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The emergence of "Community Land" in Kenya

Land tenure reforms in national policy processes and community mobilizations

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III. INTRODUCTION

**Picture 5. May 20, 2014. Conference Hall, Panafric Hotel, Nairobi.
Launch of Taskforce on Historical Land Injustices**

'The land question for this country is one that has touched all communities and therefore is one that has to be dealt with, decisively and properly' (CKRC, 2003: p. 13).

During the land chapter discussions at Kenya's national constitutional conference, eminent Kenyan and African land expert Professor H. W. O. Okoth-Ogendo stressed that, stemming from the colonial legacy, Kenya had failed to recognize customary interests in land as possessing force as statutory derived rights. This lies at the heart of the so-called "land question"1, which has constituted one of the principal tenets of the struggle for constitutional reform in Kenya. Land was one of the major stakes in the struggle for independence and in the negotiations between the British and early Kenyan elites on drawing up of the first Constitution in 1963. As American political scientist John Harbeson suggests in his 1973 seminal work on the first land reform in the 1950s, the "land-question" had actually been (and still is, if I may add) at the heart of nation-building in Kenya.

The Constitution of Kenya Review Commission (CKRC) was appointed in 2000 by the then President of the Republic, Daniel arap Moi. Although reform of the land sector and revision of

1 The Truth, Justice and Reconciliation Commission (TJRC, 2013) deals with land issues in Kenya by placing them in their historical and political context. It explains that "colonial policies, laws and practices, as well as the negative impacts that they engendered, collectively generated a land question embodying various land issues arising during colonialism, which became a key motivation for the formation of various local political groups pressing for Kenya's independence" (p.199). Furthermore, "[f]rom the advent of colonialism, Kenya has grappled with the land question, which subsequent regimes have been unable or unwilling to resolve" (p.157); this is part of the reason why the "land question" is described as "a potential trigger of conflict, owing to its peculiar historical and legal origins and the impact dispossession has had on the economic fortunes of locals" (p.103).

Kenya's Constitution were interwoven, they progressed at different speeds. The very first draft of the new constitution published in 2002 and referred to as "The People's Choice" (CKRC, 2002) because it was informed by the views of the *wananchi* ("citizens" in Kiswahili) that had been gathered countrywide, contained legal and institutional innovations for acknowledgement of customary tenure. Transition from the trusteeship model to community ownership of land (*see infra*) was also provided for, following recommendations made by the 2002 Njonjo Commission.

The Njonjo Commission was appointed in the wake of conflicts taking place in the Rift Valley and in the coast region in the 1990s. Successive reports inquiring into the causes and unfolding of the violent land-related clashes (Kiliku and Akiwumi Reports) had acknowledged that the origins of inter-community tensions lay in the ethnicization of distributive politics around land (Kameri-Mbote, 2008). President Moi appointed a Commission of Inquiry into the Land Law System of Kenya, named after its chairman Charles Njonjo. The Njonjo Report was the first official governmental document arguing for the need to overhaul the national land administration system and land regimes. It set important precedents: firstly, echoing the seminal work of Okoth-Ogendo, it acknowledged the history of the tragedy of African commons, along with their expropriation, suppression and subversion by the colonial regime (RoK, 2002). Secondly, as a way forward to address these injustices, a reform of land tenure categorization was proposed. Most significantly, the then "Trust lands" were to be renamed as Commons, and to be held under customary tenure (*Idem*). Kenya's 2010 Constitution, overwhelmingly supported by Kenyans via referendum, endorsed these principles, thus acknowledging "communities" as legal persons, legally entitled to hold the land they reside on and use, thus giving rise to the tenure category of *community land*. The Parliament was entrusted with the mandate of enacting legislation to give effect to the Constitutional provisions (Art.63 (5), RoK, 2010).

This paper is part of a PhD project focusing on land tenure reform, developed in a context of renewed international interest in the "commons" and related attempts to overcome conceptualization of development as equating to the promotion of private property (see *inter alia* Colin *et. al.,* 2009). This translated into a wave of "new" land reforms (Bernstein, 2004: p.192) acknowledging customary land tenure in African countries. Against this background, this paper will analyze land reform processes in Kenya by discussing how the new legal tenure category of *community land* emerged and was discussed in national and local fora of debate, leading to its institutionalization in the policy arena and its adoption in the 2010 Constitution, and eventually its translation into land laws. Overall, undercurrents of institutional change are understood by putting two scales of analysis into perspective: on one hand, detailed exploration of itinerant, contradictory and eminently political processes of national policy-making is undertaken; on the other hand, the study of one particular case of community mobilization for the recognition of ancestral land rights is carried out to illustrate how some of these claims have been brought up to the highest level of the national political system, thus influencing decision-making.

Kenyan land tenure reforms appeared particularly interesting because of the outstanding historical rootedness of the private property model in both policy and practices. Moreover, the rich literature on the political economy of the country had also suggested that privatization of land via titling schemes had been instrumental in allowing territorialization of power via monopolization of authority to allocate land rights, thus constituting and maintaining political constituency and/or patronage networks. As a result, the general question addressed within this paper is why and through which processes would the Kenyan government endorse constitutional dispositions committing it, at least in principle, to land tenure reform, which acknowledges *community land*, i.e. a legal category that confers entitlement to landholding on rural communities, thus potentially thwarting historically established neo-patrimonial control of land?

By undertaking extensive fieldwork (for a total of eighteen months), subsequent analysis of qualitative data collected via over one hundred semi-structured interviews, observations and review of archives and press articles, the argument developed points to how longstanding processes of democratization from within (procedural democratization and substantial liberalization of the regime with increasing prominence of civil society actors), combined with external pressure and the operation of transnational networks facilitating conveyance of development models, ideas and paradigms in countries of the Global South have resulted in the adoption of innovative policy narratives. While it has been seen as a victory against a conservative Kenyan political establishment bound by the structure of property rights, in-depth analysis of the policy process demonstrated that sections of political and bureaucratic apparatuses were averse to institutional change since the inception of the reform process. Complex power relations highlighted the political dimension of decision making, demonstrating that inasmuch as the path dependency of political institutions are important to factor in, ideas and norms are intensely negotiated (especially at legislative level) and indeed re-produced by power struggles at different scales of the political system, eventually defeating the initial democratic project embedded in the notion of *community land.*

Thus, decision-making processes are explored via a socio-anthropological approach that draws from the social science of policy analysis and from development anthropology [2]. In brief, the socio-anthropology of public policy is an approach based on in-depth fieldwork and close empirical observation of negotiation processes that result in policy formulation. It pays particular attention to transnational networks of actors and to the policy beliefs and models they put forward in the dynamic negotiation of norms and power relations.[3] This approach argues for studying public action through analysis of interlocking scales of governance, thus documenting and questioning the manner in which local actors participate in, interpret, divert, or exploit policy debates and policy instruments that are designed at national or international level. This multi-sited approach makes it possible to grasp the ways in which localized struggles and institutional, legal, or organizational innovation at local level can influence national policies (Valette *et. al.,* 2015). Ultimately, this analytic strategy makes it possible to come to grips with the complexity of land politics in its local, national and international dimensions.

This present paper takes this actor-centered approach to the policy process,[4] showing how it contributes substantially to understanding issues at stake in the reform of Kenya's land tenure system and especially to understanding the politics surrounding the design of new legislation on *community land*. It is structured as follows. The first section of the paper lays out some background to the legal category of community land in Kenya and to the political economy of land governance since colonization: colonial legacy and postcolonial continuity are in fact primordial historical elements to understanding the final outcome of the reform process, as well as the high

2 See Valette et. al., 2015 for a discussion of the transferability of analytical tools molded on Western countries to aid-dependent countries, and for a comparison and contrast of different heuristic paradigms for the study of public action (i.e. political science and anthropology). The concept of "public action" comes from the French school of policy analysis, which strives to bring sociological approaches to the study of public policy and to transcend standard state-centered approaches (see Thoenig, 1998; Lascoumes and La Galès, 2007).

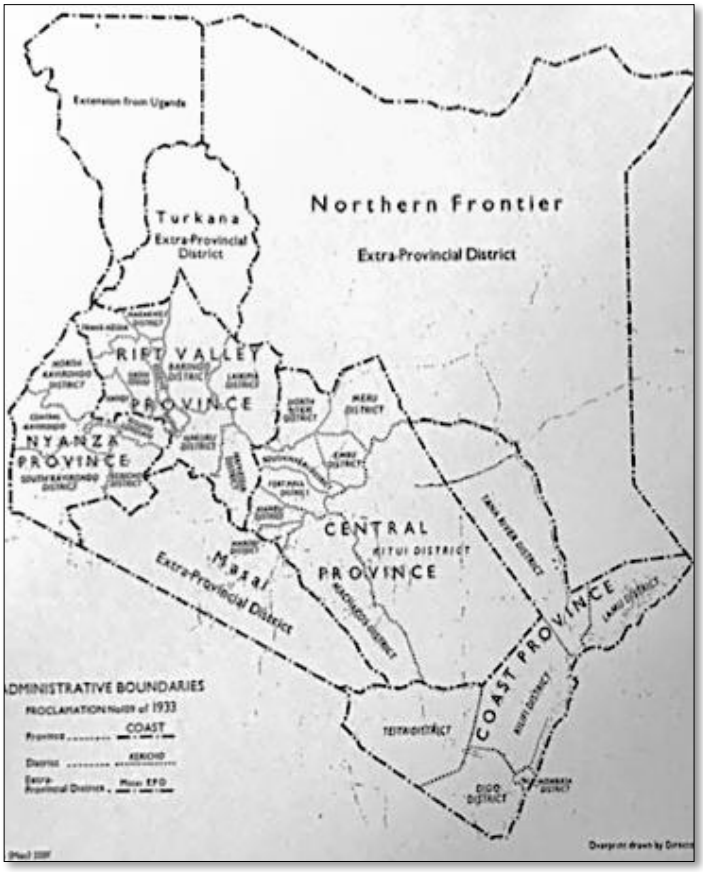
3 For further elaboration, see Lavigne Delville, 2011; 2016.

4 The actor-centered approach draws upon eminent sociology schools, such as the Manchester School and Interactionism (see Bierschenk et. al., 2000, p.14), which challenge the classical structural-functionalist anthropological paradigm. It stresses that social actors are not mere implementers of norms; they are seen as able to create "room for manoeuvre" (p.16), especially at the interstices or "interfaces" of normative systems and power structures.

political stakes of defining the governance structure for managing *community lands.* The second section explores the policy processes by which Kenya, a country with historical and ideological commitments to private property, came to acknowledge customary land rights: the agenda setting process is in fact explored here by taking account of socio-political dynamics at different scales of governance. The third section studies the formulation of principal texts comprising land reforms by comparing decision-making processes to stress that procedural mechanisms and loci of deliberation eventually impact decisions. The fourth section (20 pages) explores the politics of drafting Kenya's Community Land Law, namely the process of translating general principles into legislative norms and procedures for recognition, protection, and registration of *community land*. The fifth and last section puts national processes into perspective with one particular local case of "community land claim", by analyzing the historical process of emergence of historical land claims over ancestral land. It also illustrates how the new constitutional and legislative provisions have been interpreted and used by political entrepreneurs [5] belonging to a particular "community" in western Kenya in order to advance their specific land claims. The focus is on collective actions undertaken by "Ogiek indigenous people": this analytic focus makes it possible to examine a particular set of actors and processes aimed at building up neo-traditional claims to ancestral land. I seek to trace how cultural entrepreneurs have worked to bring community claims to land to the highest levels of the national political system in order to influence decision-making processes, while it will also become apparent that state interventions have concurred, along with other factors, to shape community belongings and the claim of ownership over forestland.

5 Taking development anthropology approaches (see Beirschenk et al, op. cit.), I designate these particular actors as "cultural entrepreneurs" (or "activists"). I borrow from Beirschenk et al's concept of "courtiers locaux en développement," which they define as "social actors who are embedded in local arenas (where they play political roles, more or less overtly)" and who act as intermediaries to bring resources coming from the aid system to the locality (p.7). This definition seems to me particularly appropriate to describe the role that a number of activists from the area under study in this paper have come to play.

IV. COMMUNITY LANDS: A HISTORICAL PERSPECTIVE



Map 2. Administrative Map of Colonial Kenya in 1933.
Source: Boundary Commission of 1961 (British Library, London)

Under colonial rule, "native lands" or "tribal lands", as they were referred to at the time, were progressively legally framed by a trusteeship system which, during that period, was devised to meet the requirements of a segregationist system minimizing any interaction between the market economy of the white settlers and the "traditional" African tenures.

1.1. AT THE ROOTS OF THE TRUSTEESHIP MODEL

Between 1895 and 1897, the British government legally extended the *Land Acquisition Act* to the East Africa Protectorate: all lands that, according to European understanding, were wasted and unoccupied were declared *Crown lands*[6] (Sorrenson, 1968; Okoth-Ogendo, 1991). At this stage, the rhetoric of policy to protect African land rights translated into the interdiction of alienating the land actually occupied by native populations. However, settlers' land hunger and their

6 The High Commissioner for the British Protectorate was delegated the authority to allocate those lands to the white settlers.

dissatisfaction with legal restrictions on native populations' lands instigated a tug-of-war with the Foreign Office (Hughes, 2006), in which the battlefield resided in formulation of laws and ordinances elaborated to regulate tenure regimes. The settlers, and the colonial administration which was backing them, progressively obtained disfranchisement of Africans and neutralization of Africans' legal entitlement to land[7]. Moreover, amendments to the *Crown Lands Ordinance* in 1915 formally lifted the interdiction of alienated village land or land farmed by Africans, by extending the definition of *Crown lands* to the reserves. The latter was formalized by the 1926 *Native Areas Ordinance*, which acknowledged what was a fait accompli on the ground.

In 1932, the Carter Commission was appointed by the British government to assess the Africans' land claims and their present and future needs. The Commission was expected to recommend proper redress of the claims by suggesting whether extension of the reserves was desirable and feasible so to compensate the Africans for the "lost land" alienated to white settlers (Great Britain, Colonial Office, 1933). To do this, the Carter Commission undertook a review of land issues across the entire territory today known as Kenya, from the then Colony (Western and Central Districts) to the Coastal strip protectorate and to the Northern Frontier comprising the arid and semi-arid territories of the North[8] (see Map No 1).

The Commission's most important conclusion was its definition of African rights to land as amounting only to usufruct rights, hence minimizing (or undercutting) the possibility of entitlement (titling) to these rights. This legitimized land alienation to the settlers, and derisory levels of (monetary) compensation to Kenyan land holders (when compensation occurred). Any rights that Africans could have claimed outside the reserves were abolished. The Commission's recommendations were implemented through a long series of laws and regulations. Among these is the 1938 *Native Land Trust Ordinance,* which converted land in the reserves from *Crown lands* to *Trust lands*, so called because entrusted to the *Native Land Trust Boards.* The legal implication of the *trusteeship model* is that Africans only retain use rights, whereby they can manage the land in the reserves according to their customary practices. However, the ultimate administrator of the land is the trustee, who is the interface or intermediary between the statutory system established by the colonial administration and the "natives." Under this model, the native population is considered unfit or unable to interface directly with either the state or the market.

When Kenya gained Independence, the *Trusteeship* system was maintained. Responsibility for *Trust lands* was conferred upon local authorities, the county councils, which acted as legal administrators on behalf of native communities until the promulgation of the new Constitution in 2010. These councils were delegated the power to lend/lease concessions on Trust lands to individuals or companies, to sanction land alienation and privatization, as well as to adjudicate land rights. Given these sweeping critical powers, administration of Trust lands (as well as Public lands) has remained a domain of public action that is subject to extensive political interference. Indeed, centralization of power in the executive has led to extensive "land grabbing" benefitting the national political and

7 The Anglo-Maasai Agreements of 1904 and 1911 inaugurated a new face of the rhetoric on protection of African lands, instating the segregationist system of the reserves, where Africans were supposed to be protected from dispossession. However, by moving the Maasai from the Rift Valley southwards, the colonial administration freed space for the settlers by curtailing it from Africans, who were moved to a circumscribed territory whose boundaries where never really surveyed because de facto subjected to variation according to settlers land hunger (Okoth-Ogendo, Ibidem).

8 With regards to the latter, for instance, the recommendations advised against the subdivision of the territory in reserves, because of the ecological nature of the environment (consisting of very little arable land), but also because of the livelihood system of the "natives" of the North, nomadic pastoralism: it was deemed in the best interest of the pastoralists to leave them the right to circulate (Idem). This is partly the reason why this region has remained virtually untouched since long after Independence.

economic elites. The so-called Ndung'u Report, generated by a Commission of Inquiry into Irregular and Illegal Land Transactions, appointed in 2002, revealed the many abuses of the *trusteeship model* (RoK, 2004).

1.2. THE POLITICAL ECONOMY OF LAND IN KENYA

In Kenya, as in other African countries, the enterprise of colonization was not only waged forcefully, it also materialized through the "legal" means of institutional engineering (Mann and Roberts, 1991), *inter alia* by instituting "modern" bureaucratic apparatuses that sanctioned the acquisition of what was officially framed as *terra nullius.* Colonial structures of dominance were asserted via the confiscation of land: in fact, redefinition of land tenure relations became the underpinning principle of the new power relations. As a result of this process of redefinition and expropriation, pre-colonial land tenure regimes and modes of production were irreversibly affected and more or less profoundly transformed according to populations' proximity to the geographical center of colonial power. Despite the British government declaring the whole territory now known as Kenya to be the British East African Protectorate, colonial bureaucratic and territorial structures of government took root unevenly throughout this territory, mostly (but not only) according to their agro-ecological exploitability.

As a result of the British penetration of East Africa and attempts to establish a new socio-economic order, land use patterns were permanently altered: contingent forms of territorial control were forced upon pastoralist, hunter-gatherer and agriculturalist groups who had previously accessed land in an itinerant manner (Okoth-Ogendo, 1991), via nomadic practices of pastoralism, seasonal migration between different ecological zones and shifting cultivation. Mobility had not only been deeply inherent to land uses, it also more largely reflected flexibility and dynamism in pre-colonial societal organization, which had been molded by the constraints of a harsh ecological environment that generally called upon inter-communitarian solidarity (Vanderlinden, 1991).

In pre-colonial Kenya, forms of political organization were characterized by decentralized sovereignty and by the absence of hierarchized political structures, as was conversely the case for the neighboring Buganda Kingdom - located west of what is today known as Lake Victoria. It was only on the coast that the ancient Swahili cities, which had been incorporated into the globalized Indian Ocean trade system centuries before British colonization, had experienced more hierarchized forms of socio-economic differentiation and political organization than those of inland societies, despite remaining flexible and not very bureaucratic. The British colonial enterprise hinged on the cultural and political complexities of the extant coastal societies, on which they could not impose direct sovereignty as the Omani Sultanate already reigned over the so-called Swahili Coast. As I shall demonstrate, this did not prevent colonial policies from impacting on coastal populations' social matrices or on the definition of their land tenure regimes. Possibly, this was less the case only in the arid northern territories of the British East African Protectorate (hereafter BEA Protectorate), which the colonizers merely viewed as a buffer zone separating the highlands from the Ethiopian threat; nevertheless, even here socio-ecological equilibrium was ravaged by colonial policies of control and "development".

From the outset, it has to be emphasized that the most cumbersome legacy of colonization can be found in the centralized and authoritarian shape of the modern Kenyan state. The colonial state sought to, and to some extent succeeded, monopolize the legitimate use of physical force within the territory that is contemporary Kenya; it was successful in imposing itself as the ultimate decision-making executive body: central government, along with its decentralized territorial

institutions became the depositary of public authority (Colson, 1971: p.208). Although the coercive capacity of the colonial apparatus and its consistency in terms of policy directions and actions has to be nuanced – and I am going to explore the contradictions inherent to the colonial period and the inconsistency of its action and policies – the colonial state was interventionist, especially when imposing a particular territorial configuration that segregated the public space (see Médard, 1999) and organizing human settlements (see Sorrenson, 1967) to better control and organize means of production. In fact, the exploitation of African labor, segregated in the reserves and compelled in different ways to work for the British, constituted the actual basis of the colonial economy (see Kanogo, 1987; Okoth-Ogendo, *op. cit.*; Orvis, 1997).

Finally, the colonial state forged its authority by redefining property regimes; land and its commercial development were the *raison d'être* of the colonial enterprise, and via its reinvention of "the customary", the colonial state legitimized its enterprise of domination, notably by establishing itself as the ultimate resort of authority, especially on land matters (Colson, *op. cit.*: p.207). T Claire Médard, who studied the territorialization of state power in Kenya in her doctoral dissertation, has argued that the state in Kenya is at the heart of land regimes (*l'Etat au coeur du foncier*: Médard, *op. cit.*: p.215), while in turn territorial control has been at the foundation of the colonial state and of the centralized and authoritarian bureaucratic and political machinery *tout court* (*le territoire au fondement de l'Etat*) (p.279). The need for the colonial state to exert such control was indeed induced by the very nature of colonization in Kenya (p.25), which in central and western regions took the shape of a settlement colony, with the development of a settlers' economy based essentially on export-oriented crops and ranching, which were the outstanding priority in terms of policy objectives and security measures.

Post-Independence politics and policies were molded by colonial models; in respect of land, the National Land Policy, which was the first document approved by the Kenyan government, in 2009, flagging the reform process that I endeavor to study in this dissertation, describes the transitional period - from colonization to Independence - as pre-empting any form of change or democratization of the land governance system:

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialize and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonization process represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy. (RoK, 2009: p.5)

After Independence, land reform (let alone agrarian reform) was neither contemplated nor implemented by successive Kenyan regimes, as colonial legacy was reinforced by post-colonial continuity brought about by the territorial control strategies embedded in neo-patrimonial systems of relations wielded by the Kenyan elites, at the center of which there was land (Médard, *op. cit.*; Klopp, 2001). In addition, colonial contempt for customary systems of land tenure (Okoth-Ogendo, 2000), deemed economically irrational and inefficient, indeed primitive, was sanctioned by the Kenyan elites ascending to power, especially with the adoption of what is referred to as the evolutionist paradigm of substitution of property rights (Platteau, 1998) - i.e. land privatization. Kenya is actually among the first countries in Africa to experience a vast program of land registration and consolidation in the African scheduled areas, which occurred in the 1950s (Sorrenson, 1968; Harbeson, 1971), though in the "white reserves" the regime of private property had been in effect since the early years of the twentieth century and on the coast in the early years of the 1910s a limited attempt towards land claims registration - especially of Arab families' descendants - took place, though it was never completed due to the high costs involved and the

complexity of the issues involved. Generally speaking, the substitution paradigm was incorporated into the developmental thinking of the late-colonial state, which amongst contrasting claims and political tug-of-war transmitted it to the Kenyan elites taking over from the British: developmental ideology and national and local politics have revolved around *land allocations* and *titling* programs since the colonial period. To date, this has in fact remained virtually unchanged.

Similarly, the Kenyan economic and administrative structures did not undergo major changes: the large landowner sector cultivating the best lands only changed hands due to Africanization, but "the role of the state as creator and protector of large landowners" remained the same (Holmquist *et. al.*, 1994: p.76). Not only did policies on rural development continue to be inspired by the myth of large farms' productivity (see Leys, 1975, and Orvis, *op. cit.*), social inequalities also increased as a result of neo-patrimonial management of resources – especially land (see Klopp, 2000; 2001). French political scientist Jean-François Médard first showed how the phenomenon of *straddling,* considered as "the essence of neo-patrimonialism" (Gazibo, 2012: p.1), is reproduced in Kenya – as well as in other political systems (*see infra)* – by illustrating the way in which individual economic ascension is often realized via accessing state resources (Médard, 1992: p.191); while other authors have contended that once in power redistribution of resources is performed via regional and ethnic affiliation (see i*nter alia* Bradshaw, 1990; Klopp, *op. cit.*; Wrong, 2009). Stemming from the colonial legacy of centralized authority and despotic power, exerted particularly through bureaucratic apparatuses, state institutions in Kenya have been characterized by "systemic patron client relations" (Klopp, 2001: p.13). Against this background, land allocation and issuing of titles played a critical role in informing political strategies to building and maintain clientele networks, which from the 1990s onwards – since the reinstatement of multiparty politics – also translated into strategies to build and maintain electoral constituencies (See *inter alia* Klopp, *op. cit.*; Médard, *op. cit.*, 2008; Boone, 2012, 2014). It follows that bureaucratic institutions regulating land access and control have been politicized all along (*see infra*): in particular, the Ministry of lands and the Provincial Administration have been enmeshed in a state-led neo-patrimonial system of selective redistribution of resources. They hence submit to political power and personal interests, while impoverishing the quality of the service they deliver to Kenyan citizens (RoK, 2004).

1.3. THE ADJUDICATION OF TRUST LANDS AND THE POLITICAL DIMENSION OF TITLING

A significant element of continuity between colonial and post-Independence regimes has been the policy of adjudication of Trust lands, which started under a comprehensive program of land reform in the 1950s (Swynnerton Plan, 1954) targeting the central districts, chosen for political reasons that cannot be covered in this paper, but that have largely been studied in the literature (*cfr.* Sorrenson, 1967; Harbeson, *Ibidem*; Okoth-Ogendo, *Ibidem*). The *Trust Land Act* (Chapter 299 of 1970)*,* the *Land Adjudication Act* (Chapter 284 of 1968) and the *Land Consolidation Act* (Chapter 283 of 1977) are part of the colonial legacy and to some extent still applied in order to convert Trust lands into individualized plots.

The adjudication process was designed to enable the ascertainment and recording of rights and interests in Trust lands to promote individualization of tenure and eventually the issuing of titles, in order to also possibly access credit to improve land exploitation. The process has been ongoing since the 1950s, though the statute of Trust land is still significant, especially in the semi-arid North of Kenya. Trust land is actually the most extensive land tenure category in the country (67%), although it has become very marginal in areas with high agricultural potential.

As noted earlier, the adjudication process started in the Central Region in the 1950s and was then extended to other highly populated areas of the Kenya Highlands[9] (Médard, 1999). In west and central Kenya, the category of "unregistered community lands" is usually limited to forests, parks and urban centers.

The process of adjudication and registration was extended to all high-potential agricultural lands and eventually also to pastoral areas. In the west, the adjudication process was considered complete in 1970. In the Rift Valley, the former Kalenjin[10] reserves, located in regions with high agricultural potential (Kericho, Bomet, Nandi) have all experienced the adjudication and registration process (*Idem*). In Nyanza Province, a significant proportion of the land was adjudicated after independence[11].

In the 1980s, the adjudication process moved to the less populated districts of the Rift Valley and Eastern Province. In these provinces, 20-30% of the territory was adjudicated in the 1980s (*Idem*). On the coast, complicating factors impinged on the adjudication process, such as the heritage of the great Arab land domains and the problem of squatters - both factors have played a huge role in slowing down adjudication[12]. Nevertheless, the districts of Kwale and Kilifi have been targets of recent adjudication and it seems that this process has considerably advanced[13]. Lastly, almost all of the North and North West (Turkana), comprised of arid and semi-arid lands, is not adjudicated[14].

To have a better understanding of the spatial differentiations of the process of land adjudication and of the rootedness of private property in Kenya, Map No. 2, 3 and 4 below show the percentage of total sub-county area that has been adjudicated over time. The maps represent the process over five-year periods (using the most recently available sub-county boundaries) and starting from its early inception in the 1950s[15]. In fact, Map No. 2 below illustrates the process as it began in the Central Region as early as in the 1950s, in the then districts of Nyeri, Forth Hall (today called Murang'a) and Kiambu.

9 Without going into further detail, it should be noted that the first adjudication process of land claims in Kenya actually took place as early as in the 1910s on the coast, when the British colonial authorities sought to define the domain of Arab families, through application of the Land Titles Ordinance of 1908, in order delineate the Crown land domain, up to alienation.

10 The ethnonym "Kalenjin" was forged during colonization; it comprises a number of pastoralist groups inhabiting the Rift Valley and its surroundings, without necessarily implying the homogeneity and contiguity of pre-colonial settlement.

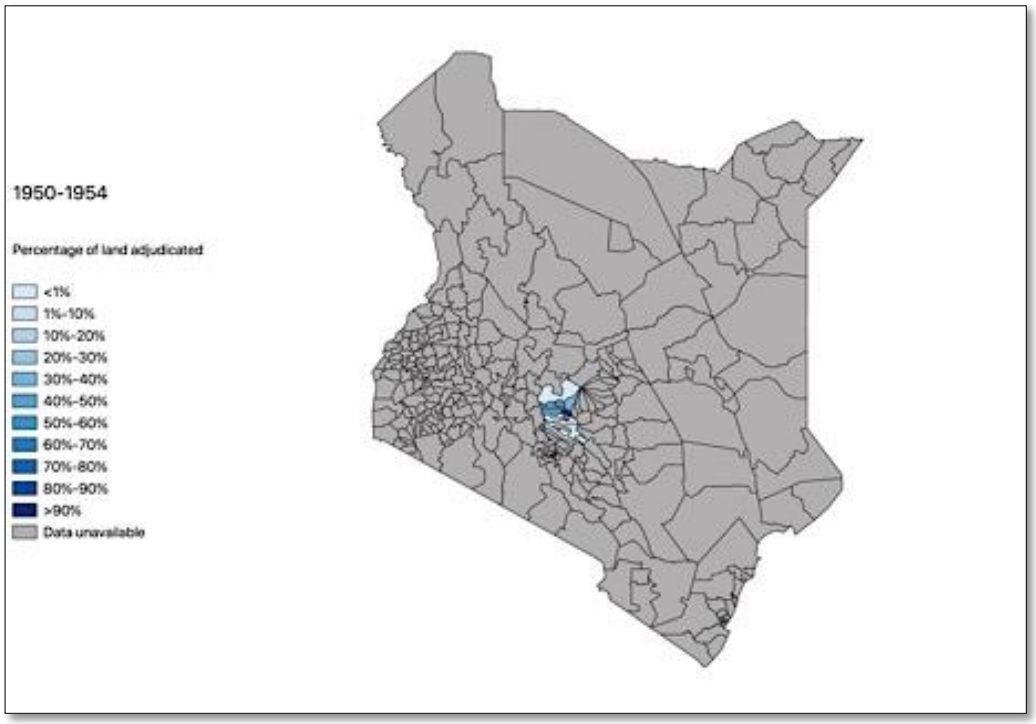
11 From interview with land adjudication officer (Nairobi, 17 June 2016).

12 The northern part of the coast (Lamu and Tana) does not seem to have extensive Trust lands, mainly because "native reserve lands" were never converted into Trust land. (They remained Crown lands, later converted into "Government land."). As a result, the adjudication process has not been extended to these areas.

13 Interview, Ibidem.

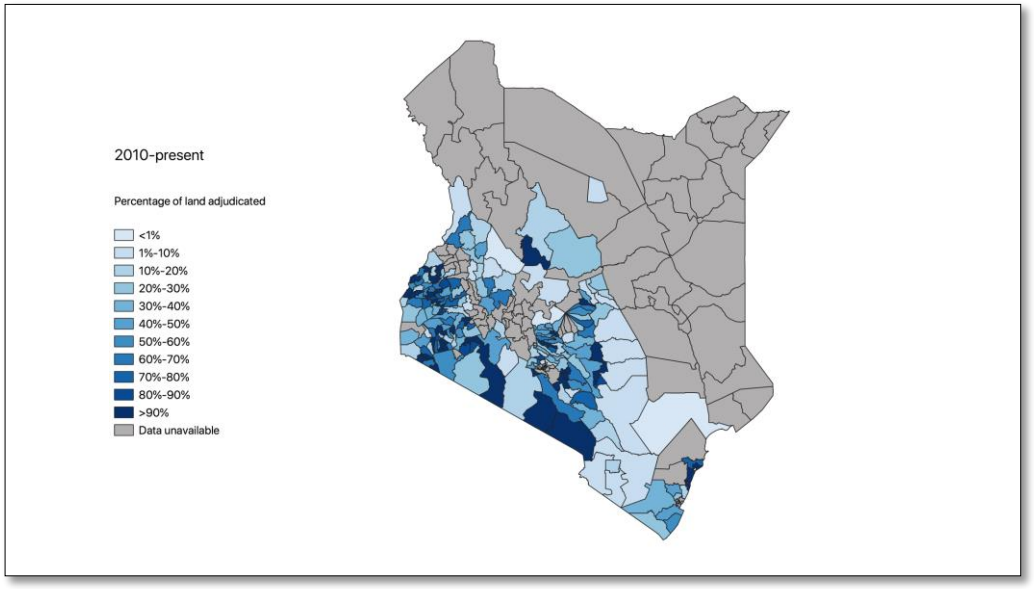
14 Idem.

15 These maps result from a geo-referencing project conducted thanks to the generosity of an adjudication officer of the Ministry of Land in Kenya, and within the framework of a larger research programme led by Catherine Boone, Professor of Comparative Politics at the LSE. Only four of the eleven maps produced are included in this paper as the main goal here is to underline that privatization and individualization of land tenure is not a recent phenomenon, rather very rooted in land policies.

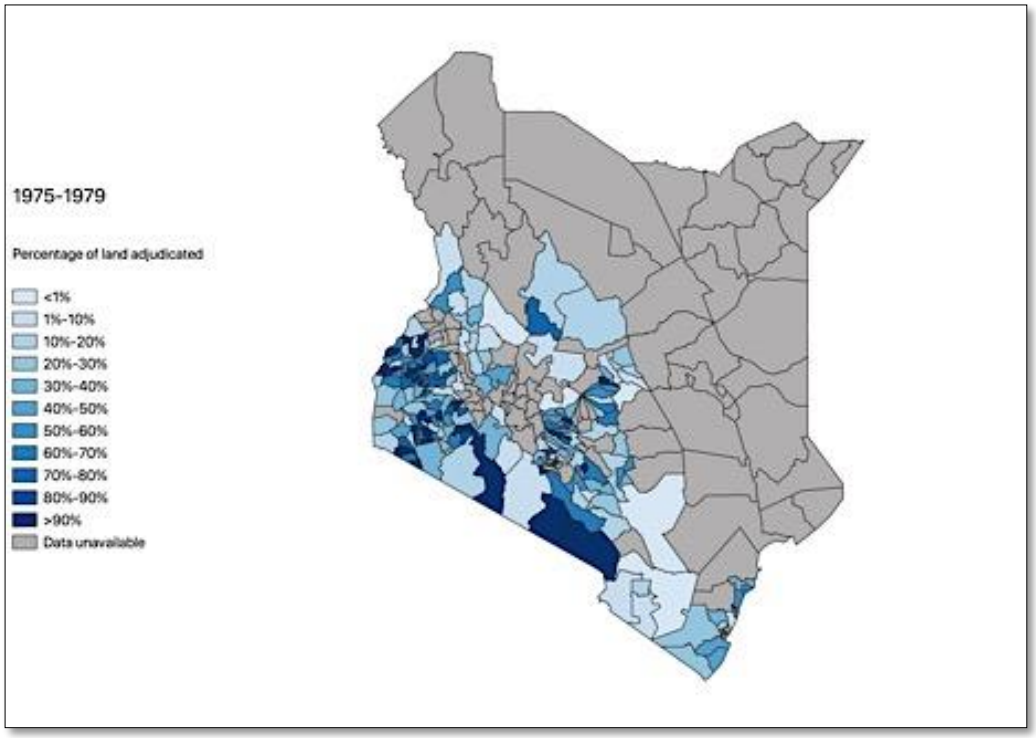


Map 2. Percentage of land adjudicated by sub-county: years 1950-1955

Map No. 3 below shows the extent of adjudicated areas (again by sub-county) in the period 1975-1979; while the following Map No. 4 shows the present situation by showing the state of the adjudication process as reflecting the latest updates recorded by the Adjudication Department at the Ministry of Land (as of June 2016).



Map 3. Percentage of land adjudicated by sub-county: years 1975-1979



Map 4. Percentage of land adjudicated by sub-county: years 2010-present

The arguably small difference in proportion of adjudication land between Map No.3 and Map No. 4, leads to the conclusion that out of the total of today's registered lands in Kenya, the end of the 1970s had seen the bulk of the process of land adjudication already accomplished. This further demonstrates the entrenchment of the private property model in Kenya and of the relative importance attributed to title deeds, though one must bear in mind that the accomplishment of the adjudication process in a given area does not necessarily imply that titles have been issued and collected by the legitimate land-holder. Moreover, this map has to be nuanced because it only accounts for one type of land privatization process, 'adjudication of land rights': this means that the "grey areas" in the maps are not simply un-adjudicated: there are rather quite a number of other possible forms of privatization that are not taken into account here because of the unavailability of data on the matter, i.e. the establishment (from Independence to the present day) of settlement schemes, the concessions of leasehold on trust and public land; and of course, on these maps we don't see "protected area", i.e. forest, game reserve, private conservancies, etc., which are normally public land (occasionally trust land), but that have also been privatized as is the case of the forestland object of "community claim" in the framework of the case study explored in the third and last section of this paper.

This being said, these maps depict an interesting picture of the extent of individualization of tenure and the striking spatial inequalities of this process: they visibly point to the polarization of the question of "community land", which in the northern drylands could be a very salient issue, given the allegedly "untouched" nature of these territories; while in the so-called 'useful Kenya' - the center and west - it may no longer be relevant. It is important to know that the western and central regions, where adjudication processes seem quite well advanced, if not completed, are also the most highly populated, while the dry northlands are scarcely inhabited. Thus spatial

inequalities are reflected in the political dimension of titling, whereby its geopolitics mirrors the practice of promoting 'development' by the government: the title is presented in politicians and administrators' discourses as a development instrument, delivered to people in a top-down manner for their benefit, thus aiming at securing their property and ensuring economic growth; in reality the aim is to promote politicians' popularity and build and maintain vote reservoirs. It is in fact an instrument to create and maintain territorial control. In this sense, title deeds are highly cherished and in great demand, especially given the history of irregular and illegal allocation of public and Trust lands by past governments to politically connected individuals, de facto dispossessing communities of their lands, thus increasing tenure insecurity and inducing a common perception of title deeds as a shield from disinheritance.

It is this historicity and socio-political dimension of title issuing that one shall bear in mind to explain why, in the negotiations of policy and laws, the dimension of *ownership* in defining community ultimately prevailed.

V. AGENDA SETTING OF LAND REFORMS IN KENYA

The previous section has attempted to give some background to the intimate nexus that exists in Kenya between power relations and land relations that historically informed what has been termed by a number of authors as the "land question" (see *inter alia* Okoth Ogendo, 2007). This "land question" has been at the heart of inter-communitarian tensions and conflicts, as argued by the Truth, Justice and Reconciliation Commission, set up in the wake of post-electoral violence between 2007 and 2008. This Commission provides a general definition of the "land question" as "embodying various land issues arising during colonialism" (TJRC, 2013: p.199) that "subsequent regimes have been unable or unwilling to resolve" (p.157); but it also importantly concludes that the "land question" appears as "a potential trigger of conflict, owing to its peculiar historical and legal origins and the impact dispossession has had on the economic fortunes of locals" (p.103).

Moreover, I argue that there also exists a link between the potential for conflict of the so-called "land question" and the inception of land reforms in Kenya: this is part of the argument that will be developed in this section, which analyses the multiple *streams* (see Kingdon, 1991) informing agenda setting for initiation of policy-making processes producing the fundamental texts of the reform. The *streams* of policy-making are construed here in a twofold sense: firstly, the chronological reconstruction of the agenda setting process highlights the extent to which different streams of events at various scales (from the global to the meso-level) play a concomitant role of facilitating circulation of ideas and policy narrative, thus influencing policy-makers and their decisions regarding the priorities that the government shall tackle. Secondly, and retrospectively, the scales are analytically re-grouped to exemplify, following John Kingdon's theorization, how the multiple streams of agenda setting converge towards the opening of the so-called *policy window.*

As part of the historical background, it is also important to stress that "structural injustices" generated by the neo-patrimonial system partly sketched out in the previous section – indeed part of the "land question" – were instrumentalized by "patronage bosses" who manipulated historical narratives, thus deliberately forging an "oppositional politics", which triggered land-based ethnic clashes in Kenya (Klopp, 2001: p.19). American political scientist Jaqueline Klopp, has argued in her doctoral dissertation that within the context of post-Cold War and Structural Adjustment Programs, the rarefication of resources supplying patronage networks counter-intuitively engendered what she has called "patronage inflation" (p.30), whereby among the new strategies striving to maintain neo-patrimonial control, incitation to violence emerged as a "new resource" (p.33). Against this context, land has been at the center of the political rhetoric, using the dispossession from "ancestral territory" to blame political opponents and frame them as responsible for "historical injustices" (see also Médard, *op. cit.*, and 2009; Lynch, 2011).

Jacqueline Klopp (*op. cit.*) has defended the thesis that "new political opening and constitutional concessions" ensued from the significant changes that the structure of neo-patrimonial control underwent in Kenya, basically as a result of readjustment to the phenomenon of "patronage inflation" typical of the 1990s. This inflation resulted from the emergence of a gap between declining supply of patronage resources and increasing demand for it, mostly given the introduction of multiparty politics (p.30). She explains:

> *"A new impetus emerges for ruling cliques to find alternative resources, to solidify networks and avoid "defection". To manage these difficulties, rulers may negotiate new political opening and constitutional concessions." (p.32)*

This thesis is also to some extent confirmed by similar arguments advanced by Daniel Branch and Nic Cheeseman, who contend that the accession to power of President D. arap Moi (in power from 1978 to 2002) accelerated the processes of "elite fragmentation and state informalization" (2008: p.3). The two authors explain that the post-colonial elite alliances that Jomo Kenyatta (Kenya's first President, in power from 1963 to his death in 1978) had been built on collusion of interests and distribution of resources, which had mitigated many groups' grievances, were broken off under the Moi regime. Due also to deteriorating economic conditions (post-structural adjustment programs and international economic crisis), it became increasingly difficult to maintain Kenyatta's client networks. President Moi's response to these difficulties was, on one hand, public revenue depredation (with land being the masterpiece for elite co-optation) and, on the other hand, the enhancement of executive control of political space: thus paving the way to protest and eventually the opening up of political space and "constitutional concessions".

In a more recent article co-authored by Jaqueline Klopp and Odenda Lumumba, a Kenyan human rights activist and a key actor in the policy process studied here, the two authors argue that in the 1990s "[a]n emboldened press and civil society began to report on 'grabbing' of key public lands and also chronicled the numerous public protests and mobilizations against grabbing"; they also add that, "[i]n response to mounting public alarm and civil society activism", the first Commission of Inquiry, the so-called Njonjo Commission was set up by the then President Moi, thus having the effect of publicizing the land problems experienced by Kenyans (Klopp and Lumumba, 2017: p.7). Moreover, the two authors also put forward the historical electoral demise, in 2002, of the political party that had been in power since Independence, the Kenya African National Union (led first by J. Kenyatta and then by D. arap Moi). They frame this electoral victory as an element conducive to the setting of land reforms on the political agenda, mainly because the coalition accessing power "included some reformers" (p.8). However, while explaining that the newly elected President, Mwai Kibaki, had promised to lead constitutional reforms and in response to public outcry about "land grabbing" had appointed a second Commission (the Ndung'u's) to inquire into such delicate matters ("Irregular and Illegal Land Allocations") they also point to the difficulties that the so-called Ndung'u Commission experienced, because of under-funding by the same government that appointed it and obstructionism by land administration officials (*Idem*), which points to the explanatory insufficiency of electoral change as a dependent variable to elucidate policy change, i.e. the advent of land law reforms.

Interestingly, J. Klopp and O. Lumumba, having already stressed the relevant role of civil society organizations in raising awareness among the public and the political class on the issue of "land grabbing", emphasize the role of one particular actor, a Kenyan umbrella organization: "the Kenya Land Alliance (KLA), which emerged as a way for aggrieved groups to constructively engage in the complex land problems and struggles that had intensified in the 1990s" (*Idem*). Finally, they specify that "[t]he KLA led the effort, organizing meetings and pushing the government slowly towards change" (*Idem*). Finally, they mention the post-electoral violence of 2007/08 and acknowledge it as a driver of the government's adoption of the land reform agenda, by framing the crisis as a "window of opportunity", as well as acknowledging the KLA as a "policy entrepreneur" that seized the "critical juncture" to "influence the reformulation of institutional rules" (*Idem*).

To sum up, on one hand, the systemic reconfiguration of the Kenyan political (or neo-patrimonial) regime would explain the "opening up", and therefore preparing of the ground for an overhaul of the social contract between state and citizens through review of the constitution. On the other hand, the agency of specific actors, resisting and opposing neo-patrimonial logics, would concur to explain the adoption of the land reform agenda by the Kenyan government. Although inspiring, a fundamental problem arises from this analysis: while international actors are taken into account

in the analysis of Kenyan neo-patrimonial regime developments, particularly by explaining that the aid system generates exploitation of resources by state actors, which feeds into patronage logics (Klopp, *op. cit.*: p.29), the influence that international actors have potentially had on both agenda setting and policy-making processes is ignored.

Yet, J. Klopp had taken into consideration that "new anticorruption conditions" (*Idem*) attached to the funding directed to governments, were among the structural changes that the aid system had undergone since the end of the Cold War, when the geo-strategic importance of African regimes, no matter how despotic they were, suddenly became meaningless, and multi- and bilateral donors began to require - as a condition to aid - procedural democratization of regimes, i.e. multi-party politics. Even before this reconfiguration, shifts in aid development paradigms had emerged with Structural Adjustment Programs promoted by International Financial Institutions, which from the 1970s onwards had already started emphasizing the endemic corrupted nature of African states and promoting the role of "civil society actors" as a counter-power that would play a watch-dog role and hold the corruption-inclined African governments accountable to citizens.

This paradigmatic shift definitely impacted donors' priorities and led to a reconsideration and redefinition of aid-recipients, thus increasingly targeting non-state actors as the preferential players to foster substantial democratization by holding political and bureaucratic apparatuses deemed to be autocratic and corrupt accountable (see *inter alia* Quantin, 2008 for discussion of positive and negative perceptions about "civil society" from the 1990s to the 2000s). Thus, the international dimension of agenda setting, the role of donors in policy processes and the so-called extraverted nature of African decision-making (Bayart, 1989) seems to become relevant here, thus leading us to consider the global scale of governance alongside national processes. The initial hypothesis here is that international actors (multilateral and bilateral donors, but also international NGOs and international/internationalized consultants) significantly influenced the wider process of reform in Kenya. As previously stated, land reforms have to be understood in the wider framework of political liberalization, constitutional reforms and democratization processes (in both procedural and substantial terms).

Such influence is construed here in a twofold way: on one hand, donors were directly influential when urging President Moi at the turn of the 1990s to comply with multiparty democracy. When the "political space" eventually opened up, opposition parties, the media and civil society finally had room to express dissidence, but also assert and articulate ideas on the Kenya they wanted. On the other hand, I argue that international actors were also indirectly, but perhaps more fundamentally, influential when channeling aid to human rights organizations during the 1990s. International funding might actually have contributed to the structuring of "emboldened civil society actors", even though, as will become apparent, international actors and actions are meaningless when not articulated with national personalities and political developments: the scales are closely intertwined.

2.1. INTERNATIONAL STREAM: GLOBAL TRENDS AND SUB-CONTINENTAL INTERCONNECTEDNESS

At the turn of the 1990s, even the most fervent supporter of property rights privatization, i.e. the World Bank, seemed to concede that individual titling programs were expensive and ineffective in driving economic production and expanding land markets (WB, 2003). In conjunction with the new emphasis on 'poverty alleviation' (see Swallow, 2005 for a Kenyan perspective), international aid policy standards to be applied in virtually all the 'developing world' were readjusted with a

view to designing *pro-poor land reforms* via formalization or authentication of customary rights (see *International Guidelines* produced later in the 2000s: EU, 2004; AUC-ECA-AfDB Consortium, 2010; FAO, 2012). Against this background, and especially considering the "wave" of southern and eastern African land reform processes, it appears that a number of the latter were *connected* via the composition of a *transnational network* that operated across African national borders and in aid-related fora, while ultimately attempting to influence decision-making processes in African countries by conveying particular ideas and policy narratives.

In fact, one of the nexuses between these land reforms, principally in terms of processes, resides in the strategic creation of *Land Alliances* by transnational networks (that will be better characterized below): these are platforms to unite civil society organizations, with the precise intent of not only contributing to build and maintain the reform momentum, but also to inform content and propose policy solutions. The Land Alliance is conceived as an advocacy coalition *connecting* national personalities and organizations operating in different sectors (academia, professionals and NGOs) that have a common interest in land issues: the underlying model of engagement consists in enabling *networking* among national personalities and with international institutions in order to exchange ideas, strategize and build content, thus aiming at the mutualization of knowledge and efforts so to achieve greater effectiveness in advocacy and lobbying. The ultimate goal is to create a united front assembling all voices pressing for change not only in order to exert a greater pressure on governments, but also to mutualize expertise on technical aspects thus enhancing the competency and credibility of the advocacy platform.

The preliminary stage to the creation of the Land Alliances is the creation of a *network* that first works towards the production of research-based evidence, thus identifying and characterizing public problems (related to land) to start discussion and reflection and, ultimately, formulation of policy solutions. These fora of debate are usually donor-funded and facilitated by so-called *international expertise* pointing to the *lesson learned* from early experiences. Essentially, the 'Land Alliance formula' was not devised *ad hoc* for Kenya, but actually drawn from other countries' experiences, imported into Kenya by international development workers liaising with Kenyan personalities, who by profession, interest, or vocation are connected to international actors, such as donors, international NGOs, and consultants. These are the international ties that make the networks eminently *transnational,* not bound by national boundaries, but ubiquitous to different country realities; these ties are actually crucial in shaping the entrepreneurial ability of actors and the scope of their action.

This emphasis on the regional and sub-continental framework results from the realization of the interconnectedness of various countries' land reform experiences via particular individuals, navigating the aid system, whose professional capital is accrued precisely by participation in a number of these processes. In fact, from my understanding of the establishment of the Kenya Land Alliance, the Kenyans involved were either already connected to the aid system, in this case to the British aid agency, Department for International Development (DfID) and/or Oxfam GB, an international NGO based in Oxford. When they were not directly part of it by virtue of their professions (outstanding academic personalities, NGO management staff and/or consultants), once identified as key characters by virtue of their public stature and/or valuable expertise in land matters, they were sought to be co-opted. In essence, the Kenyans involved in the creation of the Alliance were either people working in NGOs implementing projects that touch on land issues, or scholars who have written on land in Kenya.

A number of personalities seem quite relevant: the first is the late Kenyan law Professor H. W. O. Okoth-Ogendo, who had undertaken research and published extensively on the subject of land tenure and constitutionalism in Kenya and in other eastern and southern African countries.

Professor Okoth-Ogendo had actively participated in the reform processes of numerous African countries as a consultant contracted by numerous bilateral[16] and multilateral donors[17], as well as by African governments, such as those of Zimbabwe, Malawi, Tanzania and Swaziland. Importantly, Okoth-Ogendo had been lead-consultant in the drafting of the National Land Policy of Uganda in the 1990s, while also being contracted to advise the Uganda Land Alliance, which seemed to benefit extensively from his counsel (interview with Robin Palmer).

In a paper written by Robin Palmer[18] in 2016, ahead of a conference where he would participate in a panel discussing the creation of Land Alliances[19], the author identifies a number of factors that in his view propelled the creation of such platforms in East Africa. For him, the fall of the Berlin Wall is for him the first factor to take into account because it coincides with the period when the WB embarked on its worldwide promotion of the private property capitalist model, to which scholars such as Okoth-Ogendo in Kenya (and Issa Shivji in Tanzania), he argues, reacted by pointing to the criticalities of land rights individualization and privatization (see Manji, 2006). Palmer contends that subsequent calls for alternative models to foster development by scholars such as the above-mentioned might have influenced donors' support for the creation of land alliances in East Africa. Since 'individuals do matter', key competent and committed characters in both DfID and Oxfam, Palmer believes, were pivotal in fomenting civic pressure on government to initiate reforms. On the DfID, he writes:

> *A fourth [factor] was the brief emergence of a radical, progressive donor in the form of the Rural Livelihoods Division of the British Department for International Development (DfID). Its head, Michael Scott, was keenly aware of the critical importance of land rights in Africa and he encouraged his staff, in East Africa and elsewhere, to engage seriously in debates on land laws and policies and also to support the growing need for land coalitions or alliances and to make funding available to both governments and civil society. There was a 5-year honeymoon (1998-2003) during which DfID was a serious and key player on land rights in East Africa and elsewhere on the continent (Idem).*

Indeed, M. Scott seems to embody the fresh air of change that new governments inflate into administrative and political agencies, even though his arrival did not strictly drive the formation of the Kenya Land Alliance that was actually already in gestation at the time of this meeting in mid-1997 with R. Palmer. In fact, at that precise time, the Oxfam-Nairobi team manager, Adam

16 The DfID (then called Overseas Development Assistance, ODA), the Swedish International Development Cooperation Agency (SIDA), the Danish International Development Agency, and others.

17 The WB, the FAO and other UN agencies.

18 Robin Palmer is a historian who was recruited by Oxfam GB in the late 1980s and spent twenty years (1987-2007) working in this international NGO, mainly on southern African countries, though during the second half of his career his spectrum of action widened dramatically, as in 1997 he became Oxfam's Land Policy Adviser (Idem). R. Palmer followed the setting up and operations of the Zimbabwean and South African land alliances, and for this reason became a key resource-person during the creation of the eastern African land alliances. He kindly shared with me forty-five pieces of documentation, including reports from consultancies (not necessarily conducted by himself, mainly by Martin Adams), personal notes taken during meetings and seminars, relevant newspaper and academic articles that were circulating during the period under examination, as well as email correspondences that undoubtedly is the most valuable asset, as it tangibly illustrates the interconnectedness of a certain number of individuals, thus unveiling the extent to which the triviality of interpersonal relationships was actually the fulcrum of the transnational network's structure.

19 Robin Palmer (Mokoro), Supporting the establishment of land alliances in East Africa: some personal reflections. Conference on The Politics of State Interventions on Land Rights in East Africa, IFRA, Nairobi 22-23 June 2016: http://mokoro.co.uk/wp-content/uploads/Supporting-the-establishment-of-land-alliances-in-East-Africa.pdf

Leach, was working on the very initial phase of bringing relevant Kenyan personalities together. Certainly, the advent of a progressive character at the head of one key division within DfID promoting an alternative approach to the WB's mainstream vision was an enabling factor for the operation of the transnational network, which DfID eventually ended up funding. The UK aid agency in fact facilitated Oxfam's project of founding the Land alliance in Kenya from its early inception throughout the period R. Palmer has termed 'honeymoon' in the above quotation.

Interestingly, the networking strategy was equally applied more widely by attempting to connect land experts continent-wise. M. Scott committed to a global design, first, by giving room to prominent scholars, consolidated advocates of a less rigid economist approach to land reform. In 1998, he set up the Land Tenure Advisory Group by establishing collaboration with Oxfam, represented in the Group by R. Palmer, and with the International Institute for Environment and Development (IIED), represented by Camilla Toulmin, a British economist with particular expertise on dryland in Africa[20]. The Group was coordinated by Juan Quan, a development researcher and practitioner, specializing in land tenure and land policies: it aimed to establish a continental network on land (the *LandNet*) comprising international experts, but also, above all, African scholars and practitioners. The final end product was supposed to be a land network 'owned by Africans', that possibly would not remain the prerogative of consultants from the Global North but become a useful instrument to convey technical knowledge to Africans (PALMER/NETWORK/8.03.1999). To that end, DfID was to hold a workshop on 'land rights and development' bringing together prominent scholars that would reflect on a new perspective on the subject. This was going to materialize in the influential conference held in London, which later on became a book, edited by C. Toulmin and J. Quan (2000).

2.2 THE MESO-LEVEL OF THE POLICY STREAMS AND ITS ARTICULATION WITH THE TRANSNATIONAL NETWORK

In the meanwhile, Oxfam had been operating at different levels in Kenya, but first and foremost, this international organization with a primarily humanitarian focus had stood out for its involvement in the northern drylands and related pastoral issues since the 1980s in Turkana, Isiolo, Samburu and Wajir. The first project undertaken in this desolate region, virtually untouched by state presence, was a vast *restocking program,* whose conceptualization can be credited to the work of Richard Hogg (see Moris, 1988), who had been studying pastoral nomads in northern Kenya and became an advocate of the restocking approach versus settlement and irrigation schemes.

While Oxfam projects in the 1980s and 1990s mainly focused on livelihood and food security, a relevant element was 'civic education of the grassroots' geared towards the participation of pastoralists in policy-making (PALMER/IZZY MEMO/24.03.1999). Since the early 1990s, two key individuals had been working for Oxfam on these projects on drylands in the north: Izzy Birch and Mohamed Elmi, respectively British and Kenyan citizens. They were part of the transnational network that began discussing the possibility of devising a national advocacy strategy that would not be limited to pastoralists, but transversal to different livelihood activities and Kenyan sub-regional contexts: as Oxfam had been confronted with solicitations from a multiplicity of organizations representing very specific constituencies and land claims, the eventual utility of

20 This is what R. Palmer has written about the Tenure Group: 'Camilla and I found this initiative extremely valuable, as it gave us easy access to DFID Rural Livelihoods staff across Africa, while in turn Camilla and I provided access for DFID to the individuals, groups and communities with whom IIED and Oxfam were working' (Palmer, Ibidem).

creating one single platform for several groups' interests to coalesce and gain strength by unity in the struggle was recognized (Interview with M. Elmi, Nairobi, 09.10.2015).

The idea of creating the Kenya Land Alliance indisputably originated from Oxfam: Mohamed Elmi became Deputy Country Director towards the end of the 1990s, and was the managing officer who awarded the first grant to the nascent organization (Interviews with Izzy Birch in Nairobi, 25.09.2014); with M. Elmi, *Ibid.*; and with R. Palmer in London, 21.03.2017). However, before getting to that point, his predecessor - Adam Leach - had been working during the years 1997 and 1998 – or since before – on the project of creating the land alliance: this emerges from email correspondence between A. Leach and R. Palmer, whereby the former sought counselling form the latter given his involvement in similar processes of alliances' formation in southern Africa[21].

In this early stage of contemplating the idea of founding the Alliance in Kenya, it is instructive to note that Adam Leach was seeking inspiration from the South African model of the *National Land Committee* (PALMER/NLC2/*Ibidem*), which was a platform linking local organizations operating at the 'provincial/county level' that R. Palmer thinks had been impressively effective in attempting to support and protect African land rights in the difficult context of Apartheid (Palmer's intervention at IFRA's land conference, June 2016).

A. Leach seemingly nurtured the idea by starting to conceptualize the terms of reference of the eventual founding project, and by mobilizing a number of outstanding Kenyan figures, such as eminent professors like Okoth-Ogendo, Smokin Wanjala and Justice J. B. Ojwang, all authors of seminal works on land and property rights in Kenya (PALMER/NLC4/25.06.1997). A. Leach updated R. Palmer on the progress of the work: *inter alia* he confided in him about support to Kenyan NGOs to write a 'policy piece' in light of the WB-driven process of formulating a Country Assistance Strategy (WB CAS) (*Idem*), which will eventually lead to the elaboration of the Poverty Reduction Strategy Program, endorsed by the Bank in the late 1990s. Importantly, from this correspondence emerged hopes and expectations about DfID's renewed interest in land: both officers seem aware that the aid agency is re-organizing its priorities and strategies and hope they, as Oxfam, may be able to 'bend their ear' (*Idem*).

In 1998, A. Leach sent R. Palmer a strategy document called *Land Reform Policy Action* asking advice: the idea is taking shape, and among Palmer's comments, looms the emphasis on difficulties linked to the 'political climate' and, as a result, the importance of donors' action in lobbying the government, which Palmer considers 'crucial in the Kenyan context' (PALMER/ADAMQNRP/22.04.1998). International actors are despondent by the Moi regime's imperviousness, and reckon that demand from civil society organizations, albeit well organized, might not be sufficient to kick off reforms in Kenya. In fact, in another email that R. Palmer sent to a number of Oxfam's program officers working in Kenya (among which Izzy Birch and Adam Leach) by way of introducing to this team the new DfID's Natural Resources Adviser, he reports that Oxfam 'stressed on him the importance of land issues' and eventually 'urged him to explore opportunities for movement in Kenya, stressed the need to push the government to allow dialogue' (PALER/M.LEACH/22.07.1998).

21 For instance, when Palmer is first asked to comment on the idea of founding one of those alliances in Kenya, he plays the role of the experienced rider by warning his colleague in Kenya about the pitfalls that seem to be common when seeking to federate different interests and goals under one banner (PALMER/NLC2/22.06.97). Palmer brings the example of an early workshop, in which he had participated in Dar es Saalam, where he had witnessed jealousy among NGOs, which in his view constituted the usual hindrance against unity of purpose also in Zimbabwe (Idem).

Oxfam was seeking DfID backing so to have an ally in the hostile Kenyan context and also with a view to preparing the ground for the land alliance operations. In the meanwhile, the preliminary structuring of the alliance went ahead by means of networking, i.e. seeking to co-opt eminent Kenyan personalities: among those, one key individual is Michael Ochieng Odhiambo, who will in the course of time become the first Coordinator of the Kenya Land Alliance. He is a lawyer by training, who seems to have become aware of land rights issues through his legal practice, experiencing people's hardness via the cases he handled in the courtroom. He was contracted by Oxfam to consult on pastoralist issues in northern Uganda (Interview with Shadrack Omondi): connection was hence established. It is interesting to note that in the proposal he addressed to DfID in 1999 asking the aid agency to sponsor the launch of the Kenya Land Alliance, he wrote: '[…] while it is almost universally now appreciated that the policy and legal regime governing land in Kenya is inadequate to the task, little real progress appears to be made in moving beyond the lamentation about what is wrong with the system. The scandals involving the allocation of public land to private individuals, and the frustrations suffered by those who have tried to intervene in these scandals whether through court processes or other mass action initiatives clearly show that there is something lacking in the framework' (PALMER/ADVCONS/ no date).

Mr. O. Odhiambo became Adam Leach's key interlocutor in the discussion on how to advance the agenda of policy advocacy in Kenya (PALMER/RE/15.09.1999). In fact, by founding his own NGO in 1999, Resource Conflict Institute (RECONCILE), he became an institutional player in the network, the reference of the alliance, especially vis-à-vis donors such as DfID. RECONCILE's headquarters has been in Nakuru since its early days, on the very doorstep of the Rift Valley, perceived as the most incendiary region of the country, where land conflicts had been rampant throughout the 1990s.

Below follows the reconstruction of the underlying reasons and motives leading to the foundation of RECONCILE by M. O. Odhiambo. The quote is taken from an interview with the current RECONCILE Executive Director, Shadrack Omondi, who had been working in RECONCILE since 2005, despite having left it in 2011 to briefly join Oxfam-Kenya for twenty-two months, before subsequently returning to RECONCILE to rung it (Interview with S. Omondi, in Nakuru, 13.05.2014). Moreover, it could be actually argued that the time spent in Oxfam represented for S. Omondi a training field where he might have possibly 'prepared' to take over from M. O. Odhiambo, who had been running the NGO for a decade and had conceivably designated his dauphin, to whom to leave the reins of his creature.

Michael Ochieng Odhiambo, founded RECONCILE in 1999, Director until February 2011. He was a lawyer interested in land issues. When he was practicing his profession, he realized that most of his clients were rural people who were contesting the land-related issues, and some of them were losing in court heavily, so the grievances started with him in the court process. The court processes are not giving justice to this people, how they can behave to secure their livelihoods? Those who can access court, get better lawyers, are winning the cases, but even in the situation whereby one person of the community wins the case in most cases the relationship [with and within the community] is destroyed. So he started thinking how can this be? Then he went to a meeting in the US. So, on his way back it occurred to him that the inadequacy within the institutional framework would need a push from outside to open up space to communities to be considered. So the first drafting of the vision and mission for RECONCILE was drafted in an airport. By the time he was landing he had an idea, then he shared this idea with a few friends, who became the members of the board (Idem).

According to S. Omondi, before advocacy engagement at national level, donors first supported RECONCILE in its work with 'communities', namely with the rural/village dwellers who the NGO

sought to train on matters pertaining to their land rights, the legal framework and ultimately on the instruments they might mobilize as a group to intercede with state authorities. The initial idea the organization was about to address appears to have been, in Omondi's words, 'the problem of knowledge gap' (*Idem*), namely the rift between the social norms accepted and binding the community members and the statutory laws and statutes, as well as the inadequacy of the community organizational structure (often acephalous and rather horizontal) vis-à-vis the social codes and rules applying at the different scales of state authority.

In the meanwhile, in London, the plans towards establishing the LandNet were becoming very concrete: by February 1999 these materialized in the organization of an international workshop entitled *Land Rights and Sustainable Development in Sub-Saharan Africa*, funded by the UK government via DfID. Scholars and practitioners researching and working on land issues in Africa participated in the event, along with policy makers. The ultimate goal for DfID was to expose these policy-makers to close academic analysis and 'controversial debates' (PALMER/RE/15.09.98). In the report compiled by J. Quan in the wake of the workshop, the emphasis on the African ownership of the network was highlighted by stressing the commitment to capitalize on existing experiences of networking in Africa, which were to be inquired into by regional representatives attending the workshop (PALMER/NETWORK/ 08.03.1999). Inherent studies on the state of affairs of networking in their context were commissioned from these individuals, in the expectation that they would propose recommendations on the *way forward*. M. O. Odhiambo was entrusted with the regional study covering East Africa. Two more workshops were to be organized in 2000 in the Horn of Africa.

Interestingly, the WB was also in attendance at the workshop in London, represented by Shem Migot-Adholla, a prominent Kenyan economist and co-author of a seminal work on land rights registration in Africa, including Kenya (Bruce and Migot-Adholla, 1994). On that occasion, S. Migot-Adholla seems to have played a 'mediator' role, relaying the initiative to the WB's high ranks. In the wake of the conference, he addressed an email (PALMER/REAFRICA/15.03.1999) to a large number of recipients, among which key participants at the conference - mainly representatives of bilateral donors - including R. Palmer, in which he transmitted endorsement of the initiative on behalf of the WB[22]. The LandNet was conceived as a very loose structure, not necessarily formalized, but to be appended to an existing organization.

While this particular initiative might seem disconnected from the work Oxfam was seeking to conduct in Kenya, I am led to believe that it wasn't, primarily because this proves the seriousness of DfID's interest in the debate on land policies in Africa: it showed its intention to be ambitious by reasoning in terms of a continent-wide forum that would connect people, especially governments and civil society organizations, and eventually empower the African-end by providing knowledge and human capital. Secondly, it was also the occasion for M. O. Odhiambo to officially enter the donors' circle: he was actually put in the loop by Adam Leach who asked Robin Palmer to get him invited (PALMER/RE/15.09.1998), hence accruing his credibility. This is confirmed by the role Odhiambo played in the subsequent attempts to operationalize the LandNet in the following years; in fact, he was entrusted with key functions of responsibility. It will suffice to evoke here that in the wake of the LandNet's *launching workshop* (held in Addis Ababa in January 2000), Odhiambo had been designated the person in charge of the East Africa regional framework of the LandNet (PALMER/OSSREA/January 2000). In fact, he travelled across

22 The Bank framed the initiative in terms of 'local capacity building' for African practitioners who were supposed to benefit from the network by tapping into research findings and information generated and shared by network members.

the East African region and held talks with key individuals in Tanzania, Uganda, and eventually Rwanda (whom he co-opted into the process of constituting the network) (*Idem*). He acted as the spokesperson on behalf of DfID. It is relevant to also note that, after the meeting in Ethiopia, RECONCILE had been designated as provider of secretariat services for the East African network, acting as a coordinator, and eventually organized and hosted the third meeting, held in Nairobi in August 2000 (LANDNET AFRICA, 2000): these developments exemplify the importance of the ties established with DfID, almost becoming the donor's darling.

In 1999 the process of establishing the Kenya Land Alliance accelerated: in March, R. Palmer was asked to comment on the draft concept paper on land advocacy in Kenya, produced by a newly appointed Kenyan Project Officer (PO) (PALMER/RESPCONC/24.03.1999). Here, Palmer insisted on the striking contextual differences between Zimbabwe, Tanzania and Uganda, vis-à-vis Kenya, whereby in the former the Land Alliances had been created after the opening up of the policy opportunity, i.e. after the policy process had actually commenced, whereas in Kenya the political situation was considered 'blocked', thus hinting at greater efforts the activists and the alliance in particular could have made (*Idem*). DfID was obviously indicated as the most likely donor agency to engage with, mainly because of its previous experience in South Africa, Tanzania and Uganda (*Idem*). Palmer's taking on the WB's positioning vis-à-vis land reforms in Kenya is very interesting, as is the strategic advice he gives to the PO:

> *You'll also be aware of the role the World Bank has played in the past in Kenya. The Bank now says it has changed its views and no longer supports compulsory titling as the only way forward. Whether the Bank can, at some stage, be brought in to help the Kenyan Government emerge from the 'blockage' is a moot point. Certainly Shem Migot-Adholla, the Bank's Africa Lead Specialist in its Rural Development and Environment section, and a Kenyan himself, didn't think that anything was likely to emerge in Kenya in the near future - and that what might happen was some token gesture towards the end of the life of the current parliament. But, despite this, it might be useful to keep some lines of communication open with the Bank in case that moment should arrive.*

In May, Oxfam funded the organization of a *Consultation Workshop* that RECONCILE convened on the theme of land advocacy in Kenya (PALMER/CONTACT/14.05.1999). In the ensuing email correspondence between Palmer and the Oxfam PO, whereby the latter reported on the workshop proceedings and outcomes, it is worth noting that Palmer was pleasantly struck by the presence at the workshop of two DfID senior representatives, who by attending were, in his view, demonstrating actual support (PALMER/RPKLA/1.07.1999). In the same email, in an effort to add value to the enterprise of founding a land alliance in Kenya, Palmer attempted to resume in a few points what his experiences in South Africa, Zimbabwe, Tanzania and Uganda had taught him about NGOs' networks. The first point evoked was the fragility of such loose structures where, as in the Ugandan case for instance, only a small number of members are really active; secondly, he advised the hiring of a full-time coordinator 'to make things happen'; then, several points pertained to the usual biases that generally feature in NGOs, namely the gender predominance of men among employees, who are also usually middle-class and urban-based (*Idem*). On this last point, his recommendations revolved around the need to create ties between the urban pressure group and grassroots, 'up country people', he writes: he explains that in Tanzania, pastoralists have started attending workshops in Dar es Salaam *only* one year ago and that, in Kenya, Oxfam can surely assist the land alliance by linking them up to pastoralists given its connections in northern Kenya (*Idem*).

This suggestion is extremely fruitful, especially in hindsight, knowing that both RECONCILE and the Kenya Land Alliance will make these alleged ties with the grassroots their hobbyhorse into the Ministry of Lands during the formulation of the National Land Policy. The last interesting issue

raised by Palmer in regards to Alliances' weak spots, concerns the need for land alliances to have 'targets', namely a clear objective to work towards to: here, the case of Zimbabwe is brought to the fore to illustrate that as soon as the Land Policy and the Resettlement Program began to be discussed, the NGOs actually contributed significantly, thus suggesting that previous engagement had not been meaningful (*Idem*). This concern is reiterated in a number of other emails[23] in which Palmer invokes the opinions of highly respected and credible Kenyans to worryingly stress the political stalemate:

> *[…] it's worth bearing in mind that it was the prospect of legislation on land coming into force which sparked the creation of these organizations (as also happened in Zambia and Mozambique). This is unlikely to happen in Kenya shortly (this was certainly the view of Professor Okoth-Ogendo and of Michael Ochieng Odhiambo), so there will not be this obvious focus to stimulate the emergence of something comparable in Kenya (PALMER/RESPCONC/24.03.1999).*

At this point, Mohamed Elmi was already Country Director for Oxfam. In August, a second workshop was organized by RECONCILE, this time with the joint support of DfID and Oxfam, with the purpose of planning in detail the mission and objectives of the Kenya Land Alliance. In fact, DfID granted KShs.780, 000 (almost 150,000 US$) to RECONCILE to hold the *Planning Workshop* for formalizing the creation of the Alliance. Thirteen civil society organizations had been invited to the *Consultation Workshop* of May 1999. Ten of these formed an *Interim Steering Committee*, chaired by Oxfam, and hosted by the same RECONCILE.

At the *Planning Workshop* it was agreed that the Alliance would be registered as a trust (the easiest and cheapest format of registration in Kenya), that a subsequent concept paper would identify the major land problems existing in Kenya, with a view to guiding the advocacy work of the platform. It was also agreed that the membership was to be expanded by incorporating both organizations and individuals. The emphasis on participation, intended here as 'popular support', was stressed when noting that this Alliance, as a pressure group, could have been effective only if it pursued the interests of the population, dissected only if Kenyan citizens were involved in a consultative process seeking to define 'the land question' (PALMER/FULLREP/no date: p.9).

The *Planning Workshop* was a success[24]: the Senior Natural Resources Advisor of DfID attended it and not only because he had funded it, but most importantly because he was going to fund more of the Alliance's undertakings. In fact, from a Draft Report compiled by Martin Adams in August 2003, we learn that in 1999 DfID provided KShs. 17 million to cover a three-year program, thereby securing the establishment of the umbrella organization, including a one-person secretariat located at the RECONCILE offices in Nakuru (DfID, 2003: p.13). This grant followed on from the recommendations of the 'Output to Purpose Review of DfID Support to the Kenya Land reform Process' (DfID, 2001), another report that M. Adams had compiled earlier on. A national

23 In view of the WB CAS, it was proposed that research work be commissioned from the alliance on the impact of land policies aiming at individualization on land holding, and on poverty levels, in order to prepare the platform to engage the government (PALMER/ILKLC/02.07.1999): in putting up some content, the alliance would have found the fundamental purpose of its lobbying activity, although this kind of 'exercise' was definitely orienting the framing of problem-based evidence that the Alliance was to gather.

24 In an email P. Palmer wrote to his colleague in Oxford, he expressed positive feelings about the workshop, about the commitment of the organizations participating, and also noted that Adam Leach had left a 'good deal of resentment' about the way he had approached people and sought to involve them in this initiative, whereas Mohamed Elmi's way was highly appreciated, and actually harvesting results (PALMER/IAN2/19.08.1999).

Coordinator was hired in the person of Odenda Lumumba, activist and former employee – Program Officer-Advocacy – in the KHRC. O. Lumumba is a relevant character to the evolution of the organization: politically, he had actively participated in the struggle for democratization in the 1980s, when the priority was liberalization of the political system, thus experiencing the brutality of Moi's regime, which employed incarceration as a prevalent response to political dissidence[25].

To sum up, DfID's contribution was crucial in materializing the physical and programmatic establishment of the umbrella organization, primarily a creature of Oxfam, conceived in strict association with key Kenyan individuals. It was in fact an important piece of consultancy commissioned from Law Professor Okoth Ogendo, delivered on 30 September 1999[26] that actually spurred DfID involvement in the land sector and commitment in the agenda for land reforms in Kenya. *Land Issues in Kenya. Agenda Items from the 20th Century* (Okoth-Ogendo, 1999) is a comprehensive appraisal of critical land developments in Kenya, divided into five main areas systematically dissected in a first assessment of the issues at stake (*developments*), followed by an analysis of the socio-economic and political *consequences*, and ultimately by the *challenges* that might hinder their redress.

This piece of consultancy is indeed one (the first) of the cornerstones informing the content of land reform in Kenya, though not usually acknowledged in official texts. The last section of the report seeks to answer the question of the *Prospects for Reform*, which Okoth-Ogendo dismembers in several questions: first, about whether there is a *need* for land reform, the political (especially volatility of certain regions in terms of conflicts), economic (deterioration of agricultural production and of the land itself), and social (disequilibrium in cultural structures) dimensions of the *consequences* presented above exemplify the actuality of such need, not only in terms of policy, but also of legislation and institutions. Secondly, and most importantly, in regards to whether there is a *momentum* for land reforms, Okoth-Ogendo lists three reasons for which he believes one can be optimistic: one consists of the peripheral pressures coming from the regional context as virtually every country is undertaking or has recently gone through such law revision; other pressures seem to come from internal initiatives, such as civic activism for forest protection (the Wangari Maathai movement), the muted voices of land professionals advocating to bring sanity into the sector, and the recent establishment of the Kenya Land Alliance.

The overall outcome of this consultancy is based on the DfID's cause for action. The latter was indeed encouraged to participate in building land advocacy networks in Kenya: it is thus possible, if not probable, that the consultancy itself had been commissioned from Okoth-Ogendo to inform the decision on whether or not to engage in land advocacy in Kenya. In two distinct subsequent reports (DfID, 2001; 2003) extensive reference is made to Okoth-Ogendo's assessment and there is reason to believe that this consultancy ultimately made a case for DfID to fully support a "radical transformation of land relations through comprehensive reforms", especially by warning the UK agency that "[t]he longer the land claims and territorial disputes in the Rift Valley, the Coast Province remain at the margin and between the pastoral and mixed farming areas remain

25 Lumumba had been an undergraduate at Makarere University in Uganda; in the 1990s he had moved to the Rift Valley to teach religious studies, but it seems that his fervor and militant soul cost him imprisonment as he was 'preaching' against the land-grabbing phenomenon: he spent four years in prison for being a 'rebel' and when he was eventually released towards the end of the 1990s, the only job market relatively accessible was that of the NGO sector, one (Odenda Lumumba intervention at Makoro's roundtable in Oxford, 19.04.2018).

26 I had the chance to access this document courtesy of Martin Adams, who I wish to acknowledge and thank for his precious contribution.

unsolved, the more volatile will these regions become" (DfID, 2003: p.17). Okoth-Ogendo's words sound like a self-fulfilling prophecy when he writes with regard to 2002 elections that "major political transition is due to take place", and also when listing the drivers of reform, which for him are the poverty rates and the "chaotic tenure arrangements [that] are creating a great deal of tension and insecurity". His conclusions were that land reform was "evident and urgent'" on the legal as well as institutional level (p.18). In this sense this report was surely successful: only a few weeks after its completion, another initiative was added to the list of good reasons for being optimistic about building reform momentum in Kenya: this will be tackled in the part that deals with internal political developments and the way they were seized by the reform movement.

2.3 NATIONAL POLITICAL DEVELOPMENTS GALVANIZING THE TRANSNATIONAL NETWORK

In November 1999, the transnational network became enthusiastic about the appointment by the then President of Kenya, D. arap Moi, of a Commission of Inquiry into the Land Law System of Kenya (Gazette Notice No. 6594, 26th November 1999), soon to be baptized *Njonjo Commission,* after the name of the Commission's chairman, Charles Njonjo. On 24 November, the headlines of the Daily Nation announced that *Lands boss retired in major shake up as Njonjo heads inquiry* (Mugonyi, 1999). The 'major shake up' referred to the political earthquake that actually shook the Ministry of Lands and Settlement: the Commissioner of Lands (who had served in this function for seventeen years), along with the Directors of all the major departments (Survey, Adjudication and Settlement, and Physical Planning), was discharged and substituted. The same fate awaited the Chief Land Registrar, and the Director of the Kenya Institute of Survey and Mapping.

The higher top-ranking officials of the Ministry of Lands were used as scapegoats for the long-standing irregularities in the administration of land. The President himself declared to the journalists that the Commission had been appointed to 'avoid a potential explosion', while the Minister explained that the review of the land laws was necessary given the obsolete nature of the current legal framework inherited from colonial time (*Idem*). Interestingly enough, among the key issues to be reviewed by the Commission, almost entirely pertaining to the field of land administration, the Minister also alluded to tenure issues by anticipating that 'customary law will be incorporated into statute law' (*Idem*). In fact, the report issued by this commission of Inquiry was bound to become the first document in Independent Kenya, issued from the circle of the executive, concerned with the question of 'the commons', to which I will indeed return.

This news set in motion the transnational network of individuals that had been working towards this momentum: suddenly an opportunity was materializing in an unexpected way. As indicated above, prominent Kenyan personalities had excluded the possibility that the incipit of the reform process would result from the government. In one email correspondence following this appointment, an international land expert expressed the opinion that the Commission only amounted to a token gesture 'to keep land off the agenda', and also that the end result may be no more than 'legal tinkering' (PALMER/LIZVIEW/24.11.1999). This perception continued to be dominant within the transnational network until the publication of the Commission's findings and recommendations, expected by the end of 2002. In fact in 2001, while the Commission was still undertaking its inquiry, expectations were very low: in the DfID Report compiled that year, one can read that the general opinion on the so-called *Njonjo Commission*, was that it 'provide[d] a convenient means in an election year for the government to divert criticisms arising from its mishandling of land issues' (DfID, 2001: p.3). This notwithstanding, Martin Adams also wrote that the Njonjo Commission, as much as the CKRC, was a golden opportunity for the Kenya Land Alliance to spark public debates on salient land reform issues: finally the advocacy platform

created amidst fears of no policy target to work towards had a great opportunity to gain relevance by contributing to the Commission's outcomes via forwarding solid evidence-based content.

In fact, in the Terms of Reference of the consultancy evaluating DfID support to the Kenya Land Alliance[27], DfID's goals are outlined and clearly geared towards the advancement of the reform agenda:

> *1.2 This program is designed to contribute to developing dialogue and debate in Kenya on land tenure and administration with the objective of building pressure for changes in land policy, legislation and institutional arrangements.*
>
> *1.3 The purpose of the program is to catalyze and facilitate reform of land policy, legislation and institutional arrangements.*

In the first Draft Report of the said Output Review (DfID, 2001), Martin Adams noted that the Alliance's personnel was 'severely over-stretched', and that to achieve the objectives they assigned themselves in 1999 (see above: Objectives of the Kenya Land Alliance), the capacity of the organization needed to be expanded (p.6). In fact, member-organizations were not always effective: only a handful was actively contributing to the debate on land reforms (p.7). The Report recommendations promoted the expansion of the organizational structure by hiring more personnel and providing the Alliance with its own office (p.8). Moreover, to catalyze the work of the Alliance and its members, Martin Adams suggested organizing a *National NGO Conference on Land Reform and the Land Question* that would be instrumental in systemizing ideas around the issues at stake, notably by taking stock of previous experiences of land reforms in the region, presenting research findings that could guide the formulation of alternative policy solutions to land issues, and also by acting as a deliberative forum that would adopt recommendations to be subsequently forwarded to the government[28] (*Idem*). This seemed the perfect formula to organize thoughts and action with a view to formulating *submissions* to both the Constitutional Review and the Njonjo Commissions.

M. Adams pointed to similar events being organized in South Africa and Namibia prior to and during respective land law reform processes (*Idem*): although having reserves on the current strength of the Kenyan Alliance, he concluded the report on a rather positive note:

> *There can be little doubt that the KLA, as presently resourced, is a very fragile institution. Its operation depends on one individual. The KLA, when compared with the National Land Committee in RSA [Republic of South Africa], the Uganda Land Alliance or TriPARRD in the Philippines […] is very small beer indeed. But these are early days. This review makes proposals for improving KLA's organizational capacity and the potential impact of the project.*
>
> *DFID's support to the Kenya Land Alliance comes at a critical stage in the land reform process, i.e. at a time when the views of civil society are being brought to bear in an unprecedented manner. With modest assistance, civil society will be better able to contribute to changing land policies that have led to the marginalization of the poor in both rural and urban areas (p.9).*

27 The previously mentioned 'Output to Purpose Review of DfID Support to the Kenya Land Reform Process' (DfID, 2001).

28 In the Annual Report of the Kenya Land Alliance of 2002 it is noted that the reason underlying the organization of such a gathering laid in the preoccupation that the Njonjo Commission could limit its recommendations to reforming the existent legal framework barely to upgrading land regulations, thus actually resulting in a smokescreen for displaying government's commitment to change via exposure of a few corruption cases with no impact on the real issues at stake, namely 'the perpetual vulnerability' of both the urban and rural poor (KLA, 2003: p.7).

DfID aid disbursement in Kenya was tied to the IMF decision of suspending financial support to the country unless it embarked upon the reforms the government committed to in 1998/9: so, while pending resumption of aid to the government, DfID assistance was re-directed to civil society, deemed an actor capable of drawing attention to the plight of the poor (pp.16-17).

Thus, on the recommendations of the 2001 Output to Purpose Report (OPR), DfID funding to the Kenya Land Alliance was further increased and the proposal of holding a National NGO Conference endorsed. The Conference actually took place between May 21 and 23 2002 in Nairobi, and it appears to have been very influential on the research endeavors that both the CKRC and the Njonjo Commission were undertaking. This statement is upheld by both the views of the Land Alliance's Coordinator, O. Lumumba, who, when interviewed on 8 July 2014, confirmed that in 2002 the Alliance was pretty busy in feeding into both processes by submitting memoranda. M. Adams also endorsed those views in the Project Completion Report compiled for DfID, when concluding 'that the project has resulted in the establishment of an effective land advocacy network that, in terms of its prescribed outputs, has usefully contributed to both the Njonjo Commission and the CKRC' (DfID, 2003: p.14).

Eventually, the Kenya Land Alliance addressed a proposal to DfID for the organization of the said Conference: here an attempt is made to define the "land question" in Kenya by dissecting it in five key points, clearly drawn from Okoth-Ogendo's land issues appraisal. Then, as a conclusion of this assessment, the aversion of successive governments to confront and dispute post-Independence land tenure arrangements is deemed to be the "overarching problem", as "[t]he government's response has been piecemeal, rather than the development of an integrated land policy and land reform" (p.2).

Even though the Njonjo Commission convened hearings and called for submissions from the public to be able to air their views and grievances, in the Conference Proposal it is argued that this process would be dominated by politicians and that legal aspects of the Terms of Reference of the Commission might not allow local grievances to emerge and be listened to (p.2): thus the necessity of feeding into the Commission's investigation. So, since this early stage the Kenya Land Alliance positions itself as the representative of 'local communities' in decision-making. In fact, *mobilize a broad participation* is among the general objectives of the National Conference along with the achievement of *consensus* on the issues at the stake, thus informing policy recommendations, hopefully with a view to attaining a comprehensive program of land law reform.

The content of the Proposal also capitalizes on the suggestions contained in the DfID report compiled by M. Adams (DfID, 2001): the role of this DfID consultant appears pivotal. Convergence on the importance of Adams' expertise is also apparent in O. Lumumba's version of the story:

At that time, KLA was basically trying to find its niche and in the same 2000-2002, I think just 2002, we managed to bring together what we called the first National Land Reform Conference, funded by DfID […]. So at this material time, two things were really going on, we were feeding into the reform process, and as doing that, fundamental questions were arising: what was it that we really needed to do to fix the land issue? People are very clearly that, 1) we didn't have a land policy to guide the country […]; 2) the land laws were basically typically colonial pieces of law […]; 3) the institutions that were governing the land […] were basically perpetuating what we call local land grabbing, engagement of illegal, irregular allocation of land, and people were very uncomfortable about it. So we had a beginning saying, we need to address this. So it is within this thinking that the issue of doing the national land policy emanated. So, the question was at that material time how do we go about this, I was running the only land project of DfID and we were discussing this with DfID plus some of the advisor, then there was Martin Adams that represented DfID as an advisor, he came in here and we

were trying to discuss how do we go about this thing, everybody says policy, but how do we start a policy? (Interview with O. Lumumba, in Nakuru, 08.07.2014)

How to start a policy? The most immediate answer to that question was to finely frame the problem by producing knowledge, evidence, facts: that was the overall aim of the conference, to produce content, i.e. research, position papers, and regional reports voicing the people's views.

The KLA 2002 Annual Report (KLA, 2003) praises the 'excellent working relationship' with the CKRC Secretariat; DfID 's funding is acknowledged when clarifying that it is in the wake of the 2001 external review (Martin Adams' appraisal) and subsequent decision of further support to the KLA, that the organization engaged in the constitutional and law reform process (p.iii).

With the advocacy base thus informed, the reform momentum reached its climax in the first half of the 2000s. 2002 was the year of many turning points that catalyzed the reform process. In May, the National NGO Conference organized by the KLA took place; in September, the first Constitution Draft was published (called *The People Choice*: CKRC, 2002a); in November, the Commission of Inquiry into the Land Law System finalized the work (Njonjo report), though the report wasn't made available immediately; and, in December, the much awaited and coveted political transition finally came about with the KANU, the dominant party since Independence, being electorally overthrown by the opposition coalition.

Starting with the *National Civil Society Conference on Land reform and Land question in Kenya,* whose report (KLA, June 2002) I accessed courtesy of Martin Adams, who not only attended but was pivotal both in *designing* the conference format and in articulating deliberations and recommendations. The conference was organized following a format of proceedings that is going to become a pillar of the subsequent policy formulation that I will call the *working-group-format*, supported by the *logframe* instrument. The managerial instruments and standards prerogative of the development world (*aidland*) are already mobilized and applied in this forum to facilitate exchange. Firstly, a number of erudite presentations set the stage for further reckoning and resolution on proposed policy principles, subsequently deliberated by the conference participants, divided into ten groups[29].

The Conference was attended by high-ranking personalities: the British High Commissioner, Paul Harvey and the CKRC chairman, Professor Yash Pal Ghai, were both in attendance and this feature undoubtedly attracted media attention (Mbaria, 22 May 2002), even though government officials actually deserted it, as noted by Y. P. Ghai in his keynote address (p.14). He noted in fact that such absence despite invitation was very disappointing; interestingly, he acknowledged NGOs' and think tanks' commitment in informing the work of the Constitutional Commission[30]; he recalled the importance of including land issues in the constitutional framework and hinted at the fact that the 'land problems' in Kenya basically stemmed from the failure to convert communal to individual ownership, and generally dismissed the trusteeship model by asserting the urgency of *restoring power over the land to the people* (p.15); eventually, he admitted that power relations are nested in land systems and that to ensure social justice *redistribution* needed to be taken into consideration (*Idem*).

29 The working groups were divided into the following themes: Women, Land and Property rights, Redressing of Historical Wrongs and Past Injustices, Pastoral Land rights, Public Land Management, Environmental Management, Land Institutions/Delivery Systems and Land Dispute Resolution, Land Use Planning.

30 He particularly referred to the 'Kenya chapter' of the International Commission of Jurists, the KLA, the Institute of Economic Affairs, the Kenya Institute for Public Policy Research and Analysis, and the Tegemeo Institute of Agricultural Policy and Development of the Egerton University (Idem).

From the contributions of both the *experts* and the *stakeholders* comprising the membership of the working groups one can explore what Kenyans refer to as the *emotive* dimension of land issues: it is very instructive to report here some of the reflections and policy propositions advanced at the conference, which indeed reflect the multi-layered complexity and politicization of the historical developments I attempted to illustrate in the first part of this dissertation, and that have possibly led to the obfuscation of rationality in certain instances. For instance, within the panel on land tenure, an academic suggested that to address *historical wrongs* 'all land ought to revert to their ancestral owners' (p.22), to which the panelist speaking after him reacted by arguing that such a suggestion was not as simple as alluded to and eventually framing the approach as 'unworkable' (p.22). Similarly, in the working group on the same subject, one of the recommendations was to 'investigate what boundaries existed prior to the colonial period', and also that 'those occupying land that is not originally their own should pay an occupancy fee to the indigenous people'[31] (p.36). As I shall illustrate in the next sub-chapters of this dissertation, issues revolving around historical land injustices and ancestral claims have been the most divisive and *contentious*, mainly because of the difficulty at times of remaining aware of the complex multiplicity of historic, political, cultural and environmental strata informing land claims.

Finally, the policy solutions proposed were actually "moderated' and the Report of the Land Conference stemming from the three-day consultations, presentations, and discussions became very influential, even within the Ministry of Lands: in fact, from the account of one key officer, we learn that the said Conference Report reached the corridors of the Ministry and actually successfully sowed the seed of policy innovation. Below is the account of one of the Lands Ministry officers who formed the team spearheading the National Land Policy Process in the 2000s:

[…] even before the Njonjo commission civil society had met and we had a report of the problems in the Land sector and the major one was to do with the administration, particularly the administration of land was in the hands of one person, this is not good and things have to change, plus many other kind, like the customary has to be recognized with a number of problems within the coast, the squatters' issue, so we started […]. (Interview with Lands' Ministry officer, in Nairobi, 06.05.2014).

The Land Policy Principles, a major output of the Land Conference, are summarized in the matrix below and sorted by fields of pertinence: these were also attached to a policy brief that was produced at the early stage of the policy process, and given the same prominence as the Njonjo Commission's recommendations and the CKRC land framework, extrapolated from the Report entitled *The People's Choice*, published on 18 September 2002.

Land Tenure	Land Administration
Vest all land in Kenya in a novel institution, the *National Land Commission* that will act as a trustee for the people of Kenya;	Put in place a novel institutional infrastructure with the *National Land Commission* at the center and the *District Land Boards* as its devolved bodies:
Redefine tenure categories: Private land refers to land *legally acquired* either via first registration or transfer;	The state is required to play an active role in: Guaranteeing *equitable* distribution of land via establishment of a *statutory land fund*;

31 A similar proposition was advanced in regard to public land management, whereby it was recommended that 'protection, preservation and control of forests (catchment areas etc.) be under the community that has ancestral right to that particular area/region' (p.44).

Customary land refers to all *un-adjudicated* and *unregistered* shall be held under customary tenure; and, trust land irregularly acquired shall be reverted to the Land Commission. Public land refers to un-alienated public land that should be *held* by the Land Commission, used *only for public purposes,* and in case of irregularly privatized public land this is to be reverted to the Land Commission as well.	Regulating directly and indirectly land markets; Providing adequate funds for implementation of land reforms.
Ensure equitable access to land to Kenyan citizens by redressing *Historical Land Injustices:* individuals and communities victims of such injustices (*after 1895*) shall be compensated either via restitution or other means of redress	Redress of historical land injustices by a novel institutional, conceived as an organ of the Land Commission, the *Land Claims Court,* a permanent body having to undertake investigations and implement redress provisions.
Securing women land rights via co-ownership of spousal land, deemed the principal source of livelihood of the family.	Expropriate land only in accordance to the principle of *public interest,* and prior to just and equitable compensation that shall take into account the historical background of land acquisition.

The emphasis on equity and social justice is remarkable, as is the proactive role attributed to the state for redressing inequalities and the wrongs of the past, while at the same time the historical land policy narrative centered on privatization of the land is controverted by provisions on tenure providing for customary land rights to govern unadjudicated land.

Besides these positive developments, no thorough commitment to reforms seemed to materialize until the December presidential election, when the hegemonic KANU party, which had controlled Kenyan politics since the 1960s, was dismissed by an alliance of different opposition parties, including a faction coming the old guard, made up of KANU dissidents, amongst whom Mwai Kibaki, a historical figure of the party, who stood out as leader the opposition coalition. The victory of the National Rainbow Coalition (NaRC) marked the end of forty years of the KANU regime and was indeed instrumental in institutionalizing the land reform agenda, and more particularly the reform narrative that had been building up and advanced by the transnational network. Not only had *land reforms* been a major platform of the NaRC electoral campaign, the so-called *reformist wing* of the government coalition also fundamentally contributed to creating a conducive environment for initiating systematic collaboration with donors and NGOs. In fact the most relevant change was not really the advent of opposition parties to power, rather the new entry into politics of recruits by opposition parties of eminent personalities from civil society and academia, partly as a result of the merging of the two political forces during the 'struggle for constitutional review', of which the so-called *Ufungamano Initiative* is a good exemplification (see *inter alia* Kanyinga, 2003).

Clamor about NaRC victory was soundly echoed in the 2003 KLA Annual Report, which construes it as a 'landmark election' promising 'widespread reforms', and the same newly appointed Ministry of Lands and Settlement is initially put under a positive light as the organization 'secured a first appointment' inaugurating collaboration with government (KLA, 2004: p.iv). The KLA was in fact almost immediately involved in the plans of the new 'government reform agenda' and thus via the appointment of its staff in various initiatives flagged off that same year: the first and probably most importantly, the *Commission of Inquiry into Irregular and Illegal Allocation of Land*, chaired by Paul Ndung'u (who had also been part of the Njonjo Commission), and of which

Odenda Lumumba became a Commissioner. Also, in the wake of the Njonjo Commission recommendations, a *Technical Working Committee* was appointed, which was in charge of mounting *Capacity Building of Land Control Boards and Land Dispute Tribunals*[32]. The KLA was associated with the process, taking part in the Ministry of Lands and Settlement *Stakeholders' Forum on Land Policy Development Process*, while sitting on the Technical Committee on Land, Property, other Natural resource and Environment of the Constitution Review Process that was going to be resumed (p.3).

However, although the beginning of the year 2003 was encouraging as starting under the best auspices, the Annual Report notes that by the end of the year 'little progress has been made to the much promised National Land Policy development process', which remained at the preparatory stage (*Idem*). It is only in the early months of 2004 that the policy process actually commenced, although as we shall see in the next section negotiations with *development partners* had been ongoing since 2003.

Taking all these developments into account, it could be argued that the 'regime transition' unblocked the political situation actually rendering possible the initiation of the reform process: that the NaRC victory was a decisive factor in *setting* the *agenda* for land reforms, which according to J. W. Kingdon (1984) refers to the process of narrowing down 'the set of conceivable subjects or problems to which governmental officials, and people outside the government closely associated with those officials, are paying some serious attention at any given time' (pp.3-4). In fact, as the list of initiatives and commitments in which the KLA was involved during 2003 demonstrates that newly elected Kenyan government officials actually began to pay more serious attention to the land reform issue, thus prompting the *opening of policy window*, 'the opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems' (p.173).

However, as many of my interlocutors have pointed out, the kick start of the reform process cannot be exclusively linked to the advent of the NaRC government: while the new administration undeniably represents Kingdon's 'policy window', the latter has to be understood more as a *result* than a *trigger*. As I have shown throughout this section, a number of individuals and organizations (the transnational network) had been preparing the ground and significantly contributing to increase pressure on the Moi administration, actually achieving significant outcomes such as the appointment of the Njonjo Commission. In addition to this, public debates on land issues mirrored in the daily newspapers had been painting a grim picture of the governing class, both of elected leaders and territorial administrators. The destruction of forests and related land grabbing had been hitting the headlines of newspapers throughout the years preceding the elections[33]. The perceived message was that the Moi government had failed to protect Kenyans' most cherished heritage, land. Forestlands in particular had been extensively plundered (see Klopp, *op. cit.*, Lynch, *op. cit.*), the misallocation of plots to provincial administration's high-ranking officials was

32 This was more of a capacity building program to support the Land Control Boards and Land Dispute Tribunals, coordinated by an Inter-Ministerial Working Committee under the auspices of the Kenya School of Law. In the 2006 KLA Annual Report, this program is said to be continuing 'on low key': a handbook is supposed to be published and should result in 'up-scaling the performance of the land institutions' (KLA, 2006: p.11).

33 See *inter alia* Daily Nation: 12.01.00 ('For how long will forest plunder go on'); 29.02.00 ('Forest land given out'); 24.04.00 (Surveyors descend on forest land: residents worried about conservation); 31.03.00 ('Prime forest land sold off'); 02.06.00 ('PC stops allocation of forests'); 22.06.00 ('Forest excisions a national problem'); 29.06.00 ('Forest grabbed: Wangari Maathai'); 12.07.00 ('Leaders in Molo accuse government to give out forest to squatters from outside Nakuru'); 14.07.00 ('Spare forest, state urged').

the order of the day in newspapers: land issues had indeed tainted President Moi's name in the eyes of the people.

Below, two pertinent comments from two actors of the reform process, who are both members of the Institute of Kenya Surveyors, alluding to the 'promised engagement' though formulating the consequential nexus between the realization of the reform process and the advent of the NaRC government as a 'natural fact' free of any extraordinary or praiseworthy elements.

[…] in trying to oppose the then government, the actors that then formed the government were very vocal in saying 'we shall make sure that we address these problems that people keep talking about'. So, it wasn't too difficult to then prod them through a consistent voice […] it wasn't too difficult for them to then make that commitment to formulate a National Land Policy, because it was like fulfilling part of what they had been telling to people that they would address the land question […] that's how it started, a bit of luck? because it was a transition, actors moving from the past who are now acceding to government and taking advantage of their ascension to government to then say 'we shall fix the land question now that we are in power'. (Interview with I. Mwathane, former director of Institute of Surveyor of Kenya, in Nairobi, 05.06.2014).

[…] anybody coming into removing the former Moi President could have best sold his manifesto or his campaign on a land reform platform, and Kenyans were looking forward to land reforms so that the issues of displacement, land conflicts, squatters in rural and urban areas could be a sign of the past (Interview with land surveyor involved in the policy making, in Nairobi, 29.04.2014).

A similar opinion is also expressed by a Kenyan who has been working for almost fifteen years in the Sweden International Development Agency, one of the main funders of the policy process: what is striking in his answer is that, while acknowledging the significant facilitative function played by the new administration, he also adduces a number of blatant facts demonstrating the deliberate strategic reasons behind the policy agenda:

F: The coming into power of the NARC coalition was a facilitative factor?

J: Definitely, I think that was the main thing. Of course, it was a campaign item, it was a priority in the campaign that they were going to do land reform, and of course it was easy to campaign against Moi on the land issue, so they say that, and of course even some of the guys were big landowners but, anyway they genuinely wanted to do land reform, I think so and the Minister had clear instructions, actually in the Economic Recovery Strategy, land reform […] got into that strategy, so basically formally they put it on the table. So in a way, the change of government was very big facilitator. I think it speaks about the politics of Kenya in a way, that agenda wouldn't necessarily be on the table if it was just Kibaki, but since it was a coalition, people had diverse interests and land was one of the key interests, of course complaining from a lot of regions, but it had to be put on the table because it was a coalition (Interview with SIDA program officer, in Nairobi, 27.06.2014).

The NaRC coalition's campaign had been extensively based on the notion of rehabilitating public services by restructuring and bringing sanity: the accomplishment of constitutional reforms was one of the campaign's tenets, along with restoration of 'good governance' by fighting corruption (see Raila Odinga, 15 October 2002 in *Daily Nation*). The coalition government promised that within the first one hundred days of their government, all institutions envisaged by the new Constitution would have been put in place (Mwi Kibaki, 14 November 2002 in *Daily Nation*). Boosting agricultural production was among the coalition's priorities, especially by putting policies and laws in place that would address the problem of 'shrinking land among small-holders': the emphasis was on obviating citizens' 'basic needs', by promising 'a comprehensive

health insurance scheme', the creation of a National Housing Development Fund and 'free compulsory education' (*Idem*).

Besides the NaRC manifesto, other candidates, who were actually potential post-electoral and then also de facto allies of the NaRC, were able to push framing further, and did not hesitate to touch on the *ownership issue,* the most frightening, especially given the resettlement programs that were being implemented in the not-so-faraway Mugabe's Zimbabwe, which were also being debated in Kenyan dailies ('Should we try to emulate Zimbabwe?' in Daily Nation, 12 April 2000….). In 2002, James Orengo[34], who had been in politics since the 1980s and had been elected in 1992 and 1997 on a FORD-Kenya ticket, ran for presidency of the Social Democratic Party (SDP); this is how he presented the land question in Kenya and the land reform agenda that his party would eventually implement once in power:

Land Reform:

Twenty million Kenyans live in rural areas where cultivable land is extremely limited: only 13 per cent of our total land area is arable, 7 per cent is marginally so while 80 per cent is arid. Eighty per cent of our rural families live within arable and marginally arable lands where 95 per cent of the parcels are smaller than four acres while a few estates; no more than 3,000, contain about 5 million acres. Large chunks of these estates are under-utilized hence contributing to poverty and scarcity of land. We will undertake land reform with a view to settling the thousands of rural families in need of land for housing and cultivation. Government will purchase all large estates in high potential zones, break them up into small-holdings suitable for peasant settlement, and create village-level committees to identify and allocate the holdings to the needy (James Orengo, 5 December 2002).

J. Orengo's score was eventually too low for the SDP to enter Parliament, let alone for him to win the presidential seat, however he eventually joined the NaRC coalition and was named Minister of Public Works and Housing for the first term of the government (2002-2007), while during the second term (2007- 2013), he was actually appointed Minister of Lands, though whether he would accomplish such an agenda, was not to be taken for granted.

Overall, the victory of the NaRC government and the emergence onto the scene of new actors such as Kimunya gave hope to donors, Kenyan NGOs and probably to the citizens too. On the DfID side, since the early months of 2002, the British aid agency had been revisiting its country strategy: by mid-year, as strong emphasis was now put on working with the Kenyan government and in collaboration with other donors, especially the biggest multilateral donors, namely the WB, the IFM, and the EU, to achieve harmonization of programs and finances, somehow anticipating the prescriptions of the *Paris Declaration* (2005), (PALMER/TELECONWITHLAMBRECHT /06.02.2002). By the time of the 'change of guard', DfID was very keen on lobbying the government and, more particularly, the then Minister of Land, Amos Kimunya, who was relatively young and on good terms with the DfID bosses. His background was not that of a politician: an accountant by training, he had served as chairman of the Institute of Certified Public Accountants of Kenya and had also worked as matrix consultant for DfID. Thus, he must not have been averse

34 Orengo became well known for his fight against unjust rule and spent several years in detention as a result. He was, together with six other MPs, part of The Seven Bearded Sisters. Orengo, along with Michael Kijana Wamalwa, Kiraitu Murungi, Raila Odinga and Paul Muite, was among the Young Turks who, along with Jaramogi Oginga Odinga, Masinde Muliro and Martin Shikuku, brought about what was termed Kenya's second liberation, they formed the formidable Forum for the Restoration of Democracy (FORD), a vehicle that nearly pushed the KANU ruling party out of power in the 1992 general election. He is a founding-member of Muungano wa Mageuzi (Movement for Change), a cross-party lobby group. Orengo was elected as an MP for Ugenya Constituency as a KANU candidate in a by-election in 1980. He became the youngest MP at age 29.

to relating to donors, which seemed a determinant factor in getting his commitment to closely collaborate with them for the design and actual making of land reform.

Indeed, for the UK aid agency, A. Kimunya represented a key asset, which is inferable from Robin Palmer's notes from a meeting he had with the Senior DfID Advisor in mid-2003: by the end of July 2003, a trip to the UK had been scheduled for the Minister, his Commissioner of Lands and the Deputy Director of the Department of Physical Planning (future Coordinator of the so-called National Land Policy Formulation process) to meet the Scottish Registry and Ordinance Survey (PALMER/NOTES/July 2003). They were part and parcel of the team that would spearhead the land law reform process: the idea was to expose them to new thinking, to global experiences. Basically, they were going to be instructed on what to do (Interview with Palmer).

However, from other notes R. Palmer wrote at a meeting with the Kenya Land Alliance's Coordinator, we learn that the latter was rather disillusioned: confidence in the capacity of Amos Kimunya to extricate himself from the complexity of land issues within and outside the Ministry of Lands was meagre. Since the beginning, he appears to only have had eyes for technical aspects of the reforms: the digitalization of the registry was his hobbyhorse (PALMER/MEETINGS JULY 2003). Moreover, it is striking that Lumumba tells Palmer that neither civil society nor the government have the capacity for writing the land laws: he recognizes that civil society has no experience in proposing alternatives, as it is only used to protesting and being antagonistic (*Idem*). In Lumumba's words much depends on bilateral donors' attitudes, and he seems to be worried that civil society may become a collateral victim of DfID collaboration with the government (*Idem*).

The first meeting of *development partners* with the high ranks of the Ministry of Lands, with a view to initiating policy-making, took place in November 2003. This meeting led to the formation of the so-called *Development Partners Group on Land,* officially comprising fifteen aid agencies, and eventually chaired by UN-Habitat: government-donor negotiations and the launch of the process is tackled in the next section, which attempts a comparison of the formulation processes of the National Land Policy and of the Constitutional Chapter on Land and Property, both of which took place under the new regime.

2.4 MULTI-DIMENSIONAL FACTORS INFLUENCING AGENDA SETTING

Overall, the argument on the *agenda setting* of 'land reforms' in Kenya speaks in favor of a *casual convergence* of multiple social, economic, political, organizational, transnational and very localized dynamics that concurrently informed the opening of the 'policy window'. However, casualty doesn't mean fatality, but *serendipity*, 'the occurrence and development of events by chance in a happy or beneficial way' (Oxford dictionary). However, *a posteriori* it is likely that actors may read events as unfolding in an ineluctable manner, as they were meant to be: below, two narrations that actually echo the idea of irresistibility and inevitability of land reforms:

F: Was the NARC government important in getting the process started?

A: I wouldn't say so. As in the revolution, there are factors that boil and push a process, […]. I would say things were boiling; land issues were boiling in the country. It was inevitable. It had to come. If you look at the 1990s, there is a lot of political movement, but this political movement was driven again by the people. Civil society was quite important in this, speaking and representing the voice of the people. I wouldn't say that it was this party who did it, the NaRC, anybody, for me, in terms of politics reform and change, sometimes even if you want to resist change, it comes and you can't resist it, so, for me, what brought in the land policy at that time, because so many conflicts, you

may have read it, so many commissions were there, Akiwumi, Njonjo, Ndung'u, all this was representing voices of people protesting and therefore no government could have resisted, or could have ignored it […]. (Interview with A. Rachier, legal drafter, in Nairobi, 10.07.2014)

This commentator is a lawyer, head of a well-known cabinet of lawyers in Nairobi, who had also been involved in the construction of the Land Policy throughout the policy process and actually drafted the first land laws in application of the Constitutional provisions on Land (though he did not participate in the Constitutional Conference). Strikingly, international actors and aid-driven motions are absent from his narration, arguably because of the embeddedness of his experience in eminently domestic or 'in-house' processes, such as the political economy of ministerial appointments of legal consultants for taskforces, commissions of inquiry etc. On the contrary, given the NGO background of the following commentator (Acting Deputy at the KLA at the time of the interview), she is arguably more likely to take into consideration international and sub-regional factors that triggered land reform processes in Kenya.

The acknowledgment of multifactorial influences on Kenyan policy-making is inspiring, as is the metaphor she uses (of an 'outbreak' or 'disease') to describe what she perceives as the *breaking in* of land reforms, which, while conveying the idea of irreversibility, equally illustrate the domino effect that seemingly hit Kenya.

These two accounts combined seem to elucidate all elements that, by converging, resulted in the opening of the 'policy window'. The latter corresponds to the advent of the NaRC coalition to power, as it was this government that, by responding to domestic and international pressures mirroring land-based conflicts in the country, started collaborating with development partners in *designing* and then actually *implementing* the so-called National Land Policy Formulation Process. The '*joint* effect', 'complex *combination*', or 'multiple causation' of factors responsible for an item or problem becoming a government's priority is one of the main features of John W. Kingdon's theorization of the *agenda setting* (*op. cit.*: pp.79-81): the heuristic goal is to find out *how* and *why* subjects and proposals emerge in the first place. This conceptualization calls for an analytical distinction between the shaping of the *agenda* and the specification of *alternatives*, i.e. policy solution related to a problem, which Kingdon suggests studying by 'tracking the progression of ideas', or 'the source of initiative', which he ascertains by distinctly describing the *processes* and the set of *participants* that is important in these (p.16). A further specification concerns the 'processes', which are understood as *streams* that develop independently, unrelatedly to one another until they are *coupled,* i.e. until the combination of *solutions, problems,* and *participants* occurs at *critical junctures,* thus producing agenda setting (p.92).

With regards agenda setting in Kenya land reforms, I believe that *domestic pressure* is the key factor that provided a fertile soil for the transnational network to effectively operate and for the ideas it generated to take root: a number of commentators have indeed pointed to the longstanding roots of the *land reform process*, recalling the extent to which the 1980s and 1990s were crucial years for structuring of socio-political demands for an overhaul of land systems in Kenya (Interviews with A. Rachier, *Ibid.*; with S. Ouma, a National NGO director, in Nairobi, 19.04,2015; with a former KLA program officer, in Nairobi, 15.06.2014). However, one commentator has been particularly inspiring in pointing to the intimate link between land rights and democracy. Dr. Winnie Mwangi, a surveyor by training, participated in land policy-making as a representative of the Institution of Surveyors of Kenya; she is also a renowned scholar, a lecturer at the University of Nairobi's School of In-Built Environment, of which she has recently become the Dean. When I interviewed her the first time (29.04.2014), she clearly though accidentally identified what J. Kingdon calls the *problem stream*, 'the inexorable march of problems pressing the system' (1992, p.17): in doing so, she necessarily goes back to colonial legacy and links

contemporary land struggles to the Independence struggle, simply because 'land has been used all along' (Interview with W. Mwangi, *Ibid.*). However, her observations on the political dimensions of land policies are not limited to the neo-patrimonial system that derived from the colonial legacy; she goes further by considering land to be a political value in a broader sense than just economically or strategically: in her view, the call for land reforms is closely linked to 'the struggle for multiparty democracy, starting from 1992,and 1997, inasmuch as securing land rights is part and parcel of upgrading democratic accountability mechanisms, and indeed guaranteeing human rights. So, 'land reform wasn't a 2002 thing', she argues, but was more profoundly rooted in the historically longstanding quest for democracy:

[…] the debate about land was mainly pushed by the Human Rights organizations, because it is not possible to detach issues of land conflicts and land displacements from human rights issues…when you talk about slum and informal settlements where there are deprivations of basic services, which we know from international conventions and international laws and institutions, they are all part of human rights. In this country there is no democracy because your land rights have been denied (Idem).

However, she agrees on the facilitating role played by the NaRC administration, which sold its manifesto on a land reform platform *inter alia*, and once in power had eventually the best chance to bring about change; moreover, if the pro-reform narrative had been easy to sell, she agrees that international actors 'were willing to back them up immediately', and also recognizes that what primarily fostered donors' interests in land was the incumbent threat of conflicts (*Idem*). This narrative has been confirmed by donors, and more inherently by the narrative of two officers from very relevant donor organizations, the Swedish International Development Agency and the Ford Foundation: it would seem that the underlying motive of donors' commitments towards the realization of land reforms in Kenya lies in the eminently and overwhelming political dimension of land governance, which also reflects the *stream* of land-related problems in Kenya.

[…] you cannot separate the issue of governance from land. As long as the politicians are going to use the land agenda as an electoral tool, addressing the issues of land ownership means addressing directly the issue of election […] (Interview with SIDA program officer, Ibid.).

What is unique in the Kenya process, like in the Uganda process, is that many development agencies […], when begin working on a ground which delivers humanitarian aid or relief or anything for development, they will always encounter the issue of land: the biggest cause of conflict. […] So that the problem kept coming up, so one organization, Oxfam, made a deliberative move to engage with land issues. […] When Oxfam started speaking strongly about land issues, the government of Kenya responded by asking what legitimacy they had and whose constituency they were speaking when asking questions on land, because land is considered a sovereign issue […]. So, when Oxfam got challenged into answering to these questions that, they decided to form the Land Alliance […] [which] is the first organization to begin a conscious effort to engage land issue. So, they set up the Uganda Land Alliance, the Kenya Land Alliance, the Ethiopia Land Alliance, in the whole region (Interview with Ford Foundation program officer, Ibid.).

Donors' influence at both national and regional scales, and also at both government and civil society levels, is an undeniable fact. As this Ford Foundation program officer notes, as indeed others do (Interview with former Oxfam officer, in Nairobi, 09.07.2014), the rationale of creating a Land Alliance in Kenya was for DfID and Oxfam to have a national surrogate that would legitimately engage the government and speak out on strategic national issues, such as *land*. Mohammed Elmi puts it somehow differently when asserting that the thrust on government came from civil society: '[i]t was a local push, and that is also why I formed the KLA, because the locals are the ones who shall push for change, no the internationals' (Interview with M. Elmi,

Ibid.). Both perspectives are valid and complementary: they prove that both ends of the transnational network were beneficial to each other as the donors obtained the government's engagement in the land policy development project, and national players improved their initial status, not only professionally and economically because of being integrated in the aid system, earning a relatively stable job and income, but also politically because they were undeniably empowered as activists, certainly finance-wise as well as content-wise, i.e. ability to devise policy solutions, given the support provided by donors in terms of *experts'* services and the subsequent exposure to international fora of debate where *knowledge* was being produced.

It is in this sense that I would argue more generally that the internationalization of activists via joining the transnational network, not only expanded their repertoire of actions (the Kenya Land Alliance reflects the innovation of the 'network-organization', i.e. unity of intentions and actions), but also concurred to build content and politicize them. This is particularly apparent in a number of activists' personal and professional trajectories: an example is the journey of a key character such as Odenda Lumumba, the head and soul of the KLA. The first time I interviewed him (08.07.2014), he revealed that his personal trajectory as both a human rights activist and a land expert resulted from his exposure to a number of international processes, i.e. 'big summits' that 'propelled people to think widely' (Interview with Lumumba). The story he tells is very detailed: he lists a handful of international conferences that from 1990 to 1998 concurred to inform his political and intellectual growth[35]. Ultimately, the 1998 South African conference on land tenure and land reforms, funded by German aid agency GTZ, was of great importance for him. By then, O. Lumumba was at the Kenya Human Rights Commission, running a land rights project and advocating on broad land issues: the Kenyan delegation was funded by the Ford Foundation not only to participate, exchange and capitalize on academic work, but eventually also to publish what became Smokin Wanjala's book (2000). Important contributions came from Lecturers and Professors of the School of Law at the University of Nairobi and from the Adam Leach, Oxfam-Kenya country director and a transnational network actor who wrote on the subject of *Land reform and Socio-Economic Change in Kenya*.

The operation of this transnational network, which I attempted to analyze by finely characterizing interactions among its *participants,* corresponds to what J. W. Kingdon designates as the *policy stream,* the incremental process of *generating alternatives and proposals,* normally carried out by *specialists in a given policy area* participating in the *gradual accumulation of knowledge and diffusion of ideas* (Kingdon, *Ibid.*: p.18 & pp.85-88). However, Kingdon also suggests that the critical factor that explains prominence of an item or problem over the government agenda is not its source but the *climate* in government, or its *receptivity* to such proposals or ideas*,* thus assuming that the so-called *political stream* indeed affects the agenda, and ultimately explains why ideas 'take hold and grow'*,* i.e. *policy change* (p.76). This stream accounts for regime transformation via electoral processes, partisan alliances and institutional processes such as the political transition occurring at the expiry of D. arap Moi's mandate in 2001. Thus, political processes or events, such as '[s]wings of national mood, vagaries of public opinion, election results, […] change of administration […] all may have powerful effects (pp.18-19). This conceptualization calls for particular attention to consideration of strategic and partisan politics that might foster politicians' receptivity, and is especially useful in explaining what my

35 He says that if at the outset he was 'agitating basically for national reforms broadly' in the 1990s by deepening the discussions about critical issues such as demographic growth (in 1990 in Cairo), environmental sustainability (in 1992 in Rio de Janeiro), human rights (in 1993 in Vienna), food security (in Rome in 1995), and millennium goals (in Copenhagen in 1996), he progressively realized the centrality of tenure issues in democratization processes (*Idem*).

interlocutors construed as the 'natural' inclination of the NaRC government to embrace the idea of land reforms as one of their campaign platforms.

A final important consideration arising from Kingdon's model that I am espousing in the analysis of land reform agenda setting in Kenya, is the conceptualization of the *relative independence* of streams: in fact, inasmuch as they are separate and unfold according to different logics, these streams do not influence each other's course (p.93), as I showed for instance in the case of the appointment of the Njonjo Commission, eventually galvanizing the transnational network, which illustrates the extent to which the political stream can enable the operation of the policy stream; or in the case of the organization of the NGO Land Conference and the extent to which its policy recommendations influenced the work of the Ministry of Lands in conceptualizing 'land reforms' as per the testimony of one bureaucrat; or as shown by the accounts of donors' officers arguing that the state of affairs in the land sector, i.e. land conflicts and neo-patrimonial use of land (the problem stream), did determine the decision of certain aid agencies to get involved and shape a program of action that was geared towards the formulation of policy solution, notably via funding the KLA, which importantly informed the course of the policy stream.

The apex of the streams' inter-influence was reached at the time of the 'policy window', which corresponds to the opportunity of pursuing a proposal or pushing attention to particular problems, if seized by *policy entrepreneurs* it results in the coupling of the streams, i.e. when they come together and there is alignment: 'a problem is recognized, a solution is developed and available to the policy community, a political change makes it the right time for policy change, and potential constraints are not severe' (p.174). The access to power of the NaRC coalition is such a moment for the 'land reform' item, as the coalition recognized the problem when promising to commit to its redress during the presidential campaign, and I have also shown that the transnational network had been preparing the ground by developing alternatives or policy solutions that the 'policy community' could draw on: thus, when the political transition eventually took place, 'the right time' had actually come and the new government's honeymoon period temporarily reduced the incidence of constraints on the operation of the transnational network, which jumped on or seized the opportunity (p.184) for bending the ear of governmental officials. Thus, I designate the individuals singled out as forming the transnational network as being the 'policy entrepreneurs', 'advocates who are willing to invest their resources – time, energy, reputation, money – to promote a position in return for anticipating future gain in the form of material, purposive, or solidary benefits' (p.188): the 'central figures in the drama' (p.189). Kingdon's observations about the interdependence of a number of entrepreneurs, instead of one single individual being responsible for the agenda setting (*Idem*), is indeed pertinent in regard to the Kenyan case, as well as the note on the importance of the 'political connections', as one could posit that pre-existing links between the NaRC coalition's first appointee as Minister of Lands, Amos Kimunya, who was in charge of the land docket from 2002 to 2006, and DfID, for which he had worked as a consultant, also informed the conducive environment setting the government agenda for land policy development.

All in all, one could posit that the internationalization of actors was instrumental in opening up perspectives not only for civil society activists, but most importantly for government officials, especially in terms of fostering collaboration between the two via the mediation of development partners that, as we shall see in the next sub-chapter, obtained the Minister's compliance to undertake an untraditional policy-making process, which one could define almost as *revolutionary* in its procedural outlining. In sum, the lobbying activity of donors was both *necessary* for sparking legal reforms and instrumental in acceptation of the *opening up* of decision-making in compliance with emergent policy guidelines that the 'aid community' was formalizing at that same time (see European Union, 2004; African Union, 2010; FAO, 2012).

However, if one delves into the Kingdon's policy stream analysis to reflect more profoundly on the issue of generating alternatives, one realizes that internationalization of actors is also very relevant to the process of *problem framing*, corroborating the theorization that the extent to which 'the intersubjective nature of social experience […] impact[s] both on issue initiation and policy formulation' (Rochefort and Cobb, 1993: p.57). Problem definition, which is closely linked to the characterization of solutions, appears as a very key and powerful process shaping public policy, 'a supreme instrument of power' (*Idem*). It can be defined as the manner in which information is organized and presented, thus assigning it particular meanings and ultimately re-shaping reality (p.58). Among the approaches enumerated by Rochefort and Cobb (*Idem*), a close scrutiny of the operation of the transnational network in Kenya pushing for one particular interpretation of land problems, i.e. the heavy weight of colonial legacy and post-colonial continuity negatively affecting customary law that needs to be rehabilitated, leads to believe that the *availability of solutions made problems possible* (p.59), namely that policy solutions over-determined the interpretation of problems. It is in fact evident from the reconstruction of facts that I attempted to describe in this section, that within the 'policy stream particular viewpoints were dominant and authoritatively imposed a grid of analysis or *frame* through which to construe the 'reality' of land problems, or of the 'land question' in Kenya.

VI. THE PROCESS OF REFORMING THE LAND SECTOR IN KENYA

The analysis in this section puts the so-called National Land Policy Formulation Process into perspective (NLPFP, held between 2004-2009) with the wider *legal land reform process*, of which the NLP is only one element. In fact, the Review of the Constitution (2000-2010) is an equally eminent aspect of the construction of land reforms, which allows direct comparison with the NLPFP, especially in terms of the processual unfolding of decision-making. In the conclusion of this section, the salient process of elaboration and enacting of the first land laws of 2012 will also be briefly evoked, while section 4 deals more comprehensively with the enacting of reform principles pertaining to land tenure reforms, the construction of the Community Land Law (2010-2016).

Looking at the NLPFP as one element of a wider process allows a critical analysis. In fact, it is only in retrospect, after following first-hand the last two years of the legislation-making process and, most importantly, after delving into the grey literature produced by the Ministry of Lands during the NLPFP, which I accessed only in 2016, that I realized the uniqueness and exceptionality of the decision-making process inherent to the elaboration of the NLP. I have come to conceptualize the NLPFP as partly disconnected from the rest of the land reform process, representing one happy island in the middle of troubled waters, insulated in the 'aid-bubble'.

Besides these differences, two particular aspects of the making of land reforms are shared by both the NLPFP and the Revision of the Constitution:

Process-wise, the formulation process since the Constitutional revision has had an unprecedented participatory design, thus contemplating two forms of deliberations: on one hand, since 2002 when the very first draft of the new constitution was published (called "The People's Choice": CKRC, 2002), this had been informed by the views of *wananchi* ("citizens" in Kiswahili) collected countrywide via *consultations in situ*. As I will show, the practice of touring the country to allow airing of people's views and positions on specific issues or policy directions is actually rooted in the colonial history of Kenya, punctuated by numerous commissions and committees that instated this *modus operandi*, instrumental in both getting a sense of the stakes on the ground and in structuring the articulation of the different levels and scales of territorial administration (see Carter Commission in section 1).

On the other hand, since the Bomas Constitutional Conference held in Nairobi between 2003 and 2004 (at the Bomas of Kenya, a cultural center on the outskirts of Nairobi), the organization of *stakeholder participation,* of both *selected representative clusters* of Kenyan society (usually urban-based organized interests) and of *delegated visiting teams* (supposed to come from and represent the localities) were held, and became an almost *sine qua non* of legislation-making. In fact, since the review of the Constitution, these two instruments of participatory democracy have been more or less diligently applied to the process of elaboration of the legal texts informing land reforms. They have literally become a threshold: according to the 2010 Kenyan Constitution, "public participation" (although never defined) not only becomes an essential feature of governance, included among the national values (article 10: RoK, 2010), but also, at the legislative level, the involvement of citizens in decision-making is deemed a constitutional duty of Parliament (article 118: *Idem*).

Content-wise, as already partly outlined, in the framework of the reform of land tenure categories, the regime under which the once-called *Trust lands* were administered is overhauled, with the aim, in principle, of abolishing the *Trusteeship model* and transferring the entitlement of *proprietorship* directly to a newly created legal entity, the *community*. As the perpetuation of land

spoliations had continued in the post-Independence era, many official reports, produced upon request from the then Kenyan presidents (RoK, 2002; 2004), recommended the acknowledgement of legal entitlement to "communities" as a way to ensure security of tenure, i.e. safeguarding "community land" from grabbing. This has in fact emerged as a policy solution to redress historically rooted land grievances, perpetuated by contemporary Kenyan political elites, and which had also been at the origins of land-based violence. Those principals were eventually enshrined not only in the National Land Policy, but also, most importantly, in the 2010 Constitution, which while remaining a liberal document acknowledges "community property" and provides provisions for addressing "historical land injustices", notably by giving mandate to a newly established institution to commence investigation and propose a legislative framework that set the procedures for redress (in line with TJRC recommendations as well).

3.1 Entanglement and disconnection of NLPFP and Constitutional Review

Although they progressed at very different speeds, the reform of the land sector and the revision of the Constitution have been entangled. They occurred during the same period and, most importantly, informed each other by also mutualizing a number of actors, such as Okoth-Ogendo, who was appointed vice-chairman of the Constitutional Review Process, termed *Bomas Conference*, after the name of the cultural center where it took place. Also, as in the case of the Constitution Review, the making of the Land Policy was characterized by society agitations, mobilizations and extensive demand for inclusion and participation: this is what I will call "reform movements". In fact, without the determination of the advocacy and lobbying activities of some non-state actors, Kenya would probably not have either an NLP or an entire chapter in the Constitution dedicated to land issues (Chapter 5 on Land and Natural Resources). However, agitations for Constitutional Review have longstanding roots in postcolonial Kenyan history: here it will suffice to recall that the CKRC, appointed by Moi in 2000, resulted from a merger that expanded the originally appointed Constitutional Commission to include representatives of the so-called "People Commission", a civil society initiative that had exerted relevant pressure on the regime, thus forcing it to integrate the people's movement into the official government arena.

It is important to recall that the debate on and the struggle for constitutional revision in Kenya had begun in the 1980s, in response to the centralization of power in the hands of the President, resulting in the consolidation of a fierce dictatorship, perpetrated through the continuous amendments to and abuses of the Independence Constitution (the Lancaster Constitution of 1963). In fact, notwithstanding the brutal repression of any form of opposition, the reform movement, pulling together individuals and organizations from different sectors of Kenyan society (human rights organizations such as the Kenya Human Rights Commission and Release Political Prisoners; religious and professional bodies such as the National Council of Churches of Kenya and the Law Society of Kenya), kept demanding democratic reforms, such as political liberalization. The government tried to resist the pressure exerted from below, but it was forced into the discussions on the purpose and scope of structural reforms because of the "movement" initiative of engaging its own constitutional review process (see *inter alia* Mutunga, 1999; Mutua, 2008).

In December 1999, the reform movement reached momentum by establishing itself as the *Ufungamano initiative* (composed by the aforementioned organizations, in conjunction with some personalities from the opposition). In June 2000, the so-called People Commission of Kenya was launched. The latter was expected to drive the revision of the constitution by engaging in a participatory process of collecting the views of Kenyans. In doing so, the executive was somehow compelled to react and take ownership of the constitution review process: that is when, in

November 2000, the Parliament adopted the Review Act, and the country experienced the peculiar situation of having two parallel processes of constitutional revision. Then, Professor Yash Ghai (appointed by Moi to chair the CKRC) lobbied the government and persuaded civil society leaders to accept the merger: the negotiations succeeded in June 2001, and the thus merged 'Ghai Commission' was able to start its work. From December 2001 to August 2002 the commissioners carried out their principal tasks, i.e. conducting civic education and listening to Kenyans' wishes about institutional principles to be enshrined in the new Constitution.

Two successive quotes from two commissioners participating in the constitutional conference illustrate the eminently political character of the process:

The reform process was not organized and structured, it evolved, and in its evolution the process picks people and rocks others, or it picks people as others rock out, and moves on. Why do I say so? We have had very many civil society people becoming politicians who when they join government or the system, they change tune […]. Some people become politicians via the civil society route, they started it, they present themselves to the public as the leader of the civil society struggle. Then, of course, when the multiparty was allowed, some of them presented themselves to be elected by Parliament, and they will get there, but then some will get co-opted and abandon the ideals they used to argue for. […] They could have been talking about corruption when they were in the civil society, once they join the other side, they become corrupt, a good example is Kiraitu Murungi: he was very critical, calling the Provincial Administration a 'colonial relic', but when he joined government under Kibaki, before we completed the Constitution, he was among those who were viscerally opposed to any suggestion that will abolish Provincial Administration. So, that is the irony of reform process, but on the other hand, it is not an irony, it is that […] a country is always in a reforming process, there is no that you can say, we have reached, so it keeps evolving […]. And that has happened to Kenya, even though we have met a lot of constitutional and legal reform, in terms of practices and behavior, we have lost more people to corrupt tendencies, to an extent where the young people only look for an opportunity to join the band-wagon, the train […] if they give me a job from where I can also eat, why not, everybody is doing this! (Interview with John Muthaka Kangu, Nakuru, 15.01.2016)

In this unified process, fairly quickly we realized that generally speaking, it was made up of four types of commissioners: the first was a group that was committed to the law and looking forward to a transformative constitution, in three ways: 1. Radically departing from the old institutional (colonial inspired, dictatorship-minded, single party mentality) order, that was in the law that we negotiate, and it will clearly seek that discredited past with the wishes of the people; 2. It will make the human rights a corner-stone of this constitution, and not only first generation rights, but second and third as well, which also meant that mobbing away from an individualistic bill of rights that only recognize individuals, but a constitutional framework and human rights that also recognize group rights; 3. Process, content and outcome are intertwined, and if you involved people well the outcome will be good, and that you will be investing into constitutionalism even through processes, and consent of the people and meaningful participation of the people, that's what we put in the constitution.

That was a first group, and I was part of that group. Then, there was a second group that was pro-government and was looking to do a number of things with the constitution: 1. Delaying it as much as possible; 2. Circumvented from inside and discrediting it from within, but also try to get a government version of the constitution, a constitution by the government for the government. If you look at the document, you will see tensions between these two groups throughout the process and this is the same group that advise certain politicians to walk out of the conference and the same group that at end advise the amendments that were done in the middle of night at the Parliament that led to the rejection in 2005. The side of the first group was for the Bomas document, and the side of the second group for the government was the Wako draft. Then there was a third group, mainly made of

intellectuals, and people who were honest and were willing to do a good job, and they were willing to be persuaded by either sides and they will side according to their conscience and the strength of the argument presented before them.

But there were a fourth group of the mercenaries who would take position according to who is paying and at the end they became part of the second group, the government. (Interview with Abubakar Zein, Nairobi, 06.03.2015).

A very similar view on the manner in which negotiations unfolded and actors devised their strategies of lobbying is held by G. Murunga, who rather speaks of only two camps, the "conservatives" and "progressives", though it also detailed the different kinds of actors involved by differentiating the different interests, whether dogmatic or merely opportunistic.

What emerges from these accounts is the fierce competition among elites, especially Members of Parliament, the true protagonists of the conference, which does not appear to be the case for the NLPFP that, besides involving a number of land bureaucrats, failed to mobilize MPs except occasionally.

The Constitutional Chapter on Land has been controversial, though not central in the political wrangles that have animated and eventually extinguished the alliance between the two main parties comprising the government alliance, the political deal between political figures, Raila Odinge and Mwai Kibaki. The land principles enunciated in the *People's Choice* in 2002 were streamlined but maintained almost throughout the whole process of revision, which lasted almost ten years.

One could indeed argue that the two processes have been intimately connected at the very beginning of the CKRC's undertakings, when the NLPFP was still in gestation. In fact, as I have showed in the previous section (2) the key dispositions of the National Land Policy, enunciated in the Land Conference organized by the KLA, were inspired by the document M. Adams compiled in 2002, and which incorporated the recommendations of the Njonjo Commission, the 2002 CKRC Report and the NGOs' National Conference.

While, in terms of players and content, the two processes might seem closely interrelated, their stakes have been radically different, notably because, as I will discuss hereafter, the process of revision of the Constitution mirrored the national elite groups' competition for power. Meanwhile, the NLPFP remained virtually untouched by almost any of the main political happenings.

3.2 NLPFP AS PROJECT DESIGN AND IMPLEMENTATION

The NLPFP is in fact an emanation of the aid system, which is particularly evident in its managerial ideation and highly procedural unfolding, which is absolutely unique in comparison to the rest of land reform processes. Its design carefully incorporates and follows internationally agreed protocols, masterpieces of contemporary developmental standards. The most representative tool of this managerial protocol, conceived to foster and regulate deliberation processes is the workshop, designed to produce and ensure consensus building, i.e. guaranteeing that participants adhere to the developmental discourse.

Besides 'consensus-building' being a classic managerial approach applying to conflict resolution, defined as a voluntary process in which the participants seek a mutually acceptable resolution to their differences, in developmental discourse/jargon this notion takes on paradigmatic connotations. It is originally brandished by international actors such as the World Bank to mark a

shift in the way development agencies work towards fostering institutional change, upon which poverty reduction is assumed to rely heavily, in so-called developing countries (see Mosse and Lewis, 2005).

As illustrated in the previous section, a number of bilateral donor agencies, particularly DfID but seemingly also SIDA, had been preparing the ground in different ways for the land law reform process to take place, *inter alia* via lobbying government officials, and by funding NGOs' research work that could ultimately inform their evidence-based reformist argument, and hence strengthen (if not build ex-novo) their advocacy strategy. In the NGO sector, donors found a fertile ground, especially because it had inherited the human capital of 1980s political activism. Simultaneously, the importance of relating to state actors is re-asserted in particular to ensure *aid effectiveness*: although the Paris Declaration was not issued until 2005, the 'harmonization, alignment and coordination' mantra was already in the air as demonstrated by the creation of the Development Partners Group on Land (DPGL), which regrouped a number of key development agencies operating in the land sector in Kenya.

These donors coalesced in order to pull funds together and foster cooperation both among themselves and, in turn, with the government of Kenya (as per the Paris Declaration), with the aim of designing and implementing the NLPFP. Moreover, the focus on the promotion of *policies* instead of conventional projects also reflects innovation within the developmental discourse that, according to Mosse and Lewis (*op. cit.*) promotes new aid packages including *neoliberal reforms* that are essentially market-oriented and geared towards economic growth that is supposed to be *pro-poor* (p.3): 'the notion that there is close positive relationship between freedom for capital and freedom for the poor carries more conviction than ever' (p.5). Importantly, the *reform packages* are holistic in the sense that they propose a particular model of 'public sector management' and accurately designed consultative and participatory processes (p.3), expected to involve the state-counterpart, i.e. *civil society*, actually comprising the same NGOs that donors funded, and in some cases also founded.

The donor-aid recipient relation is reframed in terms of *partnership,* whereby the states are 'merely' financially and technically assisted to develop their own strategy (of poverty reduction) (p.4): it is within this framework that one has to understand the formation of the DPGL that was to guide and support the Kenyan government. B. Mwera in his doctoral dissertation (2016) systematically analyzed the Minutes of the meetings held by the DPGL, where donors' representatives and Ministry officials discussed procedural matters: he writes in his doctoral dissertation that the DPGL, formed in July 2003, held the first meeting in September 2003, when seventeen donors working on land were listed as potential participants in the Group, though only five seem to have been actively contributing to the *basket fund,* i.e. DfID, SIDA, USAid, IrishAid and UN-Habitat; the latter was elected *chair* of the group, chosen for its intrinsic expertise on land and its multilateral character, which conferred neutrality upon it (*op. cit.*: pp.154-156) and indeed made it appear as 'a natural stakeholder' (Interview with UN-Habitat officer, Nairobi, 03.06.2014).

The relevance of UN-Habitat in the domain of *soft international law* related to the land sector is pertinently pointed out by Patrick McAuslan, an eminent British law professor and very influential legal consultant - involved in land law reform processes in Uganda and Tanzania – in particular when he refers to a high-level summit (Habitat II) organized in June 1996 that turned out to be a

landmark in setting out the 'global principles in tackling problems of human settlement' [36] (McAuslan, 2015: p.348).

UN-Habitat was the chair of the DPGL for ten years, from 2003 to 2013 (Mwera, *op. cit.*: p.156), represented by Clarissa Augustinus, renowned land expert, founder and lead of the *Global Land Tool Network*, who co-authored UN-Habitat's land policy guidelines *How to Develop a Pro-poor Land Policy. Process, Guide and Lessons* (UN-Habitat, 2007). However, from M. Adams' account, DfID was the real engine of the Group, as well as the main financial contributor: UN-Habitat took front-of-stage because 'the British wished to maintain as low a profile in the land sector as possible' (PALMER/DfID IN KENYA/2009).

It is relevant here to take into account a SIDA program officer's version of the story as it illustrates both processes and donors' strategies well. The interviewee is a Kenyan citizen who joined the donor agency in 2002, perfectly in time to follow the reform process since its early inception: in the following elaboration he is replying to my first general question on his experience of the NLPFP, and SIDA's involvement in the same.

[…] I think before 2002, we were interested in supporting the [Kenyan] government and we started discussions with the Ministry, but the government wasn't interested at that time, in 2001 and 2002. When I joined in 2002 we were very much in the corridor of the Ministry trying to get appointments, what can we do and all that. […] [L]uckily the government had a lot of energy and they actually did appoint a Minister who was quite active, Kimunya, […] at least he showed leadership now trying to implement that campaign agenda and promise. Then they started the Ndung'u [Commission], and parallel to that they started discussions and they promised a new Land Policy. And of course the Ministry wanted to do the land Policy in six months […], actually what happened is that DfID started that process and then we jumped on board with the UN-Habitat to participate to that, and mainly there was dialogue and promising them to support and help them to actually design the policy process. So we came on board, we started a basket with DfID, IrishAid, USAid to support the Policy, and we were quite active in the process: we met very regularly, every two months with the Ministry, where we went through their plans and put things on the table. We really encouraged them and offered them the technical support that they required to undertake that. So we also put money directly in government […], but the point is we were active in giving them funds but also actually [in having] regular dialogue in the meetings: we were almost as a member of the steering committee, we discussed issues in details that ordinarily we do not discuss as donors, and the process went quite fast. […] But the process was very elaborated. We didn't just support the government, the point is there is a lot of things that you want to say but you can't say, and we also knew there is an agenda that belongs to the people of Kenya, so we can't do this. So we funded NGOs to first of all mobilize communities for the participation in that process, but also to raise their own issues that they felt were important to them. So we had a double track support: supporting government to lead this process, but also supporting communities, NGOs able to mobilize communities, and therefore issues came from all manner of communities […] (Interview with SIDA officer, Nairobi, 27.06.2014).

The 'double track support' mentioned by the SIDA officer resembles the DfID's strategy of attempting to spur *policy initiation* both in state and non-state fora, which I illustrated extensively in section 3.1.2, with the crucial difference that SIDA, as other donors in the DPGL, 'jumped on

36 Notwithstanding the eminently urban dimension of the so-called 'Habitat Agenda', what strikes from McAuslan's analysis is the prescriptive nature of the summit's outputs: he calls attention to the rigid formulation of such 'global precepts', implying that 'all countries are under at least a quasi-obligation to follow', with virtually 'no recognition of the need to adapt international precepts to national situations' (p.349).

board', as the officer suggests above, while DfID was part and parcel of the transnational network that jumpstarted the process. If any SIDA lobbying activity took place before 2002, as the officer suggests, I found no trace of an endeavor to prepare the ground for a participatory land law reform process comparable to that of the DfID. SIDA and other donors might have been funding Kenyan NGOs to implement projects on land and natural resources with various scopes, though the 'advocacy line' of funding became preponderant only from the early 2000s, when it became evident that the policy window had opened up.

This seems the case especially when looking at NGOs activities. For instance, Kenya Land Alliance's (hereafter KLA) founding members and the NGOs that joined later on had not engaged either in constructive reflections on land policy reforms or in attempting to collaborate with state institutions (Interview with the Executive Director of Pamoja Trust, Nairobi, 28.06.2014). What is striking is the fact that Odenda Lumumba (National Coordinator of the KLA), when working at the KHRC in the 1990s, did not in fact engage the field of policy-making partly because participating in decision-making was actually unthinkable, especially given Moi's entrenchment and authoritarian style of government. Strategies of advocacy and more generally of engaging state institutions to obtain social change (poverty reduction for instance) were brought about by transnational networks at the time of the Kenyan regime of 'political transition': KLA actually became the passer of new repertoires of engagement.

- **The participatory injunction within the NLPFP**

Stakeholders' participation is in my view one of the most important innovations introduced into policy-making in Kenya at ministerial level by the NLPFP Concept Note, which set the pace for a decision-making process that would not only include urban-based NGOs, but also undertake wider local consultations aimed at including 'communities' in policy-making. It was unique and pioneering, although the Constitutional Conference also had a participatory outline, first consultative (from 2001 to 2002), then deliberative (from 2003 to 2004), whose practices were mutualized from other constitutional conferences, especially given the very international background of Yash Pal Ghai, the Kenyan Law expert leading the process (professor of public law at the University of Hong Kong and advisor in numerous constitution-making processes). However, the domino effect generating by the Constitutional Review Process and affecting the NLPFP can be excluded, as from study of the latter it appears that donors' developmental injunctions are more likely to be the source from which the Lands Ministry' bureaucrats draw design of policy-making. In fact, as Martin Adams has put it quite plainly, 'the whole model of policy-making came from South Africa: that was the way we worked those days' (Interview with M. Adams, Cambridge, 29.06.2018).

More precisely, according to the SIDA officer's version of the story, initially the Minister himself was not interested in a participatory design, and was planning to conduct the policy-making as per the usual praxis, i.e. have a consultant that drafts it; it seems that it was the irruption of 'civil society' bursting onto the scene that imposed openness and inclusivity on the Ministry. Below, the account of the aid agency officer, followed by O. Lumumba's version of the same story.

F: Were donors influential in shaping the participatory framework of the process?

J: What happened was, when the Ministry came in and they started this process, they wanted to do it in six months, they thought it was just a matter of experts seated somewhere writing, and then maybe a few comments and all that. But I can tell you that this was something that a lot of stakeholders were waiting for very long, […] in fact, at the first workshop we had there were demonstrations, the Ministry thought we are going to launch this thing, but there were demonstrations, they came and disrupted the meeting.

F: Who came to disrupt the meeting?

J: Just some groups from all over, self-organized or organized by NGOs, they brought reality home to the Ministry. This is not something you are going to do easily, so he came running to us: 'can you help us to try to get these guys on board?' And that's how we agreed to come on board and try to design something, but initially we knew, that's why we wanted to have a participatory process but the Ministry didn't think so, but then he realized that it was going to be much easier to have them on board, but obviously it was going to take much, much, longer than he thought he would take. So in a way we offered it, but it was really demand-driven in the sense that Kenya demanded to be part of this process. (Interview with SIDA officer, Nairobi, 27.06.2014)

[…] initially the government wasn't keen as usual, they thought they would do basically the policy the normal way, the Ministry does it with the government and the government does it, we said 'No!' This must be consultative, facilitative, and participatory, we used all those terms, which we end up calling the core values, co-guiding values and principles of this; it must be transparent and all this, we ended up with almost nine principles or so to guide this. […] So, the concept that was done in 2004, for all practical intents, it was a government concept, but it was really a stakeholder process. We were invited to it, we know that they had refused to invite other people, I remember leading the pastoralists communities to bust into a meeting and seek a place on the table, so by the time Ministry adopted the Concept in 2004 February, we almost had galvanized the stakeholder element. The Ministry was reluctant because of course […] they think 'so and so' are the stakeholders and these are not, and we said, 'No!' Stakeholders are broad, so we need all the stakeholders. (Interview with O. Lumumba, Ibidem)

'Civil society' involvement in the *formulation* of the NLP is generally believed to have been instrumental in raising awareness among the 'general public' and eventually prompting citizens' participation in decision-making. This model of engagement had been embryonic in the designing of the KLA, emanating from the general assumption within the aid community that NGOs are complementary to government officials in policy-making. The underlying idea is that NGOs, equated to the 'civil society' counter-weighting states' power, would effect the 'inclusiveness' dimension of the policy process. The participation of NGOs in the latter ultimately ensures that the final policy outcome is addressing the real issues at stake, the needs of the poor, for whom NGOs are spokespersons. As will be illustrated in the last section (5), by adhering to this same storytelling, the ILO had been funding Kenyan NGO CEMIRIDE to establish a network of 'community representatives' (the PHGEMN), expected to advocate for the acknowledgment of minority groups' rights within the Constitutional review process.

Together with the KLA, CEMIRIDE, capitalizing on the Constitutional review's experience, was among the NGOs that organized *grassroots participation* by 'bringing' community leaders to the NLPFP *Launching Workshop* in February 2004 (Interview with Lands Ministry officer, Department of Adjudication and Settlement, seconded to the NLPFP Secretariat, 11.06.2015), in order to symbolically and factually impose the presence of common citizens (the *wananchi*) on decision-makers. These NGOs were cherished by donors because of their alleged ties with the so-called *grassroots*, i.e. the peasants, the pastoralists, the aggrieved poor, the marginalized clusters of society, whom they endeavored to 'educate' (*civic education* would be the emic wording) and/or *politicize* (my terminology) with the aim of bringing their voice into institutional fora of debate and policy arena.

A Lands Ministry officer who was involved in the NLPFP since its inception implicitly acknowledges that the lands bureaucrats were resistant to sitting beside village dwellers, as she argues that only after the 'civil society' burst in at the first meeting, was it agreed that 'communities' would participate as 'finally people came to realize it was necessary' (Interview, *Idem*). However, it

would be misleading to conceive of the participatory outline as being enforced in a bottom-up perspective, thus understanding it as some spontaneous social movement. It is in fact instructive to note that the initial draft of the *Concept Note,* circulated among attendants at the February 2004 workshop (MoL, 2004a), and eventually published in March 2004 (MoL, 2004b), already contained important elements clearly setting the stage for a 'facilitative', 'consultative', 'participatory', 'interactive', and 'consensus building' process: these being some of the policy process 'guiding values' enshrined in the Concept Note (MoL, 2004b: pp.ix-x). These are the values O. Lumumba points to in the quote above: he stresses their relevance and also seems to allude to the fact that these were a 'civil society' hobbyhorse, put forward to ensure the democratization of policy-making. Interestingly enough, they were also recommended as core values to apply to policy-making on land reforms in Kenya by both the National Conference of NGOs on the Land Question and Land Reform organized by the KLA (KLA, June 2002: p.55), and the Njonjo Report (*op. cit.*: pp.36-38, and p.85). And, going further back, these values were already mentioned in the RECONCILE project proposal addressed to DfID at the end of the 1990s, when fund-raising for getting the umbrella network, the KLA, structured and then functional with a view to undertaking research and building content for advocacy (see section 2).

In this respect, it can be argued here that the participatory design of the policy process, as far as the NLPFP is concerned, was an emanation of the transnational network translating internationally agreed norms and standards into the Kenyan context. To validate this argument, the sentiment of the Lands Ministry' officer (Interview, *Ibidem*) that 'civil society', and the KLA in particular, had been pivotal in conveying 'the struggle for customary rights', namely that NGOs actually first formulated the demand for formal recognition of ancestral land rights (*Idem*). At the time of the interview (2015), she had served for thirty-five years in the Adjudication Department of the Ministry of Lands, extensively dealing with *trust lands* and the determination of *ancestral claims* to land, which she defines as emerging from a longstanding settlement in a given territory. The statutory acknowledgment of customary tenure advocated for by *inter alia* the KLA implied a radical departure from what she considers to be the common mind-set about 'customary rights', essentially deemed 'inferior compared to secularized rights' (*Idem*).

Although the Adjudication officer's pronouncement on the role of the KLA in *initiating the issue* of community rights formalization might be confuted by the Terms of Reference of the Njonjo Report, published in the Official Gazette of Kenya on 26 November 1999, when the KLA was barely in existence, providing for the commissioners 'to take into account all customary laws relating to land and so far as practicable, to incorporate such of those laws […]' (RoK, 2004: p.4). Yet, as I will demonstrate in the ensuing developments of this section, as far as the Ministry of Lands is concerned the KLA is the spokesperson of 'communities' advocating for the legal recognition of their rights and historical claims.

The overall argument is that the material, intellectual, political and symbolic capital that the KLA built up was indeed a function of its embeddedness in the transnational network, as well as a result of the critical role played within the six-year long NLPFP, during which it informed content, assumed leadership of 'civil society' and gained the reputation of embodying 'grass-roots movements' disinherited of their land. This reputation was eventually earned because of both the strategic actions undertaken, geared towards communities' involvement, and the policy solutions promoted, pervaded by principles of social justice and radical administrative transformations.

It is fundamental to briefly present the structure and the unfolding of the policy process, i.e. the managerial architecture conceived to ensure both effectiveness and inclusiveness. This was meticulously designed: the *formulation process* was envisioned in the Concept Note as comprising

around twenty-five steps supposed to be realized (very optimistically) in eighteen months (Implementation Plan, Annex 1: MoL, 2004a: pp. 29-33). My argument is that, on one hand, by the same nature of the very articulated and highly procedural organization of the *policy development project*, the NLPFP sought to establish its authoritative source of legitimation: asserting authority by displaying performativity (Anders, *art. cit.*). On the other hand, socio-political dynamics typically characterizing *participatory apparatuses* concurred to ensure legitimacy of the outputs by the very same organization of workshops, consultations etc. (see *inter alia* Blondiaux, 2008).

David Mosse (2005) tackled the issue of *success* of development projects by arguing that one must consider the discursive construction justifying the existence of the project (the policy formulation in this case). His argument is that such construct ensures the stabilization of a particular interpretation of the problem at stake (he writes 'the power lies in the narrative'): besides acknowledging that such realization emerges from the field of discursive policy analysis, however the anthropologist critiques discursive approaches inasmuch as they fail to demonstrate that adherence to the discourse is 'socially sustained' (p.8). Mosse attempts to fill this gap by resorting to Bruno Latour's theorization in the field of science and technology studies, to argue that 'the success of policy ideas or project designs […] arises from the ability to continue *recruiting* support' (italics in the text) (*Idem*), notably via *translational processes* converting policy objectives into personal interests and vice versa. D, Mosse argues that *translation* is 'the task of skilled brokers (managers, consultants, fieldworkers and community leaders […]) who read the meaning of a project into the different institutional languages of its stakeholder supporters' (p.9). Indeed, one could argue that the triumphant presentation of the NLPFP by the Lands Ministry' officer reflected his belonging to the *interpretive community* of the policy development project: he was 'successfully' co-opted. He is a supporter of the discursive construct legitimizing the project.

The entire process is officially conceived to infuse the decision-making process with innovative deliberative and participatory methodologies expected to organically produce progressive provisions for overhauling the oppressive and inefficient land order in Kenya. The aim of these participatory apparatuses is to facilitate synergy among hundreds of participants, mainly non-state actors who are allegedly brought into the policy arena to democratize policy-making. However, the discussions at the regional consultations, for instance, have been dominated by the *politics of land* and very localized issues, extremely diversified from one region to the other, or even from one forum to the other. Interestingly enough, the choice of organizing exchanges by districts, participants refused to have deliberations on national interests, but rather put forward specific claims. A 'blame game' has often monopolized the discussions and exclusionary recommendations have only pointed to the politicization of land issues, intended here in terms of their permeation by factionalisms and neo-patrimonial logics. A reality principle thus invaded the participatory apparatus of the NLPFP and actually made it tilt, inasmuch the organizers felt overthrown by the *stakeholders*.

Moreover, what emerges for instance from M. Adams' recollection (Interview, *Ibid.*) is that, apart from an initial sprint, the Thematic Working Groups expected to build the Policy content had been mostly dormant: two of them never reported back (which explains the deficiency of the NLP on urban issues). It fell in fact on his shoulders to write a financial and feasibility assessment in 2005 (NLPFP, 2005c). The *policy development project* unfolds in a self-fulfilling manner, seeking to legitimize a particular *policy narrative*, enunciated by the Njonjo Report in the hand of Okoth Ogendo in 2002, synthetized in a strategic paper by M. Adams (the so-called *Principles of Land Policy, Ibid.*), eventually endorsed via the recruitment of supporters who were invited to attend workshops and who did participate for a wide range of reasons that can vary from passionate interest in land issues to the possibility of networking or having a free meal.

As far as the *experts* are concerned, they were the very protagonists of the project. M. Adams was very pivotal in *translating* ideas and interests into intelligible policy parlance at the inception of the process: he would prefer to be called an *interpreter*, because he was incessantly interpreting people's attitudes and concerns and trying to adapt accordingly; 'listening' and 'testing' were his watchwords, while juggling between the intricacy of the Ministry of Lands (where he never felt really accepted), the effervescence of civil society and the expectations of donors vis-à-vis the managerial structure supposed to yield specific outcomes, i.e. a pro-poor land policy.

This "virtuality" of the NLPFP stands in opposition to both the Constitutional Review Process and legislation-making processes, whose politicization is overtly characterizing them, not least because *politicians* are the missing chain of the NLPFP, the glaring gap of the interpretive community that the project had striven to build. This is most evident in the way the politics stream heavily affected the policy stream of the Constitution Review Process, while sparing the NLPFP.

3.3 THE POLITICS OF LAND REFORM IN DECISION-MAKING ARENAS

From 2005 onwards the game begins to change, and according to international actors the attitudes of bureaucratic elites from the Ministry of Lands seemed to change quite radically.

Then from 2002 to 2005 the constitution fell hostage to the power game because there were critical issues between Kibaki and Raila, so that's why the first constitution failed, because eventually the political class was using the call for a new constitution to get into power because they had understood it was a rallying cry for ordinary citizens to get into power, and now start what Moi was doing, which is, if you have read the John Githongo book, "It's our time to eat", then everything was tight to the politics of the presidency: as long as you were in the presidency, you felt that your community would benefit, although there were no communities who benefited, it was always the politicians who ever benefited, but whenever they were faced with trouble they go back in the name of their community (Interview with program officer at Kituo cha Sheria, Nairobi, 03.06.2015).

As a matter of fact, 'the politics coming in' factor obstructed the reform process. Given its opportunistic nature, the 'marriage of convenience' between the two parties composing the NARC coalition did not last. After his first months in power, the then President Mwai Kibaki disowned the Memorandum of Understanding he had signed with Raila Odinga's wing. Inevitably, this schism resonated in the reform processes. Political skirmishes caused the split of the coalition into two distinct camps. Tensions between the two camps became harsher at the so-called 'Bomas' National Delegates Constitutional Conference in 2005 (named after the Conference center where constitutional discussions took place). The resumed process of revision of the Constitution (interrupted by Moi at the outset of the political elections of 2002) was a failure, since the two sides could not reach an agreement, mostly as a result of the 'unwillingness of the entrenched political elites to enact any reform that would undermine their power and influence' (Kanyange & Long, 2012). Not surprisingly, given the political skirmishes surrounding the 'Bomas Draft', the 2005 Constitution was eventually rejected when submitted to Kenyans through the referendum of November 2005. Significantly, the 'no camp' campaigned, *inter alia*, against some provisions of the Constitutional land chapter. Among the most contentious issues there was the establishment of a constitutional body (the National Land Commission) managing public land on behalf of the Ministry (interview with the executive director of a Kenyan NGO, 05-06-2014, in Nairobi). Gender empowerment was also picked up on and emphasized so that the most conservative elements of Kenyan society would rise up against the 'Bomas Draft' (interview with a Kenyan scholar, among the drafters of both the Policy and the Constitution, 26-06-2014,

Nairobi). At the end of the referendum process, the NARC government was experiencing serious cracks:

> *Conflicts over the National Land Policy and the political developments in the country posed a significant setback for the formulation and finalization process. Particularly with the rejection of the proposed draft constitution, which meant that the land chapter which significantly contributed to the draft land policy reforms was not adopted. (MoL, 2007)*

As a result, the politics stream now became a disenabling factor for the reform process, as it stalled the policy-making. The policy window closed down and the game became very political because of the definition of powers entangled in Constitution-making. The process deteriorated and stalled from 2007 to 2009.

In addition to the breakdown of the political alliance at the high level of the state, within the non-state actors' arena, national NGOs enthusiasm and unity under the KLA suffered an abrupt halt. In fact, it has to be underlined that describing the process as consultative and inclusive of all Kenyan constituencies, does not actually reflect the opinion of one lobby group called the Kenya Land Owners Association (KELA). The KELA seems to have come into being just before the national stakeholders symposium was held, mainly because land-owners felt that the policy making was not taking the views of the 'people who actually own the land other than communities' into consideration (interview with KELA spokesperson, 27/06/2014 in Nairobi). Therefore, they took part in the symposium and raised concerns over the Policy's content. Firstly, they found that the NLPFP had been led mainly by representatives of civil society and academia, who had no pragmatic understanding of land management (*Idem*). Among the Policy's provisions that were deemed by the KELA as very unsatisfying and actually undermining property rights, was the reduction of lease duration from 999 years to 99 years (considered insufficient for investment); the creation of a constitutional body administrating land transactions on behalf of the Ministry (the National Land Commission, hereafter NLC) was also considered rambling, because of the excessive powers attributed to the NLC not legitimized by electoral accountability, which the Ministry naturally considers as deriving from the government (argument also put forward by some Kenyan scholars: interview of 26/06/2014, in Nairobi); the historical land injustices recovery process (implying a mechanism of restitution and reparation of land allocated illegally or irregularly) was similarly considered too radical because of the fear that it may be politically driven and end up contrasting the 'sanctity of title', which was well-established in Kenyan society through land trading on the willing-buyer willing-seller basis. This last argument is one of the most critical dividing the current debate on the methodology to be applied for addressing historical land injustices. In 2007, 'in order to get traction in terms of influence' (interview with KELA spokesperson, *Ibidem*), the KELA strongly lobbied alongside DFID, convincing the UK development agency that the Policy they had so enthusiastically supported was actually against the interest of British and Kenyan farmers because of the NLP's endorsement of a very radical model that was endangering property rights.

As a matter of fact, the DFID exited the FPNLP. Below is an interesting excerpt from an email that Martin Adams sent to political economist Lionel Cliffe in response to inherent questions regarding the DfID decision to backtrack from the process.

> *Rachel Lambert's departure to India was a contributing factor in the waning DFID support. Rachel was a fierce advocate of land rights for the poor. […] In 2002-3, she was on good terms with the then young minister Amos Kimunya who was in my opinion (initially at least) serious about changing the culture of under-counter-dealing in the land ministry. […] I think a defining moment for Kimunya was the presidential commission into irregular and illegal land allocations - the Ndungu Commission. […] The lack of GOK support to serious reform and the arrival of Leigh Stubblefield, the*

DFID officer who presided over the withdrawal of DFID support to the land sector in Malawi in 2004, were I believe major factors. I reported to her when I conducted a review of DFID support to the land sector in Malawi and recommended a continuation. She has not the same energy as Rachel and prefers a quiet life - very laid back. Regarding the 'settler-led KLA, I don't know much about the organization. I have met Ian Parker on several occasions he is an iconoclastic and acerbic character. He has a lot of good sense and authority in his own right on the subject of wildlife and conservation. I don't associate him with the settler fraternity. I think this might be a blind alley. The explanations of UK withdrawal are more to do with the reluctance of DFID to touch anything which smacks of risk taking. The Swedes are interested primarily as a result of pressure from SwedeSurvey - their survey parastatal. They have a very technical approach to the subject... (PALMER/DFID in Kenya/no date)

At this point, the Swedish International Development Agency (hereafter SIDA) came in replacing DFID: KLA sought SIDA's support in order to form the Land Sector Non State Actors (LSNSAs) that now allied united CSO and professional bodies[37] with the purpose of coordinating and galvanizing non-state actors' action for the approval of the NLP (interviews with a project officer of an international NGO, 15-06-2014, in Nairobi, and with Odenda Lumumba, in Nakuru, 08.07.2014). This alliance has often been described as a 'rescue operation' (interviews with a CSO's executive director, in Nakuru, 13.05.2014; with aid an agency's officers, in Nairobi, 14.05.2014 and 27.06.2015), but also as a 'marriage of convenience' (interview with O. Lumumba, *Ibidem*): as a matter of fact, SIDA came to put some fuel into the reform movement machine to help restart the engine and advocate more intensively for the Policy to be adopted by the political establishment. This actually worked out. As, the SIDA officer asserted: 'without the Swedish support, land reform in Kenya would have been something different' (interview with an aid agency officer, in Nairobi, 05.06.2014).

Paradoxically, what definitely unblocked the reform process was the frightening violence that occurred in the aftermath of the December 2007 general elections. Since the politicization and ethnicization of the competition for land resources forged the ideology sustaining the violence, the need to reform land institutions was mentioned in the *Kenya National Dialogue Reconciliation Agreement* of 2008. The international mediation led by Kofi Annan produced a coalition government. Post-crisis NARC embarked on an ambitious course of reforms: the NLP was approved in 2009, while the new Constitution was adopted in August 2010. The violence quieted down in February 2008. Since the politicization and ethnicization of the competition for land resources forged the ideology sustaining the initial phase of the post-electoral violence in the Rift Valley (central Kenya) (Médard, 2008), the need to reform land institutions was mentioned in the *Kenya National Dialogue Reconciliation Agreement* of 2008, which states, *inter alia,* that land reform is crucial to restore long-term peace and security. The international mediation led by Kofi Annan produced a coalition government. Post-crisis NARC embarked in an ambitious course of reforms: the NLP was approved in 2009, while the new Constitution was drafted in less than two years and adopted in August 2010 through a referendum with a voter turnout unprecedented in Kenyan history (72%).

In my interpretation of events, the "problem stream" invaded the political and public arena, thus forcing the political establishment to endorse both the NLP and the Constitution. However, I don't consider that the 2007/2008 clashes re-opened the policy window, because it seems that the political climate remained too agitated to opportunely commit to reform: the political

37 The LSNSAs were composed of the FIDA-Kenya, the KHRC, the ISK, the Haki-Jamii Trust, the Resource Conflict Institute, the Shelter Forum, the Land Governance Development Institute, the Pamoja Trust and the KLA.

administration was a transitional one, and its move to endorse reforms remained eminently political as a result of the exceptional post-crisis context.

- **Enactment of the Constitutional provision on land via promulgation of land laws**

Before going into the in-depth analysis of the elaboration of the *Community Land Law,* I wish to briefly place the making of this particular law in the wider frame of the implementation of the constitutional principles underlying land law reforms in Kenya.

The Fifth Schedule of the Constitution concerned the legislation to be enacted by Parliament to implement constitutional reforms. Chapter Five dealt with Land and Environment. It provided for a set of laws to be enacted in order to effect the provisions on land. The Constitution gave Parliament 18 months from the Constitution's ratification to promulgate laws regulating the domains of public and private lands in application of article 68 (RoK, 2010), and then, five years to enact a community land law (article 63: see Appendix 1) and a law on land use (article 66: RoK, 2010).

The vicissitudes of the first three land laws enacted are relevant here as the elaboration of what today is known as the Land Registration Act (N°3 of 2012), the National Land Commission Act (N°5 of 2012), and the Land Act (N°6 of 2012) (hereafter, the Land laws) were subject to a number of controversies, starting from its initial drafting. The legal consultant hired by the Ministry of Lands was accused by concerned non-governmental organizations of having conducted the drafting work unprofessionally by "copying-pasting" the content of the Tanzanian legislation on land[38]. The bills were nonetheless introduced to Parliament on 10 February 2012, thus very close to the constitutional deadline of 27 February 2012 (which then had to be extended). Kenyan NGOs protested the lack of public participation in this process[39]. A 60-day extension was voted and accorded (LDGI, 2012). Eventually, the Land laws were enacted before the new deadline. No sooner were the land laws promulgated than a task force was put in place to revise them, apparently because it was acknowledged that the time allotted for deliberation had not been sufficient: therefore, the choice had been to respect the constitutional deadline, enact the Land laws, knowing that they still needed to be harmonized as a set of laws and harmonized with the constitutional provisions[40]. This was an intriguing solution and definitely a political one: enacting the Land laws only with a view to subsequently amending them.

The Land (Amendments) Law was only published and gazetted in 2015. At the same time, redefinition of the roles and functions of land governance institutions had emerged as a very political issue in Kenya. The most debated issues had to do with renewal of leases, the issuance of titles, and the investigation of irregular and illegal allocations of land. The amendment law came to be known as "Omnibus Bill" since it comprised amendments to all three Land laws (See Klopp and Lumumba, *art. cit.* for details). Once in Parliament, the Omnibus continued to create

38 From interview with land surveyor (Nairobi, 29 May 2014).

39 From interview with land surveyor (Nairobi, 21 May 2015). According to the 2010 Kenyan Constitution "public participation" (although never defined) becomes an essential feature of governance, included among the national values (article 10: RoK, 2010). As a result, at the legislative level (article 118: Idem), involving citizens in decision-making is deemed a constitutional duty of the Parliament. The accusation that the public participation was insufficient is contested by the special unit of the Ministry of Lands (Land Reform and Transformation Unit) that spearheaded the process by maintaining that consultation at the regional level was indeed conducted (from interview with Ministry of Lands' officer: Nairobi, 22 April 2016), probably without the consultation's inputs being taken into account by the legal consultant when drafting the laws.

40 Gazette Notice N°7503 of 2013. From interview with the legal drafter (Nairobi, 3 November 2015).

controversy. In fact, along with the Community Land Bill, it was rejected by the Senate, and was only approved later by a Mediation Committee. Both laws were promulgated in August 2016.

This brief summary points to the high political stakes of the legislation-making process around land in Kenya. The new laws involved a (re)definition of functions, mandates and powers of institutions such as the Ministry of Lands. The reforms sought to challenge its powers through devolving (to local governments) and decentralizing (to alternative institutions) its disproportionate prerogatives. This set in motion a complex interplay of competing interests driven by sectorial, economic and personal agendas. The next section focuses on the high stakes of reforming laws around community land.

VII. COMMUNITY LAND RIGHTS UNDER THE NEW ORDER

This section focuses on the concept of "community land" and the making of the Community Land Law in Kenya. The first state-led forum where the proposition of recognizing customary land tenure was discussed was the constitutional conference held at the Bomas of Kenya from 2001 to 2005. Kenyan law professor H. O. Okoth-Ogendo chaired the working-group on the Land and Environment Chapter. As far as community land is concerned, the result of this long deliberative process was Article 63 of the 2010 Constitution (see Appendix 1).

From the reading of this Article's clauses, the Constitution acknowledges "community" as a legal entity that may be constituted on the basis of basically two features: ethnicity and culture. The "community of interests" suggested by the Constitution can be interpreted either as commonality rooted in cultural practices, or, in *sensu lato*, as commonality of interests in land (as in the case of estate residents who share common areas). The Parliament is thus given a mandate to enact community land provisions.

In article 63(2) of the Constitution, the designation of community land is wide-ranging and ambivalent. Clause (2)(a) clearly refers to the Land (Group Representatives) Act (Chapter 278, 1970), which concerned unregistered pastoral lands, and led to their registration as ranches. This particular process of adjudication of community land eventually floundered, as the management structure of the ranches was not inclusive and transparent. As a result, most of the ranches were subdivided among shareholders, leading to the ultimate individualization of the ranch land.[41] Even so, a number of ranches remain collective entities. According to the Constitution, these are eligible for conversion from ranch land to community land.

A number of scenarios are suggested for land that may be conferred to the new legal entity, the community. Processes of attribution by the law are envisaged by clauses (2)(b) and (c), and these may include the conversion of tenures. Clause (2)(d) identifies community land in forests registered as Trust lands (community forest), grazing areas (pastoral commons), sacred sites, ancestral land[42] of hunter-gatherers, and all the Trust lands. Clause (3) reveals a certain ambiguity in that it reproduces the trusteeship model by conferring unregistered community land to the county governments (the lowest devolved entity created by the 2010 Constitution) until registration. Clause (4) dilutes this continuity by interdicting any disposal of land entrusted in the county executive[43].

The following sections describe the drafting process and its contextual background, and propose an analysis of the political economy of the drafting of the community land law. This helps explain the respective positions, visions and agendas of the actors involved in the development of the law.

41 For further details on the subdivision of these commons, see inter alia Rutten, 1992, Mwangi, 2005.

42 As I shall demonstrate below, "ancestrality" of a claim is difficult to translate into a clearly delimited "property" claim. This is mostly because the territories concerned are embedded in the social matrices of "communities", which are themselves the product of long historical and political processes.

43 As we shall see, this ambiguity in the formulation of constitutional provisions and "safeguards" against abuses of power became the object of intense debate.

4.1 LEGAL PROCESSES: THE DRAFTING OF THE LAW

The first attempt at establishment of an institutional framework for acknowledging community land rights was the work of the USAID-funded SECURE project[44]. The SECURE project began in September 2009. At this time, Kenya's National Land Policy draft was already out (since 2007), but still awaiting approval from the Parliament (which happened in December 2009). The draft of the new Constitution had been released by a Committee of experts, following the rejection by referendum of the so-called Wako draft in 2005. Both these legal documents proposed a transition in the conceptualization of land tenure in Kenya, from the trusteeship model to a community ownership model. This constituted the legal basis upon which the SECURE project sought to develop the Community Land Rights Recognition (CLRR) Model.

The project targeted Lamu County in the far northeast of Kenya, which borders Somalia (see map below)[45]. The rationale of the project was to pick a fragile ecosystem, decree the need to improve conservation management and posit (in line with international standards and paradigms) that the approach to natural resource management be community-based, and that "communities" shall be involved in conservation by ensuring that they have a more formal and legal stake in holding the land to be conserved[46].

44 A.k.a. Securing Rights to Land and Natural Resources for Biodiversity and Livelihoods in the Kiunga, Boni and Dodori Reserves and Surrounding Areas in North Coastal Kenya.

45 Lamu was considered an ideal pilot area because it was targeted for one of the government's Vision 2030 mega-projects: the construction of the Lamu Port Southern Sudan-Ethiopia Transport corridor (LAPSSET), which USAID was welcoming while seemingly being concerned about how construction of the corridor would affect community lands rights in the area: from interview with SECURE chief of project (Nairobi, 14 February, 2015)

46 See Agrawal and Gibson (1999) for a critical reading of community-based conservationist paradigms.

Map 5. SECURE Project locations: Google.maps

The project sought to develop a model (or protocol) for the process of recognition and formalization of community rights - this was to be instrumental in securing community land tenure through elaborating a cadastral survey map and issuing title deeds[47]. The projects targeted 4 villages that were visited over the course of 4 weeks. A multi-stakeholder team of about 20-25 people, comprising state actors (from the Ministry of Lands of Nairobi and Lamu, as well as conservation agencies), along with non-state-actors (national and local NGOs), carried out the first step of the project, centered on documenting community land rights. In September 2011, the study was complete and the model had been finalized. It was presented in a forum held in Malindi and it eventually received endorsement from the then Minister of Lands, James Orengo (see Appendix 2, for an extract of the Ministry' speech in Malindi).

Technical steps envisaged by the Model will not be tackled here, given our focus on the long process that led to the Kenyan government's new legislation on community land. Notwithstanding the support that the SECURE Project seemed to enjoy from the establishment, public lands in Lamu County were never converted to community land and the Model was never piloted. From the Malindi forum in September 2011 to the end of the SECURE project in

47 These were tools that were deemed to be needed by communities when facing investors coming to build the port (Idem). The project sought to create demand for title deeds, demand that may not have preexisted. Eventually, the project aimed at building capacity for individuals to negotiate with investors and developers, so that communities could gain from leasing out their land and from participating in the stipulation of investment conditions.

September 2012, no activities were conducted in Lamu. USAID did not grant any extension for the project[48].

Meanwhile, on the legislative side of the process, in 2011 the first drafts of the new land laws were released for discussion. This also contributed to a shift in land stakeholders' attention from the CLRR Model to the legislative process.

In July 2010, the Ministry hired a consultant from a Kenyan law firm. According to the Contract Agreement between the Ministry and the firm, the lawyer had been assigned the task of writing what I have called the Land laws of 2012. There were no provisions about the Community Land Law in the contract. However, the consultant went ahead and drafted the bill (on the basis of desk-research only), at the time called the Zero Draft, and published it in October 2011.

An analysis of the Zero Draft was commissioned from a number of land experts within the framework of the SECURE project (Freudenberger *et. al.*, 2012), who criticized the bill extensively. The latter was said to be not properly focused on the recognition of customary land and, in numerous articles, to contradict constitutional and national land policy requirements. It was stated that this draft did not allow for the discovery of existing customary land institutions by pre-determining what customary rights consist of. And finally, it allowed extensive government control over the specification of land use and allocation of such land.

The content was deemed inappropriate, but so was the drafting process: national legislation, as envisaged in the Constitution (art.10), must be informed by public participation, whereby citizens' views must be properly harmonized by a team of experts in an *Issues and Recommendations Report*. These steps, as mentioned previously, were never followed by the consultant who drafted the Zero Draft and the Land laws.

To overcome these shortcomings, on 21 September 2012, almost one year after the Zero Draft was published, the then Minister of Lands appointed a Taskforce on Formulation of Community Lands and Evictions and Resettlement Bill (Gazette Notice No.13557, September 2012), with the mandate of formulating these draft bills through a consultative process. The Taskforce had an initial mandate of two months for two bills. However, the terms of reference were revised, hence splitting the elaboration of the two bills. For the Community Land Law, the time frame was also extended from two months to two years, so as to allow wide consultation among the public and communities.

On the work of the Taskforce, there are several points to highlight. Firstly, the Taskforce had a very variegated composition: twenty people composed the group, among whom professionals from relevant sectors[49] (plus three joint secretaries). Secondly, all consultation steps were

48 Different narratives speculate about the reasons for the closure of the project even before it was piloted. The USAID pullout was said to be political, firstly because of the US presidential election bringing new priorities, and secondly because of the upcoming Kenyan election that made USAID nervous about intervening in land matters in such a highly politicized environment (Idem; and from interview with international organization officer: Nairobi, 17 February 2015). Furthermore, both at the national and local level, the project appeared unwanted by both the Ministry of Lands officer and by local NGOs, which found that American leadership in the handling of the community land question was not appropriate (from interview with SECURE chief of project, Ibidem; and interview with Kenyan NGO officer: Nakuru, 13 May 2014).

49 Including lawyers, land economists, land surveyors, land administrators, legislator drafters, government officials, civil society representatives, anthropologists, historians and representatives of professional bodies.

followed[50] (that is why the process was quite lengthy). Taskforce members went around the country: communities gave very raw information and suggestions, for instance, on the institutional framework for management at local level, and also on how to link it with the national level[51]. Although I do not possess full documentation on the consultation process, accounts from Taskforce members and other actors depict the making of the Taskforce Bill as "fully participatory" (and also fully funded by the Kenyan government)[52].

When the Community Land Bill drafted by the Taskforce was handed over to the Ministry of Lands in February 2014, no action was taken. In December 2013, the government changed (as a result of an election), as did the Cabinet Secretary for the Ministry of Lands. The Taskforce Bill was never published in the official gazette and never forwarded to Parliament for debate. Meanwhile, in November 2013, another Community Land Bill was introduced into the Senate by the Senate Majority Leader, Professor Kithure Kindiki. The Kindiki Bill was said to be "a minor version of the Taskforce Bill" that a Taskforce member had "sneaked out" and passed over to the Senator, who claimed to only want to fast-track the process[53].

For almost a year, a state of limbo dominated the scene whereby the Ministry of Lands shelved the Taskforce Bill. The Senate proceeded with readings of the Kindiki Bill.[54] Then, in August 2015, the Majority Leader of the National Assembly introduced another modified version of the Taskforce bill in the Kenyan Parliament[55]. This originated from the Ministry of Lands (hereafter, the "Cabinet Secretary Bill"). When the Cabinet Secretary Bill entered the National Assembly on 19 August 2015, a number of parliamentarians moved a "Special Motion" for a one-year "extension of period in respect of legislation with constitutional timeline of 27 August 2015"[56]. They argued that, "given the very nature of the issues", such as definition, management and registration of community land - all defined as "quite weighty, and controversial" - the Community Land Bill was deemed as "not amendable to easy consensus" [57]. Menacingly, a Member of Parliament (hereafter, MP) said: "If we don't extend, MPs will be shooting themselves under the foot"[58]. Another fear related to potential dissolution of the Parliament in the event where the latter failed to meet the Constitutional deadline: Kenyan citizens could have seized the High Court to blame the Parliament for non-fulfilment of the Constitutional provisions, MPs feared. The extension was hence accepted.

50 These include: literature review to ensure that the law drafted is not in conflict with other legislation; identification of the main issues (what is a community, what is community land, how is it actually managed); then, the issues were taken to the public for preliminary public consultation.

51 From interview with Taskforce member (advocate), (Nairobi, 27 May, 2015).

52 Idem; Interview with another Taskforce member (land surveyor), (Nairobi, 25 February 2015).

53 From interviews respectively with Kenyan NGO officer (Nakuru, 8 July 2014) and interview with a Taskforce member (advocate: Ibidem).

54 Later, the Commission for the Implementation of the Constitution (CIC) pointed out that there had been no public participation in the making of the Kindiki Bill, as required by the Constitution. The Speaker of the Senate was then asked to withdraw the Bill (Daily Nation, 6th December 2013).

55 Dated 11th August 2015 (The National Assembly Bill N° 45 of 2015).

56 From Official Report, Hansards of National Assembly, 19 August 2015 at 2.30pm. As the Honorable Members pointed out, the current Parliament (the 11th), being bicameral (unlike the 10th, previous to the enactment of the 2010 Constitution), bills could no longer be passed in an expeditious manner and more time was needed.

57 From the Hansard of the National Assembly, Ibidem.

58 Idem.

In order to further comply with Constitutional provisions, the Departmental Committee on Land and Natural Resources of the National Assembly organized consultation with selected stakeholders. In September 2015, a Parliamentary Retreat was held in Mombasa, in order to discuss three land bills, including the Community Land Bill[59]. In Mombasa, stakeholders' views were aired and the Committee compiled a report, along with the amendments to be proposed on the floor of the National Assembly. Thanks to the collaboration with the KLA, which hosted me for nearly six months (from September 2015 to February 2016), I had the opportunity to participate in an official three-day Parliamentary Retreat (held at Travellers Hotel in Mombasa from 16 to 20 September, 2015: see pictures below), where I could conduct participatory observations that allowed me to clarify the stakes of land law reform and positioning of actors.

The Cabinet Secretary Bill was tabled in parliament between April and May 2016. Almost all the amendments proposed by the Committee were approved (see *infra*). However, when the Bill was passed over to the Senate, where it was tabled on 15 June 2016, the Senators rejected the Community Land Bill. A Mediation Committee was established and public participation was called upon again. A Report was finally issued by the Mediation Committee, along with an agreed version of the law, which was eventually adopted by both the Chambers of Parliament in early August, just in time to meet the Constitutional deadline. The President of the Republic of Kenya, Uhuru Kenyatta, assented to the Community Land Law on 31 August 2016[60].

59 The remnant bills are the "Omnibus Bill" and the Land Use Bill.

60 Act n°27 of 2016 has been published in the Kenya Gazette Supplement on 7th September 2016, by the Government Printer (with date of commencement, the 21st September 2016).

Picture 6. Travellers Hotel. Mombasa. 16 September 2015, Parliamentary Retreat: Elected leaders, members of the Departmental Parliamentary Committee on Land and Natural Resources and members of National Land Commission

Picture 7. Travellers Hotel. Mombasa. 16 September 2015, Parliamentary Retreat: stakeholders invited to participate in the legislation-making debating process

4.2 The Political Economy of the Drafting

The analysis above focuses on legislation-making and the factors that informed and affected it. A number of drafts emerged from this complex and iterative elaboration process. The environment of land law reform is highly politicized and significant changes were introduced with successive versions of the bill. Important modifications affected the recognition, protection and registration of community land rights.

This section identifies and examines possible rationales for successive alterations, and analyzes the positioning of some key actors. The analysis goes from the Taskforce Bill, to the Kindiki Bill, to the Cabinet Secretary Bill[61]. It then looks at the parliamentary debate and the amended version that the National Assembly passed over to the Senate. I will call this amended version the Committee Bill, since it incorporated almost all the amendments proposed by the Departmental Committee on Land and Natural Resources of the National Assembly.

61 From this review, I will exclude the CLRR Model and the Zero Draft Bill since they were never seriously taken into consideration by the legislator for regulating community lands.

A quote from an Honorable Member of the Kenyan National Assembly underscores the stakes of the Community Bill:

> *The challenge of the CLB is that of clashing of cultures. On one hand you have a community that owns a piece of land from ancestry, but on the other hand you have a capitalist system coming in where land is highly valued in terms of monetary gain […]. There is a serious juxtaposition of a conflict of value systems*[62].

Many MPs defined the "issue of community land" as a sensitive one, mainly because of the violent clashes affecting parts of the country in the 1990s and 2000s, which were largely due to unaddressed or instrumentalized "community land issues" (Lynch, *op. cit.*).

A recurrent concern during the debates was the clarification of what "community" is. This appears at the core of the Bill. It is important because it delineates who is entitled to claim community land. The Constitutional definition (Art.63.1, see Appendix 1) is the basis upon which the Bill would have to rest. The Taskforce Bill expounded the Constitution's definition and, notwithstanding small changes, this was maintained[63]. Among the changes, the Cabinet Secretary Bill, for instance, struck out the reference to ethnicity (one of the attributes that a group can put forward on the basis of groupness). Debates on this issue were intense, both in Mombasa, when the Committee held a retreat where "stakeholders" were invited to help find loopholes and debate visions, and also in the National Assembly.

The dilemma was whether to leave out ethnicity and include "migrant communities" in the definition of the kind of group entitled to community land rights, or to define "community" in ethnic terms, thus excluding the "migrant communities" residing in a geographical space deemed as traditionally belonging to an "indigene community." The fear, clearly stated, had to do with fueling ethnic conflicts. Eventually, ethnicity was reinstated at the third reading of the bill. In the National Assembly, a number of MPs opposed this reinstatement, arguing that looking at communities in terms of "tribes" would risk further tribalization of society. Eventually, it was noted that "the word" was in the Constitution itself. Finally, its reinsertion was accepted[64].

Another very key area of discussion revolved around the process of registering community land rights, and the management structure for administering such land. The Taskforce Bill required that every community with an interest in community land constitute itself into a registered legal entity, and also provided for a three-tier system of governance[65].

The Kindiki Bill, by contrast, did not require communities to register, but only to form a Committee, comprised of "members of the community" (hence vaguely defined) that would identify the boundaries of their land in order for the registrar to issue a Certificate of Title, before

62 From Official Report, Hansards of National Assembly, 3 March 2016 at 2.30 p.m.

63 See Appendix 3 for the ultimate definition of "community" by the Community Land Act (RoK, 2016).

64 The historical reality of community land in Kenya has been shaped by many layers of administrative intervention since colonization. Given this, whichever word or words are used will necessarily eventually imply, in practice, attempts to disentangle these complex histories.

65 This includes the "Community Assembly," "Community Committee," and " Community Board," all conceived as an inverted pyramid with the Assembly (comprised of virtually all the members of the community) endowed with ultimate decision-making power, the Committee as the executive entity, and the Board as a supervising body. See clauses 15 to 30 for provisions on the management structure (MoL, 2014).

adjudication takes place[66]. This bill also envisioned that decisions on disposing of community land should be ratified by a resolution of "the members of the community" in a meeting convened for that purpose[67]. The scope, intention and wording of the Kindiki Bill already appear very different from the Taskforce's, at least less precise. What is even more striking is that, according to the Kindiki bill, the county government would be able to transact and manage land that is unregistered, convert community land to private land (subject to approval of the Committee) and to set aside part of it for public purposes[68].

Finally, the Cabinet Secretary Bill, on one side, did require communities to register, but in accordance with the law relating to societies, thus letting the registered community administer and manage the land; while, on the other side, it did not require any structure or community institutions, and eventually gives the Cabinet Secretary the power to prescribe the procedure for the registration of community land[69].

From this outline, it appears that the complex inverted pyramid devised by the Taskforce, which was to ensure a maximum of checks and balances in the administration of community land, was lowered, if not dismantled by the subsequent versions of the bill.

On the Kinkidi Bill, the re-centralization of power in local authorities is puzzling, because under the previous regime, the local authorities holding the land in trust for communities, the then-called county councils, hugely abused their power, which is well documented in the so-called Ndung'u Report (RoK, 2004: see *above*). With the transition to a decentralized system of governance, the democratization of local government (with an elected Governor and county assembly) does not seem to have enhanced the administration of unregistered lands. In fact, during the parliamentary debates, quite a number of MPs (transcending the political wing they belong to) pointed to the laxity of Governors and county executives in managing community lands entrusted to them since 2010. Therefore, MPs were asking for more precision on the interdiction for county governments to transact on unregistered land; as well as more precision on the transitional clauses regulating the land alienated or leased under the previous administration. Of particular interest for the MPs were the procedures regulating the renewal of the leases for community land: some of them were demanding, firstly, to ensure that once the lease expires, land shall revert back to the community, and secondly, that the royalties obtained from the leases shall not be held in trust by the county government, but be directly passed over to communities. At the third reading of the bill on the floor of the National Assembly, MPs demanded more safeguards. Accordingly, a number of sub-clauses were inserted as amendments[70].

On the Cabinet Secretary Bill proposals for community registration as a society, the rationale for such a suggestion can be inferred from the discourse of the Ministry of Lands' representative at

66 See Clause 15.2 of the Kindiki bill (RoK, 2014).

67 See Clause 20 (Idem).

68 See Clauses 38 and 39 (Idem).

69 See Clause 7 on the provision for the registration of community as a society, and clauses 15 and 16 on management (RoK, 2015).

70 These basically say that even though the county government was to hold any monies in trust to communities, these were to be deposited in a special interest-earning account (Clause 6.4) and, of course, released to the community upon registration (Clause 6.3). Finally, beside the interdiction for county governments to dispose of any unregistered land, the text added interdiction to sell, transfer, convert for private purposes or in any other way dispose (Clause 6.7: RoK, 2016).

the Mombasa retreat. The officer explained that the communities of Kenya are variegated: they have different ways of functioning and governing themselves, hence there is no need to constrain them to one type of structure (or even to tell them how to organize themselves). Secondly, it was too expensive to provide for those local structures, which may easily be subject to elite capture. Finally, in the words of the Ministry officer, "the Ministry of Lands registers land, not communities!" [71] However, almost all parties at Mombasa opposed these arguments. The representatives of the Commission for the Implementation of the Constitution recommended that the Honorable Members of the Committee amend this section, and compel the communities to register because, in the Commissioner's words, "one must deal with an entity"[72], this goes beyond the specificity of how community manages itself. The National Land Commission's representative also opposed such a claim, pointing out that the problem was actually in forcing communities to register as a society and eventually concluding that, since communities were already being forced to take on a statutory form, the best thing to do was to leave it to communities to determine their jurisdictional form. Civil society organizations also urged for the "Taskforce system" to be reinstated.

Interestingly enough, when the bill reached the National Assembly, the management structure devised by the Taskforce was actually reintroduced. Credit for the Committee's concern for "safeguards" for the protection of community land should probably go to the Pastoralist Parliamentary Group (PPG). As an MP noted during the debate, "I have observed very keenly that Members have extreme interest in the Bill, particularly the Members from pastoralist areas"[73]. In fact, a record number of Members (55) intervened at the second reading stage. The PPG seems to have been more influential than the MPs from the other areas. For example, when discussing the definition of "community land", one MP argued that, "I strongly support the Chairman of the Departmental Committee on Lands. As the Pastoralists Parliamentary Group, we are a caucus of about 84 Members of Parliament. We are the ones who came up with this definition"[74].

The polarization of the Chamber was more evident in discussion on the mechanism for setting apart land for investments on community land[75]. There were two camps, one comprising the parliamentarians seeking 100% security (i.e. all the members of the community should approve the decisions on land management), and a second camp of more liberal parliamentarians who thought that the threshold should be lower because they did not want to make the investments criteria impossible to meet. (They also felt that the CLB was a transitional arrangement, because at the end of the day, everyone would want individual ownership.) Finally, the MPs agreed upon a threshold for decision-making that was deemed high, but appropriate: 2/3 of the Community Assembly (made up of all registered community members) sitting in a *baraza* ("meeting" in Kiswahili), whereby the major transactions (alienation, leasing etc.) will be discussed and voted upon. It appears that credit for these safeguards should go to an alliance of Coastal and Pastoralist MPs - representing regions with most of Kenya's community land, and also normally representing opposition parties - and other opposition MPs. They "ganged up", as an MP asserted.

71 From notes taken at the Mombasa Retreat, Travellers Beach Resort and Club Hotel, Mombasa, 17 September 2015.

72 Idem.

73 From the Official Report, Hansards of the National Assembly, 2 March 2016 at 2.30 p.m.

74 From the Official Report, Hansards of the National Assembly, 20 April 2016 at 2.30 p.m.

75 This is according to an MP interviewed on 16 June 2016, in Nairobi.

A sort of compromise was reached, whereby these safeguards were not made retroactive. This is meant to protect investors who had already invested in community land. In fact, all past deals in the former Trust lands are "condoned"[76]. One MP questioned why the Chairman of the Committee had not amended this article - in her view, Clause 46.1 constituted a negation of the essence of the entire Act.

Already, from the contextual analysis, one could infer the high stake of this law. Proposed drafts are advanced by different sectors of the governing class: among them, the highest ranks of the Ministry of Lands are the uncontested protagonists, seeking to pull the strings from center-stage, but also from the sidelines; however, we have seen that international actors did not hesitate to take part in the process and Kenyan NGOs equally sought to make their opinion count by pressurizing the law-makers[77], who for their part, once the ball fell in their court, seized it and indeed ran with it. All sectors of Kenyan society felt concerned with the issue of "community land", which appears as the last portion of unregistered land in the country, but also as the cultural heritage of Kenyans.

From the political economy of the drafting, one may conclude that the national arenas of debate are quite polarized, with one pole taking up the economist rationale, thus seeing those unregistered lands as "dead capital to unlock", to quote the famous de Soto assumption (de Soto, 2000), and another pole promoting the protection of the cultural aspect enshrined in these community lands, which should be shielded from investors. However, the argument that I will seek to illustrate in the next and last section of this paper is that in local arenas, from where the claims to community land originate, the real issues at stake are less polarized, yet far more complex than this simplistic equation. Investigating the making of a "community claim" helps us to grasp the multifaceted nature of community land.

The next section of this paper aims to analyze the complexity and intrigues of "community land claims," showing that these can really only be understood when placed in historical and political context.

76 Clause 46.1 (RoK, 2016) says that "[…] any rights, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act".

77 The lobbying and advocacy strategies, and the coordination attempts undertaken by the non-governmental sector in Kenya around land reforms, and especially of the Community Land Law, have been of great interest for my research. However, given space limitations, I do not to delve into this aspect of my research here.

VIII. THE POLITICAL AGENCY OF A MARGINALIZED COMMUNITY FROM THE MAU FOREST OF KENYA

The choice of adding another scale to the analysis of the debate on community land in Kenya was methodological, arising from the wish to combine the analysis of the policy process with a more grounded insight into the studied phenomena. The significance of such an approach has been corroborated by the empirical experience that has shown the extent to which the two levels (the national and the local) are intertwined, connected in a twofold way, from top-down through government action, but also from bottom-up through the action of "entrepreneurs" who spin their webs in order to achieve their ideals and interests[78]. Moreover, during my empirical study of the making of land reforms, at the national level, it has become apparent that mainstreaming international concepts, such as "participation", "civil society", "grass-root", "minority/ marginalized group", "conservation" and "community", have served as entry points for cultural entrepreneurs to put forward very localized agendas.

This being said, my interest in the mobilization of a group of activists representing a "community" of forest dwellers from the west of the country was triggered by their outstanding participation in the policy process and more particularly in the national arenas of debate on land reforms. The means and the rationale of this participation will be highlighted first, thus showing the multi-scale nature of the policy process, as well as the internationalization of the repertoire of action of "community-mobilization". I will also enable emergence of the grievances and claims of this particular group, and subsequently call attention to the historicity of these same claims and their politicization, to eventually stress the difficulty of identifying a single and unequivocal "community", let alone "community land".

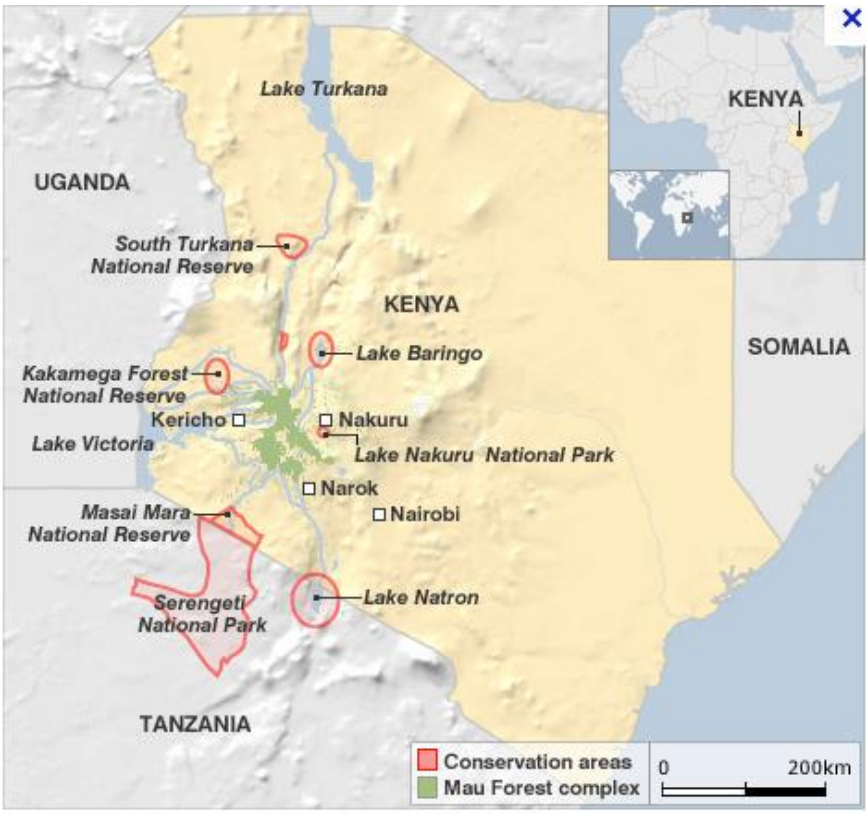
5.1 THE MOBILIZATION OF A HUNTER-GATHERER "COMMUNITY"

To start from the policy process, in view of the constitutional review process, the International Labour Organization, which has been engaging in the battle for indigenous and tribal peoples' rights since the 1920s[79], granted funding to a Kenyan NGO called Centre for Minority Rights International (CEMIRIDE). The latter embarked on building a network of representatives of indigenous/marginalized/minority communities, to voice their grievances as part of the legal and constitutional reform processes. The lobby committee was called the Pastoralist and Hunter-Gatherers Ethnic Minority Network, and its mission revolved around the organization of workshop meetings to disseminate information on minority group issues and influence the legislative process. Although the Network realized some of its goals, its lifetime was fairly short: it did not survive the constitutional review process. The organizational and contextual hindrances that this Network encountered fall outside the scope of this paper, however, it is important to underline that one of the key cultural entrepreneurs fomenting the mobilization I investigate below was part of this lobbying team, which gained visibility within this forum of debate and consultation.

78 Following the methodological precautions outlined by Bierschenk et al. (op. cit.), I wish to refrain from both a "positive" view of these actors as emanating from a "civil society" that emerges in confrontation with the state, and a "negative" view of the same actors as profiteers of poorly-managed aid flows (pp.7-8).

79 http://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm

Against this background, the "Ogiek community" is presented as composed of hunter-gatherers inhabiting the Mau forest in the Rift Valley of western Kenya (see map below)[80]. Under the banner of the Ogiek Welfare Council (OWC), a number of activists also took part in deliberations on the National Land Policy. Along with the Ogiek People Development Program (OPDP), the OWC became a regular "stakeholder" in the consultative processes engaged in elaboration of Kenya's new Land laws. The OWC came about in the wake of the legal action undertaken by some community leaders in the late 1990s (see *infra*): it attracted funds and support from national and international NGOs, though has remained a loosely organized body, which eventually deteriorated due to lack of transparency and accountability mechanisms.



Map 6. Mau Forest Complex and conservation areas in Kenya. Source: BBC, 2009

The OPDP came about more or less during the same period, though initially representing a different geographic area (the Narok-side of the Mau forest, opposed to the Nakuru constituency where the OWC was based and used to operate): however, as the OWC lost ground, the OPDP expanded in terms of professionalization and also in scope of action, until purportedly attaining coverage of the entire "Mau Complex"[81] (see *infra*), ultimately supplanting the OWC. The latter

[80] Another hunter-gatherer community, also named Ogiek, is found in the extreme West of Kenya on the slopes of Mount Elgon.

81 From interview with OPDP officer (Nakuru, 15 June 2015).

formally ceased operating, yet its coordinator is still involved in lobbying activities, sometimes in conjunction with the OPDP and sometimes not[82]. In sum, via these organizations, activists professedly representing the interests of "the Ogiek of Mau", have participated in nearly all government-led processes and civil society advocacy actions pertaining to land reforms in Kenya since the mid-2000s.

Also, it should be noted that this group claim takes shape in the wider context of ethno-political mobilization. By surfing the wave of the globalized indigenous people movement, the grievances put forward by these cultural entrepreneurs have come to assert a unique ethnic identity, thus dissociating from the larger Kalenjin grouping of the Rift Valley of Kenya. Gabrielle Lynch (*op. cit.*) has construed these mobilizations as forms of ethno-nationalism that use opportunistic (re)branding or positioning (Li, 2000) in an attempt to get traction and put forward their demand to the Kenyan government at the national level, as well as at the international level. This has contributed to giving remarkable visibility to their cause and has in turn led to the internationalization and further politicization of the "Ogiek struggle". Against this background, I sought to analyze the catalysts of Ogiek mobilization.

- **The Repertoire of Actions**

What gave rise to this marginalization of the hunter-gatherer communities, and of the "Ogiek community" among them? Activists perceive that they have been neglected by the central administration (colonial and postcolonial), which never set aside a "reserved forestland" for them to enjoy as their exclusive domain. On the contrary, under colonialism, the Mau and other forested lands were gazetted as government land and placed under the authority of the Forest Department (today known as Kenya Forest Service). The leitmotiv of today's activist discourse is that theirs is a fight for self-determination against the authorities' design to assimilate the Ogiek into Kenya's dominant ethnic groups. For Ogiek activists, preservation of their identity and culture is only possible through the conservation of their "original" habitat, the forest, which allows for the maintenance of certain socio-cultural activities, including traditional beekeeping. These cultural entrepreneurs felt that their ancestral rights to forest access were violated when, following conservationists' recommendations (see *infra)*, they were urged to leave the forest and to convert to mixed farming on settlement schemes.

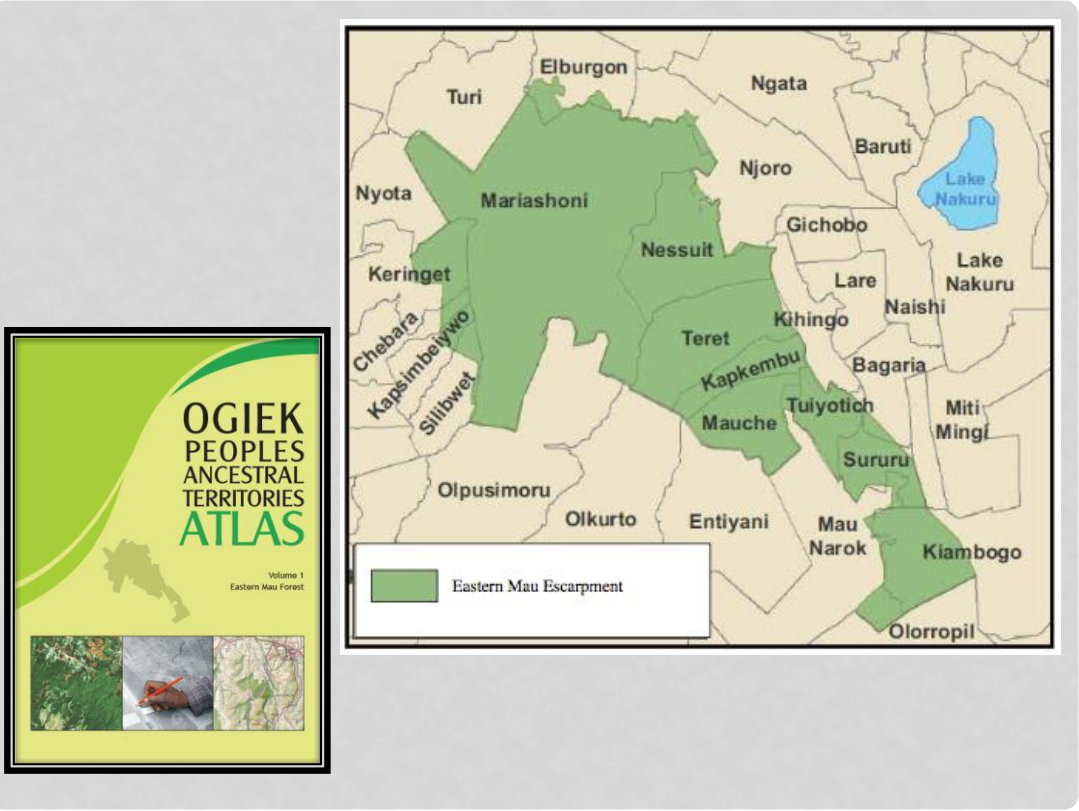
Components of the "Ogiek community" rallied to take action, both individually and as a group. In 1997, the eastern sides of the Mau Forest (then inhabited by these hunter-gatherers) were excised to be converted into settlement schemes. Individuals sued the local and national governments to block evictions (including a case before the High Court of Kenya) and protested the irregular, even illegal, settlement of "outsider communities" on their ancestral land[83]. The evictions were deemed to have resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests. The High Court ruled in favor of the applicants' cause and directed the National Land Commission (NLC), custodian of all public lands in Kenya since 2012, to identify and open a register of members of the Ogiek Community, and to identify land for the settlement of the said Ogiek members. Yet, as we shall see, no action was taken to implement the Court ruling. The reasons for this inaction are

82 From interview with OWC activist (Nakuru, 27 June 2016).

83 The most famous court case is Joseph Letuya & 21 others vs Attorney General & 5 others, filed on 25 June 1997, which was finally addressed by the Land and Environment Court (established by the homonymous Act of Parliament of 2011) in 2014.

manifold but may reside in part in the confrontational stance that Ogiek activists assumed against successive governments.

Since 1997, this group's repertoire of action (which is more heterogeneous than this brief account may suggest) evolved through the progressive internationalization of its leaders. For instance, the mobilization led to the development of the Ogiek Peoples Ancestral Territories Atlas (OPAC), participatory 3D mapping conducted by a Kenyan NGO. The maps show that the territory the Ogiek claim actually covers the entire South-Eastern Escarpment (see map below). These same maps have been used as proof of the Ogiek claim, notably in the Ogiek case filed against the Kenyan government before the African Court for Human and Peoples Rights on 12 July 2012[84]. Minority Rights Group International, the OPDP, and CEMIRIDE are the three applicants[85]. The case was heard on 27 and 28 November 2014. However, the African Court only delivered its judgment on 26 May 2017, in favor of the "Ogiek claim", hence acknowledging the dispossession they endured[86].



84 The Ogiek case [is] the first case of indigenous people's rights to be considered by the African Court (ESCR-Net, online article, 26-02-2014). The case was lodged on behalf of the Ogiek people in 2009, on the grounds of violations of the Ogiek's rights to property, natural resources, development, religion, culture and non-discrimination under the African Charter on Human and Peoples' Rights. (Idem)

85 Their demands before the ACHPR are the following: 1) to halt eviction and interference with community's lifestyle; 2) to recognize Ogiek's ancestral land, i.e.. the land mapped out in the Atlas (see fn), which is gazetted as a forest reserve, i.e. public land managed by Kenya Forest Service, by issuing titles; 3) to pay compensation for the losses, both material and immaterial.

86 https://www.youtube.com/watch?v=y4VJ0Lz0i_U

Map 7. Cover of the Ogiek Peoples Ancestral Territories Atlas and map of Eastern Mau Escarpment as the territory claimed by the Ogiek people mobilization

At the African court, two different interpretations of the conservationist paradigm were mobilized by the applicants and the respondent, respectively. On one side, the Kenyan government's argument is that over the years, changes in Ogiek livelihood activities have occurred. In the 1990s, over 77% of Ogiek owned cattle. Cultivation was first recorded in 1942. By the early 1990s, it was estimated that each household was cultivating an average of 10 acres of land. These activities are not compatible with conservation. On the other side, activist discourse held that although the Ogiek experienced an agro-pastoral transition, their profound socio-cultural ties with the forestland remain unchanged. Therefore, because of their attachment to (no longer dependence upon) the forest, their land rights actually coincide with conservation demands. Their policy suggestion is the conversion of the land tenure of the forest, from public land to community land, thus upgrading the management style of the forest (community-based management).

Does the Kenyan legal framework on land and property enable 'communities' to claim ownership of forests? Not surprisingly, despite Art. 63.2 (d) (i) & (ii) (see Appendix 1), just a comma before, at Article 62 (g), government forests and water catchment areas are deemed to be public land. Therefore, in terms of the legal feasibility of the claim before the African Court, the matter seems to fall into the NLC's domain of competence, which is, by virtue of Clause 24 of the Community Land Act (Rok, 2016), the only institution entitled to convert public land to community land by allocation (on a case by case basis). The Chairman of the NLC, Professor Mohamed Swazuri, interviewed on 4 April 2016, seemed well aware of the "Ogiek case" and the historical injustices that groups previously living in the Mau Forest as hunter-gatherers had experienced. While being empathetic, he also displayed great caution because of the "sensitivity" of the area and the fear that intervention may generate more conflict. The next section attempts to explain the motives behind the NLC chairman's fears.

- **The Origins and Perverse Impact of the Mau Forest Settlement Schemes**

Since the Carter Commission of 1933, the forested areas of Kenya have been gazetted (i.e. declared government land), and communities' access to them has been regulated by the state. Following in the footsteps of the colonial regime, independent governments ruled out recognition of usufruct rights over public land, planning to "accommodate" affected communities through land demarcation and the issuing of title deeds. The Mau Forest hunter-gatherers' problems started when Daniel arap Moi's government undertook to "regularize" their situation.

What is referred to as the "Mau Forest Complex" (see Map No 3) is located at the heart of the Rift Valley highlands. It is the biggest forest ecosystem in Kenya (18 forests, 400,000 hectares), and is the most important water catchment area of the country (feeding 12 rivers and 5 lakes). Despite the ecological and environmental importance of these forests, massive deforestation affected the Complex from the 1990s onward, due to the creation of settlement schemes (hereafter, SSs: see picture below). The official aim of the SSs was to settle the forest dwellers, the hunter-gatherers, by providing them with "developmental tools": farming plots to develop. Due to procedural irregularities, these SSs led to the loss of 25% of the Mau Forest Complex (the equivalent of 107,000 hectares). The social and ecological repercussions of the would-be conservation project help us to understand the drivers of mobilization.

Picture 8. Mauche Ward in Njoro Sub-location, in Nakuru County

The origin of these SSs can actually be tracked back President Moi's wish (1978-2002) to carry out a road-creation project to link areas of South West Mau Forest (SW Mau) and the Trans Mara to the towns of Kericho and Nakuru. Moi's government engaged the British Cooperation, which agreed to fund the project. This required an environmental assessment. A project for forest conservation emerged from this: the so-called KIFCON Project.

Studies were commissioned for the KIFCON project, and a team of scientists, including an anthropologist, was sent to SW Mau. The team "discovered" the hunter-gathers partially living in the Tinet forest of SW Mau[87]. Hunter-gatherers were also living in camps alongside forest stations, due to repeated evictions conducted by the Kenya Forest Department (which worked to ensure that no individuals inhabited forests that were supposed to be conserved)[88]. The anthropologist recommended a halt to the evictions and proposed that the forest dwellers be settled near their ancestral territory in Tinet forest, thus allowing them to preserve their cultural practices and identity. Moi rejected the settlement plan suggested by the KIFCON project and eventually the project was closed down. Moi did not tolerate interference in the management of a process as sensitive as land allocation - Kenya turned to multiparty democracy in 1991 and the creation of a settlement scheme represented nothing but the creation of a political constituency, a vote reservoir. As Jaqueline Klopp and Job Kipkosgei Sang argued:

> *Failing to understand the complex politics around power and land in Kenya, KIFCON made a recommendation that would legitimize settlement in the forest: the Ogiek settlement scheme*

87 From interview with the anthropologist of the team (Nairobi, 27 November 2015).

88 Evictions of hunter-gatherers from SW Mau had actually started in the 1940s and became even more brutal after Independence.

became a cover for massive and irregular appropriation. Predictably, the "Ogiek settlement scheme" became a site of land accumulation and patronage politics by those in power, producing exclusion, conflict and environmental destruction. (Klopp and Sang, 2011)

KIFCON had embarked on the tricky task of listing the names of the Ogiek people to be (re)settled. The forest had never been the exclusive domain of hunter-gatherers, but following the displacements of the colonial era, various scattered groups had chosen it as a safe place of refuge and asylum. As Klopp and Sang note, "[g]iven the complexity of this task, which involved highly mobile and elusive people, even those working for KIFCON doubted the accuracy of the list. […] [T]he list grew as it moved through the corridor of power down to the local provincial administration" (pp. 129-130). From the 1,800 families in the initial KIFCON estimate, when the settlement scheme of 25,000 hectares was initiated in 1996, the number of families being allocated land had reached 9,000 (p.130).

Even though KIFCON was terminated, the Moi government went on to settle "forest dwellers" by taking them from the west to the east of the Mau Complex. In addition to the "original" forest dwellers, landless people drawn from Chepalungu location (in the highly populated area of Bomet) were brought into the scheme, which was called MauCHE (Mau + Chepalungu). Due to the increased number of beneficiaries, the deforested territory in East Mau turned out to be insufficient. The overflow population was brought back to SW Mau, where other SSs were created, deforesting even more land.

The ill-effects of these poorly conceived SSs are numerous. The process aimed to use land allocations as political gifts intended to create patronage ties between scheme beneficiaries and the regime. Many irregularities arose. Some happened in the allocation procedure itself. Land surveys, for example, were often conducted in illegal ways (RoK, 2004). Planners and surveyors sent out by the Ministry of Lands did not hesitate to survey, demarcate and parcel out water catchment areas and other conservation hot spots (RoK, 2009b). To add insult to injury, many of the same state officers became illegal beneficiaries of land allocations in Mau.

In the early1990s, two more SSs were initiated in the Eastern Mau Escarpment: the Nessuit and Mariashoni SSs. These are also the home locations of some of the Ogiek activists. Unlike the schemes discussed above, which emerged from a state-led process, these were demand-driven. Inhabitants asked the government[89] to provide the hunter-gatherers with the development tools - access to school, health care and farming tools - which their brothers from the west had also been blessed with[90]. When the forest was cleared and the land subdivided into individual plots, some members of these communities opposed the process of individualization and demanded that they be allocated a "reserve." They demanded a community title instead of the individual titles provided through the SS.

Some local opposition to the SSs thus emerged. It came from the realization that the SSs were opening their homeland to "foreigners" - that is, to landless people from highly populated areas in Bomet and Kericho. This opposition was ignored and land adjudication and parceling was eventually completed. While titles were being issued in 1997, a group of activists mobilized residents to sue the government before the High Court of Kenya. The court case interrupted the process of issuance of titles, not only for the Eastern Mau Escarpment but for all the SSs in the Mau Forest Complex. By the time the authorities stopped the registration process, titles had

89 Through leaders appointed on the basis of their degree of literacy.

90 From interviews with a chief of location (Nessuit, 12 May 2016) and with a former community leader (Nessuit, 26 June 2016).

already been issued in MauCHE. This was not the case for the SSs in the southwest. These were not issued until 2005, prior to the constitutional referendum, when Mwai Kibaki (then President) was seeking electoral support in the area.

The perverse nexus between elections and forest destruction in Mau reached a climax under the Moi regime in 2001. Prior to another important election, another forest excision was carried out. 61,586 hectares of forest were cleared, allegedly to settle "the Ogiek."

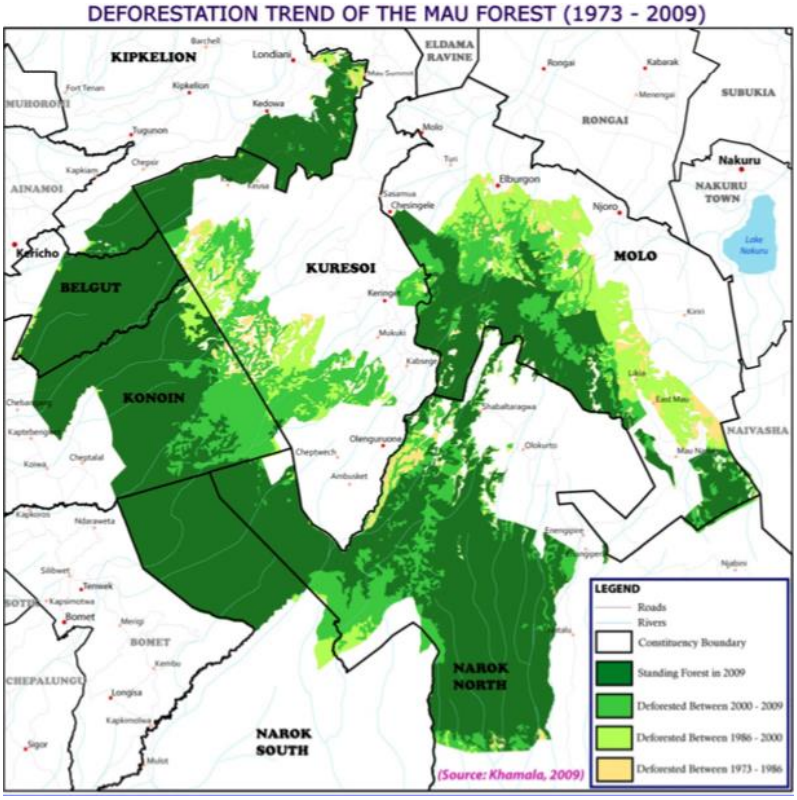
5.2 "INVENTION" OF THE WATER TOWERS AS A DEPOLITICIZING NARRATIVE[91]

Over the decade 1995-2006, encroachments and degradation of the Mau Forest had occurred as a result of relentless waves of migrant communities settling and irregularly expanding the farmland perimeter. Sustained public outcry brought the case to national and international attention. The situation became explosive. The then Prime Minister, Raila Odinga, set up a Taskforce to investigate the causes of the ongoing destruction of the Mau Complex.

The United Nations Environment Program (UNEP) and Kenyan NGOs played an important role in drawing attention to the degradation of this national asset. The UNEP published several important reports on the high elevation forests in Kenya. They represented the first attempt to monitor the impact of human activities on what had been named "the five main Water Towers" of the country[92]. These reports showed that several of the Water Towers were being degraded and the Mau complex was being destroyed at a very rapid pace. This was attributed essentially to encroachment, in line with a classic neo-Malthusian explanation linking forest encroachment and degradation to the rapid demographic growth in adjacent agricultural areas.

91 The analysis on the depoliticizing nature of the "Water Tower narrative" is drawn from a reflection that I have been conducting jointly with Gaële Rouillé-Kielo, PhD candidate in geography (Université Paris Ouest Nanterre). I wish therefore to acknowledge her contribution.

92 The Mau Forest Complex, Mount Kenya, The Aberdares, The Cherangani Hills and Mount Elgon.



Map 8. Map produced using remote sensing technology. Source: Khamala, 2009: p.6

Nothing happened until 2008, when PM Raila Odinga showed interest in the agenda of the UNEP and other international actors and agencies. The new policy narrative revolved around conservation[93], translated here into the need for forest rehabilitation. Odinga launched the Mau Task Force to assess the extent of forest degradation and recommend action. This new state intervention in Mau sought, at least in principle, to de-politicize the eminently political land question.

The Ndung'u Commission of Inquiry (appointed in 2002: see *above*) had already extensively shown that Kenya's forestlands were endangered. Yet, the Ndung'u Commission was less concerned with conservation than with "irregular and illegal allocation of lands." The Ndung'u Report had framed the problem as being a governance issue: excessive concentration of power, manipulation of redistributive politics, nepotism and corruption on the part of the elite. The TRJC had recommended the initiation of a national process aimed at redressing historical land injustices. These recommendations were never implemented. In these analyses, destruction of the Mau Forest was attributed to a systemic failure of governance and understood to be "land

93 As pointed out by political ecology analysts 'existing and long-term conflicts within and between communities are "ecologized" by changes in conservation or resource development policy' (Robbins 2012: p.22). "Ecologization" of an existing conflict seems to be the process at work here, and the link between environmental issues and politics would surely deserve more attention than I am devoting to it in the current paper, especially in regards to the role played by international actors such as the UNEP in the Mau Forest, which could also possibly be analyzed through the lens of the "anti-politics machine" conceptualized by James Ferguson (1990). However, such analysis and debates will not be tackled in the framework of this paper.

grabbing". The Ndung'u Report recommended the establishment of a Land Tribunal to review the title deeds issued in Mau.

The notion of "Water towers" seems to have filled this vacuum. It justified public intervention in the high-elevation forests of the country, not by focusing on the contentious allocation of lands, but rather by pointing to the importance of the ecological areas. This gave intervention a legitimacy vis-à-vis internationally recognized paradigms, now reformulated as the Sustainable Development Goals. The "Water Tower" was the basis of a powerful ecological argument in favor of forest "rehabilitation." The ecological argument hides the political intricacies of the case: it actually seeks neutrality through high-tech instruments (like remote sensing technologies) that pretend to depict the forests objectively. Evictions from forest reserves cannot be challenged when they are framed in terms of ecological necessity.

The mandate of the Taskforce was to provide for the relocation of people residing in the forest and make recommendations for the restoration of degraded forest and water catchment areas. In March 2009, the so-called Mau Report (RoK, 2009b) was released. It painted a grim picture of the environmental consequences of decade-long destruction of the Mau forest. On land ownership and resettlement, the Mau Task Force recommended the regularization of the SSs' residents, by firstly establishing their "bona-fide" – i.e. whether they are Ogiek or not – and secondly, the relocation of the bona-fide settlers who were issued titles in critical water catchment areas and biodiversity hot spots (p.46).

In May 2009, the Ogiek went to Nakuru to voice their opposition to the relocation plan. For them, "relocation" actually meant "eviction". In July and September 2009 respectively, the Cabinet and the Parliament adopted the Taskforce Report calling for the removal of all current inhabitants of the Mau. In October 2009, the government issued a thirty-day eviction notice to the Ogiek and other settlers in Mau. This is when the case was filed at the ACHPR, to halt the evictions and compel the state to comply with the African Charter's indigenous peoples' rights declaration.

In the meanwhile, during the Taskforce's investigations, the Ministry of Lands had declared a moratorium on all land transaction in the Mau Forest SSs, drastically constraining residents' property rights. In the wake of the 2013 elections, these restrictions (so-called caveats) were lifted. They were reinstated in 2014, following filing of the ACHPR court case. As a result, beneficiaries of the Mau Forest SSs have found themselves in possession of caveated titles – i.e. holders of plots that cannot be transferred, alienated, leased or, technically, not even developed.

This situation engenders profound insecurity for peasant smallholders. They feel they have no control over the legal and political processes that are going to decide their future. Even so, as the chief of one of the MAUCHE sub-locations told me "life continues": residents of the SSs cannot afford to stop farming and cannot prevent themselves from exploiting the market value of the asset they have been entitled to.

In fact, during my stays, I observed an impressive dynamism of land markets in each and every SS and sub-location I visited (in the SW as well as in the Eastern Escarpment of Mau). The value of the land keeps going up, reaching 400,000 Ksh per acre ($4,000), notably in some good locations close to the main roads. Renting or selling the plots is the norm and not the exception. This contributes to a certain demographic dynamism, drawing migrants from densely populated areas. Migrants outnumber "the Ogiek," the original inhabitants of the forest, who in certain cases feel oppressed by this "invasion". This explains the intensification of the identity discourse.

Cultural entrepreneurs have managed to ride the wave of the indigenous people's movement, attracting funding from international organizations, which have supported their case before the African court. These activists not only complain about the flawed processes through which the

SSs were put in place, thus destroying their forests, but also rebuke the government for having allowed “strangers” to settle in their territory[94]. Ultimately, this mobilization has exacerbated inter- (as well as intra-) community tensions, because feelings of "otherness" are fueled by claims of indigeneity. This has already led to deadly conflicts, particularly in the Eastern Escarpment of Mau, where accusations of illegal or irregular land acquisition are confused with accusations of non-indigeneity.

In fact, the policies and politics of land allocations of the 1990s have, either *de facto* or by design, rendered these localities cosmopolitan (multiethnic), and allowed private property relations and the market to penetrate the social and economic practices of resident populations. Sometimes they have adapted unwillingly or sought to resist the individualization of tenure and the dilution of customary systems of norms via local interactions. These responses have been shaped by the political-economic factors and processes that I have sought to highlight in this paper.

94 It should be noticed that in a number of cases, which were brought to my attention, this assertion is not quite correct due to sales of plots that actually took place as soon as the settlement schemes in the Eastern Mau Escarpment were incepted: I was shown an important number of land sale agreements dating from 1997.

IX. CONCLUDING COMMENTS

Part I of this paper aimed to build a solid historical and institutional background for the study of contemporary Kenyan land reform. These historical reconstructions also illustrate several political dimensions of land policies: how the neo-patrimonial conception of power is indeed part of colonial legacy, though strongly reaffirmed during postcolonial times. The chronology proposed revolved around historical junctures or times of intense land policy production and implementation. Despite the discontinuity and simplification of the reconstructions proposed, these facilitate analysis of patterns of colonial and postcolonial land policy narratives. Postcolonial continuity is, for instance, evident in the elites' strategies for instrumentation of the law and of bureaucratic apparatuses.

The building of the power structures is visible in the material endowments conferred upon the Department of Land Adjudication and Settlement (DLAS), later absorbed by the Ministry of Lands, since colonial times and in postcolonial regimes. Since the 1950s, this bureaucratic apparatus inherited the land policy instruments of the *land register,* until then reserved for a privileged white race that was soon, however, held hostage by the politicization of land allocations and land transactions. This politicization, intended as elites' neo-patrimonial strategies, geared towards exerting control over land administration in order to pursue private interests of self-enrichment and consolidation of political power, was a structural feature of the establishment of the colonial state, and it is perpetuated in the entrenchment of power visible in the formation of the postcolonial state. This is especially palpable in the processes of policymaking and land policy implementation by colonial officers, postcolonial land bureaucrats, and provincial administrators *legalizing land spoliations.* What is most striking in Kenyan postcolonial land policies is that, despite the ideological adherence to capitalist principles of individualization and commoditization of property to expand the markets, de facto not only state actors remained (since colonial times) highly interventionist in economic processes, but land privatization, became a political - rather than an economic - instrument to reward or punish constituencies. In the 1960s and 1970s implementation of land privatization policies reached its climax: their patterns, however, overwhelmingly followed geopolitical considerations.

Historical processes of socio-economic and political transformation of Kenyan society and political systems were put into perspective with multi-scalar processes of framing land problems and devising policy solutions (parts II and III): the multi-stream model of J. Kingdon appeared particularly useful in analyzing and laying out the mechanisms of the different inter-influences of phenomena. This model has been extended beyond the agenda setting for which it was initially conceptualized, encompassing the policymaking as a whole. Delving into the transformations of collective action in Kenya allowed the grounding of agency of 'civil society' actors and organizations in a historical perspective. Advocacy networks, rooted in a longer-term struggle for democracy, appeared as playing a key role in the *policy stream*, from the inception of ideas until the final stages of 'pushing' the adoption of land reform texts. This historical grounding equally allowed us to clearly qualify the non-homogeneity of so-called 'civil society' and its evolving contours at different historical junctures.

In delving into the analysis of the policy process, identification of critical junctures within the *politics stream,* i.e. points of rupture or opening of windows of possibility, proved very helpful in illustrating how the streams mutually influenced each other. Successive regimes, at times, played a role of habilitation or containment of the policy stream. However, it is important to stress the extent to which decisions made at a certain point and time also became independent from their proponents. Tracing of policy processes clearly showed that decisions often turned against their

promoters, not least because decision-makers also respond to contingent situations, such as particular public discontent and electoral engagement, which to some extent limit their margin of maneuver. This is indeed the case with President Moi's decision to appoint the so-called Njonjo Commission, which came about against all odds and which the President possibly thought he could keep under control. Instead, the policy narrative enshrined in the report issued by this particular commission of inquiry went very far, probably beyond the President's imagination, in shaping the content of land reform policy processes.

Actor-centered approaches prove their value, especially as it allows us to *look inside* organizations in order to relativize their homogeneity and expose the contradictions often inherent to their functioning. This seems very important to achieve insight into *donors'* contribution to policymaking in aid-reliant countries. As in any other organization, institutional practices are an important determinant of action, but contextual factors also matter and the role of individuals is crucial. The DfID's part in the agenda setting for land reform in Kenya exemplifies this last point. The head of the Rural Division of the DfID, Michael Scott, was fundamental in undertaking bold initiatives that provided funds and networking to empower a number of Kenyans in the establishment of the Kenya Land Alliance, which inserted reformist policy narratives into the policy process. The importance of single personalities was also felt with the arrival in the mid-2000s of Leigh Stubblefield at the DfID, who marked a relevant alteration in the course of events, as, when confronted with the declining engagement of the government to conduct land reform, she decided to exit the policy arena.

Broadly speaking, bilateral and multilateral donors have been relevant actors in the land policy reform formulation phase, in a continuum of the role they have been playing since Independence, by funding important development programs with national scope and significant economic worth. Kenya is indeed a very important business hub for donor agencies to engage in, not least because of the conducive economic environment. However, the ultimate impact of their influence can only be measured via the manner through which different Kenyan actors seize or relinquish the opportunity in terms of resources, networks and ideologies that donors provide in the pursuit of their agendas. The part played by international actors does not follow a linear pattern, nor the planned lines of the policy program provided by the *logframe* of the policy development project. The interactions between donors, Kenyan NGOs, government, and bureaucratic authorities are actually determinant in the policy process: these interactions are indeed complex, itinerant and open-ended.

In conclusion, it can be argued that the Sessional Paper n°3 of 2009 enshrined the policy frame advanced by the transnational network, which is permeated by decolonizing narratives appealing to social justice and radical changes in land ownership categories, as well as land administration. Yet, the decolonizing narrative carried out by the transnational network, of which the KLA is the best exemplification, *translated* into policy outcomes only after confrontation, exchanges and negotiations with many other actors. In fact, Part VI focuses on the ongoing negotiation between 2010 and 2016 of a set of laws, and more particularly of the Community Land Law, that were supposed to concretize the policy choices made in the 2010 Constitution. The polarization of positions within debates on the future of 'community land' seems to be due to the political stakes of the legislative translation process. The policy tracing analysis overall reveals the great interests that several actors with very disparate backgrounds manifested by seizing the opportunity of legislation-making to put forward different translations of the notion, either advancing particular corporatist and political interests, as well as institutional practices or disparate ideas and ideals of communitarian life as opposed to a capitalist system.

Strikingly, colonial conceptual categories still inform the institutional mold that influenced the ultimate translation of tenure reform, in principio acknowledging the *legality* of customary land rights, whose tenure regime comprises a multitude of rights (the famous *bundle*), which sit very uncomfortably with exclusive and absolute ownership. The debate on the definition of 'community' echoed these contradictory visions and is also the best example of resorting to colonial conceptual categories on the delimitation of groupness. It is, however, remarkable that several actors from diverse clusters of Kenyan society (MPs, academics and activists) wished to reject *ethnicity* as a criterion to define community membership precisely because of reminiscing about colonial tribalization and postcolonial politics of belonging. There have in fact been attempts at revisiting and deconstructing colonial legacy: the intellectual elaboration of the Taskforce is one great example. The *translations* operated within this forum are deeply rooted in the NLPFP, which was a very formative process for most of the Taskforce's members.

The general realization arising from this part is, however, the inability or unwillingness of actors in policy-making processes to favor an interpretation of 'community land' that restores social balance; firstly, because national decision-making processes are ultimately dominated by national elites that give privilege to ideals and interests linked to their 'class', and secondly because of the historically rooted political dimensions in which land issues are embedded. The translation of 'community land' into *community ownership* proves the overwhelming weight of institutional and administrative logics and dynamics construing 'legal acknowledgment of customary tenure' in terms of land rights adjudication, demarcation, surveying and registration. The institutional mold is detectable even in the activists' discourse, which perceives the necessity of caveating the legal entitlement of 'communities' in order to avoid land sales.

Since the inception of the land reform process and the Review of the Constitution in the early 2000s the notion of 'community land' has been construed by a number of actors as an opportunity to put forward their *community land claims*, which, since colonial times, have found expression in territorial terms evoking and re-inventing the exclusive land rights of the natives in the reserves. Historico-political dynamics explain cyclical resurgence of group claims that emphasize *ancestrality* of attachment to land, thus legitimizing rights over territories from which they have been uprooted. Land politics has pushed several groups towards marginality and subalternity. Ancestrality is these groups' repertoire of action, seeking a way out of inevitable dispossession: the politicization of these claims, implying substantial diversion from the social activities that customary land tenure originally entailed, especially inasmuch as the claims actually put forward by groups of activists, such as those representing 'the Ogiek', demand acknowledgment of ownership rights over territories. Against this background, politicization is indeed a means to seek to reassert control over resources, but it also has the effect of denaturalizing land relations referred to as 'customary' to legitimize political action.

Finally, participation processes brilliantly exemplified the process of politicization of community land claims translating into the interests of elitist representative groups of imagined communities in acquiring absolute and exclusive proprietorship of so-called ancestral territories. The example of the relevance acquired by groups such as the Ogiek of the Mau Forest and the Sengwer of Embobut forest, within the Constitutional Review and the NLPFPF, is not surprising inasmuch as what makes an organization naturally eligible for participation in policy processes is its historical and political establishment within the 'civil society' landscape (for a similar conclusion in different regional contexts see Cissoko and Touré, 2005). Linkages with influential players such as the KLA and CEMIRIDE were fundamental for the Ogiek's political entrepreneurs to enter these fora. Actually, most of the 'dissenting' groupings from the Rift Valley were acknowledged as the communities affected by historical land injustices and thus as deserving to voice their grievances.

Against this particular background, the process of policy change is better understood via an analysis of the interlocking of scales positing historical and political production of *community ownership* in Kenya by the concomitant action of emergence and consolidation of localized struggles historically produced by Kenyan land politics, which promoted territorial control and dispossession on one side, and national processes of legal reforms on land politicizing and endorsing community land claims on the other. In fact, the institutionalization of *community ownership* as an *idea* becomes intelligible by studying, in historical perspective, the politicization of both policy processes resulting in the production of the legal category of 'community land' and land claims resulting in the appearance of ownership claims over ancestral territory: it is the concomitant action of multi-scalar processes under multiple influences that exemplify the historical and contradictory movement of change in policy, institutions and practices.

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XI. APPENDIX 1

63. (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of

Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this

Article. (RoK, 2010: p.44)

XII. APPENDIX 2

[…]The model is not a legal framework but a sequence of actions to be undertaken by Government in collaboration with communities towards the recognition of their rights to land. Essentially, the Model provides steps and processes that will enable the divestiture of land from public land category to the community land category as per the provisions of the Constitution and the National Land Policy that reclassify all Trust Lands to Community Lands, and the provision in the Policy to convert Public Land (formerly Government Land) in the Coastal strip to Community Land. For the first time in Kenya, the CLRR offers opportunity to take politics out of land administration. […] In addition, a Cabinet Memorandum be prepared to seek Cabinet approval to convert Public land (formerly Government Land) in Lamu that has not been alienated and registered to community land as we await Parliament to enact legislation that will allow for conversion of land from one category to another (Annex 5, Remarks of the Honorable James Orengo, Minister for Lands, on the occasion of the closing ceremonies for the SECURE Project Workshop at Kaskazi Beach Hotel, 16th September, 2011: USAID, 2011).

XIII. APPENDIX 3

"community" means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes-

(a) common ancestry;

(b) similar culture or unique mode of livelihood;

(c) socio-economic or other similar common interest;

(d) geographical space;

(e) ecological space; or

(f) ethnicity. (RoK, 2016: p.528)