

LAMU PORT PROJECT

Human Rights Implications from the Perspective of Marine Cultural Heritage: Framework and Guidelines for Training and Free, Prior and Informed Consent

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1. Background on LAPSSET

The Lamu Port, South Sudan, Ethiopia Transport Corridor (LAPSSET) is one of the largest infrastructure projects in Kenya. It is being carried out as one of the flagship projects under Kenya's Vision 2030.¹ The project spans three countries: Kenya, South Sudan and Ethiopia, but the benefits anticipated from the project are expected to span the entire Eastern African region. It is a major infrastructure development project that involves developing a transport corridor from a new Port in Lamu through the towns of Garissa, Isiolo, Maralal, Lodwar and Lokichoggio to branch at Isiolo to Ethiopia and South Sudan.² The corridor is made up of a new road network, railway line, oil refinery at Lamu, oil pipeline, Lamu Airport and free port at Lamu (Manda Bay) in addition to resort cities at the coast and in Isiolo.³ The project is expected to spur economic growth in Kenya and open up regions which were hitherto underdeveloped. In March, 2013, the LAPSSET Corridor Development Authority was created to plan, coordinate and manage implementation of all LAPSSET projects.⁴

¹ Sessional Paper no. 10 of 2012 on Kenya Vision 2030. (Kenya Vision 2030 refers to Kenya's long-term economic blue print covering the period 2003 to 2030).

² Sessional Paper no. 10 of 2012 on Kenya Vision 2030.

³ Sessional Paper no. 10 of 2012 on Kenya Vision 2030.

⁴ Legal Notice No. 58 of 22nd March, 2013.

Figure 1: Map of LAPSSET Corridor, from Enns and Bersaglio 2019



2. LAPSSET Project Components

There are several components to the LAPSSET project.

- a. **Lamu Sea Port**-the Lamu Port Master Plan consists of 32 berths all located along a 6 km strip of the Indian Ocean coastline. The berths were to be constructed in phases, with the first three due for completion in 2016, 20 by 2030 and the rest after 2030. Manda Bay was chosen for the port because it has deep waters and is therefore able to berth deeper vessels.
- b. **Standard Gauge Railway**-the Standard Gauge Railway, (popularly referred to as the SGR), is a railway line from Lamu through Isiolo to South Sudan and Ethiopia. This component allows for faster passenger and cargo trains (going at speeds of 160 km/h for passenger train and 120 km/h for cargo train respectively). The SGR was expected to reduce the pressure on the roads for long-haul cargo between Lamu and South Sudan and Ethiopia, handling 3 and 4.7 million tonnes of import and export cargo respectively by 2020 and 5.1 and 9.3 million tonnes respectively by 2030.
- c. **Oil pipeline from Lamu through Isiolo to South Sudan and Ethiopia**-this project involves the construction of a 1,260 km crude oil pipeline from Juba in South Sudan to Lamu and a 980 km product Sine from Lamu to Ethiopia. Initial projections were for the pipeline and Sine to be completed by 2016.
- d. **Highway from Lamu, through Isiolo to South Sudan and Ethiopia**- this 880-kilometre-long road is projected to run from Lamu to Isiolo (530 km) and from Isiolo to Lokichar (350 km).
- e. **International airports**- in addition to the existing Manda Airport, Isiolo, Lake Turkana and Lokichoggio are expected to be serviced by international airports, all of which were scheduled for completion by 2020.
- f. **Resort cities**- Lamu, Isiolo and Turkana are expected to develop into resort cities with Kipsing Hill in Isiolo and Eliye Springs in Turkana being earmarked in this regard.
- g. **Oil refinery at Lamu**- this refinery is expected to serve Kenya and Ethiopia with its capacity of 120,000 barrels per day.
- h. **Associated infrastructure for electricity supply, water supply, highway, railway oil pipeline and other utilities such as optic cable, power lines and sewage**- it is estimated

that the project will require 1,100 MW of electricity and a 185 km long water supply chain that is required to be in place by 2020. A corridor is also expected to be constructed to provide for other utilities such as optic cable, power lines and sewage.

3. Objectives of the Lamu Port Project

The decision to embark on the project was influenced by the fact that Mombasa port was the only gateway to international waters, serving both Kenya and its neighbours. The number of imports coming through the port, coupled with the limited land available at the port of Mombasa, restricted movement of ships into the port and any inefficiencies or delays at the port affected the economies of the whole region. It is hoped that when the port is fully operational, it will ease congestion at the Mombasa port, which has increased cost of shipping of goods and trade in the region, by providing an alternative shipping port and thus create a competitive environment for commerce and trade flexibility.

The construction of a second port is also considered to be strategically sound for security reasons. In addition to creating a safer transport route for crude oil from South Sudan, the regions covered by the project are areas which have been prone to conflict and banditry, all of which have undermined security in the area. With the coming of the LAPSSET project, there has been an increase of security apparatus in the area in Lamu and the construction of police stations in Mandera. This has made it possible for security agencies to promptly respond to security threats and community conflicts, thereby heightening security in the region. The improved access to job opportunities created by the LAPSSET project have also had the collateral benefit of expanding means of livelihood beyond livestock keeping, thereby diffusing conflicts caused by reliance on one means of livelihood, especially livestock keeping.

Further, Kenya's railway system was also unable to cope with current and future demands since it was a metre gauge line and therefore outdated. One of the components of the Lamu Port Project was therefore the Standard Gauge Railway.

Moreover, the project also seeks to increase economic growth through creating interconnectivity between African countries and through socio-economic development along the corridor by creating job opportunities both from the port and corridor development and from other fields including agriculture, manufacturing, logistics, transport and trade.

In addition, the project is also expected to open up the sea for access to the North and Eastern parts of Kenya as well as to South Sudan and Ethiopia. It is anticipated that the LAPSSET corridor will incentivise investment in underdeveloped and sparsely populated regions of the country.

4. Implementation of the Project

The port project has been implemented in two phases. Phase one is made up of 3 berths. Phase 1 is at 70% completion and has been fully funded by the government of Kenya for a sum of USD 480 million.⁵ Phase 2 which is made up of 29 berths is to be financed by private sector investors. Phase 2 has not started.

5. Financing of the Project

At the onset, it was anticipated that Kenya would raise funding for the project from private investors from Brazil, China, the EU, India, Japan, Qatar and South Korea. However, when these fell through on their commitments, it was agreed that Ethiopia, South Sudan and Kenya would leverage domestic resources for their respective parts of the project. Kenya could only afford to pay in phases to allow for the construction of 32 berths at the Lamu Port. The Cabinet approved the funding of the project through public private partnerships in 2014.⁶ The contract for the construction of the first three berths was awarded to the China Communications Construction Company in 2013.

In 2015, the LAPSSET project was included in the African Union PIDA Project (Program for Infrastructure Development in Africa). This allowed for its inclusion for support through the African Union Commission/New Partnership for Africa's Development for funding and implementation financing. It would also allow the project to attract foreign direct investment.⁷ Indeed, subsequently, the African Development Bank made a grant of KES 195 million to the government of Kenya for the Lamu Port project.⁸

⁵ LCDA, 'Lamu Port' available at <<http://www.lapsset.go.ke/projects/lamu-port/>>.

⁶ 'Kenya Eyes Funding from Private Investors for Various Mega Projects' The East African, 22nd March, 2014, available at <<https://www.theeastafrikan.co.ke/tea/business/kenya-eyes-funding-from-private-investors-for-various-mega-projects--1323542>>.

⁷ <http://vision2030.go.ke/inc/uploads/2018/05/LAPSSET-Project-Report-July-2016.pdf> (accessed 23 August 2020).

⁸ Trademark East Africa, 'AfDB gives Sh 195m Grant for Lamu Port' available at <<https://www.trademarka.com/news/afdb-gives-sh195m-grant-for-lamu-port/>>.

In 2020, the three countries signed a Memorandum of Understanding to use crowdfunding to raise the money needed to build the infrastructure and to make provision for joint budgetary allocation.⁹

6. Structure of Public-Private Partnerships in Kenya

PPPs in Kenya are regulated by the Public-Private Partnerships Act.¹⁰ The Act was enacted for the purposes of facilitating participation of private actors in government development projects through ‘financing, construction, development, operation or maintenance of infrastructure’. The participation could be by way of concessions or contractual agreements.

The Act defines public-private partnerships as arrangements between a contracting authority and a private actor to perform a public function on its behalf, to receive benefit from that function whether by way of compensation from a public fund, charges collected from users or consumers of a service provided to them or a combination of both and where the private actor incurs liability arising from performance of the actions which are set out in the project agreement.¹¹

Institutions under the Act

a. The Public Private Partnership Committee

The Committee is made up of principal secretaries from various ministries and persons appointed by the cabinet secretary.¹² Its functions are to:¹³

- ensure that each project agreement is consistent with the provisions of the Act and national priorities
- formulate policy guidelines on public private partnerships
- approve project proposals submitted to it by a contracting authority
- approve project lists
- authorise allocations from the Public Private Partnership Project Facilitation Fund
- formulate or approve standards, guidelines and procedures for awarding contracts and standardized bid documents

⁹ <https://www.businessdailyafrica.com/economy/Kenya--neighbours-turn-to-Lapsset-crowdfunding/3946234-5419584-g8qsfn/index.html> (accessed 23 August 2020).

¹⁰ Act No 15 of 2013.

¹¹ Section 2 of the PPP Act.

¹² Section 4 of the PPP Act.

¹³ Section 7 of the PPP Act.

- examine and approve the feasibility study conducted by a contracting authority
- review the legal, institutional and regulatory framework of public private partnerships
- oversee the monitoring and evaluation by contracting authorities, of a public private partnership from the commencement to the post completion stage
- ensure approval of, and fiscal accountability in the management of, financial and any other form of support granted by the Government
- ensure the efficient implementation of any project agreement entered into by contracting authorities

b. Public Private Partnerships Unit

This is established within the state department responsible for finance.¹⁴ Under the Act, the unit has two functions: to serve as the secretariat and technical arm of the Committee; and to provide technical, financial and legal expertise to the Committee and any node established under the Act.¹⁵

c. Public Private Partnership Nodes

Whenever a contracting authority¹⁶ intends to enter into a public private partnership arrangement with a private party, it must establish a public private partnership node.¹⁷ Each node is headed by the accounting officer of the contracting authority and shall consist of such financial, technical, procurement and legal personnel as that authority shall, in consultation with the unit, consider necessary for the performance of its functions in relation to a project.¹⁸ The functions of the node are:

- identify, screen and prioritize projects based on guidelines issued by the Committee
- prepare and appraise each project agreement to ensure its legal, regulatory, social, economic and commercial viability
- ensure that the parties to a project agreement comply with the provisions of the PPP Act

¹⁴ Section 11 of the PPP Act.

¹⁵ Section 14(1) of the PP Act.

¹⁶ The PPP Act in its section 2 defines a “contracting authority” as ‘...a State department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party...’

¹⁷ Section 16(1) of the PPP Act.

¹⁸ Section 16(2) of the PPP Act.

- undertake the tendering process
- monitor the implementation of a project agreement
- liaise with all key stakeholders during the project cycle
- oversee the management of a project in accordance with the project agreement
- submit to the unit, annual or such other period reports on project agreements
- maintain a record of all documentation and agreements relating to each project
- prepare projects in accordance with guidelines and standard documents issued by the Committee
- facilitate the transfer of assets at the expiry or termination of a project agreement

How PPPs work under the Act

A contracting authority intending to enter into a public private partnership can conceptualise or identify potential projects and then undertake the preparatory and tendering processes of the project.¹⁹ While doing this, the contracting authority must consider the strategic and operational benefits of entering into a public private partnership arrangement compared to the development of the facility or provision of the service by itself.²⁰ Further, such a project must have been approved as part of the national priority list by the Committee and published as such by the Unit. Once a project is approved, the contracting authority must carry out a feasibility study to determine viability.²¹ The feasibility study must consider the following:

- the technical requirements of the project
- the legal requirements to be met by the parties to the project
- the social, economic and environmental impact of the project
- the affordability, value for money and public sector comparator for the project.

¹⁹ Section 31(1) of the PPP Act.

²⁰ Section 31(2) of the PPP Act.

²¹ Section 33 of the PPP Act.

Once a feasibility study has been concluded, its report is submitted to the Committee for approval.²²In considering whether to approve the project or not the Committee must consider the recommendations of the Unit and the Debt Management Office which must give its approval. Once all approvals have been secured by the contracting authority, the contracting authority shall proceed to invite requests for qualification by notice in at least two newspapers of national circulation and in the electronic media.²³ The bidding process must be undertaken competitively.²⁴

7. Applicable International Legal Framework and the Role of Marine Cultural Heritage

In 2001 Lamu Old Town, the oldest and best-preserved Swahili settlement in East Africa, was inscribed as a UNESCO World Heritage site. In describing the cultural and historical significance of Lamu Old Town, UNESCO cites the well-preserved buildings that represent a long history of the development of Swahili building methods that is reliant on locally sourced coral, lime and mangrove poles.²⁵

UNESCO further cites the outstanding universal value of the tangible and intangible attributes of the Old Town and emphasises the need to maintain its relationship with the surrounding landscape.²⁶

Thus, large infrastructure development projects such as the development of Lamu Port represent a real threat to the cultural heritage of the inhabitants of the Old Town and the surrounding areas, both in respect of its integrity as an island town with close connections to the sea and dunes and to its ultimate survival in terms of the fresh water that the dunes supply. UNESCO goes on to emphasise the need to protect the Old Town and the surrounding islands and mangroves.²⁷

Of particular concern to local campaigning groups, as further discussed in this document, is the sustainability of the Lamu Port project and its effect on traditional fishing and construction methods, as well as basket weaving practices which are all entirely reliant on the shallow waters surrounding Lamu Island and the survival of the mangroves.²⁸ Of key importance to the longer term

²² Section 35 of the PPP Act.

²³ Section 37(1) of the PPP Act.

²⁴ Section 29(1) of the PPP Act.

²⁵ UNESCO, "Lamu Old Town", available at: <https://whc.unesco.org/en/list/1055/>.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Save Lamu, "Restorative Justice Mangroves", available at: www.savelamu.org/restorative-justice-mangroves/.

sustainability and survival of Lamu Old Town and its MCH is also the fact that mangroves have a key role in ensuring local resilience and adaptation against adverse climate change impacts.

The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention) addresses nature conservation and the preservation of cultural properties and recognises the need to preserve human interaction with nature.

Article 1 defines cultural heritage primarily from the perspective of tangible cultural heritage, that is to say, it protects artistic artefacts, monuments and similarly man-made manifestations of cultural heritage. As such, it foregrounds cultural heritage as follows:

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

A similar approach is also identifiable in the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 Underwater Cultural Heritage Convention, of which Kenya is not a state party). Article 1 of the 2001 Convention defines underwater cultural heritage as ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years’. Such ‘traces of human existence’ include building, artefacts, human remains, vehicles or parts thereof and other objects of prehistoric character.

The above definitions, however, have been found to be inherently problematic as they suggest a separation between land and sea when considering the importance of cultural heritage. As such, the UNESCO definitions should be seen as a (non-exhaustive) starting point to the conceptualization of

a more comprehensive definition of marine cultural heritage (MCH) which refers more broadly to entire heritage landscapes²⁹ that mirror the symbiotic relationship between human beings and the sea. Christer Westerdahl first introduced the concept of maritime cultural landscape in 1992, within the context of maritime archaeology, as a bridge between coastal buildings and traditions and underwater sites, whilst also including the concept of maritime culture to encompass the various ways in which human beings utilized the maritime space. Contemporary scholars, therefore, within and beyond archaeology, have embraced the concept of **MCH, understood as ‘all past human action on the coasts as well as directly on the sea’** and encompassing

tangible remains such as shipwrecks, submerged settlements, ports and harbours, maritime ecologies, and geology as well as equally vital intangible components such as cultural practices, artistic and linguistic expressions, local skills, traditional and historical knowledge. The reach of MCH is then similarly broad and includes its relationship to economic development, environmental management, social justice, education and identity.³⁰

It is to this conceptualization of the **symbiotic relationship** between human beings and the sea that, as demonstrated in this document, the **right to culture** and **indigenous people’s specific right to free, prior and informed consent**, as enshrined in international human rights law, can contribute to add a richer understanding of cultural heritage as also encompassing much-needed dimensions of indigenous rights, intergenerational rights, futurity and sustainability.³¹

In the specific context of Lamu Old Town, in fact, it is possible to identify expressions of the relationship between human beings and the sea which transcend mere economic and transactional boundaries, to encapsulate local as well as indigenous traditions tightly connected to the coastal

²⁹ R.M. Hutchings, *Maritime Heritage in Crisis: Indigenous Landscapes and Global Ecological Breakdown* (Routledge, 2017).

³⁰ See definitions in J Henderson, ‘Oceans without History? Marine Cultural Heritage and the Sustainable Development Agenda’ (2019) 11 *Sustainability* 5080. According to Henderson, the adjective ‘marine’ is to be preferred to ‘maritime’ as it “relates to all things pertaining to the sea and as such encompasses all activity associated with the oceans while ‘maritime’ is usually used in a more restricted sense to refer to sea travel, shipping and exploration. ‘Marine’ also fits in with the terminology used in the Ocean Sciences and by marine stakeholders in spatial planning, conservation, tourism, ecological services, engineering and development more generally. ‘Marine’ is not used to negate or replace the term ‘maritime’ as it is used in archaeological contexts but rather to flag the relevance and utility of heritage as a usable knowledge base to current marine stakeholders who might not otherwise think it is relevant to their activities”.

³¹ These dimensions are at the core of our project ‘Protecting the past, preserving the future’, which understands the protection of Marine Cultural Heritage (in its tangible and intangible manifestations) as crucial to the preservation of planetary boundaries, ensuring intergenerational equity and a sustainable future for generations to come. See also R.M. Hutchings, *Maritime Heritage in Crisis: Indigenous Landscapes and Global Ecological Breakdown* (Routledge, 2017).

mangroves. Aspects of MCH in Lamu Old Town are primarily, but not only, of an intangible nature, in that they pertain to perceptions, practices, traditions, representations, customs and broader cultural landscapes, related for instance to fishing and traditional construction methods.

As a State Party to the 1972 World Heritage Convention and to the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, Kenya has an obligation to preserve World Heritage Sites, such as Lamu Old Town. This includes, by virtue of Article 5(1) of the 1972 World Heritage Convention, adopting policies to integrate cultural and natural heritage into comprehensive planning programmes. Accordingly, consideration of the adverse impacts that the realization of Lamu Port and the broader LAPSET corridor will have on the cultural heritage of the community in Lamu should have formed part of the planning of the new port's development. Article 6(1) of the 1972 World Heritage Convention goes on to explain that such heritage constitutes world heritage and extends the duty to co-operate in the protection of heritage sites to the international community as a whole, albeit whilst respecting the sovereignty of the State in which the heritage site exists. The extension of this duty therefore would encompass any donor states investing in the port project as part of the PPP structure described in this document. Furthermore, Article 6(3) places a duty on all States Parties not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage on the territory of other States Parties to the World Heritage Convention which again brings into question the actions of any donor states and international financial institution involved.

The Right to Culture

The right to culture is protected by Article 27 of the Universal Declaration of Human Rights (UDHR) which states:

*Everyone has the right **freely to participate** in the **cultural life of the community**, to **enjoy the arts** and to **share in scientific advancement** and its **benefits**.³²*

Article 27 of the UDHR is replicated and reinforced by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which goes on to provide that:

³² United Nations (1948) *Universal Declaration of Human Rights*, 10 December 1948, Article 27, available at: www.un.org/en/universal-declaration-human-rights/.

*The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*³³

171 countries, including Kenya, have ratified ICESCR and are therefore bound by its provisions.³⁴

In order to comply with Article 15 of the ICESCR, States parties have both positive and negative obligations:

- **Positive Obligations:**

- Put in place conditions for and facilitate **participation** in cultural life.
- **Promote** access to cultural life.
- **Preserve** cultural goods.

- **Negative Obligations:**

- Refrain from **interference** with the exercise of cultural practices.
- Refrain from **interference** with access to cultural goods and services.³⁵

Whilst the full realisation of Article 15 of the ICESCR can be achieved progressively, retrogressive measures that impact a community's ability to take part in cultural life are prohibited unless it can be shown that a careful consideration of alternatives was undertaken which included consideration of all of the rights contained in ICESCR.³⁶

Cultural goods, as pertaining the right to culture, have been interpreted to include:

³³ United Nations (1966) *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Article 15, available at: www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

³⁴ As of 10 June, the following four countries were ICESCRE signatories: Comoros, Cuba, Palau and the United States of America. The following 22 countries/states had taken no action in relation to the treaty: Andorra, Bhutan, Botswana, Brunei, the Cook Islands, Holy See, Kiribati, Malaysia, the Federal States of Micronesia, Mozambique, Nauru, Niue, Saint Kitts and Nevis, Saint Lucia, Samoa, Saudi Arabia, Singapore, South Sudan, Tonga, Tuvalu, the United Arab Emirates and Vanuatu.

³⁵ UN Committee on Economic, Social and Cultural Rights (2009) *General comment No. 21*, at p. 2, 21 December 2009, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en.

³⁶ UN Committee on Economic, Social and Cultural Rights (2009) *General comment No. 21*, at p. 10, 21 December 2009, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en.

- Nature's gifts, such as **seas**, lakes, rivers, mountains, forests and nature reserves, **including the flora and fauna found there**, which **give nations their character and biodiversity**;³⁷
- Intangible cultural goods, such as languages, **customs, traditions**, beliefs, **knowledge** and history.

As outlined later in this document, in relation to stakeholder interviews, the local fishermen of Lamu expressed concern over the dredging of the Lamu channel in order to accommodate the larger vessels that will be using the new port. The communities' traditional fishing practices, which are carried out from traditional hand-crafted dhows, are not suited to the deep waters that would replace their current shallow fishing territories.

Furthermore, the building of the new port will impact on the fertile mangroves which the local community use for traditional basket weaving and construction practices which are vital aspects to the community's cultural heritage and to their longer-term survival and climate change mitigation.

These concerns are crucial, when it comes to the protection of the right to culture in respect of both the positive obligation to preserve cultural goods – namely the coastal seas; flora and fauna; and biodiversity of the area, as well as intangible goods – and the negative obligation to refrain from interfering with the exercise of and access to such cultural goods.

Thought must therefore be given to whether careful consideration, that took account of all the rights contained in ICESCR, was taken prior to the decision to develop Lamu Port. When interpreting Article 15, the Committee for Economic, Social and Cultural Rights (CESCR) stressed the importance of giving **special protection** to a number of specific communities including **indigenous peoples** and **persons living in poverty**.³⁸ Local fishermen of Lamu Old Town, as evidenced later in this document, explained that the impact of building the port and dredging the channel is to render them without work. Article 6 of the ICESCR recognises the right to work,

³⁷ In their work, both Luisa Maffi and Alexandria Poole, just to mention two of the most prominent scholars, advocates for the recognition and affirmation of 'biocultural heritage', representing 'not only the biogenetic diversity of landscapes, but also the interrelation this diversity shares with the language, heritage, cultural memory, ecological knowledge and values of local and indigenous communities'. Furthermore, this concept fully captures 'the diverse ways of being between human communities and their local environments' referred to in this document. See A.K. Poole, 'Where is Goal 18? The Need for Biocultural Heritage in the Sustainable Development Goals' (2018) 27 *Environmental Values* 55-80, 57. See also L. Maffi, 'Cultures are not museums' (2012) *The European*, at <https://www.theeuropean.de/en/luisa-maffi-2/6068-biocultural-diversity>.

³⁸ UN Committee on Economic, Social and Cultural Rights (2009) *General comment No. 21*, at p. 10, 21 December 2009, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en, paras. 36-39.

including the right to gain living by work which is freely chosen and obliges states to take appropriate steps to safeguard this right. Read in conjunction with Article 11 of the ICESCR which confers a right to an adequate standard of living, including food and housing, it is hard to see how action that adversely impacts the livelihood of the local and indigenous communities could have been carefully considered, particularly in light of the lack of consultation with the effected community (see interviews below). Other relevant protected rights most likely impacted by the construction of Lamu Port (beyond the right to culture and indigenous peoples' rights, especially to Free, Prior and Informed Consent) are the right to life, the right to health, the right to self-determination, the right to an adequate standard of living, the right to a livelihood, the right to be free from discrimination, and the right to an effective remedy.

The Constitution of Kenya views culture as 'the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'.³⁹ In its article 44, the Constitution grants every person the right to enjoy his/ her culture. Indigenous Peoples and their Free, Prior and Informed Consent

Lamu is home to four different indigenous communities: the Bajuni, the Sanye, the Boni and the Orma. The Bajuni peoples are the largest indigenous population in the area and they mostly rely on farming, fishing and mangroves harvesting. Therefore, this appears to be the community which will be most affected by Lamu Port, since the Sanye and Boni rely mainly on forest resources as hunters and gatherers and the Orma are pastoralists. The impact of the broader LAPSSSET project on these and other indigenous peoples remain to be seen, although this is beyond the immediate scope of this document.

For the purposes of these guidelines, it is important to note that indigenous peoples are recognized, in international law, as entitled to 'the effective protection of their traditional lands, territories and resources as well as their distinctive cultures, practices and traditions',⁴⁰ not least because their homes hold about 80 per cent of planetary biodiversity.⁴¹ The two main international legal instruments giving effect to such effective protection are the 2007 United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴² and the International Labour Organization Convention

³⁹ Article 10.

⁴⁰ J. Aguon and J Hunter, 'Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime' (2019) 38 *Stanford Environmental Law Journal* 3, 30.

⁴¹ Ibid.

⁴² UN Doc A/RES/61/295 (2 October 2007).

No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169). Other relevant instruments are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

These documents enshrine (albeit to different degrees) the state's duty to obtain Free Prior and Informed Consent (FPIC) from indigenous peoples in relation to development projects which may impact their land, communities and (of essential importance for our purposes) their culture. Whilst various UNDRIP's provisions (such as articles 10, 11, 19, 28 and 29) refer to the need to obtain FPIC before a project is approved and commences, article 32(2) is of central importance to the normative content of FPIC in international law, since it establishes that:

*States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*⁴³

'Territories and other resources', within the context of UNDRIP implementation, have been interpreted broadly as going beyond the land immediately inhabited by indigenous peoples, and including areas that they use for traditional practices, in line with their ancestral relationship with the land. With direct pertinence to MCH, article 25 of the UNDRIP pertains to both land, waters and coastal seas, in order to ensure that indigenous peoples can "maintain and strengthen their distinctive spiritual relationship...and to uphold their responsibilities to future generations in this regard".⁴⁴

The former and current Special Rapporteur in the field of cultural rights often also reiterated the importance of FPIC, and confirmed its crucial role for the self-determination of indigenous peoples,⁴⁵ and for their survival as distinct peoples,⁴⁶ especially when development activities have 'a direct bearing on areas of cultural significance, in particular sacred places, or

⁴³ Ibid.

⁴⁴ Aguon and Hunter, 33.

⁴⁵ Report of the Special Rapporteur on the field of cultural rights to the UN General Assembly, 'Universality, cultural diversity and cultural rights' (25 July 2018) UN Doc A/73/227, para 62: '[f]or indigenous peoples, the right to self-determination and most of other human rights cannot be fully realized without respect for their world views and cultural resources, and therefore implies their right not to be forced into assimilation. An integrated approach, bringing together universality and cultural diversity is essential, as is free, prior and informed consent'. See also para 77(d).

⁴⁶ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, to the UN Human Rights Council (6 July 2012) UN Doc A/HRC/21/47, para 65.

on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival'.⁴⁷ UN Special Procedures have also expressed concern about the tendency to conflate indigenous peoples with local groups, causing confusion as to 'the importance of recognizing the particular international legal status of indigenous people, due to the application of the right to self-determination, and the specific legal framework which applies to them under the UNDRIP and other relevant standards'.⁴⁸

The work of the UN Treaty Bodies, mandated to interpret the normative content and monitor the implementation of relevant international instruments, has also been decisive in clarifying the normative content of FPIC as requiring an obligation to obtain the consent of indigenous people (rather than to merely consult with them) prior to approving or commencing a development project which would impact on their land, communities and culture,⁴⁹ and the corresponding indigenous peoples' right to self-determination, which entails the right to freely pursue their economic, social and cultural development.⁵⁰

Explicit reference to FPIC, however, is unfortunately absent from the decision by the High Court of Nairobi in *Mohamed Ali Baadi and Others v Attorney General*,⁵¹ which considered more generally the rights to public participation and access to information of local communities, as enshrined in Kenyan domestic law. Such rights, the Court found, were not respected in relation to the project because although there was evidence of meetings regarding the projects, there was no evidence of dialogue at these meetings, nor was information concerning environmental impact assessments made available before commencement of the projects. It is important to note that there is no specific domestic legislation that expressly protects the rights of indigenous peoples, neither has Kenya adopted the UNDRIP or ILO Convention 169 on indigenous and tribal people. Thus, while there is acknowledgement of the protection

⁴⁷ Ibid.

⁴⁸ Report of the Special Rapporteur in the field of cultural rights, Karima Bennouna, to the UN General Assembly on climate change, culture and cultural rights (10 August 2020) UN Doc A/75/298, paras 55-56. See also Report of the Special Rapporteur on the rights of indigenous peoples to the UN Human Rights Council (1 November 2017) UN Doc A/HRC/36/46, paras 44-50.

⁴⁹ See e.g. CERD Committee, General Recommendation No. 23 on the Rights of Indigenous Peoples (1997) contained in UN Doc A/52/18, annex V, paras 4 and 5; CESCR, General Comment No. 21, paras. 3, 36, 37, 50, 55(e). According to article 55(e), state parties 'should obtain [indigenous peoples'] free and informed consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk'.

⁵⁰ Also affirmed in the UN Declaration on the Right to Development (4 December 1986) UN Doc A/RES/41/128, available at: www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx. According to article 32(1) of the Declaration, 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.

⁵¹ *Mohamed Ali Baadi and Others v. Attorney General*, High Court of Kenya at Nairobi (No. 22 of 2012) [2018]eKLR.

of community land in the Constitution (see above), FPIC is not respected when dealing with land belonging to indigenous peoples.

Right to Development

In the context of the vast port project in Lamu, it is of course also vital to consider the local residents right to development. At the international level these are primarily contained in the UN Declaration on the Right to Development.⁵²

The right to development, as conferred by Article 1 of the Declaration, is an inalienable right which ensures all individuals have the right to participate in, contribute to, and enjoy economic, social, cultural and political development and implies the full realisation of the right to self-determination. Article 2 provides that individuals are the central subject of development and should therefore be an active participant and beneficiary.

By virtue of Article 3, the primary responsibility for creating the conditions for the right to development lies with the State. This role, as per Article 8, includes taking all necessary measures at the national level to create equitable access to basic resources, food and housing.

The right to development, as contained in the Declaration, is underpinned by active participation which was discussed earlier in these guidelines and was clearly absent from the planning stages for the new port.

Sustainable Development

What is clear from the legal framework set out thus far, is that States have obligations under international law to promote, protect and fulfil the rights of indigenous and local communities when embarking on development projects in the area. Many of the rights-based issues that are discussed in these guidelines are directly linked to matters of sustainable development. In particular, Goal 14 of the UN Sustainable Development Goals⁵³ which aims to conserve and sustainably use the oceans, seas and marine resources. The negative impact on small-scale fisheries as a result of the continuous deterioration of coastal waters is highlighted and the three billion people dependent of marine and coastal biodiversity for their livelihoods is noted. Target 14.B specifically covers provision for access to marine resources for small-scale artisanal fishers such as the indigenous and local fishing

⁵² Ibid.

⁵³ United Nations, *Sustainable Development Goals*, available at: www.un.org/sustainabledevelopment/sustainable-development-goals/.

communities in Lamu. The issues relating to the achievement of Goal 14 are well understood by the Kenyan authorities as they gear up to co-host, alongside Portugal, the 2020 UN Ocean Conference which aims at addressing the challenges posed towards achieving sustainably managed oceans.⁵⁴

The previous 2017 Ocean Conference brought about General Assembly Resolution 71/312, Our Ocean, Our Future: Call for Action⁵⁵ which underlines the need to integrate Goal 14 into national development plans and strategies. It promotes the involvement of relevant stakeholders including national and local authorities, local communities, business and industry and recognises that the ocean forms an important part of individuals and communities natural and cultural heritage.

Whilst the resolution advocated the use of effective and transparent multi-stakeholder partnerships, including public-private partnerships,⁵⁶ it also calls for mitigation measures to address harmful impacts on the ocean and coastal and blue carbon ecosystems such as mangroves.⁵⁷ It also calls for capacity building and technical assistance for small-scale fishers in developing countries “to enable and enhance their access to marine resources and markets and improve the socio-economic situation of fishers and fish workers within the context of sustainable fisheries management.”⁵⁸

Key to successful sustainable development is the commitment from those financing large scale development projects like Lamu Port. The matter of financing for development was first properly addressed by the international community in 2002 at the International Conference on Financing for Development from which the Monterrey Consensus was born. The Consensus embodied an agreement between developed and developing countries recognising their roles in respect of development financing. The Consensus notes that in order to enable sustainable development, necessary internal conditions need to exist to create a domestic environment capable of encouraging the private sector; and attracting and making effective use of international investment and assistance.⁵⁹ The Consensus goes on to note that, “freedom, peace and security, domestic stability,

⁵⁴ Owing to the Covid-19 pandemic, a decision was taken on 7 April 2020 to postpone the Conference to a later date. Further information available at: www.un.org/pga/74/2020/04/07/un-ocean-conference-3/.

⁵⁵ United Nations, Resolution 71/312 Our Ocean, Our Future: Call for Action, 14 July 2017, available at: www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/312&Lang=E.

⁵⁶ United Nations, Resolution 71/312 Our Ocean, Our Future: Call for Action, at para 9, 14 July 2017, available at: www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/312&Lang=E.

⁵⁷ United Nations, Resolution 71/312 Our Ocean, Our Future: Call for Action, at para 13(k), 14 July 2017, available at: www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/312&Lang=E.

⁵⁸ United Nations, Resolution 71/312 Our Ocean, Our Future: Call for Action, at para 13(o), 14 July 2017, available at: www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/312&Lang=E.

⁵⁹ United Nations (2002), *Monterrey Consensus of the International Conference on Financing for Development*, 18-22 March 2002, at para 10, available at: www.un.org/esa/ffd/wp-content/uploads/2014/09/MonterreyConsensus.pdf.

respect for human rights, including the right to development, and the rule of law ... and democratic societies are also essential and mutually reinforcing.”⁶⁰

The Monterrey Consensus has subsequently been built upon, including in 2015 by the Addis Ababa Action Agenda which created a renewed framework for financing sustainable development that focuses on the synergies of the sustainable development goals. Areas identified include the protection of ecosystems for all, including a commitment to coherent policies and financing in order to protect, manage and restore marine ecosystems and the promotion of their sustainable use. Governments, businesses and households are all identified as needing to change behaviours in order to ensure sustainable production. In this regard, corporate sustainability is encouraged including reporting on environmental, social and governance impacts.

The central tenet to achieving all the rights discussed thus far, and as previously mentioned in these Guidelines, is the *meaningful* participation of the rights holders and the right to free, prior and informed consent pertaining to indigenous peoples. These issues have been emphasised by the UN Special Rapporteur on the right to development in both his 2019 Guidelines and recommendations on the practical implementation of the right to development⁶¹ and 2020 report on financing for development.⁶² In order for participation to be meaningful, the rights holders should be placed at the centre of decision making about their development, including decisions about financing for development. In order to achieve sustainable results, it should also be part of a holistic multi-stakeholder process including States, international organizations, civil society, members of academia and the private sector.⁶³ The Special Rapporteur also warns about the lack of standards for due diligence, environmental and social impact assessments and meaningful consultation with affected populations under public-private partnerships in the absence of a harmonised framework.⁶⁴

⁶⁰ United Nations (2002), *Monterrey Consensus of the International Conference on Financing for Development*, 18-22 March 2002, at para 11, available at: www.un.org/esa/ffd/wp-content/uploads/2014/09/MonterreyConsensus.pdf.

⁶¹ United Nations Human Rights Council (2019), *Guidelines and recommendations on the practical implementation of the right to development*, 2 July 2019, available at: <https://undocs.org/A/HRC/42/38>.

⁶² United Nations (2020), Report of the Special Rapporteur on the right to development, Saad Alfarargi, 16 July 2020, available at: <https://undocs.org/A/75/167>.

⁶³ United Nations (2020), Report of the Special Rapporteur on the right to development, Saad Alfarargi, 16 July 2020, at para 8, available at: <https://undocs.org/A/75/167>.

⁶⁴ United Nations (2020), Report of the Special Rapporteur on the right to development, Saad Alfarargi, 16 July 2020, at para 17-18, available at: <https://undocs.org/A/75/167>.

8. Impact on Indigenous and Local Communities

Many indigenous communities rely on natural resources not just for their livelihood but also for their cultural practices. These communities typically relate to these resources in a sustainable way, or else their livelihoods would disappear or their cultures would perish.

Principle 10 of the Rio Declaration recognises that these communities therefore have a right to take part in decision making regarding these resources and substantive rights with regard to these resources.

Article 8(j) of the Convention on Biological Diversity require states to promote the preservation of the knowledge, innovations and practices of indigenous and local communities and promote their wider application with the approval of the holders of the knowledge and come up with ways of equitably sharing the benefits arising from the utilisation of such knowledge.

A review of reports on the LAPSSSET projects indicates that the focus of the government has been on the economic benefits of the project both for the country and for the local communities. The government has touted the growth of employment both from the corridor construction and operation of the components listed above as the main benefit to Kenyans from the project.

The project is also projected to increase business through the provision of essential goods and services to those involved in the construction of the project and its operations.

Beyond the construction phase, it is anticipated that as a result of the project, new education and learning institutions, industries and urban developments will contribute to the economy by creating thousands of jobs for local Kenyans.

It is also projected that irrigation projects, food processing and export processing zones will come up in Garissa, Bura and Lamu; livestock farming and meat processing in Garissa, Mandera Border Post and Isiolo; distribution and warehousing and transport logistics centres in Moyale and Nadal Border Posts, Isiolo and Lamu; and fishing, fish processing, boat making/ship building and repair are expected to thrive at Lake Turkana and Lamu.

However, the state does not indicate how the local communities will be facilitated to tap into these opportunities, particularly those requiring technical skills, in light of the low literacy levels in the area, a concern voiced repeatedly by local residents and leaders interviewed during stakeholder meetings in Lamu. There are therefore concerns that the project will benefit communities outside of

the Lamu in particular more than the local residents without proper planning and capacity-building by the state in collaboration with the county government.

There is also no reference to the impact on the existing economic life of the people in the affected regions, particularly Lamu which is well known for fishing and mangrove farming by indigenous communities. Both of these activities have been affected by the construction of the Port. This will be discussed in greater detail later in this report.

9. Public Participation from a Human Rights Perspective

Public participation is both a human rights issue and a governance issue. Regional human rights mechanisms have ruled that the right to public participation is an inherent part of the right to development and that the people's right to development cannot be achieved where they are not consulted in the process of decision-making and implementation of a project. Following several stakeholder meetings with various leaders and residents in Lamu, it became apparent that there was no meaningful consultation with the people of Lamu before the initiation of the LAPSSSET project in the region.

This section reviews guidelines of public participation to outline the framework that ought to be followed where large-scale projects such as this one have an impact on local communities. Comparisons will also be drawn to other regions and decisions of other courts in assessing effective public participation. While Kenya does not have legislative guidelines on what constitutes effective public participation, some guidelines have been developed by the Office of the Attorney-General, in consultation with various stakeholders, and reference will be made to them in this section.

9.1 International Best Practice Principles on Public Participation

The Public Participation International Best Practice Principles,⁶⁵ prepared by the International Association for Impact Assessment (IAIA) provide some guidance to individuals and groups that are affected by a proposed project that is subject to a decision-making process. The guidelines seek to define the prerequisites for effective public involvement and the conditions for credible public participation processes which maximise the interests and commitment of all stakeholders.

⁶⁵ André P et al, 2006 Public Participation International Best Practice Principles, Special Publication Series No. 4, Fargo, USA: International Association for Impact Assessment.

These principles emphasise the centrality of public participation in impact. However, they are 'broad, generic and non-prescriptive' and are intended to apply at all levels, within the available constraints of time, information and resources.⁶⁶

The standards define public participation as:

the involvement of individuals and groups that are positively or negatively affected by a proposed intervention (e.g. a project, a programme, a plan, a policy) subject to a decision-making process or an interested in it.

9.2 Levels of Participation

According to the guidelines, there are different levels of participation relative to the phase of the impact assessment process i.e. from initial community analysis and notice of the proposed project to approval of decision making, monitoring and follow up. These include passive participation/information reception, consultation and interactive participation. Of these, passive participation affords the least engagement, and the guidelines classify it as a unidirectional engagement while interactive participation offers high levels of engagement through such forums as workshops, negotiation, mediation and even co-management.⁶⁷ The guidelines make it clear that public participation is not achieved where public opinion is manipulated using public relations techniques or where there is limitation of the freedom to participate.⁶⁸

The guidelines also capture the link between public participation and good governance and the different purposes that should be pursued in a public participation process. These include inviting those affected and interested to the decision-making process 'to foster justice, equity and collaboration'; informing and educating stakeholders on the proposed intervention and its consequences; gathering from the public information about their human and biophysical relationship with the environment (including traditional and local knowledge); seeking public input on the project and how to reduce its negative impacts, increase its positive outcomes and compensate them where impacts cannot be mitigated; arriving at a better analysis of proposals thus resulting in more creative development, more sustainable interventions and by extension greater public acceptance and support on the project; and mutual learning of stakeholders and improvements to the public participation and impact assessment practice for a proposal.⁶⁹

⁶⁶ André *et al* (as above) 2.

⁶⁷ As above.

⁶⁸ André *et al*, 4.

⁶⁹ As above.

In relation to environmental protection, the 1992 Rio Declaration acknowledges public participation and the right to information as central to the achievement of sustainable development, in the following terms:⁷⁰

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

9.3 Regional Standards on Public Participation

The African Commission on Human and Peoples' Rights has also adjudicated over what consultation should mean in the context of development projects, particularly those whose scale is that they will have a 'major impact' on the community. In *Centre for Minority Rights Development (Kenya) & Another on behalf of the Endorois Welfare Council v Kenya*,⁷¹ in interpreting the right to development under the African Charter, the Commission advocated for a human-rights based approach to development and set out guidelines for the application of the right to development.

The Commission considered the right to development as a two-pronged one; addressing both procedural (dealing with process) as well as a substantive element (dealing with the outcome or end of the project). The Commission ruled the right to development to be both 'constitutive and instrumental, or useful as both a means and an end'.⁷² It was the obligation of the state to ensure that both the procedural and substantive elements were met and a violation of either prong constituted a violation of the right to development. Conversely, the fulfilment of only one of the prongs was not sufficient to fulfil the right to development.⁷³

On the process, the Commission asserted that the right to development required the consultation of communities before decisions affecting them were made. It set out three broad principles to guide the consultation process: consultation in 'good faith', the use of 'culturally appropriate procedures' and consultation must be done with the aim of 'reaching an agreement'.⁷⁴ Such consultation should

⁷⁰ Rio Declaration on Environment and Development, Principle 10.

⁷¹ Communication 276/03 (2009) AHRLR 75 (ACHPR 2009) (27th Activity Report).

⁷² At para 277 of the decision.

⁷³ As above.

⁷⁴ At para 284. These obligations are also contained in the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Twenty-eighth session, 2003) and the ILO Convention 169 which

take into account the literacy levels of the affected group and the impact of the development project on means of livelihood.

The Commission made reference to the decision of the Inter-American Court of Human Rights where the regional court established that the State of Suriname had an obligation to actively consult with the Saramaka people according to their customs and traditions in undertaking development projects within their territory.⁷⁵ This duty implied within it consistent communication between the parties and required the state to both accept and disseminate information.

In particular, the Commission found that where large-scale development projects were to have a major impact on the territory of a community, there was a greater obligation on the part of the state: that of obtaining their ‘free, prior and informed consent, according to their customs and traditions’.⁷⁶ The determination of whether the project requires consultation in good faith or free, prior and informed consent is done by assessing the impact of the proposed government action on the particular group, through an impact assessment study which should be done for all development projects affecting communities.

On the substance of the right to development, the Commission found that it was only satisfied where the state ensured that there was ‘mutually acceptable benefit sharing’⁷⁷ and ensure that the project improves the ‘capabilities and choices’ of the affected community in line with the UN Declaration on Development which includes within the right to development ‘active, free and meaningful participation in development’.⁷⁸ It was therefore not enough to engage with communities by giving them tokens, as the Kenyan government did with the Endorois by giving them food aid; there must be a demonstration that the community is empowered by the project.

Failure by the Kenyan government to demonstrate compliance on both the procedural (the state failed to consult with the Endorois Welfare Council and to account for the illiteracy of the majority) and substantive (failing to provide adequate compensation and benefits) prongs of the right to development resulted in a violation of the right of development of the Endorois people.

states: “Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

⁷⁵ *Case of the Saramaka People v. Suriname* Inter-American Court of Human Rights, Judgment of November 28, 2007.

⁷⁶ Para 291. The obligation of free, prior and informed consent was restated in the case of *the Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of June 27, 2012 (Merits and reparations).

⁷⁷ Para 296.

⁷⁸ Para 283.

9.4 National and County Standards on Public Participation

Public participation is a principle anchored in common law as an element of the doctrine of natural justice. As indicated above, Kenya does not have a unified legislative framework on public participation. It is anticipated that both the national and county governments will pass legislation on public participation. However, public participation is a constitutional value that permeates the entire constitutional framework. It is encapsulated in Article 10 of the Constitution as one of the values that should guide all persons whenever they interpret or apply the Constitution, enact interpret or apply any other law or whenever public policy decisions are made or implemented. Article 10 includes within it democracy and participation of the people, inclusiveness, good governance, integrity, transparency and accountability as national values and principles of governance.

Article 27 which guarantees equality and non-discrimination in the enjoyment of all rights and freedoms also prohibits the state from discriminating directly or indirectly on any of the prohibited grounds listed therein. Article 33 entitles every person to the freedom to seek, receive or impart information and Article 35 entitles every citizen to not only information held by the state but also that which is held by any other person and which is necessary for the exercise or protection of a right or fundamental freedom. The state is also under an obligation to ‘encourage public participation in the management, protection and conservation of the environment’.⁷⁹

In relation to the two-tiers of government, public participation is considered an integral to decision-making. The objectives of devolved government includes giving powers of self-governance to the people and increasing people’s participation in the exercise of state power and in decision-making affecting them; and the recognition that people have the right to manage their own affairs and further their development.⁸⁰ National legislation for the governance and management of urban areas and cities is also required to provide for the participation of the residents in the governance of urban areas and cities.⁸¹ Among the functions allocated to county governments by the Constitution include ensuring and coordinating the participation of communities in governance. It is the obligation of county governments to assist communities to develop the administrative capacity to enhance their exercise of power and participation in governance at the local level.⁸²

⁷⁹ Art 69 (1) (d) of the Constitution.

⁸⁰ Art 174 (c) and (d) of the Constitution.

⁸¹ Art 184 (1), Constitution of Kenya.

⁸² Fourth Schedule Part 2(14).

Guidelines on public participation have been developed for both the national and county levels of government. The Ministry of Devolution and Planning and the Council of Governors developed and published the County Public Participation Guidelines of 2016.⁸³ These guidelines define public participation as:

the process where individuals, governmental and non-governmental groups influence decision making in policy, legislation, service delivery, oversight and development matters. It is a two-way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision making and is responsive and accountable to their needs. The public gets actively involved in the process when the issue at stake relates directly to them.

According to the guidelines, public participation is a mandatory and continuous process,⁸⁴ which entails five stages: **collaboration** between the state and the public to develop decision criteria and alternatives and identify preferred solution; **involvement** of the public with the end goal of ensuring that their concerns are factored in throughout the decision-making process and particularly when developing decision criteria and options; **consultation** with the public to obtain feedback on alternatives or decisions; **informing** the public by offering information to enable them understand the issues, options and solutions; and **empowerment** of the public by handing over final decision-making authority to them.⁸⁵

The County Guidelines import the principles on citizen participation contained in the County Government Act.⁸⁶ They anchor the obligation of facilitating public participation on the constitutional foundation which vests sovereign power in the people of Kenya, which power is delegated to state actors at both the national and county levels. The Guidelines further assert that this sovereignty must be respected and institutionalized in all governance processes.⁸⁷

For participation to be meaningful, the County Guidelines proffer certain conditions: **clarity of the subject matter** created by establishing realistic and practical goals acceptable to all stakeholders; **clear structure and process** setting out the rules of participation, tools and how final decisions will be arrived at; **access to information** in acceptable, easy to use formats; **opportunity for balanced influence** to avoid dominance by any group; commitment to the process of public participation; **inclusive and effective representation** which reaches out to all stakeholders; **a climate of**

⁸³ These can be accessed here: https://sentaokenya.org/?smd_process_download=1&download_id=24075 (accessed 21 August 2020).

⁸⁴ As above, 9.

⁸⁵ County Public Participation Guidelines (2016), 1.

⁸⁶ Act No.17 of 2012, sec 87.

⁸⁷ County Public Participation Guidelines (2016), 3.

integrity created by credible, honest and trustworthy government officials; **a belief in the value of public input** resulting in better decision-making; **capacity to engage** that ensures that both government agencies and the public have the knowledge and skills to participate effectively in the process; **complete transparency** effected through timely sharing of understandable and accessible information and **bearing in mind standing conditions of the participants** i.e. their socio-economic status, religious beliefs, ethnicity and clans, seeing as knowledge levels, incomes and power wielded will influence deliberations and ultimately affect outcomes.⁸⁸

The Guidelines also offer a framework for the public participation process, which includes establishing the content for discussion (policy problems and proposals); legitimising the decision-making process (who needs to be involved, at what level, who are the opinion shapers and decision makers, institutional capacity, kinds of decisions to be made and the decision-making process); , implementing the policy, legislation or development plan, and monitoring and evaluation (outlining a monitoring and evaluation framework and implementation plan).⁸⁹

At the national level, the Kenya Draft Policy on Public Participation has not yet been formally adopted. It is pending Cabinet approval before implementation. It is anticipated that the policy will provide an execution framework to guide both levels of government, the private sector and non-state actors in public engagement around issues of governance by setting standards and coordination mechanisms for public participation. It acknowledges that there have been hindrances to the realisation of effective public participation as envisaged in the Constitution including lack of standards and effective coordination mechanisms; ineffective inclusion of marginalised groups, citizen apathy, inadequate funding and inadequate coordination among providers.⁹⁰

The policy acknowledges the right to access information as enshrined in the Constitution and the obligation of the government to disclose information to the public through appropriate media and formats, particularly for zones with high levels of illiteracy. The policy asserts that the right to access information can only be limited in accordance with Article 24 of the Constitution, section 6 of the Access to Information Act, 2016 and sections 43 and 49 of the Kenya Defence Forces Act, 2012.⁹¹

The policy also concedes that public participation in governance cannot be achieved without sufficient budgetary allocation for the necessary infrastructure processes and planning for public

⁸⁸ As above, 8.

⁸⁹ County Public Participation Guidelines (2016), 9.

⁹⁰ Kenya Draft Policy on Public Participation (2018) 5.

⁹¹ As above, 14.

participation, actual engagements, monitoring and evaluation, feedback and coordination. To facilitate these activities, the policy requires the allocation and protection of the necessary resources by all government agencies and that their budgets provide for public participation.

To ensure that those engaged in activities which impact communities are equipped to effectively carry out public participation processes, the Policy recognises that relevant skills are needed to manage and coordinate public participation effectively, including stakeholder identification and mobilisation, facilitation and documentation, analysis, communication and monitoring and evaluation and preparation of public participation reports. The capacity building should be done at all levels and will also have the effect of removing the fear of intimidation and encouraging individuals to hold to account duty-bearers. The policy therefore seeks to standardise capacity building and the tools of engagement.⁹²

To ensure implementation of the Policy, the Policy proposes the establishment of a multi-sectoral coordination agency under the leadership of the Office of the Attorney-General and Department of Justice which will include other state bodies with a mandate on the areas addressed in the policy and non-state actors who work directly in any of the policy areas which the Policy focuses on.

Each of the levels of government is required to prepare guidelines on public participation and publish an annual Public Participation Report detailing the level of public participation and the challenges experienced.

To anchor public participation in law, both national and county governments are to pass legislation to provide a working definition of public participation, how public participation is to be effected and the duties of stakeholders, the identification of participants and how their participation will be realised, the incorporation of special interest groups, the criteria for meaningful participation; timelines for participation, the rights and duties of members of the public and capacity building for key stakeholders. The law should also include a mechanism on how monitoring, evaluation, learning and resource mobilization is to be realised.

The County Guidelines on Public Participation developed for county governments provide parameters, in line with international and regional standards, on free, prior, informed consent before development projects affecting the public can be initiated. Most importantly, they give obeisance to the constitutional dictate of the sovereignty of people in Article 1 of the Constitution by

⁹² Kenya Draft Policy on Public Participation (2018) 17.

empowering the people to make decisions on projects affecting them. However, the latter are not applicable to LAPSSSET as it is a national government project.

Nevertheless, the national government was consulted in the drafting of the County Public Participation Guidelines and the lack of a national policy on public participation did not preclude the national government from taking guidance from the existing policy to obtain free, prior, informed consent before commencing the LAPSSSET project. The absence of a national policy/legislation on public participation does not exempt the national government of its obligation under the Constitution to give effect to national values and principles such as democracy and participation of the people, inclusiveness, good governance, integrity, transparency and accountability.⁹³

The courts have given guidance as to the adequacy of public participation in the case *In the Matter of Mui Coal Basin Local Community*,⁹⁴ where the High Court stated that:

*it is not possible to come up with arithmetic formula or litmus test for categorically determining when a court can conclude there was adequate public participation. However as we have alluded above, the courts look at the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.*⁹⁵

From a reading of international principles on public participation, the court also formulated guidelines and stated that public participation at a minimum should entail the following principles: that the government agency or public official involved fashion a programme of public participation that accords with the nature of the subject matter; that there be innovation and malleability depending on the nature of the subject matter, culture and logistical constraints; that whatever programme of public participation is chosen include access to and dissemination of relevant information; that public participation should not be taken to mean that everyone must give their views so long as there is intentional inclusivity and diversity; that the right to public participation does not guarantee that everyone's views will be controlling so long as the government agency or public official took the views into consideration in good faith; and finally, that the right to public participation is intended to cross-fertilise and enrich the views of the office holders with those of the people to be most affected by a decision or policy not to usurp their technical or democratic role.⁹⁶

⁹³ Constitution of Kenya, Art 10.

⁹⁴ (2015) eKLR

⁹⁵ At para 99.

⁹⁶ At para 97.

10. Right to a Clean and Healthy Environment

The right to a clean and healthy environment was first recognized in the 1972 Stockholm Declaration. The Declaration not only correlates a clean and healthy environment to dignity and well-being but it also acknowledges the right to enjoy a clean environment during one's lifetime and the obligation to protect and improve it for future generations. It provides in part that:

...man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁹⁷

In order to pass on a clean and healthy environment to future generations, any development pursued must not only be focused on the present generation, but it must also bear in mind the capacity of future generations to enjoy and reap benefits from the same environment. The World Commission on Environment and Development (WCED) in its 1987 Report emphasized the need for sustainable development, which it defined as:

development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁹⁸

The Commission pointed out that sustainable development encompasses not only the concept of needs but also the idea of limitations created by the environment's ability to meet both present and future needs.⁹⁹

The right to a clean and healthy environment is directly related to the right to life and other rights set out in the Universal Declaration of Human Rights.¹⁰⁰ The centrality of a clean and healthy environment to the enjoyment of all other rights was stated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* where it asserted:

the protection of the environment is...a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.¹⁰¹

⁹⁷ Principle 1.

⁹⁸ p. 37

⁹⁹ Ibid.

¹⁰⁰ See also *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others* [2018] eKLR, para 133; *Peter K. Waweru v Republic* [2006] eKLR.

¹⁰¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia Judgment, ICJ Reports 1997, p. 7.*

10.1 Right to a Clean and Healthy Environment in Kenya

Before the 2010 Constitution, the right to a clean and healthy environment did not enjoy constitutional protection, and the rights of citizens to vindicate the right were limited by strict requirements on *locus standi*. With the adoption of the Environmental Management and Coordination Act (EMCA),¹⁰² the limitations imposed on standing by the courts where a person needed to demonstrate special injury over and above the rest of the public to sue were done away with. Section 3 of the Act entitled every person to the right to a clean and healthy environment and the right to bring an action in the High Court where this right is denied, threatened or violated. EMCA also adopted the meaning of sustainable development set out in the 1987 Brundtland Report.¹⁰³

Without public participation, good governance and responsive, transparent and accountable government is impossible to achieve. Sustainable development also requires access to both judicial and administrative remedies where there has been environmental harm.

Both the right to a clean and healthy environment and sustainable development have found expression in the 2010 Constitution of Kenya. The Bill of Rights entitles every person to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures and the right to have obligations relating to the environment (including public participation) fulfilled.¹⁰⁴ Where this right is denied, violated, infringed or threatened, any person may apply to a court for redress in addition to any other remedies available without having to demonstrate that they have incurred any loss or suffered any injury.¹⁰⁵ In *Kenya Association of Manufacturers & 3 Others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others*, the court, in upholding the ban on plastic bags found that the law was consistent with the constitutional requirement of giving effect to the right to a clean and healthy environment, which requires the state to eliminate processes and activities that are harmful and likely to endanger the environment.¹⁰⁶ In *Adrian Kamotho v Council of Governors*,¹⁰⁷ the right to a clean and healthy environment was said to import an obligation on the part of national and county governments to provide toilets and other sanitation facilities on the country's road network to give effect to the right to a clean and healthy environment on the roads. The court directed the

¹⁰² Act No.8 of 1999.

¹⁰³ EMCA, sec 2.

¹⁰⁴ Art 42

¹⁰⁵ Art 70.

¹⁰⁶ [2018] eKLR, para 131-132.

¹⁰⁷ [2020] eKLR.

formulation of a working group to formulate a policy to incorporate the construction of toilets and other sanitation facilities as part of roadside developments for existing and new roads and that the policy take into account the need to have the facilities properly maintained by the county governments once established.

In *African Center for Rights and Governance and 3 Others v Municipal Council of Naivasha*,¹⁰⁸ the court found that an unlicensed waste facility and an illegal dumpsite maintained by the Municipal Council of Naivasha, and later by the county government of Nakuru violated the right to a clean and healthy environment and directed that an environmental impact assessment be done failing which the land was to be restored to its original use within 90 days.

Any person can institute a claim to protect the right to a clean and healthy environment without demonstrating that they have incurred loss or suffered injury and a lack of public participation with the local community taken together with absence of proof that trees were harvested in a sustainable manner was enough to require that tree harvesting in the Lembus Forest be restrained.¹⁰⁹

Sustainable development is one of the national values and principles recognized by the Constitution.¹¹⁰ In addition, Article 69 of the Constitution imposes certain obligations upon the state in relation to the environment. The state is required to:

- ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits
- work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya
- protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities
- encourage public participation in the management, protection and conservation of the environment
- protect genetic resources and biological diversity
- establish systems of environmental impact assessment, environmental audit and monitoring of the environment
- eliminate processes and activities that are likely to endanger the environment

¹⁰⁸ Petition 50 of 2012.

¹⁰⁹ Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR.

¹¹⁰ Constitution of Kenya, Art 10.

- utilise the environment and natural resources for the benefit of the people of Kenya

In addition, EMCA requires every proponent of a major project to apply for an Environmental Impact Assessment licence before undertaking such projects.¹¹¹ The application must be accompanied by an environmental impact assessment study report. The report must be published in the *Gazette*, in at least two newspapers circulating in the area or proposed area of the project and over the radio.¹¹² The publication must state the following:

- a summary description of the project
- the place where the project is to be carried out
- the place where the environmental impact assessment study, evaluation or review report may be inspected
- a time limit, not exceeding sixty days for the submission of oral or written comments on environmental impact assessment study, evaluation or review report

11. Public Participation in the LAMU Port Project

To gauge the level of public participation in the design and implementation of the Lamu Port Project, interviews were conducted with various stakeholders whose feedback is outlined below:

11.1 Meeting with the Kenya National Commission for UNESCO on 23rd July, 2019 (Mr. John Omare)

- The respondent is the director in charge of Culture Programme.
- The Commission is a State Corporation established under the Kenya National Commission for UNESCO Act, 2013
- The Commission is responsible for coordinating the activities of UNESCO within the country.
- The Commission has 5 focus areas:
 - Natural sciences

¹¹¹ Section 58 of the National Environmental Coordination Act.

¹¹² Section 5 of the National Environmental Coordination Act.

- Social and human sciences
- Communication and information
- Culture
- Education,
- The respondent was recommended to the researchers as his area of expertise was the protection of culture and he highlighted the 6 Culture Conventions that have been adopted by UNESCO:
 - 1954 Hague Convention on the Protection of Cultural Property in the Event of an Armed Conflict
 - Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970
 - 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage
 - 2001 Convention on the Protection of the Underwater Cultural Heritage
 - 2003 Convention for the Safeguarding of the Intangible Cultural Heritage
 - 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- He reported that Kenya has only ratified the 1972, the 2003 and 2005 Conventions.
- In relation to the 2003 Convention, he reported that the Ministry of Sports, Culture and Heritage was the focal ministry. Under this Convention, three elements were listed as in need of urgent protection:
 - The traditions and practices associated with the Kayas of the Mijikenda (funding for this is available through UNESCO).
 - The three male rites of passage of the Maasai community
 - Isukuti dance of Isukha and Idakho communities of Western Kenya
- Under the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, which Kenya ratified in 1991, he reported that 7 of the world heritage sites listed were from Kenya. These include:
 - The Lake Turkana National Park
 - Mt Kenya National Park

- The Great Rift Valley Lakes- Elementaita, Nakuru and Bogoria

- Fort Jesus

- Lamu Old Town

- The Sacred Kaya Forests of the Mijikenda

- Thimlich Ohinga Cultural Landscape

- The Commission's concern in relation to each of these sites is to ensure that due to their outstanding universal value, environmental impact assessment is carried out where there are threats.
- In terms of ensuring compliance with Kenya's commitment under the various international instruments, the Commission mainly relies on the Ministry of Foreign Affairs to put pressure on other government agencies to act to ensure protection of these sites.
- Mr Omare further narrated that the Lamu Port Project and the risks that it presents to Lamu Old Town formed part of the subject of discussions at the 43rd Session of the World Heritage Committee meeting (30th June- 10th July, 2019) which proposed that the Committee visits the Lamu Port project as well as the Lamu coal plant. However, due to safety concerns the visit is yet to happen (More information available at <https://whc.unesco.org/archive/2019/whc19-43com-18-en.pdf>).
- It was highlighted that the coal plant was shut down until an environmental impact assessment had been undertaken, which was a victory for the protection of the site.
- The Commission had also expressed concern about the impact of the airport on the sites.
- Unfortunately, the Commission's role has also been hampered by limited funds for coordination of activities to develop and revise the management plan for Lamu Old Town. It had been anticipated that the funds would be contributed by the Lamu Port-South Sudan-Ethiopia-Transport (**LAPSSET**) Corridor project, the national government and the county government.
- When asked whether KNATCOM had had effective discussions with stakeholders on the LAPPSET project, it was reported that there had been some consultative meetings to prepare, but that the Commission had not received much collaboration with the government on the project. It was noted with disappointment that KNATCOM was not even consulted before the project was initiated.

- Mr Omare expressed concern that whereas the government had indicated that it was committed to the protection of cultural heritage, no concrete action had been taken to do so in light of the project. He reiterated that KNATCOM was not opposed to development; their concern was with the sustainability of the development.

11.2 Meeting with Katiba Institute on 25th July, 2019 (Mr. Lempaa Suyianka and Mr. Omar Elmawi)

- Met Mr. Lempaa Suyianka (advocate of the High Court of Kenya, he represented the Petitioners in the High Court case {*Mohamed Ali Baadi and Others v Attorney General & 11 Others*[2018] eKLR-Malindi Petition}. He is also acting for them in the appeal before the Court of Appeal) and Mr. Omar Elmawi (involved in advocacy work relating to the Lamu Coal Project- www.decoalonize.org. He is the Campaign Coordinator)
- Katiba Institute was established in 2011 to promote knowledge and studies of constitutionalism and to facilitate the implementation of Kenya's new Constitution. Its activities include publications on the Constitution, workshops on constitutional issues, public interest litigation, development of the legal and judicial system, establishment of county governments, land reform, review of legislative bills to implement the Constitution, and promoting the participation of Kenyans in public affairs.
- Katiba Institute has been involved in advocacy work relating to the Lamu Port and Coal projects through legal representation for affected persons and through mobilisation and sensitisation of affected communities; its work has mainly revolved around right to a healthy environment, right to culture, right to access to information and public participation.
- The Institute was fully satisfied with the outcome of the Malindi petition.
- Institute feels that fishermen remain conflicted between the importance of right to culture and monetary compensation. They are more interested in monetary compensation on a long term basis.
- Institute thinks that the fact that the government is going ahead with the Port project despite the pending case before the Court of Appeal weakens the case in terms of leverage. Probably, by the time the court shall be making its final determination, phase 1 of the port project would be complete or would be at a very advanced stage (Indeed, phase 1 is already completed while the appeal remains pending in court).
- Participation of private investors in the port project would present a challenge in terms of accountability to the public.
- There was a concern that the low literacy levels in Lamu were likely to deny local residents any potential benefits in terms of employment and business opportunities.
- The residents feel that the government programmes put in place to support education in Lamu are not sufficient and there is fear that opportunities will be taken by non-locals.

11.3 Meeting with, Lamu Fort (National Museum of Kenya) (Mr. Mwenje Mohamed, the Curator on 29th July, 2019)

- National Museums of Kenya (NMK) is a state corporation established by an Act of Parliament, the Museums and Heritage Act 2006; its role is to collect, preserve, study, document and present Kenya's past and present cultural and natural heritage.
- The preservation of Lamu Old Town as a world heritage site is under the management of the National Museum of Kenya. Some of the activities of the National Museum of Kenya in relation to preservation of Lamu Old Town include:
 - Lobbying for listing and ensuring that Lamu Old Town is maintained in the list of World Heritage Sites
 - Playing an advisory role within the Lamu County Government under the Lamu Old Town Conservation by-laws.
 - Development of a management plan for the town through the Lamu Old Town Planning Commission made up of the National Museum of Kenya; County Government; Ministry of Public works; Ministry of Health; Physical Planning Department; Ministry of Trade; Provincial Administration; 3 Community Members and a Representative of the business community: The County Government of Lamu provides the secretariat for the commission; The commission is housed by the National Museum of Kenya.
- Involvement of the National Museum of Kenya in the Port Project started midway and there was a proposal to include a nominee of the National Museum of Kenya in the LAPSSET advisory board
- The National Museum of Kenya received funding to carry out a heritage impact assessment in 2014-2015 whose report was presented to LAPSSET for incorporation in the design and implementation of the projects.¹¹³
- The National Museum of Kenya thinks that there would be need for the implementers of the port project to exercise caution so as not to undermine the status of Lamu Old Town as a world heritage site.
- The Malindi petition led to the establishment of Lamu Heritage Committee. The Committee is made up of LAPSSET; National Museum of Kenya; Lamu County Government; National Environmental

¹¹³ Report can be accessed at: <https://whc.unesco.org/document/135436>.

Management Authority; Kenya Ports Authority; Community Members; The committee has developed an action plan for Lamu Town.

- Coordination of protection activities are hampered by the lack of clear structures between the role of the County Government and the National Government in protecting the town.
- Advocacy engagements for the protection of Lamu Town from international actors appear to lack sustainability. Carried out in an *ad hoc* and uncoordinated manner.

11.4 Meeting with Save Lamu on 30th July, 2019 (Mr. Abubakar Mohamed Ali).

- Mr. Abubakar is the chairman of the board of Save Lamu.
- Save Lamu is a coalition of Community Based Organisations and other stakeholders; it is made up of 40 individual members and Community Based Organisations (local and international)
- Save Lamu supports the port project because it will open up Lamu. Says Lamu has been marginalised since independence.
- Save Lamu not impressed by the manner in which the project was designed and implemented; no public participation and no Environmental and Social Impact Assessment.
- As a way of building the capacity of the residents of Lamu, some students have been sponsored by the government to undergo marine training.
- Save Lamu has been carrying out advocacy work through court action and through sensitization workshops.
- Save Lamu has held numerous meetings with government officers over the port project. Meetings have been initiated by Save Lamu and the government hasn't shown any commitment to the resolutions of the meetings.
- Save Lamu played a significant role in rallying stakeholders to support the court action in Malindi.
- Save Lamu is happy with the outcome of the Malindi petition.
- Save Lamu shall facilitate distribution of the compensation awarded to fishermen by providing relevant data.
- Fishermen would be happier to receive money and not equipment
- Engagement with the government post Malindi petition hasn't been easy. Government officials not available for meetings.
- There is fear that opportunities brought by the port project would be taken up by foreigners.

- Save Lamu has been advocating for the government to offer more training opportunities for the residents of Lamu to enable them take up new opportunities.
- Fishermen could ditch traditional fishing methods once they are provided with modern fishing gear; traditional fishing methods lead to small catches which sustains poverty levels in Lamu. Fishermen are more concerned about their livelihood

11.5 Meeting with Lamu Youth Alliance on 29th July, 2019 (Mr. Isack Abubakar)

- Mr. Abubakar is a member of the Board for Save Lamu
- He won the award for the 'Human Rights Defender, 2018' in Kenya
- The mandate of Lamu Youth Alliance includes the following:
 - Countering violent extremism
 - Protection of the environment
 - Promotion of education
 - Advocacy and capacity building on human rights.
 - Public participation in county activities
- LYA is registered as a Community Based Organisation since 2010.
- It has been involved in sensitisation work on the likely negative impact of the port project.
- It has been training community members on their rights under the Constitution.
- LYA views the port project as more promising to outsiders than locals.
- LYA not opposed to the project but would like mitigation measures to be put in place. LYA is completely opposed to the coal project.
- LYA says that the location of the port project is a strategic spot for tourism, especially snorkeling activities.
- The activities of LYA are supported by local and international partners. Support has been in the form of funds and resource persons like advocates.
- There has been no change of attitude or approach by the government despite the judgement by the court in the Malindi petition.
- LYA took part in the Malindi petition through Save Lamu.

- Fishermen in Lamu do not see the monetary compensation awarded by the court as a sufficient remedy. It must be combined with other mitigation measures to ensure conservation of mangroves, coral reefs and protection of vulnerable communities.
- The proposal for the government to buy modern fishing equipment for fishermen not likely to yield much because of corruption in government. Fishermen also worried that it would be more expensive to maintain the larger and modern vessels.
- The money awarded by court should be distributed through the Beach Management Unit.
- There are concerns that opportunities created by the port would be taken up by outsiders (persons from other regions or ethnic communities in Kenya).
- The community does not have confidence in any consultations with the government since they were not included in the process from the beginning.
- There is an influx of people from other communities emigrating to Lamu to take up economic opportunities.
- Worried that the second phase might present more challenges because of involvement of private sector financiers.

11.6 Meeting with the Lamu Beach Management Unit (BMU) on 29th July, 2019 (Mr. Adam Lulu)

- Beach Management Units (BMU) are created under the Fisheries Management and Development Act and is made up of fishers, fish traders, boat owners, fish processors and other beach stakeholders who traditionally depend on fisheries activities for their livelihoods.
- Mr. Adam is a member of BMU and was assigned to speak to us by the Chairman of BMU, Mr. Somo
- Membership of BMU is not limited to fishermen. It covers all persons in the fishing industry in Lamu.
- BMU is registered with the Fisheries Department. It controls fishing methods; sensitizes members on their rights;
- Not been meaningfully involved in the Lamu port project by the government; views not taken into account
- The project is likely to require fishermen to shift to new fishing grounds.

- Advocacy work by BMU on Lamu Port project has been through sensitization of members and coordination of activities under Save Lamu
- Save Lamu has been the main actor in advocacy relating to the project. Other organizations work within the Save Lamu umbrella.
- BMU is happy with the outcome of the Malindi petition
- BMU has no trust in the government initiatives in trying to enlist the participation of fishermen since it hasn't been forthcoming with information. Further, the government has not been keeping its promises
- The proposal to compensate fishermen as awarded by the court came from the government and not the petitioners.
- BMU thinks the best remedy would be to build the financial and technical capacity of fishermen.
- BMU has fears that government could use the compensation money to support other sectors at the expense of fishermen.
- BMU would like the compensation to be paid from the Malindi petition to be allocated as follows
 - 40% to be available to members as loans
 - 40% to be paid as cash grant to members
 - 20% to be utilized for development of fishing infrastructure
- BMU thinks the monetary award is not sufficient for damage likely to be caused by the project
- The figure of 4700 fishermen in Lamu used by the court could be inaccurate. It came from the Fisheries Department. Number of BMU members is higher than this.
- BMU fears that opportunities arising from the port project would not be shared equitably. Opportunities likely to be taken by outsiders.

11.7 Meeting with Ghalib Ahmed (Mr. Bush) on 30th July, 2019

- Mr. Bush is a resident of Lamu, born in Lamu
- He is the proprietor of Bush Gardens Restaurant in Lamu Town.
- He is a former deputy chairperson, Lamu Tourists Association.
- He is the current chairperson of Lamu Culture Festival.
- He is a member of Lamu Fishermen Association.

- The mandate of Lamu Culture Festival includes: conservation of Swahili culture like dances, dhow building skills, dhow racing; promoting Lamu as a tourist destination; preservation of Lamu Town as a UNESCO heritage site
- Lamu Culture Festival has not been directly involved in advocacy work on the port project. Respondent did not see the Port Project as a threat. In fact, he thinks the port would bring more opportunities.
- The government should simply ensure that there are mitigation measures to preserve the ecosystem
- The respondent thinks that most fishermen employ traditional fishing methods because of poverty/ lack of means/ better facilities and thus sees no harm in the calls for them to adopt modern fishing techniques.
- Adoption of modern fishing gears and methods would greatly boost the economy of Lamu by opening it to international trade through exports.
- The mere creation of the port would not lead to extinction of the culture of the people of Lamu. Respondent gave the example of Mombasa where despite having developed into a town, Kiswahili culture still remains dominant and attracts tourists.
- Respondent thinks that younger generations in Lamu are more open to adopting new fishing methods. Most of them own speed boats
- Maintaining old boats made of wood has become very costly, thus the need to embrace new boat making technology and use of fiber glass.
- Respondent thinks that since the port project is located on the mainland and not Lamu island, the threat to the status of Lamu as a UNESCO protected site is not real.
- Respondent observed that the port project is unlikely to undermine the cultural heritage of the people of Lamu. Further he observed that the cultural practices have been resilient enough to weather invasion by different other civilizations in the course of history (invasion by the Portuguese, Chinese, Arabs, Europeans etc).
- Lamu Culture Festival was not consulted by the government on the design and implementation of the port project.

**11.8 Focus Group Discussion at Kwasasi Village in Lamu County on 30th July, 2019
(Organised By Save Lamu)**

Participants

- Kassim Ali Mohammed
- Abdi Bam Athumani
- John Kagwema Kamau
- Bakari Abdalla Bakar
- John Mutua
- Japheth Dori
- Nzaro Kalama
- Najim Mohamed
- Abdul Karim Mohamed
- Abubakar Ali Mohamed

- Kwasasi village hosts the port and coal projects in Lamu. It is located in Hindi/ Mokowe Ward.
- The area is mainly inhabited by the Bajuni and Boni; their main economic activities are- fishing, beekeeping, farming and animal husbandry.
- The residents depend on the sea for fishing and mangroves for timber for building houses and boats.
- Respondents fully opposed to the Coal Project but support port project subject to consultations and institution of mitigation measures.
- Poor literacy rates prevalent: highest level of education for respondents was form four (High School), most were illiterate.
- The respondents said that they had not been involved in the design and implementation of the Port project; they support development initiatives but wish to be consulted.
- Participation in community engagement with government has been hindered by failure to package the content in ways accessible to all including the uneducated.
- The criterion used by the government to identify affected communities lacks objectivity and transparency.

- The respondents expressed fear that opportunities would be taken up by outsiders since they are not educated and lack money for business.

11.9 Meeting with a Representative of the Kenya Ports Authority on 31st July, 2019 at the Port (Mr. Benson Komora)

- Mr. Komora is a Human Resource Officer with the Kenya Ports Authority.
- Kenya Ports Authority was established in January 1978 under an Act of Parliament (Kenya Ports Authority Act). It is mandated to manage and operate the Port of Mombasa and all scheduled seaports along Kenya's coastline that include Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. In addition, the Authority manages Inland Waterways as well as Inland Container Depots at Embakasi, Eldoret and Kisumu.
- Construction of the port project is being done by China Communications Construction Company which was contracted by the Kenya Ports Authority.
- The port project is made up of 32 berths each measuring approximately 400 meters in length.
- Part of the land on which phase 1 of the project sits was reclaimed from the sea (approximately 2 kilometers into the sea).
- Respondent acknowledges that the location of the project is a traditional fishing site for residents.
- The 1st Berth is almost complete (to be ready in a month's time); the crane to serve this berth has been purchased already; the 2nd and 3rd berths to be completed by the year 2020.
- 50% of the work force on site are locals (manual labourers); technical jobs are being carried out by non-locals because of lack of the required skill set.
- Kenya Ports Authority is running a training programme for locals so as to prepare them for employment (approximately, 300 locals have been trained).
- Respondent declined to respond to our question on the Kenya Ports Authority's engagement with stakeholder on the project. Says a different department would be better-placed to respond to this.
- Respondent says that no immediate plans exist for phase 2 of the port projects; says that even the process of land acquisition has not started.
- Says that there have been many consultative meetings with locals and that they support the project.
- Says he doesn't know if there are plans to ensure that locals continue to reap benefits once the port is operationalised.

- Says that within the current design of the port project, there is no provision for schools, hospitals. There is only a police station located within the port.
- Says that there has been an influx of foreigners to areas surrounding the port and that the benefits of the project are already evident in the changing lifestyle of the local residents; there are motor bike operators, shops- there are small towns coming up.
- Says that at present, other than technical staff, the project does not have female employees. Says not sure if there are capacity building initiatives specifically targeting women.

11.10 Meeting with the County Government of Lamu on 1st August, 2019 (Mr. John Mburu and Mr. Abdulhakim Aboud Bwana)

- Mr. Bwana is the deputy County Governor while Mr. Mburu is the County Secretary.
- County Government has been involved in various activities for the promotion of cultural heritage. These include:-participation in the annual cultural festival; identification of cultural sites for preservation by the National Museum of Kenya; promotion of collaboration with Magical Kenya and Kenya Tourism Board to market Lamu as a tourist destination;
- There has not been any meaningful consultation with the County Government on the port project.
- The County Government would have wished to be involved in looking at the adverse effects of the project and identification of mitigation strategies and planning for the provision of services with the influx of foreigners. The County Government is already overburdened.
- As a way of preparing the locals for the benefits likely to come with the port project, the County Government is currently conducting capacity building programmes. It is also subsidizing training costs. It has been offering scholarships and bursaries.
- The capacity building initiatives are being run in Technical and Vocational Education and Training Institutions. The courses include: welding, mechanical engineering, masonry, clearing and forwarding, driving, coxswaining, carpentry, plant operation etc.
- Respondents say that the national government does not appear to care about the adverse effects of the project to locals.
- Respondents say that locals would be more interested in economic benefits and there would be need for a benefits sharing arrangement.
- Respondents acknowledge that it would be difficult to genuinely identify the people who could be entitled to compensation as fishermen in the context of the court case. Everyone claims to be a

fisherman. Membership in the Beach Management Unit would not be helpful as its membership includes all in the fishing industry.

11.11 Kenya National Commission for Human Rights (Email Correspondence with Ms. Stella Wangechi)

- The mandate of the Commission

The Kenya National Commission on Human Rights (KNCHR/Commission) is the National Human Rights Institution (NHRI) for Kenya. It is established by the Constitution of Kenya (Article 59) and operationalised by the Kenya National Commission on Human Rights Act. The Commission is also established as per the Paris Principles. The commission enjoys a wide mandate on the promotion and protection of human rights in both private and public spheres in the country.

- Has the Commission been involved in advocacy work relating to the Lamu Port Project and in what ways?

As per the mandate of the commission, we have received and investigated several issues arising from this project. The advocacy around this project has been done through conducting fact finding investigations, undertaking public forums, hosting mediation sessions and holding policy meetings with duty bearers.

- What are the current activities of the commission relating to the project/ engagement with civil society and affected communities/ international actors?

The commission is actively engaged in the larger LAPPSET projects especially through their EISA review processes. Besides giving feedback to the EISA, the commission monitors the stakeholder engagement processes to ensure that they follow transparent and inclusive processes. Additionally, our officers ensure that fundamental stakeholder views are communicated back to the communities once the project developers make decisions on the issues raised.

The commission has recently conducted a human rights and environmental training with lead agencies of EISA review plus NEMA officials. The objective of the training was to infuse human rights lens into the overall review of EISA.

- Was the Commission involved in any way in the design and implementation of the project?

NO

- What proposals does the commission have regarding the project?

The Lamu port is bound to increase expansion of business activities in the area and beyond. Businesses have both positive and negative impacts. In terms of negative impacts, human rights violations are likely to increasingly be impacted. The expansion of business must therefore go hand in hand with the government's commitment to infuse human rights standards into business.

11.12 Meeting with Zainab Ghadhamfar, SAVE LAMU, on 13 January 2021

The respondent is a lawyer currently working with SAVE LAMU. She is a local resident who received her basic education on the island but who also went to university in Nairobi and later returned to Lamu to work.

In the period since LAPSSET began, she noted that there had been rapid urbanization and an influx of people into Lamu to take advantage of the economic opportunities created by the project. Due to this influx, there was concern about cultural erosion, so much so that the UNESCO World Heritage Commission had communicated its consideration of the deregistration of Lamu as a world heritage site. In this regard, a workshop had been scheduled for 19-22 January 2021 by stakeholders to consider how to manage this challenge and put in place measures for disaster management around the heritage site.

Economically, she noted that while the LAPPSET project portended economic benefits, these benefits were not proportionately enjoyed by residents, particularly those who were less educated and simultaneously economically disadvantaged. Since economic opportunities for professionals were few, Lamu residents, whose education levels are not high, were unlikely to get these opportunities.

As a young lawyer, she noted that while promises had been made to build the capacity of the youth to take on jobs on the project, the sponsorship that had been promised had not come through in full, thereby hampering the promised training of youths on the island.

It was therefore her view that in the immediate short term, because of the destruction of mangrove forests to make way for the port, the livelihoods of the majority of the residents had been affected. Without sophisticated fishing equipment, fishermen were no longer able to carry out their normal fishing activities as they had no capacity to move their fishing into the deep sea. Traders who previously invested in fishing in the island no longer consider it economically viable as most of the

good fishing grounds, including those of lucrative stocks such as crustaceans and other seafood, have been destroyed. This means less income for locals.

Given that for cultural and religious reasons women were dependent on men as the breadwinners, where men can no longer access fishing grounds, women had no resources for family upkeep. This has meant that many Lamu residents remain poor despite the increasing wealth brought on by the project, which appears to be favouring communities from the inland. Without resources for daily upkeep, it is difficult to invest in education for local children, meaning that poverty could be cyclic if interventions are not made to remedy the situation.

She expressed concern that the youth and women on the island are disillusioned with the project as the President and other national government officials who have toured the island to inspect the project appear to tout all the benefits of the project without inviting input from the locals on their concerns for erosion of their environment, cultural heritage and livelihoods.

11.13 Meeting with Raya Famau, Save Lamu, on 14 January 2021

Raya is also a resident of Lamu who has lived there all her life. She is currently a community representative with Save Lamu. She noted that Lamu had been historically marginalised and no development projects had taken place there until LAPSSET was inaugurated.

The region is also predominantly inhabited by Muslims and she pointed out that the Islamic culture is particularly strict on women. Under Islamic culture, land ownership is predominantly male, which means that even where women use land, they only have access rights as neither their traditions nor their religion allows them to own land.

When the government issued compensation for land acquired for the project, she narrated that landowners were paid KES1.5 million (approx. USD14,000) for each acre of land acquired, money that was given to the registered (male) landowners.

Since there is no obligation to share this compensation with their wives, there were instances where men left their homes with the money and started new lives elsewhere. This meant that the proceeds from the acquisition of the land were in most cases not used for meeting family needs; which, coupled with displacement from the land in the LAPSSET area, left some women and children destitute. Without access to land, women were not able to grow maize and cassava as they had traditionally done and thus family incomes decreased.

She noted the close relationship between the environment and well-being of women; that where there is destruction of the environment, women suffered disproportionately compared to men, as their lives were centred on access to land.

Without access to land and little income that comes from subsistence farming, many women found themselves unable to meet the basic needs of their families, including healthcare and education. This was made worse by the fact that men who had been fishing had also had their fishing activities hampered by the destruction of fishing grounds when mangrove forests were cut down and the ports constructed.

In relation to the Coal Power Project, which had been the subject of litigation in Malindi, it was narrated that farmers were deprived of access to the land affected by the project during the pendency of the suit, without compensation, which also affected the livelihoods of the concerned residents.

It was her assessment that whereas the long-term benefits of the project may be laudable, the current trajectory indicates that local residents will not benefit to the same extent as people from the inland who have come to Lamu. She expressed concern about the long-term impacts of the influx of outsiders on local culture, language and way of life and how this might impact cultural events which have contributed to the status of Lamu as a world heritage site.

She reiterated that Lamu residents were not opposed to LAPSSSET, but they were concerned about the continued destruction of mangrove forests (which are central to their economy and way of life), the potential loss of world heritage site status, the impact of the project on tourism and economic lives of people and that women were not included at all in the decision-making processes around the project.

Summary of Key Findings

- Kenya has a comprehensive legal and policy framework for the protection of the environment, which is also directly relevant to the protection of MCH.
- While public participation is anchored in the Constitution, there is no legislative framework that governs public participation at the national level. At the national level, the Kenya Draft Policy on Public Participation has not yet been formally adopted. Nevertheless, the principles of citizen participation in the County Government Act and the County Guidelines

provide a robust framework and offer guidance on public participation which can be relied on by the national government for development projects pending adoption of a national framework. The principle of public participation also permeates the entire constitutional framework and should guide all actors where the public interest is concerned.

- While there is no specific legislation that protects the rights of indigenous groups neither has Kenya adopted the UNDRIP or ILO Convention 169 on indigenous and tribal people, the obligation of public participation permeates Kenya's constitutional framework and is affirmed by several court decisions. The African Commission has also established this obligation as part of the right to development.
- Despite the constitutional obligation of public participation, and findings of the African Commission in the *Endorois Case* on the obligation of the state to consult communities before decisions affecting them were made in fulfilment of their right to development, the government failed to meaningfully involve key stakeholders (especially local and indigenous communities) in the design and implementation of the Lamu Port project. The national government's lack of consultation with indigenous communities before commencement of LAPSET in violation of international standards has been confirmed in several court decisions.
- The fishermen in Lamu appear not to have agreed on the best method to use in distributing the money awarded in the Malindi Petition. Most respondents said that the money should be distributed through the Beach Management Unit. However, membership of BMU also includes people within the fishing sector who are not fishermen.
- This lack of consensus reveals the complexity of ensuring *meaningful* participation. In a sense, some stakeholders could be using public interest concepts like protection of the environment or preservation of MCH as pretext for obtaining economic compensation.
- There has not been change of tune by the government on engagement with stakeholders following the determination by the High Court in Malindi.
- The government filed an appeal against the High Court judgement and obtained an order for stay of execution of the judgement pending the determination by the Court of Appeal. In the meantime, the project has gone on unhindered. First 3 berths that form phase 1 of the port project are nearing completion.

- Phase 1 of the port project has been funded fully by the government of Kenya while the remaining phases are to be finance by private sector investors.¹¹⁴ The current COVID-19 pandemic, however, has affected the project. Phase 1 is almost complete (reportedly at 80 per cent of completion as of November 2020), the commissioning and handover was delayed because the port equipment was sourced internationally. The project timeline has been adjusted at the request of the contractor and it is now expected that the commissioning of the first phase will happen in December 2021. As a consequence, the rest of the project will also be delayed.
- Most stakeholders appeared to be totally opposed to the Coal Power Project but supportive of the Port project subject to incorporation of concerns raised by stakeholder. This position might motivated by two facts:
 - The port project is being financed by the Government and being carried out by a Government entity- Kenya Ports Authority. The Coal Project is being carried out by a consortium of private investors. The Coal project thus may present difficulties to stakeholders seeking to hold the investors accountable based on public law concepts.
 - The adverse effects of the Coal project on the environment might seem more apparent as compared to the adverse effects of the Port Project on the environment and cultural heritage.
- Low literacy levels in Lamu might deny the residents a chance to reap the economic benefits likely to be brought about by the port project.
- Opposition to the port project might be motivated by a feeling of invasion of Lamu by non-locals while Lamu has been neglected and marginalized by successive governments since independence. The residents do not have confidence government initiatives and the manner in which the project was initiated has not helped matters. Further, residents think that the government has not been sincere in its commitments to them and has also not been forthcoming with information.
- There indeed exists a vibrant network of actors conducting advocacy in relation to the Lamu Port Project. However, most of these actors are based within Lamu Town (the island). There might be need to involve the immediate (rural) host communities based on the mainland where the project is located.

¹¹⁴ LAPSET Authority, Lamu Port <<http://www.lapset.go.ke/projects/lamu-port/>>.

- There was a general feeling among respondents that preservation of cultural heritage should not be done at the expense of the economic advancement of Lamu residents. For instance, preservation of traditional fishing methods would lead to more poverty since this is done on a small-scale basis. These methods though attractive to tourists, are uneconomical since they use old wooden boats that are becoming increasingly costly to maintain. There would be need to show residents the real (including economic) benefits of preservation of cultural heritage.
- It is not clear at present whether the government has a policy in place to ensure incorporation of local content in the project and whether it would put in place a benefit sharing arrangement with the host community or the Lamu County Government.
- Amongst the various capacity building and other initiatives envisaged at national and county level, there appears to be none specifically targeting women and/or taking into consideration the specific impact of the project on their rights and needs.
- The project development appears to have worsened the economic conditions of women, partly due to their pre-existent lack of access to land rights at both community and family level. Destitution and lack of access to livelihood options have therefore intensified as a result. Women in the community still appear to support the project, based on its promises for future improvement of local conditions. At the same time, they fear for the destruction of the mangrove forest, and the environmental and social sustainability of the area in the longer term.