



## **Indigenous peoples' land rights in Tanzania and Kenya: the impact of strategic litigation and legal empowerment**

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Independent review by Valérie Couillard, Jérémie Gilbert and Luke Tchalenko

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## About the review team

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## Executive summary

The last decade has seen significant positive legal developments in relation to indigenous peoples' land rights on the African continent. Strategic litigation programmes such as the one led by Minority Rights Group International (MRG) have played an important role in supporting indigenous communities to seek recognition and legal redress and in influencing the development of progressive human rights law standards for indigenous peoples in East Africa. Indigenous peoples in Africa share a similar and longstanding history of eviction and/or lack of access to their ancestral lands. A series of state decisions and legislative reforms adopted in the period post-independence until the late 20<sup>th</sup> century resulted in these communities being deprived of their ancestral lands, livelihoods and led to multiple violations of their human rights.

In Tanzania, Maasai people are currently using national courts to seek land restitution and compensation. After many years of legal empowerment and consultations they are hopeful that their claims will be heard. In Kenya, after failed attempts at national level, indigenous communities resorted to the African Commission and Court on Human and Peoples' Rights, which both ruled in favour of indigenous peoples' land rights, ordered that measures be taken for land restitution and compensation and declared Kenya had violated the human rights of the Endorois and Ogiek indigenous peoples. The Endorois have been pressing for implementation of the African Commission's decision since 2010. The Ogiek, who very recently won their case before the African Court (May 2017), are looking forward to seeing words put into action.

This evaluation reflects on the impact of strategic litigation and legal empowerment work in East Africa over the past 15 years, with a view to identifying learning points potentially useful for the orientation of future programmes. In particular, the review report will be used by MRG and potential partners in Niger to assess the 'replicability' of the work to support litigation of land rights cases related to slavery in Niger.

The review report analyses the material consequences, the legal and political impact, and the social changes that could at least partially be attributed to the implementation of strategic litigation programmes. The views of community members are put forward as a powerful and useful lens to assess the value of strategic litigation programmes.

The report finds that: (1) Common contextual factors matter for the effective implementation of strategic litigation programmes; (2) Very little de jure material impact has been identified as coming out of the legal process in terms of actual redress for communities, which have not had their land returned to them, demarcated or titled in spite of rulings to that effect, but a reduction of the number of arrests and cases of harassment have been reported; (3) Legal and political impact is considerable, especially for communities, indigenous peoples' organisations and the African human rights system, but not for national legal institutions or the legal

profession; (4) Social change is a strong outcome of the litigation work, notably because of the empowerment of communities and the small but meaningful shift in the attitudes and behaviours of some external actors; (5) The African human rights system is a progressive and fruitful platform for change and that the role of indigenous peoples in conservation is a strong advocacy point which could be promoted further; (6) MRG's existing and potential future partners communicate the importance of long term and comprehensive support.

Our recommendations based on the main findings of the report are:

- 1)** Donors should be aware long-term support is a key component of litigation programmes especially in order to generate material consequences. MRG should work to influence some donor programmes to try to overcome systemic short termism so that they better correspond to the needs of strategic litigation programmes.
- 2)** Include activities to ensure effective legal empowerment of the judiciary and public authorities alongside any strategic litigation programme. Because of the adversarial nature of strategic litigation, this can perhaps be better achieved as part of a consortium. Donors should be aware that these activities are essential to the success of strategic litigation and provide adequate resources to that end.
- 3)** Continue advocacy and litigation of indigenous peoples rights in the African human rights system, including at the African Commission, whose implementation role is yet to be realised. MRG should continue to offer technical support to the mechanisms of the African Commission that are responsible for implementation and extend this support to the African Court.
- 4)** Continue the successful legal empowerment activities with communities, paralegals and lawyers representing communities.
- 5)** Donors should be aware of the sensitive security contexts in which human rights litigation takes place and allocate funding in case urgent security measures are needed. MRG can continue to ensure responsible action for litigation programmes operating in unstable political climates where violence is likely to break out, notably through adequate security screening and risk assessments for the prevention of violence as well as adequate support to affected communities in case of violence.
- 6)** Women's empowerment remains a priority. Voices from Tanzania are inspiring examples of potential for change. While the example of Maasai women has been promoted via publication, support towards community exchanges on this issue could be explored, as it could be beneficial in other communities where women are less empowered.

- 7)** MRG can enhance and further develop its existing partnerships with African based NGOs deploying programmes for the strategic litigation of land rights in Africa.
- 8)** Deepening of advocacy and support for knowledge sharing amongst the wider population in relation to the positive role of indigenous peoples in preserving the environment is likely to support the change in perception on the issue on environmental conservation. MRG can increase the scope of its efforts to convince governments of the well-documented role of indigenous peoples in preservation of the environment, notably in its work towards implementation on the Ogiek and Endorois decisions.
- 9)** A strong media strategy that influences coverage at national level is likely to impact change. Enhancement of existing efforts on that front, including the implementation of an advocacy strategy aimed at national media, is advised, as it is likely to bring positive change.
- 10)** Strategic planning in relationship to partnerships should include the assessment of existing partnerships and an assessment of MRG's capacity to provide support to existing and prospective partners, bearing in mind the long-term support necessary to the conduct of successful strategic litigation programmes.
- 11)** Partnership with Association Timidria in Niger has been assessed by MRG and the review team as bearing potential to impact change through the use of strategic litigation. If adequate resources are available, further consultations should take place with Association Timidria to discuss the possible implementation of a long-term collaborative programme of work.

*'We believe strongly in litigation and want to proceed to the end of the case until we win.'* Maasai woman in Mondorosi

## Section 1: Purpose of the review and methodology

### Purpose of the review

The last decade has seen significant positive legal developments in relation to indigenous peoples' land rights on the African continent. The African Commission on Human and Peoples' Rights issued a decision stating that Kenya violated the land rights and other human rights of the Endorois people living around Lake Bogoria and recommending redress for these violations. The African Court recently ruled in favour of the Ogiek people of the Mau Forest of Kenya, who were seeking demarcation and land titling of their ancestral lands as well as redress for human rights violations. Strategic litigation and legal empowerment programmes such as those led by MRG have played a significant role in influencing those legal developments.

This evaluation report proposes to examine 'elements of impact' with regards to MRG's legal work in support of indigenous peoples' rights to land and natural resources in parts of East Africa. It seeks to identify learning points in order to both assess past efforts and ground future work. It is foreseen that MRG will continue to support communities in Kenya and Tanzania and establish new partnerships in Niger and this is part of the context in which this review was commissioned.

More essentially, this review looks into the question of the value of legal empowerment and strategic litigation support work. The specific cases of the Maasai of Tanzania, the Endorois and the Ogiek peoples of Kenya are examined with this objective in mind. All three communities share a similar and longstanding history of eviction and/or lack of access to their ancestral lands. A series of state decisions and legislative reforms adopted in the period post-independence until the late century resulted in the Maasai, the Ogiek and the Endorois peoples being deprived of their ancestral lands, livelihoods and led to multiple violations of their human rights. These changes took place without adequate consultation or participation of the people involved and despite the fact that they had been living in the said areas for times immemorial. Widespread injustice and inequalities were perpetuated for years. Challenging this situation before the courts and seeking legal remedies was the purpose of the legal empowerment and strategic litigation programme of MRG.

The strategic litigation process in support of the three communities took place while international law and national law on indigenous peoples' rights to land were growing significantly apart: while international law was defining indigenous peoples' rights to their ancestral lands and ordering land restitution and demarcation of territories for a number of indigenous peoples in the rest of the world, on the African continent the concept of indigenous peoples wasn't taking root in national law. The need for harmonisation of international and national law was highlighted

and the concept of indigenous peoples in Africa was extensively developed in a report adopted by the African Commission in 2005.<sup>1</sup>

It is essentially because of this gap between international and national legal systems and because of this momentum at the African level that strategic litigation of indigenous peoples' cases within the African regional human rights system was seen an opportunity for change. The Endorois and the Ogiek cases are landmark decisions that are shaping the regional jurisprudence. After 15 years of strategic litigation in East Africa, what are the lessons learned?

## Methodology

To assess the varied impacts of MRG and partners' legal work and related advocacy efforts, the research relied on a hybrid legal analysis, which was desk based research and qualitative empirical research in the field. The approach for this review process was unusual because the analysis it calls for is not attached to a particular project. It rather seeks to review the most prominent outcomes of a number of strategic litigation and legal empowerment initiatives, which have taken place over a number of years. Its approach differs from widespread evaluation exercises, which are based on pre-established monitoring frameworks and guided by specific grants and programmes of work. This flexible approach was understood by the review team as an opportunity to allow genuine rooting of the findings of the report in communities' voices.

The review sought to measure three types of elements:

- (1) Material consequences of litigation, focussing on the legal redress obtained and the implementation of the new legal standards and including some changes in policy or practices of those litigated against;
- (2) Legal and political impacts, with the aim of examining what were the impacts on legal and political institutions;
- (3) Social changes and empowerment of communities or more precisely the non-material or attitudinal changes amongst and towards indigenous peoples in relation to their rights to land.

All three types of impacts were examined with a view to analyse the value of strategic litigation and legal empowerment programme such as the ones supported by MRG in East Africa.

Interviews were conducted with a large degree of flexibility to allow interviewees to express their own vision rather than stick to pre-imposed questionnaires. Open questions and flexible questionnaires were used as bases for discussion to allow free

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<sup>1</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).



flow of exchanges, with a view to extract the most prominent areas of successes and the associated challenges (questionnaires are in the annexes).

The evaluators met in person and/or discussed over the phone and /or over email with:

- 1) Members of the Ogiek community, living in at least 4 different locations within or nearby Nakuru county<sup>2</sup>
- 2) Members of the Endorois community, living in at least 4 different locations within or nearby Baringo county<sup>3</sup>
- 3) Members of the Maasai community, living in the 3 affected villages in the Sukenya Farm dispute<sup>4</sup>
- 4) Partners such as indigenous peoples' organisation and non-governmental organisations<sup>5</sup>
- 5) Local lawyers and other relevant actors<sup>6</sup>
- 6) MRG staff and board members, paralegal trainees and community activists involved in the legal cases<sup>7</sup>
- 7) Partners and relevant actors in Niger<sup>8</sup>

All interviewees were given the opportunity to provide anonymous comments. When conducting the interviews, the evaluators ensured that women's issues were examined and that, everywhere possible, a gender balance was achieved in terms of participation rates. This review report looks into gender relationships within the strategic litigation process and how MRG's support addressed some of the associated challenges. Finally, the review process also ensured a fair participation of elders and youths.<sup>9</sup>

Understanding and quantifying the impact of legal support work, especially in contexts where indigenous peoples' land struggles have been persisting for many years and where many other processes of resistance, advocacy, lobbying and protest are on-going, is a challenging task. It is worth noting that some of the impacts identified in this review have occurred while implementing an important number of programmes, led by an impressive number of organisations and actors including but not limited to those with whom MRG collaborated or had knowledge of. The

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<sup>2</sup> Interviews in Nakuru/ Mau Forest area: 50 elders, 2 women leaders, paralegals; 3 staff members of the Ogiek Peoples' Development Program in Nessuit.

<sup>3</sup> Interviews with in Baringo/Lake Bogoria area: group of 15 elders, 30 youth, and 19 women in the Village of Lobo; a group of 13 women and a group of 70 men in the Village of Sandai; 3 staff members of the Endorois Welfare Council (EWC); 2 youth paralegals.

<sup>4</sup> Interviews in Loliondo/Sukenya Farm: 73 community members in Soitsambu, Mondorosi and Sukenya villages; 53 women in Sukenya and Mondorosi; and 4 staff from a local organisation.

<sup>5</sup> Ogiek Peoples Development Program/OPDP (Kenya), Endorois Welfare Council/EWC (Kenya), Forest Peoples Programme (UK), IWGIA (Denmark) and members of other organisations who wish to remain anonymous.

<sup>6</sup> 8 external experts were contacted and 4 responded. 2 legal experts were interviewed in Arusha.

<sup>7</sup> 13 staff and board members were contacted and 7 contributed.

<sup>8</sup> 6 individuals were interviewed in relation to Niger, including NGO leaders and community members, lawyers and other legal experts including from national human rights institutions.

<sup>9</sup> In each community elder and young people were interviewed separately in addition to their participation to group meetings.

impacts discussed were also generated using a variety of instruments all aiming at ensuring legal empowerment and access to legal remedies for indigenous peoples, again including but not limited to those with whom MRG was involved.

## Section 2: Context and litigation history

The review team had the opportunity to visit and interview: the Maasai living in the villages of Mondorosi, Sukenya and Soitsambu in the district of Loliondo, Tanzania. The team also visited the Ogiek in Nessuit, a village of Nakuru County and the Endorois in the Lobo and Sandai villages of Baringo County of Kenya. The team's visit also coincided with the hearing of the Ogiek case on 26 May 2017, at the African Court in Arusha, Tanzania. Indigenous representatives attending the hearing were also interviewed. This section presents a brief overview of three litigation stories highlighting key aspects of the cases.

### Maasai of Loliondo, Tanzania

There are around 2,800 Maasai people living in the villages of Mondorosi, Sukenya and Soitsambu in the district of Loliondo in northern Tanzania. Their land dispute pertains to an area referred to as 'Sukenya Farm', which traditionally has been used by Maasai pastoralist communities for the grazing of livestock and subsistence food farming. In 1984, part of the concerned land was acquired by Tanzania Breweries Ltd, which was then a government parastatal corporation owning a number of barley and wheat farms around the country.

On acquisition of the land by Tanzania Breweries Ltd, the Maasai were not consulted and did not provide consent. However, the corporation barely used the land for cultivation so life continued as normal for the Maasai, who continued to use the land for grazing and watering their livestock. Up until 2006, the communities maintained traditional use of the land when Tanzania Breweries Ltd sub-leased the land for 96 years to Tanzania Conservation Ltd, a subsidiary company of the US-based tourism operator, Thomson Safaris Ltd. The Maasai were not consulted on that land transaction either. From 2006, Sukenya Farm became a bone of contention between different actors: Maasai, local authorities, and the Tanzanian Conservation Company Ltd (Thomson Safaris) were all claiming rights to the same land. These events amount to a clear lack of recognition of the fundamental rights of the Maasai.

The communities subsequently experienced numerous instances of forced expulsion and harassment when approaching their ancestral land, which prompted the most recent petitions in Tanzanian courts. The review of national litigation shows three distinct instances: a first case launched in 1987, another in 2010, and the most recent in 2013.<sup>10</sup> As of today, the communities are still engaged in this legal battle with their latest case pending on appeal.

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<sup>10</sup> The most recent decision is: High Court of Tanzania, Land Division, Mondorosi Village Council, et al. vs. Tanzania Breweries Limited, Land Case No. 26 (2015). See: <http://tinyurl.com/y7qft6jp>

MRG started to provide legal support to the Maasai in 2009, both at national level and through international advocacy. At national level the work included community consultations and capacity building, training of lawyers and paralegals on international human rights law, organisational capacity building and financial support to acquire equipment. The Maasai created a community leadership forum, which allowed a community-led legal strategy to be formed and community consultations to take place across the 3 principal sub-villages. A groundbreaking activity was the training of the judiciary through a workshop held in 2014 and gathering 19 judges and registrars from Tanzania's High Courts and the Principle Judicial Institute. International advocacy included extensive outreach to relevant international and regional human rights mechanisms in the form of reports and requests for urgent actions.<sup>11</sup> MRG also facilitated the allocation of emergency funding and urgent legal redress where requested by partners.

### Endorois of Lake Bogoria, Kenya

The Endorois are a predominantly pastoralist community living in Kenya's Rift Valley, and their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy season. The establishment of the Game Reserve in the lands surrounding Lake Bogoria in 1973 resulted in the de facto expulsion of the community from its land. Several game lodges, roads and a hotel were then built on the Endorois' ancestral territory, to allow the development of tourism in the area. More recently, concessions for ruby mining were granted. These measures resulted in the Endorois being denied access to their land, which negatively impacted on their capacity to develop their livelihoods and engage in cultural and religious practices. The Endorois were not adequately consulted, compensated or offered alternative lands, nor did they receive benefits generated from tourism activities taking place on the Lake Bogoria Reserve.

After years of impasse in their efforts to negotiate access to Lake Bogoria with the provincial administration, the Endorois decided to pursue litigation to get their land rights recognised. Following an unsuccessful attempt to get redress before national courts<sup>12</sup> the community partnered with the Centre for Minority Rights Development (CEMIRIDE)<sup>13</sup> and with MRG to file a communication at the African Commission on Human and Peoples' Rights (ACHPR) in 2003.<sup>14</sup> The absence of meaningful engagement from the Kenyan government with this complaint led the African Commission to declare the matter admissible in 2006 and to proceed on the merits of the case.<sup>15</sup>

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<sup>11</sup> See among others MRG recommendations for the Universal Periodic Review of Tanzania (2016); MRG alternative report to the Committee on the Elimination of Discrimination Against Women (2015); MRG alternative report to the Committee on Economic, Social and Cultural Rights on the combined initial, second and third periodic reports of Tanzania (2012), available at: <http://tinyurl.com/y7qft6jp>

<sup>12</sup> William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, High Court Judgment of 19 April 2002, Civil Case No. 183 of 2000

<sup>13</sup> CEMEDIRE is a Kenyan NGO.

<sup>14</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, ACHPR Comm, No. 276/2003

<sup>15</sup> No submissions on the issue admissibility were made by the Kenyan State, "despite numerous letters and reminders of its obligations under the Charter", Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, ACHPR Comm, No. 276/2003, para 41

In 2010, the Commission issued a decision stating that the government had violated several rights of the Endorois, including their right to property, culture, religion and development.<sup>16</sup> It recommended that Kenya:

- (a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.*
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.*
- (c) Pay adequate compensation to the community for all the loss suffered.*
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.*
- (e) Grant registration to the Endorois Welfare Committee.*
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.*
- (g) Report on the implementation of these recommendations within three months from the date of notification.*<sup>17</sup>

This decision was quickly hailed as a landmark victory for indigenous peoples in Africa and globally. The Endorois decision was the first decision from the African Commission unequivocally affirming land rights for indigenous peoples in Africa, building on and echoing international jurisprudence on the same issue. The case was acclaimed by the international legal community and received as progressive and comprehensive jurisprudence providing meaning for indigenous peoples' land rights under the African Charter. In the face of the public interest arguments submitted by the State, the Commission declared that:

*[...] the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to "the general interest of the community" or a "public need."*<sup>18</sup>

However, most of the recommendations of the African Commission have not been implemented by the government, the Endorois still live on the edges of their ancestral land, not having secured restitution of their lands.

The legal empowerment support provided to the Endorois Welfare Council (EWC) by MRG since 2002 has been extensive. In addition to legal advice in the African Commission case, MRG supported the use of other relevant mechanisms, including

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<sup>16</sup> Kenya was found by to have been in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter on Human and Peoples' Rights.

<sup>17</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, ACHPR Comm, No. 276/2003, page 80.

<sup>18</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, ACHPR Comm, No. 276/2003, para 215.

actions towards effective implementation of the decision.<sup>19</sup> At national level, MRG ensured EWC's effective in interaction with Kenya's *Taskforce on the implementation of the Endorois decision*.<sup>20</sup> A wide-ranging strategic programme on implementation, which included legal research and advocacy activities, capacity building workshops, inter community dialogues, development of organizational effectiveness through staff and board training, financial support for biannual Endorois council meetings and the acquisition of offices for EWC, was managed by MRG.<sup>21</sup> As it will be discussed in this report, the Endorois decision remains to date largely unimplemented.

### Ogiek of Mau Forest, Kenya

The Ogiek people interviewed in the course of this review live in parts of the Mau Forest in Kenya. They are approximately 30,000 members of this traditional hunter-gatherer community in the Mau Forest. In the 1930s, the Mau Forest became Crown Land, in 1945 it became a National Reserve and in 1954, a Forest Reserve under Kenya's Forest Act.

The classification as Forest Reserve did not stop large influxes of settlers, notably farmers, during the 1970s and 1980s. As a result, large parts of the forest area have been cleared for settlement. Human activities, especially logging, have led to massive deforestation of the area since 1973. The settlements became especially acute in the 1990s to 2001. Several Ogiek clans faced forced eviction to make way for farmers and other settlers.

This process took place despite the fact that the Ogiek people had been living in the forest since time immemorial. Because of these changes happening over the years and taking place without adequate consultation and/or participation of the Ogiek people in their implementation, the Ogiek became divided and squatters within the very land that used to be their source of livelihood.

In 2001, 60,000 hectares of Mau were allocated to settlers, which resulted in serious deforestation. The intense deforestation (and notably its impact on the water resources of the country) has led to a series of forced evictions in 2008. Under this scheme and lacking any form of formal land title the Ogiek were evicted, without any compensation or proposal for new settlements.

In 2008, the Kenyan government established a "Task Force on the Conservation of the Mau Complex". The report of the Task Force, which was then adopted by the

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<sup>19</sup> See among others MRG statement to the Human Rights Council for the adoption of the final report of the Universal Periodic Review of Kenya (2016); MRG reaction to the first report of the UN Special Rapporteur on the rights of indigenous peoples (2014); MRG alternative report to the Human Rights Committee on the third periodic review of Kenya (2012); Address by MRG Chair on Human Rights Day at the Commonwealth Secretariat (2012); MRG statement to the 36th Session of the African Commission on the human rights situation in Kenya (2004).

<sup>20</sup> On the task force, see: "The Endorois decision" – Four years on, the Endorois still await action by the Government of Kenya", <http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/>

<sup>21</sup> Baring foundation funded this three year project 2008-2011 for which the budget was approximately £250,000.

Parliament, called for the immediate eviction of encroachers to the forest, and due compensation.<sup>22</sup> In October 2009, the government through the Kenya Forestry Service, issued a 30-day eviction notice to the Ogiek of East Mau. Since then, many Ogiek have been forcibly evicted and their property destroyed with many homes set on fire or otherwise demolished.

Following these evictions, the 2009 notice and following the failure of national litigation,<sup>23</sup> the Ogiek were supported by the Centre for Minority Rights Development (CEMIRIDE) and MRG to submit an urgent communication to the African Commission on Human and Peoples Rights, stating potential irreparable harm.<sup>24</sup> The African Commission issued an order for provisional measures on 23 November 2009 requesting Kenya to suspend the implementation of the eviction notice while the case was being heard.<sup>25</sup> This order was not implemented to the satisfaction of the African Commission, which referred the case to the African Court in July 2012 on the basis that the situation demonstrated serious and mass human rights violations.

The African Court issued an order for provisional measures in March 2013. In 2016, the Court decided to proceed with considering the case, following the unsuccessful attempt of the parties to reach an amicable settlement. On 26 May 2017, the African Court decided in favour of the Ogiek. The Court declared that seven provisions of the African Charter had been violated<sup>26</sup> and ordered that Kenya takes all appropriate measures within a reasonable time to ensure the rights of the Ogiek people are respected and to inform the Court within six months. Reparations are currently being defined as it was decided that both parties' written arguments would be submitted within a given time frame that brings the next developments on this case to be expected no earlier than November 2017.<sup>27</sup>

MRG has been providing legal and capacity building support to the Ogiek of the Mau Forest since 2009. This support included an extensive fact finding mission, community consultations, and legal capacity building activities. As a result, the Ogiek, who were supported in getting their voices heard through the submission of reports to human rights mechanisms and urgent action requests, extensively used

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<sup>22</sup> Republic of Kenya, Report of the Government's Task Force on the Conservation of the Mau Forest Complex (2009)

<sup>23</sup> See Joseph Letuya and 21 others v Attorney General and 5 others, HCCA case no 635 of 1997, and Joseph Letuya and 21 others v Minister of Environment, HCCA case no 228 of 2001; Francis Kemai and 9 Others v Attorney-General and 3 Others, HCCA case no 238 of 1999; Republic v Minister for Environment and 5 Others, ex parte the Kenya Alliance of Resident Associations and 4 Others, HCCA case no 421 of 2002; Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others, Nakuru High Court Civil Case no 446 of 1999; Joseph Kimetto Ole Mapelu & Others v County Council of Narok, Nakuru High Court Civil Case no 157 of 2005;

<sup>24</sup> This communication was dated 14 November 2009.

<sup>25</sup> Request for provisional measures under Rule 111 of the Rules of procedures of the African Commission on Human and Peoples Rights, letter to President Maui Kibaki from Chairperson Reine Alapini Gansou, ACHPR/PROVM/KEN/819.09, 23 November 2009.

<sup>26</sup> Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter.

<sup>27</sup> African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No.006/2012, African Court on Human and Peoples' Rights, judgment of 26 May 2017. See paragraph 227 (page 68) and below for the ruling.

international advocacy with relevant platforms.<sup>28</sup> MRG also supported paralegal trainings and the process of evidence gathering for the case before the African system. Furthermore, MRG facilitated the effective participation of the Ogiek people in the African Court case through the provision of trainings for witnesses and the identification of funding sources for their attendance to proceedings.

### Learning point 1 on contextual factors

The evaluation is mindful of the fact that contextual factors can have an impact on the potential success of strategic litigation activities. The identification of specific or unusual factors in the local/national context, which are common to all three communities, is useful to the framework of this evaluation.

The three communities face a similar history, one of gradual dispossession from their ancestral lands. Whilst the concerned communities' right to land have been disregarded (usually by colonial powers), there is also a more recent history of land dispossession following the arrival of external, more-powerful actors with a desire to grab indigenous territories. This has resulted in violent evictions and forceful land dispossessions without consultations or adequate compensations. The choice to engage in litigation comes after this long history of gradual land dispossession, with a more recent experience of forced expulsion and harassment, which has pushed communities to seek legal support. In such contexts, litigation seemed to have been used as a last resort measure to find solutions to deeply historically embedded land disputes. This provides a first element of commonality in terms of the 'ground' for strategic litigation programmes, which are best used when other potential remedies such as negotiation and advocacy have been tried and failed.

In addition in both countries, the social and political climate is characterised by an extreme resistance to the recognition of indigenous peoples' land rights according to international law. In all three situations there has been a long history of (failed) attempts to address issues using national legal processes. The global consensus and lobby for environmental conservation also played a great role in fortifying this resistance. The lack of adequate national legal framework to protect and guarantee indigenous peoples' ancestral land rights in line with international law has pushed communities to seek legal support from international partner organisations, such as MRG, for support them in challenging national settings reluctant to the recognition and implementation of indigenous peoples' rights.

## Section 3: Material consequences

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<sup>28</sup> See among others: MRG statement to the Human Rights Council for the adoption of the final report of the Universal Periodic Review of Kenya (2015); MRG statement calls the attention of the UN Human Rights Council on minorities in Yemen and Ogiek in Kenya (2016); Kenyan Civil Society Coalition submission to the Human Rights Council on Kenya's second Universal Periodic Review (2014); MRG alternative report to the Human Rights Committee on the third periodic review of Kenya (2012); MRG letter to the UN Special Rapporteur, 2009

Redress for land claims can take various forms, including restitution, demarcation, and/or monetary compensation. Other possible forms of redress can be economic, cultural and social remedies, such as the provision of employment opportunities, access to health facilities or protection of usage rights over some of the natural resources to guarantee access to livelihood. All these types of redress could be described as the envisaged material consequences of the litigation process. In the case of the Endorois, the Ogiek and the Maasai, not much evidence of this expected material consequences is shown, because implementation is yet to take place (Endorois and Ogiek) or claims are still pending (Maasai). Two positive material changes have nonetheless been reported by communities and are felt to be consequences of the litigation process: (1) there is better access in practice to the disputed land and its resources for the communities; and (2) there is less harassment and violence towards the Maasai and the Endorois in relation to the usage of the disputed land.

### Some reports of better access

In Tanzania, in the most recent case that was ruled in 2015, the court ordered the return and demarcation of 2,617 acres of land to the Maasai community. This was based on a minor point concerning an illegal transfer of part of the land.<sup>29</sup> The grounds for this adjudication are a technical mistake showing overlapping land titles on paper. It was not a recognition of the property rights of the Maasai over their ancestral land. However, many Maasai interviewed in the three locations indicated that despite not getting a clear victory in court, the court decision clarified the property of the land, which resulted in practice in awarding them back part of the land for which property rights are contested. Whilst on the ground the demarcation has not yet been materialised, all the villagers describe this as an important material change associated with the litigation efforts.

Maasai communities also reported better access to water sources located on the disputed land and their ability to bring their cattle to graze on parts of it. Also, communities mentioned that they have been able to formally notify the government of their opposition to an application to change the legal status of the disputed land and turn it into a tourism and conservation only zone.

In Kenya, Endorois community members highlighted the blatant lack of implementation of the African Commission's decision of 2010 and voiced their resounding disappointment on that front. No material consequences such as land restitution, demarcation or titling have taken place. Nevertheless, they were able to pinpoint positive consequences of the litigation process, such as an increased number of community members employed by the park authorities and their enhanced access to Lake Bogoria. It was also reported by a staff member of the Endorois Welfare Council that since the decision more Endorois children were

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<sup>29</sup> High Court of Tanzania, Land Division, Mondorosi Village Council, et al. vs. Tanzania Breweries Limited, Land Case No. 26 (2015).



attending schools, that the general standards of living had improved and that the Endorois now had a say in the management of the land.<sup>30</sup>

The Ogiek noted the absence of an adequate and timely reaction from the government to the African Commission's order, which in 2009 requested the immediate suspension of the eviction notice. The lack of timely engagement of the government of Kenya with this pressing issue, which pushed the Commission to refer the case to the court in 2012 and the need for additional provisional measures to be ordered by the African Court in 2013 is weighing heavy on community members' minds with regards to their capacity to qualify redress and implementation in their case as positive. Community members interviewed in Nessuit however indicated that the provisional measures adopted by the African Court in 2013<sup>31</sup> helped in imposing a caveat and limiting land transactions.

As the African Court only ruled in favour of the Ogiek very recently (in May 2017), redress is yet to happen in reality and changes on the ground are still to be expected. While the Ogiek community is celebrating its resounding victory in the regional tribunal and generally feeling relieved and hopeful, the lack of implementation of the Endorois' case is leaving them and land rights experts interviewed, eager to find out if this ruling from the African Court will indeed generate material consequences at a national level regarding land restitution, demarcation and titling.

### Some testimonies of violence lessening

The Maasai from all three villages in Tanzania reported a significant reduction of harassment, arrests and violence compared with before the court ruling of 2015. They indicated that since the ruling, they can bring their cattle for grazing with less fear of been harassed. In particular, members of the communities on the Sukenya Village, who live nearest to the disputed land, highlighted that the private guards from Thomson Safari, the tourism company operating on disputed land, do not appear to be systematically resorting to the police and authorities when the Maasai are on the said land. The situation has thus only marginally changed in practice, cattle grazing is still not allowed on the disputed land and the Maasai still get chased but at the time of the visit, a lessening of harassment and violence was reported.

It is crucial to note however that in the opinion of the review team, this state of affairs appears fragile and safety in Loliondo can easily be disturbed. Following the visit of the review team, the local media reacted fiercely and published false information alleging collusion amongst local and international civil society organisations to dishonestly take the Tanzanian government to court in relation to the land in Loliondo. An overview of the local media activity regarding the disputed land in Loliondo shows that the tension around this claim is high and that threat of harassment and violence are still very present regarding the land dispute.

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<sup>30</sup> Socio-economic redress was not ordered in the decision of the African Commission

<sup>31</sup> African Court Order of Provisional Measures: African Commission on Human and Peoples' Rights v. Kenya, Application No. 006/2012 (15<sup>th</sup> March 2013)

The Endorois also described significant positive changes and the reduction in cases of harassment since the Commission's decision in 2010. Elders from the village of Loboï said that life had changed for the better due to litigation. Beforehand they were brutalised, evicted, squatters, but they indicated that the police stopped harassing them.

For the Ogiek however the situation was reported as still turbulent. Some described a serious increase of violence and harassment since the beginning of the litigation. They explained that despite the provisional measures ordered by the African Commission they witnessed many house demolitions and violence. Community members indicated that police arrests and harassment were getting worse, coupled with a high level of destruction of property in early March 2017. Some other Ogiek explained that since the litigation *'the police still fabricates charges [against the Ogiek] but not charges on land issues, the charges involve [accusations of] assault'*.

### Learning point 2 on material consequences

The above points demonstrate that the material consequences of strategic litigation for these communities has been low and the reality on the ground for communities has not changed much in terms of land restitution, demarcation, titling, or other socio-economic forms of reparation. A crucial part of legal redress has been obtained through the adjudications on the Endorois and the Ogiek cases at the African Commission and Court. The new regional human rights standards are applicable not only in Kenya but also in Tanzania as well as anywhere else in Africa, which is another important material consequence of the litigation process. The implementation of the Endorois decision, however, is so far yet to materialise and implementation in the Ogiek case is yet to take place, as the Parties and the Court are currently defining the reparations. So the extent to which there has been legal redress for communities is grounded in their satisfaction of winning their cause before the regional tribunals.

Whereas it is clear that the complaints submitted to the African Commission and Court, and the respective decisions that followed, tackled particularly serious human rights violations, for the most part, remedy for these violations is also yet to become reality. Some communities describe a reduction of harassment and others an increase in violence. In spite of marginally better access to land reported by some, the material realisation of legal protections and rights is minimal.

## Section 4: Legal and political impact

Before the Endorois, Ogiek and Maasai sought remedy before the courts, the level of engagement of both the African human rights system and the national legal systems with indigenous peoples' land claims was limited. After 15 years of strategic litigation efforts by MRG and its partners in Tanzania and Kenya, what can be said about the legal and political impacts these activities have had on the African legal and human rights system, the national institutions and the legal profession, public authorities and community members and civil society actors?

### African and international human rights systems

The most prominent impact of indigenous peoples' and MRG's concerted strategic litigation efforts is the ground-breaking legal developments in the African regional system, with regards to indigenous peoples' land rights. These also had a significant impact in feeding international jurisprudence on this issue. In the late 90s and early 2000s, the African Commission started taking part in consultations with communities and experts with a view to define the contested concept of indigenous peoples in Africa. The Commission in 2005 adopted a comprehensive report on the issue<sup>32</sup> and a number of country visits were undertaken following which recommendations on the harmonisation of national law with regional and international human rights law were issued.<sup>33</sup> A number of resolutions and recommendations pertaining to indigenous peoples' rights were also adopted by the African Commission.<sup>34</sup> The Endorois case was however the first decision extensively and directly addressing the issue of indigenous peoples' rights on the continent and the discrepancy between international and national law.

Equally, the long-term collaboration between lawyers representing communities and the legal officers advising commissioners has had huge learning impact for both the communities and the legal professional directly involved in the cases. The impact on the knowledge and expertise of commissioners and judges of the African Commission and Court regarding the issue of indigenous peoples lands rights has also been enhanced, as they qualified and addressed the land disputes presented before them. The use of international jurisprudence to ground the reasoning of both the Endorois and Ogiek decisions is further evidence of this enhanced international legal expertise and a massive step towards the effective and harmonised implementation of international human rights law within regional and international systems.

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<sup>32</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

<sup>33</sup> See for example: Kenya: Mission Working Group Indigenous Populations / Communities, 2010; Congo: Mission Working Group Indigenous Populations / Communities, 2010.

<sup>34</sup> The African Commission has a promotion and protection role with regards to human rights on the continent. The hearing of litigious cases is part of its protection role.

The support of MRG also allowed local partner organisations in Kenya and Tanzania to use other international human rights bodies. In addition to the urgent action measures taken at the African level to prevent irreparable harm, indigenous peoples organisations partnering with MRG submitted urgent action requests and reports to several United Nations (UN) human rights mechanisms.<sup>35</sup> This increased the engagement of UN human rights bodies with the situation faced by indigenous communities. For example, in 2017 the UN Committee on the Elimination of Racial Discrimination adopted concluding observations on Kenya, which stated that the lack of access to legal remedies for the Ogiek was a violation of Kenya's international legal obligations.<sup>36</sup>

### National legal institutions and the legal profession

The impact of MRG and its partners' legal work on national legal institutions and the legal profession however is less significant than the one observed for regional and international human rights systems. In Tanzania, there seems to be very little impact on the way national legal institutions and the legal profession have been influenced by the cases on indigenous peoples' rights. There is no real indication that the process of national litigation has had any impact on the way the legal institutions and the legal profession perceive indigenous issues. A lawyer from Tanzania involved in the national litigation process indicated that there is still very little awareness of the Maasai's rights on the part of the legal profession, and also very little understanding of international human rights law pertaining to indigenous peoples in Africa and elsewhere. There seem to be little direct and measurable impact on the use of the international legal language on human rights and indigenous peoples' rights. In Tanzania the legal profession is still not using human rights standards and has little awareness and understanding of their potential relevance to the situation in the country.<sup>37</sup>

A training of judges and registrars held in Tanzania shows the importance and immense scope for impact of such legal empowerment activities in raising awareness of indigenous peoples' rights in Africa. The training report shows that a central lesson learned from this activity is that:

*[...] facilitators should be aware in advance that participants from the Judiciary may be not only unaware of the concept of indigenous peoples in Africa, but actually hostile to the concept at the start of the training. This means facilitators need to be very sensitive to the fact that participants initially believe in the government position that all Tanzanians are indigenous and therefore do not understand or believe in rights for indigenous people. This awareness on the part of facilitators will mean they give sufficient time to exploring this debate and clearly showing the need for these rights and*

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<sup>35</sup> Some of which are referenced in Section 2 of this report.

<sup>36</sup> Committee on the Elimination of Racial Discrimination, Concluding observations on the fifth to seventh periodic reports of Kenya, UN Doc. CERD/C/KEN/CO/5-7 (May 2017), para. 19-20

<sup>37</sup> Interview with Rashid Rashid in KNR Legal Office, Arusha on 31<sup>st</sup> of May 2017. This idea is also supported by MRG staff and other international legal experts interviewed.

*protections to exist and that pastoralists as well as hunter-gatherers deserve these legal protections to be applied to them.*<sup>38</sup>

Community members who attended court hearings as witnesses echoed this idea and said they felt that the courts did not understand the reality of their pastoralist way of life. Community members commented that since none of the judges are themselves Maasai or from another indigenous group, it is not to be expected that they would have an instinctive understanding of indigenous peoples' conditions and way of life and in general, they felt that the national legal institutions have very little awareness and understanding of their culture and what it is to be a pastoralist.

In Kenya, the fact that the African Commission delivered a decision in favour of the Endorois' right to land in 2010 and more recently (May 2017) the African Court ruled in favour of the Ogiek's rights to their ancestral lands inevitably had an impact on the legal profession. The ethics of the legal profession instructs that legal professional be routinely informed of these legal developments and they have a duty to take the new international jurisprudence that is directly relevant to their country into account. Judiciary action also generally acts as a safeguard for the rule of law. As one legal expert pointed out: 'Strategic litigation has the potential to prevent legal issues from arising by promoting a fairer legal system and ensuring the law reflects international human rights standards.'<sup>39</sup>

It is however difficult to assess the extent to which the international legal standards on indigenous peoples and their land rights have penetrated Kenya's national legal system. The absence of implementation of the Endorois' case of 2010 does not support the idea that regional (or international) strategic litigation has impacted change in the application of indigenous peoples' rights law by national legal actors in Kenya. However, it was noted that the Endorois decision was fully taken on board by Kenya's national human rights commission, which has since then adopted a more supportive and proactive approach to indigenous rights.

## Public authorities

Communities reported on a more positive but still difficult relationship with public authorities since engaging in litigation. It was reported that the knowledge and understanding of the claim of the Maasai, Ogiek and Endorois to their ancestral territory by public authorities had been enhanced since their engagement with litigation.

The Maasai indicated that since their last court case in 2015 their relationship with one of the District Commissioners (DC) appointed in the past years has considerably changed, as he adopted a much more supportive attitude towards their land rights claim. Elders and leaders in Sukenya also revealed that there has been a change in the attitude of local authorities. Whilst not all public authority representatives are

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<sup>38</sup> Narrative Report to International Working Group for Indigenous Affairs and Minority Rights Group International, 27<sup>th</sup> June 2014

<sup>39</sup> Anonymous contribution.

respectful and understanding of the position of the Maasai, many appear to have adopted a more positive and supportive approach since the start of litigation. Community members in Soitsambu reported for example that local councillors attended their meeting where feedback on the legal case was discussed. They understood the presence of the local counsellors as a shift in the public authorities' approach and generally feel that local authorities are now being sympathetic to their cause.

Meeting with groups of Maasai women demonstrated the same. They indicated that 'before the case they were never listened to by the authorities whereas now after the court ruling the authorities are starting to listen to them'. In Mondorosi, women indicated that 'since the last court case the authorities have changed their attitude'. They highlighted that a good example of this change is the fact that before the court case the government was pushing them to accept the 'deal' proposed by the private tourism company which included building a school (in exchange for their land) and that since litigation, authorities are no longer pushing them to accept this offer.

The Endorois elders and women reported that their life changed as a consequence of litigation, particularly because there was 'less brutality happening' and that the 'police stopped harassing the Endorois'. Kenya Wildlife Service also de facto recognises Lake Bogoria as Endorois land and have included them in the management plan of Lake Bogoria. Game wardens also allow the Endorois unrestricted access to Lake Bogoria. Currently, the main worry and point of tension was the 'wild animals attacking their cattle and the government protecting wild animals'. It was also reported that there was more respect from the government towards the Endorois, who were now 'able to talk to the police about their land rights'.

The Ogiek indicated a similar level of change in attitudes. Community members in Nessuit explained that they felt the authorities were more respectful of the Ogiek people as a result of litigation. They also indicated that the Deputy County Commissioner of the Ndjoro sub commission met them before the Arusha hearing of May 2017 and promised he would act positively upon the ruling. They added that before the case the authorities 'just thought we were illiterate'.

### Community members and civil society

The most prominent and measurable impact in legal awareness is at the community level. In both countries, communities widely indicated that, as a result of litigation processes, they learnt a great deal about laws and legal institutions of their country and international human rights law. Community members testified to a good understanding of the law, national legal institutions and the legal issues at stake.

The Maasai of the Soitsambu Village explained their better understanding of legal institutions because of their access to legal advice and the legal empowerment activities they benefitted from. They describe their communication with lawyers as

positive and a general feeling that lawyers have a better understanding than previously of their way of life.

The Ogiek expressed similar thoughts and explained that since engaging in litigation they had greater understanding of their rights and of the judicial process. The participation of Ogiek and Endorois community members at the mechanisms of the African regional human rights system was brought up as a valued aspect of the legal and human rights empowerment activities. Community members who attended these mechanisms emphasised that the experience was extremely important to allow them to understand the working of the regional system, and as summarised by a community member: 'going to court and to Addis Ababa was very empowering'.

The training of paralegals in particular was also found to have been successful and appreciated by the indigenous communities interviewed. In Tanzania, the paralegals indicated the immense impact on their learning concerning land rights as well as the law and the judiciary in general. They reported gaining knowledge of customary rights and specifically indicated the relevance of education about civil rights. When questioned about the understanding of their situation by the courts and the legal profession, community members trained as paralegals stated that 'the courts have to understand that it is our fundamental right'.

### Learning point 3 on legal and political impact

The influence of strategic litigation on the judiciary in East Africa is difficult to assess because there is little reporting of the use of the new legal standards in the national jurisprudence of Kenya and Tanzania. However, in theory and in accordance with the legal practice's ethics, members of the legal profession have a duty be informed of the new jurisprudence. The same can be said about the familiarity with rights-based issues for judges, lawyers, rights advocates and the public; concrete changes cannot be pinpointed but the advocacy and training activities, as well as media coverage of the cases and decisions, will inevitably have impacted on the capacity of legal actors and the public to understand the issues at stake.

The fact that the Endorois and Ogiek have used national legal processes and thereafter the regional human rights Commission and Courts has also unavoidably had an impact on national legal institutions, the legal profession and the public authorities. This impact cannot however be shown strictly through an assessment of the actual level of harmonisation of international and national law. There is a clear lack of understanding of international law remaining in the national legal sectors and within public authorities. Also, there is tangible apprehension in relation to the very possibility of effectively implementing the Endorois and Ogiek decisions.

However, the review team is of the opinion that the progress made in influencing the effective application of international human rights law is significant. The sections of this report on legal and political impact and on social change provide evidence to support the fact that strategic litigation, accompanied by competent legal empowerment support work, is an outstanding change-making tool.



## Section 5: Social change and empowerment

The review team asked communities to share their views on the changes they may have observed within their communities and with regards to the behaviours, attitudes and perceptions of the wider society following litigation. Here below are reports of community empowerment and unity, some positive changes in women's empowerment, and inter-generation relations. In addition, some changes in the communities' relationships with other actors such as neighbouring communities, private corporations and the media are also observed.

### Impact within the communities

Communities reported significant impact in terms of their empowerment and sense of justice. They also explained that the litigation process gave them an opportunity to feel united. Positive impact has also been observed on women's empowerment and in general, enhanced intergenerational relationships. There are however nuances to these points.

### Empowerment about rights and hope for justice in Tanzania

In Tanzania, many members of the communities have indicated that the process of litigation has empowered them. The Chairman of one of the villages in Loliondo stated that 'even though litigation might not bring justice it is nonetheless an important process to tell truth.' He indicated that litigation has allowed them to affirm 'the truth as their right.' Community members in Soitsambu highlighted that since engaging with the litigation they had gained hope for justice. This was confirmed during a larger meeting held in Sukenya gathering elders and younger leaders. Women interviewed in Sukenya share that they feel hopeful with regards to the litigation process and expressed a strong sense of encouragement as they plan to pursue litigation further until justice is achieved. They indicated they had learnt their land rights and fundamental human rights and that 'the court process gives us entitlement for other forms of protests'.

Paralegal trainees explained the steep learning curve that litigation has been for them. They highlighted that they had learnt not only about land rights, but also more generally about their human rights. They felt a strong sense of empowerment and hope for justice, stating that they have 'hope with the court proceedings as it is the place of rights and it is our land'. They also highlighted that the language of indigenous rights has empowered them, saying 'we are the indigenous; we have the awareness and understanding of the land'. A staff member of the Maasai's organisation who is a legal officer responsible for education highlighted that he felt that the communities have 'learnt about entitlement to land instead of legal formal deeds'. He highlighted that in his view the engagement with courts and legal processes had participated greatly in a 'transformation of the mind of the communities'. There was also an indication that the legal empowerment of the three directly affected communities was also felt by other neighbouring Maasai



communities who had learnt from them. A Maasai woman noted that legal empowerment was not limited to communities currently litigating but allowed other Maasai communities to learn and be empowered from the process.

### Unity around shared struggles

In Tanzania, many members of the communities indicated that the engagement in the litigation has created a strong sense of unity, notably between the three different villages. Elders and leaders in Sukenya highlighted that the community stands very united around the litigation, which plays an important role in collective mobilisation. The women's group interviewed in Mondorosi also explained that the litigation effort created a strong sense of unity both within their own village but also with the other two villages concerned with the land dispute. In particular, the meetings held to share information on the legal case created an important unifying factor against a common threat and the three villages decided to go court together.

There was a similar feeling shared by several members of the Ogiek community in Kenya. The Ogiek live in more scattered communities, but they indicated that the litigation had played a significant unifying role. They indicated that whilst a section of the community initially didn't believe in litigation, after the judgment everyone has bought into it. As noted by one of the senior staff from the Ogiek Peoples' Development Programme (OPDP) 'litigation has made the Ogiek known each other more'. Following the very fresh ruling, there was an understandable jubilation and mostly a deep 'sense of relief at the idea that the land is coming back, and this is giving hope'. The feedback on community's legal empowerment was extremely positive. A better understating of rights and a general ability 'to challenge other people knowing the land is legally ours' was reported.

For the Endorois community, while it appears clearly that the lead up to the case and the adjudication by the African Commission has on the whole supported community cohesion, today the overall feeling is one of disparity rather than unity. An independent evaluation of MRG's work with the Endorois published in 2012 also found that there were challenges within the Endorois community, as an 'unwanted consequence of litigation'. It found that: *'it was evident that the project had tremendous positive impacts at the community level'* and that *'elders, youth and women spoken to were unanimous in their support and pride about the decision.'*<sup>40</sup> However, the report also found that: *'one unintended consequence on the community of the successful determination of the Endorois case by the African Commission is that it has exacerbated elite rivalries between those who are identified with the pursuit of the claim and those who have not been actively involved in it.'*<sup>41</sup>

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<sup>40</sup> Micheal Ochieng Odhiambo, 'A solution to the forced displacement of the Endorois in Kenya: working towards the implementation of the African Commission on Human and Peoples' Rights Decision (November 2008-October 2011), Report of final evaluation, Nakuru, February 2012, p.22.

<sup>41</sup> Micheal Ochieng Odhiambo, 'A solution to the forced displacement of the Endorois in Kenya: working towards the implementation of the African Commission on Human and Peoples' Rights Decision (November 2008-October 2011), Report of final evaluation, Nakuru, February 2012, p.23

The review team received many reports from community members criticising the leadership of EWC. The staff of the EWC itself also acknowledged this. Many staff from the organisation expressed scepticism and dissatisfaction regarding other staff and denounced a lack of focus, leadership and representation. At the same time, a lot was said also on the desire to change this and achieve better relationships. One Endorois woman interviewed expressed that the EWC needed 'to win back communities'.

### Women's empowerment

In Tanzania, it was noted that the engagement with the litigation had a very positive impact on women and their role in the community. The role of women was greatly enhanced and supported by the establishment of a specifically dedicated 'Women Legal Framework'. This platform was created as a channel to reach all the women concerned by the land dispute, and it quickly became a central forum to push ideas and decisions made by women regarding the legal strategy. A member from the organisation's women's forum indicated that the process of litigation has been important in raising the role and place of the women stating that 'before it was difficult for women to talk'. She also highlighted that women played an important role in taking strategic advocacy decisions, she gave the example of the women organising demonstrations to support the court case.

On the one hand in Kenya, Ogiek women explained that 'litigation empowered them to feel in control to become elected officials'. Some said that 'before men felt superior' and that 'litigation has provided a platform for women to air their views'. On the other hand, women from the Endorois community said they feel they didn't get the chance to get involved in the case properly because men were worried and reluctant about their involvement. It was also highlighted that it is often very challenging for women to attend meetings about the litigation due to the high level of chores and work coupled with the fact that often meetings take place in faraway places.

MRG staff reported that they perceive Endorois women as particularly marginalised within the community and that the potential of their contribution to the community's organisation is undermined. As an example, it was explained by MRG staff who had worked closely with the communities that Endorois women who were supported to attend the African Commission session had gained important knowledge that they were later unable to share with the communities, 'because women are not allowed to speak'. One Endorois woman said '*there is a need to organise specific programmes within the community to reassure men that women participating in international events and the steering of the organization is good and not worrying*'. She added that Endorois women needed '*flexibility to go out in communities and lead the much needed work on women's issues*'.

### Intergenerational engagement

Litigation of indigenous peoples' cases draws on a long history of marginalisation, which brings an important element of inter-generational engagement for the communities, with elders working with younger generations to share and pass on information about their land and the court strategy. Many members of the communities have highlighted that there was an important element of exchange between elders and youths to ensure continuity in the legal battle.

Several youth members of the community in Tanzania indicated that they had learnt a lot about their own history by supporting their elders to bring evidence of land occupation. They highlighted that it gave them a sense of intergenerational engagement and that whatever happens they will continue the struggle that was started by their ancestors. One of the youth paralegals indicated that litigation has been an important element of learning for the youth, highlighting that 'they are extremely eager to know about the case'. In Kenya, the Ogiek representatives attending court indicated that process around litigation had played a very important role across generations, with an increased awareness and engagement of the youth.

The interviews with the Endorois exposed that the youth and the elders may have different priorities in terms of remedies and different ideas for the future of the leadership of their organisation. Young people expressed that education is a priority for them. They wish to benefit from scholarships to ensure their future and that of their people, so it is this type of remedy that they would like to see being implemented. Elders emphasised the importance of focusing on the restitution of the ancestral land. The youth also demonstrated their vivid eagerness in being able to contribute to the work of their organisation, highlighting that male elders are de facto leading the organisation, which leaves the youth and women feeling unable to participate fully.

### Communities' relationships with the wider society

Also relevant to assess change are the attitudes and behaviours of other part of society, including neighbouring communities and the media. Have these shifted since the start of the litigation process?

#### Neighbouring communities

Indigenous communities' engagement with litigation can have a significant impact on other neighbouring indigenous communities, who might not have been aware of legal strategies beforehand. This was confirmed in Tanzania where the communities indicated that their own struggle has served as an example to other indigenous neighbouring communities. They indicated that many neighbouring communities are now considering legal action as a possible way forward.

Indigenous communities' engagement with litigation can also have a significant impact on the relationship between the concerned communities and their immediate non-indigenous neighbours. For example, members of the Ogiek people indicated that their relations with neighbours (non-indigenous) were usually 'not

good', they also highlighted that 'now it is worse because there is insecurity as to who owns the land'. The Ogiek feel very much aware of the fact they are a minority, they feel the situation is 'tense and unpredictable' and there is a 'fear of the repetition of past violence'. Insecurity of land rights and the feeling that the authorities protect the settlers creates tense and unpredictable situations. Some of them noted that 'other communities became suspicious of Ogiek because of litigation, some coming with animosity.'

#### Private sector

Litigation can also have a significant impact on the relationship between indigenous communities and private actors, usually corporations that are operating on indigenous territories. In Tanzania, the Maasai communities stated that they have been seriously affected by the operations of tourism companies on their land. The communities reported that some of the private actors involved in the tourism industry have been very aggressive with some members of the communities, with several members reporting some harassment and violence. Some members of the communities indicated that this has notably included scaring and harassing young children who are looking after the cattle. The tension reportedly increased when the communities started to engage in the litigation. When specifically asked about potential changes in the relationship with the company, community members indicated that there has been no significant improvement in their relationship with private actors since the beginning of the proceedings, but they nonetheless indicated that their relationship with some of the private guards has improved, and notably that they do not systematically call the authorities and police when cattle from the communities might be on the disputed territory.

#### Media

The impact of litigation on the media and vice versa has been mixed. On the one hand, in terms of international media, it seems that litigation has resulted in more positive and comprehensive coverage of the issues faced by the communities. On the other hand, litigation has at times been negatively depicted by the local media. Whilst some local news agencies have reported neutrally or positively on the cases, some others have been known to provide extremely negative, aggressive and often erroneous coverage. This led to significant distrust in the media by some of the community members.

Several interviewees from communities and experts noted that international media has been positive about the cases but in general there has been less positive coverage at the local and national levels. However, the recent decision of the African Court regarding the Ogiek received quite a large amount of positive coverage in the media.<sup>42</sup> Similar points were made in previous evaluation reports, and it appears

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<sup>42</sup> See for example: <http://www.bbc.com/swahili/habari-40064292#>; <https://www.standardmedia.co.ke/article/2001241328/ogiek-community-win-forced-eviction-case-against-kenya-in-african-court>; [http://www.the-star.co.ke/news/2017/05/26/victory-for-ogiek-as-african-court-rules-against-kenyan-government\\_c1568932](http://www.the-star.co.ke/news/2017/05/26/victory-for-ogiek-as-african-court-rules-against-kenyan-government_c1568932); <http://www.the-star.co.ke/news/2017/06/20/ogieks-landmark-ruling-gives-hope->

challenging for MRG to tackle and influence the activity of national media. As explained in a 2009 evaluation of work with pastoralist women in Africa:

*'Public media in all forms are a very powerful tool for advocacy. MRG's campaign reports and briefings are highly influential and respected: more could be made of them in future projects by including clearer positive proposals for national media strategy in target countries.'*<sup>43</sup>

Other expert opinions were expressed according to which the media could be better used for the purpose of promoting international law and this could play a great role in ensuring harmonisation of national and international law. 'Members of the judiciary and lawyers reading about these fundamental legal issues in the paper would certainly take them on board'<sup>44</sup>. However, the media does not systematically attend legal workshops on international law, often because they require financial resources for their attendance to be made possible. Further exploration by MRG of the reasons behind poor national media coverage of international law and the possible strategies to improve media coverage nationally is strongly recommended.

The importance of an effective strategy on national and international media to support the whole legal process, including implementation, was also articulated by MRG staff:

*'While it is still a legal process, with the court to hear submissions on reparations, the process is not happening in a bubble. So it is essential to consider the supporting advocacy tools to bolster the litigation work - domestic and international advocacy, media, etc. to hold the Kenyan Government accountable to implementation.'*<sup>45</sup>

## Learning point 4 on social change and empowerment

Voices from the Maasai and the Ogiek communities echoed that overall, litigation has been a vehicle to enhance community empowerment, unity, women's empowerment and intergenerational relationships. While it is also true that there was a clear positive impact for the Endorois, women voiced their unfulfilled desire for empowerment. It should also be noted that EWC has been dealing with leadership and community representation challenges and that clearer steps should be taken to engage women and youth fully in the programmes for legal empowerment and the implementation of the African Commission's decision.

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[to-rural-people-across-africa\\_c1583380](https://dgrnewsservice.org/resistance/indirect/lobbying/landmark-victory-ogiek-delivered-african-court-human-peoples-rights/); <https://dgrnewsservice.org/resistance/indirect/lobbying/landmark-victory-ogiek-delivered-african-court-human-peoples-rights/>

<sup>43</sup> Fay Warrilow, Final evaluation of MRG pastoralist programme, 2009, p.3-4.

<sup>44</sup> Interview with Pacifique Manirakiza 23 June 2017

<sup>45</sup> Anonymous contribution.

The Ogiek observed an increase of violent and negative reactions from neighbouring individuals following litigation. National newspapers and media haven't addressed indigenous issues as sufficiently as hoped by MRG and partners but international media coverage was increased and generally positive.

Litigation has considerable potential as a vehicle to support social change and act as an essential tool for legal empowerment, but this requires the communities and organisations to be able to manage attempts to divide and rule and negative consequences such as those caused by the interventions of external business actors like in the case of Tanzania. Clear steps must be taken to engage women and youth fully in litigation processes also.

## Section 6: Future advocacy and partnerships

This section addresses issues pertaining to advocacy and partnerships that are based on converging comments received by a number of individuals and groups interviewed. Ideas discussed included among others: the value of the African human rights system as a platform for change; and the use of advocacy strategies robustly based on the promotion of indigenous peoples' role in preserving the environment. Exchanges with communities and MRG staff members also allowed for the discussion of issues pertaining to existing partnerships. Furthermore, this section of the report looks in more details at the opportunity for MRG's to establish a new partnership with a partnership specific to Niger.

### The African human rights system: a good platform for change?

When interviewing all parties (community members, legal experts, MRG staff, etc.), the comments were mixed as to whether the African human rights system, in particular the African Commission, was a good platform for change through the use of strategic litigation. The length of the procedures and the lack of implementation of the legal standards emerging from the mechanisms were highlighted as particular concerns.

The review team for instance received a lot of comments that MRG and local organisations had accomplished a huge amount but that 'implementation altogether is something else'<sup>46</sup>. When asked why the Endorois case was not implemented in Kenya, one interviewee explained that there are real key challenges:

*'This is a difficult one as it raises broader rule of law questions and how to secure implementation of this specific case in that broader context. Greater domestic advocacy, perhaps, informed by a power mapping and a theory of change so that the EWC is not relying on previous (and unsuccessful) advocacy approaches.'*<sup>47</sup>

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<sup>46</sup> Comments from MRG board member.

<sup>47</sup> Anonymous contribution.

Implementation is also a multi-faceted challenge. When asked which lessons can be learned from the experience of the poor implementation of the Endorois decision in Kenya with a view to supporting the implementation of the Ogiek decision, an expert interviewee brought to light the fact that lack of implementation raises issues around strategy. In particular the framing of reparation is crucial because it can create confusion if not specific enough:

*'It has raised questions around strategy, for example, would certain submissions on reparations risk getting bogged down in implementation, and as such the submissions make clear asks so that the Court can order specific reparations.'*<sup>48</sup>

Political will and capacity is essential to the implementation of international law at national level. The former Rapporteur on Kenya of the African Commission on Human and Peoples' Rights, who has been actively involved both in the implementation of the Endorois decision and in the unfolding of the Ogiek case refers to the creation of the national task force on the implementation of the Endorois decision to highlight the steps taken by the government. He explains however that there is a *'systemic issue with implementation of the decisions of the African regional human rights system. There is no clear consensus within the African Union with regards to the weight and enforceability of the decisions of the Commission and the Court'*. He goes further in suggesting that the Commission *'hasn't fully awoken to its implementation role, that it should be more proactive in requesting States to implement its decisions and that in particular, its role in implementing the decisions of the Court is yet to be observed'*.<sup>49</sup>

Strategic litigation aiming at realising or developing international human rights law is often a long-term process that involves extensive evidence gathering (including legal empowerment and capacity building) and lengthy legal procedures. Implementation of the decisions is also a long-term process. Litigation of indigenous peoples' land rights is a perfect example of this characteristic. In addition to many years of consultation and capacity building, the legal procedures of strategic litigation in the Endorois case lasted 7 years from submission of the complaint until the conclusion of the procedures. In the Ogiek case, it has been 8 years since the start of the advocacy with MRG and procedures on reparation are still pending. A similar timeframe has been observed for the litigation of indigenous peoples issued within the Inter American human rights system. Despite this, the progressive and innovative character of the legal standards set through the adoption of the Endorois and Ogiek cases has shown that the African system is a fruitful platform for change.

Several other African based NGOs are increasingly using the African system to implement strategic litigation programmes. Among others, the relatively newly established Initiative for Strategic Litigation in Africa (ISLA)<sup>50</sup>, the Southern Africa

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<sup>48</sup> Anonymous contribution.

<sup>49</sup> Interview with Pacifique Manirakiza, 23 June 2017.

<sup>50</sup> <http://www.the-isla.org>

Litigation Centre (SALC)<sup>51</sup>, the Centre for Human Rights of the University of Pretoria (CHRUP) and Lawyers for Human Rights (LHR). These organisations carry out legal empowerment programmes and implementing activities such as: legal trainings for communities, lawyers and judges; moot courts exercises and legal clinics for law students; and side events within the regional and national human rights platforms. These organisations have also identified the need to support the realisation of women's land rights and have dedicated programmes relevant to these issues.

These initiatives testify to the significance of the African human rights system and of its potential as a platform for change. They also present as interesting collaboration possibilities for MRG. As this review also seeks to identify other opportunities for strategic litigation on the African continent for MRG, it appears appropriate to recommend the continuation of strategic litigation using the African mechanisms, the nurturing of existing partnerships with African-based NGOs implementing regional strategic litigation programmes, and the creation of new or enhanced collaborative relationships with the organisations mentioned above.

Other widely validated reasons to use the African human rights system are the richness of its instruments in terms of potential for change and the proven track record of its mechanisms in adopting a progressive approach to human rights. The concept of peoples in the African Charter, the rights to natural resources and to development, as well as the highly comprehensive Protocol on the rights of women are some of the examples that can be highlighted to support that point.

### Continued advocacy strategy around the conservation argument

One area where there could be potential for improvement and which could impact positively on implementation is the strengthening of the advocacy around the role of indigenous peoples in preserving the environment. Environmental justifications are at the heart of the legal issue; conservation is the core legal reason why governments argue that no people can live in protected areas and conservation also supports indigenous peoples' property rights to their ancestral lands.

An advocacy strategy that emphasises the positive role played by indigenous peoples in environmental conservation is likely to be effective because it has the potential to neutralise governments' first legal argument against land restitution claims. Undeniably, the human rights issues at stake cannot be simplified to this argument alone. However, a legal review of cases similar to the Ogiek and the Endorois decisions shows that arguments concerning conservation and damage to protected environments is systematically debated and continues to impede implementation even after land restitution is ruled.

The positive role played by indigenous peoples in environmental conservation is already widely advocated by MRG and other indigenous peoples' rights organisations. It is now part of international law as it supported notably the rulings

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<sup>51</sup> <http://www.southernafricalitigationcentre.org>



in the Ogiek case. Governments however are still sceptical of this argument so increasing and broadening current advocacy efforts around this core issue may generate positive results. Such strategy would be emphasising: the legal and historical injustices that indigenous peoples have faced by the creation of protected areas; the misconception according to which the evictions were necessary to protect the environment; and the documented evidence that indigenous peoples play a positive role in the preservation of the environment. In particular and linked to the findings of the section above, the national media could be targeted as well as all governmental bodies opposing the conservation argument.

### The importance of revisiting and improving partnerships

Partnership in legal empowerment and litigation is a very broad topic and an in-depth analysis is beyond the scope of this report. Nonetheless, some points brought up by communities on their partnership with MRG are relevant to this evaluation and are hereby conveyed.

In Loliondo many community members expressed they are extremely grateful and aware of MRG's support. Many indicated that their partnership with MRG highly facilitated their meeting and building of relationships with national lawyers and helped them with legal costs. They indicated that when MRG got involved the quality of the work and communication with their lawyers greatly improved. Community members from Sukenya indicated the importance of the long-term involvement of MRG. Some of them had personally met with MRG's legal director, and testified to a strong trusting relationship. The reliance on the relationship with a single staff person at MRG is at the same time perceived as an element of fragility by communities, who fear the partnership could be undermined if that person was to leave the organisation. Long-term support and continuity in their partnership with MRG is sought.

In Kenya, staff members of OPDP voiced the importance of broader funding, with allocation to other programmes alongside litigation. The support to existing programmes for which funding is threatened was mentioned as important to communities. The OPDP also stressed that the legal empowerment and strategic litigation programmes are an '*enormous strain on local organisations*' and this could be factored in further by MRG and donors when partnering with indigenous peoples' organisations. They looked forward to a continued collaboration.

Discussions with staff of EWC revealed a general feeling of discontent not only around the non-implementation of the decision but also, uncertainty about MRG's future support and on the next steps for implementation. The relatively new role of Kenya advocacy officer created by MRG was recognised as bearing potential for change. Adding human resources from the region and based in the region is deemed useful for the implementation of both decisions in Kenya in particular.

MRG staff expressed a feeling of having exhausted all possible avenues to support implementation of the Endorois case. When asked why the decision had not been implemented, MRG staff said that this was mainly due to a 'lack of political will by the government of Kenya' and expressed a sense of powerlessness to change the situation. It appears clear from the review that capacity building around implementation was a very significant part of the strategic litigation and legal empowerment work. The report from the evaluation of the three programmes funded by the Baring Foundation found that extensive efforts have been deployed notably to build the institutional capacity of the EWC and that activities towards this end have been comprehensively designed and implemented.<sup>52</sup>

The lack of progress on implementation has clearly been a setback for the Endorois community, the EWC and MRG. One Endorois staff stressed the need for a 'road map for implementation' in spite of all the efforts already deployed to this end. Reports from communities also indicate the need to ensure that the organisations that represent them remain the driving force to push for implementation with the clear and transparent participation of all members of the community. Elite capture was highlighted as a risk that could undermine the whole impact of litigation.

All Endorois members interviewed called for additional support from MRG, stressing that long-term programmes and adequate financial and human resources are key. MRG emphasised that its support is different to that of donors since MRG's partnership with EWC and indeed any other organisation is circumscribed by their own funding and strategic plan. MRG also pointed out that their policy on this matter allows for the exiting of relationships once it is deemed that partner organisations have received sufficient support to allow them to function independently. The issue of long-term support therefore also brings up the necessity of assessing and revisiting existing partnerships regularly. As one MRG staff member expressed:

*'I think if an organisation is committed to a partnership model not just litigation, the work must include capacity building of the partner organisation. There is a question, though, that must be asked after a number of years with little progress on capacity about the future of that partnership. That requires an honest assessment of the partner and whether MRG has exhausted all avenues open to it to support that partner while respecting a community's representation structures and self-determination. There is a risk of over-reach there because of the genuine goal of achieving good outcomes for the community, but MRG needs to be clear about its purpose, who the partner is, and its ability to support change.'*<sup>53</sup>

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<sup>52</sup> Michael Ochieng Odhiambo, 'A solution to the forced displacement of the Endorois is Kenya: working towards the implementation of the African Commission on Human and Peoples' Rights Decision (November 2008-October 2011), Report of final evaluation, Nakuru, February 2012, pp.13-16

<sup>53</sup> Anonymous contribution from MRG staff member.

## New partnership in Niger?

Alongside the evaluation exercise at the basis of the present report, MRG is revisiting existing partnerships in Africa and exploring new ones. Among others, the possibility of supporting the work of Association Timidria, an NGO based in Niamey, which operates in eight regions of Niger, is being looked into.<sup>54</sup> Timidria's work started around 1991 and was prompted by a desire to find a peaceful solution to an ongoing protest led by the Touareg people. Timidria's overarching objective is to fight against slavery and all forms of discrimination in Niger. With that objective at the forefront of its activities, TIMIDRIA contributes to supporting equality and respect for human rights in Nigerian society. MRG is currently consulting with Timidria and partners on the opportunity of extending its litigation programme to support cases in Niger at all national and regional levels. The litigation strategy planned in the case of Niger would seek redress for descent-based discrimination. MRG and TIMIDRIA would support people who may nowadays no longer be affected by slavery but are marginalised and discriminated against precisely because their people have a history of being affected by slavery and they have seen their land rights encroached as a result of this historical discrimination.

In addition to the mechanisms of the African Commission and Court, the sub regional court of the Economic Community of West African States (ECOWAS) is seen by MRG as a platform particularly likely to provide impact.<sup>55</sup> MRG explains that the current explorative legal strategy in the case of Niger would be to use the concept of 'peoples' in the African Charter. Communities supported by Timidria in Niger do not self-identify as indigenous. This means that a number of international standards successfully applied in the litigation of the Endorois and Ogiek cases, such as instruments and recommendations pertaining specifically and wholly to indigenous peoples rights, could not be deployed in the case of Niger. The conservation argument is equally not likely to bear any relevance in the case of Niger, because the rights violations do not originate in land dispossession following the enactment of environmental protection measures.

Nevertheless, a significant part of the legal capital gained through the Endorois and Ogiek cases before the African Commission and Court draws on the notion of 'peoples' and their right to land. The African Charter's provisions on the rights of 'peoples' to land and natural resources<sup>56</sup> are a particularly rich and the potential for jurisprudential developments on that front is great. The African Charter, in contrast with other international human rights instruments, specifically states that: *'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'*<sup>57</sup> It goes further in ensuring all peoples' right to existence and self-determination and addressing issues attributable to colonization and oppression.<sup>58</sup> The right of peoples to freely

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<sup>54</sup> Association Timidria is composed of nine sections (regions), 32 sub sections and 682 local offices. It counts approximately 350,000 partisan members.

<sup>55</sup> Notes from an interview with Lucy Claridge, 20 June 2017.

<sup>56</sup> Articles 19-24 of the African Charter on Human and Peoples' Rights.

<sup>57</sup> Article 19 of the African Charter on Human and Peoples' Rights.

<sup>58</sup> Article 20 of the African Charter on Human and Peoples' Rights.

dispose of their wealth and natural resources as well as the right to development are other examples of the progressive character of the African Charter.<sup>59</sup>

This far-reaching content suggests that, despite some challenges<sup>60</sup>, there are significant advantages in supporting the development of the jurisprudence and standards of the African human rights systems. A comprehensive human rights advocacy strategy will also include, in parallel with the use of the African regional mechanisms, the use of other platforms such as the relevant UN mechanisms, which are based on an older and more comprehensive body of instruments and standards, but whose texts are in comparison more limited.

Slavery is as a grave and pressing problem that still prevails in modern days. It is estimated that 20 to 30 million people across the globe experience slavery and over 6 million of these are in Africa.<sup>61</sup> Strategic litigation of slavery cases in the African regional system bears tremendous potential for the improvement of the lives of peoples whose rights are being violated. There has also been very limited number of cases of litigated, even before international mechanisms. As argued in a recent article authored by Helen Duffy, modern day slavery is being litigated before regional mechanisms but:

*'given the gravity and scale of the problem, cases to date have been remarkably scarce and it is likely that there will be 'a burgeoning of regional and international litigation in this field in the future as we seek to narrow the gulf that currently exists between some of the oldest and firmly entrenched rules of international law and their implementation in practice'.*<sup>62</sup>

Discussions with the Director of TIMIDRIA and the legal experts advising the organisation revealed solid capacity within TIMIDRIA, which ensures a good basis for partnership. The review team discussed five cases that have been presented to national courts with a lawyer representing TIMIDRIA since the penalisation of slavery in Niger in 2003. Two of them were unsuccessful, two pending and one successful in appeal.<sup>63</sup> Reference was made to the jurisprudence of the ECOWAS human rights system by a legal collaborator of TIMIDRIA, which is another indicator of TIMIDRIA's extended capacity for human rights advocacy in the region. Discussions also included issues of capacity building of communities as well as relevance and timing of the use of regional and sub-regional mechanisms.

Interviewees expressed interest in advocacy and strategy at the regional and international levels, with some emphasising the need to prioritise support towards current efforts at national level. Particular interest in the length and scope of the potential support from MRG was raised. TIMIDRIA and experts consulted are well aware that litigation programmes take years to be implemented and of the limited

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<sup>59</sup> Articles 21, 22 and 24 of the African Charter on Human and Peoples' Rights.

<sup>60</sup> For example procedural length and challenges related to implementation.

<sup>61</sup> See: <https://www.globallslaveryindex.org/region/sub-saharan-africa/> and [http://www.theworldcounts.com/stories/Modern\\_Day\\_Slavery\\_Statistics](http://www.theworldcounts.com/stories/Modern_Day_Slavery_Statistics)

<sup>62</sup> Helen Duffy, Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution, *Journal of International Criminal Justice* (2016) 14 (2): 375-403, Oxford University Press, 09 April 2016.

<sup>63</sup> Reference could be provided on request.

resources available. They highlighted the need to plan for long-term support and partnership. They look forward to engaging in further discussions with MRG.

Based on the *Learning point 1* of this review according to which similar contexts are a likely to make regional and international litigation programmes impactful, it is relevant for MRG to assess the feasibility of extending its support to partners in other African countries where slavery and descent-based discrimination is an issue. MRG is already supporting people affected by slavery in Mauritania, and there may be other countries where NGOs and affected peoples would welcome legal empowerment support.

*Learning point 2* of this review looks at material consequences. A strategic litigation and legal empowerment programme led by MRG with partners in Niger is likely to produce similar outcomes to those obtained in East Africa. Litigating descent-based discrimination will undoubtedly bring about change as people affected by slavery are supported to bring about their cases before national and or/regional tribunals. Strategic litigation will address the need for harmonisation of national legislation, policies and practices with international human rights standards. Similar implementation challenges are however to be expected because those appear to be systemic both at national and regional levels. The findings of this review demonstrate that deploying additional and efforts and innovative strategies to tackle systemic challenges pertaining to implementation are also necessary to effect concrete material change for communities.

In relation to *Learning points 3 and 4* on legal/political impact and social change, it is to be expected that a litigation programme in Niger would have similar impact as it did in Kenya and Tanzania. As in the case of Kenya and Tanzania, both legal and social sectors are areas of impact for which MRG has the most direct leverage. The recommendations at the end of this report on empowerment of the judiciary and the strengthening of the national media advocacy are particularly relevant to ensure the positive impact of strategic litigation.

### Learning point 5 on future advocacy and partnership

Litigation and implementation are long-term and multi-faceted processes with important challenges, most predominantly that of weak political will and lack of governmental capacity to engage with and implement international law. In litigating indigenous peoples' rights in Africa, advocates can use an array of approaches. This report suggests that the African system is a very fruitful platform for change, and recommends that future advocacy activities continue to include the strategic use of its mechanisms. Strengthening advocacy can also mean targeting the governmental resistance based on environmental considerations issues so that the role of indigenous peoples in the preservation of the environment is better understood.

When interviewed on partnership, communities indicated the need for support such as that provided by MRG through its legal empowerment programme. The importance of long-term support, of funding existing programmes other than

litigation that build the general capacity of the organisations and promotes the rights of indigenous peoples was emphasised. The importance of assessing current partnerships and exploring new ones is also brought to light with this review.

## Section 7: Learning points and recommendations

This final section presents the core learning points that have emerged from the evaluation and formulates recommendations to support MRG in its future work. Many positive impacts of strategic litigation have been identified in the report. It is worth noting in concluding this report that one of the very significant impacts of strategic litigation has been legal empowerment, as strong reports supporting effective and valuable legal empowerment came from community interviews.

### Core learning points and recommendations

#### 1. Common contextual factors are roots for litigation strategies

Part of the impact of strategic litigation in East Africa is attributable to the grounding of arguments in common contextual factors: indigenous peoples seeking remedy for land losses. The Endorois, Ogiek and Maasai share a similar history of human rights violations, where their rights to land and resources have been disregarded by colonial powers. The arrival of external actors resulted in land grabs with violent evictions and forceful land disposessions without consultation or adequate compensation. Litigation was an effort to find solutions to deeply historically embedded land disputes. In both countries, the social and political climate has been extremely resistant to recognising indigenous peoples' land rights in accordance with international law. The history of legal engagement by the communities is also a common factor: all three communities approached MRG for support after years of failed attempts to engage the national legal system in recognising their rights. These common contexts allowed for cross-fertilisation of human rights standards and provided a strong platform for community-led litigation strategies.

#### 2. Material consequences: a long term project

The regional human rights system has ruled in favour of indigenous communities and ordered land restitution, demarcation and titling but a strong plan to support implementation and actual material gain for the communities is necessary. In terms of redress and material consequences, winning these regional legal cases is the start of a process. For all three communities, the material consequences of litigation have been minimal and implementation is a great challenge. The prospects of effective implementation can be stalled by a lack of access to long-term financial support and human resources for national and international NGOs, as well as for human rights mechanisms and governmental bodies responsible for implementation, so adequate support on that front is essential.

#### 3. Legal impact: a work in progress

The impact of strategic litigation on the national legal frameworks of Kenya and Tanzania is not straightforward. While legal empowerment of communities is undeniable, the judiciary in Kenya and Tanzania have not yet taken on board international law on indigenous peoples' rights. The training of judges and registrars held in Tanzania shows the importance of such activities in raising the awareness of decision-makers about indigenous peoples' rights in Africa and internationally. Litigation is part of a larger advocacy strategy aiming at making national laws consistent with indigenous peoples' rights in international law and supporting the legal profession to work to realise these rights. From this perspective, litigation is a powerful tool for change and the impact of litigation is felt mainly at the community, regional and international levels, where the contribution of indigenous peoples' organisations in Kenya and Tanzania and of MRG to the regional jurisprudence on land rights in Africa is remarkable.

#### 4. Social impact: significant legal empowerment and community impact

In the course of the litigation processes, significant and positive social changes have been observed. Reports were received regarding the enhancement of communities' sense of justice, legal empowerment and unity around long-term struggles. A certain degree of positive change in attitudes and behaviours of other parts of society, such as neighbouring communities, local authorities and the media, has also been reported as a consequence of the legal and human rights activities and litigation. This state of affairs however remains fragile, given they are not supported by material and legal changes. Also, in the case of both Kenya and Tanzania, communities expressed some concerns that litigation can contribute to the inflammation of existing tensions and surges of violence where the socio-political climate is unstable. Responsible action is necessary and a litigation programme operating in such circumstances must be supplemented with security screening measures and risk assessments for the prevention of violence, as well as access to funding and remedies in case of violence.

#### 5. Future advocacy strategy and partnership

The experience of litigation in the African human rights system testifies that it is a fruitful platform for change. In spite of an often lengthy process, the use of African human rights mechanisms is highly likely to continue to produce positive and progressive legal outcomes for indigenous peoples' rights. In the case of indigenous peoples' land rights, environmental conservation is a cornerstone argument for which further advocacy activity can be explored. The role of indigenous peoples in conservation is widely embedded in international jurisprudence but governments are still sceptical of this argument so further efforts in this area could have a positive impact.

As MRG is reflecting on its partnerships in Africa and elsewhere, the review highlights that drawing on commonality of contexts can strengthen litigation strategies. Intensification and diversification of efforts on implementation and the legal education and empowerment of decision makers is necessary. Donors also need to be committed to the long-term and extensive nature of the support needed

to achieve change. Community consultations led under this review call for long-term partnerships with MRG. The communities have said these partnerships should continue to include support for legal empowerment, community outreach and exchanges, the inclusive participation of women, youth and elders. They also call for the development of support for other strategic activities held in parallel to litigation.

## **Recommendations**

Based on the above, the following recommendations can be formulated:

1. Donors should be aware long-term support is a key component of litigation programmes especially in order to generate material consequences. MRG should work to influence some donor programmes to try to overcome systemic short termism so that they better correspond to the needs of strategic litigation programmes.
2. Include activities to ensure effective legal empowerment of the judiciary and public authorities alongside any strategic litigation programme. Donors should be aware that these activities are essential to the success of strategic litigation and provide adequate resources to that end.
3. Continue advocacy and litigation of indigenous peoples rights in the African human rights system, including at the African Commission, whose implementation role is yet to be realised. MRG should continue to offer technical support to the mechanisms of the African Commission that are responsible for implementation and extend this support to the African Court.
4. Continue the successful legal empowerment activities with communities, paralegals and lawyers representing communities. Because of the adversarial nature of strategic litigation, this can perhaps be better achieved as part of a consortium.
5. Donors should be aware of the sensitive security contexts in which human rights litigation takes place and allocate funding in case urgent security measures are needed. MRG can continue to ensure responsible action for litigation programmes operating in unstable political climates where violence is likely to break out, notably through adequate security screening and risk assessments for the prevention of violence as well as adequate support to affected communities in case of violence.
6. Women's empowerment remains a priority. Voices from Tanzania are inspiring examples of potential for change. While the example of Maasai women has been promoted via publication, support towards community exchanges on this issue could be explored, as it could be beneficial in other communities where women are less empowered.



7. MRG can enhance and further develop its existing partnerships with African based NGOs deploying programmes for the strategic litigation of land rights in Africa.
8. Deepening of advocacy and support around the role of indigenous peoples in preserving the environment is likely to support change. MRG can increase the scope of its efforts to convince governments of the well-documented role of indigenous peoples in preservation of the environment, notably in its work towards implementation.
9. A strong media strategy that influences coverage at national level is likely to impact change. Enhancement of existing efforts on that front, including the implementation of an advocacy strategy aimed at national media, is advised, as it is likely to bring positive change.
10. Strategic planning in relationship to partnerships should include the assessment of existing partnerships in parallel with an assessment of MRG's capacity to provide support to existing partners, bearing in mind the long-term support necessary to successful strategic litigation programmes.
11. Partnership with Association Timidria in Niger has been assessed by MRG and the review team as bearing potential to impact change through the use of strategic litigation. If adequate resources are available, further consultations should take place with Association Timidria to discuss the possible implementation of a long-term collaborative programme of work.

### **Communities and partners' voices**

Communities' concerns and priorities are:

- Community exchanges requested by the Maasai who are eager to learn from the Ogiek and their case.
- Long-term support that ensures solid partnerships with adequate resources and continuity in working relationships.
- Sustainable means for communities outreach.
- Attendance to litigation and advocacy platforms and mechanisms.
- Continued programme supporting paralegals and training them on international law following additional consultations on the development of these programmes.
- Support in ensuring inclusive participation of women, youth and elders.
- Organisational capacity building and better flexibility in administrating the allocation of financial resources.
- Funding for activities other than litigation in parallel to litigation programmes.

*'MRG should not give up hope, we are ready for the long struggle, going all the way until justice is done.'* Soitsambu Village

## Annexes

### Annex 1 Review schedule

#### Schedule of the review

##### April 2017

1. Desk based research.
2. Production and agreement on an inception report.
3. Planning of field visits with partner organisations.
4. Interview members of MRG's legal team, land rights experts, gender context experts and academics working on the region.

##### May 2017

5. Travel to Tanzania and Kenya for interviews with communities, partner organisations, paralegals, community activists and where possible members of neighbouring communities and local officials.
6. Interview members of MRG's legal team, land rights experts, gender context experts and academics working on the region (continued).
7. Interview individuals in Niger.

##### June 2017

8. Interview individuals in Niger (continued).
9. Interview members of MRG's legal team, land rights experts, gender context experts and academics working on the region (continued).
10. Report writing.

##### July 2017

11. Report writing (continued).
12. Submission of draft review report mid July 2017.
13. Interact with MRG and peer reviewers for possible amendments to the report.
14. Submission of final report.

**Post report:** Participation in the East-West Africa community exchange in Kenya to validate the evaluation.

## Annex 2 Start up questions for community interviews

As per the methodology described in the report, the following guiding questions were brought up as a common starting point for group meetings and individual meetings:

1. Looking back at the situation before litigation took place, what would you say has changed in your life?
2. What has been the biggest impact of litigation within your community?
3. Do you think that litigation impacted other actors (including public authorities, police, lawyers, judges, other neighbouring communities, private corporations, etc.)?
4. How would you describe the impact of MRG work with your organisation and community members? Do you have any advice or comment on the working relationship with MRG?

The conversations flowed freely so that the review team could be exposed to the comments that community members wanted to share. The approach deliberately avoided tackling pre-identified issues with determined questions.

### Annex 3 List of guiding questions for academic and other experts

- Is there a change that you would identify as the most significant change following MRG's legal support work?
- Are you aware of any legal redress for the concerned communities?
- Have we noticed a change in reality "on the ground" in terms of laws, policy, practice, behaviour and/or attitudes?
- Can you identify contextual factors that may have led to those impacts?
- To your knowledge, have the national courts accepted international human rights law standards pertaining to indigenous peoples' rights as relevant?

#### **Role of strategic litigation**

- What can be said about:
  - o the independent value of strategic litigation in constructing and/or consolidating a culture of respect for the rule of law?
  - o the role of legal empowerment and strategic litigation in fostering agency and recapturing the dignity of affected communities?
  - o the use of litigation as a form of advocacy to place pressure on a duty-bearer and/or decision-maker, often but not always state authorities, to take some responsive action
  - o the change in jurisprudence, or development of jurisprudence, the impact on domestic courts to recognise the relevance of international law?

#### **Change in attitudes/ awareness of the issues at stake (which would have been prompted by legal empowerment and strategic litigation work)**

- What can be said about:
  - o any change in public and media awareness about the issue(s) and of the role and responsibility of litigators and NGOs in public communication?
  - o any change in popular culture about the specific issue at hand and/or the role of law, and litigation, in fostering change, in favour of the equality, non-discrimination and respect for human rights?
  - o the influence on the judiciary and on a country's general legal capacity about issues at stake and/or about their own role and/or responsibility to act?
  - o the greater familiarity with rights-based issues for judges, lawyers, rights advocates and the public as a result of litigation?
  - o the generation of instructive examples of law-based checks on administrative power
  - o any examples of good practice (for attitude change) which may serve as role models for others?

#### **Capacity building and empowerment**

- Did MRG's work effectively support the community's sense of

empowerment? If so how? What are the reasons for this and which methods and approach might have worked better to support their rights claims?

- Which motivations and methods led to communities choosing to take or not to take legal action?
- What can be said about:
  - o the level of engagement and participation of the communities in the legal work?
  - o the role of legal empowerment in enabling, encouraging and/or facilitating positive mobilisation of the community including the ability of leaders to reach out to and include all sections and sectors of communities to avoid a divide and rule approach?

### **Women's issues**

- What can be said about MRG's support in relation to gender issues?
- Has there been an impact on the ability of leaders to mainstream gender and ensure women participate appropriately in litigation and implementation, capacity building, decisions and benefit appropriately?
- How much scope was provided to women to participate and benefit from MRG's legal work?
- Have women been specifically affected by the legal disputes because of their gender/traditional roles? Is there evidence of double discrimination based on gender and being part of a minority/indigenous group?;

### **Elders and youth**

- Are there any particular point to raise about the elders and the youth?
- Are there any intergenerational issues that should get the review's attention?
- What can be said about the impact of MRG's work for older and younger members of the communities supported in the course of the legal empowerment work?

### **Lessons learned and recommendations**

- Is it possible to identify areas of learning for improvements?
- Which recommendations should be made to MRG, partners and donors and other stakeholders on future work, programme design, cooperation and strategies?
- Which recommendations should be made on the 'replicability' and application of the methods adopted by MRG in its legal work?

### **Any other considerations?**

## Annex 4 Learning issues discussed with experts and MRG staff and board

The terms of reference for the review offered a list of learning questions, which have been used to support the development of the analytical parts of the report. MRG staff and board members, as well as some experts interviewed were approached using this list of issues as a basis for reflection. Most of them responded in writing.

The learning themes for this review were:

- Legal redress for the community, enforcement of existing legal protections and rights
- The independent value of strategic litigation in constructing and/or consolidating a culture of respect for the rule of law
- The role of legal empowerment and strategic litigation in fostering agency and recapturing the dignity of affected communities
- The change in reality “on the ground” in terms of laws, policy, practice, behaviour and/or attitudes
- The tackling of particularly egregious violations of the rights at issue
- The use of litigation as a form of advocacy to place pressure on a duty-bearer and/or decision-maker, often but not always state authorities, to take some responsive action
- The change in jurisprudence, or development of jurisprudence, the impact on domestic courts to recognise the supremacy of international law
- The generation of instructive examples of law-based checks on administrative power
- The rise in public and media awareness about the issue(s) and of the role and responsibility of litigators and NGOs in public communication
- The change in popular culture about the specific issue at hand and/or the role of law, and litigation, in fostering change, in favour of the equality, non-discrimination and respect for human rights
- The positive influence on the judiciary and on a country’s general legal capacity about issues at stake and/or about their own role and/or responsibility to act
- The greater familiarity with rights-based issues for judges, lawyers, rights advocates and the public as a result of litigation
- The instructive examples of good practice which may serve as role models for others
- The role of legal empowerment in enabling, encouraging and/or facilitating positive mobilisation of the community including the ability of leaders to reach out to and include all sections and sectors of communities to avoid a divide and rule approach
- The ability of leaders to mainstream gender and ensure women participate appropriately in decisions and benefit appropriately.

## Annex 5 Issues discussed with partners in Niger

The following questions were asked to each person interviewed that is from Niger. In addition, some free flow questions were asked while discussing with some of the interviewees over the phone.

1- Do you think it is strategic, advisable and timely to use of regional / international mechanisms (such as the Commission and the African Court) for the communities TIMIDRIA represents?

Should community consultations and community engagement (further) take place before resorting to regional / international mechanisms? Do you know whether consultations have already been held on the use of regional / international mechanisms (if so, on what period and how)?

2- In relation to the right to land and other rights: What are the main human rights violations for which TIMIDRIA is seeking redress? Can you explain the right to land according to the communities with which TIMIDRIA works?

3- Cases before the national courts: Can you describe the cases before the court (number of cases, which courts, during or complete)? Victories/defeats?

4- What is the attitude of the authorities today regarding the situation of the communities that TIMIDRIA represents and do you think that the use of regional / international mechanisms would change this attitude for the better?

5- What can we expect from the impact that the national human rights institutions in Niger have on the situation of the communities with which TIMIDRIA works?

6- What can we expect from the impact that national courts in Niger can have on the situation of the communities with which TIMIDRIA works?

7- Does TIMIDRIA seek support with regards to national court cases or does TIMIDRIA (and the communities) believe that it is time to seize the regional / international mechanisms?

8- What do you consider as the absolutely necessary elements for a successful cooperation between TIMIDRIA and an international NGO that is directly and truly useful for the communities?

9- What do the communities want to see change?

10 - Are there any other aspects that you would like to discuss?