

**Recognition and Implementation of Indigenous Peoples' Collective Rights in Tanzania:
Global and Banjul Charter Perspectives**

Dissertation

zur Erlangung des Grades eines Doktors der Rechte der Rechts- und
Wirtschaftswissenschaftlichen Fakultät
der Universität Bayreuth

Vorgelegt

von

Cecilia Edward Ngaiza

aus

Arusha, Tanzania

Dekan: Prof. Dr. André Meyer

Erstberichterstatter: Prof. Dr. Bernd Kannowski

Zweitberichterstatter: Prof. Dr. Jörg Gundel

Tag der mündlichen Prüfung: 28.05.2024

Acknowledgements

As this research was conducted amidst challenging times and events, the most occasioned by the outbreak of the global COVID-19 pandemic two months after my admission to this PhD programme in Germany, and my very first time residence in a foreign country; I am indebted to many who have been my rock, comforters and support throughout this journey. This goes along with institutions that have played a major role in shaping the success of my research.

First and foremost, I would like to thank God, the Almighty for the gifts of life and good health generally and particularly all through this Doctorate journey. I thank Him for granting me the grace of resilience to undergo this exceptional academic undertaking. I could not have made it without His divine providence. *All honour and praises belong to Him now and forever! Amen!*

I acknowledge with abundance and distinction, my Supervisor, Prof. Dr. Bernd Kannowski for accepting the task of supervising my Doctorate. I highly appreciate his time, counsel, dedication, guidance, support, thoughtfulness and encouragement throughout this research work. His kind understanding and strong belief in me gave me the strength to pursue this study to completion. I forever remain grateful.

I extend my sincere thanks to Prof. Jörg Gundel for taking his valuable time to read, mark and assess this work as a Second Supervisor.

With gratitude, I thank the University of Bayreuth's Cluster of Excellence "Africa Multiple" financed by the German Research Foundation (DFG) for funding my entire Doctorate programme. This goes along with many thanks to the Human Rights, Corporate Social Responsibility and Interacting Markets in Africa (HR-CSR) Project for hosting me as a Research Assistant under the umbrella of the aforementioned Cluster. Working in this project has enormously enriched my research and academic knowledge and skills and has established long-lasting collaborations. I extend my appreciation to all the project members for their unwavering support and cooperation. It was quite an honour for me to work with such inspiring academic figures and experts.

I would like to thank very much the University of Bayreuth Graduate School and the Bayreuth International Graduate School for African Studies (BIGSAS) for their supporting programmes in this Doctorate programme. I also thank Dr. Udeogu-Gözalán for her wellness sessions.

I further register my sincere gratitude to Prof. Em. Dr. Ulrike Wanitzek who has been a distinguished mentor and support for me since when I arrived in Bayreuth. Particularly, she encouraged me to pursue this doctorate degree as soon as I completed my Masters (LL.M) at the University of Dar es Salaam under the Tanzanian-German Centre for Eastern African Legal Studies (TGCL) Scholarship. She instilled in me the confidence to tap into this life-changing experience. I extend the same degree of gratitude to her family in Bayreuth particularly Mr. Bernhard Wanitzek who has had a great role to play to ensure my smooth settlement, stay and familiarity with the City of Bayreuth. I am forever indebted!

Furthermore, I thank very much my other mentors, Prof. Chris Maina Peter, Prof. Dr. Thokozani Kaime, Dr. Jeannett Martin, Dr. Daniel Shayo, Dr. Robert Owino, Dr. Elifuraha Laltaika and Commissioner Tom Nyanduga Mukirya for their kind support whenever I needed it. Through them, I received learning platforms, coaching sessions, references and recommendations on relevant sources of information for this study. This was of profound value in aiding this study's progress.

I thank the Secretariat of the Chair of Civil Law and Legal History: Civil Law (VII) particularly Mrs. Jessica Meyer who with humility and diligence handled administrative matters related to my position as a Research Assistant at the Chair. I also thank my fellow Research Assistants and Student Assistants of the HR-CSR Project with whom I worked under this Chair with great respect, cooperation and understanding.

Moreover, I thank the Secretariat of the Chair of African Legal Studies for their priceless collaboration and hospitality particularly the TGCL Secretariat. Further, I extend my gratitude to the Secretariat to the Faculty of Law Business and Economics (Dean's Office) which ensured my successful tenure as a student under this Faculty. In addition, I extend many thanks to the University of Bayreuth Students' Affairs Office, Welcome Services for International Students Office and the Studentenwerk Oberfranken (SWO) for guaranteeing my comfortable settlement in Bayreuth as an international student, especially in my first year of study.

I greatly appreciate the support I have received from the University of Dar es Salaam which granted me leave to pursue further studies as well as research permits during my field visits. This was coupled with immense cooperation specifically from the University of Dar es Salaam School of Law. I acknowledge the unconditional support I received from the Offices of the Private Law Department and that of the Dean of the School within the timeframe of

September 2019 to May 2024. Apart from the administrative support granted, I was allowed access to research facilities such as office space and reference materials in the School's Staff Library without any impediments during my research stays in Tanzania.

I express special thanks to all the governmental and non-governmental institutions that helped me with relevant respondents and documents as I conducted empirical research in Tanzania. I also appreciate all the efforts made by specific individuals to ensure that I had access to crucial documents for this thesis that were not publicly accessible for various reasons. This goes simultaneously with thanking all the individuals who set time apart to specifically accommodate me for expert interviews and focused group discussions. I am also grateful to all persons who walked an extra mile to assist me in accessing particular respondents and research areas in an unbureaucratic manner. All your contributions have made this study a great success.

Additionally, I acknowledge with thanks the support from all my friends, family friends and relatives who cheered me on since when I undertook this programme. The same level of appreciation goes to my colleagues at the University of Dar es Salaam School of Law, particularly Dr. Goodluck Kiwory (who constantly encouraged me to pursue a PhD "while still young"), Dr. Nickson Filbert, Dr. Theophil Romward, Dr. Antidius Kaitu and Dr. Petro Protas (who were peer candidates at different research stages); and those with whom I walked this journey at the University of Bayreuth. This includes, but is not limited to, Dr. Florencia Kimario, Dr. Goodluck Temu, Dr. Veronica Buchumi, Dr. Jebby Gonza, Dr. Gilbert Hagabimana, Ms. Ange-Dorine Irakoze, Ms. Diana Byarugaba Kisakye, Ms. Isabelle Zundel, Ms. Veronica Thalhammer, Ms. Jane Murungi, Mr. Nelson Otineo, Mr. Gift Mauluka and Mr. Albert Irambeshya. In addition, I am grateful to Mr. Leiyo Singo and Joseph Rwagaba's family for their friendship, fellowship and hospitality in Bayreuth. I thank the ALS PhD Club, my long-distance PhD fellows Ms. Sonja Kahl from the University of Freiburg, Mr. Boaz Mabula from the University of Munich, Mr. Dyoniz Kindata from Lüneburg University, all in Germany, and Ms. Winnie Muangi from Reading University, England for their peer support. Abundant thanks also go to Kimata, Peter and Caro for their unconditional friendship and support while I lived in Bayreuth and visited Berlin and Munich.

I sincerely appreciate the Bayreuth City Church (the BCC) for its spiritual guidance throughout this journey.

Furthermore, I am humbled by the massive, reliable and constant care and encouragement I received from my family members i.e. my five brothers, their spouses and children. Most importantly I acknowledge the jovial support from my sister Gloria with whom I luckily shared the doctorate journey as she undertook hers at the University of Oxford in England. It was such a blessing that we could laugh at some “PhD memes” together as we sailed through our PhD journeys. I value her input in my research as well as the time we spent together in Bayreuth a week before I submitted my work for examination. I remain inspired by her work ethic.

I thank Mr. Nsaa-Iya Kihundrwa, Ms Getrude Mapunda and my in-laws who have always kept a positive attitude towards this journey.

Lastly and vastly important, I express my sincere appreciation to my spouse for all the support he offered me as I conducted this research both in Germany and Tanzania. I do not take any of it or granted.

Vielen Dank! Thank you a lot! Asanteni sana!

Dedication

To those who find hope in the middle of chaos!

List of Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AfrCHPR	African Court on Human and Peoples' Rights
AIWO	African Indigenous Women's Organization
ALAPA	Association for Law and Advocacy for Pastoralists
ALS	African Legal Studies
AU	African Union
CAS	Conference Committee on the Application of ILO Standards
CBD	Convention on Biological Diversity
CCPR	Committee on Civil and Political Rights
CCRO	Certificate of Customary Rights of Occupancy
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CEMIRIDE	Centre for Minority Rights Development
CERD	Committee on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRAGG	Commission for Human Rights and Good Governance
CIDA	Canadian International Development Agency
CMA	Conference of the Parties Serving as the Meeting of Parties to the Paris Agreement
COSTECH	Commission for Science and Technology
COP	Conference of Parties
COVID-19	Corona Virus Disease - 2019
CRC	Committee on the Rights of the Child
CSOs	Civil Society Organisations
DOAG	<i>Deutsch-Ostafrikanische Gesellschaft</i>
DRC	Democratic Republic of Congo
EACJ	East African Court of Justice
EACOP	East African Crude Oil Pipeline
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
Eds.	Editors

EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EPFI	Equator Principles of Financial Institutions
ESIA	Environmental and Social Impact Assessment
ESIS	Environmental and Social Impact Statement
ESS	Environmental and Social Standards
EU	European Union
FCCC	Framework Convention on Climate Change
FDG	Focused Group Discussion
FPIC	Free, Prior and Informed Consent
GEF	Global Environment Facility
GN	Government Notice
HIMWA	Huduma ya Injili na Maendeleo kwa Wafugaji
i.e.	<i>id est</i>
IActHR	Inter-American Court of Human Rights
IAITPTF	International Alliance of Indigenous and Tribal Peoples of the Tropical Forest
<i>Ibid</i>	<i>Ibidem</i>
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
<i>Id</i>	<i>Idem</i>
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILO	International Labour Organisation
IPACC	Indigenous Peoples of Africa Co-ordinating Committee
IPPF	Indigenous Peoples Policy Framework
ITK	Indigenous Technical Knowledge
IUCN	International Union for Conservation of Nature
IWGIA	International Work Group for Indigenous Affairs
KADCO	Kilimanjaro Airports Development Company
KFS	Kenya Forests Services
KIA	Kilimanjaro International Airport

LEAT	Legal Environmental Action Team
LGAs	Local Government Authorities
LHRC	Legal and Human Rights Centre
<i>Loc. cit.</i>	<i>Loco citato</i>
LRC	Law Reform Commission of Tanzania
LTIP	Land Tenure Improvement Project
MCF	Malignant Catarrh Fever
MDAs	Ministries, Departments and Agencies
MLUC	Multiple Land Use Concept
MOP	Meeting of Parties
MOU	Memorandum of Understanding
MRGI	Minority Rights Group International
MWEDO	Maasai Women Development Organisation
NAFCO	National Agriculture and Food Corporation
NBS	National Bureau of Statistics
NBSAP	National Biodiversity Strategy and Action Plan
NCA	Ngorongoro Conservation Area
NCAA	Ngorongoro Conservation Area Authority
NCCS	National Climate Change Strategy
NDC	National Development Corporation
NDC	National Development Corporation
NGOs	Non-governmental organisations
NHFR	Northern Highland Forest Reserve
NHRAP	National Human Rights Action Plan
NHRI	National Human Rights Institution
NR	Natural Recommendation
OAU	Organisation of African Unity
OBC	Ortello Business Corporation
OD	Operational Directive
OHCHR	Office of the High Commissioner for Human Rights
OMS	Operational Manual Statement

<i>Op. cit.</i>	<i>Opus citatum/Opere citato</i>
OP	Operational Policy
PAICODEO	Parakuiyo Pastoralists Indigenous Community Development Organisation
PALSEP	Pastoral Livelihood and Empowerment Program
Para.	Paragraph
Paras.	Paragraphs
PINGOs	Pastoralists Indigenous Non-Governmental Organisations
PPT	Permanent Peoples' Tribunal
PS	Performance Standard
PSSN	Productive Social Safety Net
QMS	Quota Management System
REDD	Reduced Emissions from Deforestation and Forest Degradation
RIMS	Research Information Management System
R.E	Revised Edition
SBI	Subsidiary Body on Implementation
SDGs	Sustainable Development Goals
SGR	Standard Gauge Railway
SNP	Serengeti National Park
TANAPA	Tanzania National Parks
TANU	Tanganyika African National Union
TAPHGO	Tanzania Pastoralists, Hunter and Gatherers Organisation
TASAF	Tanzania Social Action Fund
TAWA	Tanzania Wildlife Management Authority
TAWIRI	Tanzania Wildlife Research Institute
TBL	Tanzania Breweries Limited
TCL	Tanzania Conservation Limited
TFS	Tanzania Forest Services
THRDC	Tanzania Human Rights Defenders Coalition
TIC	Tanzania Investments Centre
TIRDO	Tanzania Industrial Research and Development Organization
TIRP	Tanzania Intermodal and Rail Development Project

TNRF	Tanzania Natural Resources Forum
TRC	Tanzania Railways Corporation
UAE	United Arab Emirates
UCRT	Ujamaa Community Resource Team
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
UNICEF	United Nations International Children’s Emergency Fund
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNSRIP	United Nations Special Rapporteur on the Rights of Indigenous People
UNWGIP	United Nations Working Group on Indigenous Populations
VDPA	Vienna Declaration and Programme of Action
VGPF	Vulnerable Groups Planning Framework
VPO	Vice President’s Office
WB	World Bank
WGRI	Working Group on Review of Implementation of the Convention on Biological Diversity
WHC	World Heritage Centre
WMA	Wildlife Management Act
ZLSC	Zanzibar Legal Services Centre

List of Cases

Human Rights Committee

- Ominayak et al. v. Canada*, Communication No. 167/1984. (CCPR/C/38/D/167/1984).
- Apirana Mahuika et al. v. New Zealand*, Communication No.547/199. (CCPR/C/70/D/547/1993).
- George Howard v. Canada*, Communication No. 879/1999. (CCPR/C/84/D/879/1999).
- Mr. Jarle Jonassen and Members of the Riast/Hylling Reindeer Herding District v. Norway*, Communication No. 942/2000. (CCPR/C/76/D/942/2000).
- Tiina Sanila-Aikio v. Finland*, Communication No. 2668/2015. (CCPR/C/124/D/2668/2015).
- Klemetti Käkkäläjärviet al. v. Finland*, Communication No. 2950/2017. (CCPR/C/124/D/2950/2017).

Inter-American Court of Human Rights

- Mayagna (Sumo) Awas Tigni v. Nicaragua*, Judgment of August 31, 2001. (Merits, Reparations and Costs).
- Moiwana Community v. Suriname*, Judgment of June 15, 2005. (Preliminary Objections, Merits, Reparations and Costs).
- Saramaka People v. Suriname*, Judgment of November 28, 2007. (Preliminary Objections, Merits, Reparations, and Costs).

African Commission on Human and Peoples' Rights

- Katangese Peoples' Congress v Zaire*, Communication No. 75/92.
- Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication No. 155/96.
- Sir Dawda K. Jawara v Gambia*, Communication, No. 147/97.
- Legal Resources Foundation v Zambia*, Communication No. 211/98.
- Malawi African Association and Others v Mauritania*, Consolidated Communications Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000).
- Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya*, Communication No. 276/2003.
- Front for the Liberation of the State of Cabinda v Republic of Angola*, Communication No. 328/2006.

AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v Cameroon, Communication No. 336/2007.

African Commission on Human and Peoples' Rights v Republic of Kenya, Application No. 006/2012.

African Court on Human and Peoples' Rights

Reverend Christopher R. Mtikila v. United Republic of Tanzania, Application No. 011 of 2011. (Ruling on Reparation).

African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012. (Judgments on Merits and Reparations rendered on May 26, 2017 and June 23, 2022 respectively).

East African Court of Justice

James Katabazi and 21 Others versus Secretary General of the East African Community & Attorney General of the Republic of Uganda, Reference No.1 of 2007, (EACJ - First Instance Division).

Ololosokwani Village Council and 3 Others versus Attorney General of the United Republic of Tanzania, Application No. 15 of 2017, (EACJ - First Instance Division).

Ololosokwani Village Council and 3 Others versus Attorney General of the United Republic of Tanzania, Reference No. 10 of 2017, (EACJ - First Instance Division).

Ololosokwani Village Council and 3 Others versus Attorney General of the United Republic of Tanzania, Appeal No. 13 of 2022, (EACJ - Appellate Division).

Court of Appeal of Tanzania

Yoke Gwaku and Others versus Gawal Farms Limited and NAFCO, Civil Appeal No. 37 of 1998.

Halmashauri ya Kijiji cha Mabwegere (Mabwegere Village Council) versus Hamisi (Shaban) Msambaa and 32 Others, Civil Appeal No. 53 of 2010.

Udaghwenga Bayay and Others versus Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge, Civil Appeal No. 77 of 2012.

Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori-Burunge versus Udaghwenga Bayay and Others Civil Application No. 16 of 2013.

Mondorois Village Council and 2 Others versus Tanzania Breweries Limited and 4 Others,
Civil Appeal No. 66 of 2017.

Republic versus Lee Lenina and Baraka Lenina, Criminal Appeal No. 356 of 2018.

High Court of Tanzania

Mulbadaw Village Council and 67 Others versus National Agriculture and Food Corporation (NAFCO), [1984] T.L.R.15, (High Court - Arusha).

National Agriculture and Food Corporation (NAFCO) versus Mulbadaw Village Council and Others, [1985] T.L.R. 88, (High Court - Arusha).

Yoke Gwaku and Others versus Gawal Farms Limited and NAFCO, Civil Case No. 52 of 1988, (High Court of Tanzania at Arusha).

Joseph Kessy and Others versus Dar es Salaam City Council, Civil Case No. 299 of 1988, High Court of Tanzania at Dar-es-Salaam.

Lekengere Faru Paratu Kamunyu and 52 Others versus Minister for Tourism, Natural Resources and Environment and Others, Consolidated Civil Case No. 33 of 1994, High Court of Tanzania at Moshi.

Halmashauri ya Kijiji cha Mabwegere (Mabwegere Village Council) versus Hamisi (Shaban) Msambaa and 32 Others, Land Case No. 23, 2006, High Court of Tanzania at Arusha.

Udaghwenga Bayay and Others versus Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge, Land Appeal No. 31 of 2009, High Court of Tanzania at Arusha.

John Maselu and Others versus Permanent Secretary, Ministry of Natural Resources and Tourism and Another, Land Case No. 212 of 2012, High Court of Tanzania at Morogoro.

Mondorois Village Council and 2 Others versus Tanzania Breweries Limited and 4 Others, Land Case No. 26 of 2013, High Court of Tanzania at Arusha.

Republic versus Lee Lenina and Baraka Lenina, Criminal Appeal No. 30 of 2018, High Court of Tanzania at Dodoma.

Ndalamia Partareto Taiwap and Others versus Minister of Natural Resources and Tourism and Another, Miscellaneous Civil Cause No. 9 of 2022, High Court of Tanzania at Arusha.

Latang'amwaki Ndwati and Others versus Attorney General, Civil Application No. 178, 2022, High Court of Tanzania at Arusha.

Baraka Moson Kesoi and Raphael Oleruye Oloishiro versus the Ngorongoro Conservation Area Authority and 2 Others, Criminal Appeal No. 9 of 2023, High Court of Tanzania at Arusha.

Saitem Hotee Pololeti & 297 Others versus Director Kilosa District Council and 11 Others, Civil Case No. 5, 2023, High Court of Tanzania at Morogoro.

District Court and Land Tribunal of Tanzania

Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge versus Udaghwenga Bayay and Others, Application No. 70 of 2008 (District Land and Housing Tribunal for Manyara at Babati).

Republic versus Lee Lenina and Baraka Lenina, Criminal Case No. 58/2018 (District Court of Kondo).

List of Declarations

Universal Declaration on Human Rights, 1948.

Universal Declaration on the Rights of the Peoples, 1976.

Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004.

United Nations Declaration on the Rights of Indigenous Peoples, 2007.

List of International Legal Instruments

Versailles Treaty, 1919.

Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933.

United Nations Charter, 1945.

Indigenous and Tribal Populations Convention, 1957.

International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

International Covenant on Civil and Political Rights, 1966.

First Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008.

Convention Concerning the Protection of World Cultural and Natural Heritage, 1972.

Convention on the Elimination of All Forms of Discrimination against Women, 1979.

Indigenous and Tribal Peoples' Convention, 1989.

Convention on the Rights of the Child, 1989.

Convention on Biological Diversity, 1992.

United Nations Framework Convention on Climate Change, 1992.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000.

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation to the Convention on Biological Diversity, 2010.

Paris Agreement, 2015.

List of African Regional Agreements

Cultural Charter for Africa, 1976.

African Charter on Human and Peoples' Rights, 1981.

African Charter on the Rights and Welfare of the Child, 1990.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

African Youth Charter, 2008.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, 2018.

African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2018.

List of Statutes

Tanzania

Chiefs (Abolition of Office: Consequential Provisions) Act, 1963, Act No. 53 of 1963.
Land Acquisition Act, 1967, Act No. 47 of 1967.
Game Parks Laws (Miscellaneous Amendments) Act, 1975, Act No. 14 of 1975.
Ngorongoro Conservation Area Act, 1975, Act No. 14 of 1975.
Villages and *Ujamaa* Villages (Registration, Designation and Administration) Act, 1975, Act No. 21 of 1975.
Law Reform Commission Act, 1980, Act No. 11 of 1980.
Tanzania Commission for Science and Technology Act, 1986, Act No.7 of 1986.
Basic Rights and Duties Enforcement Act, 1994, Act No. 33 of 1994.
Land Act, 1999, Act No. 4 of 1999.
Village Land Act, 1999, Act No. 5 of 1999.
Commission for Human Rights and Good Governance Act, 2001, Act No.16 2001.
Forests Act, 2002, Act No. 14 of 2002.
National Parks Act, 2003, Act No. 11 of 2003.
Environmental Management Act, 2004, Act, No. 20 of 2004.
Wildlife Conservation Act, 2009, Act No. 5 of 2009.
Tourism Act, 2009, Act No. 29 of 2009.
Grazing Land and Animal Feed Resources Act, 2010, Act No. 13 of 2010.
Statistics Act of 2015, Act No. 9 of 2015.
Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, Act No. 5 of 2017.

Foreign Statutes

Kenyan Community Land Act, 2016.
DRC Law for Protection and Promotion of the Rights of Indigenous Pygmy Peoples, 2022.

Colonial Laws

German

Imperial Ordinance for the African and South Seas Possession with Exception of German South West Africa, 1891.

Imperial Ordinance on the Creation, Acquisition and Conveyance of Crown Land and Alienation of Real Estates in German East Africa of November 26, 1895. (*Kaiserliche Verordnung über die Schaffung, Besitzergreifung und Veräußerung von Kronland und über den Erwerb und die Veräußerung Von Grundstücken in Deutsch-Ostafrika im allgemeinen vom 26. November 1895*).

Usambara Forest Reserve Ordinance, 1895 (*Waldordnung für Usambara*).

Wildlife Preservation Ordinance, 1896 (*Wildschutzverordnung*).

Hunting Protection Ordinance, 1903 (*Jagdschutzverordnung*).

Forest Protection Ordinance, 1904.

Game Ordinance, 1908.

German Forest Protection Ordinance, 1909.

British

Foreign Jurisdiction Act, 1890.

Tanganyika Order in Council, 1920.

Game Preservation Proclamation, 1920.

Game Preservation Ordinance, 1921.

Forests Ordinance, 1921.

Land (Law of Property and Conveyancing) Ordinance, 1923.

Land Ordinance, 1923.

Native Authority Ordinance, 1926.

Game Ordinance of 1940.

National Parks Ordinance, 1948.

Fauna Conservation Ordinance, 1951.

Forests Ordinance, 1951.

Forests Ordinance, 1957.

National Parks Ordinance, 1959.

Ngorongoro Conservation Ordinance, 1959.

List of Constitutions

Constitution of the United Republic of Tanzania, 1977.

Constitution of the Republic of Uganda, 1995.

Constitution of the Republic of South Africa, 1996.

Constitution of the Republic of Rwanda, 2003.

Constitution of Kenya, 2010.

Constitution of the Central African Republic, 2016.

Constitution of Burundi, 2018.

List of Policies and Standards

Financial Institutions

World Bank Policies on Indigenous Peoples

Tribal Peoples in Bank-Financed Projects Operational Manual Statement (OMS) 2.34, 1982.

Operational Directive 4.20 on Indigenous Peoples (OD 4.20), 1991.

Indigenous Peoples' Operational Policy (OP 4.10), 2005 (revised in 2013).

Environmental and Social Framework (ESF), 2017: Environmental and Social Standard 7 (ESS7).

European Investment Bank

Environmental and Social Standards, 2022: Standard 7 on Vulnerable Groups, Indigenous Peoples and Gender

African Union

Framework and Guidelines on Land Policy in Africa, 2010.

Policy Framework for Pastoralism in Africa, 2012.

Tanzania

National Land Policy, 1995.

National Tourism Policy, 1998.

National Forest Policy, 1998.

National Livestock Policy, 2006.

Wildlife Policy of Tanzania, 2007.

National Environmental Policy, 2021.

List of Strategic Plans, Frameworks and Action Plans

International Level

Strategic Plan for the Cartagena Protocol on Biosafety (2011-2020).

Kunming-Montreal Global Biodiversity Framework, 2022.

Regional Level

African Commission on Human and Peoples' Rights, Strategic Framework, (2021-2025).

National Level

National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (2nd Draft), 2012.

National Human Rights Action Plan (2013-2017).

National Biodiversity Strategy and Action Plan (2015-2020).

National Forest Policy Implementation Strategy (2021-2031).

National Climate Change Response Strategy (2021-2026).

Implementation Strategy for the National Environmental Policy, (2022-2032).

Abstract

This thesis assesses the potential for and the extent of the recognition and implementation of indigenous peoples' collective rights in Tanzania. It does so by focusing on the obligations assumed by Tanzania under the global and regional legal frameworks which capture aspects of indigenous peoples' rights and other related interests. Given the fact that indigenous peoples are categorised by the African Commission on Human and Peoples' Rights as one way of unpacking the term "peoples" as stipulated in the Banjul Charter, this study approaches indigenous peoples' collective rights in form of "peoples' rights". The study encompasses legal and factual challenges facing communities self-identifying as indigenous peoples in Tanzania and leading traditional lives which are distinct from that of the mainstream population. Furthermore, it delves into the conceptual debate around the term "indigenous peoples" and highlights its contextual application particularly on the African continent. Drawing practical examples from Tanzania, the study answers the core question which is, "to what extent does the Government of Tanzania meet its domestic responsibility under international law and the Banjul Charter to promote and protect indigenous peoples' collective rights?" Both empirical and doctrinal research methods have been applied to tackle this question while employing the global and African regional human rights standards as tools of assessment.

The dissertation successfully reveals the situation of indigenous peoples in Tanzania from the historical and contemporary perspectives. It also relates the present state of affairs with the country's national policies, legislation and institutional framework. Finally, it presents conclusions on the research questions and proves partially true the hypothesis applied in the research, i.e. the implementation of indigenous peoples' collective rights in Tanzania is unsatisfactory due to the low priority and lack of regard extended to the communities self-identifying as indigenous peoples in the country by the Government of Tanzania.

Drawing from this conclusion, the thesis presents recommendations for improvement with regard to the recognition of indigenous peoples' rights in Tanzania. The recommendations target relevant actors with emphasis on the Government of Tanzania which has undertaken to protect human rights and other legal obligations at the global and African regional levels via ratified instruments. It also proposes areas for further research to encourage more academic exploration in the field of indigenous peoples' rights in Tanzania.

Table of Contents

Acknowledgements.....	i
Dedication.....	v
List of Acronyms and Abbreviations.....	vi
List of Cases.....	xi
List of Declarations.....	xv
List of International Legal Instruments.....	xvi
List of African Regional Agreements.....	xvii
List of Statutes.....	xviii
List of Constitutions.....	xx
List of Policies and Standards.....	xxi
List of Strategic Plans, Frameworks and Action Plans.....	xxii
Abstract.....	xxiii
Table of Contents.....	xxiv
CHAPTER ONE.....	1
1.0 GENERAL INTRODUCTION.....	1
1.1 Introduction.....	1
1.2 Scope of the Study.....	3
1.3 Statement of the Problem.....	5
1.4 Research Hypothesis.....	7
1.5 Objectives of the Study.....	7
1.5.1 Main Objective.....	7
1.5.2 Sub-Objectives.....	7
1.6 Research Questions.....	8
1.6.1 Main Question.....	8

1.6.2 Sub-Questions	8
1.7 Justification and Significance of the Study.....	8
1.8 Literature Review.....	10
1.9 Methodological Framework.....	16
1.9.1 Data Collection Tools	16
1.9.1.1 Empirical Methods.....	16
1.9.1.2 Secondary Method	16
1.9.2 Sampling	17
1.9.2.1 Respondents	17
1.9.2.2 Institutions and Organisations.....	17
1.9.2.2.1 Government Institutions.....	18
1.9.2.2.2 Non-Governmental Organisations	22
1.9.2.3 Human Rights Experts	23
1.9.3 Area of Study and Sample Size.....	23
1.9.3.1 Country of Study.....	23
1.9.3.2 Geographical Regions of Study	24
1.9.3.3 Sample Size.....	24
1.9.3.3.1 Interviewed Respondents.....	25
1.9.3.3.2 Respondents from Focus Group Discussions	27
1.9.3.3.3 Selected Villages for Observation	29
1.10 Research Ethics	29
1.11 Empirical Research Phases and Limitations of the Study	30
1.11.1 Research Phases	30
1.11.2 Research Limitations.....	30
1.12 Data Analysis and Presentation Style	33
1.13 Synopsis	34

CHAPTER TWO	36
2.0 CONCEPTS AND THEORIES ON INDIGENOUS PEOPLES AND COLLECTIVE RIGHTS	36
2.1 Introduction.....	36
2.2 Key Concepts and Terms	37
2.2.1 Indigenous.....	38
2.2.2 Peoples and Peoples’ Rights	39
2.2.2.1 The Trail in Legal Documents	39
2.2.2.2 The Study by UNESCO.....	40
2.2.2.3 Peoples and Peoples’ Rights under the Banjul Charter	43
2.2.3 Indigenousness, Indigenous Peoples and Indigenous Peoples’ Rights	47
2.2.3.1 International Law Perspective.....	47
2.2.3.2 The Perspective of Scholars	49
2.2.3.3 The Perspective of Financial Institutions	51
2.2.3.3.1 The Perspective of the World Bank	51
2.2.3.3.2 The Perspective of the European Investment Bank	53
2.2.3.6 The Perspective of African Human Rights	55
2.2.4 The Indigenous Peoples Movement.....	57
2.2.5 Other Related Terms	59
2.2.5.1 Indigenous Minorities	59
2.2.5.2. Local Communities	61
2.3 Theoretical Framework.....	61
2.3.1 Liberal Theory	62
2.3.2 Communitarian Theory vis-a-vis Liberal Theory	63
2.3.3. Communitarian Theory and the African Perspective of Rights	64
2.4 Conclusion	65

CHAPTER THREE	67
3.0 THE GLOBAL DIMENSION OF INDIGENOUS PEOPLES' RIGHTS.....	67
3.1 Introduction.....	67
3.2 Indigenous Peoples' Agenda in International Human Rights Law.....	67
3.2.1 ILO Conventions C107 of 1957 and C169 of 1989.....	68
3.2.2 ICERD, 1965.....	73
3.2.3 ICCPR and ICESCR, 1966	75
3.2.4 UNDRIP, 2007.....	76
3.3 International Mechanisms for Implementation of Indigenous Peoples' Rights.....	79
3.3.1 Mechanisms under ILO C107 and C169	79
3.3.2 State Reporting Mechanism under the International Labour Office.....	80
3.3.2.1 Committee of Experts on the Application of Conventions and Recommendations (CEACR).....	80
3.3.2.2 Conference Committee on the Application of (ILO) Standards (CAS).....	82
3.3.3 Human Rights Committee.....	83
3.3.3.1 Human Rights Committee's General Comments	84
3.3.3.1.1 General Comment No. 12 of 1984: Right to Self-determination (Article 1).....	84
3.3.3.1.2 General Comment No. 23 (1994): Right of Minorities (Article 27).....	85
3.3.3.2 Communications before the CCPR.....	86
3.3.4 Committee on Economic, Social and Cultural Rights (CESCR).....	107
3.3.4.1.1 General Comment No. 7 (1997): The Right to Adequate Housing: Forced Evictions (Article 11 (1)).....	108
3.3.4.1.2 General Comment No. 12 (1999): The Right to Adequate Food (Article 11). 108	
3.3.4.1.3 General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12).....	109
3.3.4.1.4 General Comment No. 15 (2002): The Right to Water (Articles 11 and 12) ..	110

3.3.4.1.5 General Comment No. 21(2009): Right of Everyone to Take Part in Cultural Life (Article 15 (1) (a)).....	111
3.3.4.1.6 General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities	114
3.3.4.1.7 General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Articles 15 (1) (b), (2), (3) and (4)).....	116
3.3.4.1.8 General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights	117
3.3.4.1.9 General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Rights (in drafting stage)	120
3.3.4.2 Indigenous Peoples’ Communications before the CESCR.....	122
3.3.5 Committee on the Elimination of Racial Discrimination (CERD)	123
3.3.5.1 CERD’S General Recommendations on Indigenous Peoples’ Rights	124
3.3.5.2 CERD’s Early Warning and Urgent Procedures on Indigenous Peoples’ Rights	125
3.3.5.2.1 Decisions.....	125
3.3.5.2.2 Statements	127
3.3.5.2.3 Warning Letters	128
3.3.6 Convention and Committee on the Rights of the Child (CRC).....	129
3.3.6.1 Convention on the Rights of the Child	129
3.3.6.2 Committee on the Rights of the Child	129
3.3.6.2.1 General Comment No. 11 (2009): Indigenous Children and their Rights under the Convention.....	130
3.3.6.2.2 General Comment No. 16 (2013): State Obligations Regarding the Impact of the Business Sector on Children’s Rights.....	131
3.3.6.2.3 General Comment No.26 (2023) on Children’s Rights and the Environment with a Specific Focus on Climate Change	131

3.3.7 Committee on the Elimination of All Forms of Discrimination against Women	132
3.3.8 Indigenous Peoples’ Special Mechanisms under the United Nations.....	133
3.3.8.1 Permanent Forum on Indigenous Issues (UNPFII).....	134
3.3.8.2 Special Rapporteur on the Rights of Indigenous Peoples (UN-SRRIP).....	135
3.3.8.3 Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)	136
3.3.9 Indigenous Peoples’ Affairs in Non-human Rights International Instruments	137
3.3.9.1 The Convention on Biological Diversity (CBD), 1992	138
3.3.9.1.1 Implementation of the CBD.....	138
3.3.9.1.2 Protocols to the Convention on Biological Diversity	142
3.3.9.3 Kunming-Montreal Global Biodiversity Framework, 2022	149
3.4 Conclusion	150
CHAPTER FOUR.....	152
4.0 INDIGENOUS PEOPLES’ RIGHTS IN THE AFRICAN HUMAN RIGHTS SYSTEM	
.....	152
4.1 Introduction.....	152
4.2 Background to the African Human Rights System.....	152
4.3 Indigenous Peoples, the Banjul Charter and its Implementation Mechanisms.....	155
4.3.1 Collective Rights and African Philosophy under the Charter	156
4.3.2 The Banjul Charter and Indigenous Peoples’ Rights.....	157
4.3.2.1 Right to Equality (Article 19)	158
4.3.2.2 Right to Existence and Self-Determination (Article 20).....	159
4.3.2.3 Peoples’ Right to Free Disposal of Wealth and Natural Resources (Article 21)	160
4.3.2.4 Peoples’ Right to Economic, Social and Cultural Development (Article 22)	161
4.3.2.5 Peoples’ Right to National and International Peace and Security (Article 23)...	163
4.3.2.6 Peoples’ Right to a General Satisfactory Environment Favorable to their Development	
(Article 24).....	165

4.3.3 Indigenous Peoples’ Rights and African Human Rights Mechanisms	166
4.3.3.1 African Commission on Human and Peoples’ Rights	166
4.3.3.1.1 Composition and Mandate of the Commission.....	166
4.3.3.1.2 Background of ACHPR Practice in Respect of Indigenous Peoples’ Rights ..	168
4.3.3.1.3 Special Mechanism on Indigenous Peoples’ Rights	169
4.3.3.1.4 Jurisprudence of the Commission.....	172
4.3.3.2 African Court on Human and Peoples’ Rights.....	177
4.3.3.2.1 Composition and Mandate of the Court.....	177
4.3.3.2.2 Jurisprudence of the Court.....	178
4.3.3.3 Challenges and Opportunities for Indigenous Peoples in the African Human Rights System	187
4.3.3.3.1 Challenges.....	187
4.3.3.3.2 Opportunities.....	189
4.3.4 States’ Obligations towards Indigenous Peoples’ under the African Human Rights System	190
4.4 Conclusion	193
CHAPTER FIVE	195
5.0 SITUATION OF INDIGENOUS PEOPLES IN TANZANIA.....	195
5.1 Introduction.....	195
5.2 Background to the Situation of Indigenous Peoples’ Rights in Tanzania	196
5.2.1 Pre-colonial Period.....	197
5.2.2 Colonial Period	199
5.2.2.1 The German Colonial Era (1880s-1916).....	199
5.2.2.2 British Colonial Era (1916-1961)	204
5.2.3 Independence and Post-Independence Periods	214
5.3 Communities Self-Identifying as Indigenous Peoples in Tanzania	217

5.3.1 Akie.....	217
5.3.2 Barbaig.....	218
5.3.3 Hadzabe.....	218
5.3.4 Maasai.....	219
5.4 Selected Case Studies	221
5.4.1 Villagisation Programme and Sedentarising the Hadzabe	221
5.4.2 The Case of Mkomazi Game Reserve.....	223
5.4.3 The Case of Mkungunero Game Reserve	225
5.4.4 The Case of Loliondo.....	227
5.4.5 The Case of Ngorongoro Conservation Area.....	235
5.4.6 The Case of Essimiongor Forest Reserve	243
5.4.7 The NAFCO Case	244
5.4.8 The Case of Vilima Vitatu	246
5.4.9 The Case of Mabwegere Village.....	248
5.4.10 The Case of Kilombero Valley	251
5.4.11 The Case of KADCO	253
5.4.12 The Case of the Engaruka Soda Ash Project	255
5.4.13 The Case of the East African Crude Oil Pipeline (EACOP).....	257
5.4.14 The Case of Oldoinyo Morwak.....	259
5.5 Conclusion	260
CHAPTER SIX.....	261
6.0 APPRAISAL OF THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING INDIGENOUS PEOPLES' RIGHTS IN TANZANIA.....	261
6.1 Introduction.....	261
6.2 Legal Framework	261
6.2.1 International Instruments	261

6.2.2 Regional Instruments	263
6.2.3 Domestic Law	267
6.2.3.1 The Constitution.....	267
6.2.3.2 Selected Legislation.....	270
6.2.3.2.1 Natural Wealth and Resources (Permanent Sovereignty) Act, 2017	270
6.2.3.2.2 Land Laws and the Concept of Ancestral Lands.....	271
6.2.3.2.3 Wildlife Conservation Act, 2009	274
6.2.3.2.4 National Parks Act, 2003	280
6.2.3.2.5 Ngorongoro Conservation Area Act, 1975	281
6.2.3.2.6 Forest Act, 2002.....	284
6.2.3.2.7 Grazing Land and Animal Feed Resources Act, 2010.....	285
6.2.3.2.8 Environmental Management Act, 2004	286
6.2.3.2.9 Tourism Act, 2008	287
6.3 Policy Framework, Strategies and Action Plans.....	288
6.3.1 National Land Policy, 1995	288
6.3.2 National Livestock Policy, 2006.....	289
6.3.3 National Tourism Policy, 1998	291
6.3.4 The Wildlife Policy of Tanzania, 2007.....	292
6.3.5 National Environmental Policy 2021	294
6.3.6 National Forest Policy, 1998.....	295
6.3.7 National Forest Policy Implementation Strategy (2021-2031)	297
6.3.8 Implementation Strategy for the National Environmental Policy (2021) for the Period 2022-2032.....	297
6.3.9 National Climate Change Response Strategy (2021-2026).....	298
6.3.10 National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (2nd Draft), 2012.....	299
6.3.11 Tanzania National Biodiversity Strategy and Action Plan (2015-2020).....	301

6.3.12 National Human Rights Action Plan (2013-2017).....	302
6.4 Institutional Framework.....	304
6.4.1 Commission for Human Rights and Good Governance (CHRAGG)	304
6.4.1.1 CHRAGG’s Engagement in the UPR Mechanism	305
6.4.1.2 CHRAGG’s Engagement with the ACHPR	311
6.4.1.3 CHRAGG’s Domestic Engagement in Indigenous Peoples’ Affairs.....	312
6.4.2 The Law Reform Commission of Tanzania	319
6.4.3 Vice President’s Office (Environment Division).....	320
6.4.4 The National Bureau of Statistics	322
6.4.5 Tanzania Social Action Fund.....	324
6.4.6 Tanzania Railways Corporation.....	325
6.4.7 Tanzania Investment Centre.....	328
6.4.8 The Ngorongoro Conservation Area Authority	329
6.4.9 The Ministry of Livestock and Fisheries	331
6.4.10 Ministry of Lands, Housing and Human Settlements Development.....	335
6.4.11 Ministry of Culture, Arts and Sports.....	337
6.4.12 Ministry of Constitution and Legal Affairs.....	338
6.4.13 Ministry of Community Development, Gender, Women and Children.....	342
6.5 Conclusion	344
CHAPTER SEVEN	346
7.0 GENERAL CONCLUSION	346
7.1 Introduction.....	346
7.2 Summary of Findings.....	346
7.3 Conclusion on the Study’s Objective.....	348
7.4 Summary of Answers to Research Questions	349
7.5 Proving the Hypothesis.....	351

7.6 Recommendations.....	352
7.6.1 Recommendations to the Government of Tanzania	352
7.6.2 Recommendations to the NGOs.....	356
7.6.3 Recommendations to Indigenous Communities.....	357
7.7 Proposals for Future Research	357
BIBLIOGRAPHY	359

CHAPTER ONE

1.0 GENERAL INTRODUCTION

“...human rights must be responsive to African circumstances. Clearly, collective rights...are essential element of human rights in Africa.”¹

1.1 Introduction

Governments hold responsibilities towards their subjects. Such responsibilities take various forms, one of which is the obligation to fulfil the rights of various groups existing in their countries. This thesis investigates the extent to which the Government of Tanzania recognises and implements the collective rights of indigenous peoples in Tanzania. The collective rights in question are those provided for as peoples’ rights under the African Charter on Human and Peoples’ Rights (herein referred to as the Banjul Charter)² and those reflected in international human rights instruments.

In one of its commissioned studies, the African Commission on Human and Peoples’ Rights (ACHPR) which was established by the Banjul Charter to oversee the Charter’s implementation by the States Parties, construed peoples’ rights found in the Charter as including indigenous peoples’ rights.³ The Commission has maintained this interpretation in its jurisprudence when determining communications submitted to it, as will be discussed in the forthcoming chapters.

Given this background, the blend of the specific provisions of the Banjul Charter and international standards for the recognition and implementation of indigenous peoples’ rights has been applied in this study to benchmark the practicability of indigenous peoples’ rights in Tanzania.

Largely, indigenous peoples’ rights across the globe take the form of group rights. They include rights to autonomy, communal property, tangible and intangible cultural heritage, access

¹ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication No. 155/96, paragraph 68.

² The African Charter on Human and People’s Rights was adopted on June 27, 1981, as OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force on October 21, 1986.

³ African Commission on Human and Peoples’ Rights (ACHPR) and the International Work Group for Indigenous Affairs (IWGIA), *Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities in Africa* (Copenhagen: Eks/Skolens Trykkeri, 2005).

to and utilisation of natural resources and sacred sites, to mention but a few. Remarkably, it is in the Banjul Charter that group rights are formally and expressly guaranteed alongside other categories of rights, such as civil and political rights and economic, social and cultural rights. Other regional human rights instruments do not hold this uniqueness. This explains the rationale behind this study's selection of the Banjul Charter perspective in assessing the implementation of indigenous peoples' collective rights in Tanzania as one of its States Parties.

Although this thesis is centred on the collective rights of indigenous peoples, it does not disregard the fact that members of indigenous communities remain entitled to their individual rights which are also provided for in the Banjul Charter and other international human rights instruments.

Practically, indigenous peoples' rights are sought to be preserved, protected and perpetuated under what is known as the "global indigenous peoples' movement". This movement is a transnational initiative by traditional communities based in different parts of the world. The movement maintains networks which work together and in collaboration with relevant domestic and international institutions to ensure the promotion and protection of indigenous peoples' rights globally. The efforts are in favour of communities that self-identify as indigenous peoples in terms of leading distinct customary lives which are incompatible with the rest of the national population.⁴ Peoples that resonate with the global indigenous peoples' movement are principally groups of traditional pastoralists and hunter-gatherers who seek recognition and protection of their collective rights.⁵

In Africa, the indigenous peoples' movement and self-organisation is not as strong as it is at the global level or in other human rights regions. This is due, among other things, to inadequate resources to support the initiative.⁶ However, the implication here is not that there are no efforts at all towards securing indigenous peoples' rights in the continent. An indigenous peoples' movement in Africa has been gradually gaining positive momentum. Africa's

⁴ For a deeper understanding of the concept "global indigenous peoples' movement", see Rebecca Hardin and Kelly Askew, "Claims, Rights, Voices, and Spaces in the Global Indigenous Peoples Movement," *Journal of Law, Property and Society* 2, (2016): 49-69, <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-HardinAskew.pdf>.

⁵ ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities*, 15.

⁶ Commission for Human Rights and Good Governance (CHRAGG), Pastoralists Indigenous Non-Governmental Organizations Forum (PINGOs Forum) and International Work Group for Indigenous Affairs (IWGIA), *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania* (Unpublished: 2015), 31.

indigenous peoples continue to defy the odds by participating in regional and global policy and decision-making forums that deliberate on matters affecting their core interests. For example, following the lobbying and other strategic initiatives of African indigenous peoples, the ACHPR has since the 1990s accommodated their agenda in its sessions. The Commission has further made revolutionary progress by establishing a Working Group on Indigenous Populations/Communities and Minorities in Africa.⁷ The effect of these initiatives at the regional level is worthy of a comprehensive survey on the ground. This is exactly what this study has endeavoured to do with specific examples drawn from Tanzania.

This chapter presents the blueprint of the entire thesis. It breaks down the essence of the study and tools applied to collect and analyse data which have contributed to the results presented here.

1.2 Scope of the Study

As explained above, this study's focus is on the Tanzanian Government's implementation of its obligations towards indigenous peoples as provided for under the Banjul Charter and international law. Thus, the research was conducted taking into account the fact that the Banjul Charter was conceived not only to complement the already existing international human rights standards but also to capture the situation of human rights in Africa. The Charter was drafted to reflect the history, values, traditions, development criteria, realities and aspirations of the African continent;⁸ and it goes beyond the guarantees of conventional individual human rights by providing for collective or peoples' rights. The researcher was mindful of the fact that, although the Charter caters for all three generations of rights, i.e. civil and political rights (first generation), economic, social and cultural rights (second generation) and peoples' rights (third generation),⁹ the study's focus is on collective rights, or the nature of rights which are primarily

⁷ See the African Commission on Human and Peoples' Rights, "Working Group on Indigenous Populations/Communities and Minorities", accessed July 17, 2022, <https://achpr.au.int/en/mechanisms/working-group-indigenous-populationscommunities-and-minorities-africa>

⁸ See paragraph 5 of the Preamble to the Charter.

⁹ This categorisation was propounded in the 1970s by Karel Vasak, a Czech human rights Scholar. However the same has received criticism from subsequent scholars who believe that human rights are indivisible and equally important; and that, categorising the rights in form of generations suggests that one generation precedes the other, while in fact all the rights are meant to complement each other. See Yvonne Donders, "Foundations of Collective Cultural Rights in International Human Rights Law," in *Cultural Rights as Collective Rights: An International Law Perspective*, ed. Andrzej Jakubowski (Amsterdam: Brill Nijhoff, 2016), 5, https://pure.uva.nl/ws/files/2741195/177596_SSRN_id2622424_1_pdf.

sought to be protected by the indigenous peoples' movement.¹⁰ Such rights are specifically those provided for under Articles 19 to 24 of the Charter: peoples' rights to equality of rights, existence and self-determination, free disposal of wealth and natural resources, economic, social and cultural development, peace and security, and general satisfactory environment.

Conceptually, the study revolves around the term "indigenous peoples". As explained in the foregoing discussion, following the report of the commissioned Working Group of Experts on Indigenous Populations/Communities in Africa, the ACHPR adopted the approach of interpreting the term "peoples" under the Banjul Charter to include indigenous peoples. This was a response to the lack of any definition or description assigned to the term "peoples" by the drafters of the Banjul Charter. This approach was also influenced by the absence of a universally accepted definition of the term to borrow from at the global level.

As to the challenges posed by the situation of indigenous peoples in Tanzania, this study confines itself to the hurdles identified by the aforementioned study by the ACHPR's Working Group, i.e. land alienation, violation of cultural rights, and non-recognition and lack of legal protection of indigenous peoples' rights,¹¹ which also persistently feature in other relevant sources.

Coming to the particular indigenous communities studied in Tanzania, this thesis drew inspiration from the research conducted in the country by the abovementioned ACHPR's Working Group delegate from January 21 to February 6, 2013 which revealed that it was only the Barbaig, Maasai, and Iparakuyio pastoralists, as well as the Hadzabe and the Akie hunter-gathers who resonated with the indigenous peoples' movement in the country and have continued to be vocal about it. This study solely dealt with these communities as the situation on the ground was found to be similar to that featured in the ACHPR's study report. Nonetheless, the ACHPR's delegate emphasised that the above-mentioned communities held the opinion that other ethnic and sub-ethnic groups such as the rest of the Datooga community who live in comparable conditions would join the movement if they were familiar with it.¹² The research was

¹⁰ See Solomon Dersso, "The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights," *African Human Rights Law Journal* 6, no.2 (2006), 358. Also see ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts*, 72.

¹¹ For a detailed discussion of these aspects in the African context, see ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts*, 107.

¹² African Commission on Human and Peoples' Rights (ACHPR) and the International Work Group for Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group on Indigenous Populations/ Communities: Research and Information Visit to the Republic of Tanzania* (Copenhagen: Eks-Skolens Trykkeri, 2015), 38.

based in Mainland Tanzania given the fact that the above-mentioned communities are located in regions found in this part of the United Republic of Tanzania.

1.3 Statement of the Problem

Indigenous peoples face human rights violations by their governments and other non-government actors not only in Tanzania and Africa but also in other parts of the world. This is the prime outcome of colonisation and the historical invasion of indigenous peoples' territories.¹³ Yet, since the colonial period their situation has not improved. They continue to experience discrimination, based on their distinct cultures, identities and livelihoods. This has exposed them to disproportional poverty and marginalisation.¹⁴

Specific to Tanzania, although the country is party to the Banjul Charter and other international instruments,¹⁵ indigenous peoples' rights are domestically unrecognised, legally unprotected and less promoted in general. Article 1 of the Banjul Charter requires all States parties to recognise and assume legislative actions and other measures to give effect to the rights, duties and freedoms provided for under this legal instrument. This is yet to totally materialise in Tanzania when it comes to the promotion, protection and fulfilment of peoples' rights in form of indigenous peoples' rights.

Therefore, it is plausible to state that for the indigenous peoples in Tanzania maintaining their traditional lifestyles continues to be a difficult undertaking. Their status and rights as indigenous peoples are neither addressed in the Constitution of the United Republic of Tanzania, 1977 (as amended)¹⁶ nor categorically captured in relevant legislation. The essence of their existence is shallowly and vaguely represented in the country's legal framework. The same is the case with various national policies such as the National Land Policy. As discussed in chapter six

¹³ United Nations: Office of the High Commissioner for Human Rights, "Special Rapporteur on the Rights of Indigenous People," accessed January 21, 2023, <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

¹⁴ United Nations: Office of the High Commissioner for Human Rights, "Special Rapporteur on the Rights of Indigenous People."

¹⁵ Tanzania signed the Banjul Charter in May 31, 1982 and ratified the same on February 18, 1984. See African Union, "List of Countries which have Signed, Ratified/Accessed to the African Charter on Human and People's Rights," https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.

¹⁶ The Constitution of the United Republic of Tanzania of the year 1977 was adopted without a Bill of Rights until eight years later when the Bill of Rights was included via Act No. 15 of 1984. This Act which occasioned the 5th constitutional amendment in Tanzania was adopted in October 20, 1984; the same year in which Tanzania ratified the Banjul Charter. Hence, it can be argued that Tanzania had the opportunity to include peoples' rights in the country's Constitution as early as 1984 had there been an active indigenous peoples' movement in the country by then and the political will and priority to do so.

of this thesis, only a few provisions in this policy address land matters in relation to pastoralists; some of whom are communities self-identifying as indigenous peoples in Tanzania.¹⁷ Yet, the same Policy names nomadic pastoralism (which is one type of indigenous peoples' livelihood in Tanzania)¹⁸ as a cause of environmental degradation and land conflicts across the country.¹⁹ The same position was reiterated by the President of the United Republic of Tanzania in her inaugural speech before the Parliament of the United Republic of Tanzania when she commenced her tenure of office.²⁰ At the time this speech was made by the head of the government, the National Land Policy was already over twenty-five years old. The implication here is that the government has maintained the same attitude towards nomadic pastoralists over the years. The empirical study presented here has affirmed this position.²¹ As for the hunter-gatherers, their ancestral lands continue to shrink as a result of urbanisation and large-scale commercial farming.²² Moreover, both pastoralists and hunter-gatherers are experiencing the drastic impacts of climate change with insufficient measures geared towards adaptation and mitigation by the government.²³

In general, the situation of indigenous peoples in Tanzania is characterised by policy marginalisation,²⁴ discrimination,²⁵ evictions, land alienation and grabbing, poverty and food insecurity, as well as meagre representation in decision-making bodies.²⁶ In addition, they face

¹⁷ See for example policy statements 1.1 (iii), 7.3.0, 7.3.1 (i) and (iii) of the National Land Policy, 1995.

¹⁸ The Maasai, Iparakuyio and Barbaig indigenous communities in Tanzania practise traditional nomadic pastoralism.

¹⁹ See policy statements 7.3.2 and 7.2 (iii) of the National Land Policy.

²⁰ See *Hotuba ya Rais wa Jamhuri ya Muungano wa Tanzania, Mheshimiwa Samia Suluhu Hassan, Wakati wa Kulihutubia Bunge la 12 la Jamhuri ya Muungano wa Tanzania, Dodoma, Aprili 22, 2021, uk. 25*. (Unofficial translation: "Speech by the President of the United Republic of Tanzania, Honourable Samia Suluhu Hassan before the Parliament of the United Republic of Tanzania (12 Session), Dodoma, April 22, 2021, 25).

²¹ An interview conducted with the Senior Environment Officer (Livestock) on August 13, 2021 at the Vice-President's Office – Environment Division in Dodoma pointed towards this direction.

²² This was noted in observations and interviews conducted with the Hadzabe during field research in Karatu District in March 2022.

²³ Interview at PINGOs Forum conducted on July 19, 2021 in Arusha.

²⁴ Formal recognition of communities self-identifying as indigenous peoples is more critical due to the country's well known reputation of building a national culture of unity *vis-à-vis* ethnic differences. See ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 37.

²⁵ For instance, the Hadzabe are discriminated against and looked down on due to their ethnicity and station of life. They are stereotyped as a "backward" community compared to the rest of the national population. The same situation is faced by traditional nomadic pastoralists like the Maasai and Barbaigs across the country. This information was obtained from field visits on March 8 and 9, 2022 in Dumbachanda Village, Karatu District and at the Late Maasai Oligwanan's household in Monduli District respectively.

²⁶ CHRAGG, PINGOs Forum and IWGIA, *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania*, 36.

poor infrastructure in their habitats, and a lack of conservation activities and investments.²⁷ All these aspects are unpacked in chapter five of this thesis which delves deeper into the situation of indigenous peoples in Tanzania.

1.4 Research Hypothesis

Drawing from the aforementioned statement of the problem, the study was conducted under the hypothesis that the recognition and implementation of indigenous peoples' collective rights in Tanzania is unsatisfactory due to the low priority and a degree of neglect accorded to communities self-identifying as indigenous peoples in the country by the Government of Tanzania.

1.5 Objectives of the Study

1.5.1 Main Objective

Primarily, the study assesses the extent to which indigenous peoples' collective rights are domestically recognised and implemented in Tanzania.

1.5.2 Sub-Objectives

The aforementioned main objective was attained by executing the following sub-objectives:

- i) Studying the meaning of the concept and theories around the term "indigenous peoples" and their associated rights.
- ii) Examining indigenous peoples' rights practice at a global level. This was necessary in order to establish the nature of universal human rights obligations towards indigenous peoples, before looking at such obligations in the African regional human rights standards.
- iii) Looking into the African human rights system's position in terms of promotion and protection of indigenous peoples' rights. This was carried out firstly by establishing the relationship between the Banjul Charter and indigenous peoples' rights and secondly by examining how the said rights have been accommodated by the African human rights implementation mechanisms so as to be well supervised at the national level.

²⁷ CHRAGG, PINGOs Forum and IWGIA, *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania*, 36.

- iv) Explaining the *status quo* of the situation of indigenous peoples in Tanzania with specific examples.
- v) Establishing how far the government of Tanzania has gone in fulfilling its global and regional human rights obligations towards indigenous peoples in terms of adopted legal, policy and institutional frameworks.

1.6 Research Questions

The following aspects were inquired into by the study:

1.6.1 Main Question

To what extent are indigenous peoples' collective rights recognised and implemented in Tanzania?

1.6.2 Sub-Questions

Other questions addressed in the study were:

- i) Is there a unique way of defining "indigenous peoples" from an African human rights perspective in a sense that directly applies to Tanzania?
- ii) What is the relationship between indigenous peoples' collective rights and the provisions of Articles 19 to 24 of the Banjul Charter?
- iii) What is the actual situation of indigenous peoples' rights in Tanzania as one of the State parties to the Banjul Charter and other international instruments?
- iv) Are the laws, policies and relevant institutions in Tanzania responsive to the country's obligation under the Banjul Charter and international law to promote, protect, and fulfil indigenous peoples' rights?
- v) Is the situation of indigenous peoples' rights in other jurisdictions different from what it is in Tanzania?
- vi) What are the best practices that Tanzania can learn from other jurisdictions in terms of recognition and implementation of indigenous peoples' rights?

1.7 Justification and Significance of the Study

The *raison d'être* for this study is two-fold. First, the study was conducted to reveal the gaps existing in the field of human rights law in Tanzania and contribute knowledge in this respect.

This research project has also strived to reduce the problem of insufficient literature on group rights, particularly indigenous peoples' rights in the human rights field. It has done so by looking into the legal, policy and institutional frameworks accommodating these rights. Apart from this, the study presents recent empirical findings on the situation of indigenous peoples' rights in Tanzania. This is of value to other researchers, scholars, indigenous peoples' rights advocates and decision-makers within and outside Tanzania.

Second, the question of indigenous peoples' rights is a matter of global concern calling for continuous development and deliberation by academicians among other stakeholders. Notably, there are about 370 million indigenous peoples found in over 90 countries across all continents.²⁸ They form about five per cent (5%) of the world's population and occupy 25% of the world's lands and waters.²⁹ Most importantly, indigenous peoples' habitats are located in areas hosting at least 80% of the global biodiversity.³⁰ These statistics naturally justify studies on the rights of indigenous peoples from the international, regional and national perspectives to promote inclusion in natural resources management, and environmental and human rights obligations. Also, indigenous peoples' existence contributes to humankind's heritage which requires protection;³¹ lack of which leads to its irreversible extinction. The indigenous peoples' global movement emphasises livelihood protection, restoration and perpetuity. The movement calls for continued indigenous peoples' rights advocacy through various strategies, including academic research and writing. This study not only provides insights into Tanzania's practice in respect of indigenous peoples' rights as an obligation under the Banjul Charter but also traces such obligation under international law. It clearly shows what the law at international level requires of Tanzania to fulfil indigenous peoples' rights for the broader interest of abiding by

²⁸ CHRAGG, PINGOs Forum and IWGIA, *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania*, 25.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Paragraph 2 of the preamble to the United Nations Declaration on the Rights of Indigenous Peoples, 2007 affirms that all peoples (including indigenous peoples) have an equal share in contributing to the diversity and wealth of human civilisations and culture. UNESCO has over the years made remarkable efforts to ensure the preservation of cultural heritage. A good example can be derived from the Organisation's inscription of three Maasai male rites of passage, i.e. the Enkipaata, Eunoto and Olng'esherr, into the list of intangible cultural heritage in need of urgent safeguarding in the year 2018. This was done to emphasise the importance of protecting indigenous peoples' cultural heritage at a global level. See United Nations Educational, Scientific and Cultural Organisation (UNESCO): Intangible Cultural Heritage, "Three Enkipaata, Eunoto and Olng'esherr, Three Male Rites of Passage of the Maasai Community", accessed November 17, 2023, <https://ich.unesco.org/en/USL/enkipaata-eunoto-and-olng-esherr-three-male-rites-of-passage-of-the-maasai-community-0130>.

international human rights standards. Along these lines, it analyses various treaties, declarations and institutions adopted and set up by the international community to guarantee and oversee the implementation of such rights.

1.8 Literature Review

While conducting this research, different kinds of literature relating to the chosen topic were reviewed. These include books, journals, reports, PhD dissertations and conference papers. All the materials reviewed have been of significance in the sense of enabling a clear-cut definition of the research gap as well as providing insights into the matters addressed in this work.

For a focused literature review, attention was paid to two sets of literature. The first set was based on indigenous peoples' rights beyond Tanzania and the second set dwelled on the same aspect in Tanzania. This categorisation was influenced by the scope of the study as specified in section 1.2 above. In addition, general literature on indigenous peoples' rights was also consulted where necessary throughout the study as evidenced in the following chapters.

The concept and situation of indigenous peoples in Africa is vividly portrayed in the report by the *ACHPR and IWGIA*³² through the research conducted by the African Commission Working Group of Experts on Indigenous Populations/Communities in Africa. When reviewing the literature, this report was found to be the most comprehensive account of indigenous peoples' rights in Africa from the Banjul Charter perspective. Apart from the concept and the situation of indigenous peoples in Africa, the Report also expands on the Banjul Charter and its concept of "peoples" through existing jurisprudence of the ACHPR and the African Court on Human and Peoples Rights (AfrCHPR). It also digs into the criteria for identifying indigenous peoples in Africa and finally provides viable conclusions and recommendations for meaningful implementation of indigenous peoples' rights in the continent. To a great extent, the report made it possible to state the research problem clearly by providing specific examples of the situation of indigenous peoples in Tanzania. However, the existence of this report does not lessen the significance of other works concerning the rights of indigenous peoples in Africa. For example, the book by *Ndahinda*³³ probes into the concept of indigeness in Africa. Another book by

³² ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts, supra*.

³³ Felix Mukwiza Ndahinda, *Indigeness in Africa, A Contested Legal Framework for Empowerment of 'Marginalised' Communities* (The Hague: T.M.C. ASSER PRESS, 2011).

*Barume*³⁴ specifically addresses the question of land rights of indigenous peoples in Africa. It focuses on three regions of Eastern, Central and Southern Africa. Both books have contributed important information on the situation of indigenous peoples' rights in Africa (including Tanzania) to the thesis. Another book reviewed which had an impact on the study was by *Laher and Sing'Oei*.³⁵ This book is a deep reflection on the revolutionary decision of the ACHPR in the *Endorois Case*³⁶ which laid down the juridical foundation for the protection, promotion and fulfilment of indigenous peoples' rights within the African human rights system. *Sing'Oei* has also published a chapter in an edited book by *Abbas*³⁷ that reflects on the vulnerability of indigenous peoples in Africa regarding enjoyment of their rights as well as the challenges faced in attempts to enforce such rights in legal forums. Apart from this specific cluster of works which address indigenous peoples' rights in Africa, the study also profited from literature that touches on human rights in Africa generally. Here, the aim was to discover how far scholars have approached the concept of collective rights in terms of peoples' rights under the Banjul Charter. This included but was not limited to an edited book by the *African Law Association*.³⁸ This book presents symposium papers addressing the context, development and significance of the Banjul Charter. The papers focus on human rights protection and implementation mechanisms, morality and peoples' rights in the Charter. The book provides illustrations of the practicality of implementing peoples' rights within the African human rights mechanisms. In addition, the book by *Umozurike*³⁹ traces historical human rights practices in traditional African societies before the enactment of the Charter. It discusses the pertinency of all three generations of rights in Africa generally. It further tackles the question of the Banjul Charter's peculiarity in terms of the nature of the rights and duties it contains compared to other regional human rights instruments. Additionally, the book discusses the prospects for human rights in Africa. This book has been useful to this study for its far-reaching knowledge of the background, present and future viability

³⁴ Albert Kokwo Barume, *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*, 2nd Edition (Copenhagen: IWGIA, 2010).

³⁵ Ridwan Laher and Korir Sing'Oei, eds., *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Pretoria: Africa Institute of South Africa and Institute for Global Dialogue, 2014).

³⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication No. 276 / 2003 (ACHPR).

³⁷ Korir Abraham Sing'oei, "The Rights of Indigenous Peoples in Africa," in *Africa's Long Road to Rights: Reflection on the 20th Anniversary of the African Commission on Human and Peoples Rights*, Hakima Abbas, ed. (Nairobi and Oxford: Fahamu Books, 2009), 13 – 23.

³⁸ African Law Association, ed., *The African Charter on Human and Peoples Rights: Development, Context, Significance* (Marburg: ALA, 1991).

³⁹ Oji Umozurike, *The African Charter on Human and Peoples' Rights* (Hague: Kluwer Law International, 1997).

of the rights provided for under the Banjul Charter. Also, the book's comparison of African and other regional human rights systems contributed knowledge of the situation of indigenous peoples in other regions. Another piece of literature reviewed on human rights in Africa was a book by Howard⁴⁰ that discusses the situation of human rights in Africa with a special focus on the commonwealth countries. The books by Umozurike and Howard have been valuable to this study as they trace the history of peoples' rights in the African human rights system, something that has been given specific attention in chapter five of this thesis.

As part of navigating indigenous peoples' rights in Africa, literature touching on the rights of indigenous peoples in East Africa was reviewed which is the sub-region to which Tanzania belongs. This choice was influenced by the notion of territorial proximity. Territorial proximity is a situation where neighbouring countries are separated by "artificial" boundaries but host the same (indigenous) communities. Classical examples of this may be drawn from countries like Kenya and Tanzania which host the indigenous Maasai pastoralists. Also, Uganda, Rwanda, Burundi and the Democratic Republic of Congo host the indigenous Batwa hunter-gatherers. Although these indigenous peoples live today in different countries, they share a common heritage in terms of history, language, customs, traditions, values, morals and beliefs. They also find themselves in similar circumstances when it comes to recognition and implementation of their rights by the governments of the countries to which they belong. In this regard, an edited book by Majamba⁴¹ was spotted. This book takes a human rights approach in addressing various aspects related to the right of minorities to participate in political and decision-making processes. Some of its chapters treat indigenous peoples' communities such as the Hadzabe of Tanzania as an ethnic minority. Due to the nature of its traditional way of life, a community like this finds itself outside the margins of the mainstream community's political and decision-making processes. This has negative impacts on the collective rights of its members.⁴² Furthermore, in the same book, authors like Nassali⁴³ and Ohenjo⁴⁴ attempt a distinction between

⁴⁰ Rhoda Howard, *Human Rights in Commonwealth Africa* (New Jersey: Rowman & Littlefield, 1986).

⁴¹ Hamudi Majamba, ed., *Towards a Rights-Sensitive East African Community: The Case of Ethnic and Racial Minorities* (Kampala: Fountain Publishers, 2011).

⁴² William Tate Olenasha, "The Political and Social Exclusion of Minorities in Tanzania: The Case of the Hadzabe Hunter-Gatherers," in *Towards a Rights-Sensitive East African Community*, ed. Majamba (Kampala: Fountain Publishers, 2011), 225-267.

⁴³ Maria Nassali, "Ethnic and Racial Minorities and Movement towards Political Inclusion in East Africa: Cases of Kenya, Uganda and Tanzania," in *Towards a Rights-Sensitive East African Community*, ed. Majamba (Kampala: Fountain Publishers, 2011), 1-65.

minorities and indigenous peoples. This issue is discussed in chapter two of this thesis which tackles relevant concepts and theories around the term indigenous peoples and their corresponding rights.

Coming to the category of literature on indigenous peoples' rights in Tanzania, some important contributions were identified. Nevertheless, very few were found to have specifically addressed the aspect of their collective rights. Even so, all the literature reviewed was worthwhile as it clearly stated the situation of indigenous peoples in the country with particular examples. In this regard, a series of studies by *Laltaika* was discovered. This included publications on topics related to indigenous peoples' rights to land and natural resources,⁴⁵ the position of indigenous peoples' rights in Tanzania in the eyes of international human rights law⁴⁶ and the relevancy of the draft Constitution's provisions to indigenous pastoralists and hunter-gatherers in Tanzania.⁴⁷ A discussion on the draft Constitution in Tanzania and its relationship to indigenous peoples' rights has also been undertaken by *Gastorn*⁴⁸ with regard to the specific aspect of land rights. The same author has also written on how the 1999 land laws have had impacts on indigenous pastoralists' customary land rights.⁴⁹ Other authors like *Tenga*⁵⁰ and *Peter*⁵¹ discuss the concept of indigenous peoples' rights in the context of minority rights in Tanzania. While Tenga touches on the adjudication of the indigenous minorities' right to customary (collective) land title, Peter ponders on the definitional part of indigenous minorities. He shows how indigenous peoples' group rights can potentially be waived by a mere definitional criterion. He also sheds light on the earliest struggle for land rights by the indigenous Barbaig

⁴⁴ Ohenjo Nyang'ori, "Participation of Minorities and Indigenous Peoples in Political Decision Making in Kenya," in *Towards a Rights-Sensitive East African Community*, ed. Majamba (Kampala: Fountain Publishers, 2011), 156-224.

⁴⁵ Elifuraha Laltaika, "Pastoralists' Right to Land and Natural Resources in Tanzania," *Oregon Review of International Law* 15, no. 43, (2013): 43-61.

⁴⁶ Elifuraha Laltaika, "Indigenous Peoples Rights in Tanzania and International Human Rights Law," *Tuma Law Review*, no.1 (2012): 142-165.

⁴⁷ Elifuraha Laltaika, *A Highlight of the Provisions of the Draft Constitution with Relevancy on the Rights of Pastoralists and Hunter-Gatherers, Prepared for Katiba Initiative*, (2013) accessed August 21, 2021, https://www.academia.edu/4422120/Draft_Constitution_and_Rights_of_Pastoralists_and_Hunter_gatherers.

⁴⁸ Kennedy Gastorn, "The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania," *Journal of Law, Property and Society* 2, (2016):181-221.

⁴⁹ Kennedy Gastorn, *The Impact of Tanzania's New Land Laws on the Customary Land Rights of Pastoralists: A Case Study of the Simanjiro and Bariadi Districts* (Münster: LIT, 2008).

⁵⁰ Ringo Willy Tenga, "Minority Rights in Tanzania," 1-36, accessed July 22, 2022, https://www.academia.edu/42538083/MINORITY_RIGHTS_IN_TANZANIA.

⁵¹ Chris Maina Peter, "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law," 14 *International Journal on Minority and Group Rights*, (2007): 455-487.

pastoral community in the highest Courts in Tanzania, i.e. the High Court and the Court of Appeal.

The literature review further looked into the landmark work done by *Shivji and Kapinga*⁵² on the rights of the Maasai in the Ngorongoro Conservation Area (NCA). This book was extremely useful for the empirical research conducted in the NCA in Tanzania between May 2021 and March 2022. It provided a substantial foundation of knowledge and background information on the underlying issues facing the Maasai residents in this protected area. From this book which was published more than two decades ago, issues to be followed up and loopholes to be filled by the current study were established. Further, a book by *Madsen*⁵³ which addresses the human rights situation of the Hadzabe in Tanzania played the same role, as field visits within the aforesaid timeframe were also extended to the “Hadza land”, particularly in areas around Lake Eyasi Basin, as is discussed in respect of the research methodology. Additionally, an article by *McKie*⁵⁴ which explores the dynamics of the early Barbaig land rights movement in Tanzania was reviewed. As one of the aims of this study was to trace the history of the indigenous peoples’ rights movement in Tanzania, this article was vital in explaining the early struggles of indigenous peoples’ land rights in the country.

Last but not least, PhD dissertations which inquire into various indigenous peoples’ issues in Tanzania were reviewed for two main reasons. The first reason was to obtain a variety of scientific insights into this field from different scholars’ perspectives. The second reason was to distinguish the current study from other PhD theses touching on matters related to indigenous peoples in Tanzania. The thesis by *Mchome*⁵⁵ whose entire chapter five analyses how the establishment of protected areas in Tanzania has had impacts on indigenous peoples’ rights was reviewed. In his dissertation, a case study of Mkomazi Game Reserve was employed to show how the rights of the indigenous Maasai pastoralists were violated through forceful evictions in the course of establishment of the game reserve. Further, the same thesis discusses the litigation

⁵² Issa Shivji and Wilbert Kapinga, *Maasai Rights in Ngorongoro, Tanzania* (Nottingham: IIED/HAKI ARDHI, 1998).

⁵³ Andrew Madsen, *The Hadzabe of Tanzania: Land and Human Rights for Hunter-Gatherer Community* (Copenhagen: IWGIA, 2000).

⁵⁴ Kristin McKie, “International Donor Funding and Social Movement Demobilization: The Barbaig Land Rights Movement in Tanzania”, *Africa Today* 66, no 1, (2019): 73-95.

⁵⁵ Sifuni Mchome, “The Problem of Using Law by Government Officials in Support of the Course of Development: A Case Study of Mkomazi Game Reserve and Kazimzumbwi Forest Reserve” (PhD diss., University of Dar-es-Salaam, 2001).

relating to the violated rights by the victims before the higher Courts in Tanzania. Another thesis by *Mwanga*⁵⁶ was reviewed. It investigates how the role of indigenous knowledge in tackling climate change finds space in relevant laws and policies in Tanzania. A thesis by *Kinunda*⁵⁷ was also found to be of relevance to the study. His work addresses the protection of indigenous pastoralists and hunter-gatherers' rights to land amidst processes of villages' land formalisation. It draws examples from the Barbaig pastoralists and the Hadzabe hunter-gatherers which are communities of interest in this thesis.

To distinguish the aforementioned PhD theses from this current study, a broader approach to tackling the question of indigenous peoples' rights in Tanzania has been taken here. This thesis has gone above and beyond the aspects of establishment of protected areas, formalisation of village lands and (non-)inclusion of indigenous knowledge in legal and policy frameworks. In addition, it has looked into the recognition of indigenous peoples' rights in matters such as natural resources governance, operation of extractive industries, environmental conservation, national budget distribution and infrastructural development. This has been done taking a collective rights approach inspired by the provisions of the Banjul Charter which provide for peoples' rights. In this regard, particular attention was paid to the dissertations by *Rubner*⁵⁸ and *Ingange-Wa-Ingange*⁵⁹ because of their value in explaining the origins of the provisions of the Banjul Charter and their deep conceptual analysis of the terms relating to group rights under the Charter.

As a way of summing up this section, it can be noted that the aforementioned literature was reviewed as preparation for the study. Documentary sources remained important throughout this work to meet the necessities of each individual chapter.

⁵⁶ Elia Mwanga, "Integrating Indigenous Knowledge Systems into Climate Change Strategies: Examination of Legal and Policy Challenges" (PhD diss., University of Dar-es-Salaam, 2019).

⁵⁷ Aron Kinunda, "Certification of Village Land in Tanzania: Examining the Protection of Indigenous Peoples' Security of Tenure" (PhD diss., University of Dar-es-Salaam, 2020).

⁵⁸ Nathaniel Rubner, "The Origins of the 1981 African Charter on Human and Peoples' Rights" (PhD diss., University of Cambridge, 2011). An extended version of this thesis is published in Nat. Rubner, *The African Charter on Human and Peoples' Rights, Volume 1: Political, Intellectual & Cultural Origins* (Suffolk: Boydell and Brewer, 2023) and Nat. Rubner, *The African Charter on Human and Peoples' Rights Volume 2: The Political Process* (Suffolk: Boydell & Brewer, 2023).

⁵⁹ Jean Désiré Ingange-Wa-Ingange, "The African Human Rights System: Challenges and Prospects" (PhD diss., University of South Africa, 2010).

1.9 Methodological Framework

Various components of research methodology were employed in conducting this study. These components are explained below.

1.9.1 Data Collection Tools

Both empirical and doctrinal data collection tools were applied.

1.9.1.1 Empirical Methods

To obtain first-hand data, empirical research was inevitable. This was conducted through both structured and semi-structured interviews, focus group discussions and observations. Semi-structured interviews with open-ended questions were used for respondents who offered an unlimited length of time for the interviews. Structured interviews with a majority of closed-ended questions were used for respondents who had less time at their disposal. The distinction between the two interview methods was made before and during the interviews. Focus group discussions were used to interact with respondents at the grassroots level. This method was applied to facilitate a friendly environment for interaction with relevant respondents. It was also useful for resource- and time-saving in the sense that the resources and time needed to reach a wide range of respondents from the selected communities (such as community leaders, elders, men, women, youth and children) in different locations were saved by bringing the respondents together in collective focus group discussions. Most importantly, this method was applied to create a balance in the data collected through the inclusion of respondents from various sections of the selected communities in the same focus group discussions. Last but not least, this research involved the observation method in several locations inhabited by communities self-identifying as indigenous peoples in Tanzania. This method was applied to confirm some facts that were noted in the interviews and focus group discussions. The specific locations of the places that were visited and the respondents interacted with are given in the following sections.

1.9.1.2 Secondary Method

This method involved desk research where data was collected through a comprehensive search in libraries and documentation centres. Also, online resources such as the publishers' and relevant institutions' websites were visited to obtain information essential for the study. Generally, the materials consulted were books, journal articles, conference papers, institutions' reports,

commentaries, opinions, resolutions, declarations and general comments. Additionally, laws, policies and cases were analysed. Other relevant materials were physically accessed from the governmental and non-governmental institutions and organisations while conducting interviews.

1.9.2 Sampling

Both purposive and representative methods of sampling were applied in determining sample sizes and selecting respondents, institutions, organisations and places of study.

1.9.2.1 Respondents

The interviews conducted for this research involved interviewees from both governmental and non-governmental organisations and institutions. Here, the respondents selected for interviews were mainly key informants. This type of respondent was preferred to obtain insights into the recognition and implementation of indigenous peoples' rights by the institutions and organisations visited. Also, human rights experts, particularly consultants on indigenous peoples' issues, were engaged. Respondents involved in focus group discussions were representatives of other members of their own communities from the same age set, gender and position.

1.9.2.2 Institutions and Organisations

Governmental and non-governmental institutions and organisations selected for the study played both purposive and representative roles. Governmental institutions like ministries, agencies and departments represented the Government of the United Republic of Tanzania's position regarding the recognition and implementation of indigenous peoples' rights. The most important thing to highlight here is that despite a wide range of responses from governmental institutions, not all interviews were successful.⁶⁰ Nevertheless, the governmental institutions which could be accessed sufficed to provide a representative picture of the government position as intended. The situation was not the same when it came to interaction with non-governmental organisations (NGOs). Despite the fact that the selected NGOs shared the goal of advocating for indigenous peoples' rights in Tanzania, the data collected from each one was not representative of the others but only the individual NGO visited.

⁶⁰ Research limitations will be stated subsequently in this chapter.

Purposively, each institution sampled played a unique role in contributing to the empirical data obtained.

1.9.2.2.1 Government Institutions

Research was conducted at the Ministry of Constitution and Legal Affairs where interviews were referred to the Law Reform Commission of Tanzania (LRC) (T) and the Commission for Human Rights and Good Governance (CHRAGG). Taking into account the fact that Article 19 of the Banjul Charter guarantees the general right to equality and equality of rights, the reason for conducting research in this Ministry was to establish the presence of efforts or initiatives to ensure this right is domestically fulfilled. Given the LRC's mandate under Section 4 of the Law Reform Commission Act,⁶¹ i.e. to conduct research and propose to the Government necessary law reforms to meet the dynamic needs of the Tanzanian society, a visit to the LCR was arranged to specifically learn the extent to which this had been attained with respect to recognition and implementation of indigenous peoples' rights in Tanzania. Moreover, the CHRAGG offices both in Dar es Salaam and Dodoma were visited to investigate the programmes undertaken so far by these institutions to ensure domestic promotion and protection of indigenous peoples' rights in the country. Notably, CHRAGG's mandates as the National Human Rights Institution (NHRI) are, *inter alia*, to promote the protection of human rights in Tanzania, receive complaints and inquire into acts of human rights violations in the country, conduct research and awareness programmes on matters related to human rights and advise the government on various human rights issues. These mandates are provided for under Article 130 (1) of the Constitution of the United Republic of Tanzania, 1977⁶² and Section 6 (1) of the Commission for Human Rights and Good Governance Act, 2001⁶³ respectively.

Another ministry visited was the Ministry of Lands, Housing and Human Settlements Development. The objective was to find out the ministry's position in recognising and protecting indigenous peoples' land rights across the country. The selection of this ministry was inevitable since land is the bedrock for the survival of indigenous peoples' livelihoods.

Additionally, the then Ministry of Industries, Trade and Investment, which is now a section in the President's Office known as Investments and Planning, was visited. Here the focus

⁶¹ Cap. 171, [R.E 2002].

⁶² Cap. 2 [R.E. 2002].

⁶³ Cap. 391 [R.E. 2002].

was on the Tanzania Investments Centre (the TIC) which operated under this ministry. The TIC is a one-stop centre for the promotion and facilitation of investments in Tanzania. This visit's objective was to establish how the Centre takes into account the significance of safeguarding indigenous peoples' rights, particularly their land tenure security, when promoting and facilitating various investments in the country. Under the same ministry, the National Development Corporation (NDC), which is currently under the Ministry of Trade and Industries, was visited with the deliberate objective of collecting data on the Engaruka soda ash project which was being pioneered by the Corporation. This project is expected to be established in a geographical area inhabited by the Maasai indigenous peoples in Monduli district, Arusha region.

Further research was conducted at the Ministry of Natural Resources and Tourism to learn about the Ministry's initiatives to secure the right of indigenous peoples to freely dispose of wealth and natural resources as provided for by Article 21 of the Banjul Charter. Since most of the indigenous peoples' traditional habitats in Tanzania are located in or at the peripheries of protected areas such as national parks, game reserves, forest reserves and a conservation area, for which this ministry is responsible, the researcher visited the Ngorongoro Conservation Area Authority (NCAA), Tanzania Wildlife Research Institute (TAWIRI) and Tanzania National Parks (TANAPA) Headquarters in Arusha, Tanzania Wildlife Management Authority (TAWA) in Morogoro and Tanzania Forest Services (TFS) in Dar es Salaam. Each institution was visited to attain particular objectives.

The Ngorongoro Conservation Area Authority (NCAA) was visited with the objective of assessing one of the Authority's functions under section 6 of the Ngorongoro Conservation Area Act, 1975, i.e. protecting the interests of the Maasai indigenous community within the NCA, such as its right to dispose of natural resources. Examples of such natural resources are grazing land, forests and water resources. At the time the visits to the NCA were conducted, the Authority, on behalf of and in collaboration with the Ministry of Natural Resources and Tourism, took the decision to relocate the Maasai from the NCA for various reasons, including "overpopulation" and "overstocked animals" in the Area. This was alleged to be posing a threat of environmental and ecological depletion in the protected area. There was also another supposition that the multiple land use model practised in the NCA, whereby the Maasai co-exist with the wildlife, has negative impacts on the Maasai livestock, such as Malignant Catarrh Fever

(MCF), which is alleged to be caused by the viruses carried by the wildebeest.⁶⁴ In light of these contentions, research was conducted in the TAWIRI to find out if any scientific studies had been conducted to prove or disprove the alleged effects of the Maasai's presence in the NCA. Markedly, one of the TAWIRI's functions is to investigate the causes of wildlife diseases and come up with ways of preventing them.⁶⁵ A research visit to the TAWIRI was crucial to establish whether there were proven facts warranting the Maasai relocation from the NCA. Moreover, visits to TFS were made to establish the status of interaction between this institution and indigenous peoples in the course of implementing its daily tasks of developing and conserving forest resources.

In line with these research objectives at the Ministry of Natural Resources and Tourism, subsequent research interviews were conducted at the Vice President's Office (VPO)-Environment Division. As already indicated in the statement of the problem, nomadic pastoralism as practised by some indigenous peoples in Tanzania, such as the Maasai, Barbaig and Parakuiyo, is regarded as one of the causes of environmental degradation. This was also the position of the VPO - Environment Division.⁶⁶ It was, therefore, essential to find out how this division takes aboard indigenous peoples' rights as it implements its obligation to ensure environmental conservation for sustainability across the country.

To further assess the Tanzanian government's implementation of indigenous peoples' collective right to economic, social and cultural development as reflected in Article 22 of the Banjul Charter, research was conducted at the Livestock Sector within the Ministry of Livestock and Fisheries to investigate strategies in place to support indigenous peoples' traditional pastoral livelihood. It is important to note that livestock, particularly cattle, is not only of economic value to the indigenous pastoralists but also of social and cultural significance. Other significant research visits in connection with the right to economic, social and cultural development were made at the Ministry of Health, Community Development, Gender, Elderly and Children⁶⁷ and

⁶⁴ See Tundu Lissu, "Policy and Legal Issues on Wildlife Management in Tanzania's Pastoral Lands: The Case Study of the Ngorongoro Conservation Area," *Law, Justice and Global Development (LGD)* 1, (2000), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/lissu/.

⁶⁵ TAWIRI, "Functions of TAWIRI," August 27, 2023, <https://www.tawiri.or.tz/overview/>.

⁶⁶ See Vice President's Office, *State of Environment Report*, (2019) 63. Also see *Ofisi ya Makamu wa Rais, Taarifa ya Kikosi Kazi cha Taifa cha Kuokoa Mfumo wa Ikolojia wa Bonde la Mto Ruaha Mkuu*, (2017), 29. (Unofficial translation: Vice President's Office, Report of the National Taskforce to Rescue the Ecological System of the Great Ruaha River Basin (2017), 29).

⁶⁷ Now split to form two Ministries, i.e. the Ministry of Community Development and Gender and the Ministry of Health.

the Ministry of Water and Irrigation to find out how indigenous peoples in Tanzania are included in the distribution of social services such as water supply and health services. In addition, research was conducted at the Tanzania Social Action Fund (TASAF) to explore how indigenous peoples benefit from the the TASAF's poverty alleviation programmes. The rationale behind this was drawn from the initial field visits to Baray Ward in Karatu district and NCA which revealed that a great number of indigenous peoples from the Hadzabe, Datooga (including Barbaig) and Maasai communities live below the poverty line, which is a monthly income of at least fifty thousand shillings per adult.⁶⁸ Moreover, research was conducted at the National Bureau of Statistics (NBS) to determine how practical it is to accommodate indigenous communities in the periodic demographic surveys to enable their inclusion in the national budgets and hence facilitate the fulfilment of their socio-economic rights. Specific to the indigenous peoples' right to cultural development, interviews were conducted at the then Ministry of Information, Culture and Sports, which is now the Ministry of Culture, Arts and Sports, to learn about the Ministry's engagement with indigenous peoples in its day-to-day cultural programmes. Additionally, research in this Ministry aimed at identifying plans and strategies formulated to support the indigenous peoples' cultural lifestyle, which is basically in line with universal human rights standards.

In order to establish how infrastructural projects affect indigenous peoples' collective rights in Tanzania, research was conducted at the Ministry of Works and Transport (which has now been divided into two ministries, i.e. Ministry of Works and Ministry of Transport). Note that some infrastructural projects have negative impacts on the livelihoods of indigenous peoples, especially relocation from their ancestral lands, blockage of livestock corridors and restrictions on accessing grazing land and water resources. In this ministry, special attention was paid to two projects that were being implemented by the government through the Tanzania Railways Corporation (TRC), i.e. the Tanzania Intermodal and Rail Development Project (TIRP II) and the Standard Gauge Railway (SGR) project. Both of these projects were being implemented when this research was conducted. Visits were paid to the Tanzania Railways Corporation (TRC) Headquarters in Dar es Salaam to secure respondents for interviews and access to relevant project documents. In this regard, another government agency that was

⁶⁸ According to the World Bank, in the year 2018, the national poverty line was 49,320 Tanzanian shillings per adult in a month. See World Bank Group, "Tanzania Main Poverty Assessment," accessed 1 May 2024, https://www.nbs.go.tz/nbs/takwimu/hbs/Tanzania_Mainland_Poverty_Assessment_Report.pdf.

targeted for interviews was the Kilimanjaro International Airport Company (KADCO), a government-owned company tasked with the management and operation of Kilimanjaro International Airport (KIA). KADCO was considered for empirical research based on the underlying land conflict that has been reported to be long-lasting between KADCO and the periphery indigenous Maasai community. At the centre of this conflict stands the land which has been demarcated for the airport's expansion.⁶⁹

Last but not least, research visits were made to the Office of the Parliament of the United Republic of Tanzania to physically access relevant Hansards that were not made available online. In particular, the Hansards sought were those documenting the Constituent Assembly's sessions which discussed and deliberated on the inclusion of group rights in the Draft Constitution of the United Republic of Tanzania in the year 2014.

1.9.2.2.2 Non-Governmental Organisations

Non-governmental organisations whose missions are advocacy, sensitisation, lobbying, promotion and protection of human rights in Tanzania, particularly indigenous peoples' rights, were visited. The goal was to find out the extent to which such organisations play a pivotal role in complementing the government's obligation to fulfil indigenous peoples' rights in the country. Research in the NGOs was also aimed at learning how such organisations challenge the Government to fulfil such obligations. Research inquiries and visits were made at the Pastoralists Indigenous Non-Governmental Organisations Forum (PINGOs Forum), Parakuiyo Pastoralists Indigenous Community Development Organisation (PAICODEO), Ujamaa Community Resource Team (UCRT), Tanzania Natural Resources Forum (TNRFF), Legal Environmental Action Team (LEAT), Association for Law and Advocacy for Pastoralists (ALAPA), Envirocare, Legal and Human Rights Centre (LHRC), Huduma ya Injili na Maendeleo kwa Wafugaji (HIMWA), Pastoral Livelihood and Empowerment Program (PALSEP), Tanzania Pastoralists, Hunter and Gatherers Organisation (TAPHGO) and the Maasai Women Development Organisation (MWEDO).

⁶⁹ International Work Group for Indigenous Affairs (IWGIA), "Threat of Dispossession in Hai District for Expansion of Kilimanjaro International Airport," accessed September 17, 2020, <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>.

1.9.2.3 Human Rights Experts

Contact was made with human rights experts who possess experience in research, consultancy and participation in the national, regional and global human rights and indigenous peoples' forums. Such experts have experience in working with higher learning institutions, i.e. the University of Dar es Salaam and Makumira University, the Commission for Human Rights and Good Governance, the African Commission on Human and Peoples' Rights, the Committee on the Elimination of all Forms of Racial Discrimination (CERD), the International Law Commission, the World Bank and the United Nations Permanent Forum on Indigenous Issues. The aim of talking to these experts was to obtain a deeper understanding of the dynamics that come along with implementing indigenous peoples' rights at the global, regional and domestic levels, aspects that are specifically covered from chapter three to chapter six of this study.

1.9.3 Area of Study and Sample Size

The selection of the study area and the size of the sample, both individual respondents and institutions, were conditioned by various factors. These are broken down below.

1.9.3 1 Country of Study

The research was based on one State party to the Banjul Charter, i.e. Tanzania. This selection was made for the following reasons. First, the time factor: only one country with accessible indigenous communities could be taken into account for the empirical research. This is because there are more than ten countries which are parties to the Banjul Charter and which host indigenous communities in Africa (i.e. Tanzania, Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Central African Republic, Namibia, Botswana, Cameroon, Niger, Mali and Nigeria) and the timeframe allocated to this research did not allow a comprehensive ground survey in all of these countries. This became more acute with the travel limitations that were imposed by each individual country due to the COVID-19 outbreak. Therefore, one case study suited the allocated timeframe for empirical research. Nonetheless, in writing this dissertation, examples were drawn from the rest of the aforementioned African countries as it was necessary to ensure their inclusion in the study. Second, at the beginning of this research, statistics from the African Court on Human and Peoples' Rights (herein referred to as the African Court) indicated that more than forty per cent (40%) of the cases decided before this continental human rights

adjudicatory body came from Tanzania.⁷⁰ However, all such cases concerned individual rights under the Banjul Charter. There was no single decided or pending case from Tanzania in the Court's record that addressed collective rights, and particularly indigenous peoples' rights. This fact aroused an interest in Tanzania as the leading respondent before the African Court. It led to investigation of the practicality of implementing collective rights in Tanzania with the question: why is it that there is no single case from Tanzania concerning collective rights filed before the African Court in spite of the fact that cases from Tanzania lead in the statistics of the Court? This was especially interesting given the fact that there were allegations of violation of the collective rights of indigenous peoples in the country before and after the establishment of the African Court. By the year 2019 when this study was conceived, the only case concerning indigenous peoples' collective rights which had so far been filed and decided by the African Court was the *Ogieks' Case*⁷¹ from Kenya. No single case of this kind had been filed from Tanzania although the Court is advantageously located in the country, and even in the region inhabited by the largest number of indigenous peoples, i.e. Arusha. To a great extent, this influenced the selection of Tanzania as a case study.

1.9.3.2 Geographical Regions of Study

Research was conducted in six regions of Mainland Tanzania only. No research was conducted in Zanzibar since there is no community there that self-identifies as an indigenous people. The regions selected in Mainland Tanzania host relevant institutions and communities which were purposefully selected for interviews, observations and focus group discussions. These regions were Arusha, Dar es Salaam, Dodoma, Kilimanjaro, Morogoro and Tanga.

1.9.3.3 Sample Size

The overall empirical research involved a total number of seventy-five respondents who participated in interviews and focused group discussions. The respondents are presented in anonymity to adhere to research ethics.

⁷⁰ African Court on Human and Peoples' Rights, "Statistics Graph," accessed October 6, 2019, <https://www.african-court.org/cpmt/finalised>.

⁷¹ *African Commission on Human and Peoples' Rights versus Republic of Kenya*, Application No. 006/2012.

1.9.3.3.1 Interviewed Respondents

A total number of forty-five respondents were interviewed, of whom twenty-nine came from government institutions, ten from non-governmental organisations and six were individual experts on human rights and indigenous peoples' affairs who volunteered information from their personal experiences.

a) Respondents from Government Institutions

The first research interview in Tanzania was conducted at the Commission for Human Rights and Good Governance (CHRAGG) in its residual Dar es Salaam Office.⁷² This interview was attended by two respondents, i.e. a Commissioner and a Legal Officer.⁷³ A follow-up interview in the same institution was conducted with the Director for Legal Services at the Institution's Headquarters in Dodoma.⁷⁴ The second institution visited was the Tanzania Wildlife Authority (TAWA), where one respondent from the Conservation, Research and Community Outreach Department was assigned for the interview.⁷⁵ Further, a one-on-one interview with the Acting Investment Facilitation Manager (Aftercare Services) was conducted at the Tanzania Investment Centre (TIC), followed by a telephone interview with the Principal Economist from the same institution.⁷⁶ The next interview was carried out at the Tanzania Wildlife Research Institute (TAWIRI). Here, one interview was conducted with the Principal Research Officer.⁷⁷ This was followed by a visit to the Ngorongoro Conservation Area (NCA) where two interviews were conducted at the Ngorongoro Conservation Area Authority (NCAA) with the Deputy Conservator-Community Development and the Manager of the Community Development Department.⁷⁸ Due to the dynamic nature of the relocation of the Maasai from the NCA in Arusha region to Msomera village in Tanga region, a supplementary interview at the Ngorongoro Conservation Area was subsequently conducted with the Deputy Conservator-Wildlife Resources to establish developments that had taken place since the time when the first and the

⁷² The CHRAGG's Headquarters had already been relocated to Dodoma by the time this research was conducted.

⁷³ Interview at CHRAGG (Dar es Salaam Office) was conducted on June 2, 2021.

⁷⁴ Interview at CHRAGG (Dodoma Headquarters) was conducted on August 17, 2021.

⁷⁵ Interview at TAWA was conducted on June 30, 2021.

⁷⁶ A one-on-one interview at the Tanzania Investment Centre (TIC) was conducted on June 14, 2021. A subsequent telephone interview was conducted on June 15, 2021.

⁷⁷ Interview at TAWIRI was conducted on July 22, 2021.

⁷⁸ Interviews at the NCAA were conducted on August 9, 2021.

second interviews were conducted at this institution.⁷⁹ Furthermore, two interviews were held at the Law Reform Commission of Tanzania (LRC) with respondents from the Legal Research and Law Reform Departments.⁸⁰ The same number of interviews was conducted at the National Bureau of Statistics (NBS) where respondents from the Directorate of Population Census and Social Statistics were interviewed.⁸¹ Other interviews were carried out at the Vice President's Office (VPO) - Environment Division. Here, two respondents were interviewed: one of them was the National Project Coordinator of the Project titled "Reversing Land Degradation Trend to Increase Food Security in Semi-Arid Areas in Tanzania" and the other was an Environmental Officer.⁸² In addition to this, seven respondents from the Ministry of Livestock and Fisheries (Livestock Sector) were interviewed from the Grazing Land and Animal Feed Resources Development Division, Legal Services Unit, Livestock Resources and Training Services Division, Veterinary Services Division and Livestock Product and Marketing Development Division.⁸³ Additionally, two interviews were carried out with Cultural Officers at the Ministry of Information, Culture and Sports (now the Ministry of Culture, Arts and Sports).⁸⁴ Further, one interview was held later with a Research and Development Specialist from TASAF.⁸⁵ Last but not least, two additional interviews were held with the National Development Corporation (NDC), one with the Director of Research, Planning and Industrial Development and the other with the Engaruka Soda Ash Project Implementation Officer.⁸⁶

b) Respondents from Non-Governmental Organisations

An interview with the Executive Director of PAICODEO was the first empirical research activity with NGOs in Tanzania.⁸⁷ This was followed by an interview with the Executive Director of HIMWA.⁸⁸ Three more interviews were conducted with the Executive Director, Head of Programs and Program Coordinator (Yaeda and Lake Eyasi) from UCRT.⁸⁹ Other interviews with three respondents were conducted with Executive Directors from the PINGOs Forum,

⁷⁹ This interview was conducted on March 25, 2022.

⁸⁰ Interviews at the LRC were conducted on August 13, 2021.

⁸¹ Interviews at NBS were conducted on August 12, 2021.

⁸² Interviews at the VPO-Environment Division were conducted on August 16, 2021.

⁸³ Interviews at the Ministry of Livestock and Fisheries were conducted on August 12 and 16, 2021.

⁸⁴ Interviews at the Ministry of Information, Culture and Sports were conducted on August 11, 2021.

⁸⁵ Interview with TASAF was held on August 20, 2021.

⁸⁶ Interviews at the NDC were conducted on May 25, 2023 and June 8, 2023.

⁸⁷ This interview was conducted on July 1, 2021.

⁸⁸ Interview at HIMWA was conducted on July 2, 2021.

⁸⁹ Interviews with the UCRT were conducted on July 23 and 28, 2021 as well as March 23, 2022.

ALAPA and TNRF.⁹⁰ Last but not least, two interviews with the Executive Director and Programs Officer were conducted in MWEDO.⁹¹

c) Human Rights and Indigenous Peoples Experts

Four human rights experts were interviewed, one being the World Bank consultant on indigenous peoples' rights in Tanzania⁹² and another an expert and consultant who served at the United Nations Permanent Forum on Indigenous Issues and continues to offer consultancies on indigenous peoples' rights to various national, regional and international organisations.⁹³ The third interview was conducted with an experienced academician and researcher on human rights in Tanzania,⁹⁴ and the fourth with a former Chairman of the National Human Rights Institution in Tanzania (CHRAGG) and Acting Chairperson of the African Commission on Human and Peoples' Rights.⁹⁵ Apart from the aforementioned interviews, two other interviews were conducted with anthropology and linguistic experts from the University of Dar es Salaam who have conducted extensive research on the Hadzabe ethnic group in Tanzania for decades.⁹⁶

1.9.3.3.2 Respondents from Focus Group Discussions

Five focus group discussions (FGDs) with a total number of thirty-three respondents were conducted within communities self-identifying as indigenous communities and those belonging to the mainstream society. Twenty-three respondents from communities self-identifying as indigenous peoples were involved in three FGDs. These group discussions were conducted in the Ngorongoro Conservation Area in the Ngorongoro District, Baray Ward in Karatu District within Arusha Region and Doinyo village in the Hai District within Kilimanjaro Region. Two other FGDs were conducted in the same regions with ten respondents from two mainstream communities known as the Meru and the Chagga in Poli and Kilingi villages respectively.

A focus group discussion in the Ngorongoro Conservation Area involved five respondents from Nainokanoka and Naiyobi villages and one cultural Boma. This focus group

⁹⁰ Interview at PINGOs Forum was conducted on July 19, 2021. Interviews with TNRF and ALAPA were conducted on July 22, 2021.

⁹¹ Interviews at MWEDO were conducted on July 20, 2021.

⁹² Interview conducted at the University of Dar es Salaam on June 6, 2021.

⁹³ Interview conducted at Makumira University on August 4, 2021 and 23 March 2022.

⁹⁴ Interview at the University of Dar es Salaam on June 2, 2021.

⁹⁵ Interview conducted at a consulting firm on August 23, 2021.

⁹⁶ Interviews conducted on June 8 and 9, 2021.

discussion was devoted to protection of the collective rights of the Maasai living within the Ngorongoro Conservation Area. The discussion revealed contradicting positions relating to the relocation of the said Maasai community from the NCA to Msomera village in the Tanga region.⁹⁷ In Doinyo village, the FGD was conducted in the vicinity of Oldonyo Murwak Hill in Hai District where the Maasai perform initiation rituals.⁹⁸ It involved ten respondents: seven were Maasai leaders (men) from different age sets and three came from the local government administration, i.e. one Village Chairperson, a Ward Community Development Officer and a member of the village council. Here, the discussion mainly focused on the cooperation that the Maasai community receives from the Government in preserving sacred sites such as the Oldonyo Murwak which is of cultural and spiritual significance to the Maasai of both Tanzania and Kenya. The third FGD was conducted in Dumbachanda Village in Karatu District with eight respondents from the Hadzabe community.⁹⁹ The respondents described their contemporary situation as a marginalised indigenous group which struggles to maintain a traditional hunting and gathering forms of livelihood in the face of what they termed as a shift from long-term and gradual change to an abrupt loss of their ancestral land. The respondents were clear about the fact that the current expansion of large-scale onion farms continues to shrink their lands by driving their neighbouring traditional agro-pastoralist community (the Datooga) towards their habitats. Eventually, this causes them to move further into the hinterland and away from their ancestral lands.

A further FGD was conducted in Meru, Arumeru District, Arusha region with the principal traditional leader of the Meru ethnic group (Mshili Mkuu), his secretary and two other members of the traditional council.¹⁰⁰ Another FGD which was carried out in Kilingi village, Siha District, Kilimanjaro region involved six participants, i.e. the Chief of Siha, his spouse, two local government leaders, and two youth representatives. These two FGDs were aimed at establishing other communities' positions and perceptions of the indigenous peoples' rights movement in Tanzania. As will be elaborated in the next chapter, various attempts to describe indigenous peoples in the post-colonial era in Africa involve the characteristic of "identification or recognition of communities self-identifying as indigenous peoples by other members of the

⁹⁷ FGD at the NCA was conducted on August 7, 2021.

⁹⁸ FGD at the Doinyo village was conducted on March 22, 2022.

⁹⁹ The FGD with the Hadzabe was conducted on August 8, 2021.

¹⁰⁰ This FGD was conducted in March 23, 2022 at *Mringaringa* in Poli village which is the headquarters of the Meru traditional administration in Tanzania.

mainstream community.” Thus, these FGDs were important for establishing whether indigenous peoples and their rights are recognised by members of the mainstream society in Tanzania. The Meru and Chagga leaders interviewed played a representative role. They represented members of their communities as well as offering insights as part of the general mainstream community.

1.9.3.3.3 Selected Villages for Observation

Observations on the situation of the selected indigenous communities were generally made in areas visited for focus group discussions. Additionally, other areas such as the Olaiboin *Boma* in Monduli District and specific locations across Lake Eyasi Basin¹⁰¹ in Karatu District were purposely visited to observe and learn about the daily activities of the Maasai, Datooga and Hadzabe. Four more villages, Engaruka Chini, Irendereni, Idonyonaado and Mbaashi, in Monduli District were visited for observation of the location of the intended Engaruka Soda Ash Project and its potential effects on the Maasai bomas within and at the peripheries of the project area.¹⁰² The last village visited for observation was the Msomera village in Handeni District.¹⁰³ This was a follow-up visit to monitor the trail of relocation of the Maasai residents from the Ngorongoro Conservation Area to this village. The visit was aimed at observing the new lifestyle experienced by the relocated Maasai from the NCA, in the sense of its compatibility with their traditional livelihood and collective interests.

1.10 Research Ethics

This study was conducted with due regard to academic ethical principles. Rules against plagiarism were abided by while employing secondary methods of data collection. While conducting empirical research, the rules pertaining to respondents’ consent to audio and video recording, photography, acceptable language and the rule against induced information were strictly observed. Anonymity was promised to preserve the respondents’ privacy, encourage honest responses and facilitate respondents’ cooperation.

¹⁰¹ Visits to Lake Eyasi Basin in Karatu and Olaiboni village in Monduli were made on August 8, 2021 and March 25, 2022.

¹⁰² Field visits to the Engaruka Chini, Irendereni, Idonyonaado and Mbaashi at Monduli District were made on October 20, 2023.

¹⁰³ A visit to Msomera village in Handeni District was made on November 7, 2023.

1.11 Empirical Research Phases and Limitations of the Study

1.11.1 Research Phases

Field research was conducted in four phases. The first phase covered the period from May 1 to August 31, 2021. The objective of this phase was to obtain first-hand information through scheduled interviews and FGDs. The second phase was conducted from March 1 to April, 29 2022. In this phase, interviews that could not be fully realised in the first research phase were conducted. Also, new developments that had taken place in the field between the first and the second phases were captured. This phase was implemented through follow-up interviews. A good example of this was the case of the relocation of the resident Maasai from the Ngorongoro Conservation Area to Msomera village. As this case gained new dimensions throughout the study, a follow-up interview with the NCAA apart from the ones that were conducted in the first phase was necessary. The third research phase was conducted in May and June 2023. In this phase specific respondents from the National Development Corporation (NDC) were interviewed to gain information about the possible impacts of the Engaruka Soda Ash project on the collective rights of the Maasai who live in the vicinity of the intended project's area. The fourth phase of field research took place in October and November 2023. This was a follow-up phase in which the rural wards of Engaruka, Mfereji and Selela were visited to witness in realtime the developments mentioned in the interviews with the NDC in Dar es Salaam in May and June 2023. In the same phase, another visit to Msomera Village was made as part of monitoring the case of relocation of the resident Maasai from the NCA to Msomera Village.

1.11.2 Research Limitations

This research was conducted amidst major transformational events at the global and domestic levels in Tanzania which posed immense challenges to the conduct of this study. These challenges arose from the global COVID-19 pandemic, the shift from analogue to digital government communication systems in Tanzania, the transfer of government business from Dar es Salaam to Dodoma region, and most of all the change from the fifth to the sixth regime following the demise of the fifth President of the United Republic of Tanzania (the late John Pombe Magufuli) on March 17, 2021 and the accession to power of President Samia Suluhu Hassan on March 19, 2021. These major events in combination with other factors seriously affected the flow of this research project.

Starting with the COVID-19 pandemic, various challenges were posed in respect of data collection due to its outbreak and spread. Some respondents could not be accessed for one-on-one interviews because of their institutional COVID-19 restrictions. Consequently, some interviews were held remotely via the Zoom online platform, which was not always easy because the internet connection of some of the respondents was not constantly stable. In addition, as the world strived to fight the spread of the virus, one of the respondents in Arusha region met an untimely demise before the scheduled interview could be conducted.

As to the shift of the government's communications from analogue to digital, this transformation affected the flow of research activities, particularly field visits. It rendered the process of application for a research permit cumbersome. It should be noted that, in order to conduct scientific research in Tanzania, it is mandatory to obtain a research permit from the Tanzania Commission for Science and Technology. This Commission was established by the Tanzania Commission for Science and Technology Act of 1986¹⁰⁴ to coordinate and promote research and technology activities in Tanzania.¹⁰⁵ The University of Dar es Salaam is empowered to issue the required permit to its staff members and students through the Research Information Management System (RIMS). Given the fact that I am a member of the academic staff at the University of Dar es Salaam, I sought a research permit via the University. The permit which I had initially applied for with hard copy forms and which was successfully granted was later revoked when I was already in Tanzania for the field research. This was because all government correspondence was moved to a digital communication system. Hence, I was obliged to make a fresh online application for a research permit when it was already time for me to commence field visits. The new procedure called for a different application format and attachments which also had to be freshly procured. The re-application process took time to mature, and delayed my field research. When the online permit was released, each government institution that was approached for research had to upload the permit into their individual online systems for it to undergo yet another online approval process by various departments. Despite multiple follow-ups, some departments said they never received the forwarded research permit because the system was still in a trial phase. This meant that some communications had to be repeated several times.

¹⁰⁴ See section 4 (1) of Act No.7 1986.

¹⁰⁵ See Tanzania Commission for Science and Technology (COSTECH), "Establishment," accessed May 1, 2024, <https://costech.or.tz/establishment>.

Coming to the transfer of all government business from Dar es Salaam region to Dodoma region, research activities were slowed down by delayed approval of institutional research clearances and access to relevant respondents. Aside from the fact that research had to be conducted by moving back and forth between Dar es Salaam and Dodoma regions, some government offices which were already in Dodoma were split between the University of Dodoma where some offices were temporarily located, the Government City in Mtumba which was still under construction, and other locations scattered across Dodoma town where some stand-alone government buildings are situated. This affected the flow of communication especially with offices that were in the midst of relocating from Dar es Salaam to Dodoma and from temporary offices across Dodoma to the Government City in Mtumba. This state of affairs involved a series of back and forth follow-up movements that were exceptionally tedious, and time- and resource- consuming.

Also, the change of regime came with restraints affecting empirical data collection. Some of the respondents in government institutions were apprehensive about stating their position regarding the recognition of indigenous peoples and their rights in Tanzania. It was my observation that these respondents were not certain about the policies of the new regime so that they were unable to clearly state the government's position on certain issues and particularly the one at hand. I suppose that it was the same problem which led to last-minute interview cancellations by some respondents, denied approvals for research clearance at the institutional level, and no response at all to requests for conducting interviews by some institutions. The regime change in Tanzania also occasioned the restructuring of some of the ministries' departments. A particular example is the merging and disintegration of the Ministry of Health, Community Development, Gender, Elderly and Children. The flow of communication in this ministry was not straightforward.

Another limitation which is not linked to the aforementioned transformational dynamics but recurred during field research was the limited access to some relevant documents in government offices. Some crucial documents were said by the respondents to be present in the offices visited but were marked "confidential." For instance, the Commissioned Report on the Investigation of Land Disputes in Mabwegere Village, Morogoro Region, 2016 which looked into the long-standing boundary conflict between pastoralists and farmers was found to be existent in the Morogoro Regional Office but could not be accessed as it was marked

confidential. This report which was prepared by the High Court Judge was publicly announced by the then Minister of Lands, Housing and Human Development Settlements as containing viable recommendations for approaching pastoralist-farmer conflicts, not only in Mabwegere but also across the country. I sought access to this report to obtain more data that would describe the situation of indigenous peoples in Tanzania. However, I could not access it for the reason that the government was still implementing the proposed recommendations.¹⁰⁶

To mitigate the effects of failure to access some of the empirical data, I visited the websites of institutions that could neither host the desired interviews nor grant access to relevant documents. The aim was to obtain relevant information for the study digitally that could not be obtained empirically. Also, the lack of empirical data was compensated by watching several interviews and press conferences with desired respondents on topics of relevancy on the YouTube online platform (both live streams and recorded sessions). This will be evidenced in chapters five and six of the study. Also, other relevant print materials such as reports, policies, commentaries and articles in connection with the information that could not be obtained empirically were consulted in libraries and documentation centres to fill in these gaps. Finally, significant, sufficient, up-to-date and reliable data for this thesis was successfully collected.

1.12 Data Analysis and Presentation Style

This is a qualitative study. The primary and secondary data collected was analysed through qualitative methods. The same is presented in a variety of styles, i.e. narration, description and explanation. The narration of data primarily provides background information on the theme addressed as well as the sequence of events to be communicated. The description of data provides elements or characteristics of things, states of affairs, persons or communities relevant to the thesis. The explanation of data provides reasons and expounds on relationships between a variety of variables in the study. These three tools of data analysis address the five questions of what, which, why, when and how throughout the thesis. Case notes and digests have also been employed where necessary to provide practical application of the relevant legal provisions before relevant adjudicatory bodies. Most importantly, to create a logical flow of ideas and cohesive data presentation, the convergent approach of grouping similar data was applied while writing the thesis.

¹⁰⁶ This information was obtained during the field visit to the Morogoro Regional Office on July 1, 2021.

1.13 Synopsis

The course of this thesis begins with the introduction of the whole study in chapter one. This includes clearly stating the problem in relation to the recognition and implementation of the collective rights of indigenous peoples in Africa generally and in Tanzania particularly. This is followed by the study's hypothesis which is drawn from the problem stated. Further, the chapter lays down the study's objectives and significance and proceeds to lay down the research questions. It further presents the general literature reviewed, the methodological framework applied to obtain data, the research phases and limitations, the research ethics abided by throughout the study, and the data analysis techniques used. Chapter one is then concluded with a synopsis of the thesis. The second chapter discusses the conceptual and theoretical framework around the terms "indigenous peoples" and "collective rights." This is done by looking into various attempts by scholars to define or describe the concept of peoples, indigenes, indigenous peoples, indigenous peoples' rights, collective rights, minority rights, and local or national communities. The chapter also elaborates on what is meant by the global indigenous peoples' movement. It also delves into the theoretical logic behind selection of the defined or described concepts in the chapter. The chapter is then concluded by stating this study's position in approaching the term "indigenous peoples" and their associated rights. Chapters three and four provide insights into the practice of indigenous peoples' rights beyond Tanzania. Chapter three traces the origin of global indigenous peoples' rights initiatives and how these have been captured in various international instruments and enforcement mechanisms. The same approach is applied in chapter four but on the level of the African regional human rights system. Both these chapters establish benchmarks for assessing indigenous peoples' rights implementation in Tanzania. Looking at global movements contributes lessons of relevancy to Tanzania. Moreover, chapter four digs deeper into each investigated right that is considered a collective right under the Banjul Charter. The aim here was to establish their relationship with indigenous peoples' affairs. Chapter five describes the situation of indigenous peoples in Tanzania with specific examples drawn from the pre-colonial, colonial and post-colonial periods. Chapter six assesses the legal, policy and institutional frameworks relating to recognition and implementation of indigenous peoples' rights in Tanzania. Chapter seven provides a general conclusion to this study. It states the achieved objectives, proven hypothesis and viable recommendations for

improving the situation of indigenous peoples' rights in Tanzania. It also proposes possible areas for future research.

CHAPTER TWO

2.0 CONCEPTS AND THEORIES ON INDIGENOUS PEOPLES AND COLLECTIVE RIGHTS

2.1 Introduction

Generally, the concept of “indigenous peoples” is used to refer to peoples who inhabited a given geographical location before invasion by others, in most cases colonialists. In what are famously known as the CANZUS states, i.e. Canada, Australia, New Zealand and the United States, such communities are referred to as First Nations, Aboriginals and natives.¹⁰⁷ In other areas such as Asia, Europe, the South Pacific and Africa they are known as hill tribes, island communities,¹⁰⁸ tribal people, forest people, and Bushmen, among other terms. To some extent, the names depend on the nature of the livelihood depended on by such communities, i.e. traditional pastoralism, hunting and gathering or foraging. Despite the aforementioned terms used to refer to “indigenous peoples”, there is not any universally agreed upon definition of who indigenous peoples are. It is argued that a clear-cut definition of the term is not desired because of its potential misuse by governments to deny particular communities recognition as indigenous peoples.¹⁰⁹ In some countries, indigenous peoples are referred to using local terms that are not easy to decipher. Some do not formally recognise them but acknowledge their presence within their geographical boundaries. Others completely deny their existence.¹¹⁰ Notwithstanding this fact, efforts to describe the term “indigenous peoples” and related expressions have been going on for decades. Proponents of approaching the term in its literal meaning, i.e. using aboriginality as the only key defining factor, have faced criticism for not taking into account other criteria contributing to the nature of indigenous communities. In the case of the African continent, the aboriginality criterion has been criticised for not considering the contemporary issues that continue to affect some traditional communities, long after the colonial period. Such issues are acts of oppression, domination, suppression, alienation, marginalisation and discrimination by the dominant societies and their respective national governments.¹¹¹

¹⁰⁷ ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts*, 91.

¹⁰⁸ *Id.*, 16. Also see Hardin and Askew, “Claims, Rights, Voices, and Spaces in the Global Indigenous Peoples Movement,” 50.

¹⁰⁹ ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts*, 87.

¹¹⁰ *Id.*, 91.

¹¹¹ *Id.*, 92.

With the lack of a one-fits-all definition of the term indigenous peoples and the desire to attribute more components to it, the groundwork to set parameters for describing who indigenous peoples are has been done particularly in Africa, where all Africans are considered indigenous to the continent.¹¹² In this case, the term indigenous peoples has been associated with collective rights under Articles 19 to 24 of the Banjul Charter.¹¹³ Before diving deeper into the relationship between indigenous peoples and the peoples' rights under the Banjul Charter discussed in chapter four of this study, the current chapter describes key terms that relate to the concept "indigenous peoples" from different perspectives. It also discusses the theory which associates this concept with collective rights.

The discussion begins with the universal definition of key terms and subsequently narrows down to the African human rights system's perspective. The aim is not to overlook works that have tackled terms relating to indigenous peoples from the perspective of other regional human rights systems, but to present a focused discussion on the regional human rights system that is central to this thesis. The situation of indigenous peoples in other parts of the world is highlighted in the next chapters.

2.2 Key Concepts and Terms

Due to the controversies attached to the concepts and terms dealt with in this section, they are described rather than defined. The notion of "indigenous peoples" itself has been the subject of wide debates. The term is made up of two words, i.e. "indigenous" and "peoples", which have separately exercised the minds of scholars over the years in the quest to agree on the universally acceptable meaning of each. Put together as a term, "indigenous peoples" attracts conflicting views, one of which relates to the rights to which the subjects of the term are entitled.

To clarify what is meant by "indigenous peoples" in this study, the relevant key terms are discussed below.

¹¹² Generally see IWGIA, *Report of the ACHPR Working Group of Experts*, 86, 88 and 92.

¹¹³ A holistic approach to the ACHPR and IWGIA's *Report of the ACHPR Working Group of Experts* provides a deeper understanding of and insights into the facts aforementioned.

2.2.1 Indigenous

Originating from a Latin word *indigena*, the term “indigenous” means native.¹¹⁴ From the middle of the 17th century, it was used to refer to persons born in a particular region or products naturally produced in a particular land or soil.¹¹⁵ Igoe argues that the term “indigenous” suggests “a state preceding that which is foreign or acquired”.¹¹⁶ At different times and in different contexts calling for the application of the term, it has acquired a variety of connotations, leaving it vague and open for different interpretations.

In the Americas, Australasia and parts of Russia, the term “indigenous” is not hard to explain. It captures people whose ancestors came neither from Europe, nor from Africa through the trans-Atlantic slave trade in what is known as the “age of discovery”.¹¹⁷ In Asia, even though most of the continent was colonised, the same remained with a minute of European settlers. Therefore, the term “indigenous” may be applied to almost the whole population of the continent. Nevertheless, it is sometimes applied to particular communities with distinct origins.¹¹⁸

In most cases, the question of who qualifies to invoke an “indigenous” identity arises when both members of dominant populations and those alleging that they are “dominated” assert claims over particular territories, ethnic hegemony, cultural legitimacy and other concerns,¹¹⁹ such as socio-economic self-determination. Revolutionarily, the term “indigenous” has been used by some marginalised groups to define and promote their social, economic and political movements.¹²⁰ It is now invoked by specific groups of people engaging in, among other things, a struggle for recognition of their cultural distinctiveness, and arguing that they have a special connection with their ancestral territories, and a right to the natural resources there, as well as to participation in political processes of the present-day nation-states and decision-making opportunities in international arenas.¹²¹

¹¹⁴ Dorothy Hodgson, “Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas,” *American Anthropologist* 104, no. 4 (2002): 1038.

¹¹⁵ *Ibid.*

¹¹⁶ Jim Igoe, “Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics,” *African Affairs* 105, no 420 (2006):399.

¹¹⁷ Geoffrey Benjamin, “Indigenous Peoples: Indigeneity, Indigeny or Indigenism,” in *Routledge Handbook of Asian Law*, ed. Christoph Antons, (London: Routledge, 2017), 362.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Hodgson, “Comparative Perspectives on the Indigenous Rights Movement,” 1038.

¹²¹ Mathias Guenther *et al.*, “Concept of Indigeneity,” *Social Anthropology*, (2006): 17.

Benjamin suggests six ways of approaching the term “indigenous” universally. He argues that these are people who self-identify or are identified by others as: (a) those who have inhabited a particular geographical area since time immemorial and have maintained a distinct culture, (b) those who have refused assimilation into a mainstream community of a nation-state and have organised themselves in social units such as tribal communities, (c) those who have claims over ancestral territories that have been alienated by the modern state governments, (d) those who inhabit a particular territory although they may have originated from other places, (e) those who self-proclaim themselves as indigenous by virtue of the formation of a particular nation, and (g) those who are referred to as “ancient” from an archaeological point of view.¹²² The meaning of this term will become more vivid in the following discussion on who are indigenous peoples in a legal context.

2.2.2 Peoples and Peoples’ Rights

2.2.2.1 The Trail in Legal Documents

The term “peoples” has been in use since the time of the passing of the Decree of the French Constituent Assembly of 1790 in which the rights of man and “peoples” were mentioned.¹²³ The term was later applied in the United Nations Charter of 1945.¹²⁴ Further, it features in the International Covenant on Civil and Political Rights (ICCPR)¹²⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²⁶ both of 1966, specifically in relation to the right to self-determination and free disposal of wealth and natural resources. Additionally, the term “peoples” is found in the 1976 Universal Declaration on the Rights of the Peoples, famously known as the Algiers Declaration. This is a non-binding but inspirational document addressing the rights of “peoples” which was adopted in Algiers by non-governmental actors from all over the world including labour unionists, liberation activists and non-governmental organisations. The Declaration was particularly adopted to support peoples’ struggles against

¹²² Benjamin, “Indigenous Peoples,” 363.

¹²³ Richard Kiwanuka, “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights,” *The American Journal of International Law* 82, no. 1 (1988): 81.

¹²⁴ See the preamble, Articles 1, 55, 73, 76 and 80 of the Charter.

¹²⁵ See Articles 1 and 47 of the ICCPR.

¹²⁶ See Articles 1 and 25 of the ICESCR.

colonialism, neo-colonialism and tyrannical governments.¹²⁷ Further, the Indigenous and Tribal Peoples Convention, 1989 (the ILO C 169) captures the term. Also, the term “peoples” is featured in the African regional human rights instrument, i.e. the African Charter on Human and Peoples’ Rights, 1981. Here, the term is used in the title of the Charter, the preamble and individual provisions, particularly Articles 19 to 24. Lastly, the term is contained in the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

2.2.2.2 The Study by UNESCO

Despite being captured in the aforementioned international instruments, the concept of “peoples” is neither defined nor described in such documents. Also, there is no overall consensus on what the notion means despite a massive amount of scholarly work attempting to establish a definition. Nonetheless, for the purpose of its application in the term “peoples’ rights”, an initiative was taken by the United Nations Educational, Scientific and Cultural Organization (UNESCO) by convening an International Meeting of Experts on Further Study on the Concept of the Rights of Peoples held at UNESCO’s headquarters in Paris from 27 to 30 November 1989. The Meeting’s objective was *inter alia* to study the relationship between peoples’ rights and human rights as provided for in international human rights instruments.¹²⁸ The Meeting of Experts tackled the concept of “peoples’ rights” by distinguishing it from “human rights.” The Meeting clarified that, although both notions address the common international phenomenon of “rights”, peoples’ rights and human rights have separate histories and legal foundations. However, the Experts emphasised that the two kinds of rights are interdependent. This means that individual human rights such as the rights to life, freedom of speech, expression and liberty cannot be said to be fully attained if peoples’ rights to existence and self-determination are not fulfilled and vice versa.¹²⁹ The Experts suggested that peoples’ rights are preconditions for the fulfilment of individual rights.¹³⁰ To narrow down the discussion, the Meeting of Experts outlined common characteristics of “peoples” for the purpose of the application of the term to the

¹²⁷ For more details about the adoption of this Declaration, see Permanent Peoples’ Tribunal (PPT), “Algiers Charter,” accessed February 9, 2021, <http://permanentpeopletribunal.org/algiers-charter/?lang=en>.

¹²⁸ This meeting was organised against the long history of UNESCO’s involvement in studies about peoples’ rights. See UNESCO, *Final Report on the Meeting of Experts on Further Study of the Concept of the Rights of Peoples* (Paris: UNESCO, 1989), 2.

¹²⁹ UNESCO, *Final Report on the Meeting of Experts*, 5.

¹³⁰ *Id.*, 7.

concept of “peoples’ rights.” This was done while acknowledging the fact that a consensus on its universal definition is yet to be reached. The Experts described “peoples” as:

a group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;
- (b) racial or ethnic identity;
- (c) cultural homogeneity;
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) territorial connection;
- (g) common economic life; ...

The Experts added that for a group to be regarded as a people, it ought to have a particular number, not necessarily a large number, but more than a mere association of individuals in a given state. Additionally, the group must have a consciousness and willingness to be identified as a people and should have a means of expressing their shared identity and characteristics, such as institutions.¹³¹ Lastly, the Experts concluded that, as per the above definition, under international law, different groups may be termed as “peoples”. They were of the opinion that a determinant factor for identifying “peoples” for the purpose of addressing peoples’ rights must be the clarity of the elements to be protected, and also that the claims asserted by “peoples” must align with objectives and rights accepted as legal norms.¹³²

Having defined which groups may potentially be termed as “peoples”, the Experts pondered on the concept of “peoples’ rights”. They acknowledged the great role played by specific groups in defending group rights under international law compared to that played by the States. This is despite the fact that States are regarded as primary actors in implementing and communicating their domestic human rights situations before the human rights enforcement bodies. The Experts rationalised this by explaining how States may not be responsive to the true aspirations of the “peoples” domestically especially when such aspirations are in conflict with “public interests”. They added that this is usually the case with indigenous peoples’ claims

¹³¹ UNESCO, *Final Report on the Meeting of Experts*, 7 and 8.

¹³²*Id.*, 8.

against their own nation-state(s). Hence, the Experts noted that States are not always better placed to represent peoples' rights in the eyes of international law.¹³³

Another point discussed by the Meeting of Experts was the misconception that advocating for peoples' rights is at the expense of individual human rights. The Experts argued that this was one of the reasons why Western countries like the United States of America and the United Kingdom pulled out of UNESCO in 1984 and 1985 respectively. The two superpowers alleged that the Organisation was succumbing to pressure to accord equal status to individual and peoples' rights. They argued that peoples' rights at that time were still extremely vague and ill-defined, and a danger to democratic states.¹³⁴ Since the late 1950s, many independent countries which had struggled for independence as peoples were joining the United Nations (UN). Thus, accommodation of this dynamic in terms of rights within the UN and a shifting of UNESCO's priorities were inevitable. In pinpointing the importance of peoples' rights, the Experts acknowledged that even the United States Declaration of Independence used the term "one people" to emphasise that a group of people is entitled to certain rights, and that the same term is used in the Charter of the United Nations.¹³⁵ This was the Experts' practical way of asserting that rights applying to a group of people do exist and can by no means be discarded on the ground that they undermine individual rights.¹³⁶ Moreover, the Experts noted that at the time of their Meeting the question of whether peoples' rights were recognised in international law was already settled. Peoples' rights were integrated in international legal instruments such as the United Nations Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African regional human rights instrument, i.e. the African Charter on Human and Peoples' Rights. Also, the term had started featuring in the United Nations General Assembly's Resolutions.¹³⁷ The only aspect that was yet to be settled was its content. This is still the case to date. "Peoples' rights" remains a dynamic concept undergoing constant development.

¹³³UNESCO, *Final Report on the Meeting of Experts*, 1.

¹³⁴*Id.*, 5.

¹³⁵*Id.*, 6.

¹³⁶*Ibid.*

¹³⁷*Ibid.*

2.2.2.3 Peoples and Peoples' Rights under the Banjul Charter

Unlike the aforementioned international instruments, the Banjul Charter in the African human rights system provides a wider range of content in respect of peoples' rights. This is an important milestone in developing the body of these rights. The Charter not only provides for the right of peoples to existence, self-determination, free disposal of natural wealth and resources, and economic, social and cultural development, as is the case in international human rights instruments, i.e. the ICCPR and ICESCR; it also provides for the right of peoples to equality, national and international peace and security and general satisfactory environment.

It is not evident from the Charter that the Algiers Declaration mentioned above was the foundation for its adoption of peoples' rights. The Declaration was instigated by international non-governmental organisations and activists. One author explains that, during the drafting of the Banjul Charter, the major objective of the drafters was to have a regional human rights instrument which was truly African, i.e. responding to the necessities of African people and reflecting their values and experiences.¹³⁸ Insistence on the inclusion of peoples' rights in the Charter by then active socialist states like Ethiopia and Mozambique was fierce. These states embraced communitarian ideologies as a move to counter the United Nations human rights covenants that were accused of being individual-centred rather than community-centred.¹³⁹ This force advocated for the normative communitarian nature of African societies. In this kind of setting, a community, whether a clan or an ethnic group, is considered a subject of law, unlike in the Western setting where the individual is at the centre of legal protection of rights. Before this background, it is apparent that the Charter was designed to match the nature of African societies.¹⁴⁰

Thus, the use of the term "peoples" in the Banjul Charter was meant to reflect the African continent's human rights concept, realities and philosophy of law.¹⁴¹ The drafters intended to present the African peoples' reality of liberation struggles from colonial oppression and

¹³⁸ Rose M. D'sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action," 10 *Australian Yearbook of International Law*, (1981-83), 106.

¹³⁹ *Id.*, 116.

¹⁴⁰ International Commission of Jurists, *Report on the Conference on Human and People's Rights in Africa and the African Charter Held in Nairobi from 2 to 4 December, 1985* (Geneva: ICJ, 1986), 27.

¹⁴¹ ACHPR and IWGIA, *Report of the Working Group of Experts*, 72.

domination¹⁴² and the long history of slavery in the continent.¹⁴³ Another objective was to emphasise the concept of equality of rights, having learnt from the aforementioned experiences. Further, the Charter was crafted to assert that no individual is entitled to dominate others. It was embedded in the African philosophy of law that grants precedence to society's well-being over individual interests. According to this philosophy, an individual is well protected within the confines of his or her community. Hence, the protection of group rights is a precondition for the enjoyment of one's individual rights. Despite this background, the Charter does not define the concept of "peoples", which leaves it open to various interpretations.

There have been divergent views regarding the meaning of the term "peoples" under the Charter.¹⁴⁴ Some scholars have construed it to mean the entire population of the continent,¹⁴⁵ some to mean the population of a particular state¹⁴⁶ and others "distinct communities constituting the state."¹⁴⁷ Peculiarly, Commissioner Umozurike, a former Chairman of the ACHPR, once observed that beneficiaries of peoples' rights under the Charter may not necessarily be all peoples in a particular country or particular members of an ethnic group, but any people with *identifiable interest(s)* (emphasis added). He stated, "...this may be carpenters, may be tribes, may be fishermen or whatever."¹⁴⁸ Kiwanuka holds the view that the meaning of the term peoples may not consistently mean the same thing across the Charter. This is because each right attracts its unique context.¹⁴⁹

Despite the fact that the ACHPR, which has the mandate to interpret the Charter, has not attempted a definition of the term "peoples",¹⁵⁰ it has made attempts to describe it. The adopted report of the ACHPR's Working Group of Experts on Indigenous Communities/Populations presented a decisive conclusion in respect of the term after the study on the concept of

¹⁴² Ibhawoh argues that "Colonialism shaped the history of human rights in Africa in definitive ways." See Bonny Ibhawoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018), 90.

¹⁴³ Julia Swanson, "The Emergence of New Rights in the African Charter," *New York Law School Journal of International and Comparative Law* 12, no. 1 (1991): 3326-27.

¹⁴⁴ ACHPR and IWGIA, *Report of the Working Group of Experts*, 72.

¹⁴⁵ See Dersso, "The Jurisprudence of the African Commission," 361.

¹⁴⁶ Howard, *Human Rights in Commonwealth Africa*, 92. Also see Julia Macted and Abebe Zegeye, "North, West and the Horn of Africa" in *World Directory of Minorities*, ed. Minority Rights Group International (London: Minority Rights Group International, 1997), 392.

¹⁴⁷ Dersso, "Jurisprudence of the African Commission", 362.

¹⁴⁸ University of Minnesota: Human Rights Library, "African Commission on Human and Peoples' Rights Examination of State Reports on the 9th Session, March 1991: General Discussions," accessed November, 27, 2023, <http://hrlibrary.umn.edu/achpr/sess9-generaldiscussions.html>.

¹⁴⁹ Kiwanuka, "The Meaning of 'People,' " 82.

¹⁵⁰ The ACHPR has the mandate to interpret provisions of the Charter under Article 45 (3) of the Charter.

indigenous people and communities in Africa was completed by the Experts. In this report, the Experts concluded that the concept can be explained as embracing, among other things, indigenous peoples. They further asserted that the ACHPR's jurisprudence in the cases of *Katangese Peoples' Congress v Zaire*,¹⁵¹ *African Association and Others v Mauritania*¹⁵² and the *SERAC Case*¹⁵³ laid a strong foundation for the use of the term "peoples" to refer to indigenous peoples.¹⁵⁴ In the *Katangese Case*, the Commission suggested and affirmed that the concept "peoples" could be interpreted to mean a portion of the population of a state, be it a specific ethnicity or not. It stated in paragraph 3 of the decision that: "The issue in the case is not self-determination for all Zaireois as a people but specifically for the Katangese." This was the first time in the history of the ACHPR's jurisprudence that an opportunity for national sub-groups to exercise the right of a people to self-determination was entertained. In paragraph 4 of this decision, the ACHPR provided a variety of forms in which the right to self-determination can be exercised. These included "self-government, local government ... or any other form of relations that accords with the wishes of the people" (emphasis added). Clearly, one of the forms of relations that accords with the wishes of the people is the association based on the collective status of indigenes. The ACHPR referred to the Katangese as the "people of Katanga" as part of the entire population of Zaire and linked them to the right to self-determination that they were claiming under Article 20 (1) of the Banjul Charter. The same approach was applied in the *Mauritania Case*. In this case, the Commission considered the allegations against Mauritania, i.e. domination and discrimination of one section of the nation's population by the other. The allegations were based on claims of violation of Article 19 of the Charter which provides for peoples' rights to equality. Although the Commission admitted that the facts provided were not sufficient to establish a violation of the Article, it did not argue that the section of the population known as black people in Mauritania was not entitled to base its claims on peoples' rights under the Charter. It only condemned the discrimination against black Mauritians by other parts of the Mauritanian population. Additionally, in the *SERAC Case*, the Commission recognised the Ogoni as a people whose rights to freely dispose of wealth and natural resources and to a general satisfactory environment under Articles 21 and 24 of the Charter were found to have been

¹⁵¹ Communication No. 75/92.

¹⁵² Consolidated Communications Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000).

¹⁵³ *Supra*.

¹⁵⁴ ACHPR and IWGIA, *Report of the Working Group of Experts*, 13.

violated by the military government of Nigeria. Under paragraph 69 of the case, the Commission recognised both individual and community rights by urging States and multinational corporations to remain mindful of the “common good and the sacred rights of individuals and communities”. Dersso holds the view that it was not the ACHPR’s intention to assign specific names to sub-groups which claim peoples’ rights before it. For instance, in the *SERAC Case*, the Commission was not categorical in stating what kind of people the Ogoni were, i.e. whether they were typically an indigenous people, a mere minority, or both.¹⁵⁵ He applauds the Commission’s approach, especially in the context of Africa, for its ability to avoid “controversies surrounding the categorisation of sub-state groups as minorities or indigenous peoples”.¹⁵⁶ However, in the groundbreaking case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*,¹⁵⁷ famously known as the *Endorois Case*, the Commission went an extra mile and particularly delved into the meaning of the term “peoples” in relation to a distinct ethnic community, i.e. the Endorois.¹⁵⁸ After a lengthy discussion on the concept, which also borrowed a leaf from international law and regional human rights practices, the Commission arrived at the conclusion that the Endorois were a distinct indigenous community which self-identified as such. It explained the rationale behind this conclusion by saying that the Endorois people share a similar culture, religion and history. It was satisfied that they fulfilled the condition for being termed a “people” under the Banjul Charter and that they were therefore entitled to benefit from the provisions of Articles 19 to 24 of the Charter. The Commission added that the alleged violations of peoples’ rights in this case were justified because they concerned the essential rights of the Endorois as a people, such as the right to preserve the community’s cultural identity, which was tied to the contested ancestral lands.¹⁵⁹

Further, in the case of *Legal Resources Foundation v Zambia*,¹⁶⁰ the ACHPR laid down criteria for invoking peoples’ rights under the Banjul Charter. It stated that for peoples to claim rights under the peoples’ rights provisions of the Charter, they need to prove the effects of violation of such rights on an identifiable group. Moreover, the members of the group must share

¹⁵⁵ Dersso, “Jurisprudence of the African Commission,” 372.

¹⁵⁶ *Ibid.*

¹⁵⁷ Communication No. 276/03.

¹⁵⁸ See paragraphs 146-162 of the Endorois case.

¹⁵⁹ Paragraph 162, of the Endorois case. .

¹⁶⁰ Communication No. 211/98.

“common ancestry, ethnic origin, language or cultural habits”.¹⁶¹ These criteria squarely point to indigenous peoples.

The jurisprudence of the African Court on Human and Peoples’ Rights does not fall far from the ACHPR’s position when it comes to interpreting the term “peoples” under the Charter. Through the *Ogieks’ Case*, the Court ruled that the drafters of the Charter voluntarily omitted to define the meaning of the term “peoples” in order to allow flexibility of interpretation depending on the circumstances. The Court emphasised that it was evident during the nationalist period in Africa that the word “peoples” referred to the general population of the continent fighting for independence. Peoples’ rights such as the right to self-determination were clearly relevant in this period. However, it was the Court’s observation that to continue giving a pre-colonial meaning to the term “peoples” in the post-colonial era is impractical. Hence, in contemporary times, the term “peoples” may be extended to capture some ethnic groups or communities within a state’s population as long as such groups do not seek to violate an independent country’s sovereignty or territorial integrity.¹⁶²

2.2.3 Indigenusness, Indigenous Peoples and Indigenous Peoples’ Rights

The preceding discussion on the concepts “indigenous,” “peoples” and “peoples’ rights” has laid the groundwork for explaining the terms “indigenous peoples” and “indigenous peoples’ rights”. To subject such controversial terms to deeper scrutiny, various approaches have been adopted in this study. This is in order to achieve the ultimate goal of pulling together these different perspectives. The rationale behind the use of terms outside their literal meaning, particularly in an African context, is also explained.

2.2.3.1 International Law Perspective

To quote Stavenhagen:¹⁶³ “there is no internationally agreed upon definition of indigenous peoples.”¹⁶⁴ Even in what is considered the latest and the most comprehensive international instrument providing for the rights of indigenous peoples, i.e. the United Nations Declaration on the Rights of Indigenous Peoples, 2007 (UNDRIP), the term “indigenous peoples” is not defined.

¹⁶¹ Communication No. 211/98, paragraph 73.

¹⁶² Paras.196-198, *Ogieks Case* (merits).

¹⁶³ Rodolfo Stavenhagen was the first United Nations Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous Peoples.

¹⁶⁴ ACHPR and IWGIA, *Report of the Working Group of Experts*, 91.

However, under international law, there are two conventions conceived under the auspices of the International Labour Organisation (ILO) which take a legal approach to the term. These are the Indigenous and Tribal Populations Convention, 1957 (C 107) and the Indigenous and Tribal Peoples Convention, 1989 (C169). These Conventions capture the concept of tribal populations and tribal peoples. In both Conventions, the terms “indigenous” and “tribal” are used separately. This implies a slight difference between the two. Although “tribal peoples” clearly fit within the term “indigenous peoples” in the sense that they inhabit a specific geographical area, indigenous peoples are more of a non-segmentary and larger social formation. They are broader communities dominated by a state. Modern states seek to disintegrate such “indigenous” communities in the quest to build national communities. Some of the tactics applied by modern states to accomplish this mission include cutting indigenous peoples’ ties with what they consider their ancestral lands or territories. This is done by implementing relocation strategies, meaning that indigenous communities are resettled away from their original localities. As a result, indigenous peoples are transformed into middle-class urbanites.¹⁶⁵

Both the aforementioned ILO Conventions do not define who indigenous peoples or populations are. They merely describe the terms by indicating to whom they apply. C107 considers tribal and semi-tribal populations¹⁶⁶ in independent countries as indigenous populations.¹⁶⁷ It identifies them as indigenous populations by the criteria of descent from people that occupied a country or part of it on or before conquest by others or colonisation. Further, the Convention describes indigenous populations as those who conform to their traditional institutions in all spheres of life as opposed to the modern state’s institutions.¹⁶⁸ C 169 qualifies these characteristics by establishing the criterion of “self-identification” as a prime determinant of indigenous or tribal peoples.¹⁶⁹ C 169 does not mention the aspect of semi-tribe.

At the United Nations level, there is no universal convention adopted by the international community to provide for the rights of indigenous peoples. This is despite the existence of institutional and periodic strategies to promote indigenous peoples’ rights at the international level, for example the United Nations Permanent Forum on Indigenous Issues (UN PFII), United

¹⁶⁵ “Indigeneity, Indigeny or Indigenism?,” 365-366.

¹⁶⁶ For the purposes of this Convention, the term *semi-tribal* includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

¹⁶⁷ Article 1 (1) (b) of the Indigenous and Tribal Populations Convention, 1957.

¹⁶⁸ *Ibid.*

¹⁶⁹ Article 1 (2) of Indigenous and Tribal Peoples Convention, 1989.

Nations Expert Mechanisms on the Rights of Indigenous Peoples (UN-EMRIP), United Nations Special Rapporteur on the Rights of Indigenous Peoples (UN SRRIP), the United Nations Decades of the World's Indigenous Peoples in 1995-2004 and 2005-2014, and the International Day of the World's Indigenous Peoples which is commemorated on August 9 of each year. Nevertheless, the UN's adoption of the UNDRIP laid the foundation for a future United Nations Convention on Indigenous Peoples' Rights. This is notwithstanding the lack of a definition of the term "indigenous peoples" in this declaration.¹⁷⁰ Thus, under international law, the sole description of indigenous peoples which is legally binding for the member states is the one provided under ILO C 107 and C169. Stavenhagen argues that the lack of a specific definition of indigenous peoples in an international arena should never be a barrier to actions dedicated to promoting and protecting their rights.¹⁷¹ Such actions are like those undertaken by the ILO through the adoption of the aforementioned Conventions.

2.2.3.2 The Perspective of Scholars

The fact that there is no agreement on the meaning of the term "indigenous peoples" makes the scholarly debate on the term very interesting.¹⁷² Scholars from various disciplines have tried to explain the meaning of the term indigenous peoples. Still, they have not succeeded in coming up with an agreed definition. The discussion presented here does not capture every scholar's point of view but summarises contributions that are vital to establishing a broader understanding of the term.

Kuper calls the term an "ideological makeover" of the earlier term "primitive people."¹⁷³ Citing Cobo,¹⁷⁴ Skutnub-Kangas and McCarty present what they consider a "definition" of the term "indigenous peoples" as follows:

¹⁷⁰ The ACHPR has expressed the opinion that the absence of a definition of the term "indigenous populations" in the UNDRIP would lead to considerable juridical problems regarding the implementation of the Declaration. It added that this deficiency was not only legally incorrect, but would also spark tensions and instability between ethnic groups and sovereign states. See African Commission on Human and Peoples' Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Advisory Opinion on the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: Eks-Skolens Trykkeri, 2010), 30.

¹⁷¹ ACHPR and IWGIA, *Report of the Working Group of Experts*, 91.

¹⁷² Alan Barnard, "Indigenous Peoples," *Anthropology Today* 20, no.5 (2009): 19, accessed December 9, 2023, https://www.academia.edu/24096876/Indigenous_peoples

¹⁷³ Guenther *et al.*, "Concept of Indigeneity," 21.

¹⁷⁴ José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, Volume 5 (New York: United Nations, 1987) 4.

Communities, peoples, ...having a historical continuity within pre-invasion and pre-colonial societies that developed within their territories, consider themselves distinct from other sectors of the society(ies) now prevailing in those territories. They form non-dominant sectors of society determined to preserve, develop, and transmit to future generations their ancestral territories, identity, and often, their language as the basis of their continued existence as peoples, in accordance with their cultural practices and social and legal systems.¹⁷⁵

Benjamin relates the term to minority tribes or endangered communities which suffer socio-economic, political and cultural disadvantages. This is in contrast to the rest of the given country's population which is usually the majority.¹⁷⁶

Barnard explains the term "indigenous peoples" as a legal instrument for political persuasion.¹⁷⁷ He argues that it can be invoked to further marginalise peoples' causes.¹⁷⁸ Kenrick argues that the rationale behind the use of the term beyond its literal meaning is to advance the causes of marginalised groups. Firstly, he points out that marginalised groups see themselves as such because this is how they are referred to by others. Secondly, they continue identifying themselves as indigenous peoples following the legal rationalisation used in colonial and post-colonial assimilation policies. Third, they have always used the term as an instrument for defending themselves against domination. Fourth, they label themselves indigenous peoples to echo the call by other traditional communities to maintain lifestyles which are incompatible with the "capitalist" way of life. Fifth, they identify themselves as indigenous peoples in the process of reclaiming land rights alienated by state and non-state actors.¹⁷⁹

Ndahinda finds three constructions of "indigenusness" based on different ways of describing "indigenous peoples" as a legal term. The first construction is the one applied during the colonial period to refer to non-Europeans who lived in the colonies, the second refers to non-Europeans in post-colonial countries and the third captures the "marginalised" traditional

¹⁷⁵ Tove Skutnabb-Kangas and Teresa McCarty, "Key Concepts in Bilingual Education: Ideological, Historical, Epistemological and Empirical Foundations," in *Bilingual Education: Encyclopedia of Language Education*, Volume 5, 2nd edition, eds. Jim Cummins and Nancy Hornberger (New York: Springer, 2008), 4. Also see Tove Skutnabb-Kangas, "Indigenusness, Human Rights, Ethnicity, Language and Power," *International Journal of Sociology and Language* 213, (2012): 88.

¹⁷⁶ Benjamin, "Indigenous Peoples," 362.

¹⁷⁷ Alan Barnard, "Indigenous Peoples," 9.

¹⁷⁸ *Ibid.*

¹⁷⁹ Guenther et al., "Concept of Indigenusness," 19-20.

communities in Africa, the Americas, Australia, Asia, Europe and the Pacific isles who are engaged in the global indigenous rights movement that seeks to protect their collective rights. The three constructions present the evolution of the application of the term in the colonial period, the post-colonial period and the period of “globalisation of indigenusness.”¹⁸⁰ It is, therefore, safe to say that the pragmatic and contemporary use of the term “indigenous peoples” for legal purposes is primarily aimed at securing the rights of the communities concerned, rather than defining its literal meaning.

2.2.3.3 The Perspective of Financial Institutions

Some international financial institutions have developed indigenous peoples’ policies with a view to ensuring protection of the rights of indigenous communities in the projects that they fund. The World Bank and the European Investment Bank are prime examples which shed light on this approach to the term “indigenous peoples.”

2.2.3.3.1 The Perspective of the World Bank

The World Bank is the first multilateral financial institution to accord specific attention to indigenous peoples in the implementation of its funded projects.¹⁸¹ It officially adopted the policy directive named “Tribal Peoples in Bank-Financed Projects,” Operational Manual Statement (OMS) 2.34 in February 1982. In this policy, the term “tribal peoples” was used to imply “indigenous peoples.” It referred to ethnic groups that possess the following characteristics in varying degrees:

First, geographically isolated or semi-isolated; second, un-aculturated or only partially acculturated into the societal norms of the dominant society; third, non-monetised, or only partially monetised; production largely for subsistence, and independent of the national economic system; fourth, ethnically distinct from the national society; fifth, non-literate and without a written language; sixth, linguistically distinct from the wider society; seventh, identifying closely with one particular territory; eighth, having an economic lifestyle largely dependent on the specific natural environment; ninth, possessing indigenous leadership, but little or no national representation, and few, if any,

¹⁸⁰ Ndahinda, *Indigenusness in Africa*, 19.

¹⁸¹ World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, (Washington: The World Bank, 2003), 1.

political rights as individuals or collectively, partly because they do not participate in the political process; and, tenth, having loose tenure over their traditional lands, which for the most part is not accepted by the dominant society nor accommodated by its courts; and, having weak enforcement capabilities against encroachers, even when tribal areas have been delineated.¹⁸²

This policy directive was not adopted to apply to indigenous peoples' projects, but to projects funded by the Bank which may have impacts on tribal peoples.¹⁸³

In 1987, the World Bank's internal review of this OMS revealed that the policy was only applicable to "small, isolated, and unacculturated tribal societies" and not to other groups which also needed protection.¹⁸⁴ As a result, it was proposed that there should be a shift of approach from merely protecting the "isolated tribes" to considering their modes of production, their ecological adaptation and their social and cultural systems which are distinct from those of the dominant national societies.¹⁸⁵

Consequently, the 1982 policy directive was revised in 1991 through the adoption of the Operational Directive 4.20 on Indigenous Peoples (OD 4.20).¹⁸⁶ The new directive broadened the description of the term "indigenous peoples" to cover peoples who have preserved distinct social and cultural identities over the years, who have a special attachment to their ancestral territories and who are always left out of development projects. Modification of the term "indigenous peoples" by the World Bank was also considered necessary to align the Bank's policies with the dynamic international approach to indigenous peoples' rights.¹⁸⁷

The OD 4.20 was later replaced by the Operational Policy 4.10 on Indigenous Peoples (OP 4.10) of July 2005 which was later revised in April 2013. The OP 4.10 defines indigenous peoples as:

...cultural communities, tribal groups that can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

¹⁸² World Bank's Operational Manual Statement (OMS) 2.3, paragraph 2.

¹⁸³ Shelton Davis, "The World Bank and Indigenous Peoples," in *Social Development in the World Bank: Essays in Honour of Michael M. Cernea*, eds. Maritta Koch-Weser, Scott Guggenheim (Cham: Springer, 2021), 194.

¹⁸⁴ World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples*, 1.

¹⁸⁵ *Ibid.*

¹⁸⁶ World Bank, "The World Bank and Indigenous Peoples Policy and Program Initiatives," accessed February 2, 2022, <https://documents.worldbank.org/en/publication/documents-reports>.

¹⁸⁷ World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples*, 2.

- (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) an indigenous language, often different from the official language of the country or region.¹⁸⁸

In Africa, the World Bank’s Environmental and Social Framework (ESF) which is designed to provide support to borrowers’ projects to end extreme poverty names indigenous peoples interchangeably with the term “Sub-Saharan African Historically Underserved Traditional Local Communities” under the Environmental and Social Standard 7 (ESS7). It describes them as having characteristics like the ones listed in OP 4.10 above. The ESS7 also applies to those who are considered indigenous peoples in their national context.¹⁸⁹

2.2.3.3.2 The Perspective of the European Investment Bank

Description of the term indigenous peoples under the auspices of the EIB is found under the European Investment Bank Environmental and Social Standards, 2022. This policy framework was adopted, among other things, to complement the EIB’s efforts in implementing inclusive and sustainable development programmes and to support communities which are climate resilient.¹⁹⁰

The policy recognises that there is no universally accepted definition of the term indigenous peoples.¹⁹¹ However, it takes into account the existence of vulnerable or marginalised groups that are likely to be excessively impacted by the EIB’s funded projects compared to others.¹⁹² The policy explains the reason behind this as, among other things, such groups’ weaker ability to access tools or resources that can enable them to mitigate the projects’ risks. These

¹⁸⁸ World bank Operational Policy 4.10, paragraph II.

¹⁸⁹ World Bank, *World Bank’s Environmental and Social Framework (ESF)* (Washington: International Bank of Reconstruction/World Bank, 2017), 77.

¹⁹⁰ European Investment Bank, “Environmental and Social Standards,” accessed 11 December 2023, <https://www.eib.org/en/publications/eib-environmental-and-social-standard>.

¹⁹¹ European Investment Bank, “Standard 7 – Vulnerable Groups, Indigenous Peoples and Gender,” *Environmental and Social Standards*, (Luxemborg: European Investment Bank Group, 2022), 49, paragraph 3.

¹⁹² See Standard 7 on Vulnerable Groups, Indigenous Peoples and Gender.

groups include indigenous peoples. The Bank describes indigenous peoples as groups with identities and aspirations distinct from those of the dominant national societies. It considers them to be negatively affected by conventional models of development.¹⁹³ Under this Policy, Standard 7 on Vulnerable Groups, Indigenous Peoples and Gender describes indigenous peoples in a more generic form as vulnerable or marginalised socio-cultural groups that possess the following characteristics in different degrees:

- (a) Self-identification as members of a distinct ethnic or cultural group and recognition of this identity by others;
- (b) Collective attachment to geographically distinct habitats, ancestral lands, or areas of seasonal use or occupation, as well as to the natural resources in these areas and use thereof;
- (c) Customary cultural, economic, social or political institutions, laws or regulations that are distinct or separate from those of the dominant society or culture; and
- (d) A language or dialect, often different from the official language or languages of the country or region in which they reside.¹⁹⁴

Apart from various names assigned to indigenous peoples which are mentioned in the introductory part of this chapter, the Bank provides additional terms associated with indigenous peoples, such as “ ‘ethnic minorities,’ ‘minority nationalities,’ ‘scheduled tribes,’ ‘tribal groups,’ ‘historically underserved communities,’ and ‘traditional local communities’.” The Bank clarifies that such terms apply depending on the national context. However, for the projects funded by the EIB, the applicable names should not be the determinant factor for identifying indigenous peoples but the aforementioned characteristics.¹⁹⁵ Further, it is stated in Standard 7 that the policy covers indigenous peoples who are nationally recognised although they may not possess the above-mentioned characteristics.¹⁹⁶ It also applies to peoples who have over the years lost collective attachment to what they consider their “ancestral or distinct territories” in the project areas due, *inter alia*, to dispossession, resettlement or establishment of urban areas.¹⁹⁷

¹⁹³ European Investment Bank, “Standard 7 – Vulnerable Groups, Indigenous Peoples and Gender,” 49, paragraph 3.

¹⁹⁴ *Id.*, 50-51, paragraph 10.

¹⁹⁵ European Investment Bank, “Standard 7 – Vulnerable Groups, Indigenous Peoples and Gender,” 50-51, paragraph 11.

¹⁹⁶ *Id.*, 12.

¹⁹⁷ *Ibid.*

Generally, the EIB Standard 7's specific objectives aim at ensuring that projects funded by the Bank fully promote respect for indigenous peoples' rights, livelihoods, culture and identities by carrying out genuine consultations before executing projects in their habitats. This includes obtaining their free prior and informed consent (FPIC). Also, the Standard seeks to ensure respect for indigenous communities living in voluntary isolation (like the Hadzabe in Tanzania) by adhering to the principle of "no contact" unless and until such contact is initiated by the indigenous peoples themselves.¹⁹⁸

2.2.3.6 The Perspective of African Human Rights

The groundwork for assigning a meaning to the term indigenous peoples has largely been carried out by the ACHPR through its commissioned studies and jurisprudence. The African Court on Human and Peoples' Rights has also played this role in the *Ogiek's Case*. Before diving deeper into what exactly the term "indigenous peoples" suggests under the African human rights system, this section presents various critiques and misconceptions identified by the ACHPR which are normally associated with the use of the term "indigenous peoples". These misconceptions and criticisms lead to misunderstandings when it comes to the application of the term. Consequently, this state of affairs creates impediments to the domestic recognition and implementation of indigenous peoples' rights in African countries.

In a nutshell, the ACHPR is of the view that it is a misconception to consider protection of indigenous peoples' rights as "availing them with special rights". This misconception implies that indigenous peoples' rights are more important than the rights of other members of the state's population. The Commission does not subscribe to this approach. It is, however, of the opinion that there has been discrimination against particular marginalised groups in African states due to their culture and livelihood. Such discrimination is not experienced by the rest of the state's population. Therefore, the call to protect these groups' rights does not mean according them special rights, but rather doing away with this kind of discrimination.¹⁹⁹ Another misunderstanding highlighted by the Commission is the idea that "all Africans are indigenous to Africa" since they all inhabited the continent before conquest by Europeans. The Commission neither disputes this nor does it deny the legitimate African identity of other members of a state's population. It elaborates that the term "indigenous peoples" is used as a modern analytical

¹⁹⁸ European Investment Bank, "Standard 7, 50, paragraph 8.

¹⁹⁹ ACHPR and IWGIA, Report of the Working Group of Experts, 87-88.

approach to describing peculiar circumstances faced by certain communities in Africa. This is with a view to obtaining protection of their rights under international human rights law and moral standards.²⁰⁰ It is by no means meant to rob other communities of their right to claim their African heritage.

Additionally, the notion that promoting indigenous peoples' rights creates tribalism or ethnic conflicts is not backed by the Commission. In fact, the Commission opposes this assertion. Acknowledging the multiplicity of ethnic groups existing across the continent, it holds the view that respecting this diversity and allowing each ethnic group to flourish in its own unique way leads to fewer conflicts. This includes respecting each group's specific concerns and perceptions of life. The Commission regards this approach as an opportunity for African countries to sow the seed of multicultural democracy which is inclusive of all groups. Thus, it nurtures the potential of eradicating ethnic conflicts across the continent.²⁰¹

From the studies it has carried out, the Commission holds that a definition of the term "indigenous peoples" is irrelevant in the quest to securing their rights. This is because, first, there is no globally agreed definition of the term; second and most importantly, a single definition cannot accommodate the different characteristics of indigenous peoples across the world. As an alternative, the Commission has laid down core criteria for identifying indigenous peoples in Africa.²⁰² These are based on characteristics attributed to groups of people who self-identify as indigenous peoples, whose cultures differ considerably dissimilar from that of the dominant society, and who are typically threatened with extinction. The Commission notes that one of the principal characteristics of indigenous peoples is that the survival of their livelihood is fully dependent on their ancestral lands and the natural resources attached to it. Moreover, such communities or groups are considered backward and suffer from discrimination. This is accompanied by political and social marginalisation due to their geographically isolated habitats. They are also prone to be dominated and exploited in the execution of projects aimed at benefiting the mainstream population.²⁰³ They are termed by the Commission as descendants of

²⁰⁰ ACHPR and IWGIA, Report of the Working Group of Experts, 88.

²⁰¹ *Id.*, 87-88.

²⁰² ACHPR and IWGIA, *Advisory Opinion on the African Commission on Human and Peoples' Rights*, 30.

²⁰³ ACHPR and IWGIA, *Report of the Working Group of Experts*, 89.

hunter-gatherers, and some groups of pastoralists who are connected to the global indigenous peoples' movement.²⁰⁴

2.2.4 The Indigenous Peoples Movement

The initiative to advocate for and seek protection of the rights of specific groups whose distinctive cultures and livelihoods have been subjected to contempt and discrimination is widely known as the indigenous peoples movement. The movement trickles down from global to regional and national movements. Communities resonating with this cause have suffered injustices during and after the colonial period. For clarity, this section discusses the roots of the indigenous peoples movement in its global and African regional dimensions, down to the national level of Tanzania as a case study.

Globally, the indigenous peoples movement originated in the Americas. It began in the early 1920s when Levi General (Chief Deskaheh) and his attorney George Decker on behalf of the Iroquois (Six Nations) in today's Canada travelled to Geneva in 1923. He sought to table his peoples' claims to independence and land and freedom to profess their own faith against the British Crown before the League of Nations.²⁰⁵ He was, however, not availed the opportunity to address this forum and returned home in 1925.²⁰⁶ The movement was later picked up in Australasia by Tahupōtiki Wiremu Rātana, a religious leader of the Māori peoples of New Zealand, who travelled to London in 1924 to face the Crown (King George) in the quest to address his peoples' grievances over the breach of the Waitangi Treaty. This Treaty "formally" granted the Māori peoples full ownership of their lands. Rātana's attempt in London failed. He sent a delegation to the League of Nations in Geneva to pursue the same cause and joined it later in 1925. This bore no fruits as the delegation was denied access to the League of Nations. This is the same fate that was met by Chief Deskaheh.²⁰⁷ Despite these early defeats, the attempts sowed

²⁰⁴ ACHPR and IWGIA, *Report of the Working Group of Experts*, 89.

²⁰⁵ Ndahinda, *Indigeness in Africa*, 15.

²⁰⁶ United Nations: Department of Economic and Social Affairs (Indigenous Peoples), "Indigenous Peoples at the United Nations: 1923-1925, First International Involvement," accessed January 20, 2024, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

²⁰⁷ United Nations: Department of Economic and Social Affairs (Indigenous Peoples), "Indigenous Peoples at the United Nations: 1923-1925, First International Involvement," accessed January 20, 2024, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

the seed which grew into a momentous indigenous peoples' movement in these regions and later extended into the Nordic countries and subsequently to other parts of the world.²⁰⁸

While the global indigenous peoples movement gained momentum over the decades, the African indigenous peoples' experiences were not taken aboard.²⁰⁹ It was not until 1989 when one Moringe Ole Parkipuny, a Tanzanian Maasai (who was then a Member of the Parliament in Tanzania) spoke of the struggles of indigenous peoples in Africa for the first time before the United Nations Working Group on Indigenous Populations (UN-WGIP). He was the first African to ever access such a forum. This milestone registered the African component in the global indigenous peoples movement.²¹⁰ At the same time, it formally instigated the indigenous rights movement in Africa, particularly in Tanzania. Chapter four of this thesis will shed more light on how the indigenous rights movement in Africa advanced and the role played by Tanzania in hosting the very first African indigenous peoples' conference. It will also show how this conference culminated in the incorporation of the indigenous peoples' rights agenda into the African human rights system.

The national indigenous peoples movement in Tanzania began with the formation of non-governmental organisations which opposed the alienation of pastoralists' traditional grazing lands. This alienation was rooted in the implementation of the economic liberalisation policy in the country in the 1980s. This policy necessitated the grabbing of pastoralists' lands to give room to large-scale investments such as wheat farms.²¹¹ This was followed by apolitical liberalisation campaign in the country in the early 1990s: in 1992, the single-party political system was abolished, culminating in the introduction of multiparty democracy in Tanzania. Apart from this development in the country's political sphere, a variety of non-governmental organisations that did not exist during the single-party regime were formed and thrived during this period.²¹² The pioneer NGOs advocating for indigenous peoples' rights in the country were typically dominated by Maasai pastoralists. However, by the year 1993, NGOs accommodating other ethnic groups,

²⁰⁸ Ndahinda, *Indigenusness in Africa*, 17.

²⁰⁹ Ricarda Rösch, *Indigenusness and Peoples' Rights in the African Human Rights System*, *Verfassung und Recht in Übersee VRÜ (Constitution and Law Oversea)* 50, no.3 (2017) 246.

²¹⁰ Ndahinda, *Indigenusness in Africa*, 15. It should be noted that, dominant groups in the post-colonial Africa have continued suppressing and marginalising traditional communities found within their borders. This one of the reasons as to why the victim communities in Africa have enrolled into the global indigenous peoples' movement. See ACHPR and IWGIA, *Report of the Working Group of Experts*, 92.

²¹¹ See the case of *Mulbadaw Village Council and 67 Others versus National Agriculture and Food Corporation (NAFCO)*, [1984] T.L.R.15 (High Court-Arusha).

²¹² Igoe, "Becoming Indigenous Peoples," 400.

such as the Hadzabe hunter-gatherers who pursued the same cause, had been formed. This was the earliest indigenous peoples movement in Tanzania. The scattered NGOs of this nature formed an umbrella organisation known as the Pastoralists Indigenous Non-Governmental Organisations (PINGOs) Forum which was established in 1994.²¹³ Through the experiences of other indigenous peoples of the world and participation in the United Nations Permanent Forum on Indigenous Issues and other related platforms, PINGOs Forum has over the years made great steps in deepening the roots and driving forward the indigenous peoples' rights movement in Tanzania.

2.2.5 Other Related Terms

Aside from the above core terms associated with the notion "indigenous peoples," below are additional expressions sometimes used interchangeably with the term indigenous peoples depending on the applicable context.

2.2.5.1 Indigenous Minorities

The terms "indigenous" and "minorities" can be addressed as stand-alone variables. However, at times, the term "indigenous" may be used to refer to a minority group or indigenous minorities. The evolutions of legal norms protecting minorities and the indigenous have had separate backgrounds. Ndahinda argues that while the protection of minority rights had its roots in Europe during the era of the formation of nation states, the indigenous rights movement originated in the Americas in the quest to protect the distinct cultures of peoples conquered by European colonialists.²¹⁴ Legal theory and practice suggest that the protection of minority rights centres on individual rights, while the protection of indigenous rights focuses on securing group rights.²¹⁵ However, the protection of indigenous peoples' rights has sometimes surfaced in the form of safeguarding minority rights. The practical aspect of this is reflected in cases that have landed before the Human Rights Committee alleging violation of Article 27 of the ICCPR.²¹⁶ This provision provides for the right of minorities to enjoy their own culture, profess and practise their religion and use their own language. A deeper discussion on this aspect is presented in the next

²¹³ Igoe, "Becoming Indigenous Peoples," 400.

²¹⁴ Ndahinda, *Indigeness in Africa*, 34.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

chapter which, among other things, discusses how indigenous peoples use the United Nations' human rights mechanisms. Scholars like Majamba and Peter have also described indigenous peoples as "indigenous minorities" in their studies of the situation in East Africa and Tanzania respectively.²¹⁷

It is pertinent, however, to underscore the fact that the term "minority," just like the term "indigenous", is yet to receive a universally acceptable definition. The same approach of describing the characteristics of minority groups is applied to mitigate the lack of a definition of the term.²¹⁸

According to *Capotorti*,²¹⁹ a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

In this description, it is stressed that the primary criterion for a group to be classified as a minority is its being non-dominant. This is significant because there may be instances where a numerically small group dominates the majority, as was the case with the apartheid regime in South Africa where the white minority dominated the black majority population.²²⁰

Article 1 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 (the Minorities Declaration)²²¹ characterises minorities as groups whose national, ethnic, cultural, religious or linguistic identity deserves protection by the state. The rights associated with such groups can be addressed as

²¹⁷ See Majamba, *Towards a Rights-Sensitive East African Community*, *supra* and Peter, "Human Rights of Indigenous Minorities in Tanzania," *supra*.

²¹⁸ Tove Malloy, "Introduction" in Tove Malloy ed., *Minority Issues in Europe: Rights, Concepts, Policy* (Berlin: Frank & Time, 2013), 15.

²¹⁹ Capotorti Francesco who was a Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities offered this definition in the year 1977. See, United Nations Human Rights Commission, *Minority Rights: International Standards and Guidance for Implementation*, (Geneva: United Nations, 2010), 2.

²²⁰ United Nations Human Rights Commission, *Minority Rights*, 2.

²²¹ Adopted by General Assembly, Resolution 47/135 of 18 December 1992.

minority rights. However, these characteristics of minorities are not a conclusive warrant for a definition of the term.²²²

Indigenous peoples can be a minority but not all minorities are indigenous peoples. This implies that indigenous peoples' rights are a segment of minority rights. Generally, the term "minority rights" is broader than indigenous people's rights. It captures a wider range of other sub-groups in a given state.

The African Commission Working Group of Experts on Indigenous Populations/Communities explains that when the ACHPR was deliberating on whether to address indigenous peoples in Africa as minorities, the term minorities was found fit to describe indigenous peoples in a given country. However, it was resolved that although the two terms could mingle to a certain extent, they do not always refer to the same subjects. Rather, the terms are contextually applicable on a case-to-case basis. As stated above, the rights of minorities are primarily tied to individuals, for instance, the right to profess and practise a particular religion or participate in a particular culture. Nonetheless, the same rights can also be exercised by a collective. Indigenous peoples' rights are tied to a group of people who enjoy such rights in community with others; for example, collective rights to existence, self-determination, ownership of ancestral lands or disposal of wealth and natural resources. These rights which are categorically provided for under the ILO C 169 and the UNDRIP are absent in the Minorities Declaration.

2.2.5.2. Local Communities

Even though indigenous peoples are sometimes addressed as "traditional local communities",²²³ the term local communities is also used in this study to refer to parts of the population in Tanzania that neither self-identify as indigenous peoples nor resonate with the national, regional or global indigenous peoples' movement.

2.3 Theoretical Framework

This section is dedicated to describing and discussing the communitarian theory of justice that has been identified as matching the objectives of promoting and protecting indigenous peoples' rights. This theory is discussed in contrast with the liberal theory of justice to emphasise the

²²² ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts*, 96.

²²³ European Investment Bank, "Standard 7," page 51, paragraph 11.

association of the communitarian theory with the concept of collective rights. But first, the liberal theory will be briefly described to lay the foundation for a subsequent comparative theoretical analysis.

2.3.1 Liberal Theory

Theorists like John Rawls, Robert Nozick and Ronald Dworkin have dealt with the liberal theory. Rawls is of the opinion that liberals consider an individual in his or her original state, capable of making rational decisions. In his theory of justice, he believes that for the sake of according justice to an individual, such an individual's self-chosen ends must take precedence over any group's interests.²²⁴ Nozick's entitlement theory propounds that an individual owns him or herself fully and has absolute freedom to decide what happens in his or her life. This includes what one earns through one's own efforts. He insists on the concept of private property which is opposed to the collective ownership of property, as in indigenous peoples' collective ownership of ancestral lands. The theory supports the idea that individuals can own properties unequally so long as such properties are acquired legitimately.²²⁵ He is of the view that the whole idea of "common good" involves the exploitation of some members of a particular group by others who have not done anything to reap the benefits of belonging to such a collectivity.²²⁶ This argument pokes holes into the whole idea of a communitarian way of life which is typically practised by indigenous communities. Dworkin's theories of rights have placed a considerable amount of weight on fundamental (individual) rights. He considers individual rights to be in competition with collective rights.²²⁷ He expresses his strong belief in the power of an individual to stand for himself or herself against the rest when it comes to protecting his or her rights. For example, Pildes cites him as follows: "A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."²²⁸ This position operates far from the confines of communitarianism. The communitarian way of life requires a communal way of possessing the

²²⁴ Amitai, Etzioni, "Liberals and Communitarians," *Partisan Review* 57, (1990): 215.

²²⁵ This position goes hand in hand with Dworkin's theory of justice and moral independence that, "justice is a parameter of individual ethics". See Dragica Vujadinovic, "Ronald Dworkin – Theory of Justice", *European Scientific Journal* 8, no. 2 (2012): 13.

²²⁶ Asif, Salahuddin, "Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation", *Journal of Civil and Legal Sciences* 7, no.1 (2018): 3-4.

²²⁷ Richard Pildes, "Dworkin's Two Concepts of Rights," *The Journal of Legal Studies* 29, no. 1 (2000): 310.

²²⁸ *Id.*, 313.

same values, beliefs, cultural practices and perceptions of rights and duties. This includes communal property ownership, preservation and utilisation.

By and large, liberals suggest that individual liberties can be protected by individual rights and that they take precedence over any collective good.²²⁹ The implication here is that individual rights cannot be protected in a communitarian setting. The liberal theory thus regards collective rights as being secondary to individual rights.²³⁰

2.3.2 Communitarian Theory *vis-a-vis* Liberal Theory

Unlike the liberals who focus on individual rights, communitarians defend the rights of collectives, such as the right to autonomy.²³¹ In explaining the communitarian theory using the example of peoples' right to self-determination, Wazler states that the right to self-determination cannot be exercised by individuals in separation. It involves a collective democratic process in which all the members of a community who live in a particular territory, participate in the internal economy of the community and abide by its rules take part in the entire process of defending their autonomy.²³² He argues that individualist ideas are detrimental to social cohesion which is essential for the achievement of society's collective goals. He further explains that the liberal theory is not realistic in view of the lives that individuals live.²³³ Sandel cements this argument with a general theoretical statement: "A comprehensive theory must understand persons in terms of their social relationship."²³⁴

Also, it is Barber's suggestion that, as far as individuals cherish their existence from the liberal point of view, they are yet to liberate themselves. They will always believe that political institutions, for example, exist to serve their individual interests rather than community interests. He argues that this threatens peoples' common good, as those who are favoured by the existing system will continue supporting it at the expense of those who are not.²³⁵ His argument supports the criterion of an individual's "willingness and consciousness" to be identified as belonging to a particular group and freely enjoy the benefits of belonging to it. The characteristic of "self-

²²⁹ Etzioni, "Liberals and Communitarians," 217.

²³⁰ *Id.*, 221.

²³¹ Robert, Thigpen and Lyle, Downing, "Liberalism and the Communitarian Critique," *American Journal of Political Science* 31, no. 3 (1987): 647.

²³² Thigpen and Downing, "Liberalism and the Communitarian Critique", 649.

²³³ *Id.*, 641.

²³⁴ *Id.*, 643.

²³⁵ *Id.*, 651.

identification” as indigenous peoples that has been internationally accepted as a prime criterion for recognising indigenous peoples is reflected in this argument. Barber insists that a person can declare himself or herself as a full individual when he or she can satisfactorily exercise individual autonomy within the particular group or community to which he or she belongs.²³⁶ This implies that individual rights can be fully attained when a person is content within the collectivity with which he or she identifies.

Aligning with the same thought, MacIntyre underlines the point that one’s membership of a particular collectivity such as family, neighbourhood or ethnic group does not take away one’s individuality.²³⁷ Selznick supports this position by stating that, despite the primary value in a communitarian society being the sense of “belongingness,” there is space for protection of individual rights in a collectivity. He asserts that individual interests are better served by having social ties in a community.²³⁸

2.3.3. Communitarian Theory and the African Perspective of Rights

In light of the above theoretical analysis, it is irrefutable that any discussion of human rights in Africa must take into account the communitarian theory, because African societies have embraced the collective way of life since time immemorial. It has always been a characteristic of African societies that a person who does not identify him- or herself with a particular community is regarded as a stranger who operates outside the realm of his or her community’s protection.²³⁹

In explaining the practice of human rights in pre-colonial Africa, *Umozurike* argues that a full individual realises his rights through his society. Human rights were recognised and enforced for the benefit of all members of the community to the exclusion of non-members. Individual rights were enjoyed in relation to others.²⁴⁰ Dankwa gives examples of how human rights such as the right to life, property and social security were practised in pre-colonial African societies. He argues that the right to life was under the custody of the whole community. Hence, the unauthorised taking away of this right was punished in the interest of the community as a whole. He draws examples from some of the customary ceremonies in which prayers were said by

²³⁶ Thigpen and Downing, “Liberalism and the Communitarian Critique”, 643.

²³⁷ *Id.*, 642.

²³⁸ Etzioni, “Liberals and Communitarians”, 221.

²³⁹ Ahmed, EI-Obaid and Kwadwo, Appiagyei-Atua, “Human Rights in Africa: A New Perspective of Linking the Past to the Present,” *McGill Law Journal* 41 (1996): 830.

²⁴⁰ Umozurike, *The African Charter on Human and Peoples’ Rights*, 17.

different communities to ensure the protection of life. He further discusses the notion of vicarious liability which meant that claims could be made against the entire family or clan of a wrongdoer. For instance, if one member of the family or clan took away another person's life or property without authority, the family or clan could jointly be held liable for the offence and charged with compensating the victim(s). He goes further to show the existence of social security systems in Africa as a collective means of preserving the well-being of the community.²⁴¹ Along the same lines, M'baye states that pre-colonial Africa possessed fitting rights and freedoms despite the fact that they were not formalised as they are today.²⁴² He explains that the existing societies were inherently communal and individual rights were protected in the community's wider context.²⁴³ Cobbah and Nahum support this position by arguing that Africa has its concepts of human rights which differ from the Western concepts. Such concepts emphasise the preservation of societal harmony and people's dignity in a communal mode; i.e. an individual is defined in the context of his community. This practice is based on the individual's sense of cultural existence with the rest of the community members.²⁴⁴

Gyekye cites an Akan and Sudanese saying that states "A single hand cannot clap" to underscore the fact that the life of an individual makes sense only when the person identifies himself or herself with a particular group.²⁴⁵ This is a central mantra of the communitarian theory which this study has adopted in discussing the nature of indigenous communities and their associated collective rights.

2.4 Conclusion

This chapter has navigated through concepts and theories related to the notions of "indigenous peoples" and their respective collective rights. It has also amplified the theory which better

²⁴¹ Victor Dankwa, "The African Charter on Human and Peoples Rights: Hopes and Fears", in *The African Charter on Human and Peoples Rights: Development, Context, Significance*, ed. African Law Association, (Marburg: ALA, 1991), 3 and 4.

²⁴² Rubner, "The Origins of the 1981 African Charter on Human and Peoples' Rights", 148.

²⁴³ Keba M'Baye, "Human Rights in Africa", in *The International Dimensions of Human Rights*, eds. Karel Vasak and Philip Alston, (Westport, Connecticut and Paris: Greenwood Press and UNESCO, 1982), 583.

²⁴⁴ Josiah Cobbah, "African Values and Human Rights Debate: An African Perspective," *Human Rights Quarterly* 9, no.3 (1987): 331 and Fasil Nahum, "African Contribution to Human Rights," (Paper Presented to the African Seminar on Human Rights and Development at the National Institute of Development and Documentation, University of Botswana), Gaborone, 1982, cited in Issa Gulam Shivji, *The Concept of Human Rights in Africa*, (London: CODERSIA BOOK SERIES, 1989), 14.

²⁴⁵ Gyekye, Kwame, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*, (Cambridge: Cambridge University Press, 1987), 156.

explains the nature of communities and rights that are central to this study. In doing so, the following conclusions have been reached. First, it is a fact that a universally acceptable definition of the term “indigenous peoples” cannot be attained due to the varying circumstances surrounding communities self-identifying as indigenous peoples across the globe. Second, despite the lack of a universally acceptable definition, “indigenous peoples” can be described by enumerating their cross-cutting characteristics. Third, it is the position under international law that one of the core characteristics of indigenous peoples is the criteria of “self-identification”. Fourth, various scholars and institutions have tried to assign meaning to the terms that work for the good of securing the rights of indigenous peoples. As a result, the path to protecting indigenous peoples’ rights, particularly in Africa, has been made clearer. This includes adoption of the clear-cut standpoint of the ACHPR in respect of describing who indigenous peoples from an African human rights perspective are. The ACHPR’s approach to indigenous peoples is the one subscribed to and applied in this study. The rationale behind this is the potential it has to capture the reality of the situation of indigenous peoples in Africa generally and Tanzania in particular.

CHAPTER THREE

3.0 THE GLOBAL DIMENSION OF INDIGENOUS PEOPLES' RIGHTS

3.1 Introduction

An overview of the law and practice of indigenous peoples' rights at an international level is presented in this chapter. The chapter probes into the aspects of recognition, promotion, protection and fulfilment of such rights from this wider perspective. Here, the objective is to establish the overall parameters applicable in gauging the extent to which indigenous peoples' rights are domestically realised in Tanzania as part of the country's obligations under international human rights law. Another objective is to draw lessons from other jurisdictions regarding the recognition and implementation of indigenous peoples' rights.

From a historical point of view, the chapter traces the advent of initiatives to legally protect indigenous peoples' rights through international agreements. It also maps the development of such initiatives over the years. It analyses specific international instruments which expressly and impliedly provide for indigenous peoples' rights. Furthermore, the chapter not only considers the actions, institutions, mechanisms and policies adopted by the international community to promote and protect indigenous peoples' rights at an international level, but also highlights their contribution to the jurisprudence of indigenous peoples' rights. In this regard, the United Nations human rights framework is examined in the light of indigenous peoples' rights. This framework's impacts on the States Parties' domestic human rights practice are also looked into. The same approach is taken with regard to the international non-human rights framework which has a bearing on indigenous peoples' affairs.

3.2 Indigenous Peoples' Agenda in International Human Rights Law

Internationally, the general quest to ensure human rights protection through legal instruments picked up a solid momentum at the dawn of the post World War II period. This was the point in time when the question of human rights protection became a critical subject of international concern. At the same time, the nationalisation movement across the colonies was evident. The era of newly independent governments had inevitably arrived.

Given this background, the international community found it essential to formally recognise and affirm fundamental human rights, including the dignity of human beings and equality of rights. This was first realized through the adoption of the United Nations Charter in

1945 after the world had experienced the ordeals of the First and Second World Wars.²⁴⁶ This was followed and complemented by the adoption of the non-legally binding Universal Declaration of Human Rights in 1948 which recognises the inherent dignity, equality and inalienable rights of all members of humankind.²⁴⁷ Taking into account the endless debate behind the universality of rights, it is important to emphasise here that the Declaration was adopted not to refute the significance of collective rights or cultural relativism of rights, but to set minimum international human rights standards.

In particular, initiatives to protect indigenous peoples' rights at the international level started with the International Labour Organisation (ILO). This organisation was established as an affiliate to the League of Nations back in 1919 by the Treaty of Versailles which formally marked the end of the First World War (WW I). The ILO's original Constitution formed part XIII of the said Treaty.²⁴⁸ ILO was one of the post WW I organisations that was established with the motto of bringing about international peace through adherence to social justice.²⁴⁹

3.2.1 ILO Conventions C107 of 1957 and C169 of 1989

The ILO's history of pursuing social justice has been directly linked, among other things, to the urge to improve the affairs of indigenous and tribal peoples in working environments across the world.²⁵⁰ Its engagement with indigenous and tribal populations began in the 1920s.²⁵¹ Its rising

²⁴⁶ See paragraph 1 of the preamble to the United Nations Charter, 1945 which reaffirmed the international community's faith in human rights and dignity of persons and determination to establish international human rights obligations. This Charter was adopted on June 26, 1945 in San Francisco at the Conference on International Organisation.

²⁴⁷ Paragraph 1 of the Universal Declaration of Human Rights, 1948 adopted by the United Nations General Assembly through Resolution 217A of December 10, 1948.

²⁴⁸ The original ILO Constitution of 1919 has been amended several times since its adoption. Amendments were made in 1922, 1945, 1946, 1953, 1962, 1972 and 1997, and the last amendment entered into force on 8 October 2015. The Constitution is now a stand-alone document. The original fundamental aims and purposes of the ILO were re-visited in 1944 at the ILO General Conference in its 26th Session held in Philadelphia which adopted the Philadelphia Declaration to that effect. The Declaration is annexed to the most recent version of the ILO Constitution. See ILO, "ILO Constitution" accessed October 16, 2022, https://www.ilo.org/hanoi/Whatwedo/Publications/WCMS_818973/lang--en/index.html.

²⁴⁹ International Labour Office, *Labour Provisions of the Peace Treaties*, (Geneva: 1920), 1, accessed September 27, 2022, https://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf and International Labour Organisation (ILO), "History of the ILO," accessed September 28, 2022, <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.html>.

²⁵⁰ International Labour Organisation, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future*, (2019), 5.

²⁵¹ International Labour Organisation, "Indigenous and Tribal Peoples," accessed September 7, 2022, <https://www.ilo.org/global/topics/indigenoustribal/langen/index.htm#:~:text=The%20ILO%20has%20been%20e>

concern over the dynamics in labour standards globally heightened post the WWII which involved poor working conditions for indigenous peoples and other sub-groups. Therefore, in 1946, the ILO, alongside other United Nations affiliate agencies such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO), embarked on the task of developing an international Convention which would govern working standards for indigenous and tribal peoples and impose obligations on governments to safeguard their affairs within their jurisdictions. This process involved not less than eleven years. In 1957, the first ever worldwide Convention providing for the rights of indigenous and tribal populations was adopted, the Indigenous and Tribal Populations Convention, 1957 (C107).²⁵² The Convention had the objective of recognising and protecting the rights of indigenous and other ethnic and semi-ethnic populations in the then newly formed independent countries that were yet to enjoy the benefits of being integrated into the national community due to their economic, social and cultural circumstances.²⁵³

The C107 was adopted by the General Conference of the International Labour Organisation on June 26, 1957 and came into force on June 2, 1959, twelve months after it had received its second ratification from Cuba on June 2, 1958. The first ratification came from Haiti which ratified the Convention on March 4, 1958. In total, before other developments pertaining to the status of the Convention came in, C107 had received twenty-seven ratifications from countries all over the world, with six ratifications from the African continent, i.e. Angola, Egypt, Ghana, Guinea Bissau, Malawi and Tunisia.²⁵⁴

At the time of the adoption of this Convention, it was considered by the ILO that the protection of indigenous peoples' rights would mostly materialise through their assimilation into the mainstream society. Therefore, independent states were obliged under this Convention to ensure the *progressive integration*²⁵⁵ of indigenous and other tribal and semi-tribal populations

ngaged%20with%20indigenous%20and,deals%20exclusively%20with%20the%20rights%20of%20these%20peoples.

²⁵² Hanson Erin, "ILO Convention 107," accessed November 10, 2021, http://indigenousfoundations.arts.ubc.ca/ilo_convention_107/.

²⁵³ See the Preamble to the Indigenous and Tribal Populations Convention, 1957 (No.107) paras 6 and 7.

²⁵⁴ International Labour Organisation, "Ratifications of C107: Indigenous and Tribal Populations Convention, 1957 (No. 107)," accessed November 10, 2022, http://www.ilo.ch/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO.

²⁵⁵ Emphasis added.

into the national community and oversee the improvement of their living conditions.²⁵⁶ This strategy which advocated for the provision of social services and channelling of economic projects into the habitats of indigenous and other tribal and semi-tribal populations was designed to be implemented without discrimination, segregation or disruption of their values, institutions and ways of life. Also, the Convention made it a requirement that the integration process in respect of indigenous peoples and other tribal and semi-tribal populations should take place without the use of any force or coercion.²⁵⁷

Furthermore, the Convention recognised both indigenous and other tribal and semi-tribal populations' individual and collective rights to their traditional lands.²⁵⁸ It protected them against removal from their territories without their consent, except for legal reasons related to national security, health safety or public interest.²⁵⁹ The Convention further guaranteed indigenous and other tribal and semi-tribal populations the right to full monetary or material compensation for any loss or injury occasioned by "inevitable" removal from their habitual territories. It emphasised further that whenever relocation was found to be necessary, it should go hand in hand with allocating the victims land of the same quality as the the one they have been forced to abandon, so as to cater for their current and future needs.²⁶⁰ Furthermore, the Convention guaranteed indigenous peoples, among others, the right to use, own and transmit land in accordance with their customary law and recognition of this right by the national laws.²⁶¹ It obliged independent states to grant additional lands to such populations should their traditional lands not sufficiently cater for their needs, and to assist them in the general development of their lands where relevant.²⁶²

The C107 has nonetheless received criticism for relying on integration into the national community as the main strategy for guaranteeing the socio-economic development of indigenous and other tribal and semi-tribal peoples. This means their specific rights as indigenous and tribal

²⁵⁶ Preamble to the Indigenous and Tribal Peoples' Convention, 1957 (C107).

²⁵⁷ Generally, see Articles 2 to 5 of C107.

²⁵⁸ Article 11, C107.

²⁵⁹ Article 12 (1), C107.

²⁶⁰ Article 12 (2) and (3), C107.

²⁶¹ Article 13 (1), C107.

²⁶² Article 14, C107.

peoples are only relevant before their integration into mainstream society.²⁶³ This approach did not promote the long-term co-existence of the national (modern) and indigenous or tribal (traditional) communities in independent countries. The focus was on the integration into mainstream society of indigenous and other tribal and semi-tribal peoples so as to create a homogeneous national community.

Consequently, C107 was revised by the Indigenous and the Tribal Peoples' Convention, 1989 (C169)²⁶⁴ which was adopted on June 27, 1989 and entered into force on September 5, 1991. This was twelve months after its ratification by two countries, i.e. Norway and Mexico, on June 19, 1990 and September 5, 1990 respectively.²⁶⁵ The entry into force of C169 signified the official closing of C107's further ratifications.²⁶⁶ Also, ratification of C169 by any country that had ratified C107 implied automatic denunciation of the C107's ratification.²⁶⁷ By the time this research was conducted, the C107 had received ten automatic denunciations and none of the aforementioned six African countries that had ratified it had made fresh ratification of C169. Hence, C107 remains in force in such African countries and other non-African countries that had ratified C107 and have not ratified C169.²⁶⁸ So far, C 169 has been ratified by twenty-four countries, the latest ratification coming from Germany which ratified the Convention on June 23, 2021.²⁶⁹ Only one country from Africa is party to the Convention, i.e. the Central African Republic.²⁷⁰

C169 came in to rectify the "assimilation strategy" of C107. It did so by drawing the attention of the international community, among other things, to the peculiar contributions made by indigenous and tribal peoples to global cultural multiplicity. This added weight to the need to protect and preserve their survival. As it stands now, the Convention expressly mentions the aspiration of indigenous peoples to govern their own affairs separately from the national

²⁶³ Cher Weixia Chen, "Indigenous Rights in International Law" 5, accessed October 3, 2022, <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-7>.

²⁶⁴ See article 36 of C169.

²⁶⁵ Article 38 (2) of C169.

²⁶⁶ Article 36 1(b) of C107.

²⁶⁷ Article 36 1(a) of C107.

²⁶⁸ Article 36 (2) of C107. Also, see International Labour Organisation, "Ratifications of C107 - Indigenous and Tribal Peoples Convention, 1957 (No. 107),"

²⁶⁹ International Labour Organisation, "Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)," accessed September, 2022, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.

²⁷⁰ *Ibid.*

community. This is far from the C107's assimilation and integration spirit. C169 recognises the need to acknowledge and value indigenous peoples' socio-economic, cultural and political practices. This approach opens the way for global indigenous peoples' agenda in the post-colonial era.

The Convention obliges its Members to design systematic and well-coordinated measures to ensure protection of the rights and dignity of indigenous and tribal peoples. This includes closing the development gap between them and other members of the national community. It requires this obligation to be fulfilled without discrimination or destabilising any of their long-established social, cultural and economic systems; and in a manner that is compatible with their way of life and aspirations.²⁷¹ The Convention grants indigenous and tribal peoples discretion to decide their priorities when it comes to the question of development. It makes it a duty of the Member States' governments to involve indigenous and tribal peoples when studying the social, spiritual, cultural, economic and environmental impacts of projects which are designed to be implemented in their territories.²⁷²

Further, Member States' governments have been urged to ensure consultation with indigenous and tribal peoples before and during the undertaking of any legal or administrative actions which are likely to affect their interests in both individual and collective capacities. This includes supporting them in establishing and maintaining their institutions. Such institutions are intended to act as platforms for decision-making processes and media of communication between the indigenous and tribal peoples and their governments.²⁷³ In meeting this obligation, the Convention emphasises that the customary laws of indigenous and tribal peoples should be respected, as well as their conflict resolution mechanisms. However, it is the Convention's position that the operation of indigenous and tribal peoples' customary institutions should not be incompatible with national and international human rights law and standards. It also emphasises that matters attracting penal charges should be governed by the state's mechanisms to ensure protection of human rights.²⁷⁴

By and large, the right to access justice by indigenous peoples under C169 has been secured. Their right to approach appropriate forums by themselves or through their

²⁷¹ Articles 3 and 4, C169.

²⁷² Article 7, C169.

²⁷³ Article 5 and 6, C169.

²⁷⁴ Articles 8 and 9, C169.

representative institutions in cases of breach of their individual or collective rights has been confirmed.²⁷⁵

Regarding land as a right, the interests of indigenous peoples are protected by C169 in the same manner as in C107. There is, however, an additional aspect in C169 which addresses protection of their right to natural resources on their land. Article 15 of the Convention safeguards indigenous peoples' right to use, manage and conserve natural resources within their territories. It makes it a duty of the Member States' governments to consult them before exploring, exploiting or taking ownership of the natural resources found in their traditional lands. This is in order to establish the nature of impacts such activities may have on indigenous peoples' interests in the relevant resources. Consultaion is also necessary to come up with mitigation strategies in relation to possible impacts, such as compensation or sharing of benefits accruing from the utilisation of the said resources via specifically established schemes.²⁷⁶

Another important point to note about C169 is that it was not only conceived to cure ailments that came with C107 but also to accommodate developments that had taken place in international human rights law since 1957 when C107 was adopted.²⁷⁷ This included the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both adopted in 1966 by the United Nations General Assembly. Each of these international human rights instruments implies indigenous peoples' rights in some of its provisions as elaborated below.

3.2.2 ICERD, 1965

The ICERD was adopted on December 21, 1965, through General Assembly resolution 2106 (XX) and entered into force on January 4, 1969, having attained the minimum number of twenty-seven ratifications.²⁷⁸ This Convention condemns discrimination on grounds of race, colour or ethnic origin. It describes these kinds of discrimination as barriers to the friendly and peaceful

²⁷⁵ Article 9, C 169.

²⁷⁶ Article 15, C169.

²⁷⁷ Preamble to the Indigenous and Tribal Peoples' Convention, 1989.

²⁷⁸ Article 19 of the ICERD.

co-existence of nations and persons living within the same State. It stresses that discrimination has the potential of destabilising peace.²⁷⁹

The Convention specifically defines racial discrimination to mean:

... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁸⁰

Indigenous peoples all over the world have experienced various forms of racial discrimination.²⁸¹ This places the States Parties to ICERD under an obligation to ensure the eradication of all forms of racial discrimination against indigenous peoples within their own boundaries.²⁸² However, ICERD does not regard as racial discrimination any necessary measure taken by the state to ensure the advancement of a particular racial or ethnic group or individuals in its quest to guarantee equal rights within its territory. This applies only when such measures do not occasion inequality of rights between racial groups or outlast the objectives of their implementation.²⁸³ Generally, the debate around what is regarded as the advancement or development of indigenous peoples remains open. This is because the traditional way of life practised by indigenous peoples is generally perceived as “backward” by the mainstream society. Hence, for many years, governments have strived to assimilate indigenous peoples into the national community in order to “develop” them. These efforts have often been in vain because the concept of development has proven to be relative. It is not necessarily related to integration of indigenous peoples into the mainstream society. Indigenous peoples have their own approach to development. An example can be drawn from a traditional Maasai community where the level of development is defined by the number of livestock a man owns and his ability to father many children who will participate in multiplying and maintaining his wealth and status.²⁸⁴ At the same time, through observation and interviews, it is clear that there are many Maasai men and women who have associated

²⁷⁹ Para. 6 of the preamble to the ICERD.

²⁸⁰ Article 1(1) of ICERD.

²⁸¹ Chris Cunneen, “Indigenous People, Resistance and Racialised Criminality” in *Media, Crime and Racism*, eds. Monish Bhatia *et al.* (Cham: Springer Nature, 2018), 277.

²⁸² See the implied obligation under Article 2 of ICERD.

²⁸³ Article 1(4) of ICERD.

²⁸⁴ Information obtained from the late Maasai Olaiboni’s eldest son (Lekundai) in his residence in Monduli District, Arusha region during a field visit to Tanzania on March 25, 2022.

themselves with the mainstream society and acquired formal education. They are living comfortable lives on modest employment salaries in urban areas. Some own luxurious hotels and tourism companies across Tanzania, while others are making a living from informal jobs in towns and cities as gatekeepers, hairdressers, clothing vendors and specialists in Maasai traditional medicine.²⁸⁵ This suggests that there may not be a single definition of the concept of “development” with respect to indigenous peoples.

3.2.3 ICCPR and ICESCR, 1966

The ICCPR was adopted as General Assembly Resolution 2200A (XXI) of December 16, 1966, and entered into force on March 23, 1976, after being ratified by thirty-five countries.²⁸⁶ The ICESCR was adopted as General Assembly Resolution 2200A (XXI) on the same date as the ICCPR. It entered into force on January 3, 1976 having also received thirty five- ratifications.²⁸⁷ Despite the fact that both the ICCPR and the ICESCR do not directly address indigenous peoples’ rights, Article 1 (1) of both Covenants provide for all peoples’ right to self-determination. This right entitles them to freedom to pursue their own economic, social and cultural development. Article 1 (2) of the same Covenants also guarantee all peoples’ right to utilise their natural wealth and resources as they strive to sustain their means of subsistence.²⁸⁸ Therefore, States Parties to the ICCPR and ICESCR are obliged to ensure fulfilment of these rights under these Covenants without distinction as to, *inter alia*, race, colour, language, religion or social origin.²⁸⁹

Moreover, under the ICCPR, Article 27 by default provides for (indigenous) peoples’ rights to culture, religion and language as a collective. The States Parties to the Covenant undertake to take measures aimed at implementing the rights recognised by the ICCPR according to their constitutional processes. These include the adoption of legislation and establishment of relevant institutions to ensure due recourse to justice in the case of rights alleged to have been violated under the Covenant.²⁹⁰ Also, each State Party to the ICESCR is obliged to ensure the

²⁸⁵ Information obtained from observation and random purposive informal interviews in Arusha, Dodoma, and Dar es Salaam cities and Morogoro town between June 20 and August 18, 2021.

²⁸⁶ See Article 49 of the ICCPR.

²⁸⁷ Article 27 of the ICESCR.

²⁸⁸ These provisions should be read together with Articles 47 and 25 of the ICCPR and ICESCR respectively.

²⁸⁹ Article 2 (1) of the ICCPR and Article 2 (2) of the ICESCR.

²⁹⁰ Article 22 of the ICCPR.

progressive realisation of the social, economic and cultural rights recognised by the Covenant. This includes the adoption of relevant domestic laws as is the case with the ICCPR.²⁹¹

3.2.4 UNDRIP, 2007

The aforementioned international human rights instruments which imply indigenous peoples' rights in their provisions are complemented by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This Declaration was adopted on September 13, 2007 as the United Nations General Assembly Resolution A/RES/61/295. It was the result of the World Conference on Human Rights which adopted the Vienna Declaration and Programme of Action (VDPA) on June 25, 1993. The VDPA called for the completion of the UNDRIP draft. The aim of adopting this Declaration was to affirm the international community's commitment to respect the existence of indigenous peoples, their cultural diversity and ethnic identities, which are components of the common heritage of humankind and contribute to the development of plural societies.²⁹² In adopting the UNDRIP, one hundred and forty-three out of one hundred and ninety-two UN members voted in its favour. Only four states, i.e. Australia, Canada, New Zealand and the United States (the CANZUS states), voted against the Declaration. Other states, i.e. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine, abstained from voting. It is, however, on record that the four CANZUS states that had initially voted against the Declaration eventually abandoned their original position in support of the Declaration.²⁹³ UNDRIP is currently regarded as the most detailed and comprehensive international instrument which addresses indigenous peoples' rights. It recognises both the individual rights of members of indigenous communities as provided for in international human rights law, and the collective rights of specific indigenous groups which are essential for their existence as peoples.²⁹⁴ It affirms that the situations of indigenous peoples differ from one region to another, in the same way they differ from one country to another.²⁹⁵ This being the case, the Declaration is crafted to cater for minimum standards for the promotion, protection and fulfilment of indigenous peoples' rights which are considered to be of universal

²⁹¹ Article 2(2) of the ICCPR and Article 2(1) of the ICESCR.

²⁹² Paragraph 13 of the preamble, Articles 20 and 28 of the Vienna Declaration and Programme of Action, 1993.

²⁹³ United Nations: Department of Economic and Social Affairs (Indigenous Peoples), "United Nations Declaration in the Rights of Indigenous Peoples," accessed October 10, 2022, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

²⁹⁴ Paragraph. 22 of the preamble and Article 1, UNDRIP.

²⁹⁵ Paragraph 23, *id.*

applicability. These standards relate to the protection of indigenous peoples' lands and territories, as well as their economic, political and social structures, cultures, values, spiritual traditions, philosophies and histories.²⁹⁶ The standards have been adopted to ensure the well-being, survival and dignity of indigenous peoples around the globe.²⁹⁷ The Declaration recognises that specific human rights apply to indigenous peoples depending on their circumstances, for instance the right to utilise indigenous knowledge or practise certain cultural traditions.²⁹⁸

Moreover, UNDRIP provides for indigenous peoples' right to identify themselves and their membership of a particular community according to their own customs and traditions. It further accords them the right to equality and non-discrimination, as well as freedom to exercise the rights which relate to their own origin and identity. It also provides for indigenous peoples' right to self-determination in pursuit of their socio-economic and cultural development. Additionally, it provides for their autonomy in defining their political status and governance of their internal affairs.²⁹⁹ The Declaration further contains indigenous peoples' right to both maintain and strengthen their internal institutions and fully engage in the state's affairs as nationals.³⁰⁰ This includes the right to participate in decision-making processes concerning matters which affect their interests.³⁰¹ They are also accorded the right to take part in the exercise of formal recognition of their laws, customs, traditions and land tenure systems.³⁰² Moreover, the Declaration gives indigenous peoples the right to determine their development priorities and strategies for achieving their development.³⁰³ As well, the Declaration provides for indigenous peoples' collective right to live freely as a distinct people and prohibits their forceful assimilation, integration or cultural disruption. This right places an obligation on States to prevent or redress acts of discrimination, and acts which deprive indigenous peoples of their integrity, values and identity, or lead to dispossession of their traditional territories and resources.³⁰⁴

²⁹⁶ Paragraph 7 of the preamble to UNDRIP.

²⁹⁷ Article 43, *id.*

²⁹⁸ Paragraph 11 of the preamble to UNDRIP.

²⁹⁹ Articles 2, 3, 4 and 33, UNDRIP.

³⁰⁰ Articles 5 and 6, *id.*

³⁰¹ Article 18, *id.*

³⁰² Article 27, *id.*

³⁰³ Article 23, *id.*

³⁰⁴ Articles 7 (2) and 8, *id.*

As seen in the above paragraph, and as is the case with C107 and C169, UNDRIP provides for indigenous peoples' rights to lands, territories and the resources therein. This implies their right to maintain traditional ownership, control, use and development of such lands, territories and resources as per their customary tenure systems. Consequently, this calls for protection by States of the said lands, territories and resources from any kind of encroachment.³⁰⁵ Additionally, indigenous peoples' right to maintain their special spiritual relationship with their lands, territories and resources and pass it forward to their future generations is covered by UNDRIP. In this regard, States are once again obliged to legally recognise and protect these rights while taking into account the pre-existing indigenous peoples' land tenure systems.³⁰⁶ The Declaration goes on to provide that any relocation of indigenous people from their ancestral lands should only be carried out after obtaining their free, prior and informed consent. It adds that this should go parallel with mutually agreed just and fair compensation and the possibility of their return to such territories.³⁰⁷ Here, States are put under the responsibility of consulting indigenous peoples and cooperating with them in good faith to achieve this goal and any other objective related to the implementation of legal or administrative actions that are likely to affect them.³⁰⁸

In relation to culture, UNDRIP provides for indigenous peoples' right to practice and maintain their culture in all its manifestations, and bequeath it to the next generations.³⁰⁹ As well, the Declaration provides for their right to control, maintain and protect their cultural heritage and traditional knowledge.³¹⁰

Most important of all, UNDRIP declares indigenous peoples' rights to domestic recognition by the States that have signed and accepted international obligations to safeguard their rights at the national level.³¹¹ This goes together with according them both technical and financial assistance to achieve their rights as spelt out in the Declaration.³¹² The Declaration makes it a duty of the United Nations' institutional framework and other intergovernmental

³⁰⁵ Article 29, UNDRIP.

³⁰⁶ Article 26, *id.*

³⁰⁷ Article 10, *id.*

³⁰⁸ Article 19, *id.*

³⁰⁹ Article 11 and 13 (1), *id.*

³¹⁰ Article 32, *id.*

³¹¹ Article 37, *id.*

³¹² Article 39, *id.*

organisations to promote and ensure the effective application of the provisions of this Declaration at the international and national levels.³¹³

3.3 International Mechanisms for Implementation of Indigenous Peoples' Rights

The aforementioned international human rights instruments are backed up by various mechanisms which enforce the objectives behind their adoption. In this section, light will be thrown on the work done by the international mechanisms for the enforcement of indigenous peoples' rights within the United Nations where the above instruments were conceived. Additionally, other specific indigenous peoples' rights mechanisms which have been separately established by the United Nations to serve a similar purpose are examined.

3.3.1 Mechanisms under ILO C107 and C169

One of the initial reasons for the establishment of the International Labour Organisation in 1919 was to eliminate the exploitation of native workers. The term "native workers" was used to refer to indigenous workers in the colonies. The preparatory work which culminated in the adoption of the Forced Labour Convention, i.e. ILO Convention No. 29 of 1930 (C29), noted that indigenous and tribal peoples in the colonies were subjected to forced labour; this led to the establishment of an ILO Committee of Experts on Indigenous Labour in 1951. Subsequent to this, a landmark study titled "Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries" was conducted in 1953. The study highlighted the urgency of solidifying efforts to protect indigenous and tribal peoples' rights across the globe through appropriate policies.³¹⁴ Along these lines, and as already alluded to in the foregoing discussion, the General Conference of the International Labour Organisation adopted C107 and subsequently C169 as a way of meeting this urgency, and invited individual States to join hands by ratifying the Conventions. However, neither C107 nor C169 prescribe a specific international mechanism to ensure domestic implementation of the Conventions in the Member States. Nevertheless, they do provide room for flexibility in terms of scope and actions to be taken to give effect to their provisions at the national level, as they take into account the varying circumstances of each

³¹³ Article 42, UNDRIP.

³¹⁴ International Labour Organisation, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future*, *supra*, 32.

Member State.³¹⁵ An important point to note here is that enforcement of C107 and C169 is made subject to other international agreements and customs, as well as legislation.³¹⁶

3.3.2 State Reporting Mechanism under the International Labour Office

Despite the enforcement gap in the provisions of ILO C107 and C169, Article 22 of the ILO Constitution, 1919 (as amended) obliges Member States who have ratified the ILO Conventions, including C107 and C169, to present annual reports to the International Labour Office on actions taken to implement the provisions of the said Conventions domestically.

3.3.2.1 Committee of Experts on the Application of Conventions and Recommendations (CEACR).

The reports submitted to the International Labour Office by Member States are subsequently examined by a neutral Committee of Experts on the Application of Conventions and Recommendations (CEACR). This Committee is made up of twenty renowned independent jurists from varying geographical, legal and cultural backgrounds whomake a technical analysis of the legal and practical measures taken by the Member States to implement the provisions of the ILO Conventions at the national level. At the end of this process, the CEACR comes up with observations and direct requests to the relevant Member States.³¹⁷ The Committee's observations point out shortcomings in the legal and practical measures undertaken by Member States to meet their obligations under the Conventions, while its direct requests reflect the Committee's engagement with specific Member States' governments in matters of a technical nature regarding implementation of the Conventions. For example, on one occasion, as the CEACR was examining the implementation of Article 11 of C107 in Panama, it observed discrepancies in the adjudication of collective rights to land of the indigenous peoples through the implementation of Act No. 72 of 23 December 2008. This Act set up special procedures for land rights claims by indigenous peoples who have been excluded from accessing and exercising ownership of their ancestral territories. In this particular case, the Bri Bri indigenous community, who had applied for adjudication of their rights to ancestral lands to the National Land Administration Authority

³¹⁵ Articles 28 and 34 of C107 and C169 respectively.

³¹⁶ Articles 29 and 35 of C107 and C169 respectively.

³¹⁷ International Labour Organisation, "Committee of Experts on the Application of Conventions and Recommendations," accessed October 17, 2022, <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.html>.

in 2015, had been denied their claims. The Committee noted that it had directed the government of Panama to report on the number of communities that had benefited from the adjudication process established by the aforementioned Act but it had not done so. Therefore, the Committee issued a direct request to the government of Panama to take immediate action to recognise collective ownership of land traditionally occupied by the Bri Bri indigenous community. It also requested the Government to further a dialogue with the community to obtain durable solutions to all of their land claims. Further, the Committee reiterated its appeal to the government of Panama to avail it with periodic reports of the status of the adjudication process of the indigenous communities' collective rights to land under Act No. 72 of 23 December 2008.³¹⁸ Another example can be drawn from the application of Articles 6 and 15 of C169 in Peru. The case concerns the utilisation by indigenous peoples of natural resources located on their land. Here, the central issue was implementation of mining projects on indigenous peoples' land. The CEACR observed as a positive aspect that there had been at least fifteen consultations to identify indigenous communities whose interests were likely to be affected by mining exploratory and exploitation projects intended to be carried out on their traditional lands. However, the Committee noted shortcomings in the consultation activities, such as a lack of transparency regarding some of the specific impacts of the mining projects in the proposed areas. Consequently, the agreements signed between the government and indigenous peoples with regard to the projects did not clearly protect the rights of the indigenous communities. These grievances were submitted to the Committee by the Peru National Trade Union Centre *Central Autónoma de Trabajadores del Perú* (CAPT). The Committee then requested the government of Peru to avail it with all subsequent consultation reports and guarantee that the consultations would fully inform the indigenous peoples of the likely impacts of the intended projects so as to achieve an equitable dialogue.³¹⁹

Apart from observations and direct requests by the CEACR to a particular Member State, the Committee may issue general observations on matters which are not particular to a specific Member State, but connected to the general application of the ILO Conventions.³²⁰ For example,

³¹⁸ International Labour Organisation, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Application of International Labour Standards 2022*, (2022), 797.

³¹⁹ *Id.*, 800.

³²⁰ International Labour Office, *Excerpts from Reports and Comments of the ILO Supervisory Bodies: Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, (2019), 6, accessed October 18, 2022,

the CEACR issued three general observations related to the application of C169 in 2008, 2010 and 2018. Throughout these observations, the participation of indigenous peoples in decisions affecting their interests recurred as an aspect that needed close attention in the domestic implementation of C169 by the Member States. The CEACR persistently called for the strengthening of appropriate and efficient mechanisms for the consultation and inclusion of indigenous peoples in matters such as the formalisation of indigenous peoples' land titles, exploitation of natural resources and access to health and education facilities.³²¹

An important point to note about the CEACR is that its opinions and recommendations are not binding. They act as tools for monitoring national authorities' actions in response to their ILO Conventions' obligations. However, since the Committee's supervisory work in respect of the ILO's Conventions boasts of more than nine decades of experience, its reputation and monitoring effect on the ILO Conventions' Member States is persuasive and legitimate enough to move the Member States to act accordingly. Apart from its long-term experience, its moral authority is also derived from the Committee's neutrality and the nature of the expertise held by its members. The observations made by the CEACR are included in its annual report which is submitted to the International Labour Conference by the Secretary General to the ILO.³²²

3.3.2.2 Conference Committee on the Application of (ILO) Standards (CAS)

State reports that have gone through the CEACR are scrutinised by a tripartite standing committee known as the Conference Committee on the Application of Standards (CAS). This Committee is composed of representatives from the governments, employers and employees. The CAS examines specific cases mentioned in the CEACR's observations. Subsequently, the governments referred to in the CEACR's reports are given an opportunity by the Committee to react to the issues raised by the CEACR. This is before the Conference Committee reaches a conclusion on such matters. Its conclusions involve the issuance of further recommendations on

https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/ilo_aids/documents/publication/wcms_714341.pdf.

³²¹ International Labour Office, *Excerpts from Reports and Comments of the ILO Supervisory Bodies*, 38-54.

³²² Article 23 of the ILO Constitution. Also see International Labour Organisation, "About the ILC," accessed October 16, 2022, <https://www.ilo.org/ilc/AbouttheILC/lang--en/index.html>.

remedies to be taken by the relevant Member State(s) to alleviate the violation of ILO standards. The conclusions reached are published in the Conference Committee's reports.³²³

By way of concluding this part, it is important to note that the International Labour Organisation was established before the adoption of the United Nations Bill of Rights which includes the ICCPR and the ICESCR. The Bill of Rights necessitated the creation of two UN human rights mechanisms, i.e. the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Therefore, although the ILO now operates as one of the UN agencies, it has its own comprehensive governance structure and body of Conventions adopted by the International Labour Conference.³²⁴ This is the reason why the discussion on the implementation of ILO C 107 and C 169 has preceded that of the ICCPR and ICESCR implementation mechanisms. They are separate mechanisms.

3.3.3 Human Rights Committee

The Human Rights Committee, i.e. the Committee on Civil and Political Rights (CCPR), is one of the United Nations treaty bodies. It was established pursuant to Article 28 (1) of the ICCPR and conferred with the mandate to monitor domestic enforcement of the ICCPR by the States Parties. It is composed of eighteen independent and prominent human rights experts who are elected from various States Parties to the ICCPR. The experts render services in their personal capacities.³²⁵ This gives the Committee the moral authority to hold a global voice.³²⁶ Article 40 of the ICCPR obliges the States Parties to the Covenant to periodically present reports to the Committee on the legal and policy framework, as well as practices adopted to realise the objectives of the Covenant at the national level. Such reports must be submitted to the Secretary General of the United Nations one year after the Covenant has entered into force in a particular State Party and subsequently at every event when requested to do so by the CCPR. The Secretary-General causes such reports to be transmitted to the CCPR for consideration, or after

³²³ International Labour Organisation, "Conference Committee on the Application of Standards," accessed October 23, 2022, <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.html>.

³²⁴ Jeanne Woods and Hope Lewis, *Human Rights and the Global Market Place: Economic, Social and Cultural Dimensions*, (USA: Transnational Publishers, 2005), 272.

³²⁵ Article 28 (2) and (3) of the ICCPR.

³²⁶ United Nations: Office of the High Commissioner for Human Rights, "Introduction to the Committee: Human Rights Committee," accessed October 26, 2022, <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee>.

consultation with the Committee conveys copies of the same reports to the specialised relevant mechanism where need be.

3.6.3.1 Human Rights Committee's General Comments

For many years, the CCPR has considered reports from States Parties to the Covenant and issued general comments regarding implementation of the provisions of the ICCPR by its States Parties whenever applicable.³²⁷ Unlike the Committee's concluding observations on each State Party's report, general comments are not specific to a particular State Party but are meant to be of general application to all States Parties. Some of the general comments issued by the Committee capture matters related to indigenous peoples' rights. Pertinent examples are given below.

3.6.3.1.1 General Comment No. 12 of 1984: Right to Self-determination (Article 1)

This general comment was issued at the Committee's 21st ordinary session. Firstly, the Committee presented the rationale behind placement of the right to self-determination before all other rights in the ICCPR and ICESCR provisions. It explained that this right lays the foundation for promotion of all other individual rights.³²⁸ This means that, before everything else, peoples have the inalienable freedom to determine their political status and pursue their socio-economic and cultural development as provided for under Article 1(1) of the ICCPR.³²⁹ The General Comment emphasises the significance of States Parties' holistic reporting on implementation of the Article. This includes a clear account of constitutional guarantees and processes adopted to fulfil the States Parties' obligation under the aforementioned Article 1(1) and Article 1(2) which provide for peoples' rights to freely dispose of their natural wealth and resources, as well as protection of their own means of survival. The Committee noted that States Parties to the Convention have on several occasions omitted to provide information on these aspects. They merely confine themselves to reporting on the election processes when it comes to this broad right to self-determination.³³⁰ As discussed in chapter two of this study, the concept of "peoples" includes indigenous peoples who live in independent countries. Thus, the standards that were set by the international community when the ICCPR was adopted were meant to apply to all States

³²⁷ This mandate is provided for under Article 40 (4) of the ICCPR.

³²⁸ Paragraph 1 of the CCPR's General Comment No. 12 of 1984.

³²⁹ Paragraph 2, *id.*

³³⁰ Paras. 3-5, *id.*

Parties to the Convention without exception. Omission to report on the implementation of particular rights under the Convention is equivalent to violation of the same.

3.6.3.1.2 General Comment No. 23 (1994): Right of Minorities (Article 27)

Adopted by the CCPR at its fiftieth session in 1994, paragraph 1 of General Comment No. 23 (1994) acknowledges the necessity of recognising minority rights which are applicable to ethnic minorities.³³¹ Further, the CCPR noted in this general comment that in the communications submitted by individuals to the Committee under the provisions of the first Optional Protocol to the ICCPR, there has sometimes been confusion between the rights of minorities provided for under Article 27 of the ICCPR and the right to self-determination protected under Article 1 of the same Covenant. Also, the States Parties' Reports submitted to the Committee under Article 40 of the ICCPR have occasionally blended the States Parties' obligations to protect the rights of minorities under Article 27 of the Covenant with those provided for under Articles 2 (1) and 26 of the same Covenant which protect individuals against acts of discrimination.³³² Regarding the confusion of minority rights and the right to self-determination provided in two separate Articles of the ICCPR, the Committee drew a clear distinction between such rights. It stressed that the right to self-determination is asserted by "peoples" as a collective as opposed to individual minority rights which can be claimed individually.³³³ This means that there is no room for collective assertion before the CCPR of a people's right to self-determination through the available communications procedure. Specifically with regard to indigenous peoples, however, the Committee in this general comment noted that, despite the fact that the drafters of the Covenant did not mean to oust the sovereignty and territorial integrity of States Parties to the ICCPR under the provisions of Article 27, inevitably, the right to self-determination, which to a certain extent means economic self-determination, paves the way for claims by ethnic minorities before the CCPR. This is especially applicable in cases where ethnic minorities pursue their collective right to utilise natural resources for hunting, herding or fishing in areas that are legally protected.³³⁴ Given the fact that indigenous peoples' attempts to exercise their right to self-

³³¹ Paragraph 1 of the CCPR's General Comment 23(50), 26 April 1994.

³³² Paragraph 2, *id.*

³³³ Para 3(1), *id.*

³³⁴ Paras. 3 (2) and 7, *id.*

determination has generally been seen as a threat to the territorial integrity of sovereign states,³³⁵ the Committee, in this general comment, expresses the opinion that the enjoyment of such a right requires legal initiatives and measures for the inclusion of minorities (in this case ethnic minorities) in matters that concern them. The Committee adds that, as Article 27 of the ICCPR was designed to ensure, among other things, perpetuation of the cultural identity of minorities, which contributes to the totality of a particular society, this provision should be implemented not in confusion with, but in conjunction with other provisions of the Covenant.³³⁶

As to the States Parties' confusion between the rights to non-discrimination and equality before the law and other minority rights when it comes to reporting on implementation of these rights, the Committee, in this general comment, noted with great concern the danger of neglecting the special attention accorded to minority groups by Article 27 of the Covenant by dissolving it into general reports on the right to non-discrimination. This is perceived by the Committee as an implied denial of the existence of minorities within States that report in such a manner.³³⁷

Apart from the general comments, since its 44th Session held in March 1992, the CCPR has been issuing specific concluding remarks or observations on particular States Parties' reports. The concluding remarks have the significance of acting as a reference point in the preparation of each upcoming State Party's report.³³⁸ Details of concluding observations on Tanzanian human rights reports before the Committee which specifically address indigenous peoples' rights are discussed in chapter six of this thesis.

3.6.3.2 Communications before the CCPR

Through the adoption of the First Optional Protocol to the ICCPR on 16 December 1966, a mechanism for individuals' complaints before the Committee was established.³³⁹ Under this mechanism, individuals from States Parties to the aforementioned Optional Protocol have an

³³⁵ "...the right to self-determination is seen not only in the external context of obtaining a new independent state, but also in an internal context as protecting the self-realization of a certain community within an existing state." See Shikova Nataliaja, "Practicing Internal Self-Determination *Vis-a-Vis* Vital Quests for Secession," *German Law Journal* 17, No. 2 (2016): 239.

³³⁶ Paras. 7, 8 and 9 of General Comment 23(50), *id.*

³³⁷ Para. 4, *id.*

³³⁸ United Nations, *Report of the Human Rights Committee: General Assembly-Official Records*, Seventy-Sixth Session, Supplement No.40, (New York, 2021), 2.

³³⁹ The Protocol came into force in about ten years after its adoption, i.e. in March 23, 1976.

opportunity to submit their complaints to the Committee in form of communications in cases of violation of their rights under the Covenant. This can only be done, however, after local remedies have been exhausted.³⁴⁰ Article 1 of the First Optional Protocol to the ICCPR grants individuals eligibility to submit communications to the Committee.

Despite the fact that most indigenous peoples' rights are inherently collective, and hence can only be asserted by a group, the Committee has on several occasions received and presided over communications by individuals which relate to indigenous peoples' collective rights. The jurisprudence of the Committee evidences its fondness for accommodating collective rights in this mechanism. This is especially when the rights under Articles 1 and 27 of the ICCPR are in question. The rights that have commonly been adjudicated in favour of indigenous peoples by the Committee are the rights to self-determination,³⁴¹ free disposal of natural wealth and resources and enjoyment of one's own culture in community with others. Examples of individuals' communications submitted before the Committee which have a bearing on indigenous peoples' rights are from countries like Finland, Norway, New Zealand and Canada, as discussed below. These cases provide examples of the situation of indigenous peoples in the European, Australasian and North American continents.

(i) *Tiina Sanila-Aikio v. Finland (CCPR/C/124/D/2668/2015)*³⁴²

This communication was authored by Ms. Tiina Sanila-Aikio, a Finnish citizen from the Sami indigenous community. She submitted a communication to the Committee on her behalf and on behalf of the Sami people of Finland in her capacity as President of the Sami Parliament of Finland.³⁴³ She alleged violation of articles 1, 25, 26 and 27 of the ICCPR by Finland in the following manner. On 30 September 2015, acting to uphold the "human rights and constitutional principles" of the country, the Finnish Supreme Administrative Court accepted 93 appeals by the non-Sami Applicants who were seeking to be included as eligible voters in the Sami Parliament elections. This happened after such Applicants had been disqualified to vote in the Sami Parliament elections by the Sami Parliament Board. The Court's decision which allowed the appeals was alleged to have violated the author's rights as an individual Sami and those of her

³⁴⁰ Articles 1 and 2 of the First Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

³⁴¹ In para. 32.1 of the *Ominayak et al. v. Canada*, Communication No. 167/1984 (CCPR/C/38/D/167/1984), the Committee observed that an individual could not claim a right to self-determination under Article 1 of the ICCPR as this right is conferred on peoples as a collective right. Also see para. 13.3 of the same communication.

³⁴² Communication No. 2668/2015.

³⁴³ Para. 1.1, (CCPR/C/119/D/2668/2015).

fellow members of the Sami indigenous community as a whole. The violated rights were claimed to be those guaranteed by article 26 separately and in conjunction with article 1 of the ICCPR. The author alleged further that in 2011, the same Court had made the same kind of decision. It departed from the consensual interpretation of section 3 of the Sami Parliament Act³⁴⁴ which provides language and descent as objective criteria to qualify a person to be enrolled into the roll of voters in the Sami Parliament elections.³⁴⁵ Such criteria are additional to a person's mere self-identification as a Sami.

Having won the appeal, the Appellants participated in the Sami's Parliament elections, something that was viewed as a violation of the Sami peoples' right to political self-determination. The violation was based on the State's interference in defining who should participate in the Sami's elections. The author of the communication claimed that this situation weakens the effectiveness of the Sami Parliament. It also encroaches on the Sami peoples' voice in the decision-making process, especially in matters pertaining to their collective interests, such as lands rights and cultural matters. The communication further alleged violation of articles 25 and 26 of the Covenant through the same State interference in the Sami's election affairs. Such provisions guarantee the individual's right to freely choose his or her political representative, freedom to one's political opinion and equality before the law. The State's interference in the Sami election process was claimed to have infringed their right to political participation as a whole. Moreover, the author claimed violation of article 27 of the ICCPR which guarantees a right to the enjoyment of ones' culture in community with others and use of one's language in countries where ethnic or linguistic minorities exist. The claim was built on the fact that there had been membership dilution in the Sami peoples' Parliament elections. Notably, the Sami Parliament is the body which plays a vital role in safeguarding the Sami people's right to enjoy

³⁴⁴ Act No. 974/1995.

³⁴⁵ It was argued that there had been a series of movements by non-Sami residents in the northern parts of Finland to list non-Sami persons as voters in the Sami Parliament elections in order to gain control over the composition and positions of the said Parliament. In 2015, hundreds of applications to that effect were not approved by the Board of the Sami Parliament, leading to an approximate number of 200 appeals which landed before the Finnish Supreme Administrative Court. See CJ Iorns Magallanes, Introductory Note to Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning *Sanila-Aikio v. Finland*, Communication No. 2668/2015 and *Klemetti Käkkäläjärvi et al. v. Finland*, Communication No. 2950/2017 (H.R. Comm'n) in Views Concerning Communication Nos. 2668/2015 & 2950/2017 (H.R. COMM'N) [2020], 302, accessed February 10, 2023 DOI:10.1017/ilm.2020.19. In the similar subsequent case of *Käkkäläjärvi et al. v. Finland*, 2950/2017 (CCPR/C/124/D/2950/2017), the authors alleged the desired forged participation of non-Sami in the Sami Parliament was due to economic interests. See para. 4, Concurring Opinion of Olivier de Frouville in CCPR/C/119/D/2668/2015.

their culture and language.³⁴⁶ The Parliament is also a medium for securing the free, prior and informed consent from the Sami people in state-related matters that are likely to affect the Sami's collective interests.³⁴⁷

In response, Finland averred that it respects the criteria of self-identification in defining membership of a particular indigenous peoples' community as provided for under article 1 (2) of C 169; hence, it respects the Sami Parliament's right to decide on the qualifications of its voters in accordance with the Sami customs and traditions. It added that the country recognises their identity as an indigenous people and protects their rights to enjoy their culture and language together with other members of their community.³⁴⁸ However, it noted the distinction made by the CCPR between a people's right to determine their political status under article 1 of the ICCPR and the right of individuals to participate in public affairs provided for under article 25 of the same Covenant. This distinction was made by the CCPR in General Comment No. 25 (1996) on participation in public affairs. The Finnish government was of the view that it had discharged its obligation under article 25 of the Covenant by assuring that all persons entitled to vote were able to exercise such right.³⁴⁹

Finally, in this case, the Committee noted the uncontested fact that the decisions rendered by the Finish Supreme Administrative Court disregarded the consensual interpretation of section 3 of the Sami Parliament Act which decides on membership in the electoral rolls of the Parliament. It noted specifically that the Court consciously disregarded the additional criteria of language and descent as a qualification for a person to vote in the Sami Parliament elections, apart from the criterion of self-identification. It merely made a "blanket inquiry" into the Applicants' opinion regarding their self-consideration as Sami people. The Committee found this to be an infringement of the Sami's right to self-determination in deciding who is a Sami. Consequently, the Commission found the Court's rulings to have violated the Sami Parliament's electoral process, and described the Sami Parliament as a crucial institution through which the

³⁴⁶ Sami parliaments are legally established in the Nordic countries of Finland, Norway and Sweden. The same model exists in Russia with no legal recognition.

³⁴⁷ Paras. 1.2 and 3.1 of the CCPR/C/119/D/2668/2015.

³⁴⁸ Section 17 of Finland's Constitution recognises the Sami as an indigenous people with the right to maintain and develop their own language and culture. Section 121 of the same Constitution guarantee the right of the Sami to self-government in their own native land in accordance with the Sami Parliament Act.

³⁴⁹ Para 2.5, *id.*

Sami can practise their right to internal self-determination.³⁵⁰ Accordingly, the Committee's position was that Finland had violated article 25 of the ICCPR read separately and in conjunction with article 27 of the same Covenant and construed in the light of article 1 of the Covenant. Hence, the State Party was ordered to remedy the victims of the violation.³⁵¹ Such remedies comprised reparations and a review of section 3 of the Sami Parliament Act to ensure that all requirements for eligibility to participate in Sami Parliament elections are well described and practised to reflect the Sami people's right to internal self-determination. Finally, Finland was tasked with guaranteeing that such violations of rights would not re-occur in the future.³⁵²

In this communication, apart from the fact that the CCPR dealt with an individual's right to freely take part in public affairs by expressing his or her will in the voting process, and the right to practise one's culture and use one's language in community with other members of the same group, as per articles 25 and 27 of the ICCPR, it did not shy away from interpreting these provisions in the light of article 1 of the same Covenant which, among other things, guarantees the collective right of a people to internal political self-determination.

The communication has the significance of presenting the Committee's revolutionary practice of reconciling individual and (implied) collective rights guaranteed under the ICCPR. The CCPR took upon itself to prevent future damage likely to be suffered by the Sami, and potentially other indigenous peoples elsewhere, in the event that non-indigenous peoples should attempt to interfere with their internal affairs. The Committee executed this task by not allowing the spirit of individual rights embedded in the Covenant to outweigh the collective interests of the Sami as an indigenous people. It recognised the central component of the Sami Parliament elections, i.e. self-determination, as having the final say with regard to who qualifies as a Sami to vote in the Sami Parliament elections. This overcame the ulterior motives of individuals who hid under the umbrella of individual rights in order to override the objectives of the establishment of the Sami Parliament for their own benefit.

³⁵⁰ Internal self-determination embeds the right of peoples to freely decide the mode of their economic, social and cultural existence in a particular state as well as their political status. By political status it means their position as peoples within the country. This is opposed to external self-determination which entails the state's sovereignty in relation to other states.

³⁵¹ Having established these primary violations, the Committee did not go further to establish other violations alleged by the author, for instance those based on Article 26 of the Covenant. See para 6.12 of CCPR/C/119/D/2668/2015.

³⁵² Paras 6.11-8, CCPR/C/119/D/2668/2015.

*(ii) Kalevi Paadar, Eero Paadar and his family, Veijo Paadar, and Kari Alatorvinen and his family v. Finland (CCPR/C/110/D/2102/2011)*³⁵³

The authors of this communication described themselves as full-time reindeer herders living in the Nellim village in Finland. At the time of filing the communication, they were part of the Ivalo Reindeer Herding Cooperative (in this case referred to as “the Cooperative”). The Cooperative was described as having two divisions or herding groups, one located in the north where the Nellim village is and another located in the south where a village known as Ivalo is, after which the Cooperative was named. Within the Cooperative, the Nellim herding group comprised members of the Sami community who preserve traditional herding methods rooted in their culture. The authors of the communication claimed they were the only remaining Sami families who solely depended on reindeer for their livelihood. This was in contrast to the rest of the herders in the Nellim herding group who kept fewer reindeer and had other secondary sources of income or means of subsistence.³⁵⁴ The authors contended further that, for them and the other Nellim herders, reindeer herding becomes difficult in the winter season.³⁵⁵ This difficulty is coupled with other pasturage challenges. However, the Ivalo group does not experience such challenges. The Nellim group asserted that their reindeer were not “caged” but traditionally fed on natural pastures. This method of feeding exposed them to predators like bears,³⁵⁶ something which was not the case with the reindeer kept by the Ivalo group. The Ivalo group kept their reindeer in areas that were described as being mostly human-inhabited, and hence less prone to predator attacks.³⁵⁷ The communication stated that the Nellim group was located in a wide and isolated area bordering Norway and Russia with a high number of bears. According to the authors, killing the bears, or other predators like eagles, was forbidden by law; hence the only legal way to avoid the predators’ attacks on their reindeer was to abolish their Sami traditional open grazing method on natural pastures and adopt artificial feeding methods. The authors of this communication perceived this option as neither economically viable nor

³⁵³ Communication No. 2102/2011.

³⁵⁴ Para 2.1, CCPR/C/110/D/2102/2011.

³⁵⁵ Due to the snowy conditions, Nellim reindeers feed on lichen during the winter and are only fed when being led to wild pasturages.

³⁵⁶ It was averred by the authors of this Communication that a large number of the Nellim herders’ newborn calves were lost in the forests where the adult reindeer wander and feed. This was due to the natural conditions such as extreme winter weather and exposure to predators.

³⁵⁷ Para 2.2, CCPR/C/110/D/2102/2011.

compatible with their customary herding practices.³⁵⁸ For these obvious reasons, it was clear that within the Ivalo Reindeer Herding Cooperative, the Nellim herders were in a disadvantaged position compared to the Ivalo herders.

The Ivalo Reindeer Herding Cooperative was a creature of the State. It was legally “imposed” back in the 1930s. At the time of the filing of this communication, the Cooperative was regulated by the Reindeer Husbandry Act (“the Act”) which had been in force since 1990. The authors alleged that the establishment of the Cooperative was not based on the Sami peoples’ free will. They have been involved in a constant struggle to break away from it in order to establish their own traditional and voluntary reindeer herding unit. However, all their efforts have been unsuccessful.³⁵⁹

Moreover, the authors claimed they were the minority in the Cooperative with fewer reindeer than the Ivalo group. The Ivalo group formed the majority in the Cooperative and had more reindeer. This was a disadvantage to the Nellim group in terms of decision-making in the Cooperative. The state of affairs led to a series of disagreements between the Nellim herders and the Cooperative. One of the disagreements centred on the fact that the reindeer pastures had been demarcated by a fence between the Nellim and the Ivalo herding groups. The authors alleged that the fencing method prevented the Nellim group from practising the Sami traditional reindeer herding method. The fence was a barrier to ordinary routes used by the Nellim reindeer to return to their winter pastures after the summer season. This occasioned the loss of many reindeer calves by the Nellim group. Some would be trapped in the fences and others suffered the consequences of the long detours. The second disputed issue concerned the Nellim group’s campaign against deforestation. The campaign was aimed at preserving the natural forests which supported their traditional pastoralism. The natural forests were being destroyed by the logging business whose consequences were negative to the reindeer’s natural pastures. Since the Ivalo group did not practise traditional herding methods and fed their reindeer with hay, they were against the Nellim group’s campaign against human activities in the natural forests. Given their majority in number within the Cooperative, the Ivalo herders’ decisions regarding both fencing the pastures and forestry activities dominated over those of the Nellim group.³⁶⁰ The tension between the two groups in the Cooperative led to the State’s interference in the Cooperative’s

³⁵⁸ Para 2.9, CCPR/C/110/D/2102/2011.

³⁵⁹ Paras 2.3, *id.*

³⁶⁰ Para. 2.21, *id.*

affairs. As a way of containing the situation, the Finnish State through the Ministry of Agriculture and Forestry had to determine the number of reindeer kept by the Cooperative as a whole and the number of reindeer each shareholder within the Cooperative should keep. This included ensuring a particular number of reindeer was not exceeded during the winter season to balance the availability of the Cooperative's winter pastures.³⁶¹ In cases of an excessive number of reindeer within the Cooperative or owned by individual herders, the Cooperative was legally permitted to sanction reduction of the excessive number by slaughter. Under this arrangement, if an individual herder was not in agreement with the decision to slaughter his or her reindeer; the Cooperative could execute the slaughter on his or her behalf. The authors asserted that the Cooperative's decision to slaughter a herder's reindeer could only be waived on exceptional grounds or by decision of the Administrative Court.³⁶² The authors claimed there was a drastic decrease in their reindeer due to the Cooperatives' slaughter scheme which did not take into account the fact that the Nellim herders were already at a disadvantage in terms of the number of reindeer they owned compared to the Ivalo herders.³⁶³

In 2005, one of the authors (Kalevi Paadar) filed a complaint before the Rovaniemi Administrative Court when it became apparent that the Cooperative's decision to slaughter his reindeer threatened his livelihood and was discriminatory against his community. He lost the case before the Administrative Court and later before the Supreme Administrative Court where he pursued an appeal. The Cooperative's decision to slaughter the reindeer, which would effectively put an end to the Nellim group's relevancy in the Cooperative, was found not to be discriminatory. Rather, it was found to be promoting "equality" amongst the Cooperative's shareholders regardless of their ethnic background. This was held so in the light of the Finnish Constitutional provisions and international agreements to which Finland is a party.³⁶⁴ At this point, even the Nellim group's "capital reindeer" which were female were set aside for slaughter. Much worse and to the Nellim group's detriment, the law did not permit the purchase of any more reindeer once a herder had lost all of his stock.³⁶⁵ The domestic administrative and judicial remedies sought by the authors aimed at mitigating the threat of extinction of the traditional reindeer husbandry economy. Such local remedies ended in vain. The Nellim reindeer herders

³⁶¹ Paras. 2.4 and 2.5, CCPR/C/110/D/2102/2011.

³⁶² Para. 2.6, *id.*

³⁶³ Para 2.8, *id.*

³⁶⁴ Para 2.16, *id.*

³⁶⁵ Para. 2.12, *id.*

were exposed to irreparable loss of their central economic activity, which is, in fact, a typical indigenous Sami livelihood and heritage. Their village was also facing the threat of total disappearance.

Having exhausted all local remedies in respect of their allegations of inequality regarding the slaughter plans within the Cooperative, discrimination and creation of a threat to the existence of the authors' traditional livelihood and culture,³⁶⁶ the authors submitted their communication to the CCPR.

Before the Committee, the authors alleged a violation of article 14 (1) of the ICCPR by the Finnish Supreme Administrative Court's decision. They alleged that the Court passed the decision which affected their livelihood without diving deeper into the legal claims, arguments and facts presented before it. Also, the fact that the Supreme Administrative Court relied on the Government's statement to arrive at its decision ousted its judicial power to preside over the matter, hence it was a compromised decision.³⁶⁷ Further, the authors of this communication alleged a violation of the right to enjoy their culture in community with other members of the Sami indigenous community as guaranteed under article 27 of the Covenant. They claimed that the fact that the Cooperative compelled them to slaughter their reindeer so as not to exceed the maximum prescribed number would prevent them from practising their culture when they had no more reindeer left in their possession. This claim went parallel with that of violation of section 17 (3) of the Finnish Constitution which recognises the Sami as an indigenous people and guarantees their right to enjoy their language and culture.³⁶⁸ Regarding their traditional language, known as Anar, the authors stated that it was under threat of disappearing. This is because the language is used amongst the Sami in their collective activities such as reindeer herding. If reindeer herding activities were to end in Nellim village, the Anar language would also eventually wither away.³⁶⁹ Additionally, the Cooperative's decision to slaughter the authors' reindeer in the name of controlling the number of reindeer within the Cooperative was said to have infringed article 26 of the ICCPR both in its purpose and effects. It was argued that the slaughter was executed disproportionately between the two groups which were operating with two different modes of reindeer herding. This was perceived by the Nellim group as a strategy to

³⁶⁶ Para 2.15, CCPR/C/110/D/2102/2011.

³⁶⁷ Para 3.1, *id.*

³⁶⁸ Para 3.2, *id.*

³⁶⁹ Para. 3.5, *id.*

put to an end to the Sami's traditional herding style, their campaign against the logging business and their ethnicity as a whole.³⁷⁰

The State Party responded to the author's claim by asserting that the authors received a fair trial before the Supreme Administrative Court. It elaborated that a fair trial is said to have been achieved as per article 14 (1) of the Covenant when both parties to the case are accorded the right to be heard, and the Court has gathered sufficient and crucial information to arrive at its decision. The State Party argued that both of these prerequisites were met before the Supreme Administrative Court arrived at its decision. Regarding articles 26 and 27 read together with article 1 of the Covenant, the State Party argued that all facts related to this case did not reveal any breach of these provisions.³⁷¹

Having evaluated the information provided by both parties to this communication, the Committee decided by majority in favour of the State Party in its entirety.³⁷² Nevertheless, four members of the Committee partly dissented from the Committee's decision.³⁷³ They took the position against the majority decision that article 27 of the Covenant which guarantees the right to enjoy one's culture in community with others had been breached.³⁷⁴ This clearly illustrates the point that within the CCPR, there is still support for indigenous peoples' collective rights claimed under the provisions of the ICCPR. Occasionally, the experts' inclinations while determining the communications before the Committee are informed by their own backgrounds.³⁷⁵

*(iii) Mr. Jarle Jonassen and Members of the Riast/Hylling Reindeer Herding District v. Norway (CCPR/C/76/D/942/2000)*³⁷⁶

This communication involved members of the Sami indigenous people who are herdsman from one of the reindeer herding districts in Norway known as Riast/Hylling.³⁷⁷ It was also supported by the Sami Reindeer Herder's Association of Norway. The communication averred that

³⁷⁰ Para 3.3, CCPR/C/110/D/2102/2011.

³⁷¹ Para 4.19, *id.*

³⁷² Para.7.2 and 8, *id.*

³⁷³ The four dissenting members of the Committee were Walter Kälin, Víctor Manuel Rodríguez Rescia, Anja Seibert-Fohr and Yuval Shany.

³⁷⁴ See the Appendix to CCPR/C/110/D/2102/2011.

³⁷⁵ Information obtained from a lecture by a former Human Rights Committee Expert held at the University of Bayreuth on January 18, 2023.

³⁷⁶ Communication No. 942/2000.

³⁷⁷ Para. 1, CCPR/C/76/D/942/2000.

according to the Norwegian Reindeer Husbandry Act of 1978, the Sami herdsmen were allowed to engage in reindeer husbandry in particular selected districts. However, in 1988 the Norwegian Supreme Court ruled in the *Korssjøfjell case* that the Sami could not practise reindeer grazing within the permitted districts without showing proof of their legal right to do so.³⁷⁸ This had occasioned conflicts between the Sami reindeer herders, farmers and other land owners. Such conflicts matured into cases before courts of law. The author alleges in this communication that in one of the cases the Norwegian Supreme Court ruled against the Sami herders in favour of the farmers while citing the Lap Land Commission's Opinion of the year 1883. The opinion stated that the farmers had cultivated the disputed lands for a longtime before the Sami herders invaded them. It added that the Sami had been a continuous nuisance to the farmers since then.³⁷⁹

The communication stated further that on February 2, 1869 the Ministry of the Interior had declared that the “ nomadic culture is such a great burden for Norway and that it has no corresponding advantages, that one must unconditionally desire its cessation.”³⁸⁰ In 1997, in the *Aursunden case*, the authors lost their claims before the Norwegian Supreme Court. This case involved land that formed only 4 to 5% of their herding district. Despite its small size, this land was crucial for the authors' access to larger surrounding areas which they would not be able to access without trespassing on the “forbidden” fields.³⁸¹ Consequently, they lost about 120 square kilometres of grazing land in their district. The same consequence was faced by the authors in the same year in the *Tamnes case*. In this case they lost another 33 square kilometres before the same Court. By the time of filing this communication before the Committee, there were related pending cases in the Norwegian Supreme Court and the authors had every reason to anticipate further loss of their grazing land, given the history of their experiences with this Court.³⁸²

Before the Committee, the authors alleged a violation of article 27 read together with article 2 of the ICCPR. The allegations were based on Norway's non-recognition of their right to graze reindeer in their traditional areas and enjoy their own culture.³⁸³ Additionally, the authors claimed a breach of article 26 of the Covenant following the Supreme Court's decision that was rendered relying on its own previous decision. That decision was made in the nineteenth century

³⁷⁸ Para. 2.4, CCPR/C/76/D/942/2000.

³⁷⁹ Paras. 2.14 and 2.16, *id.*

³⁸⁰ Para 2.17, *id.*

³⁸¹ Para 2.9, *id.*

³⁸² Paras. 2.10 and 2.11, *id.*

³⁸³ Para. 3.1 and 3.2, *id.*

against the Sami and in favour of powerful private land owners. The decision was alleged to have been made in times of acute discrimination against the Sami by the Norwegian landowners who were promoting the culture of private property ownership.³⁸⁴

Norway contested the claims made by the authors under articles 2 and 26 of the Covenant. It argued that the authors had not proved the allegation that the Norwegian Supreme Court was biased when assessing their case in the light of the decision it had previously made in 1897. As to the breach of article 27 of the Covenant, Norway argued that the authors had not fully exhausted the local remedies within the jurisdiction of domestic courts and Norwegian law regarding this claim, which was brought before the Committee as an “*actio popularis*”. It asserted further that filing the claim on behalf of other Sami herders did not entitle them to a hearing before the Committee. This was argued in the view of article 1 of the Optional Protocol to the ICCPR which grants *locus standi* before the Committee to individuals only.³⁸⁵ Regarding the right to private property *vis-à-vis* communal property, the State Party argued that the mere demarcation of reindeer grazing districts in Norway did not automatically grant the Sami the right to graze there without a legal basis such as contracts with private land owners. Therefore, the claim that the authors had lost their collective grazing rights as an ethnicity was unfounded. The State elaborated that the authors’ claims related to privately owned property. In addition, Norway underscored that privately owned property is protected by the Norwegian Constitution and the First Protocol to the European Convention on Human Rights which is also part of Norwegian law. It was therefore argued that the provisions of domestic law concerning privately owned property should be considered when determining the extent to which States Parties to the Convention should offer preferential treatment to particular ethnic groups at the expense of circumventing its own civil law standards.³⁸⁶

The Committee ruled out Norway’s argument that the authors did not qualify to file a communication before it under article 1 of the Optional Protocol to the ICCPR since they presented their case as an “*actio popularis*”. It was of the opinion that the case could still stand

³⁸⁴ Para. 3.1, CCPR/C/76/D/942/2000.

³⁸⁵ Para 4.1 and 4.2, *id.*

³⁸⁶ Paras. 4.4 and 4.3, *id.*

before it as the authors were individuals asserting specific reindeer grazing rights in particular territories in their districts.³⁸⁷

As to the breach of article 26 of the Covenant, the Committee found this claim inadmissible under article 2 of the Protocol. The authors were unable to substantiate that the Norwegian Supreme Court's decision in the "*Aursunden case 1997*" was discriminatory against the Sami.³⁸⁸ Regarding the breach of article 27 of the Covenant, the Committee resolved that the authors had not exhausted the local remedies available domestically in Norway with respect to their claims. There were still claims of the same nature by the authors pending before the domestic adjudicatory body.³⁸⁹

*(iv) Apirana Mahuika et al. v. New Zealand (CCPR/C/70/D/547/1993)*³⁹⁰

Apirana Mahuika and 18 others who were the authors of this communication came from the Māori indigenous people of New Zealand. Before the Committee, they alleged a violation of articles 1, 2, 16, 18, 26 and 27 of the ICCPR by New Zealand with respect to the abolition of their traditional fishing rights by a settlement deed. This deed which is famously known as the "Sealord deal" was signed between the leaders of the Māori people and the New Zealand Government (the Crown). The deed subjected all of the Māori's fishing rights held under the 1840 Treaty of Waitangi³⁹¹ to the Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992.³⁹² The Act was intended to implement the aforementioned settlement deed whose objective was to conclusively settle the Maori's pending and future claims to commercial and non-commercial fishing rights. Among other things, payment of a total sum of NZ\$ 150,000,000 was to be paid to the Māori to extinguish their rights to commercial fishing and oust the jurisdiction of any judicial body from inquiring into matters related to such rights. It also changed the status of the Maori non-commercial fishing rights to non-legal claims and rid the Crown of any legal obligations in this respect.³⁹³ The authors alleged that a considerable number of the Māori peoples were not sufficiently represented in this deal. Some of them were totally against it and some were in a

³⁸⁷ See para. 8.5 *id.* This is significant to indigenous peoples' possibility of claiming their traditional rights to land and particular territories as individuals before the Committee.

³⁸⁸ Para 8.3, CCPR/C/76/D/942/2000.

³⁸⁹ Para 8.6, *id.*

³⁹⁰ Communication No. 547/1993.

³⁹¹ This Treaty which was signed between the Maori and the British Crown acknowledged the Maori peoples' rights to self-determination and utilisation of their natural resources including control of their tribal fisheries.

³⁹² See paras. 1, 5.1 and 5.12, CCPR/C/70/D/547/1993.

³⁹³ Para. 5.12, CCPR/C/70/D/547/1993.

position to communicate their conditions had they been fully consulted.³⁹⁴ Before the Committee, the authors claimed a violation of their right to self-determination under article 1 of the ICCPR with regard to the restricted access and control of natural resources. They also claimed a breach of article 27 of the Covenant by the government of New Zealand through passing of a law that threatened the existence of their culture which is embedded in their livelihood.³⁹⁵ They asserted that fishing formed part of their cultural manifestations and that their tradition knows no boundary between commercial and non-commercial fishing. They alleged that the Treaty of Waitangi (Fisheries Claims) Settlement Act seized their inherent right to pursue traditional fishing. In the case of *Ominayak v. Canada*,³⁹⁶ the CCPR opined that rights which involve an economic element also guarantee an individual's freedom to practise his or her own culture in community with others.

Further, the authors alleged a violation of article 14 (1) of the ICCPR which provides for everyone's right to equality before the courts and tribunals. Section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act usurped the Māori's right to pursue claims with legal remedies in any court or tribunal with respect to commercial fishing. This was not the case before the enactment of this law. The law only allowed the Waitangi Tribunal to receive and consider customary claims under the Waitangi Treaty of 1840. Such a Tribunal could not make any legally enforceable decisions. Its mandate was restricted to issuing recommendations only.³⁹⁷

New Zealand did not dispute the authors' claim regarding article 27. It stressed that the Sealord deal signed between the Government and the Māori people considered the Māori's culture by granting them opportunities to practise both commercial and non-commercial fishing activities. The State averred that the settlement deed ensured that the Māori, who formed approximately fifteen percent of New Zealand's population at the time, had control over New Zealand's largest deep-water fishing fleet. They had been allocated shares and membership in the Board of Directors of this commercial undertaking. It was further stated that the settlement deed allocated to the Māori more than 40% of New Zealand's fishing quota³⁹⁸ which generates

³⁹⁴ Para 5.8, CCPR/C/70/D/547/1993.

³⁹⁵ Para 6.1, *id.*

³⁹⁶ Communication No. 167/1984.

³⁹⁷ Para. 6.4, CCPR/C/70/D/547/1993.

³⁹⁸ Quota is an allotment in fishing stock. Each stock is said to contain the amount of 100,000,000 per each fishing year. The Quota Management System was introduced in New Zealand in 1986 through amendment of the Fisheries Act with the alleged intention of containing the over exploited inshore fisheries by limiting the number of fish in commercial species to be caught in a year. For more information about the Quota Management System

revenue. According to New Zealand, that was a modern-day form of engaging the Māori people in the commercial fishing industry. As to the Māori's non-commercial fishing rights, the State submitted that specific regulations had been adopted to ensure customary foraging is recognised and practised sustainably. Nevertheless, the State contended that the minority rights guaranteed under article 27 of the Covenant are not absolute. They are subject to domestic regulation as long as such regulation is backed by a rational justification and does not amount to the denial of rights. New Zealand emphasised that the State had a duty to strike a balance between the Māori and the public interests within the fishing industry and guarantee its sustainability.³⁹⁹ It had a duty to safeguard New Zealand's resources for the benefit of future generations.⁴⁰⁰

Regarding consultation of the Māori people before execution of the Settlement Deed, the State argued that the Māori were represented by negotiators from various Māori groups. Also, the State believed that the Crown was justified in proceeding as it did. This is because the Waitangi Tribunal had given an opinion indicating that the Māori negotiators' report acknowledged the fact that the Waitangi Treaty would not be compromised in the settlement process even though several aspects of the Treaty required forfeitures by the Māori before the deed was executed.⁴⁰¹

As to the authors' claim that the Settlement deed seized their right to access justice, the State argued that article 14 of the Covenant does not guarantee such a right in its wording. The authors were alleged to have put the general idea of the right to access justice into the provision which merely provides for procedures to be followed to ensure proper standards of administration of justice in criminal and civil proceedings. The State Party stressed the point that the Māori's right to access judicial organs with fisheries claims was totally extinguished in the deed in exchange for the improvement of their position in the commercial fishing industry. Hence, the Māori people had no right to claim before the courts.⁴⁰²

As to article 1 of the Covenant, the State argued that the Committee could not admit the communication because it lacked the mandate to preside over cases which are not based on individual claims. The communication at hand was said to have been filed by the authors who

(QMS), see New Zealand's Ministry of Primary Industries, "Fish Quota Management System", accessed February 24, 2023, <https://www.mpi.govt.nz/legal/legislation-standards-and-reviews/fisheries-legislation/quota-management-system/#about>.

³⁹⁹ Paras. 7.1 and 7.2, CCPR/C/70/D/547/1993.

⁴⁰⁰ Para 7.5, *id.*

⁴⁰¹ Para. 7.4, *id.*

⁴⁰² Paras. 7.7 and 7.8, *id.*

represented the rest of the Māori people in matters pertaining to collective rights. The State questioned the authors' authority to represent the Māori people. It argued that the right to self-determination as provided for under article 1 of the ICCPR was meant for "peoples" who constitute the entire population of the state and not minorities, whether indigenous peoples or otherwise.⁴⁰³

In determining this case, the Committee observed that it is true that article 1 of the First Optional Protocol to the ICCPR mentions individuals as the rightful authors of communications submitted to it. However, it refuted the State Party's allegation that the authors had no *locus standi* before it. The Committee referred to its previous jurisprudence to emphasise that communications from groups of individuals with common claims have never faced any objections despite the provisions of article 1 of the Protocol. It added that the provisions of article 1 of the ICCPR are relevant in interpreting other rights in the Covenant, particularly article 27 which provides for the right of members of a minority to practise their culture in community with other members of their group. This was presented as a right which affects collective interests.⁴⁰⁴ Following this line of argument, it was the Committee's view that the authors' claim under article 27 of the Covenant was justified, given the undisputed fact that they belonged to a minority group in New Zealand and their fishing activities are embedded in their long-established culture.⁴⁰⁵ Having stated its position in this respect, the Committee proceeded to decide whether there was any breach of rights under article 27 of the Covenant by the government of New Zealand through the implementation of the Fisheries Deed of Settlement. The Committee explained that article 27 of the ICCPR not only seeks to protect the livelihood of minorities, but also accommodates the incorporation of modern elements into such livelihoods in a way that the rights to be guaranteed are not affected.⁴⁰⁶ It added that this was exactly the

⁴⁰³ Para 7.6, CCPR/C/70/D/547/1993.

⁴⁰⁴ Para 9.2, *id.*

⁴⁰⁵ See Para 9.3, *id.* Traditionally, fishing for the Māori people is not only an economic activity, but also a sacred spiritual activity. It is believed that fish are descendants of Tangaroa, the god of the sea, and other gods. Various groups within the Māori would return their first fish harvest to the gods who would in turn bless the fishermen with more abundant harvests. Also, fishermen would offer Tangaroa sacrifices in form of their best fish harvests as a token of thanks in the event of rich harvests. See TEARA: The Encyclopedia of New Zealand, "Story: Te hī ika – Māori fishing", accessed February 26, 2023, <https://teara.govt.nz/en/te-hi-ika-maorifishing#:~:text=Fishing%20is%20important%20in%20M%C4%81ori%20tradition%3A%201%20Tangaroa,disc%20covered%20New%20Zealand%20while%20chasing%20a%20huge%20octopus>.

⁴⁰⁶ Para. 9.4, CCPR/C/70/D/547/1993.

essence of the Settlement deed. Nevertheless, the Committee acknowledged the limitations to the enjoyment of article 27 of the Covenant by the Māori which were brought about by implementation of the Waitangi (Fisheries Claims) Settlement Act, 1992.⁴⁰⁷ Despite this acknowledgement, it ruled that there was no provision under article 27 of the ICCPR that had been breached by the adoption and implementation of the aforementioned Act.⁴⁰⁸ The Committee was satisfied that the Māori groups had been sufficiently consulted through their national institutions. It elaborated that the authors' claims that members of their sub-groups were not consulted and did not consent to the Fisheries Settlement could not override the interests of the entire Māori people.⁴⁰⁹ However, it was the Committee's general emphasis that the State Party had an obligation to take into account the religious and cultural significance of fishing for the Māori people when implementing the Waitangi (Fisheries Claims) Settlement Act.⁴¹⁰ As to the alleged breach of the right to access justice, the Committee explained that since the Settlement Deed was an isolated case involving a nation-wide settlement of claims which had emerged due to issues to be settled by the Deed, there was no breach of article 14 (1).⁴¹¹

In general, the Committee found no breach of any provisions of the ICCPR in this case.⁴¹² Nonetheless, a dissenting opinion was expressed by one of the Committee Members who found a violation of article 14 (1) of the Covenant by the State Party. He was of the view that there was an overall violation of the authors' right to equality before the courts and tribunals given the fact that the Waitangi (Fisheries Claims) Settlement Act had the effect of discontinuing all pending lawsuits concerning Māori fishing rights before any adjudicatory body. Also, the Committee Member was of the view that the authors' claim of insufficient consultation in the process of closing an agreement between the Māori representatives and the government could not be simply disregarded.⁴¹³

Once again, this dissenting opinion was in favour of the indigenous people. This added to the jurisprudence that creates more space for the protection of indigenous peoples within the CCPR.

⁴⁰⁷ Para. 9.5, CCPR/C/70/D/547/1993.

⁴⁰⁸ Para 10, *id.*

⁴⁰⁹ Para 9.6, *id.*

⁴¹⁰ Para 9.9, *id.*

⁴¹¹ Para. 9.10, *id.*

⁴¹² Para 10, *id.*

⁴¹³ See the Appendix to CCPR/C/70/D/547/1993, Individual Opinion by Mr. Martin Scheinin, the Member of the Human Rights Committee (1997-2004).

(v) *George Howard v. Canada (CCPR/C/84/D/879/1999)*⁴¹⁴

One George Howard filed this communication as a member of the Hiawatha First Nation. This community is legally recognised as belonging to the Aboriginal peoples in Canada. He claimed violation of his individual and the community's rights guaranteed under articles 2 (2) and 27 of the ICCPR. The claim stemmed from his summary conviction and an order passed against him to pay a fine by the Ontario Provincial Court. He was condemned for engaging in illegal fishing out of season in an area close to the First Nation's reserve.⁴¹⁵ The author based his claim on the Constitutional provision which guaranteed aboriginal and aboriginal treaty rights in Canada.⁴¹⁶ Locally, this attempt met defeat as the Court ruled that the author's ancestors had surrendered the First Nations' rights to fish, hunt or trap animals to the Crown through various treaties, one of which was the Williams Treaty of 1923. One of the agreements in this treaty was that in exchange for USD 500,000 compensation, the Mississauga First Nations surrendered and ceded their title, claims and interests in land to the Crown except for specific designated areas reserved by the Crown for their use.⁴¹⁷ Subsequently, the author appealed to the Ontario District Court which rejected the author's appeal with the same reasoning as the Ontario Provincial Court. Further, appeals to the Ontario Court of Appeal and the Supreme Court did not succeed on the ground that when entering into these treaties with the Crown, the First Nations' representatives were clear about the terms of surrendering, among other things, their fishing rights to the Crown. Therefore, no First Nations' rights subsisted after these treaties, be it a special fishing right or otherwise.⁴¹⁸

Notably, in the Supreme Court's earlier decision of *R. v. Sparrow*,⁴¹⁹ it was established that the First Nations' "subsisting right" as protected under section 35 of the Constitution could be proved by its perpetual exercise, no matter how rare the frequency of the exercise is. Following this decision, the Canadian Government adopted the "Community Harvest Conservation Agreements" according to which the Ontario Government and the First Nations

⁴¹⁴ Communication No. 879/1999.

⁴¹⁵ The First Nation's reserve consists of areas reserved for their exclusive use. The areas were demarcated when they ceded their territories to the British Crown through Treaties in exchange for monetary compensation and other agreed incentives. See the Canada Encyclopedia, "Reserves in Ontario," accessed February 28, 2023, <https://www.thecanadianencyclopedia.ca/en/article/reserves-in-ontario>.

⁴¹⁶ Section 35 of the Canadian Constitution Act, 1982.

⁴¹⁷ Paras. 2.1 and 2.2, CCPR/C/84/D/879/1999.

⁴¹⁸ Para. 2.3, CCPR/C/84/D/879/1999.

⁴¹⁹ [1990] 1 SCR 1075 (SCC).

who were party to the Williams Treaties entered into an annually renewable agreement which allowed the First Nations to conduct hunting, fishing, ceremonial and spiritual activities in areas outside their reserves.⁴²⁰ Nevertheless, this initiative was short-lived upon entering into power of the new government which sought to align its practice with the Supreme Court's decision in the author's case. The new government restored the original position regarding the First Nations' claim to "subsisting rights" after signing treaties with the Crown. Given this new dynamic, the affected First Nations sought orders of injunction from the Court of Justice of Ontario against the government. The applications were unsuccessful. The Court of Justice advised that seeking further remedies of such kind would be "pointless" as the Ontario Government was rightly exercising its mandate.⁴²¹ The author filed a motion for rehearing of this case before the Supreme Court. Such efforts ended in vain and hence the author had resort to the CCPR.

Before the Committee, the author alleged a violation of his and all other members of his community's right to conduct traditional fishing. This was claimed to be detrimental to him as an individual and to other members of his community as a collective in the sense of jeopardising his and their social, spiritual and cultural survival, with reference to article 27 of the ICCPR. To expand on this, the author argued that the rights to hunt, gather, fish and trap form an integral part of his community's culture. Therefore, prohibition of these activities entailed a threat to their sustainability for future generations.⁴²² Moreover, from the foregoing, the author claimed a breach of article 2 (2) of the Covenant which obliges States Parties to adopt all measures necessary to give effect to the provisions of the Covenant. It was the author's view that the government's prioritisation of monetary compensation over restoring aboriginal rights when it abolished the "Community Harvest Conservation Agreements" was not a reflection of necessary measures to ensure the domestic fulfilment of article 27 of the Covenant. This article is usually interpreted in the light of article 1 (2) of the same Covenant which provides that no people may be deprived of its means of subsistence or its right to dispose of its wealth and natural resources. Seeing that the concept and the rights of the First Nations were already constitutionally recognised and guaranteed in Canada, the author was of the view that the State could not derogate from fulfilling such rights as emphasised in article 5 (2) of the Covenant. This provision prohibits States Parties to the Covenant from derogating from the fulfilment of fundamental

⁴²⁰ Paras. 2.4. and 2.5, CCPR/C/84/D/879/1999.

⁴²¹ Para. 2.7, *id.*

⁴²² Para. 3.1, *id.*

rights provided for under any domestic or international law in the pretext that such rights are not fully recognised by the ICCPR or recognised to a lesser extent.⁴²³ Finally, the author requested the Committee to recommend that Canada should take effective measures to restore and guarantee fishing, hunting and trapping rights to his community as a collective.⁴²⁴

Canada argued that the author's communication was inadmissible to the Committee as he had not exhausted all local remedies. For instance, his action before the Ontario Court of Justice which failed on procedural errors could still be pursued in merits before the same Court, but he did not do so. Also, his argument that his and his fellow community members' claims failed before the Supreme Court with a decision that their ancestors had relinquished their aboriginal rights to fish, so that any further attempt to restore such rights would not succeed, was not reason enough to conclude that all domestic remedies had been exhausted. Canada argued that other avenues were still at his disposal to explore before filing a communication to the Committee.⁴²⁵ Additionally, the State argued that negotiations were still pending between the Williams Treaty's First Nations and the government regarding the restoration of their fishing and hunting rights outside the First Nations Reserve. Such negotiations stemmed from the Federal Court's proceedings. Hence, the author could have waited for their outcome before filing his communication to the CCPR. Most importantly, Canada emphasised that the regulations in place were not made to forbid the First Nations' hunting or fishing activities but to regulate the practice and ethics of such activities for the conservation and sustainable use of the resources involved. Hence, the First Nations could still practise their traditional fishing or hunting activities within such regulations.⁴²⁶ The State Party also raised the issue of the author's position as an individual to act on behalf of his community members before the Committee without their authorisation contrary to article 1 of the Optional Protocol.

In general, the Committee was of the view that the author had valid claims as an individual. Given its past jurisprudence, for example in the case of *Ominayak et al. v. Canada*,⁴²⁷ it held the opinion that, in principle, the Committee had always found no objection to a group of individuals who alleged similar violations of their rights filing their communication before it as a collective. However, in the present case, the Committee noted that the author of this

⁴²³ Para. 3.3-2.5, CCPR/C/84/D/879/1999.

⁴²⁴ Para. 3.6, *id.*

⁴²⁵ Para 5.2, *id.*

⁴²⁶ Para. 5.2, *id.*

⁴²⁷ Communication No. 167/1984 (CCPR/C/38/D/167/1984). See para 32.1 of this communication.

communication had no proof that he had been authorised by the rest of the members of his community to act on their behalf before the Committee. To this extent, his claim to represent the interests of other members of his community was rendered inadmissible as per article 1 of the First Optional Protocol to the ICCPR.⁴²⁸

As to the breach of articles 2 (2) and 27 of the Covenant, Canada argued that the author had not been denied the right to practise traditional fishing as an individual and in community with other members of the Hiawatha First Nation. This is because all legal avenues were there to be exhausted. It asserted that the 1923 Williams Treaty set aside reserved areas and other areas outside the reserved areas where First Nations could practise traditional fishing. To this effect, the government came up with regulations to monitor the fishing seasons and quotas to ensure the sustainability of every fish species in the water body. It added that if the Hiawatha First Nation could not fish in one of these areas for conservation reasons, they were legally allowed to obtain a licence to fish in other water bodies just like any other person. All these avenues could be used by the First Nations to practise traditional fishing and transmit their knowledge to the younger generations. Further, the State argued that for the Hiawatha First Nation tourism was their primary source of livelihood, and not fishing which was a recreational activity.⁴²⁹ Canada recalled that the author had been convicted and fined at the Provincial Court for having been found guilty of fishing in a prohibited season. On his appeals up the judicial hierarchy, the Courts emphasised the point that the area where the author was found fishing was one of the areas that his ancestors had ceded to the Crown in the Williams Treaty back in 1923; hence, section 35 of the Canadian Constitution Acts, 1982 which came later did not redeem the rights that were already surrendered.⁴³⁰

The Committee did not find any breach of the provisions of article 27 of the Covenant by the Ontario Fishing Regulations given the avenues available to the author and other members of Hiawatha First Nation to practise their culture.⁴³¹ Generally, the Committee established no violation of any provision of the Covenant by Canada as there was no breach of any fiduciary duty(ies) under the Williams Treaty so far. It was also established that the subsequent control of fishing activities by the Ontario Provincial Government did not breach the right of members of

⁴²⁸ Para. 8.3, CCPR/C/84/D/879/1999.

⁴²⁹ Paras. 9.1-9.4, *id.*

⁴³⁰ Para. 9.5, *id.*

⁴³¹ Paras. 12.5-12.7, *id.*

the Hiawatha First Nation to fully exercise their culture in community with other members of their group. The information presented by the author to the Committee was found insufficient to prove a breach of this right under the Covenant.⁴³²

3.3.4 Committee on Economic, Social and Cultural Rights (CESCR)

The CESCR is another implementation mechanism within the UN human rights system. Unlike other UN Treaty Bodies, this Committee which meets bi-annually was established by the United Nations Economic and Social Council (ECOSOC) Resolution No. 185/17 of May 28, 1985. It is a subsidiary of and derives authority from the ECOSOC.⁴³³ It is composed of eighteen members with recognised human rights expertise. The Committee Members are elected by ECOSOC in a secret ballot, with due regard to equitable geographical distribution and representation of different legal systems, from a list of persons nominated by the States Parties to the ICESCR.⁴³⁴ The Committee was set up to carry out ECOSOC's mandate prescribed in part IV of the ICESCR on its behalf, i.e. monitoring States Parties' implementation of the economic, social and cultural rights enumerated by the ICESCR.⁴³⁵ It was mandated to receive and evaluate each State Party's periodic report.⁴³⁶ Upon consideration of the States Parties' reports, the Committee has from time to time made general suggestions and recommendations pertaining to the States Parties' implementation of the provisions of the ICESCR. As part of assisting ECOSOC to submit reports with general recommendations to the General Assembly and bringing to the attention of other United Nations institutions matters arising from States Parties' reports to obtain necessary technical assistance, the Committee submits to ECOSOC periodic reports on its

⁴³² Paras. 12.11 and 13, CCPR/C/84/D/879/1999.

⁴³³ United Nations: Office of the High Commissioner for Human Rights, Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, 1991, para.6, accessed January 16, 2023, <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet16rev.1en.pdf>.

⁴³⁴ Paras. (b) and (c) of the ECOSOC Resolution 185/17 of 28 May 1985.

⁴³⁵ For more effective monitoring of the implementation of the ICESCR, the Committee was transformed into its current form from what was previously known as the Sessional Working Group of Governmental Experts on Implementation of the International Covenant on Economic Social and Cultural Rights, which was performing more or less the same mandate bestowed upon the Committee. See Para. (a) of the ECOSOC Resolution 185/17 of 28 May 1985.

⁴³⁶ Under Articles 16 and 17 of the ICESCR, the States Parties to the Covenant, undertake an obligation to submit periodic reports to the Committee. This is to be done within two years of the entry into force of the Covenant in a particular State Party and subsequently once in every five years. The reports are to elaborate legal and non-legal actions taken to guarantee enjoyment of the rights provided for under the ICESCR. Further, the reports must indicate the level of implementation of such rights and the associated challenges (if any). See United Nations: Office of the High Commissioner for Human Rights, Fact Sheet No.16 (Rev.1), para. 6, *supra*.

general activities which include the aforementioned recommendations of a general nature based on the States Parties' reports considered within the period in question.⁴³⁷

3.3.4.1 CESCR's General Comments

Over the past twenty years, the Committee has made general comments which particularly touch on indigenous peoples' rights. Some of the comments that are directly relevant to this study are presented below. They span the period from the late 1990s to the present.

3.3.4.1.1 General Comment No. 7 (1997): The Right to Adequate Housing: Forced Evictions (Article 11 (1))

In this general comment, the CESCR noted as a major setback the adverse impact that forced evictions have on vulnerable groups, particularly indigenous peoples, as far as implementation of the Covenant is concerned.⁴³⁸ It considered forced evictions as a gross violation of human rights. The Committee recommended legal protection for persons evicted from their land, referring to the United Nations Conference on Human Settlements held in 1976 (the same year in which the ICESCR entered into force) which emphasised actions to be taken by States to protect people's rights when there is no alternative to relocating them from their habitats.⁴³⁹ In its general comment No. 4 of 1991 on the right to adequate housing, made under Article 11 (1) of the ICESCR in its sixth session, the Committee recommended that all people should be guaranteed security of tenure under the law to protect them from eviction, threats and other related harassment. Despite this earliest recommendation by the Committee, indigenous peoples like the Maasai in Tanzania have been experiencing forced evictions from protected areas and other economically lucrative locations across the country. This has been highlighted in chapter one of this study while stating the problem and is discussed in detail in chapter five of the study which describes the situation of indigenous peoples in Tanzania.

3.3.4.1.2 General Comment No. 12 (1999): The Right to Adequate Food (Article 11)

This general comment, which was made twenty-five years ago, underlined the relationship between the specific right to food and the general right to an adequate standard of living as provided for under Article 11 (1) of the ICESCR. As is the case with the right to water, the

⁴³⁷ Para. (f) of ECOSOC's Resolution 185/17 of 28 May 1985.

⁴³⁸ Para. 10, General comment No. 7 (1997).

⁴³⁹ Para. 2, *id.*

Committee commented that this right, which is comprehensively addressed by the Covenant, has a great role to play in the enjoyment of other rights.⁴⁴⁰ Having accumulated information from States Parties' reports since 1976 when the Covenant entered into force, the Committee in this general comment identified some of the main issues it considered important regarding implementation of the right to adequate food. One of these issues was the definitional aspect of the right. In tackling this issue, among other things, the Committee highlighted the special attention which must be paid to minorities in relation to the right to adequate food. It particularly recommended priority consideration of disadvantaged groups such as indigenous peoples when it comes to the States Parties' duty to ensure accessibility of food to these communities. Specific mention was made of indigenous peoples, among other groups, who have from time to time been deprived of their means of obtaining food through land grabbing and dispossession.⁴⁴¹ Nevertheless, indigenous peoples are yet to fully enjoy this right as they continue experiencing shrinkage of the lands on which they depend for food. Such shrinkage is the result of various activities carried out in their territories by state and non-state actors, such as conservation activities, logging, infrastructural projects and large-scale farming.

3.3.4.1.3 General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12)

The Committee regards health as a fundamental human right essential for the enjoyment of other human rights. In this general comment, the Committee explained that this right includes legally enforceable components, such as the principle of non-discrimination in relation to health facilities, goods and services.⁴⁴² The Committee stressed that health services should be accessible to the whole population, including vulnerable and marginalised groups, such as indigenous peoples.⁴⁴³ Therefore, an inclusive approach to realising this right was promoted by the Committee through health policies, programmes and the adoption of specific legal instruments.⁴⁴⁴

Given the developments that had taken place at the international level with regard to the promotion and protection of indigenous peoples' rights, the Committee proposed functional

⁴⁴⁰ Para. 1, CESCR's General Comment No.12 (1999).

⁴⁴¹ Paras 2-4 and 13, *id.*

⁴⁴² Para. 1, General Comment No. 14 (2000).

⁴⁴³ Para. 12(b) (ii), *id.*

⁴⁴⁴ Para. 1, *id.*

elements that define indigenous peoples' right to health to assist States Parties to the Convention that host indigenous peoples in the implementation of Article 12 of the ICESCR. Some of such elements are respect and inclusion of indigenous peoples' cultural practices in the health sector. This includes recognising their traditional knowledge of medicines, preventive care and healing. Such recognition goes along with the protection of their medicinal plants, minerals and animals that form part of their health practices. Thus, States were advised to provide room and resources for indigenous peoples to participate in designing, delivering and controlling health services. Here, the objective is attaining the highest standard of physical and mental health. In this respect, the Committee condemned activities which deprive indigenous peoples of their access to resources that are crucial to their nutritional and medical practices, such as displacement from their traditional territories. Most importantly, the Committee noted the relationship between the state of health of individual members of an indigenous group and that of the health of the entire indigenous group. Viewing the right to health in a collective dimension, the Committee was of the view that, since indigenous peoples live in a communal setting, a health setback for one of them affects the day-to-day communal activities of the entire group. For instance, in respect of security and food production, collective efforts are usually engaged in by members of indigenous groups to ensure their communal survival.⁴⁴⁵

3.3.4.1.4 General Comment No. 15 (2002): The Right to Water (Articles 11 and 12)

In this general comment, the Committee describes water as a limited natural resource that plays a crucial role in people's lives. As a human right, the Committee links water directly to human dignity and relates fulfilment of this right to the realisation of other rights provided for in the ICESCR, such as rights to an adequate standard of living and the highest attainable standard of health under Articles 11 (1) and 12 (1) of the Covenant respectively.⁴⁴⁶ It notes that whereas the right to water applies to every individual, States Parties to the Covenant ought to direct particular attention to groups, such as indigenous peoples, which habitually face challenges in accessing water.⁴⁴⁷ Thus, in this general comment, the Committee recommends the protection of indigenous peoples' right to access water resources on their ancestral lands and protection of such resources from encroachment. With regard to nomadic communities, some of which are

⁴⁴⁵ Para 27, General Comment No. 14 (2000).

⁴⁴⁶ Paras. 1 and 2, CESCR's General Comment No. 15 (2002).

⁴⁴⁷ Para. 16, *id.*

indigenous communities, the Committee holds the view that they should be guaranteed access to adequate water at their traditional and designated replenishing sites.⁴⁴⁸ Generally, in this general comment the Committee urges States Parties to take practical measures to realise peoples' right to water without any kind of discrimination.⁴⁴⁹

3.3.4.1.5 General Comment No. 21(2009): Right of Everyone to Take Part in Cultural Life (Article 15 (1) (a))

The importance of cultural rights as part of the body of rights and their universal value is recognised by this general comment. The CESCR notes that the protection of cultural rights promotes sustainable multi-cultural social interaction in the world. It further highlights that a person's right to take part in cultural life coordinates with other rights in the ICESCR, such as all peoples' right to self-determination provided for under Article 1 of the Covenant and the right to an adequate standard of living which is covered by Article 11 of the same Covenant.⁴⁵⁰ Paragraph 3 of the general comment specifically recognises indigenous peoples' rights to their cultural institutions, traditional knowledge, ancestral lands and natural resources, as well as development, which are also reflected in ILO C 169⁴⁵¹ and UNDRIP.⁴⁵²

As part of States Parties' obligations in these areas, the Committee was of the view that:

States Parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their

⁴⁴⁸ Para. 16 (d) and (e), CESCR's General Comment No. 15 (2002).

⁴⁴⁹ Para. 1, *ibid.*

⁴⁵⁰ Para 1 and 2 of the CESCR General Comment No. 21 (2009).

⁴⁵¹ See Articles 2 (2) (b), 4 (1), 5 (a), and (b), 7, 8 (1) and (2) and 10 (1), 12, 13-18 of C 169.

⁴⁵² See Articles 5, 8, and 10, 11, 12 and 13 of the UNDRIP.

cultural identity. States Parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.⁴⁵³

In addition, the Committee affirmed that States Parties are obliged to safeguard indigenous peoples' spiritual relationship with the ancestral territories which they traditionally own as well as the resources found therein.⁴⁵⁴

Further, in paragraph 7 of the same general comment, the Committee proposed that the decision to take part in one's cultural life individually or in community with others should be recognised, respected and protected especially for indigenous peoples who exercise this right collectively.

Moreover, in laying down the essential elements for the full realisation of everybody's right to take part in cultural life based on the principle of equality and non-discrimination, the Committee mentioned the aspect of "appropriateness" and how it applies to indigenous peoples. This element refers to the fulfilment of a particular human right in a manner that applies to a given cultural modality or context.⁴⁵⁵

Also, in this general comment, the Committee emphasised the States Parties' duty to ensure fulfilment of indigenous peoples' right to be taught about their own culture in cases where they form minorities in the State. This includes access to their linguistic heritage.⁴⁵⁶ Along the same lines, States Parties were tasked with the obligation to respect and incorporate cultural elements of minority groups, including indigenous peoples, in their educational programmes. The elements which the Committee proposed should form part of the school curricula for all students comprise history and indigenous knowledge, together with the values and aspirations of minority groups. Furthermore, in special schools designed for indigenous peoples, the Committee recommended that the language of instruction should be a relevant indigenous language. Most importantly, the Committee suggested that all educational programmes should

⁴⁵³ Para 36, CESCR General Comment No. 21 (2009).

⁴⁵⁴ Para 49 (d), *id.*

⁴⁵⁵ Para. 16 (e), *id.*

⁴⁵⁶ Para 49 (d), *id.*

strive to be as inclusive as possible of indigenous peoples while taking into account their wishes and the standards set by international human rights law.⁴⁵⁷

As to the indigenous peoples' cultural heritage, traditional knowledge and expressions, the Committee emphasised in this general comment that indigenous peoples have the right to act in association to ensure respect, protection and perpetuation of such elements of their culture. It elaborated that these aspects may be manifested in "their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts." The general comment condemned illegal and unjust exploitation of indigenous peoples' lands and resources by state and non-state entities.⁴⁵⁸ Finally, the Committee expressed the opinion that States Parties to the ICESCR should adhere to the principle of free, prior and informed consent of indigenous peoples in matters affecting the aforementioned cultural aspects and other specific rights.⁴⁵⁹ It insisted that their free, prior and informed consent should be complemented by the engagement of indigenous peoples in the whole process of designing and implementing laws and policies which are likely to affect them.⁴⁶⁰ This obligation is vested upon States Parties to the Convention on Biological Diversity (CBD), as will be discussed below.

Aside from the States Parties' obligation to respect and protect the individual and collective right to participate in culture, the Committee also touched on the issue of promotion of the said right. It asserted that this obligation goes hand in hand with taking the necessary steps to ensure public awareness programmes concerning this right are implemented, especially in rural and other isolated areas that are not prioritised in development programmes.⁴⁶¹ Last but not least, despite the fact that the obligation to protect and promote the rights provided for under the ICESCR is vested upon the States Parties, the Committee made a recommendation that non-state actors such as civil society have the responsibility not to shy away from ensuring effective implementation of the right to participate in cultural life. Hence, States Parties were urged to work hand in hand with non-state actors towards achieving this goal.⁴⁶²

⁴⁵⁷ Para. 27, CESCR General Comment No. 21 (2009).

⁴⁵⁸ Para 50 (c), *id.*

⁴⁵⁹ Para. 37, *id.*

⁴⁶⁰ Para 55 (e), *id.*

⁴⁶¹ Para 53, *id.*

⁴⁶² Para 73, *id.*

3.3.4.1.6 General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

This general comment was adopted by the Committee on Economic, Social and Cultural Rights at its sixty-first session held from 29 May to 23 June 2017. The Committee made this general comment after noting in the States Parties' reports various actors' non-adherence to internationally recognised human rights standards in their business activities.⁴⁶³ The objective was to address the impacts of business activities on peoples' economic social and cultural rights, such as the right to food, clean water, health and housing. The general comment was adopted to clarify the duties of States Parties under the ICESCR on this particular subject so as to prevent further violation of human rights by corporate activities within their jurisdictions.⁴⁶⁴ Among other things, the Committee noted that one of the groups that experience the adverse impacts of business activities in the States Parties to the Covenant is indigenous peoples, specifically when it comes to the implementation of national development projects and exploitation of natural resources. It also pointed out that one of the factors placing indigenous peoples in this situation is the poor role they play in political processes. The Committee described indigenous peoples as politically "disempowered". It argued that this state of affairs leaves them in a disadvantaged position when it comes to decision-making processes, particularly in matters involving eviction from their ancestral lands or restrictions from accessing areas with natural resources on which they depend for survival.⁴⁶⁵

Also, the Committee noted with concern the question of discrimination facing indigenous women and children. It referred to this as "vulnerability within vulnerability". It explained that women and children face discrimination on grounds of gender and age and at the same time as indigenous people. It gave the example of investment-induced evictions or displacements which are likely to expose women and children to multiple dangers including physical and/or sexual violence. The Committee urged the States Parties to the ICESCR to take steps to prevent such repercussions of business activities on women and girls and accommodate gender perspectives in

⁴⁶³ For the purposes of this general comment, business activities means transnational or domestic business activities whether publicly (State) or privately owned, big or small.

⁴⁶⁴ Para. 1 and 2, CESCR General Comment No. 24 (2017).

⁴⁶⁵ Para 8, *id.*

the regulation of business activities. This includes taking into account the general Guidance on National Action Plans on Business and Human Rights, 2016.⁴⁶⁶

In addition, drawing from its General Comment No. 21 of 2009 and UNDRIP, the Committee commented that the obligation of States Parties to respect economic, social and cultural rights is likely to be violated when business interests are unjustifiably prioritised. An example was drawn from investments that necessitate forced evictions in places where “indigenous peoples’ cultural values and rights are associated with their ancestral lands”. Therefore, it stressed that States Parties and businesses must adhere to and “respect the principle of free, prior and informed consent of indigenous peoples about all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired”.⁴⁶⁷

Apart from respecting the aforementioned rights as part of States Parties’ responsibility under the Covenant, this obligation extends to protecting the same rights by ensuring incorporation of all aspects touching on indigenous peoples’ rights into human rights impact assessments while providing avenues for conducting businesses domestically.⁴⁶⁸ This entails open consultation with indigenous peoples’ representatives when human rights due diligence studies to identify potential threats to indigenous peoples’ interests are being conducted. The Committee suggested that consultations should also include possible mitigation strategies in cases of harm to indigenous peoples’ interests, such as arrangements for sharing benefits generated from conducting business activities on indigenous peoples’ territories.⁴⁶⁹

Additionally, the Committee touched on the question of intellectual property while deliberating on the obligation of States Parties to observe the rights set out in the Covenant. It asserted that when designing legal frameworks in respect of intellectual property rights the States Parties should guarantee the right of indigenous peoples to be in charge of their cultural heritage and expressions, and their traditional knowledge, as their intellectual property.⁴⁷⁰

Further, the Committee recommended judicial and non-judicial remedies in cases of infringement of indigenous peoples’ individual and collective rights resulting from business

⁴⁶⁶ Para. 9, CESCR General Comment No. 24 (2017).

⁴⁶⁷ Para. 12, *id.*

⁴⁶⁸ A recommendation was made by the Committee that all information related to impact assessment on indigenous peoples’ territories should be made available to it before actualisation of the planned business activities. See para. 38, CESCR General Comment No. 24 (2017).

⁴⁶⁹ Para. 17, *id.*

⁴⁷⁰ Para. 24, *id.*

activities. It insisted that the said remedies should be not only accessible but also sensitive to indigenous peoples' cultures.⁴⁷¹ This implies formal recognition of indigenous peoples' customary laws, traditions, practices and ownership of their lands and natural resources. Also, the Committee emphasised that all judicial proceedings should be held in a language understood by the indigenous people concerned. Particularly, indigenous peoples should be accorded effective interpreters and other legal aids to secure their interests throughout judicial proceedings. This should go hand in hand with the training of judicial officers on topics related to indigenous peoples' history, values, legal traditions, customs and practices.⁴⁷² Alternatively, the Committee proposed the same approach to non-judicial mechanisms.⁴⁷³

Last but not least, in a very specific way, the Committee denounced threats encountered by human rights defenders who undertake to defend the economic, social and cultural rights of people affected by extractive and development projects. The specific human rights defenders addressed here were indigenous peoples' organisations, leaders and advocates.⁴⁷⁴

3.3.4.1.7 General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Articles 15 (1) (b), (2), (3) and (4))

This general comment was adopted by the Committee in its sixty-seventh session held from 17 February to 6 March 2022. In this general comment, the Committee focuses on everyone's right to enjoy the benefits of scientific progress and its application provided for under Article 15 (1) (b) of the ICESCR. Its core objective is to elaborate the relationship between science and economic, social and cultural rights using the aforementioned specific provision and the rest of the provisions in the same article that relate to science; for instance, the relationship between Article 15 (2) which addresses the States' obligation in respect of conservation, development and diffusion of science and culture and Article 15 (4) which addresses the States Parties' obligation to develop and maintain international contacts and co-operation in the fields of science and culture.⁴⁷⁵

In the specific paragraphs of this general comment, the Committee underlines that special attention ought to be accorded to specific groups that have been subject to systemic

⁴⁷¹ Para 46, CESCR General Comment No. 24 (2017).

⁴⁷² Para. 52, *id.*

⁴⁷³ Para 56, *id.*

⁴⁷⁴ Para. 48, *id.*

⁴⁷⁵ Para. 3, CESCR General Comment No. 25 (2020).

discrimination when it comes to the question of enjoyment of the right to participate in and benefit from science, such as women, persons living with disabilities or in poverty and indigenous peoples.⁴⁷⁶ The Committee notes that “traditional and indigenous knowledge, especially regarding nature, species (flora, fauna, seeds) and their properties, are precious and have an important role to play in the global scientific dialogue”. Hence, States Parties are bound to protect such knowledge.⁴⁷⁷ It adds that indigenous peoples across the globe are entitled to participate in the international and intercultural dialogue and have their inputs included so as to avoid the use of science as a means of cultural imposition. In this regard, the Committee reiterated the States Parties’ obligation to support and respect indigenous peoples’ right to self-determination regarding both education and technology in realising their participation in the said dialogue. Further, it asserted that the same respect is to be extended to indigenous peoples regarding the knowledge they have authored. This goes hand in hand with official consultation to obtain their free, prior and informed consent whenever any research is conducted in respect of their knowledge or in any decision or policy formulated with a resultant impact on them.⁴⁷⁸

3.3.4.1.8 General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights

This general comment was adopted by the CESCR at its seventy-second session held from 26 September to 14 October 2022. The Committee pointed out in this general comment that land not only plays a role in food production but is also the foundation for social, cultural and religious practices, as well as the enjoyment of people’s right to take part in cultural life. It highlights further that indigenous peoples’ spiritual relationship with their land is related to their spiritual ceremonies and, equally important, to their subsistence activities such as herding, hunting and gathering, as well as fishing.⁴⁷⁹ Therefore, land tenure systems which are secure are crucial in the protection of indigenous people’s access to and use of land, and in guaranteeing their sustainable

⁴⁷⁶ Para. 28, CESCR General Comment No. 25 (2020). About 10 years earlier, through its General Comment No. 20 (2009) on non-discrimination in economic, social and cultural rights (Article. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), the Committee commented in para. 18 that it had noted with great concern the persistent increase in formal and substantive discrimination touching a number of rights addressed by the Covenant which affect the affairs of indigenous peoples and ethnic minorities, among other groups.

⁴⁷⁷ Para.39, CESCR General Comment No. 25 (2020).

⁴⁷⁸ Para. 40, *id.*

⁴⁷⁹ Para. 16, CESCR General comment No. 26 (2022).

livelihoods.⁴⁸⁰ The Committee noted, however, that at the time this general comment was made the manner in which land was used and managed did not serve the interests sought to be protected by the Covenant. It cemented this by pointing out that there was a rise in competition for access to and control over land due to various factors, in particular rapid urbanisation.⁴⁸¹ It said that, in its review of the States Parties' reports, it had noted an increasing number of negative impacts on indigenous peoples regarding access to land. This was due to international investment practices, most of which take the form of public-private partnerships between state agencies and foreign private investors.⁴⁸² The Committee pinpointed that for indigenous peoples to freely pursue their right to self-determination economically, socially and culturally⁴⁸³ it is indispensable that they own and have access to their land uninterrupted.⁴⁸⁴ It emphasised that, given indigenous peoples' right to internal self-determination, their collective rights to lands, territories and natural resources ought to be recognised and respected through clear demarcation and protection by the States Parties.⁴⁸⁵ As Articles 2 (2) and 3 of the ICESCR require States Parties to eliminate all forms of discrimination and promote equality domestically, the Commission recommended to the States Parties to review their policies and legislation, particularly in matters related to rights under the Covenant that have a bearing on land issues.⁴⁸⁶ It was the Committee's opinion that such laws and policies should rescue indigenous peoples from encroachment of their land by state and non-state actors for mega investment projects. Also, relocation of indigenous peoples from their land should only take place in extraordinary circumstances with their prior, free and informed consent.⁴⁸⁷ The Committee reiterated what it has always emphasised, namely that the question of free, prior and informed consent is an international legal standard which calls for a holistic process of dialogue and negotiation. This is fundamental in situations where consent is required to make decisions involving the utilisation of lands and resources which are considered "ancestral" by indigenous peoples. The aspect of free

⁴⁸⁰ Para. 1, CESCR General comment No. 26 (2022).

⁴⁸¹ Para. 2 (a), *id.*

⁴⁸² Para. 40, *id.*

⁴⁸³ In this general comment, the Committee was clear that it was specifically dealing with internal self-determination which is relevant to indigenous peoples and ought to be exercised subject to international law and the territorial integrity of States. Under international law, indigenous peoples' collective right to land and traditional territories is recognised by ILO C 169, 1989 and UNDRIP.

⁴⁸⁴ Para. 11, CESCR's General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights.

⁴⁸⁵ Paras. 11 and 19, CESCR's General Comment No. 26 (2022).

⁴⁸⁶ *Id.*, para. 12.

⁴⁸⁷ Para. 16, *id.*

and informed consent accommodates indigenous peoples' active position in influencing the outcome of decision-making processes.⁴⁸⁸

Regarding access to justice in cases of violation of indigenous peoples' rights to land, the Committee was of the view that, for access to justice to be said to have been granted to the indigenous peoples, the process must include their unrestricted access to procedures meant to address the impact of business activities in their territories. Such access should be granted not only in the country of origin of the business organisation concerned but also in the country where such impacts are evident.⁴⁸⁹ In light of this right, the Committee highlighted the role played by regional human rights bodies, specifically the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, in contributing to upholding the rights of indigenous peoples to their traditional lands and territories in cases involving unjustifiable loss of access to land.⁴⁹⁰ It cited *Moiwana Community v. Suriname*⁴⁹¹ and *Saramaka People v. Suriname*⁴⁹² as examples of cases in which the jurisprudence of regional human rights court was developed to emphasise the protection of indigenous peoples' collective rights and their relationship to land. The Committee took note of the fact that such collective rights may also apply to other communities that do not self-identify as indigenous peoples but maintain a similar relationship to their ancestral lands.⁴⁹³ Generally, the Committee emphasised the importance of embracing the concept of communal ownership of land at the national level by the States Parties to the Convention when it comes to dealing with groups like indigenous peoples.⁴⁹⁴ It also urged the traditional institutions dealing with collective tenure systems to ensure equitable and genuine participation of all members of the communities that they represent in all decision-making processes on the use of their collective territories.⁴⁹⁵

In cases of land conflicts involving indigenous peoples' territories, the Committee noted that land conflicts, particularly those related to unequal distribution of land may emanate from factors such as the colonial legacy. This has often left indigenous peoples in independent countries at risk of perpetual conflicts leading to forced displacement as a result of continued

⁴⁸⁸ *Id.*, para. 21, CESCR's General Comment No. 26 (2022).

⁴⁸⁹ Para 60, *id.*

⁴⁹⁰ CESCR's General Comment No. 26 (2022).

⁴⁹¹ Judgment of June 15, 2005, paras. 132–133.

⁴⁹² Judgment of November 28, 2007, para. 86.

⁴⁹³ Para.17, CESCR's General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights.

⁴⁹⁴ *Id.*, para. 127.

⁴⁹⁵ *Id.*, para. 35.

land grabbing and unlawful land dispossession. Consequently, the Committee proposed that the States Parties to the Convention should take steps to resolve long-term land disputes involving indigenous peoples' territories in order to enable sustainable peaceful enjoyment of the rights provided for by the Covenant. In cases of inevitable dispossession, States were urged to have in place compensation programmes to avoid the recurrence of such conflicts.⁴⁹⁶

The Committee also made recommendations to the States Parties on matters related to climate change. It started by acknowledging the adverse impacts of climate change on peoples' access to and use of land. These include land degradation due to floods and desertification due to the rise in temperature levels. Accordingly, the States Parties were recommended to fulfil their duties under international law relating to the reduction of activities which have negative impacts on climate conditions, particularly those agreed upon under the Paris Agreement of 2015. Further, it was recommended that the States Parties should adopt policies to mitigate the effects of climate change. However, the Committee warned the States Parties to avoid adopting climate change mitigation policies that lead to land grabbing on indigenous peoples' territories in the name of implementing reforestation programmes to trap atmospheric carbon dioxide.⁴⁹⁷

3.3.4.1.9 General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Rights (in drafting stage)

Although the discussion on the development of this general comment started at the Committee level way back in 2018,⁴⁹⁸ at the time of completion of this thesis, the CESCR was still in the process of developing it. Processes involving the Committee's formal and informal regional consultations with members of academia, researchers, think tanks, experts, practitioners and civil society organisations from various parts of the world had been completed. This was followed by a General Discussion held at the Committee's 73rd Session in 2023. The General Discussion focused on ten key themes contained in the Issue Paper which was composed by the Committee's Drafting Group as a background document for the preparation of this general

⁴⁹⁶ Para. 48, CESCR's General Comment No. 26 (2022).

⁴⁹⁷ CESCR's General comment No. 26 (2022), para. 56.

⁴⁹⁸ United Nations: Office of the Human Rights Commissioner (OHRC), the Committee on Economic, Social and Cultural Rights, "Day of the General Discussion on the General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Rights", accessed January 15, 2024, <https://www.ohchr.org/en/events/events/2023/day-general-discussion-general-comment-economic-social-and-cultural-rights-and-sustainable-development>.

comment.⁴⁹⁹ These themes were meant to reflect economic, social and environmental aspects, which are the three important pillars of sustainable development.⁵⁰⁰ Number six of the ten key themes is “Indigenous Peoples, Peasants and Other People Working in Rural Areas”. This theme takes cognisance of the fact that indigenous peoples, among other groups, have a direct interest in matters related to economic, social, cultural rights and sustainable development. Therefore, they are worthy of special treatment in the anticipated general comment. This reasoning was linked to the fact that they suffer from environmental degradation caused by violation of the principles of the sustainable development goals. The impacts of this include environmental pollution and loss of biodiversity. These were seen as injurious to the livelihoods of indigenous peoples who depend on natural resources for their survival.⁵⁰¹

Further, this theme recognises the fact that strategies to mitigate the impacts of climate change sometimes have disproportionate impacts on the populations to be protected, particularly on indigenous peoples’ territories. However, it highlights the vital importance of their traditional knowledge in contributing to environmental conservation and sustainable and equitable development.⁵⁰² The Committee finalised the discussion of this theme by taking note of the fact that the specific rights of indigenous peoples are already internationally recognised in international instruments such as UNDRIP. Therefore, the lingering questions that were before the Committee for general discussion concerned the States Parties’ particular obligations towards indigenous peoples with regard to climate change mitigation, adaptation strategies and specific measures to be taken to rid indigenous peoples of the impacts of environmental degradation and loss of biodiversity. In addition, another question to be considered was what specific measures were to be proposed in the intended general comment to facilitate the incorporation of

⁴⁹⁹ United Nations: Office of the Human Rights Commissioner (OHRC), the Committee on Economic, Social and Cultural Rights, “General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Right,” accessed January 15, 2024, <https://www.ohchr.org/en/treaty-bodies/cescr/general-comment-sustainable-development-and-international-covenant-economic-social-and-cultural-rights>.

⁵⁰⁰ CESCR Drafting Group, “Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights,” September 4, 2021, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fcescr%2Fdiscussions%2F2023%2F2023-01-30%2FIssues-Paper-Sustainable-Development-2021-en.docx&wdOrigin=BROWSELINK>.

⁵⁰¹ CESCR Drafting Group, “Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights,” 16.

⁵⁰² *Ibid.*

indigenous peoples' traditional knowledge, cultures and practices in the sustainable development strategies.⁵⁰³

3.3.4.2 Indigenous Peoples' Communications before the CESCR

The Optional Protocol to the ICESCR which was adopted in 2008 and entered into force in 2013 establishes the complaint and inquiry mechanism before the CESCR on violation of rights guaranteed by the Covenant. Under this Optional Protocol, the Committee is vested with the mandate to receive communications only from the States Parties which have ratified the said Optional Protocol and accepted the competence of the Committee to receive such communications.⁵⁰⁴ One of the most remarkable elements of this mechanism is that the Committee allows communications by and on behalf of individuals and groups of individuals. Here, the only requirement to represent a group before the Committee is production of the consent of the represented victim(s) or a thorough justification of the reasons for filing a communication on behalf of the victim(s).⁵⁰⁵ This is an open opportunity for indigenous peoples to approach the Committee through representation with cases concerning the infringement of their collective economic, social and cultural rights. This is because, to a great extent, indigenous peoples are ignorant of the existing mechanisms through which they can enforce their rights. They also have poor or no financial resources to formally pursue legal actions. Hence, most of their claims reach the international adjudicatory bodies through representation by individuals or non-governmental organisations (NGOs).

Unlike its counterpart, the Human Rights Committee (CCPR), the CESCR has so far received very few communications addressing indigenous peoples' rights. This is despite its Optional Protocol's clear provisions allowing representative communications that favour collective claims and the presence of other provisions in the Covenant that apply to indigenous peoples. More than ninety-five per cent of communications filed before it concern individual rights, mostly rights to adequate housing, education, health, satisfactory work conditions, social security and equality before the law.⁵⁰⁶ The first case involving collective rights was in 2022

⁵⁰³ CESCR Drafting Group, "Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights," 16.

⁵⁰⁴ Article 1, Optional Protocol to the Economic, Social and Cultural Rights, 2008.

⁵⁰⁵ Article 2, *id.*

⁵⁰⁶ See United Nations: Human Rights Bodies, "UN Treaty Body Database," accessed February 11, 2023, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en.

when Communication No. 251/2022 was filed before the Committee by the Sami people against Finland alleging violation of articles 1, 2, 6, 7, 11 and 15 of the ICESCR due to the negative impacts on the Sami peoples' reindeer husbandry activities by the mining exploration activities in their territories.⁵⁰⁷ The aforementioned articles provide for the rights to self-determination, non-discrimination, work (which includes the right to earn one's living), just and favourable conditions of work, and an adequate standard of living. A similar communication, i.e. Communication No. 289/2022, was filed against Finland later in the same year. Both of these cases were still pending before the Committee at the time of completion of this study.

The proliferation of specific indigenous peoples' rights mechanisms within the United Nations is the main reason why CESCR receives very communications concerning indigenous peoples. Some of these mechanisms were in operation long before the adoption of the Optional Protocol to ICESCR that establishes CESCR's complaint mechanism via communications. However, CESCR's complaint mechanism remains an open opportunity for indigenous peoples to seek redress for violations of their economic, social and cultural rights.

3.3.5 Committee on the Elimination of Racial Discrimination (CERD)

This human rights mechanism is composed of independent experts charged with the duty of supervising the implementation of ICERD by the States Parties. It does so by examining the States Parties' reports, which must be submitted one year after a State Party accedes to the Covenant, and every two years subsequently. From these reports, the Committee draws conclusions and recommends to the States Parties viable strategies for domestic implementation of the Convention.⁵⁰⁸ Apart from the reporting mechanism, the Committee monitors implementation of the Covenant by admitting complaints from individuals or groups of individuals in the form of communications and inter-state complaints.⁵⁰⁹ It also performs this task through early warnings and urgent procedures, as well as issuing general recommendations in the

⁵⁰⁷ This communication is still pending before the Committee. See United Nations: Human Rights, Office of the High Commissioner, "Table of Pending Cases Before the Committee on Economic, Social and Cultural Rights, Considered under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," accessed February 12, 2023, <https://www.ohchr.org/en/treaty-bodies/cescr/table-pending-cases>.

⁵⁰⁸ United Nations: Office of the High Commissioner, "Committee on the Elimination of Racial Discrimination: Introduction," accessed January 6, 2024, <https://www.ohchr.org/en/treaty-bodies/cerd/introduction>.

⁵⁰⁹ See articles 14 (1) and 11 (1) of ICERD.

course of interpreting the provisions of the Covenant.⁵¹⁰ Below is a glimpse of how indigenous peoples' rights have been accommodated in the aforementioned ICERD implementation mechanisms, particularly through general recommendations (which are of universal applicability to all the States Parties), early warnings and urgent procedures, as well as communications.

3.3.5.1 CERD'S General Recommendations on Indigenous Peoples' Rights

A specific general recommendation by CERD on indigenous peoples' rights was issued on August 18, 1997. This was General Recommendation No. 23 of 1997. In it, the Committee underlined the point that the situation of the indigenous peoples of the world has always been one of the priority concerns in the examination of the States Parties' reports. This is because discrimination against indigenous peoples is one element that falls under the scope of ICERD and every suitable measure to eliminate such discrimination ought to be taken by the States Parties to the Convention.⁵¹¹ Taking into account the fact that such discrimination was still ongoing in various regions of the world,⁵¹² it recommended to the States Parties to recognise and respect indigenous peoples' cultural distinctiveness, their equality of rights and dignity, their identity, and their inclusion in all aspects of public life and decision-making processes, and to ensure suitable conditions for their development which are culturally sensitive, with freedom to take part in their cultural life and recognition and protection of their traditional territories and resources.⁵¹³ Lastly, the Committee called upon States Parties which host indigenous peoples to include in their periodic reports information on the situation of these indigenous peoples in respect of the relevant provisions of the Covenant.⁵¹⁴

On September 29, 2009, CERD issued another general recommendation, i.e. General Recommendation No. 33 of 2009 (CERD/C/GC/33) with the title Follow-up to the Durban Review Conference. The Conference was devoted to a review of the Durban Declaration and Programme of Action which was adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001. The Conference asserted that CERD is the principal international human rights instrument that checks all kinds of racial

⁵¹⁰ United Nations: Office of the High Commissioner, "Committee on the Elimination of Racial Discrimination: Introduction."

⁵¹¹ Para. 1, CERD, General Recommendation No. 23 of 1997.

⁵¹² Para. 3, CERD, *id.*

⁵¹³ Paras. 4 and 5, CERD, General Recommendation No. 23 of 1997.

⁵¹⁴ Para. 6, *id.*

discrimination and related intolerance. The general recommendation urged States Parties to the Convention to be mindful of the actions taken to contain their internal financial crises and insisted that such actions should not lead to intolerance towards indigenous peoples, among other groups.⁵¹⁵

Another general recommendation, i.e. General Recommendation No. 34 of October 3, 2011 (CERD/C/GC/34), was issued in relation to Racial Discrimination against People of African Descent. This general recommendation acknowledges that people of African descent are victims of racism and structural discrimination due to the infamous slavery legacy. Their status is equated to that of indigenous peoples in the sense that, in some circumstances, they suffer from extreme poverty, non-inclusion in decision-making processes, and limited access to quality education and social recognition.⁵¹⁶ The Committee, therefore, made a recommendation to the States Parties to take steps to identify indigenous peoples, among other groups, when conducting demographic surveys.⁵¹⁷ This is one step towards their inclusion in all national development strategies.

3.3.5.2 CERD's Early Warning and Urgent Procedures on Indigenous Peoples' Rights

Under this procedure, the Committee has issued various warnings and provided immediate procedures to be followed in response to the violation of indigenous peoples' rights addressed by ICERD. These have been issued in the form of decisions, statements and (warning) letters as shown below.

3.3.5.2.1 Decisions

Decisions concerning indigenous peoples' rights have been issued to various States Parties to the ICERD. As specific examples, decisions issued against the United States of America, the Philippines and Canada are discussed here.

On April 11, 2006, Decision 1(68)⁵¹⁸ was issued against the United States of America concerning the situation of the Western Shoshone indigenous people who had requested the Committee to intervene in the denial of their right to traditional lands by the State Party. The Committee expressed its concern about the State Party's inaction on its previous concluding

⁵¹⁵ Para. 1 (f), CERD/C/GC/33.

⁵¹⁶ Para. 6, CERD/C/GC/34.

⁵¹⁷ Para. 9, CERD/C/GC/34.

⁵¹⁸ CERD/C/USA/DEC/1.

observations on the same case. It urged the United States to prioritise immediate actions towards resolving the pending situation by initiating a dialogue with the Shoshone indigenous people to obtain a durable solution that is compatible with articles 5 and 6 of ICERD.⁵¹⁹ As a way of recommending the urgent procedure to be taken pending long-term solutions, CERD recommended seizing all plans meant to facilitate privatisation of the Shoshone's ancestral lands in favour of multinational corporations that were seeking to set up extractive industries and exploit natural resources for energy production on these lands. It further recommended that the State Party should stop the imposition of grazing fees and other restrictions that inhibit the Western Shoshone from accessing and using their ancestral territories.⁵²⁰

With regard to the Philippines, alarmed by the listing of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, a former member of the United Nations Permanent Forum on Indigenous Issues, a former member of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, indigenous leaders and other human rights defenders fighting against racial discrimination in the Philippines as alleged affiliates of what was termed a “terrorist organisation”, the Committee issued Decision 1(95) of 8 May 2018 against the State Party.⁵²¹ This Decision urged the State Party to remove these individuals from the list associating them with terrorist activities in order to create a safe space for indigenous peoples' rights advocacy and enjoyment of their rights as provided for by ICERD.⁵²²

In the case of Canada, the Committee issued Decision 1(100) of 13 December 2019 because it was concerned about the State Party's failure to obtain the free, prior and informed consent of indigenous peoples before undertaking large-scale projects in their territories.⁵²³ In this Decision, it called upon Canada to halt construction of the Site C dam, Tran Mountain (Expansion) pipeline and Coastal Gas Link pipeline in the traditional and unceded lands of the West Moberly and Prophet River First Nations, the Secwépemc people and the Wet'suwet'en people until their free, prior and informed consent to such projects had been obtained.⁵²⁴ Further, the Committee urged the State Party to abstain from applying force to evict members of the Secwépemc and Wet'suwet'en peoples from their territories, and to avoid future engagement in

⁵¹⁹ Paras. 5 and 9, CERD/C/USA/DEC/1.

⁵²⁰ Para. 10, *id.*

⁵²¹ CERD, Decision No. 1 (95) of 2018, 1.

⁵²² *Id.*, 2.

⁵²³ CERD, Decision No. 1 (100) of 13 December 2019, 1.

⁵²⁴ *Id.*, 1 and 2.

large-scale projects without obtaining the free, prior and informed consent from the indigenous peoples affected.⁵²⁵

3.3.5.2.2 Statements

As examples of the latest statements addressing indigenous peoples' rights issued by CERD, statements on COVID-19 have been selected. This is to illustrate how the Committee has been dynamic in securing indigenous peoples' rights against discrimination in all conditions. On August 7, 2020, the Committee issued Statement 2 (2020) against Peru following the disturbing spread of COVID-19 amongst the indigenous peoples living in the Amazon region in Peru. Also, the corresponding early response measures and resources at their disposal were found to be poor.⁵²⁶ The Committee called upon the State Party to include indigenous people in all decision-making processes concerning measures to be taken to prevent and address the effects of the pandemic, to prevent the further spread of the virus by prohibiting contact between indigenous people and outsiders, to provide reliable protection to indigenous people who were in involuntary isolation, and to adopt mitigation strategies to address the impacts of COVID-19 on the social, economic and cultural life of indigenous people. Lastly, Peru was recommended to join international efforts to curb the spread of the virus and particularly to seek assistance on better means to approach the pandemic in the context of indigenous peoples' rights.⁵²⁷ This Statement was followed by a general Statement 3 (2020) on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination of the same date. This statement acknowledged that indigenous peoples, especially those living in isolated areas, were vulnerable to COVID-19. It therefore called upon States Parties to the Convention to protect their well-being during the pandemic.⁵²⁸ Along the same lines, CERD issued Statement 2 (2022) on April 25, 2022, on the lack of equitable and non-discriminatory access to COVID-19 vaccines which called on States parties to ensure effective access to COVID-19 vaccines for individuals and groups that are prone to racial discrimination as defined by article 1 of ICERD.⁵²⁹ This call was made following the "disproportionate impact of the pandemic on those groups protected by the Convention" caused,

⁵²⁵ CERD, Decision No. 1 (100) of 13 December 2019, 1 and 2.

⁵²⁶ CERD, Statement 2 (2020): Peru, 1.

⁵²⁷ CERD, Statement 2 (2020): Peru, 2.

⁵²⁸ CERD, Statement 3 (2020), 3.

⁵²⁹ CERD, Statement 2 (2022), 1 and 4.

among other things, by the effects of structural discrimination and inequalities rooted in slavery, colonialism and apartheid.⁵³⁰

3.3.5.2.3 Warning Letters

Over the years, CERD has issued warning letters to prevent the worsening of the situation of indigenous peoples as one of the groups protected by ICERD. For example, on March 7, 2014, a warning letter was issued to Kenya regarding the situation of the Sengwer indigenous people who had been facing forceful evictions from the Cherangany Hills by the Kenya Forests Services (KFS). This information was brought to the attention of the Committee by NGOs. The Committee's letter was issued to the State Party following its lack of response to the previous letter issued by the Committee on the same matter about one year previously.⁵³¹ The Committee advised Kenya to adhere to its General Comment No. 23 of 1997 on the rights of indigenous peoples which urges States Parties to ICERD to protect indigenous peoples' rights to their traditional territories. It also requested the State Party to have an open dialogue with the Sengwer and compensate the victims of the aforesaid evictions. Lastly, it advised Kenya to respond to its previous letter and report on the implementation of these requests in its subsequent reports.⁵³²

Another letter was issued to France, on August 29, 2019, concerning the impacts of the "Montagne d'Or" mining project on the indigenous people of French Guyana. The project was alleged to have been established without adequately consulting the indigenous people. Therefore, there was no free, prior and informed consent to the project on their part.⁵³³ In this letter, the Committee communicated its persistent concern about the absence of measures taken to ensure genuine dialogue that would amount to obtaining the indigenous people's free, prior and informed consent to the "Montagne d'Or" project.

In another case, the Committee issued a warning letter to Cameroon on December 8, 2023. This was to bring to the attention of the State Party the situation of the Bagyeli people concerning the development of a palm oil plantation established by the Cameroun Vert S.A. (CamVert) on their traditional territories. The Committee warned the State Party that the concession granted to Cameroun Vert S.A. (CamVert) to undertake such a project was approved

⁵³⁰ CERD, Statement 2 (2022), 2.

⁵³¹ CERD, Warning Letter to Kenya, March 7, 2014, 1.

⁵³² *Id.*, 2.

⁵³³ CERD, Warning Letter to France, August 29, 2019.

neither with the free, prior and informed consent of the Bagyeli nor with just and equitable compensation. Ultimately, the project was likely to cause them irreparable loss of their traditional land to which their culture and livelihood are attached.⁵³⁴ Cameroon was called upon to devise practical and legal measures to remedy the situation. This included cancelling the concession to give room for adequate consultation with the Bagyeli to obtain their free, prior and informed consent to the project, and adopting legal measures to ensure security of tenure for indigenous peoples on their traditional lands.⁵³⁵

As a way of summing up this section, it can be noted that this Committee has issued a series of warning letters to Tanzania regarding the Maasai indigenous rights in Ngorongoro District. These are discussed in chapters five and six of this thesis.

3.3.6 Convention and Committee on the Rights of the Child (CRC)

3.3.6.1 Convention on the Rights of the Child

Primarily, the Convention on the Rights of the Child, 1989 provides for universal children's rights. Nevertheless, it has a bearing on the specific rights of indigenous children. For instance, article 17(d) of the Convention which provides for children's right to information requires the mass media to meet the specific linguistic needs of children belonging to minority groups or indigenous communities. Also, article 29 of the Covenant, which provides for the States Parties' duty to implement children's right to education, urges the States Parties to ensure that the education given to children prepares them to be responsible members of society in the spirit of friendship, understanding and tolerance of all peoples including indigenous peoples.⁵³⁶ Most importantly, article 30 of the Convention insists that, in States where indigenous peoples are present, a child belonging to an indigenous community is entitled to enjoy his or her culture, religion and language in community with other members of his or her community.

3.3.6.2 Committee on the Rights of the Child

This Committee was established under article 43 of the Convention on the Rights of the Child to oversee its implementation. Among other implementation mechanisms, the Committee has issued general comments on various issues pertaining to the rights of children that call for the

⁵³⁴ CERD, Warning Letter to Cameroon, December 8, 2023, 1.

⁵³⁵ *Id.*, 2.

⁵³⁶ Article 29 (d) of the International Convention on the Rights of the Child, 1989.

attention of States Parties to the Convention. Some comments are specific to indigenous children and others which address different thematic areas have a bearing on indigenous children's rights. As examples, the following general comments have been selected.

3.3.6.2.1 General Comment No. 11 (2009): Indigenous Children and their Rights under the Convention

Making reference to the above specific provisions which provide for indigenous children's rights, this general comment acknowledges that indigenous children require special attention to fully implement the provisions of the Convention on the Rights of the Child. It was developed taking into account the fact that indigenous children experience severe discrimination in aspects such as access to education and health care, something that is contrary to article 2 of the Convention.⁵³⁷ Here, the Committee recommends to the States Parties that special measures should be taken to meet the particular needs of indigenous children who are prone to face various layers of discrimination. It recommends further to the States Parties to treat cases related to indigenous children in rural areas differently from those in urban areas.⁵³⁸

When developing this general comment, the Committee noted that when it comes to protecting their best interest, this principle must be conceived in both its individual and collective dimensions. It noted further that children belonging to indigenous communities have not been receiving the attention that they deserve because their specific needs have been obscured by other concerns related to their indigenous communities at large. It added that in applying the principle of their best interest to indigenous children, one should consider the collective cultural rights of the community to which the children belong. However, it emphasised that the best interest of an indigenous group should not be preferred at the expense of the best interest of indigenous children.⁵³⁹

Finally, States Parties were recommended to adopt a human rights-based approach in tackling matters related to indigenous children's rights and to borrow a leaf from international indigenous peoples' rights standards such as ILO C169 and UNDRIP. Also, they should include

⁵³⁷ Para. 5, CRC/C/GC/11, February 12, 2009.

⁵³⁸ Para. 29, CRC/C/GC/11.

⁵³⁹ Para. 30, *id.*

in their periodic reports specific information concerning the implementation of indigenous children's rights and seek support from international agencies on this matter where necessary.⁵⁴⁰

3.3.6.2.2 General Comment No. 16 (2013): State Obligations Regarding the Impact of the Business Sector on Children's Rights

In this general comment, referring to children's inherent right to life, survival and development provided for under article 6 of the Convention, the Committee underlined that activities related to the operations of business enterprises have the potential to cause adverse impacts on indigenous children. For instance, the question of environmental contamination degrades children's rights to health, food and safe and clean drinking water. Also, the alienation of traditional lands in favour of large-scale investments deprives indigenous peoples of their means of subsistence, something that affects children's mental and physical well-being in their developmental stages.⁵⁴¹ In relation to this, the Committee addressed children's right to their own opinion in matters that affect them as provided under article 12 of the Convention. It urged States Parties to grant opportunities to children belonging to indigenous groups to air their views when developing business-related laws and policies which are likely to affect them. This is especially important because indigenous children are more likely to face impediments in the quest to make their voices heard.⁵⁴²

3.3.6.2.3 General Comment No.26 (2023) on Children's Rights and the Environment with a Specific Focus on Climate Change

This general comment recognises the impacts of loss of biodiversity, environmental degradation, contamination and climate change on indigenous children. It also notes that such impacts have discriminatory effects on children belonging to indigenous groups.⁵⁴³ They tend to suffer more due to the nature of the livelihoods pursued by their communities that solely depend on nature for survival. In connection with this, the Committee underlines that attempts to mitigate the effects of climate change will have discriminatory effects on children belonging to indigenous groups if these attempts involve evicting such communities from their ancestral territories. Here, they lose their shelter and means of subsistence and are reduced to a poor standard of living.

⁵⁴⁰ Paras 81 and 82, CRC/C/GC/11.

⁵⁴¹ CRC/C/GC/16, April 17, 2013, C.

⁵⁴² CRC/C/GC/16, April 17, 2013, D.

⁵⁴³ Para. 14 and 58, CRC/C/GC/26, August 22, 2023.

Therefore, States Parties to the Convention are urged to provide alternative shelter for indigenous communities before evicting them in order to give way to large-scale development projects, energy production or climate change mitigation and adaptation measures. The Committee highlights the importance of making an impact assessment in relation to indigenous children's rights before implementing such projects.⁵⁴⁴ It also insists that the rights of indigenous and non-indigenous children require comparable measures. Last but not least, the Committee proposes that as indigenous children are adversely impacted by the effects of climate change and environmental pollution, they should be integrated in advocating for the application of traditional knowledge in climate change mitigation and adaptability alongside their families.⁵⁴⁵

Other general comments by CRC that touch on indigenous children's affairs are General Comment No. 24 (2019) on Children's Rights in the Child Justice System, General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence and General Comment No. 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts.

3.3.7 Committee on the Elimination of All Forms of Discrimination against Women

This Committee was established by the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) to monitor progress in the implementation of the Convention.⁵⁴⁶ Notably, CEDAW does not have a single provision providing for the rights of indigenous women. Nevertheless, the CEDAW Committee has on several occasions implied that the rights of indigenous women and girls are included in the provisions of the Convention when issuing general recommendations to the States Parties to CEDAW. Firstly, it has issued a general recommendation on indigenous women, i.e. General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, which underlines the obligation of the States Parties to protect the rights of indigenous women and girls as implied in articles 1 and 2 of the Convention. Secondly, it has developed general comments on specific dimensions of indigenous women and girls' rights to which particular attention must be paid by the States Parties. These dimensions are prevention of gender-based violence against indigenous women and girls, the right to participate in political processes and public life, and the right to education, work, culture, food,

⁵⁴⁴ Para. 49, CRC/C/GC/26, August 22, 2023.

⁵⁴⁵ Para. 58, *id.*

⁵⁴⁶ See Article 17 (1) of CEDAW.

water, a clean and healthy environment, land, territories and natural resources. Before issuing this general recommendation, the CEDAW Committee had already issued general recommendations on other themes touching on indigenous women's rights, such as General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. This general recommendation addresses the particular needs of indigenous women, among other groups of vulnerable women, with regard to gender-sensitive responses to climate change disasters. Others are General Recommendation No. 36 (2017) on the right of girls and women to education which addresses the equal right of indigenous girls to access education, General Recommendation No. 34 (2016) on the rights of rural women which includes indigenous women, and General Recommendation No. 24 (1999) on women and health which calls for special attention to be directed to women belonging to vulnerable and disadvantaged groups, such as indigenous women, to mention but a few.

3.3.8 Indigenous Peoples' Special Mechanisms under the United Nations

In the light of the above discussion, it is clear that the instruments for the protection of indigenous peoples at the United Nations are built on the premises of human rights, a healthy environment and sustainable development. This view is shared by the late Erica-Irene Daes, the founding Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations.⁵⁴⁷ Thus, apart from the implementation mechanisms discussed above, the UN has established three specific mechanisms charged with overseeing indigenous peoples' issues. These specific mechanisms are the Permanent Forum on Indigenous Issues (UNPFII), Special Rapporteur on the Rights of Indigenous People (UNSRIP) and Expert Mechanism on the Rights of Indigenous Peoples (UNEMRIP). This attests to the international community's commitment to ensuring the global promotion, protection and fulfilment of indigenous peoples' rights.

Before delving deeper into these three mechanisms, it is imperative to first highlight the earliest UN initiative to have a specific organ tasked with indigenous peoples' affairs. This initiative can be traced back to 1982 when the Working Group on Indigenous Populations (UNWGIP) was formed. It was one of six working groups established to act as subsidiary organs

⁵⁴⁷ Erica-Irene Daes, "A United Nations Permanent Forum for the World's Indigenous Peoples- A Global Perspective" in *International Human Rights Monitoring Mechanisms*, Gudmundur Alfredson *et al* eds. (The Hague: Kluwer Law International, 2001), 371-379, at p.372.

to the Sub-Commission on the Promotion and Protection of Human Rights which was the principal arm of the defunct United Nations Commission on Human Rights acting under the Human Rights Economic and Social Council.⁵⁴⁸ It was primarily tasked with mapping the developments that had taken place so far regarding the promotion and protection of indigenous peoples and monitoring their evolution. This was also an opportunity for indigenous peoples to bring their agenda into the UN.⁵⁴⁹ However, following the establishment of UNPFII in 2000 and the reforms that came in with the founding of the United Nations Human Rights Council (UNHRC) in 2006 (which replaced the United Nations Commission on Human Rights), the WGIP's mandate ceased in 2007.

3.3.8.1 Permanent Forum on Indigenous Issues (UNPFII)

The proposal to have a permanent forum for indigenous peoples within the UN system was for the first time put forward at the World Conference on Human Rights held in Vienna in 1993. This Conference adopted the Vienna Declaration and Programme of Action on June 25, 1993 whose paragraph 32 proposed that the General Assembly should proclaim an international decade of the world's indigenous people. This paragraph further urged consideration of the establishment of a permanent forum for indigenous people. This proposal was implemented through adoption of the UN General Assembly's Resolution 48/163 of December 1993.⁵⁵⁰ Among other things, this Resolution requested the UN Commission on Human Rights to consider and prioritise the establishment of a permanent forum for indigenous people within the United Nations system.⁵⁵¹ The UN Human Rights Commission adopted this proposal in 1994 through Resolution 1994/28.

Finally, UNPFII was established in 2000 by the Economic and Social Council (ECOSOC) Resolution 200/22 with the mandate to deal with six thematic areas of indigenous peoples' rights, i.e. culture, economic and social development, education, environment, health and human rights. It is composed of sixteen members from various UN Member States. Half of

⁵⁴⁸ United Nations: Department of Economic and Social Affairs: Indigenous Peoples, "Indigenous Peoples at the United Nations: Working Group on Indigenous Populations (WGIP)," accessed January 21, 2024, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

⁵⁴⁹ United Nations: Department of Economic and Social Affairs: Indigenous Peoples, "Indigenous Peoples at the United Nations: Working Group on Indigenous Populations (WGIP)."

⁵⁵⁰ International Decade of the World's Indigenous People, G.A. res. 48/163, 48 U.N. GAOR Supp. (No. 49) at 281, U.N. Doc. A/48/49 (1993).

⁵⁵¹ Paragraph 20, *ibid.*

the members are nominated by Governments and half of them are elected by ECOSOC following thorough consultations. The members dispense their duties in the Forum in their individual capacities. In implementing its mandates, UNPFII serves as a high-level advisory organ to ECOSOC, providing it with expert opinions and recommendations on matters related to indigenous peoples. It does the same for other UN agencies, funds and programmes. Further, it works to promote, raise awareness of, integrate and coordinate indigenous issues activities within the UN system generally. Most importantly, it supervises the implementation of UNDRIP. The Forum meets for ten days annually at the UN Headquarters or at any other place that it deems fit. The operations of this mechanism are backed by the Trust Fund on Indigenous Issues.⁵⁵²

3.3.8.2 Special Rapporteur on the Rights of Indigenous Peoples (UN-SRRIP)

After the establishment of UNPFII in 2000, the international community made efforts to secure the rights of indigenous peoples globally. The UN appointed the first Special Rapporteur on the Rights of Indigenous Peoples in 2001 under the framework of the Special Procedures of the then UN Commission on Human Rights for which independent human rights experts were elected with mandates to report and advise on human rights from a thematic or country-specific perspective. Currently, mandate-holders under the Special Procedures of the Human Rights Council are elected for a three-year term which is renewable once.⁵⁵³ They execute their tasks by conducting country visits, sending communications to relevant UN Member States or other responsible bodies in cases of reported human rights violations or matters of a general nature. They also participate in the development of various human rights standards. Further, they offer advice in matters related to technical cooperation in human rights matters, as well as taking part in advocacy and raising public awareness on human rights topics.⁵⁵⁴

Specific to indigenous peoples, the SRRIP is tasked by the Human Rights Council (before the Commission on Human Rights) with conducting studies on specific themes concerning indigenous peoples in order to identify issues of major concern regarding indigenous peoples' rights and provide recommendations for improvement of their situation. The Rapporteur

⁵⁵² United Nations: Department of Economic and Social Affairs (Social Inclusion), "United Nations Permanent Forum on Indigenous Issues (UNPFII)," accessed January 21, 2024, <https://social.desa.un.org/issues/indigenous-peoples/unpfii>.

⁵⁵³ United Nations, Office of the High Commissioner on Human Rights, "Special Procedures of the Human Rights Council," access January 21, 2024, <https://www.ohchr.org/en/special-procedures-human-rights-council>.

⁵⁵⁴ *Ibid.*

is also charged with tackling specific cases of violation of indigenous peoples' rights in various regions of the world, as well as generally reporting on the situation of indigenous peoples worldwide.⁵⁵⁵

In recent years, the Rapporteurs have taken up specific themes related to “attacks and criminalisation of indigenous human rights defenders, implementation of domestic laws and international standards to protect indigenous rights, relationship between formal state law and customary indigenous law, international norms concerning indigenous peoples, autonomy and self-governance.”⁵⁵⁶

Additionally, the SRRIP has the duty to identify and promote best practices in relation to the implementation of indigenous peoples' rights by the UN Member States. These include working to ensure domestic administrative, legal and institutional reforms that incorporate the standards set by the international instruments and UNDRIP by soliciting the financial and political will of the Member States.⁵⁵⁷ The UN-SRRIP's activities are supported by the Office of the (United Nations) High Commissioner for Human Rights (OHCHR).⁵⁵⁸ Since the appointment of the first Rapporteur in 2001 by the Commission on Human Rights, the mandate has been renewed three times, in 2004 by the Commission on Human Rights, in 2007 and 2022 by the Human Rights Council.⁵⁵⁹ The current SRRIP holds the mandate under the Human Rights Council Resolution 51/16 of 2022.

3.3.8.3 Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

After the establishment of the UN Human Rights Council in 2007, replacing the UN Commission on Human Rights, the Working Group on Indigenous Populations that was affiliated to the Commission was discontinued and replaced by the Expert Mechanism on the Rights of Indigenous Peoples. EMRIP was set up as a subsidiary body to the Human Rights

⁵⁵⁵ United Nations: Office of the High Commissioner for Human Rights, “Special Rapporteur on the Rights of Indigenous People,” accessed January 21, 2024, <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

⁵⁵⁶ United Nations: Office of the High Commissioner for Human Rights, “About the Mandate: Special Rapporteur on the Rights of Indigenous People,” accessed January 21, 2024, <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/about-mandate>.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ United Nations, Office of the High Commissioner on Human Rights, “Special Procedures of the Human Rights Council,” *supra*.

⁵⁵⁹ United Nations: Office of the High Commissioner for Human Rights, “About the Mandate: Special Rapporteur on the Rights of Indigenous People,” *supra*.

Council through the Human Rights Council's Resolution 6/36 to provide thematic advice to the Council via studies and research as it directs. The Expert Mechanism offers the Council recommendations for approval. It is composed of five independent experts on indigenous peoples' issues who are appointed by the Human Rights Council. It meets annually (usually in July) to deliberate on matters concerning indigenous peoples' affairs. The meeting is attended by the five experts, the Special Rapporteur on the Rights of Indigenous Peoples and one representative from the Permanent Forum on Indigenous Issues in order to ensure coordination between the three UN indigenous peoples' rights mechanisms. Representatives from the UN Member States, intergovernmental organisations, indigenous peoples' organisations, civil society, academia and indigenous peoples also take part in these meetings. The participation of these representatives is facilitated by the Voluntary Fund for Indigenous Populations upon successful application.⁵⁶⁰

As the latest development, the Expert Mechanism's mandate was revised in 2016 through resolution 33/25 which tasked it with providing the Council with expert opinions on implementation of the provisions of UNDRIP. Also, it was charged with assisting the UN Member States, upon their request, in achieving the promotion, protection and fulfilment of the rights of indigenous peoples in accordance with UNDRIP.⁵⁶¹

In all of its engagements with stakeholders such as international organisations, national human rights institutions, civil society and indigenous peoples, EMRIP has always insisted on creating room for indigenous peoples to participate in decisions that affect them.⁵⁶²

3.3.9 Indigenous Peoples' Affairs in Non-human Rights International Instruments

This section addresses international agreements which do not deal primarily with human rights but which have a bearing on the rights of indigenous peoples in some of their provisions.

⁵⁶⁰ United Nations: Department of Economic and Social Affairs, "Indigenous Peoples of the United Nations: Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)," accessed January 21, 2024, <https://social.desa.un.org/issues/indigenous-peoples/indigenous-peoples-at-the-united-nations>.

⁵⁶¹ United Nations: Office of the High Commissioner for Human Rights, "About the Mandate: Expert Mechanisms on the Rights of indigenous Peoples," accessed: January 21, 2024, <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/about-mandate>.

⁵⁶² *Ibid.*

3.3.9.1 The Convention on Biological Diversity (CBD), 1992

This Convention was adopted by the UN Member States with the objective of ensuring conservation of biological diversity and utilisation of its components in a sustainable manner. It was also meant to ensure equitable and fair apportioning of benefits accruing from exploitation of genetic resources,⁵⁶³ which includes unimpeded access to such resources.⁵⁶⁴ The preamble to the Convention recognises the exceptional dependence of indigenous peoples on biological resources as they lead a traditional life. It also takes note of the importance of ensuring indigenous peoples' enjoyment of the benefits of sharing traditional knowledge as a contribution to the sustainability of biological diversity⁵⁶⁵ and its components.⁵⁶⁶

Hence, in providing for *in-situ* conservation, Article 8 (j) of the Convention places an obligation on each Contracting Party to respect, protect and uphold indigenous peoples' knowledge, practices and innovations as much as possible. It points out that such elements form part of their daily life and are significant in ensuring sustainable utilisation of biological resources.⁵⁶⁷ It also emphasises the involvement of indigenous peoples in the application of their knowledge, as well as the equitable distribution of benefits arising from utilisation of such knowledge. However, the Convention bestows this duty upon the Contracting Parties subject to the provisions of their national legislation. This can create miscarriages in the domestic implementation of the relevant provision if there are national laws that inhibit its full realisation.

3.3.9.1.1 Implementation of the CBD

The Conference of Parties (COP) to the CBD oversees implementation of the Convention through the decisions it renders at its periodic meetings.⁵⁶⁸ Such decisions are reached by considering recommendations made by special mechanisms established by the COP to support implementation of the Convention. These mechanisms are the Ad Hoc Open-ended Working

⁵⁶³ According to Article 2 of the CBD, genetic resources entails "...genetic material of actual or potential value."

⁵⁶⁴ Article 1 of the Convention on Biological Diversity, 1992.

⁵⁶⁵ Article 2 of the CBD defines "biological diversity" to mean "...variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems."

⁵⁶⁶ Para. 12, preamble to the Convention of Biological Diversity, 1992.

⁵⁶⁷ Biological resources are defined to include "... populations, or any other biotic component of ecosystems with actual or potential use or value to humanity." See Article 2 of the Convention on Biological Diversity.

⁵⁶⁸ UNEP, "Conference of Parties (COP): Background and Status," accessed March 18, 2023, <https://www.cbd.int/cop/>.

Group on Review of Implementation of the Convention on Biological Diversity (WGRI) and the Subsidiary Body on Implementation (SBI).

(a) The WGRI

The WGRI was established by the COP in 2004 through paragraph 23 of Decision VII/30 of February 2004 made at the COP's seventh meeting held in Kuala Lumpur. The Working Group was asked to evaluate progress made in the implementation of the CBD, its Strategic Plan and resultant achievements aimed at realising the 2010 Biodiversity target. This included conducting a review on the impacts and effectiveness of mechanisms established to engineer implementation of the Convention, such as the meetings of the Conference of Parties, functioning of the Secretariat and national focal points, and considering means to overcome the obstacles identified.⁵⁶⁹ Following its establishment, the WGRI held a total of five meetings before it was replaced by the SBI.

The fifth meeting of the WGRI was held in Pyeongchang in the Republic of Korea from June 16 to 20, 2014. This meeting was attended by Parties and non-party stakeholders as observers. Amongst the observers, there were representatives from indigenous peoples' international, regional and national entities and organisations. These included the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Indigenous Forum on Biodiversity (which included the Indigenous Women's Biodiversity Network), the Centre for Support of Indigenous Peoples of the North/Russian Indigenous Training Centre, the Indigenous Information Network and the Union of Indigenous Nomadic Tribes of Iran.⁵⁷⁰ At this meeting, on behalf of other indigenous organisations, the representative of the International Indigenous Forum on Biodiversity highlighted how indigenous peoples have been custodians of biodiversity since time immemorial. She explained how the loss of biodiversity negatively affects their livelihoods and leads them to poverty. She then proposed that state and non-state investment projects should be conducted very cautiously in the indigenous peoples' territories. She further acknowledged the efforts taken by Parties to the CBD to facilitate the participation of indigenous peoples' representatives in such a forum and the number of capacity-building sessions arranged for

⁵⁶⁹ Para. 23, UNEP, 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting. Strategic Plan: Future Evaluation of Progress', UNEP/CBD/COP/DEC/VII/30, dated 13 April 2004, at p.5.

⁵⁷⁰ UNEP, *Report of the Ad Hoc Open-Ended Working Group on Review of Implementation of the Convention on the Work of its Fifth Meeting*, NEP/CBD/COP/12/4, (2014), 2.

indigenous peoples' representatives. She proceeded to applaud the decision of the Global Environment Facility (GEF) to set up an indigenous peoples' advisory group and pleaded for increased financial support and inclusion of indigenous peoples and local communities in all GEF's meetings.⁵⁷¹

The decision reached by the Working Group at this meeting emphasised the need to ensure the full participation of indigenous peoples in the process of improving the efficiency of structures and processes under the Convention and its Protocols.⁵⁷² Therefore, the Working Group urged the developed countries which are Parties to the CBD to enhance their financial contributions to the applicable voluntary trust funds to facilitate indigenous peoples' participation in this process.⁵⁷³ It further requested the Secretariat to hold regional workshops for national focal points on the Convention and its respective Protocols. It was stressed that such workshops should also be attended by the indigenous peoples amongst the key stakeholders in order to share lessons and experiences in the implementation of the national biodiversity action plans and strategies.⁵⁷⁴ Also, regarding stakeholders' engagement, the Working Group recalled the COP's decision X/2 on the adoption of the Strategic Plan for Biodiversity 2011-2020, specifically, paragraph 3 (a) which provides for opening up participation of stakeholders from all levels, including indigenous peoples, in fulfilment of the Strategic Plan.⁵⁷⁵

On the matter of conservation of biodiversity for development, the Working Group took note of the fact that indigenous peoples have since time immemorial taken part in the conservation of biodiversity and have lived in harmony with nature as they practise their traditional livelihoods.⁵⁷⁶ Hence, it encouraged the Parties to the CBD to incorporate biodiversity into their poverty eradication and sustainable development strategies. It also urged them to promote development and biodiversity policies and projects which seek to empower indigenous peoples, amongst other groups, who solely rely on nature and its biodiversity for the sustainability of their livelihoods. The Working Group also encouraged the Parties' governments to protect indigenous peoples' conserved territories. Further, governments were urged to use a rights-based approach in guaranteeing indigenous peoples' full participation in decision-making

⁵⁷¹ Para. 22, NEP/CBD/COP/12/4, 6.

⁵⁷² Para.5, NEP/CBD/COP/12/4, 24.

⁵⁷³ Para. 6, *id.*

⁵⁷⁴ Para 17(b), *id.*, 26.

⁵⁷⁵ *Id.*, p.33.

⁵⁷⁶ *Id.*, p. 38.

processes in accordance with international standards and domestic human rights legislation. Finally, the Parties and non-Party stakeholders were urged to act towards overcoming obstacles that hinder the implementation of decisions taken by the Conference of the Parties.⁵⁷⁷

Regarding the incorporation of biodiversity into the post-2015 United Nations development agenda and sustainable development goals, the Working Group urged indigenous peoples, amongst other stakeholders, to engage in conversations which reflect on the objectives of the CBD, its associated strategic plans, targets and 2050 vision.⁵⁷⁸

In an annex to the COP's decision X/2 titled Guidance for Integration of Biodiversity and Poverty Eradication, the Working Group suggests that the incorporation of biodiversity in poverty eradication strategies ought to consider, among other things, cross-cutting issues applying to groups like indigenous peoples. It elaborates that this can be achieved by maintaining a common understanding that loss of biodiversity is not only a problem but also an opportunity to achieve wider socio-economic goals while attaining a healthy environment and thriving society. This was said to be a practical approach to overcoming the ever-changing environmental and socio-economic conditions affecting groups like indigenous peoples.⁵⁷⁹ Nevertheless, the Guidance was to be implemented depending on the Parties' varying national visions, priorities and situations on the ground.⁵⁸⁰ Potentially, this creates room for sidelining the inclusion of indigenous peoples' affairs in the whole process of integrating biodiversity into poverty eradication and development strategies. However, the Guidance suggests the implementation of long-term measures to mitigate the loss of biodiversity by promoting land management transparency and access to natural resources by indigenous local communities and marginalised groups. Land rights and utilisation of natural resources are the areas where most indigenous peoples of the world have struggled to maintain control against their governments. The Guidance imposes upon Parties an obligation to continue building the capacity of indigenous peoples and other stakeholders regarding the conservation of biological diversity, and to report such

⁵⁷⁷ Paras, NEP/CBD/COP/12/4, 5-8

⁵⁷⁸ Para. 1, NEP/CBD/COP/12/4, 40.

⁵⁷⁹ Para 3, Chennai Guidance for the Integration of Biodiversity and Poverty Eradication (Annex) to NEP/CBD/COP/12/4, p.41.

⁵⁸⁰ Para 4., Chennai Guidance, NEP/CBD/COP/12/4, p.41, at p.41.

initiatives and their capacity-building needs, as well as their priorities in their national strategies.⁵⁸¹

(b) The SBI

The SBI was established by the COP by decision XII/26 at its twelfth meeting held in Pyeongchang in the Republic of Korea from October 6 to 17, 2014. It replaced the WGRI and undertook its main tasks, as well as additional tasks such as spearheading strategic actions to accelerate implementation of the CBD and its protocols.

Since its establishment, the SBI has held several meetings, one of which was held in Geneva, Switzerland from March 14 to 29, 2022. The Report of this meeting contains recommendations in light of a review of progress made in the implementation of the CBD and the Strategic Plan for Biodiversity 2011-2020. Some of the recommendations make reference to indigenous peoples in the sense that it welcomes States Parties' efforts to incorporate indigenous peoples' traditional knowledge and customary sustainable use of biodiversity.⁵⁸² Further, the same recommendations encourage increased participation of indigenous peoples in developing and implementing national biodiversity action plans.⁵⁸³ Nevertheless, the report noted with great concern that, despite all efforts to ensure that indigenous peoples and local communities are fully engaged in ensuring customary sustainable use of natural resources, this aspect is not sufficiently reflected in many national biodiversity strategies and action plans or in the implementation of the Convention generally.⁵⁸⁴ Hence, the Parties and the Executive Secretary were advised to organise national and international dialogues with indigenous peoples and other stakeholders to lay out plans for the improvement of this particular shortcoming and reflect on the progress of implementing the 2020 global diversity framework.⁵⁸⁵

3.3.9.1.2 Protocols to the Convention on Biological Diversity

The Convention on Biological Diversity is complemented by two Protocols named the Cartagena Protocol on Biosafety, 2000 and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on

⁵⁸¹ Paras. 1-2, UNEP/CBD/COP/12/4, pp. 54-55.

⁵⁸² Section I, Paras. 2 and 3, UNEP, Report of the Subsidiary Body on Implementation on its Third Meeting, CBD/SBI/3/21, dated 16 May 2022, p.4.

⁵⁸³ Para. 4, *id.*

⁵⁸⁴ Para. 7, *id.*

⁵⁸⁵ Para. 10, *id.*

Biological Diversity, 2010. Both of these Protocols have a bearing on indigenous peoples' interests and rights as discussed below.

(a) Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000

The Conference of Parties to the CBD adopted this supplemental Protocol on January 29, 2000, in Cartagena, Colombia to protect biological diversity from risks likely to be occasioned by dealing with living modified organisms which are the results of biotechnology. Such protection extends to human health.⁵⁸⁶ The Protocol urges the Parties to CBD, among other things, to take into consideration the value of biological diversity to indigenous peoples and local communities when deciding on the importation and use of livingmodified organisms (LMOs). This is especially important for indigenous peoples who depend solely on the natural environment for their survival. As part of this socioeconomic aspect, cooperation with indigenous peoples in research and information sharing is encouraged by the Protocol to promote biosafety and protect the integrity of biological diversity which is crucial to indigenous peoples' everyday life.⁵⁸⁷

The Conference of the Parties to the CBD serving as the Meeting of the Parties to this Protocol (COP-MOP) is charged with overseeing effective implementation of the Protocol, including the establishment of subsidiary implementation bodies as deemed necessary.⁵⁸⁸ The search for proper mechanisms to implement the Protocol has involved many processes, including development of the Strategic Plan for the Cartagena Protocol on Biosafety 2011-2020. At its ninth meeting held in Sharm El-Sheikh, Egypt, from November 17 to 29, 2018 the COP-MOP resolved to develop a follow-up plan to the Strategic Plan for Biodiversity 2011-2020 and the Strategic Plan for the Cartagena Protocol on Biosafety 2011-2020, with a view to preparing the post-2020 Global Diversity Framework. Therefore, the Executive Secretary to the CBD Secretariat was requested to make a compilation of submissions by stakeholders, including indigenous peoples, which would contribute to the form and content of the intended post-2020 framework.⁵⁸⁹ Notice to submit such views (Notice 2019-027) was made by the Executive

⁵⁸⁶ See UNEP, "Cartagena Protocol': About the Protocol (Introduction)," <https://bch.cbd.int/protocol/background/#intro> (Accessed: 17 March 2023). Also see article 1 of the Cartagena Protocol, 2000.

⁵⁸⁷ Article 26, Cartagena Protocol.

⁵⁸⁸ Article 29 (4) (b), *id.*

⁵⁸⁹ Para. 9 (e), UNEP, Decision Adopted by the Parties to the Cartagena Protocol on Biosafety: Preparation for the follow-up to the Strategic Plan for Biodiversity 2011-2020 and the Strategic Plan for the Cartagena Protocol on Biosafety 2011-2020' (CBD/CP/MOP/DEC/9/7), dated 30 November 2018, 2.

Secretary on February 28, 2019. Submissions were later received from stakeholders. One indigenous people's organisation, the Organización del Parlamento Mapuche - Tehuelche, submitted its views which appeared in the synthesis developed by the Liaison Group for the Cartagena Protocol on Biodiversity. Most of the views expressed by this organisation emphasised recognition of indigenous peoples' know-how and structures in strengthening the national biosafety frameworks.⁵⁹⁰ Another emphasis was placed on securing effective free, prior and informed consent from indigenous peoples in the implementation of the Protocol.⁵⁹¹ Eventually, these processes were taken over by the Subsidiary Body of Implementation under the CBD whose meeting held in March 2022 came up with recommendations on implementing the plan and a capacity-building action plan for the Cartagena Protocol on Biosafety (CBD/SBI/REC/3/4). Annex I to these recommendations, the Implementation Plan for the Cartagena Protocol (2021-2030), recognises indigenous peoples as potential stakeholders who can vitally contribute to implementation of the Protocol.⁵⁹² This includes their participation in local capacity-building activities to ensure the functioning of the Protocol.⁵⁹³ At its meeting held in Montreal, Canada from December 17 to 19, 2022, the COP-MOP to the Cartagena Protocol finally adopted a decision on implementation of the Protocol which contained the aforementioned recommendations.

(b) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010

This Protocol was adopted on October 29, 2010 by the Conference of Parties to the Convention on Biological Diversity held in Nagoya, Japan from October 18 to 29, 2010. The Protocol entered into force in October 2014. It was adopted to specifically give effect to the CBD's objective of ensuring equitable and fair distribution of benefits accruing from the utilisation of genetic resources. The Protocol categorically states the Parties' obligations with regard to genetic resources and the notion of benefits sharing. In doing so, it notes the relationship existing

⁵⁹⁰ UNEP, *Synthesis of Views of Parties to the Cartagena Protocol and Observers on The Post-2020 Process for the Cartagena Protocol on Biosafety*, (CBD/CP/LG/2019/1/INF/1), dated 20 June 2019, 4 and 23.

⁵⁹¹ UNEP, *Synthesis of Views of Parties to the Cartagena Protocol and Observers on The Post-2020 Process for the Cartagena Protocol on Biosafety*, p.25.

⁵⁹² Section I, para.3, Annex 1, UNEP, Recommendation Adopted by the Subsidiary Body on Implementation: Implementation Plan and Capacity-Building Action Plan for the Cartagena Protocol on Biosafety, dated 28th March 2022, 5.

⁵⁹³ Section I, para.2, Annex II, *id*, p. 13.

between indigenous peoples, their traditional knowledge, genetic resources and nature, and various ways in which their knowledge related to genetic resources is used. It further notes their crucial role in the conservation of biological diversity to ensure its sustainable use for the benefit of their survival.⁵⁹⁴ Most importantly, the Protocol is attentive to indigenous peoples' right to classify the rightful holders of their knowledge related to genetic resources.⁵⁹⁵ Hence, taking UNDRIP into account, the Protocol defies all approaches which would construe any of its provisions to the effect of weakening the rights of indigenous peoples.⁵⁹⁶

Article 5 of the Protocol, which addresses the fair and equitable sharing of genetic resources, directs the contracting Parties to take legal and non-legal steps through mutual agreements to guarantee fair and equitable sharing of monetary and non-monetary benefits ensuing from the exploitation of genetic resources which are in the custody of indigenous people. Also, Article 6 (2) provides that, whenever indigenous peoples have the discretion to grant access to genetic resources, their prior and informed consent should be obtained first as per the provisions of domestic law and policy. The same requirement applies to accessing indigenous peoples' traditional knowledge related to genetic resources. Obtaining the consent of indigenous peoples before accessing genetic resources within their territories and their knowledge related to genetic resources is a collective right sought to be protected by this Protocol. The main challenge lying between them and accessing these rights plus the accruing benefits is the liberty left to the contracting parties to subject these rights to national legislation and policies. This puts the guarantee of indigenous peoples' rights in jeopardy if the national legislation or policies are not in favour of indigenous peoples' rights. Hence, the rights sought to be protected under the Protocol cannot be said to be absolute.

The Protocol further provides for the need of transboundary cooperation in cases where on-site genetic materials are found in territories located in more than one country. Such territories include indigenous peoples' territories.⁵⁹⁷ A good example of this is the Maasai territories found both in Kenya and Tanzania.⁵⁹⁸

⁵⁹⁴ Para 22 and 23 of the Preamble to the Nagoya Protocol.

⁵⁹⁵ Para 24, *id.*

⁵⁹⁶ Para. 26 and 27, Preamble to the Nagoya Protocol.

⁵⁹⁷ Article 11, Nagoya Protocol, 2010.

⁵⁹⁸ Kenya signed the Nagoya Protocol on 1 February 2012 and ratified it on 7 April 2014 while the United Republic of Tanzania acceded to the Protocol on 19 January 2018.

Further, Parties to this Protocol have been placed under the duty of considering, among other things, indigenous peoples' customary laws, procedures and protocols when dealing with their traditional knowledge on genetic resources. They are further put under the obligation to make information available to potential users of indigenous peoples' traditional knowledge of their responsibilities when using such knowledge in the utilisation of genetic resources. Such information includes benefits-sharing mechanisms.⁵⁹⁹ Notably, the Parties to this Protocol are urged to ensure that there are legal, policy and administrative mechanisms in place to guarantee that indigenous peoples' prior and informed consent is obtained before accessing their traditional knowledge. Also, such laws and policies should address the aspect of mutual benefit sharing in respect of the utilisation of genetic resources.⁶⁰⁰

Last but not least, the Parties to the Protocol are tasked with the organisation of meetings with indigenous peoples, amongst other stakeholders, to raise awareness concerning the exploitation of genetic resources, access to traditional knowledge, and benefit-sharing.⁶⁰¹ In extension of this duty, the Parties are urged to establish and sustain indigenous peoples' help desks to address all issues related to the objectives of the Protocol and the CBD in general.⁶⁰² This obligation goes hand in hand with capacity-building programmes for indigenous people and other stakeholders on the same topics. In this regard, the least developed countries are advised to define their capacity-building needs and incorporate them into their national strategic plans. The Protocol requires the Parties to meet the indigenous peoples' capacity-building needs and priorities.⁶⁰³

Compliance with the Nagoya Protocol is overseen by the Compliance Committee established pursuant to Article 30 of the Protocol.⁶⁰⁴ The Committee receives submissions of compliance with the Nagoya Protocol via the CBD Secretariat.⁶⁰⁵ Among the 15 members of the

⁵⁹⁹ Article 12 (1) and (2) of the Nagoya Protocol.

⁶⁰⁰ Article 16 (1), *id.*

⁶⁰¹ Article 21 (b), *id.*

⁶⁰² Article 12 (c), *id.*

⁶⁰³ Article 22 (1) and (3), *id.*

⁶⁰⁴ Para. 1, "Institutional Mechanisms," NP-1/4. Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Nagoya Protocol and to Address Cases of Non-compliance, UNEP/CBD/NP/COP-MOP/DEC/1/4, p.4, date 20 October 2014, p.2.

⁶⁰⁵ Para.1, 'Procedures'. UNEP/CBD/NP/COP-MOP/DEC/1/4, p.4.

Committee who are proposed by the Parties,⁶⁰⁶ indigenous peoples' representatives are accommodated. Additionally, two other representatives of indigenous and local communities (at least one of them from a developing country) are granted observer status before the Committee.⁶⁰⁷ The indigenous peoples' representatives elected to serve and participate in the Committee ought to be knowledgeable and proficient in the Protocol's relevant fields just like other members of the Committee in order to objectively serve the Protocol's interests.⁶⁰⁸ The two indigenous representatives granted observer status are elected to serve for a full term of four years and cannot exceed two consecutive terms.⁶⁰⁹

When the Commission receives submissions from the party that has triggered the Committee's procedures, the Respondent Party is availed with an opportunity to respond to the issue(s) raised, before the Committee proceeds to deliberate on the matter and issue recommendations.⁶¹⁰ In making its recommendations, the Committee may seek information from various sources including the affected indigenous communities or an independent expert on indigenous issues when the rights of indigenous peoples are at stake.⁶¹¹ Finally, the Committee submits reports (which include recommendations it has made in the implementation of its functions) to the next meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol, for purposes of consideration and suitable measures.⁶¹²

3.3.9.2 Paris Agreement, 2015

The Paris Agreement is an international legally binding agreement adopted on December 12, 2015 by the United Nations Conference of Parties to the Framework Convention on Climate Change (FCCC) to strengthen and provide for long-term implementation of the FCCC. The aim was to provide direction to all nations on the concrete steps to be taken towards reducing and mitigating the impacts of climate change globally. This Agreement which entered into force on November 4, 2016 recognises the Parties' human rights obligations as they endeavour to tackle

⁶⁰⁶ According to the United Nations' General Assembly and Conference Management Department, regional grouping is presented in form of Africa, Asia-Pacific, Eastern Europe, Latin America and Caribbean and Western Europe.

⁶⁰⁷ Para. 2, "Institutional Mechanisms" *id.*

⁶⁰⁸ Para. 4, "Institutional Mechanisms," UNEP/CBD/NP/COP-MOP/DEC/1/4.

⁶⁰⁹ Para. 6. *id.*, p.3.

⁶¹⁰ Para.8, UNEP/CBD/NP/COP-MOP/DEC/1/4, 'Procedures', 4

⁶¹¹ Paras. 1 and 2, 'Information for and Consultation by the Committee after the Triggering of the Procedures', UNEP/CBD/NP/COP-MOP/DEC/1/4, 5.

⁶¹² Para. 3, "Functions of the Committee', UNEP/CBD/NP/COP-MOP/DEC/1/4, p.3.

the global climate change challenge. This includes human rights obligations towards indigenous peoples.⁶¹³

In establishing the universal goal of adapting to climate change and attaining the Sustainable Development Goals (SDGs), the Agreement considers the use of indigenous peoples' knowledge as one of the tools to be included in domestic legal and non-legal socio-economic and environmental adaptation initiatives.⁶¹⁴ Thus, the last paragraph of the decision to adopt this Agreement indicates that the parties to the Agreement had resolved to promote and maintain cooperation with indigenous peoples, among other relevant stakeholders, so as to put in place a robust and functional climate action. Last but not least, the Agreement undertakes to strengthen the knowledge of non-party stakeholders on how to respond to climate change through the establishment of platforms for sharing experiences of climate change resilience to ensure a holistic approach to this global crisis.⁶¹⁵ The non-party stakeholders include indigenous peoples.

The implementation of the Paris Agreement is overseen by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA). The CMA makes decisions to ensure efficient implementation of the Agreement. Its functions resemble those of the Conference of Parties to the Framework Convention on Climate Change (FCCC) which is the parent Convention to the Paris Agreement. The CMA meets annually at the same time as the Conference of Parties to the FCCC.⁶¹⁶ The CMA meeting held at the Sharm el-Sheikh Climate Change Conference from November 6 to 20, 2022 in the Arab Republic of Egypt made a decision which stressed the point of involving indigenous peoples when making any decisions regarding climate change globally. Also, in Decision -/CP.28 -/CMA.5 on the operationalisation of the new climate change funding arrangements passed by the CMA at the latest Climate Change Conference held in the United Arab Emirates from November 30 to December 12, 2023, indigenous peoples were named as one of the key stakeholders to be considered in the funding arrangements. Their participation includes having observer status at the Fund Board's meetings,

⁶¹³ Para. 11 of the preamble to the Paris Agreement, 2015.

⁶¹⁴ Article 7 (5) of the Paris Agreement, 2015.

⁶¹⁵ Para. 135 of the adoption instrument to the Paris Agreement.

⁶¹⁶ UNFCCC, "Supreme Bodies: Conference of the Parties serving as the meeting of Parties to the Paris Agreement (CMA)," accessed March 7, 2022, <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-serving-as-the-meeting-of-the-parties-to-the-paris-agreement-cma>.

the Fund's consultative forums and high-level dialogue.⁶¹⁷ Also, the Fund sets out to extend small grants to indigenous peoples as one of the vulnerable groups which suffer the repercussions of climate change.⁶¹⁸ In extending such grants, the Fund sets out to include indigenous peoples by gathering details of the climate change impacts on their communities to enable accurate estimates of recovery and reconstruction costs to be allocated to them.⁶¹⁹

3.3.9.3 Kunming-Montreal Global Biodiversity Framework, 2022

This is a non-legally binding instrument adopted by the Conference of Parties to the United Nations Convention on Biological Diversity on December 19, 2022 at its fifteenth meeting held in Montreal, Canada. It succeeded the Convention on Biological Diversity's Strategic Plan, 2011-2020. The Framework was adopted following submissions by indigenous peoples and other stakeholders on how to bring about a harmonious world of human co-existence with nature by the year 2050. As it moves towards this vision, the Framework's mission is to reverse the loss of biodiversity through immediate actions for the restoration of nature for the benefit of the global population by 2030.⁶²⁰ In laying down important aspects to be taken into account for its implementation, the Framework acknowledges the rights and contributions of indigenous peoples and local communities as custodians and partners of biodiversity conservation in ensuring its sustainability.⁶²¹ It also recognises the fact that nature has varying advantages for different kinds of people.⁶²² For example, for indigenous peoples, nature plays a crucial role in their livelihood and cultural survival. Hence, their values and knowledge systems are to be included in the processes of achieving the Framework's mission and vision.⁶²³ The Framework was designed to achieve a total of four long-term goals by the year 2050. One of the goals is realising equitable sharing of the fiscal and non-fiscal benefits arising from utilisation of indigenous peoples' traditional knowledge in relation to genetic resources, and protection of such

⁶¹⁷ Para. 20 and Decision -/CP.28 -/CMA.5, Operationalisation of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4. Also see para 14 (h) of Annex II to this Decision.

⁶¹⁸ Para 49 (d), Decision -/CP.28 -/CMA.5.

⁶¹⁹ Para 60 (d), *id.*

⁶²⁰ Paras. 10 and 11 of the Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity, 19 December 2022. Available at <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>, accessed March 5, 2023.

⁶²¹ Para 7 (a), *id.*

⁶²² Para 7 (b), Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity, 19 December 2022.

⁶²³ Para. 7(o), *id.*

knowledge for biodiversity sustainability.⁶²⁴ Moreover, the Framework has 23 action-oriented targets of global application to be attained by the year 2030. These targets include having in place integrated biodiversity planning and management of land and sea resources to restore the most vulnerable ecosystems while upholding indigenous peoples' and local communities' rights.⁶²⁵ Further, the Framework sets out to ensure that by 2030 at least thirty per cent of terrestrial and marine resources located in areas of ecological and biodiversity importance are effectively conserved while respecting indigenous peoples' rights, especially where their traditional territories are involved.⁶²⁶ The Framework also seeks to guarantee the sustainable harvest of wild species without affecting the cultural utilisation of such resources by indigenous peoples and ensuring such activities benefit them socially, economically and environmentally.⁶²⁷ Moreover, the Framework names the target of accessing reliable data by relevant stakeholders engaged in governance and management of biodiversity. Another target is ensuring that in the event that indigenous peoples' knowledge is likely to be utilised, their free, prior and informed consent must be sought in accordance with the domestic legislation of the Party concerned.⁶²⁸ One of the challenges posed by this target is that there are Parties like Tanzania which do not have legislation providing for procedures to obtain free, prior and informed consent from indigenous peoples, let alone subscribing to their legal recognition. Last but not least, the Framework seeks to ensure equitable access to justice and representation in decision-making in matters related to biodiversity by indigenous peoples, among other groups.⁶²⁹ As part of fulfilling this target, the Framework proposes that awareness-raising programs on topics relating to nature and biodiversity, including traditional values, knowledge systems and contribution to sustainable development, should be offered in the models and language(s) that are familiar to the indigenous peoples, among other local groups and communities.⁶³⁰

3.4 Conclusion

This chapter has endeavoured to present an exhaustive picture of international instruments within the UN relating to indigenous peoples' rights. Specific legal and institutional standards for the

⁶²⁴ Goal C, Kunming-Montreal Global Biodiversity Framework, 2022.

⁶²⁵ Target 1, *id.*

⁶²⁶ Target 3, *id.*

⁶²⁷ Target 5 and 9, *id.*

⁶²⁸ Target 21, Target 5 and 9, *id.*

⁶²⁹ Target 22, *id.*

⁶³⁰ Paras. 22 (a) and (d), Adopted by the Conference of the Parties to the Convention on Biological Diversity, *supra.*

implementation of indigenous peoples' rights have been discussed. These comprise domestic adoption of legal policies, and institutional frameworks that respond to indigenous peoples' rights as provided for under UNDRIP and other international legal instruments, and mechanisms for reporting to the respective human rights implementation bodies. Under the state reporting mechanism, States Parties are placed under the obligation to take note of observations made with respect to each periodic report, respond to warning letters and implement decisions and general recommendations made by such bodies. Another practice recommended to the UN Member States in this regard is cooperation with the three UN-specific indigenous peoples' rights mechanisms, i.e. UNPFII, UNSRRIP and the UNEMRIP, as well as other agencies and institutions that work for the benefit of indigenous peoples. Moreover, it has been noted in this chapter that the tenet of including indigenous peoples in all decisions made domestically with the likelihood of impacting their rights is emphasised in the instruments, communications and reports analysed. In addition, the intersectional aspect of indigenous children and women has formed part of this chapter. All these variables have been applied as tools for assessing the implementation of indigenous peoples' collective rights in Tanzania in the following chapters.

This chapter has also contributed lessons from other jurisdictions in the form of best practices drawn from the communications filed before the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR). Such communications came from Canada, New Zealand, Finland and Norway. Lessons drawn from these cases have been incorporated in chapter seven of this study which presents general conclusions and recommendations. Although the aforementioned countries appeared before the Committees as "defendants" in the communications, they have made remarkable developments domestically in terms of legally securing indigenous peoples' rights. Here, the major highlight is section 35 of the Canadian Constitution Act, 1982 which recognises not only indigenous peoples' land rights but also cultural and social rights and their right to self-governance.

CHAPTER FOUR

4.0 INDIGENOUS PEOPLES' RIGHTS IN THE AFRICAN HUMAN RIGHTS SYSTEM

4.1 Introduction

This chapter presents the viability of the African human rights system in securing the rights of indigenous peoples in Africa. It uncovers the potential of the provisions of the Banjul Charter in providing for substantive indigenous peoples' rights. It also ventures into the practical implementation of such rights by the Charter's human rights implementation bodies. The chapter further enumerates States parties' obligations under the provisions of the Charter which protect indigenous peoples' rights. The discussion in this chapter is built on the research work of the ACHPR's Working Group of Experts on Indigenous Populations/Communities. In their report they state:

The Working Group...takes the view that, as the African Charter recognises collective rights, formulated as rights of 'peoples,' these rights should be available to sections of populations within nation states, including indigenous people and communities. ...the African Commission has started to interpret the term 'peoples' in a manner that should allow indigenous people to also claim protection under Articles 19 – 24 of the African Charter.⁶³¹

Before digging deeper into the substantive content of the Banjul Charter and its implementation mechanisms, it is pertinent to first have a glance at how the African human rights system came into being. Also, as the Banjul Charter is a typical historical document, tracing the intentions of the African States in formulating it in its uniqueness of accommodating group rights is paramount.

4.2 Background to the African Human Rights System

The African human rights system, established under the auspices of the African Union (the AU), formerly the Organisation of African Unity (OAU), comprises legal human rights instruments and organs mandated by such instruments to oversee the implementation of human rights in the continent. The idea of having a formal regional human rights law in Africa traces its origin to the

⁶³¹ACHPR and IWGIA, *Report of the ACHPR Working Group of Experts*, 79.

time when the OAU was not yet in the picture. The seed was sown in 1961 at the African Conference on Rule of Law held in Lagos, Nigeria organised by the International Commission of Jurists, when the newly formed African governments were introduced to the notion of having a regional human rights instrument.⁶³² Two years later, the OAU was formed through the adoption of the OAU Charter of 1963. Notable is the fact that when it comes to human rights provisions, the OAU Charter only provided for the Member States' willingness to adhere to the Universal Declaration of Human Rights 1948. Nothing more substantive related to human rights was captured by this instrument.⁶³³

Later in 1967, the United Nations Commission on Human Rights initiated an exploration of the possibility of having regional human rights Commissions in regions where they did not exist. This included Africa.⁶³⁴ This exploratory exercise led to the organisation of a Seminar held in Cairo in 1969 that was attended by twenty African countries and representatives from the United Nations, the Council of Europe and the Arab League. One of the resolutions made at this Seminar was the establishment of the African Human Rights Commission by the OAU's decision rather than by adoption of a human rights Charter.⁶³⁵ Ten years later, following frequent encouragement from international organisations, the OAU initiated the drafting process for a Charter when the Heads of State and Government met from July 17 to 20, 1979 in Monrovia for its sixteenth ordinary session.⁶³⁶ The Session resolved that a group of experts for the task be convened. This was done. The first meeting of experts was held in the same year in Dakar, Senegal. Other meetings followed which were held in Banjul, Gambia in 1980 and 1981. These were Ministerial meetings composed of African States' Ministers of Justice and other experts. The drafters of the Charter departed from the existing European and the Inter-American human rights instruments, given the nature of the continental problems that were sought to be addressed by the Charter. The motive behind this was what is referred to by Rubner as "African

⁶³² D'sa, "The African Charter on Human and Peoples' Rights," 103.

⁶³³ See the Preamble and Article II (1) (e) of the OAU Charter, 1963 which are the only parts of the said document that mentioned "human rights" throughout the entire document.

⁶³⁴ Three of the Commissions established by Article 20 of the OAU Charter, 1963 were only the Economic and Social Commission, Educational, Scientific, Cultural and Health Commission and the Defence Commission.

⁶³⁵ D'sa, "The African Charter on Human and Peoples' Rights," 104.

⁶³⁶ See OAU Decision 115(XVI) Rev 1, OAU Doc AHG/III (XVI) 1978. Also see Rubner, "The Origins of the 1981 African Charter on Human and Peoples' Rights," 260, for further discussion on the Resolution 115.

revanchism” ,or the fundamental need to reflect African history, experiences, identity and aspirations in the provisions of the Charter.⁶³⁷

The draft Charter was successfully passed at the plenary session for consideration at the African States’ Ministerial Conference attended by forty African countries. The draft proceeded to the discussion stage by the Council of Ministers.⁶³⁸ At this stage, the Charter received concrete criticism for being vague,⁶³⁹ not restraining the Commission from interfering with the internal affairs of the OAU Member States and lack of expression of peoples’ right to independence. Despite these criticisms, the Council of Ministers pushed the draft Charter to the next stage to be considered for adoption by the Heads of State and Government (without amendments). The Charter was approved and adopted by the Heads of State and Government in June 1981 at the Eighteenth Assembly of Heads of State and Government who met to deliberate on the Charter in Nairobi, Kenya.⁶⁴⁰ The Charter was then open for ratification by all members of the OAU with no restrictive clause as to the conditions for ratification, such as proof of domestic adherence to human rights.⁶⁴¹ It finally came into force on October 21, 1986.⁶⁴²

Regarding the drafting process of the Charter, it is notable that, despite all the criticisms made by the Council of Ministers, it was not moved by the lack of definition of the term “peoples” in the draft. This is despite the fact that this term was used throughout the document, in the proposed title, the preamble and in the specific provisions of the Charter. This suggests that the Council of Ministers’ deliberately chose to leave the term open for flexible interpretation. Also, there seemed to be a pressing need for hasty adoption of the Charter by the Assembly of the Heads of States and Governments, so that several recommendations by the Council of Ministers were sidelined to eliminate any possible obstacles to the adoption of the Charter. This raises the question of whether the adoption of the Charter was merely done to serve the political purpose of cleansing the African States’ human rights image or whether it had genuine intentions

⁶³⁷ See particularly Chapter 2 in Rubner, “The Origins of the 1981 African Charter on Human and Peoples’ Rights,” *supra*.

⁶³⁸ D’sa, “The African Charter on Human and Peoples’ Rights,” 105.

⁶³⁹ For example, the drafters had proposed that the Chairman of the OAU Assembly could take measures against any OAU members in exceptional circumstances to ensure adherence to human rights. Such “measures” and “exceptional circumstances” were neither defined nor given a specific description. See Michelo Hansungule, “The African Charter on Human and Peoples’ Rights: A Critical Review,” *African Yearbook of International Law* 8, no. 1 (2000): 275.

⁶⁴⁰ Richard Gittleman, “The African Charter on Human and Peoples’ Rights: A Legal Analysis,” *Virginia Journal of International Law* 22, no.4 (1982): 668-69.

⁶⁴¹ See Hansungule, “The African Charter on Human and Peoples’ Rights” 267.

⁶⁴² *Id.*, 265.

of promoting and protecting human and peoples' rights in the continent.⁶⁴³ If the latter is true, the next question is, why there are continued gross human rights violations by the Parties to the Charter, including violation of indigenous peoples' rights? Among other things, the following discussion strives to provide answers to this question.

4.3 Indigenous Peoples, the Banjul Charter and its Implementation Mechanisms

The Banjul Charter, named after the capital city of Gambia where the draft African Charter on Human and Peoples' Rights was concluded, became the primary human rights instrument in the continent. Among other things, it brought into existence the African Commission on Human and Peoples' Rights established under Article 30 of the Charter. The Commission was established as the principal supervisory body for implementation of the Charter. The Commission was officially launched on November 2, 1987. Later, through the adoption of the first Protocol to the Charter, the African Court on Human and Peoples' Rights (AfrCHPR) was established under article 1 of the said Protocol. The Protocol was adopted on June 9, 1998 by the OAU Member States and entered into force on January 25, 2004.⁶⁴⁴ The first Judges of the Court were appointed in 2006 and the Court laid down its first rules of procedure in 2008. The Court was set up to complement the functions of the Commission, particularly the protective mandate, through the rendering of legally binding decisions. An important fact to be noted is that, apart from the adoption of the Protocol establishing the AfrCHPR, there are other Protocols adopted under the Charter to address the human rights of specific groups like women, older persons and people with disabilities, i.e. the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2018 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, 2018. In addition, there exists an independent Charter providing for the rights and duties of children in Africa, the African Charter on the Rights and Welfare of the Child, 1990. This Charter establishes its own implementation mechanism, the African Committee of Experts on the Rights and Welfare of the

⁶⁴³ It is to be noted that the post-colonial period in Africa, from the 1950s to the early 1990s, was clouded with extreme authoritarian, exploitative, oppressive, corrupt and discriminatory governance by ruling elites. This was the class that had control of national ideologies, policies, economy and political inclinations, for instance socialism, pan-Africanism, pan-Arabism and one-partism. See EI-Obaid and Appiagyei-Atua, "Human Rights in Africa," 822.

⁶⁴⁴ African Charter on Human and Peoples' Rights, "About Us," accessed January 27, 2024, <https://www.african-court.org/wpafc/#>.

Child. Also, there exists another Charter providing for the rights, freedoms and duties of youth in Africa, the African Youth Charter, 2006. Despite the existence of other stand-alone human rights instruments addressing the rights of particular groups in the continent, one of which has its own specific implementation mechanism, it is apparent that implementation of the rights set out in the Banjul Charter is under the custody of the ACHPR and the AfrCHPR.

Despite the desire to depart from other regional human rights instruments' substantive provisions, being the youngest of all the human rights systems, the African human rights implementation mechanisms were imported from the pre-existing human rights systems in Europe and America.⁶⁴⁵ Nevertheless, as already pointed out in chapters one and two of this thesis, unlike the European and the Inter-American human rights instruments, the Banjul Charter contains all three generations of rights. These are civil and political rights which are principally based on individual liberties and their enjoyment based on non-interference by the State; economic, social and cultural rights which are based on the principle of equal provision by the State; and group or collective rights whose achievement is not only reliant on the State's abstention and provision but also, and more importantly, on solidarity amongst the people seeking to protect their common interest(s).⁶⁴⁶ The following discussion is devoted to this latest category of rights, i.e. group rights. It explains the essence of their existence in the Banjul Charter, their relationship with indigenous peoples and the practice related to these rights within the African human rights mechanisms. Finally, as already indicated in the introductory part of this chapter, States' obligations under the Banjul Charter in relation to indigenous peoples' rights are pointed out.

4.3.1 Collective Rights and African Philosophy under the Charter

As put by Ukwamedua, "philosophy is a rational enterprise, which is predicated on culture, wonder and human experience". So, as long as Africans are rational beings, practise culture and share experiences about their world, they do have a philosophy of their own. African philosophy is expressed through culture, common social values, stories, oral tradition, social institutions and

⁶⁴⁵ Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights," *Human Rights Quarterly* 23, no. 2, (2001): 333.

⁶⁴⁶ International Commission of Jurists, Report of a Conference on Human and Peoples' Rights in Africa and the African Charter held in Nairobi from 2 to 4 December 1985, 29.

scholarly writings.⁶⁴⁷ The cross-cutting African philosophy is built on the principle of “I am because we are”, based on the Zulu phrase “*Umntu ngumuntu ngabantu*”, and summarised in one word as “*Ubuntu*”. This means one is complete as a person through other persons.⁶⁴⁸ As a philosophy, *Ubuntu* has been expressed through stories and even songs.⁶⁴⁹ It emphasises the collective nature of living over and beyond the individualistic life. In this philosophy, a person’s rights are defined through his or her community. The community is the custodian of rights, morals and values. The philosophy is embedded in the spirit of solidarity, collectiveness, togetherness and interdependence.⁶⁵⁰ This communal-oriented way of living, sometimes known as “African humanism”, was practised by pre-colonial African societies. It is part and parcel of the African historical tradition and a representation of African civilisation. The same spirit of solidarity was reflected in the liberation struggles across the continent to reclaim the African identity⁶⁵¹ and heritage in its true character.

Paragraph 5 of the preamble to the Banjul Charter indicates that, among other things, the State Parties to the Charter were inspired by the African “historical tradition” and “values of African civilization” to reflect and shape the concept of human and peoples’ rights in Africa. These values form the foundation for the African philosophy of rights under the Charter. Collective rights under the Banjul Charter that have been presented in terms of peoples’ rights reflect these values. Article 27 of the Charter which provides for individuals’ duties under the Charter, recognises the weight of responsibility each individual carries towards his or her society and more so if he or she belongs to a “legally recognised community”. The nature of the African societies studied in this thesis, i.e. indigenous peoples in Tanzania, fits squarely in this description.

4.3.2 The Banjul Charter and Indigenous Peoples’ Rights

This section provides a synthesis of how peoples’ rights under the Banjul Charter can take shape as indigenous peoples’ rights. As mentioned above, the Banjul Charter as a principal human

⁶⁴⁷ Anneth Amin, “The Potential of African Philosophy in Interpreting Socio-economic Rights in the African Charter on Human and Peoples’ Rights,” *African Human Rights Yearbook* 5, (2021): 23-50, 27.

⁶⁴⁸ Amin, “The Potential of African Philosophy,” 29.

⁶⁴⁹ *Id.*, 27.

⁶⁵⁰ *Id.*, 28-29.

⁶⁵¹ The colonialists discouraged the practice of African cultures by introducing foreign religion, languages, and education, which was detrimental to the African identity. El-Obaid and Appiagyei-Atua, “Human rights in Africa,” 822.

rights instrument is extended by Protocols which cover specific rights, especially the rights of women and persons with disabilities. However, the Charter does not expressly provide for indigenous peoples' rights. Hence, one of the strategies towards achieving substantive indigenous peoples' collective rights under the Charter is innovative application of the provisions of the Charter which provide for peoples' rights in Articles 19 to 24, as explained below.

4.3.2.1 Right to Equality (Article 19)

Citing the Charter of the Organisation of the African Unity, paragraph 3 of the preamble to the Banjul Charter names equality as one of the necessary elements for achievement of the "legitimate aspirations of the African peoples". Naturally, peoples who aspire to equality are likely to have suffered inequality before. Therefore, it was indispensable for the drafters of the Charter to include and underline peoples' right to equality and condemn the domination of peoples by others. This drew from the inequalities the peoples of Africa had suffered through slavery and colonialism, and continued to suffer through apartheid at the time of the adoption of the Charter. Even in the post-colonial era, peoples, particularly indigenous peoples, have continued to experience inequalities in the form of domination, marginalisation and discrimination. They are regarded as backward and less important in all spheres of national agendas, compared to other sections of the national society.⁶⁵² These are manifestations of the colonial legacy in Africa that continue to haunt the continent. Peoples who have maintained their pre-colonial traditional civilisation and livelihood remain at the extreme margin of national development due to unequal inclusion in general development programmes. The processes are dominated by members of the mainstream society who do not have indigenous peoples' interests at heart. As a result, social services such as health care, education and water supply remain unevenly distributed, and difficult to access for indigenous peoples. Also, indigenous peoples are excluded from participation in decision-making forums due to their small numbers, low social position and lack of access to information regarding such processes. Therefore, Article 19 of the Banjul Charter is important for securing indigenous peoples' right to enjoy the same level of respect and entitlements accorded to other members of the mainstream society. This will preserve their dignity as groups forming part and parcel of the national population.

⁶⁵² ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts*, 89.

4.3.2.2 Right to Existence and Self-Determination (Article 20)

The right to existence goes along with the right to self-determination. This is the essence of advocating for States' recognition of the existence of indigenous peoples within their territories before they can respect and protect their right to self-determination. If States deny this recognition, it does not mean indigenous peoples cease to exist within their boundaries; but it is a major setback to supporting their existence. The right to self-determination basically entails non-interference with peoples' internal affairs by external forces. In practice, this right has two dimensions, internal and external self-determination. Internal self-determination is exercised by a sub-group within a state claiming autonomy in the political, social, economic and cultural spheres, while external self-determination involves a people's claim to recognition as a fully-fledged sovereign state in the eyes of the international community (secession).⁶⁵³

According to the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960,⁶⁵⁴ peoples within the colonial states were entitled to the right to self-determination. This right was exercised by African peoples during the independence struggles against colonialism.⁶⁵⁵ Peoples' struggle for independence while claiming their right to self-determination paved the way for the inclusion of this right in the Charter. This right was relevant at the time the Charter was adopted to ensure full independence on the African continent. This was a guarantee that peoples in Africa could enjoy statehood and freely handle their affairs without external interference.⁶⁵⁶

Indigenous peoples may exercise their right to autonomy in the form of internal self-determination.⁶⁵⁷ Thus, they may maintain their political institutions, elect their leaders and make decisions concerning their welfare; in the economical sphere they may follow their traditional mode of production, and in the socio-cultural sphere they may practise their customs and traditions, which includes conducting ceremonies and rituals, as well as the transfer of indigenous knowledge from one generation to the next. At the same time, they are also entitled to participate in the state's political processes and mainstream economic activities. However, in

⁶⁵³ Anyangwe, "The Normative of the Right to Self Determination," 49.

⁶⁵⁴ UNGA Res 1514 (XV) 14 December 1960 A/RES/1514(XV).

⁶⁵⁵ El-Obaid and Appiagyei-Atua, "Human Rights in Africa," 824.

⁶⁵⁶ Carlson Anyangwe, "The Normative of the Right to Self Determination under the African Charter and the Principle of Territorial Integrity: Competing Values of Human Dignity and System Stability," *African Human Rights Yearbook* 2(2018): 50.

⁶⁵⁷ Agnieszka Szpak, "The Right of Indigenous Peoples to Self-Determination: International Law Perspective," *ATHENAEUM: Polish Political Science Studies*, 59 (2018): 190.

modern states, while the right to internal self-determination is central to indigenous peoples' lives, adherence to the national laws and international human rights standards is paramount. It is a principle within the African human rights system that the right to autonomy can be exercised by national sub-groups within independent African states but that such exercise should not encroach on the State's sovereignty and territorial integrity.⁶⁵⁸ The sub-groups referred to here include indigenous peoples.

4.3.2.3 Peoples' Right to Free Disposal of Wealth and Natural Resources (Article 21)

Considering the motives of the imperialists in Africa and the misappropriation of natural resources that had taken place and was still taking place in the continent at the time the Charter was being moulded, peoples' right to free disposal of their wealth and natural resources, like land, crude oil, minerals, gas, forests and water resources, gained a place in the Charter. This narrative was rightly captured by the ACHPR in the case of *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*⁶⁵⁹ as follows:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African Society.

It is argued that the inclusion of the right to freely dispose of wealth and natural resources in the Charter was a historical reflection of the fact that the mere attainment of political self-determination did not automatically guarantee economic self-determination. Hence, this needed to be included in the Charter in the form of a right that can be collectively pursued.⁶⁶⁰ While discussing the state's involvement in the control of wealth and natural resources, and who is the bearer of this right under the Charter, Kiwanuka asserts that, in countries where the control of

⁶⁵⁸ See the *Katangese Case*, *supra*, para. 5.

⁶⁵⁹ Communication No. 155 of 1996, para. 56.

⁶⁶⁰ Hansungule, "The African Charter on Human and Peoples' Rights," 291.

wealth and natural resources is vested in the state, this does not imply that the right is taken from the hands of the people, but that the state is awarded the discretion to administer such resources for and on behalf of the people.⁶⁶¹ Here is where the entitlement of indigenous peoples to this right comes into play. As the people's right to dispose of their wealth and natural resources is exercised by the state on behalf of the people, States parties to the Banjul Charter are automatically prevented from alienating this right from indigenous peoples, as has been the case across the continent. With regard to the exercising of this right by indigenous peoples, in the case of *Front for the Liberation of the State of Cabinda v Republic of Angola*,⁶⁶² the ACHPR ruled that autonomy to exercise the right to free disposal of wealth and natural resources is vested on the communities that have a strong and distinctive bond with their land and whose livelihoods depend on it.⁶⁶³ With this ruling, the Commission intended to prevent opening the flooding gates for litigations from every national sub-group which could claim violation of this right. It took into consideration that reckless claiming of this right by the people could drastically affect the sovereignty of the States parties to the Charter if claims of this nature were launched indiscriminately. The exercise of this right was therefore narrowed to indigenous peoples because this category is small in most countries and poses the lowest risk of uncontrollable claims before the Commission. As far as this right is to be exercised for the benefit of peoples in States parties to the Banjul Charter, the interests of indigenous peoples are secured under Article 21, which provides for this right. This entitlement is supported by the jurisprudence of the ACHPR.

4.3.2.4 Peoples' Right to Economic, Social and Cultural Development (Article 22)

The right to development is a universal right. It was first propounded by the Senegalese jurist Keba M'baye in 1972.⁶⁶⁴ It was subsequently recognised by the United Nations through Resolution 4 (XXXIII) of the United Nations Commission on Human Rights of 1977.⁶⁶⁵ It was given deeper recognition at the UN through the adoption of the Declaration on the Right to

⁶⁶¹ Kiwanuka, "The Meaning of 'People', 98".

⁶⁶² Communication No. 328/2006.

⁶⁶³ Paras. 100-110.

⁶⁶⁴ Russel Barsh, "The Right to Development as a Human Right: Result of the Global Consultation," *Human Rights Quarterly* 13, No. 3 (1999): 322.

⁶⁶⁵ See Shivji, *The Concept of Human Rights in Africa*, 29.

Development in 1986.⁶⁶⁶ Article 1 (1) of the Declaration acknowledges peoples' entitlement to enjoy the right to socio-economic, cultural and political development in which other fundamental rights and freedoms can be realised. Also, Article 1 (2) of the Declaration associates the right to development with full realisation of the right to self-determination and free disposal of wealth and natural resources.

In Africa, the inclusion of this right in the Banjul Charter in the early 1980s was a major move towards ensuring the development of the African peoples in the economic, social and cultural fields as they were still "picking up the pieces" after the end of colonialism. It is crucial to note that one of the colonialists' tactics for exploiting Africa was to dismantle the African societies for smooth administration of the colonies and easy access to the available resources. Indigenous communities were mixed, relocated and merged for colonial purposes without considering their common ethnic identities, history, and social or economic backgrounds.⁶⁶⁷ Such communities became subject to the new colonial administration with newly established rules, principles, economic and social orders. Traditional African economic, social and cultural structures were suspended, leaving the African peoples with no specific path to take towards their own development.⁶⁶⁸ Peoples' sense of development was redefined to mean receipt of basic and centralised services from the state. This was contrary to their traditional perception of development which involved collective accumulation of wealth within the structure of family, lineage, clan, tribe and ultimately ethnic group. This illustrates the principle which says "Deprive a people of their ethnicity, their culture, and you deprive them of their sense of direction or purpose."⁶⁶⁹ It was therefore rational for the liberation struggles in Africa to engage in efforts to restore what was lost during colonialism, i.e. the African social economic and cultural

⁶⁶⁶ The Declaration was adopted via General Assembly resolution 41/128 of 4 December 1986.

⁶⁶⁷ A practical example is the case of *AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon*, Communication No.336/2007, in which the colonial legacy was alleged to have caused a persistent land conflict between the Bali-Nyonga and the Moko-Oh ethnic groups in Cameroon. The dispute emanated from boundaries drawn between the Bali-Nyonga and Moko-oh habitats during the colonial administration. The result of this was a reduction in number of the Moko-oh villages from 31 to 3 villages. For the Moko-oh, this meant a massive loss of land to the Bali Nyonga. The Moko-oh continued fighting to regain this land, and having exhausted all local remedies had recourse to the ACHPR.

⁶⁶⁸ Francis Deng, "Ethnicity: An African Predicament," *The Brookings Review* 15, no. 3, (1997): 28.

⁶⁶⁹ *Ibid.*

heritage.⁶⁷⁰ Peoples' economic, social and cultural rights were important for the drafters of the Charter.

The preamble to the Charter stresses the significance of giving attention to the right to development, taking into account the fact that the satisfaction of economic, social and cultural rights contributes to the enjoyment of civil and political rights and *vice versa*.⁶⁷¹ The inclusion of this right in the Charter was intended to underscore the point that economic and social rights, such as the right to work or participate in economic activities, as well as the right to access viable social services like infrastructure, health care and education, are not just a prerogative of the elite class but are among the rights of all peoples in the African States.⁶⁷² To facilitate the survival of indigenous peoples and their livelihoods, governments are obliged to ensure that services such as water supply and health care facilities are constantly placed at their disposal.

As to cultural rights, these are inherently collective as they dwell in and are practised by communities that distinguish themselves through their activities and history.⁶⁷³ Therefore, the same weight given to the protection of economic and social rights ought to be extended to cultural rights to complete the circle of the interdependence of rights.

The right to development may be understood differently by traditional indigenous peoples and mainstream society. If indigenous peoples are absorbed into the mainstream society, they are likely to succumb to urbanisation and extinction of their economic, social and cultural way of life. States are obliged under the Charter to guarantee peoples' enjoyment of the right to development. For indigenous peoples, this means according them freedom to continue practising their traditional lifestyle and to develop at their own pace and according to their own definition.

4.3.2.5 Peoples' Right to National and International Peace and Security (Article 23)

Looking into this right, the term people appears to mean the whole population of a State whose right to peace and security has to be fulfilled by the State internally and externally in relations with other States. It is argued by Rubner that the incorporation of this right into the Banjul Charter stemmed not only from the insecurities brought to Africa by external forces such as

⁶⁷⁰ Bience, Gawanas, "The African Union: Concepts and Implementation Mechanisms Relating to Human Rights," in *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, eds. Anton Bösl and Joseph Diescho, (Windhoek: Macmillan Education Namibia, 2009), 141.

⁶⁷¹ D'sa, "The African Charter on Human and Peoples' Rights", 119.

⁶⁷² *Id.*, 114.

⁶⁷³ Donders, "Foundations of Collective Cultural Rights," 1.

slavery and colonialism, but also from the need to protect the populations of Africa who, at the time of the adoption of the Charter, had suffered and were continuing to suffer from oppression under the post-colonial regimes.⁶⁷⁴ The slave trade and the colonial period in Africa had led to the capturing of slaves through ambushes and kidnapping, the burning of villages, mass killings following uprisings and forced labour. Post-colonial Africa was haunted by civil wars, border conflicts,⁶⁷⁵ *coups d'état* and violent regime changes. Examples of these are the civil wars involving the Banyamulenge of Kivu Province *vis-à-vis* the Congo-Zairean government in the 1970s and 1980s. These wars were instigated by the discriminatory Congo-Zaire nationality policies and legislation that prohibited the Banyamulenge from acquiring Congolese citizenship.⁶⁷⁶ Another example is the series of military *coups* which took place in Nigeria. These were meant to overthrow corrupt and oppressive governments in the country. The first official *coup* took place in 1966 and sparked subsequent civil wars and political unrest in Nigeria. Other cases of turmoil and insecurity in African countries were the civil wars between the northern and southern parts of Sudan between 1955 and 1972, with the southern part claiming regional autonomy and representation in the government,⁶⁷⁷ and the Kagera border conflict between Tanzania and Uganda in 1978 and 1979, to mention only two. These conflicts caused internal unrest and displacement of people within and outside the victims' countries.⁶⁷⁸ It therefore became necessary that what was once known in Africa as a societal virtue should obtain the status of a right in the Charter to entitle peoples to peace and security in their own countries.

⁶⁷⁴ Rubner, *The Origins of the 1981 African Charter on Human and Peoples' Rights*, 267.

⁶⁷⁵ Some internal and border conflicts in Africa are a colonial legacy. The colonialists divided Africa amongst themselves, something that occasioned forced displacement of ethnic groups in different parts of the continent. See Nordiska AfrikaInstitutet and Shadrack Gutto, "Human and Peoples' Rights in Africa, Myths, Realities and Prospects," 12 *Current African Issues*, Uppsala: Nordiska AfrikaInstitutet, (1991): 10.

⁶⁷⁶ For an extensive discussion of the Banyamulenge case, see Andrew Mollel, "Minority Rights, Nationality Laws and Conflict Prevention: Rethinking the Banyamulenge in the Democratic Republic of Congo," *Journal of African and International Law* 1, No.1, (2008): 53.

⁶⁷⁷ In the colonial period, the Anglo-Egyptian Condominium favoured and empowered the Arab-Muslims who dominated the northern part of Sudan, which had proven to full of resources, over the southern part that was 'African'-Christian dominated and considered a bareland. The two parts were divided with a boundary. The boundary was lifted upon independence so that the two regions were both subject to the central government in Khartoum. However, the merger of the two regions did not change the terrible conditions experienced by the people in the southern part of Sudan in the colonial period. The newly independent government in Sudan proceeded from where the colonialists had left off in 1956. It ignored the southern part of the country in terms of development and participation in the country's governance. For more details, see Marina Ottaway and Mai El-Sadany, *Sudan: From Conflict to Conflict* (Washington: Carnegie Endowment for International Peace, 2012), 4-6.

⁶⁷⁸ This was later acknowledged in paragraphs 10 and 11 of the Preamble to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

According to Article 23 of the Charter, this right is meant to be enjoyed by the people against any threat by their own government and against any external threat likely to compromise it. The former is more applicable to indigenous peoples in the sense that governments have a duty to fulfil this right to indigenous peoples as a fraction of the national population. This is particularly important for indigenous peoples in the face of forceful eviction from their ancestral lands by the state. As examples, scattered events of this kind have been experienced by the San in Botswana, the Maasai in Kenya and Tanzania, and the Anuak in Ethiopia.

4.3.2.6 Peoples' Right to a General Satisfactory Environment Favorable to their Development (Article 24)

As with the lack of definition of the word “peoples” in the Banjul Charter, the term “environment” is not assigned a meaning by the Charter. Also, the Charter does not unpack the content of this right but only links it to the concept of development.⁶⁷⁹ However, through its jurisprudence, the ACHPR concretises the content of the right by emphasising the protection of peoples from pollution and ecological destruction, with the objective of promoting conservation and ensuring ecologically sustainable development and utilisation of natural resources.⁶⁸⁰

In pre-colonial times, environmental conservation and management relied on the communities' traditional knowledge, norms and beliefs that were passed from one generation to the other. This included planning and predicting the availability of resources in the future, monitoring utilisation patterns, and the categorisation of different kinds of soil and vegetation, in order to diligently conserve them for future use. Decision-makers relied on this community knowledge.⁶⁸¹ Later, in the colonial period, these traditional environmental conservation and management patterns were weakened and disrupted by vicious imperial exploitation of African resources. As a result, the newly independent African governments inherited crippled patterns of environmental management, which violated peoples' right to a satisfactory environment favourable to their development. Mining activities, oil extraction and transportation, gas processing industries, to mention a few, were challenging peoples' healthy environment at the

⁶⁷⁹ Kaniye Ebeku, “The Right to Satisfactory Environment and the African Commission,” 3 *African Human Rights Law Journal* 3, (2003): 69.

⁶⁸⁰ See *the SERAC Case*, para. 52.

⁶⁸¹ Oloka-Onyango, *When Courts Do Politics*, 196. Also see Lilian Chenwi, “The Right to Satisfactory, Healthy and Sustainable Environment in the African Regional Human Rights System,” in *The Human Right to the Healthy Environment*, eds. John Knox and Ramian Pejan, (Cambridge: Cambridge University Press, 2018), 59.

time the Banjul Charter was adopted.⁶⁸² This experience had made it necessary to have this right included in the Charter for its promotion and protection at the national level. Indigenous peoples in Africa such as the Maasai in Olkaria Ward in Kenya, where geothermal energy is harnessed, have continued to suffer from extractive activities that affect their livelihoods. Governments are therefore put under the obligation to pay particular attention to protecting indigenous peoples' right to a satisfactory environment for their development under Article 24 of the Charter.

To conclude this section, it should be noted that especially with respect to the right to self-determination (which is the condition for the enjoyment of other peoples' rights under the Charter), the ACHPR has established that application of the provisions of the Banjul Charter to protect group rights should not be done at the expense of infringing the rights of other members of the national population, or undermining the national unity or sovereignty and territorial integrity of the State concerned.⁶⁸³

4.3.3 Indigenous Peoples' Rights and African Human Rights Mechanisms

Although the Banjul Charter does not directly provide for the rights of indigenous peoples, the ACHPR and the AfrCHPR have not used this as an opportunity to disengage with these rights. Through special ACHPR mechanisms, the Commission has managed to implement and monitor indigenous peoples' rights in the continent. Also, the ACHPR together with the AfrCHR have embarked on revolutionary jurisprudence in the quest to promote and protect indigenous peoples' rights in Africa.

4.3.3.1 African Commission on Human and Peoples' Rights

4.3.3.1.1 Composition and Mandate of the Commission

The composition and mandate of the ACHPR are provided for by the Banjul Charter as follows.

(a) Composition

The ACHPR is made up of eleven Commissioners from the States parties to the Charter. However, they render their duties to the Commission in their personal capacity. Having been nominated by their own States parties, their election is conducted through a secret ballot by the

⁶⁸² See Ebeku, "The Right to Satisfactory Environment and the African Commission," 157, which discusses how the 1972 oil spills in the Niger Delta affected more than two thousand hectares of farm land and became one stringent cause of water pollution.

⁶⁸³ Katangese Case, *supra*.

General Assembly of the African Heads of State and Government. The members of the Commission, who must be nationals of the countries which elected them, are usually figures from the legal profession with high morals, integrity, neutrality and expertise in human and peoples' rights.⁶⁸⁴ The Commission elects its own Chairman and Vice-Chairman and makes its own rules of procedure.⁶⁸⁵

(b) Mandate

The primary mandate of the ACHPR is to promote human rights and oversee their protection in the continent as per the conditions provided under the Charter.⁶⁸⁶ Among other things, the Commission is mandated to undertake various studies and research on matters concerning human and peoples' rights, support national institutions on human rights issues, and offer recommendations to the States parties' Governments in cases of human rights controversies. Further, the Commission has the power to formulate rules and principles that provide solutions to legal problems related to human and peoples' rights and fundamental freedoms which will guide the States parties' Governments in adopting relevant legislation. The Commission is also obliged to cooperate with other African and international human rights institutions such as the UN human rights mechanisms (including indigenous peoples' mechanisms) and perform any task assigned to it by the Assembly of the Heads of State and Government to which it must submit periodic reports of its activities.⁶⁸⁷ In submitting its periodic reports to the Assembly of the Heads of State and Government, the Commission must make any recommendations it finds useful. One of the duties to be performed by the Commission is consideration of communications submitted to it by States or any other person or persons concerning alleged human rights violations committed by States parties to the Banjul Charter.⁶⁸⁸ Having considered the communications filed before it, the Commission issues non-binding recommendations to the relevant State party on measures to be adopted to remedy the alleged human rights violations. However, the Commission has discretion to resort to any other suitable method of investigating matters related to human rights violations under the Charter.⁶⁸⁹

⁶⁸⁴ Articles 31-33 of the Banjul Charter.

⁶⁸⁵ Article 42, *id.*

⁶⁸⁶ Article 30 and 45 (2), *id.*

⁶⁸⁷ Article 45(1) (a), (b), (c), (3), (4) and 54, *id.*

⁶⁸⁸ Articles 48 and 55, *id.*

⁶⁸⁹ Article 46, *id.*

Regarding applicable principles in the functioning of the Commission, it is sanctioned by the Charter to derive inspiration from, among other sources, the international instruments adopted by the United Nations, for instance UNDRIP or instruments adopted by UN Specialised Agencies, such as ILO C169. Also, inspiration can be drawn from instruments adopted by African countries in the field of human and peoples' rights.⁶⁹⁰ Aside from international human rights standards, the Commission is required to take into account overall legal precedents, doctrines and African practices which are in alignment with international human and peoples' rights norms and principles that are accepted by the African States. This extends to other customs accepted as law.⁶⁹¹ Thus, it can be argued that the African human rights system is aligned with international standards for the promotion and protection of indigenous peoples' rights while taking into account local circumstances within the continent.

4.3.3.1.2 Background of ACHPR Practice in Respect of Indigenous Peoples' Rights

A robust initiative to protect indigenous peoples' rights in Africa was taken in 1999 when such an agenda landed before the ACHPR for the first time.⁶⁹² This was done by indigenous peoples' representatives backed by non-governmental organisations following a Conference on African indigenous peoples' held in Arusha Tanzania in 1999. This Conference was organised by the International Work Group for Indigenous Affairs (IWGIA) and the Pastoralists' Indigenous Non-governmental Organizations' Forum (PINGO's Forum, based in Tanzania). The Conference brought together under one roof international and regional stakeholders such as the United Nations Commission on Human Rights (now the United Nations Human Rights Council), the International Labour Organisation, the European Union (EU), the ACHPR, the Indigenous Peoples of Africa Co-ordinating Committee (IPACC), the International Alliance of Indigenous and Tribal Peoples of the Tropical Forest (IAITPTF), the African Indigenous Women's Organization (AIWO), the Working Group of Indigenous Minorities in Southern Africa and the African Human Rights Champions. Representatives of hunter-gatherer and pastoralist communities from the Eastern, Central and Southern regions of Africa also attended the Conference. The hunter-gatherers present were the Akie and Hadzabe from Tanzania, the Ogiek

⁶⁹⁰ Article 60, the Banjul Charter.

⁶⁹¹ Article 61, *id.*

⁶⁹² African Commission on Human and Peoples' Rights, "Working Group on Indigenous Populations/Communities and Minorities in Africa: Establishment" accessed November 12, 2021, <https://achpr.org/>.

from Kenya, the BaSua and Abayanda from Uganda, the Batwa from Rwanda, Pygmies from the Democratic Republic of Congo and the San from Namibia and South Africa. The pastoralist communities in attendance were the Maasai from Kenya and Tanzania, the Barbaig from Tanzania, the Pokot, Samburu, Rendille and Somali from the northern part of Kenya and the Himba from Namibia.⁶⁹³ Among other things, the Conference discussed and deliberated on the practicability of securing indigenous peoples' rights in Africa. Consequently, the Arusha resolutions were adopted, one of which urged the relevant governments to accord indigenous peoples special legal protection.⁶⁹⁴ This led to participation of the representatives of the aforementioned indigenous communities in the subsequent ACHPR sessions. In the form of testimonies, the representatives told the Commission about the hurdles faced by members of their communities in their respective countries due to the nature of their livelihoods. These included marginalisation in mainstream development projects, exclusion from decision-making processes on matters affecting their livelihoods, and loss of their ancestral lands in the name of public interests. They called for recognition, respect and protection of indigenous peoples' rights in Africa.

4.3.3.1.3 Special Mechanism on Indigenous Peoples' Rights

The ACHPR establishes subsidiary mechanisms to carry out specific thematic tasks on its behalf. The mechanisms established take the form of Committees, Special Rapporteurs and Working Groups. The Commission assigns each mechanism its mandate, composition and terms of reference. Each special mechanism is obliged to submit a report of its activities at every ordinary session of the Commission. With respect to indigenous peoples, the relevant special mechanism established by the Commission is in the form of a Working Group.⁶⁹⁵

Working Group of Experts on Indigenous Populations/Communities and Minorities in Africa

Consistent lobbying by indigenous peoples' champions at the ACHPR resulted in the formation of a Working Group of Experts on the Rights of Indigenous or Ethnic Communities. The Working Group came into being through the ACHPR's Resolution on the Rights of Indigenous

⁶⁹³ Jensen Marriane, *Indigenous Peoples in Eastern, Central and Southern Africa*, (Copenhagen: IWGIA, 2001) 11.

⁶⁹⁴ Paul Tamuno, "New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa," *Journal of African Law* 1 (2017): 311.

⁶⁹⁵ African Commission on Human and Peoples' Rights, "Special Mechanisms," accessed February 7, 2024, <https://achpr.au.int/index.php/en/special-mechanisms>.

Peoples' Communities in Africa - ACHPR/Res. 51(XXVIII)00 of the year 2000.⁶⁹⁶ The Working Group was charged with studying the concept of indigenous populations or communities in Africa, examining the impact of the Banjul Charter on the rights of indigenous peoples in Africa, and proposing viable mechanisms for monitoring and protecting such rights. The Working Group was officially established at the ACHPR's twenty-ninth ordinary session in May 2001. It consisted of three Commissioners, one independent expert on indigenous issues and three other experts on indigenous communities in Africa.⁶⁹⁷ Having executed the mandate bestowed upon it by the aforementioned resolution, the biggest mark left by this Working Group was the landmark Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities which has already been discussed in the literature review section in chapter one of this thesis. One of the recommendations made in this report was the formation of what is known as the Working Group on Indigenous Populations/Communities in Africa.⁶⁹⁸ Consequently, in the ACHPR's thirty-fourth ordinary session held in November 2003, the ACHPR adopted the aforementioned report through its Resolution on the Adoption of the "Report of the African Commission's Working Group on Indigenous Populations/Communities"- ACHPR/Res. 65(XXXIV) 03. It also established the Working Group on Indigenous Populations/Communities with six members (one as a Chairman and one independent expert) and reconstituted its mandate for the next two years. The Working Group was commissioned to study the situation of indigenous populations or communities in individual African countries by conducting country visits and gathering information concerning the violation of indigenous peoples' human rights and fundamental freedoms from all possible sources, such as the indigenous peoples themselves, NGOs and governments. The Working Group was expected to offer recommendations concerning preventive measures and remedies in respect of the violation of indigenous peoples' rights, to raise funds from interested stakeholders to support the work of the Working Group, and to cooperate with other international and regional human rights bodies to further the cause of protection and promotion of indigenous peoples in Africa. Lastly, the Working Group was obliged under this Resolution to submit periodic reports

⁶⁹⁶ This resolution came earlier than the United Nations Human Rights Council's Resolution No. 6/36 of 2007 which established the United Nations' Expert Mechanism on the Rights of Indigenous Peoples.

⁶⁹⁷ African Commission on Human and Peoples' Rights, "Working Group on Indigenous Populations/Communities and Minorities in Africa: Establishment."

⁶⁹⁸ African Commission on Human and Peoples' Rights, "Working Group on Indigenous Populations/Communities and Minorities in Africa: Establishment."

of its activities to the ACHPR.⁶⁹⁹ This Working Group was established by the Commission due to the lack of a specific mechanism within the ACHPR to promote, protect and monitor the enjoyment of indigenous peoples' rights in the continent.⁷⁰⁰ Since its establishment, the Commission has been renewing its mandate and revisiting its composition at two-year intervals, except where shorter or longer intervals became inevitable.

It was not until 2020 that the Working Group's mandate was expanded to cover the rights of minorities in Africa, such as cultural, ethnic, linguistic and religious minorities. This was done through the adoption of a Resolution of the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities, in Africa- ACHPR/Res. 455 (LXVI) 2020. The resolution also changed the title of the Working Group to Working Group on Indigenous Populations/Communities and Minorities in Africa.

Over the years, the ACHPR has adopted resolutions on indigenous peoples' rights touching on specific topics. For example, in 2011, it passed a Resolution on the Rights of Indigenous Women in Africa⁷⁰¹ and a Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and Designation of Lake Bogoria as a World Heritage Site,⁷⁰² in 2014 it adopted a Resolution on the United Nations World Conference on Indigenous Peoples,⁷⁰³ and in 2016 it passed a Resolution on Indigenous Populations/Communities in Africa⁷⁰⁴ which addresses the right of indigenous peoples to their ancestral lands and territories in Africa. Further, in 2019, the Commission passed a Resolution on the Recognition, Promotion and Protection of Indigenous Languages⁷⁰⁵ and in 2021 a Resolution on Conducting a Study on the Impact of COVID-19 on Indigenous Populations/Communities in Africa.⁷⁰⁶ In all of the aforementioned Resolutions, the Commission urged the States parties to the Banjul Charter to adopt policies, laws and specific programmes that promote and protect indigenous peoples' rights with regard to the themes addressed.

⁶⁹⁹ African Commission on Human and Peoples' Rights, "Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations / Communities" - ACHPR/Res.65(XXXIV)03, accessed February 1, 2024, <https://achpr.au.int/en/node/728>.

⁷⁰⁰ *Ibid.*

⁷⁰¹ ACHPR/Res.190 (XLIX) 11.

⁷⁰² ACHPR/Res.197 (L) 2011.

⁷⁰³ ACHPR/Res.291 (EXT.OS/XVI) 2014.

⁷⁰⁴ ACHPR/Res.334 (EXT.OS/XIX) 2016.

⁷⁰⁵ ACHPR/Res.430 (LXV) 2019.

⁷⁰⁶ ACHPR/Res.476 (LXVIII) 2021.

4.3.3.1.4 Jurisprudence of the Commission

The jurisprudence of the Commission has played a great role in protecting and promoting the rights of indigenous peoples in Africa. First and foremost, the Commission has taken upon itself to tackle the term “peoples” as used in the Banjul Charter with a view to making clear who the beneficiaries of peoples’ rights under the Charter are. It has done so through its jurisprudence which clearly accommodates indigenous peoples in the term “peoples.” Consequently, it is now clear that indigenous peoples are beneficiaries of peoples’ rights under the Banjul Charter. This element of the Commission’s jurisprudence has been thoroughly exhausted in section 2.2.2.3 of this thesis. To avoid repetition, the discussion will not be reproduced here. This section will deal with the substantive rights under the Banjul Charter that have been assertively claimed by indigenous peoples and protected by the Commission. This is exemplified by the landmark *Endorois Case*.

*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*⁷⁰⁷

Facts

This communication was filed before the Commission by the Centre for Minority Rights Development (CEMIRIDE) in collaboration with the Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE) which made an *amicus curiae* submission on behalf of the Endorois. They alleged violation of several rights by the Government of Kenya affecting the Endorois people who reside around the Lake Bogoria area in the Rift Valley Province. The violations related to the government’s eviction order which sought to remove the Endorois from their ancestral land with inadequate consultation and compensation. This was alleged to have resulted in the displacement of people, the loss of property, the dismantling of pastoral activities, a barrier to accessing religious and cultural sites, and disruption of the general well-being and development activities of the community.

The clash between the Endorois and the government of Kenya traces its roots back to 1973 when Lake Hannington Game Reserve was established, with the subsequent gazetting of Lake Bogoria as a Game Reserve in 1978. Also, the ruby mining concessions granted to private companies by the government in 2002 on the Endorois’ land was considered likely to cause a

⁷⁰⁷*Supra.*

great deal of environmental pollution which would affect the life of the Endorois as well as their livestock. The Endorois claimed ownership of the disputed land since time immemorial. After having failed in pursuit of their rights at the administrative level, the Endorois were also defeated at the High Court in Kenya. The Court was of the view that there is no such thing as “a collective right to property” and was against the idea that the law in Kenya should give room for protection of “peoples’ land” by mere reasons of long-time occupation or cultural rights.⁷⁰⁸ These defeats led to the Endorois’ claims before the Commission.

Legal Complaint

The Endorois alleged infringement of Articles 8,14,17, 21 and 22 of the Banjul Charter pertaining to religion, property, free disposal of wealth and natural resources and development.

Parties’ Arguments

Regarding the Endorois’ right to practise their religion, they argued that a substantial part of their religious practices was tied to the disputed land. For example, their religious sites and ancestors’ burial grounds were all around Lake Bogoria. They added that their ancestors’ spirits lived in the lake. Hence, evicting them from the vicinity and denying them access to Lake Bogoria violated their right to practise their religion. As to the right to property, the Endorois stated that they had been *bonafide* owners of the disputed land since the pre-colonial period, not on paper but by habitation and through their cultural, religious and economic activities on it. Anyone who wanted to access their ancestral land must seek permission from them.⁷⁰⁹ They averred that during the colonial period, when the British Crown claimed formal ownership of all land in Kenya, they were left undisturbed with all other rights to the land except ownership. During and after the colonial period, their land was held in trust on their behalf by the County Council with a view to handing over its full title to the Endorois in future when they would own it under the applicable customary law as stipulated in the then Kenyan Constitution.⁷¹⁰ They cited the case of *Mayagna (Sumo) Awas Tigni v. Nicaragua*⁷¹¹ determined by the Inter-American Court of Human Rights and the Commission’s Report of the Working Group on Indigenous Populations/Communities to emphasise the right to collective title to land which was not domestically recognised in Kenya at

⁷⁰⁸ Para 11 of the *Endorois Case*.

⁷⁰⁹ Para. 72, *id.*

⁷¹⁰ Paras. 86-89, *id.*

⁷¹¹ Series C, No 79, 31 August 2001.

the time of filing the communication.⁷¹² Regarding the right to culture, the Endorois alleged that the Kenyan government had violated this right by disrupting their pastoral way of life and hindering their access to cultural sites on the shoreline of Lake Bogoria where they hold periodic cultural rites and celebrations.⁷¹³ Coming to the issue of violation of the right to free disposal of wealth and natural resources, the Endorois cited the *SERAC Case* where the Commission had settled that the right to free disposal of wealth and natural resources can be exercised by indigenous people inhabiting a particular area within a State. They were of the view that their eviction from the disputed area infringed their right to utilise the land that held resources crucial for their own and their livestock's survival. The Endorois relied on this land for resources such as traditional medicine, pastures and salt licks for the livestock. Also, the government's move to grant concessions to private companies to conduct mining activities on the Endorois land without consulting them violated their right to dispose of the wealth found in their own ancestral lands.⁷¹⁴ This was said to go along with a breach of their right to development, because evicting them from the Lake Bogoria vicinity resulted in the loss of livestock and had other negative impacts on their general well-being. This had direct restraining effects on their development. Further, the lack of adequate consultation by the Kenyan government before issuing the eviction notice meant they were excluded from sharing the economic benefits that would accrue from the government's new activities in the area.⁷¹⁵

The Respondent State averred that the Endorois were not "a people" but just one of many clans belonging to the Tugen ethnic group living around Lake Bogoria and could not exclude other clans from the area by claiming exclusive rights thereto. Also, at the time when the disputed area was gazetted as a Game Reserve, all the procedures for establishing a Game Reserve had been followed, including payment of compensation and enforcement of a resettlement programme through what is known as the Mochongoi resettlement scheme.⁷¹⁶ Further, the Endorois, just like any other community in the country, had always been involved in the national development budget and provision of social services, including providing them with free primary education.

⁷¹² Para. 91-93, *Endorois Case*.

⁷¹³ Para. 116, *id.*

⁷¹⁴ Paras. 120-121, *id.*

⁷¹⁵ Paras. 131 and 133-135, *id.*

⁷¹⁶ Para. 64, *id.*

Commission's Reasoning

Addressing the conceptual issue of the term “peoples” in the Banjul Charter, the Commission underlined the fact that all attempts to define the term “peoples” under the Charter had tied indigenous peoples to their land and culture, as well as their consciousness and willingness to be identified as such.⁷¹⁷ It then went on to deliberate on the substantive rights as follows.

On the alleged violation of the right to practise their religion, the Commission observed that preventing the Endorois from accessing Lake Bogoria with no tangible justification such as environmental conservation, economic reasons or protection of public security unreasonably violated their right to practise their religion.⁷¹⁸ As to their right to property, the Commission was of the view that to protect African communities, the initial step involves recognising their rights, benefits and interest in their land, all of which are guaranteed under the Banjul Charter. Thus, the Respondent State had the obligation not only to respect the Endorois' right to their property but also to protect it.⁷¹⁹ It was therefore clear that the eviction of the Endorois from their traditional land by the Kenyan Government was a severe infringement of their collective right to property. Moreover, this infringement was not proportionate to any urgent public need which would necessitate forcing eviction upon them.⁷²⁰

As to the right to practise their culture, the Commission commented that imposing restrictions and rules against the practice of a culture undermines and disintegrates a society's core values, practices, trends, norms and beliefs that have been built up over the years. Such cultural practices include the Endorois' cattle rearing activities and ceremonies performed in connection with Lake Bogoria.

Regarding the right to free disposal of wealth and natural resources, the Commission reiterated the opinion it gave in the *SERAC Case* that a traditional community occupying a certain area should benefit from the resources found in that particular piece of land. It noted that, although the Endorois did not have a direct use for the rubies that were discovered in their land, they were entitled to a share of the proceeds obtained from the mining of such minerals. In addition, they were entitled to access Lake Bogoria as one of the natural resources found in the area. Generally, the dispute involved the Endorois traditional land, hence, it was the

⁷¹⁷ Para. 150-154, *Endorois case*.

⁷¹⁸ See para. 173, *id.*

⁷¹⁹ Paras. 187 and 191, *id.*

⁷²⁰ Paras. 200 and 238, *id.*

Commission's opinion that the Kenyan government had an obligation to adequately consult the Endorois on how they would benefit or be fairly compensated in relation to the wealth and resources found in their land upon eviction, if at all such eviction was necessary.⁷²¹

Coming to the Endorois' right to development, the Commission was of the view that the right to development was violated by the Kenyan government in disregarding the losses that the Endorois people incurred through displacement from their ancestral land. This included loss of pastures and water sources for their livestock which had led to the death of a considerable number of their cattle. Also, poor involvement of the Endorois in decisions regarding the establishment of a Game Reserve on their ancestral land denied them the right to contribute ideas on how such a Game Reserve could add value to their development.⁷²²

Holding

The Commission held that the Kenyan government had violated Articles 1, 8, 14, 17, 21 and 22 of the African Charter. It therefore recommended that the government should acknowledge the Endorois' collective right to ownership of their ancestral land and restore this right to the community without any restrictions whatsoever. Also, the government was recommended to compensate the Endorois for the losses incurred as a result of their eviction. Further, it recommended that Kenya should ensure consultations with the Endorois are conducted with a view to including them in the benefit-sharing strategies of whatever economic activity is likely to be established by the government in their land. Lastly, consultations were proposed for implementation of the Commission's recommendations. The State party was also recommended to update the Commission on the progress made in the implementation of these recommendations. As it made these recommendations, the Commission pledged to provide all the assistance possible in ensuring their implementation.

Analysis

This case illustrates the role played by the ACHPR in safeguarding the rights of indigenous peoples in Africa. It underlines the relevancy of the mechanism in handling both individual and collective rights provided for in the Banjul Charter. It presents the Commission's position when it comes to approaching the provisions of the Banjul Charter concerning the protection of

⁷²¹ Paras. 267-8, *Endorois case*.

⁷²² Paras. 288 and 297, *id.*

indigenous peoples' rights. The case lays the juridical foundation for the practice of the ACHPR in cases involving indigenous peoples' rights. It reflects the Commission's obligation to align its practice with international human rights standards and practices, in this case, indigenous peoples' rights standards and practices. In arriving at its decision in favour of the Endorois, the Commission cited international legal instruments for the protection and promotion of indigenous peoples' rights, such as ILO C169 and UNDRIP. Also, apart from referring to its own previous jurisprudence, it borrowed a leaf from the jurisdiction of other regional human rights courts, i.e. the Inter-American Court of Human Rights (IActHR) and the European Court of Human Rights (ECHR), specifically when it came to defining property rights. This is sufficient evidence of the Commission's determination to go an extra mile to secure the rights of indigenous peoples in the African continent. With this case, indigenous peoples' collective right to own ancestral lands were clearly established by the Commission as one dimension of approaching the right to property under the Charter. This specific right is the foundation for the enjoyment of other collective rights attached to indigenous communities.

4.3.3.2 African Court on Human and Peoples' Rights

Like the Commission, the AfrCHPR has served as an avenue for enforcing indigenous peoples' rights. The Court has admitted cases on indigenous peoples' rights as part of exercising its mandate provided for under the Charter.

4.3.3.2.1 Composition and Mandate of the Court

(a) Composition

The AfrCHPR is composed of eleven Judges each elected from one of the OAU Member States. After being nominated by the States Parties to the Protocol Establishing the Court,⁷²³ the Judges are elected through the mechanism of secret ballot by the OAU Assembly of Heads of State and Government.⁷²⁴ The elected Judges are jurists of high integrity and moral standards who serve in the Court in their personal capacity according to their juridical experience and competence in the field of human and peoples' rights.⁷²⁵ The President and Vice-President of the Court are elected

⁷²³ Article 12 of the Protocol Establishing the AfrCHPR.

⁷²⁴ Article 14, *id.*

⁷²⁵ Article 11, *id.*

from amongst the judges of the Court.⁷²⁶ The Judges preside over a case when a quorum of at least seven is attained.⁷²⁷ No Judge presides over a case involving the State which he or she comes from.⁷²⁸

(b) Mandate of the Court

The AfrCHPR has the jurisdiction to preside over all contentious and non-contentious cases submitted before it regarding the application and interpretation of the Banjul Charter, the Protocol establishing it and any other human rights instruments that are ratified by the parties.⁷²⁹ The Court receives cases from the African Commission on Human and People's Rights, States Parties involved in a communication before the Commission, the State Party from which the victim(s) of human rights violation(s) come(s), and the African Intergovernmental Organizations.⁷³⁰ Upon request, a State Party to the Court with interest in a case before the Court may be allowed to join the case.⁷³¹ Additionally, individuals and non-governmental organisations with observer status before the ACHPR are permitted to institute cases directly before the Court subject to the condition that such individuals and NGOs must come from the States Parties that have deposited their declaration with the AU Secretary General accepting the competence of the Court.⁷³²

4.3.3.2.2 Jurisprudence of the Court

On May 26, 2017 the AfrCHPR rendered its first decision on a case involving indigenous peoples' rights since becoming operational in 2004. This landmark case came from Kenya and it landed before the Court through the ACHPR after the State Party's reluctance to act on the Commission's recommendations on, among other things, halting alleged human rights violations. This case, which is discussed below, is famously known as the *Ogiek Case*.

⁷²⁶ Article 21 (1), Protocol Establishing the AfrCHPR.

⁷²⁷ Article 23, *id.*

⁷²⁸ Article 22, *id.*

⁷²⁹ Article 3, *id.*

⁷³⁰ Article 5(1), *id.*

⁷³¹ Article 5 (2), *id.*

⁷³² See Article 5 and 34 (6) and (7), *id.*

*African Commission on Human and Peoples' Rights versus the Republic of Kenya*⁷³³

Facts

Upon the Ogieks being served by the Kenya Forestry Service in late 2009 with a thirty days eviction notice to vacate the Mau Forest, the Centre for Minority Rights Development (CEMIRIDE) and the Minority Rights Group International (MRGI) filed a communication before the ACHPR on behalf of the Ogieks. The communication sought the Commission's intervention to save the Ogiek peoples' economic, social, cultural and political interests that were in jeopardy. The Commission responded with interim recommendations to the Kenyan government to hold the eviction of the Ogieks from the Mau Forest pending determination of the alleged infringed rights. This was not heeded by the Kenyan government since no response was filed to the Commission. As a way forward, the ACHPR seized the AfrCHPR with an application. In this application on behalf of the Ogieks, the Commission indicated continued violations of the Ogieks' individual and collective rights by the Kenyan Government through evictions from the Mau Forest. Among other things, the forest was alleged by the Kenyan Government to be a water catchment area. The application indicated that the Ogieks had continued facing these evictions since the colonial period despite several judicial actions they had undertaken domestically in Kenya.

Legal Claims

The Applicant claimed violation of the Ogieks' rights to life and respect of their dignity, freedom of conscience and religion and right to property as per Articles 1, 2, 4, 8 and 14 of the Charter. The application further claimed violation of the Ogieks' rights to participation in their group's cultural life, protection of their morals and traditional values, free disposal of their wealth and natural resources, and economic, social and cultural development, as per Articles 17 (2) and (3), 21, and 22 of the Charter.

Parties' Arguments

On the Ogieks' indigenosity to the Mau Forest, the Applicant submitted that the forest had always been the ancestral home of the Ogieks as hunter-gatherers, and that their occupancy of it was essential for all aspects of their life and well-being, including their cultural, traditional, and religious practices. It was added that the forest provided sources of medicine and supported all of

⁷³³ Application No. 006/2012.

the Ogieks' economic activities. The Respondent State argued that the Ogieks could no longer be considered indigenous peoples since at the time of filing the Application they were composed of varied ethnicities, unlike the Ogieks who lived in the Mau Forest in the 1930s. It further argued that the contemporary members of this community had adapted to the modern way of life, meaning they were not an indigenous people but a community just like any other modern community in Kenya.

Regarding the Ogieks' right to communal ownership of property, the Applicant argued that the non-recognition of the Ogieks as indigenous peoples by the Respondent violated their communal right to own the disputed land.⁷³⁴ Also, the evictions of the Ogieks from the Mau Forest without their consent and with poor compensation, and granting concessions to use the same property to third parties, entailed denying them benefits accruing therefrom. The Applicant submitted that different concessions for exploitation of the Mau Forest had been granted to non-Ogieks, including corporate bodies, but that the Ogieks had not benefited from these arrangements, in violation of Article 21 (2) of the Charter.⁷³⁵ The ACHPR argued before the Court that the Ogieks should receive full recognition as an indigenous people in Kenya and obtain a communal title to their ancestral land in the Mau Forest. In reply, the Respondent emphasised that the Ogieks were not the only community depending on the Mau Forest and that they were not entitled to exclude other communities, like the Keiyo, Tugen and Kipsigs, from the forest by claiming sole ownership of it. The Respondent stated further that, since the colonial period, the Ogieks had been evicted from the Mau Forest because it was a conserved area. Additionally, the Respondent argued that all forests belong to the State, except for private and local authorities' forests; hence, access to or use of the forests and evictions from them always follow the due process of law, which the Respondent had abided by. The State Party averred that, in the case of the Mau Forest, the due process of law had been followed and that the Ogieks' eviction had included a series of consultations with them.⁷³⁶

As to discrimination of the Ogieks, the Applicant alleged different treatment of the Ogieks and the rest of the minority groups in Kenya. This was shown by the restraint imposed upon the Ogieks by the Respondent State from accessing their ancestral land, religious and cultural sites and exploitation of natural resources there, due to non-recognition of their

⁷³⁴ Para. 114, *Ogieks Case* (merits).

⁷³⁵ Para. 43 (B) and (D), *id.*

⁷³⁶ Paras. 120-121, *id.*

distinctive identity by the State.⁷³⁷ The Respondent countered this argument by asserting that, unlike in the 1963 Kenyan Constitution, the right to non-discrimination on these lines was sufficiently guaranteed by the new 2010 Kenyan Constitution.⁷³⁸

Coming to the right to life provided for under Article 4 of the Charter, the Applicant argued that the eviction of the Ogieks from the Mau forest threatened their right to decent survival since their hunter-gatherer livelihood depended on the forest. The Respondent State counter-argued that the eviction was intended, among other things, to allow the development of the Mau Forest Complex, which was meant to benefit all Kenyans, including the Ogieks. Additionally, minorities like the Ogieks inevitably tend to suffer when development projects are established in their areas which serve the national interest. Hence, their eviction should be viewed in light of the proportionality principle.⁷³⁹

Regarding the right to religion, the Applicant was of the view that the Ogieks' right to practise their religion, which is closely connected to some parts of the forest, was recognised by international law. Hence, such a lifestyle was not a threat to law and order, as alleged by the Respondent. Conversely, the Respondent State was of the view that since the Ogieks could not adduce any evidence as to the specific areas in the forest that are connected to their religion, it was obvious that they no longer practised any form of religious activities in the forest. It added that the Ogieks had adapted to modern forms of worship, i.e. Christianity, and therefore there was no breach of the right to practise their religion.⁷⁴⁰

As to the right to participate in one's culture, the Applicant argued that restricting the Ogieks from accessing their cultural sites resulted in a violation of their right to participate in their culture. The ACHPR recalled its jurisprudence in the *Endorois Case* where it deliberated on what constitutes culture. In that case, it had ruled that culture means the material and spiritual undertakings of a given society that differentiates it from other societies and includes language, religion, morals, knowledge and other characteristics of this kind.⁷⁴¹ The Respondent argued that it recognised this right and had taken local and international steps to promote it. However, this right could be exercised at the expense of the environment which is intended to benefit all

⁷³⁷ Para. 133, *Ogieks Case* (merits).

⁷³⁸ Para. 135, *id.*

⁷³⁹ Paras. 147 and 150, *id.*

⁷⁴⁰ Paras. 157 and 161, *id.*

⁷⁴¹ Para. 170, *id.*

Kenyans. Also, it was the Respondent's view that the Ogieks no longer exercised their culture in its inherent form as they had undergone modernisation.⁷⁴²

Regarding the right to free disposal of wealth and natural resources, the Applicant elaborated that this had been violated in two ways: firstly, by restraining the Ogieks' access to the resources found in the Mau Forest, and secondly, by granting permission to private companies to carry out logging activities in the forest without any benefit accruing to the Ogieks from these activities on their ancestral land.⁷⁴³ The Respondent argued that it had not violated this right with respect to the Ogieks; rather, it had exercised its discretion concerning Kenyan natural resources. Thus, it had granted the Ogieks access to the forest resources rather than ownership and control of their disposal.⁷⁴⁴

On the right to development, the Applicant was of the view that since the Ogieks were not consulted and did not consent to eviction from their ancestral land, their general right to development had been violated.⁷⁴⁵ The Respondent countered this argument by suggesting that such violation should be proven by the Ogieks with evidence showing in what circumstance this right had been violated.⁷⁴⁶

Court's Reasoning

In merits, the initial step taken by the Court was to examine the question as to whether the Ogieks constituted an indigenous people. This issue was found central to the entire disposal of the application.⁷⁴⁷ The Court reasoned that there was no definition of the term "indigenous people" in the Charter.⁷⁴⁸ It therefore drew inspiration from reports of various studies conducted on the subject and international instruments as per Articles 60 and 61 of the Charter to come up with the criteria for identifying an indigenous people:

...presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of

⁷⁴² Paras. 174-175, *Ogieks Case* (merits).

⁷⁴³ Para. 191, *id.*

⁷⁴⁴ Para. 194, *id.*

⁷⁴⁵ Para. 202, *id.*

⁷⁴⁶ Para. 205, *id.*

⁷⁴⁷ Para. 102, *id.*

⁷⁴⁸ Para. 105, *id.*

production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.⁷⁴⁹

Having carefully gone through these criteria, the Court affirmed that the Ogieks were an indigenous people entitled to special protection according to the theory of vulnerability just like any other indigenous population in the world.⁷⁵⁰

Regarding the Ogieks' right to communal property, the Court was of the opinion that since it had satisfied itself that the Ogieks were an indigenous people; their right to communal property was to be determined in line with Article 26 of UNDRIP. It stated that this right means not only entitlement to ownership, but also possession, use and occupancy of the land.⁷⁵¹ It then went ahead to determine that since the Respondent State had argued that eviction of the Ogieks from the Mau Forest was justified by the public interest of protecting a natural ecosystem, but could not prove how the continued existence of the Ogieks in the forest degraded the ecosystem, the evictions were unjustifiable and in violation of Article 14 of the Charter.⁷⁵²

On the alleged discrimination against the Ogieks, the Court believed that different treatment amounts to discrimination as per Article 2 of the Charter when it does not have a specific purpose, reasonable justification, necessity or sense of proportionality.⁷⁵³ The Court found that there was no proof that the destruction of the ecosystem in the Mau Forest was solely due to the Ogieks' presence in the forest and that there were other activities carried out in the forest by non-Ogiek communities and corporate bodies sanctioned by the government of the Respondent State.⁷⁵⁴ It was noted by the Court that other minority groups in Kenya who were also dependent on the natural environment, like the Ogieks, were not restrained from accessing their major means of livelihood, i.e. the natural resources at their disposal. This was found to be discriminatory to the Ogieks due to the mode of life which they had chosen to lead as hunter-gathers.⁷⁵⁵ The Court emphasised that, even though the 1963 Kenyan Constitution did not

⁷⁴⁹ Para. 107, *Ogieks Case* (merits).

⁷⁵⁰ Para. 112, *id.*

⁷⁵¹ Para 127, *id.*

⁷⁵² Paras. 129 and 130, *id.*

⁷⁵³ Para 139, *id.*

⁷⁵⁴ Para 145, *id.*

⁷⁵⁵ Para 142, *id.*

sufficiently address peoples' rights like the 2010 Constitution, the Kenyan government already had the responsibility to protect peoples' rights under the Charter as a State Party.⁷⁵⁶

As to violation of the right to life, the Court affirmed that the eviction of the Ogieks from the Mau forest had disrupted their way of life and dependence on the forest. However, since there had been no evidence adduced linking their eviction to the deaths that had taken place at different times within the Ogiek community, this right was not sufficiently proved to have been violated by the Respondent State.⁷⁵⁷

Regarding the right to participate in one's culture, the Court ruled that, as the Respondent State could not prove how the Ogieks' engagement with the Mau forest was destroying the natural ecosystem, evicting them from the forest unjustly curtailed their right to participate in cultural activities in the forest, including religious rites.⁷⁵⁸

On the alleged violation of the right to freely dispose of wealth and natural resources, the Court was of the view that, as far as the Respondent State was found to have violated the aforementioned rights through the eviction of the Ogieks from the Mau Forest, it was evident that the Ogieks' right to free disposal of the natural resources in the forest had also been violated.⁷⁵⁹

As to the right to development, the Court reasoned that Article 22 of the Charter needed to be considered in parallel with Article 23 of the UNDRIP which provides for indigenous peoples' right to decide their own approach to development and the necessity of including them in all development programmes. Also, the same Article 23 provides for indigenous peoples' right to administer development programmes through their own institutions. Considering that the Ogieks' eviction from the Mau Forest had taken place without consultation and without their free consent, the Court resolved that the aforementioned provisions were not heeded and their right to social, economic, and cultural development was violated.⁷⁶⁰

Finally, regarding the violation of Article 1 of the Charter which obliges the Member States to operationalise the rights, duties and freedoms provided for in the Charter by enacting corresponding domestic legislation or doing any other act giving effect to such rights, the Court was of the view that, regardless of the laws enacted in Kenya to recognise some of the rights

⁷⁵⁶ Para 143, *Ogieks Case* (merits).

⁷⁵⁷ Paras. 155-156, *id.*

⁷⁵⁸ Paras. 198, *id.*

⁷⁵⁹ Paras. 200-201, *id.*

⁷⁶⁰ Paras 209-210, *id.*

provided for in the Charter, there was no substantiation by the Kenyan government of the steps taken to give effect to Articles 2, 8, 14, 17 (2) and (3), 21 and 22 of the Charter in relation to the Ogieks, which constituted a violation of Article 1 of the Charter.⁷⁶¹

Holding

The Court found that the Respondent State (Kenya) was in violation of Articles 1, 2, 8, 14, 17 (2) and (3), 21 and 22 of the Charter. It decided that it would rule on reparations⁷⁶² to the Ogieks in a separate decision.

Reparations

The judgment on reparations in relation to this case was passed on June 23, 2022, which is more than five years after the judgment on merits was rendered.⁷⁶³ The reparations ordered in favour of the Ogieks were both pecuniary and non-pecuniary. The pecuniary reparations ordered were compensation by the Kenyan Government for the material and moral injustices suffered by the Ogieks, i.e. KES 57 850 000 and KES 100 000 000 respectively, tax free.⁷⁶⁴ The non-pecuniary reparations ordered were legal and administrative measures necessary to grant the Ogieks collective title to their ancestral land in the Mau Forest by the Respondent State. Also, there should be an inclusive dialogue by the Respondent State with the Ogieks and all other parties concerned to reach an amicable settlement on strategies to be adopted to allow the Ogieks to benefit from the concessions and leases already granted to other parties on the Ogieks' land. If this dialogue should fail, the Respondent State was ordered to cancel the concessions or lease agreements and compensate the parties concerned. Further, the Respondent State was ordered to grant full legal recognition of the Ogieks as an indigenous people in Kenya within one year from the passing of the judgment, including recognition of their language and their cultural and religious practices.⁷⁶⁵ Further, the Respondent State was ordered to ensure the inclusion of the Ogieks in all development programmes likely to affect them. This included consulting them in a

⁷⁶¹ Paras 216 and 217, *Ogieks Case* (merits).

⁷⁶² Restitution, compensation, satisfaction and guarantees of non-repetition by the Kenyan Government. See para 218 of the Charter.

⁷⁶³ It was acknowledged by the Court's Vice President (Judge Blaise Tchikaya) in the separate opinion to the Reparations Judgment that the Ogieks case was the longest finalised case ever recorded in the history of the Court in the past sixteen years. See Para. 2 of the Application No. 006/2012 (Reparations Judgment of 23 June 2022), Individual Opinion of Judge Blaise Tchikaya, Vice-President.

⁷⁶⁴ Para 160 (i), *Ogieks Case* (reparations).

⁷⁶⁵ Para. 160 (iv) to (vi), *id.*

manner to which they were accustomed. Additionally, to avoid further violation of the rights of the Ogieks, the Respondent State was ordered to ensure total inclusion of the Ogieks in the implementation of the reparations judgment. Moreover, it was ordered to adopt legal and administrative measures that would give full effect to the terms of the reparations judgment. These included establishing an Ogieks community development fund which would act as a repository for all the funds to be paid to the Ogieks and a Committee to be responsible for the management of this development fund.⁷⁶⁶ Also, the Respondent State was ordered to publish nationwide the outcomes of both judgments on merits and reparations in the *Government Gazette*, in newspapers and on the official government websites. Additionally, the Respondent State was ordered to submit to the Court a report on the implementation of the reparation orders within one year from the date of notification of the reparations judgment. Most importantly, the Court undertook to hold a hearing on the status of the implementation of the reparation orders twelve months after rendering of the judgment.⁷⁶⁷

Analysis

This case contributes to the development of jurisprudence concerning indigenous peoples' rights within the African human rights system. It is a pioneering case on indigenous peoples' rights in the AfrCHPR. It is also one of the very few cases that have made it to the AfrCHPR via the ACHPR.⁷⁶⁸ The case is a representation of the AfrCHPR's mandate to handle cases with claims in respect of both individual and collective rights provided for under the Banjul Charter. This is evidence of the interdependence of these rights in the Charter. An individual right like the right to property has been innovatively approached to accommodate the Ogieks' right to collective ownership of land and access to its natural resources. The same approach was applied in the *Endorois case*. This shows that the African human rights implementation bodies are interested in securing the rights of indigenous peoples in the African continent.

In ordering reparations for the Ogieks, the Court applied both cultural and communitarian approaches. With regard to the cultural approach, the Court's order regarding legal and administrative recognition of the Ogieks as an indigenous people in Kenya due to their cultural

⁷⁶⁶ Para. 160 (ix) to (xiii), *Ogieks Case* (reparations).

⁷⁶⁷ Para. 160 (xiv) to (xvi), *id.*

⁷⁶⁸ As of February 7, 2024 only three contentious cases had been filed in the Court by the Commission. See African Court, Contentious Matters, "Statistics Graph," accessed February 7, 2024, <https://www.african-court.org/cpmt/statistic>.

distinctiveness and way of life paints a clear picture of its profound concern for cultural survival of this indigenous community. The Court considered the Ogieks' eviction from their communal land as a direct violation of their right to freely practise their culture and religion, because these practices are attached to their land.⁷⁶⁹ As to the communitarian approach, the Court's order for formalisation of the Ogieks' ownership of land in the Mau Forest in the form of a collective title signifies its communitarian approach to the right to property under the Charter. Further, as to the measures for coordinating payment and management of their compensation, the Court ordered the setting up of a community development fund and a Committee to oversee the fund for the benefit of the entire community. Compensation was not ordered to be paid on an individual basis but to the whole community.

4.3.3.3 Challenges and Opportunities for Indigenous Peoples in the African Human Rights System

4.3.3.3.1 Challenges

One of the challenges facing indigenous peoples in terms of accessing justice within the African Human Rights System is procedural. Both the ACHPR and the AfrCHPR require any party wishing to approach such forums to have exhausted local remedies.⁷⁷⁰ It is a fact that most African States have been reluctant to recognise the specific rights of indigenous peoples in their domestic legislation.⁷⁷¹ This has been causing unnecessary and unreasonable delays in respect of indigenous peoples' access to the regional human rights bodies. For indigenous peoples, exhausting all local remedies has typically been challenging and at times fruitless. A good example is the *Ogieks Case* in which domestic litigation was unreasonably prolonged. Some cases took ten to seventeen years to be finalised. The delays were found to have been caused by the Respondent State's failure to defend its position or non-appearance. Some of the cases that were finalised were not executed on time in favour of the Ogieks.⁷⁷² The rationale for the

⁷⁶⁹ For more discussion on the communitarian and cultural approach of the Court in the Ogieks' reparations case, see Nelson Baiye Mbu and Fabrice Tambe Endoh, "A Commentary on the African Court on Human and Peoples' Rights' Remedial Approach in its Ruling on Reparations in African Commission on Human and Peoples' Rights v. Kenya," *African Human Rights Yearbook* 7 (2023): 362-63.

⁷⁷⁰ See article 50 of the Banjul Charter and Article 6 (2) of the Protocol to the Establishment of the Court read together with Rule 34 (4) of the Court

⁷⁷¹ Jérémie Gilbert, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights," *International and Comparative Law Quarterly* 60, no. 1 (2011): 246.

⁷⁷² Para. 96, Ogieks Case (merits).

requirement to exhaust local remedies before approaching the regional human rights bodies is that it seeks to respect the sovereignty of States Parties to the regional human rights instruments, particularly their sovereignty in handling domestic legal issues. However, if such remedies are unavailable, ineffective or insufficient to locally address the human rights violation,⁷⁷³ regional human rights mechanisms remain the last resort.

There are yet other obstacles to directly accessing the AfrCHPR. First of all, to access this Court, the AU Member State from which an indigenous community comes must be party to the Court, i.e. it must have ratified the Protocol on the Establishment of the Court; and second, the State must have deposited a declaration with the Secretary-General of the AU accepting the competence of the Court to receive applications against it from individuals and NGOs with observer status before the Commission.⁷⁷⁴ These become barriers to indigenous peoples' access to justice by this forum if a State does not fulfil the aforementioned requirements. Another barrier is when the State has fulfilled the requirements but subsequently withdraws its declaration accepting the competence of the Court to receive cases from individuals and NGOs. This leaves the State with the status of "party to the Court" but its citizens and NGOs with observer status before the Commission cannot directly access the AfrCHPR for claims against it.⁷⁷⁵ Tanzania is a prime example of this. The country signed a notice for withdrawal of a declaration accepting the competence of the AfrCHPR to receive cases from individuals and NGOs on November 14, 2019 and submitted the same to the African Union on November 21, 2019. This marked a great setback in the efforts geared towards enabling indigenous peoples' access to justice through the AfrCHPR, especially ironical in that the AfrCHPR has its Seat in Arusha, Tanzania. Last but not least, poor cooperation from States Parties to the African human rights bodies during and after proceedings before such forums poses challenges to effective protection of indigenous peoples' rights by such bodies. For instance, in the *Endorois case*, there was no cooperation on the side of the Kenyan Government in filing submissions on the admissibility of the communication despite several reminders by the Commission.⁷⁷⁶ Also, in the *Ogieks case*, it was the same Respondent State that failed to heed the ACHPR's interim

⁷⁷³ These criteria were laid down in the case of *Sir Dawda K. Jawara v. Gambia*, Communication, No. 147 of 1997, para 32.

⁷⁷⁴ Article 5 (3) read together with article 34 (6) of the Protocol Establishing the AfrCHPR.

⁷⁷⁵ It is to be emphasised that NGOs play a crucial role in facilitating indigenous peoples' access to regional human rights mechanisms. An example is the *Endorois Case*.

⁷⁷⁶ Paras. 59 and 60, *Endorois Case* (merits).

recommendations to halt the eviction of the Ogieks from the Mau Forest pending determination of the communication filed before it on behalf of the Ogieks. This defiance necessitated the Commission's institution of a case before the AfrCHPR to obtain legal orders against the Kenyan Government. The ACHPR noted in its 2021-25 Strategic Framework that even after passing of the Commission's decisions on merits, some of the States parties to the Banjul Charter have continued lacking the political will to implement the Commission's recommendations. One reason highlighted is the fact that the Commission's recommendations are not legally binding. The Commission also noted the failure of the States Parties to abide by the orders and recommendations of the African regional human rights mechanisms, in contrast to international mechanisms like the United Nations' Universal Periodic Review (UPR).⁷⁷⁷ Article 29 (2) of the Protocol Establishing the Court provides that domestic implementation of the decisions of the Court is to be monitored by the Council of Ministers. Article 30 of the same Protocol requires State Parties to comply in a timely manner with the decisions of the Court. Also, Rules 25 and 93 read together with Rule 114 (6) of the ACHPR's Rules of Procedure, 2020 mandates the Commission to appoint a Special Rapporteur for each communication who shall, among other things, monitor implementation of the Commission's decisions according to specific timelines provided for under Rule 125. Despite these legal provisions, political will remains central to the practical implementation of the AfrCHPR and ACHPR's orders and recommendations. The situation in most African countries remains rigid, especially when it comes to the implementation of orders and recommendations that seek to protect the rights of indigenous peoples. This is influenced by the attitude of these countries to domestic recognition of indigenous peoples and their collective rights.

4.3.3.3.2 Opportunities

The fact that the Banjul Charter left the term "peoples" open to various interpretations by the human rights implementation bodies offers an opportunity for the accommodation of indigenous peoples in the term "peoples". This opportunity has been effectively seized by the ACHPR and AfrCHPR through their promotion and protection mandates as shown above.

Regarding the AfrCHPR's accessibility, despite the fact that some of the States Parties to the Court have not deposited or have withdrawn the declaration accepting the competence of the

⁷⁷⁷ African Commission on Human and Peoples' Rights, *Strategic Framework, 2021-2025*, (2020), 14.

Court to receive direct applications from individuals and NGOs, the ACHPR remains an open route to accessing the Court. A good example of accessing the Court through the Commission is the *Ogieks case*.⁷⁷⁸

Further, there is an opportunity to gain financial assistance from the Legal Aid Fund of the African Union Human Rights Organs. The Commission may act *suo motu* or at the request of the party to a case to facilitate legal aid provision to a party that has proven to have no or insufficient means to sustain a communication before it. The Commission may use this opportunity to ensure equality of the parties or as a self-help mechanism to ensure that it renders just decisions.⁷⁷⁹ The same applies to the Court. Article 10 (2) of the Protocol Establishing the Court read together with Rule 28 of the Court's Rules provides for every party's right to legal representation and free legal aid, which may be placed at the disposal of disadvantaged parties to the cases before the Court to meet the ends of justice.

Another opportunity is the will of the ACHPR and AfrCHPR to protect indigenous peoples' rights not only by rendering decisions in their favour despite all the uncertainties surrounding the concept of "indigenous peoples" in Africa, but also by developing strategies to oversee practical implementation of their decisions. A good example of this is the *Ogieks Case* in which the AfrCHPR ordered reparations to be made to the Ogieks as a community within the prescribed timelines.⁷⁸⁰

4.3.4 States' Obligations towards Indigenous Peoples' under the African Human Rights System

Under the African human rights system, States' obligations to promote and protect indigenous peoples' rights are derived from the provisions of the Banjul Charter. These are complemented by the work of the ACHPR and the AfrCHPR in the form of rules, recommendations, provisional measures and judicial orders. Through the inventive approach to the term "peoples" adopted by the ACHPR and the AfrCHPR, it is clear that peoples' rights in the Banjul Charter accommodate indigenous peoples' rights. Therefore, every obligation that States parties have towards peoples

⁷⁷⁸ It should be noted that this was not the reason why the Commission filed the case before the Court on behalf of the Ogieks. Kenya still has her declaration deposited accepting the competence of the Court to receive cases from individuals and NGOs against it.

⁷⁷⁹ Rule 126 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020.

⁷⁸⁰ Mbu and Endoh, "A Commentary on the African Court on Human and Peoples' Rights," 360.

under the provisions of the Charter also applies to communities self-identifying as indigenous peoples.

Article 1 of the Banjul Charter lays the foundation for States's obligations under the Charter. Member States of the AU (previously OAU) have generally been put under the responsibility to *recognise* (emphasis added) the rights, duties and freedoms provided for under the Charter and assume legislative and other measures necessary to give them effect. Further, Article 25 of the Charter charges States parties with the duty to promote these rights and freedoms through teaching, educational programmes and publications with a view to ensuring that such rights and freedoms and the corresponding duties are well comprehended domestically. Furthermore, under Article 26 of the Charter, States parties are put under the obligation to ensure domestic judicial independence,⁷⁸¹ and establish and develop national human rights institutions that will play the role of domestic promotion and protection of the rights and freedoms provided for in the Charter.⁷⁸² To ensure implementation of these obligations from the date the Charter came into force, States parties have the duty to submit reports every two years concerning the legislative and other measures adopted to give effect to the provisions of the Charter.⁷⁸³

Moreover, States Parties to the Charter have a general obligation to cooperate with the ACHPR and the AfrCHPR in their mission to promote and protect human rights in the continent. For instance, Rule 69 of the ACHPR's Rules of Procedure, 2020 provides an implied obligation for the States parties to participate in the Commission's ordinary sessions when it deliberates on human rights issues which are of particular interest to a specific State. This implied obligation is contained in the Commission's invitation to the relevant State party to participate in the specific ordinary session. Regarding communications, Rule 92 of the aforementioned ACHPR's Rules of Procedure obliges parties to a communication to fully cooperate with the ACHPR during the

⁷⁸¹ It is imperative to underscore that, when a State does not interfere with the independence of the judiciary, the judiciary is in a good position to defend indigenous peoples' rights even in States that do not recognise such rights. Through judicial activism, the rights of indigenous peoples can intentionally be implied in the provisions of the national's Constitutions which do not guarantee such rights.

⁷⁸² According to Rule 71 of the ACHPR's Rules of Procedure, such institutions are eligible for application to be accorded affiliate status with the Commission in accordance with the ACHPR's Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions (NHRIs) in Africa, ACHPR/Res. 370 (LX) 2017. If they are granted this status, the institutions are liable to operate according to the conditions stipulated in the aforementioned Resolution as well as internationally and regionally recognised norms and standards. According to Rule 82 (4) of the ACHPR's Rules of Procedure, it is through NHRIs with affiliate status with the ACHPR that concluding observations on States' reports are transmitted to the national level.

⁷⁸³ Article 62 of the Banjul Charter.

relevant proceedings and to abide by all conditions considered necessary by the Commission to ensure effective dispensation of justice. This includes implementing provisional measures ordered by the Commission pending determination of the communication(s) in merits⁷⁸⁴ and providing the Commission with all information requested to enable disposal of the communication(s) before it.⁷⁸⁵ Further, Rule 74 makes it an obligation for States parties to ensure the safety of any person or entity that provides the Commission with evidence, testimonies or other information which assists the Commission with the discharge of its duties. According to this rule, the same level of safety is to be extended to the members of the Commission and its staff as they work to fulfil the mandate of the Commission. Moreover, States Parties are obliged to protect individuals who lodge communications before the Commission on matters related to domestic human rights violations.⁷⁸⁶ After the Commission has rendered decisions on merits concerning communications filed before it, the States parties concerned are obliged to implement such decisions and report to the Commission on the progress of this implementation within the specific timelines set out under rule 125 of the ACHPR's Rules of Procedure, 2020.

As to the ACHPR's promotion missions, States parties are required to invite the Commission to conduct such activities within their territories. If the Commission sets out to conduct such missions of its own volition, the States Parties must facilitate their success. This includes granting the Commission all necessary permissions to enable smooth execution of the Commission's activities.⁷⁸⁷ The same kind of cooperation is required of State parties during the Commission's protection missions. In addition, for both promotion and protection missions, States parties are obliged to guarantee the members of the Commission free movement within their territories, necessary facilities, security and access to relevant documents to ensure the smooth running of the missions.⁷⁸⁸ All of these obligations are also applicable in situations where indigenous peoples' rights are in question.

Regarding the States Parties' obligations in the framework of the AfrCHPR, Article 7 of the Protocol Establishing the AfrCHPR mandates the Court to apply not only the Charter but also other human rights instruments ratified by the States parties in the dispensation of justice. Thus, should any State party to the Court ratify ILO C 169, there is a greater chance for direct

⁷⁸⁴ Rule 100 (1) of the ACHPR's Rules of Procedure.

⁷⁸⁵ Article 51 (1) of the Banjul Charter.

⁷⁸⁶ Rule 107 of the ACHPR's Rules of Procedure.

⁷⁸⁷ Rule 76, *id.*

⁷⁸⁸ Rule 87, *id.*

application of ILO C 169 by the Court in cases concerning indigenous peoples' rights. Hence, to ensure better protection of indigenous peoples' rights before the AfrCHPR, parties to the Court are under an implied obligation to ratify ILO C 169 to make litigation of indigenous peoples' rights before the Court more practical and instant. Further, when a judgment is rendered by the Court, the States parties concerned are responsible for implementing the Court's orders within the timeline prescribed in the judgment.⁷⁸⁹ This goes along with implementing reparations for the damages occasioned to victims of human rights violations, who may be indigenous peoples. In the case of *Reverend Christopher R. Mtikila v. The United Republic of Tanzania*,⁷⁹⁰ the Court ruled that:

One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.⁷⁹¹

This position is supported by article 27(1) of the Protocol establishing the AfrCHPR which provides compensation and reparations as one category of remedies available to the party in whose favour the judgment is rendered.

4.4 Conclusion

Following the discussion above, this chapter can be concluded by underlining that the legal foundation for the protection of indigenous peoples' rights in Africa is the Banjul Charter. Given the continent's historical background of struggle against colonialism that came along with exploitation, oppression, marginalisation and suppression, the Charter reflects a spirit of solidarity that is embedded in some of its provisions which refer to "peoples' rights". This approach to drafting the Charter was complemented by other factors like what is known as "African values" of communitarianism. The drafters were also influenced by the circumstances in which many African societies found themselves at the time of the adoption of the Charter, due to their oppressive post-colonial governments. While the term "peoples" was included in the Charter for these reasons, it was not assigned a universal meaning in order to allow a dynamic

⁷⁸⁹ Article 30 of the Protocol Establishing the AfrCHPR.

⁷⁹⁰ Application No. 011 of 2011 (Ruling on Reparation).

⁷⁹¹ Para. 27, *Mtikila v. The United Republic of Tanzania*, AfrCHPR (Ruling on Reparation).

and innovative approach to it. The ACHPR and subsequently the AfrCHPR have given indigenous peoples a place within the African human rights system by interpreting the term “peoples” as including indigenous peoples. Through this, States parties to the Banjul Charter have automatically been tied to the obligation to promote and protect indigenous peoples’ rights domestically through the provisions of the Charter. As much as the African human rights system was meant to specifically meet African human rights needs, it has also drawn inspiration from international human rights standards. In cases involving the rights of indigenous peoples, the ACHPR and AfrCHPR have on several occasions cited UNDRIP which currently operates as the “global constitution of indigenous peoples’ rights”. This practice is one way of acknowledging the consensus and milestones reached so far at the global and regional levels in the quest to promote and protect indigenous peoples’ rights. As the seed for protection and promotion of indigenous peoples’ rights has been sown within the African human rights system, States parties are obliged to follow this dynamic.

CHAPTER FIVE

5.0 SITUATION OF INDIGENOUS PEOPLES IN TANZANIA

“...States have used the power of definition, historically and still today, to avoid their human rights obligations under international law”.⁷⁹²

5.1 Introduction

Tanzania is a sovereign State, a United Republic whose territory comprises Mainland Tanzania and Tanzania Zanzibar.⁷⁹³ This research was based in Mainland Tanzania. According to the national census conducted by the Tanzanian National Bureau of Statistics (NBS) in 2022, the country has a population of 61,741,120; of these, 59,851,347 people belong to Mainland Tanzania and 1,889,773 belong to Tanzania Zanzibar.⁷⁹⁴ This population is made up of more than 125 ethnic groups.⁷⁹⁵ However, as already mentioned in chapter one of this thesis, only the Akie, Barbaig, Hadzabe, Ilparakuiyo and the Maasai self-identify as indigenous peoples in Tanzania and resonate with the national, regional and global indigenous peoples’ movement.⁷⁹⁶ According to information obtained from an interview at the NBS, the census in Tanzania records districts and regions but not ethnicities.⁷⁹⁷ Therefore, it is impossible to generate the percentage of indigenous peoples in Tanzania from the total population obtained from the national census. Nevertheless, some scholars have attempted to approximate the number of indigenous people in the individual communities to which they belong. It is estimated that in 2023 the number of Maasai in Tanzania was 430,000 (including the Ilparakuiyo), the Barbaig, 87,978, the Hadzabe, 1,000 and the Akie, 5,268.⁷⁹⁸

The government of Tanzania does not generally subscribe to the labeling of these communities as “indigenous peoples”. This position has led to violations of indigenous peoples’ rights in the country as it results in non-recognition of some of their claims, particularly

⁷⁹² See Harriet Ketley, “Exclusion by Definition: Access to International Tribunals for the Enforcement of Collective Rights of Indigenous Peoples”, *International Journal on Minority and Group Rights* 8, no.4 (2001): 332.

⁷⁹³ See Article 1 and 2 of the Constitution of the United Republic of Tanzania, 1977.

⁷⁹⁴ National Bureau of Statistics, “Population Size in Tanzania,” accessed February 11, 2024, <https://sensa.nbs.go.tz>.

⁷⁹⁵ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 32.

⁷⁹⁶ ACHPR and IWGIA, *id.*, 38.

⁷⁹⁷ An interview with an Officer from the Directorate of Population Census and Social Statistics conducted in NBS Headquarters in Dodoma on August 12, 2021.

⁷⁹⁸ IWGIA, “Indigenous World 2023: Tanzania,” accessed February 23, 2024, <https://www.iwgia.org/en/tanzania/5063-iw-2023-tanzania.html>.

claims related to collective rights to ancestral lands and territories. Yet, it is noteworthy that this position has been adopted due to specific historical, socio-political and economic circumstances in Tanzania over the years.

As already highlighted in the statement of the problem in chapter one of this thesis, the situation of indigenous peoples in Tanzania has not been satisfactory. Aside from the fact that they have been discriminated against based on their station of life and open cultural manifestations, the biggest problem has been their land tenure insecurity. A series of land alienations and dispossessions by formalisation, redefinition of villages and boundaries of protected areas, evictions, relocations, resettlements and marginalisation in all spheres of life have been recorded as troubling these communities for decades. Madsen argues that, “once people lose their land, it is not long before they lose everything else: their language, their heritage, identity, children, culture and all too frequently their lives”.⁷⁹⁹

The discussion in the previous chapters has shown that land is central to the survival of indigenous peoples’ livelihoods. The jurisprudence of the ACHPR and the AfrCHPR in the *Endorois* and *Ogieks Cases* has defined indigenous communities in relation to their connection with their ancestral lands, to the extent that land is declared to be the bedrock of indigenous peoples’ economic, social and cultural survival. This is in line with protecting their right to property under the Banjul Charter.⁸⁰⁰ Thus, the discussion in this chapter largely revolves around indigenous peoples’ struggles to secure a collective right to their ancestral lands as a means of guaranteeing the survival of their distinct livelihoods. The collective right to ancestral lands plays a pivotal role in ensuring the enjoyment of other collective rights provided for in the Charter. The following discussion adopts a historical approach in accounting for a series of events which have contributed to the situation of indigenous peoples in Tanzania today.

5.2 Background to the Situation of Indigenous Peoples’ Rights in Tanzania

The applicability of the term “indigenous peoples” in Tanzania for the purpose of domestic realisation of internationally and regionally recognised human rights standards relevant to indigenous peoples is a matter of controversy. The core predicament lies with the question of

⁷⁹⁹ Madsen, *The Hadzabe of Tanzania*, 8.

⁸⁰⁰ It is important to note that the drafters of the Banjul Charter crafted the right to property as a neutral right. The language used in Article 14 of the Charter: “*The right to property shall be guaranteed...*” leaves room for accommodation of both individual and peoples as beneficiaries of the right.

who exactly are indigenous to the land and who are not, which is typically a matter of recognition. Practice has shown that recognition of indigenous peoples is one step towards implementing their rights. For various reasons, the term is not subscribed to by the Government of the United Republic of Tanzania, something that makes it difficult to implement indigenous peoples' rights. The field research conducted for this thesis, which involved interactions with various government departments, revealed the government's conservative approach to the term, i.e. that all Tanzanians of "African origin" are indigenous to the country. The research also established that the Government's position has been largely influenced by the following trail of historical events.

5.2.1 Pre-colonial Period

In pre-colonial times, every person belonged to a particular community. Communities were built by various factors which forged their single identity.⁸⁰¹ They practised a communal way of life in order to survive. This included owning territories communally.⁸⁰² As land and other natural resources were crucial for peoples' daily sustenance, they were administered and preserved through traditional knowledge, customary law and cultural norms. The nature of the land, the availability of resources and climate conditions dictated indigenous peoples' choice of locality and movements.⁸⁰³

The earliest known inhabitants of what is today Tanzania Mainland were hunter-gatherers (the Khoisan). This group spoke "click" languages. They occupied the circumference of the plateau overlooking the great (Gregory) Rift Valley (Eastern Rift) in the northern part of Tanzania.⁸⁰⁴ Residual members of this community today are the Hadzabe and the Sandawe. Later, another group from the north (Ethiopia) whose members spoke Cushitic languages arrived and occupied the Eastern Rift to the Southern Highlands region. This was around 200 B.C. Members of this group were agro-pastoralists but did not use iron tools yet. One variant of this group in present-day Tanzania is the Iraqw. Another migration from the north was the Chari-Nile, who spoke a Nilotic language.⁸⁰⁵ This group which was made of pure pastoralists is said to have been the ancestors of today's Datooga (Tatooga) community. It settled in the area between

⁸⁰¹ John Iliffe, *A Modern History of Tanganyika*, (Cambridge: Cambridge University Press 1979), 318.

⁸⁰² Gastorn, *The Impact of Tanzania's New Land Laws on the Customary Land Rights of Pastoralists*, 22.

⁸⁰³ Iliffe, *A Modern History of Tanganyika*, 6.

⁸⁰⁴ *Id.*, 6-7.

⁸⁰⁵ Iliffe, *A Modern History of Tanganyika*, 7.

the northern part of the Eastern Rift Valley and Lake Victoria.⁸⁰⁶ After a lapse of a long period of time, another wave of the Nilotic group arrived from the north. They drove away the pre-existing communities and seized the Eastern Rift Valley region in the eighteenth century. This was none other than the Maasai pastoralists.⁸⁰⁷ The fourth migration arrived in Tanganyika from the west. This was a Bantu-speaking group of cultivators who used iron tools. Archaeological studies indicate that this group settled in the present-day Bukoba District located in the western part of Lake Victoria in 500 B.C. The group grew stronger and colonised the greatest regions of Tanganyika. As it did so, it absorbed other pre-existing groups⁸⁰⁸ in the conquered regions, and as a result several regional cultural and dialect variations were formed which still exist in Tanzania today. The regions conquered by the Bantu-speaking group were the Lake Victoria region, the South-East, the Southern Highlands and the Western plateau stretching across the North-East through the mountain blocks of Kilimanjaro, Meru and North Pare, where distinct Bantu-speaking communities have been recorded as having existed before. The Southern Highlands region also received another Bantu-speaking group from the South known as the Ngoni between the 1820s and 1840s. The Ngoni migrated to and settled in this region and later conquered some neighbouring communities in the campaign famously known as *Mefecane*.⁸⁰⁹ Currently, over ninety per cent of the population in Tanzania is made up of Bantu-speaking ethnic groups due to these historical events.⁸¹⁰

The above narrative shows that Khoisan hunters and gatherers, Cushitic herdsmen and cultivators, Nilotic pastoralists and Bantu agriculturalists formed the pre-colonial societies in what would become Tanganyika. Land was at the centre of survival of each community, clan and chiefdom. Most of the population lived in the fertile regions, with arid lands barely inhabited or seasonally occupied by the hunter-gathers.⁸¹¹ By the late mid-seventeenth century, Tanganyika was vulnerable as one of the frontiers for the penetration of colonial powers into the interior of the East African region.

⁸⁰⁶ Iliffe, *A Modern History of Tanganyika*, 7.

⁸⁰⁷ *Loc. cit.*

⁸⁰⁸ For example the hunter-gathers Sandawe blended with the Turu (Taturu) and became herders and cultivators. They also absorbed many words from the Turu. In present day Tanzania, some of the Sandawe claim to have originated from the Turu. See Iliffe, "Creation of Tribes," 9.

⁸⁰⁹ For more discussion about the Ngoni migration see T.J. Thompson, "The Origins, Migration and Settlement of the Northern Ngoni," 34 *The Society of Malawi Journal*, No. 34 (1981): 6-35.

⁸¹⁰ *Ibid.*

⁸¹¹ Iliffe, *A Modern History of Tanganyika*, 7-8.

5.2.2 Colonial Period

The period of colonial administration spans the period between the late 1880s and 1961. It is divided into two phases, the German and the British colonial eras. These phases with their respective impacts on indigenous peoples' rights are analysed below.

5.2.2.1 The German Colonial Era (1880s-1916)

The first colonial undertaking in Tanganyika was launched when the German explorer Carl Peters and his two companions arrived in Saadani, a coastal area (south-east of Pangani) in November 1884. They were carrying out a mission sanctioned by the *Gesellschaft für Deutsche Kolonisation* (Society for German Colonisation) to begin the accumulation of capital for German colonisation in Africa.⁸¹² Saadani was the starting point from where Carl Peters proceeded to Usagara, of which striking stories had been told by previous explorers upon their return to Germany. On his way from the coast to Usagara (today's Kilosa), which was then led by Chief Mangungu, Peters concluded ten "Treaties of Protection" with indigenous coastal Chiefs (whom he named Sultans) in Useguha (Chiefs wa Wazigua) and in areas known as Ukami (in today's Mufindi District of Iringa), Nguru and Ukaguru (in today's Morogoro - *kwa Wakaguru*).⁸¹³ The Germans presented these treaties to the local leaders in the form of a pledge for protection from their hostile neighbours, while in reality the treaties concluded the formal surrender of the people and their indigenous land rights to the prospective German colonialists. Peters, on behalf of the Society for German Colonisation, secured the exclusive right to exploit land and other natural resources, such as mines, water and forest resources under "private law" and seized what is understood under German constitutional law as government sovereignty. He also secured rights to establish a colonial administration and military power, as well as the right to impose custom taxes. Another agreement made the indigenous rulers supply labour and guarantee military support when called upon.⁸¹⁴ Through these kinds of agreements, Carl Peters annexed initial territories in the coastal and interior areas of Tanganyika and secured trade routes before the launch of a formal colonial scheme. On his return to Germany in February 1885, he published

⁸¹² John William East, "German Administration in East Africa: A Select Annotated Bibliography of the German Colonial Administration in Tanganyika, Rwanda and Burundi from 1884 to 1918," (Thesis Submitted for the Fellowship of Library Association of London, 1987), iv-v.

⁸¹³ Arne Perras, *Carl Peters and German Imperialism, 1856-1918: A Political Biography*, (New York: Oxford University Press Inc., 2004), 57.

⁸¹⁴ Perras, *Carl Peters and German Imperialism, 1856-1918*, 58.

propagandistic writings that described the radiant wealth he had witnessed in the African region visited and the opportunities for colonising it as a “well-structured” entity. His publications were crafted in such a way as to solicit the establishment of the German East African Company, the *Deutsch-Ostafrikanische Gesellschaft (DOAG)*. Eventually, the company was put in place and its first expedition proved that Carl Peter’s narration of the colony was authentic. The company gained massive support and was endorsed as a Chartered Company to undertake a colonial scheme in the region as an independent entity. German East Africa was the name of the protectorate controlled by the DOAG from 1885. It included Tanganyika and Ruanda-Urundi, today’s Tanzania Mainland, Rwanda and Burundi.⁸¹⁵ In its early operations in the territory, the company faced resistance from the coastal population as it attempted to penetrate the interior of the region to execute its mission. The most remarkable resistance was the Abushiri Rebellion which took place between 1888 and 1890. This rebellion was organized by, among other groups, the Bantu-speaking locals. It drove away the DOAG representatives from the coastal strip, i.e. from Pangani in today’s Tanga region in the north, to Lindi and later Mikindani in today’s Mtwara region in the south, leaving only two German strongholds in Bagamoyo and Dar es Salaam sustained by DOAG with support from the German Navy operating from Zanzibar.⁸¹⁶ However, this rebellion was put down in 1890 by the German Expeditionary Corps (*Schutztruppe*), a private army raised by Hermann von Wissmann with orders from the Imperial Government in Berlin, having received a “cry for help” from the “overwhelmed” DOAG. Local rebellions coupled with other factors, such as disease, lack of enough manpower, bankruptcy, poor military resources to support the acquired territories, and ultimately the company’s mismanagement in the form of brutality and arrogance towards the natives, forced the Imperial German Government to take over the administration of the German East Africa dominion in 1891.⁸¹⁷ This move, which was complemented by the Helgoland-Zanzibar Treaty, signed in 1820 between the Germans and the British to officially establish their spheres of influence in East Africa marked the beginning of the German Imperial Government’s administration of German East Africa via direct rule. Laws were imposed for better governance of the colony.

⁸¹⁵ East, “German Administration in East Africa: A Select Annotated Bibliography of the German Colonial Administration in Tanganyika,” v.

⁸¹⁶ Information obtained from the guided tour in Bagamoyo Town (National Historical Site) on November 3, 2023. Also see Arne Perras, *Carl Peters and German Imperialism, 1856-1918*, 102 on Peters, support from the German warships sent to Zanzibar for the Company’s support.

⁸¹⁷ Arne Perras, *Carl Peters and German Imperialism, 1856-1918*, 113-6.

To begin with, the Imperial German Colonial Government established the first colonial land law in the territory in 1895. This law was known as the *Kaiserliche Verordnung über die Schaffung, Besitzergreifung und Veräußerung von Kronland und über den Erwerb und die Veräußerung von Grundstücken in Deutsch-Ostafrika im allgemeinen vom 26. November 1895*, meaning the Imperial Ordinance on the Creation, Acquisition and Conveyance of Crown Land and Alienation of Real Estates in German East Africa of November 26, 1895.⁸¹⁸ Through this law, ownership of all land in what is today known as Mainland Tanzania, whether occupied or unoccupied, was removed from the indigenous communities and vested in the German Empire as a Crown colony. The law officially took away the concept of communal land ownership from the indigenous peoples in the territory. The Imperial Ordinance for the African and South Seas Possession with Exception of German South West Africa 1891⁸¹⁹ had already disqualified any landowners from engaging in activities related to exploring, extraction or exploitation of minerals without special approval issued under procedures laid down in the Ordinance.⁸²⁰ Nonetheless, under this regime, indigenous land rights such as reserved pasture lands for pastoralists like the Maasai were to some extent promoted. The rationale behind this, however, was to prevent nomadic pastoralists from interrupting the European farmers. Moreover, the colonial administration retained the right to appropriate such reserved lands at any point in time as it deemed fit.⁸²¹ In addition, the German colonial administration enacted conservation laws which had impacts on indigenous peoples' land rights. The laws which established both game and forest reserves formally dispossessed indigenous peoples of their land and imposed restrictions on accessing the conserved areas for livelihood activities like hunting, gathering and grazing.⁸²²

The first legislation to be enacted was the Wildlife Preservation Ordinance of 1896 (*Wildschutzverordnung*), section 13 of which granted authority to the German colonial

⁸¹⁸ This was followed by the Ordinance by the Governor Regarding the Application and Carrying Out of the Imperial Decree of 26 November (1895) regarding Creation, Acquisition and Transfer of Land in G.E. A., and rules there under by the Imperial Chancellor dated the 27 November 1895.

⁸¹⁹ Section 1 of Decree No.64 of 1891.

⁸²⁰ See Boniface Luhende, "Legal Framework for Oil and Gas Exploration and Production in Mainland Tanzania," (2020):4 accessed February 13, 2024, https://www.academia.edu/en/53904066/LEGAL_FRAMEWORK_FOR_OIL_AND_GAS_EXPLORATION_AND_PRODUCTION_IN_MAINLAND_TANZANIA

⁸²¹ Gastorn, "The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania," 190.

⁸²² *Ibid.*

government to establish hunting and forest reserves.⁸²³ The reasons behind the establishment of hunting reserves under this Ordinance were to protect endangered wildlife for scientific purposes and to guarantee recreational hunting for future generations.⁸²⁴ However, this Ordinance was repealed in 1898 and replaced by more specific legislation regulating such activities. In 1903, a comprehensive law regulating hunting activities, i.e. the Hunting Protection Ordinance, 1903 (*Jagdschutzverordnung*), was enacted. It had clearer provisions on hunting reserves to the effect that the reserves were completely closed areas for the preservation of wildlife.⁸²⁵ Hunting in these reserves was prohibited for the local people. A fine of 3000 rupees or maximum imprisonment of three months was imposed for anyone who contravened the restrictions.⁸²⁶ Under this Ordinance, thirteen hunting reserves were established across the colony.⁸²⁷ Later, the Hunting Protection Ordinance was replaced by the Game Ordinance of 1908. This changed the name of the restricted areas from hunting reserves to game reserves. The Ordinance regulated the hunting of game inside and outside the restricted areas.⁸²⁸ It gave the Governor the mandate to declare various areas as game reserves for the same purpose of wildlife conservation.⁸²⁹ Generally, the Ordinance restricted hunting in established game reserves but gave the Governor the right to make exceptions in isolated cases. In the same year that the Ordinance was enacted, through the Governor's decree, twelve game reserves were established in the colony.⁸³⁰ The Game Ordinance was slightly revised in 1911. By 1914, a total of fifteen game reserves had been established in the colony, covering approximately 3 per cent of the entire territory which was 30,000 square kilometres.

As to forest conservation, the first law establishing a forest reserve was the Usambara Forest Reserve Ordinance of 1895 (*Waldordnung für Usambara*). This was enacted to preserve the Usambara Mountain Forest which was, and still is, of metrological importance. The law was necessary due to the European farmers who owned large plantations in this area. It was repealed by a new Ordinance in 1899.⁸³¹ Later in 1904, a more comprehensive Ordinance governing forest

⁸²³ Urike Wanitzek and Harald Sippel, "Land rights in Conservation Areas in Tanzania," 46 *GeoJournal*, (1998):114.

⁸²⁴ *Ibid.* It should be noted that, hunting was an important sport for the Europeans.

⁸²⁵ Section 1, Hunting Protection Ordinance, 1903.

⁸²⁶ Section 14, *ibid.*

⁸²⁷ Wanitzek and Sippel, "Land rights in Conservation Areas in Tanzania," 115.

⁸²⁸ *Ibid.*

⁸²⁹ Section 13 (1), Hunting Ordinance of 1908.

⁸³⁰ Wanitzek and Sippel, "Land rights in Conservation Areas in Tanzania," 115.

⁸³¹ *Ibid.*

reserves was enacted, i.e. the Forest Protection Ordinance, 1940. Section 9 of this law gave the German colonial government power to declare parts of the German East Africa as forest reserves. The Ordinance restricted or prohibited the exploitation of forest resources and imposed fees for such activities.⁸³² The 1899 and 1904 Ordinances were revised in 1908 and 1909 respectively. The Forest Protection Ordinance empowered the German colonial government to create forest reserves in various parts of German East Africa. By 1913 the forest reserves created covered about 7500 square kilometres which was the equivalent of 0.8 percent of the vast territory of German East Africa. The creation of forest reserves by the German colonial administration remained a continuous exercise until the colony passed into the hands of the British in 1916. For instance, shortly before the British takeover of Tanganyika, in 1914, the Ngorongoro Conservation Area was established as a forest reserve, the Northern Highland Forest Reserve (NHFR), to protect the natural resources there and specifically the watersheds. It should be noted that the Ngorongoro Conservation Area had been home to the Maasai long before the establishment of German East Africa as a colony. Demarcating the forest as a reserve was the beginning of appropriating the Maasai ancestral lands in this geographical area.

In general, the Forest Protection Ordinance aimed at conserving the forest resources and nobody was allowed to encroach on them. However, commercial licences could be issued to individuals and private companies to exploit the forest resources in activities like logging. Also, to avoid complaints by indigenous populations, hunting and pastoral activities were permitted in forest reserves which were not game reserves. As the indigenous peoples' livelihood activities were restricted in forest reserves, the major alternative for them was "illegally" accessing the forests to hunt for sustenance and graze livestock. Most forest reserves were situated in remote areas. This made it difficult for the colonial authorities to control all the reserves.⁸³³

In principle, the creation of game and forest reserves in German East Africa appropriated land and other resources on which indigenous peoples originally depended for their survival. The laws enacted for game and forest conservation laid an enduring foundation for the struggles of indigenous peoples in Tanzania today. This will be shown in the following discussion.

As all this was happening, the Germans applied direct rule in the colony with *Liwalis* (predominantly Arabs) administering at the district level. They acted as the German

⁸³² Wanitzek and Sippel, "Land rights in Conservation Areas in Tanzania," 115.

⁸³³ *Ibid.*

Government's counsel on matters related to local laws and customs. Below them were the *Akidas* who were trained in Government Schools to become cheap subordinates with clerical and soft skills to be recruited as administrators at the level of divisions (*tarafa*) where there were no respected Chiefs. In areas where reputable Chiefs existed, they were also designated as *Akidas* acting on the instructions of the colonial government. Below the *Akidas* were the *Jumbes* who were the equivalent of today's village Chairpersons or Ten Cell leaders. *Liwalis* and *Akidas* received wages from the colonial government while the *Jumbes* served on honoraria terms.⁸³⁴ Eventually, the German colonial government was functioning with the territorial civil servants who were recruited based on talent.⁸³⁵ Swahili was promoted as an official language from the coast to the interior. People of non-African origin in the colony like Arabs were also considered as "natives" under German law.⁸³⁶ The German colonial government had no interest in dividing up the population in the territory beyond the European and non-European dichotomy. The major focus was on serving the capitalistic interest that had led to its presence in the colony. Both Islam and Christianity were promoted over indigenous religion as a way of discouraging religiously motivated uprisings like the Maji Maji Uprising of 1905 to 1907.⁸³⁷ While the German Imperial government continued occupying Tanganyika, the First World War broke out in Europe in 1914 with drastic impacts on the German colonies in Africa and elsewhere.

5.2.2.2 British Colonial Era (1916-1961)

During the First World War (WWI), in 1916, British forces backed by the Royal Navy and British-Indian Infantry seized the German East Africa colony and placed it under military rule.⁸³⁸ Following the Paris Peace Conference held in France between 1919 and 1920 and the adoption of the Versailles Treaty of 1919, Germany lost all her overseas colonies, including German East Africa, to the Allied and Associated Powers. This measure was imposed by the Allied and Associated Powers as one means of compensating for the role played by Germany in WWI. The Paris Conference also gave birth to the League of Nations, founded in 1920 to oversee overall global peace. In accordance with Article 22 of the Covenant of the League of Nations, part of German East Africa, i.e. Tanganyika which is currently Mainland Tanzania, was placed under

⁸³⁴ Iliffe, *A Modern History of Tanganyika*, 209.

⁸³⁵ *Op. cit.*, 210.

⁸³⁶ *Ibid.*

⁸³⁷ *Op.cit.*, 204.

⁸³⁸ Information obtained from a guided tour to the Tanzanian National Museum on November 1, 2023.

British mandate in 1922.⁸³⁹ Later, in 1946, after the end of the Second World War (WWII) and the formation of the United Nations, Tanganyika was assigned to the British as a Trust colony of the United Nations.

In accordance with the Foreign Jurisdiction Act of 1890, the British issued the Tanganyika Order in Council of 1920 for the authoritative administration of Tanganyika. This law vested all the land in Tanganyika in the hands of the British Governor who held it in trust on behalf of the British Crown. It declared all land in the territory as public land. It also empowered the Governor to make laws for governing the territory as though Tanganyika was a British colony *per se*.⁸⁴⁰ In 1923, English land law was imported into Tanganyika through the enactment of the Land (Law of Property and Conveyancing) Ordinance, Cap. 114 and the Land Ordinance, Cap. 113 to govern land matters in the territory. As all land was already declared public land, Tanganyikans could only occupy land legally through the “right of occupancy” established by the aforementioned land laws.⁸⁴¹ This has remained the case in the country to date, something that has overridden indigenous peoples’ claims of collective rights to own ancestral lands. Under the British land regime, the Governor was empowered to grant individuals the right of occupancy of lands that were not occupied under the customary or deemed right of occupancy. This position remains the same in Tanzania Mainland’s land laws today, save for the replacement of the word “Governor” with “President.”

Designing the right of occupancy to capture the customary right of occupancy was a response to section 8 of the Trusteeship Agreement for the Territory of Tanganyika, 1946 made between the United Nations and the British Government. The agreement directed that the laws concerning administration of lands in the territory should have regard for native laws and customs and protect their rights and interests in lands and natural resources for their current and future generations. The same was the case with section 6 of the Mandate Agreement for the Tanganyika Territory, 1922 entered into between the League of Nations and the British Government. It should be noted that the term “native” in the two Agreements was used to refer to the non-European population. There is no indication anywhere in such Agreements that the term “native” meant the first occupants of land or those who have used it for the longest period of

⁸³⁹ On November 22, 1932, the Anglo-Belgian Treaty was concluded whereby boundaries between Tanganyika (currently Mainland Tanzania) and Ruanda-Urundi were demarcated. Tanganyika remained in the hands of the British and Ruanda-Urundi (currently Rwanda and Burundi) was allocated to the Belgians.

⁸⁴⁰ Gastorn, “The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania,” 191.

⁸⁴¹ *Ibid.*

time. Section 22 of the Land Ordinance, 1923 defined a “native” as “...any native of Africa, not being of European or Asiatic origin or descent, and shall include a Swahili and a Somali”.⁸⁴² Under this colonial administration, people were considered native not because of their birth in a particular geographical location in the territory but because of their domination by European foreigners.⁸⁴³

Regarding conservation activities, the British administration picked up from where the Germans had left in terms of efforts to establish protected areas in Tanganyika. The first initiative was started with the adoption of the Game Preservation Proclamation of 1920.⁸⁴⁴ Shortly after, in 1921, the Game Preservation Ordinance was adopted. This Ordinance had no impact on the land rights of indigenous peoples inhabiting areas established as game reserves. The initiative was later catalysed by an agreement signed in 1933 in London by the colonial powers, known as the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933 (the London Convention). The Convention introduced the idea of national parks and strict natural reserves. In both kinds of protected areas, human activities were to be totally forbidden. Section 3 of this Convention obliged the Contracting Governments to identify suitable areas for the establishment of national parks or strict game reserves in their colonies. It also urged them to implement this obligation within two years from entry into force of the Convention. Subsequently, the Game Ordinance of 1940⁸⁴⁵ was enacted with the objective of protecting and preserving the fauna in its natural state. Section 3 of the Ordinance gave the Governor power to declare any part of the Tanganyika territory a national park subject to approval by the Legislative Council. This led to the establishment of the first national park in Tanganyika, the Serengeti National Park, under section 4 (1) read together with schedule I of the Ordinance.⁸⁴⁶ The Ordinance generally prohibited entry and residence in the national parks. Nevertheless, section 6 reserved this right for people whose ordinary residence or place of birth was located in the national park. The same right was extended to people who had immovable property in them. This chiefly affected the Maasai pastoralists. Further, hunting was prohibited in

⁸⁴² Unlike the Germans, the British ruled the natives with indirect rule. Chiefs played the role of agents of the British colonial administration in communities that were self-organised and already had their own Chiefs. In areas where there were no organisations of this kind, the British persuaded the communities to make similar arrangements for easy administration of the colony.

⁸⁴³ Gastorn, “The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania,” 192.

⁸⁴⁴ Proclamation No. 4 of 1920.

⁸⁴⁵ Ordinance No. 20 of 1940, Cap. 159.

⁸⁴⁶ Wanitzek and Sippel, “Land Rights in Conservation Areas in Tanzania,” 116.

the national parks in section 9 of the Ordinance. However, an exception was made in section 29 of the Ordinance which permitted hunting for sustenance.⁸⁴⁷

Specific to national parks, the Game Ordinance, 1940 was repealed and replaced by the National Parks Ordinance of 1948 which separated the administration of national parks from that of game reserves by establishing the Tanganyika National Parks Board of Trustees.⁸⁴⁸ Sections 11 and 12 of the National Parks Ordinance, 1948 maintained the residential rights of communities living within the national parks. Hunting and other forms of disruption of nature were strictly prohibited with no exception in respect of hunting for sustenance.⁸⁴⁹ The law did not provide for further acquisition of land for the establishment of national parks, as was the case with the Game Ordinance of 1940. More than ten years later, the National Parks Ordinance of 1948 was re-enacted as the National Parks Ordinance of 1959.⁸⁵⁰ This Ordinance was the strictest law on conservation to ever exist in the British colonial administration in Tanganyika. It extinguished all land rights of the local communities living in the areas established as national parks.⁸⁵¹ Thus, all residential and entry rights, together with the freedom to conduct human activities such as grazing and cultivation that were reserved for inhabitants within national parks, were ceased. Hunting (even for sustenance) was also forbidden. This activity could only be permitted with a special written licence from an authorised Officer.⁸⁵² The Ordinance granted the right of (regulated) entry to national parks to tourists for game viewing only.⁸⁵³ Also, the Members of the Board of Trustees and their Officers or Officers on duty employed by a particular national park had the right of entry to national parks as per section 14 (1) of the Ordinance. Further, any person with a licence to conduct mining activities in the national park was guaranteed entry to the relevant national park as per section 15 of the Ordinance.⁸⁵⁴ The Ordinance also reinstated the power of the Governor through a specific proclamation to expropriate land for the establishment of national parks. It also empowered the Governor to define or alter the boundaries of existing national parks to annex more land.⁸⁵⁵ The Ordinance

⁸⁴⁷ Wanitzek and Sippel, "Land Rights in Conservation Areas in Tanzania," 116.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ Section 13, National Parks Ordinance, 1948.

⁸⁵⁰ Ordinance No. 12 of 1959, Cap. 412.

⁸⁵¹ Section (1), National Parks Ordinance, 1948.

⁸⁵² Section 16 (1), National Parks Ordinance 1959.

⁸⁵³ Wanitzek and Sippel, "Land Rights in Conservation Areas in Tanzania," 117.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ Sections 3 and 4, National Parks Ordinance, 1948.

gave individuals whose land rights were extinguished following the establishment of national parks the right to compensation. But such a right was not automatic. It had to be claimed within ten weeks from the date when the proclamation establishing a national park or altering its boundaries was made, i.e. the period before coming into operation of the proclamation. Compensation would be paid as per the agreed terms.⁸⁵⁶ This right would cease if not claimed within the time prescribed in the law, even for those who had not agreed to relinquish their land rights within the established national parks.⁸⁵⁷ Section 6 of the National Parks Ordinance, 1959 declared Serengeti National Park (SNP) as a stand-alone national park, demarcating it from the newly established Ngorongoro Conservation Area (NCA) which was previously part of the national park. The NCA was established as a conservation area by the Ngorongoro Conservation Area Ordinance of 1959. As the National Parks Ordinance of 1959 now prohibited entry or residence in the national parks, the Maasai, who still resided within the boundaries of the newly reconstituted Serengeti National Park due to the leniency of the previous legislation, were left with no choice but to relinquish all of their land rights there and move to the NCA, which was established as a trial model for a multiple land use scheme (MLUC). In this scheme, human beings (the Maasai) were legally allowed to peacefully co-exist with the wildlife in a protected area, i.e. the NCA. It appears that, historically, the split of the pre-existing Serengeti National Park into two protected areas, a national park and a conservation area, came about after the Maasai had refused to relinquish their rights in the Serengeti National Park during the earlier negotiations. These negotiations were carried out by a Committee of Enquiry, known as Nihill's Committee, related to the re-establishment of the Serengeti National Park's boundaries. In accordance with its mission to come up with a long-term solution, the Committee proposed the "fair" compromise of confining the Maasai to the eastern part of Serengeti National Park (which is now the NCA) with in exchange for a solemn pledge by the British colonial administration that it would allow them to continue practising their traditional lifestyle within the NCA with restrictions only on game hunting. The British government was also to pay the Maasai compensation in the form of a water supply in the NCA where they were being moved to.⁸⁵⁸ Moreover, the Maasai were guaranteed protection of their pre-existing rights in case of a conflict

⁸⁵⁶ Section 7(1), National Parks Ordinance, 1948.

⁸⁵⁷ *Ibid.* Also see section 7 (7) of the same Ordinance.

⁸⁵⁸ Shivji and Kapinga, *Maasai Rights in Ngorongoro*, 9.

between their interests and those of nature conservation.⁸⁵⁹ To avoid further resistance from the Maasai in respect of giving up their rights in the Serengeti National Park, the British government discarded the Nihill Committee's proposal to restrict the Maasai from accessing the Ngorongoro and the Empakaai Craters in the event they should move to the NCA. It was the British colonial government's opinion that imposing further restrictions on the Maasai with regard to the NCA at this stage of the negotiations would jeopardise the chances of a successful total surrender of land rights by the Maasai in the Serengeti National Park.⁸⁶⁰ However, restrictions within the NCA affecting the life of the Maasai, including the prohibition of access to the aforementioned craters, were introduced later by the independent government. This happened many years after the Maasai had moved to the NCA. The Maasai were said to have "voluntarily" surrendered their rights in the Serengeti National Park and moved to the NCA. With reference to the provisions of the Trusteeship Agreement, it was argued that the British colonial government did not carry out this exercise arbitrarily.⁸⁶¹ However, Lissu does not seem to agree with this position. He argues that the Maasai were offered only two options with regard to their land rights in the Serengeti National Park. The options were either to peacefully give up their rights in the SNP or be forcefully evicted.⁸⁶²

Apart from the re-establishment of Serengeti National Park, which is the largest national park in Tanzania covering about 14,763 square kilometres,⁸⁶³ the British colonial government established two more national parks before Tanganyika gained independence in 1961. These were the Lake Manyara National Park with a size of 648.7 square kilometres⁸⁶⁴ and the Ngurdoto National Park (now known as the Arusha National Parks) which covers a range of 552 square kilometres.⁸⁶⁵ Both these national parks were established in 1960. It should be noted that the Serengeti National Park derived its name from the Maasai word *Siringet* which means

⁸⁵⁹ Shivji and Kapinga, *Maasai Rights in Ngorongoro*, 9-10.

⁸⁶⁰ *Id.*, 9.

⁸⁶¹ Mchome, "The Problem of Using Law by Government Officials in Support of the Course of Development," 132.

⁸⁶² Tundu Lissu, "Policy and Legal Issues on Wildlife Management in Tanzania's Pastoral Lands: The Case Study of the Ngorongoro Conservation Area," *Social Justice and Global Development (LGD)*, (2000), accessed February 18, 2024, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/lissu/.

⁸⁶³ Section 5 of the National Parks Ordinance declared re-constitution of Serengeti National Park. Also see Tanzania National Parks (TANAPA), "Establishment," accessed February 17, 2024, <https://www.tanzaniaparks.go.tz/pages/history>.

⁸⁶⁴ Tanzania National Parks (TANAPA), "Lake Manyara National Park," accessed February 17, 2024, <https://storymaps.arcgis.com/stories/10ce7c6dd58f427d8f9748320acb131f>.

⁸⁶⁵ Tanzania National Parks (TANAPA), "Establishment."

“endless plains”⁸⁶⁶ and the Lake Manyara National Park was named after Lake Manyara whose name originates from the Maasai word *Emanyara* which is the name of a plant commonly found in the vicinity, scientifically known as *Euphorbia tirucalli*.⁸⁶⁷ Later, in 1970, the Tarangire National Park was established. This park was named after the Tarangire River which cuts across the park and sustains the wildlife there, particularly in dry seasons.⁸⁶⁸ The name *Tarangire* has multiple meanings in the local Maasai, Wambugwe and Hadzabe languages. In the Maasai language *tara ngare* means “spotted water”, referring to the river that never dries completely in dry seasons. In Kimbugwe *tara* means (meandering) river and in Hadza *ngire* means “warthog.” The combination of *tara* (Kimbugwe) and *ngire* (Hadza) results in the name “river of warthogs”.⁸⁶⁹ This is evidence of the existence of the Maasai, Hadzabe and other indigenous peoples in these geographical areas long before the establishment of the aforementioned national parks. By 2019 a total of twenty-two national parks had been established in Mainland Tanzania, occupying about 99,306.5 square kilometres. Appropriation of land for the establishment of national parks in the pre- and post-independence periods, especially in the northern part of Tanzania, has continued to be one of the major contributing factors to the loss ancestral lands of communities self-identifying as indigenous peoples.

As to the game reserves, the 1921 and 1940 Game Ordinances made no restrictions on the rights of indigenous peoples residing in areas established as game reserves. They also permitted hunting for sustenance in game reserves. However, the British colonial government repealed and replaced the Game Ordinance of 1940 with the Fauna Conservation Ordinance of 1951.⁸⁷⁰ This Ordinance created various degrees of fauna conservation, i.e. game reserves, game-controlled areas and partial game reserves.⁸⁷¹ Section 2 of the Ordinance described a game reserve as an area where hunting of all animals is generally prohibited except by permission and conditions stipulated by the Chief Game Warden. Entry and residence remained regulated.⁸⁷² In

⁸⁶⁶ Tanzania National Parks (TANAPA), “Serengeti National Park,” accessed February 17, 2024, <https://storymaps.arcgis.com/stories/da3c674bdcc44265af0d5e85d8403583>.

⁸⁶⁷ Tanzania National Parks (TANAPA), “Lake Manyara National Park,” accessed February 17, 2024, <https://storymaps.arcgis.com/stories/10ce7c6dd58f427d8f9748320acb131f>.

⁸⁶⁸ Tarangire National Park, “History of Tarangire National Park,” accessed February 18, 2024, <https://tarangire.org/history-of-tarangire-park/>.

⁸⁶⁹ Ultimate Kilimanjaro, “Tarangire National Park: Everything you Need to Know,” accessed February 18, 2024, <https://www.ultimatekilimanjaro.com/tarangire-national-park-everything-you-need-to-know/>.

⁸⁷⁰ Ordinance No. 17 of 1951, Cap. 302.

⁸⁷¹ Wanitzek and Sippel, “Land rights in Conservation Areas in Tanzania,” 119.

⁸⁷² See section 5 and 6 of the Fauna Conservation Ordinance, 1951.

game-controlled areas, human activities such as entry and residence were not regulated except for hunting which called for written permission and conditions prescribed by the Chief Game Warden. Game-controlled areas were listed under the seventh schedule of this Ordinance. In partial game reserves, conditions were the same as in game-controlled areas, except for hunting, but particular animal species could not be hunted without the written permission of the Chief Game Warden. The eighth schedule to the Ordinance provided for partial game reserves. The important point to note here is that, amongst the aforementioned three categories of fauna conservation areas, game reserves led with the strictest rules which allowed human activities in the reserves only with permission and regulated the entry and residence of people who had their place of birth or residence or immovable property there.⁸⁷³ As the law allowed human activities to a certain degrees in these conservation areas, killing animals for the defence of life or property was not prohibited. Also, although hunting was in general totally prohibited in game reserves,⁸⁷⁴ an exception was made for communities like the Hadzabe and Dorobo (Akie) which were allowed to continue hunting for food.⁸⁷⁵ The Fauna Conservation Ordinance, of 1951 did not extinguish the land rights of African communities in areas established as game reserves in contrast to the laws establishing national parks. Hence, the acquisition of land for the establishment of game reserves (also in the case of the establishment of the NCA) was done under the provisions of section 10 of the Land Ordinance, 1923 which permitted the acquisition of land by the colonial government in the public interest.⁸⁷⁶ The first game reserve to be established in Tanganyika was the Mkomazi Game Reserve which was established in 1951. Upon this establishment, a restricted number of Parakuiyo indigenous peoples were allowed to continue residing in the game reserve. They kept about five thousand cattle.⁸⁷⁷ When this happened a group of Maasai pastoralists also started pushing towards the vicinity from what was known as the *Maasai Steppe*. Also, other communities like the Pare and Sambaa (Shambaa) inhabited the area seasonally.⁸⁷⁸ Given the powers bestowed upon the Minister responsible for fauna conservation by section 58 of the Fauna Conservation Ordinance, 1951, he or she could make regulations for the better preservation of fauna and protection of life and property in game

⁸⁷³ Wanitzek and Sippel, "Land rights in Conservation Areas in Tanzania," 119.

⁸⁷⁴ Section 12, Fauna Conservation Ordinance, 1951.

⁸⁷⁵ Section 18 of the Fauna Conservation Ordinance, 1951 read together with 22nd Schedule to the same Ordinance.

⁸⁷⁶ Wanitzek and Sippel, "Land rights in Conservation Areas in Tanzania," 119.

⁸⁷⁷ Daniel Brockington, "Conservation, Displacement and Livelihoods. The Consequences of the Eviction for Pastoralists Moved from the Mkomazi Game Reserve, Tanzania," 3 *Nomadic Peoples*, No. 2 (1999): 77.

⁸⁷⁸ Mchome, "The Problem of Using Law by Government Officials in Support of the Course of Development," 155.

reserves. This included restriction of certain activities such as grazing and cultivation in the reserves, deciding the location of residences, as well as controlling the number of residents and animals kept in the reserves. This provision laid the foundation for eviction of the Maasai pastoralists from this game reserve in the 1980s, which had severe repercussions on their livelihoods. This eviction led to Maasai claims being brought before the higher courts of Tanzania, as will be discussed below.

In terms of conservation of forest resources, it is clear that the engagement of the German and British colonial administrations in respect of the conservation of forest resources has affected indigenous peoples' access to these resources up to the present day.⁸⁷⁹ At the time the British took over Tanganyika, the German colonial government had established some forest reserves which were incorporated into the British forest reserves' administration.⁸⁸⁰ To replace the German Forest Protection Ordinance of 1909, the British passed the Forests Ordinance of 1921⁸⁸¹ whose section 3 read together with the Schedule to the Ordinance declared particular areas as forest reserves. Section 4 of the same Ordinance gave the Governor a mandate to declare further areas as forest reserves through a proclamation published in the government *Gazette*.⁸⁸² This Ordinance was amended by Ordinance No. 6 of 1943 which introduced native forest reserves. This amendment gave the Governor power to establish native forest reserves and place them under a Native Authority.⁸⁸³ The Forests Ordinance 1951 also gave the Governor powers to declare already existing forest reserves as Native Authority forest reserves. Also, the same Ordinance gave the Governor a mandate to make rules which prohibit grazing in or entry into a forest reserve.⁸⁸⁴ Later, another Forests Ordinance was enacted in 1957 repealing the 1921 Forests Ordinance.⁸⁸⁵ It came into force in 1959. It renamed forest reserves as territorial forest reserves which later came to be known as national reserves. It also renamed the Native Authority forest reserves as Local Authority forest reserves which later came to be known as District forest

⁸⁷⁹ It is nevertheless argued that the British colonial government annexed more land in the name of forest conservation for the purpose of operating and benefitting from the timber business. Between 1921 when the British took over Tanganyika and 1945 when the Second World War ended, the colonial power had enlarged the coverage of forest reserves from 3386 to 4696 square miles. See Wanitzek and Sippel, "Land Rights in Conservation Areas in Tanzania," 120.

⁸⁸⁰ See Wanitzek and Sippel, "Land Rights in Conservation Areas in Tanzania," 120.

⁸⁸¹ Ordinance No. 32 of 1921, Cap. 132.

⁸⁸² Wanitzek and Sippel, "Land Rights in Conservation Areas in Tanzania," 120.

⁸⁸³ Section 25 of the Forests Ordinance of 1921.

⁸⁸⁴ Sections 7 (1) (d), (2), 27 (2) of Forests Ordinance, 1921.

⁸⁸⁵ Ordinance No. 30 of 1957, Cap. 389.

reserves.⁸⁸⁶ The 1957 Forests Ordinance required that before a forest reserve is established, a prior notice of ninety days should be issued in case of any objections from persons with interests in the forest. It also required that due consideration should be given to the objections raised and the rights of interested parties should be determined. Under section 6 of this Ordinance, persons who relinquished their rights and interests in the forest were entitled to immediate compensation. The same section deemed rights which were not claimed as extinguished. Those who claimed rights in the established forest reserves but were not willing to relinquish their rights would have their rights recorded and could practise them under licence.⁸⁸⁷ Section 9 of the Ordinance, which dealt with the creation of new rights and the protection of existing ones, recognised both the rights of the “natives” and “native communities” existing under native law and customs. It provided that such rights could be claimed upon establishment of a forest reserve but only under certain conditions.

Just like the case with game administration, forest conservation under the British colonial administration was of varying degrees, which is still the case in Tanzania today. There was the category of protective forest reserves which were considered “sanctuaries.” This category was accorded the highest level of protection. Another category was productive forest reserves which were accessible by licence for various kinds of forest produce. A further category of forest protection was unreserved land governed by the Land Ordinance, 1923. It basically protected reserved trees in areas where land rights were not restricted. However, traditional communities were allowed to use the reserved trees for particular purposes.⁸⁸⁸ Section 15 of the Forests Ordinance, 1957 provided that access and utilisation of forest resources for particular uses such as residence, grazing and cultivation required a licence.

All in all, the British colonial administration contributed to the current government’s attitude towards indigenous peoples, particularly in the field of land administration and conservation activities. It bequeathed to independent Tanganyika a legal framework which fosters the state’s domination over pre-existing traditional communities that were autonomous in the governance of their social, political and economic spheres of life before the colonial invasion. Its independence struggles having proven that Tanganyika had reached a point of able self-governance as an independent state, the country was granted independence from the British on

⁸⁸⁶ Sections 5(1), 33(a) (i) and (ii) of Forests Ordinance, 1957.

⁸⁸⁷ Section 8 of the Forests Ordinance, 1957.

⁸⁸⁸ Wanitzek and Sippel, “Land Rights in Conservation Areas in Tanzania,” 120.

December 9, 1961. As was the case with other British colonies, Tanganyika was assisted in formulating the Independence Constitution of 1961, a “Westminster Model” defining the powers of the new government. Such powers had a colonial touch as the British had the upper hand in framing the Constitution. In other words, remnants of the traditions of the former rulers lingered in this new order.⁸⁸⁹ The Constitution lacked a Bill of Rights.

5.2.3 Independence and Post-Independence Periods

At independence, Tanganyika as a country functioned with laws that neither recognised nor protected indigenous peoples’ rights. Starting with the Independence Constitution of 1961 which contained no Bill of Rights, the same was the case with the subsequent Constitutions, i.e. the Republican Constitution of 1962, the Interim Constitution of 1965 and the Permanent Constitution of 1977 which had no Bill of Rights until 1984 when the Bill of Rights was finally entrenched in it. Alongside the lack of human rights provisions in the country’s constitution at independence, the country proceeded with the colonial Land Ordinance, 1923 and other laws on natural resources management which had no intention of giving total self-governance to indigenous communities. Land was vested in the President as a custodian on behalf of all Tanganyikans, leaving indigenous communities dispossessed of their ancestral lands. All land in the country was public land under the laws in operation. During this period, efforts were directed to nation-building with a nationalistic ideology that was not in favour of tribal or ethnic orientations. This was intended to ensure equal treatment of all citizens.⁸⁹⁰ The spirit of national unity was strongly defended by the founders of the nation led by Mwl. Julius Kambarage Nyerere, the first Prime Minister and later President of Tanganyika and the United Republic of Tanzania. The nationalistic ideology involved, among other strategies, embracing Swahili as a national language and the banning of chiefdoms in 1963.⁸⁹¹ Most of the Tribal Chiefs who acted as agents of the British under the Native Authority Ordinance, 1926, were absorbed into government administration structures after the creation of the new local government authorities.⁸⁹² This was to avoid their political manipulation that could have compromised the

⁸⁸⁹ Chris Maina Peter, “Constitution Making Process in Tanzania: The Role of the People in the Process,” accessed March 4, 2024, https://www.academia.edu/71916937/Constitution_Making_in_Tanzania_The_Role_of_the_People_in_the_Process.

⁸⁹⁰ Gastorn, “The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania,” 195.

⁸⁹¹ This was legally done by passing the law called Chiefs (Abolition of Office: Consequential Provisions) Act, 1963.

⁸⁹² Gastorn, “The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania , 197.

national unity which was being advocated for by the new regime.⁸⁹³ This adjustment destabilised the internal structures of the traditional communities existing in Tanganyika in the post-colonial period. Moreover, wearing of traditional attire in public was outlawed.⁸⁹⁴ In 1967, the criteria of tribe and religion were abolished in census records.⁸⁹⁵

The Tanganyika African National Union Party (TANU) formed the government and was at the centre of all spheres of peoples' lives. All communities were required to contribute to nation-building and communities such as the Akie, Barbaig, Hadzabe, Maasai and others who clung to their traditional ways of life were considered to be moving in the wrong direction. Long before the signing of the Banjul Charter in 1982, the government's engagement with indigenous peoples had already begun under the "modernisation policy". This policy aimed at coercing indigenous peoples to adapt to a "civilized" and sedentary life while engaging in agriculture as their basic mode of production. In 1965, Tanganyika became a *de jure* single-party state. Alongside this transition, the country was proclaimed a socialist state by the Arusha Declaration of 1967 which set out to implement the *Ujamaa* policy. Among other things, the policy was implemented through nationalisation of the economy and execution of the villagisation strategy. Under this strategy, the *Ujamaa* Villages were formed. In 1975, the structure of village governments was legally established through the Villages and *Ujamaa* Villages (Registration, Designation and Administration) Act, 1975. Here, the village administration was vested with the control of land and other resources found in the designated villages.⁸⁹⁶ The scheme intended, among other things, to bring people together in the established villages to reinforce joint food production through agriculture and enable easy provision of state-coordinated social services.⁸⁹⁷ Dedicated efforts were made to assimilate indigenous peoples into these mainstream development programmes. Nevertheless, this bore no fruits as these communities were not accustomed to a sedentary life. They perceived the government's attempt to "develop" them as violent and coercive, and hence as contravening their "rights."⁸⁹⁸ For example, it is in the records that the Hadzabe and Barabaig on several occasions defied the government's initiatives to

⁸⁹³ Gastorn, "The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania", 197.

⁸⁹⁴ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 37.

⁸⁹⁵ Gastorn, "The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania", 197.

⁸⁹⁶ *Id.*, 29.

⁸⁹⁷ Goran Hyden, "Ujamaa, Villagisation and Rural Development in Tanzania," *Development Policy Review* 8, no. 1, (1975): 55.

⁸⁹⁸ Madsen, *The Hadzabe of Tanzania*, 19.

incorporate them in mainstream social services, such as mandatory schooling for children or government-designed economic schemes developed in their areas.⁸⁹⁹

During the 1980s, it became clear that the state-centred economies of many African countries had proven futile. In Tanzania particularly, this reality occasioned a shift from the *Ujamaa* policy to economic liberalisation policies in the country. Doors were re-opened to free market enterprises. Foreign investments flooded the country. This went simultaneously with violations of indigenous peoples' rights, especially in the area of access to natural resources like land. The government's focus was on facilitation of large-scale investments such as wheat plantations and the expansion of tourist attractions. It was during this period that a subsidiary law named Extinction of Customary Land Rights Order, 1987 was adopted to extinguish the customary rights held by people in their previous home lands before being relocated to *Ujamaa* Villages. This was one form of dispossession of customary rights to land by legal formalisation. Dispossession of indigenous peoples' territories by formalisation continues to be practiced in the country to date. History shows that indigenous peoples became victims of the national *Ujamaa* policy and economic liberalisation policies. They have also continued to suffer from wildlife conservation practices which were initiated and applied during the colonial period. In view of the fact that land alienation poses a threat to their existence as distinct communities, some of the indigenous peoples of Tanzania, such as the Maasai and the Barbaig, have attempted to secure their collective right to their ancestral lands in courts of law.⁹⁰⁰ Some attempts have been successful and some have met with tragic failure due to legal technicalities. Other indigenous communities, such as the Hadzabe, have continued moving far away from where their land has been alienated or where contact has been or likely to be established with the mainstream society. Selected cases in the upcoming discussion shed more light on this.

It should be noted that the spirit of building a national culture and solidarity against any form of domination in post-colonial Tanzania has left narrow possibilities for survival of the cultures of indigenous peoples. The laws and policies in the country do not point in this direction. For instance, the National Land Policy, 1995 formally abandoned the use of the term "native" as used in the Land Ordinance, 1923. It adopted the use of the terms citizens and non-citizens as it addressed matters related to land administration. This was to avoid any possible

⁸⁹⁹ Barume, *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*, 44.

⁹⁰⁰ Igoe, "Becoming Indigenous Peoples," 410 and 414.

debate, confusion or connotations that would come with the use of the term “native.” The dichotomy between citizens and non-citizens was reflected in the newly enacted land laws of 1999, i.e. the Land Act and the Village Land Act.⁹⁰¹ The first independent regime in Tanzania successfully built a strong foundation for a national culture and the unity of more than 125 ethnic groups. The nature of the country’s history makes it challenging to include the idea of indigenous peoples’ rights (in its contemporary meaning) in the government’s daily functioning, despite efforts towards holistic implementation of its international and regional human rights obligations. The government of Tanzania does acknowledge the existence of ethnic groups which lead a traditional lifestyle involving a special relationship with their natural surroundings. However, each community is treated as a vulnerable group depending on the environment it is exposed to.

5.3 Communities Self-Identifying as Indigenous Peoples in Tanzania

It is a fact that there are many ethnic groups in Tanzania who still hold on to their traditional cultural practices, even if these are not visibly manifested. For example, the Meru in the Arusha region still have a well-structured and functional traditional system, with leaders known as “Washili” who oversee socio-cultural and economic aspects of the Meru from the household to the community level. However, due to the dynamic approach to the term “indigenous peoples” and current international and African regional human rights practice, it is only the Akie, the Barbaig, the Hadzabe and the Maasai who self-identify as indigenous peoples in Tanzania due to their lifestyle and the hurdles that come with it. Their profiles are as follows.

5.3.1 Akie

It is explained in the literature that the Akie, also known as the Akiek, split from a larger group of Ogiek hunter-gatherers who are currently found in Kenya.⁹⁰² They migrated to the most southern part of the *Maasai Steppe* in Tanzania. Their migration went side by side with the Kisongo Maasai about 200 years ago.⁹⁰³ The residual Akie(k) community in Tanzania is currently found in two villages, Nkapapa and Napilukunya, in Kiteto District, Manyara Region. They are addressed as “Dorobo” in the Maa language to mean people with no cattle.⁹⁰⁴ The

⁹⁰¹ Gastorn, “The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania”, 193.

⁹⁰² Ilaria Micheli and Karsten Legèr, “Ogiek and Akie: How Many Peoples for How Many Languages? What is their Future?,” *Testi e linguaggi* 17, (2023): 95.

⁹⁰³ *Ibid.*

⁹⁰⁴ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 43.

Akiek are mainly faced with the invasion of their land by farmers who clear vegetation for cultivation. This kind of human activity in their natural environment pushes the animals they hunt for food far away from their dwellings. Also, the cleared vegetation coupled with the effects of climate change reduces their chances of harvesting natural honey from the trees. This is because the plants that used to attract bees to their vicinity are disappearing.⁹⁰⁵ As a result, food insecurity has been one of their biggest challenges over the years.

5.3.2 Barbaig

The Barbaig who are nomadic pastoralists are a sub-section of the Datooga (Tatooga) Nilotic group which has for many years been known to be living and wandering around the north and central parts of Tanzania in the regions of Arusha, Singida, Shinyanga and Dodoma.⁹⁰⁶ In particular, they were recorded as living in the Hanang District around Katesh Ward before some of them were displaced to other locations across the country. Their displacement was mainly due to large-scale plantation investments established in their traditional dwelling and grazing lands in the 1980s.⁹⁰⁷ Today, it is clear that the Barbaig have never recovered from this experience. Some have wandered as far as Morogoro Region but they have not found a place to call their own.⁹⁰⁸ Their ancestral land is currently changing hands from one investor to the other while they roam desperately across the country. Hanang District which was previously a pastoralist-dominated district is now mainly occupied by farmers.⁹⁰⁹ Also, evictions continue to affect those who stayed behind. Apparently, most evictions are related to tourism investments.⁹¹⁰

5.3.3 Hadzabe

The Hadza (singular) or Hadzabe (plural) are semi-nomadic hunter-gatherers living in the northern part of Tanzania within the Lake Eyasi Basin in the Eastern Wing of the Gregory Rift Valley. Research suggests that the Hadzabe have lived in this location for the longest period ever recorded. Their stories do not seem to suggest that they came from somewhere else.⁹¹¹ Various factors such as climate change, conflicts with the Datooga agro-pastoralists and large-scale onion

⁹⁰⁵ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 43.

⁹⁰⁶ Peter, "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law," 471.

⁹⁰⁷ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 45.

⁹⁰⁸ *Id.*, 46.

⁹⁰⁹ *Ibid.*

⁹¹⁰ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 47.

⁹¹¹ Frank Marlowe, *The Hadza Hunter-Gatherers of Tanzania*, (California: University of California Press, 2010), 17.

farms have caused them to move out of their long-established traditional territories (Hadzaland) and push into the neighbouring region of Simiyu.⁹¹² The Hadzabe who are matrilineal, survive on hunting and gathering of wild fruits and roots. They live in camps with an average of one to two hundred people. The population of the camps depends on the location of the water holes. In dry seasons, most camps are located close to where the holes are found. During the rainy seasons, camps may split and become less populated as drinking water may be found in a number of locations, such as in pools or on the surface of gigantic rocks. The distance between one camp and another is approximately twelve kilometres.⁹¹³ The camps may be moved up to six times per year within the Hadzabe territories. Camps alternate so that they do not overlap in a single location at the same time.⁹¹⁴ Over the past fifty years, the Hadzabe have lost more than 90% of their traditional land to farmers and pastoralists.⁹¹⁵ This has increased food insecurity among them. Therefore, a small part of them has adapted to a sedentary life where they practise small-scale seasonal farming of crops like maize. Also, as their level of interaction with the outside world increases, they are being introduced to a money economy. They have learnt to showcase their daily life for tourists and obtain money from them which they use to purchase food and home appliances such as cooking utensils. Their population keeps decreasing as their land shrinks. On the one hand, their interaction with mainstream society has introduced them to intermarriage and permanent sedentary life; while on the other hand, it has exposed them to diseases such as HIV/AIDS.⁹¹⁶ Field research revealed their vulnerability during a pandemic like COVID-19. There were no COVID-19 preventive measures observed on the ground during field visits to the Hadza camps. However, only victims of bacterial infections such as trachoma were noted.⁹¹⁷ The geographically isolated location in which they reside makes them vulnerable to maternal mortality in cases of birth complications.

5.3.4 Maasai

The Maasai are semi-nomadic traditional pastoralists found in two East African countries, Kenya and Tanzania. They are amongst the many ethnic groups who were affected by the Berlin

⁹¹² Information obtained from a Focused Group Discussion in Dumbechanda Village during a field visit on August 8, 2021.

⁹¹³ Frank Marlowe, *The Hadza Hunter-Gatherers of Tanzania*, 40-43.

⁹¹⁴ *Ibid.*

⁹¹⁵ Ujamaa Community Resource Team, "Securing Land Rights for the Hadzabe," accessed March 6, 2024, <https://www.ujamaa-crt.or.tz/securing-land-rights-for-the-hadzabe.html>.

⁹¹⁶ Information obtained from FGD in Dumbechanda Village on August 8, 2021.

⁹¹⁷ Observations from a field visit to Lake Eyasi Basin on March 9, 2022.

Conference of 1884-1884 which partitioned the African continent among the European colonial powers. This partition did not take into account the geographical distribution of ethnic groups. Hence, some communities found themselves living in two or more different countries divided by artificial boundaries. This applies to the Luo who are found in Uganda, Kenya and Tanzania, and the Makonde who are found in Tanzania and Mozambique.⁹¹⁸ Historically, the Maasai are said to have wandered and lived in an area extending from the southern parts of Kenya along the East African Rift, i.e. in Kajiado, Nakuru and Narok counties, to the northern parts of Tanzania covering the Monduli, Simanjiro, Kiteto, Longido and Ngorongoro Districts.⁹¹⁹ This is the area that the colonial administration referred to as “the *Maasai Steppe*.”⁹²⁰ They are estimated to have existed in this area from 1600.⁹²¹ The Maasai mainly herd cattle, goats, sheep and donkeys. Livestock keeping is at the centre of their existence as a community. Livestock for the Maasai is of social, economic, spiritual and cultural value. The Maasai shift their livestock to various parts of their rangelands seasonally. This is systematically done to obtain and preserve pastures at the same time. However, they maintain a permanent homestead where they raise their families.

Just as with other indigenous communities in Tanzania, land is at the heart of the existence of the Maasai community. Aside from its importance for grazing activities, land provides them with traditional medicine, water and minerals (salt licks) which are a necessity for their livestock’s diet. It also offers them settings for spiritual and cultural practices such as hills and gorges.⁹²² Throughout the colonial and post-colonial periods, the Maasai have been alienated from their ancestral lands. In Kenya, dubious treaties were signed in 1904 and 1911 to move the Maasai from their productive ancestral lands in the northern part of the Rift Valley (Laikipia) and marginalise them in the less productive parts of the country. This was done to establish white settlements (Whitelands) to accommodate the influx of the white population in the colony.⁹²³ In Tanzania, the Maasai have been losing their land and territories in favour of various activities

⁹¹⁸ Peter, “Human Rights of Indigenous Minorities in Tanzania and the Courts of Law,” 480-481.

⁹¹⁹ ACHPR and IWGIA, *Report of the African Commission’s Working Group on Indigenous Populations/Communities: Extractive Industries, Land Rights and Indigenous Populations/Communities’ Rights*, (2017), 17.

⁹²⁰ ACHPR and IWGIA, *Research and Information Visit to the Republic of Tanzania*, 47.

⁹²¹ Lotte Hughes and Daniel Rogei, “Feeling the Heat: Responses to Geothermal in Kenya’s Rift Valley,” *Journal of Eastern African Studies* 14, no.2 (2020): 4. <https://doi.org/10.1080/17531055.2020.1716292>.

⁹²² FGD with Laigwanans at OI Doinyo Morwak conducted on March 22, 2022.

⁹²³ For more discussion on the two agreements, see Ben Koissaba, *Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya; A Historical and Contemporary Perspective*, accessed March 6, 2024, https://www.researchgate.net/publication/303484500_Elusive_Justice_The_Maasai_Contestation_of_Land_Appropriation_in_Kenya_A_Historical_and_Contemporary_Perspective.

such as the establishment of protected areas and development projects.⁹²⁴ Due to the size of their population, which is larger than other indigenous communities, and their habitat which is rich in resources, there are more clashes between them and government and non-government actors, particularly over land use and access, than there are in the case of the Akie, Barbaig and Hadzabe. The Maasai population size is complemented by the presence of a sub-Maa-speaking community known as the Ilparakuyio (Parakuyo or Baraguyu). This group migrated from the north and settled in an area known as Kipirash in Handeni District, Tanga region, many years ago.⁹²⁵ The area was later invaded by farmers who created pressure on the land for the Parakuiyo pastoralists. In search of vast grazing areas, most of them moved from this area and settled in Morogoro, Coastal (Chalinze) and Mbeya regions. Their biggest challenge, as is the case with other indigenous groups, is land tenure insecurity.⁹²⁶

5.4 Selected Case Studies

This section provides examples of the situation of the aforementioned indigenous communities in Tanzania. The cases selected mostly depict indigenous peoples' struggles to maintain their distinct traditional way of life and land tenure security which is a central component of their existence. The selected cases relate to conservation, mega-investment projects, conflicts between crop farmers and pastoralists and infrastructure projects. Nevertheless, since the chapter aims at explaining the *status quo* of indigenous peoples' rights in Tanzania, some of the selected cases show the other side of indigenous peoples' struggles in the country.

5.4.1 Villagisation Programme and Sedentarising the Hadzabe

Before independence, there had been attempts to settle the Hadzabe by the British colonial government in 1927 and 1939.⁹²⁷ Both attempts failed due to the brutality of the approach adopted by the Scouts in charge of the sedentarisation operation. The same attempt was undertaken by the independent government in 1965 with support from the American Mission at Yaeda Chini. In this case, a school and a clinic were constructed for the Hadzabe. The Hadzabe were taken from their bush camps and transported to new settlements in lorries with a company

⁹²⁴ ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts*, 24.

⁹²⁵ Interview at Parakuiyo Pastoralists Indigenous Community Development Organisation (PAICODEO) on July 1, 2021.

⁹²⁶ ACHPR and IWGIA, *Research and Information Visit to the United Republic of Tanzania*, 54.

⁹²⁷ Frank Marlowe, *The Hadza Hunter-Gatherers of Tanzania*, 32.

of police officers.⁹²⁸ This exercise did not succeed. Most of the Hadzabe who moved to the new settlements contracted respiratory and other infectious diseases and a good number of them died. The rest returned to the bush after only a few months in the settled camp.⁹²⁹

Efforts persisted to sedentarise the Hadzabe by forcing them to settle in permanently established villages and undertake agriculture.⁹³⁰ For the government, the motive was to persuade them to abandon their nomadic hunting and gathering activities and participate in building the national economy. This policy was implemented in the socialist era in Tanzania via the *Operation Vijiji* strategy.⁹³¹ The government attempted to sedentarise the Hadzabe in order to guarantee them access to social services such as houses, schools and hospitals. It also sought to give them food security through agricultural programmes.⁹³² This work was eventually left in the hands of missionaries who were believed to have a different way of approaching such a traditional community through converting them to Christianity.⁹³³ All these efforts to educate, provide health services and even a new faith to the Hadzabe can be described as attempts to “develop” or “emancipate” this community from its “backward” lifestyle.⁹³⁴ But, as Peter asks, “...who said they have no education system of their own and medicines—sometimes more superior and of high quality to take care of the sick?”⁹³⁵

Article 22 of the Banjul Charter provides for peoples’ right to pursue their economic, social and cultural development according to their “freedom and identity and in the equal enjoyment of the common heritage of mankind”. In pursuit of this right, the Hadzabe have always returned to their “old ways” and efforts to assimilate them into the mainstream society in the name of developing them have always ended in vain. This is especially due to the forceful and violent methods applied to the Hadzabe in the process.⁹³⁶ A field visit to Gidamilanda Primary School in Karatu revealed a maximum of one to two Hadzabe students enrolling for studies annually. The number of pupils from the Datooga community is higher due to the fact that the Datooga are now agro-pastoralists with a certain degree of sedentary life enabling them

⁹²⁸ Frank Marlowe, *The Hadza Hunter-Gatherers of Tanzania*, 32.

⁹²⁹ *Ibid.*

⁹³⁰ Madsen, *The Hadzabe of Tanzania*, 18-19.

⁹³¹ Mchome, “The Problem of Using Law by Government Officials in Support of the Course of Development,” 128.

⁹³² *Id.*, 19.

⁹³³ Frank Marlowe, *The Hadza Hunter-Gatherers of Tanzania*, 32-33.

⁹³⁴ Peter, “Human Rights of Indigenous Minorities in Tanzania and the Courts of Law,” 466.

⁹³⁵ *Ibid.*

⁹³⁶ Madsen, *The Hadzabe of Tanzania*, 19.

to send more children to school. One of the school teachers commented that the Hadzabe children's attendance at school depends on the location of their camps at different times of the year and the availability of food in their families. There are not many initiatives to send children to school from Hadzabe who dwell in camps, especially when food is scarce. Instead, children are sent to collect wild fruits or honey, or dig edible roots with their mothers. Roots are also a source of water for the Hadzabe. As a matter of elementary education amongst the Hadzabe, children are taught intergenerational survival skills, including hunting, gathering, self-medication and defence against wild animals.⁹³⁷

As to inclusion of the Hadzabe in decision-making processes, their interests remain under-represented at the grassroots level due to their nomadic lifestyle. They do not live in villages but in wandering camps. Thus, the chances of their participation at meetings that decide on matters affecting their interests, particularly natural resources management, are always small.

5.4.2 The Case of Mkomazi Game Reserve

As already highlighted in the foregoing discussion, section 58 of the Fauna Conservation Ordinance of 1951 gave the Minister responsible for matters related to fauna conservation the power to make regulations to preserve the fauna found in game reserves. This power was not exercised in relation to the Mkomazi Game Reserve for a number of years, leading to a gradual increase in pastoralists and their livestock that went beyond the carrying capacity of this protected area. This predicament was first observed by the game reserve administration of the British colonial government back in 1955, but the situation remained unregulated up to and after independence.⁹³⁸ The tension became acute in 1964 when a special Commission known as the "Anderson Commission" was formed to come up with recommendations on how to contain the crisis. In 1967, the Commission issued a report that pointed out the presence of uncontrolled migration and unregulated grazing activities in the reserve. It recommended the immediate imposition of restrictions on entry into the game reserve. It also encouraged grazing outside the reserve, as well as destocking, which would include settling domestic livestock from Mkomazi Game Reserve in Saunye, Handeni District, Tanga region. To achieve this, a proposal of shooting six hundred elephants was put forth to raise six hundred pounds to compensate the Wa-Kwavi who would be relocated from their usual settlements to make room for the pastoralists'

⁹³⁷ The visit to Gidamilanda was made on 9 August 2021.

⁹³⁸ Mchome, "The Problem of Using Law by Government Officials in Support of the Course of Development," 163.

resettlement in Handeni.⁹³⁹ The Anderson Commission's recommendations were not substantially implemented despite the fact that the six hundred elephants were really shot.⁹⁴⁰ Twenty years later, in 1987, the matter resurfaced with a severe eviction strategy to be imposed by the game administration upon pastoralists residing and grazing in the game reserve. The strategy was famously known as "*Operation Okoa Mkomazi*" meaning Operation Save Mkomazi. The ultimate result of this operation was the forceful evictions of legal and illegal resident pastoralists from the Mkomazi Game Reserve in 1988. Although the burden of mismanagement of the game reserve was to be equally shared by the pastoralists and the government, the pastoralists faced the consequences alone. Notably, this happened in the decade in which Tanzania had signed and ratified the Banjul Charter and had adopted the Bill of Rights in the country's Constitution.

Aggrieved by the evictions, the Maasai pastoralists took their case before the High Court of Tanzania (Moshi Registry) as *Lekengere Faru Paratu Kamunyu and 52 Others versus Minister for Tourism, Natural Resources and Environment and Others*.⁹⁴¹ In this case, the Plaintiffs sued the Minister for Tourism, Natural Resources and Environment, the Director of the Wildlife Division from the aforementioned Ministry, the Project Manager of Mkomazi Game Reserve and the Attorney General of the United Republic of Tanzania because of their forceful eviction from the Mkomazi Game Reserve which they referred to as their "ancestral lands". The claims described the evictions as having included burning down of the Maasai dwellings and destruction of property and livestock, which had left the owners with no choice but to flee to the neighbouring country of Kenya and nearby towns. They also claimed disruption of their way of life. They consequently requested the Court to, among other things, declare them as lawful residents of the Alaililai Lemwazuni (the Mkomazi Game Reserve) since the Fauna Conservation Ordinance did not extinguish the customary land rights of the residents found in the game reserve. They also sought a declaration that their eviction was unlawful and that they were entitled to compensation for loss of dwellings and property. They further prayed the Court to issue a declaration that the fines which had been imposed on them for their activities in the reserve were unconstitutional and unlawful. This case partially succeeded before the High Court. The Court affirmed the Maasai's claims for compensation for the loss of dwellings and

⁹³⁹ Mchome, "The Problem of Using Law by Government Officials in Support of the Course of Development," 164.

⁹⁴⁰ *Id.*, 163.

⁹⁴¹ Consolidated Civil Case No. 33 of 1994, High Court of Tanzania at Moshi, (Munuo J.).

livelihoods. To facilitate restoration of their livelihoods, the Court ordered the defendants to provide alternative land for the victims' resettlement. It emphasised that this remedy should go simultaneously with providing them with start-up capital to facilitate the resettlement process. The plaintiffs were not fully satisfied with this decision. They filed an appeal before the Court of Appeal of Tanzania. In this appeal, the Court found that some of the Appellants had no lawful claims before the Court *ab initio*. It added that there was no evidence tendered to prove that they were residents of the game reserve when it was established. However, the Court of Appeal upheld the decision of the High Court with respect to compensation by way of alternative land for resettlement. It ordered the Respondents to provide the victims with alternative land with the same quality as the lost land and resettlement capital (monies) of 300,000 TZS per victim. Unlike in the High Court, at this level, the Appellants had the advantage of deciding the time frame in which they should be resettled in the new dwellings. As the Court of Appeal is the final forum in the judicial hierarchy in Tanzania, its orders in this case were final and conclusive. Despite the foregoing, pastoralists have continued clashing with the park rangers in this protected area which has now been upgraded to a national park. For instance, it was reported that on July 5, 2022, in the course of seizing livestock grazed within the national park, the park rangers shot dead one Maasai teenager named Ngaitepa Marias Lukumay. Following the unprecedented public outcry over the incident, TANAPA took responsibility for the life lost and issued a public apology on July 12, 2022.⁹⁴²

5.4.3 The Case of Mkungunero Game Reserve

This is yet another case of a struggle by the Maasai to defend their land rights following the establishment of a game reserve. Mkungunero Game Reserve, which was initially established in 1974 as a game-controlled area⁹⁴³ and later upgraded to a game reserve in 1996, covers the three districts of Kondoa, Kiteto and Simanjiro. The two latter districts are mainly inhabited by Maasai pastoralists. Mkungunero game reserve serves as a natural wildlife corridor within the Tarangire-Manyara Ecosystem.⁹⁴⁴ In view of the establishment in this region of the Lake Manyara National

⁹⁴² International Work Group for Indigenous Affairs (IWGIA), *Indigenous World 2023: Tanzania*, (2023), 129.

⁹⁴³ According to the Wildlife Policy, 2007, Game Controlled Areas are established to protect wildlife corridors, dispersal areas and migratory routes. See Wildlife Policy 2007, 22.

⁹⁴⁴ Tanzania Wildlife Management Authority (TAWA), "Mkungunero Game Reserve," accessed February 19, 2024, <https://www.tawa.go.tz/attraction-details/mkungunero-gr>.

Park (648.7 square kilometres) in 1960 and Tarangire National Park (2,850 square kilometres)⁹⁴⁵ in 1970, it is obvious that the establishment of this game reserve (743 square kilometres) took another portion of the land on which indigenous people conducted their livelihood activities (mostly pastoralism), particularly the Maasai of Kiteto and Simanjiro. On various occasions, people who have been confined to the peripheries of the Mkungunero Game Reserve have pleaded with the government to give them a portion of land from the reserve to support their livelihoods. However, such efforts have always been in vain. Since the Mkungunero Game Controlled Area was upgraded to a game reserve, conflicts between the neighbouring villages and the game reserve have intensified to the extent that the Minister responsible for natural resources and tourism has often had to intervene.⁹⁴⁶ The most recent and persistent conflict was between the Mkungunero Game Reserve and Kimotorok Village situated in Simanjiro District. In the year 2000, the Mkungunero Game Reserve boundaries were altered and extended to Kimototok Village, taking a total of 6,400 square kilometres of village land. This was done without consultation with the Kimotorok village administration.⁹⁴⁷ At the end of 2021, the Minister responsible for lands, housing and human settlement development visited the disputed land and guaranteed the Kimotorok villagers that about 4,400 square kilometres out of 6,400 square kilometres would be returned to the village. At the time of completion of this study, it was yet to be established if the government had fulfilled this “promise”. Efforts to secure an interview with the relevant Ministry in Dodoma were unsuccessful. Generally, the government’s move to acquire land from Kimotorok Village (which hosts other five sub-villages) has left the Maasai and some Datooga pastoralists with a very limited area for livestock grazing. As if the problem of Mkungunero Game Reserve in Kimotorok Village was not enough, in 2004 the boundaries of Tarangire National Park were redefined and pushed towards Kimotorok village. A natural impact of this was loss of more Kimotorok village land.⁹⁴⁸

⁹⁴⁵ See Tanzania National Parks, “Tarangire National Park,” accessed February 19, 2024, <https://storymaps.arcgis.com/stories/b49867b8d81c497f92d6c1f6b0eb5ae5>.

⁹⁴⁶ IPP Media, “Government Working on Sanctuary Conflict-Minister,” accessed on February 19, 2024, <https://www.ippmedia.com/en/news/govt-working-sanctuary.conflict.minister>.

⁹⁴⁷ International Work Group for Indigenous Affairs, “The Indigenous World 2022: Tanzania,” accessed February 19, 2024, <https://www.iwgia.org/en/tanzania/4643-iw-2022-tanzania.html>.

⁹⁴⁸ PINGOs Forum, “The Plunging of Pastoralists in Kimotorok,” accessed February 19, 2024, <https://pingosforum.or.tz/the-plunging-of-pastoralists-in-kimotorok/>. Also see Jevgeniy Bluwstein, “Resisting Legibility: State and Conservation Boundaries, Pastoralism, and the Risk of Dispossession through Geospatial Surveys in Tanzania,” *Rural Landscapes: Society, Environment, History* 6, no. 1, (2019): 4.

The establishment of the Mkungunero Game Reserve also affected Irkiush Oibor village in Kiteto District, where demarcation of the boundaries of the Game Reserve was carried out without prior consultation with the village administration. For this reason, pastoralists from the village have on several occasions found themselves grazing in the established game reserve without their knowledge. As a result, they have faced arrest, seizure of livestock and charges before courts of law for violating conservation laws. A good example of a clash between pastoralists and Mkungunero Game Reserve is the *Lenina Case* which began at the District level and climbed up the ladder to the Court of Appeal of Tanzania. In *Republic versus Lee Lenina and Baraka Lenina*,⁹⁴⁹ Lee Lenina and Baraka Lenina were charged before the District Court of Kondo for unlawful entry, grazing livestock and destruction of vegetation in the game reserve contrary to section 15 (1) and (2) and section 18 (2) and (4) read together with section 111 (1) (a) of the Wildlife Conservation Act, 2009. The presiding Magistrate found the accused to be wrongly charged. He was of the opinion that these were alternative charges. To remain with one charge, he discarded the charge for entry into the game reserve and destruction of vegetation therein. He went ahead to dispose of the remaining charge of grazing livestock in the game reserve. Concerning this charge, he found no water-tight evidence by the prosecution to sentence the accused persons. He eventually acquitted them. This decision was upheld by the High Court of Tanzania at Dodoma in Criminal Appeal No.30 of 2018. The prosecution filed an appeal before the Court of Appeal of Tanzania. The case was admitted as Criminal Appeal No. 356 of 2018. Nevertheless, even at this level, the prosecution did not prove its case beyond reasonable doubt. Hence, the appeal was dismissed. It was ordered that the cattle that had been seized and held by the Mkungunero Game Reserve authority should be returned to the owners.

5.4.4 The Case of Loliondo

Generally, the profile of Maasai land rights in Loliondo Division, Ngorongoro District has been a turbulent one. Firstly, it was claimed by the applicants in Land Case No. 26 of 2013 before the High Court of Tanzania at Arusha that the government's acquisition of 12,167 acres of land covering Mondorois, Sukenya and Soitsambu villages and allocating it to Tanzania Breweries Limited (TBL) for barley production in 1984/1985 was done without abiding by required legal procedures. Moreover, TBL only utilised 8,000 acres while holding the rest of the land

⁹⁴⁹ Criminal Case No.58/2018.

unproductively and out of reach for the Maasai pastoralists from the aforementioned villages.⁹⁵⁰ Later, in 2003, TBL transferred all the interests in the land to a company known as Tanzania Conservation Limited (TCL). This arrangement took the form of a 96-year lease and was allegedly made without consultation with the Maasai residents of the area.⁹⁵¹ The aftermath of this was a case filed before the High Court of Tanzania at Arusha, *Mondorois Village Council and 2 Others versus Tanzania Breweries Limited and 4 Others*.⁹⁵² Before the Court, the Plaintiffs challenged the transfer of land from TBL to TCL. They claimed it was illegal for the reason that when the disputed land was acquired from them and allocated to TBL, they were not sufficiently compensated. Also, the acquired land was 2,617 acres more than what was originally allocated to TBL, i.e. 10,000 acres. Further, the Plaintiffs claimed ownership of the disputed land by adverse possession as TBL had abandoned it for a long period. When ownership was transferred to TCL, access to the land was restricted, affecting their general economic, social and cultural activities on the land. The defendants countered these claims by asserting that the disputed land was acquired through proper procedures and authorities. They also emphasised that the land was never abandoned during the whole period it was owned by TBL. Also, the transfer of interests in the land to TCL was justified by TBL's change of management policies. Eventually, the High Court rendered its decision in favour of the Plaintiffs (Mondorois, Sukenya and Soitsambu Village Councils) but only to the extent that the extra 2,617 acres taken from the village land was found to be illegal. Therefore, the Court ordered that the Certificate of Occupancy issued to TBL and later TCL should be revised, with these acres being removed from it and returned to the villages. Dissatisfied with this decision, the Maasai Village Councils appealed to the Court of Appeal of Tanzania. Their case was admitted as Civil Appeal No. 66 of 2017. However, this appeal was struck out of the Court's records for procedural irregularities on the part of the Appellants.

There is another enduring series of land conflicts between the Maasai indigenous peoples and the government in the Loliondo Division going back to the early 1990s. It is reported that in 1992, over 40,000 hectares inhabited by the Maasai in this area were acquired by the government

⁹⁵⁰ See page 2 of the Judgment to the Land Case No. 26 of 2013.

⁹⁵¹ See Minority Rights Group International (MRGI), *A Review Report on Indigenous Peoples' Land Rights in Tanzania and Kenya: The impact of Strategic Litigation and Legal Empowerment*, 2017, at p. 9, available at <<https://minorityrights.org/wp-content/uploads/2017/11/FINAL-Report-on-Legal-Empowerment-and-Strategic-Litigation-English.pdf>> (accessed 30 December 2019).

⁹⁵² Land Case No. 26 of 2013.

and allocated as a hunting block to Ortello Business Corporation (OBC), from the United Arab Emirates (UAE). The block was particularly meant for the establishment of a private trophy hunting game reserve and the development of a private airport, mainly for the UAE Royal Family and their guests.⁹⁵³ The land acquired is alleged to have been home to more than fifty thousand Maasai.⁹⁵⁴ More than fifteen years later, in 2009, a major eviction was carried out to give room to the company's arrangement of private hunting trips. The eviction is reported to have left about three thousand Maasai dispossessed of their homesteads. The series of Maasai evictions from this area has continued ever since, due to its lucrative value for the tourism business and the need to sustain wildlife and natural ecosystems. For instance, in 2015, the Maasai underwent another wave of evictions by the Serengeti National Park Rangers. They were alleged to have violated the national park's boundaries. In this incident, one hundred and fourteen Maasai *bomas* were burnt.⁹⁵⁵ Another round of evictions occurred in 2017, when more than 185 bomas were destroyed and about twenty thousand Maasai left displaced. Apart from the government revenue obtained from tourism activities in this area, its significance also rests on its ability to sustain life in the Serengeti National Park and support the Serengeti-Mara Ecosystem.⁹⁵⁶ However, the approach to handling the land rights of the indigenous Maasai leaves a lot to be desired in view of the peoples' rights set out in the Banjul Charter. The government has continued fostering conservation and economic activities in the public interest at the expense of the loss of the Maasai's land rights in Loliondo. The Loliondo incidents, which have led to insecurity, distress and uncertainty among the indigenous Maasai, are in contradiction to Articles 1, 19, 21, 23 and 24 of the Banjul Charter.

On June 10, 2022, the Tanzanian Minister responsible for natural resources and tourism signed an Order for Gazettement of Pololeti Game Controlled Area declaring the official establishment of a protected area covering a total of 1,502 square kilometres via Government Notice Number 421 (GN No. 421 of 2022) published on June 17, 2022.⁹⁵⁷ Since this Order came

⁹⁵³ Minority Rights Group, "Beyond Just Conservation: A History of Maasai Dispossession," accessed February 21, 2024, <https://minorityrights.org/beyond-just-conservation-a-history-of-maasai-dispossession/>. Also see Oakland Institute, *Losing the Serengeti: The Maasai Land that was to Run Forever*, (Oakland: Oakland Institute, 2018), 7.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Minority Rights Group, "Beyond Just Conservation: A History of Maasai Dispossession,"

⁹⁵⁶ Azam TV, "Athari za Kutohifadhi Pori Tengefu la Loliondo na Ukweli Kinanchoendelea Ngorongoro," Translation: "Effects of Non-Conservation of the Loliondo Game Controlled Area and the Truth of What is Going on in Ngorongoro," accessed February 12, 2023, https://www.youtube.com/results?search_query=LOLIONDO+MKURUGENZI+WA+WANYAMAPORI.

⁹⁵⁷ Order under Wildlife Conservation (Pololeti Game Controlled Area) (Government Notice. No.421 of 2022).

into force, fines were automatically applicable to the Maasai pastoralists who graze livestock in the demarcated controlled area without prior permission sought and obtained from the Director of Wildlife contrary to section 21(1) of the Wildlife Conservation Act, 2009. Subsequently, a Declaration Order for gazettelement of the Pololeti Game Reserve via Government Notice 604 of 2022 was signed by the President of the United Republic of Tanzania upgrading the Pololeti Game Controlled Area to Pololeti Game Reserve.⁹⁵⁸ The huge chunk of land annexed to establish this Game Reserve, which was previously a Game Controlled Area, is claimed to belong legally to the fifteen Maasai villages of Arash, Enkobereti, Kipambi, Kirtalo, Loosoito, Lopolun, Malambo, Olalaa, Oldoinyowaas, Oloiswashi, Oloipiri, Ololosokwani, Orkuyainie, Ormanie and Piyaya situated in the Loliondo and Sale Divisions.⁹⁵⁹ These villages claim illegal acquisition of their villages by the government without adherence to the due procedures provided for under the Constitution of the United Republic of Tanzania, Village Land Act and Wildlife Conservation Act.⁹⁶⁰ The process for the establishment of this protected area which borders the Serengeti National Park involved forceful eviction of the Maasai from their “ancestral land”, something that brought the victims’ claims before the High Court of Tanzania and the East African Court of Justice (EACJ).

Domestically, the victims filed a case before the High Court of Tanzania (Arusha District Registry), i.e. *Ndalamia Partareto Taiwap and Others versus the Minister of Natural Resources and Tourism and Another*.⁹⁶¹ The Applicants prayed for leave to apply for orders of *certiorari* and prohibition against the Minister’s Order declaring the establishment of the Pololeti Game Controlled Area due to the repercussions of this Order on the Maasai inhabitants of the disputed area. The leave was granted on November 15, 2022. As directed by the Court, the same Applicants filed a case in the High Court which was admitted as Miscellaneous Civil Cause No. 21 of 2022. They requested the Court to make an order of *certiorari* to “call for, examine, quash and declare the Wildlife Conservation (Paloleti Game Controlled Area) Declaration Order GN. No. 421 of 2022 to have been promulgated illegally, irrationally, unreasonably, in violation of the principle of natural justice and procedural impropriety”. They also requested an order of

⁹⁵⁸ Paloleti Game Reserve Declaration Order 2022, (Government Notice No. 604 of 2022).

⁹⁵⁹ Pan-African Lawyers Union, “East African Court of Justice Delivers Judgment on Loliondo Case,” accessed February 20, 2024, <https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/>.

⁹⁶⁰ See para. 5, *Ololosokwani Village Council and 3 Others versus The Attorney General of the United Republic of Tanzania*, Application No. 15 of 2017, (EACJ).

⁹⁶¹ Miscellaneous Civil Cause No. 9 of 2022 (TZHC).

prohibition against the Minister of Natural Resources and Tourism (who was the first Respondent in the case) from evicting the residents in the area that had been declared Pololeti Game Controlled Area.

Regarding the relief of *certiorari*, the Court confirmed that the process for the establishment of Pololeti Game Controlled Area by the Minister was legally faulty and the remedy available would be to quash the Order establishing the controlled area and return the matter to the relevant authority (the Minister) to cure the committed legal irregularities, i.e. lack of consultation with the relevant local authorities (in this case the Maasai Village Councils in the disputed land) before establishment of a game controlled area contrary to section 16 (1) of the Wildlife Conservation Act, 2009. However, since this ruling was rendered on September 19, 2023, when the Pololeti Game Controlled Area had been upgraded to a game reserve, the Court could not make any effective order against the Minister responsible. The Wildlife Conservation (Pololeti Game Controlled Area) Declaration Order GN. No. 421 of 2022 had been automatically quashed and overtaken by the Presidential Pololeti Game Reserve Declaration Order, 2022 (Government Notice No. 604 of 2022) dated October 14, 2022, establishing the Pololeti Game Reserve. The Applicants were advised to challenge this Presidential Order if they were still inclined to pursue their course. The relief of prohibition was also not granted. The Court was of the view that prohibition is usually a consequential relief according to the nature of the violation committed. The violation committed in this case related to the Ministerial Order which illegally annexed the applicant's village land without consulting them. This Order had been overtaken by events; hence the Court's order for prohibition could not be attached to a non-existent Ministerial Order.

A fresh case was filed by members of the Maasai community before the same Court, i.e. *Latang'amwaki Ndwati and Others versus the Attorney General*, Miscellaneous Civil Application No. 178 of 2022. The Applicants were seeking to challenge the Presidential Declaration Order establishing the Pololeti Game Reserve. The application sought the Court's leave to apply for prerogative orders of *certiorari*, *mandamus* and prohibition, thus requesting the Court to "...call for, examine, quash and declare that the ... (Pololeti Game Reserve Declaration Order) GN No. 604 of 2022 was promulgated illegally, irrationally and unreasonably and in violation of the principle of natural justice and procedural impropriety" under the relief of *certiorari*, "... compel the Respondent to remove the beacons he had installed following the

declaration which did not follow procedures” under the relief of *mandamus* and “... restrain the Respondent from evicting the Applicants from the land to which the declaration was issued without following legal procedures” under the relief of prohibition. The application was granted by the Court on August 22, 2023, with an order to the government to stay the implementation of the Pololeti Game Reserve Declaration Order, 2022 pending determination of the intended main case to be filed by the Applicants. It should be noted that at the time this Court order was issued, the Pololeti Game Reserve Declaration Order, 2022 had taken effect. As a result, in the case of *Baraka Moson Kesoi and Raphael Oleruye Oloishiro versus the Ngorongoro Conservation Area Authority and 2 Others*,⁹⁶² based on this Declaration Order, Baraka Moson Kesoi and Raphael Oleruye Oloishiro, who were found to be grazing livestock within the Pololeti Game Reserve on January 25, 2023, were ordered to pay a total amount of 13,000,000 Tanzanian Shillings as a fine for grazing 130 head of cattle, made up of 100,000 Tanzanian Shillings each and 2,250,000 Tanzanian Shillings for grazing 90 head of goats and sheep in the game reserve.⁹⁶³ For the indigenous Maasai, the land on which they are fined for grazing their livestock is still their ancestral land, despite all the changes happening to it. The pursuit of their collective right to use the land still continues, inside and outside the courts, not only in domestic but also in international forums.⁹⁶⁴

Related cases were filed before the East African Court of Justice. Notably, this Court does not have original human rights jurisdiction. However, its own jurisprudence has paved the way to its human rights practice.⁹⁶⁵ Also, access to this Court for urgent orders is straightforward compared to the AfrCHPR where exhaustion of local remedies has to be proved before a case is admitted. This is because the Treaty for the Establishment of the East African Community, 1999

⁹⁶² Criminal Appeal No. 9 of 2023.

⁹⁶³ This case was an appeal arising from the compounding Order made by the NCAA under section 116 of the Wildlife Conservation Act, 2009 on behalf of the Director of Wildlife. The Order was rendered by the NCAA under which the Pololeti Game Reserve is governed.

⁹⁶⁴ For instance, a Maasai delegation held a two weeks advocacy tour across Europe in mid 2023 to solicit international support on land conflicts that were ongoing within the Ngorongoro District in Arusha Region. Among other things they highlighted the role played by wildlife conservation in shrinking their ancestral lands and the indirect role of the EU/European governments in the crisis. They highlighted that funds from Europe injected into the conservation budgets in Tanzania have a part to play in enabling violations of indigenous peoples’ rights. Therefore, funds should be disbursed with conditions on domestic adherence to human and peoples’ rights. For more information on this tour, see PINGOs Forum, “Maasai Delegation meets with European Governments and Politicians on Eviction Crisis,” accessed February 25, 2024, https://pingosforum.or.tz/wp-content/uploads/2023/06/MaasaiEuropePR_EN.pdf.

⁹⁶⁵ See the case of *James Katabazi and 21 others versus Secretary General of the East African Community & Attorney General of the Republic of Uganda*, Reference No.1 of 2007, 16, (EACJ).

to which Tanzania is a party does not make it a requirement for anyone who wishes to seek redress before the EACJ to first exhaust local remedies. Therefore, in order to obtain orders for both temporary and permanent injunctions in a speedier manner, the victims approached this forum. The application seeking a temporary injunction against the government's forceful eviction of the inhabitants from the disputed area was filed by four village councils on behalf of others, i.e. Ololosokwani, Oloirien, Kirtalo and Arash Village Councils, in the case of *Ololosokwani Village Council & 3 Others versus the Attorney General of the United Republic of Tanzania*.⁹⁶⁶ The details of this application indicated the government's involvement in arresting and prosecuting inhabitants of the aforementioned villages, burning their *bomas* (homesteads) and seizing their livestock. This followed the Directive issued on August 5, 2017 by the Ngorongoro District Commissioner directing the Applicants to vacate the area bordering Serengeti National Park. As the Applicants had resisted this directive, the government formed a special Task Force to forcefully evict them from the disputed land. Given that the application for temporary injunctions was filed together with the main case seeking permanent injunctions, i.e. Reference No. 10 of 2017, when members of the Applicants' villages faced more harassment and intimidation from the Police Force from May 18, 2018 they were forced to withdraw both cases from the Court.⁹⁶⁷ The temporary injunctions were granted by the EACJ to prevent the continued destruction and loss of life and property, as well as to prevent irreparable damage that would have been suffered due to the interference with the Court's proceedings.⁹⁶⁸ The injunctions issued were not heeded by the government.⁹⁶⁹ On the permanent injunctions applied for by the Applicants on the same grounds in the main case, the EACJ did not find tangible evidence by the Applicants to prove that the evictions were conducted on their village lands and not within the Serengeti National Park. The expert evidence rendered to support the Applicants' case was insufficient. In particular, the Court established that the Expert was not aware of the existence of Government Notice No. 235 of 1968. Through this Government Notice, the Serengeti National Park boundaries were altered by the President as per section 4 of the National Parks Ordinance, Cap. 412. Also, the Court found that no witness had proven bodily harm or injury to property by the Respondent. All the evidence adduced was ruled as hearsay and inconsistent to prove brutal

⁹⁶⁶ Application No. 15 o 2017.

⁹⁶⁷ Paras. 6-9, Application No. 15 o 2017 (EACJ).

⁹⁶⁸ Para. 58, *Op cit*.

⁹⁶⁹ Pan-African Lawyers Union, "East African Court of Justice Delivers Judgment on Loliondo Case," *supra*.

evictions from the disputed land. Further, as the Applicants were issued prior notice to vacate the conserved area, it was established by the EACJ that the due process of law was followed.⁹⁷⁰ The main case was therefore dismissed for lack of merits.

As the above decision rendered on September 30, 2022 by the First Instance Division of the EACJ dismissed the Applicants' case, the Applicants pursued their cause by filing an appeal before the Appellate Division of the same Court. They also filed a separate and fresh case before the First Instance Division on August 16, 2022, challenging the official establishment of the Pololeti Game Controlled Area in what they claim to be their villages' land.⁹⁷¹ At the Appellate stage, the judgment of the First Instance Division with regard to Reference No. 10 of 2017 was set aside on 29 November 2023 in Appeal No. 13 of 2022. The appeal was allowed with costs in favour of the Appellants. The Court ordered *trial denovo* on substantive issues of Reference No. 10 of 2017 with emphasis on the application of a standard of proof based on a balance of probabilities.⁹⁷²

The course of events in Loliondo has raised concerns among various regional and international human rights bodies. On February 22, 2022, a joint letter was written to Tanzania by a Country Rapporteur for the Human Rights Situation in Tanzania and the Chairperson of the ACHPR's Working Group on Indigenous Populations/Communities and Minorities in Africa. The letter appealed to the President of Tanzania to look into the imminent eviction of the Maasai from the disputed area in Loliondo and take necessary measures to contain the situation.⁹⁷³ Also, on June 15, 2022, the United Nations Human Rights Experts from the Special Procedure Mechanism of the Human Rights Council issued a joint statement expressing their grave concern about the government's treatment of the Maasai in this case.⁹⁷⁴ Moreover, on June 19, 2022, the International Union for Conservation of Nature (IUCN) expressed its deepest concern regarding

⁹⁷⁰ Paras 55-67 of Reference No. 10 of 2017 (EACJ).

⁹⁷¹ Pan-African Lawyers Union, "East African Court of Justice Delivers Judgment on Loliondo Case," *supra*.

⁹⁷² Paragraph 165, 170 and 171 of Appeal No. 13 of 2022, (Arising from Reference No. 10 of 2017), (EACJ).

⁹⁷³ *African Commission on Human and Peoples' Rights*, "Statement on Joint Letter of Urgent Appeal to the United Republic of Tanzania," accessed February 21, 2024, <https://achpr.au.int/en/news/press-releases/2022-03-01/statement-joint-letter-urgent-appeal-united-republic-tanzania>.

⁹⁷⁴ See United Nations: Office of the High Commissioner for Human Rights, "Tanzania: UN Experts Warn of the Escalating Violence Amidst Plans to Forcibly Evict Maasai from Ancestral Lands," accessed February 20, 2024, <https://www.ohchr.org/en/press-releases/2022/06/tanzania-un-experts-warn-escalating-violence-amidst-plans-forcibly-evict>.

reports by the Maasai indigenous people in Loliondo of violence perpetrated by “security” forces which involved one death and many bodily injuries.⁹⁷⁵

5.4.5 The Case of Ngorongoro Conservation Area

The relocation of the Maasai from the Serengeti National Park to the Ngorongoro Conservation Area was not the end of their land tenure insecurity. Although their pre-existing land rights were promised “non-derogation” by the British colonial government in the context of its conservation activities, this has not been observed even by the independent government.

Following independence, the Game Parks Laws (Miscellaneous Amendments) Act of 1975 was passed. This law came with numerous derogative provisions affecting Maasai land rights in the Ngorongoro Conservation Area. For example, section 14 of the Act amended section 9 of the Ngorongoro Conservation Area Ordinance by adding section 9A which restricted cultivation in the property.⁹⁷⁶ The same Act established the Ngorongoro Conservation Area Authority (NCAA) and bestowed it, among other things, with the mandate to conserve and oversee the development of natural resources in the property.⁹⁷⁷ In performance of this mandate, the Authority holds the power to restrict residence in any part of the property and make any order pertaining to the conservation of soil and other natural resources in the Area or a portion of it.⁹⁷⁸ Restriction of cultivation in NCA was waived in 1992 when food insecurity in the Area became serious. However, the restriction was restored in 2009 and all farms existing in the property were wiped out.⁹⁷⁹

Shivji and Kapinga argue that, when the NCA gained international recognition from UNESCO as one of the world’s natural heritage sites in 1979, the rules of conservation in the Area became more stringent.⁹⁸⁰ Apart from being a world natural heritage site, the NCA gained the status of International Biosphere Reserve in 1981. It was also declared a mixed heritage site of outstanding universal value in 2010 having received yet another international recognition as

⁹⁷⁵ IUCN, “Statement on Human Rights Violations in Loliondo, Tanzania,” accessed February 20, 2024, <https://www.iucn.org/news/secretariat/202206/iucn-statement-human-rights-violations-loliondo-tanzania>.

⁹⁷⁶ Section 16 of the Game Parks Laws (Miscellaneous Amendments) Act, 1975.

⁹⁷⁷ Section 4, Section 16 of the Game Parks Laws (Miscellaneous Amendments) Act, 1975.

⁹⁷⁸ Sections 23 and 24 of the Ngorongoro Conservation Act, 1975, Cap. 284 Revised Edition 2002.

⁹⁷⁹ International Work Group for Indigenous Affairs, *Tanzanian Pastoralists Threatened: Evictions, Human Rights Violations and Loss of Livelihood*, 2009, 76.

⁹⁸⁰ Shivji and Kapinga, *Maasai Rights in Ngorongoro*, 5.

one of the world's cultural heritage sites.⁹⁸¹ In addition, NCA was proclaimed part of the Ngorongoro-Lengai UNESCO Global Geopark in 2018.⁹⁸² These statuses explain the Maasai's limited rights in the property despite their recognition in the current operational Ngorongoro Conservation Area Act.⁹⁸³ They have so far been banned from accessing parts of the Area which have been vital to the survival of their pastoral lifestyle. One of the examples is the restriction from accessing the Empakaai Crater which is crucial for obtaining salt licks for the Maasai livestock. The Crater is rich in salt licks due to the alkaline water found in it.⁹⁸⁴ Residence and grazing in the Ngorongoro Crater is also strictly forbidden.⁹⁸⁵ Also, the ban on livestock grazing in the property has been extended up to the the Olmoti Crater and Lake Ndutu.⁹⁸⁶

Further, the Maasai's right to fully graze on the short grass plains is restricted. These plains are breeding sites for the wildebeest in the rainy season.⁹⁸⁷ The blend of limited access to parts of the NCA, the ban on cultivation and the effects of climate change have made traditional pastoralism by the Maasai difficult or impossible in the property. This contributes to persistent food insecurity amongst the resident Maasai population in the NCA. It is also a threat to their cultural survival. It is to be noted that livestock keeping is central to the cultural life of the Maasai.

Article 11 of the ICESCR requires States Parties to ensure an adequate standard of living for its subjects including adequate food provision. It calls on States Parties to design particular programmes to guarantee the fulfilment of this right. The Banjul Charter does not expressly provide for the right to food. However, in the *SERAC Case*, the ACHPR implied such a right in the right to life, right to health and right to development captured in Articles 4, 16 and 22 of the Charter. In the same case, the Commission stated that the least standard for implementation of the Banjul Charter by the States Parties was abstaining from, among other things, restraining peoples' efforts to provide for themselves.⁹⁸⁸ Also, article 1 (2) of the ICESCR which provides

⁹⁸¹ See UNESCO World Heritage Centre, *Report of the Joint WHC/ICOMOS/IUCN Mission to Ngorongoro Conservation Area, United Republic of Tanzania*, 2019, 12.

⁹⁸² See Ngorongoro Conservation Area, "The Ngorongoro Lengai UNESCO Global Geopark" available at <https://www.ncaa.go.tz/pages/geopark> (accessed: 7 August 2022).

⁹⁸³ Section 6 (c) of the Ngorongoro Conservation Area Act, 1975.

⁹⁸⁴ Information obtained from the field visit in Naiyobi in NCA on August 7, 2021.

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.*

⁹⁸⁷ Lissu T., *Policy and Legal Issues on Wildlife Management in Tanzania's Pastoral Lands: The Case Study of the Ngorongoro Conservation Area*.

⁹⁸⁸ Para 65 of the *SERAC Case*.

for peoples' right to free disposal of wealth and natural resources states that by no circumstance should people be deprived of their means of subsistence. Hence, in seeking to contain human activities in the NCA, a series of initiatives has been embarked on by the government to resettle the Maasai out of the property where they may live and provide for themselves without restrictions.

When groups of Maasai were moved from the Serengeti National Park to the NCA in 1959, there were already other Maasai resident in the Area who had wandered about there with their livestock for a long time.⁹⁸⁹ Thus, the total number of both groups, i.e. the resettled and the resident Maasai, has continued rising steadily over the years. This goes along with the increase in number of their livestock. It is reported that by 2006 the population in the property had reached more than sixty thousand (60,000) people compared to that of approximately one thousand (1,000) people in 1959, who had about 360,000 livestock.⁹⁹⁰ It is reported that the number recorded in 2006 exceeded the carrying capacity of the Conservation Area. Therefore, alternative land for resettlement of the population outside the Area was proposed.⁹⁹¹ In this regard, 400 hectares were acquired in Jema village, Oldonyo Sambu Ward, in Sale Division, Ngorongoro District where the Maasai and other immigrant residents in the NCA, such as retired NCAA officers, could voluntarily relocate to. This place was furnished with social services such as roads, a school, a hospital and a police station.⁹⁹² The voluntary relocation process gradually took place with transportation from the NCA to Jema village facilitated by the government. This strategy was expected to have solved the problem of overpopulation in the NCA by 2008. However, this hope did not materialise. The relocation exercise was associated with persistent challenges. Some of the NCA residents who voluntarily relocated to Oldonyo Sambu returned to the NCA and a number of them maintained their property in the Conservation Area. Some of those who returned to the property had sold the land allocated to them in Jema village.

According to the census report concluded in 2017 by the National Bureau of Statistics, the total population in the NCA was projected to reach 93,136 by 2018.⁹⁹³ Also, the General

⁹⁸⁹ Interview with Deputy Conservator-Community Development at NCAA held on August 9, 2021.

⁹⁹⁰ World Heritage Centre (WHC)/International Union for Conservation of Nature (IUCN), *Report of the Reactive Monitoring Mission: Ngorongoro Conservation Area (United Republic of Tanzania)*, (2008), 10. Also see United Republic of Tanzania, *State of Conservation Report*, (2006).

⁹⁹¹ *Ibid.*

⁹⁹² World Heritage Committee, *State of Conservation Reports of Properties Inscribed on the World Heritage List*, WHC-06/30.COM/7B, (2006), 5.

⁹⁹³ Interview with the Deputy Conservator-Community Development, *supra*.

Management Plan of 2018 projected that the population in the property would reach 161,000 by 2027.⁹⁹⁴ This would be above and beyond the carrying capacity of the NCA which is only 25,000 residents.⁹⁹⁵ In 2019, the Land Use Model Review Study was conducted and completed by the Ministry of Natural Resources and Tourism. The report of the study estimated that the NCA would have a total population of more than 200,000 people by 2038. It was concluded that this would be a massive threat to the conservation of the property. To avoid this risk, the study recommended the formation of management zones⁹⁹⁶ in the NCA by altering the boundaries of the property and engineering a new resettlement plan. The resettlement plan proposed internal relocation of a part of the population within the property and resettlement of another part of the population outside or at the peripheries of the NCA.⁹⁹⁷ Therefore, relocation of the NCA residents and their livestock from the property to designated areas was included in the medium-term actions planned for the period 2019-2023. This was done as part of the strategy for reduction of the number of residents in the Area.⁹⁹⁸ Also, the plan included evicting people who had returned to the NCA from Jema village. Eventually, in 2021, the NCA acting in agreement with the Ngorongoro District Defence and Security Committee issued a thirty days eviction notice with reference number BF.151/662/01/45 dated 12 April 2021 to the NCA residents who had returned to the property from Jema village. As was the case in Loliondo, the notice raised concerns among local and international human rights organisations who reacted by urging the government of Tanzania to safeguard the rights of indigenous Maasai in the NCA. The United Nations Permanent Forum on Indigenous Issues issued a statement on 14 June 2022 urging the government of Tanzania to, among other things, “... immediately cease efforts to evict the

⁹⁹⁴ UNESCO World Heritage Centre, *Report of the Joint WHC/ICOMOS/IUCN Mission to Ngorongoro Conservation Area, United Republic of Tanzania*, March 2019, 5.

⁹⁹⁵ Joint UNESCO/ICOMOS/IUC, *Reactive Monitoring Mission to Ngorongoro Conservation Area (Tanzania)*, (2012), 21-22.

⁹⁹⁶ Four management zones were proposed: a core conservation zone as a no-go zone with absolute restrictions on settlement, grazing, crop production and tourism for the purpose of protecting wildlife refuge and breeding sites; a conservation sub-zone with strict restrictions on settlement, grazing and crop cultivation but controlled tourism activities like trophy hunting; a transitional zone which implies no settlement, no crop production but room for seasonal grazing; and a community development zone where settlement, crop cultivation, livestock grazing, development programmes and ecotourism are allowed. Along the same lines, a settlement plan was proposed in the community development zone. See Ministry of Natural Resources and Tourism, *Final Report on the Multiple Land Use Model of the Ngorongoro Conservation Area: Achievements and Lessons Learnt, Challenges and Options for the Future*, (2019), 93-94, accessed February 22, 2022, <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/pdfpreview/mlum-final-oct-2019.pdf>.

⁹⁹⁷ *Id.*, 98.

⁹⁹⁸ Ministry of Natural Resources and Tourism, *Final Report on the Multiple Land Use Model of the Ngorongoro Conservation Area*, 104.

Maasai people from the Ngorongoro conservation area”.⁹⁹⁹ The International Work Group for Indigenous Affairs (IWGIA) issued an urgent alert on 23 February 2022 titled “Threats of forced eviction of the Maasai indigenous pastoralists of the Ngorongoro Conservation Area (NCA) and Ngorongoro District in Tanzania”¹⁰⁰⁰ and the African Commission on Human and Peoples’ Rights (ACHPR) published a press release on 13 June 2022 titled “Urgent Call for Cessation of the Eviction of the Masai Community in the Ngorongoro District in The United Republic of Tanzania.”¹⁰⁰¹ On top of the aforementioned reactions from international institutions, UNESCO also came forward and stated its position on the matter. It stressed that the Organisation was not in favour of the displacement of the Maasai from the NCA as had been alleged by various sources. It acknowledged the challenges experienced by the Maasai in the NCA as one of the World Heritage Sites and committed itself to continue supporting the government of Tanzania to find a suitable solution to the problem of overpopulation in the NCA, including assisting in the review of the current Multiple Land Use Model and providing technical assistance to the NCAA in deciding the way forward.¹⁰⁰² It should be noted that the Natural Recommendation No. 5 made by UNESCO in its 2012 monitoring mission to the NCAA reads as follows: “(NR5): The NCAA is encouraged to continue its efforts to arrange for the voluntary relocation of residents, by increasing the incentive to relocate.”¹⁰⁰³ Also, its Natural Recommendation No. 7 on the same mission (NR7) suggested perpetual promotion and provision of family planning services to the NCA residents as a way of controlling rapid population growth in the property. Locally, the Pastoralists Indigenous Non-governmental Organizations Forum (PINGOs Forum) issued a

⁹⁹⁹ United Nations Permanent Forum on Indigenous Issues, “Statement by the Chairperson of the Permanent Forum on the Eviction of Maasai people from the Ngorongoro Conservation Area in Tanzania, 14 June 2022,” accessed August 9, 2022, <https://www.un.org/development/desa/indigenouspeoples/news/2022/06/statement-by-the-chairperson-of-the-un-permanent-forum-on-indigenous-issues-with-reference-on-the-eviction-of-maasai-people-from-the-ngorongoro-conservation-area-in-tanzania/>.

¹⁰⁰⁰ IWGIA, Urgent Alert: “Threats of Forced Eviction of the Maasai Indigenous Pastoralists of the Ngorongoro Conservation Area (NCA) and Ngorongoro District in Tanzania, February 23, 2022,” accessed August 9, 2022, <https://www.iwgia.org/en/resources/publications/4606-urgent-alert-maasai-ngorongoro-tanzania-forced-eviction.html>.

¹⁰⁰¹ African Commission on Human and Peoples’ Rights, “Urgent Call for Cessation of the Eviction of the Masai Community in the Ngorongoro District in The United Republic of Tanzania, June 13, 2022,” accessed August 9, 2022, <https://www.achpr.org/pressrelease/detail?id=639>.

¹⁰⁰² UNESCO World Heritage Convention, “News, Ngorongoro: UNESCO has Never at any Time Asked for the Displacement of the Maasai People,” <https://whc.unesco.org/en/news/2419>, accessed August 10, 2022.

¹⁰⁰³ For an extensive discussion on the role of UNESCO in facilitating the relocation of the Maasai from the NCA to Msomera Village, see Bernd Kannowski and Cecilia Ngaiza, “Environment or (Collective) Human Rights: What is More Important? A Critical Perspective on the Implementation of the Joint UNESCO/ICOMOS/IUCN Recommendation on the Voluntary Relocation of Maasai Residents from the Ngorongoro Conservation Area in Tanzania,” *Central European Journal of Comparative Law* 3, no. 2 (2022): 55-93.

statement urging the government not to conduct the relocation process in haste, but to give enough room for dialogue and grassroots consultations with the relevant Maasai residents in the Area.¹⁰⁰⁴ Furthermore, the Legal and Human Rights Centre (LHRC) issued a press release on June 30, 2022 addressing the Loliondo and Ngorongoro cases. Specific recommendations were made in relation to Ngorongoro, in which the Centre emphasised the need to respect the rights of those Maasai who do not choose to voluntarily relocate from the property. Also, the Centre aired its position against the government’s intention to review the NCA Act to formalise the resettlement of the Maasai residents from the NCA.¹⁰⁰⁵

Given the reaction to the eviction notice published by the NCAA, it was withdrawn by the Authority through a notice published on April 20, 2021 due to the misunderstanding and “confusion” that had been raised in the general public. The Authority declared that it would consult the public on this case when further instructions were issued. It was not long before another attempt to relocate the Maasai from the NCA was made. This was in February 2022 when the Permanent Parliamentary Committee on Land, Natural Resources and Tourism Committee presented its report for the period January 2021 to February 2022 before the Parliament. While addressing the Ngorongoro case, the Committee recommended consultation meetings between the government and the residents of the NCA to resolve the impending issues related to the relocation of residents from the NCA. This recommendation was backed by the Presidential Directive communicated through the Prime Minister in the parliamentary session on 10 February 2022. In highlighting the government’s position on the Ngorongoro case, the Prime Minister informed the Parliament that he had partly begun implementing the directive. He explained that he had met the Arusha regional administration and representatives from relevant ministries. He also agreed to physically visit the Ngorongoro District to learn the opinions of the NCA residents regarding the question of a sustainable and practical Multiple Land Use Scheme in the NCA. In the same speech, the Prime Minister directed the Ministry of Natural Resources and Tourism to organise a one-day informative seminar for all Members of the Parliament regarding the dynamics taking place in the NCA, given their role in the law-making process and

¹⁰⁰⁴ PINGOS Forum, “Tamko Toka Mashirika Yasiyo ya Kiserikali Kuhusu Mgogoro wa Ardhi Wilaya ya Ngorongoro” (Unofficial translation: Joint Statement of the Non-governmental Organisations Regarding Land Conflict in Ngorongoro District), accessed August 10, 2022, <https://pingosforum.or.tz/tamko-toka-mashirika-yasiyo-ya-kiserikali-kuhusu-mgogoro-wa-ardhi-wilaya-ya-ngorongoro/>.

¹⁰⁰⁵ Legal and Human Rights Centre, “Tamko Kuhusu Hali ya Loliondo na Ngorongoro” (Unofficial translation: Press Statement on the Situation of Loliondo and Ngorongoro), dated 30 June 2022, , accessed August 10, 2022, <https://humanrights.or.tz/en/news-events/ngorongoro>.

their potential to influence policy change.¹⁰⁰⁶ Consequently, the Prime Minister held a meeting in the NCAA's old Headquarters on February 17, 2022. The meeting was attended by government officials including the Minister of Natural Resources and Tourism, the Minister of Livestock and Fisheries, the Minister under the President's Office: Regional Administration and Local Government, the Deputy Minister of Lands and Human Settlements Development, Principal Secretaries from the Ministry of Water Resources, among others, and the ruling party leaders. From the community, the meeting was attended by the Member of Parliament for the Ngorongoro Constituency, Maasai leaders (Laigwanans), Ngorongoro Pastoral Council and religious leaders.¹⁰⁰⁷ In this meeting, both parties i.e. the government and the Maasai, tabled their agenda and interests in the NCA. It was communicated by the Maasai leaders who attended the meeting that the Maasai in the NCA were ready to cooperate with the government to ensure a functional multiple land use scheme in the property. In his concluding statement, the Prime Minister offered all the NCA residents an opportunity to voluntarily relocate from the property to the areas of their choice. It was communicated that anyone who wished to do so should register his or her name with the Ngorongoro District Office. The government undertook to facilitate relocation of those who voluntarily registered to relocate from the NCA. Not long after this meeting in Ngorongoro, the government announced that it had set aside an area in Msomera Village, Handeni District, Tanga Region for resettlement of the NCA residents who wished to voluntarily relocate from the Area. Since the Prime Minister's meeting held in Ngorongoro and the subsequent announcement of the availability of a resettlement area in Msomera village, the process of registering and voluntarily relocating from NCA to Msomera Village by some of the NCA residents began. The process was still ongoing by the time of completion of this study. It is reported that by July 22, 2022, a total of 757 households (representing 4344 individuals) had submitted their names to the Ngorongoro District Office and requested assistance in moving to

¹⁰⁰⁶Parliament of the United Republic of Tanzania, Parliamentary Hansard, Sixth Session, 7th Sitting, February 9, 2022, pp. 219-220.

¹⁰⁰⁷ Despite this representation by Laigwanans, a meeting of Maasai Laigwanans that sat in Oldoinyo Morwark communicated that the Maasai who attended the Prime Minister's meeting and claimed to be the Laigwanans from the NCA were people who intended to benefit from this conflict. This meeting suggested more grassroots consultations and not just a one-time meeting like the one held by the Prime Minister. Watetezi Tv. "*Msimamo wa Malaigwanani Kuhusu Ngorongoro; Watoa Tamko Zito.*" Translation: (A Serious Statement on the Position of the Laigwanans regarding Ngorongoro). Accessed August 10, 2022. <https://www.youtube.com/watch?v=e7AxLjn7hE>.

Msomera Village in the first phase of relocation.¹⁰⁰⁸ A field visit to Msomera Village revealed successful implementation of this phase. By January 2024, a second phase of relocation of the NCA residents to Msomera village had begun. On January 5, 2024, a total of 30 households with 224 people were received in Msomera Village by the Handeni District Commissioner. Also, on January 14, 2024, 44 more households with 296 people and 1,206 livestock were received. The government has devised ways to provide adequate, equitable, fair and proportional compensation to people who have volunteered to relocate from the NCA. Each household gets a minimum of 2.5 acres for residential purposes with a modern three-bedroom house equipped with electricity and running water, 5 acres of land for cultivation and a start-up capital of ten million Tanzanian shillings. They are also provided with transport from the NCA to Msomera village. The transport package includes transfer of their belongings and livestock. Observations carried out in Msomera village revealed the presence of social services in the village, such as functional roads, a hospital, primary and secondary schools and a local market (*mnada*) within the village. Other services like animal feeding, water pools and dip tanks (*majosho ya kuoshea mifugo*) were still underway. According to the Handeni District Commissioner, the government is looking forward to building more than 5,000 houses for the NCA residents relocating to Msomera village. However, he warned that the voluntary exercise may have a deadline in the future.¹⁰⁰⁹ Other areas designated to receive residents from the NCA are Kilindi District in the Tanga Region and Simanjiro District in the Manyara Region. Although there is not yet a declared government position on the fate of the NCA residents who are not willing to voluntarily relocate from the property, there are various reports of measures applied by the government to “force” such residents out of the NCA. These include cutting down social services in the Area. For instance, the Endulen Hospital has been reduced to a clinic with all emergency services halted (including the ambulance). Also, the number of hospital staff has been cut.¹⁰¹⁰ On the one hand, it can be argued that social services in the property have been reduced due to the population decrease brought about by the ongoing

¹⁰⁰⁸ Okuly Digital, “Kwa Sababu Hizi Ni Muhimu Kwa Wakazi wa Ngorongoro Kuhamia Msomera,” (Translation: For these Reasons it is Crucial for Ngorongoro Residents to Relocate to Msomera), accessed August 8, 2023, <https://www.youtube.com/watch?v=k4UnXlxAiE>.

¹⁰⁰⁹ A conversation with the Handeni District Commissioner on November 6, 2023.

¹⁰¹⁰ Oakland Institute, *Fact Finding Report: Field Research at the Resettlement Site-Msomera Village in Handeni District Tanzania*, 2022, 6, accessed February 23, 2024, https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/pdfpreview/field_research_msomera_resettlement_site_october_2022.pdf.

voluntary relocation exercise. On the other hand, it remains unclear if the remaining social services are sufficient to cater for all the needs of the population still residing in the NCA.

The relocation exercise in Ngorongoro triggered a reaction on the part of the CERD Committee which issued a warning letter to the United Republic of Tanzania on 28 April, 2022. This followed information that the Committee had received under its Early Warning and Urgent Action Procedure regarding the situation of indigenous Maasai both in Ngorongoro and Loliondo. The Committee took note of the letter already written to Tanzania by various UN Special Procedures with reference number AL TZA 3/2021 dated February 9, 2022¹⁰¹¹ and the reply to this letter by the government of Tanzania made on April 8, 2022, rebutting the allegation of the states' forceful eviction and arbitrary arrest of Maasai indigenous people in Ngorongoro and Loliondo. The letter by the UN Special Procedures regretted that no reaction had been received so far from the government of Tanzania in relation to the previous letters written on the same matter, i.e. two letters written in 2013 and letters written in 2014, 2015, 2016 and 2019. Further, the CERD Committee noted the recommendations it had made in its concluding observations on the eighth to sixteenth state reports submitted before it by the United Republic of Tanzania (CERD/C/TZA/CO/16)¹⁰¹² read together with paragraph 5 of its General Recommendation No. 23 of 1997 on the Rights of Indigenous Peoples which urge States Parties to ICERD to recognise and protect the rights of indigenous peoples to own, use, develop and control their communal lands and territories. Notably, other warning letters by the CERD Committee on the same cases of Maasai rights in Ngorongoro and Loliondo had been issued to the United Republic of Tanzania on October 3, 2016, March 1, 2013, March 11, 2011, and March 13, 2009, but nothing substantive seemed to have been done to improve the situation. The Committee has continued receiving reports on the violations of human rights in these areas.

5.4.6 The Case of Essimiongor Forest Reserve

The Essimiongor Forest was established in 1954 under the British colonial administration via Government *Gazette* No. 187 of 1954. It is located in Monduli District, Arusha Region which is predominantly inhabited by the Maasai. This community has been utilising this forest for various

¹⁰¹¹ Accessed on March 3, 2024, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26938>.

¹⁰¹² See paras. 14 and 16 of the concluding observations.

purposes over the years before it became a target for an upgrade.¹⁰¹³ It is reported that on June 4, 2021, during the reading of the 2021/2022 Ministerial budget in the Parliament, the Minister responsible for natural resources and tourism declared the government's intention to upgrade this forest to a nature forest and make it into a forest reserve to preserve its biodiversity and the endangered flora and fauna found in it. This declaration is alleged to have been made unilaterally without consulting the villagers who benefit from the wealth and natural resources found in the forest. These are Maasai pastoralists from Esilalei, Lepurko, Makuyuni, and Selela Wards who have for many years used the forest resources for residence, worship, livestock grazing, traditional medicine and access to water resources.¹⁰¹⁴ It is reported that the government has extended the size of the forest from 4,649 to 6,070 hectares, zeroing in on the village land of eight villages, namely Baraka, Esilalei, Lossimingor, Losirwa, Mbaashi, Makuyuni, Mungere and Silalei villages, which border the forest. All of these villages are legally registered except for Makuyuni Village.¹⁰¹⁵ Should the expansion of this forest continue, the aforementioned villages are facing the danger of land tenure insecurity. Since there have been allegations that this forest reserve was established without proper consultation with the inhabitants of the adjoining pastoralists' villages, access to more information on how this exercise transpired was sought from the Tanzania Forest Services Agency (TFS) but without success.

5.4.7 The NAFCO Case

This case represents one of the earliest indigenous peoples' struggles for land tenure security against the government of Tanzania. It involves the Barbaig in Hanang District which was then part of Arusha Region.¹⁰¹⁶ In 1968, the Barbaig witnessed acquisition of 70,000 hectares of land by the government. The acquired land was part of what the Barbaig considered to be their ancestral land. This acquisition was carried out without free, prior and informed consent by the Barbaig. The land was acquired for large-scale commercial wheat plantations under the government enterprise known as the National Agriculture and Food Corporation (NAFCO). This flagship project was funded by the Canadian International Development Agency (CIDA) which

¹⁰¹³ International Work Group for Indigenous Affairs (IWGIA), "Indigenous World 2022: Tanzania," accessed February 28, 2024. <https://www.iwgia.org/en/tanzania/4643-iw-2022-tanzania.html>, accessed February 28, 2024.

¹⁰¹⁴ International Work Group for Indigenous Affairs (IWGIA), "Indigenous World 2022: Tanzania."

¹⁰¹⁵ *Ibid.*

¹⁰¹⁶ Cultural Survival, "Maasai and Barbaig Herders Struggle for Land Rights in Kenya and Tanzania," accessed March 3, 2024, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maasai-and-barabaig-herders-struggle-land-rights-kenya-and-tanzania>.

injected sixty million United States dollars into the project. The 70,000 hectares were later extended to 100,000 hectares for the same purpose.¹⁰¹⁷ Apart from being dispossessed of this huge chunk of land which was mainly used for pastoral activities, the Barbaig were restricted from passing through the plantations to access pastures and water resources on the other side. Also, their grave sites were affected.¹⁰¹⁸ For these reasons, the Barbaig sought to challenge the illegal acquisition of the land which they legally owned under customary law. One of the cases they filed was that of *Mulbadaw Village Council and 67 Others versus National Agriculture and Food Corporation (NAFCO)*,¹⁰¹⁹ filed before the High Court in Arusha. In this case, the Court recognised the Barbaig's rights to the acquired land. It was of the opinion that their rights under customary law had not been extinguished by the Land Acquisition Act, 1967. The Court asserted that land could not be acquired by mere approval of political leaders, but that the due legal process had to be followed.¹⁰²⁰ This decision was, however, challenged by NAFCO before the Court of Appeal of Tanzania in *National Agriculture and Food Corporation (NAFCO) versus Mulbadaw Village Council and Others*.¹⁰²¹ The Court allowed the appeal on the grounds that, firstly, the Mulbadaw Village Council which was representative of the villagers' interests was an administrative entity and hence had no entitlement to own land under customary law.¹⁰²² It was of the Court's opinion that the same village council produced no evidence that it had legally been allocated such village land by the District Development Council as was the legal requirement under the Village and Ujamaa Villages (Registration, Designation and Administration) Act, 1975. Here, the tables turned and Mulbadaw Village was found to have trespassed on NAFCO's farm land.¹⁰²³ Secondly, the individuals who filed a case before the High Court were found to have not proved they were really "natives" in the meaning prescribed by the Land Ordinance, 1923 to claim rights to the disputed land. By the year 1970, the word native meant "... any native of Africa not being of European or Asiatic origin or descent and including Swahili but not

¹⁰¹⁷ Survival, "Maasai and Barbaig Herders Struggle for Land Rights in Kenya and Tanzania,"

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ (1984) T.L.R. p. 15-27 HC-Arusha.

¹⁰²⁰ [1984] TLR 16.

¹⁰²¹ [1985] TLR 88.

¹⁰²² Tenga, "Minority Rights in Tanzania," 9.

¹⁰²³ Peter, *Human Rights of Indigenous Minorities in Tanzania and the Courts of Law*, 475.

Somali people.”¹⁰²⁴ In 1970, section 22 of the Land Ordinance was amended to define the term “native” to mean “...any person who is a citizen of the United Republic and who is not of European or Asiatic origin or descent.” The amendment came in under Act No. 28 of 1970. Notably, customary title to land could only be held by natives.

The requirement for the litigants to prove that they were natives to the land in which they claimed ancestral roots put the Barbaig in the strenuous process of engaging anthropologists and ethnographers in another case of a similar nature filed before the High Court, i.e. *Yoke Gwaku and Others versus Gawal Farms Limited and NAFCO*.¹⁰²⁵ In this case, NAFCO was found to have trespassed on the Plaintiffs’ land but only six of the Plaintiffs who appeared in Court were awarded monetary compensation. The Court found a defect in the representative suit filed to defend the collective rights of the Gawal community. All these legal technicalities barred the Barbaig indigenous community’s access to justice due to a lack of human rights provisions in the Constitution to back their direct claim of a collective right to property such as ancestral lands. Dissatisfied by the High Court’s decision, the Barbaig turned to the Court of Appeal of Tanzania. Their case was admitted as Civil Appeal No. 37 of 1998. The Barbaig could not defend this appeal because of non-appearance. It was dismissed on October 15, 2004. Later, they approached the same Court attempting to restore the dismissed appeal. In this regard, they filed Civil Application No. 67 of 2005 but this did not succeed. The Barbaig could not produce sufficient reasons for their non-appearance in the dismissed appeal apart from communication breakdown with the Legal Counsel who was representing them. This is one clear example of indigenous people’s lack of opportunities to successfully litigate their collective rights due to poor understanding of legal procedures.

5.4.8 The Case of Vilima Vitatu

This case involves the eviction of Barbaig pastoralists from a Wildlife Management Area. The Vilima Vitatu Village Council which claimed to have allocated part of its village land to the Burunge Wildlife Management Area (WMA) sued the pastoralists for trespassing on WMA land

¹⁰²⁴ Africans of Somali origin were recognised as non-natives through the Somalia (Miscellaneous Provisions) Ordinance, which was in force from 1949 up to 1994 when the Ordinance was repealed by the Laws Revision (Miscellaneous Repeals) Act No.8 of 1994.

¹⁰²⁵ Civil Case No. 52 of 1988, High Court of Tanzania at Arusha, (Unreported).

and later forceful evictions were implemented.¹⁰²⁶ In the District Land and Housing Tribunal for Manyara at Babati, a case to this effect was filed and admitted as Application No. 70 of 2008, *Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge versus Udaghwenga Bayay and Others*. Despite the Barbaig’s joint statement that they had occupied the disputed land since time immemorial, the Tribunal declared them trespassers in the WMA and ordered their immediate eviction. Aggrieved by this decision, they appealed to the High Court of Tanzania at Arusha via Land Appeal No. 31 of 2009, *Udaghwenga Bayay and Others versus Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge*. The appeal was dismissed and the decision of the Tribunal upheld. Determined to obtain justice, the Barbaig pastoralists proceeded with another appeal to the Court of Appeal of Tanzania against the decision of the High Court. This was Civil Appeal No. 77 of 2012 (*Udaghwenga Bayay and Others versus Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori- Burunge*). This appeal was successful. The Court of Appeal found irregularities in the establishment of the WMA in which the Barbaig were alleged to have trespassed. Aggrieved by this decision, the Vilima Vitatu Village Council and the Burunge Wildlife Management Area returned to the Court of Appeal with an application for review. They prayed the Court to review its own judgment which was rendered in favour of the Barbaig. The Applicants argued that the decision was “... based on a manifest error on the face of the record resulting in the miscarriage of justice”. Their case was admitted in the name of *Halmashauri ya Kijiji cha Vilima Vitatu and Jumuiya ya Hifadhi ya Wanyama Pori-Burunge*, Civil Application No. 16 of 2013. Nevertheless, after its determination, it was dismissed in its entirety on September 17, 2016. The issues raised by the Applicants were found to have been disposed of on merits in the appeal that they were disputing.

Despite the victories of the Barbaig in the Highest Courts of the country, on September 13, 2018, they were forcefully evicted from the disputed land following an order made by the Babati District Commissioner. This involved setting fire to the Barbaig’s homesteads (*bomas*) by government officers in the name of preventing the spread of anthrax disease.¹⁰²⁷ This left about three hundred Barbaig pastoralists homeless. The number included women, the elderly and children. Their livestock were exposed to wild animals as their bomas had been burnt to the

¹⁰²⁶ International Work Group for Indigenous Affairs (IWGIA), *Indigenous World 2019: Tanzania*, accessed March 2, 2024, <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>.

¹⁰²⁷ IWGIA, “Indigenous World 2019: Tanzania.”

ground.¹⁰²⁸ This was a direct violation of the Barbaig’s right to development, peace and security guaranteed under Articles 22 and 23 of the Banjul Charter. It is reported that the motive behind the evictions was to create room for a tourist company’s hotel investment within the Wildlife Management Area.¹⁰²⁹

5.4.9 The Case of Mabwegere Village

This case represents the old conflict between traditional pastoralist and crop farmers, as well as indigenous pastoralists’ loss of “ancestral” lands due to re-survey, re-adjustment and re-division of village land. Starting with the conflict between pastoralists and non-pastoralists, it is important to note that the Parakuiyo pastoralists had been living in what was later established as Mabwegere village since the mid-1950s. Later, the boundaries of Mabwegere Villagewere demarcated on August 7, 1989 in an attempt to end the long history of conflict between pastoralists and farmers.¹⁰³⁰ Mabwegere Village became a predominantly pastoralist village bordering Mambegwa Village which is mainly inhabited by a crop-farming population. Between these two villages was a piece of land known as Kikenke, a wetland located in Mabwegere Village at the extreme margin of Mambegwa village land. This piece of land which sustained the pastoralists’ livestock in dry seasons became a source of conflict between Mabwegere and Mambegwa Villages.¹⁰³¹ In the mid-2000s, the Mabwegere pastoralists accused the Mambegwa villagers of encroaching on land in Kikenke through crop cultivation without consulting the Mabwegere Village Council. Therefore, in 2006, the Mabwegere Village Council filed a case before the High Court of Tanzania (Land Division) against the crop cultivators from Mambegwa Village alleging trespass on their village land. This case was *Halmashauri ya Kijiji cha Mabwegere (Mabwegere Village Council) versus Hamisi (Shaban) Msambaa and 32 Others*.¹⁰³² They prayed the Court to issue orders of eviction and restraint against the Mambegwa villagers to prevent them from interfering with the Mabwegere village land, as well as compensation for the loss already caused through their encroachment on the Kikenke wetland. This matter took

¹⁰²⁸ Star TV Habari, “Mgogoro wa Vilima Vitatu Babati; Wakazi Washangazwa na Amri Zinzokinzana” (Translation: “Vilima Vitatu Conflict in Babati; Residents Astounded by Conflicting Decisions”), accessed March 3, 2024, <https://www.youtube.com/watch?v=q4HBA5B238>.

¹⁰²⁹ IWGIA, “Indigenous World 2019: Tanzania.”

¹⁰³⁰ International Work Group on Indigenous Affairs, *Tanzanian Pastoralists Threatened: Evictions, Human Rights Violations and Loss of Livelihood*, IWGIA Report 23, (2016), 41.

¹⁰³¹ International Work Group on Indigenous Affairs, *Tanzanian Pastoralists Threatened*, 41.

¹⁰³² Land Case No. 23, 2006.

four years to be finalised before the High Court, which gave room for a heated conflict between the two villages. On October 27, 2008, a herder who was attempting to access the disputed land through one of the crop farms was spotted by the owner and shot.¹⁰³³ The incident blew up into a violent clash between the Mabwegere pastoralists and the Mambegwa farmers and more lives were lost. Eventually, the crop farmers mobilised a local paramilitary militia which invaded Mabwegere village and set seventy houses on fire. They also confiscated a large number of livestock and stole other food supplies.¹⁰³⁴ As if this was not enough, shortly after the invasion of the village, the Kilosa District Commissioner issued a notice initiating what was known as *Operesheni Ondoa Wafugaji Kilosa* meaning an operation to remove pastoralists from Kilosa. It was only two months after a pastoralist had been shot on his own village land at Mabwegere that a special police unit, the Field Force Unit (FFU), invaded Mabwegere Village and confiscated 1,774 cattle, 549 goats and other property belonging to the pastoralists. To recover their property, the pastoralists had to pay not less than 123 million Tanzanian Shillings. The livestock were recovered in bad shape and those that could not be recovered were cheaply sold or transported to a slaughterhouse.¹⁰³⁵

The case instituted before the High Court was finalised on January 04, 2010. The Court noted shortcomings in relation to the formalisation process of Mabwegere Village. For instance, the certificate of title tendered in the Court showed that it was issued on January 5, 1990 and that the village obtained a title deed for a period of 99 years.¹⁰³⁶ However, the village's certificate of registration was issued on June 16, 1999. Procedurally, the latter should have preceded the former. The Court noted that the District Land Office and the Office of the Commissioner for Lands were responsible for this discrepancy, which led to the District Commissioner's order to withdraw the village boundaries. This was followed by the Commissioner for Lands' declaration that the formalisation of Mabwegere Village was null and void *abinitio*. This was a blow to the land tenure security of the Mabwegere pastoralist amidst a long-lasting conflict with the farmers. Following this discovery, the Court ruled that the pastoralists had no land to be trespassed on and the Mabwegere Village Council could not prove the trespass, hence the case was dismissed. Aggrieved by the High Court decision, the pastoralists appealed to the Court of Appeal of

¹⁰³³ IWGIA, *Tanzanian Pastoralists Threatened*, 41.

¹⁰³⁴ *Ibid.*

¹⁰³⁵ IWGIA, *Tanzanian Pastoralists Threatened*, 41-42.

¹⁰³⁶ International Work Group for Indigenous Affairs (IWGIA), "Indigenous World 2019: Tanzania," accessed February 26, 2024, <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>.

Tanzania. The appeal was admitted as Civil Appeal No. 53 of 2010. The decision of the Court of Appeal was finally rendered on February 2, 2012, partly against the Appellants. The Court of Appeal agreed with the High Court that the Appellants had failed to prove on a balance of probabilities the alleged trespass. However, the Court still recognised the Mabwegere Village Council's legal ownership of the disputed land as there was no proof of execution of the District Commissioner's orders to uproot beacons demarcating the boundaries of Mabwegere Village. Also, there was no proof of the Commissioner for Lands' revocation of Mabwegere Village's Certificate of Occupancy.

Despite the above decision by the Court of Appeal, it is reported that the disputed land was allocated to "prominent figures" who cultivate on a large scale in the area by the Kilosa District Council.¹⁰³⁷ The Mabwegere Village leadership kept pressing for implementation of the Court of Appeal's decision by the Kilosa District Council. Among other things, it requested the removal of farmers from the disputed land, but all their efforts were in vain. It is reported further that, on May 30, 2015, the Mabwegere Village Chairman who was at the frontline in this course was arrested by the orders of the District Commissioner.¹⁰³⁸ This renewed a heated conflict in the area, which attracted the attention of the Minister for Lands, Housing and Human Settlements Development. As a way to approach the conflict, the Minister in consultation with the Chief Justice appointed a High Court Judge to conduct an inquiry into the matter. The inquirer was ordered to look into the root cause of this conflict and offer recommendations on ways to ending it.¹⁰³⁹ In September 2016, the inquiry was completed after sixty days of consultation with relevant stakeholders and a report was submitted to the Minister responsible. In a nutshell, the inquiry looked into the establishment, survey and formalisation process of Mabwegere Village and the relationship between the disputed land and activities that were carried out on it. It also looked into other possible sources of conflict, apart from a boundary conflict, and what had been done so far to solve it. Most importantly, the report indicated the legal implications of implementing the recommendations made after the inquiry, taking into account the Court of Appeal's decision in Civil Appeal No. 53 of 2010, in which the Court had recognised rightful

¹⁰³⁷ IWGIA, *Tanzanian Pastoralists Threatened: Evictions, Human Rights and Loss of Livelihood*, IWGIA Report 23 (Tanzania: IWGIA, PAICODEO, UCRT, 2016), 44.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ The Minister derives this Mandate under section 18 of the Land Act, 1999 and section 7 (2) (b) of the Village Land Act, 1999.

ownership of the disputed land by Mabwegere Village.¹⁰⁴⁰ The Minister acknowledged the challenges involved in implementing the recommendations from the inquiry and urged the responsible authorities to be cautious as they moved towards implementing the recommendations. He insisted that, according to the law, such recommendations were final and had to be put into action. At the time of conducting this research, the report of the inquiry had not been published as required by section 18 (10) of the Land Act. Efforts to access it ended at the Office of the Morogoro Regional Commissioner where it was said that the report could not be made public before all the recommendations had been acted on by the government.¹⁰⁴¹

Subsequently, it was discovered in the High Court's records (Morogoro Registry) that sometime in 2021 the Director of Kilosa District Council and the Commissioner for Lands from the Ministry of Lands, Housing and Human Settlements Development had on different occasions ordered and authorised re-survey, sub-division, distribution and abolition of Mabwegere Village. This brought the Mabwegere pastoralists back to Court through the services of a private Legal Counsel. They instituted a case before the High Court of Tanzania at Morogoro, i.e. *Saitem Hotee Pololeti & 297 Others versus Director Kilosa District Council and 11 Others*,¹⁰⁴² against the government, the neighbouring villages with whom they shared previous boundaries and other private persons involved in the disputed land. The case alleged the pastoralists' deprivation, expropriation, interference, and forceful eviction from their lawful village land. However, the case could not proceed to be heard in merits due to the successful upholding of one of the three preliminary objections on points of law raised by the Defendants. It was ordered by the Court that the case be re-submitted to the Court with a cured legal irregularity in the Plaintiff.

5.4.10 The Case of Kilombero Valley

The Kilombero Valley which is found in today's Kilombero and Ulanga District has been home to Iparakuiyo pastoralists for more than 100 years.¹⁰⁴³ In the 1980s, this community received another group of pastoralists, the Barbaig, who had been displaced following the establishment of large-scale wheat farms by the government in what they had known as their homeland for many years in Hanang District, Arusha Region. Further, the area received the Sukuma

¹⁰⁴⁰Mtanzania Digital, "Ripoti Migogoro ya Ardhi Kilosa Yakamilika," (Translation: Report on Land Conflicts in Kilosa Completed") accessed February 2023, <https://mtanzania.co.tz/ripoti-migogoro-ya-ardhi-kilosa-yakamika/>.

¹⁰⁴¹Visits to the Morogoro Regional Commissioner's Office were made on June 28 and 29, 2021.

¹⁰⁴²Civil Case No. 5 of 2023.

¹⁰⁴³IWGIA, *Tanzanian Pastoralists Threatened*, 45.

pastoralists¹⁰⁴⁴ who had also been forced out of their traditional grazing lands following an extensive land acquisition exercise for mining activities and other coordinated agro-industrial projects, particularly in Shinyanga region.¹⁰⁴⁵ Before turmoil began in the Kilombero Valley, these people had practised nomadic pastoralism in the area, utilising the rich biodiversity found in the valley and its adjacent plains. They grazed in wetlands during the dry seasons and shifted to the highlands during the rainy seasons.

In 2002, the Kilombero Valley was designated as Ramsar Site, a wetland of international and national importance. Section 3 (1) of the Ramsar Convention, 1971¹⁰⁴⁶ suggests the “wise use” approach in conserving the wetlands. Therefore, in establishing the site, the government through the Wildlife Division, in collaboration with the village governments, consulted the local communities in the valley.¹⁰⁴⁷ The communities were sensitised to the local and international significance of conserving such a wetland and agreed on its establishment. In the consultations, no plan to evict the pastoralists from the valley was communicated.¹⁰⁴⁸ On the contrary, Village Land Use Plans were drawn up. Grazing lands were specified and the communities living within the Ramsar Site agreed to relocate to allocated areas. It was also agreed that the pastoralists’ livestock in the area should be branded, and this was done by the government’s livestock officers. The pastoralists paid fees for the branding exercise, unlike the crop farmers who did not have to pay any costs.¹⁰⁴⁹ It was not long after this was done that the Wildlife Division altered the formerly agreed Site’s boundaries without any agreement with the affected villages. This move affected thirty-one villages, some of which were inhabited by pastoralists. Part of the population was left landless.¹⁰⁵⁰ Eventually, the decision to evict people from the Site was reached at a meeting held in Ifakara, Morogoro Region on August 14, 2012 involving the Permanent Secretary from the Ministry of Natural Resources and Tourism and the Ulanga and Kilombero District administration.¹⁰⁵¹ As a result, the Morogoro Regional Commissioner launched *Operation Okoa Bonde la Mto Kilombero* meaning “Operation Save the Kilombero Valley.” The operation was said to be part of the implementation of the Vice President’s

¹⁰⁴⁴ The Sukuma pastoralists do not self-identify as indigenous peoples in Tanzania.

¹⁰⁴⁵ IWGIA, *Tanzanian Pastoralists Threatened*, 45.

¹⁰⁴⁶ Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971.

¹⁰⁴⁷ IWGIA, *Tanzanian Pastoralists Threatened*, 46.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *Ibid.*

directives contained in the Strategy for Urgent Actions on Land Degradation and Water Catchments (2006). Among other things, the strategy aimed at locking out pastoralists from all wetlands. In the case of the Kilombero Valley, the eviction of pastoralists began in November 2012 and ended in January 2013 with a total number of 280,000 cattle removed from the Site.¹⁰⁵² The evictions were carried out despite the High Court's injunction preventing the government from evicting pastoralists from the Site pending determination of the main case filed in October 2012 by pastoralists from more than 49 villages in the Kilombero Valley, i.e. *John Maselu and Others versus Permanent Secretary - Ministry of Natural Resources and Tourism and Another*.¹⁰⁵³ This was yet another incident in which the Court's order was ignored when evicting indigenous pastoralists from their traditional lands and territories. An identical incident has been observed in the Loliondo case discussed above.

5.4.11 The Case of KADCO

This was a land conflict involving the Kilimanjaro Airports Development Company (KADCO) and the adjoining villages of Chemka, Majengo, Malula, Mtakuja, Maroroni, Samaria and Sanya Station, principally inhabited by the Maasai community in Hai District, Kilimanjaro Region. The residents of these villages claimed ancestral rights to the land that was acquired for the establishment of Kilimanjaro International Airport (KIA) whose construction began in May 1969.¹⁰⁵⁴ During its acquisition of the land, the government faced resistance from the Maasai who had lived in the area for a long period of time. However, consensus was reached that only 460 hectares should be acquired to establish the airport and the Maasai should be paid compensation or be granted alternative land of the same quality in accordance with the law that governed land acquisition at the time.¹⁰⁵⁵ However, these remedies were not fulfilled by the government.¹⁰⁵⁶ The airport was launched in December 1971 and began operations. Due to the noise pollution from the airport, members of the Maasai community living in adjacent villages moved approximately three kilometres away leaving bare land between their homes and the

¹⁰⁵² IWGIA, *Tanzanian Pastoralists Threatened*, 47.

¹⁰⁵³ Land Case No. 212 of 2012.

¹⁰⁵⁴ International Work Group of Indigenous Affairs (IWGIA), "Indigenous World 2019: Tanzania," accessed March 1, 2024. Also see PINGOs Forum, "Historia ya Mgogoro kati ya Vijiji na Kiwanja cha Ndege Kilimanjaro" (Translation: The History of Land Conflicts between Villages and the Kilimanjaro International Airport), accessed March 1, 2024, <https://www.youtube.com/watch?v=mMhcUfYNvJs>.

¹⁰⁵⁵ PINGOs Forum, "Historia ya Mgogoro kati ya Vijiji na Kiwanja cha Ndege Kilimanjaro."

¹⁰⁵⁶ *Ibid.*

airport to be used for grazing activities. In the 1980s, the Ministry of Land Affairs demarcated 110 square kilometres of the bare land for airport expansion and development. This occurred without consulting the Maasai bordering the airport or following the due process stipulated by the Land Acquisition Act, 1967, (Act No.47 of 1967).¹⁰⁵⁷ In 1986 the land was surveyed, and registered as government property in 1989. On July 17, 1998 the government entered into a 25-year agreement with a company known as Kilimanjaro Airports Development Company established on March 1, 1998 to develop modern infrastructures and facilities for better provision of airport services at KIA. The government owned only 24% of the company's shares while the rest of the shares belonged to other internal and external investors, these being InterConsult (T) Limited (4.6%) from Tanzania, Mott MacDonald International (41.4%) from the United Kingdom and South Africa Infrastructure Fund (SAIF) (30%) from South Africa.¹⁰⁵⁸ In 2009, as this concession did not bear the fruits hoped for in the original agreement, the government bought all the shares of the company and it became a full government entity.¹⁰⁵⁹

On April 20, 2006, KIA was granted a 99-year right of occupancy of the disputed land via Land Title No. 22270 despite legal irregularities in the acquisition of the land from the Maasai and despite the conflict being tabled for discussion in the Parliament between 2000 and 2006.¹⁰⁶⁰ The affected Maasai villages sent representatives to Dodoma on April 1, 2014, to meet the Prime Minister with a view to obtaining a revival of their interests in land acquired by the government. This trip bore fruits in the sense of the establishment of a Committee by the then Minister of Transport to suggest immediate solutions to the conflict. The Maasai community claims the Committee visited the disputed area but did not engage with them in any way throughout the visit. As a result, by 2019, no feedback had been communicated to them regarding the Committee's work.¹⁰⁶¹ The conflict is yet to receive a permanent solution. This adds to the land tenure insecurity of the Maasai. The villagers bordering the airport continue clashing with government authorities overgrazing livestock in the disputed land. Also, there has been a series of intimidating patrols by KIA staff in the Maasai villages bordering the airport.¹⁰⁶² This curtails

¹⁰⁵⁷ PINGOs Forum, "Historia ya Mgogoro kati ya Vijiji na Kiwanja cha Ndege Kilimanjaro."

¹⁰⁵⁸ Daily News, "Speaker Demands Clarification on KADCO Ownership," accessed on March 1, 2024, <https://dailynews.co.tz/speaker-demands-clarification-on-kadco-ownership/>.

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ Forum, "Historia ya Mgogoro kati ya Vijiji na Kiwanja cha Ndege Kilimanjaro."

¹⁰⁶¹ *Ibid.*

¹⁰⁶² IWGIA, "Indigenous World 2019: Tanzania."

the Maasai's right to freely dispose of the land they have known to be theirs since time immemorial. The intimidating patrols by the KIA staff also violate their right to peace and security. The noise pollution from the airport violates their right to a satisfactory environment for development, which they enjoyed for many years before the construction of the airport.

5.4.12 The Case of the Engaruka Soda Ash Project

Natural soda ash deposits in Tanzania were discovered along the Rift Valley in Lakes Natron and Eyasi where the Hadzabe, Maasai and a few Datooga had lived and wandered for decades.¹⁰⁶³ The research conducted in these areas concluded that Lake Eyasi had fewer infrastructural advantages for soda ash exploitation. Therefore, this left Lake Natron standing as the only prospect for soda ash extraction.¹⁰⁶⁴ Soda ash exploration in Lake Natron began as far back as the 1960s. However, when the project reached its peak and was on the verge of moving into the exploitation stage in the early 2000s, it went downhill for environmental conservation reasons. Despite its wealth in both brine and trona which are two raw materials for soda ash production, Lake Natron was declared a Ramsar Site of international importance in 2001, specifically because of the unique habitat it offers to the long-legged waterfowl Lesser Flamingos (*Phoeniconaias minor*).¹⁰⁶⁵ This is one of the major reasons why the National Environmental Management Council (NEMC) did not approve of the launching of the soda ash project in the lake. It recommended that the project should be moved as far away from Lake Natron as possible. It later turned out that this was a “blessing in disguise” for the Maasai who inhabited this area and grazed their livestock there. Had the Lake Natron Soda Ash Project been commissioned, the four Maasai villages of Alaililai, Engare Sero, Pinyinyi and Londo Losirwa (Magadini) would have been adversely impacted.¹⁰⁶⁶ Eventually, efforts to extract soda ash raw materials elsewhere were launched. The National Development Corporation (NDC), which is in charge of the project, in collaboration with the Geological Survey of Tanzania discovered massive deposits of brine water in the Engaruka Basin (60 kilometres away from Lake Natron)

¹⁰⁶³ See Adhia Jayant, *Techno-economic Study; A Small Scale Soda Ash Production Plant near Lake Natron: A Terminal Report* (Vienna: UNIDO, 1983), 5.

¹⁰⁶⁴ Jayant, *Techno-economic Study; A Small Scale Soda Ash Production Plant near Lake Natron: A Terminal*, 5.

¹⁰⁶⁵ At the international level, Lake Natron has been ranked one of the highest vital breeding sites for Lesser Flamingoes. See Norconsult, *Environmental and Social Impact Assessment for the Development of Soda Ash Facility in Lake Natron Report (Final)*, (2007), 9.

¹⁰⁶⁶ Norconsult, *Environmental and Social Impact Assessment for the Development of Soda Ash Facility in Lake Natron Report (Final)*, (2007), 7.

suitable for soda ash abstraction. Following this discovery, an Environmental and Social Impact Assessment (ESIA) was carried out by the Tanzania Industrial Research and Development Organization (TIRDO) as part of the Engaruka Soda Ash Project Techno-Economic Study from July 2019 to May 2021. Following completion of the study, the project was awarded an Environmental (Clearance) Certificate from the National Environmental Management Council (NEMC) to proceed to the construction and operation stages.¹⁰⁶⁷ The Engaruka soda ash project is intended to cover 25,000 acres of land inhabited by the Maasai community in the villages of Engaruka Chini, Irerendeni, Idonyonaado and Mbaaashi within Engaruka, Mferejini and Selela Wards. This large piece of land for the project was donated by the Monduli District Council in which these villages are located.¹⁰⁶⁸ The question of Maasai collective rights in the project area, such as grazing and access to other natural resources such as Lake Magadi, has been considered in connection with this project. The fact is that the government through the NDC has acquired thousands of acres of land that serves as a habitat for the Maasai pastoralists and grazing land for their livestock in dry seasons.¹⁰⁶⁹ However, the government has reduced the need to relocate the Maasai from the project area by allocating only 0.4% of the acquired 25,000 acres for the construction of the project facility. This is the only area that will be fenced. The rest of the project area will be left open to be accessed for grazing and other activities by the Maasai community. Nevertheless, residence in the project area will be prohibited. The affected *bomas* have been registered and are awaiting compensation before vacating the area. Unlike the case of the NCA, this project has not prepared a specific resettlement area for the project-affected persons (PAPs). The PAPs will be awarded monetary compensation and relocated to other areas of their choice.¹⁰⁷⁰ Until this is done, the villagers may continue residing within the project area.¹⁰⁷¹ Nonetheless, an on-site visit to the project area revealed that some villagers had vacated the area without receiving compensation. Some had left and have since returned to the area and others are still awaiting compensation before vacating the project area.¹⁰⁷² The timelines for

¹⁰⁶⁷ National Development Corporation, *Engaruka Soda Ash Project Report*, (2022), 4.

¹⁰⁶⁸ Interview conducted at the National Development Corporation on June 8, 2023

¹⁰⁶⁹ Tanzania Industrial Research and Development Organization (TIRDO), *Report of the Techno-Economic Study for Engaruka Soda Ash Project*, Volume III, (2021), 14.

¹⁰⁷⁰ Interview with a Director of Research Planning and Industrial Development at NDC, May 25, 2023.

¹⁰⁷¹ Information obtained from the Chairperson of one of the affected villages during field research in Engaruka on October 20, 2023.

¹⁰⁷² Information obtained from the Chairperson of one of the affected villages during field research in Engaruka on October 20, 2023.

compensating the PAPs in this project are yet to be met as the NDC is still searching for a prospective investor who will potentially contribute about 14.08 billion Tanzanian shillings to compensate the PAPs.¹⁰⁷³

Despite the mitigation strategies planned by the NDC, the Maasai villagers no longer have security of tenure within the project area as the land has been acquired by the government for the soda ash project. First, the area where the anticipated fenced project facility will be erected will become a no-go zone. It is expected that a total of 100 hectares will be utilised when the project begins operations.¹⁰⁷⁴ Second, the grazing rights granted on the earmarked project area are also not reliably permanent. As the project is expected to run for fifty years,¹⁰⁷⁵ there are high possibilities for project expansion in the future. This implies potential termination of grazing rights in the project area. Also, while the project plan expects to urbanise the peripheries of the area through the building of modern infrastructures and social services like tarmac roads, hospitals, schools, markets and residential houses, the traditional way of life of the Maasai that was practised in this vicinity will be severely compromised. By way of conclusion, it is to be noted that, although the NDC has recognised the right of the Maasai to practise their cultural activities and dispose of the natural resources in the project area by granting access to seasonal grazing land, medicinal plants, salt licks and water resources, this has not been done in the name of securing the rights of “indigenous peoples” but in consideration of the diversity and needs of the project-affected persons.¹⁰⁷⁶

5.4.13 The Case of the East African Crude Oil Pipeline (EACOP)

The EACOP project may be traced back to the discovery of oil deposits in the Lake Albert area in 2006.¹⁰⁷⁷ Currently, a pipeline measuring 443 kilometres long is being built to run from Kabaale, an area in Hoima District in Uganda to the Chongoleani Peninsula close to Tanga Port in Tanzania. The pipeline is expected to transport crude oil from the interior of Uganda to the coastal outlet in Tanzania.¹⁰⁷⁸ Eighty percent (80%) of the pipeline lies in Tanzania and it has a total of six pumping stations, two in Uganda and four in Tanzania. From the coast, the crude oil

¹⁰⁷³ Interview at NDC, June 8, 2023.

¹⁰⁷⁴ TIRDO, *Report of the Techno-Economic Study for Engaruka Soda Ash Project*, xi.

¹⁰⁷⁵ *Id.* 19.

¹⁰⁷⁶ Interview with a Director of Research Planning and Industrial Development at NDC, May 25, 2023.

¹⁰⁷⁷ The East African Crude Oil Pipeline (EACOP), “Overview”, accessed on February 28, 2024, <https://eacop.com/overview>.

¹⁰⁷⁸ The East African Crude Oil Pipeline (EACOP), “Overview.”

will be loaded into tankers and distributed to various markets.¹⁰⁷⁹ Along the way, the pipeline will cross areas inhabited by indigenous peoples in Tanzania such as Kilindi, Kiteto, Simanjiro, and Hanang.¹⁰⁸⁰ Therefore, comprehensive consultations have been conducted between EACOP's human rights experts, civil society and NGOs advocating for the rights of indigenous peoples, on the one hand,¹⁰⁸¹ and leaders of the Akie, Datooga-Barbaig and Maasai indigenous communities, on the other hand. The consultations were aimed at registering these communities' interests in areas likely to be affected by the pipeline and planning mitigation strategies. These efforts resulted in the signing of the EACOP Framework for Vulnerable Ethnic Groups Self-Identifying as Indigenous Peoples (2021) and the EACOP Plan for Vulnerable Ethnic Groups Self-Identifying as Indigenous Peoples (EACOP Plan) in September 2022.¹⁰⁸² The planned strategies are of general application to the affected indigenous communities to ensure adherence to their collective rights during the development, construction and operation of the pipeline. However, a separate and additional dialogue was conducted specifically with the Akie indigenous community in Napilikunya in Kimana Village in Kiteto District. The dialogue concerned relocation of their sacred site from the project area.¹⁰⁸³ Consequently, an agreement was reached and signed in July 2022 by EACOP and representatives from the Akie community. In this agreement, it was settled that the sacred site, which is of cultural and spiritual importance to the Akie and which was located under the Baobab tree in the land of the Lembulu family, would be relocated to the land of the Oring'idi family to make way for construction of the pipeline.¹⁰⁸⁴ Another dialogue was conducted with this community to ensure that the pipeline does not encroach on their sacred forest on which they depend for their livelihood and spiritual activities. An agreement to this effect was also reached.¹⁰⁸⁵ Further, an agreement was signed between EACOP and the Barbaig indigenous people in Hanang District to protect the cultural

¹⁰⁷⁹ The East African Crude Oil Pipeline (EACOP), "Overview."

¹⁰⁸⁰ It should be noted that, no single indigenous community from Uganda which is internationally recognised as such will be affected by the project. This is why the focus has been on communities self identifying as indigenous peoples in Tanzania. See East African Crude Oil Pipeline, *Human Rights Due Diligence Report*, (2022), 68.

¹⁰⁸¹ NGOs working closely with the EACOP in Tanzania to secure the rights of indigenous peoples along the project's pipeline are the PINGO's Forum, Parakuiyo Pastoralists Indigenous Community Development Organization (PAICODEO) and Ujamaa Community Resource Team (UCRT).

¹⁰⁸² East African Crude Oil Pipeline, *Human Rights Due Diligence Report*, (2022), 68 and 72.

¹⁰⁸³ See the East African Crude Oil Pipeline, Free, Prior and Informed Consent Agreement between the East African Crude Oil Pipeline and Akie Community of Napilikunya, 2022.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ East African Crude Oil Pipeline, Free, Prior and Informed Consent Agreement between the East African Crude Oil Pipeline and Akie Community of Napilikunya, 2022.

heritage of this community should the pipeline's original construction plan in this area be maintained.¹⁰⁸⁶ In this agreement, EACOP agreed to narrow the pipeline at Gorimba to avoid the Barbaig's sacred site which is of spiritual significance to them.¹⁰⁸⁷

The EACOP project is a model of recognition and respect for indigenous peoples' rights in Tanzania, particularly their rights to cultural development and utilisation of natural resources. The modality of consultation and conclusion of agreements with communities self-identifying as indigenous people while implementing development projects should be adopted by all relevant government Ministries and departments whenever such projects are being planned in areas inhabited by indigenous communities.

5.4.14 The Case of Oldoinyo Morwak

Oldoinyo Oolmoruak is a hill of spiritual and religious significance for all the Maasai of Kenya and Tanzania. It is situated in Hai District, Tanzania in the Sanya Plains. It is a sacred place respected and set aside by the Doinyo Village Council to allow the Maasai to conduct their rituals and rites of passage. Every twelve to fourteen years, the Maasai from all age sets (*rika*) change their age sets' names and assume new responsibilities in their community. According to the focused group discussion conducted on this site, traditional practices and rituals at Oldoinyo Oolmoruak can be traced back by the elders as far as 1774.¹⁰⁸⁸ Some Maasai call it their "graduation site" and some the "Mecca" of Maasai all over the world. The place is still intact and is under the supervision of the youngest and strongest age set, the Morans. The ACHPR's Working Group of Experts on Indigenous Populations/Communities has named this site as an example of indigenous peoples' sacred sites of cultural significance whose alienation would deprive the whole Maasai community of its vital cultural heritage.¹⁰⁸⁹

¹⁰⁸⁶ The Citizen, "EACOP Partners with Barbaig Community in Landmark Agreement," accessed February 29, 2024, <https://www.thecitizen.co.tz/tanzania/news/national/eacop-partners-with-barabaig-community-in-landmark-agreement-4486670>.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ The focused group discussion (FDG) with the Maasai Elders in Oldoinyo Morwak was conducted on March 22, 2022.

¹⁰⁸⁹ ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa*, 41.

5.5 Conclusion

As detailed in the above discussion, the situation of indigenous peoples' rights in Tanzania was already intricate by the time the country attained independence. The colonial legacy, particularly in respect of land administration, flora and fauna conservation and political structures, has not made the situation any better. Against this background, legal recognition of "indigenous peoples", in the pragmatic and contemporary meaning of this term, and their rights in Tanzania remains a matter of discussion. Maintaining indigenous peoples' collective right to their ancestral lands is unachievable as the lands have been encroached on since colonial times. The legal framework in the country does not support this collective right as will be seen in the next chapter. The Constitution has no provision which directly provides for group rights. Hence, as shown in the foregoing discussion, most of the cases filed in attempts to secure indigenous peoples' rights have not been in the form of human rights petitions, but as normal civil and land cases. The lack of provisions in the Constitution providing for collective rights such as peoples' right to communal property makes it hard to litigate indigenous peoples' rights in the Tanzanian courts of law. This contradicts Article 1 of the Banjul Charter which obliges Member States to recognise the rights and freedoms provided for under the Charter and to undertake legal and other measures to give effect to these provisions. All in all, the discussion in this chapter reveals gaps in the implementation of peoples' rights in the form of indigenous peoples' collective rights in Tanzania.

CHAPTER SIX

6.0 APPRAISAL OF THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK FOR IMPLEMENTING INDIGENOUS PEOPLES' RIGHTS IN TANZANIA

6.1 Introduction

At a glance, it may appear bizarre to relate indigenous peoples' rights with the government's business in Tanzania. This is due to the position the government has adopted towards embracing the term "indigenous peoples". As already clarified in the foregoing chapters, the government is not in favour of referring to some communities in Tanzania as indigenous. Given this stand, one might conclude that the implementation of indigenous peoples' rights in Tanzania is unfeasible. However, this state of affairs does not eliminate the fact that the laws, policies and institutions in the country affect communities that self-identify as indigenous peoples, nor does it do away with the fact that Tanzania has international and regional human rights obligations towards indigenous peoples. This chapter unpacks the extent to which Tanzanian legislation, policies and institutional practices meet the country's obligations to uphold indigenous peoples' rights despite the nomenclature quagmire. In doing so, it sheds light on how global human rights standards and peoples' rights under the Banjul Charter play a role in securing the collective rights of indigenous peoples, even in a country like Tanzania where the concept of indigenous peoples' movement is not fully appreciated.

6.2 Legal Framework

Tanzania has signed and ratified international instruments which have implications concerning the rights of indigenous peoples. Domestically, it has adopted legislation that has direct or implied impacts on communities self-identifying as indigenous peoples in the country. The present analysis of this legal framework reveals the extent to which Tanzania has taken steps to accommodate indigenous peoples' rights (although not in name). It also points out the gaps and shortcomings in the framework that need to be addressed to meet the country's international and regional human rights obligations.

6.2.1 International Instruments

While this section aims to highlight the international and African regional legal instruments with a bearing on indigenous peoples' rights that have been ratified or acceded to by Tanzania, it also

touches on non-legally binding instruments of the same nature. The rationale behind this is that non-legally binding instruments play a persuasive role in implementing the indigenous peoples' rights embedded in the legally binding instruments. They also provide a sense of direction on how to approach the specific rights of indigenous peoples.

In 2007, Tanzania voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This was despite the available options to abstain from or vote against the Declaration that were exercised by other countries.¹⁰⁹⁰ Although not legally binding, UNDRIP is currently the most comprehensive international instrument providing for indigenous peoples' rights at the global level. Tanzania was also one of the 196 countries that adopted the Kunming-Montreal Global Biodiversity Framework, 2022 which acknowledges the contributions of indigenous peoples to conserving biodiversity and ensuring its sustainability.¹⁰⁹¹

Apart from the aforementioned non-binding international instruments, Tanzania acceded to the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 on October 27, 1972,¹⁰⁹² which condemns discrimination based on a person's ethnic group, among other criteria. The country is also a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of 1966. Tanzania ratified both covenants on June 11, 1976.¹⁰⁹³ The ICCPR and ICESCR provide for peoples' rights to self-determination and freedom to dispose of natural wealth and resources, as well as economic, social and cultural rights. Although these rights are not directly said to be indigenous peoples' rights in the covenants, they reflect the peoples' rights provided for in the Banjul Charter which this study shows can take the form of indigenous peoples' collective rights.

Further, Tanzania signed the Convention on the Rights of the Child, 1989 on June 1, 1990 and ratified it on June 10, 1991. The Convention on the Rights of the Child provides for the

¹⁰⁹⁰ For an account of votes on this Declaration, see United Nations: Office of the High Commissioner for Human Rights, "United Nations Declaration on the Rights of Indigenous Peoples: Background," accessed March 7, 2024, <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>.

¹⁰⁹¹ This Framework was adopted on December 19, 2022 by the 15th Conference of Parties (COP) to the United Nations Convention on Biological Diversity (CBD). The list of of the COP to the CBD is available at <https://www.cbd.int/information/parties.shtml/>.

¹⁰⁹² Office of the High Commissioner for Human Rights: UN Treaty Body Database, "Ratification Status for CRC-Convention on the Rights of the Child," accessed March 8, 2024, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC.

¹⁰⁹³ Office of the High Commissioner for Human Rights: UN Treaty Body Database, "Ratification Status for United Republic of Tanzania," accessed March 8, 2024, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=en.

right of indigenous children to enjoyment of their own culture, religion and language, to education and to the receiving of information in a language they understand. Moreover, Tanzania signed the Convention on Biological Diversity, 1992 (CBD) on June 12, 1992, ratified it on March 8, 1996 and officially became a party to it on June 6, 1996. Among other things, this Convention recognises the special relationship that indigenous peoples have with biological resources as they practise their traditional life. The country is also a party to the Protocols adopted under the CBD, i.e. the Cartagena Protocol, 2000 and the Nagoya Protocol, 2010. Tanzania acceded to the Cartagena Protocol on April 24, 2003 and became party to it on September 11, 2003.¹⁰⁹⁴ This Protocol places obligations on States Parties to include indigenous peoples in matters related to bio-safety and protection of the integrity of biodiversity which is crucial to sustaining their livelihoods. Tanzania acceded to the Nagoya Protocol on January 19, 2018 and became party to it on April 19, 2018.¹⁰⁹⁵ The Nagoya Protocol acknowledges indigenous peoples' role in biodiversity conservation and protection of traditional knowledge related to genetic resources. It complements the CBD in ensuring that indigenous peoples, among other groups, benefit from their participation in biodiversity conservation. In addition, Tanzania is party to the Paris Agreement, 2015 adopted to give effect to the Framework Convention on Climate Change. Among other things, the Agreement emphasises the Parties' human rights obligations as they tackle the global climate change challenge. Tanzania signed the Paris Agreement on April 22, 2016 and ratified it on May 18, 2018.¹⁰⁹⁶ Tanzania is yet to accede to the Indigenous and Tribal Peoples' Convention, 1989 which is currently the sole international legal instrument specifically providing for the rights of indigenous peoples.

6.2.2 Regional Instruments

Tanzania signed the Banjul Charter on May 31, 1982, ratified it on February 18, 1984 and deposited the instrument of ratification to the Charter with the Secretary General of the OAU on

¹⁰⁹⁴Convention on Biological Diversity, "Parties to the Cartagena Protocol and its Supplementary Protocol on Liability and Redress," accessed March 8, 2024.

¹⁰⁹⁵Convention on Biological Diversity, "Parties to Nagoya Protocol," accessed March 8, 2024, <https://www.cbd.int/abs/nagoya-protocol/signatories>.

¹⁰⁹⁶United Nations: Treaty Collection, accessed March 8, 2024, "Environment: Paris Agreement," https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

March 9, 1984.¹⁰⁹⁷ By depositing the instrument of ratification to the Charter, Tanzania committed itself to faithfully implement the provisions of the Charter including those providing for peoples' rights which have been construed by the ACHPR to include indigenous peoples' rights. The country has also signed and ratified the Protocol on the Establishment of the African Court on Human and Peoples' Rights. The signature to the Protocol was rendered on June 9, 1988. Its ratification followed on February 7, 2006 and the instrument of ratification to the Protocol was deposited on February 10, 2006. Most importantly, as per article 34 (6) of this Protocol, on March 9, 2010, Tanzania signed a Declaration accepting the competence of the AfrCHPR to receive cases against it from individuals and NGOs with observer status before the ACHPR. The Declaration was deposited with the Secretary General of the AU on March 29, 2010. As already indicated in the discussion in chapter four, this Declaration was withdrawn on November 14, 2019, leaving the ACHPR as the only channel for individuals and NGOs to access the AfrCHPR against Tanzania.¹⁰⁹⁸ To put matters more clearly, currently, indigenous peoples in Tanzania have no direct access to the AfrCHPR as individuals or through NGOs. The Protocol is silent as to whether national sub-groups like indigenous communities can directly access the Court.¹⁰⁹⁹ In the *Endorois Case*, the ACHPR declared indigenous peoples to be groups eligible to pursue collective claims under the provisions of the Banjul Charter. However, if indigenous groups seek to access the Court via the Commission, it is the Commission which becomes the applicant before the Court. A good example of this is the *Ogieks Case*. Technically, this means that indigenous groups have no direct access to the AfrCHPR in their own name, even through the Commission. The Commission has to decide if a communication qualifies to be forwarded to the AfrCHPR, and, if it does decide so, it is the Commission that will represent the indigenous group.¹¹⁰⁰

Further, Tanzania signed the Youth Charter on November 13, 2008, ratified it on December 12, 2012 and deposited the instrument of its ratification with the Chairperson of the

¹⁰⁹⁷ African Union, "List of Countries which Have Signed, Ratified/Accessed to the African Charter on Human and People's Rights," accessed March 9, 2024, https://au.int/sites/default/files/treaties/36390-slafrican_charter_on_human_and_peoples_rights_2.pdf.

¹⁰⁹⁸ See article 5 (1) (a) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, 1998 read together with article 130 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020.

¹⁰⁹⁹ See article 5 of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, 1998.

¹¹⁰⁰ Article 130 (3) and (3) of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020.

African Union Commission on March 21, 2013. In the quest to address the right to non-discrimination of youth, the Charter obliges its States Parties to recognise the rights of youth from ethnically marginalised groups or young people of indigenous origin to, among other things, enjoy their own culture, religion and language with other members of the communities to which they belong.¹¹⁰¹

Moreover, on May 5, 1978, Tanzania acceded to the Cultural Charter for Africa, 1976 and deposited the instrument of accession with the OAU Secretariat on October 12, 1978. This Charter acknowledges that the existence of various cultures in a country is important for communities' mutual enrichment.¹¹⁰² It recognises that "...African cultural diversity is the expression of the same (African) identity...and full sovereignty of the people".¹¹⁰³ Thus, the Charter emphasises that the formation of a national identity should not override the existence of distinct cultures in any of the African countries.¹¹⁰⁴ The Charter promotes the use of African languages in offering education. However, the promotion of an African national language, like Swahili in Tanzania, has had the effect of diminishing the use of the distinct languages belonging to different ethnic communities in the country. These languages are now facing the threat of disappearance as Swahili has become the dominant language across the country. Also, the Charter advocates for the promotion and protection of African cultural heritage through both legal and practical measures.¹¹⁰⁵ It should be noted that language is a component of intangible cultural heritage. In this regard, it is important to highlight that, before acceding to the Cultural Charter for Africa in 1978, Tanzania had ratified the Convention Concerning the Protection of World Cultural and Natural Heritage, 1972 on August 2, 1977.

Apart from the legally binding African regional instruments relating to the implementation of indigenous peoples' rights in Tanzania, the African Union, of which Tanzania is a member, has also adopted declarations and policies which have a direct link to indigenous peoples' affairs. The States Parties to the Banjul Charter adopted the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004 which, among other things, underlines States' obligations to adopt domestic laws and policies which give effect to the economic social and cultural rights provided for in Articles 21 and 22 of the Banjul Charter. The Declaration also

¹¹⁰¹ Article 2(3) of the Youth Charter, 2006.

¹¹⁰² Article 3 of the Cultural Charter for Africa, 1976.

¹¹⁰³ Article 4, *id.*

¹¹⁰⁴ Article 5, *id.*

¹¹⁰⁵ See article 26, *id.*

underlines the AU Member States' international obligations with regard to this set of rights.¹¹⁰⁶ It urges the States Parties to address the problem of non-protection of indigenous knowledge within their territories,¹¹⁰⁷ recognise and protect indigenous peoples' lands,¹¹⁰⁸ and adopt special measures to guarantee the rights of indigenous peoples, amongst other vulnerable groups such as displaced persons, refugees and persons living with HIV/AIDS.¹¹⁰⁹

The AU Member States also adopted the Policy Framework for Pastoralism in Africa, 2012 (Pastoralism Policy in Africa). This Policy recognises that the culture of pastoralism is part of the African cultural heritage. Also, the animals and plants found in pastoral ecosystem form part of the most important genetic resources in Africa. Further, the policy highlights that keeping livestock is the most important source of food security for pastoral societies.¹¹¹⁰ This is the first continental-wide Policy that seeks to secure the rights and livelihoods of African pastoralists.¹¹¹¹

Another policy adopted by the AU is the Framework and Guidelines on Land Policy in Africa, 2010 (Land Policy in Africa). This policy acknowledges the marginalisation of indigenous peoples, amongst other vulnerable groups, in terms of access to land. It proposes redress for this shortcoming.¹¹¹² The Policy also suggests that African countries should have land policies that recognise indigenous land rights in the process of reconciling traditional and modern land rights regimes.¹¹¹³ It emphasises the importance of indigenous land tenure systems in clarifying property rights in the agricultural sector.¹¹¹⁴ It aims to strike a balance between interests in indigenous land tenure systems and investments in manufacturing industries.¹¹¹⁵ It further seeks to underline the significance of including indigenous knowledge in the management

¹¹⁰⁶See paragraphs 1 and 2 of the Preamble to the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004.

¹¹⁰⁷Article 3, *id.*

¹¹⁰⁸Article 5, *id.*

¹¹⁰⁹Article 11, *id.*

¹¹¹⁰African Commission on Human and Peoples' Rights, "Policy Framework for Pastoralism in Africa," accessed March 10, 2024, <https://achpr.au.int/index.php/en/node/866>.

¹¹¹¹*Ibid.*

¹¹¹²See para. 2.5.3 of the Framework and Guidelines on Land Policy in Africa, 2010.

¹¹¹³Para. 3.1.3, Framework and Guidelines on Land Policy in Africa, 2010.

¹¹¹⁴Para. 3.3.2, *id.*

¹¹¹⁵Para. 3.4.2, *id.*

of natural resources and ecosystems¹¹¹⁶ and, most importantly, of including indigenous peoples' institutions in the development of appropriate land policies.¹¹¹⁷

The Pretoria Declaration on Economic, Social and Cultural Rights and the Pastoralism and Land Policies in Africa have the potential to encourage a positive approach to indigenous peoples' rights in Tanzania through the formulation of domestic policies which correspond to the provisions of these regional instruments.

6.2.3 Domestic Law

In the previous chapter, it was shown that there are three key areas which pose challenges to communities self-identifying as indigenous peoples in Tanzania. The first is the area of land tenure insecurity. The other two are flora and fauna conservation and mega infrastructural and/or development projects. This section looks into the laws governing these areas to determine the *status quo* and to examine their relationship with the country's international and regional obligations to secure the rights of indigenous communities. The discussion also considers the potential of the identified laws to address the challenges facing indigenous peoples in Tanzania today.

6.2.3.1 The Constitution

The Constitution of the United Republic of Tanzania, 1977 contains a Bill of Rights which provides for individual rights and freedoms. This is one step towards securing the rights of individual members of communities self-identifying as indigenous peoples in Tanzania. However, the Constitution does not provide for group rights from which indigenous peoples can benefit as collectives. Achieving protection of indigenous peoples' group rights under the current Constitution of Tanzania is almost unattainable. An attempt could, however, be made to interpret the provisions of the Bill of Rights as implying such rights. For instance, Article 19 of the Banjul Charter, which provides for the equality of all peoples and their right to enjoy the same respect and have the same rights, may be implied under Article 12 of the Constitution, which provides for the right to equality of all human beings. Notably, section 4 of the Basic Rights and Duties Enforcement Act, 1994¹¹¹⁸ reserves the right to approach the High Court for redress of human

¹¹¹⁶ Para. 3.5.1, Framework and Guidelines on Land Policy in Africa, 2010.

¹¹¹⁷ Para. 4.5.2, *id.*

¹¹¹⁸ Cap. 3, [R. E. 2019].

rights violations to individuals. There is no mention of a group in this section. Nevertheless, the Court has not been reluctant in accommodating human rights cases involving collective interests. For example, in the case of *Joseph Kessy and Others versus Dar es Salaam City Council*,¹¹¹⁹ the High Court of Tanzania entertained a case involving the collective right to a clean and healthy environment of the Tabata residents against the Dar es Salaam City Council which was operating a garbage dumping site in their residential area. In this case, the Court interpreted the right to a clean and healthy environment as a right to life. This right is provided for as a group right under Article 24 of the Banjul Charter. In principle, there is no clear path to collective human rights litigation in the High Court for communities self-identifying as indigenous peoples in Tanzania. This is simply because the Bill of Rights in the Constitution does not provide for such rights in the first place. In another scenario, the Constitution expressly makes it a duty for citizens to protect the country's natural resources,¹¹²⁰ while Article 21 of the Banjul Charter gives peoples the right to utilise these natural resources. Notably, this right is crucial for the survival of indigenous peoples' livelihoods. The rest of the provisions in the Constitution's Bill of Rights provide for individual rights which reflect articles found in the Banjul Charter addressing the same types of rights.

The position of constitutional guarantees of indigenous peoples' collective rights in Tanzania may shift if the constitutional review process is revived and reaches completion. This will lead to the coming into operation of a more dynamic Constitution that is sensitive to the needs of communities self-identifying as indigenous peoples. Currently, the Draft Constitution of the United Republic of Tanzania, 2014 is awaiting approval through a referendum. In its current state, the provisions of the draft recognise and guarantee the rights of various national sub-groups, including communities self-identifying as indigenous peoples. It expresses the government's undertaking to safeguard, among other things, the culture of all ethnic groups in the country.¹¹²¹ It also expresses the government's intention of creating a culture of cooperation, respect, tolerance and understanding when it comes to dealing with cultural diversity.¹¹²² With regard to land, natural resources and environmental management, the Draft Constitution recognises the right of pastoralists to own, use and develop land for their livelihood activities.

¹¹¹⁹Civil Case No. 299 of 1988, High Court of Tanzania at Dar es Salaam.

¹¹²⁰ See Article 27 (1) of the Constitution of the United Republic of Tanzania, 1977.

¹¹²¹ Article 15 (c) of the Draft Constitution of the United Republic of Tanzania, 2014.

¹¹²² Article 15 (d), Draft Constitution of the United Republic of Tanzania, 2014.

Similar rights are accorded to other groups such as fishermen, crop cultivators and small-scale miners.¹¹²³ However, the activities of hunter-gatherers are not mentioned.¹¹²⁴ Further, under the provisions of the Draft Constitution, pastoralists are entitled to enjoy the benefits emanating from the utilisation of genetic resources. They are also guaranteed inclusion in the processes of policy development and formulation of laws affecting their interests.¹¹²⁵ Most importantly, the Draft Constitution directs the relevant authorities to have in place legal procedures for identifying and allocating land for sustaining the aforementioned livelihoods.¹¹²⁶ Again, the hunter-gatherers are not mentioned in this context. It seems that representation of the hunter-gatherers in the constitutional review process and the Constituent Assembly was not sufficient to let their interests find a place in the provisions of the Draft Constitution. Efforts to trace the Constituent Assembly's Hansards that led to the inclusion of these provisions in the Draft Constitution were futile due to the bureaucracy faced.

The Draft Constitution defines indigenous peoples as minority groups whose members' survival solely depends on the natural environment for food, shelter and other necessities.¹¹²⁷ It guarantees their right to participate in leadership positions at all levels, to receive special educational and economic opportunities, and to be allocated land suitable for their sustenance.¹¹²⁸ Along the same lines, the government is obliged to take deliberate measures to ensure minority groups' economic development. This includes building infrastructures which guarantee the provision of social services for the benefit of current and future generations.¹¹²⁹ However, the provision extending all these entitlements to minority groups is derogatory. It subjects the aforementioned rights to the country's available resources and ability to support the stated initiatives.¹¹³⁰ This communicates the low priority accorded to such groups. Nonetheless, should the new Constitution be adopted, it will mark a new era in the implementation of indigenous peoples' rights in Tanzania.

¹¹²³ Article 23 (c), Draft Constitution of the United Republic of Tanzania, 2014.

¹¹²⁴ See also Article 46 (1) (a), *id.*

¹¹²⁵ Article 46 (1) (c) and (d), *id.*

¹¹²⁶ Article 46 (2), *id.*

¹¹²⁷ Article 56 (3), *id.*

¹¹²⁸ Article 56 (1), *id.*

¹¹²⁹ Article 56 (2), *id.*

¹¹³⁰ See Article 56 (1), *id.*

6.2.3.2 Selected Legislation

6.2.3.2.1 Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

This law was enacted to provide, among other things, for the ownership and control of natural wealth and resources in Tanzania. It also provides for protection of the permanency of the country's sovereignty over natural wealth and resources. At the outset, this Act warns against external interference in matters related to the country's management of its natural wealth and resources. This includes interference related to instruments embedding peoples' right to freely dispose of their wealth and natural resources. The challenge here is to strike a balance between the country's urge to fully exercise its sovereignty over natural resources and the human rights obligations it has undertaken at the regional and international levels which require it to guarantee peoples' freedom to utilise such resources. Tanzania has signed and ratified ICCPR, ICESCR and the Banjul Charter whose Articles 1(2) and 21 provide for peoples' right to freely dispose of their wealth and natural resources. It has been seen in the abovediscussion that the ACHPR's interpretation of the term "peoples" under the Banjul Charter includes "indigenous peoples". The implication here is that Tanzania has undertaken to guarantee the right of communities self-identifying as indigenous peoples to freely dispose of their wealth and natural resources. The Act defines natural wealth and resources to mean:

...all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone which can be extracted, exploited or acquired and used for economic gain whether processed or not...¹¹³¹

The law proclaims that all the people of the country have permanent sovereignty over its natural wealth and resources and that ownership and control of such resources is vested with the Government to exercise such powers on behalf of the people.¹¹³² It further states that the natural wealth and resources are inalienable and are the property of the people of the United Republic of

¹¹³¹ Section 3, Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

¹¹³² Section 4 (1) and (2), *id.*

Tanzania held in trust by the President on behalf of the people.¹¹³³ Moreover, exploitation of the country's wealth and natural resources should exclusively be in the interests of all people of the United Republic of Tanzania.¹¹³⁴ Last but not least, section 11(1) of the Act says that proceedings on matters related to permanent sovereignty over natural wealth and resources shall be subject to domestic judicial forums only. No such proceedings shall be held in foreign courts or tribunals. Indeed, this is a firm determination by Tanzania to protect the country's sovereignty over its natural wealth and resources. The laws analysed below show the extent to which Tanzania has strived to balance this domestic responsibility and its international human rights obligations when it comes to (indigenous) peoples' rights to dispose of their wealth and natural resources.

6.2.3.2.2 Land Laws and the Concept of Ancestral Lands

According to the provisions of the country's Constitution, the post-colonial approach to property rights in Tanzania is based on individualism.¹¹³⁵ Hence, at this highest level of the hierarchy of laws, the concept of communal land ownership is not embraced. Further, the land laws currently operating in Tanzania, i.e. the Land Act, 1999 and the Village Land Act, 1999, do not recognise the notion of indigenous peoples' ancestral lands. The major contributing factor here is the fact that Tanzania retained a significant part of the British colonial approach to land administration. The British land law declared all land in Tanganyika (now Mainland Tanzania), whether occupied or not, as "public land." It placed it under the control and disposition of the Governor for the "common benefit" of all natives of Tanganyika.¹¹³⁶ All titles to land held before the British colonial administration were revoked and nobody could subsequently occupy or use any piece of land in the territory without obtaining consent from the Governor. Currently, the Land Act in Tanzania upholds this position, meaning that all land in Tanzania continues to be public land held under the custody of the President for and on behalf of all Tanzanians.¹¹³⁷ The citizens of Tanzania can either hold titles to occupy land under the customary right of occupancy, or they can be granted a right of occupancy for a term not exceeding ninety-nine years.¹¹³⁸ According to

¹¹³³ Sections 5 (1) and (2), Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

¹¹³⁴ Section 6 (1), *id.*

¹¹³⁵ See Article 24 of the Constitution of the United Republic of Tanzania.

¹¹³⁶ Sections 2 and 3 of the Land Ordinance, 1923.

¹¹³⁷ Section 4 (1) of the Land Act, 1999.

¹¹³⁸ Section 4 (3) read together with section 32 (1), Land Act.

the Land Act, public land is divided into three categories, general land, village land and reserved land.

Village land is governed by the Village Land Act and is administered by a body known as the Village Council on behalf of all villagers.¹¹³⁹ As a rule, the Certificate of Village Land is issued to the Village Council by the Commissioner of Lands in the name of the President. The Certificate of Village Land confers on the Village Council authority to manage the village land.¹¹⁴⁰ Although it is generally the case that the land law in Tanzania does not accommodate indigenous peoples' collective interests in land, it allows the application of customary law in respect of using and occupying parts of the public land. An illustration of this appears in the certificate issued in relation to village land.¹¹⁴¹ Also, for villages occupied by pastoralists, the village certificate grants them the privilege of using village land for depasturing cattle. This is not the case with villages occupied by non-pastoralist communities.¹¹⁴² The Village Land Act allows the occupation and use of village land by both individuals and groups which practise customary law.¹¹⁴³ At the same time, it gives the Village Council the mandate to grant a certificate of customary right of occupancy or a derivative right to a group of people intending to communally occupy and use part of the village land.¹¹⁴⁴ A good example of this is the Oldoinyo Morwak Maasai Sacred Site discussed in the previous chapter. This Site is part of Doinyo Village allocated to the Maasai community for the communal purpose of cultural and spiritual rites. The Village Land Act also provides for communal village land that may be set aside for the benefit of all villagers and the public. This may be done in the form of a village land use plan recommended to the Village Assembly for approval.¹¹⁴⁵ According to the Village Land Act, the Village Council reports to the Village Assembly which is the highest body in the village. The Village Assembly is composed of all villagers of the age of majority. It meets periodically to deliberate on matters pertaining to the administration of day-to-day life in the village. The Village Council cannot allocate or grant the customary right of occupancy to anybody without the consent of the Village Assembly.¹¹⁴⁶ During the research for this study, it was found that the

¹¹³⁹ Section 8 (1) and (2) of the Village Land Act, 1999.

¹¹⁴⁰ Section 7 (7), *id.*

¹¹⁴¹ Section 7 (7) (c), 14 (1) read together with section 20, *id.*

¹¹⁴² Section 7 (7) (d), *id.*

¹¹⁴³ Section 12 (1) (b), *id.*

¹¹⁴⁴ Section 12 (1) (c) and (2), *id.*

¹¹⁴⁵ See section 12 (1) read together with section 13 of the Village Land Act, 1999.

¹¹⁴⁶ Section 8 (5), Land Act.

village is the ordinary avenue that indigenous people can use to exercise their interests in land and secure their livelihoods. Here they have the freedom to apply customary law in the use and occupation of land and pastoralists are entitled to use village land for grazing livestock. Nevertheless, ancestral land claims by communities self-identifying as indigenous peoples are hard to enforce in this structure. This is because the chain of command in respect of land administration runs from the village level up to the President. The situation is especially hard for the Hadzabe who barely engage with formal structures. In villages where the population is mixed, their representation in the Village Council and Village Assembly ranges from minimum to none.¹¹⁴⁷

Another category of land provided for under the Land Act is reserved land. Section 6 of the Land Act lists reserved land as land protected under, for example, the Forests Act, 2002,¹¹⁴⁸ the National Parks Act, 2003,¹¹⁴⁹ the Ngorongoro Conservation Area Act, 1975,¹¹⁵⁰ the Wildlife Conservation Act, 2009¹¹⁵¹ and the Land Acquisition Act, 1967.¹¹⁵² Indigenous peoples cannot claim ancestral lands on reserved land. This will be substantiated in the following discussion.

In the case of general land, the requirement of the right of occupancy to use and occupy land applies. The important point to note is that the whole land administration process in Tanzania is regulated by the government. This is done through the existing legally established structures. The President reserves the right to recategorise any of the three categories of public land. He can transfer village land to general or reserved land and vice versa if this is in the public interest.¹¹⁵³

This account of the land laws in Tanzania makes clear that the government's position does not allow for promoting or protecting indigenous peoples' right to ancestral land.¹¹⁵⁴ This fails to meet the objective of Article 21 of the Banjul Charter which provides for peoples' right to dispose of natural resources. Also, it has a negative impact on indigenous peoples' right to

¹¹⁴⁷ FGD at Dumbechanda village.

¹¹⁴⁸ Act No. 14 of 2002.

¹¹⁴⁹ Act No. 11 of 2003.

¹¹⁵⁰ Cap. 284 [R.E. 2002].

¹¹⁵¹ Act No. 5 of 2009, Cap. 283, [R.E. 2022].

¹¹⁵² Act No. 47 of 1967, Cap. 118, [R.E. 2019].

¹¹⁵³ Section 4 (1) of the Village Land Act, 1999.

¹¹⁵⁴ Speech by the Minister of Constitution and Legal Affairs to the Ambassadors and Consular Officials on Tanzania's Strategies on Natural Resources Management given in a (Briefing) Meeting held in Dar es Salaam on March 25, 2022. See Maelezo Tv, "The Truth about Loliondo Game Controlled Area and Ngorongoro Conservation Area," accessed March 12, 2024, <https://www.youtube.com/watch?v=GMGMoQXW16w&t=12s>.

cultural development. However, it cannot be said that the communities self-identifying as indigenous peoples in Tanzania are fully deprived by the land laws of their right to dispose of their wealth and natural resources and their right to cultural development as provided for in the Banjul Charter. They can still exercise these rights within the structure of the right of occupancy. However, this structure does not do justice to these communities' ancestral relationship with the land.

It has been shown in the foregoing discussion that the President holds the right to acquire any piece of land for a public purpose under the Land Acquisition Act, 1967 at any given point in time.¹¹⁵⁵ Hence, the indigenous communities remain prone to relocation from the land they have formed a generational relationship with in exchange for monetary compensation or another piece of land with which they have no intergenerational connection.¹¹⁵⁶ The Engaruka Soda Ash Project and the KADCO case discussed in the previous chapter are examples of this scenario.

6.2.3.2.3 Wildlife Conservation Act, 2009

The Wildlife Conservation Act is the primary legislation providing for the conservation, management, protection and sustainable utilisation of wildlife and wildlife resources in Tanzania. The Act recognises the concept of a “traditional community” and defines it as “...an assemblage of people ordinarily resident on areas habitually occupied by wildlife and whose social, cultural and ordinary lifestyles are dependent upon wildlife”.¹¹⁵⁷ The term “traditional community” in the Act connotes an indigenous community. Further, the Act makes a distinction between traditional communities and local communities by naming them separately in its provisions. Additionally, the Act makes the recognition of traditional communities in Tanzania an ongoing exercise. It grants the Minister responsible for wildlife the mandate to declare any community a traditional community by an Order published in the *Gazette* and to prescribe conditions for its utilisation of wildlife.¹¹⁵⁸

One of the objectives of this legislation is to promote the inclusion of traditional communities in “...the sustainable management, use and conservation of wildlife resources in

¹¹⁵⁵ See section 3 of the Land Acquisition Act, 1967.

¹¹⁵⁶ See section 11, of the Land Acquisition Act, 1967 read together with Section 10 (1) and 2 (a) of the Land (Compensation Claims) Regulations, 2001 (Made under Section 179 of the Land Act, 1999).

¹¹⁵⁷ Section 3 of the Wildlife Conservation Act, 2009.

¹¹⁵⁸ Article 45 (1), *id.*

and outside wildlife protected areas network.”¹¹⁵⁹ The Act recognises the contribution of traditional communities’ indigenous knowledge systems to wildlife conservation and management.¹¹⁶⁰ The Act defines indigenous knowledge as “...the systems of norms, cultures, rites, rituals and other wildlife conservation and management related practices of traditional communities which have been proved to enable the communities to interact with, and utilise wildlife resources in a sustainable manner”.¹¹⁶¹ This study has revealed that communities self-identifying as indigenous peoples in Tanzania, like the Maasai and the Hadzabe, do contribute to the conservation and sustainability of natural resources in the country. For instance, the Maasai who have co-existed with the wild for centuries in various parts of the country and specifically within the Ngorongoro multiple land use site, do not prey on wild animals. They feed on their livestock.¹¹⁶² Exceptions to this may occur in times of extreme food shortage, such as in seasons of prolonged drought where the number of livestock is drastically reduced. The Maasai also possess intergenerational knowledge on how to manage range lands, water and forest resources and other vegetation. They also have respect for particular trees, some of which are found deep in the forests. They also do not clear vegetation. Their traditional knowledge is of spiritual, medicinal and sustenance value to them. Further, the Maasai have community members who predict rainy and drought seasons. This determines their grazing patterns. They have a deep understanding of how to move their livestock to avoid overgrazing and contracting diseases from wild animals. For example, in the Ngorongoro Conservation Area, the Maasai have always kept away from wildebeest clusters in the property, and in nearby dispersal areas, such as the Loliondo Game Controlled Area (now the Pololeti Game Reserve), with low grassland plains that are used by wildebeest for breeding and feeding their young with fresh grass. The Maasai keep away until the dry season, when they return with their livestock to such areas after the wildebeest have moved elsewhere. This saves their livestock from contracting diseases from the wildebeest calves that are believed to be born carrying the virus causing Malignant Catarrhal Fever which is deadly to cattle.¹¹⁶³ Also, visits to one of the Maasai *bomas* in the NCA and the late Olaiboni residence in Monduli District revealed that the Maasai houses (Emanyattas) are

¹¹⁵⁹ Section 5 (1) (g), Wildlife Conservation Act, 2009.

¹¹⁶⁰ See 5 (1) (j), *id.*

¹¹⁶¹ Section 3, *id.*

¹¹⁶² Information obtained from the Maasai in Nainoka Noka village during field visit to NCA on March 24, 2022.

¹¹⁶³ Information from field visit in Nainokanoka village on August 7, 2021. The same position was supported during an interview conducted in TAWIRI on July 22, 2021. Also see Lissu, “Policy and Legal Issues on Wildlife Management in Tanzania’s Pastoral Lands: The Case Study of the Ngorongoro Conservation Area,” *supra*.

traditionally built by Maasai women using cow dung and other natural materials such as wooden poles for the framework and savannah grass for roofing. The entire house turns into soil overtime in the event that a homestead (*boma*) is vacated. As for the Hadzabe, it was learnt from field visits to the Lake Eyasi Basin that children are not allowed to collect all the eggs from a single bird's nest or to pluck unripe fruits. Also, men do not hunt down gravid or lactating mammals. As the Hadzabe lifestyle does not involve cultivation, they do not clear forests by fire, nor do they cut down trees for firewood. They normally eat their food raw or half-cooked with firewood picked up from the ground.¹¹⁶⁴ All these are attributes of the inter-generational traditional knowledge systems sought to be promoted and protected by the Wildlife Conservation Act.

The Act also recognises traditional communities' cultural practices. It does not prohibit the use of animals for these practices. Rather, it provides for the management of such use. It gives the Minister responsible for wildlife management power to make regulations for registering and managing animal species used by traditional communities for cultural activities.¹¹⁶⁵ This is in line with the communities' collective right to cultural development as provided for under Article 22 of the Banjul Charter.

In addition, the Wildlife Conservation Act grants traditional communities the right to hunt a particular number of specific animals in a period specified in a licence.¹¹⁶⁶ Section 40 of the Act provides that a hunting licence is required for a person to be able to hunt wild animals. The right of traditional communities to hunt is not absolute. It is regulated by the Act. Hunter-gatherers like the Hadzabe may enjoy the right to the extent prescribed in the licence issued by the Director of Wildlife. Here, it can be argued that Articles 1 (2) of both the ICCPR and the ICESCR read together with Article 21 of the Banjul Charter are partly reflected in the Act through the regulated right to hunt wildlife for sustenance accorded to traditional communities.

The Wildlife Conservation Act provides for the establishment and management of Game Reserves, Game Controlled Areas, Wetlands Areas and Reserves. Section 14 (1) of the Act gives the President the power to declare any part of Tanzania as a game reserve by an Order published in the *Gazette* after consultation with the relevant local authorities. The President may also through an Order published in the *Gazette* cause any rule applicable to game reserves to apply in

¹¹⁶⁴ Information from a FGD in Dumbachanda.

¹¹⁶⁵ Section 4 (7) of the Wildlife Conservation Act, 2009.

¹¹⁶⁶ Section 45 (2), *ibid.*

any part of Tanzania as if such part was a game reserve.¹¹⁶⁷ The Act makes punishable any breach of such a rule.¹¹⁶⁸ Section 15 (1) of the Act prohibits entry to game reserves except with prior permission by the Director of Wildlife. An exception is only made for passengers travelling through the game reserve on a highway or waterway. Contravention of this provision is punishable by fine, imprisonment or both.¹¹⁶⁹ Unlike the British colonial Fauna Conservation Ordinance of 1951, in which regulated entry and residence in game reserves were allowed, this Act has the strictest prohibition of residence in game reserves. Section 16 gives the Minister responsible for wildlife power to to establish game-controlled areas by an Order published in the *Gazette* after consultation with the local authorities. Also, he or she may provide for the management of game-controlled areas through Regulations published in the *Gazette*.¹¹⁷⁰ The Act also empowers the Minister to make regulations to ensure sustainable management of game-controlled areas.¹¹⁷¹ In addition, the Minister in consultation with the relevant authorities may review the list of established game-controlled areas to decide on their viability to continue holding such status. Most importantly, the Act directs the Minister to ensure that no village land is included in the land demarcated as a game-controlled area.¹¹⁷² However, under this Act, village land can be made a Wildlife Management Area.¹¹⁷³ Moreover, in consultation with the Minister responsible for the environment, the Minister responsible for wildlife may make regulations and guidelines for the establishment and management of wetlands area and reserves.¹¹⁷⁴ Section 18 (1) prohibits any interference with the vegetation in game reserves, such as cutting of grass or trees, without the permission of the Director of Wildlife. Section 18 (2) prohibits grazing of livestock in game reserves and wetlands reserves. Contravening these provisions attracts fines and imprisonment or both.¹¹⁷⁵ The same applies to game-controlled areas.¹¹⁷⁶ Section 19 (1) prohibits hunting in game reserves, game-controlled areas and wetlands reserves except with the written permission of the Director of Wildlife and in the manner specified therein. Contravention of this provision is an offence which attracts imprisonment.

¹¹⁶⁷ Section 14 (2), of the Wildlife Conservation Act, 2009.

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ Section 15 (2), *id.*

¹¹⁷⁰ Section 16 (2), *id.*

¹¹⁷¹ Section 16 (6), *id.*

¹¹⁷² Section 16 (5), *id.*

¹¹⁷³ Section 32, *id.*

¹¹⁷⁴ Section 16 (3), *id.*

¹¹⁷⁵ Section 18 (3) and (4), *id.*

¹¹⁷⁶ Section 21, *id.*

Fines may be added to this punishment if the Court so decides.¹¹⁷⁷ Section 20 (1) (c) prohibits crop cultivation in game reserves, game-controlled areas and wetlands reserves. However, the President reserves the authority to modify any restrictions imposed in relation to game reserves, wetlands reserves and game-controlled areas.¹¹⁷⁸

Apart from game reserves, game-controlled areas and wetlands area and reserves, the Act further provides for the establishment of protected buffer zones, dispersal areas, migratory routes and wildlife corridors. After consultation with the local authorities, the Minister responsible for wildlife may designate and make regulations governing the management of these areas through an Order published in the *Gazette*.¹¹⁷⁹ The Act directs that the regulations made by the Minister should lay down the rights of communities which are compatible with the conservation of wildlife. As communities self-identifying as indigenous peoples in Tanzania live or conduct their livelihood activities in these kinds of protected areas, their right to freely dispose of the natural resources there is not absolute. Their exercise of this right must be compatible with the rules of conservation as stated in the Act. Evidently, the right to free disposal of natural resources as provided for under Article 21 of the Banjul Charter is statutorily regulated in this regard for the sake of sustainable wildlife conservation.

Additionally, the Wildlife Conservation Act provides for the establishment of species management areas to protect particular species of wildlife and their habitat.¹¹⁸⁰ Thus, it prohibits hunting and utilisation of protected species in these areas without permission from the Director of Wildlife. Contravening this requirement is punishable by imprisonment or a fine imposed upon conviction. The same practice applies to animals declared to be national game.¹¹⁸¹

The Minister responsible for wildlife has the power to restrict the hunting of particular animals in any area during a particular season. Such seasons are known as “closed seasons”. Anyone contravening this restriction in closed seasons faces charges and is liable to imprisonment, fines or both.¹¹⁸² The Act also strictly prohibits hunting within national parks and the Ngorongoro Conservation Area. It says clearly that no provision of the Wildlife Conservation Act may be construed as empowering the Director of Wildlife to grant permission for hunting in

¹¹⁷⁷ See section 19 (2) (a) to (d), Wildlife Conservation Act, 2009.

¹¹⁷⁸ Section 29, *id.*

¹¹⁷⁹ Section 22 (1) and (2), *id.*

¹¹⁸⁰ Section 23, *id.*

¹¹⁸¹ Sections 25 and 26, *id.*

¹¹⁸² Section 27 and 28, *id.*

National Parks or in the NCA in contravention of the provisions of the National Parks Act or the Ngorongoro Conservation Area Act.¹¹⁸³ The Wildlife Conservation Act prohibits all human activities, residence or any other development likely to affect wildlife within five hundred metres from the margin of the wildlife-protected area. Exceptions to this restriction can only be made with the permission of the Director of Wildlife.¹¹⁸⁴

Despite the foregoing, it is important to underscore that, to some extent, the Wildlife Conservation Act does have regard for peoples' right to life and property. For a pastoral community like the Maasai which lives with the wildlife in a Multiple Land Use Area, killing of animals in defence of life and livestock is not an offence under the Act.¹¹⁸⁵ This may be construed as legal protection of indigenous peoples' right to existence, security and property. Also, it is a reflection of the Act's contribution to safeguarding indigenous peoples' right to development, since for pastoralist communities livestock is at the centre of their daily socio-economic and cultural activities.

Aside from the provisions of the Wildlife Conservation Act providing for traditional communities, there are regulations to the same effect made under the Act by the Minister responsible for wildlife. An example is the Wildlife Conservation (Wildlife Management Areas) Regulations of 2012 as amended by the Wildlife Conservation (Wildlife Management Areas)(Amendment) Regulations, 2019, both made under sections 31 and 121 (a) of the Wildlife Conservation Act, 2009. Regulation 2 of the WMA Regulations, 2012 (principal regulations) defines traditional communities in the same way as the Wildlife Conservation Act does. This provision defines a "village" as including a normal village established under the Local Government (District Authorities) Act, 1982 plus any area designated by the Director of Wildlife to be used by traditional communities as a Wildlife Management Area. This is a form of recognition of traditional communities' contribution to community-based wildlife conservation.¹¹⁸⁶ Regulation 29 of the same regulations directs everyone engaged in Wildlife Management Areas to guarantee, among other things, the safeguarding of traditional communities' interests by complying with the Land Use Plans. In the Vilima Vitatu case analysed in the previous chapter, it has been shown that the establishment of a Wildlife

¹¹⁸³ Section 30, Wildlife Conservation Act, 2009.

¹¹⁸⁴ Section 74, *id.*

¹¹⁸⁵ Section 73, *id.*

¹¹⁸⁶ Regulation 10 (4) of WMA Regulations, 2012.

Management Area in Vilima Vitatu Village had negative impacts involving the eviction of Barbaig families living in the village. This is exactly what this regulation seeks to address.

6.2.3.2.4 National Parks Act, 2003

The National Parks Act is the law providing for the establishment and management of national parks in Tanzania. The Act contains provisions that have adverse impacts on the rights of communities self-identifying as indigenous peoples. For instance, it provides for the extinguishment of land rights of communities found in areas declared as National Parks. It does the same when a particular piece of land is annexed to a pre-existing National Park following alteration of its boundaries.¹¹⁸⁷ However, the Act provides for compensation for the loss of lands acquired as National Parks. It also provides for the settling of disputes before the High Court of Tanzania should the victims remain dissatisfied with the compensation they are offered. Notably, compensation is not automatic upon acquisition of land for the establishment of a National Park. It has to be applied for within ten weeks of the proclamation of the National Park or alteration of the boundaries of a pre-existing National Park.¹¹⁸⁸ If the claim for compensation is not made within the time prescribed, this right shall be deemed to have ceased and forever extinguished.¹¹⁸⁹ However, monetary compensation or substitution of the land acquired for national parks with another portion of land elsewhere does not restore indigenous peoples' cultural relationship with the land they have lost. On the contrary, this violates their right to cultural development in the sense that they lose all incentive to continue their cultural practices in the event their land rights are extinguished.

Upon establishment of a National Park, entry is prohibited except with a permit issued according to the regulations made under the Act. Hunting, which is essential for the livelihood of hunter-gatherers, is strictly prohibited in national parks unless permission is obtained from an authorised officer. Violation of this requirement is an offence under the Act which is punishable by fine and imprisonment.¹¹⁹⁰

¹¹⁸⁷ Section 6 (1) of the National Parks Act, 2003.

¹¹⁸⁸ Section 7 (1) and (2), *id.*

¹¹⁸⁹ Section 7 (7), *id.*

¹¹⁹⁰ Section 23, *id.*

6.2.3.2.5 Ngorongoro Conservation Area Act, 1975

The NCA Act makes provisions on matters pertaining to the conservation and development of natural resources in the NCA and other related matters. Among other things, the provisions relate to controlling entry and residence in the property. The Act established the Ngorongoro Conservation Area Authority (NCAA). One of its functions is to safeguard the interests of the Maasai community living within the Area.¹¹⁹¹ Other functions of the Authority include safeguarding and ensuring the sustainability of natural resources and promoting tourism in the Area. Promotion of tourism involves ensuring all infrastructure and facilities necessary for the tourists are in place and in good condition.¹¹⁹² Under this Act, the President has the power to give directions to the Authority pertaining to any of its functions and the Authority is under the obligation to implement such directions.¹¹⁹³ This would be detrimental to the Maasai indigenous people should the President direct the Authority to act in a way that would negatively affect their survival in the property.

The Act empowers the NCAA to make rules regulating entry and residence in the NCA.¹¹⁹⁴ It allows entry and residence in the Area by people who hold property or interests there, together with their spouses, children and dependents.¹¹⁹⁵ Entry or residence is also allowed for tourists, travellers passing through the property, officers of the NCA and any person permitted to enter the NCA by the relevant Authority. Primarily, it is the Maasai indigenous community that is allowed to inhabit the property, as elaborated in the above discussion. However, the law does not grant them the unconditional right to freely dispose of wealth and natural resources in the property. According to the Land Act, the land in the NCA is reserved land. Therefore, the Maasai who live in the Area cannot claim any collective right to land in the NCA on the basis that it is their ancestral land, nor can they administer it as village land in the same way as other villages outside the property. The proviso to section 21 of the NCA Act emphasises that nothing in the provisions granting entry and residence to the NCA should be interpreted as recognising or granting “...any right or title to land or any interest in, over or under land within the Conservation Area”. The same proviso goes on to clarify that none of the rights extended to residents of the NCA should be construed as waiving any restrictions imposed

¹¹⁹¹ Sections 4 and 6 (c) of the Ngorongoro Conservation Area Act, 1975.

¹¹⁹² Section 6 (a), (b), (d), (e) and (f), *id.*

¹¹⁹³ Section, *id.*

¹¹⁹⁴ Article 21(1), *id.*

¹¹⁹⁵ Article 21 (b) and (d), *id.*

by the Act or any other orders, rules and restrictions made under it. Generally, the NCAA is given power by the NCA Act to prohibit, restrict and control residence in any part of the property except where the Maasai reside. This can be done through an Order published in the *Gazette*.¹¹⁹⁶ However, the Authority can if necessary make orders applying to any category of residents or settlements in the property. Also, the NCAA has the power to remove any person who resides or settles on any area of the property in contravention of the Order or conditions it has made.¹¹⁹⁷ Further, the Conservator is empowered by the Act to issue permits allowing persons to enter or reside in the Area who would otherwise not be eligible to do so. Entry or residence of this kind is strictly regulated by the terms and conditions stipulated in the permit as deemed fit by the Authority.¹¹⁹⁸

Additionally, in carrying out its function of conserving the soil and other natural resources in the Area or any part of it, the NCAA may make orders for prohibition, restriction and control of the use of land in the property for any purpose. This includes grazing, moving of livestock, clearing of vegetation, use of water resources, harvesting honey or any other forest produce, use of agricultural machinery and construction or extension of buildings in the property.¹¹⁹⁹ Such restrictions have the potential to negatively impact the Maasai and Datooga pastoralists and the Hadzabe hunter-gatherers who seasonally form camps in areas within the borders of the NCA on the northern shore of Lake Eyasi.¹²⁰⁰ A restriction affecting particularly the Hadzabe is that on collecting honey and forest produce, while the Datooga who do not normally reside in the NCA are affected by the restriction on moving livestock. Also, the Datooga seasonally make pilgrimages into the Conservation Area to worship at what they consider a “Holy Tree” which is a fig tree and the Datooga ancestral graves found in the Ngorongoro Crater.¹²⁰¹

Further, the Act prohibits cultivation in any part of the Conservation Area. For the Maasai who live in the property, this is a limitation of their rights to existence, free disposal of

¹¹⁹⁶ Section 23 (1), the Ngorongoro Conservation Area Act, 1975.

¹¹⁹⁷ Section 23 (2) (a) (c), *id.*

¹¹⁹⁸ Article 21 (3) (b), *id.*

¹¹⁹⁹ Section Section 24 (1), *id.*

¹²⁰⁰ For a clearer picture of the NCA boundaries and the Hadzabe territory, see the First Schedule to the Ngorongoro Conservation Area Act, 1975.

¹²⁰¹ Ngorongoro Conservation Area Authority, “Overview: Cultures-Datooga,” accessed March 16 2024, <https://www.ncaa.go.tz/cultures/#Datooga>.

natural resources and development under the Banjul Charter.¹²⁰² Also, this contravenes articles 1(2) of the ICCPR and ICESCR which states: “In no case may a people be deprived of its own means of subsistence.”¹²⁰³ It is understood that the Maasai pastoralists survive on their livestock. However, due to the effects of climate change, their livestock have become an insufficient source of nourishment during prolonged periods of drought. Therefore, crop cultivation has become important as a way of supplementing the Maasai diet in times of food shortage.

Moreover, the NCA Act empowers the NCAA to issue a special Order to modify, demolish or destroy buildings built in contravention of the orders made by the Authority.¹²⁰⁴ If this requirement is not met within a specified period of time, the Authority is empowered by the Act to authorise in writing persons to carry out such modification, demolition or destruction.¹²⁰⁵ A scenario of this nature is reflected in the eviction notice issued by the NCAA to the residents who returned to the property from Jema Village after they had voluntarily relocated there from the NCA and received compensation. Citing sections 23 (2) and 35 of the Ngorongoro Conservation Area Act, paragraph 2 (ii) of the Eviction Notice dated April 12, 2021 required these people to demolish the houses they had built upon their return to the NCA at their own cost. This went along with an Order to vacate the property within thirty days made under paragraph 2 (i) of the same Notice. On top of this, the NCAA has powers to seize any livestock, agricultural implements or machinery, forest produce or honey obtained in the property in contravention of the orders made under the NCA Act, and report the seizure to the nearest Magistrate.¹²⁰⁶ Also, the Conservator, Assistant Conservator, a police officer or any other person authorised by the Authority may arrest without warrant anybody who contravenes the provisions of the Ngorongoro Conservation Act if the person refuses to disclose his or her name and address or if there is a reason to believe the name and address provided is false. The same applies if there is reason to believe that the suspect is likely to escape.¹²⁰⁷ Most of all, the Act makes it an offence if a person fails to comply with the provisions regarding entry, residence and activities

¹²⁰² See Articles 20, 21 and 22 of the Banjul Charter.

¹²⁰³ Articles 1 (2) of the ICCPR and ICESCR.

¹²⁰⁴ Section 35 (1) of the Ngorongoro Conservation Area Act, 1975.

¹²⁰⁵ Section 32 (2), *id.*

¹²⁰⁶ Section 36, Ngorongoro Conservation Area Act, 1975.

¹²⁰⁷ Section 37, *id.*

conducted in the Conservation Area. Upon conviction, such person is liable to fines or imprisonment.¹²⁰⁸

In view of all the restrictions, rules and orders made under the NCA Act pertaining to the management of the NCA through the NCAA, the Maasai in this Conservation Area commented during field visits that conservation of the property had been “militarised”. They described their life in the Area to be like “walking on eggshells” in hopes of not breaking one rule or another. The promise made by the British colonial administration to their forefathers when they were moved to the property from Serengeti National Park, that their interests would be paramount does not seem to have materialised. The number of restrictions in the Area keeps rising. There is currently an ongoing exercise to relocate them from the NCA to Msomera village and other designated areas, which means they would lose their ancestral land in the Conservation Area but would have the hope of being able to live freely without all these restrictions.

6.2.3.2.6 Forest Act, 2002

The Forest Act provides for forest management in Tanzania. It facilitates the sustainable planning, use and management of forest resources under both customary and statutory law.¹²⁰⁹ It provides for different types of forests, including community forest reserves formed out of village forests.¹²¹⁰ It also recognises communities that derive their livelihood from forests and have strong traditional ties to them. A typical community of this kind amongst the groups self-identifying as indigenous peoples in Tanzania is the Hadzabe who forage for food in the forests. The Act entitles to join a Group which has organised itself to communally manage a community forest reserve.¹²¹¹ However, in this arrangement, the pre-existing customs, practices and rights of the members of the Group in terms of entering or living in the forest are likely to be modified. The idea behind this is to have them fit into the village forest management plan if, in the opinion of the Group managers, such customs, practices and rights are likely to obstruct the management of the community forest reserve.¹²¹² An important point to highlight here is that the Forest Act entitles communities which derive their livelihood from forests and have strong traditional ties to them to be assisted upon request to form a Group of their own to manage a community forest

¹²⁰⁸ Section 38, Forest Act, 2002.

¹²⁰⁹ Section 3 (b), *id.*

¹²¹⁰ Section 4 (c) (ii), *id.*

¹²¹¹ Section 42 (1) and 2 (a), *id.*

¹²¹² Section 46 (1) (b), *id.*

reserve.¹²¹³ The Act limits the communities' freedom to exercise their collective right to dispose of the wealth and natural resources found in the forests by subjecting the management of a community forest reserve to its own provisions. However, the Act does not completely deny them this freedom as it allows communities that derive their livelihood from forests to which they have strong traditional ties to form a Group of their own that will communally manage the forest resources. The Act grants such Groups the right to "...enter, occupy, use and harvest the produce of the forest jointly with all other members of the Group, in a sustainable manner" according to the Group's agreed conditions.¹²¹⁴ Also, the Groups have the right to exclude any person who is not a member from entering and utilising the community forest resources unless the person has obtained a licence to do so.¹²¹⁵

6.2.3.2.7 Grazing Land and Animal Feed Resources Act, 2010

The Grazing Land and Animal Feed Resources Act regulates the management and control of grazing lands and other related matters. It applies to pastoralist communities that self-identify as indigenous peoples, such as the Maasai, Ilparakuiyo and Barbaig. Under this Act, Village Councils are tasked with the demarcation of grazing lands according to the Land Use Planning Act, 2007¹²¹⁶ and the Village Land Act.¹²¹⁷ Notably, section 18 of the Land Use Planning Act categorises Village Councils as land use planners in their respective villages and section 8 (1) of the Village Land Act gives Village Councils powers to administer village land. The Grazing Land and Animal Feed Resources Act directs Village Councils to grant pastoralists a right of way for driving their stock when accessing, for example, water and dipping services.¹²¹⁸ Moreover, it requires Village Councils to set aside part of the communal village land as strategic grazing land to be communally or privately owned by pastoralists. Additionally, the Act makes it an obligation for Village Councils to prohibit or regulate entry into the grazing land for purposes like cultivation or establishment of protected areas. This is to facilitate only livestock grazing in such areas.¹²¹⁹ All these initiatives support the provisions of Article 22 of the Banjul Charter which provides for peoples' right to economic, social and cultural development. Creating a

¹²¹³Section 42 (3), Forest Act, 2002.

¹²¹⁴ Section 47 (a), *id.*

¹²¹⁵ Section 47 (e), *id.*

¹²¹⁶ Act No. 6 of 2007.

¹²¹⁷ Section 16 (1) Grazing Land and Animal Feed Resources Act, 2010.

¹²¹⁸ Section 16 (2), *id.*

¹²¹⁹ Section 17, *id.*

favourable environment for practising pastoralism is vital for the survival and development of indigenous pastoralist groups in the country. As highlighted above, livestock is at the heart of the pastoralists' socio-economic and cultural existence.

6.2.3.2.8 Environmental Management Act, 2004

The Environmental Management Act provides a legal and institutional framework for the facilitation of sustainable environmental management in Tanzania. To a great extent, it aligns its objectives with the international obligations that Tanzania has assumed under the Convention on Biological Diversity, 1992 and its Protocols, the Paris Agreement, 2015 and Article 24 of the Banjul Charter. It has been shown in the above discussion that communities self-identifying as indigenous peoples in Tanzania have for a very long time inhabited environmentally “fragile” and resource-rich areas calling for extraordinary protection. This Act empowers the Minister responsible for the Environment to declare any ecologically sensitive area of land as an Environmental Protected Area.¹²²⁰ However, such a declaration may only be made in areas which are not already established as protected areas by other written laws.¹²²¹ This being the case, the likelihood of further shrinkage of land inhabited by communities self-identifying as indigenous peoples in Tanzania is broadened.

The Act mentions indigenous communities in section 67 (2) (j). It distinguishes indigenous from local communities. This provision concerns the *in situ* conservation of biological diversity. The Minister responsible for the Environment in consultation with other sectoral Ministries is empowered to make regulations providing for *in situ* conservation of biological diversity.¹²²² The Act lay down that such regulations should provide “...guidelines on methods to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities”. Also, section 66, which provides for the conservation of biological diversity, recognises the importance of protecting indigenous knowledge in regulating proper access to genetic resources and the transfer of technologies. These provisions go parallel with Article 8 (j) of the Convention on Biological Diversity, 1992 which urges Contracting Parties to respect, protect and uphold indigenous peoples' knowledge, practices and innovations as much as possible in *in situ* conservation.

¹²²⁰ Section 47 (1) of the Environmental Management Act, 2004.

¹²²¹ Section 47 (2) *id.* Section 49 (1) of this Act provides that every protected area should be managed in accordance with the law under which it is protected.

¹²²² Section 67 (1) of the Environmental Management Act, 2004.

On another note, the Act empowers the Minister to issue guidelines in relation to the management and utilisation of rangelands. Here, the Minister is urged by the Act to consider, among other factors, the rangeland's carrying capacity, soil conservation and the risk of desertification. Plainly, such guidelines will affect pastoralists who graze livestock on rangelands. This is an additional parameter to the many other rules regulating indigenous pastoralists' grazing activities. The challenge lies in balancing environmental conservation and sustaining indigenous pastoralists' traditional livelihood activities. On the one hand, there are statutory regulations and, on the other, traditional knowledge in respect of managing rangelands, such as rotational grazing to facilitate rejuvenation of soil and vegetation. However, it remains an obligation for all land users to use the land sustainably. This obligation is imposed in section 72 of the Act.

6.2.3.2.9 Tourism Act, 2008

The Tourism Act provides for the administration and regulation of tourism activities and other related matters. It directs every person discharging any duty under the Act to uphold the National Tourism Policy and the Global Code of Ethics for Tourism and to promote cultural and eco-tourism.¹²²³

Although only to a small extent, this Act protects indigenous peoples' traditions and culture in relation to the tourism industry in Tanzania. It is a common practice in Tanzania that, apart from game viewing, indigenous communities' cultures and traditions are used as tourist attractions. The leading community engaged in this industry is the Maasai community. For instance, in the Ngorongoro Conservation Area and other tourists' destinations, there are designated Maasai *Bomas* where the Maasai culture and lifestyle are displayed. Recently, the Hadzabe have gradually been incorporated into this practice. Tourist trips are arranged to their camps to give the tourists an opportunity to experience first hand the Hadzabe "bush lifestyle." The Tourism Act directs all tour operators to ensure that the customs, practices and laws of the land are abided by while conducting these activities and that protection of these communities' socio-cultural identities is assured. For instance, the Act prohibits the taking of photographs to dehumanise, make fun of or diminish the dignity of persons belonging to a particular group.¹²²⁴ Given the fact that the communities self-identifying as indigenous communities in Tanzania have

¹²²³ Section 3 of the Tourism Act, 2008.

¹²²⁴ Section 60, *id.*

long suffered from stigmatisation,¹²²⁵ the provisions of this Act seek to protect them from such prejudices when interacting with tourists from both inside and outside Tanzania.

6.3 Policy Framework, Strategies and Action Plans

There exist various policies, strategies and Action Plans in Tanzania which enhance the implementation of the aforementioned legal framework. Some of the policies were adopted before the enactment of particular laws as foundations for their enactment, while others came after enactment as reinforcements. Just as with the legal framework described above, these policies, strategies and action plans have an impact on communities self-identifying as indigenous peoples in the country. Although not exhaustive, the following analysis of the policies, strategies and action plans aims at showcasing Tanzania's policy environment and other non-legal initiatives *vis-à-vis* protecting the rights of indigenous peoples.

6.3.1 National Land Policy, 1995

The National Land Policy, 1995, was adopted by the then Ministry of Lands, Housing and Urban Development to clarify the land tenure system in the country that had been developed in the post-independencedecades. Its existence laid the foundation for the enactment of the Land Act and the Village Land Act, both of 1999. The Policy emphasises respect of the right to land with secure tenure. It also advocates for the economic use of land, agricultural development and environmental protection. The Policy does mention indigenous communities but only in the context of the colonial administration.¹²²⁶ As highlighted in the previous chapter, during this era, all Africans were regarded as indigenous *vis-à-vis* the non-indigenous European colonialists who were present in the colony.

The Policy notes that the growth in the number of livestock has created a need for more grazing lands. Also, the expansion of agricultural activities shrinks pastoralists' lands. In addition, the shifting of livestock from one place to the other contributes to land tenure insecurity and environmental degradation, so that there is a need for regulation.¹²²⁷ The Policy proposes protection of agricultural activities from invasion by pastoralists.¹²²⁸ At the same time, the Policy suggests securing pastoralists' rangelands from large-scale agricultural projects. This is because

¹²²⁵ ACHPR and IWGIA, *Research and Information Visit in Tanzania*, 16 and 38.

¹²²⁶ Para. 3.0 of the National Land Policy, 1995.

¹²²⁷ Para 1.1, *id.*

¹²²⁸ Para. 7.2.1 (iii), National Land Policy, 1995.

such projects cause haphazard alienation of rangelands leading to conflicts.¹²²⁹ As one of the strategies to end conflicts between pastoralists and farmers, the Policy proposes the issuance of Village Land Certificates which protect common property regimes, including pastoralists' grazing lands.¹²³⁰ This is squarely reflected under Section 7 (7) (d) of the Village Land Act.

The Policy points out that unregulated movements of livestock by the pastoralists bring about conflicts with settled communities and land degradation. Hence, it proposes the prohibition of nomadism. In addition, it encourages modern transhumantic pastoralism through the provision of infrastructure to the nomadic pastoralists, such as cattle dips and water supply. Regulation of cattle movement is also encouraged through the provision of planned and coordinated stock routes.¹²³¹ These proposals are incompatible with the traditional practices of the pastoral communities self-identifying as indigenous peoples in Tanzania. Such communities typically practise nomadic pastoralism on the basis of intergenerational indigenous knowledge relating to the keeping of livestock. However, it can be argued that the suggestions put forward in the Policy represent an attempt to balance the rights of traditional pastoral communities with other national interests.

6.3.2 National Livestock Policy, 2006

The National Livestock Policy, 2006 was adopted by the then Ministry of Livestock Development (now the Ministry of Livestock and Fisheries) to replace the Agricultural and Livestock Policy of 1997. The Policy was adopted to capture new developments in the livestock field, including, *inter alia*, promotion of the role of indigenous technical knowledge in sustaining livestock, and issues related to bio-safety, food safety, diseases, professional regulatory institutions, livestock stocking and livestock-related disasters.¹²³² The Policy corresponds to the Tanzania Development Vision 2025,¹²³³ which suggests the adoption of affirmative action programmes to support participation of the indigenous population in the processes of wealth creation and ownership.¹²³⁴ Its mission is to ensure the development and management of livestock resources for sustainability, economic development and improvement of livelihoods.¹²³⁵ This

¹²²⁹ This is also acknowledged under para. 4.0 of the National Agricultural Policy, 2021.

¹²³⁰ Para. 7.3.1 of the National Land Policy, 1995.

¹²³¹ Para. 7.3.3, *id.*

¹²³² United Republic of Tanzania, National Livestock Policy, 2006, 1.

¹²³³ Para 2.1, National Livestock Policy, 2006.

¹²³⁴ Para. 4.3 (ii) of the Tanzania Development Vision 2025.

¹²³⁵ Para. 2.2 of the Livestock Policy, 2006.

Policy directly applies to communities self-identifying as indigenous pastoralists in the country. It recognises that most land for livestock grazing in Tanzania is communally held and that tenure insecurity is a major problem for pastoralists.¹²³⁶ It lists land tenure insecurity as a constraint to livestock development in Tanzania.¹²³⁷ It expands on this point by saying that this insecurity is caused by the absence of proper allocation of land and granting of ownership to pastoralists in respect of their grazing lands.¹²³⁸ Other constraints to livestock development listed by the Policy are livestock diseases, frequent transformation of livestock grazing areas into fields for crop cultivation, the establishment of game reserves and pastoralists' migration.¹²³⁹ The Policy notes that communal grazing facilitates free and uncontrolled movements of livestock in pursuit of water and pastures but that these movements can lead to environmental degradation and pollution, the spreading of animal diseases, conflicts between pastoralists and other land users, and social delineation.¹²⁴⁰ However, it is a known fact that nomadic pastoralism is a traditional strategy to avoid overgrazing in one area, mitigate the effects of climate, replenish soils and balance the livestock's diet. Despite the aforementioned constraints on one side of the coin, on the other side of the coin the Policy lists potential opportunities for livestock development in the country which includes diverse livestock resources, land resource base, varied and favourable climate and agro-ecological zones, and broad scope of Indigenous Technical Knowledge (ITK) in livestock.¹²⁴¹

Further, the Policy notes that the problem of overstocking, i.e. keeping a large number of livestock beyond the land's carrying capacity, is detrimental to the environment. It says that one reason for this is the socio-cultural beliefs and practice that a large number of livestock is a sign of social prestige and security.¹²⁴² For instance, for the Maasai pastoralists, the more livestock a man has, the more prestigious he is considered to be by his community. For them, this attracts more wives and ensures continuation of the lineage.¹²⁴³ In the *Leninas Case* analysed in the previous chapter, Lenina lost his wives after a long battle over land rights in the law courts that

¹²³⁶ See para. 3.23.1, Livestock Policy, 2006.

¹²³⁷ *Ibid.* The Policy defines land tenure as the right to use a piece of land under given conditions. It states that these conditions apply to acquisition, renting, use, disposition, transmission or forfeiture of the relevant piece of land.

¹²³⁸ Para 1.3 (i) of the Livestock Policy, 2006.

¹²³⁹ Para 1.3 (i) and (iii), *ibid.*

¹²⁴⁰ Para. 3.5.1, Livestock Policy, 2006.

¹²⁴¹ Para. 1.4, Livestock Policy, 2006.

¹²⁴² Para. 3.7, *id.*

¹²⁴³ Information obtained from a visit to Msomera Village, Handeni District in November 2023.

was preceded by the confiscation of a substantive part of his livestock and the arrest of some of his children. This battle involved selling a considerable number of his livestock to meet the legal expenses. As a Maasai man who was once considered prestigious in his community, he was exposed to extreme vulnerability due to complete loss of his livestock and family.¹²⁴⁴

6.3.3 National Tourism Policy, 1998

The Ministry of Natural Resources and Tourism adopted the National Tourism Policy, 1998 to replace the 1991 Tourism Policy and accommodate the political, economic and social developments that had taken place in the country. It aims at withdrawing the Government from directly engaging in tourist activities and allowing the private sector to take part in the tourism business. The Policy sees the Government as the regulatory, promotion and facilitation body in the industry. Further, the Policy was developed to capture a paradigm shift that was happening at the international level due to the rapid development of new technologies, as well to take account of the 1992 Rio Declaration on Environment and Development.¹²⁴⁵ The easy accessibility of new technologies was found to have made it simpler to advertise tourist attractions and destinations. This had increased competition in the industry. Domestically, innovation in tourism products became inevitable. The 1998 Policy adopted the approach of encouraging cultural and eco-tourism. Some of its objectives were to enhance cross-cultural exchange to facilitate domestic and international understanding of the cultures found in Tanzania, to promote and develop tourism that is environmentally friendly, and to encourage community participation in tourism as a way of diversifying tourism products in the industry.¹²⁴⁶ In respect of cross-cultural exchanges, tourists are now offered opportunities to physically appreciate the cultural aspects of specific communities, either in designated villages or in real-life family settings. Here is where communities self-identifying as indigenous peoples come to play in this industry. In one way, this initiative is an important step towards recognising, embracing and safeguarding the distinctiveness of these communities' cultural ways of life. The Policy further encourages individuals and organisations to document, disseminate and advertise information on the cultural attractions found in Tanzania.¹²⁴⁷ A good example of this can be seen on the Ngorongoro

¹²⁴⁴ PINGOS Forum, Pastoralists' Challenges in Tanzania, accessed March 19, 2024, <https://www.youtube.com/watch?v=-oC9O0FQRw>.

¹²⁴⁵ United Republic of Tanzania, National Tourism Policy, 1998, iii.

¹²⁴⁶ Paras. 4.2, 4.3 and 4.4, National Tourism Policy, 1998.

¹²⁴⁷ Para. 5.3, United Republic of Tanzania, National Tourism Policy, 1998.

Conservation Area (NCA)'s website where visits to the Maasai, Datooga and Hadzabe are advertised as one of the property's tourism products, alongside other natural attractions.¹²⁴⁸ The Policy also recognises that some tourist attractions are of spiritual significance to the communities concerned, which makes it important to involve them in planning such visits.¹²⁴⁹ A typical example of this is the Oldonyo Lengai Mountain which is of spiritual significance to the Maasai community. The name Ol Doinyo Lengai is from the Maa language and means "the Mountain of God" or the "Holy Mountain." This youngest active volcanic mountain adjoining the Ngorongoro Conservation Area is not only eye-catching by itself but also provides exotic views of the surrounding spectacular landscape from its peak. It is also of geological importance for its global uniqueness, being the only mountain in the world producing silicon-free natrocarbonatite lava. For these reasons, it attracts a good number of tourists throughout the year. For the Maasai, the mountain is believed to offer fertility solutions and cure animal diseases. Also, the community leaders offer prayers there, seeking solutions to societal problems. The Maasai believe that the volcanic eruptions represent their "God" communicating with them.¹²⁵⁰ Because of this, accessing this mountain has for many years now involved Maasai tour guides. In general, the Policy's strategy is to prioritise inclusion of members of local communities in decision-making, education and employment in cultural and eco-tourism.¹²⁵¹

6.3.4 The Wildlife Policy of Tanzania, 2007

The Wildlife Policy of Tanzania, 2007 was formulated by the Ministry of Natural Resources and Tourism. It played an important role in the formulation of the Wildlife Conservation Act, 2009. The Policy recognises that wildlife and wetlands are natural resources of enormous economic, environmental and nutritional value and hence worthy of conservation.¹²⁵² It asserts the Government's custody of the country's wildlife and wetlands areas. The Policy proposed that the Government should identify areas to be protected as wetlands and emphasized the importance of

¹²⁴⁸ See Ngorongoro Conservation Area, "Cultures," accessed March 21, 2024, <https://www.ncaa.go.tz/cultures/>.

¹²⁴⁹ Para. 5.9, *id.*

¹²⁵⁰ Information obtained during a visit to Nainokanoka village in March 2022. Also see Evaristo Haulle and Delphine Njewe, "Fertility Myth of Oldoinyo Lengai and its Impacts to the Maasai Community of Northern Tanzania," *Journal of the Geographical Association of Tanzania* 2, No. 36 (2016): 21–34 for deeper discussion on this point.

¹²⁵¹ Para. 5.9 of the National Tourism Policy, 1998.

¹²⁵² Para. 3.0 of the Wildlife Policy of Tanzania, 2007.

their “wise use.”¹²⁵³ This reflects section 3 (1) of the Ramsar Convention signed by Tanzania on August 13, 2000. As seen in the *Kilombero Valley Case* examined in the previous chapter, the shortcomings in implementation of the “wise use” approach in conservation of the Kilombero Valley led to the eviction of indigenous pastoralists from the area through what was termed as “*Operation Okoa Bonde la Mto Kilombero*” (Operation Save the Kilombero Valley).

The Policy also promotes the use of traditional knowledge in wildlife and wetlands conservation.¹²⁵⁴ It further promotes ecotourism as a strategy to reduce the impacts of tourism activities on the natural environment.¹²⁵⁵ To a great extent, ecotourism involves indigenous peoples showing tourists their exotic natural environment and showcasing their traditional lifestyles. Field research has confirmed this in the Maasai and Hadzabe communities in Ngorongoro and Karatu Districts, Arusha region. By implication, recognition of ecotourism by this Policy supports the inclusion of indigenous peoples in conservation and economic activities because they are encouraged to use their traditional knowledge and experience when accompanying tourists through their natural environment. Ecotourism contributes to the promotion and facilitation of indigenous peoples’ right to social, economic and cultural development. However, ironically, the Policy does not categorically mention traditional communities as one of the stakeholders in wildlife conservation, as is the case with the Wildlife Conservation Act. It only mentions by inference their role in Wildlife Management Areas established in their village lands.¹²⁵⁶ It notes in general that most of the population in villages depends on wildlife and wetlands for their livelihood.¹²⁵⁷ This is very striking, especially in view of the fact that this Policy openly addresses intersectional issues, such as gender equity in conservation activities. Specific attention could have been directed to expressly addressing traditional communities and their role in wildlife and wetlands conservation.¹²⁵⁸

¹²⁵³ See para. 2.5.2 of the Policy. Also see United Republic of Tanzania, Policy Statement, Wildlife Policy of Tanzania, 2007, 21.

¹²⁵⁴ Policy Statement (d), Wildlife Policy of Tanzania, 2007, 29.

¹²⁵⁵ Para. 2.4.5 of the Wildlife Policy of Tanzania, 2007. For more information about ecotourism and a practical case study in the NCA, see Susan Charnley, “From Nature Tourism to Ecotourism? The Case of Ngorongoro Conservation Area, Tanzania,” *Human Organization*, 64, No. 1 (2005): 75–88.

¹²⁵⁶ Para. 3.1.4 of the Wildlife Policy of Tanzania, 2007.

¹²⁵⁷ United Republic of Tanzania, Policy Statement, Wildlife Policy of Tanzania, 2007, 33.

¹²⁵⁸ *Ibid.*

6.3.5 National Environmental Policy 2021

The Environmental Policy, 2021 was adopted by the Vice President’s Office Environment Division to replace the National Environmental Policy of 1997 which in principle addressed six key thematical areas, i.e. deforestation, environmental pollution, the decline of aquatic systems, land degradation, loss of biodiversity and wildlife habitats, as well as the inaccessibility of clean water for rural and urban populations.¹²⁵⁹ After more than two decades of implementing this Policy, various measures had been taken in the field, but new developments necessitated the adoption of a new Environmental Policy. Examples of issues addressed by the new Policy are matters related to climate change and invasive species which have led to prolonged droughts and increased loss of biodiversity and wildlife habitats. This Policy seeks to provide solutions to problems that hindered effective implementation of the 1997 Policy, such as insufficient harmonisation of sectoral environmental management strategies, scarce alternative sources of domestic energy and heavy dependence on charcoal and firewood, poor implementation of public awareness programmes on matters related to environmental conservation, inadequate land use planning at various administrative levels and lack of enforcement of compliance with regulations related to environmental management.¹²⁶⁰ In addressing the question of deforestation, the Policy mentions “forest communities” in the sense of communities that have their habitats in the forests.¹²⁶¹ Examples of these communities are the Hadzabe and the Akie. Although the Policy does not define such communities, it distinguishes them from local communities. The term “local communities” is separately applied in various parts of the Policy. They are considered as one group of stakeholders in environmental management that ought to be included progressively in environmental conservation processes.¹²⁶² The author of this study argues that, even without formal recognition, by inserting the term “forest communities” in the Policy during its formulation, the Ministry acknowledged the existence of communities that depend on forests for their livelihood and the need to curb deforestation in order to protect their utilisation of forest resources.

¹²⁵⁹ Para. 1.1 of the National Environmental Policy, 2021.

¹²⁶⁰ *Ibid.*

¹²⁶¹ See Paras 1.2.5 and 3.5 of the National Environmental Policy, 2021.

¹²⁶² See for example, paras. 18, 32 and 59, *id.*

6.3.6 National Forest Policy, 1998

The National Forest Policy was devised to tackle challenges related to managing forest resources in an integrated and sustainable manner. The motive behind the policy was to optimise the environmental, economic, social and cultural values of forest resources.¹²⁶³ The Policy noted that Tanzania was one of fourteen global biodiversity hotspots. It therefore called for conservation programmes to sustain the country's biodiversity. The Policy does not mention indigenous or traditional communities as relevant stakeholders in the management of forest resources. It only refers to local communities or local people.¹²⁶⁴ It is important to note that when this policy was adopted, the national indigenous peoples' movement in Tanzania had begun but was yet to pick up significant momentum to influence policy reforms.¹²⁶⁵ Nevertheless, matters related to gender mainstreaming were already audible enough to be captured in the Policy.¹²⁶⁶

The Policy promotes the withdrawal of the central government's role in the management of forest resources and facilitates communities' engagement via local government.¹²⁶⁷ It states that to aid forest management and conservation, as well as equitable distribution of forest benefits, joint management agreements should be signed between stakeholders and people adjoining the forests. It directs that the management of villages' forest reserves should be done through the villages' governments.¹²⁶⁸ The Policy proposes granting forest user rights to local communities through approved management plans. This was implemented in the Forest Act, 2002 which provides for the creation of community forest reserves in village land in accordance with villages' land use plans. Under the provisions of this Act, communities which have strong traditional connections with the forests and derive their livelihood from them are accommodated under the community forest reserves arrangement. According to the Forest Act, such communities may apply to the Village Council to be allocated land for management of a community forest reserve in the village land, either inside or outside the village land forest reserve.¹²⁶⁹ Before the formulation of this Policy, such legal provisions were non-existent.¹²⁷⁰

¹²⁶³ Preamble to the National Forest Policy, 1998.

¹²⁶⁴ Para. 1.2 and 2.3, *id.*

¹²⁶⁵ See Para. 4.4.11, National Forest Policy, 1998.

¹²⁶⁶ For instance, see para 1.3 and the Policy Statement (39) of the National Forest Policy, 1998.

¹²⁶⁷ Para. 1.3 of the National Forest Policy, 1998.

¹²⁶⁸ Policy Statement (6), *id.*

¹²⁶⁹ Section 45 (1) (a) of the Forest Act, 2002.

¹²⁷⁰ Para. 4.1.3 of the National Forest Policy, 1998.

Last but not least, a striking component of this Policy is its promotion and support for beekeeping by local communities. It recognises that a substantial part of bee-keeping activities in Tanzania is done traditionally. Particularly for the Hadzabe community, forest bee production is important. They have the knowledge to monitor and protect the bees' habitat and to harvest honey. A field visit to the Eyasi Basin showed that implementation of this part of the policy is widely done by the private sector, mostly non-governmental organisations such as the Ujamaa Community Resource Team (UCRT). The NGOs implementing bee-keeping projects in this area aim at helping the Hadzabe to solve the problem of food insecurity brought about by the impacts of climate change. Here, the Hadzabe are trained on how to increase the productivity of bees with a combination of indigenous and contemporary knowledge. However, one of the participants in the Focus Group Discussion said that such projects are not sustainable because the funding available to the NGOs is often limited to a fixed term, with pressure to produce tangible outcomes within a short period of time. Short-term results in projects like these are normally not attainable, which affects extension of the funding.¹²⁷¹ A bee-keeping project has been implemented by the NCAA to enable Maasai women residing in the NCA to benefit economically from forest produce. During a field visit to the NCCA on 24 March 2023, several Maasai women were observed selling honey to the tourists who were entering and leaving the property. Interaction with some of them revealed that the language barrier is one of the biggest challenges facing their honey business. It hinders them from accessing the market to sell their product. The Forests Act prevents any person from using bee-keeping products found in the forest reserves without a specific permit or licence issued under it or the Bee Keeping Act, 2002. Generally, the bee-keeping component in this Policy has been implemented under the Forest Act and Bee Keeping Act, both of the year 2002. It is a positive observation that the government of Tanzania has taken steps to facilitate the participation of communities self-identifying as indigenous peoples in economic activities based on utilisation of forests resources. This serves the purpose of Articles 21 and 22 of the Banjul Charter which provide for peoples' right to freely dispose of their natural resources and their right to economic development.

¹²⁷¹ Interview with the UCRT Program Coordinator (Yaeda and Lake Eyasi) conducted in Arusha on March 23, 2022. The same observation was made in an interview with the Executive Director of PINGOs Forum conducted in Arusha on July 19, 2021.

6.3.7 National Forest Policy Implementation Strategy (2021-2031)

The National Forest Policy Implementation Strategy (2021-2031) was adopted by the Ministry of Natural Resources and Tourism after an evaluation of the implementation of the National Forest Policy that was conducted in 2017 and 2018. The outcome of this evaluation was the decision to adopt a Strategy to ensure implementation of the Policy within a period of ten years, i.e. between 2021/2022 and 2031/2032.¹²⁷² The Strategy was also adopted to incorporate other developments which had taken place since the adoption of the Forest Policy in 1998. These include the adoption of the Sustainable Development Goals (2030), the Tanzania Development Vision 2025 and the third National Five Year Development Plan (2021/22 – 2025/26).¹²⁷³ The Strategy refers to local communities as one of the key stakeholders in the Forest Sector. It defines local communities as a group of people who hold the same culture, traditions and beliefs and share a common environment.¹²⁷⁴ The Strategy recognises community-based forestry as a people-centred approach which involves local communities as the main decision-makers in the implementation of the Forest Policy.¹²⁷⁵ In the aspect of forest land management, the Strategy proposes offering support to community forestry activities through extension services and financial incentives.¹²⁷⁶ Also, village governments as one of the stakeholders in forest management are required to offer support to communities in establishing and managing forest community reserves.¹²⁷⁷ Drawing from the Forest Policy, the Strategy also encourages bee-keeping and forest-based ecotourism in managing and developing forest reserves.¹²⁷⁸ As already highlighted in the foregoing discussion, these are activities that communities self-identifying as indigenous peoples in Tanzania are currently participating in.

6.3.8 Implementation Strategy for the National Environmental Policy (2021) for the Period 2022-2032

The government through the Vice President's Office adopted the Implementation Strategy for the National Environmental Policy (2021) for the period 2022-2032 to enhance the practical implementation of the National Environmental Policy, 2021. This Strategy identifies local

¹²⁷² United Republic of Tanzania, National Forest Policy Implementation Strategy (2021-2031), 1.

¹²⁷³ *Ibid.*

¹²⁷⁴ *Loc cit.*

¹²⁷⁵ National Forest Policy Implementation Strategy (2021-2031), ix.

¹²⁷⁶ *Id.*, 4.

¹²⁷⁷ *Id.*, 55.

¹²⁷⁸ *Id.*, 8.

communities as being among the key stakeholders in the implementation of the National Environmental Policy. It makes no mention of “forest communities” as is the case with the National Environmental Policy. In one instance, it uses the term “local communities” interchangeably with “the (general) public.”¹²⁷⁹ This provides clarity as to what local communities are, which is the same definition adopted in this thesis. Also, this document overlooks the role played by nature-reliant communities such as “forest communities” in mitigating the impacts of climate change.

6.3.9 National Climate Change Response Strategy (2021-2026)

Tanzania as a country has been battling the effects of climate change on its socio-economic development generally and its peoples’ livelihoods in particular. Due to this, in 2012, the country adopted its very first National Climate Change Strategy (NCCS) to facilitate the country’s technical and institutional capacity to tackle the impacts of climate change.¹²⁸⁰ The Strategy aimed at strengthening measures to adapt to climate change and mitigate its effects, as well as cross-cutting interventions, taking into account its potential to weaken poverty reduction efforts. The Strategy pointed out the direct relationship between climate change, the environment and natural resource destruction, and its threat to the present and future generations. Implementation of this NCCS ended in 2018, when new issues and developments in the field called for a revised Strategy. Also, there were gaps identified in the implementation of the 2012 Strategy that needed to be addressed. These gaps included poor awareness of the risks posed by climate change and variability among the general public and among decision makers, and insufficient resources to achieve implementation, monitoring and evaluation of the impacts of climate change at all levels. Thus, the new Strategy was adopted by the Vice President’s Office, Environment Division to align government policy with the needs and dynamics on the ground.¹²⁸¹

Among other things, the new 2021 Strategy recognises the livestock sector as one of the vital economic sectors in Tanzania which is affected by the impacts of climate change. It notes that if deliberate efforts are not taken to mitigate these effects, there will be severe impacts on this sector.¹²⁸² Further, the Strategy notes that changes in temperatures and increasing variability

¹²⁷⁹United Republic of Tanzania: Vice President’s Office, Implementation Strategy for the National Environmental Policy (2021) for the period 2022-2023, 21.

¹²⁸⁰ United Republic of Tanzania, National Climate Change Response Strategy (2021-2026), 1.

¹²⁸¹ *Id.*, 5.

¹²⁸² *Id.*, 39-40.

of rainfall have resulted in prolonged periods of drought which in turn cut down the availability of pastures and water for livestock. It also notes that shrinkage of rangelands occasion migrations of herders in search of pastures and water for their livestock. The Strategy underlines that such migrations aggravate conflicts between livestock keepers, crop cultivators and other users of natural resources.¹²⁸³ In addition, it explains that warmer temperatures are expected to increase vector-borne diseases in livestock, such as Trypanosomiasis and Rift Valley Fever.¹²⁸⁴ These challenges face the pastoralist communities self-identifying as indigenous peoples in Tanzania, i.e. the Maasai, Parakuiyo and Barbaig. In this regard, one of the strategies put in place by the government to mitigate these climate change-related challenges is enhancement and development of infrastructures as well as the provision of additional livestock-related services.¹²⁸⁵ Examples of these are the building of water troughs and cattle dips to mitigate water scarcity and the spread of vector-borne diseases. The strategy assists pastoralists across the country to withstand the impacts of climate change.

6.3.10 National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (2nd Draft), 2012

The REDD+ (2nd Draft), 2012 took into account the completion and preparation of the REDD+ Framework (2009), the National REDD+ Strategy (2013a) and the REDD+ Action Plan (2013). It was the second attempt by the government via the Vice President's Office (Environment Division) to come up with a national climate change mitigation and adaptation strategy for reduced emissions from deforestation and degradation. This Draft Strategy reflects the motives behind the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) to which Tanzania is a party.¹²⁸⁶ The first draft was completed in 2010. Under this Draft Strategy, Tanzania aims to adopt legal frameworks and encourage participatory forest management in the quest to reduce emissions caused by forest degradation and deforestation. The country is putting efforts into addressing the drivers of deforestation and forest degradation through the adoption of legal frameworks and the implementation of participatory forest management.

¹²⁸³ United Republic of Tanzania, National Climate Change Response Strategy (2021-2026), 40.

¹²⁸⁴ *Id.*, 41.

¹²⁸⁵ United Republic of Tanzania, National Climate Change Response Strategy (2021-2026), (2012), 86.

¹²⁸⁶ See section 8 (c) of the UNFCCC. Tanzania signed the UNFCCC on June 12, 1992 and ratified it on April 17, 1996.

The Draft Strategy notes that the main sources of funding for forest management are donations from development partners, charges levied on forest products and budgets allocated by the state for forestry administration.¹²⁸⁷ Nevertheless, these have not been sufficient to fully address setbacks to afforestation efforts. Therefore, in this latest Draft Strategy, the government seeks to come up with innovative financing mechanisms which attract investments in forest management aside from the existing conventional sources of funds. Implementation of the REDD+ Strategy is expected to provide the country with an opportunity to attract financial investments for the purpose of supporting the management of forests in respect of reducing emissions from forest degradation and deforestation and facilitating storage of carbon dioxide as a way of mitigating climate change and its resultant impacts.¹²⁸⁸

Through this Strategy, the country expressly recognises indigenous peoples and their associated characteristics as internationally and regionally accepted. For example, a Glossary to the Draft Strategy defines the term “indigenous peoples” in the same way as the ACHPR’s Report of the Working Group of Experts on Indigenous Communities/Populations (*supra*). It also defines an “ancestral domain” as an area which belongs to “indigenous cultural communities” or “indigenous peoples” and consists, among other things, of lands which have been continuously and communally occupied or owned by the said communities since time immemorial, and which guarantee the survival of their livelihoods.¹²⁸⁹ Moreover, the Draft Strategy uses the terms “forest-dependent peoples”¹²⁹⁰ and “forest-dependent communities”¹²⁹¹ separately from the term “local communities” which is recurrently used throughout the document. This indicates that, in this Strategy, the government takes cognisance of communities that are reliant on forest resources for sustenance. Thus, in the REDD+ climate change strategies, the Government of Tanzania relaxes its stringent position towards recognition of communities self-identifying as indigenous peoples in the country. This is due to the fact that prospective investors are likely to come from countries which recognise the rights of indigenous peoples and

¹²⁸⁷United Republic of Tanzania, National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (2nd Draft), 2012, 2.

¹²⁸⁸National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (2nd Draft), 2012, 2.

¹²⁸⁹United Republic of Tanzania, National Strategy for Reduced Emissions, 54.

¹²⁹⁰National Strategy for Reduced Emissions, (2012), 48.

¹²⁹¹*Id.*, 5.

may put upfront the requirement for recognition of indigenous peoples' rights before financing REDD+ related projects.¹²⁹²

6.3.11 Tanzania National Biodiversity Strategy and Action Plan (2015-2020)

The development and implementation of National Biodiversity Strategy and Action Plans (NBSAPs) are requirements to be met by all Parties to the Convention on Biological Diversity, 1992 (CBD) as per Article 6 of the Act. BSAPs are structured roadmaps to assist Parties to the CBD to meet both national and international obligations as they derive socio-economic and cultural benefits from biodiversity.¹²⁹³ The first NBSAP to ever be developed in Tanzania was adopted in 2001. However, as the years went by, a great number of new developments emerged in the biodiversity field, such as biofuel development, blue and green economy, climate change and variability, genetically modified organisms, invasive species, synthetic biology and oil and gas exploration. These necessitated a review of the 2001 NBSAP in Tanzania.¹²⁹⁴ Also, the CBD Parties' obligations to achieve the 2020 Aichi Biodiversity Targets¹²⁹⁵ and implement the 2011-2020 Strategic Plan for Biodiversity influenced the adoption of the new NBSAP.

The 2015 NBSAP was adopted in line with the National Development Vision 2025 which, among other things, gives weight to the importance of biodiversity preservation for sustainability. The 2015 NBSAP mentioned indigenous peoples among the relevant stakeholders of biodiversity conservation in the country. It stated that one of the initiatives in which Tanzania was engaged to conserve biodiversity was the United Nations REDD Programme (2009-2013) which supported nationally-led REDD+ processes and promoted informed and meaningful inclusion of all stakeholders in the national and international REDD+ implementation processes. Some of the stakeholders mentioned were indigenous peoples and other forest-dependent communities.¹²⁹⁶

One of the NBSAP strategies was to include indigenous peoples countrywide in participatory planning, knowledge management and capacity building for the successful

¹²⁹² Opinion from the PINGOs Forum obtained during an interview conducted at the PINGOs Forum Office on July 19, 2021 in Arusha Region.

¹²⁹³ United Republic of Tanzania, Tanzania National Biodiversity Strategy and Action Plan (2015-2020), (2015), 3.

¹²⁹⁴ *Ibid.*

¹²⁹⁵ For more information about the Aichi Biodiversity Targets see Convention on Biological Diversity, "Aichi Biodiversity Targets," accessed March 24, 2024.

¹²⁹⁶ See United Republic of Tanzania, Tanzania National Biodiversity Strategy and Action Plan (2015-2020), (2015), 32.

management of biodiversity.¹²⁹⁷ This is due to their wealth in traditional knowledge on sustainable utilisation and conservation of biodiversity and its components. Further, the 2015 NBSAP aimed to account for the needs of indigenous communities, among other groups, in safeguarding and restoring ecosystems which provide crucial services like water supply.¹²⁹⁸ In addition, it undertook to respect the traditional knowledge of indigenous communities in the conservation of biodiversity and their customary use of biological resources.¹²⁹⁹ Notably, the decision to include indigenous knowledge in planning, knowledge management and capacity building relating to the conservation of biological diversity is in line with Article 27 of the ILO Convention on Indigenous and Tribal Peoples, 1989 (C 1989).

6.3.12 National Human Rights Action Plan (2013-2017)

The National Human Rights Action Plan (NHRAP) was the first Action Plan in the history of human rights in Tanzania to ever be formulated. It was developed as a response to the Vienna Declaration and Programme of Action (VDPA) whose Part II, paragraph 71, recommended that each State should consider the development of a national action plan which identifies areas of improvement in the promotion and protection of human rights. The VDPA was adopted in 1993 at the World Conference on Human Rights held in Vienna. Following this recommendation, various states across the world developed National Plans of Action for the Promotion and Protection of Human Rights.¹³⁰⁰ In Tanzania, the National Human Rights Action Plan was adopted to strengthen the promotion and protection of human rights through the adoption of specific actions and activities. The Action Plan was developed by the Government under the Ministry of Constitution and Legal Affairs in collaboration with the National Human Rights Institution, i.e. the Commission for Human Rights and Good Governance (CHRAGG), the Office of the United Nations in Tanzania, along with development partners and other stakeholders from civil society. It was intended to remedy the lack of a national homogeneous policy in respect of human rights in the country.¹³⁰¹

¹²⁹⁷ United Republic of Tanzania, Tanzania National Biodiversity Strategy and Action Plan (2015-2020), (2015), 74.

¹²⁹⁸ *Id.*, 85.

¹²⁹⁹ *Ibid.* Nevertheless, the Forest Policy, 1998, admits that there has not been sufficient utilisation of traditional knowledge in forestry planning due to limited resources available for the responsible Ministry to engage participatory consultations.

¹³⁰⁰ United Republic of Tanzania, National Human Rights Action Plan (2013-2017), 1.

¹³⁰¹ *Ibid.*

The Action Plan recognised communities self-identifying as indigenous peoples in Tanzania as belonging to the category of “disadvantaged groups”. In addressing the existing situation of the right to own property and access land, it took cognisance of the fact that:

Since the onset of liberalization policy in 1990s in the country, there has been high demand of land. Consequently, pastoral and hunter-gatherer communities in Tanzania, including the Maasai, the Barbaig, the Hadzabe, and the Taturu (Datooga), are facing increasing pressure from commercial and smallholder farmers and foreign investors who also want to use their land.¹³⁰²

Further, the Action Plan affirmed the fact that land occupied by pastoralists has been gradually annexed into protected areas, something that contributes to the challenge these communities face regarding access to land and other natural resources. Also, the Action Plan noted that the shrinking of pastoral lands goes hand in hand with food insecurity and an increase in the number of conflicts between pastoralists and farmers.¹³⁰³ Hence, one of the Action Plan’s objectives was to enhance public education on the equal right to own and access land with a particular focus on the rural population and disadvantaged groups such as pastoralists and hunter-gatherers.¹³⁰⁴

The Action Plan also recognised the country’s international human rights obligations as provided for by international human rights instruments to which Tanzania is a party. It named the country’s obligation to guarantee economic, social and cultural rights and the right to property, as captured by the ICESCR and the Banjul Charter.¹³⁰⁵ In this regard, the Action Plan stated the government’s responsibility to gradually achieve successful implementation of these obligations through the allocation of resources to human rights-based activities. Also, the government was encouraged to take advantage of the available opportunities for international assistance in fulfilling these obligations. Moreover, the adoption of effective and transparent strategies was proposed to progressively attain full realisation of human rights in the country.¹³⁰⁶

This Action plan was mainstreamed in the government’s ministries, departments and agencies, public corporations, local government authorities and civil society organisations.

¹³⁰² United Republic of Tanzania, National Human Rights Action Plan (2013-2017), 20.

¹³⁰³ *Ibid.*

¹³⁰⁴ *Ibid.*

¹³⁰⁵ *Id.*, 19.

¹³⁰⁶ United Republic of Tanzania National Human Rights Action Plan (2013-2017), 19.

Among other achievements, it managed to enhance the actors' human rights knowledge. Nevertheless, the implementation of this Action plan had shortcomings, such as unclear coordination and insufficient funds to sustain mainstream activities. Its implementation ended in 2017. At the time of completion of this study, a second NHRAP has not yet been adopted in the country.¹³⁰⁷

6.4 Institutional Framework

On-site research was conducted in various government ministries, specific departments and independent institutions to establish how, if at all, they observe indigenous peoples' rights. Also, desk research was conducted with respect to such institutions to achieve the same objective. Therefore, the data presented below is a compilation of information obtained by means of both primary and secondary data collection methods.

6.4.1 Commission for Human Rights and Good Governance (CHRAGG)

CHRAGG is a National Human Rights Institution (NHRI) in Tanzania. It was constitutionally established under Article 129 of the Constitution of the United Republic of Tanzania and its functions are stipulated under Article 130 of the same Constitution. Some of its functions are sensitisation of the public on topics related to human rights preservation, receiving complaints and conducting inquiries on matters related to human rights violations and good governance, conducting research on human rights issues and disseminating the results to the general public, as well as advising the government and other institutions (either public or private) on matters related to implementation of human rights in the country.¹³⁰⁸ In discharging its function of inquiring into alleged violations of human rights, CHRAGG is not allowed to probe into matters that are before any Court or Tribunal or any matter involving a relationship or cooperation between Tanzania and another government or international organisation.¹³⁰⁹

CHRAGG operates as an autonomous government department with no obligation to receive any advice, opinion, orders or directives from anyone or any public or private institution except the President.¹³¹⁰ However, it is under the obligation to submit an annual report to the

¹³⁰⁷ Commission for Human Rights and Good Governance, *Submission for Tanzania Third Cycle Universal Periodic Review*, (2021), 8.

¹³⁰⁸ Article 130 (1) (a), (b), (c), (d) and (g) of the Constitution of the United Republic of Tanzania, 1977.

¹³⁰⁹ Article 131 (2) (a), (b) and (d),

¹³¹⁰ See Article 130 (2) and (3), *id.*

Minister responsible for human rights (i.e. the Minister of Constitution and Legal Affairs) who subsequently tables the report before the National Assembly.¹³¹¹ This does not preclude the Commission from submitting reports to other authorities.

Article 131 (1) of the Constitution empowers the Parliament to enact a law prescribing provisions in respect of the Commission's authority and procedures for conducting its business, among other things. In this regard, the Commission for Human Rights and Good Governance Act, 2001¹³¹² was passed. The Act lays down the composition of the Commission, to be made up of a Chairman and a Vice-Chairman who qualify to hold the position of a Judge of the High Court, and not more than five other Commissioners who are knowledgeable and experienced in matters related to law, government, human rights, politics and social affairs.¹³¹³

The interviews and documentary review concerning the implementation of indigenous peoples' rights conducted in the CHRAGG Offices in Dar es Salaam and Dodoma revealed that CHRAGG generally follows the government's position of non-recognition of communities self-identifying as indigenous peoples in Tanzania. It takes into account that the implementation of indigenous peoples' rights in Tanzania is beset by definitional controversy.¹³¹⁴ However, it was found that CHRAGG is the government institution in Tanzania that is most actively engaged in debates relating to national, regional and global indigenous peoples' rights.

6.4.1.1 CHRAGG's Engagement in the UPR Mechanism

At the United Nations level, CHRAGG participates in the Universal Periodic Review. As one of the 193 Members of the United Nations, Tanzania as a country participates in this Mechanism¹³¹⁵ as one of the relevant stakeholders. National Human Rights Institutions (NHRIs) and NGOs participate in the UPR before, during and after the review stage. The basis for the participation of stakeholders, i.e. National Human Rights Institutions and non-governmental organisations, in the

¹³¹¹ Article 131 (3), Constitution of the United Republic of Tanzania, 1977.

¹³¹² Cap. 391, Revised Edition, 2002.

¹³¹³ Section 7 (1) (a), (b) and (c) of the Commission on Human Rights and Good Governance Act, 2001.

¹³¹⁴ Interview at CHRAGG's Dar es Salaam Office conducted on June 2, 2021.

¹³¹⁵ UPR is a special mechanism by the Human Rights Council established in 2006 through the United Nations' General Assembly Resolution No. 60/251. The mechanism subjects every UN Member State to a deep peer review by the UPR Working Group on its human rights situation every 4.5 years. This is with a view to offering Member States recommendations for gradual improvement of their domestic human rights situations. Since the commissioning of this mechanism, all of the 193 UN members have been reviewed thrice in the frame of three cycles. For more information about the mechanism, see United Nations: Human Rights Council, "Universal Periodic Review," accessed March 24, 2024, <https://www.ohchr.org/en/hr-bodies/upr/upr-home>.

UPR mechanism is established by the Human Rights Council's Resolution 5/1 of June 18, 2007. Paragraph 3 (m) of the UPR's Guiding Principles annexed to the HRC's Resolution 5/1 of June 18, 2007 obliges the UPR mechanism to guarantee the inclusion of all relevant stakeholders including NHRIs and NGOs in its processes as per the UN General Assembly Resolution 60/251 of March 15, 2006 establishing the mechanism. The participation of CHRAGG in the UPR Mechanism is a reflection of one of the responsibilities of NHRIs under the Principles Relating to the Status of National Institutions (Paris Principles), 1993.¹³¹⁶

While the Office of the Attorney General prepares and submits National Human Rights reports before the Human Rights Council on behalf of the Government of Tanzania, CHRAGG and NGOs submit their alternative (shadow) reports as key human rights stakeholders in the country. The Office of the Attorney General is also responsible for the implementation of the UPR's recommendations to the country. In preparation for the National Report, the Office of the Attorney General consults the stakeholders who work first-hand at the grassroots, community and national levels. Tanzania has participated in all three UPR cycles so far: it participated in the first review cycle on October 3, 2011, the second review cycle on May 9, 2016 and the third review cycle on November 5, 2021.¹³¹⁷

In the first review cycle, apart from submitting its independent report to the UPR Working Group, CHRAGG played a pivotal role in coordinating the Civil Society Organisations (CSOs) during preparation and submission of their coalition report. CHRAGG assumed this role since this was the very first time that the stakeholders were engaged in such an experience. In the next cycle, the role was undertaken by the Tanzania Human Rights Defenders Coalition (THRDC). In the first review cycle, the national report addressed the rights of minorities and indigenous peoples. It clearly stated the position of the Government of Tanzania with regard to indigenous peoples. It stated that the government takes cognisance of the existence of special groups which require particular protection in the country; and that the government had already taken several measures to provide them with political, social and cultural amenities.¹³¹⁸ The report noted further that the question of the promotion and protection of the rights of minorities

¹³¹⁶ Paris Principles were adopted by the UN General Assembly as Resolution 48/134 of 20 December 1993.

¹³¹⁷ See United Nations: Human Rights Council, "Universal Periodic Review: United Republic of Tanzania," accessed March 24, 2024, <https://www.ohchr.org/en/hr-bodies/upr/tz-index>.

¹³¹⁸ Human Rights Council: Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: United Republic of Tanzania*, (2011), 5.

and indigenous peoples was raised by the Committee on Civil and Political Rights during the consideration of Tanzania's 4th Periodic Report in which Tanzania was urged to conduct a study on indigenous peoples' rights. The National Report before the UPR Working Group indicated that the Government of Tanzania was still working on such a recommendation.¹³¹⁹ In this review cycle, CHRAGG did not address any alarming issue related to indigenous peoples' rights in the country.¹³²⁰ On the other hand, the stakeholders made a recommendation that Tanzania should adopt the ILO Convention (C169) of 1989 and enact a law on minority and indigenous people.¹³²¹ They further reported that indigenous peoples in Tanzania were subject to arbitrary actions and decisions by law enforcement agencies.¹³²² Moreover, the stakeholders communicated that the lack of political representation in the Parliament contributes to increased economic, social and political exclusion and marginalisation of indigenous peoples in the country.¹³²³ They recommended allocating a health budget to rural populations, particularly pastoralists and indigenous peoples, as well as taking account of their right to access water and pastures for their livestock in all investments and programmes carried out in their lands.¹³²⁴ Further, in terms of education, the stakeholders recommended the provision of education services which meet the specific needs of indigenous people.¹³²⁵ Further, the stakeholders noted that the country was yet to recognise indigenous peoples' rights in its laws and policies.¹³²⁶ Nevertheless, the stakeholders emphasised that, according to the criteria established by the United Nations and the ACHPR, communities fitting this description in Tanzania are the Maasai, Datooga-Barbaig, Akie and Hadzabe. In addition, they noted the eviction of indigenous people from their lands for different motives. They proposed resettlement and adequate compensation of evicted indigenous

¹³¹⁹ Human Rights Council: Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: United Republic of Tanzania*, (2011), 5.

¹³²⁰ See Commission for Human Rights and Good Governance, *Individual Report of the Tanzania National Human Rights Institution Submission to the Human Rights Council Universal Periodic Review Mechanism*, (2011).

¹³²¹ Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1: United Republic of Tanzania*, (2011), 2.

¹³²² Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1: United Republic of Tanzania*, 4.

¹³²³ *Id.*, 7.

¹³²⁴ *Id.*, 8.

¹³²⁵ *Id.*, 7.

¹³²⁶ Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1: United Republic of Tanzania* 9.

people and criminalisation of future evictions. Further, the stakeholders proposed legal recognition of indigenous peoples' identity in accordance with the international human rights instruments and standards. On top of this, they suggested the setting up of statutory, permanent and effective government machinery for consultation with organisations working with indigenous peoples. Last but not least, the stakeholders recommended the inclusion of indigenous peoples in all investment decisions involving the national government or national and international corporations.¹³²⁷

In this cycle, Tanzania received a total of 153 recommendations. She fully accepted 107 recommendations,¹³²⁸ partly accepted 13 recommendations and rejected 33 recommendations. All specific recommendations made in relation to indigenous peoples' rights were rejected on the basis that all Tanzanians are indigenous to the country.¹³²⁹ Specifically, the recommendations on indigenous peoples that were rejected required Tanzania to:

- (a) Hold responsible alleged perpetrators of forced evictions and pollution of drinking water in the area around big mines.
- (b) Align policies to ensure access to land and water for pastoralists with the African Union Framework on Pastoralism and to conclude regional agreements to facilitate cross-border pastoralism.
- (c) Recognize the notion of indigenous peoples with a view to effectively protecting their rights.
- (d) Adopt measures to protect and preserve the cultural heritage and traditional way of life of indigenous peoples and undertake effective consultation with indigenous peoples based on free, prior and informed consent.
- (e) Launch a credible investigation of forced evictions and land conflicts and use the result of the investigation to help draft new legislation, which fully takes the right of indigenous peoples into account.
- (f) Promote a legal framework giving certitude in terms of property, in particular with

¹³²⁷ Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1: United Republic of Tanzania*, 2.

¹³²⁸ Human Rights Council, *Report of the Human Rights Council on its Nineteenth Session*, (2013), 189.

¹³²⁹ *Id.*, 190.

regard to land ownership and protection against forced evictions and recognition of the rights of indigenous peoples, pastoralists, hunters and gatherers.

- (g) Set up a statutory consultation mechanism with organizations working on the rights of indigenous peoples to help avoid further conflicts.¹³³⁰

Other rejected recommendations related to bride price, polygamy and sexual minorities. The report stated that interference with beliefs in these respects violates peoples' right to practise their cultural and religious traditions.¹³³¹ CHRAGG ensured incorporation of the 2011 UPR recommendations in the National Human Rights Action Plan (2013-2017).¹³³²

In the second review cycle, the government reported its role in hosting the ACHPR's Working Group of Experts on Indigenous Populations/Communities Mission from January 21 to February 6, 2013. The Mission carried out research and information visits across the country and produced a report on the situation of indigenous peoples in Tanzania which was adopted by the ACHPR in November 2015. Tanzania reported that at the time of her appearance before the UPR, she was still examining and considering the report's recommendations with regard to the rights of indigenous peoples in the country.¹³³³ CHRAGG reported that Tanzania was yet to domestically recognise indigenous peoples living within her territory.¹³³⁴ It noted, however, that some policies which were still in the pipeline were heading in this direction, for instance the Draft TASAF III Indigenous Peoples Policy Framework (IPPF) which had initially listed the Hadzabe and Barbaig as indigenous peoples. CHRAGG urged the government to recognise the existence of indigenous peoples in Tanzania and improve their rights, to ratify the ILO Convention No. 169 on the Rights of Indigenous and Tribal Populations and to protect lands which are historically and traditionally inhabited by indigenous groups in the country.¹³³⁵

Other stakeholders reported incidents involving the arrest, torture and humiliation of indigenous peoples and other pastoralists by the military during what was known as "*Operation*

¹³³⁰ Laltaika, "Indigenous Peoples Rights in Tanzania," 164.

¹³³¹ Human Rights Council, *Report of the Human Rights Council on its Nineteenth Session*, (2013), 189.

¹³³² Interview at CHRAGG in Dar es Salaam on June 2, 2021.

¹³³³ Human Rights Council: Working Group on Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/2: United Republic of Tanzania*, (2016), 5.

¹³³⁴ *Id.*, 3. Also see Commission for Human Rights and Good Governance (CHRAGG), *Individual Report of the Tanzania National Human Rights Institution Submitted to the Human Rights Council under the Universal Periodic Review Mechanism*, (2015), 1.

¹³³⁵ CHRAGG, *Individual Report*, 5.

Tokomeza Ujangili” (Operation Ending Poaching).¹³³⁶ They also reported that indigenous peoples were faced with a high rate of food insecurity and poverty due to the impacts of climate change. Poverty was said to be rampant in the Hanang and Mbulu Districts.¹³³⁷ The stakeholders noted that indigenous peoples were faced with the challenge of landgrabbing for the establishment of protected areas and other economic purposes, and poor land use planning which occasions conflicts between pastoralists and crop cultivators. Further, the stakeholders proposed implementation of the 2011 UPR recommendations which the country had rejected, as the situation of indigenous peoples in Tanzania was yet to improve.¹³³⁸

The UPR Working Group noted the CESCR’s concern about the situation of indigenous peoples in Tanzania, particularly forceful evictions to create room for economic activities and to secure land for the building of military barracks. It noted further that the Committee recommended to the Government of Tanzania to seek the free, prior and informed consent of indigenous peoples before removing them from their ancestral lands, to investigate the forceful evictions that had taken place so far, and to bring the perpetrators of such evictions to justice. It further recommended adequate compensation to the victims of evictions.¹³³⁹ The Working Group also noted the CEDAW Committee’s remark on the situation of indigenous Maasai women in Tanzania whose community rights were deteriorating.¹³⁴⁰

In the third review cycle, the Government’s report mentioned nothing about the implementation of indigenous peoples’ rights.¹³⁴¹ The same was the case with CHRAGG.¹³⁴² However, the report by other stakeholders did point out that the country is yet to ratify the

¹³³⁶ Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 United Republic of Tanzania*, (2016), 5.

¹³³⁷ *Id.*, Human Rights Council: Working Group on Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 United Republic of Tanzania*, (2016), 9.

¹³³⁸ *Id.*, 11.

¹³³⁹ *Id.*, 13.

¹³⁴⁰ *Ibid.*

¹³⁴¹ See Human Rights Council: Working Group on Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: United Republic of Tanzania*, (2021).

¹³⁴² Commission for Human Rights and Good Governance, *Submission for Tanzania Third Cycle Universal Periodic Review*, (2021). Also see Human Rights Council: Working Group on Universal Periodic Review, *Summary of Stakeholders’ Submissions on United Republic of Tanzania: Report of the Office of the United Nations High Commissioner for Human Rights*, (2021), 1-2.

ICCPR and the ILO Indigenous and Tribal Peoples' Convention, 1989.¹³⁴³ They also highlighted that indigenous peoples were suffering from the effects of climate change due to their sole reliance on nature for survival. Further, they reiterated the existence of other challenges that are facing indigenous peoples in Tanzania such as forced evictions to give way to economic activities like tourism, farming and mining. In addition, they addressed the challenge of access to water by indigenous communities.¹³⁴⁴ With regard to these reports, the UPR Working Group noted the continued existence of a lack of safeguards for the rights of indigenous peoples, particularly the Maasai, following the forced evictions as highlighted by the United Nations' four special procedure mandate holders in the communication to the United Republic of Tanzania dated October 11, 2019.¹³⁴⁵

6.4.1.2 CHRAGG's Engagement with the ACHPR

Just like many other Human Rights Institutions in Africa, CHRAGG is affiliated to the ACHPR. It was granted this status at the ACHPR's 35th Ordinary Session held between May 21, 2004 and June 4, 2004, having fulfilled all the requirements stipulated under paragraph 4 of the ACHPR/Res.31 (XXIV) 98, i.e. the Resolution on Granting Observer Status to National Human Rights Institutions in Africa.¹³⁴⁶ This Resolution was later revised by the Niamey Resolution in 2017,¹³⁴⁷ particularly with regard to granting Affiliate Status to NHRIs. According to the 1998 Resolution read together with the revised (Niamey) Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa, 2017, CHRAGG, just like any other NHRI affiliated to the ACHPR, is tasked with the responsibility of assisting the ACHPR in the promotion and protection of human rights at the national level. For instance, NHRIs are required to persuade their governments to ratify human rights treaties such as the ILO (C 169) of 1989. Also, as part of their efforts to promote human rights domestically, NHRIs are supposed to raise public awareness of the ACHPR's structures,

¹³⁴³ Human Rights Council: Working Group on Universal Periodic Review, *Summary of Stakeholders' Submissions on United Republic of Tanzania*, 2.

¹³⁴⁴ Human Rights Council: Working Group on Universal Periodic Review, *Summary of Stakeholders' Submissions on United Republic of Tanzania*, 7.

¹³⁴⁵ Human Rights Council: Working Group on Universal Periodic Review, *Compilation on the United Republic of Tanzania: Report of the Office of the United Nations High Commissioner for Human Rights*, (2021), 9.

¹³⁴⁶ This Resolution was adopted during the ACHPR's 24th Ordinary Session in Banjul, the Gambia which took place from October 22 to 31, 1998.

¹³⁴⁷ Resolution on Granting of the Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa (ACHPR/Res. 370 (LX) 2017).

mandate and activities, including the work of the ACHPR's Working Group on Indigenous Populations/Communities and Minorities in Africa.¹³⁴⁸ NHRIs are entitled to attend and participate in the ACHPR's public meetings and periodically report on their national activities to the Commission.¹³⁴⁹ For example, in 2013, CHRAGG submitted a report of its activities to the ACHPR. Among other things, the Report assessed the implementation of the ACHPR's recommendations in Tanzania and the efforts it had taken to address the challenges encountered. The report captured aspects touching on the rights of communities self-identifying as indigenous peoples in Tanzania.¹³⁵⁰

6.4.1.3 CHRAGG's Domestic Engagement in Indigenous Peoples' Affairs

CHRAGG has implemented a Five Year Strategic Plan 2018/2019-2022/2023 which recognises the increase in demand for protection of indigenous peoples' (special) rights.¹³⁵¹ This Strategic Plan was preceded by promotion activities that engaged CHRAGG and international and local indigenous peoples' non-governmental organisations.

These activities included those carried out by CHRAGG in collaboration with local and international organisations as part of a project co-implemented by CHRAGG and PINGOs Forum, and funded by IWGIA. The title of the project was "Recognition and Implementation of Indigenous Peoples' Rights in Tanzania". The project was implemented in 2014 and 2015. The main objective of this project was to sensitise the public authorities to the need for recognition and implementation of indigenous peoples' rights in the country. Also, the project was specifically intended to lobby for the adoption of a comprehensive policy and legal framework for the formal recognition and implementation of indigenous peoples' rights in Tanzania.¹³⁵² The activities conducted under this project were the National Stakeholders' Workshop, Members of Parliament's Sensitisation Seminar and the Local Government Authorities' Sensitisation Seminar on the existence and recognition of indigenous peoples and their rights.¹³⁵³ The Stakeholders' Workshop took place in Dar es Salaam on September 29 and 30, 2014. It involved representatives from the Government Ministries, Departments and Agencies (MDAs), Local

¹³⁴⁸ ACHPR, "National Human Rights Institutions," accessed March 25, 2024, <https://achpr.au.int/en/network/nhrs>.

¹³⁴⁹ *Ibid.*

¹³⁵⁰ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania, 2014-2015*, (2015), 44.

¹³⁵¹ Commission for Human Rights and Good Governance, *Five Year Strategic Plan 2018/2019-2022/2023*, 15.

¹³⁵² CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 13.

¹³⁵³ *Id.*, 9.

Government Authorities (LGAs), Civil Society Organisations (CSOs), the indigenous peoples' communities and the African Commission on Human and Peoples Rights (ACHPR), as well as academicians, researchers and development partners. At this Workshop, recommendations on the way forward for legal recognition of indigenous peoples' rights in Tanzania were proposed and adopted. The Members of Parliament's Seminar that was held in Dodoma on June 20, 2015 involved seventy Members of Parliament and representatives of selected Parliamentary Committees. Their awareness of the need for recognition of the existence of indigenous peoples' rights was raised. The Local Government Authorities' Seminar which was conducted in Arusha on July 27 and 28, 2015 engaged thirty-six LGA leaders from six Districts inhabited by indigenous peoples in Manyara and Arusha regions. In this seminar, the participants shared the experiences of interaction with communities self-identifying as indigenous peoples in terms of challenges and best practices. They also put forward recommendations to the Central Government and other stakeholders on how to improve the situation of indigenous peoples' rights.¹³⁵⁴ Among these recommendations were that the government should ratify ILO C 169 of 1989 and implement UNDRIP, that indigenous peoples' should be given titles to their communal lands to guarantee equitable benefits of exploitation of natural resources in the country, that affirmative action should be taken to ensure the inclusion of indigenous peoples in decision-making processes including the designation of special seats in the Parliament and other decision-making platforms for the least represented communities such as the Akie and Hadzabe hunter-gatherers, that indigenous peoples' right to development should be facilitated, that funds should be allocated for indigenous peoples' cultural and language preservation programmes, that projects should be introduced and implemented that support the livelihoods and welfare of indigenous peoples, that a National Indigenous Peoples' Week should be launched during which their culture would be showcased and promoted, and that a National Indigenous Peoples' Forum should be established where strategies would be adopted to address the challenges faced by indigenous peoples. Further, it was advised that the government should form a mechanism to inform the Parliament about the situation of communities self-identifying as indigenous peoples. Also, the government should take initiatives to provide public education in schools and for the general public on the existence of communities self-identifying as indigenous peoples and their

¹³⁵⁴ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 13-14.

rights. Public events such as International Human Rights Day were proposed as suitable avenues for offering such public education. Last but not least, it was proposed that a vigorous media campaign should be organized by stakeholders to create a deeper understanding of indigenous peoples and their rights.¹³⁵⁵ As a way forward, it was proposed that the central and local government authorities should take into account the recognition of indigenous peoples and their rights when enacting principal legislation and developing and implementing by-laws. This process should go hand in hand with sensitisation and awareness-raising programmes for government officials at all levels. Also, seasonal dialogue on indigenous peoples' rights with high-profile decision-makers in the government was recommended for deeper awareness of the topic and its importance.

Specifically, CHRAGG was recommended to conduct a study on the government's contradictory positions when it comes to approaching the term indigenous peoples in Tanzania. It is significant that the country voted in favour of UNDRIP while it had an opportunity to abstain. Also, it has implemented some laws, policies and strategies which by implication recognise communities self-identifying as indigenous peoples by various names. Thus, CHRAGG was recommended to advise the government on the necessity to redefine its position in respect of such communities, taking into account the international human rights obligations it has undertaken.¹³⁵⁶ In this regard, a specific law defining and governing indigenous peoples' affairs in Tanzania was proposed to be enacted as has been done in Congo (Brazzaville).¹³⁵⁷ Further, CHRAGG should conduct a study on the issues affecting indigenous peoples and advise the government accordingly. Most importantly, it was proposed that a joint committee should be formed involving the government and stakeholders to follow up on issues of indigenous peoples' affairs in the country.¹³⁵⁸

According to CHRAGG, the implementation of this project was coupled with the following challenges. First, reluctance by the government stakeholders to participate in the project activities. Obviously, this was influenced by the government's attitude towards

¹³⁵⁵ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 59-60.

¹³⁵⁶ *Id.*, 61.

¹³⁵⁷ *Ibid.* The law on promotion and protection of the rights of indigenous peoples in the Republic of Congo is the first law of its kind in Africa and its adoption is a historic development for indigenous peoples in the continent. *Id.*, 104.

¹³⁵⁸ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 104.

recognition of communities self-identifying as indigenous peoples. Second, there were insufficient funds to accommodate all interested stakeholders. The budget utilised to successfully implement the aforementioned activities was overstretched. The project's financial resources were provided by IWGIA and unforeseen costs were not budgeted for. Third, there were delays in obtaining project funds which went through the Treasury. This delayed implementation of some of the project activities. Fourth, due to inadequate information and education on the project's theme, the participants were forced to rely on the presenters' knowledge during the project's activities.¹³⁵⁹

As this project was being implemented, CHRAGG held a side event in Dar es Salaam in collaboration with the International Fund for Agricultural Development (IFAD) on December 17, 2014. The event concerned the existence and rights of indigenous peoples in Tanzania. It was attended by fifty delegates from the Government Ministries, Departments and Agencies (MDAs), Civil Society Organisations and representatives of the indigenous communities. It was an important forum giving the participants an overview of and feedback on the African Indigenous Peoples' Regional Workshop in preparation for the second Global Meeting of the Indigenous Peoples' Forum. CHRAGG also used this opportunity to enlighten the participants about the National Stakeholders' Workshop on the rights of indigenous peoples held in Dar es Salaam on September 15 and 16, 2014. For CHRAGG, this was also an opportunity to advance policy dialogue on indigenous peoples' rights.¹³⁶⁰ In general, the core objectives of this activity were to create awareness of the existence, the situation and the rights of indigenous peoples in Tanzania. It also delved into the aspect of indigenous peoples' food systems and sustainable livelihoods, traditional production systems and biodiversity conservation.¹³⁶¹ It was explained by the IFAD representative that IFAD is a specialised United Nations Agency for agricultural development projects. It mainly targets poor and marginalised groups in rural areas. He said that the role of IFAD in Tanzania was mainly to finance projects implemented by the Government of Tanzania in this area. The rationale behind this was that Tanzania had been a member of the IFAD Governing Council and had actively worked with the Agency for over thirty years, making it a trusted partner. He further elucidated that IFAD's global investments target indigenous peoples.

¹³⁵⁹ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 16.

¹³⁶⁰ CHRAGG and IFAD, *Report of the Side Event on Existence and Rights of Indigenous Peoples in Tanzania, 17th December, 2014*, (2014), 5.

¹³⁶¹ CHRAGG and IFAD, *Report of the Side Event on Existence and Rights of Indigenous Peoples in Tanzania*, 5 and 6.

Hence, this activity in collaboration with CHRAGG gave IFAD an opportunity to better understand the situation of indigenous peoples in the Tanzanian context. As part of this activity, indigenous communities were encouraged to write proposals to IFAD for funding offered by the Agency under its Indigenous Facility. It was explained that the Facility issues funds every year to indigenous communities and organisations to support their designed programmes.¹³⁶²

A year after completion of the “Recognition and Implementation of Indigenous Peoples’ Rights in Tanzania, 2014-2015” project, CHRAGG in collaboration with ALAPA held a Dialogue on Consultation with Indigenous Peoples and Local Communities in Tanzania, on December 2 and 3, 2016 in Dar es Salaam. The dialogue brought together indigenous peoples’ representatives, government officials, local and international experts, United Nations Agencies and international organisations working in the field of indigenous peoples’ rights. This event was funded by the International Work Group on Indigenous Affairs (IWGIA) and the International Fund for Agricultural Development (IFAD).¹³⁶³ In this dialogue, the following key points were highlighted.

Firstly, the Minister assured the stakeholders that the government was open to cooperating with them in consultations regarding the topic of indigenous peoples’ rights in Tanzania. He also insisted that there is the political will in some government ministries, such as the Ministry of Agriculture, Livestock and Fisheries, to address the challenges facing communities self-identifying as indigenous peoples. However, it was underlined that provision of social services to these communities by the Local Government Authorities remains a challenge due to financial constraints. Secondly, it was noted that consultation with indigenous and local communities is essential as it reflects a central tenet of the 2030 Sustainable Development Goals, “leave no one behind”. It was further noted that this was achieved during the Constitutional Review Process in which indigenous peoples and stakeholders working in this field were consulted. This consultation resulted in the recognition and incorporation of minority groups and nature-dependent communities in the Draft Constitution of the United Republic of Tanzania, 2014. It was stressed that such consultation processes should always fit the African context. In particular, the government should embrace a rights-based approach guided by international standards adopted by the country. It was suggested that champions of indigenous

¹³⁶² CHRAGG and IFAD, 14.

¹³⁶³ CHRAGG, *et al.*, *Report of the Dialogue on Consultation for Indigenous Peoples and Local Communities in Tanzania, Held on 2nd-3rd December, 2016*, (2016).

peoples' rights in governmental and non-governmental institutions should be mapped and enabled to steer the agenda in consultations with indigenous and local communities. It was stressed that there should be mutual cooperation between the stakeholders. Thirdly, cultural diversity should be embraced as a pillar of people-centred development. Indigenous peoples' cultural dynamics should be mainstreamed in all government planning systems just as is the case with other themes such as gender. Fourthly, there is a need for a National Action Plan (NAP) for Indigenous Peoples as called for in the Outcome Document of the 2014 World Conference on Indigenous Peoples.¹³⁶⁴ Fifthly, despite the financial challenges facing CHRAGG in fully executing its functions, it is still strategically positioned to oversee the implementation of indigenous peoples' rights in the country through its mandate. It can coordinate stakeholder engagements by soliciting funds from other sources apart from the budget allocated to it by the government. In this respect, it was made clear that technical and financial support from UN Agencies and other development partners is critical in advocating for the rights of indigenous peoples as articulated in various international and regional instruments to which Tanzania is a party.¹³⁶⁵

Apart from the above activities, CHRAGG has developed several other interventions to promote and protect indigenous peoples' rights in the country. These interventions include public inquiries, human rights education and awareness-raising programmes among pastoralist and hunter-gatherer communities, and research. Also, investigations have been carried out into particular thematic human rights issues concerning the Barbaig, Hadzabe, and Maasai communities.¹³⁶⁶ For example, in 2010, CHRAGG conducted an on-site mini-survey in Mbulu and Karatu Districts to assess the human rights situation of hunter-gatherers living in these districts. The survey focused on their social, economic and cultural rights. From the Hadzabe Survival Council, the survey discovered a decline in the child-bearing rate of Hadzabe women. It also discovered a decrease in the number of wild animals for hunting due to the impacts of climate change which had generally caused food insecurity amongst the hunter-gatherers. The survey also established competing interests between hunter-gatherers' sustenance hunting and commercial hunting. Also, health services among the hunter-gatherer communities were

¹³⁶⁴ For more information on this Conference, see United Nations: Department of Economic and Social Affairs (Indigenous Peoples), "World Conference on Indigenous Peoples," accessed March 26, 2024, <https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html>.

¹³⁶⁵ CHRAGG, *et al.*, *Report of the Dialogue on Consultation for Indigenous Peoples*, 2-3.

¹³⁶⁶ *Id.*, 42-43.

insufficient.¹³⁶⁷ This was confirmed during field research across the Lake Eyasi basin carried out in 2021 and 2022.

Further, following various media reports on the forceful eviction of indigenous Maasai from the Loliondo Game Controlled Area in 2009, CHRAGG dispatched a Fact-Finding Mission to Ngorongoro District to investigate the competition between pastoralists' rights and private hunting activities in the disputed area. After the investigation, the Mission came up with the recommendation that the government should halt the eviction of Maasai pastoralists from the Game Controlled Area and allow the Ministry of Lands, Housing and Human Settlements Development and the Ministry of Natural Resources and Tourism to redefine the boundaries of the disputed land to avoid further tensions between the government and the Maasai pastoralists. CHRAGG also advised the government to build dams and boreholes for the Maasai pastoralists in the area to reduce water scarcity and movement of stock in protected areas. In addition, CHRAGG recommended increased public awareness programmes on environmental conservation and the impacts that nomadic pastoralism may have on the environment.¹³⁶⁸ Notably, CHRAGG was also a part of the Committee designated by the government to look into the Loliondo Game Controlled Area saga and advise the government on the way forward.¹³⁶⁹

Additionally, CHRAGG conducted another on-site fact-finding mission on the conflict between the indigenous Maasai community in Kiteto and the administration of the Mkungunero Game Reserve.¹³⁷⁰ After completion of this mission, CHRAGG came up with the recommendation that when protected areas' boundaries are altered, the due process of law should be followed. Also, in cases where livestock are driven into protected areas by pastoralists, arresting the pastoralists should be allowed but not the seizure of livestock. It was reasoned that it is the suspects that are arraigned in Courts to answer charges and that the livestock should be returned to the perpetrators' families who depend on them for survival.¹³⁷¹ CHRAGG insisted that livestock are perishable property that cannot withstand the length of the Court's litigation process, and less so under the custody of the government's veterinary officers who are usually

¹³⁶⁷ CHRAGG, *et al.*, *Report of the Dialogue on Consultation for Indigenous People*, I43.

¹³⁶⁸ *Ibid.*

¹³⁶⁹ An interview at CHRAGG (Dar es Salaam Office) was conducted in June 2, 2021.

¹³⁷⁰ Mkungunero Game Reserve is a breeding site, water catchment area and wildlife corridor supporting the Manyara-Tarangire ecosystem.

¹³⁷¹ An interview at CHRAGG (Dar es Salaam Office) was conducted on June 2, 2021.

few in number.¹³⁷² For instance, while probing into Lenina’s case, CHRAGG found that the Mkungunero Game Reserve had no veterinary officers of its own. It was relying on the ward’s veterinary officer who had the entire ward to attend to in addition to the game reserve. The successful outcome of this fact-finding mission was the return of ninety-five cattle and one calf to Lenina following the Court’s order whose execution was being unduly delayed.¹³⁷³

6.4.2 The Law Reform Commission of Tanzania

The Law Reform Commission of Tanzania (LRC) was established under section 3 of the Law Reform Commission of Tanzania Act, 1980.¹³⁷⁴ The Commission is tasked with reviewing laws in the United Republic of Tanzania with a view to proposing reforms.¹³⁷⁵ The Commission may on its own motion or following external directives from a competent authority launch a review of a law or branch of laws to align them with the country’s current circumstances, cure the anomalies in such laws or propose an adoption of new or more effective legislation for proper administration of justice.¹³⁷⁶ In performing these functions, the law establishing the Commission mandates it to seek collaborations and conduct consultations inside and outside the country to obtain necessary information and draw lessons from other jurisdictions.¹³⁷⁷ In this regard, research at the LRC was conducted to establish whether any initiatives have been taken by the Commission to influence the legal recognition of indigenous peoples and the protection of their rights. Two interviews were conducted at the Commission’s Legal Research and Law Reform Departments. The findings obtained from this institution indicate that, although the LRC has conducted many studies and consultations which have influenced several law reforms, none of these activities touched on the affairs of indigenous peoples in Tanzania. One of the reasons for this was said to be the government’s refusal to apply the term “indigenous peoples” to just one part of the Tanzanian population.¹³⁷⁸ Also, according to experience based on the Commission’s activities, the respondents were of the view that, although the law has a role to play in addressing the challenges facing society, it is not a panacea for all problems in the country. It was explained

¹³⁷² An interview at CHRAGG (Dar es Salaam Office) was conducted on June 2, 2021.

¹³⁷³ *Ibid.*

¹³⁷⁴ Act No. 11 of 1980 (as amended), Cap. 171 R.E. 2002.

¹³⁷⁵ Section 4 (1), Law Reform Commission of Tanzania Act.

¹³⁷⁶ Section 4 (2) (a) and (b), *id.*

¹³⁷⁷ Section 4 (a) and (b), *id.*

¹³⁷⁸ Interview with an Assistant Secretary - Law Reform Department conducted at the Law Reform Commission of Tanzania Headquarters in Dodoma on August 13, 2021.

that, although the Commission’s work has influenced many legislative reforms in Tanzania,¹³⁷⁹ most of the problems addressed have continued to exist. A vivid example given was the Sexual Offences Special Provisions Act, 1998 which amended the Penal Code, Cap. 16, Revised Edition 2022. It was said that no matter how strict this law is, the number of sexual offences in the country remain overwhelming. Therefore, it was of the respondents’ opinion that other initiatives such as thematic public awareness activities, proper policy implementation, political will and sufficient funds allocated to specific programmes would help to solve the problems facing certain groups in the national population instead of relying on law reforms alone. The respondents were of the view that communities’ self-identifying as indigenous peoples in Tanzania can be assimilated into the national community and still maintain their own cultures. This would enable them to enjoy the rights, incentives and services extended to the national population without any impediment.¹³⁸⁰

6.4.3 Vice President’s Office (Environment Division)

The Environment Division under the Vice President’s Office is a government department charged with environmental management in the country. It regulates policy, provides expert opinions and services and coordinates environmental programmes to ensure environmental conservation, development and sustainability. It also oversees implementation of the Environmental Policy 2012 and the Environmental Management Act, 2004. It consists of the Biodiversity Conservation Section, the Environmental Management of Pollution Section and the Environmental Assessment and Climate Change Management Section.¹³⁸¹ This Division implements international and domestic environmental obligations which have implications for the rights of communities self-identifying as indigenous peoples in Tanzania. For instance, at the international level, the Division has been submitting National Biodiversity Strategy and Action Plans (NBAPs) to the Convention on Biological Diversity (CBD) Secretariat as per Article 6 of the CBD. The country’s first National Biodiversity Strategy and Action Plan (NBSAP) was formulated and submitted in 2001 while the second one was submitted in 2015. As already indicated in the foregoing discussion, the 2015 NBSAP has a bearing on indigenous peoples’

¹³⁷⁹ It was revealed in the interviews that the LRC had influenced the reform of 459 laws by August 2021.

¹³⁸⁰ Interview with the Senior Legal Officer (Legal Research Department) at the Law Reform Commission of Tanzania Headquarters in Dodoma conducted on August 13, 2021.

¹³⁸¹ Vice President’s Office, “Environment Division,” <https://www.vpo.go.tz/pages/environment-division>, accessed Marc 27, 2024.

rights. The Division also submits National Reports on the implementation of the CBD and its Protocols to the same Secretariat. For instance, in its Fifth State Report, the Environment Division reported to the CBD Secretariat that climate change continues imposing challenges on the pastoral communities in Tanzania. It further indicated that the impacts of climate change force such communities to migrate to virgin lands and forests to feed their stock, leading to encroachment on biodiversity reserves.¹³⁸² This position was reiterated by one of the respondents from this Division during the field research for this study.¹³⁸³ Interviews at the Environment Division revealed that the Government of Tanzania has been implementing projects to mitigate the effects of nomadic pastoralism on the environment. One of the most recent projects was titled “Reversing Land Degradation Trend to Increase Food Security in Semi-Arid Areas in Tanzania”. This project was implemented by the VPO-Environment Division in five districts in Tanzania, i.e. Magu, Nzega, Kondoia and Mkalama in Mainland Tanzania and Micheweni in Tanzania Zanzibar. Mkalama and Kondoia Districts are seasonally inhabited by Hadzabe, Datooga (Barbaig) and Maasai pastoralists. The project has been assisting the pastoralists and the hunter-gatherer communities to participate in land use planning and forests and rangelands conservation programmes that enable them to secure and sustainably support their livelihoods. For example, under this project, the Hadzabe in Mkalama have been able to secure 1,200 acres of land for dwelling, hunting and gathering activities. The conservation activities have enabled animals to return and feed near the Hadzabe’s habitats, giving them greater chances of hunting success.¹³⁸⁴ Similarly, pastoralists have benefited from activities to rejuvenate, conserve and expand rangelands. For instance, they have been provided with seeds of drought-resistant grass to plant in rangelands to conserve the soil and have secure pastures in dry seasons. In addition, both hunter-gatherers and pastoralists have been trained to diversify their economies to mitigate the problem of food insecurity which they face as one of the impacts of climate change.¹³⁸⁵ Another project implemented by this Division is titled “Climate Change Resilience through Ecosystem-Based Adaptation in Rural Areas (EBARR)”. It assists pastoralists in

¹³⁸² United Republic of Tanzania: Vice President’s Office, *Fifth National Report on the Implementation of the Convention on Biological Diversity*, (2014), 30.

¹³⁸³ Interview with the Environment Officer, Vice President’s Office- Environment Division conducted in Dodoma on August 16, 2021.

¹³⁸⁴ Interview with the National Project Coordinator at the VPO-Environment Division in Dodoma conducted on August 16, 2021.

¹³⁸⁵ Interview with the National Project Coordinator at the VPO-Environment Division in Dodoma conducted on August 16, 2021.

becoming climate change resilient by overcoming impacts of climate change such as prolonged drought, floods, and diseases which affect livestock. At the time of conducting this research, the project was being implemented in Same, Mwanga, Simanjiro, Kishapu, Mpwapwa and Mvomero Districts in the Kilimanjaro, Arusha, Shinyanga, Dodoma and Morogoro regions respectively. The project has been training the pastoralists in production diversification through engagement in income-generating activities such as poultry keeping, gardening and tailoring. It has also widened access to clean and safe water for the pastoralists by drilling wells and building water pools in their vicinities.

At the time when field research for this study was conducted in Tanzania, the VPO Environment Division was implementing the REDD+ project titled “Strategic Support to Tanzania to Become REDD+ Ready by 2022” which aimed at fast-tracking implementation of the REDD+ Strategy and Action Plan that had been developed with the support of the Norwegian Government. As already mentioned above, the REDD+ Strategy recognises the existence of indigenous communities in Tanzania and their role as stakeholders in reducing emissions caused by deforestation and forest degradation.

Since interviews at the Vice President’s Office were conducted in 2021, follow-ups on implementation of the project have revealed the Division’s enhanced capacity to access funds for climate change projects and monitor REDD+ strategies and programmes.

6.4.4 The National Bureau of Statistics

The National Bureau of Statistics is an autonomous government entity in Tanzania established by the Statistics Act of 2015.¹³⁸⁶ It is mandated to provide official statistics to the Government, the public and the business community. It also coordinates the National Statistical System to ensure the quality of official statistics.¹³⁸⁷ The Decennial Population and Housing Census is also under the custody of the Bureau. Research was conducted at the NBS to learn about the Bureau’s initiatives to ensure indigenous peoples are captured in every decennial national census. Interviews were conducted with the Directorate of Population Census and Social Statistics.¹³⁸⁸ One of the major findings from the Bureau was that the census in Tanzania does not include the criterion of ethnic groups. It follows the hierarchy of regions, districts, wards, divisions, streets

¹³⁸⁶ Act No. 9 of 2015, Cap. 351 Revised Edition, 2019.

¹³⁸⁷ National Bureau of Statistics, “General Information,” accessed March 29, 2024, <https://www.nbs.go.tz/index.php/en/about-us/general-information>.

¹³⁸⁸ Interviews at the National Bureau of Statistics were conducted in Dodoma on August 12, 2021.

or villages and households. Just like other citizens, this is how members of communities self-identifying as indigenous peoples in Tanzania are expected to be accounted for in the process. Hence, it was not possible to obtain the exact number of indigenous peoples in Tanzania from the Bureau to determine the aggregate percentage they make as a national sub-group. The reason for this is the obvious one that all communities in Tanzania are regarded as indigenous; hence, equal treatment is extended to all citizens including when it comes to establishing criteria for conducting demographic surveys. However, the Government through the Ministry of Natural Resources and Tourism has on various occasions employed the expertise of the NBS to conduct a special census at the Ngorongoro Conservation Area to establish the number of residents within the Area (substantially the Maasai pastoralists) and their livestock. As to the challenges faced by the NBS in obtaining statistics from communities self-identifying as indigenous peoples, it was revealed by the Bureau that, since the nature of these communities is nomadic, members of their village administration inform them in advance of the date and time when the census would be conducted to ensure their participation. Despite this strategy, many members of these communities do not participate in the exercise. According to the NBS, other strategies, such as representative sampling and interviewing those who show up, are adopted to obtain details of the missing population. However, the statistics thus obtained are not reliable. Thus, the Bureau usually sticks to the statistics of those physically engaged. For communities like the Hadzabe, the biggest incentive that has been used to attract their presence in the census is the slaughter of game such as buffalo near the areas where they usually camp and apportioning the meat amongst them while conducting the census.¹³⁸⁹ Field research conducted at the Eyasi Basin has shown that the most important daily activity for the Hadzabe is searching for food to survive through hunting and gathering. Hence, providing them with food in designated areas during the census guarantees their participation in the process. Although this is not a totally reliable strategy to obtain accurate statistics, the method has proven to be more useful than nothing at all.¹³⁹⁰ The inclusion of indigenous peoples in the national census assists the government with understanding their distribution across the country and deciding the geographical allocation of social services,

¹³⁸⁹ Interview with a Statistics Officer at NBS on 12 August, 2021.

¹³⁹⁰ *Ibid.*

such as water supply, schools and hospitals. However, the challenge remains the remoteness of some of these communities' habitats.¹³⁹¹

6.4.5 Tanzania Social Action Fund

As a strategy for alleviating poverty in households living below the poverty line, the Government of Tanzania launched the the Tanzania Social Action Fund (TASAF) in 2008.¹³⁹² Having conducted a pilot study, the government embarked on a Productive Social Safety Net (PSSN) strategy as part of its Social Protection Framework. The strategy's specific objective was to support the most vulnerable and poorest households through cash transfer and establishment of income-generating activities to mitigate their vulnerability and overcome the long-term consequences of extreme poverty.¹³⁹³ This strategy has been implemented by TASAF in phases, i.e. PSSN I and II, with financial support from the World Bank, among other development partners. In the implementation of TASAF's projects, the World Bank's Indigenous Peoples' Policy OP 4.10 is usually triggered to ensure the safeguarding of indigenous peoples' rights in areas inhabited by communities self-identifying as indigenous peoples where TASAF projects are intended to be implemented. In the third TASAF implementation phase (TASAF III)¹³⁹⁴ which was scheduled for a ten-year period from 2012 to 2022, a specific indigenous peoples' policy framework was developed to guide the project's interventions. This was done to ensure that all the intended development activities under TASAF fully respected the cultures, dignity, economies and rights of indigenous peoples.¹³⁹⁵ This policy framework was called the TASAF Indigenous Peoples' Policy Framework (IPPF). For this study, only a draft of the Framework could be accessed. In this document, TASAF admits that Tanzania does not recognise indigenous peoples. However, it does acknowledge the ACHPR's Report of the Working Group of Experts on Indigenous Populations/Communities which recognises the presence of indigenous communities in Tanzania following the criteria that it has developed to be adopted in the African

¹³⁹¹ Interview with a Statistics Officer at NBS on 12 August, 2021.

¹³⁹² United Republic of Tanzania: President's Office, "Tanzania Social Action Fund: History/Background," accessed March, 29, 2024, <https://www.tasaf.go.tz/pages/test>.

¹³⁹³ Interview with the TASAF Research and Development Specialist conducted in Dar es Salaam on August 20, 2021.

¹³⁹⁴ The phase aimed at meeting the needs of the poorest households by guaranteeing food security and livelihood sustainability.

¹³⁹⁵ Interview with the TASAF Research and Development Specialist.

context.¹³⁹⁶ According to this report, the Indigenous Peoples' Policy Framework (IPPF) in its draft state recognises the Hadzabe and the Barbaig as some of the indigenous peoples in Tanzania.¹³⁹⁷ During a field visit to TASAF, it was explained that TASAF was still in the process of identifying other communities of this kind in their mapped project areas.¹³⁹⁸ Follow-ups with TASAF to establish whether the IPPF could successfully be implemented under the TASAF III were in vain. However, desk research has revealed that the government adopted another closely related framework known as the Vulnerable Groups Planning Framework (VGPF) of 2019 to serve more or less the same purpose as the IPPF in relation to indigenous groups. The implication of the VGPF is that, under the TASAF arrangement, communities self-identifying as indigenous peoples are among the vulnerable groups in the country. The VGPF ensures free, prior and informed consent to TASAF's project activities in extremely poor and vulnerable communities that can barely access social services, that live below the poverty line and that do not have the same decision-making powers as members of the mainstream society. It also seeks to benefit communities which are geographically isolated and not integrated in the mainstream society.¹³⁹⁹ These are clearly characteristics of communities self-identifying as indigenous peoples in Tanzania.

6.4.6 Tanzania Railways Corporation

Tanzania Railways Corporation is a state-owned entity mandated to provide effective railway transportation services, and manage and develop railway infrastructures in Mainland Tanzania. It was established by the Railways Act, Act No. 10 of 2017.¹⁴⁰⁰ At the time of writing this thesis, the Corporation was implementing railway development and construction projects which pass through some of the districts inhabited by indigenous peoples. These include the Tanzania Intermodal and Rail Development Project (TIRP II) funded by the World Bank and the Standard Gauge Railway (SGR) project funded by multiple sources, i.e. the government as well as international banks. As the TIRP II project was funded by the World Bank, its implementation was tied to adherence to established safeguards for indigenous peoples. For instance, the

¹³⁹⁶ United Republic of Tanzania, (Draft) TASAF III Indigenous Peoples Policy Framework, (2012), 4-5.

¹³⁹⁷ Interview with the TASAF Research and Development Specialist.

¹³⁹⁸ *Ibid.*

¹³⁹⁹ The United Republic Of Tanzania, Presiden't Office: Tanzania Social Action Fund, Productive Social Safety Net II (PSSN II): Vulnerable Groups Planning Framework, (2019), 8.

¹⁴⁰⁰ Tanzania Railways Corporation, "Overview," accessed March 30, 2024, <https://www.trc.co.tz/pages/implimentation-of-the-activities>.

project's Environmental and Social Impacts Assessment (ESIA) took into account the World Bank's Environmental and Social Standards (ESS), particularly ESS7 which, among other things, seeks to protect the rights of indigenous peoples in the implementation of development projects. This Standard aims at minimising or avoiding the impacts of such projects on indigenous peoples. The ESIA for TIRP II revealed that the WB's ESS7 applied to this project, because areas in which the project was going to be implemented are inhabited by communities self-identifying as indigenous peoples, i.e. Maasai, Mang'ati (Datooga), Parakuyo and Akie. The areas are Itigi, Kayombo, Manyoni and Ngerengere, to mention just a few.¹⁴⁰¹ The ESIA elaborated that the project has the potential to facilitate the migration of people from other parts of the country to where the indigenous peoples live, something that may alter their distinct way of life.¹⁴⁰² Under this project, a Vulnerable Groups Planning Framework (VGPF) was developed as part and parcel of the project's Environment and Social Commitment Plan.¹⁴⁰³ The objective of this VGPF is to oversee that implementation of the TIRP II project takes into account the rights of indigenous peoples living along the project's corridor.¹⁴⁰⁴ As the World Bank's ESS7 allows flexibility in the terminology used to refer to the communities self-identifying as indigenous peoples according to each country's local context, the VGPF developed in the TIRP II project refers to indigenous communities in Tanzania as vulnerable groups. It specifically notes that vulnerable groups in the TIRP project are referred to as indigenous peoples under paragraph 8 of the ESS7.¹⁴⁰⁵ This VGPF anticipated several impacts on the indigenous peoples living in the regions traversed by the project. The main impact of the project on pastoralist communities is interference with livestock corridors.¹⁴⁰⁶

As to the SGR project, the question of indigenous peoples' rights has also surfaced given the nature of the funders the project has attracted. The Environmental and Social Impact Statement (ESIS) made in relation to the Makutupora to Isaka Standard Gauge Railway revealed

¹⁴⁰¹ Tanzania Railways Corporation, *Report of the Consultancy Services For Undertaking The Environmental And Social Impact Assessment for the Proposed Second Tanzania Intermodal and Rail Development Project (TIRP 2)*, (2023), 359.

¹⁴⁰² *Ibid.*

¹⁴⁰³ United Republic of Tanzania: Ministry of Works and Transport-TRC, Environmental and Social Commitment Plan (ESCP) for the Second Tanzania Intermodal and Rail Development Project (TIRP II) (Project Id: P176682), (2023), 10.

¹⁴⁰⁴ United Republic of Tanzania: Ministry of Works and Transport - TRC, Draft Vulnerable Groups Planning Framework (VGPF), (2023), 7.

¹⁴⁰⁵ *Ibid.*

¹⁴⁰⁶ United Republic of Tanzania: Ministry of Works and Transport - TRC, Draft Vulnerable Groups Planning Framework, 19-20.

that the Maasai, Barbaig and Datooga (Taturu) communities living in Manyoni and Itigi Districts were likely to be affected by the construction and operation of this railway segment.¹⁴⁰⁷ The ESIA was conducted with reference to Performance Standard 7 of the IFC, among other standards, and Principles 2 to 5 of the Equator Principles of Financial Institutions (EPFI) which collectively seek to ensure adherence to the rights of indigenous peoples while implementing projects funded by international financial institutions.¹⁴⁰⁸ In particular, it was found that this project was likely to affect indigenous pastoralists' access to the Mgonandele water well in Makutupora village, which provides water for both livestock and human consumption. The railway was mapped to lie immediately adjacent to the well, which would cause an impediment to people and livestock who would have to cross it to access the well.¹⁴⁰⁹ This is a direct violation of peoples' right to dispose of natural resources. Also, the ESIS indicated that there was a possibility that the project might affect medicinal plants, such as the "Sabida Tree" used by the Datooga for medicine and cleansing of cursed persons.¹⁴¹⁰ Additionally, one of the Datooga ritual trees which serves as a meeting place for the Datooga was identified as being likely to be affected by the intended Itigi Train Station, projected to be built where the tree is located.¹⁴¹¹ Further, this Station would affect a sacred site (Bung'eda) of the Datooga where four of their former Chiefs' were buried. Traditional prayers for purposes of rain-making and reconciliation have been carried out here by the Datooga for many years.¹⁴¹² Thus, it was clear that IFC Performance Standard 7 and EPFI 5, which emphasise the need for indigenous peoples' free, prior and informed consent in project-related matters, were relevant in situations like these, where indigenous peoples' collective rights are found to be at stake.

This ESIA helped the TRC and the Contractor with the development of culturally appropriate mitigation strategies for impacts likely to be caused by the intended project. In the implementation of the SGR project, the government was bound to consider indigenous peoples' interests. This is because the project was set to be co-financed by international financial institutions which are guided by the international standards for project financing. Had the project

¹⁴⁰⁷ United Republic of Tanzania: Ministry of Works and Transport-TRC, Environmental and Social Impact Statement for the Proposed Makutupora to Isaka Standard Gauge Railway in – 533 KM (SGR – LOT 3 & 4) in Singida and Tabora Regions, Tanzania, (2023), 345.

¹⁴⁰⁸ *Id.*, 346.

¹⁴⁰⁹ *Id.*, 354.

¹⁴¹⁰ *Id.*, 353.

¹⁴¹¹ *Id.*, 358.

¹⁴¹² *Id.*, 496.

been solely funded by the government, the situation would have been different, given the government's well-known position regarding communities self-identifying as indigenous peoples. Other segments of the intended SGR project, for example from Mwanza to Isaka, have not been found to be traversing districts hosting communities self-identifying as indigenous peoples. The ESIA conducted in relation to this segment states that none of the communities in this area meets the characteristics of indigenous peoples listed under ESS 7.¹⁴¹³

6.4.7 Tanzania Investment Centre

The Tanzania Investment Centre is a one-stop centre for investment facilitation and promotion. One of its missions is to advise the government on investment policy so as to have a sustainable investment climate in the country.¹⁴¹⁴ A research visit was made to this institution to learn about its initiatives to implement the country's human rights obligations in respect of communities self-identifying as indigenous peoples and their role in creating an attractive and conducive investment environment in the country. It is not an unfamiliar situation in Tanzania that communities self-identifying as indigenous peoples clash with local and external investors. A good example of this is the *Mondorois Village Council and 2 Others versus Tanzania Breweries Limited and 4 Others Case* (discussed in chapter five). Here, the Maasai indigenous peoples in Loliondo were involved in a land dispute with Tanzania Breweries Limited and later with Thomson Safaris Limited. The information obtained from TIC was that the Centre subscribes to the government's position when it comes to recognition of communities self-identifying as indigenous peoples in Tanzania.¹⁴¹⁵ It treats all citizens equally. The Centre takes note of conflicts involving investors and local communities in different parts of the country. However, it is not the task of the TIC to resolve these conflicts, but that of the relevant authorities. The TIC does not have any specific programme dedicated to indigenous peoples' rights. Rather, it dedicates its efforts to promoting and facilitating investment opportunities in the country.¹⁴¹⁶

¹⁴¹³United Republic of Tanzania: Ministry of Works and Transport -TRC, Environmental and Social Impact Statement for the Proposed Standard Gauge Railway SGR – LOT 5 (Mwanza to Isaka) in Mwanza, Simiyu and Shinyanga Regions, Tanzania, (2022), 132.

¹⁴¹⁴United Republic of Tanzania: Tanzania Investment Centre, "Mission and Vision," accessed March 30, 2024.

¹⁴¹⁵A virtual interview with an Acting Investment Facilitation Manager conducted on July 15, 2021.

¹⁴¹⁶*Ibid.*

6.4.8 The Ngorongoro Conservation Area Authority

The Ngorongoro Conservation Area Act, 1975 which establishes the Ngorongoro Conservation Area Authority tasks the Authority with safeguarding and promoting the interests of Maasai citizens within the Conservation Area.¹⁴¹⁷ This is in addition to its main functions which are the promotion and facilitation of tourism and the conservation of natural resources in the property.¹⁴¹⁸ Through its Community Development Department, the NCAA has developed various programmes to meet the needs of the Maasai community living within the Conservation Area. For this study, visits were made to the Authority to establish the status quo of these programmes and how far the exercise is in alignment with the relevant provisions for collective rights provided for under the Banjul Charter. The interviews were conducted immediately after the Authority had issued notice of relocation of Maasai residents from the property. Thus, at the outset, the objectives of conducting research at the NCAA seemed summarily defeated by this public notice. Nevertheless, it was decided to conduct interviews at the Authority to establish the milestones that it had achieved so far in fulfilling its function of safeguarding the interests of the Maasai in the property. It was also vital to establish the challenges that hindered implementation of this obligation by the Authority (if any), and how it had worked to eliminate them. First and foremost, the Deputy Conservator - Community Development started by addressing the relocation process. He was of the opinion that relocating residents from the Area is one way in which the government protects the rights of the Maasai to development and free disposal of their wealth and natural resources.¹⁴¹⁹ He believed that outside the property the Maasai have greater freedom to practise unrestricted grazing of livestock and cultivation of the land for sustenance. Also, outside the NCA the Maasai have unlimited opportunities for diversifying their economic activities. These opportunities contribute to fulfilling their right to development. He also added that life outside the NCA is safer for the Maasai than their life in the property under the Multiple Land Use Model. He elaborated on this point that there have been recurring incidents of loss of Maasai lives due to attacks by wild animals. A very recent example given was that about a week before this interview was conducted two young Maasai boys were attacked by lions while searching for their missing livestock. Additionally, it is in the NCAA's records that between 2015 and 2021, a total of 49 deaths were caused by wildlife attacks. It was therefore the NCAA's

¹⁴¹⁷ Section 6 (c) of the Ngorongoro Conservation Area Act, 1975.

¹⁴¹⁸ Section 6 (a) and (b), *id.*

¹⁴¹⁹ Interview with Deputy Conservator-Community Development at NCAA held on August 9, 2021.

opinion that relocating the Maasai from the NCA was direct protection by the government of their right to peace and security as a community.¹⁴²⁰

As to the social services, the NCAA through its Community Development Department has worked closely with the Ngorongoro Pastoral Council (NPC) to ensure the services intended for the Maasai community within the Conservation Area reach them in an effective and coordinated manner.¹⁴²¹ The NPC, which is made up of both local government and Maasai community leaders, was established to protect the interests of the Maasai community living in the NCA. It was also established to create a platform for deliberating on the NCA's Maasai concerns in relation to the conservation and development of the property. It was explained in one of the interviews that the NCAA in collaboration with the NPC has over the years delivered veterinary services for the livestock of Maasai resident in the NCA. It has also been ensuring a supply of food to the Maasai households to relieve them of food insecurity, since they cannot cultivate crops on the property. The NCAA has been supplying a total of 3,006 tonnes of maize per year to the Maasai residents in the NCA up to when the fifth government regime came into power. Then a new initiative facilitating cultivation outside the property was launched. In the pilot phase of this initiative, it was found that twenty-three households could produce four hundred kilogrammes of maize annually.¹⁴²² Another strategy was to supply food at a reduced price to the Maasai residents in the property. The traditional source of the Maasai's diet is their own livestock, but they have in addition been provided with food such as maize and beans by the NCAA to supplement their diet, given the recurrent episodes of food insecurity within the property. This is due to the severe reduction in number of livestock through the impacts of climate change.¹⁴²³ In addition, the NCAA has built water supply infrastructures for both the Maasai residents and their livestock. However, it was stated that some of the residents have been obstructing the water supply infrastructure by poking holes in the water pipes to easily access water from where they are.¹⁴²⁴ Moreover, the NCAA has supported the education of Maasai children from kindergarten to university level. It has also provided them with vocational training

¹⁴²⁰ Interview with Deputy Conservator-Community Development at NCAA held on August 9, 2021.

¹⁴²¹ The Ngorongoro Pastoral Council was formed as a result of the *Ad Hoc* Ministerial Commission's work on proposing the strategies for local community's participation in the management of the NCA. For more details about the Ngorongoro Pastoral Council, See NCAA, "Pastoral Council," accessed July, 17, 2022, <https://www.ncaa.go.tz/pages/pastoral-council>. Also see Shivji and Kapinga, *Maasai Rights in Ngorongoro*, 57.

¹⁴²² Interview with the the Manager-Community Development Department at the NCAA held on August 9, 2021.

¹⁴²³ *Ibid.*

¹⁴²⁴ *Ibid.*

programmes like tailoring, carpentry and tour guiding. Despite this initiative, it was pointed out that the level of illiteracy in the property was still very high. This is due to the fact that children of school age are also at the right age for grazing livestock in accordance with Maasai customs. The idea of introducing boarding schools in the Area was met with solid resistance.¹⁴²⁵

The NCAA has been providing health care to the Maasai residents in the form of a health centre, maternity mobile clinics, ambulance services and health insurance. Additionally, the NCAA has facilitated the Maasai residents to diversify their economy by enabling their participation in ecotourism projects, operation of campsites and Maasai cultural *bomas*. It has also introduced them to poultry and bee-keeping projects. These activities have been earning the Maasai residents an income. Last but not least, the NCAA has ensured the functioning of Maasai markets in the property famously known as *minada*. In these markets, the residents get to sell various products and buy their necessities. With all that has been done by the NCAA over the years, it was argued by the respondents at the NCAA that the Authority, on behalf of the government, has always strived to guarantee the Maasai's right to development from the perspective of modern society. It has also accorded them an opportunity to attain the same right from their own standpoint.

Finally, the NCAA acknowledged that the assistance provided by the Authority to the residents has to a great extent contributed to a rapid population growth in the property. To balance the interests of the Multiple Land Use Model in the Area, the government has resorted to implementation of a voluntary relocation strategy to facilitate relocation of the Maasai residents to designated areas outside the property, such as Msomera village in Handeni District, Tanga region. Incentives provided by the government to those who are voluntarily relocating from the property have been detailed in the previous chapter.

6.4.9 The Ministry of Livestock and Fisheries

Research was conducted at this ministry to establish whether any initiatives had been adopted to support the pastoral livelihood of communities self-identifying as indigenous peoples in Tanzania. In particular, interviews were conducted in the Livestock Sector. This Sector maintained the position that its service delivery aims at meeting the needs of all pastoralists in the country, regardless of what community the pastoralists come from. Thus, pastoralist

¹⁴²⁵ Interview with the the Manager-Community Development Department at the NCAA held on August 9, 2021.

communities self-identifying as indigenous peoples, like the Maasai, Barbaig and Iplarakuiyo, benefit from the Ministries' programmes in the same way as other pastoralist groups, like the Sukuma. Nevertheless, the Ministry acknowledges the fact that the needs of pastoralist communities across the country differ due to various reasons, such as the topography and climate of the given area, population distribution and availability of livestock services and infrastructures, to mention but a few.¹⁴²⁶

Interviews conducted in the Livestock Sector involved the Grazing Land and Animal Feed Resources Development Division through which initiatives such as demarcation and development of rangelands have been implemented in favour of pastoralists. It was stated that a total of 3,060,562.27 hectares of rangeland had been demarcated countrywide for livestock grazing. The target was to allocate 6,000,000.00 hectares for the same purpose by the year 2025. It was explained that the demarcation of rangelands is vital to avoid land conflicts between pastoralists and other land users. Also, the Ministry has constructed and rehabilitated water wells and pools for both the pastoralists and their livestock, to save them from walking long distances in search of water. It was emphasised that moving livestock over long distances is detrimental to their well-being. By August 2021, a total number of 1,384 water pools and 103 water wells had been constructed by the Ministry for the benefit of pastoralists.¹⁴²⁷ As to rangelands development, it was stated that the Ministry has been providing pastoralists with grass seeds to plant in rangelands to grow pastures for the livestock. Two seed farms have been established, one in Vikuge, Kongowe, Kibaha District, Pwani Region, and another one in Langwira, Mbarali District, Mbeya Region. Here, seeds are sold to pastoralists at low prices and sometimes offered for free in community awareness programmes.¹⁴²⁸ Further, experts from this Division inspect and offer technical support to pastoralists on how to conserve grazing lands.¹⁴²⁹ The Division faces the following challenges in its efforts to support pastoralists' livelihoods. First, poor record keeping by traditional pastoralists who do not keep records of their livestock. Some of them, like the Maasai, consider counting their cattle as taboo. Also, some keep extremely large herds of cattle for prestige. What matters to them is the quantity and not the quality of the animals they

¹⁴²⁶ Interview with the Director of Research, Training and Extension, Ministry of Livestock and Fisheries held in Dodoma on August 16, 2021.

¹⁴²⁷ Interview with the Civil Engineer at the Ministry of Livestock and Fisheries conducted in Dodoma on August 12, 2021.

¹⁴²⁸ Interview with the Director of Research, Training and Extension, Ministry of Livestock and Fisheries.

¹⁴²⁹ *Ibid.*

keep. This means they are slow to adapt to contemporary methods of managing and developing rangelands. It creates difficulty in balancing the number of livestock with the allocated grazing land.¹⁴³⁰ Second, mismanagement of the water infrastructure constructed for the pastoralists and their livestock. This leads to the use of livestock water infrastructure by humans and vice versa. Also, repairing damaged water infrastructure takes a long time so that it is rendered useless to the livestock.¹⁴³¹

Another interview was conducted at the Livestock Resources and Training Services Division. It was found out that initiatives like capacity building and community awareness programmes on effective pastoralism have been offered by the Division to pastoralists across the country. The community awareness programmes covered topics such as how to combine indigenous and modern knowledge to improve the health of livestock, manage dairy products, curb livestock diseases, or access and develop rangelands. Further, it was established that the applicable laws and regulations in respect of livestock management and ways to diversify economic activities such as poultry keeping had also been taught to the pastoralists by this Division.¹⁴³² At the time of conducting this research, these programmes had been implemented in Simanjiro, Mvomero, Monduli and Mbarali Districts which are typically inhabited by pastoralists self-identifying as indigenous peoples in Tanzania. In addition, sample livestock farms have been established in various locations in the country to give pastoralists practical training on rangeland management.¹⁴³³

Further, an interview was conducted in the Veterinary Services Division where it was learnt that the Ministry assists pastoralists with controlling, managing and eradicating transboundary, vector and infectious diseases by providing not less than 15,000 litres of veterinary medicine to pastoralists annually. This service is provided by the Ministry at least twice a year. In connection with this, the Division facilitates the construction of cattle dips for livestock treatment and disease prevention. At the time of the interview in this Division, a total of 162 cattle dips had been constructed across the country, particularly in Manyara, Arusha, Morogoro and Lindi regions which are inhabited by pastoralists self-identifying as indigenous peoples. The construction of cattle dips in these regions was done in three phases. At the time of

¹⁴³⁰ Interview with the Director of Research, Training and Extension, Ministry of Livestock and Fisheries.

¹⁴³¹ Interview with the Civil Engineer at the Ministry of Livestock and Fisheries.

¹⁴³² Director of Research, Training and Extension, Ministry of Livestock and Fisheries.

¹⁴³³ *Ibid.*

the interviews at this Ministry, the fourth phase was underway. The Division has also been continuously sensitising pastoral communities on the use of cattle dips to treat their livestock. One challenge that was mentioned was that cattle dips built specifically for pastoralists are being invaded and used by non-pastoralists, due to the rapid population growth in the regions in which they are located. Also, it was highlighted that it is prohibited to build cattle dips in the Ngorongoro Conservation Area where Maasai pastoralists reside.¹⁴³⁴

The Veterinary Services Division also provides vaccination services for animals. Pastoralists are offered vaccination services at a reduced price to facilitate access to this service for all. The government subsidises about half of the livestock's vaccination prices. Access to animal vaccines against diseases such as anthrax, bovine pneumonia and vibriosis helps the pastoralists maintain a good number of livestock by avoiding sudden deaths and a mass reduction in number of their livestock. The livestock vaccinations are offered at the Ministry's zonal vaccination centres. One of them is the Eastern and Northern Zone Centre which includes Arusha, Manyara, Kilimanjaro, Tanga and Morogoro, where communities self-identifying as indigenous pastoralists are widely located.¹⁴³⁵ It was added that the Ministry collaborates with the NCA to provide veterinary services to Maasai livestock found in the NCA. The NCA buys the vaccines and supplies them to the Maasai pastoralists in the NCA. This includes, for example, the vaccine known as Peste des Petis Ruminants (PPR) which protects goats and sheep against the highly contagious Ovine Rinderpest disease. The Veterinary Division also offers free vaccination against rabies.¹⁴³⁶ This Division also plays a role in cattle fattening programmes which encourages zero livestock grazing.

Other interviews were conducted at the Livestock Product and Marketing Development Division which has introduced initiatives to enable pastoralists to access markets for their livestock products. It is a fact that the pastoral communities that self-identify as indigenous peoples in Tanzania play a great role in contributing to the meat and dairy industry in the country. Therefore, this Division has been providing them with modern market facilities such as sheds, water and electricity in markets where they sell and buy livestock and other provisions. It also prescribes prices for selling and buying livestock to allow fair trade particularly in markets

¹⁴³⁴ Interview with the Director of Veterinary and Public Health Services at the Ministry of Livestock and Fisheries conducted in Dodoma on August 12, 2021.

¹⁴³⁵ *Ibid.*

¹⁴³⁶ *Ibid.*

(*minada*) built by the government at the border areas.¹⁴³⁷ Some of these markets are located at Namanga in Longido District, Waso in Loliondo District and Horohoro in Mkinga District, all of which are close to the Tanzanian-Kenyan border. Primary markets are managed at the local government (district) level while secondary markets are managed by the Ministry. Despite this initiative by the government, this Division is faced with the challenge of building infrastructures for pastoralists who are nomadic. The infrastructures built are sometimes left vacant and unattended.¹⁴³⁸

Additionally, this Ministry has an Environmental Management Unit which oversees compliance with the Environment Management Act by the Livestock Sector. Among other things, in collaboration with the Ministry's Legal Services Unit and the Vice President's Office, the Unit advises on legal and policy reviews in matters related to environmental conservation and management within the Livestock Sector.¹⁴³⁹ Here, the goal is to manage the social and economic impacts caused by pastoralists' activities across the country. It also offers public awareness programmes on environmentally friendly livestock keeping.¹⁴⁴⁰ All in all, research for this study in the ministry shows that the government has introduced initiatives for securing pastoralists' livelihoods across the country in a manner that does not contradict the national laws, policies and regulations. The right of indigenous pastoralists to develop economically, socially and culturally is taken into account in these initiatives. Nevertheless, through this Ministry the government has continued to encourage nomadic pastoralists to practise zero grazing to improve the quality of their livestock, which does not align with traditional pastoralism practices.

6.4.10 Ministry of Lands, Housing and Human Settlements Development

Given the central role played by land in the survival of indigenous peoples' livelihoods and cultural heritage, research at the Ministry of Lands, Housing and Human Settlements Development was carried out to learn about the initiatives taken by the Ministry to guarantee the security of land tenure to communities self-identifying as indigenous peoples in Tanzania. This objective was significant given the well-established legal position of non-recognition of the

¹⁴³⁷ Interview with Deputy Manager - Livestock Product and Marketing Development Division at the Ministry of Livestock and Fisheries held in Dodoma on August 12, 2021.

¹⁴³⁸ *Ibid.*

¹⁴³⁹ Ministry of Livestock and Fisheries, "Environmental Management Unit," accessed April 2, 2024, <https://www.mifugouvuvu.go.tz/pages/environmental-management-unit>.

¹⁴⁴⁰ *Ibid.*

concept of ancestral lands in Tanzania.¹⁴⁴¹ As already explained in the research limitations section in chapter one of this thesis, one-on-one interviews could not be attained in this Ministry despite several attempts made to obtain respondents for this purpose. However, desk research revealed that the Ministry has taken several steps towards securing the rights of communities self-identifying as indigenous peoples in the country. One of the remarkable initiatives is the role the Ministry has played in collaboration with other stakeholders to secure a communal land title for the Hadzabe. This followed a pilot land use planning project that was conducted with the aim of issuing a Certificate of Customary Rights of Occupancy (CCRO) to communities rather than individuals. Previously, CCROs had only been issued to individuals and corporations under section 12 (1) and (2) of the Village Land Act, 1999. This was the first time in the history of land administration in Tanzania that CCROs were issued to a traditional community. It is reported that in 2016, the Minister of Lands, Housing and Human Settlements Development travelled to Lake Eyasi Basin to issue communal certificates to Hadzabe hunter-gatherers and Datooga agro-pastoralists.¹⁴⁴² This practice has continued: in 2023, the Minister of Lands, Housing and Human Settlements Development travelled to Munguli village to issue other CCROs to the Hadzabe community.¹⁴⁴³

Apart from these milestones, there have been other indicators of the recognition of communities self-identifying as indigenous peoples in Tanzania, such as the project implemented by the Ministry titled “Land Tenure Improvement Project” funded by the World Bank. Under this project, the Ministry developed the Vulnerable Groups Planning Framework (VGPF) 2020 (Final Draft) which was required by the Bank as a condition for financing. This VGPF recognises the Akie, Hadzabe and Sandawe hunter-gatherers, and the Maasai and Barbaig pastoralists, as vulnerable groups in Tanzania in accordance with the World Bank’s Environmental and Social Standard 7 (WB- ESS 7): Indigenous Peoples/Sub-Saharan African Historical Underserved Communities. The VGPF’s objective is to benefit the groups identified as vulnerable. It aims at ensuring their land tenure security in form of communal CCROs and associated by-laws. The VGPF was also formulated to guarantee reliable access for vulnerable groups to natural

¹⁴⁴¹ Claiming possession of their ancestral lands is a central issue in respect of indigenous peoples’ rights not only in Tanzania but also across the globe.

¹⁴⁴² Cultural Survival, Securing Hadza Land Titles, Securing Futures in Tanzania,” accessed April 2, 2024, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/securing-hadza-land-titles-securing-futures-tanzania>.

¹⁴⁴³ Minister for Lands, Housing and Human Settlements Development, “Wahadzabe Wakubali Kupimiwa Ardhi” (Translation: The Hadzabe Accepts their Land Surveyed), accessed August 27, 2023, <https://www.lands.go.tz>.

resources, including grazing lands, water and forest resources. Another target of the project was to secure vulnerable groups' cultural heritage. Last but not least, the VGPF's aims included protecting livestock routes when a joint village land use plan is made.¹⁴⁴⁴ As the WB- ESS7 allows contextual application of the term indigenous peoples at the national level, Tanzania has always preferred to address communities self-identifying as indigenous peoples as "vulnerable groups" particularly in donor-funded projects that make their recognition mandatory. The same approach was adopted in the Resettlement Policy, 2020 (Final Draft) developed under the same Land Tenure Improvement Project.¹⁴⁴⁵

6.4.11 Ministry of Culture, Arts and Sports

An interview was conducted in this Ministry which was then known as the Ministry of Information, Culture, Arts and Sports. The aim was to establish the Ministry's role in preserving the culture of indigenous communities in Tanzania. The interview was held with a Culture Officer from the Department of Cultural Development. She opened her response by summarising the Tanzanian Culture Policy, 1999 which recognises the importance of preserving communities' cultures. She also emphasised that it was the government's priority to maintain the national culture and use of the national language to strengthen unity amongst all Tanzanian citizens.¹⁴⁴⁶ It should be noted that, right after the independence of Tanganyika, the government formed a Ministry responsible for youth and national cultural development which has evolved into the current Ministry of Culture, Arts and Sports. During the interview, the Culture Officer stated that, among other things, the Ministry has managed to organise activities that use art to condemn harmful cultural practices in the country. Also, it promotes cultural heritage as a way of implementing the National Cultural Policy.¹⁴⁴⁷ She insisted that the government intervenes whenever any community's cultural heritage is at stake. Additionally, the Ministry conducts a cultural heritage impact assessment before implementation of any government project. This is done to establish the extent to which elements of cultural heritage are likely to be affected by the projects and suggest viable strategies to mitigate the effects. An example given was the

¹⁴⁴⁴ United Republic of Tanzania: Ministry of Lands, Housing, Human Settlements Development, Vulnerable Groups Planning Framework, (Draft), 2020, iv.

¹⁴⁴⁵ United Republic of Tanzania: Ministry of Lands, Housing, Human Settlements Development, Resettlement Policy: Land Tenure Improvement Project, (Draft) 2020, 78.

¹⁴⁴⁶ Interview with the Culture Officer at the the Ministry of Information, Culture, Arts and Sports conducted on August 11, 2021.

¹⁴⁴⁷ See paragraph 1.4 of the National Culture Policy of 1999.

establishment of Arusha Technical College in the late 1970s, when land that was considered “ancestral” by the Maasai community was demarcated for construction of the technical college. This was likely to affect specific aspects of the Maasai cultural heritage connected to the land in question. Therefore, the Memorandum of Understanding was signed between the government Ministries responsible for lands and education, on the one hand, and representatives of the Maasai community, on the other hand, agreeing to grant the Maasai access to the college premises for seasonal cultural practices.¹⁴⁴⁸

6.4.12 Ministry of Constitution and Legal Affairs

Given its mandate to oversee human rights implementation in the country, the Ministry of Constitution and Legal Affairs was studied to establish the role it has been playing in effecting the country’s international and regional human rights obligations towards communities self-identifying as indigenous peoples in Tanzania. This Ministry hosts a Human Rights Division which provides both expertise and services on matters related to human rights. Among other things, this Division is responsible for reviewing domestic laws to ensure their alignment with international and regional human rights standards, ensuring the government’s compliance with its human rights obligations under the regional and international human rights instruments to which it is a party, analysing various reports submitted before it by CHRAGG and coordinating the preparation and submission of country reports to the relevant regional and international human rights forums.¹⁴⁴⁹ This Division has two sections, the Human Rights Reporting Section and the Implementation Observatory Section. The Human Rights Reporting Section is responsible for the preparation of the country’s human rights reports as per the requirements of the regional and international human rights instruments. It also disseminates the concluding observations made by human rights bodies after consideration of the country’s reports. The Implementation Observatory Section is charged with overseeing and monitoring the country’s compliance with human rights standards. The Ministry submits periodic reports before the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the African Commission on Human and Peoples’ Rights. All these bodies have been established by human rights instruments whose provisions have a bearing on the rights of indigenous peoples.

¹⁴⁴⁸ Interview with the Culture Officer at the the Ministry of Information, Culture, Arts and Sports,

¹⁴⁴⁹ United Republic of Tanzania, Ministry of Constitution and Legal Affairs, Human Rights Division, accessed April 4, 2024, <https://www.sheria.go.tz/pages/human-rights-division>.

The Committee on Economic, Social and Cultural Rights has received and considered Tanzania's human rights periodic reports and shadow reports submitted before it by NGOs. In these reports, it has noted the persistent problem of tenure insecurity among vulnerable pastoralist and hunter-gatherer communities in Tanzania. It has noted further that land tenure insecurity contributes to food insecurity amongst the members of these communities. It has repeatedly recommended proper redress for the victims of forced evictions and accountability by the perpetrators of such evictions. In making these recommendations, the Committee drew the country's attention to General Comment No. 12 of 1999 on the right to adequate food and General Comment No. 7 of 1997 on forced evictions.¹⁴⁵⁰ Further, the Committee raised concerns about the restrictions facing vulnerable communities such as pastoralists and hunter-gatherers when it comes to accessing land and its resources, and the effects of these restrictions on their enjoyment of the right to cultural life as per Article 15 (a) of the ICESCR. It therefore recommended that Tanzania should take legislative and other measures to promote, protect, and preserve these vulnerable groups' traditional ways of life and their cultural heritage by ensuring their inclusion in matters related to nature conservation and other uses of land.¹⁴⁵¹ It also emphasized the importance of obtaining their free, prior and informed consent when engaging them in such activities. It has been shown above that Tanzania has taken some positive steps in this direction, even if not in the name of "indigenous peoples' rights".

These matters raised by the CESCR were also reflected in the Human Rights Committee's concluding observations made after considering Tanzania's fourth periodic report in 2009. Paragraph 26 of the concluding observations on this report urged Tanzania to take action and report on measures taken to guarantee indigenous peoples' rights and their effective informed participation in decisions taken on matters that affect them, especially those related to access to land and other natural resources. These concerns were also raised in paragraph 29 of the List of Issues Prior to Submission of the Fifth Periodic Report of the United Republic of Tanzania enumerated by the Human Rights Committee.¹⁴⁵² In light of these concluding observations, the government consented to carrying out a study on indigenous peoples in the country in order to establish their respective concerns. However, such a study was never

¹⁴⁵⁰ United Nations, Economic and Social Council: Committee on Socia, Economic and Cultural Rights, Concluding observations on the Initial to Third Reports of the United Republic of Tanzania, 2012.

¹⁴⁵¹ *Ibid.*

¹⁴⁵² See United Nation: Human Rights Committee, List of Issues Prior to Submission of the Fifth Periodic Report of the United Republic of Tanzania, CCPR/C/TZA/QPR/5 dated August 20, 2021.

conducted due to financial constraints.¹⁴⁵³ The government has on several occasions named insufficient funds as one of the reasons behind its poor engagement in matters related to communities self-identifying as indigenous peoples. However, this is not a satisfactory explanation. Budget allocations for other government projects have not been sufficient either. Government funds are often directed to priority projects. Therefore, the government's engagement in indigenous peoples' affairs is a matter of priority. It takes political will to domestically implement obligations regarding indigenous peoples' rights.

Coming to the ICERD Committee, it sent a Warning Letter to Tanzania on the situation of the indigenous Maasai in Loliondo and Ngorongoro dated April 28, 2023, in which the government was advised to urgently submit before the Committee the long-overdue combined seventeenth and eighteenth state reports indicating the measures the country has taken to halt any plan for forceful relocation and evictions of the Maasai from the NCA and Loliondo. The government was also reminded to implement the recommendations made in the Committee's concluding observations with respect to the previous eight periodic reports. In particular, paragraphs 14 and 16 of these concluding observations urged the government of Tanzania to provide detailed information on the alleged appropriation of indigenous peoples' ancestral lands and territories. It was also directed to account for the general situation of indigenous peoples in Tanzania, particularly concerning their inclusion in decision-making processes on matters which affect them.¹⁴⁵⁴

Apart from the recurring calls by the aforementioned international human rights bodies for Tanzania to domestically implement the rights of indigenous peoples, it is also important to note that Tanzania is yet to ratify the First Optional Protocol to ICCPR which establishes a complaint mechanism for individuals before the Human Rights Committee. This hinders members of communities self-identifying as indigenous peoples in Tanzania from accessing this forum to seek remedies for violation of their rights. It has been shown in chapter three of this thesis that members of indigenous communities from countries like Finland, Norway and Canada were able to claim their rights before the Human Rights Committee following their countries' ratification of the Protocol. This being the case, it is clear that the Ministry of Constitutional and

¹⁴⁵³ CHRAGG, *et al.*, *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania*, 55.

¹⁴⁵⁴ See the Committee on Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, United Republic of Tanzania, dated March 27, 2007.

Legal Affairs leaves a lot to be desired in respect of ensuring and monitoring Tanzania's compliance with international human rights obligations.

As for the ACHPR, Tanzania has been submitting periodic human rights reports to it through the Ministry of Constitution and Legal Affairs in accordance with Article 62 of the Banjul Charter. The first report submitted covered the period between 1984 and 1992. This report made no mention of (indigenous) peoples' rights. It described the initial reception of the Banjul Charter by the public in Tanzania and its dissemination process. It also reported on the preliminary measures taken to implement the Charter through the entrenchment of a Bill of Rights in the Constitution of the United Republic of Tanzania and the challenges that came with this process. Further, it covered the functioning of the judiciary and the constitutional structure.¹⁴⁵⁵ The general comments made in relation to this report did not specifically address the provisions of the Charter since this was the very first report the country had submitted before the Commission. By and large, the country was applauded for the initiative it had taken to submit its initial periodic report before the Commission and the steps it had taken so far to address salient human rights issues.¹⁴⁵⁶ Subsequently, a consolidated report was submitted before the Commission by the Ministry covering the period from 1992 to 2002. It developments that had taken place in the country within this period relating to human rights, such as the introduction of the multiparty system, the setting up of a National Human Rights Institution in accordance with the Paris Principles, and the introduction of poverty alleviation programmes. This report did mention pastoralists and hunter-gatherers as two among other "disadvantaged groups" in Tanzania in the context of accessing education as a social service.¹⁴⁵⁷ As to the protection of peoples' culture, the report explained the rationale behind the adoption of the National Cultural Policy which is to protect and promote both ethnic groups and national culture; for instance, the use of vernaculars and Swahili as media of communication in the country.¹⁴⁵⁸ In this report, the Government of Tanzania expressed the opinion that adherence to human rights may gradually be

¹⁴⁵⁵ See United Republic of Tanzania, *Periodic Report Submitted by the Government of the United Republic of Tanzania under the OAU Charter on Human and Peoples' Rights*, (1991), accessed April 4, 2024, <https://achpr.au.int/en/node/527>.

¹⁴⁵⁶ See the African Commission on Human and Peoples' Rights, General Comment on the Periodic Report Submitted by the Republic of Tanzania dated October 7, 1991.

¹⁴⁵⁷ United Republic of Tanzania, *Second to Tenth Consolidated Periodic Report Submitted by the United Republic of Tanzania under the African Charter on Human and Peoples Rights*, (2006), 28, accessed April, 4, 2024, <https://achpr.au.int/en/state-reports/tanzania-2nd-10th-periodic-report-1992-2006>.

¹⁴⁵⁸ *Id.*, 20-30.

attained in the country.¹⁴⁵⁹ The concluding observations made by the ACHPR to this report commended the government for respecting peoples' right to culture through the promotion of the use of both vernacular languages and Swahili as media of communication amongst the Tanzanian citizens.¹⁴⁶⁰ As to the poverty alleviation programmes that had been launched in the country, such as TASAF, the Commission applauded the government for its efforts to improve the livelihoods of its citizens.¹⁴⁶¹ As has been discussed above, TASAF programmes are designed to rescue household economies without discrimination. Hence, these programmes extend to communities self-identifying as indigenous peoples. Although no specific indigenous peoples' rights were addressed in this report, possibilities to report on indigenous affairs are still open if the Human Rights Division under the Ministry of Constitution and Legal Affairs engages in activities implemented to promote indigenous peoples' rights in Tanzania.

6.4.13 Ministry of Community Development, Gender, Women and Children

At the time of conducting field research for this study, the Ministry of Community Development, Gender, Women and Children was still merged with the Ministry of Health. Therefore, research was carried out in this Ministry to identify strategies developed by the then Ministry of Health, Community Development, Gender, Elderly and Children to meet the socio-economic necessities of communities self-identifying as indigenous peoples in Tanzania. Research in this Ministry revealed that the government has created a conducive atmosphere for advocacy, implementation of social impact activities, lobbying and public awareness programmes on indigenous issues by local and international non-governmental organisations (NGOs). The NGOs are registered and monitored by the Office of the Registrar of NGOs whose mandate stems from this Ministry. Although the Government of Tanzania neither recognises indigenous peoples nor subscribes to the indigenous peoples' movement in Tanzania, it does not hinder NGOs from carrying out activities relating to indigenous peoples. Also, whenever called upon, the government cooperates with the NGOs in implementing such activities. A clear example that has already been discussed is the project organised by CHRAGG in cooperation with PINGOs Forum titled "Recognition

¹⁴⁵⁹ United Republic of Tanzania, *Second to Tenth Consolidated Periodic Report Submitted by the United Republic of Tanzania under the African Charter on Human and Peoples Rights*, 44.

¹⁴⁶⁰ See Para. 17 of the Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania made by the ACHPR in its Forty-Third Ordinary Session held in Ezulwini, Kingdom of Swaziland from May 7 to 22, 2008.

¹⁴⁶¹ See para. 18 of the Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania made by the ACHPR.

and Implementation of Indigenous Peoples' Rights in Tanzania, 2014-2015" which was funded by IWGIA. Also, CHRAGG in collaboration with IFAD held an activity in Dar es Salaam on the existence and implementation of indigenous peoples' rights in Tanzania on December 17, 2014. Further, CHRAGG in cooperation with ALAPA conducted an activity named a "Dialogue on Consultation with Indigenous Peoples and Local Communities in Dar es Salaam" on December 2 and 3, 2016. All these activities implemented with NGOs have not only involved CHRAGG, but also government ministries, departments, agencies and local government authorities. Moreover, the Ministry of Lands, Housing and Human Settlements Development together with local and Government authorities in Mbulu District, Manyara Region have been working hand in hand with the Ujamaa Community Resource Team (UCRT) to secure the land rights of the Hadzabe hunter-gatherer community.¹⁴⁶² Successful attempts in this regard have taken place in Mongo wa Mono Village which is the only village inhabited by a majority of Hadzabe in Tanzania. The same success has been registered in other villages inhabited by Hadzabe which were formally the Hadzabe's ancestral territories.¹⁴⁶³ UCRT in collaboration with the government has also assisted pastoralists who live in the peripheries of "Hadza Land" to obtain CCROs, which has greatly reduced land conflicts between pastoralists and hunter-gatherers in this region.¹⁴⁶⁴ Further, PAIPCODEO which is another vibrant indigenous peoples' NGO in Tanzania was engaged in the Environmental and Social Impacts Assessment for the TIRP II project discussed above to identify the interests of indigenous peoples in the districts through which the railway would pass.¹⁴⁶⁵ Additionally, the Tanzania Natural Resources Forum (TNRF) has been working hand in hand with the Wildlife Management Authority (WMA) in reducing conflicts between humans and wildlife. This organisation has also been supporting the application of indigenous knowledge in forests conservation, for example in the Enguresambo Community Forest.¹⁴⁶⁶ Other NGOs

¹⁴⁶² See Ujamaa Community Resource Team, Securing Land Rights for the Hadzabe, accessed April 5, 2024, <https://www.ujamaa-crt.or.tz/securing-land-rights-for-the-hadzabe.html>.

¹⁴⁶³ Having secured land rights for the Hadzabe in Mongo wa Mono and Domanga, UCRT has also encouraged the Hadzabe to engage in the Carbon Project. Members of the Hadzabe community have been receiving payments for conserving forest resources from the local forest carbon generating and developer investor known as Carbon Tanzania. Information obtained from an interview with UCRT Program Coordinator (Yaeda and Lake Eyasi) conducted in Arusha on March 23, 2022.

¹⁴⁶⁴ Remote (Zoom) interviews with the UCRT Executive Director and Head of Programs conducted on July 23 and 28, 2021.

¹⁴⁶⁵ Tanzania Railways Corporation, Report on the Consultancy Services for Undertaking the Environmental and Social Impact Assessment for the Proposed Second Tanzania Intermodal and Rail Development Project (TIRP II), (2023), 229.

¹⁴⁶⁶ Interview with TNRF's Executive Director held in Arusha on July 22, 2021.

working with communities self-identifying as indigenous peoples in Tanzania, such as the Maasai Women Development Organisation (MWEDO) and the Huduma ya Injili na Maendeleo kwa Wafugajia (HIMWA) (The Pastoralists' Gospel Service and Development Organisation) were visited. Their programmes to facilitate the right to development through education and gospel strategies were studied. It was found out that the Maasai girls are sponsored and enrolled into formal education by MWEDO to rid them of harmful cultural practices such as female genital mutilation (FGM).¹⁴⁶⁷ Also, Bible studies are offered to pastoralist societies by HIMWA as a way of promoting peaceful existence amongst themselves and with their neighbours. Through gospel education, they learn about non-violent approaches to conflict resolution, abandonment of harmful cultural practices and the significance of protecting human rights. Also, HIMWA uses the gospel in pastoralist communities to spread information on environmental conservation, diversification of income-related activities to counter the impacts of climate change, participation in land use planning and rangeland management, and vaccination programmes for both humans and livestock offered by the government.¹⁴⁶⁸ All of these NGO activities with far-reaching positive impacts on communities self-identifying as indigenous peoples are regulated by this Ministry. Since the advent of the indigenous peoples' movement in Tanzania, NGOs have been at the forefront of advocating for indigenous peoples' rights, while encouraging the relevant communities to take active roles in such initiatives. By doing so, they have been complementing the government's efforts to implement indigenous peoples' rights at the national level.

6.5 Conclusion

The foregoing discussion shows the extent to which Tanzania has been fulfilling its international and regional human rights obligations in relation to promoting and protecting the rights of communities self-identifying as indigenous peoples in the country. The finding here is that these obligations are met expressly or implicitly in laws, policies and practical institutional initiatives. Although terms like "traditional communities", "traditional populations" "forest-reliant communities", "minority groups" and "vulnerable pastoralist and hunter-gatherer groups" are used in place of "indigenous peoples", it is clear that through its laws, policies, strategies and

¹⁴⁶⁷ Interviews at MWEDO were conducted in Arusha on July 20, 2021.

¹⁴⁶⁸ Interview at HIMWA conducted in Morogoro on July 2, 2021.

action plans the government of Tanzania has not completely neglected such communities in the country.

CHAPTER SEVEN

7.0 GENERAL CONCLUSION

7.1 Introduction

This chapter winds up the discussion presented in chapters one to six of this thesis. It sums up the findings obtained in both desk and field research. The chapter substantiates the hypothesis developed at the beginning of the study and shows how the study's objectives have been achieved. It summarises answers to the research questions and puts forward recommendations for the improvement of the situation of indigenous peoples' rights in Tanzania. Finally, it proposes areas for future research relating to the theme tackled by this thesis.

7.2 Summary of Findings

The findings presented above have established Tanzania's human rights obligations towards communities acknowledged as indigenous peoples by the global and African human rights systems, but that these peoples are domestically denied recognition under the same terminology. Such communities all over the world and in Tanzania particularly, have suffered repeated infringement of their collective rights due to the nature of the livelihoods they have been practising since time immemorial. Yet Tanzania, just like any other State Party to the international human rights instruments, is legally bound by its obligations under ICCPR, ICESCR, CERD, CRC, CBD and the Paris Agreement to domestically implement the rights of these communities. The same obligation is established in the African region by the Banjul Charter. The Tanzanian government's position towards the notions of "indigenesness" and "indigeneity" with respect to communities self-identifying as indigenous peoples resembles that of most African countries' governments, which is that "all Africans are indigenous to Africa". In other words, all Tanzanians of African descent are indigenous to the country. This appears to contradict the human rights obligations that Tanzania has undertaken in relation to the aforementioned legal instruments. Yet, the country should not be condemned as having totally abandoned the interests of "indigenous communities". Although not in the name of "indigenous peoples" and to a very small degree, Tanzania does recognise the existence of distinct livelihoods carried out by specific communities within its borders, i.e. nomadic pastoralists and hunter-gatherers, and the need to consider their specific interests in the management of the country's natural wealth and resources. This recognition is embedded in the provisions of the

Wildlife Conservation Act, the Ngorongoro Conservation Area Act, the Village Land Act, the Environmental Management Act, the Forest Act and the Grazing Land and Animal Feed Resources Act. Also, the government's policies, strategies and action plans developed by the President's Office (TASAF), the Vice President's Office (Environment Division), the Ministry of Lands, Housing and Human Settlements Development, the Ministry of Livestock and Fisheries, the Ministry of Natural Resources and Tourism and the Commission for Human Rights and Good Governance have to some extent addressed matters which are specifically in favour of communities self-identifying as indigenous peoples in Tanzania. At the same time, however, these laws and policies contain provisions that hinder indigenous peoples from enjoying their rights in the manner provided for under the regional and international human rights instruments. For instance, the right to free disposal of their wealth and natural resources is highly regulated by the laws and policies in Tanzania, especially in the fields of environmental and wildlife conservation, as well as land management. Further, the assertion of indigenous peoples' rights in Tanzania is challenged by the long-established national unity policy and the lingering colonial legacy in the legal framework.

In general, this research has revealed that the government of Tanzania has strived to strike a balance between its sovereignty over protection the country's natural resources, national culture and unity, on the one hand, and fulfilling its regional and international human rights obligations towards communities self-identifying as indigenous peoples, on the other hand. However, it has given more weight to the former. Even in situations where indigenous peoples' interests should naturally be paramount over national interests, the government has remained firm in its stand. This can be seen in cases where it needs to prove domestic recognition and implementation of indigenous peoples' rights in the country before receiving conditional development funds. Here, the government fulfils the conditions by treating communities self-identifying as indigenous peoples as "vulnerable groups". For instance, the Draft TASAF III Indigenous Peoples Policy Framework (2012) developed in compliance with the World Bank's Indigenous Peoples' Policy subsequently materialised as a Vulnerable Groups Planning Framework (VGPF) in 2019.

Last but not least, reading through the Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania,¹⁴⁶⁹ several points on the costs of not recognising and implementing indigenous peoples' rights in Tanzania have been uncovered. These are worth presenting in this segment. Firstly, non-recognition and non-implementation of indigenous peoples' rights damages the country's reputation in the eyes of the international community. Disregarding the collective claims of communities self-identifying as indigenous peoples domestically is interpreted internationally as a negative approach to group rights. This is not good for the country in the contemporary world of vibrant social media reporting where news of violation of such rights takes only seconds to spread across the globe. Secondly, the poor relationship between the government and communities self-identifying as indigenous peoples is detrimental to donors' and investors' confidence in the country. The lack of safeguards for indigenous peoples at a national level is seen as potentially leading to local conflicts likely to face investments and donor-funded projects. Adoption of strategies such as the UN REDD+ strategy strengthens donors' and investors' confidence and trust in building a long-lasting relationship with Tanzania. Thirdly, violation of indigenous peoples' rights increases litigation before local and international adjudicatory bodies, especially when these people are backed by NGOs in claiming their rights. Fourthly, non-recognition of indigenous peoples' rights can affect environmental and wildlife conservation. This is because most indigenous peoples in Tanzania inhabit areas which are rich in biodiversity and depend on them for survival. At the same time, these areas are subject to strict regulation by the government, resulting in a conflict of interests between the government and the indigenous peoples. The result of this is a weakening of the government's natural resources management in such areas, and increased insecurity as well as loss of livelihoods and cultural disruption among the indigenous communities. By and large, this affects the country's overall development.

7.3 Conclusion on the Study's Objective

This study's main objective was to assess the extent to which indigenous peoples' collective rights are domestically recognised and implemented in Tanzania. The aim was to uncover the government's social responsibility towards indigenous peoples as part of fulfilling its regional

¹⁴⁶⁹CHARGG *et al.*, *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania*, 32.

and international human rights obligations. The indigenous peoples' rights in question are considered as being the same as the "peoples' rights" which are addressed in the international and African regional human rights instruments. It has been observed in this study that the concept of peoples' rights is captured under ICCPR and ICESCR in the context of the right to self-determination and free disposal of wealth and natural resources.¹⁴⁷⁰ The same notion features in the Banjul Charter in the form of group or collective rights provided for under Articles 19 to 24. Tanzania is party to all of these instruments. Since there is no universally accepted definition of the term "peoples", the ACHPR, through its jurisprudence and the commissioned study on indigenous communities and populations in Africa, has interpreted the term "peoples" to include indigenous peoples. The Commission grants communities self-identifying as indigenous groups the right to assert their claims as "peoples" under the Banjul Charter. This state of affairs has tied the government of Tanzania to the obligation of domestically recognising and implementing indigenous peoples' rights. In the foregoing discussion particularly in chapter six, the extent to which this obligation is domestically fulfilled in Tanzania through laws, policies and institutional practices has been widely discussed. The major finding concerning the study's objective is that indigenous peoples' collective rights are implemented in Tanzania to a certain extent but in a manner that serves the public interest and does not go against the country's long-established tenet of national unity.

7.4 Summary of Answers to Research Questions

This main research question to be answered in this study was: to what extent are indigenous peoples' collective rights recognised and enforced in Tanzania in the form of peoples' rights? Following the discussion of the situation of indigenous peoples in Tanzania in chapter five, and the analysis of laws, policies, strategies and institutional action plans in chapter six, the answer to this question is clear: the rights of communities self-identifying as indigenous peoples in Tanzania are not formally recognised by the government. Also, the existing constitutional rights that go parallel with such status are largely not enforced, such as the right to life, property and non-discrimination. Apart from the main research question, there were sub-questions that built on the main question. One of these was whether there is a unique way of defining indigenous peoples from the African human rights perspective in a sense that would apply to Tanzania. This

¹⁴⁷⁰ See articles 1 (1) and (2) and 47 of the ICCPR and 1(1) and (2) and 25 of the ICESCR.

question was answered in the affirmative in chapter two, where the ACHPR report of the Working Group of Experts on Indigenous Communities/Populations was instrumental in providing insights into approaching the term from the perspective of an African human rights system. Also, the jurisprudence of the ACHPR and the AfrCHPR as discussed in chapter four have played the same significant role. Although a uniform definition of the term “indigenous peoples” cannot be agreed upon, a description has been found to be sufficient to explain the term. The report by the ACHPR Working Group focuses on describing indigenous peoples in Africa through the universal characteristic of self-identification and specific criteria such as practising a culture and mode of livelihood that is different from other groups within a state. It also describes such communities as victims of discrimination, subjugation, marginalisation and dispossession of land that they consider ancestral, with which they have a special relationship and solely depend on for survival as peoples. The Commission is of the view that, unlike the case in other countries like Canada and Australia, aboriginality is not a defining factor for indigenous communities in Africa. Another sub-question asked at the beginning of this research was, what is the relationship between indigenous peoples’ collective rights and the provisions of Articles 19 to 24 of the Banjul Charter? This question was answered after establishing the ACHPR’s interpretation of the term “peoples” as used in the Banjul Charter. The Commission has interpreted the term to include indigenous peoples. Therefore, peoples’ collective rights as provided for in the Banjul Charter also apply to indigenous peoples. These rights may therefore be enforced by indigenous communities before the African human rights mechanisms, as in the *Ogoni* and *Endorois cases*. In addition, this research sought to answer the question of what is the actual situation in respect of indigenous peoples’ rights in Tanzania as one of the parties to the Banjul Charter. The answer to this question has been provided in chapter five of the thesis: despite the fact that Tanzania is a party to the Banjul Charter, shortcomings in implementing indigenous peoples’ rights in the country can be pinpointed through selected case studies. Another question was, are the laws, policies and relevant institutions in Tanzania responsive to the country’s obligation under the Banjul Charter and international human rights instruments to promote, protect, and fulfil peoples’ rights in the form of indigenous peoples’ rights? The answer to this question is presented in chapter six of the thesis. It is yes, although not to a great extent. Last but not least, this research sought to find out whether the situation regarding indigenous peoples’ rights in other jurisdictions is different from the situation in Africa, and in Tanzania in particular, and what

best practices Africa, and in particular Tanzania, can learn from other jurisdictions. This questions has been answered through various discussions dispersed in different chapters of this thesis. For instance, in chapter three, it is shown that the situation of the Sami in Finland and Norway, the Maori in New Zealand and the First Nations in Canada is similar to that of communities self-identifying as indigenous peoples in Tanzania. However, the laws, policies and institutional initiatives to contain the challenges facing indigenous communities in these countries are way more advanced than those in Tanzania. The survival of their livelihoods and culture is at stake for indigenous communities all over the world due to laws imposed to manage the natural resources that they depend on for sustenance and for their cultural practices. Specific examples from Africa are given in chapter four, where it is shown that the Endorois and the Ogiek indigenous communities in Kenya have faced restrictions from accessing natural resources such as Lake Bogoria and the Mau Forest respectively. These resources are of spiritual and cultural significance to these communities. Other specific and practical lessons that Tanzania can draw from other jurisdictions are laid out in 7.6.1 (v) below. This research has thus answered all of the questions asked at the beginning of the study through findings obtained from both primary and secondary sources.

7.5 Proving the Hypothesis

The study's hypothesis was that the implementation of indigenous peoples' collective rights in Tanzania is unsatisfactory due to the low priority accorded by the Government of Tanzania to communities self-identifying as indigenous peoples. This hypothesis has been partly confirmed. The study has revealed that, generally, the Government of Tanzania does not support the idea of an indigenous peoples' movement in the country. This makes implementation of the collective rights of such communities unsatisfactory. These communities are treated just like any other citizens in most of the government's projects, regardless of the level of vulnerability they are exposed to due to the nature of the life that they lead. Since these communities substantially depend on the natural environment for their survival, they are adversely affected by the shrinking of what they consider their ancestral lands. This shrinking is due to the wildlife and environmental conservation activities implemented by the government. This limits their access to natural resources and thus poses a threat to their physical and cultural existence. In addition, they suffer from the impacts of climate change, which are yet to be critically addressed by the

government. However, this research has also shown that it cannot be argued that the Government of Tanzania has completely neglected the interests of these communities. To a certain extent, their interests feature in some of the legal provisions mentioned in the foregoing discussion. Also, some government policies, strategies and institutional action plans contain elements of relevance to these communities. In addition, some government ministries, institutions and divisions, such as CHRAGG, the VPO-Environment Division, the Ministry of Natural Resources and Tourism, the Ministry of Lands, Housing and Human Settlement and the Ministry of Livestock and Fisheries, have initiated activities in favour of communities self-identifying as indigenous peoples in Tanzania, as explained in detail in chapter six of this thesis.

7.6 Recommendations

In carrying out this research, various gaps and shortcomings in the recognition and implementation of indigenous peoples' rights in Tanzania were identified. The following recommendations may contribute to improvement of the human rights situation of communities self-identifying as indigenous peoples in Tanzania.

7.6.1 Recommendations to the Government of Tanzania

- i) The government should make efforts to fulfil all of its international and regional human rights obligations towards communities self-identifying as indigenous peoples in Tanzania. Firstly, it should ratify the ILO Indigenous and Tribal Peoples Convention (C 169) of 1989. This will establish the country's specific obligations towards these communities. Secondly, the government should ratify the ICCPR's First Optional Protocol establishing the individual complaint mechanism. This will increase the chances of communities self-identifying as indigenous peoples in Tanzania of enforcing their rights at the international level. It has been evidenced by concrete examples in chapter three of this thesis that the individual complaint mechanism before the Human Rights Committee as established by the aforementioned Protocol accommodates cases which have a bearing on indigenous peoples' collective rights. Thirdly, the government should reinstate the declaration accepting the competence of the AfrCHPR to receive cases from individuals and NGOs which it withdrew in November 2019. This would enable direct access to the

AfrCHPR by members of communities self-identifying as indigenous peoples in Tanzania and other individuals or NGOs seeking to protect the rights of such communities. Fourthly, the government should submit human rights reports on time and without failing before the international and regional human rights mechanisms. This would enable continued monitoring of the implementation of indigenous peoples' rights in the country by such bodies. It would also give the country opportunities to receive technical support in cases of challenges faced in connection with implementation. Fifthly, the government should implement the recommendations on improving the situation of indigenous peoples in Tanzania made by the Human Rights Committee, CESCR, CERD and the UPR Working Group. Also, it should look into the concerns raised and recommendations put forward by the ACHPR's Working Group on Indigenous Peoples/Communities following its research and information visit to the United Republic of Tanzania in 2013. Furthermore, the government should work on the concerns raised in respect of the situation of indigenous peoples in Tanzania by the ACHPR's promotion missions carried out in the country from October 6 to 10, 2008 and from January 23 to 28, 2023.

- ii) The government should legally recognise, protect and continue to promote the rights of communities self-identifying as indigenous peoples in Tanzania. This can be done by reviving the constitutional review process and adopting a new Constitution that expressly embeds recognition of the collective rights of these communities in the Bill of Rights. This recognition should trickle down into national legislation, by-laws, policies, strategies and action plans that have a bearing on matters touching on indigenous peoples' rights. Although it has been argued by the Law Reform Commission of Tanzania that law is not the sole solution to all societal problems, all human rights need to be secured in the country's Constitution as a starting point for other strategies.
- iii) The government should reconcile its contradictory positions on formally addressing communities self-identifying as indigenous peoples in Tanzania. It has been shown in this thesis that the Government of Tanzania stands for non-recognition of communities self-identifying as indigenous peoples and of their collective rights.

However, in some instances, such recognition is implied, depending on the context. For example, in the TASAF projects, these communities are regarded as vulnerable groups, in CHRAGG's National Human Rights Action Plan they are called disadvantaged groups, under the Wildlife Conservation Area Act they are referred to as traditional communities and in the Draft Constitution they are addressed as minority groups. This diversity causes confusion and aggravates the difficulties in identifying such communities and guaranteeing their rights. Adoption of a single clear-cut term for communities self-identifying as indigenous communities in Tanzania would provide more clarity in implementing their rights. Since there is no universally agreed definition of the term "indigenous peoples", the government does not necessarily have to refer to these communities as "indigenous peoples" in order to implement their rights. It can refer to them in a manner that is nationally acceptable, taking into account the criteria for identifying indigenous communities in Africa developed by the ACHPR. This would align the government's approach with regional and international human rights initiatives to guarantee the rights of indigenous peoples.

- iv) The government should review some of its policies, such as the Land Policy, 1995, the National Forest Policy, 1998, the National Tourism Policy, 1998 and the National Livestock Policy, 2006, to reflect the current needs of the society, including the interests of communities self-identifying as indigenous peoples. This would also offer a chance to take into account new international developments in the human rights field, for instance the adoption of UNDRIP in 2007.
- v) The government should draw lessons from other jurisdictions which have taken steps towards legally recognising and implementing indigenous peoples' rights domestically, particularly from other African countries which are also parties to the Banjul Charter. A good example is the Central African Republic which has ratified the Indigenous and Tribal Peoples Convention, in 1989. This ratification was made on August 30, 2010, making the Central African Republic the first and the only African country which is party to C 169. Moreover, in the Republic of Congo (Congo Brazzaville) specific legislation providing for a comprehensive framework for the promotion and protection of indigenous populations was adopted in 2011. Further, in

the Democratic Republic of Congo, the Law for Protection and Promotion of the Rights of Indigenous Pygmy Peoples was passed on July 15, 2022 and published in the Official *Gazette* on November 14, 2022.¹⁴⁷¹ Also, the Forest law in this country specifically provides for indigenous peoples' rights. In addition, Cameroon has adopted her first-ever National Indigenous People Development Plan under the World Bank, while Kenya recognises indigenous peoples and their rights in Articles 20 (5) (b), 21 (3) and 56 of the country's Constitution. The Kenyan Constitution, 2010 extends such recognition to ethnic minorities and marginalised groups or communities. Article 63 of this Constitution provides for community land which may be held by communities identified on the basis of ethnicity, among other groups. To give effect to this provision, Kenya has enacted the Community Land Act of 2016. Additionally, the Constitution of the Republic of Uganda 1995 recognises minorities and marginalised groups and provides for their respective rights. Article 32 (1) of this Constitution obliges the State to implement affirmative action in favour of groups that are marginalised on the basis of custom or tradition and history, among other criteria. This obligation is imposed on the Ugandan Government to address the imbalances existing in the treatment of such groups. Moreover, Article 32 (2) of the same Constitution directs the Parliament to make relevant laws, particularly the establishment of an Equal Opportunities Commission to oversee implementation of the State's obligation under Article 32 (1). Further, Article 36 of the Ugandan Constitution provides for the right of minorities to participate in decision-making processes and have their views and interests considered in the making of national plans and programmes. Furthermore Article 37 of the same Constitution provides for every person's right to enjoy in community with others his or her own culture and related practices. More lessons can be drawn from the Constitution of the Central African Republic which captures national sub-groups. It addresses indigenous peoples as minorities and vulnerable persons.¹⁴⁷² Furthermore, the Constitution of Rwanda provides for special consideration of historically marginalised communities when

¹⁴⁷¹ Rain Forest Rescue, "DR Congo Officially Recognises the Rights of Indigenous People," accessed April, 8, 2024, <https://www.rainforest-rescue.org/updates/11088/dr-congo-officially-recognizes-the-rights-of-indigenous-people>.

¹⁴⁷² See the preamble to the Constitution of the Central African Republic's Constitution, 2016.

choosing the eight Senators who are appointed by the President of Rwanda.¹⁴⁷³ In particular, a *Twa* leader should hold a seat in the Senate. The same practice is found in Burundi, where three seats in the National Assembly (first chamber) and three seats in the Senate (second chamber) are constitutionally reserved for the *Twa* indigenous community.¹⁴⁷⁴ In Namibia, a specific Directorate and a *San* Development Programme have been set up under the Prime Minister's Office to ensure implementation of the *San* community's rights.¹⁴⁷⁵ Last but not least, the Constitution of the Republic of South Africa, 1996 recognises, among other groups, cultural communities and their right to maintain their cultural practices and form associations.¹⁴⁷⁶ This Constitution provides for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as one of the State institutions for strengthening the country's constitutional democracy.¹⁴⁷⁷ Also, the Constitution recognises the role of traditional leaders in the functioning of communities which practise customary law.¹⁴⁷⁸

- vi) The government should maintain a dialogue with communities self-identifying as indigenous peoples through the relevant ministries to ensure protection of their rights in activities conducted in their habitats. The dialogue should include seeking their free, prior and informed consent before carrying out such activities.

7.6.2 Recommendations to the NGOs

This research has revealed a great knowledge gap regarding the notion and practice of indigenous peoples' rights in Tanzania. There are NGOs working to complement and fill in gaps in the government's fulfilment of human rights obligations domestically, but still there is a great need for advocacy and sensitisation programmes on the concept of indigenous peoples and their rights. Both governmental and non-governmental stakeholders should organise capacity-building activities to facilitate recognition and implementation of indigenous peoples' rights in Tanzania. This includes collaborating with the government in holding dialogues and training events with

¹⁴⁷³ See Article 80 of the Constitution of the Republic of Rwanda, 2003.

¹⁴⁷⁴ See Articles 169 and 185 (2) respectively of the Burundi's Constitution, 2018.

¹⁴⁷⁵ CHRAGG *et al.*, *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania, 2014 -2015*.

¹⁴⁷⁶ Article 31 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁷⁷ Article 181 (c), *id.*

¹⁴⁷⁸ Article 211, *id.*

relevant stakeholders, like the one that was held in Dar es Salaam by CHRAGG in collaboration with ALAPA on December 2 and 3 in 2016. Aside from collaborating with the government, NGOs should encourage the engagement of members of indigenous communities in implementing their programmes. Not only should leaders from such communities be involved, but also ordinary members of various groups such as the elderly, youth, women and children. This is to ensure the deep-rooted commitment of such communities to sustainably furthering efforts to pursue recognition and implementation of indigenous peoples' rights in Tanzania.

7.6.3 Recommendations to Indigenous Communities

Indigenous peoples should continue to peacefully engage with the government, starting from the grassroots level. Their leaders should take deliberate steps to ensure their participation in matters affecting their collective rights and interests at all decision-making levels. They should constantly solicit recognition, respect and fulfilment of indigenous peoples' rights in the country. This includes participating in as many relevant platforms as possible in order to air and share their first-hand experience and make their basic needs as national sub-groups known and met. Such platforms include national policy-making forums, public meetings to support law reform, traditional media programmes, social media platforms and international human rights forums.

7.7 Proposals for Future Research

In conducting this research, several aspects were identified as possible topics for future research. One of them is the social, economic and cultural impacts on that part of the Maasai community that has voluntarily relocated from the NCA to Msomera Village in Handeni District, Tanga Region. Another interesting topic relating to the NCA-Msomera case would be to explore the prospects of the Maasai who opt to remain at the NCA after completion of the relocation exercise in respect of their collective rights. When field research for this study was conducted at the NCA and in Msomera village, the relocation process was still ongoing. It was, therefore, premature to draw conclusions at this point in time. Further, as Tanzania voted in favour of UNDRIP in 2007, an evaluation of UNDRIP's impacts on the rights of communities self-identifying as indigenous peoples could be made in the light of the obligations embedded in the provisions of the Declaration. Last but not least, a comparative study could be made of the relevant provisions in the constitutions of other African countries, in order to inform the constitutional review process

in Tanzania with regard to formulating provisions to guarantee indigenous peoples' rights in the country.

BIBLIOGRAPHY

Books

- African Law Association, ed. *The African Charter on Human and Peoples Rights: Development, Context, Significance*. Marburg: ALA, 1991.
- Barume, Albert Kokwo. *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*. Copenhagen: IWGIA, 2010.
- Frank Marlowe. *The Hadza Hunter-Gatherers of Tanzania*. California: University of California Press, 2010.
- Gastorn, Kennedy. *The Impact of Tanzania's New Land Laws on the Customary Land Rights of Pastoralists: A Case Study of the Simanjiro and Bariadi Districts*. Münster: LIT, 2008.
- Howard, Rhoda. *Human Rights in Commonwealth Africa*. New Jersey: Rowman & Littlefield, 1986.
- Ibhawoh, Bonny. *Human Rights in Africa*. Cambridge: Cambridge University Press, 2018.
- Iliffe, John. *A Modern History of Tanganyika*. Cambridge: Cambridge University Press 1979.
- Jensen Marriane. *Indigenous Peoples in Eastern, Central and Southern Africa*, (Copenhagen: IWGIA, 2001)
- Kwame, Gyekye. *An Essay on African Philosophical Thought: The Akan Conceptual Scheme*. Cambridge: Cambridge University Press, 1987.
- Laher, Ridwan and Korir Sing'Oei, eds. *Indigenous People in Africa: Contestations, Empowerment and Group Rights*. Pretoria: Africa Institute of South Africa and Institute for Global Dialogue, 2014.
- Madsen, Andrew. *The Hadzabe of Tanzania: Land and Human Rights for Hunter-Gatherer Community*. Copenhagen: IWGIA, 2000.
- Majamba, Hamudi, ed. *Towards a Rights-Sensitive East African Community: The Case of Ethnic and Racial Minorities*. Kampala: Fountain Publishers, 2011.
- Ndahinda, Felix Mulwiza. *Indigeness in Africa, A Contested Legal Framework for Empowerment of 'Marginalised' Communities*. The Hague: T.M.C. ASSER PRESS, 2011.
- Oakland Institute. *Losing the Serengeti: The Maasai Land that was to Run Forever*. Oakland: Oakland Institute, 2018.

- Oloka-Onyango, Joe. *When Courts Do Politics: Public Interest Law and Litigation in East Africa*. Newcastle Upon Tyne: Cambridge Scholars Publishers, 2017.
- Ottaway, Marina and Mai El-Sadany M. *Sudan: From Conflict to Conflict*. Washington: Carnegie Endowment for International Peace, 2012.
- Perras, Arne. *Carl Peters and German Imperialism, 1856-1918: A Political Biography*. New York: Oxford University Press Inc., 2004.
- Peter, Chris Maiana. *Human Rights in Tanzania, Selected Cases and Materials*. Köln: Rüdiger Köppe Verlag, 1997.
- Rubner, Nat. *The African Charter on Human and Peoples' Rights, Volume 1: Political, Intellectual & Cultural Origins*. Suffolk: Boydell and Brewer, 2023.
- Rubner, Nat. *The African Charter on Human and Peoples' Rights Volume 2: The Political Process*. Suffolk: Boydell & Brewer, 2023.
- Shivji, Issa. *The Concept of Human Rights in Africa*. London: CODERSIA BOOK SERIES, 1989.
- Shivji, Issa and Wilbert Kapinga. *Maasai Rights in Ngorongoro, Tanzania*. Nottingham: IIED /HAKI ARDHI, 1998.
- Umzurike, Oji. *The African Charter on Human and Peoples' Rights*. The Hague: Kluwer Law International, 1997.
- Woods, Jeanne and Hope Lewis, *Human Rights and the Global Market Place: Economic, Social and Cultural Dimensions*, USA: Transnational Publishers, 2005.

Book Chapters

- Benjamin, Geoffrey. "Indigenous Peoples: Indigeneity, Indigeny or Indigenism." In *Routledge Handbook of Asian Law*, edited by Christoph Antons, 362–377, London: Routledge, 2017.
- Chenwi, Lilian. "The Right to Satisfactory, Healthy and Sustainable Environment in the African Regional Human Rights System," in *The Human Right to the Healthy Environment*, edited by John Knox and Ramian Pejan, 59-85, Cambridge: Cambridge University Press, 2018.
- Cunneen, Chris. "Indigenous People, Resistance and Racialised Criminality." In *Media, Crime and Racism*, edited by Monish Bhatia *et al*, 277-299. Cham: Springer Nature, 2018.

- Daes, Erica-Irene. "A United Nations Permanent Forum for the World's Indigenous Peoples- A Global Perspective." In *International Human Rights Monitoring Mechanisms*, edited by Gudmundur Alfredson et al., 371-379. The Hague: Kluwer Law International, 2001.
- Dankwa, Victor. "The African Charter on Human and Peoples Rights: Hopes and Fears", in *The African Charter on Human and Peoples Rights: Development, Context, Significance*, edited by African Law Association, 1. Marburg: ALA, 1991.
- Donders, Yvonne. "Foundations of Collective Cultural Rights in International Human Rights Law." In *Cultural Rights as Collective Rights: An International Law Perspective*, edited by Andrzej Jakubowski, 87-112. Amsterdam: Brill Nijhoff, 2016. <https://dx.doi.org/10.2139/ssrn.2622424>.
- Gawanas, Bience. "The African Union: Concepts and Implementation Mechanisms Relating to Human Rights." In *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, edited by Anton Bösl and Joseph Diescho, 135-166. Windhoek: Macmillan Education Namibia, 2009.
- M'Baye, Kebe. "Human Rights in Africa." In *The International Dimensions of Human Rights*, edited by Karel Vasak and Philip Alston. Westport, Connecticut and Paris: Greenwood Press and UNESCO, 1982.
- Malloy, Tove. "Introduction." In *Minority Issues in Europe: Rights, Concepts, Policy*, edited by Tove Malloy, 13- 23, Berlin: Frank & Time, 2013.
- Maxted, Julia and Zegeye, Abebe. "North, West and the Horn of Africa." In *World Directory of Minorities*, edited by Minority Rights Group International, 388- 465, London: Minority Rights Group International, 1997.
- Nassali, Maria. "Ethnic and Racial Minorities and Movement Towards Political Inclusion in East Africa: Cases of Kenya, Uganda and Tanzania." In *Towards a Rights-Sensitive East African Community*, edited by Hamudi Majamba, 1-65. Kampala: Fountain Publishers, 2011.
- Nyang'ori, Ohenjo. "Participation of Minorities and Indigenous Peoples in Political Decision Making in Kenya." In *Towards a Rights-Sensitive East African Community*, edited by Hamudi Majamba, 156-224. Kampala: Fountain Publishers, 2011.

- Olenasha, William Tate. "The Political and Social Exclusion of Minorities in Tanzania: The Case of the Hadzabe Hunter-Gatherers." In *Towards a Rights-Sensitive East African Community*, edited by Hamudi Majamba, 225-67. Kampala: Fountain Publishers, 2011.
- Peter, Chris Maina. "Human Rights Commissions in Africa: Lessons and Challenges." In *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, edited by Anton Bösl and Joseph Diescho, 351-74. Windhoek: Macmillan Education, 2009.
- Shelton Davis, "The World Bank and Indigenous Peoples." In *Social Development in the World Bank: Essays in Honour of Michael M. Cernea*, edited by Maritta Koch-Weser, Scott Guggenheim, 191-204, Cham: Springer, 2021.
- Sing'oei, Korir Abraham. "The Rights of Indigenous Peoples in Africa." In *Africa's Long Road to Rights: Reflection on the 20th Anniversary of the African Commission on Human and Peoples Rights*, edited by Hakima Abbas, 2nd ed., 13 – 23. Nairobi and Oxford: Fahamu Books, 2009.
- Skutnabb-Kangas, Tove and McCarty, Teresa. "Key Concepts in Bilingual Education: Ideological, Historical, Epistemological and Empirical Foundations." In *Bilingual Education: Encyclopedia of Language Education*, Volume 5, 2nd edition, eds., edited by Jim Cummins and Nancy Hornberger, 3-17, New York: Springer, 2008.

Journal Articles

- Amin, Anneth. "The Potential of African Philosophy in Interpreting Socio-economic Rights in the African Charter on Human and Peoples' Rights." *African Human Rights Yearbook* 5 (2021): 23-50.
- Anyangwe, Carlson. "The Normative of the Right to Self Determination under the African Charter and the Principle of Territorial Integrity: Competing Values of Human Dignity and System Stability." *African Human Rights Yearbook* 2 (2018): 47-71.
- Barnard, Alan. "Indigenous Peoples," *Anthropology Today* 20, no. 5 (2009). https://www.academia.edu/24096876/Indigenous_peoples.
- Barsh, Russel. "The Right to Development as a Human Right: Result of the Global Consultation." *Human Rights Quarterly* 13, No. 3 (1999): 322-338.
- Bluwstein, Jevgeniy. "Resisting Legibility: State and Conservation Boundaries, Pastoralism, and the Risk of Dispossession through Geospatial Surveys in Tanzania." *Rural Landscapes: Society, Environment, History* 6, no. 1, (2019): 1–18.

- Charnley, Susan. "From Nature Tourism to Ecotourism? The Case of Ngorongoro Conservation Area, Tanzania." *Human Organization* 64, no. 1 (2005): 75–88.
- Chris, Maina Peter. "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law." *International Journal on Minority and Group Rights* 14, (2007): 455–87.
- Cobbah, Josiah A.M. "African Values and Human Rights Debate: An African Perspective." *Human Rights Quarterly* 9, No.3 (1987): 331
- D'sa, Rose M. "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action." *Australian Yearbook of International Law* 10 (1981-83): 101-130.
- Daniel Brockington. "Conservation, Displacement and Livelihoods. The Consequences of the Eviction for Pastoralists Moved from the Mkomazi Game Reserve, Tanzania." *Nomadic Peoples* 3, no. 2 (1999): 74-96.
- Deng, Francis. "Ethnicity: An African Predicament." *The Brookings Review* 15, no. 3, (1997): 28-31.
- Dersso, Solomon Ayele. "The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights." *African Human Rights Law Journal* 6, no.2,(2006): 358-81.
- Ebeku, Kaniye. "The Right to Satisfactory Environment and the African Commission." *African Human Rights Law Journal* 3 (2003):1149-166.
- EI-Obaid, Ahmed, and Appiagyei-Atua, Kwadwo. "Human rights in Africa: A New Perspective of Linking the Past to the Present." *McGill Law Journal* 41 (1996): 819-854.
- Etzioni, Amitai. "Liberals and Communitarians." *Partisan Review* 57, (1990): 215-227.
- Gastorn, Kennedy. "The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania." *Journal of Law, Property and Society* 2, (2016):181-221.
- Gilbert, Jeremie. "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights." *International and Comparative Law Quarterly* 60, no. 1 (2011): 245-270.
- Guenther, Mathias, Justin Kenrick, Adam Kuper, Evie Plaice, Trond Thuen, Patrick Wolfe, Werner Zips, Alan Barnard. "Concept of Indigeneity." *Social Anthropology* (2006): 17-32.

- Hansungule, Michelo. "The African Charter on Human and Peoples' Rights: A Critical Review." *African Yearbook of International Law* 8, no. 1, (2000): 265-331.
- Hardin, Rebecca and Kelly Askew. "Claims, Rights, Voices, and Spaces in the Global Indigenous Peoples Movement." *Journal of Law, Property and Society* 2, (2016): 49-69, <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-HardinAskew.pdf>.
- Hodgson, Dorothy. "Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas." *American Anthropologist* 104, no.4 (2002): 1037-1049.
- Holmes, Darwin and Andrew Gary. "Researcher Positionality - A Consideration of its Influence and Place in Qualitative Research - A New Researcher Guide." *Shanlax International Journal of Education* 8, no.4, (2020): 1-10. <https://doi.org/10.34293/education.v8i4.3232>.
- Hughes, Lotte and Daniel Rogei. "Feeling the Heat: Responses to Geothermal in Kenya's Rift Valley." *Journal of Eastern African Studies* 14, no.2 (2020): 165-184. <https://doi.org/10.1080/17531055.2020.1716292>.
- Hyden, Goran, "Ujamaa, Villagisation and Rural Development in Tanzania," *Development Policy Review* 8, no. 1, (1975): 53-72.
- Igoe, Jim. "Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics." *African Affairs* 105, no. 420 (2006): 399-420.
- Kannowski, Bernd and Cecilia Ngaiza. "Environment or (Collective) Human Rights: What is More Important? A Critical Perspective on the Implementation of the Joint UNESCO/ICOMOS/IUCN Recommendation on the Voluntary Relocation of Maasai Residents from the Ngorongoro Conservation Area in Tanzania." *Central European Journal of Comparative Law* 3, no. 2 (2022): 55-93.
- Ketley, Harriet. "Exclusion by Definition: Access to International Tribunals for the Enforcement of Collective Rights of Indigenous Peoples." *International Journal on Minority and Group Rights* 8, no.4 (2001): 331-368.
- Kiwanuka, Richard. "The Meaning of 'People' in the African Charter on Human and Peoples' Rights." *The American Journal of International Law* 82, no.1 (1988): 80-101.
- Kristin, McKie. "International Donor Funding and Social Movement Demobilization: The Barabaig Land Rights Movement in Tanzania." *Africa Today* 66, no 1, (2019): 73-95.

- Laltaika, Elifuraha. "Indigenous Peoples Rights in Tanzania and International Human Rights Law." *Tuma Law Review*, no.1 (2012): 142-165.
- Laltaika, Elifuraha. "Pastoralists' Right to Land and Natural Resources in Tanzania." *Oregon Review of International Law* 15, no.43, (2013): 43-61.
- Mbu, Nelson Baiye and Endoh, Fabrice Tambe. "A Commentary on the African Court on Human and Peoples' Rights' Remedial Approach in its Ruling on Reparations in African Commission on Human and Peoples' Rights v. Kenya." *African Human Rights Yearbook*7 (2023): 355-374.
- Micheli, Ilaria and Karsten Legèr. "Ogiek and Akie: How Many Peoples for How Many Languages? What is their Future?." *Testi e linguaggi* 17, (2023): 87-109.
- Mollel, Andrew. "Minority Rights, Nationality Laws and Conflict Prevention: Rethinking the Banyamulenge in the Democratic Republic of Congo." *Journal of African and International Law*1, no.1, (2008): 51-82.
- Nataliaja, Shikova, "Practicing Internal Self-Determination *Vis-a-Vis* Vital Quests for Secession," *German Law Journal* 17, no. 2 (2016): pp.238-264.
- Nordiska AfrikaInstitutet and Gutto, Shadrack. "Human and Peoples' Rights in Africa, Myths, Realities and Prospects." *Current African Issues*12 (1991): 0280-2171.
- Odinkalu, Chidi Anselm. "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights." *Human Rights Quarterly* 23, no. 2, (2001): 327-369.
- Paul Tamuno, "New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa," *Journal of African Law*1 (2017): 305-332.
- Richard Gittleman. "The African Charter on Human and Peoples' Rights: A Legal Analysis." *Virginia Journal of International Law* 22,no.4(1982): 668-714.
- Richard Pildes, "Dworkin's Two Concepts of Rights," *The Journal of Legal Studies* 29, no. 1 (2000): 309-15.
- Rösch, Ricarda. "Indigenusness and Peoples' Rights in the African Human Rights System." *Verfassung und Recht in Übersee VRÜ (Constitution and Law Oversea)*50,no.3 (2017): 242-258.

- Salahuddin, Asif. "Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation." *Journal of Civil and Legal Sciences* 7, no.1 (2018):1-5.
- Skutnabb-Kangas, Tove. "Indigenesness, Human Rights, Ethnicity, Language and Power." *International Journal of Sociology and Language* 213 (2012): 87-104.
- Swanson, Julia. "The Emergence of New Rights in the African Charter." *New York Law School Journal of International and Comparative Law* 12, no. 1 (1991): 307-333.
- Szpak, Agnieszka. "The Right of Indigenous Peoples to Self-Determination: International Law Perspective." *ATHENAEUM: Polish Political Science Studies* 59 (2018): 178- 204.
- Thigpen, Robert, and Downing, Lyle. "Liberalism and the Communitarian Critique." *American Journal of Political Science* 31, no. 3 (1987): 637-655.
- Ukwamedua, Nelson Udoka. "Philosophy and African Philosophy: A Conceptual Analysis." *UJAH Unizik Journal of Arts and Humanities* 17, no.3 (2017): 87-106.
- Vujadinovic, Dragica. "Ronald Dworkin – Theory of Justice." *European Scientific Journal* 8, no. 2, (2012): 1-13.
- Wanitzek, Urike and Harald Sippel, "Land rights in Conservation Areas in Tanzania." *GeoJournal* 46, (1998):113–128.

Online Articles and Series

- Chris Maina Peter, "Constitution Making Process in Tanzania: The Role of the People in the Process," accessed March 4, 2024, https://www.academia.edu/71916937/Constitution_Making_in_Tanzania_The_Role_of_the_People_in_the_Process.
- International Federation for Human Rights (FIDH) and Legal and Human Rights Centre (LHRC). "Tanzania: Freedom of Expression in Peril." *Joint Situation Note*, (2017). https://www.fidh.org/IMG/pdf/joint_position_note_tanzania_fidh_lhrc.pdf.
- Koissaba, Ben. Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya; A Historical and Contemporary Perspective." Accessed March 6, 2024. https://www.researchgate.net/publication/303484500_Elusive_Justice_The_Maasai_Contestation_of_Land_Appropriation_in_Kenya_A_Historical_and_Contemporary_Perspective.

- Lissu, Tundu. "Policy and Legal Issues on Wildlife Management in Tanzania's Pastoral Lands: The Case Study of the Ngorongoro Conservation Area." *SocialJustice and Global Development (LGD)*, (2000), accessed: February 18, 2024, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/lissu/.
- Mhango, Mtendeweka Owen. "Recognising the Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: *Katangese Peoples' Congress versus Zaire*," 11. Accessed September 3, 2020, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1207&context=hrbrief>.
- Shivamba, Amanda and Anneke Meerkotter. "Rule by Law and Attack on Civil Freedoms in Tanzania." *SALC Policy Brief* 4,(2020). <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/10/Policy-Brief-Rule-By-Law-and-Attack-on-Civic-Freedoms-in-Tanzania.pdf>.
- Tenga, Ringo Willy. "Minority Rights in Tanzania", 1-36. https://www.academia.edu/42538083/MINORITY_RIGHTS_IN_TANZANIA. Accessed July 22, 2022.

Dissertations

- East, John William. "German Administration in East Africa: A Select Annotated Bibliography of the German Colonial Administration in Tanganyika, Rwanda and Burundi from 1884 to 1918." Thesis Submitted for the Fellowship of Library Association of London, 1987.
- Ingange-Wa-Ingange, Jean Désiré. "The African Human Rights System: Challenges and Prospects." PhD diss., University of South Africa, 2010.
- Kinunda, Aron. "Certification of Village Land in Tanzania: Examining the Protection of Indigenous Peoples' Security of Tenure." PhD diss., University of Dar es Salaam, 2020.
- Mchome, Sifuni. "The Problem of Using Law by Government Officials in Support of the Course of Development: A Case Study of Mkomazi Game Reserve and Kazimzumbwi Forest Reserve." PhD diss., University of Dar-es-Salaam, 2001.
- Mwanga, Elia. "Integrating Indigenous Knowledge Systems into Climate Change Strategies in Tanzania: Examination of Legal and Policy Challenges." PhD diss., University of Dar es Salaam, 2019.

Rubner, Nathaniel. "The Origins of the 1981 African Charter on Human and Peoples' Rights." PhD diss., University of Cambridge, 2011.

Reports

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 in Africa*. Copenhagen: Eks/Skolens Trykkeri, 2005.

African Commission on Human and Peoples' Rights and the International Work Group for Indigenous Affairs. *Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and Information Visit to the Republic of Tanzania*. Copenhagen: Eks-Skolens Trykkeri, 2015.

African Commission on Human and Peoples' Rights and the International Work Group for Indigenous Affairs. *Report of the African Commission's Working Group on Indigenous Populations/Communities: Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights*. ACHPR & IWGIA, 2017.

CHRAGG, IWGIA and IFAD. *Report of the Dialogue on Consultation for Indigenous Peoples and Local Communities in Tanzania, Held on 2nd -3rd December, 2016*. 2016.

CHRAGG, PINGOs Forum and IWGIA. *Report on the Recognition and Implementation of Indigenous Peoples' Rights in Tanzania, 2014-2015*, 2015.

Cobo, José Martínez. *Study of the Problem of Discrimination against Indigenous Populations*, Volume 5 New York: United Nations, 1987.

Commission for Human Rights and Good Governance and Pastoralists Indigenous Non-Governmental Organizations Forum. *Report of the Project on Recognition and Implementation of Indigenous Peoples Rights in Tanzania*. Unpublished: 2015.

Commission for Human Rights and Good Governance. *Individual Report of the Tanzania National Human Rights Institution Submitted to the Human Rights Council under the Universal Periodic Review Mechanism*. 2015.

Commission for Human Rights and Good Governance. *Submission for Tanzania Third Cycle Universal Periodic Review*. (2021).

East African Crude Oil Pipeline. *Human Rights Due Diligence Report*, 2022.

Human Rights Council. *Report of the Human Rights Council on its Nineteenth Session*. 2013.

Human Rights Council: Working Group on Universal Periodic Review. *Summary of Stakeholders' Submissions on United Republic of Tanzania: Report of the Office of the United Nations High Commissioner for Human Rights*. 2021.

Human Rights Council: Working Group on Universal Periodic Review. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: United Republic of Tanzania*. 2021.

Human Rights Council: Working Group on Universal Periodic Review. *Compilation on the United Republic of Tanzania: Report of the Office of the United Nations High Commissioner for Human Rights*. 2021.

Human Rights Council: Working Group on Universal Periodic Review. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/2: United Republic of Tanzania*. 2016.

Human Rights Council: Working Group on Universal Periodic Review. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/2: United Republic of Tanzania*. 2016.

International Labour Office. *Excerpts from Reports and Comments of the ILO Supervisory Bodies: Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 2019.

International Labour Organisation. *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future*. 2019.

International Labour Organisation. *Report of the Committee of Experts on the Application of Conventions and Recommendations. Application of International Labour Standards 2022, 2022*.

International Work Group for Indigenous Affairs. *Indigenous World 2023: Tanzania*, 2023.

International Work Group for Indigenous Affairs. *Tanzanian Pastoralists Threatened: Evictions, Human Rights Violations and Loss of Livelihood*, 2009.

International Work Group on Indigenous Affairs. *Tanzanian Pastoralists Threatened: Evictions, Human Rights Violations and Loss of Livelihood*, IWGIA Report 23, 2016.

- Jayant, Adhia. *Techno-economic Study; A Small Scale Soda Ash Production Plant near Lake Natron: A Terminal Report*, Vienna: UNIDO, 1983.
- Joint UNESCO/ICOMOS/IUC. *Report of the Reactive Monitoring Mission to Ngorongoro Conservation Area (Tanzania)*, 2012.
- Legal and Human Rights Centre and Zanzibar Legal Services Centre. *Tanzania Human Rights and Business Report*. Dar es Salaam: LHRC, 2018.
- Ministry of Natural Resources and Tourism. *Final Report on the Multiple Land Use Model of the Ngorongoro Conservation Area: Achievements and Lessons Learnt Challenges and Options for the Future*, 2019. Accessed February 22, 2022. <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/pdfpreview/mlum-final-oct-2019.pdf>.
- Minority Rights Group International. *A Review Report on Indigenous Peoples' Land Rights in Tanzania and Kenya: The impact of Strategic Litigation and Legal Empowerment*, 2017, available at <<https://minorityrights.org/wp-content/uploads/2017/11/FINAL-Report-on-Legal-Empowerment-and-Strategic-Litigation-English.pdf>> (accessed 30 December 2019).
- National Development Corporation, *Engaruka Soda Ash Project Report*, 2022.
- Oakland Institute. *Fact Finding Report: Field Research at the Resettlement Site-Msomera Village in Handeni District Tanzania*, 2022. Accessed February 23, 2024. https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/pdfpreview/field_research_msomera_resettlement_site_october_2022.pdf.
- Tanzania Industrial Research and Development Organization (TIRDO), *Report of the Techno-Economic Study for Engaruka Soda Ash Project*, Volume III, 2021.
- Tanzania Railways Corporation. *Report of the Consultancy Services for Undertaking The Environmental and Social Impact Assessment for the Proposed Second Tanzania Intermodal and Rail Development Project (TIRP 2)*. 2023.
- UNEP, *Report of the Ad Hoc Open-Ended Working Group on Review of Implementation of the Convention on the Work of its Fifth Meeting*, NEP/CBD/COP/12/4, 2014.
- UNESCO, *Final Report on the Meeting of Experts on Further Study of the Concept of the Rights of Peoples*. Paris: UNESCO, 1989.

United Republic of Tanzania. *State of Conservation Report*, 2006.

United Republic of Tanzania: Vice President's Office. *Tanzania National Biodiversity Strategy and Action Plan (2015-2020)*. 2015.

Vice President's Office. *Report of the National Taskforce to Rescue the Ecological System of the Great Ruaha River Basin*. 2017.

Vice President's Office. *State of Environment Report*. 2019.

World Bank. *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*. Washington: The World Bank, 2003.

World Heritage Centre (WHC)/International Union for Conservation of Nature (IUCN). *Report of the Reactive Monitoring Mission: Ngorongoro Conservation Area (United Republic of Tanzania)*, 2008.

World Heritage Centre. *Report of the Joint WHC/ICOMOS/IUCN Mission to Ngorongoro Conservation Area, United Republic of Tanzania*, March 2019.

World Heritage Committee (WHC). *State of Conservation Reports of Properties Inscribed on the World Heritage List, WHC-06/30.COM/7B*, 2006.

World Heritage Committee, *State of Conservation Reports of Properties Inscribed on the World Heritage List, WHC-06/30.COM/7B*, 2006.

Websites and other Online Resources

African Charter on Human and Peoples' Rights. "About Us." Accessed January 27, 2024. <https://www.african-court.org/wpafc/#>.

African Commission on Human and Peoples' Rights. "Statement on Joint Letter of Urgent Appeal to the United Republic of Tanzania," accessed February 21, 2024. <https://achpr.au.int/en/news/press-releases/2022-03-01/statement-joint-letter-urgent-appeal-united-republic-tanzania>.

African Commission on Human and Peoples' Rights. "Policy Framework for Pastoralism in Africa." Accessed March 10, 2024. <https://achpr.au.int/index.php/en/node/866>.

African Commission on Human and Peoples' Rights. "Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/

Communities”- ACHPR/Res.65(XXXIV)03. Accessed February 1, 2024, <https://achpr.au.int/en/node/728>.

African Commission on Human and Peoples’ Rights. “Special Mechanisms.” Accessed February 7, 2024, <https://achpr.au.int/index.php/en/special-mechanisms>.

African Commission on Human and Peoples’ Rights. “Urgent Call for Cessation of the Eviction of the Masai Community in the Ngorongoro District in The United Republic of Tanzania, June 13, 2022.” Accessed August 9, 2022. <https://www.achpr.org/pressrelease/detail?id=639>.

African Commission on Human and Peoples’ Rights. “Working Group on Indigenous Populations/Communities and Minorities in Africa: Establishment.” Accessed November 12, 2021, <https://achpr.org/>.

African Commission on Human and Peoples’ Rights. “Working Group on Indigenous Populations/ Communities and Minorities.” Accessed July 17, 2022, <https://achpr.au.int/en/mechanisms/working-group-indigenous-populationscommunities-and-minorities-africa>

African Commission on Human and Peoples’ Rights. “Working Group on Indigenous Populations/Communities and Minorities in Africa: Establishment.” Accessed November 12, 2021. <https://achpr.org/>.

African Court on Human and Peoples’ Rights. “Statistics: Cases Finalised.” Accessed May 3, 2020. <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases>.

African Court, Contentious Matters. “Statistics Graph.” Accessed February 7, 2024. <https://www.african court.org/cpmt/statistic>.

African Union. “List of Countries which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights.” Accessed March 9, 2024, https://au.int/sites/default/files/treaties/36390slafrican_charter_on_human_and_peoples_rights_2.pdf.

African Union. “List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and People's Rights”, Last modified June 15, 2017. https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf

- Azam TV. “Athari za Kutohifadhi Pori Tengefu la Loliondo na Ukweli Kinanchoendelea Ngorongoro.” Translation: “*Effects of Non-Conservation of the Loliondo Game Controlled Area and the Truth of What is Going on in Ngorongoro.*” Accessed February 12, 2023. https://www.youtube.com/results?search_query=LOLIONDO+MKURUGENZI+WA+WANYAMAPORI.
- Canada Encyclopedia. “Reserves in Ontario.” Accessed February 28, 2023. <https://www.thecanadianencyclopedia.ca/en/article/reserves-in-ontario>.
- CESCR Drafting Group. “Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights.” Accessed September 4, 2021. <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fcescr%2Fdiscussions%2F2023%2F2023-01-30%2FIssues-Paper-Sustainable-Development-2021-en.docx&wdOrigin=BROWSELINK>.
- CESCR Drafting Group. “Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights.” Accessed September 2021, 4, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fcescr%2Fdiscussions%2F2023%2F2023-01-30%2FIssues-Paper-Sustainable-Development-2021-en.docx&wdOrigin=BROWSELINK>.
- Chen, Cher Weixia. “Indigenous Rights in International Law,” 1-23. Accessed October 3, 2022. <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-7>.
- Convention on Biological Diversity. “Parties to the Cartagena Protocol and its Supplementary Protocol on Liability and Redress.” Accessed March 8, 2024.
- Cultural Survival. “Maasai and Barbaig Herders Struggle for Land Rights in Kenya and Tanzania.” Accessed March 3, 2024. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maasai-and-barabaig-herders-struggle-land-rights-kenya-and-tanzania>.

- Cultural Survival. “Securing Hadza Land Titles, Securing Futures in Tanzania.” Accessed April 2, 2024. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/securing-hadza-land-titles-securing-futures-tanzania>.
- Daily News. “Speaker Demands Clarification on KADCO Ownership.” Accessed on March 1, 2024, <https://dailynews.co.tz/speaker-demands-clarification-on-kadco-ownership/>.
- Economic and Social Affairs: Indigenous Peoples. “Indigenous Peoples at the United Nations: Working Group on Indigenous Populations (WGIP).” Accessed January 21, 2024, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.
<https://www.un.org/development/desa/indigenouspeoples/news/2022/06/statement-by-the-chairperson-of-the-un-permanent-forum-on-indigenous-issues-with-reference-on-the-eviction-of-maasai-people-from-the-ngorongoro-conservation-area-in-tanzania/>.
- ILO. “ILO Constitution.” Accessed October 16, 2022. https://www.ilo.org/hanoi/Whatwedo/Publications/WCMS_818973/lang--en/index.html.
- International Labour Office. *Labour Provisions of the Peace Treaties*, (Geneva: 1920), 1. Accessed September 27, 2022. https://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf.
- International Labour Organisation (ILO). “History of the ILO.” Accessed September 28, 2022. <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.html>.
- International Labour Organisation. “Committee of Experts on the Application of Conventions and Recommendations.” Accessed October 17, 2022. <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.html>.
- International Labour Organisation. *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future*. 2019. Accessed November 10, 2022. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_735607.pdf.
- International Labour Organisation, “Indigenous and Tribal Peoples,” accessed September 7, 2022, <https://www.ilo.org/global/topics/indigenoustribal/langen/index.htm#:~:text=Th>

e%20ILO%20has%20been%20engaged%20with%20indigenous%20and,deals%20exclusively%20with%20the%20rights%20of%20these%20 peoples.

International Labour Organisation. “About the ILC.” Accessed October 16, 2022. <https://www.ilo.org/ilc/AbouttheILC/lang--en/index.html>.

International Labour Organisation. “Conference Committee on the Application of Standards.” Accessed October 23, 2022. <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang-en/index.html>.

International Labour Organisation. “Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).” Accessed September, 2022. https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.

International Labour Organisation. “Ratifications of C107: Indigenous and Tribal Populations Convention, 1957 (No. 107).” Accessed November 10, 2022. http://www.ilo.ch/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO.

International Work Group for Indigenous Affairs (IWGIA). “Indigenous World 2022: Tanzania.” Accessed February 28, 2024. <https://www.iwgia.org/en/tanzania/4643-iw-2022-tanzania.html>, accessed February 28, 2024.

International Work Group for Indigenous Affairs (IWGIA). “Indigenous World 2019: Tanzania.” Accessed February 26, 2024. <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>.

International Work Group for Indigenous Affairs, (WGIA). Urgent Alert: “Threats of Forced Eviction of the Maasai Indigenous Pastoralists of the Ngorongoro Conservation Area (NCA) and Ngorongoro District in Tanzania, February, 23 2022. Accessed August 9, 2022. <https://www.iwgia.org/en/resources/publications/4606-urgent-alert-maasai-ngorongoro-tanzania-forced-eviction.html> .

International Work Group for Indigenous Affairs. “Forceful Evictions of Pastoralists in Kilosa District, Morogoro Region, Tanzania - Carried Out from 29/01/2009.” Accessed 27, 2019.

https://www.iwgia.org/images/publications/0747_Kilosa_Evictions_Urgent_Alert.pdf.
International Work Group for Indigenous Affairs. “The Situation of Indigenous Peoples in the Ngorongoro Conservation Area.” Accessed January 27, 2021. <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>

International Work Group for Indigenous Affairs. “The Indigenous World 2022: Tanzania.” Accessed February 19, 2024. <https://www.iwgia.org/en/tanzania/4643-iw-2022-tanzania.html>

International Work Group for Indigenous Affairs. “Threat of Dispossession in Hai District for Expansion of Kilimanjaro International Airport.” Accessed September 17, 2020, <https://www.iwgia.org/en/tanzania/3488-iw2019-tanzania.html>

International Work Group for Indigenous Peoples (IWGIA). “Indigenous World 2023: Tanzania.” Accessed February 23, 2024. <https://www.iwgia.org/en/tanzania/5063-iw-2023-tanzania.html>.

IPP Media. “Government Working on Sanctuary Conflict-Minister.” Accessed on February 19, 2024. <https://www.ippmedia.com/en/news/govt-working-sanctuary.conflict.minister>

IUCN. “Statement on Human Rights Violations in Loliondo, Tanzania.” Accessed February 20, 2024. <https://www.iucn.org/news/secretariat/202206/iucn-statement-human-rights-violations-loliondo-tanzania>.

Legal and Human Rights Centre. “Tamko Kuhusu Hali ya Loliondo na Ngorongoro” (Translation: Press Statement on the Situation of Loliondo and Ngorongoro). Dated June 30, 2022. Accessed August 10, 2022. <https://humanrights.or.tz/en/news-events/ngorongoro>.

Maelezo Tv. “*The Truth about Loliondo Game Controlled Area and Ngorongoro Conservation Are.*” Accessed March 12, 2024, <https://www.youtube.com/watch?v=GMGMoQXW16w&t=12s>.

Ministry of Livestock and Fisheries. “Environmental Management Unit.” Accessed April 2, 2024. <https://www.mifugouvuvi.go.tz/pages/environmental-management-unit>.

Minority Rights Group, “Beyond Just Conservation: A History of Maasai Dispossession.” Accessed February 21, 2024. <https://minorityrights.org/beyond-just-conservation-a-history-of-maasai-dispossession/>.

Mtanzania Digital. “Ripoti Migogoro ya Ardhi Kilosa Yakamilika.” (Translation: Report on Land Conflicts in Kilosa Complted”). Accessed February 2023. <https://mtanzania.co.tz/ripoti-migogoro-ya-ardhi-kilosa-yakamika/>.

National Bureau of Statistics. “General Information.” Accessed March 29, 2024. <https://www.nbs.go.tz/index.php/en/about-us/general-information>.

National Bureau of Statistics. “Population Size in Tanzania.” Accessed February 11, 2024. <https://sensa.nbs.go.tz>.

New Zealand’s Ministry of Primary Industries. “Fish Quota Management System.” Accessed February 24, 2023. <https://www.mpi.govt.nz/legal/legislation-standards-and-reviews/fisheries-legislation/quota-management-system/#about>.

Ngorongoro Conservation Area Authority. “Overview: Cultures-Datooga.” Accessed March 16 2024, <https://www.ncaa.go.tz/cultures/#Datooga>.

Ngorongoro Conservation Area. “Cultures.” Accessed March 21, 2024, <https://www.ncaa.go.tz/cultures/>.

Oakland Institute. “Losing the Serengeti: The Maasai Land that was to Run Forever.” Accessed February 23, 2023. <https://www.oaklandinstitute.org/tanzania-safari-businesses-maasai-losing-serengeti>.

Office of the High Commissioner for Human Rights: UN Treaty Body Database. “Ratification Status for CRC- Convention on the Rights of the Child.” Accessed March 8, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CR C.

Office of the High Commissioner for Human Rights: UN Treaty Body Database. “Ratification Status for United Republic of Tanzania.” Accessed March 8, 2024, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=en.

Okuly Digital. “Kwa Sababu Hizi Ni Muhimu Kwa Wakazi wa Ngorongoro Kuhamia Msomera.” (Translation: For these Reasons it is Crucial for Ngorongoro Residents to Relocate to Msomera). Accessed August 8, 2023. <https://www.youtube.com/watch?v=k4UnXIxHAiE>.

Pan-African Lawyers Union. “East African Court of Justice Delivers Judgment on Loliondo Case.” Accessed February 20, 2024. <https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/>

Permanent Peoples’ Tribunal (PPT). “Algiers Charter.” Accessed February 9, 2021. <http://permanentpeoplestribunal.org/algiers-charter/?lang=en>.

PINGOs Forum. “Historia ya Mgogoro kati ya Vijiji na Kiwanja cha Ndege Kilimanjaro” (Translation: The History of Land Conflicts between Villages and the Kilimanjaro International Airport). Accessed March 1, 2024, <https://www.youtube.com/watch?v=mMhcUfYNvJs>.

PINGOs Forum. “*Maasai Delegation meets with European Governments and Politicians on Eviction Crisis.*” Accessed February 25, 2024, https://pingosforum.or.tz/wp-content/uploads/2023/06/MaasaiEuropePR_EN.pdf.

PINGOS Forum. “Tamko Toka Mashirika Yasiyo ya Kiserikali Kuhusu Mgogoro wa Ardhi Wilaya ya Ngorongoro” (Translation: Joint Statement of the Non-governmental Organisations Regarding Land Conflict in Ngorongoro District). Accessed August 10, 2022. <https://pingosforum.or.tz/tamko-toka-mashirika-yasiyo-ya-kiserikali-kuhusu-mgogoro-wa-ardhi-wilaya-ya-ngorongoro/>.

PINGOs Forum. “The Plunging of Pastoralists in Kimotorok.” Accessed February 19, 2024. <https://pingosforum.or.tz/the-plunging-of-pastoralists-in-kimotorok/>.

PINGOS Forum. Pastoralists’ Challenges in Tanzania. Accessed March 19, 2024. <https://www.youtube.com/watch?v=-oC9O0FQRw>.

Rain Forest Rescue. “DR Congo Officially Recognises the Rights of Indigenous People.” Accessed April, 8, 2024. <https://www.rainforest-rescue.org/updates/11088/dr-congo-officially-recognizes-the-rights-of-indigenous-people>.

Star TV Habari. “Mgogoro wa Vilima Vitatu Babati; Wakazi Washangazwa na Amri Zinazokinzana” (Translation: “Vilima Vitatu Conflict in Babati; Residents Astounded by Conflicting Decisions”). Accessed March 3, 2024, <https://www.youtube.com/watch?v=q4HBA5B238>.

Tanzania National Parks (TANAPA). “Establishment.” Accessed February 17, 2024. <https://www.tanzaniaparks.go.tz/pages/history>.

Tanzania National Parks (TANAPA). “Lake Manyara National Park,” Accessed February 17, 2024. <https://storymaps.arcgis.com/stories/10ce7c6dd58f427d8f9748320acb131f>.

Tanzania National Parks (TANAPA). “Serengeti National Park.” Accessed February 17, 2024. <https://storymaps.arcgis.com/stories/da3c674bdcc44265af0d5e85d8403583>.

Tanzania National Parks. “Tarangire National Park.” Accessed February 19, 2024. <https://storymaps.arcgis.com/stories/b49867b8d81c497f92d6c1f6b0eb5ae5>.

Tanzania Wildlife Management Authority (TAWA). “Mkungunero Game reserve.” Accessed February 19, 2024. <https://www.tawa.go.tz/attraction-details/mkungunero-gr>.

Tanzania Wildlife Research Institute. “Functions of TAWIRI.” Accessed August 27, 2023, <https://www.tawiri.or.tz/overview/>

Tarangire National Park, “History of Tarangire National Park.” Accessed February 18, 2024, <https://tarangire.org/history-of-tarangire-park/>.

TEARA: The Encyclopedia of New Zealand. “Story: Te hī ika – Māori fishing.” Accessed February 26, 2023. <https://teara.govt.nz/en/tehiikamaorifishing#:~:text=Fishing%20is%20important%20in%20M%C4%81ori%20tradition%3A%201%20Tangaroa,discovere d%20New%20Zealand%20while%20chasing%20a%20huge%20octopus>.

The Citizen. “EACOP Partners with Barbaig Community in Landmark Agreement.” Accessed February 29, 2024. <https://www.thecitizen.co.tz/tanzania/news/national/eacop-partners-with-barabaig-community-in-landmark-agreement-4486670>.

Ujamaa Community Resource Team. Securing Land Rights for the Hadzabe. Accessed April 5, 2024. <https://www.ujamaa-crt.or.tz/securing-land-rights-for-the-hadzabe.html>.

Ultimate Kilimanjaro, “Tarangire National Park: Everything you Need to Know.” Accessed February 18, 2024, <https://www.ultimatekilimanjaro.com/tarangire-national-park-everything-you-need-to-know/>.

UNEP. “Cartagena Protocol’: About the Protocol (Introduction).” Accessed March 17, 2023. <https://bch.cbd.int/protocol/background/#intro>.

UNEP. “Conference of Parties (COP): Background and Status.” Accessed March 18, 2023. <https://www.cbd.int/cop/>.

UNESCO World Heritage Centre. “News, Ngorongoro: UNESCO has Never at any Time Asked for the Displacement of the Maasai People.” Accessed August 10, 2022. <https://whc.unesco.org/en/news/2419>.

- UNESCO. “Ngorongoro Lengai UNESCO Global Geopark (Tanzania).” Accessed March 21, 2024. <https://en.unesco.org/global-geoparks/ngorongoro-lengai>.
- UNFCCC. “Supreme Bodies: Conference of the Parties serving as the meeting of Parties to the Paris Agreement (CMA).” Accessed March 7, 2022, <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-serving-as-the-meeting-of-the-parties-to-the-paris-agreement-cma>.
- United Nations Educational, Scientific and Cultural Organisation (UNESCO): Intangible Cultural Heritage. “Three Enkipaata, Eunoto and Olng'esherr, Three Male Rites of Passage of the Maasai Community.” Accessed November 17, 2023. <https://ich.unesco.org/en/USL/enkipaata-eunoto-and-olng-esherr-three-male-rites-of-passage-of-the-masai-community0130>.
- United Nations Permanent Forum on Indigenous Issues. “Statement by the Chairperson of the Permanent Forum on the Eviction of Maasai people from the Ngorongoro Conservation Area in Tanzania, June 14, 2022.” Accessed August 9, 2022. <https://www.un.org/development/desa/indigenouspeoples/news/2022/06/statement-by-the-chairperson-of-the-un-permanent-forum-on-indigenous-issues-with-reference-on-the-eviction-of-masai-people-from-the-ngorongoro-conservation-area-in-tanzania/>.
- United Nations, Human Rights Bodies. “UN Treaty Body Database,” Accessed February 11, 2023, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en.
- United Nations, Office of the High Commissioner on Human Rights. “Special Procedures of the Human Rights Council.” Access January 21, 2024. <https://www.ohchr.org/en/special-procedures-human-rights-council>.
- United Nations: Department of Economic and Social Affairs (Indigenous Peoples). “United Nations Declaration in the Rights of Indigenous Peoples.” Accessed October 10, 2022, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.
- United Nations: Department of Economic and Social Affairs (Indigenous Peoples). “World Conference on Indigenous Peoples.” Accessed March 26, 2024,

<https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html>.

United Nations: Department of Economic and Social Affairs (Social Inclusion). “United Nations Permanent Forum on Indigenous Issues (UNPFII).” Accessed January 21, 2024, <https://social.desa.un.org/issues/indigenous-peoples/unpfii>.

United Nations: Department of Economic and Social Affairs, “Indigenous Peoples of the United Nations: Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).” Accessed January 21, 2024. <https://social.desa.un.org/issues/indigenous-peoples/indigenous-peoples-at-the-united-nations>.

United Nations: Human Rights Council. “Universal Periodic Review.” Accessed March 24, 2024, <https://www.ohchr.org/en/hr-bodies/upr/upr-home>.

United Nations: Office of the High Commissioner for Human Rights. “Table of Pending Cases before the Committee Human Rights Committee on Economic, Social and Cultural Rights Considered under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Accessed February 12, 2023. <https://www.ohchr.org/en/treaty-bodies/escr/table-pending-cases>.

United Nations: Office of the High Commissioner for Human Rights. “Introduction to the Committee: Human Rights Committee.” Accessed October 26, 2022. <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee>.

United Nations: Office of the High Commissioner for Human Rights. “About the Mandate: Special Rapporteur on the Rights of Indigenous People.” Accessed January 21, 2024. <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/about-mandate>.

United Nations: Office of the High Commissioner for Human Rights. “About the Mandate: Expert Mechanisms on the Rights of indigenous Peoples.” Accessed: January 21, 2024. <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/about-mandate>.

United Nations: Office of the High Commissioner for Human Rights. “Special Rapporteur on the Rights of Indigenous People.” Accessed January 21, 2024. <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

United Nations: Office of the High Commissioner for Human Rights. Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, 1991, para. 6.

Accessed January 16, 2023,
<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet16rev.1en.pdf>.

United Nations: Office of the High Commissioner for Human Rights. “United Nations Declaration on the Rights of Indigenous Peoples: Background.” Accessed March 7, 2024. <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>.

United Nations: Office of the High Commissioner for Human Rights. “Tanzania: UN Experts Warn of the Escalating Violence Amidst Plans to Forcibly Evict Maasai from Ancestral Lands.” Accessed February 20, 2024. <https://www.ohchr.org/en/press-releases/2022/06/tanzania-un-experts-warn-escalating-violence-amidst-plans-forcibly-evict>.

United Nations: Office of the High Commissioner. “Committee on the Elimination of Racial Discrimination: Introduction.” Accessed January 6, 2024. <https://www.ohchr.org/en/treaty-bodies/cerd/introduction>.

United Nations: Office of the Human Rights Commissioner (OHRC), The Committee on Economic, Social and Cultural Rights, “Day of the General Discussion on the General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Rights.” Accessed January 15, 2024. <https://www.ohchr.org/en/events/events/2023/day-general-discussion-general-comment-economic-social-and-cultural-rights-and-sustainable-development>.

United Nations: Office of the Human Rights Commissioner (OHRC). The Committee on Economic, Social and Cultural Rights. “General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Right.” Accessed January 15, 2024. <https://www.ohchr.org/en/treaty-bodies/cescr/general-comment-sustainable-development-and-international-covenant-economic-social-and-cultural-rights>.

United Nations: Office of the Human Rights Commissioner (OHRC). The Committee on Economic, Social and Cultural Rights. “General Comment on Sustainable Development and International Covenant on Economic, Social and Cultural Right.” Accessed January

- 15, 2024. <https://www.ohchr.org/en/treaty-bodies/cescr/general-comment-sustainable-development-and-international-covenant-economic-social-and-cultural-rights>.
- United Nations: Treaty Collection. Accessed March 8, 2024. “Environment: Paris Agreement,” https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7d&chapter=27&clang=_en.
- United Republic of Tanzania. Ministry of Constitution and Legal Affairs, Human Rights Division, accessed April 4, 2024. <https://www.sheria.go.tz/pages/human-rights-division>.
- United Republic of Tanzania: President’s Office. “Tanzania Social Action Fund: History/Background.” Accessed March, 29, 2024. <https://www.tasaf.go.tz/pages/test>.
- United Republic of Tanzania: Tanzania Investment Centre. “Mission and Vision.” Accessed March 30, 2024.
- Watetezi Tv. “*Msimamo wa Malaigwanani Kuhusu Ngorongoro;Watoa Tamko Zito.*” Translation: (A Serious Statement on the Position of the Laigwanans regarding Ngorongoro). Accessed August 10, 2022. <https://www.youtube.com/watch?v=e7AxLljn7hE>.
- World Bank. “The World Bank and Indigenous Peoples Policy and Program Initiatives.” Accessed February 2, 2022. <https://documents.worldbank.org/en/publication/documents-reports>.
- World Bank. “The World Bank and Indigenous Peoples Policy and Program Initiatives.” Accessed February 2, 2022. <https://documents.worldbank.org/en/publication/documents-reports>.
- World Bank. “The World Bank and Indigenous Peoples Policy and Program Initiatives.” Accessed February 2, 2022. <https://documents.worldbank.org/en/publication/documents-reports>.

Advisory Opinion

African Commission on Human and Peoples’ Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA). *Advisory Opinion on the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: Eks-Skolens Trykkeri, 2010.

Speech

Speech by the President of the United Republic of Tanzania, Honorable Samia Suluhu Hassan before the Parliament of the United Republic of Tanzania (12 Session). Dodoma: April 22, 2021.

Hansard

Parliament of the United Republic of Tanzania, Parliamentary *Hansard*, Sixth Session, 7th Sitting, February 9, 2022.