LAW AND ITS IMPACT ON KENYA'S INDIGENOUS COMMUNITIES' LAND RIGHTS: THE OPPORTUNITIES

Connie N. Maina Sozi

Thesis submitted for the Degree of Doctor of Philosophy at the Institute of Commonwealth Studies, University of London.

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Declaration

I hereby declare that this dissertation is the result of my own independent investigation except where I have indicated my indebtedness to other sources.

This dissertation has not already been accepted in substance for any other degree, and is not being submitted concurrently in candidature for any other degree.

Signed _____

Connie N. Maina Sozi

(Candidate)

Abstract: For those communities in Kenya that identify as indigenous, and with the indigenous movement, land is the core of their collective existence. To remove them from their ancestral lands violates their customary rights to land and says to them that they do not matter. For years they have been the victims of those in power who have used their political influence as well as the law to denigrate and invalidate those rights. This has been through forced assimilation of these communities into larger groups, forced evictions, damaging of property, killings, inhuman and degrading treatment; and broken promises. Judgments of regional bodies under the African Charter on Human and Peoples' Rights framework affirming those rights have gone unimplemented. This thesis therefore looks at what law has been, what it is and what it could do with a particular focus on the Constitution of Kenya 2010 and its harbinger- on land- the National Land Policy 2009. Alternatives existing under the East African Community Treaty and also the World Bank's framework on indigenous communities, -are also examined. The conclusion reached is that land in Kenya is a political chalice, howbeit, progressive law has been enacted. This must have an intended purpose, and where that purpose is not fulfilled, law may as well not exist. There is opportunity in the law for both communities and law makers to close in on this disparateness and bring out the realisation of these land rights.

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> 'Legal focus stems from the reality that the legal treatment of property rights is the ultimate determinant of tenure security.'[1]

Introduction

1 A discussion on law relating to indigenous communities' land rights is multifarious and complex in nature. It reeks of a power game in which the players are the Government, its agencies, politicians and funding donors, other citizens and finally the indigenous communities. Whoever has the most power possesses the land or determines what happens to it. Kenya's land politics has in fact been described as 'first and foremost a redistributive game that creates winners and losers'.[2] Land has been used to gain power in Kenya;[3] and law, whether imposed, respected or disregarded has played a pivotal role in that.

2 This thesis observes that land law has evolved from a communal land tenure-form in the pre-colonial period, where members of communities were allowed to use community land as they wanted as long as this was in line with the customary laws,[4] and where the concept of individual or private ownership was unknown,[5] to a codified pro-individualised and public-tenure system under the colonial regime. In introducing its systems, the colonial administration imposed measures that were alien to the native population and which ignored their existing and political patterns.[6] This affected the Kenyan native population as a whole including indigenous communities and led to

[1] Liz Alden Wily, 'The Community Land Act in Kenya Opportunities and Challenge for Communities' (MDPI 2018) <https://www.mdpi.com/2073-445X/7/1/12> accessed 5 June 2018.
[2] Catherine Boone, 'Land Conflicts and Distributive Politics in Kenya' (2012) Volume 55 Number 1 African Studies Review 75.
[3] Cyprian Fisiy puts it more aptly: 'Control over land has served as an important component of control over people', cited in Catherine Boone, *Property and Political Order in Africa: Land Rights and the Structure of Politics* (Cambridge University Press 2014).
[4] Walter Odhiambo and Hezron Nyangito, *Land Laws and Land Use in Kenya: Implications for Agricultural Development* (Kenya Institute for Public Policy Research and Analysis, 2002).
[5] Peter Ng'ang'a Mburu, 'Strategies to Modernize the Land Registration System in Kenya' (DPhil Thesis University of Groningen 2017).
[6] Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 211.

mass disinheritance of individuals and communities of their land, inequitable access to land and contributed to land tenure insecurity particularly for indigenous peoples.[7] The post-colonial era has seen perpetuation of the colonial system by Governments which have been run by individuals from dominant communities, much larger and more powerful than indigenous communities.

3 The communities that these individuals belong to have chosen to follow the individual rather than collective system of land ownership, partly as this has aligned with the agenda of donors, until now. The law in its current form, as introduced by the 2009 National Land Policy (NLP) and established by the 2010 Constitution, is a departure from the law as it was and re-introduces communal land tenure as a valid land regime. This is referred to as community land under the Constitution and is the category of land which enshrines indigenous communities' land rights. The language used in both the NLP and the Constitution are progressive in the articulation of indigenous communities' land rights. There is also the Community Land Act 2016; and other constitutionally-inspired laws dating from 2012 to 2016 relating to land, forest-management, natural resources and human rights etc., which have the potential to impact on indigenous communities one way or the other, which are some of the opportunities this thesis will explore.

Background

4 Kenya became a British protectorate in 1895. Protectorates were those territories which were not yet fully brought into the dominion of the British Crown but where Britain controlled the external affairs. In Kenya's case, this period of protectionism marked the beginning of imposition of laws by the British which began the stripping off of Kenyan native communities of their land rights. As an example, the Crown Lands Ordinance of 1902 and the Crown

[7] Republic of Kenya Ministry of Lands, 'Sessional Paper No.3 of 2009 on National Land Policy' (Ministry of Lands 2009), para 23. Hereon NLP.

Lands Ordinance of 1915 converted land formerly held by Africans to Crown Land.[8] The Rift Valley region of Kenya, home to several indigenous communities was taken from these communities and apportioned to white settlers who 'created mixed farms, huge ranches, large plantations, commercial estates' using African labour.[9]

5 When Kenya became a British colony in 1920 it meant that Kenya's external and internal affairs came under the territory of Britain. This period saw further enforcement of laws by the colonial administration to entrench its hold on the territory. The use of the law this way did not only happen in Kenya but throughout colonised Africa. H.W.O Okoth-Ogendo observed in a presentation on 'The Last Colonial Question' that:

> 'European powers took the view that political sovereignty in and of itself vested radical title to land comprised in the subject territory in much the same way as it would have done had such land been part of their domestic possessions …….. thus these powers issued decrees and/or proclamations soon after the Berlin conference, declaring that they had acquired both the territory under jurisdiction, and the property comprised therein …… (and) those decrees/proclamations purported to convert all land under their various jurisdictions, ownership of which could not be established by documentary evidence, into the private property of respective sovereigns. Thus by the mere stroke of the pen, title to all land in undocumented Africa, was appropriated to colonial authorities.'[10]

6 Centuries earlier the Europeans had used 'national flags and religious symbols' in Canada, United States, New Zealand and Australia, to 'undertak(e) a well-recognised legal procedure and ritual mandated by international law and

[8] Bahame Tom Nyanduga, 'Applicant's Final Submissions on the Merits in Application 006, *African Commission on Human and Peoples' Rights vs Republic of Kenya*' (The African Court on Human And Peoples' Rights 27 to 28 November 2014).
[9] Boone (n 2).
[10] H.W.O Okoth-Ogendo, 'Keynote Presentation' (Workshop on Norwegian Land Tools Relevant to Africa, Oslo, Norway, 3-4 May 2007) <https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September,_2014/Articles/HWOOkoth-Ogendo_THELASTCOLONIALQUESTION.pdf> accessed 14 May 2016.

designed to create their country's legal claim over 'newly discovered lands' and peoples',[11] i.e. the doctrine of discovery.

7 In Kenya, the manner in which the English regime's decrees and proclamations were applied created a very complex land management system with a myriad of statutes on land administration and management involving multiple institutions.[12] The system was deliberately set up to favour individual ownership,[13] and thus white settlers. By the 1940s the majority of Africans in Kenya had now become squatters, and were working, on land that was theirs but for its expropriation by the settlers and were being prevented from using land for their own benefit.[14] Patrick McAuslan observes that this situation became untenable and led to 'armed insurrection in the 1950s'[15] and forced the colonial government to 'commence programmes to meet the demands for land but in a way which was designed to maintain the underlying principle of private ownership of land'.[16] The basis of the reforms pursued thereafter by the colonial administration and after independence, by the Kenyan Government, was the 1955 report of the East Africa Royal Commission.[17] It is important to underscore certain excerpts from this report as these preface some of the developments that took place thereafter, which were detrimental to indigenous communities' communal land rights.

8 The Commission was asked by the colonial government to:

> 'examine the measures necessary to be taken to achieve an improved standard of living, including the introduction of capital to enable peasant farming to develop and expand production; and frame

[11] Robert J Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: the Doctrine of Discovery* (Oxford University Press 2010).
[12] NLP (n 7).
[13] ibid.
[14] Boone (n 2).
[15] Patrick McAuslan, *Land law Reform in Eastern Africa: Traditional or Transformative? A critical review of 50 years of land law reform in Eastern Africa 1961-2011* (Routledge 2013).
[16] ibid.
[17] East Africa Royal Commission, 'East Africa Royal Commission 1953-1955 Report, Presented by the Secretary of State for the Colonies to Parliament by Command of Her Majesty June 1955', Her Majesty's Stationery Office, Cmd 9475. (Hereon EARC Report).

recommendations with particular reference to: (1) the economic development of the land already in occupation by the introduction of better farming methods; (2) the adaptations or modifications in traditional tribal systems of tenure necessary for the full development of the land; (3) the opening for cultivation and settlement of land at present not fully used; (4) the development and siting of industrial activities; (5) conditions of employment in industry, commerce, mining and plantation agriculture with special reference to social conditions and the growth of large urban populations; and (6) the social problems which arise from the growth of permanent urban and industrial populations'. [18]

9 In its examination of 'The Relationship of Land Tenure and Land Usage: Individualization', the Commission recommended promotion of individual tenure over communal tenure. Its justification for this was as follows:

> 'We turn now to the relationship of land tenure and land usage. We have said it permeates all the faults of the present systems. In order to establish a system of consolidated small-holdings the community has to be persuaded to forgo the tradition of running stock communally over the land…….to deal with displacement it has to forgo the tradition of keeping others out of unused land on the plea that the clan concerned has its own responsibility for its future children. In order to promote specialization it has to forgo the tradition of forbidding outsiders to use land to plant permanent crops and build permanent houses. To do all these things it has to be persuaded that the continuation of traditions designed to preserve a clan or tribal security are now leading to a dangerous dead-end and that the road to a higher standard of living for all lies in giving security to the individual stable unit. The greatest allies for persuading the community to make these

[18] ibid.

changes must be those individuals who are convinced that their own personal future is at stake therein..... individualization has …… the virtue of developing a political as well as an economic sense of responsibility…….'[19]

10 The plan therefore seems to have been, as observed by Paul Keal in respect of other European-colonised territories, the 'decimation of indigenous peoples, or if not that, at least destruction of their cultures',[20] to prevent these cultures from hampering any economic benefit that could be derived from individualisation of lands. Any aspiration therefore to maintain traditional cultures, keep lands for future generations and retain communal relationships with land i.e. common features of indigenous community existence, was to be thwarted.

11 The Commission further recommended the creation of 'a process of adjudication and registration' not only of the individual holdings area but of whole areas. In cases where interests in land were not considered to confer full ownership rights, the Commission considered that registration of those lands would ultimately 'bring into being full ownership interests';[21] and where there were any residual interests in land, the Commission recommended that legislation be passed to 'enable governments to confer residual interests on individuals'.[22] Focus clearly being individual tenure. The recommendations proposed by the Commission were ratified in Kenya by the 1962 Registered Land Ordinance, strategically passed before Kenya became independent. The drive of the recommendations was to create a system of 'private ownership of land and …….. (ratify) the titles of colonial settlers as absolute owners of

[19] ibid, 323.
[20] Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2009).
[21] EARC Report (n 17) 353.
[22] ibid.

expropriated land……(thereby) sealing the fate of the landless and squatters (and) intensifying the tenure insecurity of the poor'.[23]

12 Kenyan gained its independence in 1963. Within 3 years of this point 20% of land in the Rift Valley's White highlands- land previously expropriated by white settlers- was purchased back by the Government,[24] through a scheme called the One Million Acre Settlement Scheme, funded by the World Bank, the British and German Governments. Christopher Leo opines that the Scheme satisfied a lot of demands including paying off the white settlers, meeting nationalist political demands, satisfying the conditions set by the funding bodies and even meeting 'the land grievances of Kenya's poor people'.[25] It is not clear how the land grievances of indigenous communities were met through this scheme given that the focus of those in power, the agenda of the World Bank and thrust of the East Africa Royal Commission beforehand. Moreover if they had been settled the problems that indigenous communities experience today would not be continuing.

13 Instead the Government's plans, upon independence, became more focused on securing African farmers' land holding, resettling African farmers on lands previously owned by white settlers, furtherance of 'cash-cropping and dairying and increased production for the market'; and expanding export productivity.[26] It was not in the Government's interests to restructure the laws to reverse the systemic problems created by the colonial administration on the status of community owned-lands. This is for example evident in the provisions of Kenya's first two post-colonial Constitutions of 1963 and 1969. They both designated land into three categories: public land or alternatively land vested

[23] McAuslan (n 15) , quoting K Karuti, O Lumumba and KS Amanor, The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances', in KS Amanor and S Moyo (eds) Land & Sustainable Development in Africa, London, ZedBooks, 100-126.
[24] Boone (n 2).
[25] Christopher Leo, 'Who Benefited from the Million Acre- Scheme? Toward a Class Analysis of Kenya's Transition to Independence', (1981) *Volume 15. No. 2 Revue Canadienne des Études Africaines/Canadian Journal of African Studies*.
[26] World Bank, 'Land Reform Sector Policy Paper', 1975.

in the Government of Kenya,[27] private land and trust land.[28] The only way that indigenous communities would have had access to land, if at all, was *via* the trust land regime in exercise of their African customary laws. However, the land reforms pursued by the post-independence Government made it possible for this land to be compulsorily acquired through registration and adjudication for Government or private purposes. Once this happened it was no longer vested for the community benefit. And any interests they had were extinguished,[29] as will be seen in the example of the Endorois indigenous community, to be discussed later.

Marketization and politicisation of land

14 Property rights have been found to 'lie at the confluence of the political-legal order and the economic order'.[30] Communal land tenure has been from the outset an antithesis to Kenya's land reforms which have been founded on neoliberalism, for exactly the reasons set out by the East Africa Royal Commission. Patrick McAuslan notes that the Royal Commission's 1955 recommendations, discussed above, actually 'influenced World Bank policy and set in train policies and legal developments to support them which have lasted to this day',[31] the main one being an 'emphasis….on issues of land titling and registration' and extirpation of customary tenure.[32] In fact the World Bank in its 1975 Sector Policy Paper on Land Reforms hailed 'the implementation and results of (Kenya's) reforms (as being) quite successful' although noting that '16% of the rural population' remained landless[33] which

[27] 1963 Constitution, s 205 of the 1963 Constitution defined this as land that as of 31 May 1963 encompassed all land in Nairobi (the capital city) previously vested in the British Monarch or the Governor of Kenya whilst Kenya was a Colony and Protectorate; and land in any region which similarly had been vested in the Governor and as of 1 June 1963 was vested or re-vested in the same. Also see decision of *Bahola Mkalindi v Michael Seth Kaseme & 2 others,* Land Case 168 of 2012, (Environment And Land Court At Malindi).

[28] 1963 Constitution, s 208 defined trust lands as special areas, temporary special reserves, special leasehold areas, special settlements areas, communal reserves, areas where permits of occupation were in force and freehold areas registered in the name of the county council. See 1969 Constitution, s114.

[29] The 1969 Constitution rehashed this position in s117 and 118.

[30] Boone (n 3).

[31] McAuslan (n 15)

[32] Ambreena Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (Zedbooks 2006).

[33] EARC Report (n 17).

appears to counter Christopher Leo's perspective on the One Million Acre Scheme. This policy paper further noted that the measures employed by the Kenyan Government which included more conversion of customary tenure to freehold, created tenancy that enabled 'in the temperate production areas…….increased on-farm investment and helped raise output'.[34] This actually aligned with aspirations set out by the Bank in the policy paper, of supporting land reform that led to 'increasing output, improving income distribution and expanding employment'.[35]

15 This reform agenda was to be part of a wider neoliberal agenda advocated by the World Bank and the International Monetary Fund (IMF), the Bretton Woods institutions, whose advice to borrower nations was that they ought to focus on 'fiscal austerity, privatisation and market liberalization'.[36] To fulfil this neoliberalist agenda, borrower nations like Kenya were required by these institutions, by imposition of conditions, to pursue policy reforms 'in exchange for access to resources'.[37] Notably the World Bank has been Kenya's main financer of development projects- with a recorded 35 active, 113 closed, 6 pipeline and 14 dropped projects- dating from August 17, 1964 to the present date.[38] This has of course meant that as with other borrower nations, these institutions have had 'unprecedented influence over' them,[39] and creates a situation where the role of the state is reduced.[40]

16 That is of course the purpose of the neoliberalist agenda. It creates a situation where 'competition is the only legitimate organising principle for human

[34] ibid, 34.
[35] World Bank, 'Land Reform Sector Policy Paper', 1975, 11.
[36] Joseph E. Stiglitz, *Globalization and its Discontents* (Penguin 2002).
[37] Sarah Babb and Alexander Kentikelenis, 'International Financial Institutions as Agents of Neoliberalism' in D. Cahill, M Cooper, M Knonings & D Primrose (eds), *The SAGE Handbook of Neoliberalism* (Thousand Oaks: SAGE Publications 2018).
[38] The World Bank, 'Projects & Operations' (The World Bank IBRD-IDA)<http://projects.worldbank.org/search?lang=en&searchTerm=&countrycode_exact=KE >accessed 16 June 2017.
[39] Babb (n 37).
[40] ibid.

activity'.[41] IMF economists actually accept that in the '80s there existed a neoliberalist agenda founded on 'two main planks', these being 'increased competition' and 'a smaller role for the state achieved through privatisation'.[42] In their view the agenda has 'rescued millions from abject poverty', increased technological knowledge to developing states, streamlined services and also reduced the 'fiscal burden on governments' but they also acknowledge that it has led to 'increased inequality' amongst other negative outcomes.[43] Joseph Stiglitz agrees that the policies pursued by the Bretton Woods institutions were meant to be applied to nations with worrying fiscal deficit, which called for 'fiscal discipline'. However, he observes that this discipline was not applied 'in the right way and at the right pace' thereby failing to achieve 'more equitable and sustainable growth'.[44]

17 However, this only explains in part why communal land rights have been suppressed. Another factor explaining the communal land quagmire in Kenya is that it has been the culvert through which those in power have reinforced their power.[45] The design or redesign of land regimes is not by default, it is by design, to facilitate governance.[46] In other words, those in power will not permit reforms if these do not advance their agenda. As will become apparent from discussions in the thesis, the process of land management and administration pursued by the post-independent Government has been 'one of the most pronounced manifestations of corruption and patronage',[47] further decimating indigenous communities' land rights. The One Million Acre

[41] Stephen Metcalf, 'Neoliberalism: The Idea that Swallowed the World' (The Guardian, 18 August 2017)<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>accessed 5 October 2019.
[42] Jonathan D. Ostry, Prakash Loungani and David Furceri, 'Neoliberalism: Oversold?', Finance & Development June 2016.
[43] ibid.
[44] Stiglitz (n 36).
[45] Ambreena Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' (2012) 50 The Journal of Modern African Studies 467 < https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/grabbed-state-lawyers-politics-and-public-land-in-kenya/EC25B795BE332A1B352670D1B92DC6D5> accessed 17 October 2018.
[46] Boone (n 3).
[47] ibid.

Scheme benefited those in power in independent Kenya than any other groups in society and because they could take land, they did.

18 It is observed that unlike in other African states where the central focus is 'use and abuse of ostensible customary authority', allocation of land by the state has been a tool in the hands of 'all of Kenya's governments' used for 'granting land access strategically to engineer political constituencies that would bolster them against their rivals',[48] evident from the 1960s to the present date where even the new constitutional land dispensation is viewed as the latest in a series of 'acts in an ongoing drama over structuring and the use of state power to distribute and redistribute land'.[49] Notwithstanding this is the law that currently is. Despite the negative effect that the law has had on their land rights, indigenous communities have used and continue to use law as a tool for adjudication of their land rights, a process that has not been without its challenges. Before we discuss those challenges it is important to discuss who indigenous communities are.

Identification of indigenous communities- regional and international position

19 The UN Working Group on Indigenous Populations' position is that there are 4 identifying characteristics for indigenous communities, namely: '1. the occupation and use of a specific territory; 2. The voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions. 3. Self-identification, as well as recognition, by other groups, as a distinct collectivity; 4. An experience of subjugation, marginalisation, dispossession, exclusion or discrimination'.[50] This is but a working definition that does not constitute an agreed global definition of the term 'indigenous'.

[48] ibid.
[49] ibid.
[50] African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (ACHPR and IWGIA 2005).

20 The African Commission[51] has considered it unnecessary to have a definition of indigenous peoples, as a single definition is unable to encapsulate all the characteristics of indigenous peoples. The Commission avers that focus should instead be placed on accentuating the 'main characteristics allowing the identification of the indigenous peoples and communities in Africa.'[52] Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that 'indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions,' but that is as far as it goes on that front. The International Labour Organization's Indigenous and Tribal Peoples Convention No.169 is globally the only legally binding instrument on indigenous communities, rather than offer a definition, talks in the following terms:

> '1. This Convention applies to:
>
> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
>
> 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'

[51] In relation to legal problems, its functions include giving its views or making recommendations to Governments, formulating and laying down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations, ensuring the protection of human and peoples' rights under conditions laid down by the present Charter and interpreting all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU: See Article 45 of the African Charter.

[52] African Commission on Human and Peoples' Rights, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (African Commission on Human and Peoples' Rights 2007).

21 The absence of a globally agreed definition is understandable as the experiences of indigenous communities differ globally. For example José Martínez Cobo,[53] in the 1980s defined indigenous communities as 'having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories…form non-dominant societies and are determined to preserve, develop…their ancestral territories, and their ethnic identity, as the basis of their continued existence….'[54] Whilst the majority of this definition may be applicable to a huge cohort of indigenous communities globally, the first part does not adequately capture indigenous groups in Africa in the same way that the ILO Convention's description of tribal, rather than indigenous groups does.

22 The African Commission states that the indigenous peoples' concept is contentious in the African context because from an autochthonous perspective/understanding of the concept or in comparison to European colonists, all communities in Africa, not just those identifying as indigenous communities today, can claim to be indigenous to Africa. However, it considers that those communities in Africa who do identify as indigenous today are those who have embraced that identity in order to address their post-colonial situation of marginalisation, discrimination, suppression and dispossession of their lands, i.e. their 'human rights sufferings'.[55] These human rights sufferings include: 'being left on the margins of development, being negatively perceived by more dominating mainstream development paradigms, having their cultures and ways of life discriminated against and facing threats of extinction',[56] which although to some degree echoes the Martinéz Cobo

[53] When he was Special UN rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities in a 1982 Study: José Martínez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations Final report submitted by the Special Rapporteur' (10 August 1982E/CN.4/Sub.2/1982/2 United Nations Economic and Social Council 1982).
[54] ibid.
[55] ACHPR and IWGIA (n 50).
[56] ibid, 87.

definition, is a human rights construct. According to the African Commission's Working Group of Experts on Indigenous Populations/Communities,[57] the:

> 'concept of indigenous peoples is indeed a human rights construct aimed at redressing specific violations of rights linked to cultural identities, livelihoods, and cultural existence as community. Factors that make certain communities self-identify as indigenous peoples, as a way of seeking redress and justice, are to be found in most working definitions or meanings of the term "indigenous peoples". They include "conquest", "settlements", "subjugation" "domination" and "colonisation".'[58]

23 The term 'indigenous' was used by colonial administrations, not just in Kenya but in other colonies to describe those found in those territories and was interchanged with terms such as 'natives, aborigines (and) populations found on those territories'.[59] In colonial Kenya, native communities, including those now self-identifying as indigenous, were not considered to be 'legal entities capable of having property rights in land'.[60] The laws enacted by the colonial administration disadvantaged all native communities. Had the indigenous movement in Africa that now exists, existed then, the majority of the communities in Kenya would have been able to claim that identity in the hope that it would highlight and address their human rights sufferings. The distinguishing event(s) must have therefore surfaced after independence. As noted earlier independence did not bear the fruits all communities had hoped as those who identify as indigenous today continued to experience subjugation, marginalisation, dispossession, exclusion and discrimination. Arguably, absent these factors, there would be no need for identification as indigenous in the African context.[61]

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[57] The Working Group was created by a resolution: '51: Resolution on the Rights of Indigenous Peoples' Communities in Africa' of the African Commission in November 2000 with a mandate to: i) examine the concept of indigenous peoples and communities in Africa; ii) Study the implications of the African Charter on Human and Peoples' Rights on the well-being of indigenous peoples; and iii) recommend ways to monitor and protect indigenous communities.

[58] Albert Kwame Barume, *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (IWGIA 2014).

[59] ibid, 25.

[60] Collins Odote, 'Debunking The Fallacies, Community Land Rights: Which Way Forward, Now That They Are a Reality?' *Daily Nation* (Nairobi, 6 May 2013).

[61] Barume (n 58).

24 Therefore although all Africans are indigenous to Africa, it is this kind of continuing 'structural subordination'[62] of certain communities by far more dominant groups and the State, and the need to have that subordination and all its by-products uprooted, that the African Commission opines necessitates their reliance on the indigenous concept. Indigenous groups in Africa are therefore said to have, in an attempt to 'address (their situation) and overcome these human rights violations, aligned themselves with the international movement for the rights of indigenous peoples'.[63] Although the efficacy of construing indigenous identity in Africa in the manner above is understandable, one could question what happens when the structural root causes- the structural subordination- no longer exist(s).[64] One may argue that addressing and redressing structural subordination in other contexts has not led to questioning why equality laws remain in force, and this is possibly because discrimination and subjugation in human society will always exist one way or another.

25 In any event whilst it remains, one theme that is characteristic of both the African human rights construct of indigenousness and elsewhere, is self-identification. The African Commission's Working Group of Experts on Indigenous Populations/Communities, has averred that self-identification and recognition of the self-identity and distinctiveness of indigenous peoples by other groups is descriptive of who is or is not indigenous;[65] and that the term 'indigenous populations/communities' has evolved over the years from being a reference to native inhabitants of territories in the colonial period in many African states, to a principle underpinned by self-identification and recognition of the self-identity of peoples.[66] Similarly, the Inter-American Commission on

[62] ACHPR and IWGIA (n 50).
[63] ibid.
[64] Felix Ndahinda, 'Historical Development of Indigenous Identification and Rights in Africa' in Laher R and Sing'Oei K (eds), *Indigenous People In Africa, Contestations, Empowerment And Group Rights* (Africa Institute Of South Africa 2012) 27.
[65] ACHPR and IWGIA (n 50) 12, 93; See also the Endorois case (n 114), para 157.
[66] ACHPR and IWGIA (n 50), introduction.

Human Rights has found that 'the criterion of self-identification is the principal one for determining the condition of indigenous people, both individually and collectively.'[67] The Inter-American Court of Human Rights has held that it is up to the community and not the State to determine 'its own name, composition and ethnic affiliation, without having the State or other external entities do it or contest it'.[68] The High Court of Australia has also considered self-identification as being fundamental to the question of whether native title to land for indigenous peoples survives:

> 'But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs.'[69]

26 Returning to Africa, as of now there appears not to be a plan to address the post-prejudice position once the basis for the self-identification ceases to exist. Self- identification therefore remains the only non-structuralist criterion for indigenous identity in Africa, and this can be problematic as it places no containment on who can so identify and as there is no exhaustive list of indigenous communities, it makes the identity susceptible to use by communities, marginalised or otherwise, to highlight their own sufferings.[70] Be that as it may, it has so far done more good than harm in terms of ensuring that these sufferings remain in the limelight, as seen in regional cases of the Endorois and the Ogiek. The Endorois case is described as 'an important victory for indigenous rights advocates in efforts aimed at translating such rights into enforceable ones'.[71] Given the continuing nature of the problems indigenous communities face, self-identification remains relevant but there should be

[67] IACHR, 'Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia' (Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007), para 216 in IACHR 2009 (n 81).
[68] IACHR 2009 (n 81) referring to the case of *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, Merits, Reparations and Costs (Inter-American Court of Human Rights)
[69] *Mabo (*n 127) para 68.
[70] Ndahinda (n 64) 24.
[71] ibid.

some thinking at some point about the characteristics.[72] In 2011, in adopting the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African /on Human and Peoples' Rights[73] (the 'Principles and Guidelines'), the Commission accentuated some characteristics of indigenous communities to be:

> 'Any group of people whose culture and way of life and mode of production differ considerably from the dominant of society, whose culture depends on access and rights to their traditional land and the natural resources thereon, and whose cultures are under threat. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society, which often prevents them from being able to genuinely participate in deciding their own future and forms of development.'

27 For the indigenous communities in Kenya who are seeking realisation of their land rights, this encapsulates their experience.

Kenya's indigenous communities

28 In Kenya the following communities self-identify as indigenous: Endorois, Ogiek, Sengwer, Yaaku, Waata, El Molo, Aweri (Boni), Malakote, Wagoshi, Sanye, Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra and Pokot.[74] These communities have a distinctive collective attachment to certain lands which they claim as their ancestral homes, on which their social, economic, cultural and political provenance is founded. These communities are repeatedly being clamped together with other communities and classed as illegal squatters and encroachers on what are essentially their own lands. This

[72] ibid.

[73] These were adopted on 24th October 2011. Their primary purpose is to assist State Parties to comply with their obligations under the Charter. They are said to draw inspiration from other international human rights instruments that promote and protect economic, social and cultural rights, decisions of domestic courts within the jurisdiction of states, reports of Special Mechanisms of the African Commission and Special Procedures of the United Nations human rights system and other declarations, reports and guidelines issued by the United Nations and African Union.

[74] International Work Group for Indigenous Affairs, 'The Indigenous World 2013' (IWGIA 2013); and African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, 'Indigenous Peoples: A Forgotten Peoples?' (ACHPR and IWGIA 2006).

failure to recognise and protect their collective forms of land tenure[75] and their self-identity as indigenous has resulted in violation of their land rights as encompassing their right to land, religion, culture, natural resources and development and in some cases has been found to have violated their right to life as it has resulted in loss of their livelihood[76] and death.[77]

29 To further understand the Kenyan position, it would be helpful to set out here brief accounts of three indigenous communities, to illustrate the customary ownership of land and also to introduce them to the discussion as they will intermittently appear in this thesis. The first two will be the Ogiek and the Endorois as these two communities have used law to pursue their land rights' claims not only under the Kenyan jurisdiction but regionally under the African Charter on Human and Peoples' Rights; and their cases under the latter have resulted in landmark decisions: *276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* in the African Commission on Human and Peoples' Rights[78] in respect of the Endorois; and *Application No 006/2012: African Commission on Human and Peoples' Rights v The Republic of Kenya* in the African Court on Human and Peoples' Rights, in respect of the Ogiek community, which have underscored recognition of indigenous communities' in Africa, reinforced entitlement of indigenous communities to land rights and State obligations to recognise, respect and protect these rights; and have brought to the fore the question of implementation of decisions-relating to indigenous communities' land rights. Both these regional decisions remain unimplemented by the Kenyan State, an issue that this thesis will examine.

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[75] Endorois case (n 114). In this case the Endorois community argued that: '(a) the failure to provide adequate recognition and protection in domestic law of the community's over land, in particular the failure of Kenyan law to acknowledge collective ownership of land' was an encroachment of their rights that went to the core of the 'community's identity as a people', Endorois case (n 114), para 99.

[76] See case of: *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] Elc Civil Suit 821 of 2012 (Os).

[77] In January 2018 a member of the Kenyan Sengwer community- identifying as indigenous- was killed by the Kenya Forestry Services and others shot at in the course of forcibly evicting them from their ancestral home during a EU funded water towers project. In 2011, a member of the Sengwer community was shot at during a World Bank-IDA funded project whilst the community was being forcibly evicted from their homes.

[78] The Commission is a quasi-judicial body created by the Organization of African Unity (now the African Union) to *inter alia* consider claims against violations of the African Charter on Human and Peoples' Rights (the Charter): See Article 30 of the African Charter.

30 The third community this thesis will introduce is the Sengwer community. Their continuing experience highlights possible defects in the application of law and policy by the Kenya Government- an important issue in this thesis, and also by international development agencies in respect of indigenous groups' land rights.

The Communities

i) The Ogiek

31 The Ogiek are hunter-gatherers,[79] and they total about 30,000 people. They claim the Mau Forest as their ancestral home, their school, their cultural identity, way of life and as heritage that gives them pride and a destiny.[80] The fact that it is their ancestral home has been confirmed in various reports: i) Kenya Legislative Council report of 1927 recommended leaving the Ogiek in the Cheplangu forest, one of the Mau forests; ii) Carter Land Commission report of 1933 reported that the Ogiek lived in the Mau forest although it then sought to appendage them to larger communities; iii) Independent Kenya Parliament report of 1965 reported the Ogiek living there;[81] and iv) the Mau Forest Task Force Report which observed that the Mau Forests Complex is the 'home of a minority group of indigenous forest dwellers, the Ogiek,' but sought to have them settled elsewhere.[82]

32 As early as 1000AD the Ogiek community initially occupied the coastal regions of East Africa and were forced to move due to attacks by slave traders and

[79] They can be found in the Mau forest and Mt Elgon. This thesis examines the Mau forest Ogiek as they have resorted to the law and informed the indigenous discourse in Kenya which makes them a suitable case study for this thesis.

[80] Julius Muchemi and Albrecht Ehrensperger, *Ogiek Peoples Ancestral Territories Atlas: Safeguarding Territories, Cultures and Natural Resources of Ogiek Indigenous Peoples in Kenya* (ERMIS Africa and CDE 2011).

[81] African Commission on Human and Peoples Rights, 'African Commission's Written Submissions to the African Court on Human and Peoples' Rights, 27-8 November 2014 in African Commission on Human and Peoples' Rights v The Republic of Kenya, Application 006/2012' (The African Court on Human And Peoples' Rights 27- 28 November 2014). Hereon the Ogiek case.

[82] Prime Minister's Task Force on the Conservation of the Mau Forests Complex, 'Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex' (Prime Minister's Task Force on the Conservation of the Mau Forests Complex March 2009). (Hereon Mau Task Force Report).

other migrating communities. One group moved to Tanzania where they were assimilated by the Maasai there and the second group moved to the plains of Laikipia bordering Mt. Kenya forest from where they dispersed to various locations in northern, central and western Kenya and by the turn of the century could be found in Mt Elgon, Cherangany, Koibatek and Nandi and the Mau forest region.[83]

33 The Ogiek speak Okiek,[84] a language of the Southern Nilotic group.[85] Some have opined that the Ogiek speak the same language as another community, the Kipsigis and other Kalenjin sub-groups and the only way to distinguish them is from their way of life in the forest,[86] but the Ogiek have maintained they are a distinct community and have been found by domestic[87] and regional courts[88] to be a distinct community.

34 A 2011 study of the Ogiek history is helpful in understanding the community's relationship with their land.[89] This study states that:

a. The Ogiek's clan/tribe system is made up of 3 sub-tribes: Tyepkwereg, Morisionig and Gipchorng'woneg.[90] They have divided the Mau Forest into clan territories which are marked using natural markers, topography and vegetation features, respected by all clan members.[91] Trespass to another territory or destruction of the forests and hunting game in another territory was rapidly addressed to ensure consultative utilisation of the territory.[92] The author interviewed an Ogiek elder in 2013 who told her:

[83] Towett J. Kimaiyo, *Ogiek Land Cases and Historical Land Injustices 1902-2004* (Ogiek Welfare Council 2004).
[84] Ecoterra Intl, 'Ogiek Language' (Ecoterra Intl. 1992-2015)<http://ogiek.org/indepth/ogiek-language.htm> accessed November 2013.
[85] Kenya Agricultural Productivity and Agribusiness Project, 'Indigenous Peoples Planning Framework (Ogiek and Sengwer)' (KAPAP 2009).
[86] Interview with Faith Rotich, Lawyer, Kituo cha Sheria, Nairobi (Nairobi, Kenya, 11 September 2013).
[87] Joseph Letuya (n 76).
[88] Ogiek case (n 81).
[89] Muchemi and Ehrensperger (n 80). The actual number of clans is 22, Twitter Message from Daniel Kobei, Director, Ogiek Peoples Development Programme (6 January 2019).
[90] ibid.
[91] ibid.
[92] ibid.

'If when hunting, our game fled into another territory, we would not dare chase after it otherwise there would be serious consequences.'[93]

b. Ogiek territories are held as cultural heritage and are passed on by oral traditions, songs, dances, ceremonies, folklore and riddles. The clan territories form the basis of their occupation, ownership, utilisation, protection, conservation, governance of the forest and its resources. Their territories run from lowlands to highlands due to climate change which has enabled the Ogiek manage their utilisation of game, quality of honey and protection of the more vulnerable members of the community.[94]

c. The Ogiek have three levels of leadership: i) the clan leaders who represent the clan members on issues affecting them; ii) the council of elders, who are leaders of the constituent clans and deal with family issues and tribal conflicts with neighbouring communities; iii) the chief council which governs the whole community, with the help of assistants and adjudicates on issues such as boundary disputes, theft of hives, inter-clan conflicts and community rules and regulations. They try to resolve minor conflict through reconciliation.[95]

d. The Ogiek have always used their traditional knowledge of the water-divide, temperature, humidity, rainfall, wind and topographical knowledge of location, altitude, aspects and relationship of terrain features to define, delineate and define their territories into eco-climatic regions.[96] It is this traditional knowledge and need to preserve forests as they depend on these for their survival as a community that makes them the best candidates for forest management and conservation, far more ideal than the State itself.[97]

e. In terms of cultural practices, the Ogiek consider several sites sacred, for instance, sites marked by springs and trees, rivers producing extraordinary sounds and any place declared sacred by the leaders. The sanctity of the place is inferred from history, declared by elderly traditional herbalists and foreseers and announced after a ritual had been performed.[98]

35 The Ogiek of today maintain this close attachment to the Mau forest. They continue to claim this forest as their ancestral home, source of life, food,

[93] Interview with Kiprono Chuma, Ogiek elder, Timboroa, Nakuru (Nakuru, Kenya, 16 September 2013).
[94] Muchemi and Ehrensperger (n 80).
[95] ibid.
[96] ibid.
[97] Expert evidence Liz Alden Wily, Ogiek case (n 81).
[98] Muchemi and Ehrensperger (n 80).

firewood, pharmacy, religious site and cultural home on which they have access to their cultural sites. They have faced forcible evictions from the forest by Government agencies on grounds that the Mau forest constitutes Kenya's largest water catchment area and is therefore public land, and their presence on it is unlawful, despite acceptance, as noted earlier, that the Mau Forest is their ancestral home. This has destructed their lifestyle and amounted to an encroachment of their rights.[99]

ii) The Endorois

36 The Endorois are a pastoralist community from Kenya of about 60,000 people who self-identify as indigenous.[100] They claim the Lake Bogoria area has been their ancestral home for centuries and that it had been accepted by all tribal neighbours that they were *bona fide* owners of this land. They claim that their way of life - their health, livelihood, religion and culture- is inextricably linked to Lake Bogoria.[101] They had remained undisturbed on this land and had continued to occupy and enjoy their land during the colonial era despite this land being converted to Crown (Government) land.[102] In the post-colonial era their land was held in trust for them by the County Councils under Article 115 of the Kenyan Constitution at the time.[103] They therefore maintained the right to remain on the land and continued to hold, use and enjoy the land without interference.

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[99] Pacifique Manirakiza, 'Oral Submissions/Introduction', Ogiek case (n 81).

[100] The African Commission has found those communities identifying as indigenous communities in Kenya to be pastoralist groups such as the Maasai, Pokot, Samburu, Turkana, Rendille, Endorois, Borana, El Molo, Somali and the Gabra; and hunter-gatherer groups like the Waata, Ogiek, Sengwer and Yaaku, Waata, see Indigenous Peoples: A Forgotten Peoples? (n 74), 15.

[101] This summary is extracted from the Endorois case (n 114).

[102] Under the Crown Lands Ordinance 1902 and 1915, all public land was 'summarily' acquired by the colonial administration and land from that point on, could only be apportioned under English law. See Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration, Chairman: Charles M. Njonjo Presented to His Excellency Hon, Daniel T Arap Moi, November 2002, 24.

[103] Constitution of Kenya 1969, Article 115 provided: 'Trust Land to vest in county councils. (1) All Trust land shall vest in the county council within whose area of jurisdiction it is situated: Provided that they shall not vest in any county council by virtue of this subsection- (i) any body of water immediately before 12 December 1964 was vested in any person or authority in right of the government; or (ii) any minerals or mineral oils; (2) Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual (……..).'

37 In 1973, the Lake Hannington Game Reserve was created in the area. In 1978, the area was re-gazetted as Lake Bogoria Game Reserve without any consultation with the Endorois community. This resulted in the Endorois being denied access to the land which effectively meant denial of their collective ownership of land, restricted access to religious sites, ability to take part in their cultural life as a community including access to cultural sites in Lake Bogoria, restricted free access to their natural resources which were vital to their existence and as result faced damage to their pastoralist way of life.[104]They pursued legal proceedings in the High Court of Kenya in 2000.[105] They argued that they were entitled to collective ownership of land as that is how they had always held land. The court rejected the concept of a collective right to property based on historical occupation and cultural rights[106] and concluded that: 'there is no proper identity of the people who were affected by the setting aside of the land….that has been shown to the Court'.[107]

38 The Endorois like other indigenous communities in Kenya view themselves as distinct from other communities with distinct cultural expressions, historical continuity and relationship with the Lake Bogoria area. Therefore in finding that the identity of the Endorois peoples had not been shown to the Court, the Court essentially found the Endorois community's identity as a distinct group utilising a collective land tenure system unrecognisable in law.[108] Hence the importance of having the guidance not only under the ILO Convention but also under the Principles and Guidelines of the ACHPR and also the Commission's approach to indigenous peoples' discourse in Africa.

[104] Endorois decision (n 50).
[105] ibid, para 12, referring to the case of *William Yatch Sitetalia, William Arap Ngasia et al. v Baringo County Council*, High Court Judgment of 19 April 2002, Civil Case No. 183 of 2000.
[106] Endorois case (n 114), para 12.
[107] ibid.
[108] ibid.

iii) The Sengwer

39 The Sengwer are hunter-gatherers. The Sengwer comprise 21 clans, who are governed by traditional structures developed by the community itself and informs their whole existence. Their ancestral home is Embobut Forest. And it is this forest that they collectively rely on for food; religion, retention of their culture; medicines and their eco-friendly livelihood.[109]They have experienced repeated violation of their land rights in the form of forced eviction from the forest, destroying of their property and means of livelihood, physical attacks threats to life and killing of community members by Government agencies during forced evictions. A 2018 report by Amnesty International, 'Families Torn Apart: Forest Eviction of Indigenous Peoples in Embobut Forest, Kenya',[110] touching on the experiences of the Sengwer community confirms that these violations against the community have been long running and for what is approaching a century. That in 1932, during the Carter Land Commission,[111] as discussed above in respect of the Ogiek community, their distinctive collectivity was not recognised and they were subjected to forced assimilation. Their land was gazetted into a public forest in 1954 even before the East Africa Royal Commission report.

40 Over the years huge tracts of land in the Embobut Forest have been irregularly allocated by the political elite, which has impacted on the community, their land rights and how they have been perceived by the authorities.[112] During a 2007-2013 World Bank development project- the Natural Resource Management Project- in Kenya, the Sengwer were subjected to mass evictions which resulted in the establishment of the Embobut Task Force which looked into genuine and economic opportunistic seekers. Although the Task Force

[109]Amnesty International, 'Families Torn Apart: Forest Eviction of Indigenous Peoples in Embobut Forest, Kenya' (Amnesty International 2018).
[110] ibid.
[111] This is briefly discussed in Chapter 1.
[112] Amnesty International (n 109).

considered the Sengwer to have resided in the forest for generations, it concluded that they had done so illegally,[113] thus perpetuating their perception by the Government and others, as squatters on what is essentially their ancestral home.

41 In January 2018 in the course of an EU- funded Water Towers Project the community were subjected to human rights violations. A community member was shot dead, others shot, forcibly ejected, properties burnt and so on. This violating treatment was perpetrated by the Kenya Forestry Service, a Government Agency. Its actions were justified on the basis that the community's presence in the forest was unlawful as they were considered to be squatters and encroachers.

Indigenous communities' cases and common issues

42 As seen with Kenyan indigenous communities, the failure to recognise and protect collective forms of land tenure- and return indigenous communities' to the position they were in prior to colonisation- has been a major contention for indigenous communities.[114] Whether this is in fact possible is an issue that has arisen in a number of cases including those pursued by Paraguayan indigenous communities in the Inter-American human rights system, where the court has considered that if restitution by means including expropriation of former lands is not possible, that the Government should allocate alternative lands with the communities' consent.[115]

[113] ibid.

[114] *Communication 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2009] African Commission on Human and Peoples' Rights, para 91. This case will hereinafter be referred to as the Endorois case.

[115] See cases of Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Inter-American Court of Human Rights); Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Inter-American Court of Human Rights) and Case of Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010 (Inter-American Court of Human Rights).

Survival of native title

43 A common feature of indigenous communities' land rights cases is whether in fact customary land tenure or native title has survived colonisation and domestic legal developments. Jérémie Gilbert and Valérie Couillard,[116] observe that 'a major problem leading to the loss of indigenous peoples' land in Africa is that customary collective tenure (is) neither recognised nor secured'[117] and that this forms one of the major requests of indigenous communities.[118] This is a global predicament which the Rights and Resources Initiative's 'Who Owns the World's Land? 2015 Report discusses.[119] The report found that indigenous groups' land contestations result from, like in the Kenyan example, forceful expropriation of communities' lands by colonial/Europeans powers, entrenched further by post-colonial Governments using statutory mechanisms that converted those lands into private and public land; and despite communities continuing to agitate for recognition of their land rights, there is a reluctance by Governments to formally recognise their rights, which continues to leave the communities susceptible to human rights violations.[120]

44 This predicament has been created, as Paul Keal, explains by the 'expansion of the European society of states to an international society global in scope entail(ing) the progressive dispossession and subordination of non-European peoples'.[121] He considers that the continuing failure by states to properly address the indigenous communities' land rights question is not a failure only

[116] Jérémie Gilbert and Valérie Couillard, 'International Law and Land Rights in Africa: The Shift from States' Territorial Possessions to Indigenous Peoples' Ownership Rights' in Robert Home (ed), *Essays in African Land Law* (Pretoria University Law Press 2011).
[117] Ibid, 55.
[118] ibid.
[119] Rights and Resources Initiative, 'Who Owns the World's Land? A Global Baseline of Formally Recognized Indigenous & Community Land Rights' (Rights and Resources Initiative September 2015).
[120] ibid.
[121] Keal (n 20).

of the states concerned but a failure of the international society of states as a whole.[122] And therefore more widely in places such as North, Central and South America, the Pacific as well as Asia,[123] indigenous communities whose rights were 'gradually eroded in response to the changing demands of European colonists' are demanding restoration of the same.[124]

45 In the 1973 case of *Calder v The Attorney General of British Coloumbia* [125] the Court held that native title to land existed and had not been extinguished by subsequent statutory dispensations. Aboriginal title to land has been confirmed as existing in Canada's Constitution Act 1982.[126] In the Australian case of *Mabo and Others*[127] the High Court examined whether native title to land had been extinguished when the territory was annexed by the Europeans. The Court held that Australia:

> 'recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.'[128]

46 The decision as left would suggest that there will be cases where native title will be deemed extinguished. However, the Australia's Native Title Act 1993, recognises and protects native title[129] and provides that this shall not be extinguished contrary to the Act.[130]

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[122] ibid.
[123] International Work Group for Indigenous Affairs, 'The Indigenous World 2018' (IWGIA 2018).
[124] Keal (n 20).
[125] *Calder v The Attorney General of British Coloumbia* [1973] SCR 313, [1973].
[126] s35(1).
[127] *Mabo and Others v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (High Court of Australia).
[128] Ibid, para 2.
[129] Section 10 of the Act.
[130] Section 11 of the Act.

47 Cynthia Morel,[131] observes that jurisprudence before the Human Rights Committee *Lovelace v Canada*[132] and under the Inter-American system *Awas Tingni v Nicaragua case*,[133] has shown that realisation of indigenous peoples' rights is contingent upon the indigenous community's identity being recognised. In the *Lovelace* case she notes that once the plaintiff's native status had been restored, other land rights accrued. In other words recognition of native status, or in the alternative pre-existing land rights that were not extinguished by colonial land policies and those that only certain communities were said to still possess, had resulted in accruement of other land rights. In respect of indigenous peoples of Nicaragua, in the *Awas Tingni* case, she notes that the Government did not contest that these peoples existed but argued that the community lacked legal standing/juridical personality as their identity as individuals or as a collective had not been registered. However, the Inter-American Commission accepted that they were indigenous, that they did have such standing and recognised them as collective rights-holders. She observes that this case made it possible for indigenous communities to make land claims as collectives under Article 21 of the American Convention on Human Rights.[134]

48 In the cases brought in the African human rights jurisdiction,[135] the argument has mainly concerned recognition of communal land rights under current laws rather than a question of whether native title has survived legal developments in the colonial and post-colonial eras, which it may be argued is immaterial as it leads to the same answer, this being recognition of land rights. However, significantly the cases have also raised the issue of recognition of indigenous

[131] Cynthia Morel, 'From theory to practice, Holistic strategies for effective strategy' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016) 357.
[132] *Lovelace v Canada*, Merits, Communication No 24/1977, UN Doc CCPR/C/13/D/24/1977 (HRC).
[133] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, reparations and costs [2001] IACHR Series C No 79.
[134] Morel (n131) 357.
[135] The Endorois and Ogiek decisions which will be discussed extensively in this thesis.

identity in the African context, an issue that certainly distinguishes discourse of indigeneity in the African context and other continents.[136]

The extent of rights

49 Another issue that arises in indigenous communities' land rights cases is the extent of the land rights. For indigenous communities, their land rights exist concurrently with other rights due to the fact that their whole existence is founded on attachment to their land. So when they seek recognition and protection of their land rights, their claims are likely to also constitute claims for protection of other rights. The South African Government, for instance, in the Richtersveld community case contended that whatever rights to land the community claimed to have on the disputed land, this did not include the right to minerals and precious stones. The Constitutional Court of South Africa disagreed and held that 'under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones'.[137] It also examined whether the community was 'dispossessed of its land rights ….as a result of discriminatory laws or practices' which goes to show the entwining of the right to land with other rights.[138]

50 The Endorois community of Kenya in their claim against the Kenyan Government before the African Commission on Human and Peoples' Rights, contended that their rights under Articles 8, 14, 17, 21 and 22 of the African Charter had been violated. The Commission observed that 'the Complainants claim that the Endorois community's health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around

[136] See discussion on the *Identification of indigenous communities- regional and international position* in this chapter.
[137] *Alexkor Ltd and Government of the Republic of South Africa v Richtersveld Community and Others* [2003] Case CCT 19/03 (Constitutional Court of South Africa), para 63-64.
[138] ibid, para 45.

the shores of Lake Bogoria.'[139] The Commission went on to find a violation of all these provisions as well as Article 1. Worth noting is the Commission's finding in this case that Article 17 not only enshrined the right of individuals to participate in community life but was a 'complex whole'[140] encompassing all manner of things including spiritual and physical connection to ancestral land, morals, customs and others that are capable of distinguishing one community from another. [141]

51 Similarly in the Ogiek community of Kenya's case before the African Court on Human and Peoples' Rights, the community contended that their rights under Articles 1, 2, 4, 8, 14, 17(2), 17(3), 21 and 22 of the Charter had been violated. The Court found a violation of these provisions save Article 4. [142]

52 In the Nigerian case of the Ogoni people,[143] an indigenous community who although not basing their case on indigenousness, alleged that the Nigerian authorities had failed to protect them from the adverse effects of oil exploration on their lands by the company, Shell and had perpetrated violent attacks against them. Amongst other findings the Court found that where housing is destroyed, this has the potential to impact on 'property, health and family life'.[144]

53 In the Inter-American human rights system, Article 21 of the American Convention on Human Rights which enshrines the right to property, has been relied on by indigenous communities for recognition also of associated rights such as rights to natural resources, socioeconomic rights such as water, food,

[139]Endorois case (n 114), para 16.
[140] ibid, para 241.
[141] ibid.
[142] In combination, the provisions relied on under the Endorois and Ogiek cases enshrine: the freedom to enjoy the rights enshrined in the Charter without distinction on grounds of race, ethnic group, language, religion, national and social origin and any other status amongst some (Art 2); the right to life (Art 4); right to freedom of conscience which includes religion (Art 8); right to property (Art 14); right to take part in the cultural life of a community and to have traditional values recognised by the State (Art 17); right to free disposal of wealth and natural resources (Art 21); and a right to economic, social and cultural development (Art 22).
[143] Communication no: 155/96 *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) versus Nigeria,* African Commission on Human and Peoples' Rights.
[144] ibid, para 60.

health, religion, honour, culture and identity; and civil political rights such as rights of association, life, dignity, movement and residence.[145] Article 21 is therefore said to encompass the 'fundamental basis for the development of indigenous communities' culture, spiritual life, integrity and economic survival'.[146] The Kichwa indigenous group of Sarayaku has argued for instance that their right to property under Article 21 has been violated in relation to the obligation to respect rights under Article 1(1), their freedom of thought and expression (Article 13(1)) and their political rights under Article 23 respectively.[147]

54 Similar protections are found under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and C169- Indigenous and Tribal Peoples Convention 1989 (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169). It is worth observing that as these instruments specifically enshrine indigenous peoples' rights they go into further detail as to what these rights are.[148]

Why this thesis is necessary

55 This thesis is pursued because there is a need to understand the impact the legal landscape created by the 2009 National Land Policy (NLP) and the 2010 Constitution will have on the aforementioned communities: the Endorois, the Ogiek, the Sengwer and others like them in Kenya, and the problems they continue to experience. In as much as it has been shown that the law has been an imperfect tool and susceptible to the various forces which have impacted on the force it could otherwise have, the fact remains it is a method that

[145] Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (OEA/Ser.L/V/II. Doc. 56/09 IACHR 2009).
[146] ibid, 1.
[147] Kichwa Indigenous People of Sarayaku v. Ecuador, Inter-American Court of Human Rights Judgment of 27 June 2012.

[148] See respectively Articles 13, 14, 15 and 16 of the ILO Convention; and Articles 3, 5, 12, 18, 20, 23, 26, 28, 29, 32, 37 and 40 of UNDRIP 2007.

indigenous communities have continued to use to ventilate their land claims and are likely to continue to use.

56 To a large degree the cases pursued by the Endorois and Ogiek communities under the African human rights system have quelled the debate on existence of indigenous communities in Africa, crystallised their entitlement to land and associated rights and confirmed the obligations states (through the example of the Kenyan state) have towards indigenous communities. However, the recommendations made in both judgments remain on the whole unimplemented. In 2013 there was a Workshop in Kenya organised by the African Commission on Human and Peoples' Rights titled 'Workshop on the Status of the Implementation of the Endorois Decision of the African Commission on Human and Peoples' Rights'[149] to discuss the factors causing the delay in the implementation of the judgment.[150] Non-implementation of this judgment effectively means that the position of the Endorois remains the same. Further, Daniel Kobei, the Director of the Ogiek Peoples' Development Programme has observed that whilst the Ogiek community has not seen the positive effect the law could have on their situation, they remain encouraged by the fact that the 2010 Constitution enshrines community land. The community is hopeful that through the new laws, and the fact that they together with the Endorois community have had positive judgments on their lands rights, their rights will finally be realised. This thesis is therefore necessary as an examination of the legal landscape to establish what the opportunities are, and concomitantly any impeding issues or themes these communities will have to face.

57 It is a decade since the 2009 NLP and 9 years since the Constitution was promulgated. This length of time enables a review of the law as written and applied. This review may assist in the navigation of the law by those pursuing claims in Kenya as they can hold the Government to account as to the intention

[149] The author was in attendance.
[150] Endorois case (n 114).

behind the provisions; and can assist those in other countries whose laws on the issues discussed here may not be as progressive, to lobby for similar provisions. In respect of some of the other laws such as the Community Land Act 2016 and the Forest Conservation and Management Act 2016, which will be discussed, it may be argued that not sufficient time has passed since enactment. However, when laws are passed they create legal powers, duties, obligations and expectations for which there needs to be some move towards meeting. In respect of these newer laws, this review process will allow scrutiny of the enforced provisions to see how they align with the Constitution and land policy and spirit of both. It will also enable investigation of whether any frictions exist between, and within, all these laws; and hopefully provide some illustration as to how, in spite of the inconsistencies, the laws can still be used to advance strong arguments.

58 This thesis also allows for examination of the external and what impact that could have on the internal. The position Kenya is in now, is unique in terms of the landmark decisions that have been made by the regional bodies. How can African nation States with a colonial history exacerbated by a post-independence period marred by political impunity deal with land rights they deem controversial particularly those affirmed by bodies like the Commission and the Court i.e. bodies created under a regime they have created themselves? Essentially, whatever happens with these decisions is likely to have wider ramifications external to Kenya. Governments and communities in other states will observe how Kenya behaves. Communities in particular will want to see what indigenous communities in Kenya do to engender implementation of the decisions.

59 Further research on land in Kenya has focused on the land-politics dichotomy but this has lacked an examination of the impact the sub-regional forum could have on indigenous communities' land rights. And in a similar way, research on the rights of indigenous communities in Kenya has focused on the impact

of international law, but has not deeply examined pragmatic steps that can be taken domestically using national bodies to make the international law a reality. This may be because the reason for seeking extraterritorial adjudication of cases is because the domestic system has failed. This thesis argues that the opportunities available in regional, sub-regional and international law are only possible where the domestic infrastructure works and the law is made to produce what it says it will.

60 This thesis will therefore examine the nitty gritty of the internal past to understand the internal present and looks at the external with the purpose of extracting from that, elements that can cause the domestic to shift. Of course the challenge of making international human rights law make sense at home is not only a struggle for Kenya and African States but one experienced in several other countries, if not all.

Chapter Overview

61 In light of the foregoing discussion, the Chapters in this thesis will look at the opportunities that exist for the realisation of indigenous communities' land rights: domestically- Chapters 1, 2 and 3; sub-regionally- Chapter 4; and through development projects- Chapter 5.

Chapter 1

62 The Kenyan Government has appointed a variety of commissions and task forces in the last 20 years which have included in their investigation the land question as this has been a recurring grievance raised by Kenyan people. Chapter 1 looks at six bodies[151] established to get to the bottom of these problems for which land has been a central feature. The cyclical appointment of these bodies, to repeatedly investigate historical problems could be read as

[151] Kenya has appointed so many more but this thesis can only discuss so many. The Embobut Forest Task Force for example is not discussed. It may be fitting to discuss this in subsequent research dealing solely with forest community specific issues.

indicative of something more sinister: political manipulation of the vulnerabilities of the have-nots to gain advantage or silence dissent, as has been discussed earlier. However, as indigenous communities have contributed to these exercises, Chapter 1 argues that this contribution, in spite of how things may appear, has not been in vain but has created an opportunity for indigenous peoples to highlight their human rights sufferings and seek redress; and that the communities ought to be more robust and creative in relying on the recommendations made by these bodies and challenging the failure to implement. Chapter 1 also serves another purpose, it provides a discussion on the politicisation of land in Kenya, because this has played a significant role in land allocation.

Chapter 2

63 Despite the law being progressive in many respects- it speaks of creating mechanisms to recognise, respect, protect and promote indigenous communities' land rights and therefore appears to address the historic issues described above- the manner in which some provisions are drafted is likely to detract from this. This has the risk of stifling some of the gains made and causing communities to lose out on potential opportunities for addressing their land problems. This Chapter examines the new legal landscape focusing in particular on the Constitution's land provisions, the Community Land Act 2016 and other laws brought in to enforce under the Constitution including the opportunities and the challenges.

Chapter 3

64 The African Charter is the only human rights instrument that recognises 'peoples' rights. The drafters of the Charter were 'opposed to every attempt by one people to dominate another no matter the importance attached to

people'.[152] The basis on which indigenous peoples in Kenya and other African States can rely on the Charter's provisions is set out in Article 1 of the Charter itself. This confirms that all member states including Kenya have given an undertaking to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislative and other measures to give effect to them. This means that the rights in the Charter are undebatable. The non-implementation of the Endorois and the Ogiek communities' decisions is a contravention of Article 1 of the Charter. This chapter argues that Kenya's obligations not only arise from Article 1 of the Charter but from Article 21 of its own Constitution which requires the State to implement human rights and fundamental freedoms. Although implementation can benefit from regional efforts,[153] it is first and foremost a domestic process. Where there is no domestic infrastructure to implement regional body decisions, then the process falters. This chapter therefore argues that there are various mechanisms in Kenya which can bring about implementation of these two decisions and they should be used by indigenous communities and triggered by certain bodies.

Chapter 4

65 This chapter appraises the East African Community (EAC) whose *raison d'etre* is described in Article 2 of the East African Community Treaty as being to 'establish an East African Customs Union and a Common Market'.[154] Granting this the Treaty nevertheless contains within it matters to be taken into account in respect of applicant nations (those seeking to join the Community) which include their adherence to universally accepted human rights principles and social justice; objectives which include raising the standard of living and improving the quality of life of the citizens in the partner states; and

[152] ACHPR and IWGIA 2005 (n 50) 72.
[153] From the regional bodies themselves including the African Union, the Parliament and other bodies created under the African Charter- For further information of these efforts on regional decisions, see Rachel Murray and Debra Long, *Implementation of the findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015).
[154] The Treaty for the Establishment of the East African Community 1994, Article 2.

fundamental principles which similarly include adherence to human rights standards and the rule of law which existing members are bound by.[155] The Treaty also provides for the establishment of the East African Court of Justice (EACJ) which has since its establishment determined cases raising human rights issues despite a treaty provision which provides that the court's jurisdiction to do that is not yet in force. Notwithstanding, the apparent dichotomy between the reason for the creation of the Community, its underlying objectives and principles and the jurisdictional uncertainty of the Court, there has been some progress made to develop a human rights framework on the Community.

66 This Chapter argues that the EAC creates an alternative forum for indigenous communities' land rights issues to be deliberated where the domestic and the regional systems fail, notwithstanding some omissions.

Chapter 5

67 Development has been described *inter alia* as the conduit through which 'major sources of unfreedom'[156] caused by personal poverty, mismanagement of public infrastructure, absence of law and order and political suppression and repression can be uprooted.[157] The World Bank's development pursuits, in respect of communal rights, because of its neoliberal focus, have had the opposite effect and decimated these rights. The World Bank's position now is that it works with indigenous communities to 'enhance their sustainable economic growth and livelihoods, implement culturally appropriate conservation and development, as well as implementing and developing strategies to address multiple sources of disadvantage by taking into account indigenous peoples' views, experience, and development priorities.'[158] It

[155] ibid, Articles 3, 4, 5 and 6.
[156] Amartya Sen, *Development as Freedom* (Oxford University Press 1999).
[157] ibid.
[158] The World Bank, 'Indigenous Peoples' (The World Bank IBRD-IDA) https://www.worldbank.org/en/topic/indigenouspeoples<accessed 8 October 2018.

considers that improving of access to land tenure, capacity building, good resource governance are among interventions that contribute to improving the situation of indigenous communities.[159] Catherine Weaver considers that is possible that the 'increasingly vigilant NGOs……pushing a "civil society" agenda, premised on the idea of empowerment of the poor', has led to the Bank changing its rhetoric.[160] Be that as it may, this Chapter examines whether development projects create a further alternative for realisation of indigenous communities' land rights, as Governments may be more willing to listen to international funders because of the money they receive from them than they otherwise would. The argument pursued is that development projects have the potential to address indigenous communities' land rights as chances are, if they impact on indigenous communities, they will have to contend with their land rights situation one way or the other. However, there are number of factors which impact on the achievement of this. To test the efficacy of this argument, this chapter examines the 2007-2013 Natural Resource Management Project (NRMP), a Kenyan development project financed by the International Development Association (IDA), one of the 5 institutions making up the World Bank Group.

Conclusion

68 Here the thesis sets out the conclusion to the issues discussed in the various chapters.

Original contribution of thesis

69 Firstly, this research makes an original contribution as other studies encountered either touch on the position prior to the coming into force of 2010 Constitution itself[161] and do not cover the post- enforcement period,[162]

[159] ibid.
[160] Catherine Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton University Press 2008).
[161] George Mukundi Wachira, 'Vindicating Indigenous Peoples' Land Rights in Kenya' (DPhil Thesis University of Pretoria 2008).
[162] McAuslan (n 15).

and if they do[163] they do not deal with the registration challenges under the Community Land Act 2016, dealt with in chapter 2, to the extent that this research does.

70 In respect of Chapter 1, the manner in which this thesis draws together the findings and recommendations of the bodies, as raising the legitimate expectation in indigenous communities that their land rights issues would be addressed, coupled with its argument that communities could rely on the statutes creating the legally-constructed bodies to push for implementation of recommendations, albeit itself ultimately at the mercy of political will, is also novel.

71 There has been research conducted on the role of the African Commission, the African Court and other African Union bodies on implementation of their decisions;[164] and the role of communities themselves and NGOs in implementation,[165] but little has been said about implementation using domestic mechanisms such as constitutionally-established bodies, parliament and national courts to engender implementation. This contribution is therefore original in that respect.

72 This thesis further makes an original contribution in its discussion of the East African Community as a potential forum for bringing indigenous communities' peoples land rights claims. There has been research conducted on indigenous communities land rights issues and equally on recognition of and litigation of human rights in the sub-regional arena.[166] Some of the human rights issues

[163] Barume (n 58).
[164] Murray and Long (n 153); and Frans Viljoen, 'The African Human Rights System and Domestic Enforcement' in M. Langford, C. Rodríguez-Garavito, & J. Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017) 351.
[165] See Michael Ochieng Odhiambo, 'A solution to the forced displacement of the Endorois in Kenya: Working Towards the Implementation of the African Commission on Human Rights' Decision (November 2008 – October 2011): Report of Final Evaluation' (Minority Rights Group International February 2012).
[166] Wachira (n 161); Murray and Long (n 153); Lucyline Nkatha Murungi and Jacqui Gallinetti, 'The Role of Sub-regional Courts in the African Human Rights System' (2010) Volume 7 n13 International Human Rights Journal; Kofi Oteng Kufuor, *African Human Rights System, Origin and Evolution* (Palgrave Macmillan 2010); Solomon T. Ebobrah, 'Litigating Human Rights before sub-regional courts in Africa: Prospects and Challenges' (2009) Volume 17 Issue 1 African Journal of International and Comparative Law 79; Frans Viljoen, *The Realisation of Human Rights in Africa*

that have been acted upon by sub-regional bodies, are: HIV and AIDS, Refugees, Human Trafficking, Women's Equality and Gender Issues; and Children's Rights.[167] However there has been no research that has specifically considered whether the legal framework of the East African Community (EAC) as a regional economic community (REC) could offer an alternative avenue, to that offered domestically and regionally, for indigenous communities to have their land rights recognised, promoted and protected. In view of domestic challenges and what some describe as 'flaws within the AU' system i.e. the regional system,[168] this chapter's focus on indigenous communities' land rights in the EAC is likely to be the first contribution on this subject.

73 The case-study of the World Bank project is original in that it asks whether development agencies can be the conduit through which indigenous communities' land rights are realised. Money is a powerful tool and can create a paradigm shift in entities. The discussion encourages the adoption of a different approach by indigenous communities, using the law, when things go wrong but also proposes ways in which development agencies can be constructive rather than destructive.

Research Methodology

74 This research undertakes a qualitative research of various source materials- legislation, policies, case law, reports, articles and various other documents. This has been for the purpose of assessing Kenya's policy direction, the intentions behind the laws, shortcomings of the law, frictions between various laws, deviation from the law and also possible innovations of the law.

Through Sub-Regional Institutions (Oxford University Press 2012); Ridwan Laher and Korir Sing'Oei, *Indigenous People in Africa, Contestations, Empowerment and Group Rights* (Africa Institute of South Africa 2012); Barume (n 58); Felix Mukwiza Ndahinda*, Indigenousness in Africa: A Contested Legal Framework for Empowerment of Marginalised Communities*' (INTERVICT 2011); Rodolfo Stavenhagen, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum, MISSION TO KENYA' (United Nations General Assembly A/HRC/4/32/Add.3 2006); McAuslan (n 15).

[167] Viljoen (n 166) 484.

[168] Murray and Long (n 153) 185.

75 In addition to the written source materials, the author has also conducted oral interviews with legal practitioners working on indigenous communities' land rights cases, experts, researchers, community members, community representatives, a member of the National Land Commission and community organisations, a list of which is appended to the thesis.

Chapter 1: A reluctant opportunity? Commissions and Task Forces impacting on indigenous communities' land rights in Kenya

Introduction

1 The bodies this chapter will examine are: i) The 1997 Constitution of Kenya Review Commission (CKRC); ii) The 1999 Commission of Inquiry into the Land Law Systems of Kenya (Njonjo Commission); iii) The 2003 Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (TJRC Task Force); iv) The 2003 Commission of Inquiry into the Irregular and Illegal Allocation of Public Land (Ndungu Commission); v) The 2008-established Truth, Justice and Reconciliation Commission (TJRC); and vi) The 2009 Task Force on the Conservation of the Mau Forest (Mau Forest Task Force).[169]

2 The creation of so many of these bodies especially at pivotal periods in Kenyan history, as will be seen, is sometimes a frontage rather than a genuine attempt at progressing issues, but nonetheless their findings have impacted on the land discourse in Kenya and have resulted, partly, in changes in Kenya's land laws, with an impact on indigenous communities. It is therefore important to consider them at the outset because, to their credit, the majority have treated the land question with the seriousness and profundity it requires. They have sought to understand the developments in the Kenyan sphere that created land contestations in the colonial era, why and how these problems have been perpetuated by post-colonial administrations, how the Kenyan people including indigenous communities perceive these problems and the redress they desire for violations suffered. Their findings and recommendations - the unadulterated and authentic versions - therefore count as a true reflection of

[169] As noted in the introductory chapter there are other land-related task forces which have not been considered in detail in this thesis including the Embobut Forest Restoration Task Force set up in 2009.

the land position and if the majority[170] are followed through, could lead to realisation of indigenous communities' land rights. The first segment of this chapter will seek to show this and act as a helpful background to the rest of the thesis.

3 The second segment argues that these bodies, especially those created by statute like bodies (i) and (v), can raise a legitimate expectation founded in law that if their recommendations are not implemented, the failure to do so could be challengeable in law. Any challenge to body (i) cannot be mounted at this stage as its objective was to prepare a Draft Bill subject to voting and this was done. However, for body (v) a challenge could be formulated against the delay in implementing its recommendations or triggering the implementation process contrary to its enforcing statute,[171] particularly as this included reparations for land rights abuses suffered by indigenous communities. Its process 'provided the most explicit forum for the expression of indigenous issues',[172] in an era when other transitional justice mechanisms in South Africa and Rwanda for example,[173] have not addressed indigenous identity at all and have in fact, 'ignored and denied' its existence.

What is their real objective?

4 The earliest Commissions of Inquiry date back to the 12th Century under English law;[174] and Kenya's first such inquiry dates back to 1913.[175] Their

[170] This thesis disagrees with the recommendation made by the Mau Forest Task Forest to resettle the Ogiek in a different area to where it found they were lawfully settled which led to the forced eviction from the forest precipitating their application to the African Commission on Human and Peoples' Rights.
[171] Truth, Justice and Reconciliation Commission Act 2008 (Act No. 6 of 2008).
[172] Laura A. Young, 'A Challenging Nexus, Transitional Justice and Indigenous Peoples in Africa' in Laher and Sing'Oei (n 166) 124.
[173] Laura Young and Korir Sing'Oei, 'Access to Justice for Indigenous Peoples' in 'Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes' (Institute for the Study of Human Rights, Colombia University 2014) 89.
[174] The Native Labour Commission, established to investigate why Africans had refused to work for the colonists, see African Centre for Open Governance, 'First Report: A Study of Commissions of Inquiries in Kenya' (Africog Reports 2007).
[175] ibid.

continued use in Kenya, for land related inquiries, is unsurprising in view of the politicised nature of land.

5 Commissions and task forces are used in Kenya: 'to seek solutions to the issues facing (the nation) such as ethnic violence, marginalisation, electoral injustice, corruption and historical injustices'.[176] These grievances have manifested in community uprising like that seen in 1991 and 1992 when 'pogroms targeted at settlers on settlement schemes killed hundreds and drove thousands off their land';[177] in 1997 ethnic clashes 'where land-related skirmishes occurred in the settlement scheme areas of Coastal Province'.[178] These Commissions and task forces are also used to purge out alleged wrongdoers or when the public/someone needs to be appeased or to obtain support.[179] As always seems to be the case with elections, the 2017 elections caused political and security concerns and led to civil unrest. The police were brutal, people were killed and injured.

6 This was a trying time for Kenya and some considered the situation conducive for a Commission of Inquiry: 'Why not use commissions of inquiry recommendations to solve the country's problems? This was the Big Question in various platforms, especially on television talk shows'.[180]

7 Ten years previously on 27 December 2007 Kenya held its presidential elections. The Government led by Mwai Kibaki claimed that it had won the election race but the main opposition party, Orange Democratic Movement (ODM) led by Raila Odinga claimed that the elections had been rigged.[181] The

[176] Eliud Kibii, 'Commissions or Omissions of Inquiry? Why Kenya has failed to address historical and other injustices' *The Elephant* (5 April 2018) <https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/>accessed 27 December 2018.
[177] Boone (n 2).
[178] ibid.
[179] Ibid.
[180] Kibii (n 176).
[181] Human Rights Watch, 'Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance' (Human Rights Watch, 16 March 2008) <https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> accessed 12 January 2018.

result was 2-3 months of post- election violence which led to fracas, civil unrest, approximately 1000 deaths, human rights abuses, forced evictions of people from their homes and areas associated with one ethnic group or another; and internal displacement of thousands, leading to the establishment of the Truth, Justice and Reconciliation Commission (TJRC) to look into historical abuses in Kenya, dating back to 1963 when Kenya became a Republic. The scope of its purview suggested that the violence was symptomatic of entrenched and unresolved long-running issues.

8 In Kenya there is a 'very close linkage between land injustices and ethnic violence'[182] and so although the 'immediate trigger' for the 2007 post-election violence was alleged election rigging,[183] the other deep-seated trigger was land. Ownership of this resource was said to have been central to the contestations.[184] As discussed in the introductory chapter, these agitations are stereotypical of Kenyan politics and were also a key component of the violence experienced after the elections in 1992 and 1997;[185] and in the 1980s in the Rift Valley region in Kenya.[186] Tellingly, it is land injustices and ethnic violence and denigration, allegorical of British imperialism that led to the establishment of the 1932 Carter Land Commission, a public inquiry, established by the colonial administration, into the land question in Kenya. Hansard recorded:

> 'In view of the nervousness among the native population as regards the land question, a full and authoritative inquiry should be undertaken immediately into the needs of the native population, present and prospective, with respect to land within or without the reserves, held either on tribal or on individual tenure.'[187]

[182] Truth Justice and Reconciliation Commission, 'Final Report of the Truth Justice And Reconciliation Commission' (Truth Justice And Reconciliation Commission 2013), Volume IV.
[183] ibid.
[184] Boone (n 2).
[185] Oluwafemi Atanda Adeagbo, 'Post Election Crisis in Kenya and Internally Displaced Persons: A Critical Appraisal' (2011) Vol 4. No. 2 Journal of Politics and Law.
[186] Boone (n 2).
[187] Statement by The Chairman of Committees (The Earl of Onslow), 'Kenya Land Commission', HL Deb 04 May 1932, vol 84, cc305-20.

9 The Commission's recommendations were in the main unhelpful to the African quest for justice and the White Highlands remained with the colonists.[188] The Commission did not address the needs of the native population. For example the Ogiek's claim to their ancestral land was refused by the Commission which instead recommended that they assimilate with larger tribes:

> 'Whenever possible the Dorobo (Ogiek) should become members of and be absorbed into the tribe in which they have most affinity. Where ... this is done, a reasonable addition should be made to the reserve concerned, if there is any land available for this purpose.'[189]

10 It is reported that those likely to suffer most from politically instigated clashes are indigenous communities as they lack representation in the political and governance spheres.[190] This is reinforced by above-like examples but also by the continued political dominance by larger communities in Kenya, which acts as their protection during the clashes.[191] After the 2007 elections, the Ogiek complained that their houses were destroyed by larger communities with full knowledge of the police authorities;[192]and that they experienced political shootings, intimidation, threats, sexual violence against women and were unable to 'access food and shelter' during this time.[193] There was also heightened politically-instigated land conflict between the Endorois and the Pokot, both indigenous groups, during this time with the Pokot allegedly being incited by politicians to expand their territory.[194] Human rights organisations

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[188] Paul Syagga, 'Public Land, Historical Land Injustices and the New Constitution' (2018) Society for International Development Constitution Working Paper Series No.9 < http://sidint.net/docs/WP9.pdf> accessed 3 January 2019).

[189] Kimaiyo (n 118) citing Kenya Land Commission, Report of the Kenya Land Commission' (Cmd 4556, 1934).

[190] Ecoterra Intl, 'Facts of the Post-Election Violence' (*Ecoterra Intl. 1992-2015*)< http://ogiek.org/news-1/facts-post-el-violence.htm> accessed 21 January 2018.

[191] The communities that enjoy most political dominance in Kenya are the Kikuyu, the Kalenjin and the Luo. The Kikuyu are the largest ethnic group and Kenya's first President, its last one and current one have been/are Kikuyu. Kenya's second President was Kalenjin as is its current Deputy President. Kenya's first Vice President was Luo and its first and only Republic-era Prime Minister was Luo.

[192] Ecoterra Intl, 'Paramilitary Units Hunt Ogiek, while Kikuyu Arsonists Burn Houses of Fleeing Ogiek to the Ground' (*Ecoterra Intl. 1992-2015* 19 January 2008) <http://www.ogiek.org/news-1/news-post-08-01-213.htm>accessed 21 January 2018.

[193] Survival International, 'Honey-hunting Ogiek Tribe Caught up in Violence' (*Survival International,* 30 January 2008) <https://www.survivalinternational.org/news/3057> accessed 21 January 2018.

[194] Leah Kimathi, 'Contesting Local Marginalization through International Instruments: The Endorois Community Case to the African Commission on Human and Peoples' Rights' (IDEA Case Study Research on "Successful Marginalized Group Inclusion in Democratic Governance Structures and Processes" March 2012).

commenting on the political crisis at the time were able to see a link between the violence and the failure to resolve historical land rights issues. Human Rights Watch for instance recommended that the Government should, amongst its actions going forward, resolve historical land rights cases relating to indigenous communities in line with past land commissions' recommendations.[195]

11 So in 2017 when the question was posed about whether an inquiry was needed to hold the country together, it is because these bodies have been the go-to forums for resolution of national problems. This it seems is always by design to create an appearance, to the rural voters - as the conflict tends to begin in the rural areas - and to international donors, that the land grievances are being addressed.[196]

12 Out of the six bodies considered in this chapter, only one, the Mau forest Task Force, dealt with a specific region in Kenya whilst the others involved the bulk of the Kenyan citizenry or focused on issues pertaining to the nation as a whole. The objective of these bodies has been to listen, consider, find and recommend, notwithstanding what has been a restrictive mandate for some.[197]

The analysis, findings and recommendations of the bodies

13 The thrust of the exercise in this segment is three pertinent questions:[198] i) what happened? ii) why did it happen and who is to blame? iii) what can be done to prevent this from happening again?[199] These questions are derived from the exercise carried out in the public inquiry system in the UK which seeks to prevent recurrence of national problems, and given the perception that

[195] Human Rights Watch (n 181).
[196] Manji (n 32).
[197] See the Mau Forest Task Force mandate.
[198] Basing this on the three UK public inquiry model.
[199] Institute for Government, 'Public Inquiries' (Institute for Government) <https://www.instituteforgovernment.org.uk/explainers/public-inquiries>accessed 20 October 2018.

national inquiries in Kenya are purposed to resolve national problems, it seems fitting to adopt them here, where the exercise permits, for the purposes of establishing how effective these bodies have been.

i) CKRC

14 The Constitution of Kenya Review Commission (CKRC) was established in 1997 via an Act of Parliament,[200] to: 'without let or hindrance…..collate and collect people's views and opinions'[201] in every constituency, on the Constitution and on various organs of the state; review human rights institutions; comparatively analyse constitutions and educate people on their rights.[202] The end result of this process was to be a Draft Bill - for a new Constitution - which would be presented to the National Assembly.[203] It was therefore a pivotal exercise in Kenya's historical, political and legal landscape(s). The process was required to engender diversity taking into account: socio-economic status, ethnicity, religion and disadvantage amongst other status. The Commission was expected to ensure free, active and meaningful participation of the Kenyan people in the process which is ordinarily denied of indigenous communities and would have enabled them to give evidence. Essentially the Commission was required to ensure that the end result of the review faithfully reflected the wishes of the Kenyan people.[204]

15 Amongst the indigenous communities the Commission heard from, were the Ogiek who expressed concern that forcible eviction from forests constituting their ancestral homes would lead to their extinction as communities;[205] pastoralist communities who felt 'their way of life is despised, and their need for land is misunderstood';[206] communities living adjacent to game parks, who

[200] Constitution of Kenya Review Commission Act 1997 (Act No. 13 of 1997).
[201] ibid.
[202] ibid, s10.
[203] ibid, s10 and 16(1)(c).
[204] ibid, s2.
[205] Constitution of Kenya Review Commission, 'The Peoples' Choice, The Report of the Constitution of Kenya Review Commission, Short Version' (CKRC Report 2002).
[206] ibid.

felt marginalised by exclusion from their lands and actions which implied preference for wildlife than their human lives.[207]

16 Communities complained that public land and land allocated for them was instead allocated to the elites; and that forests were being 'deforested, in disregard of environmental and resource considerations or even of resident communities'.[208] Communities complained that they were not able to obtain titles to land and that they wanted restoration of community land rights. They further complained about feeling the 'effects of unjust land deprivation during the colonial period';[209] of being deprived of cultural sites; and of trust lands being allocated by county councils to individuals.[210]

17 In respect of human rights, communities told the CKRC that they faced discrimination from the Government and were marginalised; had been omitted from the national census; had faced restriction of their rights; and that there was lack of respect for their language, expression of culture and religion.[211] They further complained of 'degradation of the environment and destruction of forests'.[212]

18 In terms of what happened to lead to this and who was to blame, the CKRC found that the colonial administration had introduced a land regime that had resulted in the unfair appropriation of ancestral land from communities and that these wrongs had not been addressed by post-independence regimes. In terms of why it had happened, the CKRC observed that human rights protection in Kenya was somewhat 'limited'.[213] It found that there was no protection for social, economic and cultural rights encompassing what it called 'solidarity rights- rights which pertain to the whole community (which) include

[207] Constitution of Kenya Review Commission, 'Final Report of the Constitution of Kenya Review Commission' (CKRC Report 2005).
[208] ibid.
[209] ibid.
[210] ibid.
[211] ibid.
[212] ibid.
[213] ibid.

the right to a clean, healthy and sustainable environment…to nurturing of one's culture and to development….rights which are important for the community as well as for the individual'.[214] It also found a limitation of communal rights; that Courts had applied rights restrictively; and the judiciary and the police, rather than being protectors of rights, had been 'the cause of major violations of rights'.[215] It also noted that the Constitution did not contain specific protection for minorities; that not all political and civil rights were protected; that the Bill of Rights was weak and that there was no human rights body to protect and enforce rights.

19 And to prevent this from happening again, the CKRC observed that Kenyans wanted a Constitution that offered better protection of their human rights particularly those who had faced past discrimination; that disadvantaged groups wanted affirmative action to enable them to 'catch up with other groups in social and economic development'; [216] 'better protection of property, particularly land';[217] 'access to and guarantees of preservation of the cultural sites and shrines';[218] 'equal and equitable rights to land';[219] and better 'machinery' for protecting rights'.[220] They also wanted a Constitution that provided a land system capable of addressing these past injustices; one that accepted, respected and recognised freedom to express cultural beliefs; that created a Government that was 'responsive to everyone's needs, more accountable'[221] and created a just society.[222]

20 In relation to land, the Commission considered that rather than provide a 'blueprint'[223] on land issues, a new Constitution would better serve if it

[214] ibid.
[215] ibid.
[216] CKRC Report 2002 (n 205).
[217] ibid.
[218] CKRC Report 2005 (n 207).
[219] ibid.
[220] ibid.
[221] CKRC Report 2002 (n 205).
[222] ibid.
[223] ibid.

provided 'principles'[224] to guide 'land policy and law in the future'.[225] The proposed principles included the following: that land belonged to the people. It proposed 3 categories of land: public, private and commons with the commons vested in communities or their agents. It called for respect of property rights and proposed that land 'however acquired or held'[226] be subject to the 'inherent power of the State'[227] to designate it in the public interest or benefit.

21 It further proposed that a Land Commission be established with functions including 'holding title to public land, periodic review of land law and policies; and development of policies for sustainable use and management of land'.[228] It recommended creation of a land law within 2 years of the new Constitution for: resolving land disputes and problems, expeditious and cost-effective land alienation, equitable distribution of land, addressing landlessness, investigation of historic land claims; and that this be the basis for consolidation of land laws.[229] These proposals, in particular the introduction of the commons, addressing of landlessness and investigation of historical land claims, were all new (absent from previous Constitutions) and of particular significance for indigenous communities given what they had complained about to the CKRC and the action they wanted taken.

22 In relation to the environment, the Commission proposed that the new Constitution recognise amongst other things that legislators must have regard to principles of sustainable development including principles applied by communities in the management of their environment and natural resources; that although the National Land Commission would have the responsibility of managing natural resources, it would be doing so on behalf of the Kenyan

[224] ibid.
[225] ibid.
[226] ibid.
[227] ibid.
[228] ibid.
[229] ibid.

public to whom those resources belonged; and that where there were profits to be made from resources, these would be shared with the community whose land the resources were found. It also encouraged, where 'as far as reasonably practicable'[230] the involvement of communities in the administration of natural resources.[231] Such recommendations, although not explicitly articulated in the CKCR's reports as indigenous communities' rights were in concordance with rights enshrined in the ILO Convention and UNDRIP.

23 In respect of addressing the deficiencies identified in the human rights framework, the Commission proposed the establishment of the Commission for Human Rights and Administrative Justice to, *inter alia* act as: 'the peoples'[232] protector, to investigate and conciliate complaints on its own initiative, provide accessible machinery and prompt remedies for people'.[233] This would have been in response to the complaints that there was a lack of a body in the country to deal with these issues.

24 In terms of timescales, both the Commission for Human Rights and Administrative Justice and the Land Commission were to be established before the end of 2003. In respect of the latter, the Commission observed that it was anticipated that policies seeking to address historical land issues would be challenging and would require attention, however, it was important that the process was not unduly delayed.[234] The proposed bodies were not established, as proposed due to political interference and no new Constitution was adopted within the said timeframe.

25 Ambreena Manji refers to the Shivji Commission in Tanzania in her text.[235] She observes that this Commission's objective was not neoliberal in any way but

[230] Ibid.
[231] ibid.
[232] ibid.
[233] ibid.
[234] ibid.
[235] ibid.

to 'accurately reflect the many land problems about which it had heard evidence and to answer the grievances of land users 'from below' (and) put in place mechanisms to guarantee security of tenure'. However, the government there rejected the recommendations, choosing instead to 'publish a National Land Policy'.[236] Such a move would have had no other purpose but to subdue any rural dissent and to signal to donors. And indeed this is what happened, as she notes that the British Overseas Development Agency shortly provided funding after for the drafting of a land law based on the policy.[237]

26 The work of the CKRC culminated in the Constitution of Kenya Review Commission Draft Bill 2002. Like the Shivji Commission in Tanzania, the CKRC's Draft Bill reflected what the people had said and a lot of effort was made to ensure that the people considered it. Later the Commission observed that 'its multimedia strategy …..(in respect of the Draft Bill) was one of the most publicized institutions ever established in Kenya.'[238] The people were told that they had 30 days to debate and comment on the Draft Bill after which a National Constitutional Conference of MPs, representatives from every political party, representatives from civil society, women's organisations, professional associations, trade unions, religious groups and other NGOs, and the Commissioners themselves would convene and make a decision on the Draft Bill. The people were further advised that if it was agreed, the Draft Bill would then be presented to Parliament, for acceptance or rejection.[239] Of this latter end, the people were told that 'since the MPs will have been part of the Conference we can see no reason why they should not accept the draft accepted there as an expression of the peoples' will'.[240] This process as described was mainly as it appeared in the mandating Review Act.[241] In other words the CKRC were acting as mandated statutorily.

[236] ibid.
[237] Manji (n 32).
[238] CKRC Report 2005 (n 207).
[239] CKRC Report 2002 (n 205) 2.
[240] ibid.
[241] CKRC Act (n 200), s16A (6)(a) & (8).

27 The CKRC observed that the recommended Constitution 'departed in radical ways'[242] from previous Constitutions and contained ambitious provisions, several proposed institutions which, in its view, were required to ensure participation of the public, accountability of public officers and transparency.[243] It was a Constitution that would have provided communities with 'dignity'[244] and social justice amongst other benefits.[245] Like the Shivji Commission in Tanzania which was acclaimed for 'making a number of key recommendations that had the explicit goal of increasing security of tenure for the peasant producer' and 'divesting (land) from the government' as well as creating an independent Commission of lands in place of the Government's ministry of lands,[246] but whose recommendations were not followed through, the recommendations made by the CKRC were not followed through because President Moi dissolved Parliament on 25 October 2002,[247] an act that was believed to be politically motivated, as the 'implications of constitution-making for substance',[248] had suddenly dawned on him and others in power. Those in power sought to 'dominate the process (going forward) and sought to side-line others from 'decision-making'.[249] The Draft Bill was therefore not adopted as had been hoped.

28 In 2004 another draft of the Bill was prepared following deliberations, this became known as the 2004 Bomas Draft. This draft was adopted on 15 March 2004 by the National Constitutional Conference. However, the process set out in the Review Act to enforce the Draft was not activated due to further political

[242] CKRC Report 2002 (n 205).
[243] ibid.
[244] ibid.
[245] ibid.
[246] Manji (n 32).
[247] Katiba Institute, 'About the CKRC Process' (Katiba Institute Archives 2014) <http://katibainstitute.org/Archives/index.php/ckrc-process/about-the-ckrc-process> accessed 28 December 2017.
[248] Michele Brandt and Others, 'Constitution-making and Reform: Options for the Process' (Interpeace 2011)< https://www.interpeace.org/resource/constitution-making-and-reform-options-for-the-process-2/> accessed 12 September 2016.
[249] ibid.

manipulation as the 'Government was equivocated, divided with many searching for a way to modify'[250] the draft and were successful in doing so.[251]

29 Moreover several cases all seeking to challenge the constitutionality of the Review Act and particularly the process of adoption of the Constitution as set out in the Review Act, were initiated. The case(s) argued that Parliament or alternatively the Kenyan people should have the final say on the Draft Constitution in a referendum instead.[252] The Courts agreed which led to Parliament passing the Constitution of Kenya Review (Amendment) Bill 2004 which called for more civic education on the Draft Constitution; and provided for a Constitutional referendum to take place.[253] It is said that although a draft Constitution should be amply assessed for suitability, the Kenyan process of parliamentary, court and the public's approval on what was a 'nearly finished process….placed hurdles in the way of enactment'.[254]

30 The Commission having concluded its work, produced its final report on 10 February 2005. The report detailed the challenges above.[255] All this interference meant that the 2004 Bomas Draft was amended and it is this revised version, known as the 2005 Wako Draft that was put to the Kenyan people in a referendum[256] on 21 November 2005. It was said to be a 'catastrophe';[257] and was rejected by 58% of the voters.[258] Reportedly the rejection by the people resonated their political dissent and unhappiness with how the draft Constitution seemed to 'renege on previous promises'.[259] It is said that the draft had been 'considerably amended by the NAKdominated (sic) parliament and thus fell far short of promised institutional reforms'.[260]

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[250] Charles Hornsby, *Kenya: A History since Independence* (I.B Taurus 2012).
[251] ibid.
[252] Constitution of Kenya Review Commission (n 207).
[253] ibid.
[254] Brandt (n 248).
[255] Constitution of Kenya Review Commission (n 207).
[256] Boone (n 2).
[257] Hornsby (n 250).
[258] BBC News, 'Kenyans Reject New Constitution' (*BBC News,* 22 November 2005)<http://news.bbc.co.uk/1/hi/world/africa/4455538.stm>accessed 10 January 2018.
[259] ibid.
[260] International Crisis Group, 'Kenya in Crisis' (*Africa Report No 137,* 21 February 2008).

Differences in the Draft Bills vis á vis the 2010 Constitution

31 To establish the extent to which the present Constitution reflects the CKRC process, this discussion will compare a few issues as set out in the 2002 Draft Bill (2002 non-adopted Bill), the 2004 draft (Bomas draft), the final 2005 draft (Wako draft) vis á vis the 2010 Constitution, which further evidences the politicisation of land issues in Kenya, on what essentially began as a legal process. Here are some examples.

32 The Draft Bill's definition of community land included: 'all land held, managed or used by specific communities as community forests, *water sources*, grazing areas or shrines and *identified by them as such*…'[261] (emphasis added). Water sources and community identification of land are omitted in the 2010 Constitution. Any reference to water sources in the 2010 constitution is reference to public land[262] and not community land.[263] The Endorois in Lake Bogoria and the Ogiek in the Mau Forest have faced forced evictions from water sources. Would leaving the community land definition as including water sources have prevented such evictions? Secondly, it is observed that the Draft Bill envisaged that community land would be identified by the communities themselves but the 2010 Constitution removes reference to community land being that which is identified by the communities themselves.[264]

33 Other variations of note are the 2002 Draft Bill are in respect of state acquisition of land. In the 2002 Draft the state was permitted to acquire land in circumstances where: it was for public interest reasons, where the state had

[261] Constitution of Kenya Review Commission, 'Draft Bill to Amend the Constitution' (Constitution of Kenya Review Commission 2002), Clause 234(3).
[262] 2010 Constitution, Article 62(1)(g).
[263] Under Article 63.
[264] Article 63(1) of the Constitution refers to the communities themselves being 'identified on the basis of ethnicity, culture or similar community of interest'. It makes no reference to community land being identified by the communities but rather describes what constitutes such land, see subsections 63(3) to (4).

provided reasonable justification for the hardship such acquisition would cause[265] and where the law relied on by the state provided for 'prompt payment of full compensation prior to occupation of such land'.[266] In other words for the state to acquire land for public interest reasons, it could not do so without first having due regard to the impact those being deprived of the land would face, which would have necessitated consideration of which communities used the land and the manner of their existence, their livelihood, their culture and religion. And where such impact amounted to hardship, state acquisition could only be lawful where there was reasonable justification nonetheless; and thirdly, the acquisition could only take place under a statutory regime that provided full compensation before state occupation of the land. Compensation under the Draft Bill could therefore not be an afterthought as it was in the Endorois case[267] and would have required the state to show the statutory authority or basis for its actions and that that authority created a concomitant obligation to compensate. These were far more generous safeguarding provisions against unlawful state acquisition of land than are contained within the current constitution.[268]

34 In respect of the National Land Commission (NLC), the 2002 Draft Bill provided that the NLC's functions included holding 'title to public land in trust for use by the people of Kenya';[269] and correlated to this, described public land 'as the collective property of present and future generations and shall vest in and be held by the National Land Commission in trust for the people'.[270] However, in the 2010 constitution, the NLC's function limited to managing public land on behalf of the national and county governments[271] not to holding title of public land for the people. Furthermore, under the constitution, public land is not vested in and held by the NLC but by the National Government in trust for the

[265] 2002 Draft Bill (n 261), Clause 236(2)(b).
[266] ibid.
[267] Endorois case (n 114), para 7.
[268] Constitution of Kenya, 2010, Article 40(3). Hereon 2010 Constitution.
[269] 2002 Draft Bill (n 261), Clause 237(2)(a).
[270] ibid, Clause 235(1)(a).
[271] 2010 Constitution, Article 67(2).

people.[272] It is therefore clear from these variations that under the 2010 constitution, holding of public land has been left as the preserve of the Government, rather than the Land Commission. The Draft Bill's provisions would have created safeguards for public land thus preventing illegal allocation of public land by Government officials. Notably the 2004 and 2005 drafts echo the 2010 Constitution and proposed that public land be vested in and held by the Government in trust for Kenyan people; and made the Government title holder of public land and the NLC manager of public lands on behalf of the Government.[273] Given people's grievances about irregular allocation of public land by the Government, the only explanation for keeping the Government the holder of public land is the knowledge by those in power that public land is where true power lies.

35 In relation to human rights, the 2004 Bomas Draft proposed that there be a Commission on Human Rights and Administrative Justice whose membership was to include a Peoples Protector and a Minority Rights Commissioner with 'special responsibility for the rights of ethnic and religious minorities and marginalised communities'.[274] The 2010 constitution established, as separate constitutional entities, the Kenya National Commission on Human Rights and the Commission on the Administration of Justice but neither have a peoples' protector or a minority rights commissioner. Arguably such a Commissioner would have acted as a representative of indigenous communities amongst other marginalised communities.

36 Essentially the CKRC process, like the Shivji Commission process in Tanzania engaged citizens, who in the Kenyan example included indigenous groups, about constitutional land reform and human rights amongst other issues but due to political interference failed to deliver, in the manner originally set out under the law.

[272] ibid, Article 62(3).
[273] Draft Constitution of Kenya (Bomas Draft) 15 March 2004, Clause 85(2)(a).
[274] ibid, Clause 298(1)(d).

ii) Njonjo Commission

37 In November 1999 President Moi 'being of the opinion that it is in the public interest'[275] to inquire into the country's land law system, appointed this Commission under Gazette Notice No. 6593.[276] Like the CKRC the Commission 'collated oral and written submissions from Kenyans on a wide variety of issues'[277] relating to land.

38 It recommended a system of land that secured the rights of all landholders. It recognised that communities hold land customarily and that there should be a community land category to secure these rights. It recognised that if unallocated, such land may vest in district land authorities thus recommending introduction of a framework to allocate land to the communities themselves and for such land to be held under customary law principles.

39 It further recommended that pastoral land be held by the pastoral community as their property and if, and only if, the community desired to obtain corporate title to the land, would this be done. It recommended a pastoral land policy to ensure promotion of pastoralism as proper land use, [278] which given the views expressed to the CKRC as well would have been welcome by pastoralist communities. In respect of public land, the Commission considered that this should be held by a national land body in trust for the Kenyan people; and that there should be a proper system for allocation of public land to prevent abuse.

[275] *The Kenya Gazette*, [Vol.CI-No.78] Gazette Notice No. 6593 (26 November 1999) 2278.
[276] ibid.
[277] Ibrahim Mwathane, 'The Contribution of Land to the Recent Violence in Kenya: Implications for the Ongoing Land Policy Dialogue' (Land Development and Governance Institute (LDGI) 2010).
[278] Kenya Ministry of Lands and Settlement, 'A Summary of Land Policy Principles drawn from the Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission'), The Constitution of Kenya Review Commission (CKRC), Proceedings of the National Civil Society Conference on Land Reform and the Land Question' (Kenya Ministry of Lands and Settlement 2004)< http://mokoro.co.uk/land-rights-article/a-summary-of-land-policy-principles-drawn-from-the-commission-of-inquiry-into-the-land-law-system-of-kenya-njonjo-commission-the-constitution-of-kenya-review-commission-ckrc-pr/>accessed 30 December 2018.

Further it recommended a mechanism for which historical land claims could be investigated and resolved.[279]

40 In respect of natural resources, it recommended benefit-sharing; community participation in decision-making concerning resources they depend on; co-management of resources by communities; recognition of the value of community principles relating to sustainability of natural resources and the need to strengthen these; and in instances where communities had been stripped of their land to make way for exploration projects, the Commission recommended compensation for loss suffered by present and future communities. It also recommended consulting with communities prior to pursuing land-related projects, as part of environmental impact assessments and recording their views in these assessments.[280]

41 Would these recommendations have made a difference to indigenous communities if realised? Arguably yes. The recommendations encompass what indigenous communities agitate for in their land rights claims. They were certainly in stark contrast to what had been recommended by the East Africa Royal Commission in 1955 and the land reforms pursued thereafter by the colonial and post-colonial administrations.

42 The Commission's report was produced in 2002. Looking at the NLP and 2010 constitution, it is noteworthy that although the Commission's recommendations for a pastoralist land policy are yet to be adopted, some provisions in respect of community land have been enacted which could either mean that there is a move to genuinely reverse some of the injustices indigenous communities have suffered in the past or a move to align constitutional legal theory with governmental or political agenda.

[279] ibid.
[280] ibid.

iii) TJRC Taskforce

43 This Taskforce was appointed on 17 April 2003 by Gazette Notice.[281] It was tasked, by Mwai Kibaki, the new President with establishing whether the Kenyan people wanted a Truth, Justice and Reconciliation Commission to investigate the abuses perpetrated by earlier post-colonial governments; and if the answer was affirmative, to recommend the kind of Commission to be established. Similar to the CKRC and Njonjo Commission, the Task Force undertook 'fact-finding, research, public hearings, written submissions, data collection, interviews, consultations, a national conference (and) an international conference'.[282] It even received written submissions from the Ogiek Welfare Council.[283] In the executive summary of its report the Task Force stated that at the core of its work was the 'sovereign will of the Kenyan people'.[284]

44 Those in favour of the establishment of a TJRC, said they wanted it to 'investigate political, social, economic, land-related and religious wrongs committed since the colonial period',[285] land grabbing, land rights, illegal allocations of lands including public lands by council leaders, land dispossession by foreigners; and the 'plight'[286] of those forcibly evicted from their homes 'by state agents'.[287] In terms of the period of investigation the Task Force observed that some thought 1897 was a sensible point for the commission to commence its investigations from, as this 'marked influx of settlers…. alienating land'; and others said 1885 at the portioning of states by European countries during the Berlin conference.[288]

[281] *The Kenya Gazette,* Gazette Notice No. 2701 (17 April 2003).
[282] Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, 'Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission' (Task Force on the Establishment of a Truth, Justice and Reconciliation Commission 26 August 2003). Henceforth 'TJRC Task Force Report'.
[283] ibid.
[284] ibid.
[285] ibid.
[286] ibid.
[287] ibid.
[288] ibid.

45 In terms of what happened and who was to blame, the Task Force found that land grabbing had been perpetuated in spite of constitutional provisions guaranteeing human rights; [289] that 'land……is an economic asset, and the killing or forcible eviction of the lawful owners from their lands constitutes both economic crimes and human rights violations';[290] and that economic crimes in turn set in motion a catalogue of other economic, social and cultural rights abuses.[291] The Task Force observed that the Kenyan State, albeit being party to international human rights treaties that required it to protect and promote human rights including economic, social and cultural rights, had failed to do so. [292] It also found that land had been used by the previous Government to turn community against community particularly those communities considered to be unsupportive of the Government.[293] Some of these Government-instigated 'land clashes' in regions such as the Rift Valley and Coastal regions had resulted in the ostracising of certain communities who were deemed not to belong to those areas, killing, forcible dispossession of their lands, internal displacement, experiences all of which had left 'deep wounds….on the Kenyan psyche'.[294]

46 To prevent this from happening again, it proposed that the truth commission investigate not only civil and political rights' breaches but also economic, social and cultural rights emphasising the fact that it is the vulnerable in society that are more likely to be impacted by such breaches.[295]

47 It recommended that a truth commission should 'establish culpability and make recommendations for redressing these most abominable of violations'.[296] It further proposed that the truth commission when

[289] ibid.
[290] ibid.
[291] ibid.
[292] ibid.
[293] ibid.
[294] ibid.
[295] ibid.
[296] ibid.

investigating land issues pay particular regard to 'historical claims and distortions brought about by colonialism'[297] i.e. land injustices resulting from colonialism which the post-colonial administration had not addressed.[298] It further encouraged the 'recently appointed land commission to fully investigate and settle historical land problems with finality'.[299] The land commission being referred to here was the Ndungu Commission, to be discussed below. The frustrations of the Task Force in relation to the complexities and injustices associated with land are apparent from their proposals- they wanted the issue dealt with- and so not only proposed that the truth commission address land injustices but also that the Ndungu commission 'investigate and settle historical land problems with finality'.[300] It is notable that it shared similar views with the CKRC in respect of the need to investigate and provide redress for these injustices.

48 In recognition of the enormity and existing logistical challenges of investigating injustices perpetrated during the colonial era, it recommended this task be undertaken not by a truth commission but 'a committee of eminent Kenyans to examine a limited set of issues relating to the colonial period'.[301]

49 At a conference held on 4-5 July 2003 the Justice Minister further 'assured delegates that the Government was deeply committed to the exercise and would be faithful to the wishes of Kenyans as expressed in the Task Force report.'[302] The Truth, Justice and Reconciliation Commission was to be established by 'a presidential decree by June 2004'.[303] However, no commission was immediately set up following the Task Force's work until the

[297] ibid.
[298] ibid.
[299] ibid.
[300] ibid.
[301] ibid.
[302] ibid.
[303] Kenya Human Rights Commission, The Kenya Section of the International Commission of Jurists, International Centre for Policy and Conflict, 'Transitional Justice in Kenya: Toolkit for Training and Engagement' (Kenya Human Rights Commission, The Kenya Section of the International Commission of Jurists, International Centre for Policy and Conflict 2010).

TJRC five years later and no committee of eminent Kenyans was tasked with investigating colonial injustices.[304]

50 Unsurprisingly, the failure to establish a TJRC at the time is attributed to politicisation of the process. The 'formation of a Government of National Unity' is said to have enabled KANU, the previous ruling party, to resurface and even assume 2 posts in the cabinet on grounds that this was necessary to restore 'a strong social fabric' and a 'leadership….(that) reflect(s) the entire people of Kenya'.[305] The remit of the TJRC had been to establish whether the people wanted a truth, justice and reconciliation commission to investigate what previous ruling parties including KANU had done. [306] Having members of that party existing within the new government surely prevented that. The agenda to form a TJRC was therefore 'lost' within these developments.[307]

51 The Kenya Human Rights Commission,[308] although noting that President Mwai Kibaki in the first 100 days of his appointment had shown that he was a 'committed reformer' who was seeking to deal with human rights concerns such as corruption, abuse of power and engendered 'respect' for NGOs, also observed the inconsistency in his failing to address police brutality and endorsement of a patronage system that retained some of the old guard.[309] This, they said, was difficult to reconcile with the 'hopeful mood' he had set nationally.[310]

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[304] Article 67(2)(e) 2010 Constitution; and Section 15(2) National Land Commission Act 2012 provide that this task now falls under the remit of the National Land Commission.

[305] Independent Online (IOL), 'Kibaki Hails Government of National Unity', (*IOL,* 30 June 2004) < https://www.iol.co.za/news/africa/kibaki-hails-government-of-national-unity-216081>accessed 11 January 2018.

[306] TJRC Task Force Report (n 282).

[307] Kenya Human Rights Commission and others (n 303).

[308] This is a non-governmental human rights organisation which assists individuals, groups or communities, fight for their human rights and seeks to hold state bodies and official accountable. See Kenya National Human Rights Commission, 'About/Vision and Mission' (Kenya National Human Rights Commission)<http://www.khrc.or.ke/about-us/mission.html>accessed 10 January 2018.

[309] Immigration and Refugee Board of Canada, 'Kenya: Country conditions since the election of the National Rainbow Coalition (NRC), in December 2002; and the present situation of opponents of the Kenya African National Union (KANU)' (Immigration and Refugee Board of Canada 2003) citing report of the Kenya Human Rights Commission 'The First 100 Days' (KHCR 9 April 2003).

[310] ibid.

52 Of the people whose views the TJRC Task Force gauged, 90% were in favour of a truth commission. They told the Task Force that they wanted a truth commission to get to the bottom of where, how, why and who had caused the country to err in the manner it had in the preceding years. Notably, the Justice Minister at the time was reported as saying: 'We want to diagnose the disease that assailed the Kenyan state for the last 40 years or so'.[311] Those against it thought the country did not need any more commissions, as past commissions had made recommendations which had not been implemented, and in some cases were unknown and yet public funds had been incurred. They felt yet another commission would be a 'waste of scarce public resources and valuable national time'[312] and instead the Government should adopt a 'futuristic attitude'[313] rather than seek to set right wrongs of the past.

53 According to Prof. Makau Mutua, the Chairperson of the Task Force, the implementation of the Task Force's recommendations for a truth, justice and reconciliation commission may have averted the 2007 post-election violence in Kenya.[314] It is opined by some that those establishing truth-related mechanisms do so sometimes 'without due regard to other TJ mechanisms….which serves as a whitewash measure where Governments attempt to sweep the past injustices under the rug while appearing to be advancing the aims of transitional justice'.[315] Perceptively some of the people the TJRC Task force interviewed were 'vehemently opposed to the formation of a commission'[316] as they believed it was the Government's way of 'hoodwinking'[317] the people into believing it was taking action whilst in fact it was not.[318]

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[311] BBC News, 'Truth Commission for Kenya' (*BBC News*, 15 October 2003). <http://news.bbc.co.uk/1/hi/world/africa/3194834.stm>accessed 10 January 2018.
[312] TJRC Task Force Report (n 282).
[313] ibid.
[314] Author's face to face discussion with Makau Mutua, SUNY Distinguished Professor and the Floyd H. and Hilda L. Hurst Faculty Scholar at the University at Buffalo School of Law (Post-colonial Injustices Symposium, Berlin, 26 January 2018).
[315] Kenya Human Rights Commission and others (n 303).
[316] ibid.
[317] ibid.
[318] TJRC Task Force Report (n 282).

54 Specific to land, the Task Force observed that some people thought it might be best to have a 'preliminary process that addressed land injustices meted against certain communities'[319] before actually having a truth commission whilst others considered a truth commission to be unnecessary given that the perpetrators were already known. This latter sentiment was accurate as the Task Force had confirmed what had happened, why it had happened and who was to blame. Thus it could be argued that it was not really necessary to have a truth commission as action could have been taken based on the evidence collated by the Task Force, but there was no willingness to do that or even establish one in June 2004 in line with the majority view. This process, unfortunately, seems also to confirm the political posturing inherent in land-related matters in Kenya.

iv) Ndungu Commission

55 This Commission, named after the Chair of the Commission, Paul Ndungu, was appointed by President Kibaki and its establishment confirmed by Legal Notice no. 4559 dated 30 June 2003 and published on 4 July 2003.[320]

56 The Commission's mandate was very specific: to investigate by the collation of evidence from 'ministry-based committees or from any other source' the 'nature and extent of unlawful or irregular allocations' of public lands including establishing which land had been so allocated and to whom i.e. specifically identify which 'private individuals or corporations' were allocated such land and by whom.[321] The Commission was asked to make recommendations, bearing in mind that some of the allottees may have proper title to some of the lands (for instance where they genuinely bought land at the asking price and were issued with title); propose what action could be taken from a legal

[319] ibid.
[320] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, 'Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land', (Commission of Inquiry into Illegal/Irregular Allocation of Public Land 2003). Hereon 'Ndungu Report'.
[321] Africa Centre for Open Governance, '?Mission Impossible? Implementing the Ndung'u Report' (Africa Centre for Open Governance 2009).

and administrative standpoint to restore such lands to 'their proper title or purpose' and in circumstances where such lands could not be 'restored to their proper title or purpose'; to make recommendations for criminal liability for those found 'involved in the unlawful or irregular allocation of such lands'; and propose measures for preventative action i.e. to refrain such allocations in the future.[322]

57 It is reported, and it is evident from the above mandate, that the spirit with which President Kibaki was elected was to 'purge and purify a government thoroughly soaked in corruption and stained by human rights abuses on a vast scale.'[323] This Commission, plus the 2003 Task Force, were presented as conduits through which that could happen. The political elite in government had leading up to that point used land as 'a political reward and for speculative purposes',[324] and abused the public land system in reckless abandonment including the excision of intact forest reserves (….) mainly for private purposes',[325] the extent of which needed to be investigated.[326] Through the Commission's mandate, all lands not allocated legally or regularly, in accordance with the law, would be recovered.[327] As the majority of lands indigenous communities claim as their ancestral lands are amongst these lands, the scope of the Commission's investigations were crucial to their land rights.

58 In terms of what happened and who was to blame, the Commission found that the Government and the political elite had unlawfully allocated trust land to individuals and companies,[328] contrary to the constitution (at the time) and attendant laws on trust land. It further found that at independence land previously belonging to European settlers was purchased back through loans,

[322] ibid.
[323] Boone (n 2).
[324] ibid.
[325] ibid.
[326] Wily (n 1).
[327] Manji (n 45).
[328] ibid.

and although intended for settlement schemes to settle landless Kenyans and promote agricultural production, the system fell prey to abuse by the District Plot Allocation Committees whose role had been to implement the scheme. These Committees allocated land to the Agricultural Development Corporation 'under the guise of settlement schemes which in turn allocated land to individuals including civil servants and politicians; and companies. The consequence was that the landless people the land was meant for were left landless.[329]

59 The verbatim entry of this finding on the Commission's report was this:

> 'The Commission also established that settlement schemes were established in forest areas ostensibly to resettle indigenous minorities whose lifestyles depend on forest habitats. Such minorities have been systematically displaced from their ancestral lands by the government through protectionist policies that do not recognize the historical claims of the people to the forest areas. A leading example of the displaced minorities is the OGIEK PEOPLE. The Ogiek have struggled and continue to struggle to make successive governments recognize their way of life as a forest dwelling community. Thus, sometime in 1997, the Government decided to establish a settlement scheme in the NAKURU/OLENGURUONE/ KIPTAGICH EXTENSION forest area, to resettle the OGIEK. A total of 1, 812 HA of forest land was set aside for this purpose. The requisite de-gazettement was not carried out by the Minister. (However, interviews with the former Commissioner of Lands by the Commission revealed that the real reason for hiving off this land from the forest was to establish an out-grower TEA ZONE for the Kiptagich Tea Estates Limited which stands on an area measuring 937.7 Ha within Transmara Forest Reserve and which is owned by former President Moi.) The area was duly surveyed, subdivided and allocated to prominent individuals and companies in the former President Moi's Government. Only a small number of the OGIEK people was allocated land in the area. The allottees have since been issued with title deeds. The forest was surveyed and subdivided and allocated contrary to the provisions of the Forests Act. From the list of the beneficiaries of this illegal allocation, the Commission concluded that the real intention of excising this forest was definitely not to resettle the Ogiek community.

[329] Kenya Land Alliance and Kenya National Commission on Human Rights, 'Ndung'u-Land Report' (Kenya Land Alliance and Kenya National Commission on Human Rights)<http://cemusstudent.se/wp-content/uploads/2013/01/Ndungu-Land-Report.pdf> accessed 20 December 2017.

> The objective was to allocate forestland as political reward to influential personalities in the former KANU regime. The listed allottees can neither be described as *Ogiek* or *Landless.* Many of these allottees got land far in excess of what would be recommended for an ordinary settlement scheme.'[330]

60 The Commission further found that the Government/political elite, had illegally allocated forestlands, national parks, game reserves, wetlands, riparian reserves, protected areas, museums and historical monuments, to individuals, schools, the Agriculture Society of Kenya and the Nyayo Tea Zones Development Corporation.[331] This last Corporation here being owned by President Moi.

61 The Commission attributed why all this had happened to corruption. Its overarching view was that 'illegal allocation of public land is one of the most pronounced manifestations of corruption and political patronage in (Kenyan) society'.[332]

62 To prevent it from happening again, and to provide redress for the wrongs committed, in respect of trust land, the Commission recommended that in cases where there was no ongoing litigation, those allocations should be revoked. This recommendation would arguably address a situation where indigenous communities residing on those trust lands before the allocation could return to occupying such lands unless those lands were in use by those individuals and corporations or had been allocated to other entities by those individuals and corporations. This would also mean that indigenous communities previously occupying such lands, who are likely to have been doing so under custom as these lands constituted their ancestral homes, would have these lands registered as community land.

[330] Ndungu Report (n 320).
[331] ibid.
[332] ibid.

63 It also recommended that where such land would lawfully have been set apart for public purposes but for the unlawful allocation, such land should revert to the original set public purpose. The Commission further recommended that the Ministry for Lands and Settlement, catalogue all trust lands for the purposes of identifying land adjudicated for public purposes.[333]

64 In respect of settlement schemes, the Commission recommended that (i) all titles issued under the scheme be revoked; (ii) that the lands be repossessed; (iii) 60% be reallocated to local residents and 40% be reallocated to the landless non-residents; and (iv) that the Government formulate a policy paper on settlement schemes management.[334] These recommendations would have the effect of returning land rightly belonging to indigenous communities to them.

65 In respect of forestlands, the Commission recommended: (i) that all unlawful allocations of forestlands and wetlands be revoked; ii) forest zones be resurveyed; iii) that the Forest Bill be tabled in parliament; iv) a wetlands management policy be formulated; and v) that the tea zones be abolished amongst others.[335] Implementing these recommendations in the case of the Mau or Embobut forests for example, would be capable of reversing some of the environmental degradation, forest depletion and water erosion said to be taking place there due to settlements and logging and enable indigenous communities to contribute to sustainable forest management and conservation strategies; and ultimately remain on their ancestral lands.

66 In respect of past wrongs, similar to the CKRC and the Njonjo Commission, the Commission recommended: (i) establishment of a national body, separate from the Executive, to manage public land i.e. allocate public land, a power previously belonging to the President and the Ministry for Lands; (ii) that there

[333] ibid.
[334] ibid.
[335] ibid.

be Land Titles Tribunal with power to revoke and rectify titles; (iii) that there be a land division in the High Court; (iv) that there be a computerised catalogue of public lands; (v) harmonisation of land law; (vi) a policy on development of public land; (vii) upgrading of informal settlements; and viii) enhancement of capacity of land institutions,[336] all of which would undoubtedly, ultimately, would have a positive effect on indigenous communities' land rights.

67 The Commission is acclaimed as having provided 'sound proposals for reforming land management and outlining viable legal, institutional, and policy strategies by which to surmount the expected implementation challenges....(and thus constituting) a possible way out of a crucial aspect of Kenya's land dilemma'.[337] However, its findings and recommendations have not been implemented. Notably, there was inordinate delay in releasing its report. The delay formed part of parliamentary debates over some time with various Ministers seeking clarity as to when it would be promulgated.

68 On 11 November 2004, the Assistant Minister of Lands and Housing was asked the following questions: 'a) Is the Minister aware that the current landlessness and unlawful seizure of public land is a prelude to turmoil and instability and in the country? b) What urgent measures is the Minister taking to formulate a comprehensive land policy to solve the land problems once and for all?'[338]

69 On 9 December 2004 the Minister for Lands and Housing made the following Ministerial statement on the implementation of the report. The Minister confirmed that Cabinet had concluded its deliberations on the report and had made the following direction: 'That all the recommendations contained in the report of the Commission of Inquiry Illegal and Irregular Allocation of Public

[336] ibid.
[337] Africa Centre for Open Governance (n 321).
[338] Parliamentary Debates 11 November 2004, Kenya National Assembly Office Record (Hansard).

land be implemented in full, in order to facilitate the speedy implementation of the recommendations…'[339]

70 On 3 October 2007, a parliamentarian contended that the Government had failed to table the report for discussion in Parliament and to take any action on the report. Another argued that in one particular case an Assistant Government Minister had assured citizens in a certain area that, based on the report no further development would go on a particular site and that the government was intent on implementing the report, however, the development had recently been reinstated with the developers claiming that the Ndungu report did not exist.[340]

71 On 22 April 2008 the Assistant Minister for Medical Services, Mr Mungatana, referred to a report produced by the Kenya Anti-Corruption Commission (KACC) which had recommended that the recommendations made by the Ndungu Commission be implemented and commented on how pleased he was that the Minister for Lands had 'pledged to implement' the report albeit noting: 'We hope our Minister for Lands will keep his word this time. We have had many other Ministers who went to the Ministry with steam, but somewhere along the road they have left the matter alone'.[341]

72 On 20 January 2009,[342] the Minister for Lands was asked two questions about the Commission's report: i) how much the Commission had cost the Exchequer to which he confirmed Kshs79,399,768; and ii) what the status of implementation of the report was. In response the Minister explained that some work had begun on implementation but that amendment of legislation was needed to create a 'legal framework to implement the recommendations

[339] Parliamentary Debates 9 December 2004 'Ministerial Statement Implementation of the Ndung'u Report on Irregular or Irregular Land Allocations', Kenya National Assembly Office Record (Hansard).
[340] Parliamentary Debates 3 October 2007, Kenya National Assembly Office Record (Hansard).
[341] Parliamentary Debates 22 April 2008, Kenya National Assembly Office Record (Hansard).
[342] Parliamentary Debates 20 January 2009, Kenya National Assembly Official Record (Hansard).

of the Commission'. [343] To date, no such legal framework exists and the report remains on the whole unimplemented.

73 Despite having the potential to benefit indigenous communities, the Commission's recommendations were, and remain, a political nightmare and have not been implemented, in the inveterate way these land-related exercises seem to end. It is opined that 'there has never been much political will to implement findings of Land Commissions',[344] which has been proved true.

v) The TJRC

74 The Commission was established through the Truth, Justice and Reconciliation Act 2008.[345] The Preamble of this Act acknowledged that: 'since independence there has occurred in Kenya gross violation of human rights, abuse of power and misuse of public office and that there is a desire to give the people of Kenya, a fresh start where justice is accorded to the victims of injustice and past transgressions are adequately addressed.'

75 The Commission's functions included the following: 'inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of cases relating thereto; inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization; inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities; investigate into the whereabouts of victims and restore the human and civil dignity of such victims by granting

[343] ibid.
[344] Lillian Aluanga, 'A dozen reports on land later, but no remedy' *The Standard Media* (Nairobi, 15 November 2009)<https://www.standardmedia.co.ke/?articleID=1144028411&pageNo=1>accessed 2 January 2018.
[345] TJRC Act 2008 (n 171).

them the opportunity to relate their own accounts of the violations of which they are victims. Finally it was to recommend reparation measures in respect of victims', [346] from 1963 to 2008 when the statute was passed.

76 One may question why the public land-related tasks were necessary in light of the Ndungu Commission's findings and recommendations. Nevertheless, the Commission clearly focused on hearing the 'perspectives of the victims'.[347] It had 14 thematic hearings including one on land and another on economic marginalisation and minorities. The Commission took 40,000 statements which is more than any other transitional justice process; and 60% of those statements related to land claims including some from indigenous groups which had been taken by the peoples themselves in their own regions. Indigenous communities gave evidence about their ancestral land claims, conflicts with other communities and state and corporation human rights abuses against them.[348] They took ownership of their evidence and although the Commission had not been specifically mandated to investigate indigenous land rights claims or issues, the indigenous peoples framed their evidence in that way and the Commission had to accept the evidence as given.[349]

77 It is therefore no surprise that in 2010 it was observed that the 'TJRC has an important opportunity to create a new paradigm of engagement and begin to reshape the way that Kenya's diversity contributes to the Kenyan polity'[350] including realising indigenous peoples' rights.[351] In view of the general attitude towards indigenous peoples, the fact that the report was committed to them in this way, must have raised a legitimate expectation that their land rights would be realised.

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[346] ibid, s6.
[347] ibid.
[348] ibid.
[349] ibid.
[350] Cemiride and The Advocates for Human Rights, 'Engaging Minorities and Indigenous Communities in Kenya TJRC, Recommendations and Comparative Practices Briefing Note 2010' (Cemiride and The Advocates for Human Rights 2010).
[351] ibid.

78 The Commission found that the State was to blame for the following happenings: it had failed to recognise indigenous communities' existence, unique culture and contributions; discriminated against them; failed to protect communities in predominantly pastoralist areas from inter-communal violence and that this failure had resulted in loss of property and destruction of entire homesteads and villages over a period of more than 40 years; engaged in a pattern of oppressive security operations in pastoralist areas since independence that, in some areas, amounted to crimes against humanity; failed to engage pastoralist communities in addressing boundary disputes and this had led to constant conflicts, displacement of thousands and loss of livelihood; expelled communities such as the Endorois, Ogiek and Sengwer and others from their ancestral lands; allocated forest lands to other communities which had led to the destruction of forests upon which the traditional livelihood of forest communities depended, rendering it impossible for them to practice their customs; created a land regime in Kenya that was *de facto* discriminatory and had led to the massive dispossession of ancestral lands of pastoralist and hunter-gatherer communities; failed to protect the rights of minorities and indigenous peoples to free, prior and informed consent; permitted development projects that had deepened marginalisation and exclusion of minority groups; and had failed to implement judicial decisions, such as the African Commission's judgment on the Endorois community which had their, and other communities', confidence in the ability of the Kenyan justice system to deliver substantive justice.[352]

79 Specifically on land, the Commission found like the preceding inquiry bodies, that there had been land-related injustices including: 'illegal alienation and acquisition of individual and community land by public and private entities, illegal alienation of public land and trust lands, preferential treatment of members of specific ethnic groups in settlement schemes at the expense of

[352] Truth Justice and Reconciliation Commission, 'Final Report of the Truth Justice and Reconciliation Commission' (Truth Justice and Reconciliation Commission 2013), Volume IV.

the most deserving landless…forceful evictions and the phenomenon of land grabbing, especially by government officials,'[353] and all for 'personal gain'.[354] It also blamed the British in the pre-independence Kenyan era for commission of land injustices as well as the post-colonial Governments for failing to address and redress these injustices. In respect of land policy in the post-colonial era, the Commission found that little had been done to deal with communal land claims and that the Government's Sessional Paper No. 10 titled 'African Socialism and its Application to Planning in Kenya', discussed in the introductory chapter, had justified a focus on securing private ownership of land for economic growth purposes at the expense of other types of tenure including communal tenure. Correspondingly, the Commission found that the 'effects of dispossession during the colonial era (had not been) taken into account'.[355]

80 Further, and dissimilar to the previous bodies, the Commission found that pastoralists, in the North Eastern region were marginalised as a result of the region itself being marginalised by the colonial administration.[356] The Commission found that albeit starting in the colonial period, the post-colonial Government had continued to impose marginalising policies in the region with a view to preventing alleged plans of secession of the region from Kenya to Somalia.[357] The Commission found that the Kenyan Government was responsible for escalating issues in this region as security issues and enforcing 'numerous security operation(s)…..in this region (which had) often resulted in loss and confiscation of property, especially cattle, by state security agents'.[358]

81 To prevent a repeat of these injustices, the Commission made the following recommendations, of relevance here, in its 2013 report: [359]

[353] ibid, para 246.
[354] ibid, para 253.
[355] ibid, para 231.
[356] ibid, para 233.
[357] ibid, para 246.
[358] ibid, para 235.
[359] ibid, 55.

- 'That the Ministry of Lands/appropriate government…..survey, demarcate and register all remaining Government lands, including those that were formerly owned or managed by local authorities, all protected wildlife areas and river banks, among other public lands;
- That the National Land Commission commences work with the Ministry of Lands and settlement to undertake adjudication and registration exercises at the Coast and all other areas where the same has not been conducted. Measures shall be designed to revoke illegally obtained titles…..;
- That the National Land Commission in furtherance of its mandate expedites the process of addressing and/or recovering all irregularly/illegally acquired land. Measures should be designed by the Ministry of Lands and Settlement to encourage individuals and entities to surrender illegally acquired land;
- That the Ministry of Land in conjunction with the National Land Commission design and implement measures to revoke illegally obtained titles and restore public easements;
- That the National Land Commission develops, maintains and regularly updates a computerized inventory of all lands in Kenya, including private land that should be accessible to all Kenyans as required by law. Land registries country wide should be computerized and made easily accessible as required by the law.'

82 Some of these recommendations echo some of those made by the Njonjo and Ndungu Commissions. To address economic marginalisation, the Commission recommended that the Government formulates, adopts and implements a socio-economic development policy to deal with this within 12 months of submission of its report.[360]

83 Overall, the Commission considered that the constitution, the National Land Commission and attendant laws, 'provide a sound basis to fully address land-related injustices, including historical ones, but only if there is political will to use these laws and institutions'.[361] The Commission proposed reparations as form of redress. It proposed that the Government allocate Ksh500 million as an initial figure for reparations,[362] to include collective reparation for communities who had suffered economic marginalisation and violations of socio-economic rights; for historical land injustices; forced displacement;

[360] ibid, 53.
[361] ibid, para 254.
[362] ibid, foreword.

victims and survivors of massacres; extrajudicial killings; unlawful detention, torture and ill-treatment, all within 36 months; and that this be implemented through the Implementation Mechanism.[363]

84 After conclusion of its report, the TJRC was required to recommend the prosecution of the perpetrators; ways to redress the victims of these abuses; and compile a report setting out its findings and recommendations.[364] The Truth, Justice and Reconciliation Act 2008 required the Commission to submit its report to the President at the conclusion of its work which: summarized its findings; made legal, political and administrative recommendations as necessary; set out recommendations for prosecution; recommended reparations for victims, specific actions to be taken, and legal and administrative measures to address specific concerns it identified; and which recommended a mechanism and framework to implement its recommendations and also recommended an institutional arrangement in that connection.[365]

85 The Commission did all this including recommending an implementation mechanism. The report was published. The 2008 Act, s49(3) had required implementation of the report within 6 months of publication of the report, however, this Act was amended in 2013 to say that implementation would begin immediately after parliament had considered the report. Parliament has not considered the report. On 16 May 2019 the National Victims and Survivors Network submitted a petition in Parliament for the implementation of the report.[366]

[363] TJRC Task Force Report (n 282).
[364] Truth, Justice and Reconciliation (Act No. 6 of 2008), s5.
[365] ibid, s48(2)(f).
[366] Senate Debates 16 May 2019, Senate Hansard Report (Hansard).

vi) The Mau Forest Task Force

86 The 2009 Mau Forest Task Force was established by Raila Odinga, the Prime Minister (at the time) on 21 July 2008 by Gazette Notice.[367] It was mandated to 'formulate appropriate recommendations' for: a) 'an effective management structure to stop any further degradation of the Mau Forests Complex; b) provide for the relocation of the people currently residing in the forests; c) the restoration of all degraded blocks of forests and critical water catchment areas with the Mau Forests Complex; d) Mobilizing local and international resources to implement the above mentioned objectives and to secure the sustainability of the entire ecosystem of the Mau Forest Complex'.[368]

87 This mandate suggests that all those residing in the Mau Forest were going to be relocated no matter the finding made about them. Unlike other bodies, the mandate seemed less focused on obtaining views of the people. Notably however, the Task Force appointed committee(s) from within its own membership to deal with technical or other arising issues,[369] namely: i) Committee on Enforcement and Outreach; ii) Committee on Boundaries; iii) Committee on Land Ownership and Resettlement Matters; and, iv) Committee on Restoration, Livelihoods and Resource Mobilization,[370] which enabled it to hear from groups like the Ogiek lawfully residing in the forest.

88 In terms of what had happened, the Task Force found that the Ogiek had been 'subjected to evictions severally',[371] from the Mau Forests Complex which was their home. It noted that historical records existed to show their residence in the Mau Forest for 150 years.[372] The Task Force also found that in 2001 the Government had announced that 61, 587 hectares of the forest complex was to be excised for the purpose of settling Ogiek families and victims of the 1990s

[367] *The Kenya Gazette*, [Vol.CX-No.62] Gazette Notice 7065 (1 August 2008).
[368] ibid.
[369] ibid.
[370] Mau Task Force Report (n 82).
[371] ibid.
[372] ibid.

election-related land clashes, but rather than benefit these groups, the land had been allocated to 'Government officials, political leaders and companies' and others whilst the groups the land was meant for were left landless.[373]

89 Notably, the initial proposal/recommendation to settle the Ogiek communities had in fact been made in the early 1990s by the Kenya Indigenous Forest Conservation Project (KIFCON), a project of the Ministry of Environment and Natural Resources funded by the UK's Overseas Development Administration,[374] but not followed through by the government. KIFCON had established that that Ogiek peoples were present in and around the forest complex; that some were in the forest whist others were 'alongside forest stations' as they had been evicted from the forest itself by the Kenya Forest Department on grounds of conservation. KIFCON had therefore recommended a stay of the evictions and resettlement of the Ogiek community in the Tinet forest to protect their cultural rights.[375] President Moi had rejected KIFCON's recommendations on grounds that land-allocation was outside the scope of the project's objectives,[376] leading to the termination of the project.[377] It is opined that KIFCON/ODA was naïve in: 'failing to understand the complex politics around power and land in Kenya (and that rather than their recommendation assisting those it needed to) it had legitimize(d) settlement in the forest'.[378]

90 The Mau Forest Task force noted that a 2001 Inter-Ministerial Committee on Forest Excisions Report had found that the original 3000 Ogiek families identified by KIFCON in 1992 to be resettled, had by 1996 become 9000

[373] ibid.
[374] ibid.
[375] Fransesca Di Matteo, 'Community Land in Kenya: Policy Making, Social Mobilization and Struggle for Legal Entitlement' (2017) Department of International Development Working Paper Series No.17-185.
[376] ibid.
[377] Peter Abelson, *Project Appraisal and Valuation of the Environment: General Principles and Six Case-Studies in Developing Countries* (Macmillan Press Limited 1996).
[378] Jacqueline M. Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (Science and Technology 2011).

families.[379] It observed that through the outward rejection of KIFCON's recommendations to resettle the Ogiek, the Government ended up using the scheme as 'a cover for massive and irregular appropriation'[380] of public land; and the scheme 'became a site of land accumulation and patronage politics by those in power, producing exclusion, conflict, and environmental destruction.'[381] The Task force's findings in this respect were no different to those of the Ndungu Commission, as observed earlier, which found that settlement schemes had not benefited those they were intended to benefit.

91 The Committee also found that ecologically sensitive areas such as water catchments were also being unlawfully allocated. It recommended repossession of these areas.[382] It also found that public land was being allocated for non-public use; and in this respect recommended that allocation of land only be permissible through the compulsory acquisition process. It found that 28,500 hectares of forest land had been encroached and thus recommended immediate ejection of the encroachers from the forest. It is contended that the issues that existed when both the Njonjo and Ndungu Commissions had looked into illegal and irregular allocation of public land, had not been addressed in 2008/9 thereby, unsurprisingly, leading the Committee to make more or less the same findings as these bodies.

92 To prevent continuation of the problems, the Task Force recommended the settlement of the Ogiek and other *bona fide* settlers outside ecologically sensitive areas; revocation of all title deeds not issued in accordance with the stated purposes; and that any 'bona fide settlers' who had received irregular title deeds should exchange the irregular ones for legitimate ones.[383] Although it found that the Ogiek community was lawfully settled in the forest, the Task Force recommended that they be settled outside the claimed ecologically

[379] Mau Task Force Report (n 82).
[380] Klopp and Sang (n 378).
[381] ibid.
[382] ibid.
[383] ibid.

sensitive areas. Arguably if the Ogiek were present there in the first place, those areas would have formed what the community considered to be their rightful lands. Restitution 'should, whenever possible, restore the victim to the original situation before the gross violations ….occurred'.[384] This should have meant the Ogiek being settled on their rightful land.

93 An interim Coordinating Secretariat, based on a five phase plan, was established to coordinate implementation of the recommendations made which included repossession of unparceled and unoccupied forestland excised in 2001; and land encroached by illegal squatters who the report defined as having 'no documentation to support their occupation of the forest'.[385] The Ogiek community were considered part of this category and as a result of the recommendations made by this Task Force, the Government served the community with an eviction notice to leave the forest in October 2009, leading to an urgent application to the African Commission which then sought a provisional order from the African Court.[386] This notwithstanding the fact that the Task Force, similar to the Ndungu Commission, had found that the Mau forest is the Ogiek homeland. The Ogiek were not resettled on any other land either. What is apparent from this is that where it suits the Government to implement a recommendation to evict an indigenous community, it will do so but where it is required to implement a recommendation to their benefit, it will not do so. One of the persons said to have land in the Mau forest is 'Baringo Senator Gideon Moi, President Moi's son who owns 44.7 hectares',[387] which certainly shows that corruption and political influence take precedence in land matters in Kenya.

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[384] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[385] Interim Coordinating Secretariat Mau Forests Complex, 'Brief on the Rehabilitation of the Mau Forests Complex' (Interim Coordinating Secretariat Mau Forests Complex 2010).

[386] Ogiek case (n 81), para 3.

[387] George Sayagie, 'Task Force report on Mau yet to be implemented nine years later' *Daily Nation* (Nairobi, 1 August 2018) <https://www.pressreader.com/kenya/daily-nation-kenya/20180801/281642485981322> accessed 7 January 2019.

Other examples of Land Commissions

94 As discussed earlier, the Tanzanian Shivji Commission, appointed by the Tanzanian President, was mandated to look into the land situation in Tanzania, it did and it made truly reflective proposals which the Government refused to implement.[388] It is observed that this process allowed:

> 'the voices of the intended beneficiaries of land reform (to be) heard for a brief period….and (the Commission by) depositing their detailed findings ……capture(d) the subaltern voices of poor subsistence farmers…….itself an important contribution in contemporary land reform.'[389]

95 The Commission was part of Tanzanian Government's land reform plans, which it is said were initially 'a response to pressure from rural constituents' but as the recommendations and therefore the extent of the problems surfaced, the 'demands of rural constituents were lost in translation'. [390] This bears similarity with what has happened with the Kenyan Commissions.

96 The Tanzanian Government has also recently established a Task force to investigate disputes 'between livestock keepers and farmers, reserved areas, ranches owned by the National Ranching Corporation (NARCO), holding grounds for cattle and livestock multiplication units'.[391] One of the differences between this and all the six bodies discussed above is that the Task Force will comprise: 'Members of the ……. President's Office (Regional Administration and Local Government), the Ministry of Livestock and Fisheries, the Ministry of Lands, Housing and Human Settlements Development and the Attorney

[388] Manji (n 32).
[389] ibid.
[390] ibid.
[391] Daily News Reporter, 'Tanzania: Govt Forms Taskforce to Quell Land Conflicts' *All Africa* (Kigoma, 9 November 2018) <https://allafrica.com/stories/201811090486.html> accessed 7 January 2019.

General Chambers,'[392] which sounds similar to the Paraguayan Inter-Agency Commission discussed in Chapter 3. Although this may sound positive, in view of the way the Shivji Commission report was treated by the Government, this body may yet be another example of land-politicization exercises in the East African region, the basis of which is Tanzania seeking to align itself with the agenda of donor bodies.[393]

97 Several West African States have also gone through constitutional review processes.[394] Of the exercises, it is asked whether they indicate 'a new era of recognition and acceptance of democratic processes….or merely reflect a trend of governments initiating these processes to surreptitiously attempt to subvert the democratic process through a "legitimate", widely accepted means?'[395] The answer is said to 'lie somewhere in between.'[396] What has happened and what is happening in Kenya's case although at first glance may appear to be legitimate, seems also to be subversion of the democratic process. The NLP reinforces this view.

Kenya's National Land Policy (NLP)

98 The NLP was adopted by the Kenyan Government in 2009. Its preliminary passages describe it as encompassing 'the issues and policy recommendations that have been identified, analysed and agreed upon by the stakeholders, (as being) a hall mark of the rare sense of dialogue and collaboration between the Government and the Citizenry in tackling, arguably, the most emotive and culturally sensitive issue in Kenya'.[397]

[392] ibid.
[393] Manji (n 32).
[394] Eleanor Thompson, 'What constitutional review processes in West Africa tell us', *Pambazuka News* (West Africa 18 June 2014)<https://www.pambazuka.org/governance/what-constitutional-review-processes-west-africa-tell-us>accessed 8 January 2019.
[395] ibid.
[396] ibid.
[397] NLP (n 7).

99 On the face of it, the NLP is a believable document. It acknowledges that there have been attempts to assimilate smaller communities into larger ones thus failing to acknowledge the smaller communities' distinctive identities. This captures the experience of indigenous communities like the Ogiek whose assimilation was recommended by the 1932 Carter Land Commission. The NLP states that communities have lost their homes through gazettement of forests and national reserves and unlawful allocation of land with title being given to individuals and institutions, which is a restating of the findings of the various bodies considered here.

100 The NLP is said to have benefited in particular from the Njonjo and Ndungu Commissions' reports[398] and one may therefore be tempted to conclude that the processes were not in vain. The NLP for instance recognises that policies and laws have deprived communities of access of land, disrupted their culture and disinherited them of their land;[399] that the absence of governmental accountability in land has led to irregular allocation of public land;[400] that the power of the State to compulsorily acquire land, the effect of which has been to extinguish other title to the land, has been abused resulting to irregular acquisition of land; that policies and laws have failed to provide protection on an equal basis to all land categories; and that colonial and post-colonial regimes have 'undermined'[401] traditional land systems resulting in 'uncertainty in access, exploitation and control of land and land-based resources'.[402] All these problems, according to the NLP, have created what it describes as 'land issues requiring special intervention'[403] namely: 'historical injustices, rights of minority communities (such as hunter-gatherers, forest dwellers and pastoralists) and (those of) vulnerable groups' which it considers to include *inter alia* pastoralists, hunters and gatherers.[404]

[398] NLP (n 7).
[399] ibid.
[400] ibid.
[401] ibid.
[402] ibid.
[403] ibid.
[404] ibid.

101 The NLP proposes to resolve these issues by: redistribution, restitution and resettlement; and also by establishing a framework to investigation historical land injustices. It also provides that the Government will lay out a clear framework and procedure for: a) recognising, protecting and registering of community land rights; and a framework to 'resolve the problems created by illegally acquired trust land'.[405] To prevent reoccurrence of these problems, and to secure community land, the NLP states that the Government will take the following action:[406] i) repeal the Trust Land Act (Cap 288) – notably this Act has now been repealed; ii) document and map existing forms of communal tenure 'in consultation with affected groups'[407] – this has not been done; and iii) vest ownership of community land in the community- The 2010 constitution provides for this.

102 Further the NLP provides that the Government, in order to recognise and protect these groups' rights, will identify them and 'ensur(e) their access to land and participation in decision-making over land and land based resources'.[408] This has not been done. And where 'pastoral communities' are concerned, the NLP notes that their land has been disposed of without their consultation.[409] It also provides that pastoralism will be recognised as a legitimate land use and production system and there will be a framework for 'defining and registering land rights in pastoral areas while allowing for pastoralists to maintain their unique land systems and livelihoods'.[410] This has also not been done.

103 It is said that drafters of policy are likely to draft what are in theory 'sound policies'[411] but struggle to drive the change proposed by the policy or

[405] ibid.
[406] ibid.
[407] ibid.
[408] ibid.
[409] ibid.
[410] ibid.
[411] Africa Centre for Open Governance (n 321).

sufficiently address how to 'overcome'[412] implementation challenges.[413] Although it may be suggested that the NLP was drafted with justice in mind and it has already led to the taking of certain legal steps - repealing of the trust land law; the inclusion of the community land category in the constitution, the enactment of the Community Land Act 2016 and the constitutional establishment of the National Land Commission to look into historical land injustices, evidence of implementation will always be in the operationalisation of a system. Patrick McAuslan observes that the NLP is 'wide ranging and immensely ambitious',[414] that there is indeed some mismatch between the principles contained in it and the 2010 constitution,[415] and more significantly it is unlikely to 'sweep away'[416] the political and administrative elitism that has existed, and cultivated impunity in Kenya for over 50 years.[417] This thesis agrees with that view.

104 Land in Kenya is a political chalice and the NLP and the six national exercises before it, need to be considered in that light. As to why those bodies were really established and why implementation of their recommendations have proved to be a challenge, this thesis notes Ambreena Manji's observations. She says:

> 'The pressures on national governments from rural constituents to deal with long-standing problems of land conflicts have combined with the agenda of international financial institutions and bilateral donors to liberalize land tenure. It appears that once national governments began to address grievances over land, by appointing Commissions of Inquiry into land matters for example, matters begin to develop beyond their control, there is evidence that the land reform process developed a substantial momentum of its own, ultimately leading

[412] ibid.
[413] ibid.
[414] ibid.
[415] McAuslan (n 15).
[416] ibid.
[417] ibid.

national governments to approve new land laws over which they feel little sense of ownership or control. This explains the confusion with which new land laws are often received and the uncertainty that surrounds the questions of how they are to be interpreted.'[418]

105 As discussed in the introductory chapter, and will be seen in chapter 5 of this thesis, the World Bank has interfered with Kenya's land reform policies initially emphasising reduced community land tenure and increased private tenure, to not being as emphatic about this in the early 2000s. This renewed thinking led to the Bank releasing a research report entitled 'Land Policies for Growth and Poverty Reduction' in 2003 in which it associated the definition of land rights with economic growth, poverty reduction, good governance and 'effective use of land as a resource'.[419] Conjecturally the drafting process for Kenya's NLP began a year later in 2004. The culmination of the Bank's interference may be, as Ambreena Manji says, the creation of the NLP and constitution which the government feels little sense of ownership or control over, and in respect of which, there is confusion as to interpretation and intent.

Legitimate expectation

106 This thesis argues that notwithstanding the confusion created by the domestic exercises partaken by the 6 bodies, or the politics behind their establishment, the fact of the exercises creates a legitimate expectation that their recommendations will be implemented. The Commissions of Inquiry Act 1962 Cap.102,[420] is the statute that empowers the President to appoint Commissions of Inquiry to inquire and report back on any issue of a public

[418] Manji (n 32).
[419] ibid.
[420] The Act has been amended four times with the last of these being in 2010 by the Commissions of Inquiry (Amendment) Act No.5 of 2010.

nature which s/he believes is in the public interest.[421] It is this Act through which the Njonjo and Ndungu Commissions were established. In the case Mureithi v Attorney General (2006) the applicant contended that the Court had jurisdiction to order the Government to enforce the recommendations of the Ndungu Commission under 1962 Act. The Court rejected this submission stating that there was no duty under law to do so.[422] This is correct as the Act required that the Commission of Inquiry present its report only to the President, which was done. However, the Act was amended in 2010 to require a Commission of Inquiry to report back to the President and the National Assembly.[423] The Memorandum of Objects and Reasons for the Amendment[424] explains as follows:

> 'In the history of our country, numerous inquires (sic) have been commissioned by the President in exercise of the powers vested by section 3 of the Commissions Inquiry Act. The reports of such inquiries have, in terms of section 7 of the Commissions of Inquiry Act, been submitted to the President. In a good number of cases, the results of such inquiries have remained unknown to the public. This despite the fact that inquiries are constituted to interrogate matters that are of a public nature and which directly affect the public. The public are usually active participants in the proceedings and deliberations of such inquiries. Additionally, the inquiries are funded by the public. It is therefore an anomaly that the public would remain clueless as to the results of a large number of inquiries that have been commissioned. To address this anomaly, this Bill proposes an amendment to section 7 of the Act. The proposed amendment would require a commissioner to report the findings of an inquiry to both the National Assembly and the President. Submission of a report of an inquiry to the National Assembly would afford the public, through their elected representatives, an opportunity to deliberate the results of the inquiry.

[421] s 3(1) of the Act provides: 'The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.'
[422] Manji (n 45).
[423] s7(1) provides: 'It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at.'
[424] This is annexed to 'The Commissions of Inquiry (Amendment) Bill 2009'.

> The amendment would also ensure transparency and accountability in the functioning of the inquiry system.'[425]

107 Arguably this should enable judges in the future to find, where there has been a failure to table findings in Parliament, in respect of a Commission of Inquiry, that the Government has acted unlawfully and order it to do so.[426]

108 Notably in the 2014 case of *Joseph Letuya and others*[427] the Environment and Land Court listened to arguments made by the applicants, members of the Ogiek community who contended that their forcible eviction from the Mau Forest and settlement of other persons on their land, thus excluding them, was a breach of their means of livelihood and right not to be discriminated; and that the settlement scheme under which land was being allocated to these other persons was *ultra vires*. Amongst the evidence the community relied on was the 2009 Mau Task Force's report findings and recommendations. Based on the report's findings, the Court not only found it could not:

> 'uphold the legality of the said allocations. This Court also in this regard adopts the findings and recommendations made in the Report of the Government Task Force on the Conservation of the Mau Forest Complex, and particularly the recommendations that all titles that were issued irregularly and not in line with the stated purposes of the settlement scheme be revoked, and that members of the Ogiek community who were to be settled in the excised area and have not yet been given land should be settled outside the critical catchment areas and biodiversity hotspots.'

109 The Court therefore ordered the National Land Commission to register Ogiek land 'in line with the recommendations in the Report of the Government Task Force ….'[428] Notably, the Task Force was established not through statute, like the TJRC, but Gazette Notice but the community were daring enough to

[425] Memorandum of Objects and Reasons, The Commissions of Inquiry (Amendment) Bill 2009', (John Olago Aluoch 5 August 2009).
[426] Following of course a court application not simply on its own volition.
[427] Letuya (n 76).
[428] ibid.

rely on it and rightly so, as at the very least the Task Force's findings was instructive here and assisted them despite the manner in which the Government sought to enforce them thereafter by evicting the community in October 2009. The finding that the Mau forest is the Ogiek home, which is fortunately corroborated by other reports, should continue to be relied on by the community in any event.

110 In respect of the TJRC, the 2008 TJRC Act required that 'all recommendations (of the TJRC) shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation'.[429] To this end, the TJRC recommended an 'independent body with its own offices and budget….to be supported by a Technical Secretariat'[430] to implement its recommendations. The TJRC considered that it was 'better to have fewer recommendations that are implemented, than many recommendations that gather dust on bureaucrat's shelf'. [431] As such it 'strove to make meaningful and reasonable recommendations which, it is hoped, will have a higher chance of implementation'.[432]

111 The TJRC observed that many commissions have made recommendations in the past that have not been implemented, 'in a timely fashion (or) at all'.[433] However, in 2013 following the publication of its report, the 2008 Act was amended by the Truth, Justice and Reconciliation (Amendment) Act 2013.[434] As observed earlier, the pertinent provision of this Act is s49 which provides that the Minister will 'set in motion a mechanism to monitor the implementation of the report in accordance with recommendations of the National Assembly' and that implementation of the report would commence 'immediately after consideration of the report by the

[429] TJRC Act (n 171), s50(2).
[430] TJRC Task Force Report (n 282).
[431] ibid.
[432] ibid, Foreword.
[433] Ibid.
[434] Truth, Justice and Reconciliation Commission (Amendment) Act 2013 (Act No. 44 of 2013).

National Assembly'.[435] It is possible for indigenous communities to seek to trigger implementation or tabling of the report using court proceedings on grounds that failure to consider the report is inconsistent with the Act and the purpose for which it was enacted. Notably on 16 May 2019 the National Victims and Survivors Network submitted a petition to the Senate seeking implementation of the TJRC recommendations. The Senate committed the petition to Parliament's Standing Committee on Justice, Legal Affairs and Human Rights to respond to the petition with 60 days.[436] One of the authors of the petition, Wachira Waheire, states that he has not received communication from this Committee.[437]

Conclusion

112 Transitional justice has become more common than before and appears to be what is expected even by international organisations who see it as part and parcel of the rule of law and human rights through which disputes over property, economic development, accountability of governance and conflict resolution could be addressed.[438] The UN has defined the process as: '….society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[439] As a process it is centrally focused on victims and ensuring that they are heard and have the 'right to truth, justice, reparation and guarantees of non-repetition'.[440]

113 All the six bodies discussed in this chapter have had specific remits/mandates. However, when it comes to indigenous communities and their land rights, the evidence and contentions/complaints have not changed and therefore where the recommendations seem repetitive, it is because no

[435] ibid, s49(1) and (3).
[436] Senate Debates 16 May 2019, Senate Hansard Report (Hansard).
[437] Author's twitter conversation with Wachira Waheire, 16 October 2019.
[438] Young (n 172).
[439] ibid.
[440] ibid.

change has been felt by the communities which is tantamount to a failure to redress their grievances. Without appreciation of the impact the rule of law agenda of the Bretton Woods institutions may have had on development of the NLP, one could conclude that it is purely a product of the bodies discussed here, in particular the Njonjo and Ndungu Commission reports. However, it seems that that agenda did play a part in the NLP. Even if that were the case there is no reason to think that the Commissions' reports were not used as basis for it nonetheless. It certainly appears to echo some of these reports' findings and recommendations. However, as identified by Ambreena Manji a state may struggle with ownership of a policy, and therefore implementation, where it is created through external donor pressure. It may also be that the bodies themselves were a product of the same rule of law project which may explain, in part, the failure to implement the recommendations. This thesis suggests that the level of corruption and patronage identified by all the reports and the fact that the perpetrators are the political elite in Kenya, also explains why the reports have gone unimplemented.

114 Be that as it may these exercises have played a pivotal role in ascribing what indigenous communities' land rights are and what the government should do to realise those rights. Communities can, regardless of the reasons the government has had for the creation of these bodies and producing the NLP, take a stronger stance, through litigation and also as seen more recently by submitting petitions to parliamentary bodies. Furthermore there is certainly a role awaiting civil society organisations and the constitutionally established bodies such as the National Land Commission given the focus on public land and resolution of historical land injustices by the various bodies; and the Kenya National Commission on Human Rights, the country's human rights monitor. Of these bodies, as well as the six dealt with here, Odenda Lumumba, CEO of Kenya Land Alliance opined in an interview in 2013:

> 'The constitutional ones, I think are still weak and still finding their bearing but establishing any commission as a way of probing issues has been a tactical way of postponing solutions- in the majority of cases

you do that and then the report is subject to parliament, parliament might as well refuse it, or water down the report and the nature of implementation could just come to nothing…….we are yet to behave better.'[441]

115 The constitutional bodies cannot afford to be weak where their mandates are in question and as indigenous communities await addressing of their claims.

[441] Interview with Odenda Lumumba, CEO, Kenya Land Alliance, Nairobi (Nairobi, Kenya, 20 September 2013).

Chapter 2: The 2010 Constitution and Indigenous Peoples' Land Rights

Introduction

1 The introduction and Chapter 1 have shown the challenging nature of indigenous communities' land rights in Kenya. The source of the problem: the colonial administration, post-independence Governments and donor politics. As to whether the success of the Mau Mau litigation brought in the UK High Court,[442] a challenge by members of the Mau Mau Kikuyu community against the UK's Foreign & Commonwealth Office for acts of torture perpetrated against them between 1951 and 1960, creates a precedence which indigenous communities could follow for land rights-related breaches, it has been said:

> 'many of them are saying they would want to take that as precedence but I think we are flogging a dead horse and raising the fallen dead woods of yesterday which are not helping the spark of the fire because (in as much as) we regret and we are informed by that past regrettable history…. we should concentrate on our own Government, sovereign as it always takes opportunity to say, to fulfil its mandate. It is within the mandate of the sovereign State to deal with its own Kenyan people.'[443]

2 This is reasonable as any remedy derived from such a challenge would be monetary or temporary and devoid of structural resolution which is what is required. The Government's mandate is set out in the NLP, now enshrined in the 2010 Constitution and its attendant laws including the Community Land Act 2016. These provide ways for indigenous communities to own, use and access land, which all things being equal should address problems they have hitherto experienced. The thrust of this chapter is to establish a number of things: the extent to which this is accurate including the means through which the law can make these land rights a reality; and whether there exists

[442] *Matua & Others v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB).
[443] Lumumba (n 441).

inconsistency in the framework which may create challenges in the recognition of these rights.

Land provisions in the Constitution[444]

3 Article 61 provides that: (1) 'land belongs to the people of Kenya collectively as a nation; as communities and as individuals'; and (2) 'land in Kenya is classified as public, community or private'. Article 63 recognises the rights of hunter-gatherers, pastoralists and other communities to hold, manage and use land as community forests, grazing areas, shrines, ancestral lands and traditionally occupied lands. Article 40 protects the right to property and provides that people have the right to own or acquire property on their own or in association with others. This coupled with Articles 61 and Article 63 potentially address the lack of community land protection of the past.

4 Article 66 confirms that land is subject to the inherent power of the State: 'The State may regulate the use of any land, or any interest in or right over land, in the interest of defence, public safety, public order, public morality, public health, or land use planning'. Article 67 mandates the National Land Commission to: 'manage public land on behalf of the national and county governments (which is distinctly different from actually holding title to public land in trust for the people as had been envisaged by the 2002 CKRC Draft Bill, discussed in Chapter 1); recommend a national land policy; advise on a comprehensive programme for the registration of title in land; initiate investigations…into present, or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; monitor and have oversight responsibilities over land use planning throughout the country' amongst other functions. And finally, Article 68 provides that Parliament shall have regard to these principles when revising land laws: 'equitable access to land, security of

[444] Where Articles are mentioned without further qualification, this will be reference to 2010 constitutional provisions.

land rights and sustainable and productive management of land resources',[445] amongst others.

Bill of Rights

5 Article 19(2) provides that the thrust of 'recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'. The previous constitutions did not contain such a provision; and whether or not the reason for its inclusion is the exercises discussed in Chapter 1 or the financial donors' rule of law projects, it constitutes a significant constitutional change.

6 Similarly the Bill of Rights as set out in Articles 26 to 57 of the Constitution's Chapter 4 is of critical importance in indigenous land rights discourse. Article 27 provides that all are equal before the law, have the right to equal protection and equal benefit of the law which places indigenous communities on an equal standing with others and prohibits their disparate and disadvantageous treatment on the basis of their status. The provision expressly prohibits the State or any person from directly or indirectly discriminating against anyone (which would include indigenous groups) on grounds of ethnic or social origin, religion, conscience, belief, culture or language, which ordinarily form the basis of their discrimination. To reinforce this further Article 27 requires the state to take 'legislative and other measures, including affirmative protection programmes and policies designed to redress any disadvantage suffered by individuals and groups because of past discrimination'. Although these clauses do not expressly mention indigenous communities- and there would be no reason for them to as then they would surely have to encompass all forms of

[445] Constitution of Kenya, 2010, Article 60(1). Hereon this Constitution will be cited as Constitution 2010.

societal diversity- they meet the standard expected of States to 'combat and eliminate such discrimination'[446] as against indigenous communities.[447]

7 Article 260 of the Constitution classes pastoralists; indigenous communities who hunt and gather; small communities unable to fully participate in socio-economic spheres; and traditional communities seeking to preserve their cultures from assimilation, all as 'marginalised' and they stand to benefit from non-discrimination under Article 27 and to have their specific needs met under Article 56.

8 Compared to other East African Community States, the Kenyan Constitution is not alone in its enshrining of the rights to equality and non-discrimination;[448] and affirmative action programmes[449] but is the most extensive in its definition of marginalised communities.[450] The use of indigenous communities here is new in constitutional terms. Article 260 rather than classifying all Kenyans as indigenous, suggests here that the indigenous people referred to here are distinct from the rest of Kenyan society. This seems to align with the African Commission's understanding of these communities and also accords with the wider global understanding of the characteristics of indigenous communities, as discussed in the introductory chapter. Notwithstanding communities that identify as indigenous in Kenya would still squarely fit into the other descriptions of marginalisation as expressed in Article 260. Therefore compared to other African States, Kenya's constitution here is progressive. The extent of marginalisation in other constitutions considered is restricted to marginalisation on ordinary discriminatory grounds of race, religion or status rather than resulting from historic oppressive policies and very few in

[446] Office of the High Commissioner for Human Rights, 'General Recommendation No. 23: Indigenous Peoples (Office of the High Commissioner for Human Rights, 1997).
[447] See UNDRIP 2007, preamble, Articles 2 and 9.
[448] See Articles 9, 13 of the Tanzania Constitution; Constitution of the Republic of Uganda, 1995, Article 21; Constitution of the Republic of Rwanda 2003, Article 16; Constitution of the Republic of Rwanda, Article 22.
[449] See Uganda Constitution, Article 32.
[450] The Uganda Constitution refers to marginalisation on 'the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them': Article 32. None of the other states' constitutions proffers a definition.

indigenous terms.[451] Indeed its inclusion in the Kenyan Constitution makes Kenya's resistant stance on using the term, in its responses to international bodies,[452] self-defeating but also supportive of the probability that these pro-indigenous provisions are a product of external donor pressure.

9 Furthermore this description of marginalisation, as including recognition of communities fearing forced assimilation, will make what happens at Kenya's next census interesting. Will those indigenous communities who have been forcibly assimilated and not distinctly tallied in previous census exercises like the Endorois be distinctly enumerated? Surely the positive African Commission decision and the Constitution's recognition of forced assimilation as a past cause of marginalisation will cause the Government to take steps to eradicate their marginalisation in this way particularly in light of obligations arising from Article 56.

10 Article 56 provides that the State will 'put in place affirmative protection programmes designed to ensure that minorities and marginalised groups are able to participate and are represented in governance and other spheres of life; and develop their cultural values, languages and practices.' The onus of placement of these measures falls on the State, which is indeed part of its positive obligations under international law. However, design of any such programmes relating to indigenous communities should be in consultation with them;[453] and in terms of how they wish to be identified, should have regard to their self-identification and expressions of distinctive collectively.

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[451] Cameroon's Constitution expressly lists some indigenous groups: See Solomon A. Dersso, *'Perspectives on the Rights of Minorities and Indigenous Peoples in Africa'* (Pretoria University Law Press 2010) 91.

[452] Albeit pre-2010 Constitution, it is notable that in June 2010 during its Universal Periodic Review Kenya refused to support recommendations made by other states that it strengthen its relations with 'indigenous communities with a view to promoting and protecting their rights and assisting them in their development initiatives' as it did not find the term *indigenous peoples* was applicable as 'all Kenyans of African descent were indigenous to Kenya'. Para 103.7, Human Rights Council, Universal Periodic Review, 'Report of the Working Group on the Universal Periodic Review', A/HRC/15/8, 17 June 2010. See also discussion of its resistance to use the term within the African Peer Review Mechanism: Dersso (n 449) 89-90.

[453] UNDRIP 2007, Article 14; Convention 169, Article 6.

11 Article 32 provides a right to freedom of conscience, religion, thought, belief and opinion which includes the right of a community to 'manifest any religion or belief through worship, practice, or observance.' This would encapsulate effect of indigenous communities' forced evictions on exercise of this right. Article 42 provides a right to 'a clean and healthy environment' which includes the right to 'have the environment protected for the benefit of present and future generations'. Article 43 provides that everyone has the right to economic and social rights such as accessible and adequate housing. This thesis contends, and it has been found, that this right encapsulates indigenous communities' right to their habitation; and the right to have adequate food which for indigenous communities can be interpreted as the right to their lands which are their source of sustenance. Finally, Article 44 provides a right to language and 'to participate in the cultural life' of choice; and provides that this right can be a communal right: i.e., 'A person belonging to a cultural or linguistic community has the right, with other members of that community'.[454] The right to culture is reinforced by Article 11 which provides that 'the Constitution recognises 'culture as the foundation of nation'.

12 Not only do these provisions create state obligations, their reach is greater than in previous constitutions and give indigenous communities, civil society organisations and even the KNCHR ammunition to challenge violations. It cannot be business as usual. It is worth stating, in view of the discussions in the introductory chapter and chapter 1 about the politicisation of land in Kenya that these provisions no matter the agenda behind their codification constitute the law of the land and are justiciable.

Categories of land under the Constitution

13 The 2010 Constitution designates land in Kenya into three categories: private land, public land and community land.[455] None of the other East African

[454] 2010 Constitution, Article 44(2).
[455] ibid, Art 61(2).

Community States have all these categorisations enshrined in their Constitutions.

Private land

14 Private land consists of freehold and leasehold land held by individuals; and any land that the Government declares as such by statute.[456] Such land may serve the purposes of individual members of indigenous communities who wish to hold land as individuals. In fact indigenous communities have argued that the right to property entitles them as individuals and as collectives to land.[457] Moreover the African Commission has held that the 'juridical personality' of an indigenous community is not impacted by the fact that some individuals from that community have chosen to live separately and no longer practice the traditions and laws of the community.[458] However, this category of land is not suitable for indigenous groups wishing to hold, occupy or use land communally. As a definition, it is less complex than community land or public land.

Community Land

15 This is a new category of land established under the 2010 Constitution. It is said that where there is reform or redesigning of land policy, land tenure systems, land use structures and rethinking around land administration, this offers occasion to 'create adaptive thresholds' and 'mitigate interventions' which allow the system to respond, adapt and moderate itself to various developments,[459] which can of course be positive or negative.

[456] ibid, Article 64.
[457] Endorois case (n 114), para 92.
[458] ibid, para 62.
[459] H.W.O. Okoth-Ogendo, 'Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa' in N. Chalifour and others (eds.), *Land Use Law for Sustainable Development* (IUCN Academy of Environmental Law Research Studies (Cambridge University Press 2006) 60.

16 Community land is described in Article 63(1) of the 2010 Constitution as land that is vested and held by an ethnic, cultural or other community of interest.[460] Article 63(2) of the Constitution provides that community land shall include: '(a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).'[461]

17 Article 63(3) provides that: 'any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.' Article 63(4) provides that: 'Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.' And Article 63(5) provides that 'Parliament shall enact legislation to give effect to this Article'. The Community Land Act 2016 is the mentioned legislation. This is discussed below.

18 The Community Land Act 2016 (CLA), the legislation that enacts Article 63 of the 2010 Constitution, defines 'community' as those with a 'common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity'.[462] The classification of land in Kenya to include, for the first time, community land is without prejudice to land politicisation and corruption, undoubtedly progressive and constitutionally endorses self-identifying indigenous

[460] 2010 Constitution, Article 63(1).
[461] ibid, Article 63(2).
[462] Community Land Act 2016 (No. 27 of 2016), s2. Hereon CLA 2016.

communities' right to hold, manage and use community land for various reasons including occupation. So on the face of the Article 63 provisions, indigenous communities should be able to contend that they are entitled to community land.

19 The CLA provides that to claim 'an interest or right over community land' indigenous communities will first have to, subject to invitation by a community land registrar, provide a register of all names of the 'communal interest holders' to a Community Land Registrar for registration.[463] The registrar is simply the public official designated by a Chief Land Registrar with responsibility for registration of community land.[464] The need for these communities to register implies that the rights to land as described in Article 63 of the Constitution are not automatically accessible and are subject, first, to the registration of the communities. As this category of land is the only one that enables indigenous communities to access, hold, use land communally and thereby to maintain their distinctive collectivities, if indigenous communities do not register in the manner prescribed in the CLA they will not be able to benefit or prove their entitlement to community land. This, it is argued is the first issue that indigenous communities would have to contend with in accessing their land rights under domestic law. Since the enactment of the CLA in 2016, no indigenous community has yet been registered under it. In July 2019 it was reported the 11 communities sought to register but they have been told to wait for 4 months for processing of their application by the Ministry of Lands.[465] It is actually reported that no community land registrars have been designated to carry out the registration and have not been posted to various areas for this purpose as there is currently no budget allocation for them.[466]

[463] CLA 2016, s 7.
[464] CLA, s2 & 9.
[465] Jaran Vogelsang, 'Opinion: A Historic Step Towards Securing Community Land Rights in Kenya' (30 July 2019 Thomas Reuters Foundation News)< http://news.trust.org/item/20190730151357-yl708/>accessed 1 October 2019.
[466] IWGIA, 'New Community Land Act lacks resources for implementation' (IWGIA 14 August 2019)< https://www.iwgia.org/en/kenya/3387-kenya-community-land-act> accessed 1 October 2019.

20 The second issue seems to be that community land must first be registered as 'community land' if it is to be held by the communities otherwise it must be held in 'trust by county governments on behalf' of the community according to the Constitution.[467] This thesis will address the registration and trust land issues separately.

21 Registration of community land effectively means that in order for land to be vested directly in communities rather than county councils on their behalf, the land in which they claim an interest in, or right to, must be land that is accepted, by the Government, as constituting community land. For land to be registered, it must first go through an adjudication process triggered by the Cabinet Secretary in consultation with County Governments.[468] The adjudication process entails surveying, demarcating and registration of community land[469] which is to commence with a public notice setting out an 'intention' to commence the adjudication.[470] Such notice is required to include *inter alia*, the community's name; the land to be adjudicated; and an invitation to all with 'overriding interests or any other claim on the land, to lodge their claims. It is therefore important that the identification and distinctive collectivity of indigenous communities is accepted by the state as otherwise they would fail at this initial hurdle. The notice must also specifically indicate which land is to form the community land registration unit.[471] Registration units, whether relating to community or other types of land, are said to be units constituted as such by the Cabinet Secretary in consultation with the National Land Commission and the county governments.[472] This means that even if indigenous communities were to say that the unit they were occupying

[467] 2010 Constitution, Article 63(3).
[468] CLA 2016, s 8(1).
[469] ibid, s 8(4).
[470] ibid.
[471] ibid, s 8(5).
[472] CLA 2016, s 2; Land Registration Act 2012 (No.3 of 2012), s 10, as Amended by Land Registration Act (No. 28 of 2016) s 6(1).

or using was capable of constituting a community land registration unit, unless the Cabinet Secretary agrees, it cannot be registered as such.

22 The CLA confirms that it is for the County Governments to document, map out and develop an inventory of community land.[473] Although there is a requirement for the registration process to be 'transparent, cost effective and participatory',[474] other than confirming that communities may access the inventory of community land if they wish,[475] there is no explicit requirement under the law to consult with the communities in the same way as there is an express requirement for the Cabinet Secretary to consult with the county governments over what constitutes community land capable of being registered as such. It is argued this is contrary to the NLP's proposals and also contrary to international law on the issue. Notably, 'although routinely flouted, the obligation to consult was explicit in the former Trust Land Act and the Land Group (Representatives) Act',[476] which is indicative of how the law, if existent, would be treated. This is fertile ground for contention as it is the Cabinet's Secretary's remit to determine what land could constitute community land, despite how it is defined in the constitution. Notably the CLA provides that land which is said to be 'in use for public purposes' and that which is adjudicated as private land will be excluded from surveys for the purposes of recognising and adjudicating community land.[477] In isolation this seems uncontentious. However, given the history of irregularity and illegal allocation of land in Kenya, this top-down rather than bottom-up method of registering community land seems susceptible to abuse which can impact on realisation of indigenous communities' land rights.

23 Article 63(2)(d)(iii) of the current Constitution provides that land lawfully held as trust land by the county governments can constitute community land; and

[473] CLA 2016, s 8(2).
[474] CLA 2016, ss 8(2) and 8(3).
[475] ibid, s 8(2).
[476] Wily (n 1).
[477] CLA 2016, s 8(6).

Article 63(3) provides that where community land is unregistered it will be held in trust by county governments on behalf of communities. The CLA provides that 'until any parcel of community land has been registered….such land shall remain unregistered community land and shall……be held in trust by County Governments on behalf of communities…'[478] These provisions confirm that although the trust lands system created under the previous constitutions has been repealed, the regime continues to exist where unregistered community land is concerned.

24 The difference of course is that unlike the previous position where trust lands were the only way in which communities could hold, manage or use land, the community land system created by the 2010 Constitution offers other ways. This does not necessarily make the situation better but it seems to be a way of managing those lands. Some have opined that at least it means 'customary/community property is recognised as existing, whether registered or not'.[479] Having said that it appears that those unregistered community lands may be those where customary rights to land actually exist which may cause some challenges if the County Governments circumvent legal provisions on those lands as they have done in the past.

25 In sum it is argued that the CLA does not make realisation of land rights for communities straightforward and to that end does not seem to import Article 63 of the Constitution and the NLP proposals on addressing land rights problems faced by communities as was intended; or indigenous communities' views as vocalised to the six bodies discussed in chapter 1.

[478] CLA 2016, s 10(3).
[479] Wily (n 1).

Customary rights to land

a) Subject to repugnancy laws

26 Article 260 acknowledges that there are some communities in Kenya whose lives are governed by traditions and customs rather than written laws, but who have become marginalised because they wish to continue to be so governed. When it comes to land, customary rights to land are recognised in Article 63(2)(d)(ii) of the Constitution which provides that community land shall include 'ancestral lands and lands traditionally occupied by hunter-gatherer communities'. The CLA defines the customary land rights as those that are 'conferred by or derived from African customary law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law'.[480] The CLA confirms that customary rights of occupancy shall be 'equal in status and effect' to rights of occupancy existing in public or private land categories;[481] and generally that customary land rights are 'equal in force' with freehold and leasehold rights acquired through 'allocation, registration or transfer'.[482]And where such rights are not inconsistent they shall be 'recognised, adjudicated for and documented for purposes of registration' and that such process shall be in accordance with the provisions of the CLA and any other written law.[483]

27 George Mukundi Wachira suggested, pre-the 2010 Constitution, that one way in which indigenous communities' land rights may be realised is by 'equal application of African customary law.'[484] He observed that there are groups who have founded their land claims on 'their customary laws, traditions and pre-colonial occupation' but that 'Kenya's legal framework subjugates African

[480] CLA 2016, s 2.
[481] ibid, s 14(1).
[482] ibid, s 5.
[483] ibid, s 5(2).
[484] Wachira (n 161).

customary law to written laws'.[485] This was the case under the Trust Land regime in the past where repugnancy laws were used to extinguish communities' land rights. This makes customary land rights quite vulnerable. It appears that if under the CLA customary rights to land are to be of equal force to freehold and leasehold rights, they cannot be subject to unfair and unmonitored assertions of repugnancy thus making them inaccessible.

28 Notably, the CLA confirms that customary rights shall be recognised, adjudicated for and documented for the purposes of registration if not legally repugnant.[486] And also that rights of occupancy in community land that were in existence prior to the coming into effect of the CLA, shall continue to subsist as 'recognisable right(s) of occupancy' as long as they were acquired lawfully in the first place.[487] The definition of public land creates difficulty for indigenous communities who continue to rely on customary land rights as they may not be considered to have acquired such land lawfully thus making their rights unrecognisable in law.

b) Using customary law to settle land disputes

29 One of the principles of land policy under the Constitution is to encourage communities to settle land disputes using 'recognised local community initiatives' not discordant with the Constitution,[488] which suggests that there is recognition that there are alternative dispute resolution mechanisms other than those prescribed by written law and that these should be promoted as long as they remain inoffensive to those written laws. The National Land Commission has as one of its responsibilities, the encouragement of traditional land dispute resolution mechanisms for land conflicts.[489] The judiciary is also encouraged under the Constitution to promote traditional dispute resolution

[485] ibid.
[486] CLA 2016, s 5(2).
[487] CLA 2016, s 14(2).
[488] 2010 Constitution, Article 60(1)(g).
[489] ibid, Article 67(2).

mechanisms; and to be guided by this as a principle as long as such mechanisms do not offend the Constitution including the Bill of Rights or justice or morality.[490] It will be interesting to see how this is actually applied in practice.

c) The test

30 In as much as the above shows that there is a move to lift the status of customary law, by recognising it in Article 63 and the CLA, the proof of its viability will be tested during the registration process and how repugnancy is interpreted.

Public land

31 Public land is said to include state held, used or occupied-land; land that is not capable of being owned by an individual or community through any legal process; land not classified as private or community land; Government forests other than those lawfully held, managed or used by specific communities as community forests, grazing areas or shrines as defined by Article 63(2)(d)(i) of the 2010 Constitution;[491] government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas; rivers, lakes, other water bodies defined by law; and all minerals and mineral oils.[492]

32 These public land components create contention when it comes to indigenous communities whose ancestral lands are in those areas. As established in chapter 1, the Government has been liable for illegal and irregular allocation of public land in the past resulting in degradation of these areas which has been blamed on indigenous communities, purportedly then justifying their

[490] ibid, Article 159(2) and (3).
[491] This provides: 'lawfully held, managed or used by specific communities as community forests, grazing areas or shrines'.
[492] 2010 Constitution, Article 62(1).

eviction from those areas.[493] In the following discussion this thesis will look at the discordance created by classification of forests, water catchment areas (and lakes etc.), wildlife and natural resources as public land on indigenous peoples' land rights.

Forests

33 In Kenya the law distinguishes between Government forests which are public land and community forests which are community land. Article 62(1)(g) of the constitution states that Government forests are forests other than those which fall under the category of community forests under Article 63(2)(d)(i). That provision describes community land as including 'land lawfully held, managed or used as community forests'. Unfortunately the Community Land Act 2016 does not offer much assistance in terms of determining or establishing what community forests are. However, using the constitutional understanding one deduces that unless a community forest is lawfully held, managed or used by the community, it cannot constitute a community forest.

34 The Forest Conservation and Management Act (No.34 of 2016) recognises community forests. It provides that these are forests made up of: 'a) forests on land lawfully registered in the name of a group representative; b) forests on land lawfully transferred to a specific community; c) forests on any other land declared to be community land by an Act of Parliament; d) forests on land lawfully held, managed, used by specific communities as community forests; e) forests on ancestral lands and lands traditionally occupied by hunter-gatherers; and f) forests lawfully held as trust land by the county governments, but not including any public land held in trust by the county governments under Article 62 (2) of the Constitution.'[494] The FCM 2016 Act provides that forest owners can include communities,[495] and that community forests are

[493] Institute of Economic Affairs, 'Reassessing Kenya's Land Reform' (2000) Issue No.40 The Point Bulletin of the Institute of Economic Affairs.
[494] s30 (2)(3). Act will be referred to as FCM Act hereafter.
[495] ibid, s2.

vested in the community,[496] unlike its predecessor the Forests Act 2005 which confined forest owners to: 'in the case of State forests, the Kenya Forest Service; (b) in the case of local authority forests, a local authority; (c) in the case of private forests, an individual, association, institution or body corporate'[497] and did not recognise the concept of community forest ownership.

35 But what happens where indigenous communities claim ownership of forests on their ancestral lands and lands occupied by them which also happen to be public lands? The Ogiek and the Sengwer for instance have been considered as falling foul of the law because they live in Mau and Embobut Forests, respectively, which they claim to be their ancestral homes, which are gazetted as Government forests (public land).

> 'They lied to us and said we were better off outside the forests. When we tried to come back home to the Mau, we were denied entry and they chased us away.'[498]

36 The Ogiek's Mau forest example in helpful in answering this question and for this purpose it is important to look at the African Court's assessment of the issue.

The Ogiek African Court case[499]

37 The Ogiek have no title deeds to evidence their property rights over the Mau forest but it is their ancestral land.[500] As discussed in Chapter 1, much of the blame for the excision and destruction of the Mau forest falls on the Government.[501] In July 2008 the Government instituted an 'aggressive

[496] ibid, s30(1).
[497] Forests Act 2005, s3.
[498] Chuma (n 93).
[499] Ogiek case (n 81).
[500] Minority Voices, 'Reforestation, Corruption and Evictions: The Ogiek of the Mau Forest, Kenya' (*Minority Voices Newsroom* 28 September 2010)<www.minorityvoices.org>accessed 24 November 2014.
[501] ibid.

campaign'[502] to evict illegal occupants in the Mau Forest on grounds that it needed to begin conservation plans,[503] thus the establishment of the Mau Forest Task Force. In July 2009, consequent on the findings of the Task Force it would seem, the Prime Minister at the time, Raila Odinga, announced that the Ogiek would be arrested if they did not leave the forest. This was followed a month later with the President ordering the arrest of those residing in the Mau Forest and in other water catchment areas stating that: 'The Government shall take action against people who destroy forests. Such people should not be spared at all, they should be arrested and charged with immediate effect'.[504]

38 On 25 August 2009 the Government announced by gazette notice that it was intent on commencing reforestation programmes and was ordering the removal of encroachers within 14 days of the notice.[505] This was dubious in as far as the Ogiek were concerned and even more compelling when one considers the Ndungu Commission findings and the fact that the NLP had been approved by Parliament which should have distinguished the Ogiek's lawful status. All without title deeds were deemed to be unlawfully encroaching on the forest; and on 26 October 2009 the Ogiek being deemed part of this group became victim to a forced eviction notice enforced by the Kenya Forest Service[506] resulting in their application for urgent measures in the African Commission on 14 November 2009 to prevent the Government from enforcing the eviction notice. The Commission made a provisional measures order prohibiting its enforcement which the Government failed to comply with necessitating an application to the Court for a similar order on 15 March 2013.[507] The case was thereby transferred by the Commission to the African Court on Human and Peoples' Rights (the Court). The author attended the

[502] ibid.
[503] ibid.
[504] Chris Lang, 'Ogiek threatened with eviction from Mau Forest, Kenya' (*REDD,* 19 November 2009) <https://redd-monitor.org/2009/11/19/ogiek-threatened-with-eviction-from-mau-forest-kenya/>accessed 18 April 2014.
[505] ibid.
[506] ibid.
[507] *African Commission on Human and Peoples' Rights v the Republic of Kenya*, Order of Provisional Measures, Application No.006/2012, 15 March 2013, African Court on Human and Peoples' Rights.

hearing in Addis Ababa on 27 and 28 November 2014 and has obtained some of the parties' submissions at the hearing.

39 Essentially the Government argued that the Mau forest constituted invaluable public land as a water catchment area and it had responsibility for protecting it from harmful activities. It maintained that it could not lawfully delineate the land; and the most it was permitted to do was allow access to the forest by the Ogiek 'for any special purpose' and permit the community to take part in the management of the Forest under the provisions of the Act.[508] The Minority Rights Group International (MRG) which intervened in the case submitted, amongst other things, that the Ogiek 'were friendly to the environment on which they depend'; that their existence was 'well-adapted' to Mau Forest which had been their ancestral home 'since time immemorial'; and the survival of the forest is 'inextricably linked' to their survival.[509]

40 The expert in the case, Dr Liz Wily, called by the African Commission on behalf of the Ogiek community opined that there was inconsistency between the Land Act 2012[510] which defined community land in the same manner as it appears in Article 63 of the 2010 Constitution i.e. 'ancestral land and hunter-gatherer lands are community lands',[511] and the Constitution's definition of gazetted forests as public lands.[512] Clearly what the Government was proposing- grant of access and some management rights- was insufficient and misconceived as the Ogiek were owners of the forest and full restitution is what was necessary.

41 The Court found that the community had a right to property (to use, enjoy and dispose of) which in their case was their ancestral home, the Mau Forest.[513]

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[508] Muthoni Kimani, 'Respondent's Submissions in Application 006, *African Commission on Human and Peoples' Rights v Republic of Kenya*' (The African Court on Human And Peoples' Rights 27 to 28 November 2014).
[509] Lucy Claridge, 'MRG Oral Intervention' Ogiek case (n 81).
[510] Land Act 2012 (No. 6 of 2012), s2.
[511] Ogiek case (n 81), para 119.
[512] ibid.
[513] Ogiek case (n 81).

The Court accepted that the Government was entitled to restrict the right to property where public interest demanded and the restriction was necessary and proportionate. However, the Court concluded that the Government had failed to show that its actions in restricting the Ogiek's right to property, on grounds of 'preservation of the natural ecosystem',[514] were justified particularly as it could not show that the Ogiek were responsible for 'depletion of the natural environment in the area'; [515] and that in fact evidence obtained by the Government itself showed that the 'main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions'.[516] The Court also noted that the Government had not disputed that the Ogiek community had resided in the Mau Forest 'since time immemorial'.[517]

42 As highlighted by the expert, Dr Liz Wily, where community land is said to comprise ancestral lands/traditional lands occupied by communities, where these lands are public land, there is incoherence in the law.

43 The Mau forest is public land and not categorised as community forest. It therefore does not fall under the exception in Article 62(1)(g) which means that the Ogiek cannot be considered, under the law, as lawfully holding, managing or using the Mau forest, which explains, inter alia, why they are treated as illegal occupants of the land, and even with the African Court's intervention, continue to be treated as such. But the Mau forest is their ancestral land and they have traditionally occupied it, and so it is community land.[518] Effectively the law defeats the law, as the provisions relating to public land and legal holding, managing and using of community forests, in reality, trump those relating to ancestral lands/traditional occupation of lands.

[514] ibid, para 130.
[515] ibid.
[516] ibid.
[517] ibid, para 128.
[518] 2010 Constitution, Article 63(2)(d)(ii).

44 However, it seems that in the Ogiek case the African Court in finding that the Ogiek had a right to the Mau forest, their ancestral home as their property i.e. a right to use, enjoy and dispose it, concluded that sub-articles (i) and (ii) of Article 63(2)(d) were indistinguishable and that land that is ancestral lands and lands traditionally occupied by a forest community, is land that is also lawfully held, managed or used by them as a community forest. And this finds further efficacy in the description of community forest in the Forest Conservation and Management Act (Act No.34 of 2016) as including 'forests on ancestral lands and lands traditionally occupied by hunter-gatherers.'[519] Effectively this means that in the case of such forests there must be considered as falling under the exception of public lands which are community forests. The Government will of course continue to contend that this is not the case and that where a forest is gazetted as public land unless that forest is lawfully transferred to a specific community- which notably is another description of community forest[520]- that forest remains public land.

45 Furthermore it is apparent from the Government's arguments that the furthest it is willing to go, is to permit communities like the Ogiek access to forests for specific purposes and management of the forests under forest legislation, but where these communities are the true owners of the land, this is not only perverse but delegitimises provisions of the constitution and the 2016 forest legislation. Reflectively the limiting of land rights in this way is a curiously a regurgitation of colonial land policy towards black Africans.

46 As established in chapter 1, the Government, and political elite, have been liable for illegal and irregular allocation of public land such as the Mau forest which explains any vested interest they continue to have in not allowing the law to have the effect it should. Further for communities like the Ogiek to benefit from such valuable land, and without any financial cost, may be touted

[519] FCM Act (n 494), s30 (2)(3)(e).
[520] ibid, s30 (2)(3)(b).

by politicians, and seen by other communities, as unfair, but the codification of community land and the 2016 forest legislation deposes such argument.

Communities as owners and managers

47 It is important to distinguish indigenous communities as owners of forests, as above, with them as managers of forests. The traditional mechanisms that indigenous communities use for forest conservation is 'often superior to conventional state mechanisms'.[521] The 2009 NLP suggests that gazettement of forests and protected areas has been focused mainly on the physical exclusion of human activities but that to sustainably manage forests there needs to be recognition that forests have 'multiple values' and need to be protected for their 'ecosystem values'.[522] As far as indigenous communities are concerned, their exclusion for activities they partake in has been misguided. Despite this being accepted on the global stage,[523] Kenya has failed to adopt this thinking which means that forests continue to experience forest degradation. Kenya's neighbour, Tanzania, is said to have one of the most advanced community forests ownership and management frameworks, which evolves from an acknowledgment of the poor state of Government-run forests and the need to salvage them. Under Tanzania's Forest Act of 2002 village communities using their customary governance institutions have autonomy over the forest, with clearly delineated rights of ownership and managements and this works.[524] This law says that community forest reserves can be established by a group, which is created for the purposes of management of the forest, comprising of village members or those living in proximity to the

[521] Expert evidence Liz Alden Wily, Ogiek case (n 81).
[522] NLP (n 7), para 131.
[523] See United Nations 'Agenda 21, UN Conference on Environment and Development 1992' (United Nations 1992) Chapter 11 on Combating Deforestation, which provides that indigenous communities should be amongst those involved in management-related forest activities, para 11.22; and also encourages Governments to 'Integrate indigenous knowledge related to forests, forest lands, rangeland and natural vegetation into research activities on desertification and drought', para 12.23< https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>accessed 29 December 2017.
[524] Tom Blomley and Said Iddi, 'Participatory Forest Management in Tanzania: 1993 – 2009 Lessons learned and experiences to date' (*Tz Online,* September 2009) < http://www.tzonline.org/pdf/participatoryforestmanagement2009.pdf>accessed 12 December 2018.

forest or those interested in managing a forest 'for any purpose connected with communal ownership, use and management of a community forest reserve'.[525] In other parts of Africa, Central America and Asia, the rate of deforestation is reportedly higher in protected forest areas than in community owned forests.[526] Interestingly there are examples of this in Kenya too. Loita Naimina is an example of a forest protected and managed by the Maasai community. The:

> 'forest is intact, there is livestock, water and they are feeding the community. It is managed by the community using traditional methods which are better than that used by the Government. It is better a forest managed by the community using their traditional knowledge than one managed by the Government as the Government destructs and always wants to chase people and blame them.'[527]

48 A possible explanation for its success is that this forest has never been gazetted.[528] It is trust land and would now probably fall under Article 63(2)(d)(i) land as it constitutes land lawfully held, managed and used by the Maasai as a community forest. There were plans in the 1990s to adjudicate it and gazette it for tourism purposes but the community litigated and settled the case with the Narok County Government conceding the plans.[529] This community, and generally indigenous communities recognise the importance of conserving the forest because by doing so they preserve their 'culture and society'.[530] Their communal-approach to forests is an 'ideal framework for community based operations'.[531]

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[525] The Forest Act of 2002 (No.10 of 2002), s42(1).
[526] Expert evidence Liz Alden Wily, Ogiek case (n 81); See also L.Porter-Bolland and others, 'Community Managed Forests and Forest Protected Areas: An Assessment of Their Conservation Effectiveness Across the Tropics' (2012) Volume 268 Forest Ecology and Management< http://www.cifor.org/publications/pdf_files/articles/AGuariguata1101.pdf>accessed 10 December 2018.
[527] Interview with Eunice Sinoro Parsitau Nkopio, Programme Officer, Mainyoito Pastoralists Integrated Development Organization (MPIDO), Nairobi (Nairobi, Kenya, 12 September 2013).
[528] Cultural Survival, 'Loita and Purko Maasai resist IUCN plans for the Naimina Enkiyio Forest' (*Cultural Survival*) <https://www.culturalsurvival.org/news/loita-and-purko-maasai-resist-iucn-plans-naimina-enkiyio-forest>accessed 9 January 2019.
[529] Angela Kronenburg García, *'Contesting Control Land And Forest In The Struggle For Loita Maasai Self-Government In Kenya'* (African Studies Centre 2015).
[530] Cultural Survival (n 528) and Expert evidence Liz Alden Wily, Ogiek case (n 81).
[531] ibid.

49 It is therefore important to empower indigenous communities to take up roles as forest-managers rather than 'helpers' because as managers they would have decision-making, permit-granting and other related powers currently retained by the state. The NLP in some fashion corroborates this as it provides that it is necessary to recognise 'traditional management systems' of forests by communities when setting up procedures for the co-management and rehabilitation of forest resources.[532] However, experts say this needs to go further to allow communities to have tenure security in the form of a grant of title to own respective forests which can be made contingent on them not selling the forest but 'rehabilitating and sustaining' it, thereby resulting in a 'win-win situation'.[533] This way the Government has another entity doing what it has failed to do and the community enjoying their land rights.[534]

Water Catchment areas, rivers, lakes

50 The Water Act 2016[535] defines water catchment areas as 'vulnerable water resources' for which special protective measures are required.[536] Water is State property, whether this be a water catchment area or ground water. The Act establishes a Water Resources Authority tasked with *inter alia* regulating the use and management of water resources.[537] And within this remit it can 'impose such requirements or regulate or prohibit such conduct or activities'[538] it considers is necessary for the protection of a water catchment area and its resources.[539] Similarly in relation to 'ground water', which is defined as 'water of underground streams, channels, artesian basins, reservoirs, lakes and other bodies of water in the ground, and includes water in interstices below the water table',[540] the Act provides that special measures

[532] NLP (n 7), para 135.
[533] Expert evidence Liz Alden Wily, Ogiek case (n 81).
[534] ibid.
[535] Water Act 2016 (No.43 of 2016). Hereon WA 2016.
[536] ibid, s 22.
[537] ibid, s12(b).
[538] ibid, s22(2).
[539] ibid.
[540] Ibid, s2.

can be adopted by the Water Resources Authority for its conservation where it is 'necessary in the public interest for': (a) the protection of public water or supplies used for industry, agriculture or other private purposes; (b) the conservation of the water resources of the aquifer of the ground water resources; or (c) ecological reasons……'[541]

51 From this it seems that any public purposes relating to water resources are likely to take precedence over other purposes including community purposes (projects) which in the case of indigenous communities could mean water resources they require for the sustenance of the community or for religious practice.

52 Where land is required to carry out waterworks which are 'of strategic or national importance'[542] because the water resource is considered to be of a 'cross county in nature' or to enable the National Government to exercise a public function such as creating 'reservoirs for impounding surface run-off' and 'regulating stream flows to synchronise them with water demand patterns', the Act provides that the Government will pay compensation on just terms 'to the owner of the land on which such works are constructed'.[543] Effectively, in such cases the Act does not appear to allow for consultation of communities and for free, prior and informed consent to be obtained but simply for reasonable notice to be given to the communities, if they are accepted as legitimate landholders and for compensation to be paid to them on just terms.

53 The Act also confirms that any powers or functions prescribed by it that affect land, shall in relation to community land, be 'exercised and performed subject to any written laws' relating to community land.[544] Effectively this should mean that in respect of community land and thereof indigenous communities'

[541] ibid, s 23.
[542] Ibid, s 8.
[543] ibid.
[544] ibid, s 138.

lands, any powers or functions, exercised or performed by public authorities in any public-related water-resource function, must be in accordance with CLA provisions. The CLA states that communities shall abide by relevant laws, policies and standards relating to water amongst other resources but that for the purposes of sustainable conservation, it shall be for the communities who have customary rights to water resources to 'establish measures to facilitate the access, use and co-management'[545] of those resources.[546]

54 However the CLA qualifies this by saying that it is ultimately for the State to 'regulate the use of any land, or interest in or right over land, in the interest of defence, public safety, public order, public morality, public health, or land use planning'.[547] This would mean, and is in fact confirmed in the CLA,[548] that even if the community has the power to establish measures of access, use and management of water resources, and therefore any land that may be needed for such purposes, this power is subject to the power of the National and County Governments to regulate land use, on any of the stated grounds-defence, safety, land use etc.; and is also subject to their powers as laid out in 'laws and policies' relating to 'water protection, securing sufficient residual water' and 'environmental laws' amongst others.[549]

55 This thesis has discussed above how the African Court dealt with the water catchment area issues in the Ogiek case.[550] The Court did not venture into a discussion as to the consistency of water-resources legislation and the CLA. Notably the latter was not in force at the time of the hearing in 2014. However, it is contended that although the law seems to offer safeguards in respect of how water resources are to be accessed, managed or used, and with the 2016 Water Act seems to empower communities to make decisions relating to

[545] CLA 2016, s20.
[546] ibid.
[547] CLA 2016, s 38(1); 2010 Constitution, Article 66.
[548] CLA 2016, s 38(2).
[549] CLA 2016, s 38(2).
[550] Ogiek case (n 81), para 8, 130.

water resources, this Act confirms that the ultimate regulation of land use lies with the Government.

56 As Akio Morishima[551] has observed, States are entitled to enforce environmental laws that empower them to regulate land use in view of the fact that human activity does impact on the instant environment, and in the case of water catchment areas or groundwater areas, human activity in those areas could also have wider ramifications.[552] However, Akio Morishima argues that sustainable development requires environmental laws to go beyond the conventional focus of preventing adverse effects on the environment by regulating land use to focusing also on 'air, quality of water and ecosystems….and climate change'. [553]

57 Be that as it may, there is a need to balance these interests with the interests of the communities residing in community lands where there are water resources; and in Kenya's case, the law does recognise that sustainable development calls for communities to be involved in the management and conservation of water resources. However, the state has tended to apply blanket laws, policies and decision-making which have failed to take into account the role of indigenous communities in such management or their land rights; and it has argued that the presence of indigenous communities on land where there are water resources is injurious to those resources thus justifying their eviction from those areas, without actually proving this.

<u>Wildlife conservation areas - Game reserves, national parks, specially protected areas and animal sanctuaries</u>

58 According to the NLP, to ensure sustainable management of land-based resources, identification, mapping and gazettement of wildlife migration,

[551] Akio Morishima, 'Challenges Of Environmental Law – Environmental Issues And Their Implications To Jurisprudence' in N. Chalifour and others (eds.), *Land Use Law For Sustainable Development* (IUCN Academy Of Environmental Law Research Studies, Cambridge University Press 2006) 6.
[552] ibid.
[553] ibid.

dispersal areas and corridors requires consultation with communities and individual land owners. Equally it acknowledges that for wildlife sanctuaries to be properly developed, communities bordering parks and protected areas need to participate in this and be involved in the co-management of the sanctuaries.[554]

59 Section 2 of Kenya's Wildlife Conservation and Management Act 2013[555] provides the following definitions which should assist in this discussion. 'Wildlife' is defined as 'any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya'. A 'conservation area' is said to be 'a tract of land, lake or sea with notable environmental, natural features, biological diversity, cultural heritage, or historical importance that is protected by law against undesirable changes.

60 A 'wildlife conservation area' is defined as 'a tract of land, lake or sea that is protected by law for purposes of wildlife and biological diversity conservation and may include a national park, national reserve, game reserve or sanctuary'; a 'national park' ss 'an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means'; and a 'protected area' is a 'clearly defined geographical space, recognized, dedicated and managed through legal or other effective means, to achieve long-term conservation of nature with associated ecosystem services and cultural values'. A 'community' is defined as a 'a group of individuals or families who share a common heritage, interest, or stake in unidentifiable land, land based resources or benefits that may derived therefrom'.[556]

[554] NLP (n 7), para 131.
[555] Wildlife Conservation and Management Act 2013 (Act No. 47 of 2013) which came into force on 10 January 2014. Hereon WCM Act.
[556] ibid, s 2.

61 Patricia Kameri-Mbote has argued that where wildlife is found on non-state property, for instance on an area where a 'group has defined rights',[557] the wildlife should be classed as belonging to the group and that the responsibility for the wildlife should lie with the group, particularly to ensure where they use it as a resource, such usage does not lead to extinction of the wildlife. However, because wildlife is classed as state-property this means that wherever they are found – and if it is in a communal area- other than public land, the State has rights over the wildlife and the 'areas they occupy'.[558] In effect this means that indigenous groups cannot lay claim to them and the State essentially 'appropriates' the rights of the group(s) over the land where the wildlife is found. The State is also the sole beneficiary of proceeds returned from the wildlife in that area. This has been the experience of the Maasai, who are pastoralists and use certain lands as grazing sites and for their livelihood. Their way of life and interests in land have become subservient to the state's property rights; and even in the case where 'multiple land uses are permitted',[559] the State's appropriation of rights to wildlife essentially creates a schism between the rights of the group(s) to land 'they need and previously have had unlimited access to'[560] and the State's interest in managing wildlife.[561] She accepts that it is challenging to balance the communities' interests as well to 'sustainably manage the wildlife'; [562] and that in fact 'any grandiose plan for the conservation of wildlife without adequate provision for human interests is doomed to fail.' [563]

62 In terms of declaring areas as protected areas, the Wildlife Conservation and Management Act 2013 provides that it is for the Cabinet Secretary, who may consult the competent authority, to declare, by notice, an area as a national

[557] Patricia Kameri-Mbote, 'Land Tenure, Land Use, and Sustainability in Kenya: Toward Innovative Use of Property Rights in Wildlife Management' in Chalifour N and others, *Land Use Law for Sustainable Development* (IUCN Academy of Environmental Law Research Studies Cambridge: Cambridge University Press 2006).
[558] ibid.
[559] ibid.
[560] ibid.
[561] ibid.
[562] ibid.
[563] ibid.

park.[564] In the case of public land the competent authority is the National Land Commission and in terms of other categories of land, it is the owner of the land or person entitled to the 'use, rents and profits thereof'.[565] This should hopefully provide some safeguards for indigenous communities in these areas.

63 It is also for the Cabinet Secretary 'to publish areas zoned to have wildlife conservation and management as their land use priority'[566] as long as public consultation has occurred, no challenge is pending and the declaration complies with the Environmental Management and Co-ordination Act 1999.[567] The 1999 Act confirms that it is the responsibility of the Cabinet Secretary in so declaring to comply with 'the constitution, the Convention on Biological Diversity and other treaties'.[568] As far as the constitution is concerned, the Cabinet Secretary needs to show that s/he has had regard to the protection it offers to cultural rights expressed through traditional celebrations and cultural heritage.[569] The fact that it requires all State organs and public officers to address the needs of vulnerable communities including marginalised communities and members of particular ethnic, religious or cultural communities,[570] which includes indigenous communities. Such needs would include protection of their land rights under the constitution's community land provisions.[571] Under the constitution, public land cannot be land in respect of which any community ownership can be established by any legal process.[572]

64 To comply with the Convention on Biological Diversity (CBD), the Cabinet Secretary would need to show that the decision to publish zoned wildlife conservation areas takes cognisance of the fact that the CBD accepts that indigenous communities have 'close and traditional dependence…on

[564] WCM Act (n 555), s 31(1)(a).
[565] ibid, s 3.
[566] ibid, s 31(1)(e).
[567] ibid.
[568] Environment Management and Co-ordination Act 1999 (No. 8 of 1999), s 54(1), as Amended by Section 2, Act No.5 of 2015.
[569] 2010 Constitution, Article 11.
[570] ibid, Article 21(3).
[571] ibid, Article 63.
[572] ibid, Article 62(1)(d).

biological resources', [573] that their practices can contribute to conservation of biological diversity and where this is done, there is a need to promote equitable sharing of benefits with these communities.[574] It also requires States in their role to establish a 'system of protected areas or areas where special measures need to be taken to conserve biological diversity (to) respect, preserve and maintain knowledge, innovation and practices of indigenous communities' relevant for conservation of biological diversity.[575] These are rights enshrined in the ILO Convention and UNDRIP. The Government cannot therefore continue with business as usual under these statutes. As a further safeguard the Wildlife Conservation and Management Act provides that for an area to be zoned as a wildlife conservation area, it must be with the approval of the National Assembly.[576] This was not the position before the coming into force of the Act. Parliament as legislator of the 2013 Act and watchdog over the Constitution should not approve zoning where this defeats the aforementioned safeguards.

65 Finally the CLA provides that management of community land is subject to National and County Government laws and policies relating to 'protection of animals and wildlife'.[577] These laws, as we have seen in the foregoing paragraphs, require consideration of indigenous communities' land related rights and legality of the Government's justification for degazettement of land for wildlife conservation. However, given the history of failures by the Government to lawfully justify their actions even where provisions were of a lower threshold, it is likely that indigenous communities will continue to be subjected to unlawful degazettement of their lands for public purposes and if so can resort to some of the above provisions to support their claims.

[573] Convention on Biological Diversity 1992, preamble.
[574] ibid.
[575] ibid, Article 8.
[576] WCM Act (n 555), s31(1)(e).
[577] CLA 2016, s 38(2).

Natural resources

Under the National Land Policy

66 It is important to consider how natural resources are dealt with under the NLP and under legislation as they are integral to indigenous communities' land rights claims. The NLP notes that although Kenya is abound with natural resources namely, wildlife, forests, water, minerals, marine and land itself,[578] there has been a lack of sustainable management of these resources. Amongst the solutions offered in the policy is a multi-sectoral approach to the exploitation of natural resources,[579] involvement of communities in the governance and management of natural resources, which has been amiss in the past;[580] and securing of access to land based natural resources. The third of these envisages aligning tenure of natural resources to all the categories of land including community land; vesting of land-based natural resources in communities; recognising and protecting of the rights of 'forest, water-dependent and other natural resources-dependent communities and facilitating their access, co-management and derivation of benefits from the resources';[581] formally recognising 'traditional knowledge related to land-based resources';[582] and establishing legal channels through which State obligations relating to natural resources and beneficiaries' rights can be established.[583]

67 The NLP also mandates the Government to establish legal mechanisms to recognise rights of communities to natural resources and to enable benefit-sharing by the communities of the same; compensate where loss of these resources is experienced; and where management of these resources is vested

[578] NLP (n 7), 9.
[579] ibid, (ix).
[580] ibid, 7.
[581] ibid, 22.
[582] ibid.
[583] ibid.

in local authorities, to ensure communities still benefit from the resources; and ensure all stakeholders partake in the management and utilisation of the resources.[584]

Under the Constitution

68 The 2010 Constitution defines natural resources as including surface and groundwater; forests; biodiversity; and minerals amongst other 'physical non-human factors and components',[585] which would be public land. However, it speaks of ensuring that natural resources are sustainably exploited, utilised, managed and conserved and that there is equitable sharing of accruing benefits.[586]

69 In terms of responsibilities for natural resources, the 2010 Constitution tasks the National Land Commission with conducting research into the use of natural resources and making recommendations to appropriate authorities.[587] The National Government is tasked with the protection of the natural resources for the purposes of 'establishing a durable and sustainable system of development'.[588] County Governments are tasked with implementing specific national government policies on natural resources.[589]

70 Significantly however, the Constitution provides, in the Bill of Rights, the right to collectively acquire and own property of any description and in any part of Kenya; and where such property is compulsorily acquired for a public purpose, it provides for just compensation to be paid to those deprived.[590] Natural resources would satisfy 'property of any description' and these safeguards

[584] ibid, 23.
[585] 2010 Constitution, Article 260.
[586] ibid, Article 69(1)(a).
[587] ibid, Article 67(2).
[588] ibid, Fourth Schedule, para 22, Articles 185(2), 186(1), 187(2).
[589] ibid, para 10.
[590] ibid, Article 40.

should apply to them as they do to other property. This would therefore mean that if natural resources are compulsorily acquired by the Government from indigenous peoples, they should benefit from associated proceeds.

Under the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016

71 This law makes provision for some natural-resources related transactions to be approved by Parliament before their enforcement. These include those relating to extraction of oil, gas and minerals in a wildlife conservation area or other wildlife protection areas. Similarly the following require parliamentary approval: transactions which may lead to excision or boundary changes of gazetted national parks or wildlife conservation areas; or where a 'long term concession' is sought in a gazetted forest resource; or where a transaction requires the excision or gazettement of a public forest or natural reserve.[591] In this approval process, Parliament is required to consider the extent of 'stakeholder' consultation'.[592] Although the Act does not define the term stakeholder, this must surely be reference to the 'grantor' and 'beneficiary' as a grantor is defined as the person who has granted the concession or right to exploit natural resources[593] and a 'beneficiary' is defined as the person who benefits from a 'concession'. A concession is defined in the Act as the 'right to exploit natural resources pursuant to an agreement between the grantor and the beneficiary or a permit issued under national or county legislation.'[594]

72 The approval process appears to provide an extra layer of protection for indigenous communities involved in these transactions but will only be of real benefit to them if Parliament sees them as grantors because when natural resources are on these communities' ancestral lands, indigenous communities automatically assume their rightful status as owners of natural resources and

[591] The Natural Resources (Classes of Transactions Subject to Ratification Act) 2016 (Act No.41 of 2016), Schedule. Hereon Ratification Act 2016.
[592] ibid, s 9.
[593] ibid, s 2.
[594] Ibid.

have the right thereof to dispose of those resources. This has not been accepted in the past but must be the prism through which they are seen. The beneficiaries too, whether they be the Government, corporations, donor agencies and development organisations need to respect indigenous communities' grantor status.

Under the Community Land Act (CLA) 2016

73 Under the CLA, registered communities are required to adhere to the laws, policies and standards on natural resources;[595] but are required themselves to establish measures to 'facilitate the access, use and co-management of forest, water and other resources by communities who have customary rights to these resources'.[596] Where natural resources are found on community land, the CLA confirms what the NLP and the Constitution say, that these shall be used and managed sustainably, for the benefit of the community, transparently and accountably, and on the basis of equitable benefit sharing.[597] In respect of benefit-sharing the CLA provides that 'free, prior and open' consultations which take into account environmental impact assessments in respect of community land agreements, be between stakeholders and involve the community, monitor impact on the community and stipulate compensation and royalties to be paid out to the community amongst other things.[598] This seems to suggest that communities will be treated as owners of these natural resources.

74 However, under the Ratification Act[599] Parliament may still have to approve such an investment agreement where the community itself has approved such an agreement. This would not be a problem if Parliament consents to the investment in line with the community. However, in those cases where the

[595] CLA 2016, s 20(1).
[596] ibid, s 20(2).
[597] ibid, s35.
[598] CLA 2016, s36.
[599] Ratification Act 2016 (n 591).

community is said to have consented to an agreement the fact that the Ratification Act, as noted earlier, does provide another layer of scrutiny to ensure the transactions' legitimacy, is another potential safeguard for indigenous communities.

Conclusion

75 There is no doubt that the issues discussed here are complex and to an extent, in reality, convoluted. Kenya's land law framework is a product of 122 years of written law i.e. since 1895. The 2010 Constitution can be commended for being more progressive in its definition of marginalised communities particularly its reference to indigenous communities than other African Constitutions. This means that the Government can no longer maintain its resistance to that term now that it has enshrined it in its supreme law; and must address the land-related marginalisation. However, this can only be truly effective if it involves the communities themselves.

76 The CLA constitutes a new land regime that is part of a Constitution that seeks to embrace diversity, has acknowledged that there are those within society who are vulnerable and marginalised and whose needs should be addressed and calls for affirmative action plans to be designed on behalf of these groups to secure their representation in places of governance and ensure that they are able to develop their cultural practices. This same Constitution has also created a Bill of Rights which shuns discrimination on various grounds that indigenous communities can relate to: ethnic or social origin, religion, conscience, belief, culture and language; and confirms that there is a right to property and that this can be acquired and owned individually or communally in association with others. This same Constitution then reinforces communal acquisition and ownership of communal land, setting out different ways that this can be vested in communities. The law enacted to give effect to the Constitution's provisions on community land, has been long in the making. It came into force in the sixth year after promulgation of the Constitution, and

not within the five year requisite period. There was therefore some delay in its drafting and enacting which means it is quite recent. Only time will tell how effective it is in delivering the spirit of the Constitution but notably concerns have begun to be raised about the delay in operationalising the system of registering communities.

77 The public land system has been susceptible to abuse as well. For indigenous communities the fact that areas they call their ancestral homes: forests, water catchment areas, lakes etc., are categorised as public land means that without recognition and acknowledgment of their right to land in those areas, designation of land for public purposes will always trump their land rights. The Community Land Act regime is new and but prone also to abuse particularly as the final decision as to whether a community can be registered lies with the Government as does the decision on whether land can be registered as community land. Furthermore the fact that it retains trust land elements, in respect of unregistered community land, is recipe for abuse.

78 The recognition for, and protection of, customary rights to land is positive. However, as in the past, where customary laws have been made subject to repugnancy laws on grounds that communities have engaged in activities injurious to society, which has been used to limit their rights, little appears to have changed. Customary land rights are despite being constitutionally recognised and entrenched by statute, made subject to the Government's perception of what is acceptable or not. One may argue that this is the ultimate responsibility Citizens place on their Government, which may be correct in a system less corrupt, but where it is corrupt, it is likely that the problems of the past will resurface.

79 In respect of forests, Kenya needs to go a bit further and move to a community-controlled forest system. The 2016 Forests Act albeit better than its predecessor does not go far enough. There are examples from Tanzania, Bolivia, Brazil, Nepal and other States where Governments have restored to

forest communities their communal forests, completely, and this has led to effective conservation and the communities have been autonomous conservators.[600]

80 In respect of natural resources, its pre-NLP position was somewhat scanty. The NLP and the CLA seem supportive of communities' ownership and management these resources. The constitution does not fully reflect the aspirations of the NLP. The understanding given of natural resources in the constitution is that they constitute public land. This may mean that what is in the CLA may be restricted by how the constitution is applied. Having said that, this thesis argues that Article 40 of the constitution which provides a right to own property of any description includes the right of indigenous communities to collectively own natural resources and that this cannot be disesteemed by inconsistencies in the law.

[600] Expert evidence Liz Alden Wily, Ogiek case (n 81).

Chapter 3: Implementation of the Endorois and Ogiek decisions under the African Charter on Human and Peoples' Rights framework under domestic mechanisms

Introduction

1 When the domestic system fails, the African Commission and the African Court offer, subject to satisfaction of certain criteria,[601] Kenya's indigenous communities a further opportunity for consideration of their land rights' claims. In as far as access to a regional litigious mechanism is concerned - this is it - the framework established under the African Charter on Human and Peoples' Rights (the Charter) that avails the African Commission on Human and Peoples' Rights (the Commission) and the African Court on Human and Peoples' Rights (the Court), is the place of last resort.[602]

2 The ultimate purpose of this chapter is to establish what steps can be taken by domestic actors to engender implementation of the Endorois and the Ogiek regional judgments in the African regional jurisdiction i.e. the Endorois case: *276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* by the Commission and the Ogiek case: *Application No 006/2012: African Commission on Human and Peoples' Rights v The Republic of Kenya* by the Court.

3 Both the Commission and the Court's actions in reaching these judgments have been *intra vires.* Their determination of the two claims is in accordance with their mandate.[603] This being the case, it is likely that future claims will benefit from the

[601] See African Charter on Human and Peoples' Rights 1981, Article 56; and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, Article 5.

[602] Notably it is argued in Chapter 4 that the East African Court of Justice is an alternative forum for indigenous communities' land rights claims but this is at the sub-regional rather than regional level.

[603] The Commission's mandate includes making recommendations to Governments, Article 45(1) of the Charter; and the Court is able to consider cases submitted by the Commission, of which the Ogiek case was, see Rule 33, Interim Rules of Court. The Court was established primarily to complement and reinforce the functions of the Commission as the OAU felt that in order for the objectives of the ACHPR to be attained, there was need for such an institution.

precedence set by these judgments but as they seem not to have yielded much fruit yet, in terms of changing the position of the claimant groups, there needs to be a focus on implementation. Essentially if the judgments that these bodies make are not enforced, the remedies will not be a reality to the communities they concern and the system will be said to have failed, and the law not to have worked. The 'litmus test', or alternatively, efficacy, of bodies such as these is, ultimately, determined by enforcement of their judgments.[604]

4 Unsurprisingly, there is a growing appreciation of the fact that decisions of quasi-judicial and judicial regional bodies such as the Commission and the Court cannot be left as they are and that 'strategies and mechanisms',[605] are needed to produce the desired outcome.[606] Implementation is therefore seen as an evolving and ongoing process,[607] which requires the input of various actors involved in the litigation process, who in Kenya-related cases would be:

> the claimants, their representatives, the Kenyan Government, the decision-making bodies: in this case the African Commission and the African Court, the African Union which is the regional umbrella body; and domestic actors like the Kenyan Parliament which as seen in Chapter 1, through parliamentary questions, can keep issues in the limelight and push for Government accountability; the domestic courts; the Kenyan National Commission on Human Rights which has a constitutional mandate to ensure Kenya complies with its international human rights obligations of which decisions of the Commission and the Court would constitute and as these cases relate to historical land injustices the National Land Commission; the media; domestic NGOs; and international actors such as UN bodies and international NGOs.

5 There has been research conducted on the role of the African Commission, the African Court and other African Union bodies on implementation of their decisions;[608] and the role of communities themselves and NGOs in

[604] Lutz Oette, 'Bridging The Enforcement Gap: Compliance Of States Parties With Decisions Of Human Rights Treaty Bodies' (2010) Volume 16 Number 2 Interights Bulletin 51.
[605] ibid.
[606] ibid.
[607] Interview with Rachel Murray, Director, Human Rights Implementation Centre, University of Bristol, Bristol (Telephone, 18 July 2018).
[608] See Murray and Long (n 153); and Viljoen (n 166) 351.

implementation.[609] Given the focus of this thesis on the law and its heavy focus on domestic law, this chapter will examine the domestic system's ability to implement these two decisions. The rationale for this focus on the national mechanisms is that the domestic sphere is ultimately where these decisions will be implemented and no matter how vocal and active, the Commission and the Court are in respect of enforcement of their decisions, it is in Kenya that the issues will either be aligned or not and the efficacy of the two bodies and other extraterritorial bodies can be determined.

The status quo

6 The Endorois judgment was handed down on 25 November 2009 and adopted by the African Union on 2 February 2010. The recommendations made in this case, as noted in the introductory chapter, remain on the whole, unimplemented, the most significant being recognition of the community's rights of ownership and restitution of their ancestral lands. If the position of the Endorois remains as it was prior to the claim, this then validly questions the essence of law, the judgment and in fact the whole regional process. If not to redress the community for violations under the Charter which have effectively estranged them from their land, their religion, their cultural practices and livelihoods, what was the point of it all?

7 The Ogiek judgment was promulgated by the African Court on 26 May 2017. Despite this, the Ogiek have continued to face hostilities from the Government. In May 2018 they were classed as illegal settlers, accused of environmental degradation and served with an eviction notice by the Kenya Forest Service to leave the Mau forest on grounds of environmental conservation.[610]/[611] This is against the backdrop of the Kenyan Government, in the regional case, conceding that the degradation of the Mau forest 'could not entirely be…..associated with

[609] See Odhiambo (n 165).
[610] George Sayagie, 'Storm Brews over Mau as the Ogiek Resist Eviction' *Daily Nation* (Nairobi, 6 June 2018) <https://www.nation.co.ke/counties/narok/Storm-brews-over-Mau-as-Ogiek-resist-eviction/1183318-4597524-pq84c0z/index.html>accessed on 17 July 2018.
[611] Interview with Daniel Kobei, Director, Ogiek Peoples Development Programme, Kenya (Skype, 17 July 2018).

the Ogiek';[612] and the Court finding that the Ogiek had become, ensuing from evictions from their ancestral homes, victims of 'continued subjugation and marginalisaton'[613] and that their expulsion from the Mau forest violated their right to property.[614] Unsurprisingly, the Ogiek community is now asking whether 'the case has any value at all if they will be evicted again.'[615] As the Court is yet to make appropriate orders to remedy the violations it has found in the case,[616] and has invited and received submissions on reparations[617] including an amicus brief,[618] on the one hand it may be deemed premature to criticise the Government for non-implementation of the decision as no remedial orders have been issued as yet. However, on the other hand, such criticism may not be unwarranted given the Court has found *inter alia* a violation to the right of property, basing its reasoning on a number of factors including the Government's own concession and yet the attacks experienced by the community, before the judgment, continue.[619]

The obligation to implement

8 This lies in Article 1 of the African Charter which provides: 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

9 The Endorois did not make any submissions in relation to Article 1. Nonetheless the Commission found a violation and although it was silent on its reasons, violation of the Charter is tantamount to a failure to adopt legislative or other measures to give effect to the Charter contrary to Article 1.

[612] Ogiek case (n 81), para 130.
[613] ibid, para 111.
[614] ibid, para 131.
[615] Kobei (n 611).
[616] Ogiek case (n 81), para 222.
[617] The Court has received submissions on reparations from the Commission (on behalf of the Ogiek) and the Kenyan Government, the parties in the case, confirmed by Kobei (n 611); and Interview with Lucy Claridge, Director of Strategic Litigation, Office of the Senior Director of International Law and Policy, Amnesty International (and previously Legal Director, Minority Rights Group International), London (London, 4 July 2018).
[618] From the Human Rights Implementation Centre (University of Bristol) and the Centre for Human Rights (University of Pretoria), confirmed by Murray (n 607).
[619] Ogiek case (n 81), para 130.

10 In the Ogiek case, the community argued that if the Court had found violations of other Charter provisions, such finding effectively meant that the State had violated Article 1. The Government did not make any submissions. The Court held that although the State had recently enacted a number of domestic laws since the promulgation of the 2010 Constitution, which could be said to constitute legislative measures to ensure enjoyment of Charter rights, namely: the Constitution itself, the Community Land Act 2016 and the Forest Conversation and Management Act 2016,[620] the fact remained that there had been a failure to recognise the distinctive collectivity of the Ogiek i.e. 'to recognise the Ogieks like other similar groups as a distinct tribe',[621] thus denying them access to the Mau Forest which had triggered a violation of other rights, in violation therefore of Article 1.

11 As has been found in the Ogoni peoples' case, a case determined by the African Commission in 1996,[622] giving effect to duties set out in human rights instruments, which is the implication of Article 1, means abiding by a four-fold duty:

i. respect of the rights which at a basic level means that States are prohibited from interfering in the enjoyment of fundamental rights. In the case of a collective group it also means respect for the resources it uses to satisfy its needs;
ii. protection of these rights by means of legislation and provision of effective remedies. This also requires States to take measures to protect beneficiaries of the protected rights against political, economic and social interferences;
iii. promotion of enjoyment of human rights which requires States to ensure that individuals are able to exercise their rights and freedoms by promoting tolerance, raising awareness, and even building infrastructures; and
iv. fulfilment of the rights and freedoms which requires States to take measures to actually realise the rights which in some cases might 'consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).'[623]

[620] ibid, para 216.
[621] ibid, para 216.
[622] Communication no: 155/96 (n 143).
[623] ibid, paras 45-47.

12 The recommendations of the Commission in respect of the Endorois were that the State: recognise the community's rights of ownership and restitute their ancestral land; permit their access to Lake Bogoria, surrounding sites for religious and cultural rites and for grazing their cattle; recompense them for all losses suffered; pay them royalties from existing economic activities and ensure they benefit from employment opportunities in the reserve; grant registration to their representative body, the Endorois Welfare Council[624] (EWC); engage with them to bring about the implementation of the recommendations; and provide a report on implementation to the Commission within 3 months of the decision.[625] The EWC has been granted registration but the main recommendations with include recognition of ownership and restitution of land, have not yet been complied with. In respect of the Ogiek, the Court ordered that the Kenyan Government 'take appropriate steps within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within 6 months from the date of the judgment', that is, six months from 6 May 2017. The Court reserved its position on reparations.[626] It is understood that the Government has filed a document with the Court, which has also received submissions from the Commission on behalf of the Ogiek community and an amicus curiae, as indicated at the outset.

Implementation

13 Implementation has been defined as the legal process through which findings are incorporated into domestic law through legislation, judicial decisions, executive decree or other process; and compliance with decisions is seen more broadly as the 'factual matching of state behaviour and international norms'. [627] Compliance is sometimes and inconsistently considered or equated with 'the adoption of legislation or judgements by a domestic court or an

[624] The judgment actually refers to this as the Endorois Welfare Committee which is incorrect.
[625] Endorois case (n 114).
[626] Ogiek case (n 81), para 227.
[627] Murray and Long (n 153).

amendment to policy'[628] following a regional body finding but not as 'ensuring that the victim has reparation or that the African Charter's obligations have been respected in practice.'[629] Implementation and/or compliance of the kind needed to enforce the Endorois and Ogiek decisions is therefore a colossal task. This is made even more colossal, one might add, by the multifarious and complex factors discussed in the introductory chapter: the politicisation of land, market liberalization; corruption in land management; and in Chapter 2, the friction between public and community land.

14 The African Commission's Principles and Guidelines provide useful guidance on the issue of implementation and what measures States are required to take to implement these rights. The Principles and Guidelines place implementation at the heart of the obligation to protect. They provide that this obligation not only requires States to take positive measures to ensure that non-state actors do not violate the economic, social and cultural rights under the Charter but requires States to ensure 'effective implementation of relevant legislation and programmes and to provide remedies',[630] for violations. They provide that there are certain obligations which are immediate upon the ratification of the Charter and include, but are not limited to, 'the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights'.[631] At the very minimum the Principles and Guidelines provide that a State has an obligation to ensure that 'no significant number'[632] of nationals are denied 'the essential elements of a particular right'.[633] This means that even where the State claims not to have resources, it is expected to 'ensure the minimum essential levels of each right to members of

[628] ibid.
[629] ibid.
[630] African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights 2011), para 7.
[631] ibid, para 16.
[632] ibid.
[633] ibid, para 17.

vulnerable and disadvantaged groups'.[634] Essentially this requires at the very least, prioritisation by the State of the realisation of the rights of its poorest and the most vulnerable groups.[635]

The Government

15 So in the case of the Endorois and the Ogiek communities, not only are there two decisions which have found their various rights under the Charter to have been violated and are to be remedied, Kenya is expected even if it argues that resources have made it difficult to implement the decisions in their totality, to nonetheless prioritise the realisation of these communities' needs in recognition of the fact that they form part of the poorest and most vulnerable groups within Kenyan society. One only has to look at the amount of money the Government has spent on the bodies discussed in Chapter 1 to conclude that there is money available, from somewhere. As noted it spent Kshs 79,399,768 on the Ndungu Commission alone.[636]

16 And from a very basic level, if Kenya is to be said to have complied with its obligation to take adequate measures to give effect to the rights of the indigenous communities, it needs at the very least to identify the members of the community, engage them in dialogue and make arrangements to register their land rights which means at a very basic level ensuring that there is a community land registrar to register communities as required under the CLA. It would also mean refraining from inconsistent and indefensible comments made by the Government officials contesting the legality of the decisions. At the one year's public celebration of the Ogiek decision, the County Commissioner of Narok, declared publicly that the Ogiek case should be taken back to the African Court as the Ogiek are causing trouble.[637] This is a clear

[634] ibid.
[635] ibid.
[636] Parliamentary Debates (n 342).
[637] Kobei (n 611).

misunderstanding of the Ogiek community's status in respect of the Mau forest.

17 The Kenyan Government has a duty to respect rights of its citizens which at a basic level means it is prohibited from interfering in the enjoyment of fundamental rights. In the case of a collective group it also means respect for the resources it uses to satisfy its needs. The Kenyan Government in its duty to remedy the rights which the Commission and the Court have found to have been violated in the two cases, has to begin by respecting those rights which at its basic level means prohibiting anything that is interfering in the enjoyment of the two communities of their rights. In the case of the Endorois it means opening up access to Lake Bogoria and surrounding sites for religious and cultural sites and grazing cattle. This would not only be in line with the decision itself but in line with Article 63 of the Constitution and its recognition of the fact that community land encompasses grazing areas lawfully held, managed or used by communities. The fact that the Commission has found that the community was unlawfully restricted from accessing the Lake Bogoria area means that it has found that the community to be the lawful owners of that land under customary law. This then requires that the corresponding process in the CLA as discussed in Chapter 2 has to be followed to ensure that the land is recognised, adjudicated and documented for the purposes of registration under section 5(2) of the 2016 Act, in consultation with the community.

18 This process would not therefore just address the granting of unrestricted access, it would also address the recognition of rights of ownership to the Endorois community and restitute their ancestral land to them. Although it is noted that the manner in which the CLA is drafted may cause challenges in respect of recognition of communities where those communities' distinctive collectivity is not recognised or accepted by the State, reversal of marginalisation in the form of forced assimilation[638] and reversal of effects of

[638] As defined in Article 260 of the 2010 Constitution.

discrimination,[639] coupled with the fact that the Commission has made a finding of fact that the Endorois are a distinctive collectivity, necessitates acceptance of that distinction. If that distinctive identity is recognised, as the CLA is now in force (it was not previously), there is no reason why the process of recognition, adjudication and documentation of their land should not take effect.

19 In respect of the Ogiek, the same applies. They have been recognised by the African Court as constituting a distinctive collectivity and it has been accepted that the Mau Forest is their ancestral home. These findings of fact coupled with Article 63 of the Kenyan Constitution which defines community land as ancestral lands and lands traditionally occupied by hunter-gatherer communities, should mean that the Mau Forest areas which the community claims as their ancestral land should be recognised, adjudicated and documented for the purposes of registration under the Community Land Act 2016.

20 Respect would also require the Kenya Forest Services (KFS) to respect the rights of the Ogiek community to own, use and manage forest-resources. This would require them, in the first instance, to distinguish this community from others and stop treating them as squatters and encroachers. The Ogiek Peoples Development Programme (OPDP) has a register of the Ogiek community and where they reside.[640] The KFS should collaborate with the OPDP and based on this list refrain from forcibly removing them from their land. Working from this list is likely to prevent reports such as:

> 'mushrooming of the Ogiek – people pretending to be Ogiek but we know that these people are not as they were not there when we were struggling- they are providing documents claiming to be Ogiek but we have a list of Ogiek and these people are not on the list' [641]

[639] As required by Article 27 of the 2010 Constitution.
[640] Kobei (n 611).
[641] ibid.

as it is found to have happened in the Mau Forest in respect of settlement schemes for the Ogiek community.[642] In any event identification and protection of communities like the Ogiek is a policy directive under the NLP to facilitate the meeting of their land needs.[643]

21 The Kenyan Government also has a duty to protect these communities' rights by means of legislation and provision of effective remedies. This also means that it is required to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. The most pertinent pieces of legislation pertaining to these two communities are the Community Land Act 2016, the Kenya's Wildlife Conservation and Management Act 2013,[644] the Forest Conservation and Management Act 2016, the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 and the Water Act 2016, as discussed in Chapter 2. There the friction existing between indigenous communities' land rights and public land as set out in these legislative measures is discussed. Giving effect to the two decisions would require analysis of these frictions and taking action to remedy the inconsistencies. One of the difficulties in recognising indigenous communities' rights, other than political unwillingness is the existence of inconsistent laws or laws that seek to restrict rather than protect human rights and provide effective remedies.[645]

22 The Kenyan Government also has a duty to promote the enjoyment of the communities' human rights which means promoting tolerance, raising awareness and building infrastructures to ensure that the communities are able to exercise their rights and freedoms. It is said that the majority of States which are signatories of international treaties have an under-developed national implementation infrastructure to give effect to treaty decisions.[646]

[642] See Chapter 1, para 58.
[643] NLP (n 7), executive summary.
[644] Which as noted earlier came into force on 10 January 2014, WCM (n 550).
[645] Expert evidence Liz Alden Wily, Ogiek case (n 81).
[646] Open Society Foundations, 'From Rights to Remedies, Structures and Strategies for Implementing International Human Rights Decisions' (Open Society Foundations 26 May 2013), executive summary.

The consequence of this is that implementation is not prioritised.[647] This thesis considers that this is one of the problems Kenya has: it has an under-developed infrastructure which is aggravated by politics and corruption.

23 In the few nations where implementation is effective, they have 'high-level inter-ministerial committees and working groups, standing parliamentary committees, enabling legislation and direct enforcement through national courts'.[648] However, this is the exception rather than the rule.[649] Of these Kenya has had/has the following mechanisms: two task forces tasked with implementing the two decisions; three Constitutionally-established bodies: the Kenya National Commission on Human Rights, the Commission on the Administration of Justice and the National Land Commission; a national Parliament; and national courts which by virtue of Article 2(6) of the 2010 Constitution must treat the Charter as part of the domestic law framework. These will be considered next. Suffice to say that individually these bodies have specific mandates but even where these are fulfilled, the actual realisation of the rights is reliant on Government conduct.

i) <u>The Task Forces</u>

24 There have been two of these: i) the Task Force on the Implementation of the 2010 judgment of the African Commission on Human and Peoples' Rights on the Endorois community; and ii) The 2017 Task Force on the implementation of the African Court on Human and Peoples' Rights judgment on the Ogiek community.

[647] ibid.
[648] ibid.
[649] ibid.

i) The Endorois decision Task Force

25 This was set up by the President on 19 September 2014 by Gazette Notice,[650] to implement the 2010 African Commission on Human and Peoples' Rights' decision on the Endorois community. The Task Force was mandated to:

- 'study the Decision of the African Commission on Human and Peoples' Rights contained in Communication No. 276/2003 and provide guidance on the political, security and economic implications of the Decision;
- examine the potential environmental impacts on Lake Bogoria and the surrounding area because of the implementation of the Decision;
- examine the practicability of restitution of Lake Bogoria and the surrounding area to the Endorois Community taking into account that Lake Bogoria is classified as a World Heritage Site by the United Nations Economic, Social and Cultural Organisation (UNESCO);
- assess the amount of compensation payable to the Endorois Community for losses suffered and for settlement of royalties owed from existing economic activities on and around Lake Bogoria; and
- any other matter that is relevant and pertinent.'[651]

26 The Task Force's tenure was to be for a year or longer if deemed necessary by the President. In terms of reporting on its progress and recommendations, the notice required the Task Force to report: '(a) every three months, prepare and submit to the President reports of its progress; (b) propose interim recommendations to the President within six months of its appointment; and (c) submit a final report and make final recommendations to the President within one year of its appointment.'[652]

27 Other than the assessment of compensation, there is nothing in the mandate that suggests that the Task Force was established to implement the decision. The remit appears to have been based on scrutiny of the decision rather than

[650] *The Kenya Gazette*, [Vol.CXVI-No.115], Gazette Notice 6708 (26 September 2014).
[651] ibid.
[652] ibid.

giving effect to it. For instance, it is not clear what steps would have been taken if the Task Force had made negative findings on all the issues it was tasked with investigating. However, in the initial month there was some hope of implementation as the Task Force met with various organisations including the Endorois Welfare Council (EWC), Kenyan Human Rights Commission (KHRC), the Kenya Land Alliance (KLA) and Minority Rights Group International (MRG) to discuss the decision,[653] leading the Endorois to believe that the Government was intent on implementing the decision.[654]

28 In 2015 the EWC gave a statement at the African Commission's 56th Ordinary Session. They expressed concern about the Task Force's terms of reference and noted that these:

> 'appear to give room for further study and analysis on the decision by this Honourable Commission, instead of implementation. For example the Task Force has been empowered to study the decision and provide guidance on its political, security and economic implications – yet the Government has had 5 years to evaluated (sic) the decision and all of its implications. We are also concerned that, whilst the Task Force is permitted to seek the views of the public in relation to implementation, there is no requirement to consult with any Endorois representative.'[655]

29 The Task Force's mandate did not actually require it to consult with the Endorois community which confirms EWC's concerns. The mandate of the Task force has now expired and it is defunct. Its work was not completed.[656] Implementation of recommendations aside, at least the bodies discussed in Chapter 1 completed their work which blights the Government's intentions (if genuine) with this task force.

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[653] ESCR-Net, 'First meeting of the Kenyan Task Force for the Implementation of the Endorois decision' (*ESCR-Net,* 24 November 2014)<http://www.escr-net.org/node/365690>accessed 17 October 2017.

[654] Minority Rights Group International, 'Kenya Task Force formed to implement the 2010 Endorois ruling' (*MRG*, 29 September 2014)<'https://minorityrights.org/2014/09/29/kenyan-task-force-formed-to-implement-the-2010-endorois-ruling/>accessed 7 October 2018.

[655] Wilson Kipkazi, 'Statement by Endorois Welfare Council-Kenya at the 56th Ordinary Session of the African Commission on Human and Peoples' Rights 21st April to 7th May 2015 in Banjul, the Gambia' (Endorois Welfare Council 2015)<'http://www.achpr.org/files/endorois_welfare_council_kenya.pdf>accessed 12 November 2018.

[656] Kenya National Commission on Human Rights, 'KNCHR's Engagement with Indigenous People' (Kenya National Commission on Human Rights) <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/1046/KNCHR's-Engagement-with-Indigenous-People>accessed 7 October 2018.

i) The Ogiek decision Task Force

30 This was appointed on 10 November 2017 by the Cabinet Secretary for Environment and Natural Resources by Gazette Notice.[657] Similar to the Endorois task force, the terms of reference for it have expired before conclusion of its work. Its functions included:

> 'a) study the decision of the African Court and decisions by domestic courts on the Ogiek's occupation of the Mau Forest; b) study all land related laws to see how they address the plight of the Ogieks of the Mau; c) establish both the registration and the ground status of the claimed land; d) recommend measures to provide redress to the Ogiek claim. These may include restitution to their original land or compensation with cash or alternative land; e) prepare interim and final report to be submitted to the Court on Human and Peoples' Rights in Arusha; f) examine the effect of the judgment on similar cases in other areas of the country; (and) g) conduct studies and public awareness on the rights of indigenous peoples'.[658]

31 In and of themselves these functions are not dismissible and could be seen as the recognition of the gravity of work required to bring actual realisation of the judgments to pass, however, the fact that the task force was being asked to recommend measures which it was informed *may* include restitution of the land to the community is telling of the intentions of the Government. Given that the Court had heard arguments, balanced the evidence and concluded that the Mau forest constituted Ogiek land, it was not for the Government to deliberate further on whether restitution should be effected although it is acknowledged the Court is yet to rule on reparations;[659] and may find that restitution is not actually possible. It is highly doubtful that this will be its view as the Ndungu Commission in particular sets out the pragmatic steps needed to reallocate land in the Mau forest.

[657] The *Kenya Gazette*, [Vol.CXIX-No.167] Gazette Notice 6708 (10 November 2017).
[658] ibid.
[659] Ogiek case (n 81), paras 222-223.

32 The task force was probably a mere attempt by the Government to window dress and make it appear, to the African Court and other bodies, as if it were taking measures to implement the decision. Notably, the Task Force was funded by the Kenya Forest Service (KFS). This is the same agency that has been accused of forcibly evicting the Ogiek and Sengwer communities from their ancestral homes which arguably makes it conflicted. Furthermore, its mandate did not explicitly require it to consult with the Ogiek which one might have thought necessary for the purposes of recommending measures for redressing the community.

Examples of implementation bodies elsewhere

33 This thesis will now examine two examples of implementation bodies, in Paraguay and Belize.

Paraguay

34 Paraguay, is a nation with 19 groups that self-identify as indigenous. It has a legal framework that recognises indigenous communities including its Constitution[660] and domestic law no. 234/93 that transposes the ILO Convention No.169.[661] Maugre this legal framework, there have been 3 indigenous communities' cases brought against the State in the Inter-American Court of Human Rights, namely: i) Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005; ii) Case of Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010; and iii) Case of Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010. All these cases have been determined positively by the Inter-American Court. Essentially the Court has found that the communities' property and affiliated rights as enshrined in the American Convention have been violated; and that provisions of the Paraguayan constitution which recognise indigenous

[660] IWGIA, 'IWGIA-Indigenous World-2019', IWGIA, https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf (Accessed 28 September 2019); See also para
[661] Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, para 130.

communities and their land rights had also been violated. The Court further found that the process provided for in domestic law for land rights claims determination hampered the realisation of the communities' right to their ancestral land.

35 In the first case the Court ordered the state to:

> 'identify said traditional territory and give it to the Yakye Axa Community free of cost, within a maximum period of three years from the date of notification of the instant Judgment. If the traditional territory is in private hands, the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society'.[662]

36 But as of June 2008, the Government had not taken this action and as of the end of 2017, the community was still awaiting resettlement.[663]

37 In the second case, the Court ordered, *inter alia,* restitution of the community's ancestral lands in line with the '*restitutio in integrum* principle' as reparation;[664] and noted, that albeit such restitution may be 'barred' due to the lands being 'currently privately owned',[665] the court had to nonetheless make the right to property a reality by either purchasing those lands or condemning them for the purpose of returning them to the community. However, if this was not possible, the State needed to 'make over alternative lands' in agreement with the community in a manner that respected their way of life,[666] i.e. 'formally and physically grant tenure of the lands to the victims' within 3 years of the judgment.[667] As of March 2009, three years after the

[662] ibid, para 217.
[663] Human Rights Committee, 'Fourth Periodic Report Submitted by Paraguay under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Due in 2017 CCPR/C/PRY/4' (Human Rights Committee, 7 November 2018).
[664] ibid, para 210.
[665] ibid, para 211.
[666] ibid, para 212.
[667] ibid, para 215.

judgment, the State was yet to grant tenure to the community. It was not until 2014 that the State passed expropriation laws in respect of the community's lands. The lands are said to have been awarded to the 'National Institute of Indigenous Affairs, for subsequent award to the Sawhoyamaxa indigenous community'.[668]

38 In the third case, the Court found that the 10,700 hectares of land claimed by the community did belong to the community,[669] and ordered the State to take necessary measures to ensure that the community's right to ownership, use and enjoyment of the land was realised,[670] within 3 years of the judgment.[671] The Court recognised that to do this would require 'specific identification' of the territory in participation with the Community, which it ordered should take place within a year of the judgment; [672] and once that had been done, that it was the necessary for the State to decide within the guidance provided within the Court's judgment, whether those lands, if privately owned, could be expropriated for the community and if not, the State was ordered to find alternative lands. The Court thereby being willing to grant a 1 year extension to the 3 years, to enable this,[673] but with a US$10,000 charge for each month of delay after the 3 year mark.[674] Compliance should therefore have been by August 2014 at the latest but it was not until December 2017 that land belonging to the Xákmok Kásek community had been acquired from private owners and was registered in the community's name.[675]

Paraguay's implementation system

39 In February 2009 Paraguay established the Inter-Agency Commission on the Enforcement of International Judgements (CICSI) made up of governmental

[668] HRC (n 672).
[669] *Xákmok Kásek Indigenous Community v. Paraguay,* para 107.
[670] ibid, para 281.
[671] ibid, para 285.
[672] ibid, para 283.
[673] ibid, para 287.
[674] ibid, para 289.
[675] HRC (n 672).

agencies 'to monitor and coordinate the efforts of the executive branch to comply with the judgements and recommendations of the inter-American system'[676] and as of 2013, recommendations of international supervisory bodies.[677] The Commission's current President is the Paraguayan Vice President who is one of other senior Government officials with requisite decision-making powers within it. The Commission's main objective is to develop criteria and action plans to see to it that there are no impediments to effecting decisions made by the Court and international bodies.[678]

40 Also in 2013, Paraguay ratified a National Human Rights Plan and set up SIMORE, an inter-governmental online system of following up on recommendations made by international treaty bodies' created with the assistance of OCHRC.[679] It allows state agencies to monitor their actions, prepare national reports, design public policies and conduct research.[680]

41 Arguably Paraguay has had a head start on recognition of indigenous communities' land rights, if only in law and judgments of an international magnitude. The Inter-American Court has found that its land claims system is ineffective and effectively prevents indigenous communities from realising their ancestral land rights. In Kenya, the law in its recognition of indigenous communities' land rights is fairly young and its system of land claims is yet to be tested fully. There are potential problems as discussed in Chapter 2 but even more apparent is the absence of a system akin to Paraguay's CICSI in particular as an inter-governmental body comprising of decision-makers

[676] Human Rights Council, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, Regarding the Situation of Indigenous Peoples in Paraguay' (Human Rights Council, 13 August 2015).
[677] Amnesty International, 'Paraguay: Submission to the UN Committee on Economic, Social and Cultural Rights, 54th Session (23 February – 6 March 2015)' (Amnesty International Publications 2014).
[678] VicePresidencia De La República Del Paraguay, Gobierno Nacional, Mama, Paraguay de la Gente, 'Comisión Interinstitucional para el Cumplimiento de las Sentencias Internacionales (CICSI)' (VicePresidencia De La República Del Paraguay, Gobierno Nacional, Mama, Paraguay de la Gente)<http://www.vicepresidencia.gov.py/index.php/cicsi-1>accessed 30 September 2019.
[679] HRC (n 676).
[680] Teta Rekuai & Gobierno Nacional, 'Paraguay SIMOREPlus, About Simore' (Teta Rekuai & Gobierno Nacional)<http://www.mre.gov.py/SimorePlus/Home/Page?idTipo=1> accessed 30 September 2019.

focused on implementation of judgments and importantly having longevity rather than having a fleeting existence.

42 That is not to say that CICSI is fool proof. It was created in 2009 but notably the Paraguayan State is still ten years after the Commission's creation and thirteen years after the Yakye Axa community judgment, yet to resettle the community.[681] In its 2015 periodic report to the UN Committee on Economic, Social and Cultural Rights, Paraguay stated that the CICSI had made great strides in implementing the three judgments which may be true but 3 years previously, Amnesty International's interviews with the communities revealed that:

> 'the CICSI has been ineffective in securing the traditional lands to the communities affected. Indigenous communities have expressed concerns that for many years the Commission prioritized pursuing alternative land proposals without first exhausting with due diligence other options such as conducting serious negotiations with the current owners of the ancestral lands.'[682]

43 Similarly IWGIA in a 2018 report considered that Paraguay lacked a proper legal framework for regulating and effecting implementation.[683] To its credit, in November 2018 the UN's Human Rights Committee reported that Paraguay had facilitated a visit of the Committee to the indigenous communities to 'verify the status of compliance with the three judgments', that 'follow-up' to the judgments remained on CICSI's agenda and the CICSI had held meetings with the leaders of the groups and their legal representatives.[684] In its August 2019 Concluding Observations on Paraguay, the Human Rights Committee reported that the CICSI's membership had now been extended in law to

[681] As this is awaiting determination of an ancillary right of way easement litigation being pursued by the State against a corporation linked to the land, see HRC (n 676).
[682] Amnesty International (n 677).
[683] The International Work Group for Indigenous Affairs (IWGIA), 'The Indigenous World 2019' (The International Work Group for Indigenous Affairs (IWGIA) 2019)<https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf>accessed 28 September 2019.
[684] HRC (n 676).

include representatives of civil society which it described as a positive aspect. In its observations on indigenous communities, it noted that in respect of the three judgements, there had been minimal progress but that in the last 3 years there was compliance with some of the commitments made as to implementation.[685]

Belize

44 On 22 April 2015 the Caribbean Court of Justice, determined the case of *Maya Leaders Alliance et al. v. The Attorney General of Belize*.[686] The Maya community has been fighting for recognition of its customary land tenure as property for several years. In 2004 the Inter-American Commission on Human Rights in a case brought by the Maya Indigenous Community against the State[687] found that the State had 'violated the right to property enshrined in Article XXIII of the American Declaration by failing to take effective measures to recognize, demarcate and title Maya communal property, and by granting logging and oil concessions to third parties in relation to Maya lands without effective consultations and the informed consent of the Maya people.'[688]

45 The Commission's recommendations included the adoption of measures necessary for the delimiting, demarcating and titling of the Maya territory in consultation with the community; carrying out of the said measures and refraining from actions that would impact on the 'existence, value, use or enjoyment located in the geographic area occupied and used by the Maya people;' and repairing any damage caused by environmental degradation caused by logging concessions granted by the State, on the Maya community's land.[689] Other cases had been pursued domestically by other Maya communities with similar judgments and orders including refraining from

[685] Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Paraguay CCPR/C/PRY/CO/4' (Human Rights Committee 20 August 2019).
[686] Caribbean Court of Justice [2015] CCJ 15 (AJ).
[687] Maya Indigenous Community of the Toledo District v Belize Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.12
[688] CCJ (n 685) para 17.
[689] ibid.

transacting on Maya community territories.[690] But with no proper implementation of the decisions, the community pursued the proceedings in the Caribbean Court of Justice (CCJ).

46 However, on 22 April 2015 the same day as the CCJ judgment, the community and the Belizean Government agreed a consent order in which the Government consented to the following: that community land tenure existed in the Maya villages and gave rise to collective and individual rights of property; that it would adopt measures to identify and protect the rights consequent on the customary tenure in consultation with the community and respectful of their cultural practices; that it would refrain from any land transactions in respect of the said lands pending the identification and protection of the community's tenure rights, unless with the authority of the community and in respect of their rights; that the Court would determine the issue of damages; and the parties would report back by 30 April 2016 on compliance.[691] The CCJ considered that the order did not preclude assessment of the community's constitutional rights and treatment of same by the State and proceeded to do so in the judgment. It found that the Belizean State had 'contravened the constitutional guarantee of the Appellants to the protection of the law' and endorsed the consent order agreed between the State and the community. It ordered the State to 'establish a fund of BZ$300,000.00 as a first step towards…..protect(ing) Maya customary land tenure' and 75% payment of the legal costs incurred by the community.[692]

47 Other than stating that the parties needed to report back to the Court on 30 April 2016 on compliance, there were no specific dates by which the measures of identification and protection of the community's customary tenure rights had to be complied with.

[690] Aurelio Cal v Attorney General of Belize and Manuel Coy v Attorney General of Belize (the Maya Land Rights case (2007) 71 WIR 110.
[691] CCJ (n 685) para 9.
[692] ibid, para 79.

Belize's implementation system

48 In 2016 the Belizean State 'established the Toledo Maya Land Rights Commission ("TMLR Commission") under the authority of the Belize Attorney General as the government's mechanism to implement the CCJ consent order. The TMLR Commission, chaired by former Minister of Forestry, Lisel Alamilla, was tasked with developing a draft implementation plan by 30 June 2016.'[693] As of September 2018 the plan had not been completed.[694] The Commission has reportedly met with the community's representatives but the meetings have been 'severely handicapped as the TMLR Commission has taken the view that it is for the government alone to determine the scope of the work to be done and the timeline to implement the Consent Order and, in accordance with that view, with whom they are obligated to consult.'[695] The State had also used the BZ$300,000.00 ordered by the CCJ not to compensate the community in pursuance of the CCJ order but as funds for establishing the TMLR Commission.[696] Further the Commission has stated in open court that 'it does not see the demarcation and documentation process as being within its mandate of work, and it does not expect the development of such a process to occur for several more years.'[697] Essentially no proper steps have been taken by the Commission to implement the CCJ's judgment.

49 In September 2018 the Commission is reported to have met with consultants to prepare a draft of the Maya Customary Land Tenure Policy. The Chair of the Commission was quoted as saying:

> 'When you talk about a customary land tenure, they are governed by different conventions within the global framework of what the indigenous people have been advocating for. So basically what we are

[693] Maya Leaders Alliance, 'Update Report to the Human Rights Committee of the ICCPR for the 124th Session Review of Belize' (Maya Leaders Alliance 7 September 2018) para 13.
[694] ibid.
[695] ibid, para 14.
[696] ibid.
[697] ibid.

> doing is looking at the consent order and bringing it down to how we are going to apply that in Belize. What does it look like, what should it include; what are some definitions that we have to include.'

as well as suggesting that any drafted policy would have to be approved by Attorney General and then the Cabinet before being proposed as legislation.[698] In January 2019, it was reported that the Commission's Chair had held further consultations with various participants on the legislative measures to be taken.[699] The Chair was further reported as saying:

> '"This is our second day that we're having a meeting with indigenous people's and human rights experts and we're discussing legislative principles and headings on Maya lands and their associated rights. It's really a preliminary discussion with the experts to see what are some of the principles that would be included in legislation that we will be drafting in the near future. We're being very ambitious and we hope that the legislation will be completed this year, but as a starting point for us, it's to bring key officials from the government to participate in this workshop or meeting to make sure that we're all on the same page and understanding these principles as we move forward. The idea is to just really build their capacity as we move this forward because it's important that all of government officials are understanding the basis of the consent order and how you actually make it happen on the ground. How do you bring it into fruition on the ground, how do you protect Maya customary land rights?"'[700] (sic)

[698] News5, 'Toledo Maya Land Rights Commission Holds Consultations to Draft Land Tenure Policy' (News5, 26 September 2018)<https://edition.channel5belize.com/archives/172483>accessed 1 October 2019.
[699] Government of Belize Press Office, 'Press Release: Toledo Maya Land Rights Commission Hosts Two-Day Training in Punta Gorda Town' (Government of Belize Press Office 18 January 2019)<https://www.facebook.com/GOBPressOffice/posts/press-releasetoledo-maya-land-rights-commission-hosts-two-day-training-in-punta-/2019596151409211/>accessed 1 October 2019.
[700] News5, 'Maya Land Rights Commission Heads Training Workshop in Toledo' (News5 18 January 2019) <https://edition.channel5belize.com/archives/178887>accessed 1 October 2019.

50 Given that the consent order was an agreement between the state and the Maya community and has been endorsed by the CCJ, the Commission appears to be unduly prolonging the process and above statements by the Chair seem rhetorical. The above statements by the Chair seem rhetorical rather than a genuine attempt at enforcing the judgment. What was in the consent order was effectively what the Inter-American Commission had said in its recommendations in 2004 and the State had had since then to engage with the issues and seek the assistance of experts etc., Effectively, the Belizean state through this Commission seems to be acting as if these are novel issues, behaviour one would argue is replicate of the government of Kenya. That is not to say that implementation is not complex, it is and from the example of the Paraguayan Sawhoyamaxa Indigenous Community which had to wait from March 2006 when judgment was made in their favour to 2014 for expropriation laws to be passed in respect of their lands, one sees this. The protracted nature of implementation including the challenges the Commission seems to be having in understanding what the consent order means in the Maya community's case are not unique, but attempts have to be genuine.

51 Of the two, the Paraguayan inter-agency commission seems to be far more advanced than the Belizean Commission. This is likely to be attributable in part to the fact that it has been in existence for longer and the fact that it is constituted by decision-makers.

52 Similarly other jurisdictions with indigenous communities have had task forces which have comprised of accountable stakeholders. In September 2013 the Malaysian Government set up a Task force to review a 2012 report of an inquiry by the country's national human rights institution, the Human Rights Commission of Malaysia (SUHAKAM), into the land rights of indigenous communities. This task force comprised of Government Ministries, state agencies and civil society experts and produced its report in August 2014,[701]

[701] Commonwealth Forum of National Human Rights Institutions, 'Malaysia: A National Inquiry into the land Rights of Indigenous Peoples' (*Commonwealth Forum for National Human Rights Institutions*, 13 April

which suggests that it had sufficient time to conclude its review. It endorsed the majority of the Commission's recommendations albeit rejecting some.[702] There is a follow-up plan to implement the task force's report which Suhakam continues to monitor.[703]

53 If the Kenyan Government was genuinely minded to repeat the task force exercise, having an inter-agency task force with a long standing mandate constituted by various stakeholders: senior representatives with decision-making powers from the Ministry of Lands, the Treasury, the Attorney General's office, the Department of Justice, the National Land Commission, the KNCHR given its mandate on the monitoring of Kenya's compliance with its international obligation, the Kenya Forestry Service as well as representatives of civil society including representatives of indigenous communities, will be strides in the right direction and may bring about implementation within a reasonable period.

ii) Kenya National Commission on Human Rights (KNCHR)

54 This Commission was established under the 2010 Constitution. It has a number of functions but most pertinent to this discussion is its function 'to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights'[704] that is most crucial. National human rights institutions are observed as being 'in a unique position to facilitate the implementation of international human rights judgements.'[705] It is opined that for national human rights institutions such as the KNCHR to promote implementation of international body judgments, they should have a

2016)<http://cfnhri.org/spotlight/suhakams-national-inquiry-into-the-land-rights-of-indigenous-peoples>accessed 8 December 2018.
[702] ibid.
[703] UN Permanent Forum on Indigenous Issues, 'Questionnaire to National Human Rights Institutions' (UN Permanent Forum on Indigenous Issues 2017)<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/02/Malaysia.pdf> accessed 7 December 2018.
[704] 2010 Constitution, Article 59(2)(g).
[705] Open Society Foundations (n 646).

formal mandate to 'monitor the implementation'[706] of such decisions and to 'audit executive agencies for compliance'.[707] The KNCHR has such as mandate. This mandate is more than simply 'monitoring' of the implementation of the decisions but speaks of 'ensuring', which means it has the responsibility of guaranteeing/making certain/securing Kenya's compliance with its obligations under international treaties which include obligations under the African Charter. This being the case, the KNCHR ought therefore to be the body that is leading or co-ordinating various national organs and various activities to bring about fulfilment of the decisions.

55 The 2010 Constitution provided for legislation to give effect to the KNCHR. Therefore in 2011 Parliament passed the Kenya National Commission on Human Rights Act, which established the KNCHR to give effect to the Constitution. Notably, the Commission's functions as set out in the Act seem more restricted than those contained in the Constitution. As noted above, the Constitution empowers the Commission to act 'as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights'.[708] However, Section 8(f) of the 2011 Act restricts this power and provides that the KNCHR will: 'act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights *except those* that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination.'[709] (emphasis added)

56 The Act itself does not define who special interest groups are and neither does the Constitution. The KNCHR's website describes these as: 'migrants, indigenous groups, children and intersex persons'.[710] Is Section 8(f) of the Act

[706] ibid.
[707] ibid.
[708] 2010 Constitution, Article 59(2)(g).
[709] Kenya National Commission on Human Rights Act 2011 (No.14 of 2011), s 8(f).
[710] Kenya National Human Rights Commission, 'Our Work, Special Interest Groups' (KNHCR)<http://www.knchr.org/Our-Work/Special-Interest-Groups/Indigenous-Groups>accessed 7 October 2018.

therefore to be read as if the KNCHR cannot act as the principal organ in relation to international obligations relating to the rights of indigenous groups as protected under equality and non-discrimination laws? If so this seems counterproductive particularly as 'human rights' are defined under the Act as 'fundamental rights and freedoms protected under the Constitution, and the laws of Kenya'[711] which Chapter 4 of the Constitution defines as including the right to 'equality and freedom from discrimination'.[712] By virtue of Article 2(6) of the Constitution, the African Charter on Human and Peoples' Rights is a domesticated international treaty that is applicable to all Kenyan citizens including indigenous groups whose rights, including equality and non-discrimination-related rights, that the State may have failed to protect, are enshrined. It could not have been Parliament's intention to fail to protect these communities from such violations. It is more likely that Parliament was seeking, by the introduction in the Act of such a restriction, to prevent claims being made by LGBT communities and other groups whose claimed rights may be considered contrary to Kenyan custom.[713] Be that as it may the functions of the KNCHR must be read as those envisioned by the Constitution rather than those set out in the Act.

57 In any event the KNCHR has taken the position that work on indigenous groups will form part of its work. It states that: 'The KNCHR has, in discharge of its mandate, continued to engage with indigenous people and different duty bearers and advocated for a human rights based approach to conservation. The KNCHR continues to receive and investigate complaints by Indigenous People on violation of their fundamental human rights and freedom.'[714] Notably, it has been part of both the Endorois and the Ogiek decisions task

[711] Kenya National Commission on Human Rights Act 2011 (No. 14 of 2011), s2.
[712] 2010 Constitution, Article 27.
[713] See for instance the stance taken by the Kenya Film Classification Board on Kenya's first LGBT film 'Rafiki': Daily Nation, 'Banned gay film 'Rafiki' film reveals Kenya's sexuality progress' *Daily Nation* (Nairobi, 8 May 2018)<https://www.nation.co.ke/news/What-ban-of-gay-film--Rafiki--indicates-about-Kenya/1056-4549802-r5p0flz/index.html>accessed 24 January 2019.
[714] KNCHR (n 656).

forces.[715] The following is a closer look at its work from an implementation purview.

Decisions-related work

58 In 2010/11 it assisted the Endorois community to prepare a document that they could use to engage with the Government in negotiating the implementation of the judgement.[716] It facilitated a workshop of experts to prepare a guideline for implementation of the ruling; and 'continued to engage both the Government and the Endorois community in order to realize implementation of the ruling.'[717] The KNCHR's attempts to engender discussion and interest by the Government on the decision, including attempts to enlist the Ministry of Justice and Ministry of Foreign Affairs to attend a working group on indigenous issues and also engage the Minister for Lands on the issue of implementation, failed in 2010/11. The KNCHR noted that 'bringing the government to the negotiation table on the Endorois case has been a challenge since there seems to be no clear path of progression due to an apparent lack of political will on its implementation'.[718] It reported its failed attempts to the African Commission. [719] The fact that the KHCHR could not get the Government to engage in the various processes and the fact that as a last resort it reported back to the African Commission shows that it does not have the power or alternatively will not be permitted by the Government to exercise its power of ensuring compliance.

59 In its 2012/2013 reports the KNCHR reported no Endorois/Ogiek-related activities.[720] Similarly in 2013/2014 no such work was reported.[721] In 2015/16

[715] ibid.
[716] Kenya National Commission on Human Rights, 'Annual Report for the 2010/2011 Financial Year' (Kenya National Commission on Human Rights 2011).
[717] ibid.
[718] ibid.
[719] ibid.
[720] Kenya National Commission on Human Rights, 'Annual Report for the 2012/2013 Financial Year' (Kenya National Commission on Human Rights 2013).
[721]Kenya National Commission on Human Rights, 'Annual Report for the 2013/2014 Financial Year' Kenya National Commission on Human Rights 2014).

KNCHR confirmed that the Government had set up the Task Force to examine implementation of the Endorois decision; and that:

> 'KNCHR is the principal constitutional organ entrusted with the protection and promotion of human rights of all people in Kenya and is also the chief advisor to the government on its international obligations. In fulfilment of this mandate, KNCHR has engaged the government continuously and given the necessary advisories to facilitate implementation of the decision. In realization of this mandate, the President included the KNCHR in the task force on the implementation of the ruling. The task force's work has been delayed by lack of funds.'[722]

60 The extent of the KNCHR's actions other than what is noted above, was a recommendation to the Government that it extend the Task Force's term,[723] which it has not. Notably the KNCHR attended the Ogiek victory celebration on 26 May 2018, marking a year since the decision of the Court. Although the Chairperson, Kagwiria Mbogori stated that the KNCHR would continue working with the Ogiek community, it was 'felt that she said that for the sake of the public but did not actually mean it. She did not know much about the Ogiek plight and was reportedly mesmerised as to where the community was located.[724] In her speech on the day, Ms Mbogori, noted that despite the positive-nature of the decision, forced evictions were continuing and the Task Force's terms of reference had lapsed. She called on the renewal of the Task Force's mandate to undertake:

> 'comprehensive literature review on the various relevant laws and publications; field visits for public participation whereby it shall meet the Ogiek Community; hold public hearings in all the affected regions with similar use and occupation of forest covered areas of the country; engage and interact with experts and consultants on marginalized communities, land issues with a view to come up with best practice

[722] Kenya National Commission on Human Rights, 'Annual Report for the 2015/2016 Financial Year' (Kenya National Commission on Human Rights 2016).
[723] ibid.
[724] Kobei (n 611).

applicable and; compile a report to be submitted to the African Court on Human and Peoples Rights in Arusha.'[725]

61 Given its mandate, there is no reason why this work cannot be undertaken by the KNCHR itself. Notably in Malaysia, it is the Human Rights Commission of Malaysia (SUHAKAM), the national human rights institution, as noted ealier, that undertook a National Inquiry into the Land Rights for Indigenous Peoples in 2013, that resulted in the establishment of a Task force by the Government to review the findings. The KNCHR can start the ball rolling in Kenya by carrying out a similar exercise with a particular focus on implementation.

62 In 2018 in a report,[726] the KNCHR referred to the findings of the African Court in the Ogiek case to show the Court's position on protecting the rights of forest communities in forest conservation and management; and also referred to the Endorois decision as evidence of positive findings on indigenous communities' land rights claims.[727]

63 There is no doubt the KNCHR has taken part in a number of activities to raise awareness of various indigenous communities' plights; and in addition to the above, in 2010/11 investigated claims of threatened eviction of the Ogiek community from the Chepkitale forest, gazetted as a game reserve since the mid-2000s. The KNCHR established that there had been violations of the community's land rights in that they had not been consulted prior to the gazetting and despite being advised that they would be resettled, had not been. The KNCHR asked the Government to resettle the community to enable them to enjoy their land rights.[728] In 2014 it undertook a fact-finding mission

[725] Dominic Kabiru, 'Chairperson's Remarks-Ogiek Victory Celebrations' (*KNHCR*, 26 May 2018) <http://www.knchr.org/Articles/ArtMID/2432/ArticleID/1021>accessed 8 October 2018.
[726] Kenya National Commission on Human Rights, 'The Report of the High Level Independent Fact-Finding Mission to Embobut Forest in Elgeyo Marakwet County' (KNHCR 2018)<http://knchr.org/portals/0/grouprightsreports/KNCHRFact_Finding_Mission_to_Embobut_Forest.pdf> accessed 7 November 2018.
[727] ibid.
[728] Kenya National Commission on Human Rights, 'Annual Report for the 2010/2011 Financial Year' (Kenya National Commission on Human Rights 2011).

to investigate reported forceful evictions against the Sengwer by the KFS in the Embobut forest area. Its investigations confirmed that in spite of prohibiting court orders refraining KFS from evicting the indigenous communities involved, these evictions continued.[729] Similarly in 2016 it investigated continuing further forceful evictions of the Sengwer from the same forest. It found that there were 'several human rights violations among them destruction of property, arbitrary arrests and forceful eviction of the Sengwer community members.'[730] Based on these investigations which corroborate the accounts given by indigenous communities, it is fair to say that the KNCHR is monitoring the HR situation of indigenous groups, it acts a machinery that keeps their contestations alive and gives the communities voice, if not much more.

64 At the end of 2016 together with the National Land Commission, the KNCHR took part in a 'Ground-Truthing Mission to Resolve the Ancestral Land Right Claims of Forest Dwellers'[731] in the Embobut forest where they engaged with communities affected by land rights violations. The KNCHR heard grievances from the communities relating to 'negligence, failure and reluctance by the Kenya Government and the Kenya Forest Service as well as other authorities to abide by national, regional and international human rights principles and treaties and standard procedures with respect to forceful evictions of populations.'[732] The KNCHR noted that the Chairperson of the National Land Commission informed the affected communities at this mission that 'it was important for the community to come to terms with the fact that the Government was not going to allow them to settle back into the forest but that they would be granted user rights only.'[733] The KNCHR observed that 'Dr. Swazuri's statement was not taken kindly by the affected community members present and many of them saw it (the statement) as (being) contrary to the

[729] ibid.
[730] ibid.
[731] ibid.
[732] ibid.
[733] ibid.

recommendations'[734] made at a different forum. However nothing is reported on how the KNCHR dealt with the affected communities' concerns or the comment made by Dr Swazuri. Its mandate called for a more robust response to this. If anything one would expect the KNCHR to be able to refer to international agreements,[735] which Kenya was part of, which acknowledge the importance of granting indigenous communities management rights to forests in recognition first that these forests constitute their homes and second, of their expertise in sustainable forest conservation.

65 When it comes to enforcement of the Endorois and Ogiek decisions, this thesis considers that the KNCHR has not done enough. The Ogiek Peoples' Development Program (OPDP) believes that it has taken insufficient interest in fulfilling its mandate in relation to the Ogiek decision.[736] And that in view of the fact that the funding for the KNCHR comes from the Government itself, there is concern about whether the Commission can fulfil its mandate or be allowed to do so, on indigenous land rights issues given what is at stake. Its exasperation with the Government in respect of the Endorois decision as early as 2011/12, and observation that the Government lacked political will to implement the decision shows that the extent of the KNCHR is to observe, investigate, monitor but not actually to ensure compliance or even take steps to secure appropriate redress where human rights have been violated because its capability, in these respects, is subject to Government will. Notably however, the KNCHR reports to Parliament annually and where it makes recommendations which remain unimplemented, this information is relayed too.[737] The remit of the KNCHR permits it to take a more bullish role in pushing for the implementation of the two decisions. It is reported that when Kenyan MPs asked for an increase in their salaries in 2013, the Kenya's Salaries and Remuneration Commission (SRC), also a constitutionally created body, had

[734] ibid.
[735] Such as the Convention on Biological Diversity and Agenda 21 for example.
[736] Kobei (n 611).
[737] Kenya National Commission on Human Rights Act 2011 (No. 14 of 2011), s 54.

considered this unreasonable and rejected the proposal. The MPs responded with threats. The media reported:

> '….when it attempted to reduce the salaries of MPs, the legislators threatened to disband the Commission. The Commission, itself earning super salaries, knew which side of its bread was buttered. It backed down. It was only a few months to the end of its term that the Commission found the guts to propose a modest cut to MPs' salaries, a proposal that has little chance of being implemented.'[738]

So it could be that the KNCHR makes proposals that are not implemented, even so, it should make them.

66 The KNCHR is mandated to have the gusto to address and redress violations of human rights of which the failure to implement these decisions amounts to. In addition to ensuring compliance with international obligations it is required:

- 'to promote the protection, and observance of human rights in public and private institutions;
- to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;
- to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
- to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct'.[739]

67 Any threats to its sustenance that may prevent it from doing its work should be challenged. Some opine that: 'If a commission is not granted the budget it is supposed to get then it has the right to sue and go to court and say this is

[738] Tee Ngugi, 'In Kenya, politicians sit on top of the pay pyramid as workers scrumble for crumbs' *The East African* (Nairobi, 18 April 2018)<https://www.theeastafrican.co.ke/oped/comment/Kenya-politicians-sit-on-top-of-the-pay-pyramid/434750-4421386-ja3lsn/index.html> accessed 10 January 2019.
[739] 2010 Constitution, Article 59(2).

what we were allocated.'[740] In other words possible threats of this kind should not prevent KNCHR from doing its work.

iii) The Commission on the Administration of Justice (CAJ)

68 This Commission was established under the Commission on Administrative Justice Act 2011 essentially to act as the Office of the Ombudsman in Kenya. This fact is confirmed in its functions which are as follows:

> '(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice; (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector; (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon; inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service; (d)(.....) (e) (....); (f) (....); (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies; (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures; (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration; (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and (m)(.....).'[741]

69 The failure to implement the Endorois and the Ogiek decisions falls within the remit of the CAJ at least for the purposes of investigation. It is conduct stipulated in (a) and (b) of its functions as it is prejudicial to both communities to be left in the state they were in before the claims were initiated; and it is

[740] Interview with David Achero Mufuayia, Programs Officer, Justice and Equality, CEMIRIDE, Nairobi (Nairobi, Kenya, 23 September 2013).
[741] Commission on Administrative Justice Act 2011 (No.23 of 2011), s 8. Hereon CAJ Act.

progressively prejudicial as these decisions are in their favour but the violations continue. It is reported that 'some of the Ogiek community members have had to leave the forest- because they are feeling frustrated, they had a lot of hopes.'[742] These hopes have been dashed. The delay therefore also amounts to unfair treatment, manifest injustice and unlawfulness, as it is contrary to Article 1 of the African Charter for Kenya not to recognise the rights of both communities particularly where the State has been ordered to recognise those rights. It is unfair to the communities to leave them as they are without any resolution. The failure to implement is also tantamount to unresponsive official conduct.

70 The investigations can be pursued by the Commission following a complaint or on the Commission's own initiative.[743] In the two instant cases of the Endorois and the Ogiek, only the Endorois can make a complaint as their case is no longer pending before the Commission. [744] If after the Court has given its final judgment on the Ogiek and the State does not implement the decision, the Ogiek can complain to the CAJ then. Such a complaint can be made on the basis that the State's conduct warrants investigation as it is prejudicial, unresponsive, amounts to delay and is systemically inefficient, which all fall under CAJ's investigatory remit.

71 Following investigation, the Commission's actions might include to: 'recommend to the complaint a course of other judicial redress (….); recommend (….) other appropriate methods of settling the complaint or to obtain relief.'[745] It can recommend compensation or other appropriate remedies.[746] And where it has found in favour of the complaint the Commission will set out to the relevant State organ, public office or organisation concerned its findings and recommendations; actions to be taken

[742] Kobei (n 611).
[743] CAJ Act (n 741), s 29.
[744] Section 30 (a) of the Act limits the jurisdiction of the CAJ where there is 'a matter pending before any court or judicial tribunal'.
[745] CAJ Act (n 741), s 41.
[746] ibid, s 8(g).

and its reasoning.[747] It will also inform the complainant of its decision.[748] Generally, if an Ombudsman, finds in favour of a complainant, they should really place them back in the position they would have been, had the conduct complained of not occurred.[749] In fact the CAJ's website states: 'When you complain, a wrong is righted and administrative justice is delivered. Complaining ensures that service delivery in public offices is timely, efficient and effective.'[750] As the CAJ's decisions are recommendatory in nature, they can be ignored by the Government. However, as it is financed by Parliament,[751] and is required to submit annual reports to the National Assembly, similar to the KNCHR, where such reports contain recommendations that remain unimplemented, the CAJ is required to set these out to Parliament.[752]

72 Their work is supposed to be less formal than that of a court and in some cases Ombudsmen are seen as better able to engage with systemic issues and provide input to public bodies which can make them more able to 'improve their working practices and policies'.[753] In Kenya, this could be the kind of input that is needed to trigger movement on implementation of the two decisions. The CAJ has the power to provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures which means it can provide advice on an implementation infrastructure. Notably on 21 November 2012 the CAJ wrote to the Prime Minister about the delay in appointing members of the National Land Commission. Of particular note in its opinion was this statement:

> 'The Commission is particularly concerned by the delay in making appointments to the National Land Commission even after the matters that were in High Court were determined and concluded on 12th

[747] ibid, s 42.
[748] ibid, s 43.
[749] The Law Commission, 'Remedies against Public Bodies: A Scoping Report' (The Law Commission, UK 10 October 2006).
[750] Commission on Administrative Justice, 'What Results From A Complaint?' (Commission on Administrative Justice)<Http://Www.Ombudsman.Go.Ke/Index.Php/Complain-Here/What-Results-From-A-Complaint>accessed 13 December 2018.
[751] CAJ Act (n 741), s45.
[752] ibid, s54.
[753] The Law Commission (n 749).

> October 2012 by Justice David Majanja. The cases filed in High Court were HCCC Nos. 266 of 2012, 373 of 2012 and 426 of 2012 all of which are no longer pending before the court…… is clear that the period after the final determination of the Court cases has now gone beyond the seven days provided by the Act…further delay in making appointments to the Commission might not only constitute a breach of the Constitution, but may also constitute an obstacle to speedy realisation of justice in land related claims.'[754]

73 In 2013 the National Land Commission members were sworn in.[755] This may or may not have been be attributable to the CAJ but the CAJ's views on the delay may have been taken into account. Unfortunately very little is known about the CAJ and its functions.[756] Notwithstanding, its functions albeit not expressly focused on implementation *per se* can assist in establishing what and who should be taking responsibility for implementing the decision of the Endorois presently and following the African Court's reparation judgment, on the Ogiek case; and it can certainly provide an advisory opinion on the implementation of the decisions. In view of the above statement which shows that it is clearly concerned about the realisation of land-related claims, indigenous communities should make requests for it to intervene in pursuance of its mandate.

iv) The National Land Commission (NLC)

74 As discussed in Chapter 2, the NLC can investigate complaints into historical land injustices and recommend appropriate redress.[757] The land rights claims of the Endorois and the Ogiek, as discussed in that chapter, constitute historical land injustices. The NLC should be working within its remit to manage public land, where such land is part of land that the Ndungu Commission established was irregularly and illegally

[754] Otiende Amollo, 'Delay in Making Appointments to the National Land Commission' (Advisory Opinion, The Commission on Administrative Justice 21 November 2012)<http://www.ombudsman.go.ke/index.php/resource-center/advisory-opinions/category/30-advisory2012> accessed 21 October 2018.
[755] CapitalNews, 'Land Commissioners Finally Sworn in' *CapitalNews* (Nairobi, 27 February 2013) <https://www.capitalfm.co.ke/news/2013/02/land-commissioners-finally-sworn-in/>accessed 8 October 2018.
[756] Kobei (n 611). When the author asked whether the Ogiek has ever considered engaging the CAJ, he said 'nothing is known of the CAJ in Kenya'.
[757] National Land Commission Act 2012, s 5(1)(e).

allocated and belongs to either community, to ensure that that happens. It can also work, in a more conducive manner, with the KNCHR towards implementation strategies; and also with the CAJ if it is of the view that other State organs should be responsible for implementing all or some aspect(s) of the decisions. Notably the NLC has faced challenges in enforcing its mandate, initially with the delay in the appointment of its members, and also in respect of the existing friction between its functions and those of the Ministry of Lands.[758] Even so as the land-related issues these cases raise fall squarely within its mandate it should work towards bringing their realisation rather than adopt a cynical approach as evidenced by the comments made by its Chairman, Dr Swazuri, earlier.[759] However, it may be that those comments need to be viewed in the prism of the politicising nature of land in Kenya which can easily beget disillusionment.

v) The National Parliament

75 The impact that domestic parliaments can have on the implementation process has not escaped international bodies. The Parliamentary Assembly of the Council of Europe for instance has taken it upon itself to encourage national parliaments to 'adopt a proactive approach' to the implementation of judgments.[760] The Assembly has noted that domestic parliaments are 'often overlooked' in the implementation process but can be instrumental to implementation and compliance with human rights obligations, as their role includes legislating, proposing and revising law in accordance with international judgments and ratifying of international human rights treaties; making Governments answerable for their actions by establishing domestic mechanisms like parliamentary human rights committees or 'analogous

[758] *National Land Commission v Attorney General and others* [2015] Advisory Opinion Reference 2 of 2014 (Supreme Court of Kenya).
[759] See para 64.
[760] Parliamentary Assembly, 'Implementation of judgments of the European Court of Human Rights' (Resolution 2075 (2015) Council of Europe 30 September 2015).

structures,[761] whose remit includes monitoring compliance with international judgments; ensuring compliance of legislation with human rights treaty obligations; calling witnesses and requesting evidence relating to implementation; requiring governments to submit periodic reports on international judgments; and provision of independent advice on human rights issues.[762] It observes that successful parliaments are those which have established these domestic structures.[763]

76 Further the Assembly considers that Parliaments are in a position to collaborate with national human rights institutions, civil society organisations and international human rights monitoring bodies with adequate expertise on human rights issues.[764] This viewpoint is echoed by others,[765] including those commenting specifically about Kenya's situation.[766] Notably CEMIRIDE and other organisations formed a cluster group of NGOs following the Endorois decision whose function included lobbying parliamentarians.[767]

77 It is argued that the findings of the African Commission and the African Court particularly the latter's finding that Kenya has violated Article 1 of the Charter, should be an issue of concern, one that should be deliberated on and resolved by the National Assembly. The primary onus should therefore be on the National Assembly as the domestic body tasked, by the people, with bringing into force laws to ensure that Article 1 is complied with. It may be argued that Parliament has already done that by the bringing into force of the Community Land Act 2016 which recognises the rights of indigenous communities to own,

[761] Parliamentary Assembly, 'National Parliaments: Guarantors of Human Rights in Europe' (Resolution 1823(2011) Council of Europe 23 June 2011).
[762] Like seen in Europe and Latin American States- Oette (n 604); and ibid.
[763] Parliamentary Assembly (n 760).
[764] ibid.
[765] Oette (n 604) considers that the likelihood of compliance with regional or international human rights decisions is higher in countries where there is a domestic mechanism for monitoring implementation than where there is none.
[766] Murray (n 607). The author asked Prof Murray about whether there was a need for establishment of an implementation framework at the regional African level to assist with implementation of the Endorois and Ogiek decisions, to which she responded that amongst other things that it may be more judicious for such a system to exist domestically and that Parliaments could form part of such a framework.
[767] Mufuayia (n 740).

use and access community land. The African Court observed that Kenya had taken the legislative step of: 'enacting its Constitution in 2010, the Forest Conservation and Management Act No.34 of 2016 and the Community Land Act, Act No.27 of 2016 (……) to ensure the enjoyment of rights and freedoms protected under the Charter'[768] but had not actually taken the step or measures necessary to enforce or '*give effect* to the rights.'[769] This criticism should be of concern to the Kenyan Parliament, particularly as it goes towards the legitimacy of its work. What the Court said was as good as holding that Parliament's work or value of its work in enacting law is delegitimised by the failure to enforce the law.

78 Parliament's role allows not only for deliberation over the failure to give effect to laws in the manner found by the Court but also to question those whose jurisdiction it is to give effect to the laws. The Constitution provides that the implementation of rights and fundamental freedoms lies with the State and the State organs;[770] that the onus is on the State to 'achieve the progressive realisation'[771] of socioeconomic rights which include the right to access adequate housing, freedom from hunger and clean and safe water.[772] This encompasses the bulk of the rights the Court found had been violated by the State in Ogiek case and similarly the Commission in the Endorois case.[773]

79 Its parliamentary committee system can facilitate the: '(i) summoning persons to present oral evidence and written memoranda or documents; (ii) (…); (iii) availing an environment that can facilitate presentation of details, sifting through evidence and formulating reasoned conclusions, consistent with both the statute and procedure; (iv) carrying out inspection tours, inquiry on

[768] Ogiek case (n 81), para 216.
[769] ibid.
[770] Article 21(1) provides: 'It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.'
[771] 2010 Constitution, Article 21(2).
[772] These rights are enshrined in Article 43 of the 2010 Constitution.
[773] In the Endorois case the Commission found that the right to property under Article 14 encompasses the right to adequate housing 'which although not explicitly expressed in the African Charter, is also guaranteed under Article 14': Endorois case (n 114), para 191.

matters out of which reports with recommendations are submitted to the House; and (v) forming sub-Committees for the effective and efficient discharge of varied issues within the mandate of the Committees.'[774]

80 Parliament acknowledges that these committees are crucial its workings 'without which the proceedings of a legislature could grind to a halt'[775] due to its overwhelming workload. Parliament further recognises that these committees' specific 'mandates and membership' makes them effective in 'focus(ing) their attention on a subject matter',[776] study it in detail and deepen their understanding of the issue(s); that they enable senators to engage in the intricacies of Parliamentary work by taking 'ownership of (…) outcome'.[777] They further encourage cross-party discussions outside party-line constraints which means that 'members (of committees) can consider legislative proposals and conduct inquiry with less control from the executive branch of Government'.[778] They can also 'hold hearings and meetings that provide the democratic opportunities for various interest groups (academics, professionals and individual citizens) with varied expertise, to participate in presenting their views on a range of issues',[779] thereby constituting a mechanism through which to 'legitimize the operations of parliament'.[780] Parliament further recognises that members of parliamentary committees have the opportunity to 'develop expertise' and 'become resourceful on specific issues' and are capable of recognition as reference sources by their peers, the public and the media'.[781]

81 To date there has been no select committee established to investigate Kenya's compliance with its international obligations and specifically to deal with the

[774] Parliament of Kenya, 'The Place and Functions of the Committee System' (Parliament of Kenya)<http://www.parliament.go.ke/index.php/the-national-assembly/commitees>accessed 10 August 2018.
[775] ibid.
[776] ibid.
[777] ibid.
[778] ibid.
[779] ibid.
[780] ibid.
[781] ibid.

Endorois or the Ogiek decisions; or even to deal with indigenous groups' land rights issues. South Africa, for instance, has a Select Committee on Land and Mineral Resources and a Portfolio Committee on Rural Development and Land Reform which are very active in terms of committee meetings, producing reports and inviting submissions on various issues amongst other activities.[782] And returning to Kenya's Parliament, it actually has a Standing Committee on Legal Affairs and Human Rights 'to consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics and integrity; and implementation of the provisions of the Constitution on human rights'.[783] Notably it is this select committee that has been asked to consider the petition by the National Victims and Survivors Network to the National Assembly for implementation of the TJRC's recommendations, discussed in chapter 1.

82 It seems then to be an ideal committee to raise non-implementation of the decisions with and also to bottom out who should be responsible for implementation. One way in which to bring about these issues before Parliament is for the KNCHR and the CAJ to report on the delay comprehensively in their annual reports which are brought before Parliament and hopefully trigger a discussion on the issue that way; or a specific detailed report on the issue not necessarily forming part of the annual report. For example, in 2018 Parliament established a select committee to investigate a national tragedy, the Solai Dam tragedy,[784] following a joint report by the Kenya Human Rights Commission (not the KNCHR), Freedom of Information and Mid Rift Human Rights Network.

[782] Parliament of the Republic of South Africa, 'Committees in Full' (Parliament of the Republic of South Africa)< https://www.parliament.gov.za/committees?perPage=100> accessed 29 January 2019.
[783] The Senate of the Republic of Kenya 'Standing Committees' (The Senate of the Republic of Kenya)< http://www.parliament.go.ke/the-senate/committees/standing-committees>accessed 17 December 2018.
[784] Republic of Kenya Twelfth Parliament Second Session, 'The Senate, Votes and Proceedings, Tuesday June 05, 2018 at 2.30p.m.' (Twelfth Parliament (No.032) Second Session 326, 5 June 2018)< http://www.parliament.go.ke/sites/default/files/2017-05/Senate_Votes_5.6.18.pdf> accessed 14 November 2018.

83 Through the avenue of parliamentary select committees, parliamentarians can assume the responsibility over an issue on behalf of Parliament by considering: who the victims are and the public bodies involved including determining their framework, their public obligations and establish compliance of that body with its obligations in the particular issue; and can consider the views/expertise of human rights bodies which in the instant case could be the KNCHR and also possibly the African Commission's special rapporteur on indigenous communities/someone from the African Commission's Working Group on Indigenous Populations/Communities. Parliament could also collate evidence from community members and leaders; get to the crux of the matter properly; propose a compensation scheme and other measures to avoid repetition of the issue. The reports of bodies discussed in Chapter 1 would be beneficial; undoubtedly stand such discussions in good stead; and prevent the re-invention of wheels.

84 Further, it is within Parliament's power to determine the budgets of Government bodies and State organs. If these organs are not adequately funded, it is unlikely that they will perform their duties including the giving effect to rights. This means that parliamentarians should not only be concerned with their own salaries but enable other organs to perform their functions effectively, like the community land registrars discussed in chapter 2 for example.

85 Finally, people have the power to petition Parliament to 'consider any matter within its authority, including to enact, amend or repeal any legislation'.[785] The Endorois and the Ogiek communities should be encouraged to make petitions about their land rights. It is notable that the Ogiek community are hoping to use the office of the recently voted in Senator Victor Prengei who is a member of the Ogiek community to bring awareness to their plight.[786] The senator could raise parliamentary questions about the lack of implementation and

[785] 2010 Constitution, Article 119(1).
[786] Kobei (n 611).

raise the profile of the communities and continuing land injustices. Notably Ekwe Ethuro, a former MP used the avenue of parliamentary questions to ask the Minister for Lands about the plans his Ministry had to realise the land rights of the Endorois, the Ogieks and other communities.[787]

86 The foregoing suggests that the parliamentary infrastructure to generate action towards implementation exists.

vi) Domestic courts

87 In terms of the domestic courts, there are two ways in which they can facilitate implementation. Firstly, there seems to be scope for bringing a judicial review challenge in the Kenyan High Court to challenge the continuing failure of the State to implement the decision. It should be possible to argue that the inaction by the State is unlawful as it is incompatible with Article 1 of the African Charter; and also unconstitutional as it goes against Article 21 of the Constitution which requires the Government to implement rights and fundamental freedoms as enshrined in the Bill of Rights, to take legislative, policy and other measures to realise rights socio-economic rights enshrined in Article 43 of the Constitution, and further requires that steps be taken to address the needs of vulnerable groups such as ethnic, religious or cultural communities, of which the communities are.[788]

88 Hitherto it may have been argued that the African Charter rights are distinct from the rights enshrined in the Bill of Rights under the Constitution and failure to comply with them is not unconstitutional. Such an argument would now be difficult to sustain in light of Article 2(6) of the Constitution. Where the Government is seeking to realise those rights it cannot limit its purview to the rights in the Bill of Rights but must also realise the rights enshrined in the

[787] Minority Rights Group International, 'State of the World's Minorities and Indigenous Peoples 2011: Events of 2010' (MRG 2011).
[788] 2010 Constitution, Article 21(3).

international treaties that are now part of Kenyan law. The fact that Article 21(4) of the Constitution which provides that: 'the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms' seeks to suggest that such is not the case until subsequent legislation is enforced, is neither here nor there.

89 Domestic courts can through referring to the two judgments in their own judgments or even permitting arguments to be made about the applicability and/or impact of those decisions, stimulate implementation. The fact that Kenya is now a monist State should hopefully mean that the courts are less resistant to arguments based on international law. In chapter 1, it was observed that in the case of *Joseph Letuya and others* the claimants raised the findings of the Mau Forest Task Force in their pleadings which resulted in the Court adopting the report and ordering the National Land Commission to address the issues raised in the case. Similarly in the present case, the Commission could through bringing more awareness of the decisions, change the narrative from one of oblivion, for example the like that exists in African Francophone nations where there is no reported case that refers to the Charter,[789] to one where the courts know not only about the Charter but the decisions.

90 Since the promulgation of the 2010 Constitution, there have been domestic cases which have relied on the provisions of the Charter, of which there are a few examples.[790] For the purposes of this discussion, this thesis will look at two decisions. The first is the case of *James Kaptipin & 43 Others v The Director of*

[789] Murray and Long (n 153).

[790] Case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Petition No.65 of 2010 Petition No.65 of 2010 (High Court of Kenya) where the Court was asked to consider Articles 5,14 and 16 of the Charter in circumstances of a forced eviction; Case of *Kituo Cha Sheria & 8 others v Attorney General* [2013] Petition 19 & 115 (High Court of Kenya) where the Court was asked to consider Articles 27, 28, 39 and 47 in a case of *refoulement* of refugees to Somalia; Case of *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] Petition 8 of 2012 (High Court at Meru),[790] where the Court considered police conduct in complaints relating to defilement, other forms of sexual violence and child abuse. The Court found *inter alia* that the police had violated provisions of the Charter.

Forests & 2 others [2014],[791] an indigenous communities' land rights case which enables, albeit frustratingly, insight into judicial understanding of indigenous groups' land rights.

91 In the case the complainants, the Sengwer community, argued amongst other things that Articles 1, 2, 3, 17, 18, 19 & 20 of the African Charter had been violated as they had been discriminated against, harassed and evicted from their original habitat at Kapolet forest. They also argued that contrary to an agreement to settle them in accordance with the Kapolet Settlement Scheme on a 3000 acre parcel to be hived off Kapolet forest, the Government had only settled some members on only 1846.57 acres of land.[792] The High Court in this case acknowledged that any treaty or convention ratified by Kenya formed part of the law of Kenya and referred specifically to the African Charter as one of these. However, that was the extent of its discussion on the Charter, an omission which exposed the High Court judge's limited insight into indigenous land rights issues.[793]

92 For example in paragraph 23 of the judgment, the Court having noted that community land encompasses land traditionally occupied by hunter-gatherers, concluded that absent enactment of the Community Land legislation to give effect to the Constitution, it has 'a duty to determine any claim based on the law available', thereby appearing to conclude that the Constitution was not applicable law.[794] Not only did the failure to apply the Constitution mean that the court did not engage with Article 63(2)(d)(ii) notwithstanding non-enacted legislation to give effect to it as stipulated under Article 63(5), which this thesis contends should have required it to nonetheless purposively apply the provision or at least make a finding that the community's

[791] *James Kaptipin & 43 Others v The Director of Forests & 2 others* [2014] Constitutional Petition no 6 of 2012 (High Court of Kenya).
[792] ibid, para 5.
[793] Open Society Justice Initiative, 'Strategic Litigation Impacts: Indigenous Peoples' Land Rights' (Open Society Foundations 2017).
[794] Compare this position to that of the High Court in the case of *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another [2018] eKLR (n* 801*)* discussed below.

land satisfied that definition of community land, it also failed to engage with Article 40 which as discussed elsewhere provides a right to property.

93 Given its acknowledgment that Kenya had become a monist State, the Court did not appear to appreciate the effect then of the African Charter and within that wider human rights framework, the decisions of the African Commission on the Endorois community in 2009 and the African Court Ogiek injunction in 2013. Doing so would have widened its' otherwise misinformed view of indigenous communities, which is further evident in its remark about the hunter-gatherer nature of the community. By saying: 'The community was traditionally known to be a hunter-gatherer community', the Court seemed to treat this characteristic of the community as extrinsic and past. Clearly by saying that and also calling the community indigenous, the Court seems to have concluded that a hunter-gatherer community cannot also be indigenous. Furthermore, it would have been less dismissive of the community's claim to the forest as their ancestral land, as the regional decisions would have alerted it to the fact that ancestral land is not simply a phenomenon, it exists and can be recognised and protected.

94 The Court also concluded that the Sengwer community's access to the forest be subject to permission by the Kenya Forestry Service. Awareness of the Charter and the regional decisions would have made it aware that to relegate the Sengwer community's ancestral land rights to limited access to the forest as and when it is authorised by the Kenya Forestry Service, is not only perverse given their true status as owners of the forest, but also unlawful.

95 The Court's poor reasoning can also be seen in this statement, in paragraph 25:

> 'Efforts should be made to settle the Sengwer people in accordance with international pleas to the government to do so particularly from the World Bank which is at the forefront of agitating for recognition of

> the Sengwer people's rights and their settlement. All is not lost for the Sengwer People. New legislations are coming which will address their historical problems. Some of these laws are in place and more will come.'

96 This needs to be compared to its conclusion in the same paragraph that it is 'not tenable that we can go back to the old day of hunter-gatherer lifestyles' and its refusal to carve out the forest for the community.[795] One wonders how the Court could conclude that the World Bank was capable of achieving what the law and society, purportedly, did not permit. And it seems curious that it did not apply the laws it claimed existed. The Court clearly lost an opportunity here to amalgamate the gifts the 2010 Constitution provides in Articles 2(5) and 2(6) in appreciation of the binding nature of the African Charter as a body of international law and apply that properly to an indigenous land rights case.

97 By virtue of Articles 2(5) and 2(6) of the 2010 Constitution, international treaty obligations and therefore decisions made under the Charter, have direct effect. Applicants/claimants when bringing indigenous group land claims domestically should rely on the Endorois and Ogiek decisions and by doing so bring them to attention of the domestic courts which can in turn develop case law and impact on legal discourse that way.

98 In the second decision of discussion, *Simion Swakey Ole Kaapei & 89 others v Commissioner of Lands & 7 others [2014],* a case concerning a Maasai community's land rights, the High Court although cognisant of the definition and understanding of indigenous communities under the Endorois decision, African Charter, the UNDRIP, the World Bank's policy on indigenous peoples 4.20 and constitutional provisions including Articles 40 and 63 concluded:

> 'Whether under the UN, the World Bank definition or the African Charter of Human and Peoples Rights, all the forty-two (42) sub-nations of Kenya would qualify as either *"indigenous peoples",*

[795] ibid, para 23.

> *"indigenous ethnic minorities," or "tribal groups"* because each of those sub-nations of Kenya including the Endorois are to varying degree subject to World Bank characterisation in development terms. For instance they all speak distinct languages, none of which is the national or language of commerce.' (para 29.07)

99 And further:

> '……It seems to be quite fallacious for the Petitioners or for that matter, any other person or group of persons in Kenya, to claim on the basis of the Declaration, that it has more or exclusive right to resources or in this case, land, than other people of Kenya, whether as communities indigenous to particular areas of Kenya such as the Luo and Suba around Lake Victoria or individuals of other communities. In my view that argument runs contrary to the clear provisions of Articles 40, and 60 of the Constitution of Kenya 2010, and are consequently not tenable. In my view further the more positive approach to issues of marginalisation is to seek redress by moving more resources to those economically depressed areas, but not seek a remedy in exclusivity or exclusion.' (para 34.01)

100 It is observed that this case 'was actually unusual in that it referenced Endorois at all' but that it is clear that the Court 'misinterpreted it (in) spite of established interpretations' of the decision such that it ruled that 'the term 'indigenous peoples' could apply to nearly anyone in the country, making the decision and that understanding ineffectual to the Maasai case.[796]

101 The foregoing decision of the High Court is regrettable and concerning. Hopefully the Constitutional and Human Rights Division of the High Court; or the Constitutional and Judicial Review Division may be more amenable to cases of this nature. In the *Satrose Ayuma case*[797] that Kituo cha Sheria acted on in the Constitutional and Human Rights Division of the High Court, relating to socioeconomic rights, they noted that the national court was robust in making orders mandating the parties including the Government to take action to remedy breaches within certain timescales which they found was proving

[796] Open Society Justice Initiative (n 793).
[797] *Satrose Ayuma* (n 790).

helpful for implementation.[798] The author of the thesis agrees with this as in her own practice in public law, she has found that mandatory orders with set timescales seem to elicit action from Government agencies than would otherwise be the case.

102 In the *Satrose Ayuma* case,[799] para 110, the judge cited a statement made in the *Mitu-Bell* case in the Constitutional and Judicial Review division,[800] which is apt for the present discussion. The statement provides:

> 'The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be 'progressive realization' of social economic rights, implying that the State must begin to take steps, and I might add be, seen to take steps, towards realization of these rights.'

103 Such judicial interpretation of the law is encouraging and shows that maybe these two branches of the court system are effectual in their mandates as constitutional and human rights courts. Further the above statement is doubly helpful for use in implementation-type cases as it is disproving of the *James Kaptipin*-type reluctance by the Court to give effect to constitutional rights simply because the Government has not done what it is supposed to do and second, because it is emphatic in the notion that rights are meant to be realised.

104 In another case, *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another [2018] eKLR*[801] the High Court

[798] Rotich (n 86).
[799] *Satrose Ayuma* (n 790).
[800] *Mitu-Bell Welfare Society vs. Attorney General and 2 Others* [2013] Petition No.164 of 2011 (High Court of Kenya).
[801] *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another [2018] eKLR* Miscellaneous Civil Application 82 of 2018 (High Court of Kenya).

surprisingly (in view of *James Kaptikin* and *Simion Swakey* cases*)* upheld the power of judicial review as a constitutional remedy as follows:

> '25. Judicial Review in now entrenched in the Constitution…. 26. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy ……. 27. Court decisions should boldly recognize the Constitution as the basis for Judicial Review …… Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front ……. 28. Judicial Review is …… now a constitutional principle to safeguard the constitutional principles, values and purposes.'

105 This understanding of judicial review, constitutionality and the court's role is germane to indigenous communities' land rights claims in that the Endorois and the Ogiek communities can seek judicial review of the Government's continuing failure to implement the two judgments. Other communities that are experiencing violations of the constitution, and where there is no other remedy, should seek to use judicial review as a means of asserting their rights and asking the courts to safeguard the same. It is important to also note that in the above case the court found that a mere letter by a state body was capable of violating constitutional rights and was susceptible to judicial review proceedings under the Fair Administrative Act 2015.[802] How much more so a failure to implement the two judgments or even violation of indigenous communities' land rights? The Fair Administrative Act 2015 enforces Article 47 of the Constitution which provides in subsection 1 that everyone has the right to a fair administrative action that is 'expeditious, efficient, lawful, reasonable and procedurally fair'. The decision not to implement the judgments of the African Commission and the African Court amounts to administrative action which is 'an act, omission or decision' capable of affecting the legal rights or interests of any person to whom such action relates;[803] and would therefore be susceptible to judicial review

[802] ibid, para 29.
[803] Section 2, Fair Administrative Act 2015 (No.4 of 2015) (Kenya).

challenge as it violates the right to expeditious, efficient, lawful and procedurally fair action.

So what can the Government do?

106 In its 2018 Activity report, the African Court considered the implementation status of 21 of its judgments from 2013 to 2018. In respect of implementation with interim orders the findings are telling. State parties in 18 out of 21 reported provisional measures cases informed the Court that they would not comply with the Court's orders. In relation to full judgments, many states had not reported back to the court so from the data collected, it was not possible to assess if this also meant that they had not complied. Possibly so as reporting back in itself constitutes one of the orders the Court can make. There were a few cases where judgments were partly complied with; and in another case the State seems to have complied but with some delay. Kenya is on the list but against its name is the note that the Ogiek case is still ongoing as the reparations determination is outstanding. [804]

107 It is observed that in March 2018 the Council of Europe reported that the majority of judgments made by the European Court of Human Rights in its 60 year existence had not been enforced i.e. 7500 judgments which represents 'more than half'; that 'non-compliance with the Court's judgments remains a major problem for the Council of Europe'; and that failure to enforce these judgments had the effect of generating repeat cases.[805] In terms of what could be done to the states that do not comply, it is suggested that three mechanisms could be imposed depending on the state and issues concerned, namely: 'material inducement' which is where financial benefit or sanctions are applied to bring about results; secondly, 'persuasion' which is where states are 'persuaded' to see 'the validity or the appropriateness of a specific norm,

[804] African Court on Human and Peoples' Rights, 'Activity Report of the African Court on Human and Peoples' Rights 1January -31 December 2018' (African Court on Human and Peoples' Rights 2018).
[805] Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (The European Journal of International Law Vol.29 no.4 2019).

belief or practice' and get them to a position where they have 'internalised' the same; and thirdly 'acculturation' which is where 'actors adopt the beliefs and behavioural patterns of the surrounding culture' and this is contingent on 'the cognitive and social pressures that create a compliance pull' including 'publicly condemning and shaming states'. [806] Out of these it is said that, in the European model, material inducement in the form of orders for basic, aggravated and punitive damages for claimants, seems to work best because this forces states to consider whether 'a certain behaviour is economically sound'.[807] And although it is recognised that high and unpredictable punitive damages 'are unlikely to be paid out, they may nevertheless encourage states to conduct a cost-benefit analysis and conclude that it is best to get rid of structural/systemic problems that continue the violation'.[808]

108 The above is helpful where what is at stake is a violation that can be remedied monetarily but in indigenous communities' land rights cases, money is not the remedy these communities seek and in the two cases, it was not what they wanted. The communities want their land back and that is the main order that both the Commission and the Court have made in the two cases. Even if it the remedy sought was financial, the Kenyan Government is unlikely to pay, thus continuing the non-compliance. Such sanctioning may not work but material inducement in the form of donor support may work, as will be discussed in chapter 5. Acculturation is unlikely as other African states are likely to treat their indigenous communities in a similar way. Additionally every state is unique and one state will undoubtedly give reasons for taking disparate action from another state. This thesis considers that persuasion by an entity that those in leadership can defer to may work, bearing in mind that it is those in leadership that have pursued a policies of privatisation of land, corruption and permitted market liberalisation.

[806] ibid.
[807] ibid.
[808] ibid.

Conclusion

109 Implementation of an indigenous land rights decision is undoubtedly challenging as seen not only in the Kenyan examples but also the Paraguayan and Belizean examples. However, it is a matter of settled law that the African Charter entitles indigenous communities like the Endorois and the Ogiek a right to: non-discrimination, equality before the law and equal protection of the law, religion, right to property (land), enjoyment of culture; the right to freely dispose of their wealth and natural resources and to benefit from proceeds from the same; and to determine their own development. It is also a matter of settled law that Kenya is bound by Article 1 of the Charter and should act in accordance with it. It is difficult to dispute that if these decisions are implemented the situation of the Endorois and Ogiek communities, and other indigenous communities- as they also would be able to rely on the implementation of the decisions as grounds for asking for resolution of their land rights- would vastly improve.

110 As far as the law and the determination of the Commission's and Court's decisions are concerned, what needed to be done has been done. However, perceived effectiveness of a treaty body, and in the present case the Commission and the Court, is likely to be 'measured by the extent to which (their) findings are implemented and ultimately complied with'.[809] Ultimately, it comes down to the will of the State. The political context of a State can influence whether or not a decision is implemented and complied with.[810] There are undoubtedly implications for implementing the decisions such as how much compensation would cost and what impact restitution would have on other communities etc., and fundamentally the fact that those who currently possess the land to be restituted to the communities are those in power. However, as recognised by the Court, the State has taken legislative measures since the coming into force of the constitution. The resources and

[809] Murray and Long (n 153).
[810] Murray (n 607).

efforts to legislate should have corresponding action; and in any event resources cannot be basis for taking no action at all. Arguably if all the various entities mentioned here: the KNHCR, CAJ, National Land Commission, parliament and the courts were to make implementation of the judgments a key issue then together this may cause the Government to change tack. There is certainly a lot in their various mandates and powers that they have not been doing that they could be doing to stimulate implementation.

111 However, if the KNCHR, CAJ and NLC are not deemed suitable organs to take charge of the decisions, and the state was minded to enforce the judgments, the State needs to create a properly funded and longer-term organ to co-ordinate implementation of the decisions. The decisions will require the involvement of the state organs with legislative authority under the laws that these decisions hinge on, namely the Community Land Act 2016, the Kenya's Wildlife Conservation and Management Act 2013,[811] the Forest Conservation and Management Act (Act No.34 of 2016)[812] the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 and the Water Act 2016.

112 In addition, Kenya's indigenous communities may benefit from looking at the examples in other states like the Paraguayan cases discussed earlier. The communities there persisted in their fight for realisation of rights using regional bodies, time and time again. They had to wait several years before implementation with some still waiting. They may also be encouraged (or discouraged) by looking at the *Mabo and Others,*[813] which challenged the legal position as it had been for centuries and led to the enactment of the Native Title Act 1993. Indeed Kenya has the Community Land Act 2016 and also these two regional judgments, however, it may be necessary for Endorois and Ogiek communities, and others, to continue to play the long game in view of the complexities that embroil Kenyan land politics, but whilst doing so engage the various bodies discussed in this chapter. It is correct that the obligation to

[811] WCM (n 555).
[812] Assented on 31 August 2017 and commenced on 31 March 2017.
[813] *Mabo (*n 127).

implement is the Government's but the communities should as much as possible be proactively robust in maintaining pressure on the Government by using the actors discussed here; and equally reminding them of their obligations towards them.

Chapter 4: The East African Community - An Alternative mechanism for recognition, promotion and protection of indigenous communities land rights?

Introduction

1 In chapters 1, 2 and 3 this thesis has identified the problems that exist in the domestic and regional frameworks. The domestic is of course the jurisdiction where indigenous peoples' land rights claims will be initiated. If that system fails to deliver because: the adjudicators have got the law wrong and remedies have been exhausted; or the decisions are made in a community's favour but they are not implemented; or there is significant delay in the litigation process where notwithstanding non-exhaustion of the domestic remedies, creates a sense that remedies have been exhausted; or there are human rights violations of a grave nature that need the intervention of a non-domestic court; or if the system is the kind described in Chapter 1 where quasi-legal processes are established to seek to address land rights grievances but these fail, then the obvious alternative forum has been, and is, commonly the system created under the African Charter i.e. under the African Commission and the African Court. The fact that the Endorois and Ogiek claims have been positively determined in those forums and the African Commission has a Working Group on Indigenous Peoples, which has led on the indigenous discourse in the region, adds to the appeal of the regional system.

2 However, the fact that the Endorois claim took six years to be determined (2003-2009), that in 2018 the recommendations made by the Commission remain in large part unenforced, which effectively means 16 years on, justice for the Endorois is still withheld; that the adjudication on reparations for the Ogiek has taken so long to be made, whilst land rights violations against the Ogiek persist, may open up the East African Community, as a potential forum for more indigenous land rights claims.

3 No research on human rights in the sub-regional context[814] which specifically considers the indigenous peoples' land rights question has been encountered. This chapter will examine the sub-regional system under the East African Community. The purpose of this is to see whether it could offer an alternative to the domestic and regional systems in respect of determining indigenous peoples' rights cases and promoting their land rights issues. In particular this thesis will be looking at the impact of the East African Community Treaty (EAC Treaty) including the jurisdiction of the East African Court of Justice established under it, the East African Community Bill of Rights, the East African Community Human and Peoples' Human Rights Bill, the Common Market Protocol, the Protocol on Good Governance and the Plan of Action on Promotion and Protection of Human Rights.

4 As noted in the introductory chapter,[815] the reason why other issues have caught the attention of the sub-regional bodies is that they do not concern one 'single state in isolation' and are more amenable to sub-regional responses. However, there has been recognition that the EAC member states: Kenya, Uganda, Tanzania, Burundi and Rwanda, all have indigenous communities in their territories like the Ogiek in Kenya, Hadzabe in Tanzania, the Batwa in Uganda, Burundi and Rwanda; and the Pokot in Kenya and Uganda[816] amongst others. These communities, according to the African Commission are reportedly amongst those in Africa: 'living under very difficult circumstances', 'suffering from human rights abuses' and experiencing 'dispossession of land and natural resources ….. (which has led to them being) pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their lives and cultures rather than improve their situation'.[817] It is argued that the issue of indigenous communities' land rights is one that concerns not one EAC state in isolation but all of them and should therefore lend itself to a sub-regional response. It is also argued that the current EAC Treaty

[814] Kufuor (n 166); Ebobrah (n 166); Viljoen (n 166); Murungi and Gallinetti (n 166), 119; and Murray and Long (n 153).
[815] See para 73, introductory chapter.
[816] ACHPR and IWGIA 2005 (n 50) 15-17.
[817] ibid, 15-20.

contains provisions that could be utilised by indigenous communities in advancing their land rights claims; that the present jurisdiction of the East African Court of Justice (EACJ) does not preclude it from determining indigenous land rights cases; that both the East African Human and Peoples Rights Bill and East African Bill of Rights, contain provisions which indigenous peoples could utilise in land rights cases once enforced; and that these instruments together with other human rights efforts including the EAC policy on disability rights, for instance, suggest a changing culture at the sub-regional level in respect of protection and promotion of human rights and concomitantly, indigenous land rights.

Historical background of the East African Community

5 The harbinger to the current EAC Treaty, The Treaty for the Establishment of the East African Community 1999[818] was the Treaty for East African Co-operation of 1967[819] which established the East African Community comprising of Kenya, Tanzania and Uganda. Its aim was realist survival to try to counter the impact that colonialism had had on these nations and to place them in a position to be able to stand against stronger Western economies.[820] The three partner states therefore committed themselves to 'strengthen and regulate the industrial, commercial and other relations',[821] ensure an 'accelerated, harmonious and balanced development and sustained expansion of (their) economic activities'[822] and equitable sharing of the benefits.[823]

6 There was certainly no mention of indigenous communities' land rights in this original EAC Treaty which is no surprise given that the indigenous project as a movement did not begin in the continent until 20 or so years later. The Treaty was equally silent on human rights but this was not extraordinary as the 'earliest

[818] Hereon 1999 Treaty.
[819] Hereon 1967 Treaty.
[820] Ebobrah (n 166).
[821] 1967 Treaty (n 819), Article 2.
[822] ibid.
[823] ibid.

founding legal texts of RECs….(did not contain) reference to human rights as such as part of the institutions' foundational values'[824] due to the 'focus on economic integration'.[825]

7 The main function thereof of the Co-operation was to foster 'the establishment, functioning and development of the Common Market'[826] and it created various institutions to enable this.[827] The partner states were required to align their national policies with the Co-operation's such as to ensure 'development of the Common Market and the achievement of the aims of the Community' and to refrain from 'any measure likely to jeopardize the achievement' of this aim.[828]

8 The Court of Appeal for East Africa which had been established under the East African Common Services Organization (EACSO) Agreements 1961 was mandated under the 1967 EAC Treaty to continue to 'hear and determine such appeals from the courts of each partner state as may be provided for by any law in force in that partner state and shall have such powers in connexion with appeals as may be so provided'.[829] There has been discussion as to whether in fact this court was a judicial body with judicial officers or a judicial agreement.[830] Additionally the East African Industrial Court was established under the Treaty to settle trade disputes.[831]

9 Each of the partner states was required under the Treaty to enact legislation to give effect to the Treaty.[832] Kenya on its part adopted, on 29 November 1967, the 'Treaty for East African Co-operation Act 1967, No. 31 of 1967 giving effect to

[824] Viljoen (n 166) 482.
[825] ibid, 490.
[826] 1967 Treaty (n 819), Article 43(1).
[827] ibid, Articles 30, 32, 48, 51, 54, 55 and 56.
[828] ibid, Article 4.
[829] ibid, Articles 80 and 81.
[830] Solomon T. Ebobrah considers the views of T.O.Ojienda that under the 1967 Treaty there was no provision for a 'judicial body made up of judicial officers' and F. Viljoen's view that the court was 'a form of judicial cooperation' under the Treaty in his text Ebobrah (n 166). The author considers both views to be correct as unlike Article 32 which expressly states that the Common Market Tribunal is a judicial body, there is no such express statement in Articles 80 and 81 in reference to the Court of Appeal but the mere fact that it is a court with the function of determining cases is cognizant of some judicial functionality.
[831] 1967 Treaty (n 819), Articles 84 and 85.
[832] ibid, Article 95.

certain provisions of the Treaty. The Act came into force on 1 December 1967. Like the 1967 EAC Treaty which did not make mention of human rights or indigenous communities or their land rights or how any of the institutions or judicial bodies regarded such matters, the 1967 Kenyan Act did not either. In fact it is observed that there is not much recorded activity of any courts or tribunals in the Co-operation other than the Common Market Tribunal hearing any cases during that time and no 'evidence to indicate that it had jurisdiction over human rights issues and, even if it did, (that) any were submitted to it at all.'[833] The remit of the Common Market Tribunal was very much the Common Market as elucidated by Article 32 of the EAC Treaty. This was not far removed from the founding remit of the other sub-regional bodies namely the Economic Community of West African States (ECOWAS) or SADC (Southern Africa Development Community), although founded later, whose main aim was 'the pursuit of economic development of member states' and not human rights.[834] Kofi Kufuor observes that although this is now changing, initially not much attention was paid to sub-regional courts in these 'embryonic stages'.[835] The subject of human rights was considered to be too political, at the time; and one that might interfere with state sovereignty, thus best suited for the 'international fora'.[836]

10 The East African Co-operation was dissolved in 1977 because of a 'lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the partner states due to the differences in their levels of development and lack of adequate policies to address this situation'.[837] Socialism in Tanzania was at odds with capitalist development in Kenya and Uganda; and Tanzania felt unable to submit cases to a court it considered 'dominated by lawyers with a liberal and capitalist world view'.[838] The mistrust caused by the

[833] Kufuor (n 166).
[834] Murungi and Gallinetti (n 166).
[835] Kufuor (n 166).
[836] Ebobrah (n 166).
[837] 1999 Treaty (n 818), preamble.
[838] Viljoen (n 166) 476.

military coup in Uganda by Idi Amin followed by Tanzania's invasion of Uganda also played a significant role in dismantling the Co-operation.[839]

11 On 30 November 1993 there was an agreement between Kenya, Tanzania and Uganda to form a permanent 'Tripartite Commission' for co-operation and 'coordination of economic, social, security and political issues'. In 1997 after appraising the strides made in this respect, these three partner states proposed to 'upgrade' this agreement into a Treaty.[840] It was envisaged that the Treaty would 'attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities' [841] and enable the three partner states to 'foster and promote greater awareness of the shared interests of their people',[842] matters that might have helped it overcome the problems leading to the 1977 dissolution. The focus remained very much economic betterment of the partner states but there was some desire to widen its ambit to include strengthening of social and cultural ties amongst other ties[843] in the proposed Treaty. These ties it was hoped would 'raise the standards of living of African peoples, maintain and enhance the economic stability, foster close and peaceful relations among African states' which would hopefully bring to 'realisation…the African Economic Community and Political Union'.[844]

Other sub-regional bodies

12 In the Western sub-region of Africa, the Treaty of Economic Community of West African States[845] was concluded on 28 May 1975.[846] This aimed to 'promote cooperation and development in all fields of economic activity…..and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among

[839] ibid.
[840] 1999 Treaty (n 818), preamble.
[841] ibid.
[842] ibid.
[843] The other ties were 'economic, (……) political, technological and other ties for their fast balanced and sustainable development by the establishment of an East African Community', See ibid, preamble.
[844] Preamble, 1999 Treaty (n 818).
[845] Hereon ECOWAS Treaty.
[846] ibid, preamble.

its members and of contributing to the progress and development of the African continent'.[847] Notably it was more advanced than the EAC with its focus on improving people's lives. The ECOWAS Treaty established several institutions including the Tribunal of the Community[848] tasked with 'observance of law and justice in the interpretation of the provisions of the Treaty'.[849] On 24 July 1993 this Treaty was revised. It became known as the Revised Treaty of the Economic Community of West African States 1993.[850] Its notable revisions included reference to the 1981 African Charter on Human and Peoples' Rights in its preamble.[851]

13 The Community's main aim remained economic - to promote co-operation and integration, leading to an establishment of an economic Union[852] - but fundamental principles were augmented. These included: …..(g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights; and (h) accountability, economic and social justice and popular participation in development.[853]

14 The revised Treaty included Article 63 entitled 'women and development' which required member states 'to formulate, co-ordinate and establish appropriate policies and mechanisms for the enhancement of the social and cultural conditions of women' and take measures to identify constraints inhibiting women from maximising their contribution to regional development efforts, provide a framework to address women's concerns and needs, stimulate dialogue on the

[847] ibid, Article 2(1).
[848] ibid, Article 4(1)(d).
[849] ibid, Article 11(1).
[850] Hereon Revised ECOWAS Treaty.
[851] This change was triggered by the 1992 review of the Treaty by a Committee of Eminent Persons, a group established by the OAU to look into reparation claims by African States for human rights abuses perpetrated by colonising States: See Solomon Ebobrah, 'A Rights-Protection Goldmine or a Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court Of Justice' (2007) Volume 7 No 2 AHRLJ 307; and Rhoda E. Howard-Hassmann, 'Reparations to Africa and the Group of Eminent Persons' (*Cahiers d'Études Africaines* 2004)<https://journals.openedition.org/etudesafricaines/4543>accessed 12 November 2018.
[852] Revised ECOWAS Treaty (n 850), Article 3(1).
[853] ibid, Article 4.

types of projects that would integrate women in the development process and so on.[854] The Tribunal became the Community Court of Justice (CCJ)[855] with its remit remaining the same.[856] The Treaty established the Social and Cultural Commission which was tasked with examining and developing ways to increase social and cultural ties among member states, provide a forum for consultation of such matters and make recommendations to the Council.[857] Finally, the revised Treaty also included provisions on sanctions to be imposed on member states for failing to fulfil their obligations under the Treaty which had not been provided for in the original treaty.[858]

15 The Southern Africa Development Community (SADC) was formed in 1992 in the Southern African sub-region,[859] through The Treaty of the Southern African Development Community 1992.[860] Its principles under the treaty included sovereign equality of all member states; solidarity, peace and security; human rights, democracy and the rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.[861] Amongst its objectives was to 'achieve development and economic growth, alleviate poverty, enhance the standard and the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration'.[862] The states parties undertook not to discriminate against any person on grounds of gender, religion, political views, race, religion, ethnic original, culture or disability'.[863] Article 9(1)(f) establishes the Tribunal as one of the Institutions of SADC. Its main functions are to ensure the adherence to and proper interpretation of the Treaty provisions and any subsidiary instruments; and adjudicate upon disputes referred to it, decisions of

[854] ibid, Article 63.
[855] ibid, Article 6(1)(e).
[856] ibid, Article 76.
[857] ibid, Article 49.
[858] ibid, Article 77. The sanctions include: (i) suspension of new community loans or assistance; (ii) suspension of disbursement on ongoing community projects or assistance programmes; (iii) exclusion from presenting candidates for statutory and professional posts; (iv) suspension of voting rights; (v) suspension from participating in the activities of the Community.
[859] Between Angola, Botswana, Kingdom of Lesotho, Malawi, Mozambique, Namibia, Swaziland, (interestingly) Tanzania, Zambia and Zimbabwe- Preamble, Treaty of the Southern African Development Community 1992.
[860] Hereon SADC Treaty.
[861] ibid, Article 4.
[862] ibid, Article 5(1)(a).
[863] ibid, Article 6(1).

which are to be final and binding; and to give advisory opinions as referred to it by the Council and Summit.[864]

16 Under the Treaty, the partner states also agreed to co-operate in the areas of: food security, land and agriculture; natural resources and the environment; social welfare, information and culture and others.[865] The States Parties also sought to foster a relationship with, co-operate and support NGOs in order to 'foster closer relations among the communities, associations and peoples of the Region' in pursuance of its objectives.[866] On 17 August 2008 there was an agreement to amend the SADC Treaty to replace some of the original bodies with new ones to oversee *inter alia* social and human development and special programmes which include: health and HIV and AIDS; education; labour; employment and gender.[867] The supposition here is that these had not been issues of as great concern as of the date of the original text in 1992 but were at this point. In October 2015 the 'Consolidated Text of the Treaty of the Southern Africa Development Community' was adopted.

17 The principles under Article 4 have remained the same as have the non-discriminatory undertaking in Article 6 and the Tribunal's powers under Article 16. Article 33 is a newly introduced provision that provides that sanctions may be imposed against a member state that: a) persistently fails, without good reason, to fulfil obligations assumed by the Treaty; and b) implements policies which undermine the principles and objectives of SADC amongst other reasons. SADC has also adopted a 'Protocol on Forestry' which is discussed later in this chapter.

[864] ibid, Article 16. The Tribunal did not actually become operational until 2005: Ebobrah (n 166).
[865] Ibid, Article 21(3).
[866] ibid, Article 23.
[867] Article 5, Agreement Amending the Treaty of the Southern African Development Community 2008.

The Current EAC framework and indigenous communities' land rights

The East African Community Treaty

18 The current East African Community (EAC) was established under the East African Community Treaty (1999 Treaty), a treaty signed on 30 November 1999 and entered into force on 7 July 2000.[868] Its founding partner states are Uganda, Kenya and Tanzania.[869] On 1 July 2007, Burundi and Rwanda were granted membership.[870] Tanzania is also a state party to the SADC Treaty.[871]

19 The *raison d'etre* of the EAC is set out in Article 2 and this is to 'establish an East African Customs Union and a Common Market'.[872] In this respect the EAC has made considerable efforts which notably include the ratification of the Protocol on the Establishment of the EAC Common Market in 2010.[873] Frans Viljoen has observed that generally there are 5 stages of regional economic integration namely: i) preferential trading agreement - where members have tariffs which they may lower for non-members allowing them to trade with them under certain rules; ii) customs union - where there is a 'common external tariff' applied by members to non-members' imports; iii) common market - where there is free movement of goods and services and production between members; iv) economic union - where there is harmonization of monetary and fiscal policies between members; and v) political union- which is described as the 'pinnacle of regional integration' and the stage where member states 'cede their sovereignty over economic and social policies to a supranational rather than intergovernmental authority' and where 'common legislative and judicial institutions are established'.[874] The current EAC Treaty and even the Protocol on EAC Common

[868] The Treaty has been amended twice on 14 December 2006 and on 20 August 2007. The amendments pertain to Chapters 1, 5, 6, 8, 9 and 21 <http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf> accessed 15 June 2016.
[869] 1999 Treaty (n 818), Article 3.
[870] The Treaty allows for 'any other country (to be) granted membership to the Community', ibid, Article 3.
[871] As the SADC Treaty came into force in 1992, Tanzania presumably joined SADC at a time when there was no existing treaty in the East African region.
[872] 1999 Treaty (n 818), Article 2.
[873] Viljoen (n 166) 477.
[874] ibid, 472.

Market suggest an inclination towards a political union which ties in, in fact, with what the 3 original partner states had envisaged the new treaty providing.[875]

20 Article 3 of the EAC Treaty provides that the 'matters to be taken into account' by the state parties when considering an application for membership from any other country are whether the prospective member

> 'accepts the Community as set out in the Treaty; it adheres to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice; its potential contribution to the strengthening of integration within the East African region; its geographical proximity to and inter-dependence between it and the partner states; its establishment and maintenance of a market driven economy; and whether its social and economic policies (are) compatible with those of the Community'.

21 Article 7(2) expects current partner states to be adherents of the same. This provides that 'the Partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'. Notably these aspirations are very much in line with the features of a political union.

22 The objectives of the Community are set out in Article 5 of the EAC Treaty and include a commitment to raise the standard of living and improve the quality of life of their populations. Frans Viljoen observes that despite the longstanding focus on the common market and economic development by the regional economic communities (RECs), the ultimate purpose of regional integration is eradication of poverty.[876] He contends that poverty is the 'greatest threat to and source of

[875] See para 11 above.
[876] Viljoen (n 166) 481.

human rights violations in Africa'[877] and that the 'heart of sub-regional integration would beat in vain if it did not provide a lifeline to those living in poverty'.[878]

23 Indigenous communities are amongst the poorest in Africa and such poverty is related to their land situation. The African Commission has found that the Turkana from Kenya for example live in 'poor and remote areas of Northern Kenya',[879] that the Batwa in Uganda have 'little land' with no existing 'forest-based economy',[880] that they suffer discrimination and are 'the poorest of the poor, marginalised from society'.[881] It is further reported that the majority of 'the areas still occupied by indigenous peoples and communities (in Africa) are under-developed with poor, if any infrastructure'.[882]

24 The association between poverty and land access for indigenous peoples can also be seen from the arguments made by Endorois community in their land claim in the African Commission. They argued that 'their health, livelihood, religion and culture are all intimately connected with their traditional land,[883] (and that) ….. the process of evicting them from their land not only violate(d) Endorois community property rights, but (that their) spiritual, cultural and economic ties to the land (had been) severed'.[884] In looking at these issues, the Commission found that 'dispossession of land and its resources is a major human rights problem for indigenous peoples …….. (and that it) threatens the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities'.[885] Indigenous communities can therefore rely on Article 5 to argue that the EAC has a responsibility to raise their standard of living and improve their quality of life and

[877] ibid.
[878] ibid.
[879] ACHPR and IWGIA (n 50) 54.
[880] ibid, 22.
[881] The quote refers to the Batwa in the DRC who are described as suffering the 'same discrimination as the Batwa in Rwanda and Burundi', ACHPR and IWGIA (n 50) 36.
[882] ACHPR and IWGIA (n 50) 109.
[883] Endorois case (n 114), para 16.
[884] ibid, para 19.
[885] ibid, para 244. The Commission here was referring to the Report of the Working Group on Indigenous Populations/Communities (2003).

that this comes hand in hand with resolution of their land rights problems of which poverty is a by-product.

25 A similar argument could also be made under Article 120 of the Treaty. This provides that:

> 'the Partner states undertake to closely co-operate amongst themselves in the field of social welfare with respect to: a) employment, poverty alleviation programmes and working conditions; b) (….); and c) the development and adoption of a common approach toward the disadvantaged and marginalised groups, including children, the youth, the elderly and persons with disabilities through rehabilitation and provision of, among others, foster homes, health care education and training'.

As there is a link between the poverty indigenous communities experience and dispossession of their lands, it is arguable that any poverty alleviation programmes adopted under Article 120(a) of the Treaty should be committed to raising the standard of living of indigenous communities and improving the quality of their life.

26 In respect of Article 120(c) it is arguable that this requires partner states including Kenya to develop an approach that addresses their land related needs as disadvantaged and marginalised groups. It is not in dispute that indigenous communities are disadvantaged and marginalised[886] and as such 'need recognition and protection of their basic human rights and fundamental freedoms'.[887] In addition the 2010 Kenyan constitution recognises marginalised communities and groups in Article 260 as including those unable to fully participate in the economic and social life of the state, those who are assimilated into larger communities and those disadvantaged by discrimination on grounds including ethnic or social origin,

[886] Endorois case (n 114), para 149.
[887] ibid, para 148.

religion, conscience, belief, culture or language.[888] If it is correct, as Frans Viljoen has noted, that the RECs have acted on issues such as HIV and AIDS, Refugees, Human Trafficking, Women's Equality and Gender Issues; and Children's Rights because they do not affect only one REC in isolation, as Article 120(c) actually encourages a common approach to be adopted for disadvantaged and marginalised groups, to which we have established indigenous communities belong, then it is certainly arguable that the EAC states should work towards an indigenous communities' land rights policy as has been done by SADC with its Protocol on forestry, as it has itself done with the EAC Gender and Equality Bill; and the EAC policy on disability rights, discussed later in this chapter.

The East African Community Forests Management and Protection Bill 2015 and SADC's Protocol on Forestry 2010 - a possible comparator?

27 This Bill was passed before the East African Legislative Assembly on 15 May 2015. It provides for the management and protection of forests and makes provision for regional forests management, coordination, monitoring and reporting'.[889] It is based on the Articles 111, 112 and 114 of EAC Treaty on the management of the environment including forest and natural resources, sustainable development and sharing of benefits between partner states. Article 111(2) for example provides that the community will have the following objectives:

> 'a) to preserve, protect and enhance the quality of the environment; b) to contribute towards the sustainability of the environment; c) to ensure sustainable utilisation of natural resources like lakes, wetlands, forests and other aquatic and terrestrial ecosystems; and d) to jointly develop and adopt water resources conservation and management policies that ensure sustenance and preservation of ecosystems.'

[888] 2010 Constitution, Articles 260 and 27(4).
[889] The East African Community Forests Management and Protection Bill 2015, preamble. (Hereon EACFMP Bill.)

28 And to enable this, the partner states are required in Article 112(1) to prevent, arrest and reverse the effects of environmental degradation, which unfortunately has been the Kenya Government's mantra and justification for forcibly evicting indigenous communities from forests. Article 112(2)(b) requires that the partner states: 'develop capabilities and measures to undertake environmental impact assessment of all development project activities and programmes'. This is particularly key for areas where indigenous communities reside; and as will be seen in chapter 5 is not always done properly.

29 The intent of these provisions is unambiguous. Adopting a Protocol or policy on indigenous peoples' land rights would be in consonance with these provisions and the spirit of the EAC Treaty although Articles 111, 112 and 114 appear focused on the partner states themselves. However, as the raising of the standard of living and improving the quality of life of EAC populations, who include indigenous communities, is one of the objectives of the EAC integration, and partner states are required to adhere to good governance principles which notably include adherence to human rights, in giving effect to these provisions partner states are required to ensure that they embody the rights of indigenous peoples who include forest communities.

30 Notably however, the 2015 Bill does not include forest communities in its definition of terms in the text of the Bill. On one hand it could be argued that this is immaterial as the Bill is focused on the EAC partner states rather than the communities within their territories. However, when its aspirations are explored, the omission of forest communities from the equation appears short-sighted, and particularly so when compared to the scope and intentions of SADC's forestry Protocol- discussed below- which acknowledges the role played by forest communities in sustainability of forests. For example the Bill defines Forest Conservation as: 'modalities for protection, maintenance, rehabilitation and developing of forests in a sustainable manner'.[890] Further, its memorandum which

[890] ibid.

is set out at the beginning of the Bill, refers to the 1992 Rio Summit. That Summit recognised the crucial role played by indigenous communities in forest management and development and encouraged states to recognise them to facilitate their participation in sustainable development,[891] as does the ensuing Convention on Biological Diversity;[892] the ILO Convention No. 169 which recognises the right of communities to use, manage and conserve natural recourses pertaining to their lands;[893] and the UNDRIP which affiliates respect for indigenous cultures and knowledge with sustainable, equitable and proper management of the environment.[894] For instance, the African Court in the Ogiek case found that the Mau forest was the community's ancestral home, that they had the right to occupy it, use and enjoy it. The Court also held that it had not been shown that they were responsible for degradation of the forest.[895] The fact is for indigenous forest communities, damaging of forests would be counterintuitive if not deleterious to their existence. Any other finding by the Court would have been inconsistent with this fact as well as the wider consensus that 'indigenous communities' aspirations are for sustainable management' of natural resources.[896]

31 The South African Development Community (SADC)'s 'Protocol on Forestry',[897] signed by SADC members on 3 October 2002 in comparison is certainly supportive of forest communities' involvement in management and protection of forests and forest resources. The Protocol recognises that forest communities are 'a coherent, social group of persons with interests or rights related to forests or forest resources (which are held or exercised) communally in terms of an agreement,

[891] Principle 22 provides: 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.'
[892] See Article 8(j) which encourages respect for, preservation and maintenance of indigenous groups' lifestyles which are 'relevant for the conservation and sustainable use of biological diversity'.
[893] ILO Convention No.169, Article 15(1).
[894] ibid, preamble.
[895] Ogiek case (n 81), paras 128, 130.
[896] African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Extract Industries, Land Rights and Indigenous Populations'/Communities' Rights', 2017, 37.
[897] Hereon SADC Forestry Protocol.

custom or law' and that they depend on forests for their livelihood.[898] It recognises the vital role such communities play in the conservation[899] and sustainable management of forests by virtue of their traditional knowledge and practices,[900] and thus seeks to protect and promote their right to manage or receive benefits from forests.[901]

32 The Protocol provides that forest communities are entitled to 'public participation in decision-making regarding the sustainable management of forests and use of forest resources,[902] and should be effectively involved in the sustainable management of forests and forest resources on which they depend. It further provides that such communities should be consulted and should participate in decision-making regarding natural forests and forests on public or state land, biological diversity and land-use planning.[903] Further it provides that forest communities are entitled to an equitable share in the benefits arising from the use of these resources.[904] It requires partner states to 'ensure that the laws and agreements that regulate the use, management of, access to and tenure in state-owned forests gives sufficient security of tenure to parties managing or using forest resources to create incentives for sustainable forest management; and delineate ownership and occupancy rights.[905] These provisions accord with the ILO Convention No. 169 and the UNDRIP; and are far-more advanced than those in the domestic framework discussed in Chapter 2.

33 The EAC Bill instead seems focused on economic gains and productivity. Forest Management is defined in Bill as 'acts aimed at setting up technical, economic, industrial, legal and administrative measures towards maintaining forests for

[898] Definition of local community provided in the SADC Forestry Protocol, ibid.
[899] SADC Forestry Protocol (n 886), Article 1 defines conservation as 'the protection, maintenance, rehabilitation, restoration and enhancement of forests and efforts to ensure that the use thereof is sustainable'.
[900] SADC Forestry Protocol (n 886), preamble.
[901] ibid, Article 1 defines 'community based forest management' as: 'the management of forest resources by one or more local communities on the basis of a right to manage or to receive benefits from those forests'.
[902] This is one of the guiding principles of the Protocol in SADC Forestry Protocol (n 886) Article 4(9).
[903] SADC Forestry Protocol (n 886), Article 8.
[904] ibid, Article 4(10).
[905] ibid, Article 5.

increased productivity'. [906] Public hearings were held by the EAC's Committee on Agriculture, Tourism and Natural Resources in September 2015 in the partner states to discuss the Bill. The hearings did not involve forest communities. The Committee members met 'stakeholders from National museums of Kenya, those from the State Department of Agriculture, from the Ministry of East African Community Affairs and from the Kenya Forest Service Authority'.[907] The focus of the stakeholders was, unsurprisingly, on State powers rather than protection of human rights. The stakeholders are said to have asked for the Bill to 'strengthen the mandate of institutions and forest agencies in partner states in the following areas: afforestation; curbing illegal trading; logging activities; and trading in forest products'.[908] The stakeholders also informed the Committee that Kenya was in the process of enacting legislation on forest management and conservation 'which captures 80% of the content of the regional bill and is going to be comprehensive enough to address the issues of environment, cross border trade in forest products, trans-boundary forest reserves like in Mt. Elgon forest areas.'[909]

34 Notably, the Mt. Elgon area is the home to some of the Sengwer indigenous community who have complained repeatedly about the Kenya Forest Services' attack on their land rights. This Government agency's complicity in acts of land rights violations, and general non-inclusion of indigenous communities in forest management and protection in Kenya, makes their inclusion in discussions over the EAC Bill not only unrepresentative but highly problematic. Further the fact that Kenya's Forest Conservation and Management Act 2016 refers to forest communities, recognises the concept of community forests, the concept of joint management agreements where forest agencies 'enter into partnership with other persons for the joint management of forests' and the concept of benefit sharing,[910] as discussed in Chapter 2, should have triggered discussion with forest

[906] EACFMP Bill (n 889), preamble.
[907] Committee of Agriculture, Tourism and Natural Resources, 'Report of the Committee of Agriculture, Tourism and Natural Resources on the EAC Forests Management and Protection Bill 2015: EAC Partner States Capitals, 9th to 15th September, 2015' (Committee of Agriculture, Tourism and Natural Resources 2015).
[908] ibid.
[909] ibid.
[910] FCM Act (n 494).

communities during these hearings or at the very least should have been highlighted by the stakeholders involved. The hearings' note of meetings is silent on this which implies it was not discussed.

35 The EAC could learn from SADC's Protocol on Forestry particularly as SADC, as has been highlighted before, is also a sub-regional body whose main aim is the pursuit of economic development of member states.[911] The SADC Protocol has not been without its challenges. Despite being signed in 2002, it only came into force in 2009 following ratification by a sufficient quota of SADC members. As of 2017 there were seven members yet to give their assent to it.[912] For the majority of these members, their domestic legal frameworks on forestry management are: inadequate; outdated and still contain elements of their colonial legacies and approaches to forest management; are distilled from a plethora of laws with various approaches to forest management thus creating incongruity; and are under-funded thus making forest management challenging.[913]

36 Indeed there are a number of members who have updated their domestic frameworks on forestry management which are, inter alia, supportive of communities' forest management i.e., creation, ownership and governance of forests:[914] Amongst these are Malawi, South Africa, Zambia, Namibia and Mozambique. In doing so they address some of the challenges. However, the majority of the members are yet to update their laws and continue to experience similar challenges.[915] As SADC members have shared and varied experiences of deforestation, illegal timber trading and practices that adversely impact on forest conservation, the Protocol creates a space for shared thinking on these issues including sharing of good practices, which has the potential to impact not only on how individual states manage and govern their territorial forests and resources

[911] Murungi and Gallinetti (n 166).
[912] Southern African News Features, 'SADC reviews forestry protocol implementation' (SARDC, May 2017) <https://www.sardc.net/en/southern-african-news-features/sadc-reviews-forestry-protocol-implementation>accessed 28 September 2018.
[913] Phosiso Sola, 'Forest Law Enforcement and Governance and Trade in the Southern African Development Community' (2011) Working Paper Series Vol 1 Issue 9 African Forest Forum 51.
[914] Expert evidence Liz Alden Wily, Ogiek case (n 81).
[915] Sola (n 913).

which includes their communities' participation in forest management, but also on regional approaches to these issues.[916] If the EAC has something similar, Kenya would no doubt benefit from it given the reluctance to give forest communities full ownership and management rights.

37 Notably SADC has also adopted a SADC Forestry Strategy 2010-2020 to promote the implementation of the Forestry Protocol and engender sustainable and cooperative management amongst members.[917] This Strategy entails a number of forest-management programmes, which it is hoped will support implementation of the Protocol's objectives,[918] as well as enable involvement of a wider group of forestry services stakeholders in domestic, regional and international discussions, which has been lacking.[919] In 2017, SADC began a process to review regional implementation of the Protocol, including an assessment of the degree to which its objectives are being met.[920] The assessment is ongoing.[921] In any event 2020 will probably be the true gauge of implementation as this will mark the end of the ten year Forestry Strategy. The continued suspension of the SADC Tribunal does not permit assessment of application of the Protocol in land claims.

38 The argument remains that indigenous communities land rights are a cross-over issue affecting more than one state, and should rightly and properly be addressed at the sub-regional arena and this Bill, with some revisions, is an opportunity for that.

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[916] Southern African News Features (n 911).

[917] Stergomena Lawrence Tax, 'Statement' (Launch of the JICA-SADC Project on Conservation and Sustainable Management of Forest Resources in Southern Africa, Gaborone, Botswana, 23 February 2016) <https://www.sadc.int/files/4214/5632/1862/Remarks_by_SADC_Executive_Secretary.pdf>accessed 28 September 2018.

[918] ibid.

[919] C. Dlamini, M. Larwanou and P.W. Chirwa, 'A Review of Capacities of Public Forest Administrations for Interventions in Climate Change Activities in the Dry Forest and Woodland Countries of Sub-Sahara Africa' (2015) Vol.17 (S3) International Forestry Review.

[920] Southern African News Features (n 911).

[921] See call for a consultants to tender expressions of interest SADC, 'Request for Expressions of Interest, Selection of Individual Consultant, Reference Number: SADC/FANR/FORESTRYPROTOCOL/2017, Request for Services Title: Individual Consultancy to Undertake Regional Assessment Of Implementation Of The SADC Protocol on Forestry' (SADC March 2017) <Https://Www.Sadc.Int/Opportunities/Procurement/Procurement-Archive/Consultancy-Undertake-Regional-Assessment-Implementation-Sadc-Protocol-Forestry1> accessed 2 November 2018. As the request is presently the latest information on the implementation process, one can deduce that the review is still open/ongoing.

The East African Community Gender and Equality Bill

39 The East African Community Gender and Equality Bill 2016 is founded on the fundamental principle of recognition, promotion and protection of human rights. It 'avers that women and men's contribution in the integration process'[922] is just as fundamental to the EAC as partner states' obligations under various instruments; and that in light of 'emerging threats (resulting) from HIV and AIDS, globalisation and human trafficking of women, men and children as well as feminization of poverty and gender based violence'[923] and the impact this will invariably have on EAC nationals, there is a need to marry up efforts in the partner states to effectively address the reality.[924] The Bill was passed on 8 March 2017 but awaits assent by the Heads of State.[925] The Bill acknowledges that although the partner states have individually taken measures to address gender imbalances in their territories, the measures have not been uniform. The Bill therefore serves as a tool for ensuring consistency, consolidation and harmonisation of approach to the issue which should ultimately ensure full enjoyment and protection of human rights by women in equal measure to men.[926] Essentially the Bill seeks to address the marginalisation of women.

40 The gender inequality and women's empowerment project has undoubtedly been more centre stage globally. The UN's Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted in 1979, 40 years ago. The ILO Convention No. 169 entered into force in 1991 and the UNDRIP was adopted in 2007. The Convention on the Elimination of All Forms of Racial Discrimination entered into force in 1969. The point here is that at various stages, issues of discrimination have reached a head necessitating the intervention of law

[922] East African Community Gender Equality and Development Bill 2016, preamble.
[923] ibid.
[924] Elisha Mayallah, 'East Africa: EAC Gender Bill Eases Through' (*AllAfrica.com*, 7 February 2016) <http://sjdspace.sagepub.com/?p=1264> accessed 7 April 2016.
[925] East African Legislative Assembly, 'EALA Passes Key Gender Bill on International Women's Day' (*EALA* 8 March 2017) <https://www.eac.int/press-releases/146-gender,-community-development-civil-society/729-eala-passes-key-gender-bill-on-international-women-s-day>accessed 28 September 2018.
[926] Gender Bill (n 922), preamble.

to set standards of behaviour. The significance and importance of these issues is relative. It is inevitable that some will see race as a bigger issue than gender and others will see indigenous peoples' discrimination as a bigger issue. Crucially however, as issues of discrimination, they all need resolution.

41 A further compelling fact is the adoption of regional treaties on issues already legislated on at the international stage. This suggests a move to take regional ownership of these issues. The adoption of the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' for example, whilst CEDAW still continues to have effect, must result from a desire to adopt principles suited to the region and its issues. This African Protocol on women observes in its preamble that despite the ratification of international treaties protecting rights of women by African Union members, 'women in Africa still continue to be victims of discrimination and harmful practices'.[927] The fact that the East African Community Gender and Equality Bill 2016 has now been passed reinforces the point concerning ownership, this time sub-regional ownership notwithstanding the existence of a regional instrument on the rights of women.

42 Similarly, in 1981, whilst the 1945 UN Charter on Human Rights continued to have effect in African States which had signed up to the UN, those same African states adopted the African Charter on Human and Peoples' Rights at a time when a majority of them had gained independence from colonial domination including imposition of laws foreign to them. The adoption of the Charter was seen as necessary to address those shared past experiences, for the states to protect themselves from future domination and to ensure the Charter's alignment with African aspirations and principles. The fact that the Charter enshrines the rights of peoples has made it more accessible to indigenous peoples in Africa like the Endorois and Ogiek from Kenya, the Ogoni from Nigeria and other communities and made it possible for them to bring claims as peoples rather than as individuals.

[927] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, preamble.

43 The existence of Article 120 of the EAC Treaty which calls for the 'adoption of a common approach towards disadvantaged and marginalised groups',[928] as discussed earlier creates an expectation that instruments already on the global stage that address issues of marginalisation need to be domesticated for sub-regional purposes to address those communities' unique sub-regional features. It is argued that if such action can be taken to address discrimination against East African women, then surely the same can be done and should be done to address the situation of indigenous communities in the same sub-region in light of their human rights sufferings, and to ensure that the 'heart of sub-regional integration does not beat in vain'.[929]

EAC Policy on Persons with Disabilities

44 In view of the steps taken in respect of protection for persons with disabilities in the EAC, it is argued that there can be some similar engagement with indigenous peoples' land rights issues. It is acknowledged that the discourse on disability rights far surpasses that of indigenous peoples' rights, certainly in Africa, but nonetheless it is important to see what steps the EAC is taking to promote the rights of vulnerable groups; and to see whether a fraction of this could be imported to address indigenous peoples' concerns and in particular their land rights.

45 The 'EAC Policy on Persons with Disabilities' was adopted in March 2012. The Executive Summary of the policy highlights Article 120(c) and notes that Article 39 of the Common Market Protocol of November 2009 requires amongst other things, the promotion and protection of the rights of marginalized and vulnerable groups.[930] The policy notes that following a resolution passed by the East African Legislative Assembly urging partner states to implement the UN Convention on

[928] 1999 Treaty (n 818), Article 120(c).
[929] In reference to Frans Viljoen's view that 'the heart of sub-regional integration would beat in vain if it did not provide a lifeline to those living in poverty', (n 167) 481.
[930] The EAC Policy on Persons with Disabilities 2012, 6.

the Rights of Persons with Disabilities, experts on persons with disabilities met in December 2009 to review domestic laws and policies on disability. Their review found gaps in the law, 'challenges in including disability in the Millennium Development Goals and the current social protection initiatives in the EAC Partner states'[931] and other issues to be deliberated at a disability conference, and recommended implementation of the Convention.[932]

46 The formulated policy therefore seeks to: 'promote and protect disability rights as human rights, promote research on issues of persons with disabilities and promote the self-representation of people with disabilities in all public decision-making structures'.[933] The policy is said to be consistent with various international human rights instruments including the African Charter, the Universal Declaration on Human Rights, the Convention on the Rights of Persons with Disabilities and so on.[934] It is believed that the 'policy will promote and contribute to ensuring equality and equity……(and) be used as a yardstick to inform other policies, programmes and sectoral plans among the EAC Partner states'.[935] There is no reason why similar strides should not be taken to promote and protect indigenous communities' land rights. In the same way that experts on disability issues were invited to review the respective partner states' laws on disability rights and make recommendations which included the implementation of the UN Convention on the rights of persons with disabilities, the same can be done in respect of investigating indigenous communities' land rights in the sub-region.

47 Notably, the African Commission's work on indigenous communities began with a resolution which recommended establishment of a working group of experts to examine the indigenous communities and the progress made under the African regional system on that front. Kofi Kufuor notes that sub-regional bodies are finding their own way in respect of human rights notwithstanding the

[931] ibid.
[932] ibid.
[933] ibid, 28-9.
[934] ibid, rationale.
[935] ibid, executive summary.

developments in the regional system.[936] It is contended that although the African Commission's 2005 report on indigenous communities provides the EAC with a starting point and may even mean that it does not have to reinvent the wheel, the EAC could and should as part of its Article 120 obligations, set up a working group or instruct experts as it did with the examination on disability, to examine the issue as it impacts the sub-region.

48 With specific reference to Kenya and the role it has played in pushing for promotion of disability rights, Corina Hoffman notes that as a nation it has invested quite heavily over the years in disability rights issues and has also largely focused on ensuring legal protection as seen in its 2010 Constitution and ratification of the UN Convention; and that the other EAC members could learn from its example.[937] It could therefore be argued that in the case of indigenous communities, Kenya could do more as a Partner state in protecting their land rights particularly as its constitution is more progressive than the others in terms of recognition of pastoralists and hunter-gatherers and the need to address their land rights concerns. However, for the purposes of the present examination it is averred that Article 120 requires the EAC to take a stronger stance. The Common Market Protocol also projects this expectation quite clearly.

Protocol on the Establishment of the East African Community Common Market

49 The 'Protocol on the Establishment of the East African Community Common Market',[938] seeks to give effect to Article 5 and other EAC Treaty provisions. It defines 'vulnerable groups' as including 'groups of persons who are marginalised on grounds of stigmatised illness, gender, ethnicity, disability or age'.[939] This Protocol requires partner states to 'coordinate and harmonise their social policies

[936] Kufuor (n 166).
[937] Corina Hoffmann, 'Disability Rights Movement In East Africa, The Role and Impact of Self-Representation Of Persons With Disabilities On National, Transnational And Regional Level (Max Planck Institute For Social Law And Social Policy 2014) <Https://Ecpr.Eu/Filestore/Paperproposal/60b58c73-A93a-44ab-92db-0fb846577fd8.Pdf> accessed 14 April 2016.
[938] Entered into force on 20 November 2009.
[939] The Protocol on the Establishment of the East African Community Common Market 2010, Article 1.

to promote decent work and improve the living conditions of the citizens of the partner states for the development of the Common Market'.[940] The social policies to be coordinated and harmonised under the Protocol include those related to: a) good governance, the rule of law and social justice; b) promotion and protection of human and peoples' rights; …. d) promotion and protection of the rights of marginalised and vulnerable groups…'.[941] Amongst the programmes partner states are required to implement are programmes to: '(h) expand and improve social protection; ……. (and) (p) eliminate ignorance, diseases and poverty'.[942] In implementing these programmes, partner states are required to 'adopt measures and programmes aimed at promoting the welfare of vulnerable groups'.[943]

50 Indigenous communities from Kenya should be able to argue that the Protocol applies to them as vulnerable groups for reason of their ethnicity, that the measures/programmes/policies to be adopted to promote their welfare must recognise, promote and protect their land rights, that the coordination and harmonisation of policies under the Protocol, in matters related to: a) good governance, the rule of law and social justice; b) promotion and protection of human and peoples' rights; ….. d) promotion and protection of the rights of marginalised and vulnerable groups, as seen above, should not be an abrasive process particularly as the Kenyan Constitution recognises these principles.[944] In the Endorois case, the African Commission found that Kenya:

> 'has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and

[940] ibid, Article 39.
[941] ibid, Article 39(2).
[942] ibid, Article 39(3).
[943] ibid, Article 39(4)(b).
[944] The Constitution of Kenya, 2010 preamble provides: 'Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'.

> deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction'.[945]

The same argument could be made by indigenous communities under Article 5, Article 120 and under the Protocol.

51 Article 6 of the EAC Treaty set outs the fundamental principles of the EAC which are meant to 'govern the achievement of the objectives of the Community by the Partner states'. One of these is 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. It is argued that the EAC has a responsibility to ensure that Kenya meets this objective in relation to indigenous peoples and their land rights. Although similar arguments have been made above in respect of Articles 5 and 120 and the Common Market Protocol, it is worthwhile considering the Draft Protocol on Good Governance when examining Article 6 as the Protocol seeks to give effect to it.

52 Although yet to be implemented, the Protocol is in its final draft. Underpinning it are the following principles: constitutionalism, rule of law, access to justice, protection of human rights and promotion of equal opportunities, democracy and the democratisation process amongst others.[946] In 2009 the first draft of this Protocol incorporated 'comments from stakeholders including Chief Justices, national parliamentary committees, civil society organisations and national institutions of governance such as human rights commissions, electoral

[945] Endorois case (n 114), para 248.
[946] The East African Community Protocol on Good Governance (Draft), Article 4.

commissions, anti-corruption agencies'.[947] Frans Viljoen has observed that although RECs were not established with human rights in mind, there is an 'obvious link between improving the welfare of the people', regional integration, and 'realisation of socio-economic rights'.[948] He notes that increasingly 'calls are being made to bridge the schism between the 'trade' and 'human rights regimes' and to emphasize the 'ethics' of economic integration.[949]

53 One can say that this is what the Good Governance Protocol seeks to do. It may also explain the level of consultation undertaken in respect of the Protocol which Solomon Ebobrah describes as unprecedented in 'human rights treaty making (history) in Africa'[950] which he hopes will make for an instrument for which there is 'popular ownership'[951] and thus 'internalisation of norms and standards'.[952] In 2011 a regional conference on good governance was held. This sought to 'link respect for rule of law and constitutionalism to regional integration' and was before '200 participants from governments, ministries, parliaments, judiciaries, regional and global governance institutions, academia and civil society'[953]which bolsters Frans Viljoen's views.

54 Indigenous peoples could argue that any acts which violate their land rights are inconsistent with the pillars of: constitutionalism, rule of law, access to justice, protection of human rights to name some and therefore violate Article 6 of the Treaty. "Constitutionalism" is defined in the Protocol as 'a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of Government derives from and is limited by a body of fundamental law'.[954] For the purposes of this discussion, it is averred that constitutionalism actually embodies

[947] East African Community Secretariat, 'EAC Protocol on Good Governance in Final Stages' (East African Community Secretariat 11 May 2011) <http://federation.eac.int/index.php?option=com_content&view=article&id=156:eac-Protocol-on-good-governance-in-final-stages-&catid=40:news&Itemid=147> accessed 4 April 2016.
[948] Viljoen (n 166) 481.
[949] ibid.
[950] Ebobrah (n 166).
[951] ibid.
[952] ibid.
[953] ibid.
[954] Draft Protocol (n 946), Article 1.

the rule of law, access to justice and protection of human rights. This, looking at the Kenyan Constitution, would look like this.

55 The preamble of Kenya's 2010 constitution 'recognis(es) the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.' Constitutionalism and thus respect for indigenous peoples' land rights would require compliance with Article 27(4) of the Constitution which prohibits discrimination on various grounds including ethnic or social origin, religion, conscience, belief, culture and language. Although their case was prior to promulgation of the 2010 Constitution, the Endorois, as they did before the Commission could similarly rely on Article 6 of the EAC Treaty to argue that 'violations resulting from the displacement …… from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people'[955] is tantamount to discrimination under Article 27(4) of the Constitution and therefore unconstitutional.

56 Article 56 of the constitution requires affirmative action programmes designed to 'ensure participation and representation in governance and other spheres of life; development of cultural values, languages and practices; and reasonable access to water, health services and infrastructure'. Using the example of the Endorois again, constitutionalism in this respect would be complying with the positive obligations to protect their land-related matters.[956]

57 It could also be argued that constitutionalism and thus respect for indigenous peoples' land rights requires purposive interpretation and application of the Community Land Act (CLA) 2016 in accordance with the spirit of the constitution. The Protocol actually requires states to enact laws that promote and protect the rights of women, children, persons with disabilities and other marginalised and

[955] Endorois case (n 114), para 1.
[956] ibid, para 248.

vulnerable groups.[957] Failure to properly apply the CLA in a way that promotes and protects indigenous land rights is tantamount to violation of the pillars of good governance and Article 6 of the EAC Treaty.

58 Article 48 of the constitution requires the state to 'ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice'. The Protocol requires states to ensure access to justice by establishing legal aid schemes and pro bono services. In respect of indigenous communities access to justice when litigating land rights claims, availability of legal aid and pro bono services is crucial to access to justice as dispossession of their land and other problems associated with their land is likely to have affected their economic position such that they are unable to afford legal representation. Fortunately the cases litigated by the Kenyan indigenous communities in the regional African bodies have been funded by civil society and not the communities themselves. Albeit a historical case, the colonial *Maasai case*,[958] is an example of how lack of funds can impact on pursuing land claims. The East African Court of Appeal had made an order for costs against the Maasai in their challenge against land agreements entered into with the British colonial administration. They were therefore unable to proceed to the Privy Council which it is believed might have overturned the previous decision(s).[959]

59 It will be interesting to see how Kenya actually applies Article 48 of its constitution in cases raising indigenous land rights issues given that these cases will predominantly be against the State. In any event, any acts considered inconsistent with Article 6 would be challengeable under the EAC Treaty. The Protocol also requires the establishing of mechanisms to enhance expeditious disposal of claims.[960] It is noted that the Endorois' land rights claim, although relating to actions as far back as 1973, did not come to court until 2000 and was not

[957] Draft Protocol (n 946), Article 5(4)(h).
[958] *Ole Njogo and 7 Others v The Honorable Attorney General and 20 Others,* Civil case No. 91 of 1912 (5 E.A.L.R. 70).
[959] Albert Kwame Barume, *Land Rights of Indigenous Peoples in Africa with Special Focus on Central, Eastern and Southern Africa* (IWGIA 2010) 87.
[960] Draft Protocol (n 946), Article 5(5).

determined until 2002.[961] Proceedings in the African Commission began in 2003 and ended in 2009. Establishment of such mechanisms in or through the conduit of the EAC should improve disposal of claims.

Human Rights in the Sub-Regional Body

The Draft East African Community Protocol on Good Governance

60 In respect of promotion of human rights this Draft Protocol interprets good governance in human rights terms. It says that such governance shall include encouragement of partner states to take affirmative action in favour of marginalised groups on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing existing imbalances;[962]and further encourages them to review existing laws and policies, abolish retrogressive cultures, customs and traditions that are against the dignity, welfare or interest of women, persons with disabilities, marginalised and other vulnerable groups.[963] These requirements, and the Protocol as a whole, would undoubtedly bolster indigenous communities land rights claims in the forum.

EAC Treaty

61 Similarly indigenous communities may be able to rely on Article 7(2) of the EAC Treaty. As stated earlier this provides that partner states have an obligation to 'undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.

[961] Endorois case (n 114), paras 5-13.
[962] Draft Protocol (n 946), Article 6(3)(d).
[963] ibid, Article 6(3)(e).

The EAC Plan of Action on Promotion and Protection of Human Rights in East Africa

62 This Plan was given effect in 2008.[964] It provides a framework of policies, strategies and activities that address promotion and protection of human rights and is informed by EAC's 'commitment to international, regional and national human rights including the Universal Declaration of Human Rights, African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights and the EAC Treaty among others'.[965] The plan is founded on 'the need at the regional level, to build on the gains already made at the national level, in promoting and protecting human rights'.[966] It lists 8 'strategic interventions' namely:

> 'compliance with Paris Principles on national human rights institutions; capacity building for national institutions; establishment of an East African Community Bill of Rights with mechanisms of enforcement; establishing of an EAC Human Rights Policy Forum to establish linkages with the African Union on implementation of the African Charter; building capacity of partner states to comply with their human rights obligations in compliance with regional and international human rights instruments; ratification and domestication of all relevant international and human rights instruments; and increasing levels of awareness and understanding of human rights among key actors and agencies in partner states through education and training'.[967]

The Plan was initially designed for a year from July 2008 - June 2009 but appears to be ongoing as some of the interventions like the establishment of the Bill of Rights, are yet to be concluded.[968]

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[964] East African Community, 'List of all Council Decisions, EAC/CM15/DC36' (East African Community 2008), <http://www.eac.int/council_decisions/decision.php?pageNum_qry=65&totalRows_qry=1051>accessed 12 April 2016.

[965] EAC Plan of Action on Promotion and Protection of Human Rights in East Africa 2008, introduction.

[966] ibid.

[967] ibid, Objective of the Regional Plan of Action.

[968] At the EAC Forum of NHRIs in April 2014 it was noted that an outstanding issue with the Bill of Rights was its monitoring function and that resolution on this had been deferred until the EACHPR had received assent.

63 The formulation of this Plan concerning human rights promotion and protection is in line with the EAC's human rights obligations under the Treaty; and expands on those human rights obligations. Based on this Plan, indigenous communities can contend that in addition to the Treaty's expectations that the EAC's Partner states observe human rights and the rule of law, they are bound too to respect obligations set out in international, regional and national human rights treaty obligations. Indigenous communities' land rights have been affirmed under the African Charter on Human and Peoples' Rights by both the African Commission and the African Court.

64 It is therefore arguable that the interpretation of those bodies of indigenous communities' land rights claims should be persuasive in the sub-regional sphere. In this respect reliance by indigenous communities can be placed on the Plan's strategic intervention to establish links with the African Union on implementation of the Charter. Implementation of the Charter, as discussed in Chapter 3, includes compliance with decisions and guidance set out by bodies created under the Charter. On indigenous communities' land rights, it remains good law, until these bodies reach alternative decisions on the issues, that these communities have been found to be entitled to land rights under Articles 1, 8, 14, 21 and 22. Indigenous communities can therefore argue that as the Plan exists, and it is a plan of action, the action of the Partner states should be to align themselves with human rights developments such as those existing on the African Union platform.

65 In addition to the potential of indigenous communities making these contentions, the Plan should be the basis for which the EAC acts. This would mean that even if indigenous communities do not make those contentions, the EAC has an obligation to ensure that it is taking note not only of decisions and guidance being made under the African Charter but to ensure that its actions are in accordance with such developments. This reinforces the points made about Article 120 of the EAC Treaty and the steps that could be taken to give effect to that in respect of indigenous communities. This would also apply, based on the Plan, to other

obligations arising at the UN level including the UNDRIP, ICERD, ICCPR and ICESCR; and the Declaration on the Right to Development amongst others, as they relate to human rights expectations towards indigenous communities. As it is proposed within the Plan to build the capacity of the Partner states to comply with their human rights obligations in compliance with regional and international human rights instruments, this would be part of that.

66 Further given the commitment under the Plan to international human rights, it would be within the remit of the Plan to look at Kenya's own commitment to human rights, in particular what is set out in the Bill of Rights under Articles 27, 40 and 56 of the constitution as well as Articles 2(5) and 2(6), in terms of Kenya's integration of international human rights treaty obligations in its domestic framework. And further, this would require looking at domestic exercises like the Truth, Justice and Reconciliation Commission findings, to name just one, and therein the human rights breaches reported against indigenous communities, as discussed in Chapter 1, and the recommendations of the Commission which include ratification of international human rights treaties, particularly those 'with provisions that have direct relevance to communities that may be subjected to racial discrimination such as the ILO Convention, 1989 (No.169)'.[969] All the EAC partner states are members of the ILO. Therefore to enquire under the Plan, at the very least, the extent to which Kenya's, as well as the other partner states' national assemblies have taken to ratify the Convention, would not be unsanctioned.

The Draft East African Community Bill of Rights (EACBR) & The East African Community Human and Peoples Rights Bill (EACHPR)[970]

67 The EACBR process was initiated in 2007 as part of the EAC Plan of Action on Human Rights by the Kituo cha Katiba (Centre for Constitutional Development), a

[969] TJRC Report (n 352).
[970] The EACHPR remains a Bill. It is not included in the List of the Acts on the East African Legislative Assembly, http://www.eala.org/documents/category/acts-of-the-community/P16 (Accessed 4 October 2019). The EACBR has not been adopted by the EAC.

regional organisation in Kenya that has observer status with the EAC.[971] This organisation collaborated with Kenyan, Tanzanian and Ugandan National Human Rights Institutions to form a Task Force on the Draft Bill of Rights for the East African Community.[972] The Draft Bill was reviewed by the East African Community National Human Rights Commission on 1 June 2010. At this review the EAC Deputy Secretary General observed:

> 'We cannot afford to continue applying different benchmarks to issues of governance if we hope to move this integration to a Political Federation. We also need to be brave enough and bring to the fore what disrespect for Human Rights has caused us in the past so that collectively we correct the past mistakes and put in place mechanisms to deal with Human Rights protection in future'[973]

and emphasised the importance of 'according equal treatment across the 5 partner states'[974] particularly in the light of the 'stage at which the EAC integration has reached'.[975] The EACBR has never been adopted by the EAC, and remains a document proposed by the Kituo cha Katiba, but is worth discussing.

68 In 2012 the East African Legislative Assembly (EALA/Assembly) adopted and passed the East African Community Human and Peoples Rights Bill (EACHPR).[976] The Bill aims:

> 'to establish an East African Community human rights regime; to give effect to the EAC Treaty's human rights provisions; to establish a mechanism for the recognition, promotion and protection of human rights in accordance with the African Charter on Human and Peoples Rights; and to foster the

[971] East African Community, 'East Africa: EAC Receives Proposed Regional Bill of Rights 4 months After Approving Appellate Wing of the EACJ' (East African Community 23 October 2007).
[972] Morris Odhiambo and Rudy Chituga, *The Civil Society Guide to Regional Economic Communities, The East African Community* (African Minds Publishers 2016) 25.
[973] African Press Organization, 'Heads of Human Rights Commissions Review EAC Draft Bill of Rights' (*African Press Organization*, 2 June 2010)<https://appablog.wordpress.com/2010/06/02/heads-of-human-rights'-commissions-review-eac-draft-bill-of-rights/>accessed 22 December 2018.
[974] ibid.
[975] ibid.
[976] The passing of the Bill was published in the *East African Community Gazette* [Vol. AT 1 – No. 11] (12 August 2011).

process of deepening and widening integration by guaranteeing human rights in the social, economic and political sphere'.[977]

69 This Bill has not yet received the assent of the Heads of State. The Heads of State have the power to withhold assent to a Bill of the Assembly.[978] Those Bills which have not received assent within 3 months from the date they are passed by the EALA and submitted to the Heads of State, will be referred back to the Assembly, with reasons as to why the Bill or a provision of it should be reconsidered by the Assembly. If the Assembly discusses and approves the Bill, it will be resubmitted to the Heads of State for assent. However, if a Head of State withholds assent to a re-submitted Bill, the Bill shall relapse. The current position with this Bill is that it has not relapsed notwithstanding the passage of time but is still awaiting assent.[979]

70 It is noteworthy that neither ECOWAS nor SADC has a specific instrument that seeks to recognise, promote and protect human rights in accordance with the African Charter. In respect of ECOWAS, Frans Viljoen has observed that although its original Treaty did not mention human rights, the 'shift in emphasis' results from the ratification by several of the member states of the African Charter and a 'regional movement towards greater democratization …….. between 1973 and 1993'.[980] He questions whether this movement is 'cosmetic, occasioned by the rhetorical demands of international relations'[981] or whether it is genuinely meant to be mainstreamed into ECOWAS' activities.[982] He goes with the latter using the example of the 1999 ECOWAS 'declaration on the decade of a culture of the rights of the child in West Africa and a 'declaration on child soldiers';[983] and the 2001 'Declaration on the Fight Against Trafficking in Persons' which encourages states to 'criminalise human trafficking, set up anti-trafficking law and enforcement units, sensitise and train government officials dealing with trafficking' focused on

[977] East African Legislative Assembly, 'The East African Community Human and Peoples Rights Bill 2011 Memorandum' (East African Legislative Assembly 12 August 2011)<http://www.eala.org/documents/view/the-eac-human-and-peoples-rights-bill2011 >accessed 17 June 2016.
[978] The Treaty for the Establishment of the East African Community 1999, Article 63.
[979] This still appears under the list of East African Legislative Assembly Bills on the Assembly's Bills webpage <http://www.eala.org/documents/category/bills/P16>ccessed 29 September 2018.
[980] Viljoen (n 166) 483.
[981] ibid.
[982] ibid.
[983] ibid, 487.

child trafficking and child prostitution as part of its Protocol on Democracy and Good Governance.[984] Also as part of enforcing this Protocol, he notes that ECOWAS has established a 'Gender Division' within its Secretariat and has adopted a 'gender policy'.[985] Although these instruments are non-binding and their 'legal value (could thus be said to be) limited', he views them as setting a platform for 'relevant binding standards.'[986]

71 In respect of SADC, inclusion of human rights was considered in the 'initial treaty drafting process' but it was rejected.[987] Experts mandated to 'draft a proposal for a SADC Tribunal' argued that individuals should actually be allowed to make human rights references or complaints to the Tribunal by virtue of the non-discriminatory clauses in the Treaty and that the SADC Tribunal should be given a 'more general jurisdiction in relation to human rights' but this was not followed through.[988] However, more recently there has been in SADC generally, as seen in ECOWAS, a 'similar shift towards greater recognition of human rights'.[989] One of SADC's main principles is that it will act in a manner compliant with 'human rights, democracy and the rule of law',[990] reference, Frans Viljoen believes, stems from the 'fact that (SADC states) have suffered a denial of human rights for a longer period than other African countries'.[991] Prospective applicant states are required to show observance of principles of 'democracy, human rights, good governance and the rule of law in accordance with the African Charter'.[992] He further notes that in 1999 SADC adopted a Protocol on Health which set out how it would combat HIV/AIDS amongst 'other deadly and communicable diseases'.[993] In 2003 it adopted a 'declaration on HIV/AIDS' and a 'declaration on gender and development' both of which are non-binding but offer a 'comprehensive

[984] ibid, 486.
[985] ibid.
[986] ibid, 487.
[987] ibid, 492.
[988] Ibid.
[989] ibid, 483.
[990] ibid.
[991] ibid.
[992] ibid.
[993] ibid, 485.

framework for action'.[994] In 2008 it adopted a 'model law on HIV in Southern Africa (to) guide legislative review and adoption of new laws on HIV in SADC States'.[995]

72 It is contended that taken together both the Draft EAC Bill of Rights (EACBR) and the East African Community Human and Peoples' Rights Bill (EACHPR), albeit unenforced at this juncture, certainly show a concerted effort in bringing human rights to the fore of the EAC. Both have provisions which could be relied on in indigenous communities' land rights cases. They both provide a right to property. Article 22 of the EACBR protects the right to property and states that no person may be deprived of property or any interest in or right over property except where certain conditions are fulfilled. Article 30 of the EACHPR enshrines the right to acquire and own property in any part of the EAC either individually or collectively. It prohibits partner states' national assemblies from enacting laws that would result in arbitrary deprivation of this right. The right is however qualified and can be violated in certain circumstances.[996]

73 They are similar in this respect to Article 14 of the African Charter. The EAC instruments could be utilised to make similar arguments. Both instruments protect the right to housing. Article 35 EACBR provides that everyone has the right to have access to adequate housing and requires partner states to take reasonable legislative or other measures within their available resources to achieve this. It also prohibits the eviction of persons from their homes or demolition of their homes without an order from a court or arbitrary evictions, amongst others.

74 The EACHPR provides a right to accessible and adequate housing and reasonable standards of sanitation but does not give the additional protection against eviction and demolition of homes. It is therefore similar to Article 43 of Kenyan constitution which provides that 'every person has the right (b) to accessible and adequate housing, and to reasonable standards of sanitation' which stops there and does

[994] ibid.
[995] ibid.
[996] The East African Community Human and Peoples' Rights Bill 2011, Article 30(3).

not provide protection against eviction or demolition and so the ECBR offers wider protection. The Charter does not provide a specific right to housing but this has not prevented the African Commission from finding in the *Ogoni case* that 'the right to adequate housing which although not explicitly expressed in the African Charter, is also guaranteed by Article 14.'[997] Indigenous communities, in the EAC, will be able to make similar arguments under the EAC instruments once enforced.

75 They both define 'marginalisation' as the 'means by which disempowered groups are denied the means to improve their position'.[998] This interpretation is similar to the interpretation given of 'marginalised communities' under Article 260 of the Kenyan constitution. It is also is in tandem with the definition given of vulnerable groups in the Common Market Protocol and also under the Kenya National Land Policy.[999]

76 The EACBR defines 'minorities' as a 'group which is smaller in number than that of the rest of the population in the East African Community or one that has been disempowered, whose members have different ethnic, religious and linguistic features from the rest of the population'. It has been observed that the terms 'minorities, marginalised or vulnerable communities' are used interchangeably by the Kenyan Government.[1000] Equally the African Commission Working Group has noted that the terms can overlap and that although there is some debate as to whether indigenous groups should be referred to as minorities due to the contentious nature of the term indigenous in the African context, a 'clear-cut distinction between minorities and indigenous peoples'[1001] would not be as useful as focusing on 'the human rights issues at stake'.[1002] Although similar debates could be had in respect of the use of 'minorities' or 'vulnerable' rather than 'indigenous' in the EAC context, a focus on the human rights enshrined by the instruments is arguably more important particularly given the original nature and

[997] Endorois case (n 114), para 191.
[998] The EACHPR uses the term 'disadvantaged' but provides the same definition.
[999] NLP (n 7) 45.
[1000] Stavenhagen (n 166) 6.
[1001] Indigenous World 2013 and Indigenous Peoples: A Forgotten Peoples? (n 74) 13.
[1002] ibid.

history of RECs. Be that as it may, the recognition of minorities in the manner described by the EACBR is welcome.

77 Article 18 of the EACBR provides protection for minorities and states that they have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of both national and regional plans and programmes. Article 15 of the EACHPR provides that minorities and marginalised groups are entitled to enjoy all the rights and fundamental freedoms provided for in the Act, on a basis of equality, taking account of their identity, way of life, special circumstances and needs. It requires partner states to take legislative or other measures to put in place affirmative action programmes designed to benefit minorities and marginalised groups including measures to allow them to participate and be fully represented in governance and in all spheres of national life; assist them to develop their cultural values, languages and practices; have a reasonable opportunity to meet their basic needs and live a life free from discrimination, exploitation and abuse.

78 As seen earlier Article 27(6), Article 56 and Article 203(1)(h) of the Kenyan constitution all advocate for affirmative action to be taken in respect of marginalised and/or disadvantaged communities. Article 18 of the African Charter refers to elimination of discrimination against women and children, the aged and the disabled and in respect of the latter two groups, provides that they 'shall also have the right to special measures of protection in keeping with their physical or moral needs'.[1003] To therefore have a similar level of protection advocated for by both instruments is further ground for proposing the EAC as an alternative forum for indigenous land rights cases.

79 Article 25 of the EACBR concerns rights of women and requires the state to protect women and their rights, take account of their unique status and make available affirmative action to redress the imbalance created by history, tradition or custom.

[1003] African Charter on Human and Peoples' Rights 1981, Article 18(4).

This could certainly apply to indigenous women who reportedly 'face more obstacles than other dominant groups of women both in terms of access and enjoyment of their fundamental rights' [1004] due to the 'persistence of customs that (result in) discrimination against (them) in land tenure (and …) an entrenched cycle of poverty as a result of land loss and discrimination'.[1005]

80 The EACHPR does not provide a specific provision on women and therefore does not call for additional consideration of their circumstances but it does provide a general non-discriminatory clause, Article 8, which prohibits discrimination by a partner state or an authority in a partner state including on grounds of sex. More widely, the EACBR in Article 28 requires the partner states to guarantee and provide affirmative action in favour of groups marginalised on the basis of their gender, age, disability or other reason created by history, tradition or custom. The EACHPR's Article 8 as noted above addresses discrimination and similar to the EACBR requires states to take measures in affirmative action to redress any disadvantage suffered by individuals or groups as a result of past discrimination. Indigenous peoples are likely to have suffered such disadvantage.[1006] Article 3 of the EACBR provides a right of equality before the law and advocates for non-discrimination. The EACHPR's Article 7 provides the same.

81 Article 37 of the EACBR provides every person with a right to belong to, enjoy, practice, progress, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others as long as the exercise of these rights is not inconsistent with other provisions. The Endorois relied on similar provisions under the African Charter in their African Commission claim to show that the Government had violated their right to development. Similar arguments could be made under Article 37.

[1004] Soyata Maiga, 'Gender And Indigenous Peoples Rights' in Laher R and Sing'Oei K (eds), *Indigenous People in Africa, Contestations, Empowerment and Group Rights* (Africa Institute of South Africa 2012)65.
[1005] ibid, 73.
[1006] Notably Article 27(6) of the Kenyan Constitution also highlights disadvantages caused by past discrimination and offers similar protection for individuals or groups. Article 2 of the Charter provides a right to freedom from discrimination on several grounds although it does not refer to disadvantage or past discrimination.

82 The EAC partner states, as the upholders of human rights in the Community, are required in the introduction of the EACBR to:

1. 'Respect the rights set out therein by ensuring that the laws, policies, programmes and practices they put in place do not violate human rights;
2. Protect and promote human rights in a manner that ensures that violations by others are prevented, and affordable and accessible redress is provided in instances where violations occur; and
3. Fulfil human rights whereby positive actions to realise human rights are taken.'[1007]

83 A similar provision can be found under Article 47 of the EACHPR. Although Article 47 may not provide justiciable rights it may be relied on in indigenous land rights claims to highlight any state failures to adhere to human rights standards. It requires partner states to recognise and facilitate the role of civil society in the promotion and protection of human rights.[1008] It also provides that 'all state organs and all public officers have a responsibility to understand, equip themselves to deal with the needs of special groups within society including members of marginalised communities and of particular ethnic, religious and cultural communities'.[1009] This is particularly useful in indigenous land rights cases where the state has failed to adopt policies and programmes that recognise the unique relationship indigenous communities have with their land. Article 47 also requires the partner states to implement legislation to fulfil their international obligations in respect of human rights and fundamental freedoms.[1010] This mirrors to some degree Article 21(4) of the Kenyan constitution which requires the state to legislate to enforce internal human rights treaties.

84 Article 47 of the EACHPR further requires the partner states to report on time to international human rights bodies on the implementation of human rights treaties and other instruments.[1011] It also requires them to publish reports on their human rights obligations and allow sufficient time to facilitate public discussion and

[1007] Human Rights Principles & Standards, Draft EAC Bill of Rights, Principles, 4-5.
[1008] EACHPR, Article 47(3).
[1009] ibid, Article 47(4).
[1010] ibid, Article 47(5).
[1011] ibid, Article 47(5)(a).

participation of civil society before the reports are revised and submitted; and that they disseminate to the public the general comments and recommendations of international human rights bodies relating to the implementation of their international obligations. Article 47 further requires national governments to make a statement to parliament on whether and how it intends to implement human rights recommendations; and finally every partner state to establish the necessary machinery to give full effect to the provisions of the Act. [1012] All these provisions go further than the Kenyan constitution and could address the Government's seeming inertia to implement regional decisions, as discussed in Chapter 3.

85 Article 41 of the EACBR provides that any person or organisation claiming a violation of their, another person's or group's human rights can apply to a competent national court for redress which may include compensation and on appeal to the EACJ. This would therefore allow for individual as well as collective claims to be made by members of indigenous communities. Article 48 of the EACHPR is slightly wider in its remit in this respect. It provides that a person acting in their own interest, a person acting on behalf of another person who cannot act in his or her name, a person acting as a member of or in the interest of a group or class of persons, a person acting in the public interest or an association acting in the interest of one or more of its members, has the right to complain and institute proceedings alleging a violation, infringement or threat to a right or fundamental freedom. This would allow public interest challenges to be brought which is more than is offered under the African Charter or the Kenyan constitution.

86 The EACBR does not stipulate whether a fee is required but Article 48(3) of the EACHPR provides that no fee is required for instigating proceedings which mirrors Article 22(3)(c) of the Kenyan constitution. No fee is required for communications/complaints under the African Charter either. In terms of the remedies the court(s) could offer under the EACBR, Article 41 provides that

[1012] ibid, Articles 47(7) and (8).

redress may include compensation. Article 49 (3) of the EACHPR provides that the court may order a declaration of rights, an injunction, conservatory orders, a declaration of invalidity, an order of compensation and order for judicial review which is wider in scope than the African Charter in respect of the bulk of these powers and also wider, in its offer of judicial review, than what the African Court can offer. Potentially the EACHPR could be used to seek a review of the Government's conduct/failure to act in respect of the Endorois and Ogiek judgments.

The East African Court of Justice (EACJ) and litigation of human rights in RECs

87 The original remit of REC courts, like other international courts and tribunals was to 'resolve disputes' between states.[1013] However, they now permit individuals to issue human rights claims which means that the human rights potential of these bodies, which would otherwise 'have been left largely unexplored' can be tested.[1014] There is a coherent flow from concern over 'disputes arising from the process of economic and legal integration'[1015] and consideration of 'human rights implications of economic policies and programmes' which REC courts and tribunals 'may be called' to consider.[1016]

88 The EACJ is the judicial organ of the EAC tasked with ensuring adherence to law in the interpretation and application of and compliance with the Treaty.[1017] It has a First Instance Division and an Appellate Division. The First Instance Division has jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with the Treaty. The EACJ's jurisdiction to determine cases is set out in Article 23(1) as above i.e. it is 'a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.'

[1013] Viljoen (n 166) 488.
[1014] ibid.
[1015] ibid, 490.
[1016] ibid.
[1017] The Treaty for the Establishment of the East African Community 1999, Article 23(1).

89 Article 27(1) of the EAC Treaty. This provides that:

> 'The EACJ shall initially have jurisdiction over the interpretation and application of this Treaty, provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner states'.

90 Article 27(2) provides that:

> 'the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner states shall conclude a Protocol to operationalise the extended jurisdiction'.

91 Article 30 provides that:

> 'referrals to the EACJ can only be made by legal and natural persons: (1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner state or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty; (2)The proceedings provided in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be; (3) The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner state'.

92 Before looking at the human rights jurisdiction of the EACJ, it is important to note that the process as described by Article 30, is distinct from that available at the regional level under the African Charter in the following ways: i) the limitation period for issuing cases is 2 months from the decisions, unlike 6 months at the regional level which requires speedy action from claimants to ensure they lodge

their claims in time; ii) any person can make a claim - Article 30 refers to any legal and natural person, unlike the restrictions in the regional system; and iii) there is no requirement for exhaustion of domestic remedies. Lawyers interviewed about this commented on the fact that applications can be made to it prior to the exhaustion of domestic remedies, an attribute those who have litigated in the African Commission and African Court,[1018] and other regional human rights forums,[1019] as well as those litigating in the EACJ itself,[1020] consider to be a significant and distinctive feature of the EACJ particularly in view of the gravity of issues at play in indigenous communities' land rights claims. They also consider that the long delays experienced under the African Charter system make this forum an attractive alternative.[1021]

93 In respect of human rights, Article 27(2) does not prohibit individual human rights claims.[1022]

94 It also does not preclude collective claims being made by indigenous communities on the basis of their human rights. The following cases highlight these issues well. It is the case that the EACJ has in the past not received too many cases relating to human rights.[1023] A reason for this may be the unsure nature of the EACJ's jurisdiction.[1024] Partner states have argued in the past that the EACJ cannot determine cases raising human rights issues.

95 In a case relating to Kenya, *Independent Medical Unit v Attorney-General of Kenya and Others* [2011],[1025] the complainant, an NGO on behalf of 3000 Kenyans in the Mt. Elgon district who had been tortured and inhumanely treated, brought a claim

[1018] Claridge (n 617).
[1019] Interview with Tom Lomax, Lawyer & Coordinator, Legal and Human Rights Programme, Forest Peoples Programme, UK (Telephone, 31 July 2018).
[1020] Interview with Nelson Sidney Ndeki, Associate Litigation Officer, Pan African Lawyers Union (PALU), Tanzania (Skype, 21 July 2018).
[1021] ibid.
[1022] Ebobrah (n 166) 82 citing Viljoen (n 166).
[1023] Solomon T Ebobrah, 'Human Rights Developments in African sub-regional economic communities during 2011' (2012) 12 African Human Rights Law Journal 223.
[1024]ibid.
[1025] Reference No.3 of 2010 (East African Court of Justice).

under Article 30 of the EAC Treaty arguing that Kenya, the Respondent state had violated: 'a) rule of law under Articles 6 and 7(2); (b) promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights under Article 7(2); (c) good governance under Article 6 and 7(2)'.[1026] The Kenyan Government in response raised a preliminary point that the EACJ had no jurisdiction to receive human rights related cases. The EACJ summarised the Government's argument on this point as follows:

> 'It was contended by Counsel for the Respondents that the Court is being asked to exercise jurisdiction and address issues of human rights raised in the Reference, but that the Court has no jurisdiction to do so since the Court's jurisdiction is at the moment restricted to the interpretation and application of the Treaty under Article 27(1). He argued further that Article 27(2) expressly excludes the jurisdiction to deal with human rights issues until the Court is granted extended jurisdiction through a subsequent protocol which has not yet been concluded.'[1027]

96 In response to Kenya's argument, the complainant relied on international law as arising from the Vienna Convention on the Law of Treaties and the expectation thereof that treaties are to be 'read, interpreted and performed in good faith',[1028] and that as Article 27 confirmed the EACJ's jurisdiction over matters related to the interpretation and application of the EAC Treaty, and the arguments constituted such matters, the EACJ's remit permitted it to determine the issue. The complainant further relied on an earlier decision of EACJ, *Katabazi and Others*[1029] where the EACJ 'held that although it does not have jurisdiction to deal with human rights issues yet, it has jurisdiction to interpret the Treaty even if the matters complained of include Human Rights violations.'[1030] The EACJ therefore accepted that it was permitted to consider issues of a human rights nature where these fell within its jurisdiction to interpret the EAC Treaty.

[1026] ibid.
[1027] ibid.
[1028] ibid.
[1029] *Katabazi and Others v Secretary-General of the East African Community and Another* (Reference No.1 of 2007) [2007] EACJ 3.
[1030] ibid.

97 The EACJ further observed that in the *Katabazi case* it had also considered, although this was not one of the arguments made by the complainant, that Article 8(1) of the EAC Treaty prohibited partner states from 'measures that are likely to jeopardise the achievement of those objectives or implementing of the provisions of this Treaty' and that it had found that: "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations." Therefore the EACJ's concluding remark on this issue in *Independent Medical Unit v Attorney-General of Kenya and 4 Others (Reference No.3 of 2010)* is significant. It held: 'Similarly, in this Reference, the Court shall not abdicate its duty to interpret the Treaty merely because Human Rights violations are mentioned in the Reference. In the result, we hold that this Court has jurisdiction to entertain the Reference.'[1031]

98 Some have observed that although the Court has 'creatively engaged in judicial practice to adjudicate'[1032] on human rights issues despite the fact that such a jurisdiction is 'yet to be conferred on it',[1033] it could reinforce its position by referring to its jurisdiction under Article 30 of the Treaty[1034] as human rights issues can 'be accommodated under Article 30'.[1035] Article 30 is a helpful provision but one that highlights the incongruity of the limitation of the EACJ's human rights jurisdiction in Article 27(2). A claimant who relies only on Article 30 to bring a case that hinges mainly on human rights may fall foul of it on the basis that it is subject to Article 27. This is despite the fact that Article 30 empowers the EACJ to determine whether decisions made by partner states are in accordance with the provisions of the Treaty, and this would include determining whether the decision complies with the fundamental principles of human rights under Articles 6, 7 and 8, allowing the EACJ, as it has done in some cases, to circumvent the human rights

[1031] ibid.
[1032] Ebobrah (n 1023).
[1033] ibid.
[1034] See Articles 27 and 30 of the EAC Treaty, paras 89-91 above.
[1035] Ebobrah (n 1023).

concerns and find that the decision or act is unlawful or contravenes the provisions of the Treaty.

99 The EACJ has confirmed its position in a recent matter, *Case of: 1.Ololosokwan Village Council 2. Oloirien Village Council 3. Kirtalo Village Council 4. Arash Village Council v The Attorney General of the United Republic of Tanzania Application No.15 of 2017 (Arising from Reference No.10 of 2017.*[1036] This claim was brought by a Maasai indigenous community from Tanzania in 2017. The community complained that they were 'directed to vacate'[1037] and consequently forcibly evicted from their lands. This had triggered the substantive application (Reference No.10 of 2017) in which they sought the following remedies: 'permanent halt to their (…) eviction, arrest and prosecution as well as the destruction of their property (….) restitution, reinstatement of (their) properties, as well as reparations.'[1038] Although the substantive application is yet to be determined, the decision of EACJ of 25 September 2018 was made to determine the injunctive application lodged alongside the substantive application. In the interim relief application the community had sought 'a temporary halt to (their) eviction and the destruction of their property.[1039] The community placed reliance on various EAC Treaty provisions namely: Article 6(d) which notably includes the binding principle of the partner states to adhere to 'promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights';[1040] Article 7(2), Article 27(1), Article 30 and finally Article 39 which empowers the EACJ to make injunctive relief orders.[1041]

[1036] Application No.15 of 2017 (Arising from Reference No.10 of 2017), 25 September 2018 East African Court of Justice First Instance Division.
[1037] ibid, para 1.
[1038] ibid, para 2.
[1039] ibid, para 3.
[1040] Article 6(d) in full reads: '(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'
[1041] Article 39 provides: 'The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect ad interim as decisions of the Court.'

100 The Tanzanian Government has defended its position but has not alleged that a human rights related claim cannot be brought in the EACJ. In a decision on the injunctive relief application, the EACJ confirmed that it is within its jurisdictional ambit to deal with issues of legality raised under Article 30(1), namely: 'the legality of the evictions is, in our view, a formidable legal question that falls squarely within the ambit of Article 30(1) of the Treaty as an issue that this Court may interrogate.'[1042] Article 30(1) as seen earlier permits claims to be raised as to the legality and compliance by the partner states with the EAC Treaty. This would therefore include compliance with Articles 6(d) and 7 which relate to, inter alia, adherence to human rights.

101 In relation to the EAC Treaty provisions that the Maasai community relied on in the claim, other than Article 30(1) and Articles 6(d) and 7(2), it is possible to base an indigenous community's land rights claim on grounds that a decision to violate those rights is inconsistent with the general undertaking given by a partner state as to implementation under Article 8(1) (a) to 'plan and direct (its) policies and resources with a view to creating conditions favourable for the development and the achievement of the objectives of the Community and the implementation of the provisions of this Treaty'.[1043] Taking the example of adherence to the principle of democracy, the partner states' obligation to create conditions favourable for the development and achievement of this objective, would in the case of indigenous peoples need to 'reflect the ideal of unfettered inclusion and special recognition of circumstances that have precluded (them) from being participative citizens in the post-colonial' era in those states and addressing those circumstances .[1044]

102 In the case of Kenya, as previously noted its 2009 National Land Policy acknowledges that land injustices in the colonial period have continued in the post-colonial era and have affected indigenous communities like those 'in the

[1042] Ololosokwan Village Council (n 1036), para 41.
[1043] 1999 Treaty (n 818), Article 8(1)(a).
[1044] Laher and Sing'Oei (n 166).

pastoralist areas (and have) led to the(ir) deprivation of land management rights from the traditional institutions thereby creating uncertainty in the(ir) access, control and exploitation of land based resources including grazing lands, water and salt licks among others'.[1045] Therefore for Kenya to be said to have complied with Article 8(1)(a) it would need to show that the recommendations set out in the National Land Policy to address those circumstances namely:

> 'recognising pastoralism as a legitimate land use and production system; providing for pastoralism in the Land Act; establishing suitable methods for defining and registering land rights in pastoral areas whilst allowing pastoralists to maintain their unique land systems and livelihoods; ensuring the rights of women in pastoral areas are recognised and protected; providing for flexible and negotiated cross boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit; and ensuring that all land uses and practices under pastoral tenure conform to the principles of sustainable resource management'[1046]

have been given effect. They have not been given effect in the case of the Endorois, the Ogiek nor the Sengwer communities, to name a few, as discussed in preceding chapters; and in cases such as those it would be possible to rely on Article 8 to argue that Kenya has contravened the EAC Treaty.

103 Equally it could also be argued that the failure to enforce the above national land policy recommendations or the Endorois and Ogiek regional judgments is a violation of Kenya's obligations under Article 1 of the African Charter on Human and Peoples' Rights, and thus a violation of Article 6(d) of the Treaty to recognise, promote and protect human and peoples' rights under the African Charter and ultimately a violation of Article 8(1)(c) which requires partner states to: 'abstain

[1045] NLP (n 7), para 181.
[1046] ibid, para 183.

from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty'.[1047]

104 It is of further note that although the community did not claim, and have not sought, a finding that they constitute an indigenous community, the EACJ observed that they were 'at the risk of eviction from parcels of land which they have historically occupied and from which they derive their security of tenure and livelihood'.[1048] The EACJ also considered the need to prevent the 'social disruption and human suffering that would inevitably flow from the(ir) continued eviction'[1049] and that this trumped, at least for the purposes of the injunctive relief application, 'the important duty to avert environmental and other ecological concerns,'[1050] an argument the Government made, as is common with the Kenyan Government too, in justification of its repeated eviction of indigenous communities from their ancestral homes. The EACJ's order thereby included a restraining order prohibiting the Tanzanian Government from 'evicting the Applicants' residents from the disputed land, being the land comprised in the 1500 sq km of land in the Wildlife Conservation Area bordering Serengeti National Park; destroying their homesteads or confiscating their livestock on that land',[1051] until the substantive claim is determined.

105 It is notable that the EACJ's reasoning tied in with features of the concept of indigenousness as accepted by the African Commission and the African Court. There is reference to historical occupation of land, land from which the community derives secure tenure and livelihood;[1052] and reference to social disruption and human suffering. It is accepted that the latter two can apply to any group of applicants but the former two have been accepted by the Commission and Court as a central feature of indigenous communities' identity. The community may choose not to argue their case within the confines of indigenous protection which

[1047] 1999 Treaty (n 818), Article 8(1((c).
[1048] Ololosokwan Village Council (n 1036), para 53.
[1049] ibid, para 54.
[1050] ibid.
[1051] Ololosokwan Village Council (n 1036), para 58.
[1052] ibid, para 53.

would be their entitled prerogative. However, such identification, given what the EACJ has found so far, aligns with the accepted definition and may result in further protection for them not only under their laws, but under the EAC's laws which include the African Charter and international human rights obligations binding Tanzania.

106 It will be interesting to see how the EACJ ultimately deals with this case, see whether the Applicants will argue the case in terms of their rights as indigenous communities and also seek a finding to that effect. There would be support for such an argument if the Applicants considered making it. It is possible to argue that the obligations under Article 6(d) of the EAC Treaty, that partner states adhere to 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights',[1053] permits consideration by the EACJ of claims relating to indigenous communities' land rights, as the African Charter recognises individual as well as collective rights and is distinct from other human rights instruments in that respect.[1054] The term 'peoples' although not defined by the Charter has been accepted by the African Commission in various cases to mean: and to mean indigenous communities,[1055] an entire nation,[1056] a group in a nation which sees itself as distinct from other groups and enjoys a 'common ancestry, ethnic origin, language or cultural habits', and can therefore 'include distinct ethnic groups'.[1057]

[1053] Article 6(d) provides: '(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'

[1054] ACHPR and IWGIA (n 50) 72.

[1055] The African Commission found that the Endorois community constitute an indigenous community and were a "people", 'a status that entitles them to benefit from provisions of the African Charter that protect collective rights' and that their alleged violations of the African Charter- namely Articles 8, 14, 17(2), 17(3), 21, 22: 'were those that go to the heart of indigenous rights- the right to preserve one's identity through identification with ancestral lands', Endorois case (n 114), para 162.

[1056] Clive Baldwin and Cynthia Morel, 'Group Rights' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights*: *The System in Practice 1986-2006* (2nd edn, Cambridge University Press 2008) referring to the African Commission's finding in Communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, Thirteenth Activity Report 1999-2000, Annex V, para 72.

[1057] Communication 211/98, *Legal Resources Foundation v Rwanda* [2001] (African Commission on Human and Peoples' Rights) para 73.

107 Compliance with the African Charter thus also means compliance with the decisions made by the African Charter bodies. The EACJ therefore has to consider and follow decisions made by the African Commission and the African Court, as bodies established under the Charter, which would include the Endorois and Ogiek decisions. Be that as it may, it is down to the Applicants to assess how much making such arguments, in effect seeking a finding they are indigenous communities, would assist their claim and cause. In the case of the injunctive orders at least, it did not necessitate such express identification.

108 As the above case shows although the EACJ has found a way of dealing with cases concerning human rights issues, it has grown increasingly weary of its limited jurisdiction Article 27(2). In the case of *Emmanuel Mwakisha Mjawasi & 748 Others v the Attorney General of the Republic of Kenya* [2011][1058] argued under Articles 6(d) and 7(2) of the EAC Treaty the EACJ held that:

> 'It is not in dispute that the steps in Article 27(2) have not yet been taken. It follows therefore, that this Court may not adjudicate on disputes concerning violation of human rights per *se*. The Court has no appellate jurisdiction as well. However, in this Reference, this Court is neither being asked to adjudicate on a dispute concerning violation of human rights *per se* nor to exercise an appellate jurisdiction over the decision by the Kenya High Court. The Court is being asked to determine whether the alleged failure by the Kenya Government to pay the Claimants their terminal benefits constitutes a violation of Articles 6(d) and 7(2) of the Treaty. The fact that the Reference also contains allegations of violations of human rights under the conventions listed therein cannot prevent this Court from exercising its mandate under Article 27(1) of the Treaty. We have considered this objection and come to the same conclusion in a number of references including James Katabazi & 21 Others -vs. - The Secretary General of the EAC and the AG of the Republic of Uganda (*supra*). We still hold the same view.'

109 Hopefully when the East African Community Human and Peoples' Rights Bill is assented, it will reinforce the EACJ's jurisdiction to determine human rights cases. Albeit at the risk of continuing challenge by states, its jurisdiction to interpret and

[1058] Reference No. 2 of 2010 (East African Court of Justice).

apply the EAC Treaty, does allow it to. This view is shared by those litigating[1059] or looking into the EACJ as a forum for bringing indigenous communities' land rights cases.[1060] As to whether the EACJ is a suitable alternative to the regional forum, in terms of how it fares in comparison to the bodies under the African Charter system, the EACJ, notwithstanding Article 27(2), one can say it certainly has features which may attract indigenous communities to it.

Other sub-regional courts

110 The ECOWAS CCJ is the only court with an explicit human rights mandate which makes determination of human rights issues, in the Western region, less controversial.[1061] The ECOWAS CCJ has determined issues concerning slavery, education, unlawful arrest and detention.[1062] It does not require exhaustion of domestic remedies and has in fact held that to do so would 'impose on individuals more onerous conditions …… than those provided for by the Community texts (thus) violating the rights of such individuals',[1063] a view shared by litigators in the regional sphere, as noted earlier.

111 In the Southern region, the SADC Treaty touches on human rights issues and SADC itself has acted on various human rights issues and adopted policies in this respect. This may suggest that the SADC Tribunal is 'well positioned to produce sub-regional human rights jurisprudence',[1064] however, the Tribunal has faced great resistance and opposition particularly from Zimbabwe following three judgments against it, and is now suspended.[1065]

[1059] Ndeki (n 1020).
[1060] Lomax (n 1019).
[1061] Viljoen (n 166) 490.
[1062] ibid.
[1063] *Karaou v Niger* [2008] ECW/CCJ/JJD/06/08 (ECOWAS Court of Justice), as referred to in Viljoen (n 166) 488.
[1064] Viljoen (n 166) 483.
[1065] ibid.

112 In the first of these cases, *Campbell v Zimbabwe*[1066] a case concerning the acquisition of land by the Government and obtaining judicial redress SADC found that Zimbabwe had breached the right of access to justice enshrined in the African Charter and the South African Constitution; and that this is a right that goes to the core of the rule of law which member states are required to adhere to. It therefore amounted to a violation of the SADC Treaty. The Tribunal also found that the introduction of an amendment to the law which allowed for the expropriation of land from a certain race group amounted to indirect racial discrimination, also breaching the Treaty. The Tribunal therefore ordered Zimbabwe to 'take all reasonable measures to protect the occupation and ownership of the applicants, refrain from evicting them and pay fair compensation for expropriated lands'.[1067] Zimbabwe argued that SADC had sought to become a 'human rights court' and by so doing had acted *ultra vires.*[1068]

113 In *Tembani v Zimbabwe,*[1069] another case concerning land and specifically the sale of land belonging to an individual following a default on a loan, the SADC Tribunal found that the applicant had been entitled to 'contest the amount and value of his land before a court, before the sale by the Agricultural Bank of Zimbabwe';[1070] and that denial of this was inconsistent with 'access to and a fair hearing by an independent and impartial court'[1071] which were tenets of human rights and the rule of law.[1072] In the third case, *Gondo & Others v Zimbabwe*,[1073] the Tribunal found that the failure by Zimbabwe to comply with domestic court findings was contrary to 'various fundamental principles' including the right to an effective remedy, the right to an independent and impartial court and the right to a fair hearing.[1074]

[1066] *Campbell v. Zimbabwe*, Judgment, Case No. SADCT: 2/07 (SADC, Dec. 13, 2007).
[1067] Viljoen (n 166) 483.
[1068] ibid.
[1069] *Tembani v. Zimbabwe*, Judgment, Case No. SADCT: 07/2008 (SADC, Aug. 14, 2009).
[1070] Viljoen (n 166) 493.
[1071] ibid.
[1072] ibid.
[1073] *Gongo v. Zimbabwe,* Judgment, Case No. SADCT: 05/2008 (SADC, Dec. 9, 2010).
[1074] Viljoen (n 166).

114 Zimbabwe's disagreement with these three findings led to it seeking an amendment of the Tribunal's mandate and to have it 'disbanded'.[1075] Following a review which found that the Tribunal was 'validly constituted',[1076] another review was requested during which time the Tribunal's work remained suspended.[1077] These three cases show how political land related cases can be and what effect political interference can have on justice. SADC is a body made up of several states. The deference of these states to Zimbabwe in this instance, possibly in itself a reflection of self-preservation of states in not wanting to hold others to account lest they be held to account themselves, risks making extra-territorial human rights systems impotent.

115 So far there has been no such application by the Kenyan Government in respect of the EACJ other than of course the challenges noted above to the human rights jurisdiction of the Court. The Tanzanian Maasai litigation,[1078] if this turns out to be positive and damages are awarded to the community, is likely to set the tone for how Tanzania and other partner states, including Kenya, react to the EACJ. The advances in the human rights project in the EAC, albeit slow, may not permit disbanding of the Court in the way triggered by Zimbabwe with the SADC Tribunal, although having said that, there is purportedly more recognition of human rights in SADC states, given their protracted shared past of human rights denial.

[1075] ibid, 501.
[1076] ibid.
[1077] ibid.
[1078] Ololosokwan Village Council (n 1036). As of October 2019, the substantive application is yet to be heard by the Court. See the Pan African Lawyers Union's website which refers only to the interim relief application: Pan African Lawyers Union, 'Ololosokwan village Council and 3 Others vs. The Attorney General of United Republic of Tanzania: Ref no. 10 of 2017: The Loliondo Case (Pan African Lawyers Union 5 February 2019) <https://lawyersofafrica.org/ololosokwan-village-council-and-3-others-vs-the-attorney-general-of-united-republic-of-tanzania-ref-no-10-of-2017-the-loliondo-case/>accessed 4 October 2019 and the Court's list of decided cases which does not include this case: East African Court of Justice, 'Recent-Decisions' (East African Court of Justice) <http://eacj.eac.int/?page_id=2298>accessed 4 October 2019.

4.1 Forums for enforcement of regional decisions?

116 Another valid question is whether sub-regional bodies like the EAC could be a forum for enforcement of regional decisions, like the Endorois and Ogiek regional judgments. There is much more to the EAC than meets the eye and in this regard this thesis agrees with Lucyline Murungi and Jacqui Gallinetti that the increasing litigation in these bodies, and in particular at the EACJ level notwithstanding the jurisdictional issue, serves as a pressure point for states to accord with their human rights obligations, and coordinate laws and deliberations which 'enrich the human rights discourse ……. and empower citizens'.[1079] There is a risk, they caution, that the absence of 'human rights catalogues in any of the RECs, (…….) disparate approaches to the incorporation of human rights into the mandate of RECs courts (may result in) varying degrees of protection (sub-regionally as opposed to a) common African human rights standard'[1080] thus calling into question the effectiveness of RECs as human rights mechanisms. The developments made in the EAC, in terms of setting human right standards, strongly suggest that progress is being made in the right direction. Although there is no enforced human rights catalogue, there is a treaty which is founded on human rights principles and there is a Court that appears to be continually circumventing obstacles in order to meet its mandate. This on one hand shows human rights protection is available in the EACJ, but on the other hand indicates a reluctance by the partner states to operationalise the Court's human rights jurisdiction, possibly to avoid it becoming an exclusive human rights court.

Conclusion

117 The conclusion reached is that the EAC offers indigenous communities an alternative to the regional and domestic mechanisms to present their indigenous communities' land rights claims. The conclusion would have been different if the Treaty had remained as it was under the East African Co-operation as that was

[1079] Murungi and Gallinetti (n 166), 129.
[1080] ibid.

silent on human rights. However, the current Treaty is not. The provisions under Articles 3, 5, 7, 8, 111, 112, 114 and 120 could be relied upon in indigenous land rights claims. Equally, the East African Community Human and Peoples' Human Rights Bill, the Common Market Protocol, the Protocol on Good Governance and the Plan of Action on Promotion and Protection of Human Rights in East Africa are all strong indicators that the EAC has awareness of human rights issues and is willing to be people-focused. The East African Community Bill of Rights, an instrument proposed by East African NGOs further shows the sub-regional zeal for human rights protection. For indigenous communities, raising of their standards of living and improving the quality of their lives, would mean addressing their land rights claims i.e. protecting, respecting and promoting them. The provisions in the Charter and these draft instruments or Protocols certainly make that possible.

118 The fact that the EAC has adopted a policy on persons with disabilities and a Gender and Equality Bill, both with the aim of meeting its obligations under Article 120 to develop and adopt a common approach towards disadvantaged and marginalised groups, not only creates a hope and expectation in indigenous communities, but is reason to push for similar advances to be made in respect of their land rights. Similarly, SADC's Protocol on Forestry shows that such issues affect more than the one REC and thus call for a sub-regional response; and expose the inadequacies of the 2015 East African Community Forests Management and Protection Bill in its failure to capture forest communities.

119 In respect of bringing land rights claims to the EACJ, it is accepted that the current restriction to the EACJ's jurisdiction under Article 27(2) may be problematic. Plain reading of this provision suggests that until the said Protocol is concluded the EACJ does not have jurisdiction to solely determine indigenous communities' land rights issues framed in human rights terms. Some favour clarification on this issue in the law or alternatively by way of a Protocol in pursuance of Article 27(2).[1081] However, the fact that the court has proceeded to

[1081] Murungi and Gallinetti (n 166).

determine various human rights related cases suggests that it has not allowed the delayed operationalisation of the Protocol to perturb its functions and has focused, instead, and rightly so, on its mandate as arising from Articles 23(1) and 27(1) of the Treaty. The fact that the Maasai community from Tanzania has pursued an application to the EACJ relating to their land rights will test whether the EACJ is a suitable alternative forum to the African Charter forum for such cases. Those who litigate on indigenous communities' land rights in the regional forum consider that it has features which make it so and this thesis agrees.

120 Whether in fact cases of this nature are likely to be complied with by Kenya and other partner states is a different matter altogether and is likely to need a similar approach to implementation as proposed in Chapter 3. This chapter sought to examine whether the EAC presents indigenous communities with an alternative mechanism for recognition, promotion and protection of their land rights. It seems to.

Chapter 5: Impact of International development funding on indigenous communities' land rights: Case Studying the IDA funded Natural Resource Management Project[1082]

Introduction[1083]

1 It is said that many development projects, not just those of the World Bank (the Bank), lead to 'dispossession of land, loss of resources, diminished livelihoods and environment degradation'.[1084] In 2001 the World Bank funded the Bujagali Hydroelectric power project. It was alleged that during this project the Bank had violated its own policies on indigenous communities, involuntary resettlement and environmental impact assessments. There were also corruption allegations in respect of the project. The project was temporarily stayed but restarted whilst investigations into the corruption were ongoing. During this time the Bank also increased the original loan.[1085]

2 And from what its staff say, the Bank seems to expect non-compliance from governments but will rarely take any enforcement action.[1086] Analysis of a plethora of development projects funded by the Bank between 2009 to 2013 revealed that the Bank injected US $50 billion in financing for projects said to pose 'the highest risk for irreversible or unprecedented social or environmental impacts'[1087] which had inevitably caused 'displacement of millions of people, evictions from homes, dispossession of lands and … damage to their property'.[1088]

[1082] Project P095050.

[1083] The majority of the project-related documents referred to in this Chapter will be cited by the titles given by the World Bank in the project documentation and not necessarily in OSCOLA referencing style otherwise used in the rest of the thesis. All the documents referred to can be found here: The World Bank, 'Kenya - Natural Resource Management Project' (The World Bank)<http://projects.worldbank.org/P095050/kenya-natural-resource-management-project?lang=en> accessed 24 January 2019.

[1084] C Daniel and others, 'Glass Half Full? The State of Accountability in Development Finance' (*SOMO*, January 2016) < https://www.ciel.org/wp-content/uploads/2016/01/IAM_DEF_WEB.pdf> (accessed 4 January 2019).

[1085] Weaver (n 160).

[1086] Sasha Chavkin and others, 'Investigation: Evicted and Abandoned: How The World Bank Broke Its Promise To Protect The Poor' *Premium Times* (Nigeria, 19 April 2015) <https://www.premiumtimesng.com/news/headlines/181677-investigation-evicted-and-abandoned-how-the-world-bank-broke-its-promise-to-protect-the-poor.html> accessed 11 January 2019; See also Sasha Chavkin and Mark Anderson, 'The World Bank Breaks its own Rules as Millions Lose Land and Livelihoods' *The Guardian* (London, 16 April 2015)<https://www.theguardian.com/global-development/2015/apr/16/world-bank-breaks-own-rules-indigenous-people-forced-off-land >accessed 26 January 2019.

[1087] ibid.

[1088] ibid.

The analysis further showed that the Bank fails to properly assess projects in advance to ensure that 'communities are protected…continues to do business with governments that have abused their citizens, sending a signal that borrowers have little to fear if they violate the Bank's rules'.[1089]

3 In this chapter this thesis wishes to examine the International Development Association (IDA) funded Natural Resource Management Project (P095050). This was a project financed under the auspices of the World Bank Group's Investment Project Financing (IPF). An analysis of this project is important as the project is an example of the numerous factors at play during development projects affecting indigenous communities including the Bank's and, in this case, the Kenyan government's hypocrisy.

4 The underlying question is whether by providing development financing for land, environmental and natural resources management-related projects, international development organisations like the Bank whose function includes, offering development assistance to developing nations through the avenue of funding agreements, safeguard policies or frameworks, can, in doing so, assist indigenous communities in Kenya to realise their land rights. As the focus of this research is on legal avenues, this chapter considers that as development aid frameworks are part of a wider body of international law; and the funding agreements are essentially contracts between states and multilateral development organisations, based on conditional terms which if violated can lead to termination of the agreement, the development project mechanism has quasi-legal strands which make it suitable for examination in this research.

5 As the safeguard policies are there to ensure that the projects do not have- or to minimize or mitigate against- adverse impacts on the environment and the people concerned, a process which requires an understanding, in the case of indigenous communities of their land rights, this potentially creates an avenue for recognition of those rights. Furthermore these policies provide an avenue through which

[1089] ibid.

grievances can be raised where adverse impact is complained of, which bears some semblance with bringing of grievances using courts, minus of course the remedial orders that courts can make. This potentially offers an avenue for land rights grievances to be aired and vindicated.

6 In addition, Kenya is a sovereign state with its own laws. The fact that it has been and continues to be a beneficiary of development funding from the Bank and other agencies, does not mean it has no say on development. It does, but as history and hypocrisy would have it, this is not as straightforward as it seems. Ideally however, where the Bank and other agencies fail to protect the land rights of indigenous communities, Kenya's first priority and loyalty should lie with its people.

7 It suffices to say at the outset that the project was not successful and resulted in grievances being raised by two indigenous communities for violation of their land rights which the Bank ultimately upheld. To understand what happened, this chapter will take the following form. First, there will be a discussion about the evolution of the Bank's development agenda which will lead to a discussion on hypocrisy i.e. the gap between the Bank's rhetoric and reality followed then by an analysis of the project. This will take the form of an examination of the project's components; a synopsis of the bank policies that were said to apply and what they entailed; the agreements entered into between the Bank, the Government of Kenya and its two agencies; the grievances raised by indigenous communities; a discussion on the project's frameworks and what actually happened, during the project, that led to the failure of the project; and finally the crux of the matter- indigenous communities' unmet needs will be discussed.

8 This chapter argues that development projects that impact on indigenous communities are inevitably going to require contending with their land rights question; and where that is done, it is too complex an issue to be undertaken superficially or naively and that in fact there are other factors which may be in play that overshadow the opportunities such projects present.

Concept of development

9 The marginalisation of indigenous communities, caused by their need to preserve, from assimilation, their unique culture and identity as indigenous peoples, which is centrally based on their relationship with land, has meant that they have become economically unfree or so poor that they are unable to participate in economic interchange relating to their land rights, which in turn results in violation of other freedoms. For real development to occur it needs to respect human rights and be 'shaped by the people it is designed to benefit.'[1090] The African Commission and arguments made by the Endorois and Ogiek communities in their regional cases are instructive on what development for indigenous communities in the context of their land rights constitutes.

10 Article 20 of the African Charter: the right to self-determination of political status and development, has been interpreted by these regional bodies to encompass for indigenous communities the following. Firstly, their freedom from discrimination in all spheres of economic, social and cultural life;[1091] secondly, that states obtain their informed consent prior to any exploitation of the resources on their ancestral lands; thirdly, that they benefit from any such exploitation;[1092] fourthly, that their environmental rights are respected by both the government and non-state parties;[1093] fifthly, that their cultural identity is safeguarded;[1094] and lastly, that they benefit from increased participation in governance.[1095] Article 21: the right to free disposal of wealth and natural resources, was delineated by the Endorois in their case as: 'liberty of action';[1096] access to increased capabilities;[1097] unfettered access and right to dispose of natural resources;[1098] increase in

[1090] C Daniel and others (n 1084).
[1091] Principles and Guidelines (n 630) part III, para 42.
[1092] ibid, para 44.
[1093] ibid.
[1094] ibid, para 45.
[1095] ibid, para 46.
[1096] Endorois case (n 114), para 128.
[1097] ibid, para 127.
[1098] ibid, paras 129.

wellbeing;[1099] effective consultation;[1100] not being subjected to 'coercive and intimidating activity;[1101] meaningful participation and freely given consent;[1102] and sharing in benefits.[1103] Article 22: the right to economic, social and cultural development, was delineated by the Ogiek as encompassing the community's right to determine and develop their own priorities and strategies; the right to be involved in projects impacting on their existence; and the right to take charge of the administration of such projects themselves through their own infrastructures.[1104]

What is the Bank's agenda?

11 The Bank has several agendas it would seem: market liberalization, rule of law, protection of indigenous communities and respect for human rights, which will be discussed here.

12 Its original remit as set out in the Articles of Agreement of the Bretton Woods Agreement bodies (the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF)), is capital investment, promotion of private foreign investment and supplementing of this on suitable conditions, financing for productive purposes, promotion of international trade; and arranging of or guaranteeing of loans.[1105] However, IDA was established with a libertarian remit. Its purpose at the outset was to assist less developed nations who were unable to obtain funding or meet loan requirements set by the IBRD or the IMF by offering them loans on concessional terms or 'soft-loans'.[1106]

[1099] ibid.
[1100] ibid, para 130.
[1101] ibid, para 134.
[1102] ibid.
[1103] ibid, para 135.
[1104] ibid, para 202.
[1105] See the original remit, Bretton Woods Agreements Act 1945 (UK), Article 1, Text of Articles of Agreement of the International Bank for Reconstruction and Development, Schedule, Part II.
[1106] International Development Association, 'History' (International Development Association) <http://ida.worldbank.org/about/history> accessed 20 May 2016.

13 The International Development Association (IDA) presently has 52 contributor countries[1107] and 77 countries eligible for funding. Kenya is eligible for funding.[1108] It is classed as a lower middle income country.[1109] Eligibility is dependent on a country's relative poverty based on gross national income per capita;[1110] how the country has managed its economy and other IDA projects.[1111] The Bank, and IDA for that matter, is therefore not seeking simply to give money away, it wants a return on its investment. The NRMP was a project funded under the Bank's Investment Project Financing which takes the form of 'provision of loans, credits or grants financed by the Bank (including IBRD and IDA) from its resources or from trust funds by other donors and administered by the Bank, or a combination of these'.[1112] For the NRMP, IDA agreed to provide credit, amounting to 46 million Special Drawing Rights,[1113] which is US $68.5 million.[1114] IDA credits do not accrue interest, only annual service and commitment charges.[1115] However, they are meant to be paid back.

14 Therefore it could be argued that the Bank's agenda is a neoliberal one. For neoliberalism to exist: 'the conditions allowing for a free market must be won politically, and the state must be reengineered to support the free market on an

[1107] International Development Association, 'Contributor Countries' (International Development Association) <http://ida.worldbank.org/about/contributor-countries> accessed 6 April 2016.
[1108] International Development Association, 'IDA Graduates' (International Development Association) <http://ida.worldbank.org/about/ida-graduates >accessed 12 May 2016.
[1109] Amy Copley, 'Kenya Rebases GDP and Becomes Ninth-Largest African Economy' (Brookings 3 October 2014)< https://www.brookings.edu/blog/africa-in-focus/2014/10/03/africa-in-the-news-kenya-becomes-a-middle-income-country-mo-ibrahim-index-released-south-sudan-peace-talks-yield-promise/> accessed 23 January 2019.
[1110] International Development Association 'Borrowing Countries' (International Development Association) <http://ida.worldbank.org/about/borrowing-countries> accessed 12 May 2016.
[1111] International Development Association, 'The World Bank's Fund for the poorest' (International Development Association, February 2016)<http://ida.worldbank.org/sites/default/files/images/fund-for-the-poorest.pdf> accessed 15 May 2016.
[1112] The World Bank, 'Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures' (Operations Policy and Country Services, 1 October 2012)< http://documents.worldbank.org/curated/en/777241468331877549/pdf/730380BR0R20120C0disclosed010030120.pdf> accessed 25 January 2019.
[1113] Financing Agreement (Natural Resource Management Project) between Republic of Kenya and International Development Association, 7 May 2017, para 2.01.
[1114] The World Bank IBRD-IDA, 'Kenya: Natural Resource Management Project' (The World Bank IBRD-IDA, 27 March 2016) <http://www.worldbank.org/en/news/loans-credits/2006/03/27/kenya-natural-resource-management-project>accessed 12 January 2019.
[1115] The World Bank, 'OP 3.10 - Financial Terms and Conditions of IBRD Loans, IBRD Hedging Products, and IDA Credits' (The World Bank, June 2003).

ongoing basis', thereby making 'the only social end …. the maintenance of the market itself'.[1116] It is said that upon independence, Kenya:

> 'received the enthusiastic support of the World Bank (which) ….50-odd years ago ……was an imprimatur that was eagerly sought after, greatly valued when received and taken to mean that one was on the right track. There was little, if any dissent, from the Bank's approval which also meant the Bank's financial support and financial support from bilateral donors'.[1117]

15 As discussed in the introductory chapter, the World Bank's policy in respect of Kenya, from the outset, was promotion of market liberalisation. Law did not feature anywhere in the Bank's thinking from the '60s to '90s and even in the 90s when the Bank published its policies on urban planning, law was omitted. [1118] However, because of two coinciding global developments: the end of the Cold War and African countries' agitation for more democracy, which in Kenya's case was marked by it having its first multiparty elections in 1992, the Bank's position changed.[1119] Notably also, in respect of land matters, up until that point the Bank had been promoting 'land titling and registration' at the expense of customary tenure,[1120] which it had considered to be the most efficient way to maintain market liberalization.[1121]

16 However, these global changes led to its position changing in the early '90s and a changed agenda, to one of rule of law reforms. The Bank 'came to the view that in some circumstances customary tenure did not inhibit agricultural productivity'.[1122] It therefore took a relaxed position in respect of the African states, acknowledging that it would take some time for them to replicate the

[1116] Metcalf (n 41).
[1117] McAuslan (n 15).
[1118] ibid.
[1119] ibid.
[1120] Manji (n 32).
[1121] ibid.
[1122] ibid.

'western concept of (land) ownership'.[1123] To deal with, or even control the ongoing democratisation in Africa, the World Bank and the IMF were compelled to introduce 'structural adjustment to African economies' which brought with them rule of law reforms.[1124] As noted in chapter 1 in respect of land, the Bank's rule of law land reforms saw the Bank and other international donors invest millions towards the 'drafting of national policies, the appointment of commissions of inquiry and the enactment of new land laws'.[1125]

17 The Bank also has a human rights agenda focused on indigenous communities. In or around 1992, that the Bank revised its policy on indigenous peoples, thereby extending the understanding of those communities from 'isolated and unacculturated tribal groups affected by development projects' as set out in its 1982 policy to communities seeking to maintain distinct social and cultural identities with close relationships to their ancestral lands; and as being 'susceptible to being disadvantaged in the development process.'[1126] In July 2005 the Bank published OP 4.10 its policy on indigenous peoples. The Bank's position in that policy was clear. It supported their existence and protection of their ancestral lands. However, also in 2005, the Forest Peoples Programme produced a report detailing indigenous peoples' experience of participation with the Bank.[1127] Indigenous communities said that the Bank routinely failed to involve them in processes, projects and programmes concerning them; that the Bank commonly disregarded their land rights and failed to obtain their free, prior and informed consent over land issues; that 'meaningful indigenous participation remains absent or superficial in the Bank's adjustment and programmatic loans…..that participation is always low grade and ……projects are still experienced as top-down interventions'.[1128]

[1123] ibid.
[1124] McAuslan (n 15).
[1125] Manji (n 32).
[1126] The World Bank 'The World Bank and Indigenous Peoples Policy and Program Initiatives' (The World Bank)<http://web.worldbank.org/archive/website00524/WEB/PDF/IPPOLICY.PDF>accessed 10 October 2019.
[1127] Tony Griffiths, 'Indigenous Peoples and the World Bank: experiences with participation' (Forest Peoples Programme 2005).
[1128] ibid, 1.

18 The Bank now has a human rights agenda as well. In 2017 the Bank replaced a number of its policies including its policy on indigenous communities with the Environmental and Social Framework (ESF).[1129] This comprises the Bank's vision for sustainable development, its policy for investment project financing; and the environmental and social standards which apply to both the borrowing nation and the project.[1130] The Bank acknowledges in this framework that it cannot operate in a human rights-lite vacuum. Its Vision for Sustainable Development set out in the ESF states that the Bank's activities will 'support the realization of human rights expressed in the Universal Declaration of Human Rights (and) through projects it finances….(it) seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments.'[1131]

19 In 2015 the International Finance Corporation (IFC), the private-arm of the Bank was sued by a group of Indian fishermen and farmers on grounds that the Tata Mundra power plant project it funded 'ha(d) severely damaged the local environment and (their) traditional ways of life'.[1132] They claim that the Bank provided a US $450million loan for the project knowing it posed a high risk of harm to the community if things went wrong but it failed to put safeguards in place to mitigate against those risks.[1133] IFC claimed it had absolute immunity against such claims. Although the lower US courts rejected the claim on immunity grounds, in February 2019 the US Supreme Court found that it did not have absolute immunity.[1134] In 2017 another claim[1135] was brought by a peasant community from Honduras against the IFC for funding projects which have resulted in

[1129] The World Bank, 'The World Bank Environmental and Social Framework' (International Bank for Reconstruction and Development/The World Bank 2017).
[1130] ibid.
[1131] Ibid.
[1132] Claire Provost and Mark Kennard, 'World Bank lending arm sees off lawsuit by Indian fishermen' *The Guardian* (London 30 March 2016) <https://www.theguardian.com/global-development/2016/mar/30/world-bank-lending-arm-ifc-sees-off-lawsuit-by-indian-fishermen-power-plant> accessed 12 January 2019.
[1133] Earth Rights International, 'Budha Ismail Jam, et al v. IFC' (Earth Rights International)<https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/>accessed 12 January 2019.
[1134] *Budha Ismail Jam et al v International Finance Corporation*, No 17-1011 (Supreme Court of the United States).
[1135] *Juana Doe et al v IFC Asset Management Company*, LLC, C.A. No. 17-1494-VAC-SRF (District Court for the District of Delaware).

'murders, torture, assault, battery, trespass, unjust enrichment and other acts of aggression'.[1136] The community accused the IFC of 'profit-making from land allegedly acquired by 'fraud, coercion, threat of violence, or actual violence'.[1137] Amongst IFC's arguments was that it had absolute immunity and if not, this was not the kind of case where it could waive immunity.[1138] Although the Court found that it was immune from suit, relying on the lower Courts' decision in Jam *at el*, in view of the US Supreme Court's decision in that case, that decision may be overturned.

20 So why the incoherence? The answer seems to lie in hypocrisy. Catherine Weaver states that 'hypocrisy is in essence the persistent failure of the Bank, as a collective entity, to act in accordance with its own ideals.'[1139] This, in her view, is what explains 'the mainstreaming gaps between what the Bank says are its priorities in alleviation of poverty and in socioeconomic development and what is actually does to pursue these goals'.[1140] That is what explains the Bujagali project failings which:

> 'to the most of its unforgiving critics…….exemplifies the Jekyll and Hyde character of the Bank, which preaches sustainable, participatory, and accountable development while, in practice, doing whatever is necessary to get big loans approved and out the door as quickly as possible.'[1141]

21 And as to why the hypocrisy arises, she opines that the 'sociological theories share the assumption that':

[1136] Claire Provost, 'Farmers Sue World Bank Lending Arm Over Alleged Violence In Honduras' *The Guardian* (London, 8 March 2017)<Https://Www.Theguardian.Com/Global-Development/2017/Mar/08/Farmers-Sue-World-Bank-Lending-Arm-Ifc-Over-Alleged-Violence-In-Honduras>accessed 12 January 2019.
[1137] ibid.
[1138] Earth Rights International, 'Juana Doe et al. v. IFC' (Earth Rights International)<https://earthrights.org/case/juana-doe-et-al-v-ifc/#documentsff69-1a905f26-f4b6>accessed 12 January 2019.
[1139] Weaver (n 160).
[1140] ibid.
[1141] ibid.

> 'Organizations depend upon their external environments for critical resources, including both material (financial) support and conferred legitimacy. An organisation must appear responsive to environmental demands in order to survive. Hypocrisy arises when these demands clash and the organization is compelled to separate talk from action so as to reconcile conflicting societal norms to placate multiple political masters with heterogeneous preferences'.[1142]

22 This, then must be the story behind the NRMP.

The Natural Resource Management Project (NRMP)

23 The project was approved on 27 March 2007.[1143] It officially commenced on 7 May 2007[1144] which was marked by the signing of a financing agreement between the Government of Kenya (GoK) and the IDA, as well as two project agreements between the IDA and the project's two implementing agencies: the National Irrigation Board (NIB) and the Water Resources Management Authority (WRMA) and was set to conclude on 30 June 2013.[1145]

Project components

24 The NMRP project had 4 components:

- Component 1, water resource management. This was to encapsulate: a) legal and institutional strengthening and identification of priority investments in the South-east Aberdares and West Mt Kenya catchment areas; b) Catchment investments, or alternatively, management of investments in the South-east Aberdares and West Mt Kenya catchment areas, strengthening the information base on them, decision-making, enforcement of allocations and investment in storage infrastructure and rehabilitation of existing structures; and c) irrigation reform- reforming the

[1142] ibid.
[1143] The World Bank, 'Project Profile: Natural Resource Management Project' (92518, The World Bank 2 April 2007)<http://documents.worldbank.org/curated/en/534961468044080553/pdf/9251802007Apr20t0Box0385367B0PUBLIC.pdf> 12 July 2016.
[1144] The date the financing and project agreements came into effect.
[1145] Project Profile (n 1143).

policy and legal framework around irrigation and increasing the capacity to manage irrigation schemes.

- Component 2: Management of forest resources – this was to take the form of assisting the Ministry of Environment and National Resource Management in creating the regulatory and institutional framework proposed under the Forest Bill; to undertake investments in forests to coincide with management of water resources; and to delimit land rights 'by requirements for management of forests'.[1146] Three activities were proposed under this component: a) forest sector institutional reform - including supporting the Kenya Forestry Service, which was to be established under the Forest Act; engaging private companies and communities in forest management; establishment of a certification scheme for forest products; and complete a forest inventory; b) indigenous forest protection- to find and develop approaches to protect forests including 'identifying and evaluating promising community based activities'; [1147] and c) revitalising forest industries - through encouraging community and private sector management of plantations and farm forestry.'

- Component 3: Assistance to communities for co-management- this was to be fulfilled through a 'community-driven development' approach, allowing community participation and control over planning decisions and investment resources.

- Component 4: Monitoring, management and evaluation- success of the NRMP was to be assessed by 'capturing both the changing status of the natural resources (water, forests and biodiversity) and welfare of participating communities'.[1148]

25 The NRMP's development goal or objective was to enhance 'institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks such as drought, floods and water shortage in river catchments and improve the livelihoods of communities participating in the co-management of water and forest-based resources'.[1149]

[1146] The World Bank, 'Project Information Document (PID) Concept Stage' (Report No.: AB1588, The World Bank 20 October 2005) <http://documents.worldbank.org/curated/en/696841468271848001/pdf/NRM0PID010concept0stage.pdf>accessed 15 July 2016.
[1147] ibid.
[1148] ibid.
[1149] ibid.

26 It is important to underscore that these components were not devised in isolation. In 2004, the Government of Kenya and the World Bank Group agreed a Country Assistance Strategy 2004-2007 which included a strategy to reduce vulnerability and strengthen communities, the main objective being to implement community-driven approaches to development.[1150] There was also in place a National Development Plan 2002-2008 which focused on environment and national resources management for which it was hoped the government could obtain assistance from development partners to 'guide them into supporting affected and threatened communities'.[1151] In addition in 2006, Kenya had also promulgated its own development blueprint- Vision 2030,[1152] constituting Kenya's development plan for the years 2008 to 2030. It came into force a few months after the project began. It seeks to make Kenya a 'middle-income country providing a high quality life to all its citizens by the year 2030'[1153] and is founded on three pillars: economic, social and political.[1154] These promote poverty reduction, creation of a public service that is 'more citizen focused and results-oriented'[1155] by instilling 'transparency and accountability';[1156] and seek to promote land reform and in this respect, recognise the key role that land plays in giving effect to socio-economic and political rights.[1157]

Bank policies applied

27 The NRMP was classified as a Category B project[1158] i.e. a project whose potential adverse environmental impact was considered to be site-specific, and on human

[1150] The World Bank Group, 'Kenya Country Assistance Strategy Progress Report 2004-2008' (The World Bank Group 2004)<http://siteresources.worldbank.org/KENYAEXTN/Resources/Kenya_CASPR.pdf > accessed 6 September 2016.
[1151] Republic of Kenya Ministry of Environment and Natural Resources, 'Second Implementation Report on the Implementation of the United Nations Convention to Combat Desertification' (National Environment Secretariat April 2002).
[1152] Government of Kenya, 'Vision 2030' (Government of Kenya 2007) 2.
[1153] ibid, 1.
[1154] ibid.
[1155] ibid, 8.
[1156] ibid.
[1157] ibid, 9.
[1158] The World Bank, 'Environmental and Social Management Framework for the Western Kenya Community-driven Development and Flood Mitigation Project, and the Natural Resources Management Project Final Report' November 2006 (E1520, Environmental Resources Management, November 2016)< http://documents.worldbank.org/curated/en/765061468272355570/pdf/E1520.pdf> accessed 8 August 2017.

populations or environmentally important areas. This being the case it was envisaged that the NRMP would trigger the following safeguard policies: i) OP 4.10 on Indigenous Peoples; ii) OP 4.12 on Involuntary Resettlement; iii) OP 4.36 on Forests; and iv) OP 4.04 on Natural Habitats.[1159]

28 Projects likely to affect indigenous communities triggered Operation Policy on Indigenous Peoples OP4.10. The Policy defined indigenous peoples as peoples who: self-identify as members of distinct indigenous cultural groups and this distinct identity is recognised by others; communities with attachment to distinct geographical areas, ancestral lands in the project area and attachment to natural resources in those areas; communities that have maintained traditional, cultural, economic, social and political institutions,[1160] and with 'an indigenous language, often different from the official language of the country or region'.[1161] This understanding of indigenous communities is similar to that of ILO Convention, UNDRIP and also in some respects to the definition of marginalised communities in Article 260 of the Kenyan constitution. Although the NRMP pre-dated the constitution, and IDA's understanding of the term was not reflected in any domestic legislation, the understanding the GoK would have been required to adopt is that under OP4.10.

29 Projects likely to lead to the resettlement of affected persons, at the relevant time, triggered Operation Policy on Involuntary Resettlement, OP4.12. Projects likely to affect the health and quality of forests, the livelihoods of forest-dependent communities; and which had potential to impact on forest management, protection and utilisation triggered Operation Policy on Forests, OP4.36.[1162] And those which necessitated support for the protection, maintenance and rehabilitation of natural habitats triggered Operational Policy on Natural Habitats, OP4.04.[1163] The NRMP triggered all these policies.

[1159] The World Bank, 'Operation Manual OP 10.00- Investment Project Financing' (The World Bank April 2013), para 8.
[1160] The World Bank 'Operational Manual OP 4.10- Indigenous Peoples' (The World Bank July 2015), para 4.
[1161] ibid.
[1162] The World Bank, 'Operational Manual OP 4.36 - Forests' (The World Bank November 2002), para 3.
[1163] The World Bank, 'Operational Manual OP 4.04 - Natural Habitats' (The World Bank June 2001).

30 The Bank also had a policy on environmental assessment OP/BP4.01. An environmental assessment was required to assess whether the project was environmentally sound and sustainable.[1164] An environmental assessment entailed evaluation of environmental risks and impacts of the project; examination of project alternatives; identification of 'ways of improving project selection, siting, planning, design, and implementation by preventing, minimizing, mitigating, or compensating for adverse environmental impacts and enhancing positive impacts';[1165] and facilitated 'mitigating and managing (of) adverse environmental impacts throughout project implementation.'[1166] The onus for carrying out an environmental assessment of the project lay with the GoK.[1167]

31 In most cases where a policy is triggered, this necessitates the preparation of a corresponding framework. For the NRMP, the following frameworks were required: an Indigenous Peoples' Policy Framework (IPPF), an Environmental and Social Management Framework (ESMF) and a Resettlement Policy Framework (RPF).

32 The GoK and the two implementing agencies, the NIB and the WRMA were therefore bound in their respective agreements with IDA not only to the applicable/triggered policies but corresponding frameworks as well. This is confirmed in the respective financing agreements of 7 May 2007.

<u>The Agreements</u>

i) With the Government of Kenya

33 In the Financing Agreement between the GoK and IDA, IDA agreed to provide funding for the project. The agreement confirmed the GoK's commitment to the

[1164] The World Bank, 'Operational Manual OP 4.01 - Environmental Assessment' (The World Bank January 1999), para 1.
[1165] ibid, para 2.
[1166] ibid.
[1167] ibid, para 3.

objectives of the project.[1168] The Agreement provided that 4 conditions of effectiveness applied, failing which the agreement could be terminated: i) that the GoK and its project implementing entities execute subsidiary agreements satisfactory to the Association; ii) that the Gok adopt a project implementation plan in form and substance satisfactory to the IDA; iii) that the GoK adopt an institutional risk based management framework satisfactory to the IDA; and iv) that the GoK appoint two project coordinators, one for forest resources and the other for water resources and a procurement specialist for both the forest and water related Ministries, with qualifications satisfactory to the IDA.[1169]

34 Schedule 1 to this Agreement set out the project objectives and its four components. Commitment 4, in the Agreement, contained two sub-components specific to indigenous peoples, which require highlighting, namely: 'a) developing a national resettlement policy including a communications strategy on resettlement and the rights of indigenous peoples; and b) supporting the effective implementation of the Indigenous Peoples Planning Framework.'[1170] Schedule 2 to the Agreement provided more guidance on this. It provided that the GoK, to ensure the safeguarding of the rights of indigenous peoples', displaced persons and protection of the environment, would implement the Environment Management and Social Framework, Resettlement Policy Framework, Indigenous Peoples' Policy Framework and all relevant national legal and policy requirements.[1171] The Agreement also contained an Appendix which defined certain terms. Of note are: "Indigenous Peoples" defined as 'distinct, vulnerable, social and cultural groups that may be identified pursuant to the studies outlined in the IPPF'; [1172] and "IPPF" was defined as the 'instrument outlining the basis for identifying indigenous peoples and their rights'.[1173]

[1168] Financing Agreement (n 1113), para 3.01.
[1169] ibid, para 5.01.
[1170] ibid, Part 4, Schedule 1, Project Description.
[1171] ibid, Para 4, Schedule 2, Project Execution.
[1172] ibid.
[1173] ibid, Appendix.

35 The effect of the Agreement was that if there was a breach of the Indigenous Peoples Planning Framework (IPPF), the Environmental and Social Management Framework (ESMF) or Resettlement Policy Framework (RPF), and a failure to carry out what was being proposed in Schedules 1 and 2, the agreement would be terminated.

36 As the Agreement was not terminated, and the project run its full course, it is either the case that the Bank remained satisfied that the GoK's fulfilment of the stipulated conditions was satisfactory or if it was not so satisfied, the Bank chose not to discharge the Agreement. An examination of the project's various stages, and the upholding of the grievances made by affected communities, and the fact that in 2009 the Bank found the project to be moderately unsatisfactory,[1174] as will be seen later, suggests that the Bank made the latter choice.

ii) With the two implementing agencies

37 The Bank's project agreement with the NIB confirmed that the NIB was an implementing agency and would carry out the following activities: 'Supporting the policy, legal and institutional reforms of the irrigation and drainage sector including a review of the roles and functions of the Ministry of Water and the National Irrigation Board (and) constructing and rehabilitating agreed irrigation schemes.'[1175] The Agreement required the NIB to, in implementation of its role, comply with the ESMF, IPPF and RPF.[1176]

[1174] The World Bank, 'Kenya- Natural Resource Management Project Restructuring Paper' (Report No. 62490-KE, The World Bank 10 June 2011) <http://documents.worldbank.org/curated/en/509351468272106448/pdf/624900PJPR0P090e0only0900BOX361487B.pdf> accessed 5 May 2016.
[1175] ibid, Part 1, Project Description.
[1176] The World Bank 'Project Agreement (Natural Resource Management Project) International Development Agency and the National Irrigation Board' (The World Bank 7 May 2007)< http://documents.worldbank.org/curated/en/544091468048829112/pdf/PA1NIB01conformed1.pdf> accessed 15 July 2016, Schedule, Execution of the Project Implementing Entity's Respective Part of the Project.

38 The project agreement with the Water Resources Management Authority (WRMA) similarly confirmed that the Authority was an implementing agency with responsibility for the following: 'Strengthening the capacity of the Water Resources Management Authority (WRMA); (b) Promoting an integrated approach in the management of the Upper Tana River catchment area; and supporting the preparation and implementation of community driven development sub-projects in the Thika, Sagana and Thiba River Basins which focus on livelihoods enhancing interventions and conservation of the natural resource base.' [1177] Similarly the Authority was required to carry out its part of the agreement in accordance with the ESMF, IPPF and the RPF.[1178]

The Grievances

39 There were two grievances brought under the NRMP.

i) 1st Grievance – Sengwer community

40 On 14 January 2013 representatives of the Sengwer community in the Kapolet Forest (in Trans-Nzoia District), Talau and Kaipos (in West Pokot District) and Embobut Forest (in Marakwet District) submitted a request to the Bank's Inspection Panel for investigation into the NRMP. They complained that: i) their houses had been burnt and their property destructed in Embobut forest; ii) that members of their community had been arrested from the Kapolet forest, detained and arraigned following charges of illegal cultivation of forests without permission- this they noted was their ancestral land; iii) that a female member of the community had been shot by forest guards during an attempt to arrest members of the community and had been left for dead; iv) that the project had been restructured and amongst the changes was reference to them as Vulnerable and Marginalised Groups rather than indigenous peoples, which had been done without their free, prior and informed consent thus violating their rights under

[1177] ibid, Schedule, para 2.01.
[1178] ibid, Schedule, para 5.

international law and the Bank's policies and frameworks; v) they had been subjected to threats and intimidation by the District Commissioner of the Trans Nzoia County for objecting to planting of trees; and vi) the GoK had made plans to resettle them without free, prior and informed consultations contrary to OP4.12 on Involuntary Resettlement.[1179]

41 The community asked for the following redress: i) recognition, respect and protection of their rights as indigenous forest communities to live in the forests and carry out livelihood activities that promote sustainable conservation and protection of natural resources; ii) a review of frameworks that discriminated against their right to live within their ancestral homes in the forests; iii) compensation for houses and property burnt in Embobut Forest since the adoption of the NRMP in 2007; iv) compensation for community members arrested in Kapolet Forest and those subject to court proceedings; v) compensation for the shooting of the female community member by forest guards; vi) that the GoK revert to using the term indigenous peoples as it had done in the formulation of the Indigenous Peoples' Planning Framework (IPPF); vii) transfer of the zonal manager who they believed had been responsible for the arrest of community members and shooting of the woman in Kapolet forest; and viii) suspension of further REDD funding until the alleged 'violations, injustices, concerns and fears are addressed'.[1180]

ii) 2nd grievance- Brought by the Cherangany indigenous peoples' community

42 On 1 August 2013, the Inspection Panel received a request for inspection from the Cherangany indigenous peoples' community living in the Cherangany Hills. The community contended that as they had not been recognised as indigenous peoples, they had not been recognised as the rightful owners of the Cherangany

[1179] The World Bank 'The Inspection Panel, Report and Recommendation Kenya: Natural Resource Management Project (P095050)' (Report No. 77959-KE The Inspection Panel, 29 May 2013)< http://documents.worldbank.org/curated/en/305841468276357879/pdf/779590IPR0P09500lPN0REQUEST0RQ01302.pdf> accessed 12 September 2016.
[1180] ibid.

Hills, as a result of which they had lost their identity, territory, social and cultural status.[1181] They claimed that this had exposed them to 'unfair competition and conflicts which might lead to internal friction and tribal war'[1182] from other tribes.[1183] Similar to the Sengwer they contended that use of the term Vulnerable and Marginalised Groups rather than indigenous peoples was damaging and that they had been evicted without free, prior and informed consultation.[1184]

Disjointedness between the framework, expectations and the reality

43 The failure to adhere to agreements is likely to lead to grievances, as was the case with the NRMP. This thesis argues that where a proposed development project is likely to impact on indigenous communities' land rights, the Government, as the borrower should properly communicate the anticipated impact to the communities concerned before the application is submitted; should make reasonable efforts to ensure that the communities' free, prior and informed consent to the project is obtained; and should set these issues out clearly in the project proposal. However, even where it fails to do so the development organisation should have a framework that operates as a backstop, such that the Government's failure to impute these rights is mitigated.

44 This means that the organisation needs to discharge its own duty to screen the proposed project area(s) to determine the presence of indigenous peoples; to assess the social impact of a project on the communities there including ensuring that the Government has fully engaged the community in discussions about the project and that the communities' views are heard and respected; and that throughout the preparatory, implementation and even at the post-implementation stage their rights continue to be respected. Looking at the

[1181] The World Bank, 'Memorandum to the Executive Directors and Alternates of the International Development Association, Request for Inspection Kenya: Natural Resource Management Project (P095050)' (The Inspectional Panel, 1 August 2013> http://documents.worldbank.org/curated/en/744481468272734843/pdf/801490INSP0R200m00OUO0900Box379801B.pdf> accessed 4 July 2016.
[1182] ibid.
[1183] ibid.
[1184] ibid.

agreement, it is fair to say that there was a plan at that early stage between parties to make the NRMP a plan to overhaul the law and policy impacting on indigenous communities. This being so, communities concerned or at least their representative organisations should have been aware of the agreement's proposals and been consulted. Moreover the policies said to be triggered, should have been properly applied.

Framework

45 As at 2007, no domestic legal framework existed that recognised indigenous communities' rights to land and natural resources. The Forests Act 2005 was enforced in November 2005 but this did not recognise the concept of indigenous community-owned forests. A forest owner under the Act could either be the Kenya Forest Service (KFS) in the case of public forests; the local authority in the case of local authority forests; and an individual, association, institution or body corporate in the case of private forests. The Act recognised the concept of forest communities.[1185] It provided that these communities had a right to use, subject to prescribed conditions, forest produce that they had customarily used.[1186]

46 It recognised that there were forest sacred groves with religious or cultural significance to forest communities. It also recognised that forest communities could form approved forest community associations,[1187] enabling them to participate in various forest management activities.[1188] In return the Act provided that the community would benefit from various user rights.[1189] Any person found

[1185] The Act defined such as a community as; 'a group of persons who (a) have a traditional association with a forest for purposes of livelihood, culture or religion; (b) are registered as an association or other organisation engaged in forest conservation.'
[1186] The Forests Act 2005 (Chapter 385), s 22.
[1187] ibid, s 46(1).
[1188] ibid, s 47(1) provided these would be: 'forest management activities including protecting, conserving and managing forests; and formulating and implementing forest programmes assisting the Kenya Forest Service in carrying out its functions; and entering into partnerships with other persons for the purposes of ensuring the efficient and sustainable conservation and management of forests.'
[1189] ibid, s 47(2) provided for the following user rights: 'collection of medicinal herbs, honey-harvesting, timber or fuel wood harvesting, grass harvesting and grazing, collection of forest produce for community based industries, ecotourism and recreational activities', scientific and education services, plantation establishment through non-resident cultivation, contracts to assist in carrying out specified silvicultural operations, development of community

to have contravened any of its provisions was liable for criminal prosecution.[1190] It follows that as it saw communities as users only and not owners, communities living in forests on the basis of ownership were already in contravention of the Act and liable to prosecution.

47 The World Bank's policies, at the material time, OP4.10 in particular showed that the primary focus when development projects were likely to impact on indigenous communities, was the communities themselves. The thrust of the policies was that if the communities did not consent, the likelihood was that the project would not commence or progress unless there were public interest reasons that aligned with the law which trumped their views. This therefore placed indigenous communities in a powerful position, the basis of which was that the communities were to be treated as the owners of the land and resources, and in the same way that a private individual owner would be asked to give consent for the use of their land and resources and if they refused, unless it could be shown the development was necessary for the public good, that project would not go ahead.

48 The IDA and the GoK solely on these two points alone, were already in dichotomous positions.

49 In respect of land and related natural resources, the Bank's policy recognised that indigenous communities have a close link to these resources and provided for application of 'special considerations' if there was a risk that a project would affect that link. In such circumstances the borrowing nation was required to give particular heed to:

> 'i) the communities' individual and collective customary rights to land or territories they traditionally own, use, occupy and access for natural resources essential for their existence, cultural and otherwise; ii) the

wood and non-wood forest based industries; and other benefits which may from time to time be agreed upon an association and the Service.'

[1190] ibid, s 54(1).

need to protect such lands and resources against illegal intrusion and encroachment; iii) the cultural and spiritual values these communities associate with the lands and resources; and iv) their natural resources management practices and long-term sustainability of such practices'.[1191]

50 If the GoK's position was already that forest communities did not have any such rights, and this must have been its position given the Forests Act 2005, then it would not have given heed to these issues as the policy required.

51 In respect of development of natural resources such as water and forests, as proposed by the NRMP, OP4.10 called for a similar process of assessment; free, prior and informed consultations including advising indigenous communities about their 'rights to such resources under statutory and customary law'; being transparent with the communities about potential adverse impact on 'their livelihoods, environments and use of such resources'; and inclusion in the indigenous peoples' plan, arrangements for equitable benefits sharing of the proceeds of the development. The Bank's position was that indigenous communities would benefit from such development, at the very least, at the same level as a 'landowner with full legal title to the land'.[1192] This would also have been ineffectual in Kenya's case given the law in force.

52 The policy further provided that where project activities are dependent on 'establishing legally recognised rights to land and territories that indigenous peoples have traditionally owned or customarily used or occupied', or involves 'acquisition of such lands', this would necessitate the formulation of an action plan for 'the legal recognition of such ownership, occupation, or usage'.[1193] Such a plan, according to the policy, where suitable, was to be implemented as a primary measure 'before project implementation' or enforced contemporaneously 'with

[1191] OP 4.10 (n 1160), para 16.
[1192] ibid, para 18.
[1193] ibid, para 17.

the project itself'.[1194] Based on the reading of the Forests Act 2005, the GoK could not have considered this being necessary as the Act did not recognise community ownership or occupation, only usage rights, which nonetheless would have required an action plan before project implementation or contemporaneously.

53 The policy envisaged the possibility that domestic law may not allow for 'full legal recognition of existing customary land tenure systems of indigenous peoples' or 'conversion of customary usage rights to communal and/or individual ownership rights'. Where this was the case, it provided that the indigenous peoples plan 'includes measures for legal recognition or long-term renewable custodial or use rights'.[1195] Kenya's law, as seen above, did not recognise community tenure as described here. The plan would therefore have needed measures for this. However, the continuing failure of the GoK to implement the recommendations of the Njonjo and Ndungu Commissions which included measures of this kind, should have alerted IDA to the GoK's depth of resistance to granting such recognition; and that any indigenous peoples' plan prepared was probably going to be difficult to implement.

54 And where the project was likely to lead to the resettlement of indigenous peoples, the policy required 'the borrower to explore alternative project designs to avoid physical relocation of indigenous peoples'.[1196] Where this was unavoidable, however, resettlement options were to be discussed with the affected communities, and only where 'broad support for it' had been obtained from them, and a resettlement policy prepared in accordance with the Bank's Operation Policy on Resettlement OP 4.12, would resettlement be pursued. [1197]

55 From the above it is clear that the OP 4.10 covered a series of eventualities which would have made it possible not only to consider indigenous peoples' rights but address them; and if not, not to progress with the project unless public interest

[1194] ibid.
[1195] Ibid.
[1196] ibid, para 20.
[1197] Ibid.

demanded it. Kenyan law was the problem. As alluded to above, the Forests Act 2005 was deficient in not recognising the rights of forest based communities to own and occupy forests; and was restrictive in its provisions on use of forest-based resources. The Bank was aware of the Act even before the agreements were signed.[1198] The Bank was also aware of what aspirations indigenous communities had vocalised about the NRMP:

> 'i) to live in peace with their neighbours; ii) to have access to sufficient land to practice agriculture and graze their livestock; iii) to have access to forests to gather honey for consumption and sale; iv) to practice their culture; v) to have equitable access to social infrastructure and technical services; and vi) to be fairly represented in the institutions which make decisions affecting their lives at local, regional and national levels.'[1199]

Environmental and Social Management Framework (ESMF)[1200] - creation of an expectation

56 This framework was produced in November 2006. The ESMF was supposed to set out 'the principles, rules, guidelines and procedures to assess the environmental and social impacts'[1201] as well as the 'plans to reduce, mitigate and/or offset adverse impacts and enhance positive impacts'.[1202] As OP 4.10 was set to be triggered, the ESMF provided as follows:[1203]

> 'There are a number of tribal groups in both project areas that, consistent with the revised indigenous peoples' safeguards, would be characterised as indigenous peoples. Therefore as both projects have the potential to impact both positively and negatively on these groups, this safeguard is triggered in both instances. While there are varying degrees to which the different groups in the project area satisfy the

[1198] The Bank's PID of October 2005 noted that the Forests Bill had been approved in July 2005, Project Information Document (PID) Concept Stage (n 1130).
[1199] ibid, executive summary.
[1200] ESMF (n 1158).
[1201] OP 4.01 (n 1148), Annex A- Definitions.
[1202] ibid.
[1203] ESMF (n 1158), 31-33, Table 3.1.

> characteristics as outlined in the safeguard policy, there are nevertheless distinct cultures and traditions that need to be carefully considered prior to implementing an initiative. The types of measures that could trigger this safeguard include changes in rights of access to forestry areas on which indigenous peoples rely both for subsistence and cultural purposes; changes in use of culturally sensitive areas (e.g. burial sites); or resettlement of indigenous peoples residing in environmentally sensitive areas to another location. Given the community driven nature of both projects, it is not clear now which projects will impact which groups, therefore the Indigenous People's Planning Framework should be referred to enable screening and review of initiatives in a manner consistent with the policy'.[1204]

57 In respect of the Forests Act 2005, the ESMF provided:

> 'Subcomponent 2.2……While the new Forests Act is innovative with respect to the promotion of stakeholder participation, it does not clearly articulate rights and responsibilities of concerned parties, processes for developing and approving management plans, or benefit sharing arrangements. Subsidiary legislation of the Forests Act will be critical guiding decision-making, management responsibilities and benefit sharing……..The project will also support increasing awareness on the benefits of sustainable land management practices and the conservation of forests. Encroachment of certain forest areas and the process for reclaiming these areas has aggravated the already tense relationship between encroachers and the GOK, and made enforcement challenging. To address this situation, financing will be provided to formulate and implement a coherent and transparent framework to mitigate current and future conflicts over land, customary rights and rights of indigenous people. It is expected that evictions of persons who have customary or traditional rights to forests will not be carried out till the aforementioned framework is in place.'[1205]

58 The development of the recommended framework would have been welcome and would undoubtedly have enhanced the rights of indigenous forest communities. Nevertheless, seeking to address these issues in the context of the NRMP, was bound to be a challenge given as noted earlier the already existing resistance to implement the recommendations made by bodies established by the GoK itself- the Njonjo and Ndungu Commissions.

[1204] ibid, 32.
[1205] ESMF (n 1158)16.

59 This thesis argues that whether or not a project's primary development objective is to address indigenous peoples' land rights issues or this issue arises in the midst of a project with a different objective, as it did here, the nature of indigenous peoples' land rights issues is such that they cannot be resolved superficially. They require an understanding of the following: i) historical land issues in Kenya, that is the effect of the transfer from a customary/traditional system of ownership that not only indigenous communities but other communities operated under, to the individual system of ownership introduced by the colonial administration and the adverse effect this had on land rights; ii) the perpetuation of that colonially introduced land system into, and so far throughout, independence that has left unaddressed these issues and dashed indigenous communities' expectations of restoration of their rights; iii) the entrenchment of these issues by the politicisation, mismanagement and corruption of the land system in Kenya; iv) the relationship between indigenous communities and land and expression of this relationship; and v) the existence of laws that sanction, and sometimes even criminalise, that expression; and an awareness of the incoherence in the law.

60 The fact that the ESMF was seeking to delve into these issues was action it needed to undertake properly with understanding of these issues or not at all. However, as observed in preceding chapters of this thesis, it is the case that the Bank was aware of Kenya's land history and legacy and would have been aware of the politics, mismanagement and corruption associated with it.

Indigenous Peoples Planning Framework (IPPF)[1206] – emboldening of the expectation

61 This framework shows that the Bank and the GoK appear to have considered the NRMP and subcomponent 2.2 in particular, to be contingent on creation of the

[1206] Republic of Kenya Office of the President & Ministry of Water and Irrigation & Ministry of Environment and Natural Resources, 'Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project Final Report December 2006' (IPP198, Office of the President & Ministry of Water and Irrigation & Ministry of Environment and Natural Resources, 1 December 2006)< http://documents.worldbank.org/curated/en/147881468283550135/pdf/IPP198.pdf > accessed 12 July 2016.

framework proposed in the ESMF. To justify this the GoK accepted the difficulties that indigenous communities had been subjected to, namely: assimilation policies, denial of recognition of separate and distinct identities, limited understanding of their way of life thus leading to denial of land rights including dispossession of their land, on grounds that this was *terra nullius* by the colonial administration. The IPPF noted that these issues had failed to be addressed by the post-independence administrations,[1207] and noted that these communities had continued to be subjected to further land rights violations- bans on hunting, absence of strategies addressing their needs and interests and unfulfilled compensation schemes.[1208] Specifically, the IPPF observed that the Ogiek and the Sengwer communities were within the territory of the proposed projects and sub-projects.[1209] Of the Ogiek, it noted their land rights contestations as starting in the 1920s and continuing into the independent state; and similarly it set out the Sengwer community's history, livelihoods and social organisation.

62 Significantly it observed that although indigenous communities are legally equal to other citizens in Kenya, their land rights were uncertain. It found that both the Ogiek and Sengwer, whose association was forest-based, were being forced into agro-based existence outside the forests; that their 'sedentarisation, marginalisation, social discrimination, and impoverishment'[1210] had been increased by their 'continual expropriation of land and steadily intensifying restrictions on access to natural resources- especially forests'.[1211] It noted that these communities were more dependent on forest and forest based resources than other communities and were being 'forced out of forests with little or no compensation, and with little or no land to go to or resources to live on'.[1212]

63 The IPPF further pointed to the Forests Act 2005 and its preceding Forests Policy as seeking to address some of the problems created in the past by a failure to

[1207] ibid, 16.
[1208] ibid, 15-16
[1209] ibid, executive summary.
[1210] ibid.
[1211] ibid.
[1212] ibid.

address these issues. However, it noted that both the Act and the Policy failed to embody the Convention on Biological Diversity which calls for respect of amongst other things, traditional lifestyles relevant for the conservation and sustainable use of biological diversity and equitable sharing of benefits arising from use of that lifestyle.[1213] Notably the Forests Act 2005 had claimed to have been compliant with international conventions.[1214] The IPPF confirmed that the NRMP would seek to fill those gaps by creating a framework that implemented the Forests Act and Forests Policy; and addressed the inconsistencies between the national law and the international standards by formulating a technical framework to narrow the gap. The IPPF further observed that the Ministry of Lands and Housing was seeking to formulate a land policy which addressed equitable and sustainable land use, distribution etc., and confirmed that it would use the understanding used in that draft policy for its own use, whether or not the policy translated into law.[1215]

64 In light of the discussion in Chapter 1 and the GoK's failure to operationalise mechanisms proposed by those bodies to address these impacts on indigenous communities- and taking into account the rehashed finding that the GoK was responsible for these communities' land rights abuses- the manner in which the GoK set out the framework here was duplicitous and should have made the Bank question whether the GoK meant what it said.

The plan under the IPPF

65 The action plan under the IPPF was: the training of key actors including the KFS on indigenous peoples' organisations;[1216] carrying out an inventory of indigenous communities including carrying out social assessments for communities evicted from the forests as far back as 2002 including a detailed land-use mapping and assessment of lost properties and livelihoods; ensuring participation of the

[1213] ibid, 16.
[1214] Section 61 claimed that all provisions of the Act were to be carried out in accordance with any treaty, convention or international agreement concerning forests or forest resources which Kenya is a party.
[1215] IPPF (n 1206), 17.
[1216] ibid, 45.

communities in all decision-making bodies and of community representatives in all forest and resettlement related committees, working groups and other decision making bodies; and provision of funds to the elected community representatives to carry out consultations with the communities and participate in meetings.[1217] For any evicted indigenous communities, the IPPF proposed to rehabilitate their livelihoods, provide assistance to enable them to return to their homes and formulate a resettlement strategy having regard to their cultural preferences;[1218] and ensure they benefitted from natural resources.[1219]

66 The IPPF noted that by carrying out the above plan, the NRMP would ensure that:

> 'present and past settlements, land use areas and cultural sites of indigenous peoples are comprehensively documented; (b) that the indigenous peoples are well represented in all forest and resettlement related decision-making bodies and processes; (c) that a comprehensive strategy to rehabilitate the livelihoods of evicted indigenous peoples is elaborated in an open-minded and fully participatory option assessment; (d) that this strategy is implemented in a comprehensive and timely manner; (e) that the indigenous peoples are enabled to benefit from participatory forest management and reforestation.'[1220]

67 The IPPF noted that option (c), above, was for the purpose of establishing whether it was possible for indigenous communities affected to re-establish access to land and resources crucial to their livelihood[1221] and if not that the NRMP would 'commission for each forest a Resettlement Action Plan (RAP) in accordance with international standards (World Bank OP 4.12 Involuntary Resettlement)' which would 'include a land-based resettlement strategy, compatible with the indigenous peoples' cultural preferences'. None of this was done.

[1217] ibid.
[1218] ibid.
[1219] ibid, 46.
[1220] ibid, executive summary.
[1221] ibid.

Failure to fulfil- the reality

68 The plan did not go as planned, which would suggest that the IPPF was either flawed, disingenuous or simply unrealistic. Was the GoK simply stating what it believed needed to be said to obtain funding but had no intention whatsoever of protecting the communities in the manner proposed? As noted earlier, it is reasonable to think that the Bank would have been aware of the findings and unimplemented recommendations of the bodies considered in Chapter 1. It therefore would have known of the Government's attitude towards indigenous communities and the failure to act in their best interests. In 1991 the Bank had also co-ordinated the National Forestry Development Project through which the Overseas Development Administration had funded KIFCON, discussed in Chapter 1 in relation to the Mau Forest Task Force. As discussed there, KIFCON had established the presence of the Ogiek during the project, had recommended their resettling but the Government had refused to resettle and rejected the recommendations made.[1222] Themfailure to heed the recommendations of the bodies discussed in chapter 1 was material to the NRMP's objectives in that some of the problems the project was seeking to deal with had their roots in those findings.

69 The IPPF was an elaborate and particularly transformative exercise that in light of GoK's performance and attitude towards indigenous communities in the past, made it incongruous. Looking at it in isolation, it was based purely on indigenous peoples and protection of their land rights. Given the magnitude of what it proposed, it made the NRMP more an indigenous peoples' project than what had been originally planned. Notably this was permissible under OP4.10. The policy position, as noted earlier, was where project activities are dependent on 'establishing legally recognised rights to land and territories that indigenous peoples have traditionally owned or customarily used or occupied', an action plan

[1222] Mau Task Force Report (n 82).

would be needed to legally recognise those rights, and to do so as a primary measure prior to the project implementation or contemporaneously.[1223]

70 To take up the task(s) being proposed in the IPPF and its action plans, required the GoK, and the Bank in its supervisory role, to ensure that there was: i) a thorough evaluation of what the project objectives were i.e. what is it that the project seeks to do; ii) a review of the legal framework i.e. establish what laws will govern the operation of the project and how that framework will impact on the objectives; iii) a proper assessment of the likely impact on indigenous communities i.e. how will the project's activities, in seeking to meet the objectives, impact on the communities' land rights; iv) where the impact is said to be adverse, assess whether in fact the project can realistically address those issues, with full comprehension of the five issues mentioned earlier.[1224] If the answer to this is not in the affirmative, as in most cases the answer will be given the depth of complexities, to v) then consider the possibility of alternative activities to bring to fruition the objectives that will circumvent any potential adverse impact on indigenous communities thus leaving them as they are. If that is not possible, and the project has to be pursued, to vi) resettle and compensate indigenous communities for the adverse impact on their rights which in itself would require an acceptance of their status as *de jure* landholders or *de facto* landholders. However, that creates a problem where the domestic framework on resettlement and compensation does not recognise community ownership of land or forests and criminalises community habitation of areas they consider their ancestral homes.

71 It is therefore no surprise that the Bank's own Independent Evaluation Group, when reviewing the NRMP in 2016 set out amongst the lessons learnt, the following:[1225]

[1223] OP 4.10 (n 1160), para 17.

[1224] See para 59 above.

[1225] The World Bank IEG, 'ICR Review' (Report No.: ICRR 14893, IEG 23 February 2016)< http://documents.worldbank.org/curated/en/207631468194954362/pdf/ICRR14893-P095050-Box394872B-PUBLIC.pdf> accessed 20 July 2016, section 3.

'(1). A simple and limited project design that considers institutional capacity and promotes active stakeholder participation is especially appropriate for complex natural resource situations where there is potential for land rights conflict. Sufficient time, budgetary needs and staff capacity are critical factors during preparation to ensure that all the project elements are coordinated. In this case the Project design was too broad and ambitious to be implemented within the planned duration partly because it addressed multiple reforms across several implementing agencies that had insufficient capacity and staff retention. (2). In-depth understanding of the political context and other historical evidence is critical in designing community-based natural resource management initiatives. In this case, there was insufficient appreciation at the design stage of the political and historical context of the land issue.'[1226]

72 It is difficult to understand how this happened, if not for the hypocrisy spoken of at the outset.

Resettlement Policy Framework- the unimpeded failure

73 The GoK produced this in January 2007 for project affected persons, namely indigenous communities. The policy anticipated difficulties with resettling them as their ancestral land rights were not legally ascertainable. It therefore proposed the taking of alternative measures if these were feasible, failing which it provided that experts would be commissioned to record indigenous peoples' land use following which indigenous peoples would receive advice on their land rights under the domestic legal framework and be offered compensation at the very least. For those with full rights of ownership the policy provided that they would be entitled to due process of the law, appropriate development opportunities, land-based

[1226] ibid.

compensation or compensation in kind in place of cash compensation if feasible; and participation in negotiations.[1227]

74 The policy provided that in case of any proposed resettlement, displacement or relocation of indigenous peoples from their 'communally held traditional or customary lands',[1228] the ultimate decision would be the Bank's in accordance with the IPPF and ultimately the OP4.10.[1229] The criteria for resettlement was: those with formal rights to land which was interpreted as including customary and communal land rights recognised under law; those without formal rights to land but had made claims to such land which were recognised under law; and those recognised under the Bank's resettlement policy but otherwise with no legally recognisable rights.[1230]

75 Significantly the policy observed that Kenya had a myriad of laws that applied to resettlement and that the Kenyan domestic framework allowed for compensation, for lawfully owned land, but not for those found to be encroaching. This it observed was inconsistent with its own resettlement policy, OP 4.12 which allowed for compensation for both legal owners and those found to be encroaching. The policy noted that OP 4.12 took precedence where there was a conflict between it and domestic law.[1231] This was consistent with the approach of the ESMF of November 2006 which had stated that OP 4.12 was to be complied with where involuntary resettlement was likely to take place as a result of the project.[1232] The resettlement policy allowed for a collective award of compensation for group claimants who had lost their land, access to their land and resources.[1233]

[1227] Republic of Kenya, 'Resettlement Policy Framework Natural Resource Management Framework' (RP500, Republic of Kenya, January 2007)< http://documents.worldbank.org/curated/en/124651468278041263/pdf/RP500.pdf> accessed 20 July 2016, section 3.2.
[1228] ibid, section 4.2.
[1229]ibid.
[1230] Resettlement Policy Framework (n 1227) section 7.1.
[1231] ibid, section 8.4.
[1232] ESMF (n 1158) 32.
[1233] Resettlement Policy Framework (n 1227) section 7.2.1.

76 The problem with the resettlement policy was that the criteria was based on land rights recognisable under law. The IPPF had observed that the Sengwer and the Ogiek communities' rights to land were not secure and were not recognisable in law as lawful hence their forcible evictions over the years. The resettlement policy was therefore inconsistent with the IPPF. Even if it was the case that those recognised otherwise by operation of the Bank's policy i.e. those with no legally recognisable rights, had to go through the Bank's policy procedure and were deemed under that policy to be eligible for settlement, that resettlement would have had to take place, in reality, within the confines of the domestic law. Nonetheless the Bank was satisfied with this as shown in the Appraisal and Approval Stage documentation.

77 An Integrated Safeguards Data Sheet (ISDS) produced in January 2007 by the Bank for the purposes of appraising the project,[1234] observed that the IPPF was to 'ensure that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples'.[1235] The Bank's approval of the project on 27 March 2007,[1236] must have meant that it was satisfied with what the GoK had proposed despite what history showed of its treatment of indigenous communities. This aligns further with the hypocrisy talked about by Catherine Weaver that weighs down the Bank and international organisations like it:

> 'As multilateral governmental agencies, IOs are particularly dependent upon externally conferred legitimacy, public funding, and demand for services'.[1237]

78 Therefore notwithstanding what the GoK's omissions were, it seems that the Bank's legitimacy meant the project needed to plough on regardless.

[1234] The World Bank, 'Integrated Safeguards Data Sheet Appraisal Stage' (Report No.: AC2608, The World Bank, 10 January 2007)< http://documents.worldbank.org/curated/en/222201468273009863/pdf/Integrated0Saf1et010Appraisal0Stage.pdf> accessed 17 Jul 2016.
[1235] ibid.
[1236] Project Profile (n 1143).
[1237] Weaver (n 160).

Evictions and Breaches of the Financing Agreement and Bank Policies- continuing reality

79 The project was a challenge and led to violation of the communities' land rights. The Sengwer were evicted from their ancestral lands in 2009 during the course of the NRMP, but the project did not stop. The Bank's Inspection Panel's 2013 Report and Recommendations said this of these evictions:

> 'When the Bank learned of the eviction of 450 families in April/May 2009 it requested information from KFS and received a letter from the community. Management notes that these evictions were not part of the NRMP activities and were the result of Government action in response to an ongoing dispute over water resources between communities living downstream from Embobut and those living in the forest.'[1238]

80 This was unsatisfactory. Whether or not the evictions were part of the NRMP was irrelevant. Firstly, the fact that the evictions occurred during the Bank's incumbency should have resulted in the Bank taking a stand, particularly as the perpetrating force was the GoK, its partner in the NRMP. Secondly, the forest law in force at the time was still the Forests Act 2005. The Bank had found this to be inadequate and had been told by the GoK, that it too was aware of the statute's shortcomings. This awareness of a lack of legal protection for forest-dependent indigenous communities should have alerted the Bank to the possibility that some of those being evicted were indigenous peoples, given that the Forests Act considered all those residing in the forest to be squatters.[1239] Further, it is noted that after receiving report of the evictions, the Bank sought the view of the KFS, which was unlikely to be impartial given its role in the evictions and its function under the Forests Act to prosecute squatters.[1240] Lastly, given what was happening globally at the time with the approval by the Human Rights Council of a UN

[1238] Report and Recommendation (n 1179).
[1239] Amnesty International (n 109).
[1240] Forests Act 2005, s 5.

framework on Business & Human Rights- the Ruggie principles, it certainly seems hypocritical that as a body that claims to put people first, it would have responded by sustaining the stance that the evictions were not part of the project's activities.

81 The failure to take a more robust stand by the Bank enabled the GoK's impunity to continue. On 7 April 2011 the Bank wrote to the GoK to report that indigenous communities had been forcibly evicted from their homes, had their properties burnt and had been made subject to inhibitive forest-access measures, by the KFS.[1241] On this occasion, the Bank asked the GoK to stay any further evictions until requisite safeguards relating to vulnerable groups and their resettlement were in place.[1242] What the Bank should have done is terminate the project. The eviction of indigenous communities from their homes was contrary to the Financing Agreement of 7 May 2007 as it violated the IPPF. In a response dated 27 April 2011, the GoK confirmed that no further evictions would be enforced until safeguards were in place.[1243] As the IPPF was prepared by the GoK itself, the staying of the evictions pending the enforcement of its associated safeguards was surely in itself a violation of the Agreement since the Government had undertaken in the Financing Agreement, to remain seized of those safeguards.

Restructuring Process

82 Astoundingly after having reported barely a few months earlier in December 2009 that the project was moderately unsatisfactory, the NRMP was assessed as being 'moderately satisfactory' in March 2010.[1244] It is therefore a surprise that a year later on 10 June 2011 the GoK submitted a Restructuring Paper to the Bank. If all had been satisfactory, there would have been no need for restructuring. The Restructuring Paper observed that there had been issues related to the implementation of the IPPF which had been formulated to prevent the Ogiek and Sengwer communities from being adversely affected by the NRMP and to mitigate

[1241] Project Restructuring Paper (n 1174) 4.
[1242] ibid.
[1243] ibid.
[1244] ibid, 2.

against potential negative impacts.[1245] In particular the GoK noted that it had not been possible to survey, demarcate, register and document land and speed up the issuing of titles to allotment to indigenous communities; to rehabilitate the livelihoods of indigenous communities; or to facilitate the restitution of land indigenous communities had lost between 1895 and December 30, 2002, as had been planned.[1246] The Paper observed that whilst the commitments were 'desirable on their own account (they) were not related to the mitigation of anticipated project impacts'.[1247] It admitted that those tasks required significant policy interventions and multi-agency actions regarding ancestral land rights; and could not be achieved within the project's timeline.[1248]

83 The 2016 Independent Evaluation Group report of the NRMP,[1249] found that the attempts to address 'long-standing historical land claims of indigenous peoples were ambitious and commendable',[1250] but the risk assessments at the appraisal stage were far from adequate; and there were insufficient financial and human resources to 'plan, appraise and implement such a complex undertaking, which were made even more complicated by an environment that required the engagement of actors beyond the forestry sector and intentions were not fully backed by actions'.[1251] This seems a fair assessment of what happened. The fact that the NRMP morphed into indigenous communities' land rights reform was not inevitable given what was contained in the main agreement's sub-components.[1252] As noted earlier, any attempt to resolve indigenous communities' land rights issues cannot be pursued without an understanding of the history belying those issues. To attempt to resolve, or to allow the GoK to resolve these issues within the NRMP, was a recipe for disaster, as the NRMP's original objectives were totally different.[1253]

[1245] ibid.
[1246] ibid, 3.
[1247] ibid.
[1248] Project Restructuring Paper (n 1174) 3.
[1249] ICR Review (n 1225).
[1250] ibid, para 25.
[1251] ibid.
[1252] See para 26 above.
[1253] ICR Review (n 1225), para 25.

84 For the restructured phase, the GoK informed the Bank that it would be using term Vulnerable and Marginalized Groups rather than indigenous peoples. It asked the Bank that any 'project instruments related to the implementation of OP 4.10 use (this) constitutionally-sanctioned terminology',[1254] as OP 4.10 allowed the use of different terminology as long as this did not affect the application or substance of the policy.[1255] It proposed to focus the restructured activities on a livelihood and rural development programme and a strategy for improving forest management for these communities.[1256] It proposed to implement a Vulnerable and Marginalized Group Plan (VMGP) in place of the IPPF.

85 It noted that there continued to be a risk of involuntary resettlement, risks of evictions and continued encroachments in forest areas owing to the size of the forests and insufficient number of forest guards to discourage encroachment.[1257] To address these concerns, the GoK proposed to: 'i) continue and strengthen the ongoing free, prior and informed consultations; ii) develop and implement the VMGP through the existing decentralized CFAs and user groups; iii) improve capacities of KFS, especially its forest guards, for carrying out community-driven development programs.'[1258] The paper proposed seeking to obtain community support for the VMGP, failing which the GoK would discuss the possibility of abandoning the related component.

86 It is argued that there were serious issues with this proposal that the Bank should have picked up on: firstly, the lack of indication in the GoK's plan that the communities concerned had been consulted about the use of the term, VMG particularly as the GoK had stated that the VMGP would be based on free, prior and informed consultations. Secondly, no other reasoning for the change of the

[1254] The World Bank 'Integrated Safeguards Data Sheet Restructuring Stage' (Report No.: AC6311, The World Bank, 13 June 2011)< http://documents.worldbank.org/curated/en/916871468090305426/pdf/Integrated0Saf00Restructuring0Stage.pdf> accessed 21 July 2016.
[1255] ibid.
[1256] Project Restructuring Paper (n 1174) 4.
[1257] ibid.
[1258] ibid, 14.

term was given other than that the term VMG was based on the constitution. Article 260 of the constitution actually refers to indigenous communities as marginalised communities so rejecting the term indigenous peoples was actually incompatible with the constitution. It is probably the case that the GoK considered using a different term would avert it from responsibilities associated with referring to the communities as indigenous. Notably, both communities' grievances challenged the use of the term VMGs rather than indigenous peoples as they self-identify as indigenous peoples and this had been done without their free, prior and informed consent.[1259] This was in every aspect inconsistent with the Bank's policies.

The Bank's response to the Grievance

87 Paragraphs 39 to 42 above set out the communities' grievances. In its May 2013 report, the Panel, in dealing with the complaint(s), found that the communities had raised important questions as to whether OP 4.10 had been complied with.[1260] Based on this the panel recommended an investigation into the concerns raised by the communities as to the conduct of both the Bank and the GoK and the extent to which the safeguard policies were applied. [1261] In respect of the evictions and resettlement allegations, the Panel found that despite the efforts made by the Bank's Management to address these issues, there were 'plausible linkages between activities under the Project and the concerns of the people relating to eviction and resettlement',[1262] suggesting the possibility that the Bank's safeguarding policies had not been complied with.[1263]

88 The findings of the Inspection Panel's 22 May 2014 'Investigation Report'[1264] are worth underscoring as they show the extent of what went wrong:

[1259] Memorandum to the Executive Directors (n 1181).
[1260] Report and Recommendation (n 1179), 21.
[1261] ibid, 22.
[1262] ibid, 16-17.
[1263] ibid.
[1264] The World Bank, 'Kenya: Natural Resource Management Project, Investigation Report' (Report No. 88065-KE, The World Bank, 22 May 2014)

a. Notwithstanding the fact that the Bank responded quite quickly upon awareness of the evictions, they ought to have had foresight of the risk of evictions 'given that the eviction of encroachers'[1265] was common to the Cherangany Hills.[1266] Additionally this thesis argues that the fact that the Bank was aware of the inconsistencies between OP4.10 and the Forests Act 2005, and the GoK's understanding therefore about forest communities, should have made the Bank even more alert to the likelihood of evictions.

b. The function of the KFS in evicting those it deemed encroachers from forests was incompatible with NRMP's objective of facilitating co-management of forests with communities. This being so there had been a need for 'a major paradigm shift in the culture and functioning of the KFS, a shift that would call for significant and longer-term support to capacity building'.[1267] This thesis argues that a paradigm shift was needed by both parties. For the GoK a paradigm shift could only begin with the changing of the law to make it consistent with the objectives of the project, effectively revising the Forests Act 2005 to recognise ownership, occupation and management rights of communities. And for the Bank, a paradigm shift would be as basic as complying with its own policies and at its highest, having the confidence to take enforcement action when it initially received reports of forced evictions.

c. In-depth assessment of the KFS would have detected that far more robust training was needed to assist with that culture shift.[1268] This thesis argues that enforcing a culture shift within the constraints of the Forests Act 2005 was unlikely to have been achievable as the provisions of the Act required the KFS to treat anything other than user rights as unlawful. Robust training could not have changed that.

d. Similar to earlier expressed views about the complexities of addressing indigenous communities' land rights issues and that this cannot be done superficially, the Panel observed that it was not possible to 'find a permanent solution to the plight of indigenous peoples living in gazetted forests….on the sidelines…or as an add-on to a NRMP which had a different focus, and whose main implementing agency did not have the mandate to address the issue'.[1269] The Panel recommended that the Bank engage in dialogue and at a policy level and provide backing to agencies with responsibility for this issue. This thesis argues that the Bank should not act as if in a vacuum, that seeking involvement in any land-related policy work necessitates the Bank's thorough understanding of the degree of politicisation and mismanagement

<http://documents.worldbank.org/curated/en/191221468050686466/pdf/880650REVISED0001400INSP0R201400001.pdf> accessed 20 July 2016.

[1265] ibid, para 26.

[1266] ibid.

[1267] ibid, para 27.

[1268] ibid, para 28.

[1269] ibid, para 29.

of land affairs in Kenya; and should involve the communities themselves as well, not just agencies.

e. The Panel also considered that understanding of 'the complexities of long-standing historical conflicts, particularly when they relate to land issues and indigenous peoples' claims', was paramount. They found that the NRMP's documents created a legitimate expectation that 'long-awaited solution to what the Cherangany-Sengwer considered their long-term legitimate claims'[1270] would result but was unable to fulfil this; and therefore the NRMP 'was not successful in incorporating indigenous people in the management of these forest resources, an approach that would have contributed towards the Project's goals'.[1271] This supports this thesis' view that unfortunately in projects of this kind there is incongruity between the framework, the expectations and the reality. The fact that the Agreement's sub-components effectively planned to revise the legal structure suggests the Bank was aware of this from its early stages and therefore its approach from that point should have been different.

f. The climate within which the NRMP took place was a 'very difficult political reality stemming from post-election violence'[1272] resulting in displacement of communities, ethnic conflict and 'land ownership conflicts that have deep historical roots' which complicated project implementation even further.[1273] This is correct and the Bank should have been less naïve (or hyprocritical) and more alert to the possible impact of these issues. The fact that the country had gone through by this time, all the domestic processes discussed in Chapter 1 would not have been lost on the Bank. But is it not also the case that the Bank is functioned to lend to nations, and despite IDA being the more human rights focused institution of the World Bank Group, it is still part of the Bank which lends knowing it will get its return in any event? It has a two-fold motive, first to lend with a view of a return; and then to assist in the delivery of development. Unfortunately the first seems to always trump the second.

89 In light of those findings the Panel recommended that:

> `Going forward, Bank engagement, through the high level policy dialogue currently ongoing in pursuit of a longer term resolution to the issues of land rights of Indigenous Peoples, and others living in gazetted forests, is critical. It is the Panel's firm view that, despite the complexities of the issues it reviewed in this case and the challenges involved, the World Bank continues to be best equipped in terms of expertise, mandate and resources to support the GoK in resolving these issues, and to follow through with the transformation process

[1270] ibid, para 30.
[1271] ibid.
[1272] ibid, para 32.
[1273] ibid.

> that was launched, in the interest of sustainable development, the natural environment, and the protection of vulnerable communities, including Indigenous Peoples.' [1274]

90 This thesis agrees with the criticality of resolving indigenous communities' land rights issues. However, *it is because* of the complexities that arose in this case and the manner in which the Bank acted, that this thesis questions whether it is best equipped to assist the GoK in resolving them. The NRMP was undoubtedly made complex by the presence of indigenous communities in the project areas. However, it must be acknowledged that a natural resource management project is unlikely not to touch on indigenous peoples' lives. This project's failure, in view of the discussion on the Bank's agenda in the earlier segment of this chapter, is regrettably unsurprising. Without that prism it seems irreconcilable that Bank which in development terms has been the force behind land law reforms could be a perpetrator of land rights violations.

The crux of the matter- unmet needs

91 This thesis returns now to one of the declarations made by the GoK in the IPPF. This will be referred to as the 'declaration' in this segment. It said the NRMP would by way of provision of opportunities and mechanisms, ensure that indigenous communities were no longer displaced from land and forests they have traditionally relied on for their livelihood, and for their cultural and social existence; ensure that they no longer lost legal access to natural resources which the IPPF noted were vital for their livelihood and cultural and social institutions; did not face continued harassment by cattle rustlers; were no longer marginalised from society or alienated from national life; no longer received less governmental support and less capabilities to defend their legal rights; that they were no longer dependent on other ethnic groups; and no longer at risk of losing their cultural and social identity.[1275]

[1274] ibid, para 34.
[1275] ibid, executive summary.

92 The extent of the failures of this project raises one major question about the GoK: was it really intent on resolving indigenous groups' land rights issues in the manner set out above? It appears not. The government was aware that the proposed project areas had a presence of indigenous communities and it knew that that Bank would establish this sooner or later. Therefore to ensure that funding was obtained, it said the right things, but had no intention whatsoever of resolving the issues as set out in the declaration.

93 However, for the communities concerned, the effect of the declaration is likely to have been the creation of a legitimate expectation that their land rights' grievances would be resolved once and for all particularly where Njonjo, Ndungu, TJRC-type exercises, had not been successful in conjuring such declarations. But as the Government did not deliver as promised, this thesis questions whether the failure to give effect to it (or other ones in the future) have wider ramifications or amount solely to a failure within the project? In other words, could litigation be pursued on the basis of the declaration? It is arguable that based on the finding of the Kenyan court in the *Afrison Export* case[1276] discussed in Chapter 3, if this declaration had been made outside the scope of the NRMP, one could potentially argue that the failure to give effect to it was injurious to the constitutional rights of the communities concerned. This is because the declaration suggests the GoK was seeking to enforce rights entitled to the communities and therefore failure to do that, conversely, had left them in a position where their rights continued to be violated, thus making the declaration challengeable in judicial review proceedings.

94 Be that as it may, as the declaration was made within the context of a development project, it seems arguable that the communities could have relied on it as a basis for resisting eviction notices on the basis that the declaration was tantamount to a GoK act, omission or decision, capable of affecting their legal rights or interests and therefore amenable to adjudication on judicial review grounds. Arguments of this nature are easier to make now following the

[1276] Afrison Export (n 801).

enactment of the Fair Administrative Act 2015 and maybe less so during the NRMP. It is possible, however, that judges may be reluctant to make findings relating to a development project funded by international agencies such as IDA on grounds that they have no jurisdiction in matters of a development project. Arguably however, if human rights are at the heart of such a challenge, the courts should take a different view, along the lines of those discussed in the *Afrison Export* case.[1277]

Conclusion

95 Firstly, development projects may lead to the realisation of indigenous communities' land rights but there are a lot of factors at play which may make this an unstable platform for indigenous communities to place their hopes on. One of those factors is the Bank's hypocrisy, the kind that is said pursues 'reform goals and formal structural changes' sometimes recklessly, in order to align with 'environmental expectation, to mould public opinion and fend off external criticism (and) to secure needed resources' leading to nothing.[1278] In the case of the NRMP, the gap between rhetoric and reality had adverse effects on the indigenous communities involved.

96 Secondly, it is unlikely to be the case that development projects of this nature are originally, genuinely pursued with a view to securing indigenous communities' communal tenure, especially in Kenya's context with its complex land history. And so if the issue of these rights arises, this is likely to be because it is part of the Bank's 'financialising' land relations agenda[1279] which no longer denigrates communal land tenure. The state in this case will be pursuing the land reforms knowing it is what is expected of it. The Bank will also be financially supporting the reforms because it is part of its duty and it also has to be seen as doing the right thing whether or not it actually does.

[1277] See Chapter 4's discussion on the case (n 801).
[1278] Weaver (n 160).
[1279] Manji (n 32).

97 Thirdly, in cases where the state genuinely seeks funding in order to address indigenous communities land rights or it genuinely proposes to deal with these rights as they have become coincidental or incidental to another project, given what is required for an exercise of this nature, this may not actually be possible and one of the projects will have to give way to the other. And where it is pursued, the project must not attempt to deal with the issue of land rights superficially, as discussed earlier.

98 Indeed the Bank is powerful and its resources as a development agency means it has funding prowess, which gives it the clout to generate action not previously forthcoming from reluctant states. In the case of the NRMP, it had the power and resources to assist the GoK to address the indigenous land rights' question and take firmer steps where this is not done. Its 2017 Environmental and Social Framework, as noted earlier, has an explicit human rights focus: it seeks to 'remove barriers against those who are often excluded from the development process…..to ensure that (their) voice(s)….can be heard' and to do so by realising human rights enshrined in the Universal Declaration of Human Rights and by assisting states to meet their human rights obligations.[1280] It further provides that where the Bank cannot ascertain that free, prior and informed consent has been obtained from indigenous communities in respect of a development project it will 'not proceed further with aspects of the project that are relevant to those indigenous communities'.[1281] It further provides that where the Bank has required the borrowing nation to take certain remedial action within a certain period of time, and it does not, the Bank is at liberty to apply its own remedies according to OP 10.00- Investment Project Financing.[1282] These 'include suspension of disbursements of, and cancellation of, unwithdrawn amounts of the financing.'[1283] The question is whether it will. This is doubtful.

[1280] ESMF (n 1158).
[1281] ibid.
[1282] ibid, 7.
[1283] OP 10.00 (n 1159) para 25.

99 The fact is that the Bank has been pursuing an agenda all along, one focused on opening up of the land markets and to some degree it has been successful in doing that. It was in favour of the privatisation of land upon Kenya's independence, supported the state in achieving this and managed at the same time to meet the state's goal of buying back the land from white settlers. The Bank and the state's priorities aligned. In the case of indigenous communities and security of their communal tenure, if this is a shared priority of the Bank and the state, it will happen. Currently, despite the rhetoric it is not.

100 Another way of engendering positive action, from what may otherwise be resistant states, is said to be for development agencies to 'structure their action and language to match nationally constructed rights agendas'.[1284] This means that the Bank should structure its action and language based on the 2010 constitution and the NLP which are favourable to recognition of indigenous communities' land rights. This did not happen with the NRMP and although it could be said that at the time the project started in 2007 Kenya's rights agenda was non-existent, in 2010 the constitution had been enacted but this did not elicit change in Bank or government behaviour.

101 Further in the alternative, influencing the government can be done indirectly. A good example of this is in the case of DFID and SIDA's work on the denial of identity cards to indigenous communities by the Bolivian Government. They were able to circumvent the government's resistance to the issue by supporting a civil society driven initiative to bring about change that was seen as less threatening to the government and was embraced by the 2003 government,[1285] although that government was short-lived. The Bank can in the future engage them civil society in initiatives which can generate some positive steps in the direction of realisation

[1284] IDS, 'Policy Briefing' (May 2003) Issue 17< https://www.ids.ac.uk/files/Pb17.pdf> accessed 27 January 2019.
[1285] Rosalind Eyben, 'Linking Power and Poverty Reduction' (Institute of Development Studies 2004) in Ruth Alsop (ed), 'Power, Rights and Poverty: Concepts and Connections', (The International Bank for Reconstruction and Development/The World Bank and the Department for International Development 2004).

of those rights but land is a different kettle of fish to identity cards. No change to land is likely to circumvent the GoK but that is not to say the Bank cannot work with civil society. Establishing the probability; and the pro and cons of this is a subject ripe for research but cannot be undertaken here.

102 In terms of what steps can be taken by communities where both the Bank and the GoK let them down, indigenous communities should be more robust in using the national courts particularly relying on constitutional arguments as discussed earlier. At the very least such processes if successful should halt continuing breaches of land rights.

1 This thesis has established that the law in Kenya provides opportunities for indigenous communities to realise their land rights. These can be summarised as:

i) Recognition of indigenous communities

a. Kenya is in a unique position in as far as indigenous communities are concerned. In the East African region, as seen in chapter 2, its constitution in Article 260 is the only one that speaks of indigenous communities in a way that distinguishes them from the rest of society. This suggests that in the Kenyan context, although all communities may be indigenous to Kenya, there is a different understanding of indigenousness and one that may be close to the characteristics set out regionally and internationally. Article 260 defines marginalised communities as including an 'indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy'. It further describes marginalised communities as being small in population, as suffering from social and economic disadvantage, as those with unique cultures but have been subjected to forced assimilation, as pastoralist communities who are nomadic or sedentary but have experienced minimal social and economic integration in the country and those who have been subjected to discrimination on grounds including ethnicity, culture, religion, belief or social origin thereby suffering disadvantage. Although other communities not identifying as indigenous may satisfy these characteristics, there seems to be a legal intention in the manner hunter-gatherers and pastoralists are set apart in the constitution to distinguish them from other communities which is significant.

b. Despite what may be said by the Kenyan government, whether in regional litigation[1286] or in response to regional and international peer review mechanisms that would suggest it is resistant to the concept of indigenousness as interpreted regionally and internationally, it has clearly intended to distinguish groups identifying as indigenous from the rest of Kenyan society, in the 2010 constitution, and has promised to meet their needs.

ii) Recognition of communal land

c. Kenya's 2009 National Land Policy, notwithstanding the politics of its evolution, provides that it is determined to address once and for all, land issues requiring special intervention. These land issues include those relating to indigenous communities' land grievances. The policy promises to deal with these. It also recognises that it is not right for indigenous communities' customary rights to land to remain subservient to dismissive laws. The policy legitimises those rights, in stark contrast to the manner in which things have been for the last 100 years. And to reinforce that position, these plans are now constitutionally enshrined and have introduced another feature of Kenya's law that distinguishes it from the majority of East African States,[1287] community land. Article 63 of the constitution describes this as including land that is 'lawfully held, managed or used as forest communities, grazing areas or shrines'; and 'ancestral lands and lands traditionally occupied by hunter-gatherer communities'. Kenya's previous constitutions did not include this category of land.

[1286] Although it is noted that unlike the Endorois case where it sought to argue that the Endorois were not a distinct community, it did not make similar arguments in the Ogiek case.

[1287] Uganda also recognises customary land in its Constitution and confirms that those owning land under that tenure may obtain certificates of ownership. See Constitution of Uganda, Article 237.

iii) Favourable landmark regional decisions

d. Thirdly, Kenya is also in the unique position of being the only state in Africa which has had two landmark indigenous land rights' decisions made by the African Commission and the African Court i.e. the Endorois and the Ogiek decisions respectively. These decisions have reinforced entitlement of indigenous communities to their ancestral lands and associated rights, not only in Kenya but in other African States and globally. Notably the Endorois case was the first decision to find that indigenous communities were entitled to a right to development. And the Ogiek case is the first indigenous land rights case to be heard by the African Court. This shows how pivotal these decisions are to the communities concerned but also for the African regional system.

iv) Existence of constitutional bodies

e. The 2010 constitution has established the following constitutional bodies: the Kenya National Commission on Human Rights as the national human rights institution whose mandate includes ensuring compliance with obligations under treaties and conventions relating to human rights;[1288] the Commission of Administration of Justice as the Office of the Ombudsman in Kenya whose role it is to investigate state conduct; and the National Land Commission whose mandate includes investigating complaints into historical land injustices and recommending appropriate redress and managing public land on behalf of the state. These bodies have mandates which can engender implementation of the Endorois and Ogiek regional decisions.

[1288] 2010 Constitution, Article 59(2)(g).

v) Functioning Judiciary, Legislature and Executive

f. Kenya's judiciary in the past has been resistant to human rights-related arguments but in the current dispensation seem to be more alive to these issues, albeit not all. Its' Constitutional and Judicial Review and the Constitutional and Human Rights Divisions of the High Court have in the decisions discussed in chapter 3 shown themselves to be progressive in interpretation of the constitution and socioeconomic rights.

g. Furthermore, Kenya has a functioning parliament which is empowered under the constitution by the Kenyan people,[1289] to represent them and legislate on their behalf. Parliament approved the 2009 national land policy, 2010 Constitution, the Community Land Act 2016 and various other domestic laws that indigenous communities can rely on to claim their land rights. There is an existing parliamentary committee scrutiny system which can summon persons to give oral evidence, inquire into matters and make recommendations and can form sub-committees to deal with specific issues including indigenous communities' land rights.

v) Membership to human rights bodies

h. Kenya is a state party to the African Union and the East African Community (EAC) and has human rights obligations arising from its membership. Its obligations under the African Charter have facilitated the Endorois and Ogiek decisions. The EAC has various instruments which indigenous communities can use to buttress their land rights claims. Furthermore one of the advantages of the EAC forum is that it does not require exhaustion of remedies and cases are likely to be

[1289] 2010 Constitution, Article 94(1).

considered in a less delayed manner as the sub-region only serves 5 members unlike the 55 at the African Union. The EACJ has presently before it an indigenous community's land rights case which may impact on how EAC partner states deal with indigenous communities' land rights.

2 However, as observed at the outset, Kenya's land regime is complex and has created problems which are deeply entrenched. The system is still suffering from its colonial legacy of land deprivation of the poor and vulnerable in society. Like indigenous communities in other regions like Australia, Canada, Belize and Paraguay to name a few, what indigenous communities like the Endorois, Ogiek and Sengwer are experiencing, stems from the decisions made during colonial conquest. In Kenya's case this conquest took place over 120 years ago and cases in the other regions, several centuries ago.

3 The fact that indigenous communities' land rights cases are being litigated and are succeeding shows that law is catching up with the factual position, this being that the lands they claim as their ancestral lands, are actually theirs and must be returned to them as the rightful owners. The apparent challenge seems, however, to be that the law serves no purpose if it is not realised. In other words it must bear actual results and so when a judgment orders restitution of ancestral lands, realisation of the law must mean just that.

4 The Ndungu Commission report discussed in Chapter 1 explains why it may not be possible for the Ogiek judgment, for example, to be implemented, at this point. Their land currently belongs to other entities: the state and private individuals. The fact that the public land provisions in Article 62 of the constitution apply to forests which are not community forests reinforces this further. And so actual results would necessitate both the state and the private entities acquiescing their entitlement to the forest. For the state, it would need to accept that the forest actually constitutes community land under Article 63 and for the private entities, they would need to hand in their title needs and if

not, the state would have to make the deeds of no effect. Thus the kind of expropriation that was proposed by the Ndungu Commission would need to be enforced.

5 The fact is, had the Ndungu Commission's recommendations been given effect, the Ogiek community would not have resorted to the African regional system. As they now have, they have returned to the same position that the Ndungu Commission left them in, being told what they already know: that they are the true owners of the land and they should get it back.

6 The highly politicised nature of land in Kenya coupled with the involvement of international donors like the World Bank in Kenya's affairs means that, things are never as they seem. And so where one may argue that the present constitutional landscape in Kenya in respect of, human rights protection, recognition and protection of communal land tenure and creation of constitutional bodies to monitor land relations and human rights compliance, are great advancements and are all that is required to return to indigenous communities the land they are entitled, this would be imprecise. Both the state and the Bretton Woods institutions have very clear agendas. Those in authority are above the law and wish to retain power and land enables them to do that. They will therefore see to it that the law does not have the effect that the naïve mind i.e. the mind oblivious to the existence of these agendas, thinks it should. The Bank's agenda is to maintain market liberalization, satisfy its funders and pander to its critics by assuming a human rights-compliant façade.

7 If all things being equal and where the state's agenda were actually in line with the law, the legislation considered in chapter 2 could make a huge difference to indigenous communities' land rights and the institutions discussed in chapter 3 would enable that. And where the state's agenda was not that way inclined (as is the case presently) but the Bank's agenda was to actually bring to realisation indigenous communities' land rights, it (the Bank) would have

sufficient influence to make the state take requisite steps to make that happen.

8 What about the EAC? Well, its language of good governance, human rights, poverty eradication etc., seems to echo the rule of law project and therefore appears tokenistic. Given its membership of East African states including Kenya, this may be the case. Having said that the EAC's court, the EACJ is a defiant court which has ensured that the EAC's treaty provisions that contain those promises are respected in its decisions. Nevertheless even if the EACJ were to make decisions in favour of a Kenyan indigenous community, that judgment would still need to be implemented by Kenya whose agenda, as established, currently necessitates non-compliance of judgments against it.

9 In light of the foregoing, does the situation lend itself to the ratification of the ILO Convention 169 as recommended by the TJRC or as suggested during Universal Periodic Reviews? Ratification will require parliamentary approval and even if approved, application of its provisions will still be subject to the state agenda, which is focused on maintaining the status quo.

10 This agenda goes against the Government's constitutional executive authority and essentially everything that a government should stand for. Article 129 of the 2010 constitution provides that: '(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution. (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.' This authority includes implementing the Bill of Rights,[1290] progressively realising socioeconomic rights[1291] and meeting the needs of indigenous communities.[1292] Those in leadership have failed to act in accordance with this executive authority to the detriment of indigenous communities.

[1290] 2010 Constitution, Article 21(1).
[1291] ibid, Article 43.
[1292] ibid, Article 47(4).

11 So what then? Notwithstanding the above, this thesis maintains its original position that the law presents opportunities which the indigenous communities must continue to use. The African Commission has observed that indigenous communities have linked themselves up with the global movement to expose their human rights sufferings. These communities have continued to rise each time they are beaten down, have repeatedly returned to their ancestral homes when they have been driven out and have consistently used the law to seek resolution of their land rights. Indigenous communities must continue to use the law in the domestic courts and regional and sub-regional courts. They should use the constitution as a basis for approaching various bodies like the KNHRC, the NLC and the CAJ and reminding them of their mandates and their responsibilities. They should begin to lobby parliamentarians sympathetic to their cause. The collective voice of indigenous communities needs to get louder and louder until it gets to a point where those in power will see them as a force to be reckoned with, and using the operation of the law, as seen in other jurisdictions, will one day achieve that.

12 As depressing as the situation may appear, it is important to recognise that the African Commission made its decision in the Endorois case a decade ago, at a time when the domestic law painted a very different picture. The Ogiek judgment was made three years ago and the African Court is still currently seized of the matter as it has yet to make its judgment on reparations. All this has happened, in spite of the agendas spoken of. This means therefore that notwithstanding the criticisms made of the Community Land Act 2016, indigenous communities should begin to use it or demand that the authorities concerned apply it. Where there is a failure to operationalise the system, communities should consider approaching the CAJ or the courts. As the system is fairly new, further research should investigate the operationalisation of the community land registration process.

13 Finally communities should be encouraged, with their representative bodies, to network with indigenous communities elsewhere in the region and internationally, such as those in Canada, other states in the Americas and Australia, to canvass strategies on how to persist amidst the challenges and deal with resistant governments and obtain results.

Appendix- List of Interviewees

1. 6/09/2013- Lawrence Ole Mbelati, Land and Natural Resources Right Officer, Manyoito Pastoralists Integrated Development Organization (MPIDO), Kenya

2. 12/09/2013- Faith Rotich, Lawyer, Kituo Cha Sheria, Kenya

3. 12/09/2013- Eunice Sinoro Parsitau Nkopio, Programme Officer, Manyoito Pastoralists Integrated Development Organization (MPIDO), Kenya

4. 14/09/2013 & 17/07/2018- Daniel Kobei, Director, Ogiek Peoples Development Programme, Nakuru, Kenya

5. 16/09/2013- Ogiek elder- Mr Kiprono Chouma Timboroa, Nakuru, Moinyatza village

6. 20/09/2013 - Odenda Lumumba, Kenya Land Alliance, CEO, Kenya

7. 20/09/2013- Commissioner, National Land Commission, name not to be disclosed, Nairobi, Kenya

8. 23/09/2013- David Achero Mufuayia, Programs Officer, Justice and Equality, CEMIRIDE, Kenya

9. 24/09/2013- Gordon O. Wayumba, Senior Lecturer in Cadastral Surveying and Land Administration at The Technical University of Kenya, Kenya

10. 4/07/2018- Lucy Claridge, Director of Strategic Litigation, Office of the Senior Director of International Law and Policy, Amnesty International (and previously Legal Director, Minority Rights Group International), London

11. 4/07/2018- Chris Chapman, Adviser/Researcher on Indigenous Peoples at Amnesty International, London

12. 18/07/2018- Rachel Murray, Director, Human Rights Implementation Centre, University of Bristol, Bristol, UK

13. 21/07/2018- Nelson Sidney Ndeki, Associate Litigation Officer, Pan African Lawyers Union (PALU), Tanzania

14. 31/07/2018- Tom Lomax Lawyer & Coordinator, Legal and Human Rights Programme, Forest Peoples Programme, UK

15. 16/10/2019- Wachira Waheire- Kenya's National Victims and Survivors Network

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