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# State Power, Vulnerability, And Indigenous Peoples In International Law

*The Illegal Eviction Of The Sengwer Indigenous Peoples In Kenya*

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## Abstract

Recent trends show that rather than the management of populations through life, States such as Kenya have adopted power that ensures that the populations are better managed through death. This power ensures that life closer to it is of higher value and worth protecting while those farthest from it are left to die. Therefore, this study adopts a socio-legal approach to analyse the vulnerability of indigenous peoples. Using this approach will help explain how dispossession of indigenous peoples from their lands and territories in Kenya results from continued colonialism and neopatrimonialism. The findings show that States' political and economic power have led to the vulnerability of indigenous peoples by legitimizing death-exposing developments projects using the legal frameworks adopted from colonial powers.

## Key Words

Indigenous Peoples' – Necropolitics – Sengwer – Vulnerability – colonialism – dispossession – land and territories

## 1 Introduction

The protection of indigenous peoples' rights continues to face challenges despite the growing literature calling upon governments across the world to

promote and ensure full implementation. Indeed, some countries such as Australia, New Zealand and Canada have taken a stride to ensure the recognition of indigenous peoples' intended for purposes of 'national reconciliation'.<sup>1</sup> However, in the case of Africa, there has been a reluctance by some governments 'to recognise the specific rights of indigenous peoples'.<sup>2</sup> This reluctance stems from the organisation of world order in which international law bases its framework on States being the main subjects commanding absolute power in decision making in the international legal system. As a result, the promotion, recognition, and protection of indigenous peoples' rights lies primarily as the sole responsibility of States, and thus, taking control of ensuring that these rights advocated by international law<sup>3</sup> do not interfere with their sovereignty. It is evident from this line of thought that an asymmetrical relationship ensues which might be rocky, since sovereignty of States will triumph over indigenous peoples' rights. In that regard, it leads to a state of the *living-dead*, as argued by Achille Mbembe in his theory of necropolitics, where indigenous peoples have been denied their rights by being subjected to unfavourable living conditions making them vulnerable. Thus, an analysis is needed to understand how State power contributes to the vulnerability of indigenous peoples.

Based on that line of thought, this article aims to contribute towards the literature that advocate for the promotion, recognition, and protection of indigenous peoples' rights in international law. It also aims to show that despite the recognition of their rights in international law, States have pushed for development projects that put the lives of these peoples in more danger. This goes against the principles of equality of all human beings, the rule of law and the respect for State sovereignty advocated by liberal legality. To successfully do that, this article, however, takes on a socio-legal approach by applying the theory of necropolitics. It explores whether State power contributes to indigenous peoples' vulnerability and whether certain policies and projects enacted by a State that are not in line with indigenous peoples' lives are deemed necropolitics. Thereby the organisation of this article is set

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- 1 Benjamen Franklen Gussen, 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples' (2017) 40 Melbourne University Law Review 867.
  - 2 Jeremie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) International and Comparative Law Quarterly 245.
  - 3 The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) and International Labour Organisation's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169).

out as follows: section one analyses the theory of necropolitics by bringing out its main elements on the views pertaining to the contemporary society. The analysis shows that our society is divided between 'Us' and 'them' or the 'Other' where the 'Other' is the enemy and as such needs to be eliminated (or do not get equal opportunities) for the 'Us' to survive. In the second section, the article applies the theory of necropolitics to the context of the illegal eviction of the Sengwer indigenous peoples in Kenya. To understand the context surrounding this eviction, this section will look at how necropower and necrocapitalism operate in Kenya. This analysis shows that the usage of excessive force by the government of Kenya to evict these indigenous community from Embobut forest violated their human rights.

## 2 Necropolitics

As noted earlier, the theory of necropolitics was formulated in 2003 by Mbembe, a Cameroonian post-colonial scholar, and revolves around the injustices those privileged or with power do against the less privileged in the contemporary society. These injustices are not challenges to one sector of a State or belong to that State, but they transcend it and have permeated across the whole world. Mbembe critiques the way power (State sovereignty) revolves around exerting control over 'mortality' while life manifesting around those in power or the privileged committing injustices.<sup>4</sup> And as such, he terms this as *necropolitics* which concern 'those figures of sovereignty whose central project is not the struggle for autonomy but the generalised instrumentalisation of human existence and the material destruction of human bodies and populations'.<sup>5</sup> In this way, Mbembe is wary of continued colonialism way long after many States or peoples have gained their independence where there is constant militarisation, race superiority and the well-defined and demarcated borders. He terms this as *nomos* and sees the past moving into the current and the future, helping us to understand that State sovereignty is strongly embedded in violence which acquires death as its final or ultimate redemption. For Mbembe, sovereignty leads to constant looking for enmity which leads to waging of wars and thus exercising the right to kill.<sup>6</sup>

To understand this right to kill, Mbembe analyses the work of Michel Foucault, bio-power and biopolitics and the Giorgio Agamben's state of

4 Achille Mbembe, 'Necropolitics' (2003) 15(1) Public Culture 11, 12.

5 *ibid.*

6 *Ibid* 12.

exception. For Mbembe, the management of the largest population within a State has taken a darker turn where this population is better managed in death rather than how Foucault sees it as being managed through life. This political happens in a situation where there is a suspension of law or a state of exception and in that way, this population is 'kept alive but in a state of injury, in a phantom-like world of horrors and intense cruelty and profanity'.<sup>7</sup> This differs substantially from Foucault's analysis believing in 'a power that exerts a positive influence on life, that endeavours to administer, optimise, and multiply it, subjecting it to precise controls and comprehensive regulations'.<sup>8</sup> Further, Foucault believes that 'it is no longer a matter of bringing death into play in the field of sovereignty but of distributing the living in the domain of value and unity'.<sup>9</sup> For Foucault, it is believed that bodies are made docile in order to be discipline and productive and, thus, they are not to be killed but instead useful for a State's economy. He states that:

But the body is also directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs. This political investment of the body is bound up, in accordance with complex reciprocal relations, with its economic use; it is largely as a force of production that the body is invested with relations of power and domination; but, on the other hand, its constitution as labour power is possible only if it is caught up in a system of subjection ((in which need is also a political instrument meticulously prepared, calculated and used) the body becomes a useful force only if it is both a productive body and a subjected body. This subjection is not only obtained by the instruments of violence or ideology; it can also be direct, physical, pitting force against force, bearing on material elements, and yet without involving violence it may be calculated, organised, technically thought out; it may be subtle, make use neither of weapons nor of terror and yet remain of a physical order.<sup>10</sup>

In Foucault's analysis, for instance, his look at the soldiers in barracks, he views that the strict routine they undergo while training instil in them discipline.

7 *Ibid* 21.

8 Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (1976) (trans. R Hurley, 1998).

9 *Ibid* 144.

10 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Vintage Books, 1979) 25-26.

Since the military (disciplinary actors) employ certain techniques of discipline to the soldiers, they are strong and productive due to three elements turning them into a 'case': the persistent surveillance they get, normalised judgement and examination. In this way, control is inserted on these soldiers so that they can maintain their appearance to the required standard to actively be ready to fight off attackers with ease. Foucault shows that the modern society has adopted power that control bodies solely for productivity noting that this control is to instil discipline and 'not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body'.<sup>11</sup> In this regard, Foucault regards power as oppressive but it enables the population to live rather than die due to instilled discipline. He notes that:

Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. It is not a triumphant power, which because of its own excess can pride itself on its omnipotence; it is a modest, suspicious power, which functions as a calculated, but permanent economy.<sup>12</sup>

Foucault presents a State as a system like a prison that has certain absolute power shaping the activities and behaviour of its citizens. These peoples are constantly under the watchful eyes of the power enforcement institutions where in cases of indiscipline or law broken, they are culpable to be punished. In this scenario, these peoples are constantly repressed so that they can be afraid of becoming indiscipline and thus, they self-regulate. Indeed, Mbembe shows that it is not the same as Foucault sees it as in the contemporary society the killing of populations might not be the physical or actual killing but being put through situations that put their lives in danger or vulnerabilities is equivalent to being killed. Since there is suspension of law meaning they are not provided protection, Agamben notes that they are then turned into *homo sacer* (sacred):

Whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that 'if someone kills the one who is sacred according to the plebescite, it will not be

<sup>11</sup> *Ibid* 82.

<sup>12</sup> *Ibid*, 170.

considered homicide.' This is why it is customary for a bad or impure man to be called sacred.<sup>13</sup>

In this scenario, Agamben shows that in the contemporary society, those in power subject the vulnerable population to a bare life (*zoe*) where they are included within a sovereign State while at the same time they are excluded. In this way, *homo sacer*, according to Agamben, gives the law the ability to function through its internal command as well as an external and outside element. Thus, for Agamben, 'in the system of the nation-state, the so-called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state.'<sup>14</sup> There is nothing left in this population and as such they are not earnest to be made as sacrifices since their lives are outside the valued life. As a result of this subjugation, the population (*homo sacer*) is denied the ability to experience the best opportunities in their lives as the few in power or the privileged and through that they are exposed to death. In his analysis of Agamben's work, Robinson notes that:

The state is authoritarian command and submission to such command; it is not mutual recognition, equality, or reciprocity. It imposes vulnerability as a condition of participation in public or political life [...]. The state divides people up into those who are politically recognised as fully human, and those with the lesser status of 'bare life [...]. They are thus the mirror image of the sovereign who is both within the law as an individual person, and outside it in being able to declare a state of emergency. They also express the excess of life over its inscription in sovereignty, the fact that there is always more to life than is expressed in law or politics. It is as unavoidable because the performative category of the human is suspended between nature and society, and always contains something more than its political representation.<sup>15</sup>

For Mbembe, this kind of repression is what he terms as necropower and he suggests that:

13 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press, 1998), 71.

14 *Ibid* 126.

15 Andrew Robinson, 'In Theory Giorgio Agamben: the state and the concentration camp' *Ceasefire Magazine* (London, 7 January 2011) <<https://ceasefiremagazine.co.uk/in-theory-giorgio-agamben-the-state-and-the-concentration-camp/>> accessed 12 June 2023.

[N]ecropolitics and necropower to account for the various ways in which, in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of *death-worlds*, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.<sup>16</sup>

In this way, the living dead do not have a life that is worth protecting just like homo sacer and they can be killed with no mercy whatsoever. As much as they are within a sovereignty, they are much excluded at the same time since their status within this sovereignty is lesser than the valued life. Thus, Mbembe is concerned with the way the populations termed as the living dead, in examples he provides such as the plantation and the colony, are used to produce goods and services that lead to the profitability of the State's political economy. In this way, these populations or persons are working in dangerous conditions following the orders of the people with authority which Mbembe sees as death-worlds. Thus, the focus of sovereignty is to ensure that the political economy (capitalism) is not affected and has constant supply of goods and services. Mbembe argues that, because of that, sovereignty has 'the capacity to define who matters and who does not, who is *disposable* and who is not'.<sup>17</sup> This view is supported by Ringer noting that:

To confront the ordeal of the world is to face the abyss where sovereignty occasions the rule of law in non-law. Political philosophy's division between the state of nature and the political community is a mythology concealing its founding violence or externalizing it to non-places such as plantations, colonies, concentration camps, and prisons. This non-law has its corollary in the construction of the 'native,' 'the slave,' and 'the savage' as objects whose value is determined by usability. These cannot be considered subjects. The violence of colonisation is rooted in an imaginary that empties 'the Other' of self-consciousness, invests it with animality, irrationality, and the inability to experience transcendence. The arbitrariness of the violence originating in this imaginary is colonisation's inaugural act.<sup>18</sup>

16 Mbembe (n 4).

17 *Ibid* 27.

18 Christophe Ringer, 'Achille Mbembe' (2021) <<https://politicaltheology.com/achille-mbembe/>> accessed 16 June 2023.

It is a result of the establishment of the 'Other' in the contemporary liberal democratic society that people have established interpersonal and political borders that separate them because they hold power, with the 'Other'. For Mbembe, borders and boundaries are another way to keep off the 'unwanted' and as a result 'these imaginaries gave meaning to the enactment of differential rights to differing categories of people for different purposes within the same space'.<sup>19</sup> Through this, it is easier for the rulers to adopt necropower tactics since people have been divided into exclusive zones with well demarcated borders and boundaries restricting them the ability to freely move from one area to another. Mbembe notes that one cannot miss to ascertain that 'symbolics of the top (who is on top) is reiterated' and that a 'concatenation of multiple powers: disciplinary (racism), biopolitical (restriction to movements due to established enmity) and necropolitical (killing) gives 'the colonial power an absolute domination over the inhabitants of the occupied territory'.<sup>20</sup> Mbembe notes in his other work, *On the Post Colony*, that this absolute domination has led to a situation where '[b]y consigning the native to the most perfect Otherness, this violence not only reveals the native as radically Other, it annihilates him/her'.<sup>21</sup>

In Mbembe's view, this labelling of other populations as the 'Other' has taken a more sinister form due to different ways of killing, the innovation of sophisticated weapons that are based on land, air and even in the oceans and seas and the emergence of non-state actors such as private military companies, militias, and rogue armies (war machines). As a result, the acquisition of high-tech weapons by these non-regular armies means that they displace populations and commit horrendous human rights violations because of their greed in extracting natural resources for the political market (economy) and to keep their political status. For instance, due to the lack of legal protection, African States continue to become, as Mbembe sees, enclave economies which have been 'turned into privileged spaces of war and death'.<sup>22</sup> This is due to the privatisation of violence emerging from a set of economic measures put in place by international financial institutions (IFIs) such as the World Bank for these African States to take more debts; and the increase of transnational corporations seeking to exploit natural resources in these States and these corporations hire private military companies to protect their operations. The result has been the lack to implement development projects due to mass

19 Mbembe (n 4) 26.

20 *Ibid* 29-30.

21 Achille Mbembe, *On the Post Colony* (A.M. Berrett, Janet Roitman, Murray Last, Achille Mbembe, and Steven Rendall trs, University of California Press 2001) 188.

22 Mbembe (n 4) 33.



looting of public funds meant for development purposes by African political elites resulting in the denial of public services to their populations.

Thus, Mbembe challenges this kind of colonial subjugation in the name of economic development noting that it is 'more tragic because more extreme'.<sup>23</sup> Terming it *commandment*, Mbembe is alarmed that the power that is used to rule over and across Africa rids it entirely of its dignity, sociality, and rights and substantially differs from the time of direct colonisation.<sup>24</sup> Mbembe equals this kind of inequality to the *logic of survival* where 'each man is the enemy of every other'.<sup>25</sup> Using an example of a suicide bomber who sacrifices his/her life as a martyr in the *logic of martyrdom*, Mbembe views this kind of sacrifice as a resistance in order for the disposed body to gain freedom from absolute domination. The deadly weapon attached to the martyr's body upon its explosion tears it into pieces along with taking the lives of those around him or her. In this instance, Mbembe shows that the people termed as less of humans are heavily burdened with dangerous necropolitical practices such as the increasing of more debts to African States discussed above by IFI s. These debts come with hidden interests or conditionalities just like a suicide bomber with a hidden bomb trapped to his or her body. Therefore, it results in high taxes and corruption that pushes the marginalised populations into more poverty and these States to depend entirely on debts. The way out for these peoples are to accept these violations while maintaining their normal lives and living in dilapidated conditions or resisting such injustices to have their rights respected.

While it is hard to decipher Mbembe's theory on a first read, his work is particularly written with a lot of zeal, requiring his readers to put their attention more to his message rather than his style or poetic way of writing. Mbembe is more concerned with the inhumane treatment of the vulnerable and dominated persons of our contemporary society and as such uses a lot of examples for his readers to understand his theory. In this instance, it shows that necropolitics favours more those who are close to power and disadvantages those furthest from it. By offering real-word contexts of death-making in the contemporary post-colonial States, Mbembe shows how that death has been used as a tool to ensure that these States have their sovereignties intact and subjugation of vulnerable populations to inhumane conditions or death-worlds. As Bose argues, 'Mbembe sketches the contours of a humanism grounded in vulnerability by centring the body that is exposed to pain, suffering, and

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23 *Ibid* 34.

24 *Ibid*.

25 *Ibid* 36.

degradation'.<sup>26</sup> Thus, necropolitics opens a way for people to reconsider their choices on building boundaries and borders while engaging with others. It gives people the opportunity to be more cognisant and sympathetic to people facing injustices and understand how power works to dispose these people off creating subjectivities.

In conclusion, this section has analysed Mbembe's theory of necropolitics looking at the way some populations have been marked as bodies to be disposed of and as a result they have and continue to be inflicted pain due to their vulnerability. The colonial and post-colonial injustices emanating from policies enacted by their governments that do not correspond to their way of living place them into the 'Other' category. This situation happens in a site where there is the suspension of law creating a space referred to as a death-world and in this place, horrific human rights violations occur. Thus, this death-world is separated from the rest of the world by walls or borders acting as barriers so that the peoples in this death-world do not get any opportunities or benefits directly from their governments. In this way, they are forever relegated into a situation of the living-dead since their bodies are required for the flourishing of the political economy.

### 3 Necropolitics and The Struggle for The Protection of Marginalised Indigenous Peoples' Rights in Kenya

#### 3.1 *Kenya's Necropower*

In the previous section, we got to understand that sovereignty discounts the life of those not valued as significant in the contemporary society. This has been occasioned from different aspects of society's political, social, economic, and cultural life. However, the discounting of life has been exacerbated due to globalisation and the adaptation of high performing technological advancement. Thus, it has led to States as well as people to interact easily especially in terms of their economic relations. Through this, the global political economy has gained a momentum in establishing itself as a force to reckon in determining who to live and those to die. Arguably, the world has been divided into developed, developing and least developed countries where those developed particularly are States in the Western hemisphere. Those developing and least developing countries are based in Latin America, Africa, and some in Asia. The labelling has had an impact on States predominantly in Africa where they seek to improve their development record to be at the

26 Anuja Bose, 'Necropolitics' (2021) 20(4) Contemporary Political Theory 5172.

same level as western States. They have sought funds from IFIs and signed concession agreements with TNCs for the exploitation of natural wealth in their territories. The result has been what Mbembe terms as enclave economies where they have continued to rely on their colonial powers for financial assistance and technocratic advice.

Focussing on Kenya, its political economy has mainly been driven by agriculture that 'directly contributes about 32 percent to GDP and another over 25 percent indirectly through linkages to other sectors'.<sup>27</sup> Since agriculture is the leading economic benefactor in Kenya, more land has been sorted to accommodate more agricultural products leading to the clearance of forests in turn reducing the forest covers (encroachment into forests) and displacement of marginalised communities from their lands. Karuti argues that this happens due to the political economy being driven by regional imbalances and ethnic inequalities which stems from colonial displacement of people from their lands to pave way for the creation of white highlands and upon independence, these historical land inequalities were not addressed by successive governments.<sup>28</sup> As argued by Veit:

The fundamentals of the colonial land tenure system remained in place, including the unequal relationship between statutory and customary tenure, the retention of de facto ethno-territorial administrative units, and the unaccountable powers of the executive branch over land. Kenyatta maintained the system of freehold land titles and did not question how the land had been acquired; individual private ownership rights continued to derive from the sovereign – now the President – just as in colonial times. Government programs to systematically adjudicate rights and register land titles persisted and continued to undermine customary tenure systems.<sup>29</sup>

The lack to address these historical land injustices has cemented how power is exercised in Kenya as most of the White Highlands are mostly held by Kikuyus and Kalenjins who have alternately held power since independence. Thus, land has become a symbolic entity in Kenyan politics exposing economic, colonial, and environmental impacts emerging from poor land laws and policies. As noted by Karuti, in an agrarian economy like Kenya:

27 Karuti Kanyinga, 'Political Economy of Kenya and the 2017 General Elections' (2019) *Observatoire Afrique de l'Est: Enjeux politiques et sécuritaires*, 10.

28 *ibid.*

29 Peter Veit, *History of Land Conflicts in Kenya* (2011) <[gatesopenresearch.org/documents/3-982/pdf](https://gatesopenresearch.org/documents/3-982/pdf)> accessed 15 July 2023.

The structure of land ownership itself reflects how power is held because land concentration tends to depend on economic and political influence: rules of control and ownership of land have a bearing on power relationships in the society. Changes to these rules, including customary tenure, amount to a restructuring of power relationships and not simply a restructuring of the agrarian structure.<sup>30</sup>

Apparently, the Rift Valley (now divided into 14 counties) province continue to play a significant role in the administration of politics in Kenya. During elections, this region contributes the highest number of votes and establishes itself as a kingpin in the governance of the country.<sup>31</sup> Being a multi-ethnic region, it has been involved in multi-ethnic violence after every election due to the competition for arable land (White highlands) driving the economy of Kenya as tea planted in the region is the highest revenue earner. As a result, of being a multi-ethnic region, ethnic groups have been politicised and they vote along ethnic lines where political elites use these groups for their own selfish interests. They use public resources for their own economic development and award political seats and employment opportunities to their families and people from their ethnic groups. This is because these elites 'exercise overwhelming influence in the governance of institutions' where they connect to protect and increase their 'political and economic interests through jobs as well as patronage and cronyism, specifically by doing business with the government'.<sup>32</sup>

To put this into perspective, the five largest tribes in Kenya are the Kalenjins, Kikuyus, Luhyas, Luos and the Kambas exercising their necropolitical power which has led to the marginalisation of other tribes especially the ethnic minorities. In this way, the political elites of the largest tribes bribe political elites from the smaller ethnic groups so that necropolitical and economic interests are protected. In the process, as noted by Kanyinga, these political elites undermine 'the operations of formal institutions. Formal institutions, for instance, have to operate within informal rules and specifically values prescribed by ethnic and patronage ties. In the end, this influences how the political elites implement the Constitution, the policies they develop and implement, as well as how institutions operate'.<sup>33</sup> Evidently, these political

30 Karuti Kanyinga, 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) 27(3) *Journal of Contemporary African Studies* 325, 326.

31 *ibid.*

32 Kanyinga (n 27).

33 *ibid.*

elites have absolute power to decide which land and territory within Kenya to award TNCs to extract natural resources without the full participation of the populations. The lack of the populations to participate in rent sharing has created 'a dual-based relationship that is hierarchal and exists as a vertical-dependence system' since 'citizens do not have the power to question the imbalances of sharing natural resources'.<sup>34</sup> As well as the failure of the political elites to involve population, the acquisition of land for large-scale development projects by TNCs continue to 'increasingly challenge the monopoly of state over land governance'.<sup>35</sup>

However, political elites and TNCs have faced resistance from ethnic groups such as indigenous peoples who have a strong attachment to their lands and territories and seeking to protect these lands and territories to pass them to their future generations. The political elites and TNCs usually respond by hiring private military companies or militias to protect their properties and forcefully taking up these lands. The private military companies or militias commit serious human rights abuses such as killing indigenous peoples and their crimes are not punished. For instance, in 2013, the Maasai indigenous peoples were forcefully evicted from their ancestral land by armed men of a sect known as *Mungiki* with the help of the Kenyan police.<sup>36</sup> The eviction or dispossession was to create more space for the expansion of a geothermal plant by KenGen, a State-owned power generating plant and the expansion plans 'attracted both multi-national and bilateral donors with the World Bank being the main financier of the project'.<sup>37</sup> When the Maasai resisted against this development project, political elites used all kinds of threats and bribing of Maasai's political elites in order to force the Maasai to give in to KenGen's plans. As a result, there was the displacement of 2300 people, and 'a number of houses are said to have been burned. Violence against persons and objects was accompanied by the killing of hundreds of animals, thus impoverishing the victims of the forced displacement'.<sup>38</sup> This economic injustice leads Banerjee to term it *necro-capitalism* that involves the 'contemporary forms of

34 Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' (2019) 53 *The East African Review* <<https://doi.org/10.4000/eastafrika.879>> accessed 15 July 2023.

35 *ibid.*

36 Ben Ole Koisabba, 'Forceful Evictions of Maasai from Narasha: A Recipe for Tribal Clashes in Kenya' (2013) <<https://www.culturalsurvival.org/news/forceful-evictions-maasai-narasha-recipe-tribal-clashes-kenya>> accessed 15 July 2023.

37 *ibid.*

38 *Ibid*; Stefan Kirchner, 'Recent Developments concerning Indigenous Rights (January-October 2014): Consultation and Compensation in Focus (2014) 2(1) Rights of Indigenous Peoples Interest Group Newsletter 1.

organisational accumulation that involve dispossession and the subjugation of life to the power of death'.<sup>39</sup>

### 3.2 *Necrocapitalism*

In developing his concept of necrocapitalism, Banerjee draws insights from the works of both Mbembe and Agamben arguing that 'violence, dispossession, and death that result from practices of accumulation occur in spaces that seem to be immune from legal, juridical, and political intervention, resulting in a suspension of sovereignty'.<sup>40</sup> As a result, necrocapitalism 'operates through the establishment of colonial sovereignty, and the manner in which this sovereignty is established in the current political economy where the business of death can take place through states of exception'.<sup>41</sup> In this sense, contemporary forms of capitalism capitalise on death in obtaining its surplus value where life of the dispossessed or the weak peoples are taken to be meaningless. For Banerjee, these profits are obtained through 'the use of privatised militias or through contracts for reconstruction'.<sup>42</sup> In addition, Banerjee notes that necrocapitalism is created as a result of the close working relationship between States and TNCs creating death-worlds where they exercise necropower while allowing for situations of states of exception to emerge.<sup>43</sup> Thus, the core feature of necrocapitalism in the contemporary global political economy, according to Banerjee, is accumulation by dispossession and the creation of death-worlds.<sup>44</sup>

In this sense, Banerjee's concept of necrocapitalism is powerful, showing that necropower continues to sustain organisational susceptibility in contemporary society through capital accumulation while maintaining systems of colonial subjugation. It further shows that our political economies are made of bodies that have been subjugated to the power of death due to their acceptance of the injustice due to their lack of resources and power to fight against such injustice. As a result, three main observations about necrocapitalism are obvious: First, necrocapitalism thrives with cheap labour and cheap resources where people are exposed to work and live under unfavorable conditions with little or no compensation for the goods and services they have or produce. It leads to unequal power relations between the peoples being dispossessed through necrocapitalistic practices and TNCs. As argued by Ietto-Gilles, due to globalisation:

39 Subhabrata Bobby Banerjee, 'Necrocapitalism' (2008) 29(12) Organization Studies 1541.

40 *ibid.*

41 *ibid.*

42 *ibid.*

43 *ibid.*

44 *ibid.*

Transnationalism also gives companies additional advantages in terms of acquisition of knowledge and of risk spreading. These overall advantages can be used to develop strategies that further widen the asymmetry of power between TNCs and other actors who do not have transnational power – or not to the same extent – such as labour, governments and uninationals (or not very internationalised) companies ... The enhanced asymmetry of power, derived from strategies linked to transnationality, has distributional implications: with regard to the distribution between wages and profits and the distribution of the economic surplus between the social and private sphere.<sup>45</sup>

As a result of this asymmetrical power relations, thereby, the death-worlds has been established for these people because of being dispossessed of their sources of living or their places of living have been taken away by powerful elites. This scenario has led to an increase in the gap between the vulnerable and those with wealth and power especially in developing countries since the political elites, as seen in Kenya, do business directly with the government and establish regulatory policies that TNCs apply to establish their operations. In the same vein, it is difficult for vulnerable people to have their interests protected or promoted because, as pointed out by Salako, the asymmetry of power has led to TNCs profiting ‘from conflicts by trading natural resources that prolong wars, collude with repressive governments to pervert political processes within a State, and are responsible for egregious violations of human rights and aiding and abetting crimes against humanity’.<sup>46</sup>

Secondly, necrocapitalist market is operationalised where ‘profit flows from visible and invisible violence, as well as the killing of the colonised, as a state of fear generates continuous insecurity, which in turn generates a demand for security goods’.<sup>47</sup> Here, security has become a commodity good to be bought and sold in the market where the lands and territories awarded to TNCs for extraction of resources are not only used to settle the colonisers but they are also turned ‘into showrooms for weaponry, technology and methods of domination

45 Grazia Ietto-Gillies, ‘Strategies of Transnational Companies in the Context of the Governance Systems of Nation-states’ in Ugur, M. and Sunderland, D. (eds), *Does Economic Governance Matter? Institutional Quality and Economic Outcomes*, New Directions in Modern Economics Series (Edward Elgar 2011) 96.

46 Professor Solomon E. Salako, ‘Transnational Corporations, Natural Resources and Conflict’ (2020) 9(1) *International Law Research* 56.

47 Nadera Shalhoub-Kevorkian and Stéphanie Wahab, ‘Colonial necrocapitalism, state secrecy and the Palestinian freedom tunnel’ (2021) 19(2) *African Safety Promotion A Journal of Injury and Violence Prevention*.

and control'.<sup>48</sup> As a result, other States will copy this kind of domination and apply the same kind of subjugation to their people and through this kind of practice leads to 'the transmission of technologies of control and effective ruling practices between colonial metropolises and colonies'.<sup>49</sup> In this way, Western countries' economies continue to be 'heavily dependent upon, and continuously sustained by, capitalising on the subjugation' of the vulnerable populations of developing countries 'to these technologies of containment, power, incarceration and violence'.<sup>50</sup> To put simply, developing countries or places taken up by TNCs become negative market places where 'secrecy as security is traded by building an everyday state of fear against the colonised'.<sup>51</sup> As argued by Shalhoub-Kevorkian and Wahab, secrecy is:

[A]n assemblage of concealed operations, juxtaposing various forms of invasions and dispossessions. Secrecy, within the politico-economic life, constitutes a central strategy for increasing the scope of domination. Secrecy, used and abused by the state securitised apparatus, is skilled concealment of showing, owning, or penetrating political subjects and entities. Secrecy is a site of psycho-political intimacies where forms of public/sovereign infiltration penetrate and intrude on social life, the body, and the psyche. These intrusions facilitate the private/self-disciplining of bodies and affects that can result in physical and psychological death. Furthermore, secrecy is a mode of regulating access to knowledge, as well as a mode of constructing and maintaining individual, collective, and national identities. Operating both affectively and politically, secrecy carries the power to regulate social interactions and frame institutional practices with the mere promise of some unspecified knowledge, a mystery that sustains the theatre of the concealed. Secrecy and "secret information" obtained violently by the state support, maintain and in some instances increase colonising power, enhancing a political monopoly within global capitalism.<sup>52</sup>

Related to the second point, necrocapitalism has established grounds for deeper institutionalisation of corruption in the political and economic systems as most deals such as concession agreements are done in secrecy without involvement of citizens in a State. Corruption, for Mulinge and Lesetedi, is a

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48 *ibid.*

49 *ibid.*

50 *ibid.*

51 Shalhoub-Kevorkian and Wahab (n 47).

52 *ibid.*



major impediment to all sectors of the political economy and that political elites especially in Africa lack commitment and political will to depart from it.<sup>53</sup> In this instance, they argue that the historical past of colonial domination is not entirely blamed for the current corruption in Africa since African political elites had a chance to choose non-corrupt practices.<sup>54</sup> However, Hellmann disagrees with this assertion and argues that 'colonial rule and processes of decolonisation played an important role in shaping the institutionalisation of political corruption'.<sup>55</sup> To establish a connection between domination and corruption, Hellmann argues, further, that corruption involves either the distribution of public resources within a State or distributing public resources to actors outside the State.<sup>56</sup> In the first instance, it involves instances where political elites through their total control of a State's institutions use resources for their own political gain and award loyalties resulting in instances of patronage.<sup>57</sup>

In the second instance, corruption manifests in society where political actors seek to get third party's resources in exchange for public resources in order to get fungible resources (money) that can be easily transferred.<sup>58</sup> Notably, this happens during elections where political actors have large amounts of money that they use for 'election campaigns, organisation maintenance, and policy development' and large amounts of money not only 'increase their resource base in each of these areas in absolute terms, but it also enhances actors' capability of adjusting their electoral strategies when new competitive conditions occur'.<sup>59</sup> When these two instances of corruption are combined, Hellmann notes that four types of political corruption emerge: bribery, embezzlement, election fraud and clientelism that breach impartiality principle where 'a state ought to treat equally those who deserve equally'.<sup>60</sup> Bribery involves the collaboration between a third party (economic actor) and political elites for exploitation of public resources where the economic actor gets the resources while political elites get the money (fungible resources).

These political elites then steal these fungible resources for their own personal gains leading to cases of embezzlement and in turn, use these

53 Muniya Mulinge and Gwen N. Lesetedi, 'Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa' (1998) 3(2) *African Journal of Political Science* 15.

54 *ibid.*

55 Olli Hellman, 'Political Corruption in the Developing World: The Effects of Colonial Rule and Decolonisation' (ECPR General Conference, Glasgow, September 2014).

56 *ibid.*

57 *ibid.*

58 *ibid.*

59 *ibid.*

60 *ibid.*

acquired personal gains to engage in clientelism where they 'buy' votes from voters while allowing them access to welfare services. To continue enjoying this kind of power, political elites usually manipulate electoral results (electoral fraud) to accumulate more wealth and engage more in economic injustices. For Hellmann,

For these different corrupt practices to become institutionalised, two conditions need to be fulfilled. First, as already hinted at earlier, political actors need to be in control over a strong patronage network within the State apparatus. Second, political actors' investment in hidden channels of communication and exchange, be it within the state bureaucracy or with actors outside the state, must create a positive feedback loop. Thus, ... "patronage is a necessary condition for both clientelism and corruption. Without the ability to control the state via appointments, parties would not be in the position to provide targeted selective benefits to their constituencies or have something to offer in order to secure illicit party funding".<sup>61</sup>

Certainly, these three instances of necrocapitalism are the main driving forces behind the vast dispossession of vulnerable populations in developing countries. The lack to provide clear and early access to information for peoples to understand how resources are exploited within a State, has made possible for TNCs and political elites in power to subjugate them to the power of death. In this way, the necrocapitalist market is controlled by TNCs who determine the market prices due to their bargaining power. Vulnerable peoples do not directly benefit from the resources on their lands and territories. How, then, does necrocapitalism manifest itself in the case of Kenya?

### 3.3 *Necrocapitalism in Kenya*

In Kenya, necrocapitalism is characterised by two important features: British colonialism and neopatrimonialism. Land in Kenya plays a significant role in ensuring the survival of peoples as well as communities and at the centre of politics. It has become a root cause of the various post-election violences and ethnic conflicts that have been witnessed in Kenya since independence. Médard and Duvail note that land in Kenya 'historically

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61 *ibid.*

constitutes an important and strongly controlled form of economic wealth'.<sup>62</sup> The introduction of privatisation of land system upon British arrival clashed hugely with the customary land tenure systems of communities in Kenya. This is because privatisation of land led to the dispossession of peoples and communities from their lands and territories and the land-grabbing problems witnessed in Kenya today. As noted by Médard and Duvail, land grabbing in Kenya started with the British violently taking over the White Highlands which displaced communities and forcing them to acquire new land management practices.<sup>63</sup> They note that:

First and foremost, grabbing was made to appear legal. It flourished on successive campaigns of systematic land adjudication, as well as the “legal” privatisation of lands considered as common or public. Control over land by the State and its agents was exerted through an adjudication process: first the creation of a land cadastre for “European” lands, followed by programmes of registration of “African” lands, from the 1950s, which continued after Independence.<sup>64</sup>

Certainly, the colonial government helped to institutionalise repressive form of land governance in Kenya through an established and strong central authority structure led by a strong bureaucracy. Upon Kenya acquiring independence and during the ruling of Jomo Kenyatta (1963-1978), powerful political elites transferred huge chunks of land previously held by the British to themselves.<sup>65</sup> This is because President Kenyatta maintained the status quo that of individual land tenure system disregarding the communal land ownership system of communities such as indigenous peoples. He decided to establish group ranches especially to pastoralists indigenous peoples who were strongly opposed to the privatisation of land. When President Daniel Moi, ruling from 1978-2002, took over in his regime, instead of looking for ways to deal with the land grabbing menace witnessed during the first administration, he ‘launched new despoliations’ through the mobilisations of militias.<sup>66</sup>

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62 Claire Médard and Stéphanie Duvail, ‘How Officializing Private Land Ownership Contributed to Land grabbing in Kenya’ (2023) 58 *The East African Review* < <https://doi.org/10.4000/eastafrica.4270> > accessed 30 July 2023.

63 *ibid.*

64 *ibid.*

65 *ibid.*

66 *ibid.*

The despoliations were obvious during the process of registration of grazing lands that had previously been held as commons. Once the lands were registered, the political and administrative elites continued to interfere in land ownership, using institutional backing, intimidation or fraud. In clear, since colonisation, the control of land transfers, defined at various scales of power, maintained and perpetuated discrimination and segregation. It also promoted the coexistence of different types of formalisations of land ownership or access, accompanying the growth of a property market. The acquisition of a title deed is a long process which not everyone is prepared to engage in. Alternative formalisations of land ownership concern both areas previously registered as well as areas not yet demarcated.<sup>67</sup>

President Kibaki (2003-2013) and President Uhuru Kenyatta (2013-2022) have also been involved in the predicament where 'State driven land privatisation has led to grabbing in various ways, benefiting first and foremost rent-seeking elites'.<sup>68</sup> These elites have managed to directly benefit from land grabs, in these first three regimes (Kenyatta, Moi and Kibaki), as a result of patronage politics and personalisation of presidential powers. These presidents had a lot of powers due to power exercised and usage of State resources as personal property. Instead of political elites opposing these land injustices, they are awarded huge amounts of monetary resources to keep quiet or their families are awarded State employment opportunities. Thus, the ethnic conflicts prior to the adoption of the current Constitution in Kenya were because:

The old system (pre-2010) placed the management and, at the same time, the decisions regarding legal land privatisation under the direct responsibility of a centralised administration, even if formally part of the land was under the control of the local authorities. In the absence of checks and balances, the decisions over important investments in land generally fell directly to the president, if needs be sharing his prerogatives with other powerful figures of the regime. Tied to patronage, limited measures of land redistribution, were undertaken at various times in the history of Kenya to meet the claims of a certain categories of people whose land ownership rights were not recognised, often designated as squatters, settled on public or private land.<sup>69</sup>

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67 *ibid.*

68 *ibid.*

69 *ibid.*

As a result of the centralisation of power, we see the continuance of colonialism despite the exit of British and dispossession disguised in the name of projects where concession agreements were signed without the knowledge of the people living in those lands. An example is seen in the case brought before the African Commission on Human and Peoples Rights by the Endorois community during the reign of President Moi. The Endorois community had been dispossessed from their lands to pave way for the creation of a game reserve, Lake Hannington, since 'the Country Councils held this land in trust, on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it'.<sup>70</sup> Not only did the Endorois lose their land to conservation efforts but, 'concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery' as well as privatizing the land and selling it to non-Endorois.<sup>71</sup> When they resisted this oppression, as pointed out by Lynch:

In response, 11 men were charged with holding unlawful meetings. Subsequent repression paid particular attention to Endorois Welfare Committee (EWC) chairmen. Kiplenge – the chairman for much of the 1990s – was arrested in August 1996 for belonging to the unregistered EWC, and in 1997 for holding an unauthorised Endorois Cultural Festival. Together with alleged threats to his life and his prison conditions, these experiences led Amnesty International to take up his case as one of Kenya's lawyers who 'suffered repeated harassment because he has taken on cases which the authorities do not want pursued'. Similarly, Kamuren, the EWC secretary from 1985 and chairman from 2003, was arrested numerous times between 1985 and 2005 for a range of 'offences' including illegal assembly and incitement.<sup>72</sup>

In this way, the Government of Kenya was using intimidation towards the Endorois leaders so they could give in to the Government's demands of not exposing their land grabbing problem. However, the lack to consult the Endorois regarding the conversion of their land to a game reserve unit and to provide adequate and necessary compensation led to their property rights

<sup>70</sup> Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights [5].

<sup>71</sup> *Ibid* [13]-[14].

<sup>72</sup> Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 11(442) *African Affairs* 24.

violation as established under Article 14 of the African Human and Peoples' Charter as well as their right to culture protected by Article 17 (2) and 17(3).<sup>73</sup> It was also found to have violated their right to religion enshrined in Article 8, the right to freely to dispose of their wealth and natural resources under Article 21 and the right to development under Article 22.<sup>74</sup>

The Endorois case represents a necrocapitalist practice of accumulation by dispossession in disguise as conservation and that had exposed this community to necropolitical death. Kenya sought to erase the cultural identity of the Endorois arguing that they were not an indigenous group but belonged to the larger Kalenjin ethnic group. Just the same way the British had forcefully taken the lands of Kenyans, the Government of Kenya had exercised the same powers to dispossess the Endorois of their ancestral land with introduction of modern practices: a game reserve and ruby mining. Further, the awarding of a concession to mine rubies by Corby Limited, a Canadian company without the involvement of the Endorois is a clear indicative of life that is not worthy to be offered protection. This case illustrates a perfect example where economic and political interests of the powerful are promoted in expense of the cultural and social welfare of the less privileged peoples. As a result of instances such as the dispossession of the Endorois and personification of power, most ethnic groups felt disenfranchised from State resources and that exploded following the election of 2007. Thus,

From 2010, a new system was introduced with the aim of limiting the president's power of personal intervention and control over land. It led to a consolidation of a new level of power, the county. Bolstered at the institutional level, these local governments negotiated in a very tangible way their power base in terms of new prerogatives, in between legal norms and practical norms. Although characterised by their wide variety, county governments sought to create new systems of "rent" by reaffirming their authority over certain lands and, in particular, public lands located within their territory.<sup>75</sup>

Despite the presence of the new system, certain peoples are still not protected from being dispossessed from their lands. It is evident that the Kenyan Government is keen to establish the status quo of colonial domination through promotion of necrocapitalist practices and privatisation of lands.

73 Endorois Case (n 70).

74 *ibid.*

75 Médard and Duvail (n 62).

This is possible through an established hierarchy of relations where political elites determine ownership of lands as well as the exploitation of natural resources. These elites are also in charge of legislating all laws within Kenya making it easier for them to pass laws that will safe guard their own interests. In this manner, these peoples' way of life is exposed to death due to the lack to recognise them as owners of their lands as well as promote and protect that right.

#### 3.4 *The Sengwer and the Embobut Forest*

The Embobut forest is in the County of Elgeyo Marakwet which was established after the successful implementation of the 2010 Constitution in Kenya. This forest forms part of the Cherangany Hills complex that significantly 'sit astride the watershed between the Lake Victoria and Lake Turkana basins. Streams to the west of the watershed feed the Nzoia river system, which flows into Lake Victoria; streams to the east flow into the Kerio river system'<sup>76</sup> as well as the Turkwell river. Due to its strategic importance as a catchment area, the Cherangany Hills was officially registered through the colonial Kenyan Government gazette as a national forest reserve in 1954 which did not consider the lives of the indigenous peoples living there. The Sengwer indigenous peoples were adversely affected by this gazettement as they lived in the Embobut forest. Who are the Sengwer claiming the right of ownership over this forest?

The Sengwer is a hunter-gatherer community 'living along the slopes of Cherangany Hills. They live distributed in three administrative districts: Trans-Nzoia, West Pokot and Marakwet districts in and around Cherangany Hills'.<sup>77</sup> As a hunter-gatherer community, their right to collectively own their ancestral and traditional land, Embobut forest, is currently protected under Article 63 of the Kenyan Constitution and the Community Land Act of 2016. However, that has not been the scenario, as they have been sporadically evicted by the Government since Kenya gained its independence from the British in 1963. After the gazettement of Embobut forest as a protected public forest, the colonial government then issued the Sengwer with permits that will enable

76 Justin Kenrick, 'Governance regarding land and water distribution in Africa: The case of the Cherangany Hills, Kenya – State Forest protection is forcing people from their lands' (Forest Peoples Programme 2014) <[https://www.bothends.org/uploaded\\_files/inlinetitem/141130\\_Cherangany\\_Hills\\_Case.pdf](https://www.bothends.org/uploaded_files/inlinetitem/141130_Cherangany_Hills_Case.pdf)> accessed 01 August 2023.

77 *ibid.*

them to stay in the forest.<sup>78</sup> This is because, the Embobut forest for the Sengwer is important for their survival as their 'livelihood, health system and culture depend on the natural resources found in the forests' as well as undertaking of 'their traditional economies based on herbal medicine, bee keeping, and hunting and gathering and 'support their cultural practices and so provide spiritual anchorage'.<sup>79</sup>

Just like other communities who were dispossessed of their lands and were not given to them after independence, the Sengwer were not authorised to return to Embobut as non-Sengwer populations took over their land. The post-independence governments had allowed for political corruption to determine the allocation of land to communities and because of the lack to recognise indigenous peoples. President Jomo Kenyatta in his term as president adopted through parliament the Enforcement of the Wildlife (Conservation and Management) Act 1976 and Wildlife Policy of 1975 where its 'fundamental goal was taken to be the maximisation of returns from wildlife as a natural resource, broadly defined to include aesthetic, cultural, scientific and economic gains'.<sup>80</sup> In adopting this necrocapitalist practice, the Kenyan government did not put into consideration future technological advances, conflicts between people and wildlife, climate change, population growth and the communities that had been evicted from Embobut forest. As a result, the policy, in this regard, was overambitious and it was a way for political elites to gain funding for conservation efforts which they would pocket for their own personal use.

With this, most of the Sengwer's lands were illegally and successfully 'converted into Agricultural Development Corporations (ADC) farms' when President Moi had taken power in 1978.<sup>81</sup> However, 'in the 1990s, the ADC farms were further allocated to politically influential communities and individuals leaving Sengwer peoples even more landless and alien in their own territory'.<sup>82</sup> This injustices not only led to the Sengwer to assimilate to other incoming cultures but they had to abandon their traditional hunting and gathering practices for farming. The vulnerable nature of the Sengwer at this point does not favor their chances of survival as they are directly exposed to death due

78 Pablo Orosa, 'Kenya's Embobut Forest: Attacks and evictions in the name of conservation?' *Lacuna Magazine: Exposing Injustices* (Warwick, 28 August 2019) <<https://lacuna.org.uk/environment/kenya-embobut-forest/>> accessed 01 August 2023.

79 Kenrick (n 76).

80 Ministry of Tourism and Wildlife, Kenya, 'Sessional Paper No. 1 of 2020 on Wildlife Policy' (2020) <<https://tourism.go.ke/wp-content/uploads/2021/07/WILDLIFE-POLICY-2020.pdf>> accessed 01 August 2023.

81 Kenrick (n 76).

82 *ibid.*



to the clearance of the forest to create spaces for ADCs. They could not be in a position to fight with the government of President Moi as he was well-known as a dictator leaving the Sengwer indigenous peoples in a situation of the *living-dead*.

Further evictions were witnessed in 2007 during President Kibaki's term as president when the Government of Kenya, through the Ministry of Water and Irrigation and the Ministry of Environment and Natural Resources, embarked on a project in Cherangany Hills with funding from the World Bank. For the project to be implemented, the Kenya Forest Service (KFS), a security agency was to ensure that the government conservation efforts through this project were successful by ensuring no one resided in the forest. The Natural Resources Management (NRM) Project was to run for six years, and its cost was \$68.5 million<sup>83</sup> where its goal was to ensure the 'institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks such as drought, floods and water shortage in river catchments and improve the livelihoods of communities participating in the co-management of water and forest resources'.<sup>84</sup> As noted by Kenrick, while the project was optimistic and made to look like it:

[W]as working with communities to protect the forests, however, the funding has been through the Kenya Forest Service which has (as acknowledged in the Inspection Panel report) continually evicted the Sengwer from their forest lands while working with more dominant neighbouring communities and thereby increasing Sengwer marginalisation. Instead of supporting the Sengwer to conserve their forests, the NRMP has further marginalised them, putting the future of the forests in the hands of an institution (Kenya Forest Service) that is well known for destroying indigenous forest at Mt Elgon and elsewhere as it pursues an institutional and also (for many) personal focus on profit making.<sup>85</sup>

However, the Sengwer resisted the implementation of NRM project and argued that they had not been consulted for the implementation of this project. The lack to consult the Sengwer regarding the implementation of the project emanates from the power vested upon the Government by the Forests Act of 2005 as forests such as Embobut forest belonging to the State. In this way, the

83 *ibid.*

84 Inspection Panel, Report and Recommendation on Request for Inspection Kenya: Natural Resource Management Project (P095050) (Report No. 77959-KE, 2013) para 7.

85 Kenrick (n 76).

Act does not recognise the right of the Sengwer to collectively own this forest nor their right to economic, social and cultural self-determination. The lack of the Act to establish the importance of indigenous peoples is a clear indication of the lack to recognise and protect their rights which has led to constant and violent evictions by KFS as it is given the administration of forests by the Act. Further, the lack of the Act not to include the right of free, prior and informed consent means that the NRM project was approved by the Government without obtaining that right from the Sengwer and thus, violating their right to live in their ancestral homes and lands without outside interferences. In this regard, the Government's rush to get funding while disregarding the opinions of the Sengwer regarding the NRM project is necropoliticalism.

Due to these violations, the Sengwer then made their complaints in early 2013 to the World Bank inspection panel on the Bank's lack to respect its own indigenous peoples' policy framework.<sup>86</sup> The complaints arose from the continued evictions exercised by KFS destabilizing the lives of the Sengwer after the project had even ceased to operate. The Sengwer also sought justice through the High Court in the town of Eldoret where the High Court issued an injunction order prohibiting the KFS from evicting them from the Embobut forest.<sup>87</sup> Despite the injunction, more forced evictions were undertaken by KFS through burning of the Sengwer's homes and all their belongings. In the same year, President Uhuru Kenyatta, facing the problem of Internally Displaced Persons (IDPs) because of the 2007/2008 post-election violence, termed the Sengwer as 'evictees' and included them as 'beneficiaries' of money meant for the IDPs.<sup>88</sup> This came from his visit to the area accompanied by the current president, Hon. Dr. William Ruto while serving as his deputy and the current Cabinet Secretary of Public Works, Hon. Kipchumba Murkomen who was serving as the senator of Elgeyo Marakwet. His remarks (Uhuru Kenyatta) reflect the way political elites in Kenya are not willing to protect indigenous peoples' rights and disregard the many calls directed for protections of indigenous peoples such as stopping the evictions of the Sengwer from Embobut forest.

Three years after calling the Sengwer 'evictees', President Kenyatta's government signed a deal with European Union for yet another water conservation project, Water Tower Protection and Climate Change Mitigation and Adaptation Project (WaTER). This project was undertaken through the Ministry of Environment and Forestry, the Water Resources Authority, Kenya Forest Service and Kenya Wildlife Service for a valued price of €31 million

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86 *ibid.*

87 *ibid.*

88 *ibid.*

carried out from 2017 and concluded in 2021.<sup>89</sup> With this project, Kenya sought to ‘stimulate the productivity of the ecosystems around Embobut forest and Mount Elgon.’<sup>90</sup> During the implementation of this project, as established by three experts sent by the United Nations Human Rights Office of the Commissioner (OHCHR), the Sengwer indigenous peoples were attacked and forcefully evicted from their homes. The OHCHR note that:

The Sengwer are facing repeated attacks and forced evictions by agents of the Kenya Forest Service, which is an implementing agency in the project financed by the European Union,” the experts said. On 25 December 2017, more than 100-armed Forest Service guards entered the traditional lands of the Sengwer in the Embobut Forest, firing gunshots, burning at least 15 homes and killing their livestock. On 9 January 2018, one of the Sengwer leaders, was shot at by Forest Service Service guards. While he managed to escape unhurt, his house was burnt down, and his property destroyed.<sup>91</sup>

This violence directed towards the Sengwer shows that the Sengwer resisted the resettlement due to the lack of the Government to consult them during the initial phase of the signing of the concession agreement between the Government and the European Union to obtain their free, prior and informed consent. This resistance by the Sengwer is because ‘they have seen what life outside holds for them – often poverty and dislocation from their traditional livelihoods – and they are determined to fight for their rights.’<sup>92</sup> With their determination to fight against these illegal evictions, ‘this means that they have to live in temporary and precarious shelters, constructed out of tree bark and plastic sheet, because they know that their homes will be destroyed if found by forest guards.’<sup>93</sup> Therefore, this kind of action undertaken by KFS and

89 Eileen Gbagbo, ‘The dark side of forest conservation: The Sengwer tribe and Embobut Forest’ EuroNews (Brussels, 22 September 2021) <<https://www.euronews.com/green/2020/07/20/the-dark-side-of-forest-conservation-the-sengwer-tribe-and-embobut-forest>> accessed 02 August 2023.

90 *ibid.*

91 United Nations Human Rights Office of the High Commissioner, ‘Indigenous rights must be respected during Kenya climate change project, say UN experts’ (Geneva, 15 January 2018) <<https://www.ohchr.org/en/press-releases/2018/01/indigenous-rights-must-be-respected-during-kenya-climate-change-project-say>> accessed 02 August 2023.

92 Amnesty International, ‘Kenya: Evicting the Forest Guardians’ <<https://www.amnesty.org/en/latest/campaigns/2018/05/kenya-evicting-the-forest-guardians/>> accessed 02 August 2023.

93 *ibid.*

the Government is necropolitical and exposes the Sengwer to death due to economic interests.

#### 4 Conclusion

The maximum destructions of peoples in Kenya are exacerbated by continued colonial domination and unaccounted executive powers. As analysed above, indeed, State power leads to the vulnerability of indigenous peoples as a State's continued usage of colonial laws, especially property laws, is the direct continuance of colonial domination. These colonial laws legitimise accumulation by dispossession which discounts the lives of indigenous peoples as they favour privatisation of property ownership against customary ownership of property. As the case study of the Sengwer indigenous peoples demonstrates, accumulation by dispossession is legitimatised through colonial laws which seek to protect economic and political interests of the few in power disguised as conservation. In this instance the government, IFIs and TNCs work closely together using a lot of secrecy, institutionalised corruption, and cheap labour to obtain natural resources without the knowledge of indigenous peoples.