

Dams, Displacement, And Communal Compensation: A Lesotho Highlands Legal Case

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ABSTRACT

This article addresses the major problems created for people and communities who are displaced by the construction of large dams. We focus specifically on the Lesotho Highlands Water Project, (LHWP), one of the largest hydroelectric and water transfer projects of its kind in Africa. The LHWP was implemented in 1986, when a treaty was signed between Lesotho and South Africa to undertake a series of large-scale dams, reservoirs, transfer tunnels and related infrastructure, in a vast multi-phase scheme. LHWP Phase I ended in 2007, having received numerous awards for its engineering components. However, there were and there remain problems with Phase I, in terms of its failure to restore livelihoods of project-affected communities to the point where they were at the time of the first disturbance. Some 644 households were resettled during the course of Phase I, with some cash and in-kind compensation paid to those households. A total of 27,400 people were adversely affected by the project. However, while the project-affected people downstream of the two dams, Katse and Mohale, were promised communal compensation, they have yet to receive that compensation. The Lesotho Highlands Water Authority (LHWA) is now arguing that the downstream communities affected by the project should have development projects implemented for them in a top-down fashion by the Lesotho Highlands Development Project authorities. The communities, for their part, want to be paid the compensation that they were promised under the Treaty and the Order, and under the various compensation policies

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developed during the course of the project. We examine a legal case brought against the Lesotho Highlands Development Authority in the High Court of Lesotho by the Khabang Lejone Multipurpose Co-operative Society (CIV/APN/370/2012) which was heard on 21 July 2015 and a judgment delivered on 10 September 2015. The Lesotho Highlands Development Authority has complied only partially with the current court order. After considerable delay, the Lesotho Highlands Development Authority (LHDA) complied with part of the court order by paying one third of the compensation owed for the years 2003 to 2012 as ordered by the court. The balance of the compensation due for this period was paid in late 2020. Payment of the annual amount owing for the years 2013 to today, has not yet been paid, apparently because of a change in payment policy adopted by the LHDA. This article considers the legality of such arbitrary changes in policy and the rights of the affected communities entitled to compensation. It concludes with some reflections on the nature of compensation, and it contemplates whether current legal structures for the administration of compensation in Lesotho are compliant with emerging legal norms and recommended international best practice.

1. INTRODUCTION

This article examines the legal structure which created and underpins the Lesotho Highlands Water Project, from its inception in 1986, as set out in the Lesotho Highlands Water Project Treaty, thereafter reflected in the enabling legislation enacted in Lesotho. It questions the effectiveness of that legislation, in safeguarding the interests of project-affected communities within Lesotho. The writers assess the extent to which the enabling legislation has been effectively implemented by the LHDA, (the para-statal agency created for the implementation of the LHWP and for assisting project-affected peoples). It also examines the impact of project related litigation to date.

2. THE LESOTHO HIGHLANDS WATER PROJECT: THE BEGINNING

The Lesotho Highlands Water Project (LHWP) had been conceived decades before it finally arrived. Negotiations over the Treaty were conducted during

the apartheid era. The Treaty, which was signed in 1986 by Lesotho and South Africa, set out the legal basis for the construction of the LHWP, which was the largest civil engineering project in Africa at that time. The LHWP is a set of dams and transfer tunnels carrying about 40% of the water in the Senqunyane River basin to the Vaal Dam. The Treaty is said to have been negotiated secretly in the United Kingdom, as South Africa was subject to a wide range of international sanctions in the 1980s. To avoid any accusations of ‘sanction busting’, the LHWP financial advisers set up a London based trust fund, through which project payments were then laundered.¹ Historically, the negotiations between the two parties to the Treaty undoubtedly reflected their respective strengths.

The motivation for the LHWP was South Africa’s desperate need for water in the Gauteng province.² In South Africa, the rapid industrialization and urbanization brought about by the mining activities at the Witwatersrand, in the nineteenth century had resulted in water scarcity in the area. Individuals could no longer meet their water needs on their own. As drought caused water demand to rise by 10 to 15% each year, individuals now depended on the South African government to resolve the water resource issues. This placed pressure on South Africa’s government to implement the LHWP Treaty 1986 with Lesotho. In the decades leading up to the signing of the Treaty, the LHWP had been put on hold, notwithstanding the potential economic and social benefits for both countries. This is attributable to the disagreements and political tension between the governments of Lesotho and South Africa. Lesotho’s opposition to apartheid policy in South Africa was a main contributing factor inhibiting the development of LHWP.

The relationship between Lesotho and South Africa during the 1980s was exacerbated by a number of incidents: in 1982, Lesotho had been subjected to a military attack from South Africa, aimed at the African National Congress (ANC). Threats of military invasion were also made by the South African government when Lesotho declined their demands - for uninterrupted water flow and for Security Agreements in 1983 and 1984, respectively. Furthermore, an economic blockade was imposed on Lesotho in 1985 by South Africa. The *coup*

1 N. Hildyard, “The Lesotho Highland Water Development Project – What Went Wrong? (Or, rather: What went Right? For Whom?)”, (The Corner House, 2002) <http://www.thecornerhouse.org.uk/resource/lesotho-highland-water-development-project-what-went-wrong> (accessed 13 November, 2020).

2 At the time, known as the “Transvaal” province.

d'état in January 1986 destabilized Lesotho's government. It was allegedly instigated by South Africa, in a misguided attempt to replace the military government leader with General Lekhanya, who was more compliant to South Africa's demands, and less amenable to the ANC. One might speculate that the circumstances surrounding the signing of the LHWP Treaty were questionable and might arguably have amounted to duress.

At the outset of LHWP Phase I, corrupt approaches were adopted to ensure smooth delivery of the Project. The World Bank was a key stakeholder in laying the groundwork. The LHWP gained support from the World Bank even though the LHWP would in fact violate many of its rules. By disregarding its own guidelines and becoming one of the main investors of the LHWP, this paved the way for Phase I to be riddled with corporate corruption. When asked about its decision to fund the project, the Bank responded: "As important as demand side management in the water sector is, there is no specific reference in the project to such measures, nor is there a legal requirement in the loan for RSA [Republic of South Africa] to implement such policies, since this is a loan to [Lesotho-based] LHDA."³ This raised questions over the World Bank's integrity in upholding its core evaluation principles: utility, credibility and independence.⁴

It transpired that the construction of LHWP Phase I was based upon a complex network of international corporate corruption.⁵ In 1999, the Chief Executive of the LHWP was found guilty of being bribed by more than 12 multinational corporations and consortiums. He was imprisoned for over a decade. During this period, four major international construction companies were successfully prosecuted by the Lesotho Attorney General, Fine Maema. Two of the companies were subsequently debarred by the World Bank. These admirable achievements in the battle against corporate corruption went largely ignored by the international community. The battle nevertheless exposed the vulnerability of a major infrastructure project to grand corruption. The LHWP

3 N. Hildyard (The Corner House, 2002) *Op. cit.*

4 World Bank Group, *World Bank Group Evaluation Principles* (Washington, International Bank for Reconstruction and Development / The World Bank, 2019), <https://ieg.worldbankgroup.org/sites/default/files/Data/reports/WorldBankEvaluationPrinciples.pdf#:~:text=Evaluations%20in%20the%20World%20Bank,utility%2C%20credibility%2C%20and%20independence.&text=evaluations%20be%20conducted%20ethically%20and,toward%20agreed%20dimensions%20of%20quality,> p4-5 (accessed 13 November, 2020).

5 F. Darroch 'The Lesotho corruption trials — A case study.' *Commonwealth Law Bulletin* 29(2) (2003) 901-975.

was particularly vulnerable, as the scale of Phase I used a competitive tender process and a highly complex system of international finance, consultants and contractors.⁶ As LHWP Phase II now rolls out, there is a huge risk that such corruption will recur, when such vast economic opportunities for companies and politicians are presented.

This article addresses the impacts of Phases IA and IB upon those who were re-settled, re-located, or otherwise adversely affected by project related losses – ‘project-affected people’. During the World Bank funded and supervised feasibility study of Phase I in 1986, it was recognized that the very large scale of the operation, involving a series of dams and tunnels through the Maloti Mountains, and the resulting disruption to local communities and their resources, required a new and dedicated organization to implement and manage it. The project far exceeded the capacity of any existing Lesotho government agency, and it needed a degree of financial and administrative freedom which would have been impossible to source from within the civil service. At the outset of Phase I, the LHDA was established, and with offers of higher salaries and better working conditions, it immediately attracted many of the more capable civil servants and individuals from the private sector in Lesotho.

3. THE LHDA AND THE LAW GOVERNING ITS CONDUCT

The LHDA’s legal obligations to the people and communities affected by LHWP works are based on the Lesotho Constitution, the 1986 LHWP Treaty, the LHDA Order of 1986 and the LHWP Compensation Regulations, 1990: Legal Notice No. 50 of 1990.

Article 7(18) of the LHWP Treaty, signed by the governments of Lesotho and South Africa in October, 1986, states:

“The Lesotho Highlands Development Authority shall effect all measures that members of the local communities in the Kingdom of Lesotho who will be affected by flooding, construction works, or other similar Project related causes will be enabled to maintain a standard of living not inferior to that obtaining at the time of first

6 J. Butterworth and J. de la Harpe, “Grand designs: Corruption risks in major water infrastructure projects” (CHR. Michelsen Institute, 2009), <https://www.u4.no/publications/grand-designs-corruption-risks-in-major-water-infrastructure-projects.pdf>, no. 27 (accessed 13 November, 2020).

disturbance. Provided that such Authority shall effect compensation for any loss to such member as a result of such Project related causes not adequately met by such measures.”

The Legal Order that created the LHDA by the government of Lesotho in November, 1986 reiterated this commitment, noting that ‘The Authority shall ensure that, as far as is reasonably possible, the standard of living and income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons’.⁷ One of the ways that the success or failure of this huge southern African water and hydroelectric development project would be evaluated is whether or not the LHDA fulfils its obligations to the people affected by the project. Processes of development-forced displacement and resettlement (DFDR) are ones in which local people are required to leave areas where they have resided, often for substantial periods, because of the implementation of infrastructure development projects.

The law governing the construction processes of large-scale dam projects is largely derived from domestic legislation. There are a number of different kinds of infrastructure, including roads, power lines, quarries for materials, workers’ camps, places where equipment is stored, water pipes, and dumps as well as the dams and reservoirs themselves. However, the displacement of people by dams is almost always permanent and it has wide-ranging effects on the project-affected people involved and on the regions where the projects are implemented. Displacement, resettlement, relocation, and rehabilitation consist of a physical transfer to a new location along with a whole a series of changes that affect the ways of life of individuals, families, and communities. To paraphrase Gordon, “(Re)settlement involves not only physical movement but also a psychic domain: angst and other anxieties must be allayed for (re) settlers to be settled.”⁸

The law governing resettlement and all its aspects is generally derived from those international legal norms which are then translated into policy by way of delegated legislation. However, in this instance, in the LHWP, Resettlement Action Plans (RAPs) concerning Phases IA and IB were fatally

7 Government of Lesotho, *Lesotho Highlands Development Authority Order*, No. 23, (1986) p. 420.

8 R.J. Gordon, ‘Hiding in Full View: The “Forgotten” Bushman Genocides in Namibia.’ *Genocide Studies and Prevention* 4(1) (2009) pp. 29-57.

flawed by the absence of detailed baseline studies which would have provided essential information concerning project affected communities. Both Art.7(18) of the LHWP Treaty and the LHDA Order no.23, at p 420, reflect the policy established in a number of international legal repositories, in particular in the World Bank's own Guidelines.⁹ The Bank provided huge loans for the construction of this project, and it was then heavily criticised for its failures to ensure that the project-affected people were properly cared for. Its Policy Objectives concerning resettlement, at that time, were set out in Operational Directive 4.30:¹⁰

‘(a) Involuntary resettlement should be avoided or minimized where feasible, exploring all viable alternative project designs. For example, realignment of roads or reductions in dam height may significantly reduce resettlement needs.

(b) Where displacement is unavoidable, resettlement plans should be developed. All involuntary resettlement should be conceived and executed as development programs, with resettlers provided sufficient investment resources and opportunities to share in project benefits. Displaced persons should be –

- (i) compensated for their losses at full replacement cost prior to the actual move;
- (ii) assisted with the move and supported during the transition period in the resettlement site; and
- (iii) assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them. Particular attention should be paid to the needs of the poorest groups to be resettled.

(c) Community participation in planning and implementing resettlement should be encouraged. Appropriate patterns of social organization should be established, and existing social and cultural institutions of resettlers and their hosts should be supported and used to the greatest extent possible.

9 World Bank, *Involuntary Resettlement*, OP 4.12, (Washington D.C.: The World Bank, 2001).

10 World Bank Involuntary Resettlement, OP 4.30, https://www.ifc.org/wps/wcm/connect/c41b5296-4485-43e3-a1d5-0876c39b1b19/OD430_InvoluntaryResettlement.pdf (accessed 13 November, 2020).

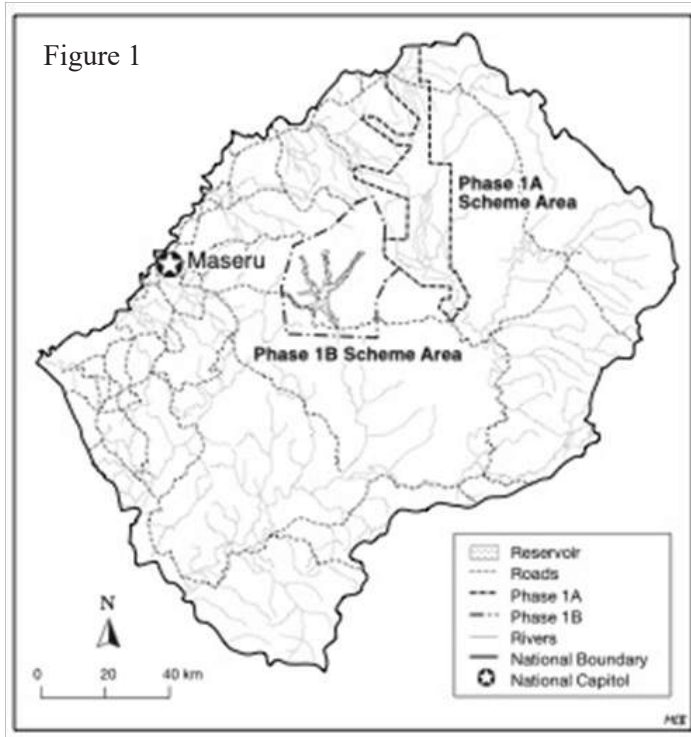
(d) Resettlers should be integrated socially and economically into host communities so that adverse impacts on host communities are minimized. The best way of achieving this integration is for resettlement to be planned in areas benefiting from the project and through consultation with the future hosts.

(e) Land, housing, infrastructure, and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities, and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project. The absence of legal title to land by such groups should not be a bar to compensation.’

4. THE LHDA – POLICY V THE APPLICABLE LAW

The construction of the LHWP in Lesotho (see Figure 1), beginning in the late 1980s, on the social side saw the devising and implementation of a comprehensive Compensation Policy (passed in 1990 for Phase IA and in 1997 for Phase IB), the drawing up and implementation of an Environmental Action Plan (EAP), and the carrying out of a wide range of public participation, environmental conservation, and social and economic development activities. The restoration of living standards required the implementation of both compensation and development activities. One of the goals of the LHWP in its *Environmental Action Plan*¹¹ was to ensure that those people affected by the project are not worse off after the implementation of the project than they were before it was developed.

11 Environmental and Social Services Group, Lesotho Highlands Development Authority. *Revised Phase IA Environmental Action Plan*. (Maseru, Lesotho: Lesotho Highlands Development Authority, 2002).



(Source: Devitt and Hitchcock 2010:64, Figure 4)¹²

A large and generously funded Environment Division was established within LHDA, with responsibility for compensation and resettlement, rural development, environmental protection, and public health. Eventually, the Environment Division was dissolved, and an Environmental and Social Services Group (ESSG) established. By 2012, however, that organization, too, was history. The work was then left to line ministries such as the Ministry of Agriculture, which lacked the capacity to provide assistance to communities adversely affected by the LHWP.

The Compensation, Resettlement, and Development (CRD) Program in the LHWP consisted of a variety of activities ranging from the assessment and payment of compensation for losses to individuals and communities suffered by the project to the implementation of agricultural and income generation projects aimed at maintaining or restoring the living standards of those people affected adversely by the LHWP.

¹² P. Devitt and R.K. Hitchcock, 'Who Drives Resettlement? The Case of Lesotho's Mohale Dam.' *African Study Monographs* 31(2) (2010), 57-106.

An assessment of the LHDA's implementation of its policies concerning project affected people during Phase I is a discouraging exercise. Whilst the sales of water to South Africa have boosted Lesotho's GDP, the problems which have dogged project-affected people have caused long term suffering and impoverishment, in direct violation of the provisions of the Treaty, as well as World Bank policy. Environmental, cultural, and social problems, and poverty are now well established, as a consequence of poor resettlement plans, loss of arable and grazing land, the use of discriminatory cash compensation, the loss of gardens which sustained project affected people families.

The LHDA's policies have led directly to the eight interrelated consequences of poorly managed human displacement identified by sociologist Michael Cernea:¹³

- Landlessness (linked to land expropriation)
- Joblessness (connected to loss of wage employment)
- Homelessness (loss of shelter, disrupted communities)
- Marginalisation (human capital loss, downward social mobility)
- Food insecurity (associated with loss of land)
- Increased morbidity and mortality (unsafe water sources, disease, stress)
- Reduced access to social services and common property (schools, health centres, pasture, forests, burial grounds)
- Social disarticulation (unravelling of social ties, loss of cultural capital, etc)

Part of the problem lies in the culture of state-owned enterprises, or "parastatals". They are creatures of statute and are generally given wide powers under the legislation that established them. In the case of the LHDA, the organisation was modelled on the parastatals of the apartheid era, notorious for their authoritarian approach to their operations. They used their enabling statute to dictate the course of events, and generally brooked no opposition to their activities.

13 M. Cernea, 'The Risks and Reconstruction Model for Resettling Displaced Populations.' *World Development* 25(10) 1997, 1569-1587.

The power to determine and implement “policies” has allowed parastatals to interpret and apply the law as they see fit. They developed policies without public consultation, simply because their foundational statute did not oblige them to seek public approval of their operations. The ‘*audi alteram partem*’ rule was not in their play book. This changed when Lesotho and South Africa became democracies and it is now a fundamental part of the rule of law to which both countries subscribe. It has not yet become part of the culture of the LHDA. In the result, the LHDA’s compensation policies have been allowed to depart substantially from the spirit of the Treaty, and the letter of the law in the form of the Order, leading to the consequences of involuntary displacement identified by Cernea above.

At the heart of the problem is the failure of the LHDA and its South African counterparts to distinguish between policies and law. Policies do not have the force of law. They are intended to guide the interpretation and implementation of the law, not replace it. A particularly egregious example of the LHDA’s disinclination to apply the law correctly is that despite having been ordered by the Lesotho High Court¹⁴ to pay cash compensation to a community, as required by both the Treaty and the Order, the LHDA has still not paid out community compensation, following a judgment in the test case examined below in this article. It has instead revised its policy, that compensation of communities for the loss of their communal resources will now take the form of developing community infrastructure, which the LHDA requires to be financed by the cash compensation which is owed to the community for the loss of its own resources, such as brushwood, medicines, etc. This revision of policy has been imposed upon many project affected communities by the LHDA, with limited input from those affected communities, and critically, no consultation or prior agreement of any sort. Having written its own policies, the LHDA now applies policy as if it is the law, even if it departs from or contradicts the legislation by which it is bound.¹⁵ Until this issue is addressed, with affected

14 See *Khabang Lejone Multipurpose Co-Operative Society v Lesotho Highlands Development Authority and International Rivers (Intervening Party as Amicus Curiae)* High Court of Lesotho (Commercial Division) CIV/APN/370/2012 dealt with below.

15 LHDA policy was adopted initially to flesh out the mechanisms for the determination of the quantum of compensation. Initially, communities were consulted. Thereafter, LHDA policies have been revised to avoid compliance with its legal obligations where these have proved difficult to implement, and most effectively, to avoid payment of compensation that is owed to affected communities. The policy processes have paid lip service to community consultation. Communities have simply been told that cash compensation would be replaced by provision of infrastructure. This is a deeply flawed approach, of doubtful legality.

communities becoming enabled or empowered to play a part in the development of the policies that affect them, then their needs will not be understood. Those needs will consequently be ignored, and the law will go unobserved.

5. THE IMPACTS OF PHASE I LHWP UPON PROJECT AFFECTED COMMUNITIES

The impacts experienced by people adversely affected by Phase I LHWP are extensive, and longstanding. Lesotho, sometimes described as the Mountain Kingdom, has traditionally been divided into three physical zones - the mountains, or Maloti; the foothills; and the lowlands. These are significantly different agro-climatic regions. The direct impact of the LHWP falls on the environment and the people of the mountains, where the dams and their reservoirs are. Displaced people have been moved to other places, some within the mountains themselves, to concentrate on livestock, or to the foothills to take advantage of the agricultural possibilities, or to the lowlands, where Maseru the capital city is situated, to try and find jobs or to take advantage of commercial opportunities.

Lenka Thamae, of 'Survivors of the Lesotho Dams' (SOLD), has spent over two decades cataloguing impacts upon project affected communities. He writes:

'Communities affected by LHWP dams have suffered multiple injustices; the impacts range from landlessness; loss of fresh produce in sufficient quantities; fresh abundant running water. Perhaps the impacts will come clearer when compartmentalized in these ways:

Environmental impacts which include loss of ecology; loss of crop fields; grazing land, trees, thatching grass bamboo reeds, herb, sand soil, springs, fish and disturbance of wildlife, caves and natural habitats. Communities report that there are birds and animals which were present before the dam, but after the dam these animals are no longer there. The construction of dams had effect on some their springs; these springs just disappeared.

Resettlement impacts include moving out of the places of forefathers; losing friends and neighbours; relocation and resettlement of graves. The most painful aspect of resettlement of graves is the exhumation aspect. This resettlement of graves was done without protective clothing from the Lesotho Highlands Water Project; communities have had to endure harrowing spectacle; when resettlement came some of the dead bodies were still fresh; and the resettled families were required to touch these corpses.

The other impact has been the loss of chiefly status and remuneration. This loss of chiefly status is like a man without beard; it is a loss of communal standing, which provides solace and a sense of belonging. In a sense, a loss of chiefly remuneration has created poverty among those members of the community who have for years, enjoyed this status!

Cultural and religious impacts have been the loss of religious ponds for anointment of congregants; loss of water snakes used for “prayers” and cultural practices. Before the dam impoundment the routes around the dam were shorter, after the filling of the dam communities around the dam walk 10-20 km as against 1 to 2 km. LHDA had promised verbally to provide boats for crossing the Reservoir, but the promise has long been withdrawn. Communities are not happy about this.

Social and psychological impacts include health issues such as HIV AIDS; villages have been decimated by the HIV AIDS pandemic without redress and rehabilitation from the LHDA; the LHDA has not provided specialist assistance to look at the emotional and psychological trauma of communities affected by resettlement.

The affected Lesotho highlands communities have also lost

massive amounts of fertile arable land. As a consequence, poverty has increased generally, among them. Asked about their lives after resettlement, the affected communities say their lives have been rendered far worse off. The impact of loss of fertile arable land has been large and by far the greatest of all negative impacts. Some of the communities have nothing to live on; others have gone into share-cropping, while others have bought fields. The example of villages which have gone into share-cropping and have bought fields are those of Ha Makotoko. It is a total of twenty-three people in Ha Makotoko, who are practising share-cropping; seven of them have bought fields. This is an indicator of the importance and attachment to land by communities affected by the Lesotho Highlands Water Project in Lesotho. The animals that the communities have, have had to go back to the highlands because of lack of adequate nutritious pastures in the resettled areas.’

A familiar tale is told by Malehana Motanyane, a 70-year-old female, who had lived for most of her life in the river valley, at Katse. She recalled the old days when everything was plentiful – firewood, fertile riverbanks, cropland, good pastures, and peace of mind. ‘Today it is different, we are poorer than before’. Promises made by the LHDA have not been kept. There is no firewood to use with the new stoves; water supplies remain uninstalled. Her plight extends to her lost family ties. She rarely sees her children, and cannot attend the funerals of relatives and friends, as the water has created too great a distance.¹⁶ Her experience reflects that of many of the people who were affected by Phase 1A and 1B of the Lesotho Highlands Water Project.

The impacts of the Lesotho Highlands Water Project dams in Phase I are shown in Table 1 below:

¹⁶ Mountain Research and Development, Vol 23 No1 Feb 2003, pp 7-10. Another interview of her was done in November of 2020 and her opinions were the same, in spite of arguments that firewood resources downstream of Katse Dam were more substantial than they were at the time the dam was completed in 1995.

Table 1. Households Relocated or Resettled by Destination and Stage in Lesotho Highlands Water Project Phase IA and Phase IB

| Stage | Destination | Foothills | Maseru | Total |
|--|----------------------------------|-----------|--------|---------------------------------------|
| IA Katse | Katse Basin | | | |
| | 71 (25 in crash program in 1995) | 0 | 0 | 71 |
| Project affected people | 20,000 | | | 20,000 |
| IB Mohale | Mohale Basin | | | |
| Stage 1(1996-1998) | 37 | 38 | 24 | 99 |
| Stage 2 (2002-2006) | 27 | 177 | 18 | 222 |
| Stage 3 (post inundation, 2006-present) | 165 | 4 | 0 | 169 |
| Total, Phase 1B | 229 | 219 | 42 | 490 |
| Project affected people, those who lost over 50% of their land | 72 | | | 72 |
| Number of project-affected people | | | | 7,400 |
| Total | 298 | 233 | 42 | 573 households relocated or resettled |
| Grand Totals | 369 | 233 | 42 | 644 |

Note: Data obtained from the Lesotho Highlands Development Authority (LHDA). In the Stage 3 (Residual Resettlement) category of Phase 1B, project affected households that lost over 50% of their arable land were allocated fields in two areas in the Mohale basin, Ha Nthakane and Ha Koporale.

It can be seen that a total of 644 households were relocated or resettled, while some 27,400 people were affected by LHWP Phases 1A and 1B. There were several unintended consequences of the LHWP. First, the two governments and the LHDA opted not to pay the second tranche of the communal compensation to those people living downstream of the two dams. Second, the water and sanitation ('WATSAN') infrastructure that was promised to the people in the Katse Basin (Phase IA) has still not been completed. The enormous amounts of money that were to be invested in these projects disappeared and largely remain unaccounted for.¹⁷ Third, the people who were resettled in the foothills and in Maseru, the capital, maintain that they are much worse off now than they were prior to the project's inception because of inflation, lack of job opportunities, and lack of post-resettlement support. The final report of the World Bank on the LHWP suggests that the social aspects of the project were not implemented sufficiently.¹⁸ Haas, Mazzei, and O'Leary, in another World Bank document, argue that the project by and large met its objectives in terms of governance and sustainability.¹⁹ The NGOs who have examined the project, including the Transformation Resource Centre (TRC) and the International Rivers Network (IRN),²⁰ have both said that the project-affected peoples' livelihoods were not, in most cases, restored, much less improved. Also, Lenka Thamae writes 'So for Basotho, resettlement means loss of livelihoods; loss of agricultural produce and animals, loss of produce in the form of fields and gardens and other agricultural inputs including fruit trees, forests, which had been good sources of firewood... Unlike jobs, land can be passed from one generation to another. It is a life-sustaining resource upon which resettled fall back when other opportunities such as commercial ventures fail and jobs are lost, as was the case when a handful of Basotho men were retrenched from the South African mining industry. ...Land is the very charter on which a tribal culture is based, it is the resting place of the

17 See the reports of the Panel of Environmental Experts for the LHWP and the World Bank's periodic review documents of progress in Phases 1A and 1B.

18 World Bank, *Implementation Completion and Results Report (IBRD-43390) on a Loan in the Amount of US\$45 Million to the Lesotho Highlands Development Authority for Lesotho Highlands Water Project – Phase 1B*. Report No. ICR 168. (Washington DC: World Bank 2007).

19 L.J.M. Haas, L. Mazzei, and T. O'Leary, *Lesotho Highlands Water Project: Communication Practices for Governance and Sustainability Improvement*. World Bank Working Paper 200. (Washington, DC: The World Bank, 2010).

20 L.M. Thamae, and L. Pottinger, eds., *On the Wrong Side of Development: Lessons Learned from the Lesotho Highlands Water Project*. (Maseru, Lesotho: Transformation Resource Centre, 2006). R. Hoover. *Pipe Dreams: The World Bank's Failed Efforts to Restore Lives and Livelihoods of Dam-Affected People in Lesotho*. (Berkeley: International Rivers Network, 2001). p. 24.

ancestors and the source of spiritual power and this explicitly explains why land is frequently regarded with a reference that is not easily understandable.’²¹

6. KATSE (PHASE IA)

Specific challenges emerged during the resettlement and relocation of communities affected by Phase IA, and the construction of the Katse Dam. Displacement, housing, seismic activity, water supplies, all created distress and long-term losses for the displaced communities.

6.1 Displacement

In Phase 1A, the Katse Dam displaced 71 families, most of whom moved upslope and remained in the vicinity. In the terminology of the project, they were ‘relocated’. ‘Resettlement’ was applied to families moving out of the area to establish themselves elsewhere. The affected families were not in fact given the option to ‘resettle’ elsewhere with project support and compensation. If they did so, they were ‘on their own’. The relocated families were compensated for their land losses with annual deliveries of grain, equivalent to the crop they would have had from their inundated land. These deliveries would continue for 15 years, after which recipients were expected to have found new income-earning opportunities through LHDA’s Rural Development Program (‘RDP’) which was charged with the promotion of agricultural, pastoral, and other income-generating enterprises.

This program, however, achieved relatively little in the way of development and in 1995, as in previous years, it was able to spend only some 3% of its annual budget due to an acute lack of implementation capacity. Some projects that had long been planned, such as water and sanitation and feeder roads did not begin to be implemented until recently. There was mounting dissatisfaction among project-affected families both with the compensation package and with water and sanitation in the Katse, Ha Lejone, and ‘Muela areas. Several major problems confronted the relocated families: First, most of their best land and natural resources had been inundated; second, there were few

21 L. Thamae, *The Irony of Development: communities impacted by the Lesotho Highlands water Project*, 29/09/2020: https://www.protimos.org/uploads/6/6/2/1/6621888/the_irony_of_development_1_thamae.pdf (accessed 15 November, 2020).

new and permanent jobs and other economic opportunities in the area; third, the RDP had not yielded significant practical benefits, and fourth, the relocated people were not enabled to move away in search of better opportunities.

6.2 Housing

New houses were built for the displaced families by LHDA according to a set of standard designs. Although LHDA had almost a decade in which to prepare for resettlement, a few months before the Katse Dam gates were to be closed in October 1995 and the water would begin to rise, no new houses had been built and no households had been relocated. A crash program was instituted and contracts for the new houses were hastily negotiated, with no thought at all given to their sustainability, for food storage, cooking facilities or insulation. Some houses were to be built in places without roads, where the cost of building to modern specifications in a hurry was very high. Some of the houses, which replaced traditional circular huts with stone walls and thatched roofs, cost as much to build as the current price of a large modern house in one of the opulent suburbs of Johannesburg/Gauteng. The new houses were, however, well received by their occupants and went some way to offset their complaints about LHDA's attempts to revive their damaged economy and pay what they felt to be adequate compensation for their losses.

6.3 Seismic activity

One of the problems that has occurred with the construction of dams is the fact that the weight of the water behind the barrier may have the effects of earth movements and destruction of homes and other facilities in the area of the dam. This problem, which is known as reservoir-induced seismicity (RIS), involves earthquakes that occur after the construction of a dam. It is important that the dam-building agencies warn the people in the area of a dam that these problems might occur. Obviously, there should be early warning systems in place for people in case of earthquake-related problems in the dam itself. An example of RIS-related earthquakes around the Katse Dam and reservoir, was an earthquake that was 3.6 on the Richter Scale and caused severe damage to a village, Mapaleng, in December 1995, amongst others. The lack of preparation

of the communities around the dam for the possibility of being affected by earthquakes was decried by various non-government organizations in Lesotho and South Africa in 1995-96. The experience was terrifying for the communities. Critically, it also resulted in the disappearance of their vital water supplies.

6.4 Water

Project-affected people such as those in Ha Mensel near the Katse Dam site ended up with lower access to water than they had before, even though there was a large water tank used for providing water to the management personnel of construction companies involved in building the dam. The village of Mapaleng and a number of surrounding villages completely lost their water supplies following the RIS in December 1995. Despite their entreaties, their water supply was only reinstated after they litigated against the LHDA for its restoration. It is common ground globally that water should be available to all, not just those in urban areas or in the construction camps of large projects. Water has now attained the status of a basic human right according to the United Nations and states such as South Africa.²²

7. HA MOHALE (PHASE IB)

Similar challenges arose during the construction of Phase IB, at Ha Mohale, with the loss of arable land proving a desperate challenge for project affected communities.

LHDA's second major dam, at Ha Mohale (Phase IB) on the Senqunyane River, displaced some 523 households when the removals were completed. The Mohale Dam is connected to Katse Dam by a 30 km tunnel. The several arms of the reservoir extend for long distances up the main and tributary valleys, creating peninsulas whose occupants would be caught between the reservoir

22 P. Gleick, 'The Human Right to Water' *Water Policy* (1999) 1(5):487-503; M. Langford, 'The United Nations Concept of Water as a Human Right: A New Paradigm for an Old Problem?' *Water Resources Development* (2005) 21(2):273-282; C.D. De Albuquerque, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*. New York: Human Rights Council 2014); Singh, N., ed., *The Human Right to Water*. Dordrecht: Springer, 2016) United Nations, *Human Rights to Water and Sanitation*. New York: United Nations, 2018); D. Koumparou, The Right of Thirst: Water as a Human Right and as a Commons. *Global Nest Journal* 20(3):637-645; A. Ibrahim, 'Water as a human right, water as a commodity: Can SDG6 be a compromise?' *The International Journal of Human Rights* (2021) DOI: 10.1080/13642987.2021.1945582.

and high mountain peaks.

The site of Mohale Dam and its reservoir, which reached full supply level in February, 2006, lies at an altitude of some 2500m, with surrounding slopes and peaks reaching up to 3500m. At this height winters are severe and snow is common in winter and not unknown in summer. The climate limits the range of crops that can be grown and their yields, and the fields are sited mainly in the valleys and on the more sheltered slopes. Most of the valleys are steeply incised and offer little level ground suitable for cultivation, while the soil on slopes is generally thin and stony. These conditions make the Mohale area suited predominantly to livestock, with agriculture confined mainly to small and isolated patches.

The Mohale Dam was designed to inundate a large and ancient oxbow, which included 760 hectares of deep and fertile soils, a rare and valuable resource in the mountains. It was mainly the agricultural possibilities that had attracted a relatively large population - for the mountains - to settle in this area. Unfortunately for the villagers the same oxbow provided valuable storage for the planned reservoir.

8. VULNERABLE COMMUNITIES

It was recognised that dislocation of the Mohale communities was likely to have particularly adverse consequences for people with little or no land, for the old and dependent, for sick and disabled people, and for young people with no land rights. For them, compensation for the loss of assets and of production was quite inadequate to prevent their falling into poverty. The provision for compensating the holders of 'secondary rights' (e.g. people who had rented land) and the Minimum Threshold Payments were designed to prevent this but largely failed to do so.²³ Despite the difficulties of implementing these policies, these were sincere attempts by LHDA to avoid harming the weak and the vulnerable. As it turned out, however some vulnerable members of the project-

23 R. Slater and Matseliso Mphale (2009) *Compensation, Welfare, and Development: One-off Lump-Sum and Regular Transfers in the Lesotho Highlands Water Project*. London: Overseas Development Institute; L.M. Moleko, M. Thokoa, and Z. Dlamini (2011) Challenges of Managing Communal Compensation Downstream of the LHWP Dams as Part of the In-Stream Flow Requirements (IFR) Policy and Procedures. In *Water and Society*, D.W. Pepper and C.A. Brabbia, eds. WIT Press/Computational Mechanics. And reports of the Panel of Environmental Experts (POE), Lesotho Highlands Development Authority.

affected population were worse off after the resettlement occurred, because of lack of land, employment, and income generating opportunities.

One of the ways that the success or failure of this huge southern African water and hydroelectric development project would be evaluated is whether or not the LHDA fulfils its obligations to the people adversely affected by the project. An assessment of the effectiveness of the law applicable to the LHDA in its protection of project affected people is incomplete without noting the complete absence of provisions in the Treaty which explicitly ensure the security of the futures of these communities. No project-affected people regeneration, technical assistance, business plans, and income regeneration schemes are explicitly required. Such gaps challenge the legal or social orthodoxy that people adversely affected by a development project of this enormity can trust and expect their government (or the relevant parastatal organisation such as the LHDA), to protect their interests in ways which reflect the law, both domestically and internationally.

Anecdotally, project-affected peoples' cooperation with the LHDA was forthcoming primarily because each community was given the very assurance about its future that is found in Art.7(18) of the Treaty. Equally, anecdotal evidence from resettled, relocated, "host" and other project affected communities shows overwhelmingly that the effects of the LHWP upon project-affected people have in the main, been beyond inadequate.

9. COMPENSATION: HOW EFFECTIVE IS THE LEGAL STRUCTURE WHICH ENTITLES PROJECT-AFFECTED PEOPLE TO BE PROVIDED WITH COMPENSATION FOR THEIR LOSSES?

It is common cause that the people displaced by the Project are entitled to "compensation" for what they have lost. What is at issue is the nature and extent of such compensation, and how it should be delivered to affected communities. Losses fall into three categories:

Material: direct loss of personal property - this is easily identifiable, valued and replaced with like for like or equivalent dwellings and infrastructure. More complicated but possible is the assessment of the loss to the affected communities of their communal resources. A

mechanism for compensating affected communities for these losses has been established and partially implemented through a Memorandum of Understanding between the LHDA and each of the affected communities.

Financial: loss of income and livelihoods- while difficult to calculate with precision, these losses are tangible and translatable into monetary amounts.

Intangible: such losses constitute a more complex set of challenges. Loss of community livelihoods and an established economic order, social cohesion, cultural values, sense of place and wellbeing, of the communities as a whole and their individual members are elusive concepts to define and value. Nevertheless these losses are real and deserve compensation.

Payment of the compensation calculated for material and financial losses has run aground for various reasons discussed below, and moves are afoot (promoted by the LHDA) to change the form of compensation from monetary payments to the provision of infrastructure and utilities of equivalent value. However, intangible losses described above, have been left out of the equation altogether.

The key legal questions which remain to be considered are:

- can the LHDA lawfully withhold payment of the amounts determined in respect of the material and financial compensation owing to the communities?
- is the change in the method of compensation currently being used by the LHDA lawful?
- is the LHDA liable for intangible losses suffered by the communities?

The first of these questions has been answered in *Khabang Lejone Multi-Purpose Co-operative v Lesotho Highlands Development Authority High Court of Lesotho, Commercial Division*, Case No. CIV/APN/370/2012 in a

judgement delivered on 10 September 2015, examined later in this article. The second and third questions fall to be determined by an analysis of the Treaty, and its subsidiary in the form of the LHDA Order 1986 (“the Order”), against the backdrop of historical and current international law, norms, and standards. The appropriate forum for the legal determination of the second and third questions is the High Court of Lesotho. However, if the court were to hold that the Treaty and the applicable subsidiary instruments do permit the LHDA to compensate the affected communities according to a set of policies which it is entitled to determine unilaterally, or that the affected communities are *not* entitled to redress for their intangible losses, either of these findings might point to a lack of legitimacy of the Treaty itself. This in turn will provoke an examination of the circumstances under which it was concluded, and the form of government practised by the parties thereto. Given the changed political dispensations of the two countries, this may lead to a review of the Treaty to bring it in line with current international ethical standards. This goes beyond the ambit of this article.

10. WHAT DOES THE TREATY SAY ABOUT COMPENSATION, WITH PARTICULAR REGARD TO THE TERMS EMPHASISED?

Article 7 – Lesotho Highlands Development Authority

‘(18) The Lesotho Highlands Development Authority shall effect all measures to ensure that members of local communities in the Kingdom of Lesotho, who will be affected by flooding, construction works, or other similar Project related causes, will be enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance: Provided that such Authority shall effect compensation for any loss to such member as a result of such Project related causes, not adequately met by such measures.

Article 10 – Cost Related Payments

(1) South Africa shall, by way of cost related payments to the Lesotho Highlands Development Authority and to the Trans-Caledon Tunnel

Authority, be responsible for all costs referred to in paragraph (3), incurred for the implementation, operation and maintenance of that part of the Project relating to the delivery of water to South Africa.

(2) Lesotho shall, by way of cost related payments to the Lesotho Highlands Development Authority and to the Trans-Caledon Tunnel Authority, be responsible for all costs referred to in paragraph (3), incurred for the implementation, operation and maintenance of that part of the Project relating to the generation of hydro-electric power in the Kingdom of Lesotho and for the developments envisaged by the provisions of paragraph (2) of Article 4 in the Kingdom of Lesotho.

(3) For the purposes of this Article costs shall comprise all costs wholly and reasonably incurred subsequent to the entry into force of this Treaty, relating to:

(h) the measures in order to ensure that members of local communities in the Kingdom of Lesotho affected by Project related causes shall be enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance as well as compensation for loss to such members as a result of such causes not met by such measures’.

Article 15 – Social and Environmental Considerations

The Parties agree to take all reasonable measures to ensure that the implementation operation and maintenance of the Project are compatible with the protection of the existing quality of the environment and, in particular, shall pay due regard to the maintenance of the welfare of persons and communities immediately affected by the Project.

In order to understand these provisions, the governments of Lesotho and South Africa are committed to ensuring that the quality of the environment is not compromised, and the well-being of the communities and individuals affected by the Lesotho Highlands Water Project will be maintained at a level that is not

below what it was at the time of the inception of the project.

11. HOW DOES THE ORDER INCORPORATE THE TREATY INTO DOMESTIC LEGISLATION?

In its simplest terms, the Treaty is a contract between Lesotho and South Africa. The LHDA is a creature of statute and a juristic purpose established by section 4 of the Order, enacted by the Military Council, then the governing body of Lesotho.²⁴ The equivalent body in South Africa is the Trans-Caledon Tunnel Authority (TCTA), which is a state-owned entity charged with financing and implementing bulk raw water infrastructure projects. It is an agency of the National Department of Water and Sanitation (DWS), which is responsible for the country's water resources in respect of usage, equitable allocation and distribution. TCTA assists the government in its pursuit of water security for South Africa and in realising its constitutional obligation of ensuring universal access to this essential resource for all citizens. It was created by a Notice of Establishment published on 12 December 1986. Its initial mandate was to finance and build the South African part of the Lesotho Highlands Water Project (LHWP), which delivers water to the Vaal River System in South Africa. It was meant to be a special purpose vehicle for South Africa to use to fulfil its treaty obligations to Lesotho in respect of this project. In 2000, the Notice of Establishment was amended resulting in the TCTA being able to undertake other projects.

The Treaty is given effect domestically in Lesotho by the Order as follows:

Section 44 (1) Compensation in respect of rights or interests in land, servitude, wayleaves, fisheries, fishing rights, water rights or other rights whatsoever shall be paid by the Authority in accordance with the laws of Lesotho.

²⁴ Government of Lesotho, *The Lesotho Highlands Development Authority Order 1986*. (Maseru, Lesotho: Government of Lesotho, 1986); Government of Lesotho and Government of South Africa, *Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa*. (Maseru, Lesotho: Government of Lesotho and Pretoria and Cape Town, South Africa: Government of the Republic of South Africa 1986).

- (2) The Authority shall,
- (a) ensure that as far as is reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons; and
 - (b) submit to the Minister for approval, proposals for assisting such persons and expeditiously execute such proposals when approved.

All claims for compensation in respect of any right or interest in land, servitude right or other property whether corporeal or incorporeal acquired or interfered with by the Authority under this Order shall be made within one year after such land, servitude, right or property is first entered or exercised or interfered with by the Authority under this Order.

12. INTERPRETATION OF THE TREATY AND THE ORDER

Article 13(17) of the Treaty requires it (and it follows, the Order) to be interpreted according to:

- a. international agreements entered into by both Parties;
- b. customary international law either universally recognized or having received the assent of both Parties;
- c. Roman Dutch customary law; and
- d. all such other rules of law in force in both the Kingdom of Lesotho and the Republic of South Africa.

The South African Supreme Court of Appeal has ruled definitively on how legal documents or instruments must be interpreted. In relation to the Treaty and the

Order, they must be interpreted with the following in mind:²⁵

- Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.
- Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production.
- Where more than one meaning is possible, each possibility must be weighed in the light of all these factors.
- Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production.
- To speak of ‘the intention of the contracting parties’ or the ‘intention of the legislature’, are misnomers, in so far as they convey or are understood to convey that interpretation involves an enquiry into the mind of the Legislature or the contracting parties.
- An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

Following this reasoning, the term “compensation” in the Treaty and the Order must be given its widest meaning, if it is to restore the complex social, economic

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA at [18] et seq, per Wallis JA.

and cultural lives of the affected communities.

In order to place the affected communities in the position they were, or better, after their displacement, the following principles should apply:

- compensation in cash, or replacement in kind in respect of the tangible property lost by the affected communities, be this individual or communal is appropriate;
 - the meaning to be attributed to the terms:
 - “standard of living not inferior to that obtaining at the time of first disturbance”
 - “any loss to such member as a result of such Project related causes, not adequately met by such measures”;
 - “protection of the existing quality of the environment and, in particular, shall pay due regard to the maintenance of the welfare of persons and communities immediately affected by the Project”;
 - “the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons”

must be read in context, and as a whole mean that the affected communities must be placed in the position that they were before displacement, all factors and circumstances considered. This requires compensation to include:

- rebuilding sense of place and wellbeing;
- restoration of livelihoods;
- skills development to enable people to replace the occupations they have lost.

Arguably, properly interpreted, the Treaty and the Order contemplate the inclusion of these intangible components as part of the obligations of the contracting parties to the Treaty, and the LHDA under the Order. If this is so, the Policy and the approach to compensation adopted by the LHDA are in conflict with the legal instruments by which they are bound and are therefore unlawful.

Similarly, Lesotho and South Africa as the contracting parties, are in breach of their commitments to the affected communities under the Treaty. Legal remedies are available to resolve these issues, in the years to come.

13. COMPENSATION FOR PROJECT AFFECTED COMMUNITIES IN PHASE I

Many of the programs involving compensation have tended to use cash as the primary means of compensation for lost assets. It should be stressed that there are many drawbacks to cash compensation. Based on global experience in resettlement and compensation programs, the giving of cash payments has not served to restore the incomes of the people who were resettled.²⁶ One of the reasons for the difficulties with cash compensation is that recipients sometimes expend their money very quickly. Another reason is the frequent lack of local opportunities for investment of the resources. A third problem relates to the control of the cash. In some cases, adult males in the household appropriate the cash for their own use; women and children thus end up being disadvantaged. These shortcomings and constraints which are latent in cash payment systems, appear to go unnoticed when cash-based systems are imposed upon communities where cash has previously been barely relevant. The payment of compensation for losses suffered by project-affected people in Lesotho is invariably insufficient to ensure the maintenance of their living standards. What *was* needed were comprehensive, well-planned, diversified, and integrated development programs and policies if project-affected people's incomes and livelihoods were to be maintained.

The principles which underlie calculations of compensation under the Lesotho Highlands Water Project were outlined in 1986 in the LHWP Treaty and the LHDA Order. These principles were incorporated into LHDA's 1997 revision of its compensation and rehabilitation policy. The revision was carried out in preparation for Phase IB of the Project, the Mohale Dam and associated infrastructure. It was based on then-current international norms and on LHDA's own experience of Phase IA of the Project - the Katse Dam, the 'Muela Dam, and the 'Muela Hydropower Station and associated infrastructure, and on the

²⁶ M.M. Cernea and H. M. Mathur, eds., *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing*. New York and Oxford: Oxford University Press, 2008).

recommendations and experience of the World Commission on Dams²⁷ and the World Bank.

Originally, project-affected communities received their payments from a fund which was established directly for the purpose of Lesotho receiving funds from South Africa for the sale of the water. The fund became mired in corruption, and in 2004 the Lesotho Parliament voted to take the money from water sales directly into general funds. Since 2004, the LHDA has avoided making a wide range of payments of compensation in a series of refusals to cooperate or take responsibility for its role in ensuring that project affected communities' needs are met. The LHDA is legally obliged to "effect all measures to ensure that members of local communities who will be affected by flooding, construction works, or other similar Project-related causes, will be able to maintain a standard of living not inferior to that obtaining at the time of first disturbance."²⁸ The LHDA Order of 1986²⁹ states that the LHDA shall "ensure that as far as reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme *shall not be reduced from the standard of living and the income existing prior to the displacement of such persons.*" [Emphasis added].

It is a basic legal principle to protect people from being deprived of their property without just and fair compensation. The compensation package in 1997 (Lesotho Highlands Development Authority 1997) consisted of 7 components, including replacement of homes and other assets, compensation for arable land losses, land for land replacement in Phase IA, compensation for communal resources (grazing, trees, thatching grass), and a disturbance allowance and minimum threshold payments (MTPs) for each project-affected household whose minimum income fell below an estimated poverty level of 3,960.00 Maloti (M7,558.80 at 2005 rates). It was to be provided in the form of cash as a top-up payment to ensure that each affected household remained above the threshold level, and it was to be paid annually for 10 years from the time of relocation or resettlement.

Communal compensation in the form of the RDP for losses of grazing

27 World Commission on Dams, *Dams and Development: a new framework for decision making*. (London Earthscan, 2000).

28 Government of Lesotho. *The Lesotho Highlands Development Authority Order 1986*. Maseru, Lesotho: Government of Lesotho. (1986) p. 27.

29 Government of Lesotho and Government of South Africa. *Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa*. Maseru, Lesotho: Government of Lesotho and Pretoria and Cape Town, South Africa: Government of the Republic of South Africa (1986). p. 3.

and other natural resources such as traditional medicines, fodder, brushwood etc. was supposed to be provided to project-affected communities and, where applicable, to their hosts. To participate in the RDP people were *required* to form co-operatives, grazing associations or other kinds of local legal entities (LLEs). While the individual compensation and threshold payments were intended to ensure that affected families were at least no worse off after than before resettlement, the ‘communal compensation’ was meant to bring ‘development’ and improved standards of living both to the affected families and to their hosts.

LHDA failures to provide communal compensation, for years, and in some cases not at all, have made profound contributions to the impoverishment of project affected communities. The cooperatives or local legal entities which communities were obliged to form, to future-proof their societies, have, in the main, *not* received communal compensation, or the technical assistance or the on-going support which might have ensured their futures and protected them from the adverse effects of Phase I LHWP. Project affected people, adversely affected by the dam, with no legal redress have found themselves losing a great deal in the wake of Phase I.

14. THE FIRST LEGAL CHALLENGE FOR PAYMENT OF COMMUNAL COMPENSATION

During the corporate corruption trials in Lesotho, Protimos, a legal civil society organisation, became aware of the plight of the displaced communities, who at that time had received no compensation for the loss of their fodder, brushwood and traditional medicines, since 2004. Protimos learnt that the affected communities had little understanding of their legal rights, and no access to legal resources to challenge the non-payment of the compensation that was patently due, owing and payable to them. Protimos had established the Seinoli Legal Hub as an operation within the Transformation Resource Centre (TRC), to identify and litigate the claims of the affected communities. TRC and many of the communities had already made complaints to the Office of the Ombudsman,³⁰ which had proved largely fruitless.

³⁰ The Office of the Ombudsman was established in terms of Section 134 of the 1993 Constitution of Lesotho. The Ombudsman is mandated to investigate or inquire either on complaint or upon own initiative where there are: Allegations of injustice, maladministration and unlawfulness resulting from actions or decisions made by public entities and offices thereof; Existence of certain conditions, practices or tendencies resulting or likely to result in disorderly administration; Infringement of fundamental rights and freedoms (i.e. violation of human rights and fundamental freedoms); Existence of certain conditions,

Lenka Thamae, of SOLD, provides this summary of the Ombudsman's recommendations which were then not implemented by the LHDA:

'The office of Ombudsman is mandated to intervene where there is a perceived injustice perpetrated by government ministries. It is in line with this mandate that the Country's Ombudsman conducted public hearings for communities affected by the Lesotho Highlands Water Project in 2003, 2006 and 2010 respectively.'

A majority of Ombudsman recommendations were rejected by the Lesotho Highlands Development Authority (LHDA). In the following paragraphs, Lenka Thamae lists the Ombudsman's legitimate recommendations that were then rejected by the LHDA.

15. KATSE RECOMMENDATIONS

The Ombudsman had recommended that the loss of porcupines and guinea fowls be restored; he had recommended that the LHDA provide water ponds to religious groups at Katse because the dam has interfered with this ritual; he had recommended that water be provided to Katse communities. The LHDA has not complied with these recommendations. The Ombudsman recommended that lake crossing be the responsibility of LHDA in the sense that the LHDA should buy boats; the LHDA temporarily complied with this recommendation, but later stopped the boats services; the Ombudsman had recommended that toilets be provided to the villages which requested them from the LHDA. This recommendation has been complied with by the LHDA, though the quality of the toilets has been problematic in some cases. The Ombudsman had recommended that two villages in close proximity to the dam be relocated; the LHDA has not complied with this recommendation. The Ombudsman recommended that houses and crops affected by quarries and culverts be compensated; the LHDA has not complied with this recommendation.³¹

practices or tendencies resulting or likely to result in corruption; and Existence of certain conditions, practices or tendencies resulting or likely to result in degradation, depletion, destruction or pollution of the environment or the ecosystem.

31 Office of the Ombudsman, *Ombudsman's Report on Complaints by Resettled Communities against the Lesotho Highlands Development Authority (August, 2003)*. Maseru, Lesotho: Office of the Ombudsman, 2003.

16. MOHALE RECOMMENDATIONS

16.1 The recommendation

The Ombudsman had recommended that Mojakhomo Sekhebetlela and Mateee Mohlomi be resettled, but the LHDA has not complied.³² The Ombudsman had also recommended that fallow land be compensated but the LHDA has not complied. The LHDA has not complied with the Ombudsman's recommendations with respect to payment of interest on delayed compensation, compensation of gardens, compensation of damaged growing crops during roads construction; compensation of springs damaged by road construction and dam construction; compensation of cracked houses, compensation for fields covered with rocks; compensation of fields damaged by culverts diverting water to fields, and has not attended to the defects and omissions relating to houses and stoves.

Litigation ensued, in which Protimos and the Seinoli legal team assisted a Phase IA community to initiate an application to the High Court. The community had been adversely affected by the LHDA's failure to compensate for losses suffered in Phase IA. The background to this case was that the villages affected by the Project had been required to form "Local Legal Entities" (unregistered associations) to receive, administer and account for monies disbursed to them as compensation for the loss of communal land and resources. Most of these were converted to registered cooperatives under the Co-Operative Societies Act of 2000 ("the Co-Operatives Act"). The Khabang Lejone Multipurpose Co-Operative ("the Co-Op") was registered in 2003 to represent Ha Lejone, a village in the Leribe District of Lesotho. In addition to the Treaty, the Order, the Regulations and the Policy, which governed the payment of compensation, the LHDA required all co-operatives to sign memoranda of understanding (MOU) to record how payments would be made and dealt with. Initially, communal compensation was provided in the form of fodder but in 1997, the Ministry of Agriculture and Co-operatives and the LHDA agreed that this form of compensation was impractical, and that monetary compensation would be paid with effect from 1998. For the period 1998 to 2003, no fodder was provided, or cash paid. After the registration of the Co-Ops in 2003, the LHDA

³² Office of the Ombudsman (2003) *Ombudsman's Report on Complaints by Resettled Communities against the Lesotho Highlands Development Authority (August, 2003)*. Maseru, Lesotho: Office of the Ombudsman.

paid compensation for the years 1998 to 2002, and a further amount in 2004. Thereafter, payments ceased. The reason the LHDA gave for the suspension of payments was that the Co-Ops had not accounted for the money received to its satisfaction, as required by the MOU.³³

16.2 The litigation

After failing in its efforts to compel payment through the office of the Ombudsman (who ruled that the full compensation was payable) the Khabang Lejone Co-Op made an application in the High Court in which it sought a declaratory order that compensation was payable in terms of the Order, and for payment of the compensation determined in accordance the agreed methods of calculation.³⁴

In response, the LHDA did not dispute the obligation to pay compensation. They contended that in terms of the MOU, the Co-Op was obliged to account for the monies received and demonstrated that it was all used for the purposes for which it was intended. At issue was the level of accounting required of the Co-Op, which the LHDA contended had to meet normal auditing standards.

In reply, the Co-Op contended that this was a level far above capability of the Co-Op, and was an unreasonable expectation, given the level of education of members of the Co-Op. The Co-Op also contended that it was the duty of the LHDA (in terms of the MOU) to assist it with the auditing of its accounts as it had in the past, to build administrative skills and capacity in the affected communities so it could perform this function competently in the future. The Co-Op saw this as yet more obfuscation by the LHDA to avoid or delay paying the affected communities what they were owed.³⁵

33 Clause 4(3) of the Memorandum of Understanding obliges the affected people to account for money received as follows:

“Disbursement of annual cash payments (ACP). The LHDA shall effect Annual Cash Payments (ACP) after the LLE has demonstrated to the satisfaction of LHDA that:- (a) Funds previously disbursed have been spent on development projects/programmes approved by the LLE; or (b) Funds previously disbursed have been invested in an interest bearing account pending utilisation; and (c) The financial position of the LLE as at 31 March of each year and the activities of the financial year proceeding that date have been properly disclosed.”

34 *Khabang Lejone Multipurpose Co-Operative Society v Lesotho Highlands Development Authority and International Rivers (Intervening Party as Amicus Curiae)* High Court of Lesotho (Commercial Division) CIV/APN/370/2012.

35 As what can only be interpreted as dilatory tactics, during the course of the litigation, the LHDA brought interpleader proceedings in which it contended there were competing claims to the funds claimed by the Co-Op by other communities, and as stakeholders of the funds, could not disburse them to any claimant without sanction of the court. The court dismissed the application.

Shortly before the matter was to be heard in November 2014, the LHDA introduced a proposal to substitute the undertaking of infrastructure projects selected by the affected parties in lieu of cash payments, in the light of the difficulties experienced by the Co-Op and other affected communities in accounting for the cash they received. This marked a major departure from the agreed methods of compensation, and, it is argued, is inconsistent with both the letter and the spirit of the Treaty and the Order.

At this point in the litigation, the question as to the purpose to be served by compensation was not raised. To paraphrase the Treaty, the purpose of compensation was to ensure that if the LHDA did not “effect all measures” to insure that the affected communities could “maintain a standard of living not inferior to that obtaining at the time of first disturbance”, it was obliged to “effect compensation for any loss” suffered by such communities “not adequately met by such measures.”

The provision of infrastructure, to which the affected communities were arguably entitled anyway, as ordinary citizens of Lesotho, did not meet the LHDA’s obligations under the Treaty or the Order.

It was difficult for the Co-Op to raise this issue so late in the proceedings, or as a new issue in reply to the LHDA’s case. International Rivers³⁶ on becoming aware of the court dispute, intervened as *amicus curiae* to offer assistance to the court, in its understanding of the concept of compensation when applied to communities displaced by large dams. This was the first time an amicus brief had been accepted in the courts of Lesotho.

International Rivers³⁷ argued that the compensation obligations, generally derived from international, regional and domestic law, World Bank Operational Directive 4.12, the LHWP Treaty and the LHDA Order, broadly applied, includes the obligation:

- to provide relevant training, capacity building and income-generating opportunities to assist communities in their own

36 A non-government organisation established in the USA in 1985 to protect rivers and defend the rights of communities that depend on them. International Rivers is recognised both by LHDA and by the World Bank as a ‘stakeholder’, its views having been invited by the Bank, on many occasions across the history of LHWP. The organisation has commented frequently and written in depth on aspects of the LHWP, both in its own publications, and in joint publications and in response to the World Bank’s own invitations to engage with its evaluation process.

37 See L. Moleko, M. Thokoa, and Z. Dlamini (2011), *op. cit.* and the discussions of the IFR issues in the Panel of Environmental Experts for the LHDA reports.

regeneration, following their re-location or re-settlement by the Project;

- to institute appropriate monitoring and evaluation processes to measure project affected progress towards the long-term goal of restoring communities to sustainability, within the period of compensation.

After hearing argument on 21 July 2015, the learned judge L.A. Moleté made the following findings:

- Section 3.4 of the Compensation Policy, 1997 read with Article 17 of the Constitution of the Kingdom of Lesotho required compensation to be prompt, and to include compensation for the loss, *inter alia* of rights of access to communal assets including grazing, brushwood, useful grasses and medicinal plants;
- The Treaty obliged the LHDA to pay a monetary amount determined in accordance with the various applicable instruments (a base amount, escalating annually at “bank rate of interest”) as set out in the notice of motion commencing the application;
- The Co-Op was bound by the MOU and was obliged to comply with its requirement that the Co-operative account (in professionally audited accounts) for the funds it had received in the previous year to qualify for the payment due in the ensuing year;
- The Cooperative had not complied with its statutory obligation to file annual returns to the Registrar of Cooperatives, and therefore was operating “illegally”.

On the basis of these findings, the judge should not have ordered the LHDA to make any payment to the Cooperative until it had complied with the MOU and its obligation to file annual statutory returns. Instead, the judge sought a solution that was “a proper balance between the LHDA’s liability to pay which is accepted; and the Co-Operatives obligation to prove that the monies are

not wasted and misappropriated". The judge was persuaded by the argument of International Rivers at the hearing, as *amicus curiae* that a portion of the funds should be disbursed to enable the Co-Op to comply with the MOU and the relevant legislation. Although the judge did not use these words, he arrived at a solution that was just and equitable in the circumstances. The conclusion to be drawn from the judgement is that fairness and justice when dealing with communities displaced by the LHWP must prevail over the contractual obligations and even the statutory requirements of the Co-Operatives Act.

The judgment sets an important precedent for compensation claims by other affected communities. Judges hearing future claims will find authority to depart from the strict letter of the law which would otherwise bar them from ordering the payment of compensation, and to make orders that are consistent with both the terms of the Treaty and the Order, and the spirit of the Treaty. The sequel to the judgment is that the LHDA paid the one third of the amount claimed after a substantial delay. Payment of the balance originally claimed was made in late 2020, after considerable delay. The delay is consistent with the dilatory tactics the LHDA has employed from the outset. It has refused to pay interest on the amount of the judgment debt from the date upon which it became due, to the date of payment. Significantly, the LHDA has still neither paid, nor tendered payment of the amounts owing from 2013 to 2020, notwithstanding that the Co-Op has fully and entirely complied with its obligations to account under the MOU and the Co-Operatives Act.

In the *Khabang Lejone* case, the learned judge did not apply his mind to or consider the question as to what compensation means, or the form in which it should be delivered to meet the requirements of the Treaty and the Order to restore the lives of the communities to a standard of living that is not inferior to that which obtained at the time of first displacement. No precedent was set in this regard, and the issue remains open for debate and ultimate resolution in a domestic or international court.

17. WHAT DOES THE FUTURE HOLD, FOR COMMUNITIES STILL ADVERSELY AFFECTED BY PHASE I, AND FOR THOSE WHO CONTEMPLATE BEING AFFECTED BY PHASE II?

As the LHWP has progressed, a wide range of issues have arisen between

the World Bank, the LHWP, marked by non-government organizations who advocate or litigate on behalf of adversely affected communities. The greatest concern for these communities is that the LHDA appears oblivious to its legal obligations towards such communities. Meanwhile, the law on development/infrastructure projects has developed internationally in a number of ways, since the LHWP began construction. Further dams are now planned, and Phase II is already underway. Such legal progress raises a series of questions which the LHDA, and parties to the LHWP Treaty may wish to consider.

One major legal issue is the extent to which the legal doctrine of Free, Prior, and Informed Consent (FPIC) is now applicable. Indigenous peoples, such as the communities affected by the Lesotho Highland Water Project (LHWP.) often suffer as a consequence of development taking place on their lands with developers exhibiting a lack of adherence to FPIC.³⁸ It is stated in the FPIC manual by the Food and Agriculture Organization (FAO) that the right of the local affected communities to FPIC is “embedded within the universal right to self-determination” which the LHWP should respect.³⁹ It is a principle which is now fully recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a pre-requisite for any undertaking that influences the ancestral lands, territories and natural resources of indigenous peoples.

Local communities have sought the right to FPIC from states, international organizations, and transnational corporations, in line with UNDRIP.⁴⁰ In practice, however, many states and international finance institutions do not agree with the principles of FPIC and instead engage in ‘consultations’, often after the decisions are made about dam projects. Local people, for their part, want to be full participants in the planning and decision-making processes related to development. Prior consultation with communities about their fate was not part of the mindset of colonial or apartheid thinking in 1986 from which the LHWP Treaty was conceived. Communities were expected to be grateful that they were consulted at all, even in the implementation of

38 Food and Agriculture Organization of the United Nations (FAO), *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities – Manual for Project Practitioners*, <http://www.fao.org/3/a-i6190e.pdf>, (2016), pp. 12 – 13 (accessed 13 November, 2020).

39 *Ibid*, p 12.

40 S. J. Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era”, in C. Charters & R. Stavenhagen (eds), *Making the declaration work: the United Nations Declaration on the rights of indigenous peoples*, (2009), pp. 184 – 199. N. Yaffe, *Indigenous Consent: A Self-Determination Perspective*. *Melbourne Journal of International Law* 19 (2018):1-47.

decisions that had been made for them.

Since Phase I LHWP, FPIC has been missing from the project planning process. Although the local communities were consulted, there was a lack of “meaningful information dissemination, local-level discussion, and real consent”⁴¹. Moreover, such behaviour was tolerated by the World Bank, an internationally recognised institution committed to “reducing poverty, increasing shared prosperity, and promoting sustainable development”.⁴² The World Bank was one of the LHWP principal Phase I investors. Previously, the Bank had argued that Free, Prior, and Informed *Consultation* with the project-affected communities is necessary but their *consent* is not.⁴³

18. THE WORLD BANK - AN ENVIRONMENTAL AND SOCIAL FRAMEWORK

The guidelines on resettlement have substantially improved and become more specific since 1986. The World Bank now has an Environmental and Social Framework (ESF) that it employs in its analysis of projects. Because of inadequate resettlement projects funded by the World Bank, the then President of the World Bank, Jim Yong Kim, announced an action plan to fix the problems on 4 March 2015. In addition to calling for better documentation, Dr. Kim said that many of the resettlement projects lacked follow-through to ensure that protection measures were implemented, and that some of the projects that affected local populations were not rated as high risk.⁴⁴ In 2018, the World Bank implemented the Environmental and Social Framework (ESF) which includes an Environmental and Social Standard (ESS) 7 on Indigenous People/Sub-Saharan African Historically Underserved Traditional Local Communities, where FPIC was introduced.⁴⁵

41 R. Hitchcock, “The Lesotho Highlands Water Project: Dams, Development, and the World Bank”, *Sociology and Anthropology* 3(10), (2015), p 535.

42 World Bank, “Who we are”, <https://www.worldbank.org/en/who-we-are> (accessed 13 November, 2020).

43 R. Hitchcock, op. cit., “p 527; . Stéphanie de Moerloose, ‘Indigenous Peoples’ Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation.’ *Verfassung und Recht in Übersee VRÜ* 53 (2020), pp. 223-244. G. Jokubauskaite, ‘Tied affectedness? Grassroots resistance and the World Bank. *Third World Thematics: A TWQ Journal*, 3(5-6), (2019), pp. 703-724.

44 World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems. <https://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems> (accessed 15 November, 2020).

45 World Bank, *Guidance Note – ESS7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*. Washington, DC: The World Bank (2018).

The ESS7 highlights the importance of the principle of FPIC when engaging in projects so that the Indigenous People (IP) can participate in, and benefit from the development process without losing their unique cultural identities and well-being.⁴⁶ The recognition of FPIC is seen earlier, in other Banks such as the Performance Standard 7 (PS 7) adopted by International Finance Corporation (IFC) in 2011 and the Performance Requirement (PR 7) on Indigenous Peoples adopted by the European Bank for Reconstruction and Development (EBRD) in 2008. Both require the incorporation of FPIC in their lending practices, to ensure that the “transition process fosters full respect for the dignity, rights, aspirations, cultures and natural resource-based livelihoods of IP”.⁴⁷ The World Bank, for its part, continues to advocate only for Free, Prior, and Informed *Consultation*, which leaves it behind other international organizations such as the United Nations Development Programme.⁴⁸

The management of the World Bank and its lawyers have previously argued that Free, Prior, and Informed *Consultation* was necessary, but not *consent*. People in the highlands of Lesotho who were being affected by the project, on the other hand, said that they not only wanted to be consulted, but they wanted to have a say in issues such as whether or not the project should go forward, what kinds and levels of compensation should be provided to project-affected people, and what kinds of land they should receive in exchange for the land that they lost in the project area. None of these arguments held sway with the two State parties to the Treaty, their governments, the Lesotho Highlands Water Commission, or the World Bank.

The size, significance and international nature of this project effectively meant that local communities were never going to be allowed to participate significantly in this decision-making process.

46 World Bank Group, “The World Bank Environmental and Social Framework”, (2017), p 75, <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf> (accessed 13 November, 2020).

47 African Development Bank Group, “Development and Indigenous Peoples in Africa”, *Safeguards and Sustainability Series*, (2016), p 17, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Development_and_Indigenous_Peoples_in_Africa_En_-_v3_.pdf (accessed 13 November, 2020).

48 United Nations Development Programme, *Social and Environmental Screening Procedure, updated in 2019, and January 2021*. New York: United Nations Development Programme (2021).

19. PRECAUTIONARY PRINCIPLE

The Precautionary Principle holds that caution should be exercised in the implementation of a project such as a dam or road in case the impacts are negative or unpredictable. The precautionary principle states that the introduction of a new product or process whose ultimate impacts are either unknown or disputed should be resisted.

Another definition of the Precautionary Principle is as follows: ‘When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.’⁴⁹ In other words, actions taken to protect the environment and human health take precedence even if scientific data have yet to demonstrate impacts. The precautionary principle is meant to ensure that the public good is represented in all decisions made under scientific uncertainty.⁵⁰

The Precautionary Principle is reflected in Principle 15 of the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development (UNCED): ‘Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ The Precautionary Principle can be seen as a kind of insurance strategy, one that ensures that populations at risk are afforded protection in the face of profound uncertainty. The potential upstream and downstream effects of dams are not always clear, so taking a cautious approach is called for.

The Precautionary Principle recognises that there are limitations to science in addressing certain threats to the environment and human health, and challenges the current system where decisions are made based on evidence-based policy and scientific knowledge.⁵¹ The use of the Precautionary Principle is an increasingly favoured approach in some jurisdictions to assist in timely implementation of protective measures that help prevent damage to the

49 T. O’Riordan and J. Cameron, eds. *Interpreting the Precautionary Principle*. (London: Earthscan, 1994); D. Freestone and E. Hey, eds. *The Precautionary Principle and International Law*. Boston: Kluwer Law International, 1996); D. Kreibel et al ‘The Precautionary Principle in Environmental Science’ *Environmental Health Perspectives* 109 (9) (2001), pp. 871-876.

50 D. Kreibel et al, eds. *Op. cit.* p. 875.

51 G. Gill, “Precautionary principle, its interpretation and application by the judiciary: ‘When I use a word it means just what I choose it to mean-neither more nor less’ Humpty Dumpty”, *Environmental Law Review*, 21(4), (2019), p 293.

environment and human health. The 1990 US Clean Air Act Amendments is one of the many examples in which the precautionary principle has been incorporated in country's legislations.⁵² Within the European Union (EU), the Communication from the Commission explains that the Precautionary Principle should be applied on a wider scale and used as a risk management strategy by decision-makers when scientific evaluation indicates well-grounded potential risks to the environment, human, animal or animal health to prompt implementation of preventive measures.⁵³

Notably in India, the Precautionary Principle is recognised as an important driver of sustainable development and a part of customary international law. The implementation of the National Green Tribunal (NGT) Act (2010) along with the establishment of the NGT was an indication of this recognition. The Tribunal was created as a specialised body for efficient disposal of environmental cases and pass orders requiring authorities to take actions including restricting pollution, recovering compensation and initiating prosecution.⁵⁴ It was also explicitly indicated in Section 20 of the Act that, "the Tribunal must apply the Precautionary Principle when processing judgement under the environmental jurisprudence".⁵⁵ Thus, this reiterates India's position in taking precautionary measures to protect its people and environment.

Adoption of the Precautionary Principle for the case of LHWP to protect the affected communities will be highly dependent on the Court to push for the recognition of the principle so that it is no longer just a concept but acquires the status of a general principle of Community Law.⁵⁶ It is only with the support of both the governments and the courts that great success in environmental and social protection has emerged in India, since the NGT Act was implemented in 2010. 29,760 cases with judgments applying the Precautionary Principle have

52 B. Goldstein, "The precautionary principle also applies to public health actions", *American Journal of Public Health*, 91(9), (2001), 1358-1361.

53 European Commission, "Communication from the Commission on the precautionary principle" (2000), <https://op.europa.eu/s/ogW> (accessed 13 November, 2020).

54 National Green Tribunal (NGT), "About Us", <https://greentribunal.gov.in/about-us> (accessed 13 November, 2020).

55 Ministry of Law and Justice, 2010, "National Green Tribunal Act, 2010", https://greentribunal.gov.in/sites/default/files/act_rules/National_Green_Tribunal_Act_2010.pdf, p 9 (accessed 13 November, 2020).

56 The Precautionary Principle is mentioned in three places in the *Lesotho Environment Act 2008 (No. 10 of 2008)*. *Government Notice 237 of 2008*. Maseru: Government of Lesotho. It is unknown how many times this principle has been cited in legal cases in Lesotho.

been handed down by the NGT.⁵⁷

In the case of *Vimal Bhai v Tehri Hydro Development Corporation and Union of India and State of Uttarakhand*,⁵⁸ the judgment is an instance where the Precautionary Principle along with the Polluter Pays principle were applied by the Tribunal. The Applicant (Vimal Bhai), a social activist, had raised various environmental concerns regarding the dumping of muck, stones, and soil into the River Alaknanda from the construction of the dam and road for Vishugud-Pipalkoti Hydroelectric Power Project by Tehri Hydro Development Corporation (THDC) but lacked scientific evidence to prove the extent of the negative impacts. However, considering that the Project lies in an eco-sensitive area, in the judgment issued by Justice Swatanter Kumar, the ruling was that there were reasonable grounds to take precautionary steps in the interest of the environment and ecology at the River. Applying the Precautionary Principle, the judge understood that science was inadequate in providing the necessary evidence but that there was justified cause for concern that the dumping might potentially lead to irreversible damage to the River's ecology. Therefore, the judge concluded that the onus was placed on the Respondent (THDC) to protect the natural assets and "take all expected precautions and preventions to ensure that no pollution results from its activity"⁵⁹ and compensation shall be recovered from both the Respondent (THDC) and subcontractors or agents who carried out the dumping. In litigation relating to the LHWP, judicial support will be needed, to systemise the application of this Principle.⁶⁰ This will place the burden squarely upon the LHDA and other relevant authorities to take precautionary measures, and to compensate the affected communities properly.

The principle of environmental management contained in the National

57 National Green Tribunal, 2020, "Grand Total of Institution, Disposal and Pendency of the cases of NGT Principal Bench and all Zonal Benches from the date of its inception till 31-05-2020", <https://greentribunal.gov.in/> (accessed 13 November, 2020).

58 *Vimal Bhai v Tehri Hydro Development Corporation and Union of India and State of Uttarakhand*, [2017] (National Green Tribunal, Principal Bench, New Delhi), Original Application No. 197 of 2016 (Miscellaneous Application No. 376). Vimal Bhai, Applicant vs Tehri Hydro Development Corporation, Union of India, and State of Uttarakhand.

59 *Vimal Bhai v Tehri Hydro Development Corporation and Union of India and State of Uttarakhand*, [2017] (National Green Tribunal, Principal Bench, New Delhi), Original Application No. 197 of 2016 (Miscellaneous Application No. 376), para [17].

60 *Lesotho Environment Act (No. 10 of 2008)*. (Government Notice 237 of 2008. Maseru: Government of Lesotho. We are not aware of any Lesotho precedents. It should be noted that *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* (11478/18) [2018] ZAWCHC 127; [2018] 4 All SA 889 (WCC); 2019 (2) SA 403 (WCC) is where the precautionary principle is recognized in South Africa.

Environmental Management Act 107 of 1998 (NEMA), but as a precedent that would be influential in Lesotho is the ruling of the judge that the international precautionary principle must be applied under South African law. It could be argued that a Lesotho court might follow suit.

20. ENVIRONMENTAL, SOCIAL AND CORPORATE GOVERNANCE

The emerging concept of Environmental, Social, and Corporate Governance (ESG) refers to the three central factors in measuring the sustainability and societal impact which is gained by an investment in a company or business. It has increasing traction as an operating standard for corporate and professional activity, as it relates to corporate health, risk and return, in particular where it is applicable to development infrastructure projects. For any major construction companies contemplating engagement in the construction of Phase II LHWP, it is a corporate reality, carrying complex potential impacts upon funding, insurance, and reporting.

These social safeguards consist of the rules or legal positions pertaining to the protections of people affected by projects or policies such as those involving resettlement.⁶¹ The legal or quasi-legal clauses in documents of the World Bank and other finance and development institutions specifying how people affected by projects are to be dealt with, have formed an essential part of this analysis.⁶² Social safeguards are also included in conventions relating to climate change such as those relating to REDD+ (reducing degradation and deforestation) which stipulate that climate-affected peoples' living standards should be mitigated, restored or improved.

Such international legal norms have increasing relevance and applicability, particularly for development bank finance, lender liability, shareholder confidence, etc. In reflecting compliance with such norms, some private mining and oil companies, among others, have developed guidelines on corporate social responsibility which devote some attention to issues of

61 R. Tello, *Social Safeguards: Avoiding the Unintended Impacts of Development*. (Arlington, Virginia: Amakella Publishing, 2015).

62 World Bank, *Guidance Note for Borrowers – Environment and Social Framework for IFP Operations: ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*. (Washington, DC: The World Bank, 2018a); World Bank, *Guidance Note – ESS7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*. (Washington, DC: The World Bank, 2018b). United Nations Development Programme, *UNDP SES Standard 5. Displacement and Resettlement*. (New York: United Nations Development Programme 2020).

resettlement. Issues surrounding corporate social responsibility of transnational corporations and agencies have become significant areas of debate in recent years

21. COMPENSATION – WHICH WAY NOW, IN LESOTHO?

21.1 The vital need for technical assistance

Resettlement and relocation are complicated processes, ones that are often hard on the people who are relocated. A major problem with development-related resettlement and relocation programs is that government officials or members of development agencies tend to focus their attention on the tangible: the loss of residences (i.e. homes), other buildings (for example, latrines), corrals [kraals] (livestock pens), and assets such as fruit trees rather than on loss of access to the means of livelihood and food production, especially land, gardens, fields, grazing, and wild resources on which people depend for subsistence and income. Provision of compensation often works out in such a way that it does not serve as a replacement for lost assets nor a means of ensuring rehabilitation or improvement of livelihoods. Aside from the mystifying delays which have generally characterised the LHDA's care and concern for these project-affected communities, the LHDA's obligation to provide technical assistance, to enable people to regenerate their communities, seems to be an equally elusive LHDA goal. What causes the greatest concern of all is that lessons for the LHDA from Phase I have not clearly not transferred to the preparatory work for Phase II.

21.2 Financial recompense taking an appropriate form

An annuity system is an attractive alternative to cash payments, because it allows for investment and it can be managed with relative ease. This kind of system has the advantage of being able to accommodate the various sources of individual and community income. It also allows people the flexibility to save their money, divide it among designated kin or other people, or pool their funds for use in community projects. A 'nest egg' plan can allow for the banking of funds indefinitely. Individuals could choose to invest a portion of their annuities in a special-purpose activity such as a revolving credit fund. Revolving credit

schemes have worked reasonably well in a number of developing countries, although they vary in their effectiveness (e.g. as seen in the Grameen Bank of Bangladesh and other schemes in Uganda). Some of them have served as a means of providing people with the capital necessary to initiate businesses and both on-farm and off-farm income generating activities. If development is to be sustainable, communities need to have access to appropriate resources, information, and technical assistance, and the continuing opportunity to participate in decisions that affect their interests and circumstances.

There are other means of assuring a revenue for project affected people, such as ‘the automatic transfer of revenues from sales, equity sharing with project affected people, taxation with a direct focus on redistribution to the dispossessed, land leases being granted to project affected people’s communities’.⁶³ A benefit-sharing approach involves one in which people not only have their assets replaced and their livelihoods brought back to the levels that existed before the development. They are entitled to improvements in their circumstances.

22. ‘LAND FOR LAND?’ HOW CAN BASOTHO LAW ACCOMMODATE THIS CONCEPT?

22.1 Eminent domain and the expropriation of land

The Constitution of Lesotho vests all land in Lesotho in the Basotho Nation. The King has the power to allocate Basotho Nation land to individuals and communities. This power must be exercised in accordance with the Constitution and any other law. Because all land vests in the state, eminent domain *per se* does not arise.

Section 108 (1) of the Constitution grants the King the power to allocate land that is vested in the Basotho Nation, to make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted. This power, vested in the King, may be exercised only in accordance with the Constitution and any other law.

⁶³ A. Oliver-Smith, ‘Introduction: Development-Forced Displacement and Resettlement: A Global Human Rights Crisis. In A. Oliver-Smith, ed. *Development and dispossession: the crisis of forced displacement and resettlement*. (Santa Fe, NM: School for Advanced Social Research (2009), pp 3-23.

Section 17 of the Constitution prohibits the arbitrary seizure of property. The taking of property is permissible only in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit. The taking of property compulsorily must be justified, regard being had to the hardship that may result to any person having an interest in or right over the property, and subject to prompt payment of full compensation.

Every person who is deprived of possession of property under the Constitution has a right of direct access to the High Court for the determination of their rights or interest in the property, the amount of compensation payable and to obtain prompt payment of such compensation.

22.2 “Full compensation”

Full compensation is not defined. Arguably, providing “land for land” is full compensation for the loss suffered by displaced people. However, this may be an illusion. Even if the land is well located, equal in quality, fertility and utility, and the displaced people have the resources to develop the land to a productive state, it may not compensate them for their irreplaceable loss of “sense of place” at being separated from their ancestral lands.

Many communities are defined by their connection to their land, not only because of its utility, but also by their historical, cultural, and emotional ties to it. Separating people from their land can leave deep and irreversible psychological scars. This loss may be permanent and irreparable. Where a person has been permanently disfigured by an injury, the scars, both physical and psychological may be permanent. In such cases, monetary compensation is the only recognised redress a claimant can expect from the legal system. Specialists’ evaluation and precedent assist the courts in determining the amount payable, and finality is reached, in the legal process at least, but not necessarily for the affected person.

Compensation for physical injury, disfigurement and emotional shock by the payment of a carefully considered but nevertheless arbitrary amount of money may be appropriate in a personal injury case but provides no solution to compensation for the psychological or emotional shock caused by the loss of land by indigenous people.

22.3 Guidance might be found in environmental impact management

Generally, where degradation of the environment cannot be avoided during lawful activities, harm must be minimised or mitigated, and then made good as far as possible or practicable. Often, there are residual environmental impacts that are borne by society at large. This deficit can be made good by monetary compensation to an environmental fund or cause, by undertaking the rehabilitation of a degraded environment, or other projects that are beneficial to the environment and society.

“Environmental offsets” are becoming increasingly popular. What is envisaged, is that in return for the right to destroy pristine forests, wetlands or grasslands, a developer will acquire “like for like” land and secure this for conservation purposes, normally in perpetuity. If the land to be acquired is not equal in quality, but can be rehabilitated to an acceptable state, the deficit is made up by applying multiplication factor requiring the offset land to be anything from three to 30 times the area sacrificed.

This too is illusory. Restored wetlands, secondary grasslands or plantation forests are no fair trade for irreplaceable, pristine wetlands, grasslands or ancient forests. However, the legal system deems the public interest to have been served. The scales of justice have been balanced, apparently. What a displaced community has lost is “irreplaceable”. It follows that determining compensation for what is lost may be impossible. At best, one can hope for a result for the affected community that is just and equitable.

Providing “land for land” addresses the spatial component. Providing resources for and equipping the affected community to make the substitute land productive, and its use sustainable, delivers the economic element. This leaves a social deficit, in the form of the loss of sense of place (defined by culture, history and the emotional connection to ancestral lands). Can the scales be balanced by an “offset”? Probably not, but a programme for the restoration of livelihoods linked to the cultural practices and the way of life previously enjoyed but improved in ways developed in consultation with the communities, would be a start. This would be consistent with the requirement of the Treaty that the affected communities should be enabled to regain a standard of living equal to or better than that they enjoyed before displacement.

This debate is probably rendered moot. Finding equivalent land might

not be possible, especially in a small, mountainous country like Lesotho, with limited arable land and harsh climatic conditions. As observed, ancestral lands by definition, once inundated, cannot be restored. Compensation with land for land would only have been possible if South Africa had been prepared to incorporate part of its territory into Lesotho – similar land down-river. At the time of the Treaty, this was inconceivable. It is not an outrageous suggestion at this stage. The expropriation of land for this purpose to secure a source of water that is critical to South Africa's economic survival would be justifiable under the SA Constitution. Obviously, such action then and now would have massive geopolitical implications. There are similar unresolved issues with Eswatini (Swaziland) over border re-alignments, promises made by both the apartheid government and the ANC before it came into power. At this stage, for the displaced communities in Lesotho, "just and equitable" compensation for their loss, would be an important step towards a return to life as they knew it.

23. COMPENSATION – WHO SHOULD RECEIVE IT?

If the governments of Lesotho and South Africa are to meet their 1986 Treaty obligations of project-affected people being 'enabled to maintain a standard of living not inferior to that obtaining at the time of first disturbance,' then substantial efforts are still required to provide for the current and future needs of all project-affected peoples. For example, there are still many unresolved Phase I issues. As of September 2020, some cash compensation had been made available for the Local Legal Entities in the upper reaches of the rivers affected by the project. Yet there has been no final decision taken as yet to provide compensation to the Local Legal Entities in the distal reaches. There are a number of reasons why distal reach communities should receive compensation like their upstream counterparts. First, the upstream (proximal reach) populations have received compensation, thus setting an important precedent. These populations did not have to demonstrate loss in order to qualify for compensation. Second, the principle of equity would dictate that those people in the distal areas should receive the same treatment as those in the proximal reaches. Third, the Treaty and the Order state specifically that all project-affected people should receive compensation. No distinction is drawn between degrees of impact. Fourth, the distinction between proximal and distal reaches is an artifact of the Instream

Flow Requirements study team and did not reflect the ways in which the people themselves perceive the project. Virtually all of the people to whom the authors have spoken, have expressed the opinion that they were project-affected.

In 2020, some of the villages in the Mohale area said that they wanted to be resettled. For them, this would mean a second resettlement. Questions were raised by the village members about whether or not they would receive moving expenses and have other costs covered if they were able to undertake this resettlement. LHDA had not agreed that these villages could be resettled as of November 2020.

International best practice in the area of development-related resettlement calls for *improvement*, not just restoration of the livelihoods and well-being of project-affected peoples. In order to offset these recurrent risks and prevent impoverishment from occurring and worsening, among project affected communities, then the relevant authorities will surely wish (i) to consult fully with those people being relocated, to ensure their full participation in all decisions implementing the project, and (ii) to build a proper set of baseline data concerning project-affected people. Compliance with the terms of the LHWP Treaty arguably creates a continuing legal obligation to improve data collection, which contains inherent challenges. What data can be reliably collected and on what basis can one translate the inchoate into the measurable? It is time to consider ways in which people can become direct beneficiaries, having created systems which ensure careful monitoring of the implementation processes. It is essential to ensure competent evaluation of the outcomes of the resettlement efforts, and to create strategies based on the best international practices.

Organisations such as SOLD are able to provide key assistance in the creation of such strategies, anticipated in their current charter:

1. Communities demand compensation for life, and not for 50 years as is currently the case with the Treaty and Compensation of 1997
2. Affected communities want water and sanitation as human rights
3. Affected communities want 10% of royalties from government
4. Affected communities demand that all Ombudsman recommendations be fully implemented by LHDA
5. Affected communities demand that development around LHWP areas should be a right and mandatory

6. Affected communities demand that 1986 Treaty be reviewed
7. Affected communities demand that all outstanding compensation should be paid by LHDA, and must come with arrears⁷

It remains to be seen whether the Lesotho Highlands Development Authority will accede to these requests, and whether the governments of Lesotho and South Africa are prepared to underwrite the costs involved.

The plight of the displaced communities in Lesotho provides fertile ground and extensive justification for the reassessment of the compensation policies applicable to people displaced by major infrastructure projects, mining, and the exploitation of natural resources. Hopefully, this article will stimulate debate on the subject, and even provoke legal action to establish judicial precedent on the meaning of “compensation” and the recognition of the gross injustices perpetrated on the vulnerable people who are the “victims” of development.

The outcomes for project-affected peoples are not encouraging. In a desk review conducted by the world-renowned expert, Ted Scudder,⁶⁴ he found that the incomes of displaced communities were improved or restored in only 16% of the cases he examined. Landlessness was an issue in 86% of the cases, joblessness in 80%, food insecurity in 79%, and marginalisation and reduced access to common property resources in 77% of cases he examined. The following factors were identified as key, in producing these outcomes: lack of implementation capacity, lack of finance, lack of political will, lack of opportunities available for resettling households, and lack of participation in decision making.

Some of the ways to ensure that people are not affected negatively by development projects include the compilation of detailed baseline studies, including the full observation of social safeguards and Free, Prior, and Informed Consent principles; engaging in careful monitoring and evaluation (M&E); the design and implementation of compensation and benefit-sharing programs; the set up and running of development trust funds; the exploitation of natural resources in a sustainable manner; capacity-building of local institutions such as community trusts, co-operatives, and other kinds of community-based

⁶⁴ T. Scudder, *Future of large dams: Dealing with social, environmental, institutional and political costs*. (London: Earthscan, 2005). T. Scudder, *Large Dams: Long term impacts on riverine communities and free flowing rivers*. (Singapore: Springer Nature, 2019).

organizations (CBOs) or Local Legal Entities (LLEs); and a focus on the rehabilitation, restoration, or, importantly, improvement of project-affected people's livelihoods and well-being that existed prior to relocation.

Dynamic regional economies benefit by minimizing the adverse economic and social impact of dams. Robert Picciotto makes the following useful observations which have particular relevance for the LHWP:⁶⁵

- (i) Alternatives are not systematically examined, with resettlement programmes developed too late in the project cycle, and human resettlement being treated as part of project implementation, rather than as part of the design of the project, and a high priority in its own right.
- (ii) Resettlement units within the public sector agencies are frequently not properly trained, equipped or enabled to do their work. Agency operatives are often more engaged with the civil engineering aspects of a project.
- (iii) The political will to ensure the success of resettlement is often absent, at all levels.
- (iv) Civil society is often not involved sufficiently or effectively, in the implementation of resettlement programmes.
- (v) Income restoration is extremely challenging. Identifying opportunities for alternative income generating work, which will suit resettlers' aspirations and capacities, is a long term and difficult task, which has to be recognised as such.
- (vi) Adequate funding, and budgets, are essential to the success of a resettlement programme.'

24. CONCLUSIONS

This article has sought to articulate and assess the effectiveness of the law as it concerns people who are adversely affected by the LHWP, a vast infrastructure project, internationally funded, which has been under construction since 1986, in Lesotho and South Africa. We conclude that whilst the applicable law, in

65 R. Picciotto, "Involuntary Resettlement in Infrastructure Projects: A Development Perspective" in GK Ingram, and KL Brandt (eds), *Infrastructure and land policies: Proceedings of the 2012 Land Policy Conference*, Hollins, NH: Puritan Press Inc, (2012) pp. 236-262 .

simplistic terms, *provides* for the equitable treatment of project affected peoples, it does not go far enough to *ensure* that such treatment is indeed provided either appropriately, or in many cases, at all. According to the copious amounts of available evidence, it is arguable that without strategic litigation, the law has yet to ensure the long-term protection of community interests. The governments of Lesotho and South Africa, after committing to fair and just compensation for project-affected communities, allowed for changes in the compensation principles and practice over time.

The great concern now is that the legal case brought against the LHDA by the Khabang Multipurpose Co-operative Society⁶⁶ has not been respected by the LHDA. The judgment given by the Lesotho High Court should now be observed by the LHDA, which continues to refuse to do so. If the LHDA did finally comply with the judgment, then the Lesotho Highlands Water Project, which has received numerous awards for its engineering works would begin to occupy a position in which it would be recognized for its social safeguards policies and for ensuring that all project-affected people were compensated equitably, fairly, and completely in line with international resettlement and compensation guidelines.

ACKNOWLEDGMENTS

This article is dedicated to Bojosi Otlhogile of the University of Botswana, whose many contributions to the law and legal systems of Botswana and Southern Africa have been substantial. The research upon which this article is based was supported by Protimos, the Survivors of Lesotho Dams (SOLD), in Maseru, the Lesotho Highlands Development Authority (for the Panel of Environmental Experts work of Robert Hitchcock), the National University of Lesotho, the Open Society Institute for Southern Africa (OSISA), the University of KwaZulu Natal, the University of Botswana, and the University of New Mexico. We thank the governments of Lesotho and South Africa and the Lesotho Highlands Development Authority for their assistance in the work presented here. We also thank the members of the Panel of Environmental Experts (POE) for their contributions, including Amusaa Inambao, John Ledger, and Mike Mentis, as well as David Cownie, Paul Devitt, Zodwa Dlamini, Lebohang Moleko, Richard

66 Supported by Protimos and the Seinoli Legal Centre.

Ramoeletsi, Ted Scudder, Keketso Sefeane, Tebo Priscilla Mosue Teletse, Taole Tesele, Mavusa Tshabalala, and Stephen Turner for the advice and information they provided to us. We would like to acknowledge Jimcall Pfumorodze for his useful editorial comments and recommendations, and an anonymous reviewer of our chapter for the *University of Botswana Law Journal* which assisted in its improvement substantially.