Journal of African Law, 66, 2 (2022), 201–227 © The Author(s), 2022. Published by Cambridge University Press on behalf of SOAS University of London. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.
doi:10.1017/S002185532200002X First published online 14 March 2022

Free, Prior and Informed Consent in Kenyan Law and Policy After *Endorois* and *Ogiek*

Nqobizitha Ndlovu*
Nelson Mandela School of Law, Fort Hare University, East London, South Africa
nndlovu6@gmail.com

Enyinna S Nwauche**
Nelson Mandela School of Law, Fort Hare University, East London, South Africa
enwauche@ufh.ac.za

Abstract

This article examines the Kenyan legal and policy framework as well as jurisprudence on the principle of free, prior and informed consent (FPIC) occasioned by the decision of the African Commission on Human and Peoples' Rights (African Commission) in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya* (*Endorois*) and the judgment of the African Court on Human and Peoples' Rights (African Court) in the case of *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek*). The main objective of this article is to examine the development and level of operationalization of the principle of FPIC in Kenyan domestic law and policy using the *Endorois* and *Ogiek* standard. It examines how the Kenyan domestic legal system has responded to these regional and international developments on FPIC and its operationalization.

Keywords

Free, prior and informed consent, *Endorois*, *Ogiek*, Kenyan law and policy

INTRODUCTION

While the judgments of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya*[1] (*Endorois*) and *African Commission on Human and Peoples' Rights v Republic of Kenya*[2] (*Ogiek*) have been the subjects of a number of scholarly articles,[3] their

---

* PhD law candidate, Nelson Mandela School of Law, Fort Hare University.
** Professor of law, Nelson Mandela School of Law, Fort Hare University.
1 (2009) AHRLR 75 (ACHPR 2009).
2 Application 006-2012.
3 K Sing'Oei "Engaging the Leviathan: National development, corporate globalisation and the Endorois' quest to recover their herding grounds" (2011) 18 *International Journal on Minority and Group Rights* 515; G Lynch "Becoming indigenous in the pursuit of justice:

impact on the development of the principle of free, prior and informed consent (FPIC) within Kenyan law and policy has received scant attention. This article addresses the Kenyan jurisprudence on the principle of FPIC in the wake of *Endorois* and *Ogiek*. The Endorois and Ogiek peoples share a common struggle against forced displacement from their ancestral lands, exclusion from the development process and exploitation of their natural resources without their FPIC. Thus, the question of ownership of ancestral land and utilization of natural resources was core in the determination of both cases. Central to the argument against the forced displacements of the Ogieks and Endorois from their traditional lands was the lack of opportunity to enable them to give or withhold their FPIC before the relocations. The Endorois and Ogiek peoples challenged the lack of consultation and effective participation or compensation for their forced displacement from their traditional lands as breaches of the provisions of the African Charter on Human and Peoples' Rights (African Charter).[4] In addition, they challenged the lack of protection afforded their traditional way of life and claimed violations of the African Charter, particularly the right to property,[5] the right to freely dispose natural resources on their land,[6] and the right to development.[7] In *Endorois* and *Ogiek*, the African Commission and African Court respectively held that the eviction of the Endorois and Ogieks against their will, and without prior consultation, was indeed a violation of these rights.

Using *Endorois* and *Ogiek* as the international standard on FPIC, the main objective of this article is to examine the development and operationalization of the principle of FPIC in Kenyan domestic law and policy. In line with this objective, the article shall be divided into the following parts. We begin with a discussion of the principle of FPIC under international law, and seek to situate the principle within the wider discourse among indigenous peoples on the right to land, territory and natural resources. The following section provides a summation of the *Endorois* and *Ogiek* judgments, with a focus on FPIC. Of major interest to this article is that both judgments were against the Republic of Kenya. There then follows a discussion of the development and operationalization of the principle of FPIC in Kenya using the *Endorois* and *Ogiek* standards. This section teases out FPIC standards in the Kenyan domestic law system, focusing on the constitution, the Community Land Act, the Endorois Peoples' Biocultural Community Protocol (Endorois Protocol) and case law authorities.

---

contd
The African Commission on Human and Peoples' Rights and the Endorois" (2012) 111 *African Affairs* 24.

4 Organization of African Unity (OAU) African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, OAU doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

5 Id, art 14.

6 Id, art 21.

7 Id, art 24.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT

The fact that indigenous peoples have a profound cultural, social, economic and spiritual relationship to their lands and territories is now widely recognized under international law.[8] However, this fact has not stopped the frequent deprivation of indigenous peoples of their traditional lands in the name of development.[9] Further, the demands of a globalized economy have resulted in the exploitation of natural resources within indigenous territories without the adequate participation of the indigenous peoples.[10] As a result, large-scale development projects such as logging, dam construction and mining have become synonymous with violations of indigenous peoples' rights.[11] Recognizing that the expropriation of indigenous lands and resources without the consent of indigenous peoples was a "growing and severe" problem,[12] international institutions strongly backed the principle of FPIC. This culminated in the recognition of the FPIC principle in international instruments such as the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO Convention 169)[13] and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[14] The ILO Convention 169 is a binding international treaty whereas the UNDRIP is a soft law instrument that lacks binding force.

Definition of the principle of FPIC

Besides the fact that the principle of FPIC has taken on central importance in relations between indigenous peoples and states, particularly in the context of natural resource governance, its precise meaning, scope and operationalization remain a subject of debate.[15] Rodriguez-Garavito characterizes FPIC as a conceptual, legal and political minefield,[16] while according to Papillon, Leclair and Leydet, not only is the principle itself contested "but its operationalization is also highly complex, rife with power struggles between

8 J Gilbert and C Doyle "A new dawn over the land: Shedding light on collective ownership and consent" in S Allen and A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011, Hart Publishing) 289.

9 M Steward-Harawira *The New Imperial Order: Indigenous Responses to Globalization* (2005, Zed Books) at 45.

10 Gilbert and Doyle "A new dawn over the land", above at note 8 at 304.

11 Ibid.

12 EI Daes "Indigenous peoples' permanent sovereignty over natural resources", E/CN.4/Sub.2/2004/30/Add.1, para 7.

13 Adopted on 27 June 1989 and entered into force on 5 September 1991.

14 Resolution adopted by the UN General Assembly, 2 October 2007, res 61/295, UN doc A/RES/61/295.

15 A Tomaselli and C Wright *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap* (2019, Routledge) at 10.

16 C Rodriguez-Garavito "Ethnicity.gov: Global governance, indigenous peoples and the right to prior consultation in social minefields" (2011) 18/1 *Indiana Journal of Global Legal Studies* 263 at 291.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

competing interests and worldviews".[17] To Shrinkhal, FPIC is a tool for indigenous autonomy, although its meaning and scope is highly contested by states and extractive industries,[18] and for Ward, the definition of the principle of FPIC is contained within its phrasing: it seeks to ensure that indigenous peoples are afforded opportunities to make free and informed choices about the development of their lands and resources.[19]

While the meaning and scope of FPIC remains contested, its various constituent elements have found some definition. "Free" means that the consent of indigenous peoples must be obtained voluntarily without any form of force, intimidation, duress or undue influence. According to Boutilier, for it to be free, consent must be obtained "without any form of coercion, intimidation, manipulation, or application of force by government or non-governmental parties seeking consent".[20] Fredericks expands on this list, noting that bribery or externally imposed timelines negate the element of free consent.[21] The element of "prior" implies that before a proposed activity is implemented, the affected indigenous peoples must be given adequate time to "understand, access, and analyze information" before giving consent.[22] While it is accepted that indigenous peoples must be engaged early in the planning process and be given sufficient time to adequately consider proposed measures, Fredericks notes that there is disagreement about the stage in the planning and development process at which consent must be obtained.[23] "Informed" implies that indigenous peoples can only freely consent if they have been given adequate information on all the possible impacts of the proposed activity, both positive and negative. According to Fredericks, this means that they should have access to information that is "clear, consistent, accurate, constant, and transparent, as well as objective and complete".[24] To promote adequate understanding of the full range of issues about and potential impacts of any decision, the information must be in the local language and must respect the customary law and culture of the indigenous peoples concerned.[25]

17 M Papillon, J Leclair and D Leydet "Free, prior and informed consent: Between legal ambiguity and political agency" (2020) 27/2 *International Journal on Minority and Group Rights* 223 at 230.

18 R Shrinkhal "Free prior informed consent as a right of indigenous peoples" (2014) 2 *Journal of National Law University, Delhi* 54.

19 T Ward "The right to free, prior, and informed consent: Indigenous peoples' participation rights within international law" (2011) 10/2 *Northwestern University Journal of International Human Rights* 54.

20 S Boutilier "Free, prior, and informed consent and reconciliation in Canada" (2017) 7/2 *Western Journal of Legal Studies* 1 at 3.

21 CF Fredericks "Operationalizing free, prior, and informed consent" (2016) 80/2 *Albany Law Review* 429 at 440.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

The element of "consent" is one question which, according to Shrinkhal, is often difficult to answer and continues to provoke debate.[26] Fredericks concurs, noting that "the precise set of actions that constitutes consent is yet to be determined".[27] Yaffe identifies some of the inherent complexities relating to the element of consent: firstly, whose consent constitutes community consent?[28] Secondly, does the element of consent amount to a veto power? Fredericks has argued that consideration of all impacted rights holders and community members is central for a conclusion that there has been FPIC.[29] While FPIC goes beyond mere consultation, in the sense that the community can withhold its consent after consultations, Tomlinson notes that governments have voiced their reluctance to confer "veto" rights to indigenous peoples.[30] This has resulted in Szablowski arguing that despite a clear theoretical distinction between consent and consultation regimes, it is not always easy to distinguish the two in practice.[31] Iseli has also weighed in, arguing that most FPIC regimes only impose a duty to consult and not a duty to achieve consent.[32] It has thus been argued that in practice, FPIC means free, prior and informed consultation rather than free, prior and informed consent.[33] Despite these definitional challenges of the principle of FPIC, the principle has come to occupy a central place in the legal landscape of indigenous peoples' issues.[34]

Evolution of FPIC under international law

Colchester and Ferrari trace the history of FPIC to the mid-1980s, as part of indigenous peoples' struggle for self-determination.[35] According to Anaya, FPIC is intrinsically connected to the idea of self-determination, which basically argues that "human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing

26 Shrinkhal "Free prior informed consent", above at note 18 at 59.
27 Fredericks "Operationalizing free, prior", above at note 21 at 440.
28 N Yaffe "Indigenous consent: A self-determination perspective" (2018) 19/2 *Melbourne Journal of International Law* 703 at 707.
29 Fredericks "Operationalizing free, prior", above at note 21 at 440.
30 K Tomlinson "Indigenous rights and extractive resource projects: Negotiations over the policy and implementation of FPIC" (2019) 23/5 *The International Journal of Human Rights* 880 at 891.
31 D Szablowski "Operationalizing free, prior, and informed consent in the extractive industry sector? Examining the challenges of a negotiated model of justice" (2010) 30 *Canadian Journal of Development Studies* 111 at 117.
32 C Iseli "The operationalization of the principle of free, prior and informed consent: A duty to obtain consent or simply a duty to consult?" (2020) 38/2 *UCLA Journal of Environmental Law and Policy* 259 at 270.
33 Ibid.
34 Yaffe "Indigenous consent", above at note 28 at 704.
35 M Colchester and M Ferrari "Making FPIC work: Challenges and prospects for indigenous peoples" (2007) *Forest Peoples Programme* at 2.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

institutional orders that are devised accordingly".[36] Gilbert and Doyle concur that FPIC is "premised on and essential for the operationalization of the right to self-determination".[37] Implicit in the right to self-determination is the right of indigenous peoples to effectively participate and be consulted in relation to any development projects or measures which affect them.[38] Daes further links the rights to self-determination and land, noting that the exercise of the right to self-determination is dependent on the recognition of the indigenous peoples' right to land and resources.[39] The Inter-American Court of Human Rights (IACHR) recognized this argument in the case of *Saramaka v Suriname*,[40] ruling that indigenous peoples' land rights will be rendered "meaningless if not connected to the natural resources that lie on and within the land".[41] Two international instruments, the ILO Convention 169 and the UNDRIP, provide the normative framework for the development of the principle of FPIC.

The ILO Convention 169

The ILO Indigenous and Tribal Populations Convention 1957 (No 107)[42] was the first international treaty specifically focusing on the rights of indigenous peoples.[43] While it was subsequently revised by the ILO Convention 169 in 1989, it remains in force in 17 countries which had ratified it, though it has closed to new ratifications since the entry into force of the later convention.[44] The origins of the current formulation of the principle of FPIC can be traced to the ILO Convention 169. Article 6(1)(a) states that governments have the obligation to consult the indigenous communities concerned "through appropriate procedures" and "through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly". Article 6(2) further clarifies that "[t]he consultations carried out … shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures". However, as noted by Anaya, while this article imposes an obligation on the state to consult with the objective of achieving consent, achieving consent is not a prerequisite for states to

36 SJ Anaya "The right of indigenous peoples to self-determination in the post-declaration era" in C Charters and R Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009, IWGIA) 184 at 185.

37 Gilbert and Doyle "A new dawn over the land", above at note 8 at 312.

38 Ibid.

39 Daes "Indigenous peoples' permanent sovereignty", above at note 12 at 8.

40 *Saramaka People v Suriname* (preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007).

41 Id, para 122.

42 26 June 1957, C107.

43 P Hanna and F Vanclay "Human rights, indigenous peoples and the concept of free, prior and informed consent" (2013) 31/2 *Impact Assessment and Project Appraisal* 146 at 150.

44 *Understanding the Indigenous and Tribal People Convention, 1989 (No 169): Handbook for ILO Tripartite Constituents* (2013, ILO) at 4.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

act.[45] Article 7 provides that indigenous peoples "have the right to decide their own priorities for the process of development as it affects … the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development". The state's obligation to consult is further mentioned in relation to the use of natural resources found on indigenous communities' land (article 15(2)), the transfer of their land (article 17), the development and implementation of special training programmes (article 22) and language (article 28). While Iseli has underlined the fact that these articles only introduce a state obligation to consult, as opposed to a right of consultation for indigenous peoples, the obligation to consult in order to seek consent is seen as the precursor of FPIC.[46] The only article which refers to the phrase "free and informed consent" in the ILO Convention 169 is article 16(2), which explicitly provides that in cases of relocation, "such relocation shall take place only with [indigenous peoples'] free and informed consent". Where this consent cannot be obtained, relocation can only proceed after "following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned". As a result, the obligation under the ILO Convention 169 has at times been classified as an obligation to free and prior consultation, but not as an obligation to obtain free, prior and informed consent.[47]

The UN Declaration on the Rights of Indigenous Peoples

The UNDRIP was adopted by the UN General Assembly in September 2007. Although it is a soft law instrument, it contains the clearest articulation of FPIC.[48] According to Yaffe, it was not until the adoption of the UNDRIP that FPIC was fully realized in an international instrument.[49] The UNDRIP operationalized self-determination by not only recognizing indigenous peoples' right to self-determination but also through the explicit recognition of FPIC. Article 3 of the UNDRIP affirms that indigenous peoples have a right to self-determination and that because of this right, they can freely determine how to pursue their own economic, social and cultural development. This is buttressed by article 32, which recognizes the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. Accordingly, it has been argued that the right to determine whether and how indigenous land can be used, which flows from peoples' right to self-determination, acts as the basis for the development of FPIC.[50] The UNDRIP recognizes FPIC as either a

45 J Anaya "Report of the special rapporteur on the rights of indigenous peoples, extractive industries and indigenous peoples" (2013) UN doc A/HRC/24/41 at 9.
46 Hanna and Vanclay "Human rights, indigenous peoples", above at note 43 at 150.
47 Iseli "The operationalization", above at note 32 at 264.
48 Ward "The right to free, prior", above at note 19 at 56.
49 Yaffe "Indigenous consent", above at note 28 at 722.
50 Hanna and Vanclay "Human rights, indigenous peoples", above at note 43 at 150.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

prospective right of indigenous peoples or as the basis for providing redress for past wrongs, in six key contexts. These are: relocation from traditional lands, which shall not take place "without the free, prior and informed consent of the indigenous peoples concerned" (article 10); redress for cultural, intellectual, religious or spiritual property taken "without their free, prior and informed consent" (article 11(2)); obtaining "free, prior and informed consent" before adopting and implementing legislative and administrative measures that affect them (article 19); redress for land taken "without their free, prior and informed consent" (article 28(1)); ensuring that there is no storage or disposal of hazardous materials on indigenous land "without their free, prior and informed consent" (article 29(2)); and obtaining "free and informed consent" prior to the approval of projects affecting their lands or territories and other resources (article 32(2)). Therefore, the UNDRIP is the only international instrument containing the "real" principle of FPIC, as the ILO Convention 169 only introduces one crucial aspect of it.[51] Although the UNDRIP is a soft law instrument that lacks binding force, international tribunals, including in the African Human Rights System, have recognized its persuasive force in the realm of indigenous peoples' rights. Within the African Human Rights System, the African Commission and the African Court referenced the UNDRIP's FPIC standard in *Endorois* and *Ogiek* respectively.

THE *ENDOROIS* AND *OGIEK* JUDGMENTS: A SUMMATION

One of the major unresolved issues in Kenya relates to land rights violations of indigenous peoples who were forcefully displaced from their ancestral lands without FPIC. The struggle for land rights has been waged in both the domestic legal system and regional human rights institutions. *Endorois* and *Ogiek* represent the struggle of the indigenous people of Kenya for land rights before the African Commission and African Court respectively. As noted by FM Ndahinda, the central issue in the *Endorois* communication related to land rights because the applicants before the African Commission primarily sought the restitution of their land, "with title and clear demarcation".[52] The overarching argument of the Endorois was that they were evicted from their traditional lands without adequate consultation and effective participation.[53]

The Endorois, a traditional pastoralist community of approximately 60,000 people living at Lake Bogoria in central Kenya, were dispossessed from their traditional and ancestral lands in the 1970s to make way for a national reserve and tourist facilities.[54] For centuries, the Endorois had established a

51 Iseli "The operationalization", above at note 32 at 265.

52 FM Ndahinda "Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights" (2016) 16 *African Human Rights Law Journal* 31.

53 *Endorois*, above at note 1, para 281.

54 SAD Kamga "The right to development in the African human rights system: The *Endorois* case" (2011) 44 *De Jure* 382.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

sustainable way of life which was inextricably linked to their ancestral land. Their ownership of Lake Bogoria had remained unchallenged for centuries and was widely accepted by surrounding tribes.[55] During British colonial rule, the Endorois retained the right of possession and use of the land, although the ownership was vested in the British Crown.[56] At Kenyan independence in 1963, the Endorois maintained their customary rights of use and possession over the land, although title was passed to the county council to be held on behalf of the Endorois community.[57] The Kenyan government gazetted the area as a game reserve in 1973, and the Endorois were dispossessed from their ancestral land allegedly without their FPIC.[58]

After being evicted from the fertile land around the lake, the Endorois were forced to congregate on arid land, where many of their cattle died.[59] They tried unsuccessfully to persuade the Kenyan government, the local authorities and the Kenyan Wildlife Service to reverse their policy of evicting everyone, including traditional inhabitants, from areas the government had designated national parks and reserves.[60] When they sought an adequate share of the tourism and revenues generated by the reserve, they were also rebuffed.[61] They then began legal action against the Baringo and Koibatek county councils. In *William Yatich Sitetalia, William Arap Ngasia et al v Baringo County Council*, the High Court refused to address the issue of a collective right to property, referring throughout to "individuals" affected and stating that "there is no proper identity of the people who were affected by the setting aside of the land … that has been shown to the Court".[62] The court stated that it did not believe Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights. Following this unsuccessful challenge within the Kenyan legal system, the Endorois brought their case to the African Commission in 2003.

In their communication, the Endorois alleged that they had been forcefully dispossessed from their ancestral land in the Lake Bogoria area without proper prior consultation or adequate and effective compensation.[63] They alleged that the eviction threatened their sustainable livelihoods as they were displaced to semi-arid areas and were denied access to fertile soils, medicinal salt licks, grazing lands and the lake, which were all integral aspects of their livelihood.[64] It was further alleged that the community was denied access to Lake Bogoria, which is central to the Endorois' religious, traditional and

55 *Endorois*, above at note 1, para 4.
56 Ibid.
57 Id, para 5.
58 Id, para 6.
59 Id, para 17.
60 Ndahinda "Peoples' rights, indigenous rights", above at note 52 at 31.
61 *Endorois*, above at note 1, para 10.
62 High Court judgment of 19 April 2002, civil case no 183 of 2000.
63 *Endorois*, above at note 1, para 2.
64 Id, para 6.

cultural practices as the historical prayer sites, places for circumcision rituals and other cultural ceremonies are around Lake Bogoria.[65] These sites were used on a weekly or monthly basis for smaller local ceremonies and on an annual basis for cultural festivities involving Endorois from the whole region.[66] The Endorois alleged that the Kenyan government had proceeded to sell their land to third parties and grant ruby-mining concessions without consulting them.[67] It was alleged that the denial of customary title to their ancestral land, the dispossession from their traditional land without proper and prior consultation, and the severe restrictions placed on access to the Lake Bogoria area, together with a lack of adequate compensation, amounted to a serious violation of the African Charter.

The Endorois argued that this forced eviction amounted to a violation of the Charter particularly in regard to the right to practice religion (article 8), the right to culture (articles 17 (2) and (3)), the right to property (article 14), the right to freely dispose of their natural resources (article 21) and the right to development (article 22). The African Commission considered the communication and the submissions of the Kenyan government and released its decision in February 2009, recognizing the Endorois as an indigenous people and finding that the Kenyan government had violated articles 8, 14, 17(2), 17(3), 21 and 22 of the African Charter. Before addressing these allegations of violation, the African Commission addressed the question of whether the Endorois are a "people" and "indigenous". Drawing inspiration from one of its prior decisions[68] and the decisions of the IACHR,[69] the Commission determined that the Endorois, having a clear historic attachment to particular land, are a distinct "indigenous" people, a term contested by the Kenyan government who claimed that the Endorois were not distinct from the Tugen sub-tribe.[70]

Following the finding that the Endorois are an indigenous people, the African Commission held the Kenyan government responsible for the violation of all the alleged provisions of the African Charter. The Commission upheld the principle of customary land tenure, holding that the Endorois had property rights over the land they traditionally occupied and used, even though the British and Kenyan authorities had denied them a formal title. We contend that the state's failure to enable the Endorois to give their FPIC

65 Ibid.
66 Ibid.
67 Id, paras 13, 14 and 20.
68 *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria* African Commission on Human and Peoples' Rights, comm no 155/96 (2001).
69 *Moiwana Village v Suriname* (preliminary objections, merits, reparations and costs) Inter-American Court of Human Rights Series C no 124 (15 June 2005) and *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (merits, reparations and costs) Inter-American Court of Human Rights Series C no 79 (31 August 2001).
70 RK Hitchcock and D Vinding *Indigenous Peoples' Rights in Southern Africa* (2004, IWGIA) at 98.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

before the relocations formed the basis of the African Commission's finding that the Kenyan government had violated the Endorois' right to property. In its extensive ruling, the Commission discussed the principle of FPIC as lying at the foundation of three interrelated rights: the right to property, the right to freely dispose of natural resources and the right to development.

In its consideration of the right to property, the African Commission held that the forced removal of people from their homes violated article 14 of the African Charter.[71] A removal must satisfy two tests for it to be lawful, the "public interest" test and the "in accordance with law" test. The "in accordance with law" test has two elements, viz. consultation and compensation. Consultation is an integral component of FPIC. Commenting on the requirement for consultation in the "in accordance with law" test, the Commission emphasized the fact that the threshold is stringent in favour of indigenous peoples as it also requires that consent be given.[72] The Commission was emphatic that failure to observe the obligations to consult and to seek consent ultimately results in a violation of the right to property.[73]

The African Commission, quoting with approval *Saramaka*, set out three conditions which the state should meet before encroaching on indigenous peoples' land.[74] Firstly, it must ensure the effective participation of the members of the indigenous community, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within their territory. Secondly, the state must guarantee that benefits flowing from any development within indigenous peoples' territory must also benefit them. Lastly, the state must undertake a prior environmental and social impact assessment before any development, investment, exploration or extraction within indigenous peoples' land. The requirements set out by the African Commission embody the principle of FPIC. The finding by the Commission was that no effective participation was allowed for the Endorois, and further, no reasonable benefit was enjoyed by the community.[75] Moreover, a prior environmental and social impact assessment was not carried out. The absence of the three elements of the "in accordance with law" test was held by the Commission to be a violation of the right to property.[76]

The African Commission used the principle of FPIC to link the rights to property, development and free disposal of natural resources. The Commission expressed this link by noting that the failure to guarantee effective participation and to guarantee a reasonable share in the profits of the game reserve not only amounts to a violation of the right to property but

71 *Endorois*, above at note 1, para 191.
72 Id, para 226.
73 Ibid.
74 Id, para 227.
75 Id, para 228.
76 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

also extends to a violation of the right to development.[77] The Commission adopted the reasoning that the right to land is intricately linked with the right to access natural resources:[78] the principle of FPIC as it applies to the right to property equally applies to the right to freely dispose of natural resources. As a result, the Commission's ruling was that the "Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State".[79] In discussing the right to development, the Commission equated FPIC to "freedom of choice"[80] and further clarified the necessary conditions for consultation. It held that consultations must be in "good faith", with the objective of achieving "agreement or consent".[81]

The principles of equity, non-discrimination, participation, accountability and transparency lie at the heart of FPIC.[82] In this regard, the African Commission noted that the Endorois believed that they had no choice but to leave the lake, and when some of them tried to reoccupy their former land and houses, they were met with violence and forced relocations.[83] According to the Commission, the lack of choice, coupled with the unequal bargaining position of the Endorois, undermined their effective participation, and hence "conditions of the consultation failed to fulfil the African Commission's standard of consultations".[84] Informing community members of the impending project as a fait accompli, without giving them an opportunity to shape the policies or their role in the development project, also falls below the consultation standards of the Commission. It is thus incumbent upon states to conduct consultation processes that not only allow the representatives of indigenous peoples to be fully informed of intended developments but to effectively participate in developments crucial to the life of the community. The principle of FPIC is thus prominent in the ruling of the Commission.

In *Ogiek*,[85] one of the prayers of the applicants was that the government of Kenya should be compelled to:

> "[A]dopt legislative, administrative and other measures to recognize and ensure the right of the Ogieks to be effectively consulted, in accordance with their traditions and customs, and / or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land."[86]

77 Ibid.
78 Id, para 267.
79 Id, para 268.
80 Id, para 278.
81 Id, para 274.
82 Id, para 277.
83 Id, para 279.
84 Id, para 281.
85 *Ogiek*, above at note 2.
86 Id, para 43 E.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

The Ogieks are an indigenous minority ethnic group in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest complex.[87] In October 2009, the Kenya Forest Service issued a 30-day eviction notice to the Ogieks, alleging that the forest constituted a reserved water catchment zone, and was in any event part of government land under section 4 of the Government Land Act.[88] The Ogieks alleged that the Forest Service's action failed to take into account the importance of the Mau Forest for their survival and that they were not involved in the decision leading to their eviction.[89] It was contended that the eviction notice was simply a perpetuation of the historical injustices suffered by the Ogieks, who had faced several evictions from their ancestral land under colonial rule.[90]

Following unsuccessful administrative and judicial objections to the forced evictions, the Ogieks approached the African Commission, citing violation of the state parties' duty to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the African Charter (article 1), the right to non-discrimination (article 2), the right to life (article 4), the right to culture (articles 7(2) and (3)), the right to practise religion (article 8), the right to property (article 14), the right to dispose freely of natural resources (article 21) and the right to development (article 22).[91] On 12 July 2012, pursuant to article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the Court (the Court Protocol), the African Commission referred the matter to the African Court, with the Commission as the applicant and the Republic of Kenya as the respondent.

The crux of the Ogieks' allegations revolved around the principle of FPIC. Once again, the principle of FPIC is the common thread in linking the right to property, the right to freely dispose of natural resources and the right to development. Firstly, the Ogieks argued that their eviction and dispossession from their land without their consent, and the granting of concessions on their land to third parties without their consent, meant that their land had been encroached upon without them deriving benefits therefrom, thus violating their right to property.[92] Secondly, they alleged that the state had violated their right to freely dispose of their natural resources by evicting them from the Mau Forest and denying them access to the vital resources therein, and by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits.[93] Lastly, with regards to the violation of the right to development, the Ogieks alleged that by evicting them from their ancestral land, and by failing to consult with them and /

87 Id, para 6.
88 Id, paras 7 and 8.
89 Id, para 8.
90 Ibid.
91 Id, paras 9 and 10.
92 Id, para 114.
93 Id, para 191.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

or seek their consent in relation to the development of their shared cultural, economic and social life within the forest, the state had violated their right to development.[94]

On 26 May 2017, at its 45th session, the African Court delivered its first judgment on indigenous peoples' rights since it was operationalized in 2006. The judgment was in favour of the Ogiek indigenous peoples in their claim against the Kenyan government for unlawful land dispossessions from their ancestral lands. After eight years, the Court found seven violations of the rights of the Ogieks as enshrined in the African Charter. Endorsing the approach adopted by the African Commission in *Endorois*, the Court considered the status of the Ogieks and held that they had suffered from continued subjugation and marginalization, which resulted from forced evictions from their ancestral lands without their FPIC.[95]

Drawing inspiration from article 26 of the UNDRIP, the African Court extended the classical meaning of the right to property to include customary tenure.[96] The principle of effective participation and consent before eviction from land was emphasized, with the Court holding that the eviction of the Ogieks without effective consultation and their prior consent amounted to a violation of article 14 of the African Charter.[97] The failure to effectively consult the Ogieks in the development process was also held to be a violation of their rights to development and to dispose freely of their natural wealth. While holding that these rights can be extended to include sub-state ethnic groups and communities, the Court was quick to caution that such rights can only be enjoyed to the extent that "such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent".[98] These rights hinge on effective participation and consultation in developmental processes that affect the indigenous peoples. The evictions from the Mau Forest and the pursuant access restrictions to the forest were also held to be a violation of the Ogieks' rights to culture and religion, as it was proven that the forest was central to these.

Ogiek affirms the African Commission's position in *Endorois* that failure to enable indigenous peoples to give or withhold their FPIC before the start of development projects that have the potential to affect their lands and natural resources will result in a violation of the right to property, the right to freely dispose of natural resources and the right to development. We contend that both *Endorois* and *Ogiek* championed the right to FPIC, and the Kenyan government was ordered in both instances to enable indigenous peoples to give or withhold their FPIC before commencement of development projects within

94 Id, para 202.
95 Id, para 111.
96 Id, para 127.
97 Id, para 131.
98 Id, para 199.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

their territories. Considering these decisions, the following section examines FPIC within the Kenyan national legal system.

OPERATIONALIZATION OF FPIC IN KENYA

MacInnes, Colchester and Whitmore cite the presence of FPIC within national legislation as a crucial indicator of the extent to which the state recognizes indigenous peoples' rights within its jurisdiction.[99] Since the incorporation of the ILO Convention 169 and the UNDRIP into the international human rights discourse, several countries have allowed for stronger state recognition of indigenous peoples' land, territory and resource rights.[100] Kenya is cited as one country which has allowed for stronger recognition of indigenous peoples' rights to land, territory and resources.[101] The elements of FPIC can be gleaned in several Kenyan constitutional, statutory and policy provisions, and the judiciary has weighed in with some interpretations of the various elements of FPIC. This section discusses the operationalization of FPIC in Kenya through examining FPIC provisions in the Constitution of Kenya 2010 and the Public Participation Bills which seek to give effect to these constitutional provisions; the Community Land Act 2016; the National Guidelines for Free, Prior and Informed Consent; and the Endorois Peoples' Biocultural Community Protocol.

The Constitution of Kenya 2010

The principle of public participation is the closest thing to FPIC in Kenyan constitutional law. Article 10 of the Kenyan constitution identifies specific national values and principles of governance that are binding to every state organ, state officer, public officer and all other persons engaged in applying or interpreting the constitution, in enacting or applying any law and in making any public policy or decision. These governance values and principles include democracy, public participation, sustainable development, the sharing and devolution of power, transparency, and accountability. Constitutionally, it is apparent that public participation forms one of the governance pillars in Kenya.

Other constitutional provisions on public participation include article 69(1)(d) on the state duty to encourage public participation in the management, protection and conservation of the environment; article 174(c) articulating public participation as the principal objective of devolution; article 184(1)(c) providing for participation by residents in the governance of urban areas and cities; article 196(1)(b) providing for public participation and involvement in the legislative and other business of the county assembly and its

99 A MacInnes, M Colchester and A Whitmore "Free, prior and informed consent: How to rectify the devastating consequences of harmful mining for indigenous peoples" (2017) 15/3 *Perspectives in Ecology and Conservation* 152 at 156.

100 Ibid.

101 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

committees; article 201(a) providing for public participation in public finance matters; and article 232(1)(d) providing for the involvement of the people in the process of policymaking. To give effect to these constitutional provisions on public participation, the two houses of the Kenyan parliament are currently considering the Public Participation Bill (Sen Bills No 4 of 2018), the Public Participation Bill (NA Bill No 69 of 2019) and the Public Participation Bill (NA Bill No 71 of 2019). Public participation is defined in these bills as the involvement and consultation of the public in the decision-making processes of the relevant state organs and public offices. One of the guiding principles on the conduct of public participation is the right of the public, communities and organizations affected by a decision to be consulted and involved in the decision-making process.[102]

The Community Land Act 2016

Besides the constitutional provisions on public participation as enshrined in the constitution and the Public Participation Bills (which are not yet law), the recognition of indigenous peoples' land, territory and resource rights is enshrined in article 63 of the constitution, which, at article 63(2)(d)(ii), recognizes ancestral lands and lands traditionally occupied by hunter-gatherer communities as communal land. The Community Land Act 2016[103] gives effect to this article; section 36 of the act provides the closest and strongest articulation of FPIC in relation to indigenous peoples' land, territory and resources, as it provides that investment in community land shall be made after a "free, open consultative process".[104] No agreement between an investor and the community shall be valid unless it is approved by two-thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two-thirds of the adult members of that community is represented.[105] The consultative process and ensuing investment agreement must provide guidelines on the environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment on the community; payment of compensation and royalties; a rehabilitation plan for the land upon completion or abandonment of the project; mitigation of any negative effects of the investment; and capacity-building of the community and the transfer of technology to the community.[106]

The Community Land Act not only provides the strongest articulation of FPIC but also sets a clear pathway for its operationalization. Through a democratic process, the community has the final say on development initiatives on

102 Public Participation Bill (Sen Bills No 4 of 2018).
103 Act No 27 of 2016.
104 Community Land Act 2016, sec 36(1).
105 Id, sec 36(3).
106 Id, sec 36(2).

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

their land. Section 36 of the Community Land Act firmly entrenches the elements of FPIC as defined in the *Endorois* and *Ogiek* decisions and under international law. Without making specific mention of FPIC, it uses the phrase "free, open consultative process" which is backed by a consent requirement of a two-thirds majority. The provision requires that the consultative process be "free", "prior" to the signing of an investment agreement and "informed" by environmental, social, cultural and economic impact assessments, rehabilitation plans and environmental mitigation plans. The consent model contained in the Community Land Act answers several questions around consent under international law. These include questions such as what constitutes consent, at what point consent should be obtained, what happens if the community withholds its consent and who has the legitimacy to give or withhold consent in the name of a specific indigenous community. The community assembly composed of at least two-thirds of the adult members of that community have the legitimacy to consent to an investment agreement. Without their consent, the development initiative cannot be implemented on community land.

The National Guidelines for Free, Prior and Informed Consent

The National Guidelines for Free, Prior and Informed Consent[107] (National Guidelines) were developed by the Ministry of Environment, Natural Resources and Regional Development Authorities in 2016. Although the guidelines are non-binding, they provide invaluable insights on the operationalization of FPIC in Kenya. Of major interest is the fact that the guidelines draw heavily from the normative framework developed by the African Commission in *Endorois*. The introduction to the National Guidelines states that its objective is "to contribute towards enhancing participation of forest dependent communities (both local communities and indigenous communities) in meaningfully contributing to and enjoying benefits from national development initiatives".[108] The development of the guidelines was informed by:

> "[T]he realization that forest dependent communities are often among the poorest of the poor, their identity and culture is uniquely tied to their land and natural resources, they play a major role in sustainable development through managing their natural resources and their rights are increasingly recognized under national, regional and international legal frameworks that Kenya has subscribed to."[109]

107 National Guidelines for Free, Prior and Informed Consent, Kenya, available at: <https://www.undp.org/content/dam/kenya/docs/energy_and_environment/2019/FPIC%20Kenya%20Guidelines%20Final.pdf > (last accessed 10 January 2021).

108 Id at 1.

109 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

The National Guidelines also reflect the jurisprudence of the African Commission and the African Court on the recognition of customary land tenure systems by its provision for the recognition of and respect for both statutory and customary rights to land and resources of indigenous peoples.[110] The guideline to enhance participation of forest-dependent communities is similar to one of the recommendations of the African Commission in *Endorois* that the government of Kenya must recognize rights of ownership to the Endorois' ancestral lands. The African Court in *Ogiek* affirmed the African Commission's reasoning, holding that the right to property as guaranteed by article 14 of the African Charter may also apply to groups or communities.[111] This guideline is now a statutory provision contained in section 5 of the Community Land Act; this recognizes customary land rights which have been given equal force and effect in law to freehold or leasehold rights acquired through allocation, registration or transfer.

The National Guidelines recognize the influence of "the country's constitution and enabling legislation, and other national, regional and international principles and practices related to Indigenous People and Local Communities".[112] In tandem with the jurisprudence of the African Commission and the African Court, the National Guidelines provide that activities, projects, programmes and policies that may have serious implications on indigenous peoples' land, territories, cultural heritage, identity, survival and collective wellbeing require consent prior to implementation.[113] The consultation and giving of consent must be conducted through the community's customary institutions and practices; in this regard, community members should be granted a platform to discuss collectively the implications of the project or activity from their own perspectives, interest, welfare and aspirations, and to arrive at a decision.[114] This guideline also finds statutory provision in section 36 of the Community Land Act, which designates the community assembly as the community institution and platform through which consultation and consent must be conducted. It is the indigenous peoples' freedom to define their own mechanisms and processes of decision-making and the right to set their terms and conditions to development projects which form the basis of community protocols.

The Endorois Peoples' Biocultural Community Protocol

The development of community protocols plays a critical role in the operationalization of FPIC. The jurisprudential basis of community protocols in Kenya can be traced to *Endorois*, where the African Commission held that FPIC must

110 Id at 3.
111 *Ogiek*, above at note 2, para 123.
112 National Guidelines, above at note 107 at 7.
113 Id at 15.
114 Id at 6.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

be in accordance with the customs and traditions of indigenous peoples.[115] The Mo'otz Kuxtal Voluntary Guidelines, adopted by the 13th Conference of the Parties to the Convention on Biological Diversity (CBD), define community protocols as follows: "[c]ommunity protocols is a term that covers a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them".[116]

Swiderska concurs, asserting that community protocols are "charters of rules and responsibilities in which communities set out their customary rights to natural resources and land, as recognized in customary, national and international laws".[117] Community protocols thus set out the rules of engagement between indigenous peoples and third parties through the FPIC process at a community level. The National Guidelines recognize community protocols by asserting that since the FPIC process concerns a specific proposed activity with potential impacts on a specific community, and that consent is given or withheld by the community collectively, FPIC is applied at the community level.[118] Accordingly, the Endorois Peoples' Biocultural Community Protocol is central to the operationalization of FPIC in Kenya, particularly among the Endorois community.[119] The protocol was launched on the 31 August 2019[120] and is derived from FPIC provisions in various international and national instruments. These include article 8(j) of the CBD, which mandates states to promote the approval and involvement of holders of traditional knowledge in the preservation of such knowledge. The consultation processes on access and benefit-sharing, as provided in articles 12(1) and (2) of the Nagoya Protocol, is another FPIC pillar to the Endorois Protocol. The third pillar to the protocol is the UNDRIP, particularly article 32, which embodies the right of indigenous peoples to determine and develop their own priorities and strategies for the development or use of their lands or territories and other resources. The Constitution of Kenya is also cited as one of the pillars of the Endorois Protocol.

Lassen et al trace the development of the Endorois community protocol to the African Commission's Endorois decision.[121] They note that the

115 *Endorois*, above at note 1, para 291.

116 CBD/COP/DEC/XIII/18, 17 December 2016.

117 K Swiderska et al "Community protocols and free, prior informed consent – overview and lessons learnt" 26, available at: <https://pubs.iied.org/pdfs/G03395.pdf> (last accessed 12 February 2020).

118 National Guidelines, above at note 107 at 7.

119 Endorois Peoples' Biocultural Community Protocol, available at: <https://www.abs-initiative.info> (last accessed 19 February 2020).

120 C Githaiga, R Birgen and W Changwony "The Endorois community launch their biocultural community protocol" (2019), available at: <https://naturaljustice.org/the-endorois-community-launch-their-biocultural-community-protocol/> (last accessed 10 February 2020).

121 B Lassen et al "Community protocols in Africa: Lessons learned for ABS implementation" at 21, available at: <https://naturaljustice.org/wp-content/uploads/2018/11/2018_Community-Protocols-in-Africa_Lessons-Learned_Natural-Justice.pdf> (last accessed 10 February 2020).

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

recognition of Endorois community rights over their ancestral lands gave them standing to share in any benefits arising from indigenous knowledge and resources.[122] The protocol recognizes *Endorois* as "an earthmoving decision" regarding the recognition and protection of Endorois' rights to identification, culture, religion and land.[123] The Endorois Protocol outlines the socio-cultural history of the Endorois, articulating community-determined values, procedures and priorities and clarifying the decision-making process of the Endorois for FPIC.[124] FPIC lies at the centre of the objectives of the Endorois Protocol: firstly, the protocol seeks to "act as a negotiation tool between the Endorois community and other groups and stakeholders seeking to engage with the Endorois community and its resources".[125] Secondly, it seeks to "ensure legally sound procedures including PIC are followed in the process of access and utilization of the Endorois community's resources".[126] Thirdly, it ensures that "benefits sharing under recognized international laws is achieved from any access and utilization of any of the Endorois' community's resources".[127] Further, it ensures that relevant government processes are followed and adhered to in any access, utilization and benefit-sharing arrangements and processes that affect the Endorois community.[128] Lastly, it seeks to ensure constructive and proactive responses to threats and opportunities posed by land and resource development, conservation, research and other legal and policy frameworks.[129] Thus, the protocol serves as the basis for the effective participation of the Endorois in the country's development process.

The Kenyan judiciary and FPIC

Kenyan courts have also played an active role in the operationalization of FPIC through judicial interpretation of FPIC and the principle of public participation in various cases, including land rights disputes and developmental projects. This section provides an overview of the courts' approaches to FPIC in Kenya; it examines how the courts have interacted with the jurisprudence of the African Commission and the African Court, as well as how they have interpreted various public participation provisions enshrined in the Kenyan constitution and legislation. While enshrining public participation as one of the national values and principles of governance, the constitution does not expressly mention that indigenous communities have a fundamental right to consultation and to give consent to projects that might affect them.

122 Ibid.
123 Endorois Peoples' Biocultural Community Protocol, above at note 119 at 10.
124 Lassen "Community protocols in Africa", above at note 121 at 21.
125 Endorois Peoples' Biocultural Community Protocol, above at note 119 at 14.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

Further, the absence of a law prescribing the requirements for public participation that meet the constitutional threshold has left it for the courts to formulate and develop jurisprudence around the duty of public participation. However, as noted in *Save Lamu v National Environmental Management Authority*, while the constitution does not prescribe how public participation is to be effected, the Kenyan Constitutional Court has set out the minimum basis for adequate public participation.[130] The Kenyan courts have been instrumental in defining and developing the parameters of public participation, which is a critical aspect of FPIC.

One of the most important decisions in this context is the decision of the High Court in the case of *Abdalla Rhova Hiribae v Attorney General*,[131] since it clarified the principal characteristics and objectives of public participation as enshrined in article 10 of the Kenyan constitution. The contentious issue in the *Abdalla* case related to the issue of consultation and participation of indigenous communities in the development process. The main contention was that the proposed development projects "violate the United Nations Declaration on the Rights of Indigenous People that provide for the right of prior informed consent before the territories of the indigenous people are taken".[132] The petitioners brought a petition as the representatives of the communities that reside in and derive a livelihood from the Tana Delta wetlands within the Tana River district, based on allegations of violations of their right to life, environmental rights and the rights of communities and indigenous, marginalized and minority groups. These communities include the Orma, Wardei and Somali communities, who are pastoralists, the Pokomo and Mijikenda who engage in farming, and fishing communities comprising the Malakote, Bajuni and Luos. Also included are hunter-gatherers, comprising the Wasanya and Boni.[133] The petitioners alleged that these communities have lived and exercised their livelihoods within the Tana River Delta since time immemorial and have thus acquired land rights and rights of use over resources available in the Tana Delta wetlands.[134]

They argued that the developments in the Delta were not beneficial to the communities and that they posed a threat to their land rights and socio-economic rights. Further, the petitioners stated that what precipitated the application was the fact that the respondents approved development projects in the Delta without consulting the local communities.[135] It was alleged that the projects had not been successful or beneficial to the local communities, as they had been speculative,[136] and that very little information on the intended

130 [2019] eKLR, para 25.
131 [2013] eKLR.
132 Id, para 12.
133 Id, para 6.
134 Ibid.
135 Id, para 8.
136 Ibid.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

projects was available to enable the residents of the Delta to participate meaningfully and have their interests taken into account in the development process.[137] As a result, the petitioners, among other reliefs, sought an order of mandamus: "directing respondents to develop, in consultation with all the stakeholders and inhabitants of the Tana Delta, a multiple and comprehensive land use master plan for guiding land use, development, livelihood and biodiversity / ecological protection".[138]

In response to the allegations, the third respondent, the Tana and Athi Rivers Development Authority (TARDA), argued that extensive consultations and public discussions were carried out on the said projects.[139] TARDA alleged that it had individually consulted 2,600 stakeholders, which included a wide range of lead agencies, members of parliament, councillors, local leaders, non-governmental organizations and conservation groups.[140] TARDA further claimed that, in accordance with the provisions of the Environmental Management and Coordination Act (EMCA),[141] it commissioned experts to undertake and carry out an environmental impact assessment.[142]

Likewise, the Water Resources Management Authority, as the sixth respondent, argued that it carried out public consultations prior to the project.[143] The Authority argued that it published its intentions to carry out the public consultations in the *Standard* newspaper, and through the *Gazette Notice* invited members of the public to present their contributions and comments for consideration in the development of the Catchment Management Strategy.[144] It contended that the petitioners did not lodge their objections and hence they should not be heard to be alleging that there was no consultation. During oral arguments, the petitioners urged the court to be guided by article 10 of the Kenyan constitution, particularly about public participation and consultation of affected communities.[145] They also asked the court to be guided by *Endorois*.

In its judgment, the court addressed the question of who can make a claim to FPIC. While the argument has been advanced that the FPIC of indigenous peoples must be obtained prior to development projects which have negative impacts on their land, the High Court, without first determining whether the affected communities were indigenous or not, took the view that they had to be consulted. The High Court cited article 10 of the Kenyan constitution, which lists participation, inclusiveness, transparency, accountability and protection of the marginalized as national values, as the legal basis for

137 Id, para 9.
138 Id, para 3.
139 Id, para 25.
140 Ibid.
141 Cap 387.
142 Id, para 26.
143 Id, para 31.
144 Ibid.
145 Id, para 66.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

consultation of the affected communities. The Court went further by noting that consultation provisions were also embedded in sections 8 and 15 of the Water Act,[146] as well as in section 58(2) of the EMCA. Accordingly, the court seems to have elevated the application of the principle of FPIC to all Kenyan communities.

The court also determined the quality and adequacy of consultation in the case and held that:

> "From the pleadings and submissions before me it is clear that some consultation and participation that involved the petitioners and the communities at the Tana Delta did take place. This is unlike the situation in the Endorois case, where no consultation of the community whatsoever appears to have occurred."[147]

We contend that the High Court's summation that in *Endorois* no community consultation appears to have occurred at all is a wrong assessment. The issue in *Endorois* was ineffective consultation and participation;[148] the argument revolved around the inadequacy of the consultations undertaken by the Kenyan authorities.[149] The African Commission upheld the principle that the effective participation of the members of the Endorois people should be in conformity with their customs and traditions,[150] and these traditions required the consultation and consent of the Endorois Council of Elders which, according to Endorois customs, forms the oldest age group in the hierarchy of decision-making in the community.[151] The council members are elected by the community and are responsible for the equitable management and sharing of natural resources.[152]

Even though the court noted that some consultation had taken place, it concluded that the communities were not given access to plans after the consultation process. It ordered that, firstly, the existing development plans of the Delta be availed to the petitioners within 45 days; secondly, that the plans for the Tana Delta be re-evaluated in consultation with and with the participation of the communities; and finally, that projects under implementation be monitored periodically to assess their impact on the natural resources and the community.[153] Despite the seemingly contradictory positions in the judgment, we suggest that the High Court was alive to the principle of FPIC as developed in *Endorois*. The three requirements of effective consultation – prior consultation, re-evaluation and periodic consultation – are now

146 Act No 43 of 2016.
147 *Ogiek*, above at note 2, para 66.
148 *Endorois*, above at note 1, para 282.
149 Id, para 131.
150 Id, para 227.
151 Endorois Peoples' Biocultural Community Protocol, above at note 119 at 11.
152 Ibid.
153 *Abdalla Rhova Hiribae*, above at note 131, para 70.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

requirements of FPIC in Kenya. We thus contend that this is a positive development in Kenyan law which can be traced to the jurisprudence of the African Commission in *Endorois*.

Another important decision in the operationalization of FPIC in Kenya is the *John K Keny v Principal Secretary Ministry of Lands, Housing and Urban Development* case.[154] The *Keny* case is central to the development and operationalization of the principle of FPIC in Kenyan law because the court decided that the African Court's decision in *Ogiek* is binding on the Kenyan courts. The petitioners' case was that they were all living in areas of the south-western Mau Forest in 2009 before they were evicted by the Kenya Forest Service.[155] The petitioners claimed that they had only known as home the areas forming part of the south-western Mau Forest, and alleged that they and several other people were evicted from their parcels of lands without the due process of the law being followed and without being fully compensated. Upon eviction, the petitioners were put in camps, where they lived from 2009 to the filing of the constitutional petition dated 30 May 2017. The petitioners instituted the suit in their individual capacities and as members of the Ogiek Independent Council of South West Mau Forest.

The Principal Secretary Ministry of Lands, Housing and Urban Development, Kenya Forest Service, the Director Kenya Survey and the Attorney General opposed the petition. The respondents denied the allegations by the petitioners and argued that the case was res judicata. They advanced the argument that the decisions in the previous cases on the Mau Forest evictions, namely *Joseph Letuya v Attorney General*,[156] *Clement Kipchirchir v Principal Secretary Ministry of Lands*[157] and *Ogiek*, are judgments in rem (a judgment applicable to the whole world).[158] The respondents argued that the issue of the compensation of the Ogiek community following their eviction from the Mau Forest had been determined by the courts and that the same issue cannot be reopened by the petitioners. In its analysis, the court noted that while in the *Joseph Letuya* and *Clement Kipchirchir* cases the courts adjudicated upon the rights of individual members of the Ogiek community in relation to their eviction from the Mau Forest, the case of *Ogiek* before the African Court was broader and addressed the issue of Ogiek land rights in the context of past, prevailing and future violations of their rights and their eviction from the Mau Forest.[159] The court took judicial notice that the eviction of people from the Mau Forest is not a one-off event but is a recurrent and cyclical occurrence that lends itself to political undertones.[160] As a result, the court decided

154 [2018] eKLR.
155 Id, para 8.
156 [2014] eKLR.
157 [2015] eKLR.
158 *Japheth Nzila Muangi v Kenya Safari Lodges and Hotels Ltd* [2008] eKLR.
159 *Keny*, above at note 154, para 40.
160 Id, para 41.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

to adopt an approach that did not just address individual concerns with regard to the evictions but looked at the broader policy questions in resolving the vexed issue of the Mau Forest and other ecologically sensitive areas.[161]

Following this broad approach to the question of res judicata, the court held that the various remedies of restitution, compensation, satisfaction and guarantees of non-repetition for the violations committed by the various state organs against the Ogieks set out by the African Court in *Ogiek* were applicable in the matter before it. The court held that the decision of the African Court in *Ogiek* "is binding on this Court by virtue of Article 2(6) of the Constitution of Kenya 2010".[162] Thus by virtue of article 2(6) of the Kenyan constitution, the High Court affirmed the position that failure to enable indigenous peoples to give or withhold their FPIC before a removal amounts to a violation of their right to property. In addition, the court found that the principle of FPIC is part of the right to fair administrative conduct that is provided for in article 47(1) of the Kenyan constitution and section 4(1) of the Administrative Action Act. The right to fair administrative action requires a person who is affected by administrative conduct to be given an opportunity to be heard and to make representations. We contend that the finding by the High Court that the right to fair administrative action incorporates the principle of FPIC is a positive development in Kenyan law as it strengthens and broadens the principle of FPIC. In making the final finding that the petitioners' rights had been violated, the court recognized the binding nature of the *Ogiek* judgment and the remedies set out in the operative part of the judgment. The court held that in consultation with the chiefs and the Ogiek Council of Elders, the National Land Commission must open a register of all evicted Ogiek members and identify land for their resettlement.

The question of what amounts to effective participation was answered by a three-judge bench of the Kenyan Constitutional Court in the case of *Mui Coal Basin Local Community v Permanent Secretary Ministry of Energy*.[163] In setting out the minimum basis for adequate public participation, the Constitutional Court made some key findings. Firstly, it held that the precepts of article 10 of the constitution, including public participation, are established rights which are justiciable in Kenya.[164] The court described public participation as a national value that is an expression of the sovereignty of the people, noting that:

> "[P]ublic participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed,

161 Id, para 42.
162 Ibid.
163 [2015] eKLR.
164 Id, para 87.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

> it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy."[165]

The Constitutional Court has thus classified public participation as a justiciable right. Having established the right to public participation, the court outlined the test for determining whether the threshold of public participation has been met. Firstly, there must be a programme of public participation. Secondly, in fashioning public participation modalities, a variety of mechanisms may be used to achieve public participation; no single regime or programme of public participation can be prescribed, and the only test the courts use is one of effectiveness. The method and degree of public participation that is reasonable in each case depends on several factors, including the nature and importance of the issue at hand and the intensity of its impact on the public. Thirdly, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. Fourthly, while public participation does not dictate that everyone must give their views on an issue of environmental governance, the programme must show intentional inclusivity and diversity. Those most affected by a policy, legislation or action must have a bigger say, and their views must be more deliberately sought and considered. Fifthly, the right of public participation does not guarantee that everyone's views will be adopted; the right is only to express one's views. However, the state has a duty to take into consideration, in good faith, all the views received as part of a public participation programme. Lastly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

This Constitutional Court position has been followed and affirmed by the High Court in ensuing decisions, in the cases of *Republic v County Government of Kiambu Ex parte Robert Gakuru*,[166] *Save Lamu*,[167] and *Mohamed Ali Baadi v Attorney General*.[168] In the *County Government of Kiambu* case, the High Court emphasized that public participation ought not to be equated with mere consultation;[169] hence public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilling the constitutional dictates.[170] In this regard, in the *Save Lamu* case the court emphasized that a vital condition of public participation is access to information.[171] This position was further affirmed by the court in the

165 Id, para 88.
166 [2016] eKLR.
167 Above at note 130.
168 [2018] eKLR.
169 *County Government of Kiambu*, above at note 166, para 46.
170 Id, para 47.
171 *Save Lamu*, above at note 130, para 69.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press

Mohamed Ali Baadi case, holding that public participation in environmental issues consists of access to environmental information, public participation in decision-making and access to justice.[172] The Kenyan courts have thus developed jurisprudence around operationalization of FPIC in Kenya through the duty of public participation.

CONCLUSION

This article has chronicled the development of the principle of FPIC under international law and its interpretation and application by the African Commission and the African Court in the *Endorois* and *Ogiek* cases respectively. It has been noted that the meaning, scope and operationalization of FPIC are highly contested by states and extractive industries. However, it can be argued that Kenya has clearly set out an FPIC model which meets the standards set out in the *Endorois* and *Ogiek* cases. While the Kenyan constitution has no express FPIC provision, article 10 of the constitution enshrines the duty of public participation. The Constitutional Court of Kenya has held that article 10 is justiciable, hence developing a justiciable right to participation in Kenya. With regards to indigenous peoples' rights to land, the Community Land Act establishes the principle of free, open consultative process, and the consultation mechanisms are set out in the act. Besides the constitution, the Community Land Act and case law authorities, FPIC has also been operationalized at various levels through the National Guidelines and community protocols. However, the public participation framework is currently fragmented. The passing of the Public Participation Bills into law will be a progressive development as far as the harmonization of a public participation framework is concerned.

172 *Mohamed Ali Baadi*, above at note 168, para 222.

https://doi.org/10.1017/S002185532200002X Published online by Cambridge University Press