴⁶ G Switkes ‘The World Bank’s big dam legacy’ *International Rivers* 17 October 2007 3 <http://www.internationalrivers.org/resources/the-world-bank-s-big-dam-legacy-2660> (accessed 22 October 2012).

⁴⁷ ‘Kariba dam people still neglected – Chief Chipepo’ *Zambian Watchdog* 17 May 2010 <http://www.zambianwatchdog.com/2010/05/17/kariba-dam-chiefs-want-development/> (accessed 1 September 2012).

⁴⁸ A Isaacman & C Sneddon ‘Toward a social and environmental history of the building of Cahora Bassa dam’ (2000) 26(4) *Journal of Southern African Studies* 618.

⁴⁹ LJM Haas *et al* *Lesotho Highland Water Project: Communication practices for governance and sustainability improvement* (2010) 3.

⁵⁰ R Hoover ‘Pipe Dreams: ‘The world bank’s failed efforts to restore lives and livelihoods of dam-affected people in Lesotho’ (2001) 2 http://www.internationalrivers.org/files/attached-files/download_a_2001_report.pdf (accessed 1 September 2012).

⁵¹ ‘Lesotho’s first successful litigation case in the wake of the dam’ *Protimos* 3 May 2012 <http://www.protimos.org/pdfs/mapelengpressrelease.pdf> (accessed 1 September 2012).

⁵² ‘Polihali dam to displace thousands’ *Water Rhapsody* 9 November 2011 <http://www.savingwater.co.za/2011/11/09/14/polihali-dam-to-displace-thousands/> (accessed 1 September 2012).

In East Africa, the likely displacement of over 5,000 individuals by the Gituamba dam planned for the near future in Kenya equally resonates in this context.⁵³ In the northern region of Africa, 15,000 families were displaced by the Merowe Dam constructed in Sudan from 2003 to 2009.⁵⁴ In Egypt, the Aswan High Dam project constructed on the Nile in the 1960s resonates in the context of this discourse. Created for hydropower and for a range of agricultural benefits, the economic value of the dam has been considered a profitable advantage that cannot be balanced against opposing interests⁵⁵ such as the displacement of about 100,000 Nubians in Egypt and Sudan. The Egyptian government involuntarily relocated the population and although it was reported that huge funds went to their resettlement, facts have revealed that the resettlement plans were poorly constructed,⁵⁶ strengthening the notion that the economic value of dams outweighs the interests of those likely to be displaced.

In terms of oil projects, the justification for prevention of displacement is equally evident. Instructive on this point is the situation in the Niger-Delta region of Nigeria where thousands have been displaced as a result of oil projects.⁵⁷ In a comparable but slightly nuanced situation, the Sudanese government in early 2000 violently attacked its own people to create space for oil exploration.⁵⁸ Congruently, mine-induced displacements in places such as Tarkwa mine in Ghana have been an issue. In Tarkwa, about 20,000 to 30,000 persons were displaced.⁵⁹ Similar situations in Botswana and Namibia have been reported.⁶⁰

In view of the foregoing, what makes DID much more pronounced is the socio-economic deprivations that often result from it. As argued by Cernea, there are eight types of impoverishments that can occur, namely, '(a) landlessness; (b) joblessness; (c) homelessness; (d) marginalisation; (e) increased morbidity and mortality; (f) food insecurity; (g) loss of access to common property and (h) social disarticulation.'⁶¹ Furthermore, the peculiarity of DID stems from the fact that these persons are often displaced by states that are supposed to protect them.

The Convention is therefore timely in its response to the prevalent situation in the continent. In light of the foregoing, it is needful to now discuss the content of the obligation imposed on states to prevent DID.

⁵³ J Wainaina 'World Bank to fund Sh7.5 billion dam in Gituamba' *The Star* 13 July 2012 <http://www.the-star.co.ke/news/article-10520/world-bank-fund-sh75-billion-dam-gituamba> (accessed 29 October 2012).

⁵⁴ 'Sudan dam protest at president's doorstep' *PeakWater* 2 August 2012 <http://peakwater.org/2012/02/sudan-dam-protest-at-presidents-doorstep/> (accessed 11 September 2012).

⁵⁵ MA Abu-Zeid & FZ El-Shibini 'Egypt's High Aswan Dam' (1997) 13(2) *Water Resources Development* 209 210.

⁵⁶ T Begg 'What next for Egypt's forgotten minority?' *Think Africa Press* 14 July 2011 <http://thinkafricapress.com/egypt/what-next-egypts-forgotten-minority> (accessed 1 September 2012).

⁵⁷ CO Opuke & IS Ibaba 'Oil induced environmental degradation and internal population displacement in the Nigeria's Niger Delta' (2008) 10(1) *Journal of Sustainable Development in Africa* 173 174.

⁵⁸ Leben (n 2 above) 13-16.

⁵⁹ TE Downing 'Avoiding new poverty: mining-induced displacement and resettlement' International Institute for Environment and Development Report 58 (April 2002) 7 <http://pubs.iied.org/pdfs/G00549.pdf> (accessed 2 September 2012).

⁶⁰ as above, 7; L Morris 'Diamond mine approved in Bushmen's ancestral land' *Digital Journal* 24 January 2011 <http://digitaljournal.com/article/302872> (accessed 2 September 2012).

⁶¹ M Cernea 'The risks and reconstruction model for resettling displaced populations' (1997) 25(10) *World Development* 1569 1572-1576.

2.3 Interpretation of the principle

Having laid out the realities from which the principle in article 10(1) of the Convention gains credence, it is needful to unpack the content of the principle. For this purpose, the VCLT and relevant human rights standards would be engaged.

2.3.1 Treaty-based interpretation

To interpret the provision of article 10(1) of the Convention, it is relevant to consider the international law instrument on the interpretation of treaties which is the VCLT. According to Linderfalk '[t]he rules of interpretation laid down in international law contain a description of the way an applier should be proceeding to determine the correct meaning of a treaty provision.'⁶² Article 31(1) of the VCLT provides that a treaty interpretation should be '...in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'⁶³

Three requirements may be sieved from this provision. First, treaty interpretation must be patterned in line with the principle of good faith. This principle emphasises the norm that states are bound by the treaties they consent to and cannot void their obligations arising from the treaty.⁶⁴ Secondly, an interpretation in line with the principle of good faith must correlate with the ordinary meaning of the text within its context and thirdly, it must reflect the object and purpose of the treaty.⁶⁵

The place of the object and purpose of a treaty in its interpretation is significant because it is through its consideration that the underlying values of a treaty can be understood. The VCLT makes mention of it eight times.⁶⁶ Article 18 of the VCLT stipulates that even when a state has only signed and has not ratified a treaty, the state is required '...to refrain from acts which would defeat the object and purpose...'⁶⁷ of the treaty. The object and purpose of a treaty underscores the very essence of that treaty and it is for this purpose that it is imperative to consider article 10(1) of the Convention in light of the object and purpose of the Convention to understand its essence and meaning.

The summary of article 10(1) of the Convention is that states have an obligation to prevent DID. Precisely, it stipulates that '[s]tates parties, as much as possible, shall prevent displacement caused by projects...'⁶⁸ In its ordinary meaning, 'to prevent' means 'to keep from happening.'⁶⁹ Hence, article 10(1) of the Convention, literally suggests that 'as much as possible' states are to keep displacements from happening.

⁶² U Linderfalk *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 29.

⁶³ VCLT (n 9 above) art 31(1).

⁶⁴ ME Villager *Commentary on the 1969 Vienna convention on the law of treaties* (2009) 425-426.

⁶⁵ I Brownlie *Principles of public international law* (2008) 632-633.

⁶⁶ DS Jonas & TN Saunders 'The object and purpose of a treaty: three interpretive methods' 43(3) *Vanderbilt Journal of Transnational Law* (2010) 565 569.

⁶⁷ VCLT (n 9 above) art 18.

⁶⁸ The Convention (n 4 above) art 10(1).

⁶⁹ Webster's online dictionary 'Prevent' <http://www.websters-online-dictionary.org/definitions/prevent> (accessed 2 October 2012).

A critical look at the provision reveals an open-ended obligation. Open-ended because there is no restriction set on the measure of discretion states can exercise. In other words, states are only to prevent DID ‘as much as possible.’ This adverbial limitation also means ‘to a feasible extent.’⁷⁰

However, considering the object and purpose of the Convention, can such open-endedness be the aim sought to be achieved? To tease out this intention, certain provisions of the Preamble to the Convention (the Preamble) would be considered because in the absence of the *travaux préparatoires*⁷¹ and in terms of article 31(2) of the VCLT, provisions in the Preamble provide a context for advancing an interpretation. And as noted by Killander, ‘[t]he “ordinary meaning” of a term can often not be determined without considering context. The context includes the treaty text, including the preamble.’⁷²

However, before the provisions in the Preamble are examined, it is needful to consider relevant provisions of article 2 of the Convention which sets out the objectives of the Convention. Article 2(a) of the Convention provides that one of the aims of the Convention is to ensure regional cohesiveness in combatting internal displacement. In article 2(b) of the Convention, the need for establishing a legal mechanism for the prevention of internal displacement is enunciated. This commitment is further affirmed in article 2(c) of the Convention which provides for the duties of states in light of the objective of ensuring that internal displacements are prevented. By virtue of these provisions, article 10(1) of the Convention must necessarily be construed in light of the objective of putting an end to issues of internal displacements.

In furtherance, the first two paragraphs of the Preamble emphasis its goal by detailing the consciousness of African leaders in its formation process. African leaders were conscious of the notoriety of displacement⁷³ and the vulnerability of IDPs.⁷⁴ Earlier in 2004, this consciousness was expressed by the African Union (AU) Executive Council when it mandated the AU Commission to come up with a solution that would secure the protection of IDPs.⁷⁵ As noted by Beyani, at the second AU ministerial conference on refugees, returnees and IDPs in 2006, ‘...the ministers resolutely affirmed “zero” tolerance for refugees and internally displaced persons in Africa and called upon member states to achieve this objective.’⁷⁶

⁷⁰ Webster’s online dictionary ‘As much as possible’ <http://www.websters-online-dictionary.org/definitions/As%20Much%20As%20Possible> (accessed 6 September 2012).

⁷¹ AM Abebe ‘The African Union convention on internally displaced persons: its codification background, scope, and enforcement challenges’ (2010) 29(3) *Refugee Survey Quarterly* 28 31-32.

⁷² M Killander ‘Interpreting regional human rights treaties’ (2010) 7(13) *SUR International Journal on Human Rights* 145 146.

⁷³ The Convention (n 4 above) para 1 of Preamble.

⁷⁴ The Convention (n 4 above) para 2 of Preamble.

⁷⁵ Executive Council, fifth ordinary session 25 June-3 July 2004, Addis Ababa, Ethiopia, Decision on the situation of refugees, returnees and displaced persons, Doc EX. CL/Dec. 127 (V) para 8 [http://www.au.int/en/sites/default/files/EX%20CL%20DEC%2093%20-%2020164%20\(V\)%20_E.pdf](http://www.au.int/en/sites/default/files/EX%20CL%20DEC%2093%20-%2020164%20(V)%20_E.pdf) (accessed 7 September 2012).

⁷⁶ C Beyani ‘Recent developments: the elaboration of a legal framework for the protection of internally displaced person in Africa’ (2006) 50(2) *Journal of African Law* 187 195.

In view of the AU Constitutive Act⁷⁷ – referred to in paragraph 6 of the Preamble – this commitment equally resonates. Article 4(n) of the Constitutive Act provides that one of the principles of the AU shall be the ‘promotion of social justice to ensure balanced economic development.’⁷⁸ The concept of social justice contemplates the existence of an egalitarian society founded on principles such as dignity and equality. It would be a contradiction of the principle of social justice if the actual construct of article 10(1) of the Convention is conceived outside the goal of the Convention. Certainly, African leaders did not intend to allow a wide margin of discretion for states owing to the severity of this situation which, as recorded in the first paragraph of the Preamble, was ‘... a source of continuing instability and tension for African states.’⁷⁹

In furtherance, paragraph 3 of the Preamble emphasises ‘...inherent African custom and tradition of hospitality...’⁸⁰ as an underpinning value of the Convention. A question that arises is what African custom and tradition of hospitality is within its contemplation? Instructive on this custom is the age-long African concept of humanness expressed in South African Zulu as *ubuntu*,⁸¹ among the Nigerian Yorubas as *ajobi*⁸² and in Swahili as *utu*.⁸³ According to Cornell and Marle, one significant perspective of *ubuntu* is ‘...the notion that one’s humanness can be diminished by the violent actions of others, including the violent actions of the state.’⁸⁴ If therefore the aim of the Convention is to re-assert African custom and tradition of humanness, then it would be a contradiction if the open-endedness of the adverbial limitation in article 10(1) of the Convention is left to the discretion of states who are often the perpetrators of this form of displacement.

Congruently, it would further be a contradiction if this discretion is not construed in light of the Guiding Principles recognised in paragraph 10 of the Preamble. Principle 6(2)(c) of the Guiding Principles provide that only in exceptional circumstances of ‘...compelling and overriding public interests,’⁸⁵ may DID be permitted. But what amounts to a ‘compelling and overriding public interest’ is not provided in the Guiding Principles. As a result, it has been argued that the rule of proportionality should be adopted,⁸⁶ but the question which this argument raises is how should this proportionality be done? What should be the yardstick significantly in light of the fact that article 4(4) of the Convention recognises that everyone has ‘...a right to be protected against arbitrary displacement.’⁸⁷ A need to clarify the vagueness and open-endedness of the adverbial limitation – ‘as much as possible’ – is

⁷⁷ African Union Constitutive Act, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/23.15 (11 July 2000) (the Constitutive Act).

⁷⁸ as above, art 4(n).

⁷⁹ The Convention (n 4 above) para 1 of Preamble.

⁸⁰ The Convention (n 4 above) para 3 of Preamble.

⁸¹ See Y Mokgoro ‘Ubuntu and the law in South Africa’ (1998)

<http://www.ajol.info/index.php/pej/article/viewfile/43567/27090> (accessed 29 October 2012).

⁸² OB Lawuyi & O Taiwo ‘Towards an African sociological tradition: a rejoinder to Akiwowo and Makinde’ (1990) 1 *International Sociology* 57 63.

⁸³ K Kresse ‘Can wisdom be taught? Kant, sage philosophy and ethnographic reflections from the Swahili coast’ in M Ferrari & G Potworowski (eds) *Teaching for wisdom: cross-cultural perspectives on fostering wisdom* (2008) 199.

⁸⁴ D Cornell & K van Marle ‘Exploring ubuntu: tentative reflections’ (2005) 5 *African Human Rights Law Journal* 195 207.

⁸⁵ Guiding Principles (n 6 above) para 6(2)(c).

⁸⁶ See VK Singh ‘India and internally displaced persons: current legal avenues and new legal strategies’ (2012) *International Journal of Refugee Law* 15; Kälin (n 15 above) 32-33.

⁸⁷ The Convention (n 4 above) art 4(4).

essential. But before this is done, it is needful to also probe the content of this obligation on states in light of relevant human rights standards.

2.3.2 Relevant human rights standards

Article 4(1) of the Convention provides that states ‘...shall respect and ensure respect for their obligations under international law, including human rights... so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons.’⁸⁸ A combined reading of articles 4(1) and 10(1) of the Convention reveals that not only is there an obligation on states to prevent displacement but there is also an obligation on states to respect those human rights duties that flow from its obligation to prevent displacement. Two questions necessarily resonate from this assertion. First, what are these rights that confer duties? Secondly, what are the obligations attached to these rights?

In answering the first question it is needful to consider individual rights and then collective rights in the African Charter that may be affected by DID. Article 2 of the African Charter prohibits discrimination, lists grounds and includes ‘other status,’⁸⁹ hence providing a space for vulnerable groups such as IDPs to be included. Closely connected with the right to non-discrimination is the right to equality in article 3 of the African Charter. The essence of this right in the context of DID resonates from Turton’s assertion that ‘...those displaced by development projects are not only... typically amongst the poorest and politically most marginal members of a society but they are also likely to become even more impoverished...’⁹⁰ And the impoverishment that often accompanies this form of displacement equally affects the right to life which includes having the basic conditions for livelihood such as food and shelter. But besides these rights, other individual rights affected by DID are the right to dignity and the right to liberty and security of persons contained in articles 5 and 6 of the African Charter.

Additionally, the right to property in article 14 of the African Charter resonates from the very nature of DID. In the *Ogoniland* case, the Commission recognised the essence of the right to property in the context of forced displacements in stating that ‘...wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress.’⁹¹ Congruently, peoples’ rights to self-determination and development enshrined in articles 20 and 22 of the African Charter are collective rights that stand to be affected by DID.⁹² Having stated these rights, the next question which needs to be considered is: what obligations attach to these rights?

The assertion of the Commission in the *Ogoniland* case is instructive. In the *Ogoniland* case, the Commission emphasised that under international human rights law, states assume three pertinent obligations, namely, to respect, to protect and fulfil.⁹³ In the language of articles 4(1) and 10(1) of the

⁸⁸ The Convention (n 4 above) art 4(1).

⁸⁹ African Charter (n 25 above) art 2.

⁹⁰ D Turton ‘Refugees and “other forced migrants”’ Refugees Studies Centre Working Paper 13 (October 2003) 9 http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper13.pdf (accessed 1 September 2012).

⁹¹ *Ogoniland* case (n 10 above) para 63.

⁹² See Communication 276/2003, *Centre for Minority Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) 27th Activity Report of the Commission (*Endorois* case).

⁹³ *Ogoniland* case (n 10 above) paras 45-48.

Convention, states are to respect and protect the right to non-discrimination, equality, life, dignity, liberty, security of persons, property and self-determination.

In terms of the obligation to respect, states are to refrain from acts which would negate the enjoyment of these rights. The obligation to protect takes a slightly nuanced perspective in that it requires states to ensure that these rights are also not violated by non-state actors.⁹⁴ Article 10(1) of the Convention re-emphasises this position by imposing responsibility on states for acts of non-state actors. The obligation to fulfil in connection with the right to development requires a state to advance its machineries towards providing and facilitating the realisation of this right.⁹⁵ Hence, a state must ensure participatory development which is fundamental to safeguarding the rights of persons likely to be displaced.

But having asserted that these obligations exist, how then should article 10(1) of the Convention and more pointedly the words ‘as much as possible’ be interpreted in light of the object and purpose of the Convention and international human rights standards? The next subheading provides clarification.

2.4 Clarification of the adverbial limitation – ‘as much as possible’

Bearing in mind that the right in article 4(4) of the Convention is not absolute, when can it be said that the adverbial limitation in article 10(1) of the Convention has been satisfied in the context of the responsibility on states to prevent DID. In light of the foregoing argument and the necessity for the Convention to be interpreted in view of its object and purpose, certain conditions must necessarily be satisfied.

First, the development project must be for a ‘compelling and overriding public interest.’ The standard imposed by this requirement necessarily requires that there must be a balancing of interest – an exercise in proportionality, where public interest is weighed against the fundamental rights of persons likely to be displaced. In addition to taking these rights into consideration, a state must be guided by the HRBA and more specifically, the cardinal principles.

The principles of pertinent importance in this proportionality exercise are rule of law and accountability.⁹⁶ While the rule of law presupposes that the law, the notion of equality and human rights are essential parameters against which the legitimacy of a state action must be weighed,⁹⁷ accountability imposes a duty on the state to act in line with the purpose for its legitimate creation and the necessities of the rule of law. It would therefore be a contradiction of the cardinal principle of accountability if states, as duty-bearers, are not accountable for the rights of all persons including those likely to be displaced. Hence, states should consult these persons, being mindful of the right in article 4(4) of the Convention.

⁹⁴ M Scheinin ‘Characteristics of human rights norms’ in C Krause & M Scheinin (eds) *International protection of human rights: a textbook* (2012) 28.

⁹⁵ SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2011) 225.

⁹⁶ UN Common Understanding (n 30 above).

⁹⁷ D Zolo ‘The rule of law: a critical reappraisal’ in P Costa & D Zolo (eds) *The rule of law history, theory and criticisms* (2007) 7-9.

Summarily, the adverbial limitation – ‘as much as possible’ – contemplates feasibility. The notion of feasibility used in connection with the objective of preventing displacement implies that displacement should be prevented to the extent that it can be achieved. The question which therefore arises is: what is not achievable? In light of the Guiding Principles, when projects are for ‘compelling and overriding public interests’⁹⁸ preventing displacement is unachievable. But how should a ‘compelling and overriding public interest’ be determined?

In light of the argument that has been canvassed, an exercise in proportionality must necessarily be done. A state must consider the main aim of the project on one hand, and on the other, consider the rights of persons likely to be displaced with due regards to those other feasible alternatives proposed in the participatory development process in article 10(2) of the Convention, and the socio-economic and environmental impacts of the project that have been assessed under article 10(3) of the Convention. In the proportionality exercise, a state must necessarily be guided by the cardinal principles of the HRBA. When this is done, then a state has satisfied the adverbial limitation in article 10(1) of the Convention.

2.5 Realising the enforcement of the principle

The enforcement of article 10(1) of the Convention primarily lies with states. But what is required if a state is to prevent DID? In light of the argument which has been canvassed, it is evident that for the purpose of enforcement, states must be guided by the emerging norm of the HRBA in the process of initiating development projects. As the HRBA is rooted in human rights, states are to ensure that in the balancing exercise where it considers the adverbial limitation, it thoroughly considers the rights of persons likely to be displaced. But that is not all. In realising the enforcement of the obligation in article 10(1) of the Convention, states are to ensure that the provisions of articles 10(2) and 10(3) of the Convention – which would be discussed in subsequent chapters – are fulfilled.

2.6 Conclusion

From the discourse on the justification and interpretation of the principle, the true intendment of article 10(1) of the Convention is evident. States are not only to prevent displacement but they are also to ensure compliance with the HRBA when initiating development projects. It is in this complementary space that the object and purpose of the Convention resonates. In furtherance, it is in this space that the development activities of a state can agree with the norms inherent in the African regional human rights system and traditional African values.

⁹⁸ The Guiding Principles (n 6 above) art 6(2)(c).

Chapter Three

Participation – article 10(2) of the Convention

3.1 Introduction

In the preceding chapter, the principle in article 10(1) of the Convention was discussed. In the discourse, it was noted that in realising the enforcement of the principle, states must ensure that the provisions of articles 10(2) and 10(3) of the Convention are fulfilled. While article 10(3) of the Convention would be discussed in the subsequent chapter, the content of article 10(2) of the Convention would be described in this chapter. Article 10(2) of the Convention provides that: '[s]tates parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects.'⁹⁹

On close look, it would be observed that this provision is worded so vaguely that the very key components such as 'stakeholders,' 'consultation,' 'information' and even 'feasible alternatives' are capable of sundry interpretations. For instance, who are stakeholders? Depending on context, the word 'stakeholder' is capable of semantic nuances that can be tangential to the object and purpose of the Convention. And while 'consultation' is also not defined, the normative gap is further widened by the uncertainty as to what 'feasible alternatives' are.

In light of past realities of DID in Africa and the watered-down participatory approach often adopted by states, such normative gap reinforces the fact that states still have a wide margin of discretion in deciding on the modalities for compliance. But the Convention, in view of its object and purpose, did not intend to create such space and in fact, article 2(b) of the Convention emphasises that the Convention was birthed to 'establish a legal framework for preventing internal displacement...'¹⁰⁰ In view of this aim, it is factual that any interpretation given to the key components in article 10(2) of the Convention must necessarily conform to such intentment.

In light of the foregoing, this research would – in defining the key components – describe the provision of article 10(2) of the Convention.

3.2 Normative definition of key terms in the provision

3.2.1 Stakeholders

As the word 'stakeholder' is capable of semantic variables, it is essential to identify its meaning in light of the context in which it is used. Article 10(2) of the Convention engages the word in the context of development projects and for this reason, it is useful to consider the expositions contained in relevant documents of international financial institutions such as the WB and the ADB.¹⁰¹

⁹⁹ The Convention (n 4 above) art 10(2).

¹⁰⁰ The Convention (n 4 above) art 2(b).

¹⁰¹ World Bank 'The World Bank participation sourcebook' (February 1996) 125-126 http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1996/02/01/000009265_3961214175537/Rendered/PDF/multi_page.pdf (accessed 25 October 2012); African Development Bank 'The Handbook on stakeholder consultation and participation in ADB Operations' (2001) (ADB handbook) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Handbook%20on%20Stakeholder%20Consultaion.pdf> (accessed 20 September 2012).

Both the WB and ADB recognise two kinds of stakeholders: primary and secondary stakeholders. Primary stakeholders are those on whom the outcome of a project would either have a positive or a negative effect. Placing this definition in the context of article 10(2) of the Convention, it is clear that persons likely to be displaced are persons who would be negatively affected by projects. Hence, they fall into the category of primary stakeholders and as such must be included in the development process.

The WB describes secondary stakeholders as those intermediaries who, though not directly affected, are relevant to the course of fulfilling development projects. In other words, secondary stakeholders are those with the capacity to influence the course of a development project. The ADB offers an incisive clarification by including, within this category: ‘...the borrowing government, line ministry and project staff, implementing agencies, local governments, civil society organisations, private sector firms, the Bank and its shareholders and other development agencies.’¹⁰² Hence, secondary stakeholders are those who have an influence on the outcome of a project. Without recognising a dichotomy between primary and secondary stakeholders, article 10(2) of the Convention includes both categories. Hence, stakeholders in the context of this provision include those discussed above as they relate to various development projects.

3.2.2 Consultation

It would be inchoate to begin to define consultation without first probing the theory of participation which has been normatively defined in international human rights law. As a concept with trans-disciplinary potencies,¹⁰³ the concept of participation has influenced discussions around issues such as environmental sustainability, poverty alleviation, democratisation and development. In the global discourse on governance, participation often reverberates as one of the benchmarks on which an ideal society should be weighed.

To political pluralists, the legitimacy of a state’s decision-making process is dependent on the space allowed for interest groups within the state to determine which way the pendulum of its decisions would swing. A similar ideology is advanced in the liberal theory of democracy in that one of the core indicators of a state’s legitimacy is how participation is utilised in improving the welfare of individuals in the state. And though the ideological bedrocks of these political views are different, there is a consensus that a decision-making process without public participation is inimical to good governance. In development activities, this reality is also evident. It formed the basis on which the non-participatory form of development prevalent in the 1970s was heavily criticised.¹⁰⁴ Noting the essence of participation to development, the question which needs to be answered is: what is participation?

¹⁰² ADB handbook (n 101 above) 2.

¹⁰³ R Eversole ‘Remaking participation: challenges for community development practice’ (2010) 47(1) *Community Development Journal* 29.

¹⁰⁴ as above, 30.

A single definition of participation in the context of development has been as daunting as it has been contentious. One reason for this, as revealed in the works of scholars like Oakley,¹⁰⁵ is the existent dichotomy between participation as a means and as an end. As a means, participation is only conceived as useful in light of the development objective, as such, it is used to legitimise concluded development plans. But as an end, participation is conceived as what it ought to be – an empowerment process in which individual capacities are increased.¹⁰⁶ This research contends that this dichotomy is superficial and participation must be understood both as a means and as an end because as a means, when it is geared towards the accomplishment of a project, it would enhance decision-making and as an end, it would increase the capacities of those individuals who stand to be affected either positively or negatively. A summary observation of the Development Declaration and more pointedly, article 2(3) of the Development Declaration, lends credence to this argument.

In article 2(3) of Development Declaration, states are obligated to ensure ‘...active, free and meaningful participation...’¹⁰⁷ in development processes. An interesting question which this provision raises is: what is active, free and meaningful participation? Because these terms are essential in dissecting participation both as a means and as an end, these terms would be defined in turn. In the absence of any instructive human rights document to define ‘active, free and meaningful participation’ it is pertinent to revert to the ordinary meaning rule in article 31(1) of the VCLT.

The word ‘active’ in relation to participation presupposes an involvement or engagement of individuals in the exchange of views. It repels the notion that participation must be passive or that individuals should only be engaged as a means of formalising development activities. ‘Free’ participation requires the absence of duress or coercion.¹⁰⁸ This is essential as a means of imparting the consciousness of ownership and ensuring the legitimacy of the process. In its plain sense, ‘meaningful’¹⁰⁹ in reference to participation suggests that the process must be channelled towards achieving a specific objective and this goal, in light of the discourse rendered above, can be said to be in two-fold. First, it must be geared towards the development objective and secondly, towards increasing individual capacities.

Asides this notional disparity, another reason why a single definition of participation has been contentious is that, for the purpose of implementation, it has been semantically altered. In other words, it has been modified in alternative words like ‘contribution’,¹¹⁰ ‘utilisation’,¹¹¹ and ‘consultation.’¹¹² As contribution, participation focuses on the development project and the extent of individual

¹⁰⁵ P Oakley ‘The concept of participation in development’ (1991) 20 *Landscape and Urban Planning* 115 116; F Cleaver ‘Paradoxes of participation: questioning participatory approaches to development’ (1999) 11 *Journal of International Development* 597 598.

¹⁰⁶ HA Nikkhah & M Redzuan ‘Participation as a means of empowerment in community participation (2009) 11(1) *European Journal of Social Sciences* 170 172-173.

¹⁰⁷ Development Declaration (n 27 above) art 2(3).

¹⁰⁸ Webster’s online dictionary ‘Free’ <http://www.websters-online-dictionary.org/definitions/free> (accessed 19 September 2012).

¹⁰⁹ Webster’s online dictionary ‘Meaningful’ <http://www.websters-online-dictionary.org/definitions/meaningful> (accessed 19 September 2012).

¹¹⁰ P Oakley *Projects with people: the practice of participation in rural development* (1991) 8.

¹¹¹ BC Smith ‘Participation without power: subterfuge or development?’ (1998) 33(3) *Community Development Journal* 197.

¹¹² SR Arnstein ‘A ladder of citizen’s participation’ (1969) *Journal of the American Institute of Planners* 216 217; BC Smith *Good governance and development* (2007) 152.

involvement is constricted to fulfilling this goal.¹¹³ Just as contribution, utilisation does not shift control over development processes to those that would be affected either positively or negatively. On the continuum of implementation, consultation has been defined as the ‘weakest’¹¹⁴ form of participation. According to Cornwall it ‘...is widely used, north and south, as a means of legitimating already-taken decisions...’¹¹⁵ Noting that the word ‘consultation’ is used in the Convention, it is needful to inquire if such watered-down definition agrees with the object and purpose of the Convention.

Article 3(1)(b) of the Convention mandate states to ‘[p]revent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement...’¹¹⁶ If consultation is considered merely as a means through which persons likely to be displaced are heard and their views do not have weight on the project implementation, then states would have acted in contravention of article 3(1)(b) of the Convention since these persons would, invariably, have been marginalised. Additionally, in light of the definition of stakeholders rendered above, it would be a contradiction if persons likely to be displaced do not participate in the development process since the first part of article 10(2) of the Convention already includes them as primary stakeholders.

Furthermore, article 4(4) of the Convention provides for the ‘...right to be protected against arbitrary displacement.’¹¹⁷ As noted in the preceding chapter, where there is a right, there is a corresponding obligation to protect that right. But what would be the nature of the corresponding obligation on states to protect the right of persons against arbitrary displacement? Since the nature of this discourse relates to the interface between human rights and development, it is needful to construe the nature of this corresponding obligation in light of the HRBA. As noted in the first chapter, one of the cardinal principles of the HRBA is participation.¹¹⁸ Participation in the context of development, as earlier noted in this chapter, is a process geared towards achieving a set development goal and increasing the capacities of individuals that are to be affected either positively or negatively by such development goal.

In respect of indigenous people, the UN Declaration on the Rights of Indigenous Peoples¹¹⁹ requires that participation should be geared towards securing their free, prior and informed consent (FPIC).¹²⁰ However, the question which needs to be answered is: does the human rights standard of FPIC only relate to indigenous people? Article 7(3)(c) of the Guiding Principles appears to suggest otherwise in providing that the ‘free and informed consent’ of persons likely to be displaced should be

¹¹³ W Boyce & C Lysack ‘Community participation: uncovering its meanings in CBR’ (2000) 46 http://www.aifo.it/english/resources/online/apdrj/selread100/comm_participation_boyce_lysack.pdf (accessed 27 September 2012).

¹¹⁴ Smith (n 112 above) 152.

¹¹⁵ A Cornwall ‘Unpacking “participation”: models, meanings and practices’ (2008) 43(3) *Community Development Journal* 269 270.

¹¹⁶ The Convention (n 4 above) art 3(1)(b).

¹¹⁷ The Convention (n 4 above) art 4(4).

¹¹⁸ See UN Common Understanding (n 30 above).

¹¹⁹ UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly Resolution 61/295, UN Doc A/RES/61/295 (13 September 2007).

¹²⁰ as above, arts 19 & 32(2); see *Endorois case* (n 92 above) paras 232, 291 & 293; *The Mayagna (Sumo) Awas Tingni Community case v Nicaragua* IACHR (31 August 2001) Ser C 79; *Saramaka People v Suriname* IACHR (28 November 2007) Ser C 172.

sought. In light of article 4(4) of the Convention, the necessity for this provision is even more evident since there is an actual recognition of a right against arbitrary displacement, and in construing the embodiment of the obligation imposed by this right, it is relevant to consider international standards, and on this note, the Guiding Principles offer guidance.

Hence, the corresponding obligation on states to protect the right of persons against arbitrary displacement requires states to ensure that these persons are actively involved in the development processes likely to occasion their displacement. It would therefore be a contravention of this corresponding obligation on states imposed by article 4(4) of the Convention if the requirement of consultation in article 10(2) of the Convention is conceived merely as a means through which persons likely to be displaced are to be heard without more. Having then established that consultation in article 10(2) of the Convention cannot merely be considered as a means, or as the ‘weakest’ form of participation, how then should it be understood? In view of the popular rhetoric of providing African solutions to African problems, it is needful to briefly consider how consultation is practiced in traditional African societies.

In pre-colonial African traditional societies, consultation was an integral component of political decision-making processes. Post-colonialism, traces of this practice are evident in the structural preserves of traditions.¹²¹ In eastern Africa the practices of the Borana of Ethiopia and Kenya are instructive. The local assembly of the Borana known as the *gumi gayo* actively engage issues of pertinent concern to the social, economic and political state of the community.¹²² Similar practices occur in Eritrea with the *baito* system¹²³ and in Burundi, with the *bashingantahe* institution.¹²⁴

In Southern Africa, the concept is equally reaffirmed in the *kgotla* system of Botswana.¹²⁵ *Kgotlas* are local assemblies in villages recognised by the government of Botswana as traditional political structures.¹²⁶ At the top of the institutional hierarchy in each *kgotla* is the traditional chief known as the *dikgosi*.¹²⁷ Like the *gumi gayo*, decisions at the *kgotla* are reached through a consensus.¹²⁸

¹²¹ K Wiredu ‘Democracy and consensus in African traditional politics: a plea for a non-party polity’ (2002) <http://them.polylog.org/2/fwk-en.htm> (accessed 27 September 2012).

¹²² ‘Borana Traditional governance system’ (undated) http://typo3.fao.org/fileadmin/user_upload/drought/docs/Borana%20and%20Gabra%20traditional%20resource%20governance.pdf (accessed 27 September 2012).

¹²³ K Tronvoll *Mai Weini, a highland village in Eritrea: a study of the people, their livelihood, and land tenure during times of turbulence* (1998) 277.

¹²⁴ A Nindorera ‘Ubushingantahe as a base for political transformation in Burundi’ Boston Consortium on Gender, Security and Human Rights Working Paper 102 (undated) 23 <http://www.genderandsecurity.umb.edu/Agnes.pdf> (accessed 27 September 2012).

¹²⁵ A Griffiths ‘Between paradigms: justice in Molepolole’ (1996) 36 *Journal of Legal Pluralism* 195 196.

¹²⁶ D Saleshando ‘We Batswana own the Kgotla’ *Mmegi online* 14 September 2012 <http://www.mmegi.bw/index.php?sid=1&aid=1247&dir=2012/September/Friday14> (accessed 27 September 2012).

¹²⁷ PC Mounakwa ‘The Botswana Kgotla system: a mechanism for traditional conflict resolution in modern Botswana. Case study of the Kanye Kgotla’ Master’s Dissertation, University of Tromsø (2010) 6 <http://munin.uit.no/bitstream/handle/10037/3211/thesis.pdf?sequence=1> (accessed 15 September 2012).

¹²⁸ See KC Sharma ‘Role of traditional structures in local governance for local development: the case of Botswana’ Paper for the Community Empowerment & Social Inclusion Programme, World Bank Institute (undated) <http://info.worldbank.org/etools/docs/library/153055/BOTSWANA.pdf> (accessed 27 September 2012).

In West Africa, among the Akans of Ghana, the primary political entities are the lineages.¹²⁹ Each matriarchal lineage is headed by an *abusua panyin* who represents the lineage in the town council. One of the primary functions of this head is to ensure that members of his lineage are consulted in matters relating to their interest. And the essence of this is encased in the proverbial words of the Akans that ‘wisdom is like a baobab tree; no one individual can embrace it,’¹³⁰ and also that ‘one head does not go into council.’¹³¹

Essentially, consensual decision-making processes are integral components of traditional African structures. Among the Igbos of Nigeria, this same recognition exists. Decisions are reached through a consensual process expressed by Muo and Oghojafor as ‘*ohazurume*.’¹³² If consultation is understood in traditional African societies as a consensual decision-making process, then it is trite to assert that consultation in article 10(2) of the Convention must be a consensual decision-making process where persons likely to be displaced are actively engaged in exploring feasible alternatives to development projects that are likely to cause their displacements.

3.2.3 Information

Congruent to the requirement of consultation in article 10(2) of the Convention is information. A peculiar reason for this congruent link is because without information, engaging in a decision-making process would be nearly impossible. It is in particular recognition of this axiom that article 10(2) of the Convention requires that persons that are likely to be displaced are to be fully informed. International human rights law recognises access to information as a right¹³³ linked but separate from freedom of expression.¹³⁴

To understand the nature of information as contemplated by international standards, it is relevant to consider the Aarhus Convention. Although the Aarhus Convention relates to access to environmental information, it provides a normative guidance on what is recognised by international standard as pertinent to the quality of information. Article 2(3) of the Aarhus Convention identifies different forms in which environmental information may exist, namely, ‘...written, visual, aural, electronic or any other material form...’¹³⁵

In furtherance, a close examination of article 2(3) of the Aarhus Convention reveals the types of environmental information that are contemplated. These are: information on scientific research,

¹²⁹ B Schwimmer ‘Akan lineage organisation’ (2003)

http://www.umanitoba.ca/faculties/arts/anthropology/tutor/case_studies/akan/lineage.html (accessed 27 September 2012).

¹³⁰ D Stewart & C Swanson *Wisdom from Africa: a collection of proverbs* (2005) 10.

¹³¹ SJ Salm & T Falola *Culture and customs of Ghana* (2002) 61.

¹³² I Muo & BEA Oghojafor ‘Ohazurume: the philosophy and practice of decision making and consensus building among the ndigbo of Nigeria’ (2012) 3(1) *American Journal of Business and Management* 154 155.

¹³³ ‘The public’s right to know: the principles on freedom of information legislation’ endorsed by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/2000/63; UN Economic Commission for Europe ‘Convention on access to information, public participation in decision-making and access to justice in environmental matters’ made in Aarhus, Denmark on 25 June 1998 available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (accessed 30 October 2012).

¹³⁴ ICCPR (n 23 above) art 19; African Charter (n 25 above) art 9; UN Commission on Human Rights, 56th session ‘Civil and political rights including the question of: freedom of expression’ report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Abid Hussain, of 18 January 2000, UN Doc E/CN.4/2000/63.

¹³⁵ Aarhus Convention (n 133 above) art 2(3).

health, cultural and even economic ramifications of environmental issues. In other words, every piece of information relevant to the discourse on the environment must be provided. In similar vein, the Draft Model Law for AU Member States on Access to Information¹³⁶ regards information as all-encompassing ‘...regardless of form or medium in the possession or under the control of the public body, relevant private body or private body to whom a request has been made.’¹³⁷

In light of the foregoing, the nature of the information required in article 10(2) of the Convention should be understood broadly in terms of the objective of finding out feasible alternatives. And as such, states have a duty to ensure that persons likely to be displaced have access to every vital piece of information that provides knowledge on the proposed development project and which is vital to their involvement in the process of ‘exploring feasible alternatives.’¹³⁸

3.2.4 Feasible alternatives

One other major component of article 10(2) of the Convention which is not defined is the notion of feasible alternatives. Literally dissecting the words, the term ‘feasible,’ which also means ‘likely,’ is as vague as the notion of what an ‘alternative,’ or an ‘option,’ constitutes. Placing these synonymic nuances in the context of article 10(2) of the Convention, it is still unclear what likely possibilities are to be explored by stakeholders. But if articles 10(1) and 10(2) of the Convention are read together, it is evident that whatever feasible alternative means must be construed in light of the obligation on states to prevent displacement recognised in article 10(1) of the Convention. But even with this assertion, what feasible alternatives are is still unclear. To close this gap, it is needful to consider recognised alternatives in relevant international standards.

One recognised alternative is the ‘no-action alternative.’¹³⁹ In other words, the possibility of not implementing the project should be considered. The essence of this alternative resonates from the fact that the execution of certain development projects likely to cause displacements might, in fact, be unnecessary. But should the development project be essential, alternative development plans should be explored. For instance, when dams are contemplated for water supply in semi-arid regions of sub-Saharan Africa, sand dams are feasible alternatives to large dams which in addition to DID, can occasion socio-environmental problems.¹⁴⁰ Congruently, in the tropical climes of Africa, electricity can be generated through solar power rather than through large dams.

¹³⁶ Draft Model Law for AU Member States on Access to Information http://www.achpr.org/files/instruments/access-information/achpr_inst_draft_model_law_access_to_information_2011_eng.pdf (accessed 30 September 2012). Although this Model Law is still being finalised and has not been adopted by the AU, its definition of what information constitutes is instructive.

¹³⁷ as above, art 1.

¹³⁸ The Convention (n 4 above) art 10(2).

¹³⁹ See generally UN Human Rights Council, fourth session, ‘Basic principles and guidelines on development-based evictions and displacement,’ report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr Miloon Kothari, of 5 February 2007, UN Doc A/HRC/4/18 annex I (Basic principles); Organisation for Economic Cooperation and Development ‘Guidelines for aid agencies on involuntary displacement and resettlement in development projects’ (1992) 6 (OECD guidelines) <http://www.oecd.org/environmentanddevelopment/1887708.pdf> (accessed 1 October 2012).

¹⁴⁰ C Fatoorehchi ‘World water forums expose large dams as “unsustainable”’ *Counter Balance* 19 March 2012 <http://www.counterbalance-eib.org/?p=1682> (accessed 20 September 2012).

But where an alternative plan is not feasible, another viable option that may be explored is resettlement.¹⁴¹ In light of the right of persons against arbitrary displacement in article 4(4) of the Convention and the obligation on states in article 10(1) of the Convention, any resettlement alternative in terms of article 10(2) of the Convention must necessarily be voluntary. In other words, persons likely to be displaced should agree to be resettled. However, considering that the right in article 4(4) of the Convention is not absolute and article 10(1) of the Convention affords states a certain amount of discretion, involuntary resettlement may occur subject to certain conditions.

First, there must be compliance with the adverbial limitation – ‘as much as possible’ – in article 10(1) of the Convention. As such, the development project must be for a compelling and overriding public interest. Secondly, persons subject to displacement must have been fully informed, consulted and been involved in the process of deciding on feasible alternatives. It is necessary to emphasise that all through this process, the cardinal principles of the HRBA must be employed. Furthermore, established international standards on involuntary resettlement and compensation¹⁴² must be complied with so that the socio-economic deprivations that often follows DID, do not occur as that would be an infraction of the fundamental human rights of these individuals. In furtherance, it is essential that the provision of article 10(3) of the Convention must be complied with. But before discussing the content of article 10(3) of the Convention, it is needful to set out clearly what article 10(2) of the Convention implies both in content and enforcement.

3.3 The interpretation and enforcement of the provision

In light of the foregoing arguments, it is evident that the provision of article 10(2) of the Convention reinforces the notion of participatory development. More specifically, it requires that states must ensure that persons likely to be displaced are integrated into the processes of development likely to displace them. In light of the arguments rendered in the preceding subheading, certain requirements are implied. First, all relevant stakeholders must be identified. In furtherance, persons likely to be displaced must have access to full information necessary to aid their involvement in the consultation process. Additionally, the consultation process, geared towards exploring feasible alternatives, must conform to the consensus-building approach immanent in African traditional practices. In view of this, the pertinent question which needs to be answered is: how are states to ensure that the provision of article 10(2) of the Convention is actualised?

First, states are to supervise the process of consultation and ensure that at every step, persons likely to be displaced are given all the requisite information needed to explore feasible alternatives. But not only must information be accessible by these persons, states must also ensure that the information provided is understandable; hence, where language barriers exist, states must ensure that

¹⁴¹ Basic principles (n 139 above) paras 16, 43, 44 & 56.

¹⁴² See African Development Bank ‘Involuntary resettlement policy’ (2003) (ADB policy) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF> (accessed 1 October 2012); World Bank ‘Revised Operational Policy 4.12 on Involuntary Resettlement’ (2011) (WB operational policy 4.12) <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (accessed 1 October 2012).

interpretation is provided. But where resettlement is the only feasible alternative, states must ensure that the process of initiation to execution is diligently carried out in a manner that would not lead to socio-economic deprivations. Hence, in summary, states must ensure that in fulfilling this obligation, the cardinal principles of the HRBA are regarded.

3.4 Conclusion

Participatory development is integral to the sustainability of any development process. The emerging norm of the HRBA echoes this axiom. In light of its potency in development, this chapter has argued that a state must ensure compliance with the provision of article 10(2) of the Convention when it seeks to implement the obligation in article 10(1) of the Convention.

In other words, to act in accordance with the obligation to prevent DID, states must necessarily ensure that persons likely to be displaced are engaged in the processes of development projects likely to displace them. This is emphatic in knowledge of the fact that persons likely to be displaced are those within the contemplation of the obligation in article 10(1) of the Convention. However, the obligation in article 10(1) of the Convention does not only demand compliance with article 10(2) of the Convention but also demands that the obligation in article 10(3) of the Convention is fulfilled. In view of this necessity, the content of article 10(3) of the Convention would be discussed in the next chapter.

Chapter Four

Prior-impact assessments – article 10(3) of the Convention

4.1 Introduction

In the preceding chapter, the content of article 10(2) of the Convention was described. The essence of participatory development to the obligation of states to prevent DID was discussed and it was noted that it serves not only to legitimise the acts of a state but also to ensure that international human rights standards are observed. But besides the obligation in article 10(2) of the Convention, another significant obligation which is essential for states to perform in fulfilment of the responsibility to prevent DID is the obligation in article 10(3) of the Convention.

Summarily, article 10(3) of the Convention requires states to perform environmental and socio-economic impact assessments prior to the initiation of a project. Conducting an environmental impact assessment (EIA) is significant for two reasons. First, it aligns with the global discourse on sustainable development. Secondly, it serves to provide pertinent environmental information relevant to the stakeholders' engagement on feasible alternatives as required in article 10(2) of the Convention.

In similar vein, conducting a socio-economic impact assessment (SEIA) is essential not just for the fact that there are socio-economic deprivations associated with DID, but also – like the EIA – it enables stakeholders to engage in the process of finding out feasible alternatives. In furtherance, knowledge of both the EIA and SEIA of a development project would assist states in the proportionality exercise when considering the adverbial limitation in article 10(1) of the Convention.

Recognising the essence of article 10(3) of the Convention in the construction of the obligation in article 10(1) of the Convention, it is pertinent to discuss the content of the provision.

4.2 Socio-economic impact assessment

Article 10(3) of the Convention requires states to perform SEIA; however, there are no indications on what this assessment should entail. From an interdisciplinary perspective, the required assessment of the socio-economic impact of a development project may further be subdivided into two categories: economic impact assessment and social impact assessment.

Scholars in the field of social sciences, such as Vanclay, Juslén and Burdge have defined social impacts from the structural dimension of complex social formations within the society.¹⁴³ But while there have been attempts to conceptualise social impacts, there have been disparities on what is relevant for inclusion when these impacts are being assessed.¹⁴⁴ According to Burdge and Vanclay, social impacts should be construed in light of actions '...that alter the way in which people live, work, play, relate to one another, organise to meet their needs, and generally cope as members of society.'¹⁴⁵

¹⁴³ J Juslén 'Social impact assessment: a look at Finnish experiences' (1995) *Project Appraisal* 163; R Burdge 'Why is social impact assessment the orphan of the assessment process?' (2002) 20(1) *Impact Assessment and Project Appraisal* 3; F Vanclay 'Conceptualising social impacts' (2002) 22 *Environmental Impact Assessment Review* 183.

¹⁴⁴ F Vanclay 'International principles for social impact assessment' (2003) 21(1) *Impact Assessment and Project Appraisal* 5 8.

¹⁴⁵ R Burdge & F Vanclay 'Social impact assessment' (1995) quoted in Vanclay (n 143 above) 190.

While this definition offers a yardstick, it appears too vague for quantification. For instance, how should the ‘play’ pattern of individuals be assessed? Or how should the social variable which Juslén refers to as ‘community cohesion’¹⁴⁶ be quantified? Indeed, these key questions reflect the challenge of defining social impacts solely in terms of the complex social formations existent within a society. But not only is it daunting to define social impacts within this complex social formations, it is equally difficult to make an assessment where such impacts are hard to define considering that they also embody a range of variables.

Defining economic impacts in the realm of economics is more definitive in that the impact of these projects on the livelihood capacities of persons likely to be displaced becomes evident. But setting such analysis outside the HRBA is delicate since it is likely to create space for the countervailing argument of cost-benefit analysis. In other words, there is likely to be the question of whose interest should really matter? And this is further amplified by the notion that national economic growth is capable of a trickle-down effect. But considering that such argument contradicts the object and purpose of the Convention, how then should the obligation to conduct SEIA be understood within the context of article 10(3) of the Convention.

First, it is instructive that a state must be guided by the HRBA. In essence, human rights must be the vanguard of such process. But what are some of these rights that states must necessarily take into account? For this purpose, it is relevant to highlight some socio-economic rights, namely, the right to work,¹⁴⁷ the right to health,¹⁴⁸ the right to an adequate standard of living,¹⁴⁹ and the right to development.¹⁵⁰ Among these, one prominent right which resonates is the right to an adequate standard of living provided in article 11(1) of the ICESCR. Inclusive among the component elements of this right are: food, water and housing.¹⁵¹

In the *Ogoniland* case, the Commission emphasised the nexus between the right to food and the right to life,¹⁵² noting that states have an obligation to ensure that food bases are not destroyed.¹⁵³ In light of article 10(1) of the Convention, this obligation further resonates in that one of the basic contemplation of state responsibility to prevent DID is to avert impoverishment, one of which Cernea identifies as ‘food insecurity.’¹⁵⁴ If such must be avoided, then guaranteeing the right to food must be a priority in the SEIA. But having stated this, the next important question is: how should this be done? An illustrative paradigm would briefly be considered. Assuming individuals in a certain community ‘A’ depend on subsistent farming and invariably land as a means of sustenance and the state in which members of this community reside wants to acquire their land for a development project. In light of the right to food, the SEIA process must necessarily take into account the arability of the land in which

¹⁴⁶ Juslén (n 143 above) 166.

¹⁴⁷ ICESCR (n 23 above) art 6; African Charter (n 25 above) art 15.

¹⁴⁸ ICESCR (n 23 above) art 12; African Charter (n 25 above) art 16.

¹⁴⁹ ICESCR (n 23 above) art 11(1).

¹⁵⁰ African Charter (n 25 above) art 22; Development Declaration (n 27 above) art 1.

¹⁵¹ ICESCR (n 23 above) art 11(1).

¹⁵² *Ogoniland* case (n 10 above) para 64.

¹⁵³ *Ogoniland* case (n 10 above) para 65.

¹⁵⁴ Cernea (n 61 above) 1575.

economic resettlement is proposed. In other words, where the state decides to relocate these individuals, it must ensure that the land allocated for farming exercises are cultivable. The WB operational policy 4.12 further lends credence to this assertion in requiring that resettlement should not compromise the prior living standard of such persons.¹⁵⁵

But besides the right to food and water, another basic component of the right to an adequate standard of living that must necessarily be included in the SEIA is the right to adequate housing. As noted by the former UN Special Rapporteur on adequate housing, adequacy contemplates certain requirements, namely, ‘...accessibility, affordability, habitability, security of tenure, cultural adequacy, sustainability of location, and access to essential services such as health and education.’¹⁵⁶

By virtue of this right, states have a duty to refrain from depriving individuals of their places of habitation. However, where relocation is proposed, states must ensure that adequate housing is provided. But, considering that article 2(1) of the ICESCR requires the progressive realisation of rights contained in the ICESCR, should the provision of the right to adequate housing be interpreted outside the interpretative base of progressive realisation? The UN Committee on Economic, Social and Cultural Rights has emphasised that ‘...in view of the nature of the practice of forced evictions, the reference in article 2(1) to progressive achievement based on availability of resources will rarely be relevant...’¹⁵⁷ In other words, states must ensure that the immediate realisation of the right to housing and invariably, an adequate standard of living of those likely to be displaced are assessed in the fulfilment of article 10(3) of the Convention.

But in view of the HRBA, that is not all. States must also ensure that the SEIA process is participatory. Reverting to the assertion made earlier that social impacts embody a range of variables, participation is important as a means of identifying these variables and assessing them. The WB has also recognised the essence of participation in emphasising that social impact assessment should be a ‘...process which provides an integrated and participatory framework for prioritising, gathering, analysing, and using operationally relevant social information.’¹⁵⁸ In such participatory space, not only would the social impacts be properly understood but also the economic consequences can be efficiently assessed in fulfilment of one of the conditions of article 10(3) of the Convention.

4.3 Environmental impact assessment

Globally, environmental sustainability is recognised as one of the key requirements for sustainable development.¹⁵⁹ This recognition derives from the fact that the environmental repercussions of economic development – in view of issues such as climate change – can be severe. But besides the

¹⁵⁵ WB operational policy 4.12 (n 142 above) para 6(b).

¹⁵⁶ Basic principles (n 139 above) para 16.

¹⁵⁷ General Comment No 7 on art 11(1): the right to adequate housing: forced evictions, adopted by the UN Committee on Economic, Social and Cultural Rights, UN Doc E/1998/22 (20 May 1997) para 8.

¹⁵⁸ World Bank ‘Social assessment’ Social Development Notes 13 (1995) 1
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/0,,contentMDK:20489639~menuPK:1304725~pagePK:148956~piPK:216618~theSitePK:244363~isCURL:Y,00.html> (accessed 8 October 2012).

¹⁵⁹ See Rio Declaration on environment and development, adopted at the UN Conference on Environment and Development, Rio de Janeiro, Brazil on 3-14 June 1992 (A/CONF 151/26 I) principle 4; A Malik *et al* ‘Environmental Protection strategies: an overview’ in A Malik & E Grohmann (eds) *Environmental protection strategies or sustainable development* (2012) 1.

ecological dimension of these damages, the capacity of individuals to live within an environment where the basic conditions necessary for an adequate standard of living are present can also be compromised.¹⁶⁰ For instance, where desertification occurs as a result of excessive irrigation, or where persons who survive on agriculture can no longer depend on land due to environmental degradation from oil extraction,¹⁶¹ food insecurity can arise. But while these repercussions evidently points to the need for the right to a healthy environment, an actual binding provision of this right has remained globally elusive.¹⁶²

However, regionally, the African Charter has granted recognition to this right.¹⁶³ In the *Ogoniland* case, the Commission noted that '[t]he right to a general satisfactory environment, as guaranteed under article 24 of the African Charter... requires the state to take... measures to prevent pollution and ecological degradation.'¹⁶⁴ One of such measures, for which there is global recognition, is EIA. EIA is the procedure of evaluating the possible effect of a development project on the environment. In this procedure, states are to follow certain stages.¹⁶⁵ For clarification, these stages would be grouped into three phases: pre-EIA phase, EIA phase and post-EIA phase.

The first stage in the pre-EIA phase is the process of screening.¹⁶⁶ In this process, states must consider whether the development project requires an EIA, in essence, states are to ascertain if the project has a potential environmental impact. When this is ascertained in the affirmative, then the next stage, which is scoping,¹⁶⁷ should commence. In the scoping process, the existing data on the effect of a development project should be gathered. It is pertinent at this stage that states should actively engage those likely to be displaced. The need for participation is underscored by the fact that good environmental decisions are taken when there is public contribution.¹⁶⁸ As noted by Fagbohun '[w]here those with responsibility for environmental decisions give premium to public participation, the public through its... scepticism and willingness to question expert and scientific claims... ultimately

¹⁶⁰ See 'Human rights and the environment: Rio+20: joint report OHCHR and UNEP' (2012) <http://www.unep.org/environmentalgovernance/Portals/8/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf> (accessed 11 October 2012).

¹⁶¹ See CNC Ugochukwu *et al* 'Environmental sustainability and sustainable development issues in the Niger Delta region of Nigeria' (2008) 21 *Forum der Forschung* 151; KSA Ebeku 'The right to a satisfactory environment and the African commission' (2003) 3 *African Human Rights Law Journal* 149 156-159.

¹⁶² See LM Collins 'Are we there yet? The right to environment in international and European law' (2007) 3(2) *McGill International Journal of Sustainable Development Law & Policy* 119.

¹⁶³ African Charter (n 25 above) art 24.

¹⁶⁴ *Ogoniland* case (n 10 above) para 52.

¹⁶⁵ United Nations Environment Programme 'Environmental impact assessment and strategic environmental assessment: towards an integrated approach' (2004) 41-44 (UNEP report) <http://www.unep.ch/etb/publications/EnvImpAss/textONUBr.pdf> (accessed 11 October 2012); International Association for Impact Assessment 'Principles of environmental impact assessment best practice' (1999) (IAIA principles) http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IAA_web.pdf (accessed 11 October 2012).

¹⁶⁶ World Bank 'Revised operational policy 4.01: Environmental assessment' (2012) para 8 <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (accessed 11 October 2012); African Development Bank 'African development bank group's policy on the environment' (2004) 20 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000027-EN-BANK-GROUP-POLICY-ON-THE-ENVIRONMENT.PDF> (accessed 11 October 2012).

¹⁶⁷ UNEP report (n 165 above) 47.

¹⁶⁸ T Dietz & PC Stern *Public participation in environmental decision-making* (2008) 2.

provide important decision-making resources.¹⁶⁹ Furthermore, where there are probable reasons to believe that a project is likely to have an environmental impact but there are scientific uncertainties, states should be guided by the precautionary principle,¹⁷⁰ which emphasises environmental caution in light of the likely irreversibility of environmental damages. Congruently, states should ensure proper documentation of the information gathered from the scoping process.

In the second phase, states are to conduct the EIA. It is essential that certain criteria must be followed, inclusive among which is that the process must be definite and clear, fostering transparency and accountability.¹⁷¹ Also, the EIA process must be participatory¹⁷² and in light of the responsibility to prevent DID, states must ensure that persons likely to be displaced actively engage in the process. This is essential for the legitimacy of the process and also, drawing from the Aarhus Convention, participation in environmental decision-making processes improves ‘...the quality and the implementation of decisions...’¹⁷³ At this stage, health and socio-economic issues that may arise as a result of environmental degradation should be considered. In other words, health impacts of probable water contamination as a result of mercury deposits from mining or oil spillages from extractive oil projects should be considered. In furtherance, states must ensure that project alternatives are considered in hopes to prevent environmental hazards.¹⁷⁴ However, where no alternative to the proposed plan exists, mitigation strategies must be adopted.¹⁷⁵ Proper documentation of this stage must also be done.

In the post-EIA stage, the EIA report must be analysed comparatively with the information gathered from the scoping process.¹⁷⁶ This is needful to ascertain that they are in line with existing EIA standards. In furtherance, the report should be examined to ensure that the content reflects the EIA process. In following these phases, not only do states ensure that environmental harm is prevented but also the HRBA is regarded and ultimately, sustainable development is ensured.

4.4 Conclusion

While it is important that development projects should be executed for economic development, it is needful that they must conform to the imperatives of human rights protection and environmental sustainability. The prior-impact assessments required in article 10(3) of the Convention jointly attest to this essence and while this chapter has described these prior-impact assessments, it is needful to emphasise that these assessments are essential to realising the enforcement of article 10(1) of the Convention.

¹⁶⁹ O Fagbohun ‘Mournful remedies, endless conflicts and inconsistencies in Nigeria’s quest for environmental governance: rethinking the legal possibilities for sustainability’ (2012) 81 <http://nials-nigeria.org/PDFs/Prof%20Fagbohun%20Final.pdf> (accessed 16 October 2012).

¹⁷⁰ P Sands & J Peel *Principles of international environmental law* (2012) 218.

¹⁷¹ UNEP report (n 165 above) 24.

¹⁷² See C O’Faircheallaigh ‘Public participation and environmental impact assessment: purposes, implications, and lessons for public policy making’ (2010) 30 *Environmental Impact Assessment Review* 19; N Hartley & C Wood ‘Public participation in environmental impact assessment – implementing the Aarhus Convention’ (2005) 25 *Environmental Impact Assessment Review* 319.

¹⁷³ Aarhus Convention (n 133 above) para 9 of Preamble.

¹⁷⁴ UNEP report (n 165 above) 51.

¹⁷⁵ UNEP report (n 165 above) 55-56.

¹⁷⁶ UNEP report (n 165 above) 57-58.

Chapter Five

Conclusion and Recommendation

5.1 Conclusion

The fact that human rights are not distant seconds to economic development has resonated in numerous international instruments. In recognition of the ripple effect of DID, article 10(1) of the Convention read in the context of the Convention as a whole, reinforces the assertion that economic development cannot be used as an excuse for the violation of human rights. Though the provision of article 10(1) of the Convention is not absolute, a state must ensure that when construing the adverbial limitation encased in the words ‘as much as possible,’ it must be guided by the HRBA. In other words, human rights must be at the centre of its developmental planning. Although this research recognises the argument that the economic value of development projects like dams, reservoirs, extraction of natural resources and roads are essential for the realisation of the right to development on a national level, it contends that this realisation must not be at the expense of certain individuals.

This assertion gains credence from the fact that it would be a contradiction for a state to marginalise certain persons in the fulfilment of the collective right to development in article 22 of the African Charter. Also, in view of the right of persons against arbitrary displacement in article 4(4) of the Convention, states are to ensure that the provision of article 10 of the Convention is diligently followed. Summarily, it was argued that when a state conforms to its obligation in article 10 of the Convention, not only does it act in line with the regional consensus on putting an end to the bane of internal displacement in Africa but also it acts in line with the values of sustainable development.

For emphasis, each of the provisions of article 10 of the Convention would be summarised.

5.1.1 Principle

In the second chapter, the provision of article 10(1) of the Convention was discussed and it was noted that this principle creates a legal obligation on states to prevent DID. However, there is an adverbial limitation that qualifies this provision encased in the words ‘as much as possible.’ It was argued that in light of the Convention and relevant international standards, it would be a contradiction if such phrase is construed as conferring a wide margin of discretion on states. Hence, it was argued that this adverbial limitation must be understood as requiring that the project must be for a compelling and overriding public interest. And to determine this, it was stated that an exercise in proportionality must be done.

In furtherance, it was argued that this exercise in proportionality should be done in light of the HRBA. But that is not all. In realising its enforcement, it was emphasised that the requirements of articles 10(2) and 10(3) of the Convention must be fulfilled.

5.1.2 Participation

In the third chapter, the notion of participatory development was discussed. The key components of article 10(2) of the Convention were unpacked and it was argued that persons likely to be displaced

should be involved in the process of deciding on feasible alternatives to a development project. It was argued that consultation in article 10(2) of the Convention cannot be regarded as the weakest form of participation in light of the object and purpose of the Convention, immanent African traditional practices and relevant international standards, significantly, the emerging norm of the HRBA. It was further argued that for the consultation process, states must ensure that all relevant information are made available to persons likely to be displaced for the purpose of exploring feasible alternatives. In furtherance, it was argued that this process must be closely patterned in accordance with the obligation on states to prevent DID in article 10(1) of the Convention.

5.1.3 Prior-impact assessments

In the fourth chapter, the essence of prior-impact assessments to the obligation of states to prevent DID was discussed. SEIA and EIA were described. Not only was SEIA described as an assessment of the likely impacts of a development project on the social structure of individuals within a certain community and their economic capacities, but also, it was defined as an assessment of the likely impacts of a development project on the socio-economic rights of these individuals. In furtherance, EIA was described as an assessment of the environmental impacts of a development project not only in terms of the ecological capacity but also in relation to the human ability to depend on the environment for sustenance.

5.2 Recommendation

Recognising that states are the primary duty-bearers of the responsibility to prevent DID, this section would make certain recommendations for states in the fulfilment of this responsibility. Also, since article 14(1) of the Convention provides for the creation of a Conference of State Parties (the Conference) to review the compliance of states, recommendations would be made on the role of the Conference in the reviewing of monitoring states' compliance.

Additionally, since article 14(4) of the Convention recognises the role of the African Peer Review Mechanism (APRM), a recommendation would be proposed for the APRM. Furthermore, the role of the Commission in realising the enforcement of article 10 of the Convention would be considered since it is an important institution in the protection of human rights in the continent. In recognition of its importance, article 14(4) of the Convention provides that states are to report to the Commission on steps taken to implement the Convention during the state reporting exercise. But since the Commission has neither passed a resolution nor offered guidance on the issue of DID, recommendations would be made on what the Commission should consider in monitoring the implementation of the provisions of article 10 of the Convention.

5.2.1 States

The recommendations for states would be discussed at two levels, namely, the regional and national levels. At the regional level, it is recommended that African states should ratify the Convention as it is not yet in force. This is essential as it is a major step in establishing the regional legal synergy for the

enforcement of the Convention. Congruently, in accordance with the provision of article 14(1) of the Convention, states should create the Conference, designated for reviewing the compliance of states.

At the national level, it is recommended that states should domesticate the Convention in accordance with article 3(2)(a) of the Convention. Satisfying this condition is particularly important in dualist states where international obligations do not become part of national law until they are domesticated. Generally, it is recommended that states should adopt separate policy guidelines on the modalities for stakeholders' consultation required in article 10(2) of the Convention and the prior-impact assessments required in article 10(3) of the Convention. While incorporating the Convention into national law would ensure that the Convention is enforceable in national legal systems, adopting separate policy guidelines is essential to provide public and private actors with extensive practice guidelines in respect of the obligation to prevent DID. However, it is needful to emphasise that these policy guidelines must conform to the regional practice guideline that should be drafted by the Conference. This is to ensure that a common regional standard is adopted.

Furthermore, it is recommended that states should create an institutional body for the enforcement of the obligation in article 10 of the Convention. The independence of this body must be guaranteed and states must ensure that civil societies are represented in the institutional composition. Additionally, this institutional body should closely monitor the compliance of public and private actors with the provisions of article 10 of the Convention.

5.2.2 Conference of State Parties

As the body designated for reviewing the compliance of state parties to the Convention, the Conference has a pivotal role in the enforcement of article 10 of the Convention. It is recommended that once it is established, the Conference should adopt a regional practice guideline to guide states in the implementation of article 10 of the Convention.

Generally, it is also recommended that the Conference should be involved in standard setting. Additionally, it is recommended that the Conference should set up a subcommittee to monitor the activities of public and private actors in those locations in Africa where development projects likely to result in displacements are being executed.

5.2.3 The African Peer Review Mechanism

Since the APRM serves as a political forum in which African leaders assess each other to promote good governance and ensure sustainable development, it offers an avenue for the enforcement of article 10 of the Convention. In recognition of the viability of this political forum, article 14(4) of the Convention recognises the essence of the APRM in fostering accountability of states in respect of obligations in the Convention. It is therefore recommended that for the APRM, certain evaluative questions should be formulated in light of its objective of assessing the compliance of states with the obligation in article 10 of the Convention.

5.2.4 The African Commission on Human and Peoples' Rights

As a key institution in the protection of human rights in Africa, the Commission has a pertinent role in ensuring that the provisions of article 10 of the Convention are realised. Articles 14(4) and 20(3) of the Convention recognise the pertinent role of the Commission with respect to monitoring states' compliance with the Convention. In light of the role of the Commission recognised in article 14(4) of the Convention, the next sub-heading provides a list of questions for the Commission's constructive dialogue with states during the state reporting exercise.

Additionally, it is recommended that the Commission should adopt a general comment clarifying the provision of article 10 of the Convention for proper implementation by states. A proposed general comment on article 10 of the Convention is contained in the subsequent sub-heading.

5.3 Suggested questions for the state reporting exercise

In light of article 62 of the African Charter, states are obligated to report to the Commission on measures taken to give effect to the African Charter. Additionally, article 14(4) of the Convention requires that during this reporting exercise, states are also to report to the Commission on measures taken to implement the provision of the Convention. Below, some questions are recommended for the Commission's constructive dialogue with states in respect of article 10 of the Convention.

1. What legislative measures have been taken to prevent DID?
2. What executive policies and regulatory mechanisms are in place to regulate the conduct of public and private actors in the execution of development projects?
3. What has been the level of effectiveness of these policies and regulatory mechanisms set in place to prevent DID?
4. What challenges are being faced with regards to the implementation of the obligation to prevent DID?
5. Are there any projects of compelling and overriding public interests? If yes, provide justification.
6. Have feasible alternatives been considered?
7. What procedure was followed in deciding on these feasible alternatives?
8. Where persons likely to be displaced consulted? If yes, to what extent was their involvement and what information was provided to aid their involvement?
9. In respect of those projects for compelling and overriding public interests, what arrangements have been made for persons likely to be displaced?
10. What are the likely socio-economic impacts of the development project?
11. What are the likely environmental impacts of the development project?
12. How would these impacts be avoided or mitigated?
13. What implementation strategies are in place to fulfil the right to an adequate standard of living of persons likely to be displaced?
14. What enforcement strategies are in place to ensure that the HRBA is followed in implementing these measures?

15. Where the specific needs of certain categories of vulnerable groups such as women, children and persons with disabilities considered in the formulation and implementation of these strategies? If yes, provide details.

5.4 Proposed General Comment on article 10 of the Convention

5.4.1 Introduction

DID has become a growing concern globally not only for its prevalence but also for its effect on the enjoyment of human rights. In recognition of the need to combat this form of displacement, article 10 of the Convention provides that states should prevent it. Though this obligation resonates in the provision of article 10(1) of the Convention, it is pertinent to clarify its content for practical application by African states.

This clarification would be advanced in light of each of the provisions of article 10 of the Convention.

5.4.2 Principle – article 10(1) of the Convention

Article 10(1) of the Convention, which provides that states shall prevent DID, is the crux of the obligation of African states with regards to DID. In this provision, there is an adverbial limitation, which in the view of the Commission, needs to be clarified. This adverbial limitation is expressed in the words ‘as much as possible.’¹⁷⁷ By virtue of this open-endedness, the very nature of state obligation to prevent DID is rather unclear. However, the Commission seeks to emphasise that this limitation must be understood in light of the aim of the Convention.

Article 2 of the Convention provides for the objectives of the Convention and one of these objectives is to stop internal displacement from occurring.¹⁷⁸ While the Commission appreciates the need for states to execute development plans, it seeks to emphasise that these plans should not conflict with the norm of the HRBA. Since the core essence of developmental activities is to create wealth for the state and in turn increase the capacities of individuals within the states, it is essential that the process should not lead to the socio-economic deprivations of certain individuals.

In furtherance, the Commission seeks to assert that the adverbial limitation must also be construed in light of article 4(4) of the Convention. Article 4(4) of the Convention recognises the right of individuals ‘...against arbitrary displacement.’¹⁷⁹ Preventing ‘arbitrary displacement’ presupposes that certain guidelines must be followed. In other words, it presupposes that displacement should not be a random exercise. This provision in connection with article 10(1) of the Convention requires that states must construe the obligation to prevent DID in the context of certain criteria. To establish these criteria, relevant international standards would be discussed.

¹⁷⁷ The Convention (n 4 above) art 10(1).

¹⁷⁸ The Convention (n 4 above) art 2(b).

¹⁷⁹ The Convention (n 4 above) art 4(4).

The Commission notes that an important criterion is contained in the corollary provision of article 6(2)(c) of the Guiding Principles.¹⁸⁰ This provision requires that only in situations of ‘compelling and overriding public interests’ can DID be allowed. The Commission strongly asserts that the adverbial limitation ‘as much as possible’ in article 10(1) of the Convention must be understood as requiring that a development project must be for ‘a compelling and overriding public interest.’

It is observable that there are two operative adjectives in this requirement – ‘compelling’ and ‘overriding.’ The Commission is aware that development projects such as dams, irrigation projects, mining and oil projects are integral to the economic growth of states. However, the Commission seeks to clarify that the words ‘compelling and overriding’ necessitates a balancing exercise. In this balancing exercise, states are to consider the necessity of the project and weigh this against the rights of persons likely to be displaced. In the weighing process, states are to be guided by the HRBA. In essence, there must be the recognition that development that leads to marginalisation or socio-economic deprivations of certain individuals is unsustainable and contradicts the HRBA. Therefore, the obligation on states to – ‘as much as possible’ – prevent DID demands that the rights of persons likely to be displaced must be regarded as integral to the sustainability of a development project.

Furthermore, the Commission seeks to emphasise that the provision of participatory development in article 10(2) of the Convention and the requirement of prior-impact assessments in 10(3) of the Convention are essential criteria to the fulfilment of the obligation in article 10(1) of the Convention.

5.4.3 Participation – article 10(2) of the Convention

In recognition of the need for the sustainability of development activities, article 10(2) of the Convention emphasises participatory development. The integral components that needs to be clarified in this provision are ‘stakeholders,’ ‘consultation,’ ‘information,’ and ‘feasible alternatives.’

The Commission notes that the term ‘stakeholders’ is capable of sundry interpretation, however, in the context of development, the Commission refers to the definition recognised by international financial institutions such as the WB and the ADB.¹⁸¹ By the definition of the WB and ADB, there are primary and secondary stakeholders. While primary stakeholders are those that stand to be affected by the development project either positively or negatively, secondary stakeholders are those who essentially determine the course of the project in one way or another. However, article 10(2) of the Convention does not make any distinction, hence, the term ‘stakeholders’ in article 10(2) of the Convention must be understood as including both categories.

The Commission also seeks to clarify the term ‘consultation’ as used in article 10(2) of the Convention. Due to the need for practical application of the norm of participation in development,

¹⁸⁰ Guiding Principles (n 6 above) art 6(2)(c).

¹⁸¹ n 101 above.

there have been watered-down simplifications of participation into semantic nuances such as ‘contribution’,¹⁸² ‘utilisation’,¹⁸³ and ‘consultation’.¹⁸⁴

Consultation has been considered as the weakest form of participation;¹⁸⁵ however, the problem with this conceptualisation is that it considers persons likely to be displaced merely in terms of legitimising development activities. In other words, this watered-down definition does not consider persons likely to be displaced as stakeholders who are bound to be affected by the development project. As such, this watered-down definition contradicts the norms of equality, inclusiveness and universality of rights inherent in the HRBA.

In furtherance, such watered-down understanding of consultation conflicts with the practices inherent in traditional African customs and tradition. Among the Akans of Ghana,¹⁸⁶ the Igbos of Nigeria,¹⁸⁷ the Borana of Kenya and Ethiopia¹⁸⁸ and in the *kgotla* system of Botswana,¹⁸⁹ decision-making processes are traditionally consensual. What this implies is the existence of an active engagement on issues before decisions are taken. But a watered-down conception of consultation in article 10(2) of the Convention does not presuppose an active engagement as recognised in these practices. The Commission therefore clarifies that consultation in article 10(2) of the Convention must be understood as a decision-making process in which persons likely to be displaced are actively engaged in the objective of exploring feasible alternatives to a proposed development project.

Information in article 10(2) of the Convention should be understood as integral to the process of consultation. The Commission reiterates that access to information is a fundamental right that should be protected. States are therefore to ensure that in terms of article 10(2) of the Convention, persons likely to be displaced are given all necessary information that would enable them engage in the process of exploring feasible alternatives.

In terms of what feasible alternatives constitute, the Commission would consider recognised international standards. One recognised standard is the ‘no-action alternative.’¹⁹⁰ Essentially, this alternative requires states to refrain from carrying out development projects likely to cause displacements. The Commission notes that such ‘no-action alternative’ resonates from the nature of the obligation in article 10(1) of the Convention. However, where this is impossible, the Commission strongly recommends that other alternative project designs should be considered. For example, where the provision of electricity is contemplated, the Commission recommends that states should consider solar energy which, in Africa, is a good alternative to the creation of large dams.

However, where alternative project plans are not feasible, the Commission strongly urge states to ensure that the planned resettlement and compensation of persons likely to be displaced are

¹⁸² Oakley (n 110 above) 8.

¹⁸³ Smith (n 111 above) 197.

¹⁸⁴ Arnstein (n 112 above) 217.

¹⁸⁵ Smith (n 112 above) 152.

¹⁸⁶ Schwimmer (n 129 above).

¹⁸⁷ Muo & Oghojafor (n 132 above) 155.

¹⁸⁸ n 122 above.

¹⁸⁹ Griffith (n 125 above) 196.

¹⁹⁰ See generally Basic principles (n 139 above); OECD guidelines (n 139 above) 6.

voluntarily accepted by these persons. The essence of ensuring voluntary resettlement resonates from the obligation in article 10(1) of the Convention. States must therefore be conscious of this obligation and ensure that it is fulfilled. However, where voluntary resettlement is not feasible, the Commission strongly asserts that states must ensure that any involuntary resettlement plan must be geared towards rehabilitating persons likely to be displaced and restoring their means of livelihood. In essence, any involuntary resettlement that would result in socio-economic deprivations must not be countenanced or executed. The Commission strongly encourage states to comply with international standards on involuntary resettlement and compensation.¹⁹¹

5.4.4 Prior-impact assessments – article 10(3) of the Convention

The Commission strongly urge states to perform both socio-economic impact assessment (SEIA) and environmental impact assessment (EIA) of a development project before initiation. The SEIA and the EIA are not only essential to the process of exploring feasible alternatives in article 10(2) of the Convention but are also essential in light of the obligation of states to prevent DID in article 10(1) of the Convention.

The Commission recommends that international standards on social impact assessments¹⁹² should be utilised. In terms of the economic impact of development projects, the Commission urge states to consider the effect of these projects on the economic capacities of persons likely to be displaced taking into account the nature of their sustenance. Also, the impact of the development projects on the socio-economic rights of persons likely to be displaced should be assessed. Congruently, the Commission recommends that the EIA process must conform to relevant international standards¹⁹³ and should be participatory as good environmental decisions are taken when space is created for participation.¹⁹⁴

5.4.5 Conclusion

The Commission strongly urge state parties to take targeted steps and in particular ensure that legislative, administrative and judicial measures are taken to give effect to the provisions of article 10 of the Convention.

Word Count: 19, 005

¹⁹¹ See OECD guidelines (n 139 above); ADB policy (n 142 above); WB operational policy 4.12 (n 142 above).

¹⁹² See Inter-organisational Committee on Guidelines and Principles for Social Impact Assessment ‘Guidelines and principles for social impact assessment’ (1995) 15(1) *Environmental Impact Assessment Review* 11-43; International Association for Impact Assessment ‘Social Impact Assessment: International Principles’ (2003) <http://www.etcinc.com/Resources/Social%20Impact%20Assessment%20Pr.pdf> (accessed 24 October 2012).

¹⁹³ UNEP report (n 165 above); IAIA principles (n 165 above).

¹⁹⁴ See UNEP report (n 165 above); Aarhus Convention (n 133 above) para 9 of the Preamble.

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