

Apartheid Reparations and the Contestation of Corporate Power in Africa

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The joint activist and juridical movement for reparations against corporations that profited from apartheid is finally making progress within the generally hostile US judicial system, using the 'Alien Tort Claims Act' and public pressure. By way of an update on the struggle, this briefing first reviews the core evidence presented by plaintiffs representing tens of thousands of black South African victims of apartheid (Khulumani *et al.* 2002), considers the rebuttals by corporations (Morrisson and Foerster 2008), and then turns to an update on the apartheid lawsuit and similar initiatives which demand that the 'historical debt' associated with oppression be repaid by those who profited, with interest.

Apartheid profits

To what extent did transnational corporations not only profit from but also sustain the apartheid regime? As one of white South Africa's most notorious leaders, John Vorster, once proclaimed: 'Each bank loan, each new investment is another brick in the wall of our continued existence' (cited in Khulumani *et al.* 2002, p. 78). In 1980, his successor P.W. Botha appointed corporate representatives from Barclays, Standard Bank, Anglo American and other firms to serve on the Defence Advisory Board (DAB), a group that was instrumental in securing

corporate support for apartheid policies. Botha told the House of Assembly:

We have obtained some of the top business leaders in South Africa to serve on the DAB in order to advise me from the inside, not only about the armaments industry, but also about the best methods to be applied within the Defence Force... I want to unite the business leaders of South Africa, representative as they are, behind the South African Defence Force. I think I have succeeded in doing so. (Cited in Khulumani *et al.* 2002, p. 79)

This collaboration, integral to the existence of the apartheid state, was acknowledged by Barclays chairman Sir Frederic Seebohm:

There are one or two identifiable political groups in [South Africa] who are bent on destroying our society in order to impose their own minority ideologies on the rest of us... One of their objects is to bring about bloody revolution and they see in South Africa a chance to do just this. They believe fervently in a policy of destruction, which is the policy of an empty mind and those who have opted out of civilised society. (cited in First *et al.* 1972)

Similarly, the post-apartheid Truth and Reconciliation Committee (TRC) found that

business was central to the economy that sustained the South African state during the apartheid years. Certain businesses, especially the

mining industry were involved in helping to design and implement the apartheid policies. Other business benefited from cooperating with the security structures of the former state. Most businesses benefited from operating in a racially structured context. (Khulumani *et al.* 2002, p. 156)

Banks, including Barclays, Citicorp, Dresdner and Commerz, provided the interface, acting as intermediaries between the licit and illicit, financing and sustaining corporations and the regime. According to an article published in *The Nation* in 1976, 'South Africa is borrowing heavily to finance massive development projects and boost its defence spending ... It is hard to imagine where it would be right now without borrowed funds'. In 1979 the Chairperson of the UN Special Committee against Apartheid charged Citigroup for supplying one-fifth of the \$5 billion inflow that bolstered apartheid in the months following the Soweto uprising. As late as 1989, *Newsday* headlined a report, 'Citibank under Fire: Loan Terms seen as Aid to Pretoria'. The New York newspaper revealed that the bank rescheduled outstanding loans of \$660 million on lenient terms. The same year, \$8 billion in loans were refinanced, negotiated by Barclays, Dresdner, Deutsche and UBS (Khulumani *et al.* 2002, p. 115).

Basil Hersov, former head of Barclays during the apartheid era, served on Botha's DAB. Barclays was listed by the UN as providing one of nine major loans to the SA government and its corporations, totalling \$478 million 'in which Barclays played a leading role'. In 1976, Barclays acquired one-eighth of all South African Defence Bonds, directly financing the armed forces. Bob Aldworth, Barclays Managing Director described it as 'part of (Barclays) social responsibility to the country'. In 1979, the company would underwrite and purchase shares in the state oil company, Sasol, the latter being set up to subvert sanctions through coal-

to-oil conversions (Khulumani *et al.* 2002, p. 113).

To summarise, the corporate role in South African racial oppression was so substantial that even US president Ronald Reagan's 1985 Executive Order implicitly acknowledged the support US firms gave the apartheid state.

The EO will put in place a set of measures designed and aimed against the machinery of apartheid. These steps include a ban on all computer exports to agencies involved in the enforcement of apartheid and to the security forces; a ban on loans to the South African Government ... (Reagan 1985)

However, moving from such clear evidence to a formal finding of a 'tort' requiring reparations payments, as in the case of the Holocaust survivors who sued European corporations in the US courts, would not be easy.

The corporate defence

Post-apartheid political discourse has been characterised by a 'talk left walk right' strategy in which anti-corporate rhetoric offered by the African National Congress occasionally emerges within a prevailing corporate and neoliberal discourse (Bond 2006). This admixture of left and right political references has provided space for the South African government to disapprove of claims for historic justice against multinationals that worked closely with the apartheid system through progressive/nationalist references, invoking alleged 'judicial imperialism'.

This basic problem was discovered by South Africans who utilised the US Alien Tort Claims Act (ATCA) in seeking compensation to be awarded against apartheid profits. The ATCA has recently been employed in some high-profile

international cases. In 1997, Holocaust Litigation cases were filed under ATCA against Swiss banks, and ultimately settled out of court for \$1.25 billion. Other ATCA cases settled out of court included victims of Burmese junta repression allegedly aided by Unocal and Yahoo! which allegedly turned over private information to the Chinese state, resulting in the imprisonment of Internet users. In 2002, South African activists including Dennis Brutus and Lungisile Ntsebeza, as well as the Khulumani Support Group for apartheid victims and Jubilee South Africa, used the ATCA to sue dozens of multinational corporations operating in South Africa during apartheid.¹

Because the Bush Administration persuaded SA President Thabo Mbeki to oppose the plaintiffs in mid-2003 (cited in Bond 2006), New York Southern Circuit Judge John Sprizzo ruled the case in favour of the corporate defendants in November 2004. Sprizzo argued that the ATCA was trumped by US foreign policy and South African domestic economic policy considerations. However, three years later, in October 2007, litigants won an appeal in the Second Circuit Court, which found that 'in this Circuit, a plaintiff may plead a theory of aiding and abetting liability [for international crimes such as apartheid] under the ATCA' (McOwen 2008). This too was appealed, and in May 2008, the conservative US Supreme Court was expected finally to kill the lawsuit on behalf of the corporations. However, four of the justices discovered conflicts of interest in their own investment portfolios (they owned shares in the sued companies), and so the Supreme Court had no choice but to pass the case back to the New York courts, which in February 2009 held another hearing on a corporate motion to dismiss.

In the corporations' defence, a 'Memorandum of Law in Support of the Defendant's Joint Motion to Dismiss' filed by

Daimler AG, Ford Motor Company, Barclays Bank, International Business Machines Corp., Fujitsu Ltd. and UBS (Morrisson and Foerster 2008), offers numerous rationalisations:

- the plaintiffs fail to 'state a claim cognisable under the (tort statute) grant of jurisdiction' violating the laws of nations or a treaty of the US;
- 'aiding and abetting international law violations are not actionable under the statute';
- 'allegations of aiding and abetting the apartheid government do not state a claim because doing business with apartheid South Africa did not violate international law';
- 'no defendant is alleged to have been involved in the promulgation or enforcement of the laws by which apartheid was administered (or) alleged to have committed torture, genocide or extrajudicial killing';
- 'complaints are composed almost exclusively of allegations concerning the sale of automotive vehicles and computers, and the loans of funds to parties in South Africa – conduct that is not and has never been in violation of international law';
- international law 'never imposed obligation on defendants to divest';
- 'none of the defendants' home countries ever prohibited South African commerce altogether';
- the UN Resolutions were limited to 'intense debates over whether to prohibit commerce with South Africa';
- the UN General Assembly is not a 'law-making body' but exists instead for purposes of 'political discussion' which is at best 'merely advisory';
- various resolutions, e.g. UN Security Council Res. 569 (1985), were not binding on member states or corporations and resolutions did not specifically single out the manufacturers of armaments and military vehicles, the technology corporations or the banks;
- 'accessorial liability' and 'substantial assistance' could not be proved,

- reiterating the words of Judge Katzmann who concluded that the plaintiffs must prove 'practical assistance ... with the purpose' and intent of facilitating the commission of primary violations;
- the tort statute is interpreted (and constrained) by 'specificities comparable to 18th century paradigms related to piracy etc;
 - the tort statute's jurisdiction does not extend to the extraterritorial nature/conduct of multinationals in foreign nations, and that it was never intended to be used applied outside US borders;
 - international law does not recognise corporate liability with jurisdiction extending to natural persons only, further highlighting that no international court has ever found a corporation guilty of 'violating a norm of international law';
 - the tort statute does not contain a statute of limitations, hence the defendants borrow the ten year limitation of the Torture Victim's Protection Act, to dismiss the claims;
 - there is 'no basis for tolling the limitations period ... to overcome their failing to bring suit so many years after Mandela's election ...
 - Khulumani's claims do not relate back as initially, the suit was materially different (deliberate on the part of Khulumani's counsel), who have only this year switched to 'class action';
 - Khulumani lacks associational standing, for 'the presence of the individual members – the real parties in interest – is required ... importantly to avoid the risk of duplicative litigation';
 - 'Khulumani (KSG) lacks standing to sue on its own behalf', and as for claims that KSG incurred expenses via voluntary expenditure on victims' behalf, the defendants maintain, 'this type of derivative claim could only be based on equitable subrogation, which is not available to volunteers';
 - 'Judgment in favour of plaintiffs would subvert the democratic decisions of those countries to permit, – and

indeed, to encourage, regulated commerce in and with apartheid South Africa';

- 'cases are non-justiciable under the political question doctrine ... the adjudication of these cases before the Court would conflict with clearly articulated foreign policy and interfere with international diplomacy';
- South Africa views objections as intrusion upon its sovereignty: 'SA has at every turn urged the US courts not to adjudicate plaintiff's claims'; 'plaintiffs seek massive monetary penalties on behalf of the classes they purport to represent ... SA considers it to be a direct challenge to the reparations programme carefully designed by the post-apartheid government to confront the legacy of apartheid'; and hence
- the successful prosecution of the case would disrupt the growth of the South African economy, undermining economic stability and deterring foreign direct investment.

Supplemental memorandums submitted by IBM, Daimler, Ford, General Motors, Fujitsu and Barclays develop the arguments, claiming that parent corporations should not be held liable for the alleged acts and policies of subsidiaries, which indeed may have supported the apartheid regime. Yet, if 60 per cent of global trade occurs by way of multinational internal transfer between parent and subsidiary, and lacks transparency, it is unclear as to how parent corporations could mount a case contesting purported information transfer and hierarchical management within the parent-subsidiary relationships in question. Apartheid-era South Africa was, after all, branded by the international community as a pariah state perpetrating horrific crimes against humanity. In this light, all banking relations on the part of defendants could be interpreted in the context of financing (state) terrorism (defined as systematic use of terror as a means of coercion).

In their supplemental memorandum, Daimler – investors and suppliers of Unimog vehicles, marketed in 1965 as a ‘military vehicle’ (Khulumani *et al.* 2002, p. 132) distinguished from the civilian version by mountings for arms, bullet-proof tyres and other characteristics – stated that the Ntsebeza Plaintiff’s allegations are insufficient as a matter of law, ‘as they are entirely conclusory, failing to make any effort to tie Daimler-Chrysler Corporation’s purported manufacture of vehicle to any particular harm suffered by any particular plaintiff’ (Daimler Brief 2008). However, the evidence paints a different picture. Khulumani *et al.* note that in July 1988, Daimler Chrysler leader Joachim Jungbeck boasted to a shareholder meeting:

During a company visit, I was proudly shown aggregates of army vehicles, including huge numbers of axles from armoured vehicles. Store-rooms contained large numbers of engines, axles and transmissions for Unimogs and armoured vehicles of the South African police and army. In between were parts for the armoured vehicle ‘Buffel’. The Buffel was used in the war against Angola and for the occupation and control of black urban settlements. (Khulumani *et al.* 2002, p.130)

Daimler’s presence in South Africa was marked by a series of collaborations with the apartheid government. In the 1970s, ARMSCOR used the chassis of the Unimog to develop the vehicle that would be used by the army and police to repress the population. One year after the UN Security Council enacted a mandatory arms embargo, Mercedes Benz shipped 6000 Unimog to SA. Corporations directly collaborated with state-owned entities, including well-known entities such as SASOL and ESCOM. As an example, the state-owned Industrial Development Corporation owned 51 per cent of the Atlantis Diesel Engines (ADE) factory; Daimler owned a 12.5 per

cent share. With regard to the ADE, Daimler Chairman Jurgen Schrepp stated: ‘The authorities established ADE for strategic reasons’. ADE’s main client was the South African army. Daimler partly owned or maintained shares in several companies that helped maintain the apartheid system, including their 56 per cent capital stock in Allgemeine Elektrizitätsgesellschaft (AEG), whose facilities aided ‘the South African government in its internal security by monitoring the identity and movement of black population ...’ (Khulumani *et al.* 2002, p. 133).

Ultimately, the corporations hoped that the decisive factor in their defence was the active collaboration of former South African Minister of Justice Penuell Maduna. The corporations’ Joint Memorandum (Morrisson and Foerster 2008) drew sustenance from Maduna’s declaration opposing litigation, later resubmitted by his successor, Brigitte Mabandla: ‘Like her predecessor, the current Minister maintains that the responsibility to address the country’s apartheid past ... lies with the South African government and not foreign courts’. The corporations also quoted Mbeki: ‘We are not defending the multinationals. What we are defending is the sovereign right of the people to decide their future... I can’t understand why any South African would want to be brought under such judicial imperialism’.

According to Khulumani lawyer Michael Hausfeld: ‘Maduna was instructed by the US government to oppose lawsuits brought in the US against multinational corporations which allegedly benefited from apartheid’. After leaving Mbeki’s Cabinet, Maduna went on to commercially represent the apartheid corporations as lawyer, alongside Democratic Alliance politician Peter Leon (brother of the party’s former leader Tony). Maduna claimed to oppose the reparations lawsuit to protect national sovereignty, yet his declaration deliberately accorded protection to the extra-territorial corporations

that undermined the struggle for freedom during the apartheid era by knowingly financing and sustaining the regime, in direct collaboration with foreign governments. Maduna had taken up this cause in 2003 as a direct result of a letter requesting him, ironically, to invoke 'SA sovereignty', from US Secretary of State, Colin Powell (Bond 2006).

In contrast, in August 2005, an Amicus brief filed by the TRC argued that the corporations listed in the Khulumani lawsuit never engaged with the TRC, nor did the multinationals ever apply for amnesty; that the lawsuits against multinationals on the part of private citizens should in no way interfere with the policies and processes of the TRC, nor should they undermine or conflict with the SA Constitution, courts or government; and finally, that private corporations may be held legally and legitimately accountable for apartheid victims, as a matter of civil law. According to advocate Dumisa Ntsebeza, former TRC head of the TRC's Investigation Unit: 'The TRC failed as an institution to find the evidence that would show that the role of business was such that they were complicit in South African apartheid. That failure was due to lack of time, lack of resources and lack of full cooperation from big business' (Duke 2002).

In spite of the post-Mbeki government's failure to overturn its predecessor's support for the apartheid corporations, the February 2009 New York court hearing led by Hausfeld seemed to open up a new trajectory. In late 2008, the plaintiffs had honed down their case to a smaller number of corporations. According to Hausfeld associate Molly McOwen (2008):

While the availability of the aiding and abetting theory is clear, the standard for establishing such liability remains undecided ... We allege that the technology companies worked with the apartheid regime intensively,

over a prolonged period of time, to develop computer systems that would run the racial passbook systems. The companies purposefully designed the systems so that they would maximize the efficiency and efficacy of the regime's enforcement of the pass laws. The companies knew that these activities violated international law. Thus, the companies' assistance was not only substantial, but it was provided with the knowledge that it was assisting international law violations and with the purpose of perpetuating apartheid (itself an international crime) and the violence necessary to the maintenance of apartheid.

In addition to the aiding and abetting theory of liability, Plaintiffs' First Amended Complaint raises a joint criminal enterprise ('JCE') theory. Under the JCE theory, a person may be liable for a crime committed by some aspect of a criminal enterprise if the person acted in furtherance of the criminal enterprise, with knowledge of the nature of that enterprise and the intent to further the criminal purposes of that enterprise. It must be foreseeable that the crimes will be committed by other members of the enterprise. This theory has been relied on in several cases before the International Criminal Tribunal for the former Yugoslavia ... Plaintiffs' factual allegations satisfy this theory, as well. For instance, we allege that Defendant Barclays National Bank was an active participant on the South African Defence Advisory Board through the bank's director, Basil Hersov. Through this collaboration, as well as Barclays' continued financing of the apartheid regime, the bank intentionally furthered the South African security forces and their criminal purpose of maintaining and enforcing apartheid. Plaintiffs' injuries were utterly foreseeable at the hands of the South African security forces, whose violent acts were

condemned around the world. Thus, Barclays should be found liable under the ATCA under the JCE theory as well as the aiding and abetting theory. . .

With respect to both theories of liability – aiding and abetting and JCE – it is important to note that the First Amended Complaint focuses exclusively on the corporate defendants' substantial assistance to the South African security forces. Plaintiffs are not suing defendants for their general business activities in South Africa during apartheid, or even for their business dealings with the South African government in general. Rather, Plaintiffs have identified the key companies that supplied armaments, military vehicles, computerized racial passbook systems, and financing to the security forces with full knowledge that these strategic military assets would facilitate the maintenance and enforcement of apartheid.

As the plaintiff's lawyers feared, the judge who replaced Sprizzo (who died in 2008), Shira A. Scheindlin, ruled in April 2009 that banks should be removed from the lawsuit. In the hearing, Hausfeld pointed out that any banks that provide financial services to terrorist organisations today are subject to prosecution. The apartheid state is as obvious a case of a terrorist organisation as any, and thus should also be subject to tort claims.

Khulumani's strategic retreat, reducing to nine corporations from three dozen, allowed Scheindlin (2009) to rule mostly favourably. She concluded that SA's TRC Act implicitly recognised the possibility of corporate liability outside the TRC process and hence international comity does not require dismissal. She also cited Stiglitz that the suit 'will not discourage foreign investors'. That means, now, on the one hand, winning again in the Court of Appeals and Supreme Court is also possible if a slim majority upholds

the claims, given that they are narrower than before. But on the other hand, this strategy diminishes the merits of the apartheid profits lawsuit for more general attacks on corporate malfeasance in Africa and elsewhere. (Another possibility, in between, is an out of court settlement, such as that which the German and Swiss firms paid Holocaust victims' descendants.)

Khulumani describes their amended lawsuit as targeting those 'companies that did profitable business by (knowingly) equipping the apartheid security agencies with the means of enforcing and sustaining apartheid'. The Khulumani lawsuit 'asks for compensation for injuries on behalf of individual victims who fall into four classes of victims. The decision regarding compensation would be based on standards established in international law' (Jobson 2009).

A common cause?

Those attacks on the record of malevolent firms and even colonial-era states are at a relatively high level of intensity at present. Other cases include claims by the Herero people against Germany for genocide carried out between 1904–08 (Sarkin 2008), and ATCA cases against firms which despoiled the Niger Delta. For example, the case *Bowoto v. Chevron* was heard in November 2008 in San Francisco, with Chevron found 'not liable' by a district court in a jury trial. The case originated in 1996, when Nigerian armed forces worked closely with Chevron security, a period during which the Nigerian army killed two unarmed Ilaje community members engaged in a sit-in at the firm's Parabe Platform. Others were permanently injured and indeed tortured by the military. In February, Chevron (whose record profits in 2008 amounted to \$23.8 billion) rubbed salt in the Ilaje people's wounds by seeking reimbursement of \$485,000 in legal fees for the case, including \$190,000

in photocopying charges (Paddock 2009). The Ilaje plaintiff's representatives are Earthrights International and lawyer Bert Voorhees. Voorhees remarked of Chevron: 'They are trying to bring this cost bill as a warning to any other folks who might seek justice' (Paddock 2009). The case was lost again on appeal on 4 March in the District Court for the Northern District of California, but Voorhees plans another appeal, due to 'insufficient evidence for the defence verdict, erroneous legal rulings, and prejudicial misconduct by Chevron's lawyers'.

An impressive network has emerged to support the Ilaje. In addition to Voorhees' firm and Justice for Nigeria Now, it included EarthRights International, the private law firms of Hadsell Stormer Keeny Richardson & Renick and Siegel & Yee, and Cindy Cohn and the Electronic Frontier Foundation, Robert Newman, Paul Hoffman, Richard Wiebe, Anthony DiCaprio, Michael Sorgen, Judith Chomsky and the Center for Constitutional Rights. Many of these organisations are also supportive of the Movement for the Survival of the Ogoni People, whose leader Ken Saro Wiwa and eight other Ogoni activists were executed by the Abacha regime in November 1995. Shell was kicked out of Ogoniland in mid-2008. Wiwa's son Ken, brother Owens and others are suing Shell for alleged 'complicity for human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress' (as stated by Justice in Nigeria Now 2008). In a case filed in 1996, but only going to court on 27 April 2009, Wiwa is invoking not only ATCA but also the Torture Victim Protection Act and Racketeer Influenced and Corrupt Organisations Act. In addition to parallel legal strategies, there is already high-profile public campaigning underway similar to the apartheid reparations campaign.

There are other important legal strategies currently being pursued, including a so far unsuccessful ATCA case (on appeal) by the family of the late Palestine solidarity activist Rachel Corrie against Caterpillar, which supplied the Israeli military with the vehicle that killed Corrie. In *Corrie v. Caterpillar, Inc.* (2007), the judges ruled that:

Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members.

More promisingly for 'ecological reparations' activists, a global warming lawsuit was settled out of court in February 2009 by Friends of the Earth, Greenpeace and the cities of Boulder in Colorado, Arcata in Santa Monica and Oakland in California. Their targets were the US Export-Import Bank and Overseas Private Investment Corporation, which invested, loaned or insured \$32 billion in fossil fuel projects from 1990–2003 with no regard to the US National Environmental Policy Act (NEPA). At present, it is only US cities which have formal standing to sue for damages from climate change under NEPA, in the wake of a 2005 federal ruling. However, others – especially in the continent least responsible and most vulnerable to global warming, Africa – may have future recourse, perhaps under ATCA. The defendants agreed to important concessions in the settlement, rather than monetary damages; both will incorporate CO2 emissions into future planning (see <http://www.foe.org/climatelawsuit>).

While the ecological debt doctrine continues to be built, there is ongoing interest in contestation of Illegitimate and Odious

Debts associated with African dictatorships. In the wake of Ecuador's January 2009 debt default, this appears to be a promising grassroots pressure discourse, since so many African countries have residual or historic debts associated with the financing of dictators by Western governments and banks. Given the inadequacy of the 2005 G7 finance ministers' concessions (the Multilateral Debt Relief Initiative) just prior to the G8 meetings in Gleneagles, a movement began to promote a 'Fair and Transparent Arbitration Process' (FTAP) which meant to promote cancellation – or if not, then repudiation – of African external debt. The group Afrodad (2009, pp. 2–3) lists several parallel initiatives whose strategic orientation would be consolidated in a March 2009 Johannesburg conference:

- i. *The Norwegian Government's (2005) declaration explicitly expresses the intention to support arbitration on illegitimate debts: 'The Government will support the work to set up an international debt settlement court that will hear matters concerning illegitimate debt'.*
- ii. *The Helsinki Process on Globalisation and Democracy, created at the initiative of the Finnish Government in co-operation with the Tanzanian Government in 2002 also promoted novel and empowering solutions to the dilemmas of global governance.*
- iii. *The Italian Parliament passed a law on debt relief in the summer of 2000, Art. 7 of which requests an examination of present debt management. Under the title International Regulations on Foreign Debt this article reads: The Government will propose, to the relevant international institutions, the starting of the necessary procedures to obtain a ruling from the International Court of Justice on the consistency between the international regulations governing developing countries' foreign debt and the general framework of legal principles and human and people's rights.*
- iv. *During a Conference in Uruguay's Parliament the Montevideo Declaration calling for FTAP was formulated, and signed by Latin American Parliamentarians.*
- v. *The ACP-EU Joint Parliamentary Assembly demanded FTAP in 2000, believing 'that consideration should be given to the creation of an International Debt Arbitration Panel to restructure or cancel debts where debt service has reached such a level as to prevent the country providing necessary basic social services'.*
- vi. *The High-Level Regional Consultative Meeting on Financing for Development, Asia and Pacific Region (Jakarta, 2–5 August 2000, session 1) called for: 'There is a need for an international bankruptcy procedure. It should also be ensured that private debt does not become government debt'.*
- vii. *At the African Union's Experts' Preparatory Meeting in Dakar 2005, the President of the Republic of Senegal argued that any lasting solution to Africa's debt crisis must first and foremost be based on an audit – a 'radioscopy' – to 'make known the amount to be repaid', recognizing the principle that debt should be repaid. This is a clear call to tackle the problem of illegitimate debts and debts that would not exist in the case of debtors in the North where basic legal principles of debtor-creditor relations are respected.*
- viii. *The Outcome document from the International Symposium on Illegitimate External Debt held in Oslo, Norway, 20–23 October 2008 called for Litigation/arbitration: 'Specific contracts concerning debts exhibiting strong signs of illegitimacy should be considered for referral to arbitration or litigation, with a view to establishing relevant practical precedents'.*
- ix. *Informal summary of the hearings with representatives of civil society and the business sector on financing for development (New York, 18 June 2008) also called for impartial and transparent processes towards resolving debt disputes,*

where parties were given equal treatment and judgments were based on impartial evaluation of cases.

- x. AFRODAD conducted national and regional FTA campaign launches in 2008, in Nigeria, Democratic Republic of Congo and Kenya, where participants demanded justice through an impartial and transparent process towards resolving debt disputes.

These are mainly elite processes, and suffer from the broader cul-de-sac of global governance paralysis, in which since the Basel Convention on Trade in Toxics (1992) and Montreal Protocol on ChloroFluoroCarbons (1996), there have been no world problems tackled effectively (consider the failed Doha Agenda of the World Trade Organisation, United Nations reform, Bretton Woods democratisation, the Kyoto Protocol). Nevertheless, Afrodad (2009, p. 3) concludes, 'We are deeply convinced that despite its own weaknesses as a global institution, the UN remains the most suitable place to establish an arbitration court because of its legitimacy across nations'.

In contrast, there are a myriad of other more militant, grassroots-driven strategies presently at work (Bond 2009), exemplified by historic AIDS medicines' victories against Big Pharma and the US and South African governments by the South African Treatment Action Campaign (TAC) and their international supporters (ACT UP! in the US, Oxfam and Medicines sans Frontiers). These included two crushing 2001 defeats for TAC's opponents in the courts, including South Africa's Constitutional Court. Other anti-corporate victories have been claimed by civil society members of the Africa Water Network, especially Accra's Campaign Against Privatisation and Johannesburg's Anti-Privatisation Forum and Coalition Against Water Privatisation. In the wake of years of militant protest, the latter groups won an April 2008 High Court victory against the public agency Johannesburg Water (managed from 2001–06

by the giant firm Suez of Paris), resulting in a judgment doubling the universal Free Basic Water allocation to 50 litres per person per day and banning prepayment meters, in a case the state appealed and which is likely to go to the Constitutional Court as well.

It is becoming clear, in such cases, that it is only in the mix of radical social pressure – 'tree-shaking' – and the power of the courtrooms – 'jam-making' – that the threat to corporations which exploit Africa can be maximised

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Endnote

1. The suits were led by 'Khulumani Support Group and 90 others'; 'Digawamaje *et al.*'; and 'Ntsebeza *et al.*', subsequently consolidated in a 2007 counter-suit, 'American Isuzu Motors *et al.* v Ntsebeza *et al.*'

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Mozambique: The Panic and Rage of the Poor

Joseph Hanlon

Frightened, poor people in Mozambique have killed Red Cross volunteers, a policeman, neighbours and strangers. In the first three months of 2009, at least 20 people were killed in urban lynchings, three were killed for stealing rain, and 16 people died in violence related to cholera.

Key to all these incidents is desperate poverty and hunger. For a decade Mozambique has been a donor darling for following the neoliberal free market development model, reporting GDP growth rates of 6–7 per cent per year, and claiming dramatic falls in poverty levels. But the claims of reducing poverty have been contested, in part because child malnutrition is rising (Hanlon and Smart 2008, pp. 57–70). 'The distance between rich and poor is widening', admitted the Mozambique self-evaluation submitted in February 2009 as part of the African Peer Review Mechanism evaluation of Mozambique. The statement is important, because until now the government and donors have stressed claims for poverty reduction and tried to refute evidence of deepening poverty. In an accompanying statement, Lourenço do Rosario, president of the National Peer Review Forum, warned that 'social exclusion and maldistribution of wealth could constitute a space for conflict'. In fact, this conflict is already happening.

In poor urban areas, people live in flimsy houses with no electricity or street lighting, and complain of increasing nighttime crime, often by people armed with knives or machetes: housebreaking, mugging, rape and thefts of food from gardens. They claim that if they turn criminals in to the police, they are quickly released in exchange for a small bribe, so they have taken to dispensing justice

with their own hands. In 2008 at least 50 people were killed in lynching, but in the first 10 weeks of 2009 the rate had doubled to two a week (*Notícias*, 13 March 2009). The word 'linchar' has entered into Portuguese for executions by mobs, based on 'lynch' in American English, used for mob killings, particularly of black people in the US south in the nineteenth and twentieth centuries. In Maputo, alleged criminals are killed by necklacing – putting a tyre around their neck, filling it with petrol, and setting it alight – a method used in South African townships in the 1980s against alleged apartheid spies.

The government's own statistics show that urban poverty is increasing. Under the present economic model, the number of formal sector jobs is falling. Large demonstrations in Maputo on 5 February and then four other towns against the high cost of living shocked Mozambique. These demonstrations, organised through text messaging, were led by young people from the informal sector, which blocked roads into the capital, effectively closing Maputo. At least five people were killed and more than 100 injured, many shot by the police. Rogerio Siteo, editor-in-chief of the government owned daily, *Notícias*, responded with a remarkable column, arguing that the root cause was 'the religious way we applaud and accept the prescriptions of the World Bank and International Monetary Fund', when these are really 'poison prescriptions'. They have destroyed jobs and failed to promote agricultural development, and this has 'contributed greatly to the impoverishment of the countryside and forced a migration to the cities, particularly of the youth'. The government needs its own development policy and needs to stop treating World Bank and IMF statements as if they were 'bible verses'. A subsequent letter to the editor was published saying the demonstrations were not vandalism, but a strike by the people demanding their rights. A columnist said the demon-

strations were useful, because before the riots the elites simply did not understand the economic crisis was not just of the poor, but of the middle classes (*Notícias*, 15, 18, 19 February 2008).

In a tour of Maputo poor neighbourhoods in mid-March 2009, first lady Maria da Luz Guebuza told young people they had to work harder to make their way in the informal sector. She said that the state pays for teachers and education, after that it is up to young people themselves. But the young responded by saying that unless jobs were created or they were given help to be self-employed, crime would continue to increase (Fauvet, 2009).

Rural hunger and cholera

Meanwhile, the crisis is also growing in rural areas. In mid-March the government announced it had a surplus of 75,000 tonnes of maize, but admitted that marketing failures meant that it did not reach areas of hunger. The poor do not have money to buy food, so private traders are not interested in going to remote areas.

In Nicosadala district in Zambezia province, local people are accusing the state of locking up the rain and only giving it to better off farmers. In mid-February three people were killed and six injured, accused of diverting the rain. One farmer was quoted by the Sunday newspaper *Domingo* as saying: 'In the farm over there, something is growing, but on mine, nothing. How is it that my neighbour can eat and I can't?'

Cholera is endemic in most of Mozambique, with 15,000 cases notified between the start of the most recent outbreak in October 2007 and early 2009. Of those, 170 people died – a mortality rate of 1.1 per cent, which is considered low, and results from an effective cholera identification and treatment programme. But

over the past decade, anti-cholera programmes have been a source of much tension in coastal areas of northern Cabo Delgado and Nampula provinces.

On 6 January 2009 an angry mob burned down three cholera treatment tents that had been set up on the beach in Pemba, Cabo Delgado. The mob also attacked the houses of the neighbourhood secretary and his deputy, who were forced to flee to the police station. They were accused of allowing the tents, to spread the disease rather than treat it. Confusingly, in subsequent meetings people from the community accused the municipal authorities of doing nothing to stop the spread of cholera and of refusing to come to their community. On 18 January in Mecúfi, on the coast south of Pemba, an eight-person anti-cholera brigade was attacked and beaten – again accused of spreading the disease.

Then in Quinga, on the coast of Mogincual district in Nampula, on 25 February 2009 two Red Cross volunteers who were part of a brigade publicising anti-cholera messages, which include putting chlorine in wells, were beaten to death, accused of poisoning the wells with cholera. Then three days later, in Angoche district (just south of Mogincual), protestors attacked health workers and accused them of spreading cholera. They were already being protected by the police, so the mob attacked the police with knives and spears, disembowelling and killing a police sergeant and seriously injuring two other policemen. On the same day in Moma district (south of Angoche) a mob attacked a community leader and accused him of putting cholera in the wells; two policemen protecting him were hospitalised.

Protests against those accused of spreading cholera continued after the murders noted above. In Quinga, three people were arrested but the crowd blocked the road to prevent them being taken out of the village; 37 Red Cross volunteers fled.

On 18 March police arrested a number of people in Quinga and took them to Liupo, the Mogincual district capital. Liupo has no court, so they had to be held until they could be taken to Angoche to be tried and charged. The police were clearly frightened by what had been done to their colleagues in Moma and Angoche, so they pushed 48 people into the tiny single cell in Liupo police station. Thirteen people died of suffocation over night (three senior police officers from Liupo have been arrested).

Driven by fear

Coastal Nampula province is one of the poorest areas of Mozambique. In 1992–93, Mogincual was the centre of an outbreak of konzo (tropical ataxic neuropathy), an irreversible paralysis of the legs, and cases have been reported regularly since then (Ernesto *et al.* 2002). Cassava roots contain cyanogenic glucosides which can cause paralysis if eaten in quantity when the roots are not adequately processed; this occurs only in periods of severe hunger when there is little other food. In early 2009 it was reported that hunger was again sweeping the district due to a poor harvest caused by drought and cyclone Jokwe in 2008. The Mogincual district Director of Health said the return of konzo was 'inevitable' (*Noticias* 27 February 2009). Fifteen schools in Quinga closed in the early March 2009 after 10,000 of the 12,000 enrolled primary school pupils abandoned classes, according to Mogincual Education Director Agostinho Mendes. He said their families were fleeing the area, mainly due to hunger, but also because of the cholera and violence.

On 19 March, the Mozambican Red Cross (CVM) said that in Quinga people attacked volunteers riding bicycles and wearing Red Cross T-shirts 'because they suspected they had money'. A house belonging to one of the murdered volunteers was burnt down, and two

others were destroyed, the statement said. In addition, bicycles used by the volunteers were stolen, and some were destroyed. In Angoche, 13 houses of Red Cross volunteers were destroyed.

This is a repeat of similar incidents. In September 2006 a mob of 70 people armed with knives and machetes attacked an anti-cholera brigade of Save the Children, accusing them of putting cholera in the wells, in Nacala-a-Velha, again in coastal Nampula province. In December 2001 angry mobs in Nacala-a-Velha and neighbouring Memba district attacked anti-cholera teams, non-government organisations workers with bicycles and motorcycles, and police. Particularly notable was that they attacked traditional leaders (*régulos*, *mapéwê*) and local government officials. More than 100 houses were destroyed and at least one person was killed.

Earlier protests in 2001 were studied by Carlos Serra (Serra 2003) in ways that remain highly relevant to the present incidents. Three obvious factors play a role. First the words 'cholera' and 'chlorine' are very close, in Portuguese as in English. For people who do not have a good understanding of disease mechanisms and only know that cholera comes from the water, the difference between putting cholera or chlorine in the water may not be clear. Second, when health officials warn that cholera is coming, local people ask: How do they know? The obvious answer is they must be bringing it. Third, this is an area of high tension between the governing Frelimo party and the opposition Renamo, which has some of its strongest support in northern coastal areas. The incidents this year come after a hard-fought local election in November in which the ruling Frelimo party won the three coastal cities of Nampula province, ousting incumbent Renamo mayors.

But the most important and shocking finding of the study was that poor

people strongly believed that the rich and powerful wanted to kill them. In a climate of distrust and disempowerment, the poor responded violently against outsiders who they assumed were putting cholera in their water to eliminate them. In interviews in Memba, local people said that the two main NGOs there, SNV and Save the Children, had not done anything practical to help the people and had failed to carry out their promises. Similarly, local chiefs and government officials were not seen to do anything useful for the people – indeed, they were accused of accepting money from the outsiders who brought the cholera. This whole picture was reinforced when a health worker under attack took refuge in the local SNV office (Serra 2003, pp. 38–40).

The Serra study notes that protests were often led by unemployed youths who saw no future for themselves, and whose actions had the tacit backing of their elders. It became a protest against authority figures – *régulos*, government officials and NGO workers, who were seen as distant, arrogant and, most importantly, not delivering. The red motorcycles of SNV extension workers, driven dangerously and at high speed through villages, became a strong symbol of arrogance and distance.

The events of 2001 have a number of more recent resonances. The 5 February 2008 riots in Maputo were led by semi-employed youths from the informal sector who, as in Memba, had the implicit backing of their elders. In their statement in March 2009 on Quinga, the Red Cross highlighted the way the better off, senior figures or those with bicycles, were targeted. The local 'better off' in this area are still quite poor, but the hungry see them in league with outsiders who bring cholera.

In his blog, Carlos Serra (8 March 2009) recounts a story from Muidumbe district in Cabo Delgado. Between June 2002 and May 2003, 18 people were lynched – accused of magically commanding

seven lions who ate 46 local people. What he found interesting was that 'those accused of commanding the lions were all important people – the district administrator, chiefs, members of Frelimo, a local businessman, etc'.

Serra and his team concluded that the protests against chlorine in the water revealed 'a profound disquiet and lack of confidence in the state'. But the campaign against chlorine in the water was not a campaign against the state or against modernising, but rather just the opposite. It was a protest against a state that had become distanced from the people, which only appeared before elections, and which increasingly failed to provide services and a better standard of living. It was not against modernity, but against the failure to provide the fruits of development.

For Carlos Serra (10 March 2009), lynchings and the cholera and rain riots in the north are all 'messages of protest' against insecurity and especially against growing social inequality. He argues that 'these protests and demonstrations are products of insecurity, uneasiness, and social disequilibrium', being exercised in culturally ancient forms, expressed in terms of magic and witchcraft. They may seem incoherent, but that 'hides a terribly coherent logic based around want'. He stresses that despite the attacks on authority and state figures, it is really an appeal for help and for increased state support in these communities. He also predicts that there will be more events like the 5 February 2008 riots in Maputo against price rises.

Modesty called for

Finally, some modesty is called for on our part. We 'know' that chlorine in water helps to prevent the spread of cholera, and thus will 'know' that local people were wrong in their belief that putting chlorine in the water was a cause of

cholera. But how different is the cholera debate in Nampula from the HIV/AIDS debate in South Africa, in which the President himself, one of the world's most respected leaders, questioned the wisdom and understanding of the some of the world's most eminent scientists? Or consider the donors, IMF and World Bank who imposed the neoliberal model and accused those of us who disagreed of being as 'stupid' as the peasants opposed to chlorine in water – only to discover after 20 years that neoliberalism brought a world economic crisis instead of development.

Objections to chlorine may be scientifically unfounded, but reflect a well-founded social and political understanding. If a nurse or health post worker normally demands a bribe to provide proper treatment, why should they be trusted when they say they are giving chlorine free? If an arrogant NGO helps only a select few, why should it suddenly be trusted to help the poorest on a key health issue? If government actions have only led to increasing poverty and loss of jobs, why trust the government now? If local chiefs and party secretaries have used their links with the outside to collect taxes and increase their own power, why should they be trusted to help now? The poor have every reason to ask if the sincere priests and health workers and NGO staff sent into rural areas are not just an attempt to build up trust so that the poor can be better exploited. They have every reason to distrust the local leaders who ally themselves with the new outside exploiters.

In a time of hunger when people see no hope of improvement in their lives, perhaps the passive and violent resistance to putting chlorine in local water supplies should be seen as local people making a desperate attempt to regain some power – as a disempowered group finally taking a stand to defend its very survival.

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Websites for ongoing coverage of these events:

Carlos Serra: <http://www.oficinadesociologia.blogspot.com>.

Joseph Hanlon: <http://www.tinyurl.com/mozamb>.

Notícias: <http://www.jornalnoticias.co.mz>

Post-election Kenya: Land, Displacement and the Search for 'Durable Solutions'

Samir Elhawary

Accusations of irregularities during the December 2007 elections in Kenya sparked widespread violence. Over 1000 people were killed and an estimated 500,000 displaced from their homes.¹ Apart from the immediate humanitarian implications, the economic cost of the crisis was put at over Ksh100 billion (around \$1.5 billion). Jobs were lost, and people were unable to harvest or cultivate their farms. Meanwhile, the ethnic character of the violence put Kenya's coherence as a nation in doubt (Africa Research Institute 2008). These events took the international community by surprise, not least because the country is usually held up as a model of stability in a largely fragile region. Yet violence and displacement accompanied elections throughout the 1990s, with some commentators warning of future instability if the underlying causes of this violence were left unresolved (IDMC 2006). Central to both past and current upheavals have been long-standing disputes over land ownership.

Post-election violence, displacement and the humanitarian response

The violence began when Kibaki's Party of National Unity (PNU) declared victory in the elections. The opposition Orange Democratic Movement (ODM) claimed widespread irregularities and fraud, sparking rioting across the country between supporters of the rival parties. The unrest enabled some groups to act on long-standing grievances over land, and forcible appropriation has led

to large-scale displacement, particularly in the Rift Valley and western Kenya.

Estimates of the number of IDPs at the height of the crisis stood at around 500,000, although patterns of displacement are fluid and accurate data was difficult to obtain. What seems clear is that many of the displaced – perhaps as many as half – were not in camps, but sought refuge with host families, often in their so-called ‘ancestral homelands’. This group of IDPs included landowners and farmers from the Rift Valley who fled to nearby towns and camps; migrant workers from the Rift Valley and Central Province, who moved back towards western Kenya; and urban dwellers and business owners from main cities such as Nairobi, Kisumu, Eldoret, Nakuru and Naivasha (OCHA 2008). These are in addition to pre-existing IDPs displaced by clashes during the 1990s, mainly located in Molo, Kuresoi, Burnt Forest and Mount Elgon. A further 12,000 refugees fled across the border into Uganda.

The Kenyan government led the humanitarian response through the Ministry of Special Programmes (MoSP). Within the ministry the National Disaster Operations Centre acted as the coordinating agent, with the Kenyan Red Cross (KRCS) the official implementing partner. The government’s response was supported by international organisations, with an Emergency Humanitarian Response Plan launched in April 2008 for US\$207 million (UN 2008). There was also a concerted response by civil society organisations, particularly Church associations such as the National Council of Churches of Kenya (NCCCK), which has historically played a significant role in assisting IDPs.

The basic needs of those that were displaced in camps, in terms of protection, food, education, health, water and sanitation, were largely met, although the humanitarian response suffered from a lack of access due to insecurity, with roadblocks delaying the provision of relief.

There were some reports of national staff being targeted because of their ethnicity. Sexual exploitation, mainly of women and children, was also widely noted, in the camps and elsewhere (IRIN News 2008). Furthermore, with the passage of time and the arrival of the rainy season, concerns were raised over conditions in some of the camps. The fate of displaced people outside the camps was – and to a certain extent remains – unclear. Accurate data do not exist and there is no systematised mechanism to identify, locate and assess their needs and intentions. This is a significant failing by the government and the humanitarian community.

For many displaced people, the concern remained security in home areas: they felt unable to return until the government addressed this issue, both in terms of physical security and in its wider socio-economic and legal sense. Unless the underlying causal factors of displacement are addressed, the prospects for durable solutions will remain bleak and conditions could deteriorate and see a relapse of violence. Here, resolving disputes over land must play a central role.

The land question and displacement in Kenya

Internal displacement is a recurring theme in Kenya’s recent history. During the colonial period, British land policy favoured white settler agriculture, entailing the dispossession of many indigenous communities’ land (mainly the Kalenjin, Maasai and Kikuyu) across the Rift Valley and Nyanza, Western and Central provinces – the so-called White Highlands (Kanyinga *et al.* 2008). This process was legalised with the implementation of an individual freehold title registration system at the expense of customary mechanisms of land tenure (KLA 2004a). The land grievances that this colonial dispossession gave rise to were aggravated by Jomo Kenyatta’s independent

government. Kenyatta maintained the system of freehold land titles and did not question how the land had been acquired. To compensate the displaced, the government began a series of resettlement schemes based on a market system, but favoured those with the financial means to acquire land (KLA 2004b). Meanwhile, corruption and ethnic politics supported patronage networks and favoured certain communities, particularly the Kikuyu, who settled in the fertile areas of the Rift Valley, at the expense of others, such as the Luo, the Maasai and the Kalenjin.

These land tensions were further exacerbated by Kenyatta's successor as president, Daniel arap Moi. In response to the political threat posed by the advent of multi-party politics in the 1990s, Moi (a Kalenjin) sought to portray the opposition as Kikuyu-led, and multi-party politics as an exclusionary ethnic project to control land (Klopp 2006). This entailed evoking *majimboism*, a type of federalism that promotes provincial autonomy based on ethnicity. To recover 'stolen' land, Kikuyu were evicted from the areas they had settled in the Rift Valley and western Kenya (Kamungi 2007). Associated clashes throughout the 1990s left thousands dead and over 350,000 displaced, allowing Moi to gerrymander elections in 1992 and 1997 (Klopp 2006). Rampant land-grabbing further undermined customary mechanisms of land governance, while growing hardship among the majority poor and rapid population growth increased pressure on the country's arable land.

The displacement crisis following the 2007 elections is thus not an anomaly; rather, it is part of a sequence of recurrent displacements stemming from unresolved and politically aggravated land grievances, in a context of population growth, poor governance and socio-economic insecurity. Simply focusing on facilitating the return of people displaced in the most recent crisis, in the absence

of efforts to address the underlying structural causes, risks creating the conditions for further rounds of violence and fresh displacement.

Humanitarians and land

Humanitarians have a poor track record when confronted with land issues. Agencies have often lacked an adequate understanding of these issues (ownership, access and use), and have tended to dismiss the problem as too complex, politically sensitive or simply outside their remit (Pantuliano 2009). This is troubling as conflicts over land often drive complex emergencies, particularly in agrarian societies where land is central to livelihoods. Forced displacement and appropriation can be a means to reward allies, acquire or secure access to resources, manipulate elections or create ethnically homogenous areas (de Waal 2009). Even where land is not a central driver, secondary conflicts can emerge, particularly if there is protracted displacement and land is occupied opportunistically. The result is often overlapping or competing land rights and claims, lost or destroyed documents, lack of adequate housing stock and increased land pressure, often in the absence of an institutional framework that can effectively resolve these conflicts (Huggins 2009). Policy responses usually favour returning populations to their areas of origin or habitual residence and the restitution of land and property. Often, however, displaced people have no land to return to, or are unable to access their properties. They may have had no alternative but to occupy someone else's land, or they may be in direct competition for land with other groups, including the state (Alden Wily 2009).

These shortcomings stem from the manner in which the humanitarian community conceptualise emergency contexts. They are understood as a breakdown or temporary aberration from a

pre-conceived state of normality in which it is the role of aid agencies to provide palliative relief until there is a perceived return to that normality (Duffield 2007). In terms of forced displacement, once a conflict is deemed to have ended or a peace agreement signed, humanitarians seek to return and reintegrate those that fled to their areas of origin. Yet the relationship between war and peace is fluid; peacetime can often be characterised by different types of violence such as sexual violence or an increase in homicide rates. Peace does not necessarily lead to emancipation or freedom from exploitation and may actually be characterised by a structural violence that reinforces grievances and can lead to further conflict or a return to war. Therefore, simply returning to what was conceived to have existed before the war can reinforce these structures of violence and recreate the conditions that originally led to the outbreak of war or large-scale political violence. As David Keen (2008, p. 186) asserts, 'we need to ask whose peace? Peace on what terms? Peace in whose interest? Peace negotiated by which individuals or groups?'

The government and humanitarian community need to ask these questions in the post-election Kenyan context to ensure that any search for durable solutions for the displaced tackle some of the underlying causes of conflict. Returning to pre-election Kenya without resolving key grievances will simply sow the seeds for future violence and displacement.

The search for 'durable solutions'

Despite continuing political uncertainty after the power sharing agreement, the Kenyan government called for those displaced by the post-election violence to return to their homes. In order to support this process, Operation *Rudi Nyumbani* (Return Home) was launched

in which a fund of Ksh1bn (\$15 million) was established, with the international community asked to contribute a substantially larger amount. The fund was administered by the newly created Mitigation and Resettlement Unit within the MoSP. In this endeavour, the government has sought to increase physical security in the areas from which people were displaced, rehabilitate key services, provide assistance for the first three months of return and promote and engage in reconciliation activities (NAIC 2008).

The government has pledged to adhere to international guiding principles on IDP return, resettlement and reintegration.² In addition, the Inter-Agency Standing Committee (IASC) has developed a framework designed to ensure a 'durable solution', covering return, relocation (settlement in another part of the country, including movement to ethnically homogeneous areas or so-called 'ancestral homelands', where the IDP has links to extended family or to an identifiable ethnic group) and local integration in areas of refuge (IASC 2008). As is usually the case in situations like this, the preferred option, for the government, donors and the humanitarian community, is the return of the displaced to their areas of former residence. This is seen as less controversial than other options, which might lead to significant changes in the structure of a society, and is a visible and quantifiable process. Furthermore, it is in line with international standards such as the Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), which call for the restitution of land and property to the displaced.³

In an attempt to show that the crisis would be over quickly, the government estimated that all IDPs would return in 100 days. Predictably, this did not occur, but since February 2008 the government estimates that over 290,000 IDPs have left the camps; however, many have not

returned to their homes and are currently residing in transit camps, often located in proximity to their farms or contain an area of land that IDPs can cultivate (OCHA 2009). There are an estimated 42,574 IDPs living in these transit sites, many of which lack basic services, but nonetheless may become permanent settlements if their displacement becomes protracted. The fate of those that did not flee to camps is uncertain, although there are reports from agencies that many host families are unable to continue supporting their needs and there are fears that the displaced may start making claims on their land.

The main obstacles to return are continuing insecurity and uncertainty around the resolution of key land grievances. Some IDPs have spontaneously formed community lobby groups to pressure the government in supporting durable solutions. They are calling for preconditions, such as assurances on security, systems to compensate for or restore lost property and measures to ensure that land issues are resolved. Many IDPs, particularly those with no, lost or destroyed titles, are sceptical that such conditions will be met, and are asking to be resettled in alternative sites, including in main urban areas such as Nairobi.

Given the complex conditions IDPs have placed on their return, pushing for a rapid return is both unfeasible and unhelpful, and can potentially lead to some being returned against their will. Nor does such a rapid response allow time to instigate the processes needed to ensure a viable, durable return. Even if the conditions for return are deemed to be in place, such a process should not be framed as a durable solution but rather a temporary measure until such time as clear processes are established to tackle unresolved land issues and other related grievances. In order to be sustainable, such processes must enjoy the support of leading local and national politicians.

The alternatives to return outlined in the IASC framework are relocation and local integration. IDPs who do not have land or who are too traumatised to return seem to favour resettlement on alternative sites, but this is a complex process and cannot be considered durable unless accompanied by a resolution of the land question more broadly. In any case, resettlement may simply aggravate existing land grievances, particularly in areas such as Central and Nairobi provinces, where population density is high and land scarce. Furthermore, solely focusing on those that have been recently displaced, as is currently the case among both the government and the humanitarian community, will create resentment among long-term IDPs (including the wider landless), who have been waiting many years to be resettled and are currently living in very difficult conditions.

Relocating IDPs to so-called 'ancestral homelands' is of particular concern. While this may offer a temporary refuge for communities that have retained strong ties with their extended families, many host families are starting to reject the continued presence of displaced people for fear that they will make claims on their land. Resettlement in areas of ethnic kinship also sets a dangerous precedent as it implicitly supports the goals of those engaged in violence and displacement as a means of ethnically cleansing certain regions. It also fails to take into account that the concept of 'ancestral homeland' is often an artificial construction of the colonial state, rather than a reflection of historical rootedness (Lonsdale 2008). Ethnicity is not a static, homogenous entity, but rather a fluid concept subject to generations of intermarriage. Any efforts to return IDPs to presumed 'homelands' would need to determine which communities actually belong to certain areas, and how far back in history one would need to go to find this out, a process that would surely further divide Kenya's

communities and could even threaten the country's cohesion.

The third possibility – integrating the displaced in the areas where they have sought refuge – depends on their characteristics and the willingness of both the displaced and host communities to accept integration. In reality, pressures on local resources are already high, and integrating IDPs in rural areas is probably not going to be feasible. In the towns and cities unemployment is a serious concern, particularly among young people, and access to land and housing is already inadequate. Despite these problems, if the political process stalls and land issues are not effectively tackled, urban migration will probably further accelerate, which means that the government and humanitarian agencies must prepare to support integration in urban areas. These efforts need to be linked with the government's wider recovery strategy, which aims to improve services in slum areas and increase employment opportunities, and must be carried out in partnership with development agencies concerned with tackling the wider problems of socio-economic insecurity in the urban peripheries where the bulk of IDPs live. Questions of land tenure also demand attention: many of the displaced squat in public buildings or other public spaces, threatening the informal property interests of the existing urban poor (Alden Wily 2009). The expertise of development agencies engaged in urban planning is increasingly needed to support measures to secure tenure for the displaced and the wider population of concern.

Any solution to displacement, whether temporary or durable, must enjoy the active participation of Kenyan civil society, particularly the faith-based organisations that have historically played an important role in supporting IDPs (Klopp 2006). These groups are important stakeholders in promoting dialogue, reconciliation and peace-building

activities; and they bring important pressure to bear on the government to effectively deal with the issues outlined in the political agreement between Kibaki and Odinga. These include a commitment by the government to resolve historical grievances, including land issues. A draft Land Policy has been developed in this regard, although its final content and adoption remains a contentious issue in Parliament. Furthermore, there are questions concerning where the resources will come from for its implementation and whether the government has the political will to reverse much of the land-grabbing that has taken place in the last few decades; many of the politicians implicated are still in positions of power. Pressure from civil society will be essential in shaping and driving this agenda forward.

Conclusion

Land issues are central to the dynamics of forced displacement in Kenya, with significant implications for humanitarian and recovery interventions that aim to support durable solutions in the aftermath of the violence that followed the 2007 elections. Even before the latest crisis, grievances over land had generated over 350,000 IDPs. Displacement is thus not a new phenomenon, and portraying return as a durable solution in the absence of clear processes to resolve the underlying causes risks embedding the conditions for further violence in the future. If a durable solution is to be achieved, historical grievances must be acknowledged and effectively addressed (Klopp 2002).

Indeed, although many of these grievances have been acknowledged, it is not yet clear whether adequate processes will be put in place to address them and whether there is sufficient political will to drive this agenda forward. As a result, many local communities oppose the return of displaced people and

displaced people themselves are not keen to return to contested areas. The possibility of coerced return raises clear protection concerns, particularly given the government desire to 'resolve' the displacement problem as rapidly as possible. The humanitarian community should be very cautious about facilitating return in the absence of adequate physical and socio-economic security. Well-informed advocacy, which incorporates land tenure expertise, is required to encourage the government to meet its obligations to ensure that the conditions for return are in place. If such processes are to represent a truly durable solution, they must be accompanied by an acknowledgement of historical grievances and the need for reconciliation processes. In the absence of such change, it is imperative that the humanitarian community monitors the fate of IDPs after their return, to ensure that their rights are protected and their needs are met, and not simply forgotten amongst the needs of the wider poor.

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Endnotes

1. The KRCS estimated there were 268,330 IDPs residing in camps, although it is widely believed among aid agencies that there were an equivalent number residing outside camps. See KRCS Operations Update, 29 February 2008, available from: <http://www.kenya-redcross.org/highlights.php?newsid=61&subcat=1>
2. The guiding principles on internal displacement are a set of principles based on international humanitarian law and human rights instruments to guide governments and international agencies in the provision of assistance and protection to IDPs.
3. For more information on the Pinheiro Principles and their implementation see Multi-agency Handbook, *Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'* (2007).

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