

**LLD THESIS(DRAFT 1)**

**PROTECTING INDIGENOUS PEOPLES' RIGHTS TO LAND IN KENYA: THE ROLE OF THE  
JUDICIARY AND A CASE FOR LEGAL REFORMS**

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**DATED: 30 NOVEMBER 2007**

## **Chapters' overview**

This thesis is divided into six chapters. Chapter one is an introduction and sets out the content and structure of the research. The Chapter commences with a discussion of the concept 'indigenous peoples' and examines its relevance in the realization of the groups fundamental human rights. The Chapter sets out the problems statement, the key questions under investigation and the methodology adopted in the research.

Chapter two is a survey of the land and resource rights of indigenous peoples. It puts into context one of the core claims by indigenous peoples and is an examination of the special relationship of indigenous peoples to their traditional lands. The chapter proceeds to discuss the main problems that hamper the realization of these rights by indigenous peoples.

Chapter three explores the international and regional norms aimed at protecting the land rights of indigenous peoples.

Chapter four examines Kenya land legal framework. Using two case studies; the Maasai and the Ogiek case studies it reviews the extent the framework protects indigenous peoples land rights.

Chapter five assesses the extent and potential of Kenya's legal framework to protect indigenous peoples' land rights. It also reviews the application of various international norms and comparative common law jurisprudence that has been invoked to give meaning to indigenous peoples land rights.

The Chapter six identifies possible reforms within the legal framework that would guarantee protection of indigenous peoples land rights.

## CHAPTER FIVE-DRAFT ONE

### THE EXTENT AND POTENTIAL OF KENYA'S LEGAL FRAMEWORK TO PROTECT INDIGENOUS PEOPLES' LAND RIGHTS

#### 5.1 Introduction

The focus of this chapter is on the possible legal resources that can be employed to address the legitimate legal claims by indigenous peoples to their traditional lands in Kenya. The chapter reviews constitutional and legislative provisions that accord recognition and protection of indigenous peoples' land rights. However, due to a restrictive interpretation of some of those provisions by Kenyan courts of law, indigenous peoples' land claims have not always been successful.<sup>1</sup> The chapter argues that the current legal framework has the potential to protect indigenous peoples' land rights through a progressive interpretation of the law as is the case in some comparative common law jurisdictions and in tandem with international standards.

It is instructive to note that Kenya's legal system is influenced by common law and case law from other common law jurisdictions.<sup>2</sup> Although such foreign case law is not binding their decisions have persuasive value in reaching a verdict.<sup>3</sup> With regard to the applicability of international instruments ratified by the state even when they have not been domesticated, Kenyan courts have recently adopted a Zambian High Court reasoning. In the Kenyan case of *RM and another versus AG* the High Court in 2006 adopted the reasoning of Justice Musumali of the Zambian High Court who held that:

Ratification of such instruments by a nation state without reservation is a clear testimony of the willingness by the state to be bound by the provision of such (a Treaty). Since there is that willingness if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.

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<sup>1</sup> See for example the case studies of the Maasai and the Ogiek in Chapter four.

<sup>2</sup> See some of the references by the Kenyan courts to decisions of other common law courts. See for example *RM and another versus AG*, High Court of Kenya (Nairobi) Civil case no 1351 of 2002, sourced at <[www.kenyalaw.org](http://www.kenyalaw.org)> (2006eKLR.) 9.

<sup>3</sup> Kenyan courts often make reference to other common law decisions during the determination of cases. In the *Francis Kemeil, David Sitienei and others versus The Attorney General, the PC Rift Valley Province, Rift Valley Provincial Forest officer, District Commissioner Nakuru* Miscellaneous Civil Application No.128 of 1999 (Ogiek case) the Court for instance made reference to various cases in other common law jurisdictions that were submitted in support of the applicants' arguments. These cases include the Indian case of *Tellis and others v Bombay Municipal Corporation and others* [1987] LRC (Const) 351 SC; and the Australian case of *Eddie Mabo and others v The State of Queensland* [1992] 66 QLR 408.

Such a finding a development is important for indigenous peoples in Kenya who may invoke international standards and comparative jurisprudence to seek protection of their rights, especially where the existing legal framework fails to do so. However, it is important to note that the general principle on the application of international standards and norms in Kenyan as with most other common law jurisdictions that unless international instruments are domesticated they do not have the force of law still applies.<sup>4</sup> Accordingly the courts have held that ‘where there is no ambiguity, the clear provisions of the Constitutions prevail over International Conventions.’<sup>5</sup>

It is the role of courts of law to determine whether the legal framework is clear. It also their duty to determine if such law is consistent with the state’s international obligations.<sup>6</sup> Where the domestic law is inconsistent with the international norms and standards, Kenyan courts of law agree with the Bangalore Principles that while they are obliged to ‘give effect to the national law, they shall draw the inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country’.<sup>7</sup> Such an inconsistency could form a ground for law reform which is the subject for discussion in chapter six. This chapter makes references to interpretations by international and regional monitoring mechanisms of international standards that are also entrenched in Kenya’s Constitution. The Chapter argues that while those provisions are not ambiguous and indeed are consistent with the state international obligations, their interpretation by Kenyan courts of law have at times been restrictive.

The rationale for analyzing some of the international standards is based on the fact that ‘like many other oppressed peoples who have appealed to the emerging discourse of international human rights in recent years, indigenous peoples recognize that international human rights law and norms have come to assume a more authoritative and even constraining role on state actors in the world’.<sup>8</sup> Williams Jr. offers the following rationale for this development:

Government assertions in the international community that abuses of its citizens' human rights are matters of exclusive domestic concern have become more difficult to sustain. Various formal and informal mechanisms have proven capable of ameliorating abusive state

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<sup>4</sup> See *RM and another versus AG, High Court of Kenya Nairobi*) Civil case no 1351 of 2002, sourced at, sourced at <[www.kenyalaw.org](http://www.kenyalaw.org)> (2006eKLR.), 9.

<sup>5</sup> As above, 20.

<sup>6</sup> See for example See *RM and another versus AG, High Court of Kenya Nairobi*) Civil case no 1351of 2002, sourced at, sourced at <[www.kenyalaw.org](http://www.kenyalaw.org)> (2006eKLR.), 21-23.

<sup>7</sup> As above 21; see Bangalore Principles of 1989 reprinted in Common Wealth Secretariat, *Developing Human Rights Jurisprudence* vol 3, 151 Principle 8.

<sup>8</sup> Robert A. Williams RA Jr, *Encounters on the frontiers of international human rights law: Redefining the terms of indigenous peoples' survival in the world*, *Duke L.J.*, 1990, 669.

practices violative of international human rights instruments and standards. Blatant state violators of international legal norms often pay the price of increasing isolation. Vital economic and cultural exchange opportunities often are constricted by the international community in reaction to a sovereign state's human rights abuses of its citizens. Although state responses to pressure from the international human rights process may not always be sincere or even sustained over time, experience indicates that few governments actively desire pariah status in the international community.<sup>9</sup>

Indeed, today, international standards and norms play a significant role in states conduct and attitude towards their citizens. States are increasingly conforming to international law notwithstanding variances in the level and manner of such compliance. Some states have domesticated such standards in their national legal frameworks while in others their courts of law have invoked and applied them whilst adjudicating disputes.<sup>10</sup> Undoubtedly the domestic legal framework is the most suitable and primary legal resource to seek legal protection. Indeed international legal norms and standards are of little value unless they find application and implementation in national legal frameworks. Accordingly, the recourse to international standards, norms and mechanisms in this chapter is in a bid to illustrate the potential they have if applied by Kenyan courts to protect to indigenous peoples land rights, with the eventual goal that these standards may percolate to the domestic legal order.

While most of these standards are not necessarily tailored for indigenous peoples only and indeed are of general character some have emerged from indigenous peoples' activism through international standard setting mechanisms seeking international protection.<sup>11</sup> Additionally, some of the standards surveyed are not binding but serve as persuasive authority with interpretive force in international fora and domestic courts. While international law standards can be classified as either binding or non binding, this chapter surveys them thematically and does not necessarily differentiate them. However, an attempt is made wherever possible to indicate which standards would be binding on Kenya and which are surveyed for the progressive interpretations they have made relevant to indigenous peoples. It is important to point out from the onset that,

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<sup>9</sup> Robert A. Williams Jr., as above note 2, 669.

<sup>10</sup> See some select examples of states that have domesticated international standards with regard to indigenous peoples' rights to land and resources in Anaya SJ & Williams RA Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 *Harvard Human Rights Journal* (2001) 33,58-74. In Africa courts of law have begun recognizing indigenous peoples rights to land and resources by invoking their own domestic standards and international norms; see for example the Botswana case of *Sesana and Others v Attorney General* (52/2002) [2006] BWHC 1 (13 December 2006); South African case of *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC).

<sup>11</sup> Robert A. Williams Jr 664-9; See for example the UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

the main standards surveyed here are those from the international standard setting mechanisms notably the United Nations and its specialized agencies such as the International Labour Organisation as well as those from the African human rights system. In a few instances some comparable norms from the Inter American Human Rights System have been cited with the aim of demonstrating possible progressive interpretations of some of the standards that would likewise apply in determining indigenous peoples' cases. An analysis of some of the existing international instruments, norms developed by international standards setting mechanisms and regional specific frameworks is made in a bid to tease out some of the applicable norms and platforms that give meaning to indigenous peoples' land and resource rights. It is expected that the emergence of favourable international standards in the protection of indigenous peoples' rights will trickle down to the domestic level.

It is submitted that in a bid to redress the land dispossessions of indigenous peoples in Kenya, courts of law have a duty to give regard to developing common law jurisprudence and international norms. That entails a progressive interpretation of the provisions of the Constitution that are consistent with Kenya's international obligations. Such duty emerges from the role of courts as impartial arbiters of disputes fairly and equitably.<sup>12</sup> It is particularly crucial in the case of the rights of minorities and the marginalized who often do not have the capacity to mobilize the democratic processes in resolving such disputes.<sup>13</sup> That position was reiterated by the Constitutional Court of South Africa in its judgment over the constitutional challenge of the death penalty under the transitional 1993 Constitution stating that:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.<sup>14</sup>

The Constitutional Court of South Africa has particularly been vigilant and afforded indigenous peoples protection of their land rights. One example is the Richtersveld community case.<sup>15</sup> Although the Constitutional Court relied upon the restitution laws,<sup>16</sup> to find violation of the community's land rights, it also and importantly held that the community possessed rights in the

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<sup>12</sup> Mac Darrow & Philip Alston, Bills of Rights in Comparative Perspectives, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Philip Alston (ed), 1999,493.

<sup>13</sup> *S v Makwanyane and Another*, 1995 (6) BCLR 665 (CC), para 88.

<sup>14</sup> *S v Makwanyane and Another*, 1995 (6) BCLR 665 (CC), para 88.

<sup>15</sup> *Alexkor Ltd & Another v. Richtersveld Community and others*, 2003 (12) BCLR 1301 (CC).

<sup>16</sup> See the Constitution of the Republic of South Africa Act 108 of 1996, section 25(7); The Restitution of Land Rights Act 22 of 1994.

disputed lands before colonialism based on their indigenous laws.<sup>17</sup> The Constitutional Court's aptness to right the wrongs of apartheid and discriminatory laws can be emulated by other courts on the continent in protecting marginalized communities who suffer under laws that subordinate African customary laws and traditions.

In common law jurisdictions, courts take an adversarial approach to litigation. The legal expertise and evidence adduced is therefore an important component to the litigation process that largely determines the outcomes of suits. However, most indigenous communities are indigent and generally do not have the resources to engage or retain counsels who are well acquainted or willing to prepare and research extensively. This may prejudice the outcome of cases especially in litigation that calls not only for written sources of laws but also customs, traditions, indigenous laws as well as international law and jurisprudence. Therefore apart from courts being progressive in the interpretation and use of available legal resources there is need to sensitize the legal professionals representing indigenous peoples of the available jurisprudence and options existing in the protection of indigenous peoples' claims. The Ogiek case study discussed in chapter four highlighted the critical role of lawyers in adducing relevant arguments in support of indigenous peoples. In that particular case for instance the High Court indicated that arguments were not made to prove that the Ogiek were the traditional inhabitants of the lands they claimed and as such had a customary interest in the lands.<sup>18</sup> Had such arguments been made, the Court might have arrived at a different verdict. Accordingly lawyers representing indigenous communities need to understand and appreciate available legal resources protecting indigenous peoples including comparative jurisprudence and international standards.

It is for some of those reasons that this chapter argues that the judiciary has the potential to rectify societal ills of marginalizing the weak and the poor by constructively engaging and interpreting the legal framework. Courts have an obligation to ensure that justice is achieved for all peoples equitably within a country. It is therefore imperative that courts being forums of last resort for the marginalized should take into consideration the special circumstances of indigenous peoples during determination of their claims. That requires constructive engagement of litigants, meticulous research, and progressive interpretation of the laws.

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<sup>17</sup> As above para 62; 64

<sup>18</sup> See Towett J Kimaiyo, 17, tracing the history of the Ogiek that would point to the Ogiek being the original inhabitants of the lands and their claims to the lands in dispute.

The Constitution of Kenya enshrines key clauses that protect the rights of individuals and marginalised groups.<sup>19</sup> Although the language of the Kenya Bill of Rights seems to only envisage individual rights,<sup>20</sup> the Constitution makes provision for rights whose enjoyment demand recognition and protection of group rights.<sup>21</sup> Relevant to the question of land rights of indigenous peoples, are provisions related to the right to life,<sup>22</sup> protection from deprivation of property,<sup>23</sup> protection from discrimination<sup>24</sup> and protection from deprivation of liberty.<sup>25</sup> Other relevant constitutional enactments include the chapter on trust lands which this thesis argues protects group rights and provides the framework for the application of indigenous peoples customary laws.<sup>26</sup>

### 5.1.1 The right to life

The Constitution of Kenya section 71(1) affirms that ‘no person shall be deprived of his life intentionally....’ While the wording of this provision is in the form of a negative obligation not to take someone’s life, ‘it can also be interpreted positively as placing a duty on the state to protect the lives of its citizens’.<sup>27</sup> Indeed, some indigenous communities in Kenya have invoked the right to life in its positive dimension to demand protection of their right to a livelihood. In *Kemai and others versus Attorney General and others*, the applicants, members of the Ogiek ethnic community, sought ‘a declaration that their right to life had been contravened by the forcible eviction from the Tinet Forest’.<sup>28</sup>

The community argued that they had been ‘living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming’<sup>29</sup> In dismissing the case, the Court held *inter alia* that ‘the applicants were not being deprived of a means of livelihood and right to life. They were merely being stopped from dwelling on a means of livelihood preserved

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<sup>19</sup> See the Bill of Rights, section 70-83.

<sup>20</sup> See section 70 of the Constitution whose relevant part reads ‘every person in Kenya is entitled to the fundamental rights and freedoms of the individual’. Most of the rights in Chapter V also provide for the rights of a person.

<sup>21</sup> See section 82 on non discrimination and Chapter ix on Trust Lands.

<sup>22</sup> As above section 71.

<sup>23</sup> As above section 75.

<sup>24</sup> As above, section 82.

<sup>25</sup> As above, section 72.

<sup>26</sup> See as above sections 114-120.

<sup>27</sup> See Currie I & de Waal J, *The Bill of Rights Handbook*,(5<sup>th</sup> Ed) Juta, Lansdowne, 2005, 285.

<sup>28</sup> *Kemai and 9 others versus Attorney General and 3 others*, civil case No 238 of 1999, KLR (e & I) 1.

<sup>29</sup> As above.

and protected for all Kenyans'.<sup>30</sup> In so finding, it is arguable that while the Court did not find a violation of the right to life, it tacitly acknowledged that deprivation of means of livelihood could amount to violation of the right to life. In the Court's reasoning the community was 'merely' being prevented from encroaching a protected area and emphasized that the 'eviction from the forest did not bar the applicants from exploiting the natural resources of Tinet forest, upon obtaining licences prescribed under the Forest Act'.<sup>31</sup>

In rejecting the community's claim that their right to life was violated by virtue of deprivation of their means to livelihood, the Court argued that community did not prove that the 'alternative land given to them is a dead moon incapable of sustaining human life'.<sup>32</sup> The main thrust of the courts arguments against recognizing the violation of the right to life of the Ogiek community in the case was based on its finding that the Tinet forest was not Ogiek land,<sup>33</sup> a point this thesis contests in ensuing sections.

The right to life provision in the Constitution has the potential to accord protection to indigenous peoples land rights in Kenya. The main hurdle would be as held in the *Kemai case*, proof of title to the land and that it is the sole basis of their livelihood.<sup>34</sup> However, while the Constitutional right to life is yet to be positively interpreted by Kenyan courts, some Common law jurisdictions have interpreted the right to life to entail protection from deprivation of ones livelihood.<sup>35</sup> The *Ain O Salish Kendro (ASK) & Others versus Government of Bangladesh* case arose after the government of Bangladeshi evicted a community in Dhaka to pave way for a government project.<sup>36</sup> The High Court held that '...any person who is deprived of the right to livelihood, except according to just and fair procedures established by law, can challenge that deprivation as offending the right to life'.<sup>37</sup>

Similarly the Malaysian case of *Kerajaan Negeri Johor & Anotherversus Adong bin Kuwau & Others* involved allegations of the violation of the right to life by an indigenous hunter-gatherer

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<sup>30</sup> As above.

<sup>31</sup> As above, 2.

<sup>32</sup> As above, 14-16

<sup>33</sup> As above, 13-14.

<sup>34</sup> *Kemai case para 13-16*

<sup>35</sup> See *Ain O Salish Kendro (ASK) & Others versus Government of Bangladesh & Others*, Writ Petition No 3034 of 1999, (1999) 2 CHRLD; see also *Kerajaan Negeri Johor & Anotherversus Adong bin Kuwau & Others* [1998] 2 MLJ 158, (1998) 2 CHRLD 281( Malaysia).

<sup>36</sup> *Ain O Salish Kendro (ASK) & Others versus Government of Bangladesh & Others*, Writ Petition No 3034 of 1999, (1999) 2 CHRLD 393

<sup>37</sup> As above 393.

community after the government's decided to build a dam on their traditional habitat without appropriate consultation and engagement of the community.<sup>38</sup> The Malaysian Court of Appeal upheld the decision of the lower court and stated that it is 'a well established principle that deprivation of livelihood may amount to deprivation of life itself'.<sup>39</sup>

In *Makwanyane*, the South African Constitutional Court upheld the right to life as 'the most fundamental of all human rights, the supreme human right'.<sup>40</sup> Accordingly, the state is obliged by the Constitution to take positive measures to guarantee the right to life.<sup>41</sup> Such measures one would argue in the Kenyan context would include the protection of the lands and natural resource rights of indigenous peoples whose subsistence they solely depend.

The Botswana case of *Sesana and Others v Attorney General*<sup>42</sup> which would similarly serve as a persuasive authority in Kenya found that unlawful termination of basic and essential services of an indigenous community abridges the right to life.<sup>43</sup> In the *Sesana* case, the government of Botswana in a bid to forcefully relocate the Basarwa (also known as the San, an indigenous community) from their traditional territories in the Central Kalahari Game Reserve, terminated basic and essential services such as water and food.<sup>44</sup> The Court held that such forceful relocation and termination of the services was unlawful and unconstitutional.<sup>45</sup> The particular circumstances of the San and the Ogiek in Kenya are quite similar and it will be demonstrated in later sections that the Kenyan High Court may have arrived at a comparable finding had it been presented with all the available legal resources in support of the Ogiek and applied them objectively.

The Indian case of *Tellis and others versus Bombay Municipal Corporation and others* upheld the right to life to entail positive duties by the state to guarantee a communities' right to a livelihood.<sup>46</sup> The Kenyan High Court sought to distinguish the applicability of that principle in the

<sup>38</sup> *Kerajaan Negeri Johor & Another versus Adong bin Kuwau & Others* [1998] 2 MLJ 158, (1998) 2 CHRLD 281.

<sup>39</sup> As above.

<sup>40</sup> See *S Versus Makwanyane* 1995 (3) SA 391 (CC), para 217.

<sup>41</sup> As above para 117; 353,

<sup>42</sup> *Sesana and Others v Attorney General* (52/2002) [2006] BWHC 1 (13 December 2006) in <[www.saflii.org.za](http://www.saflii.org.za)> accessed on 30 September 2007.

<sup>43</sup> As above, H12 (4); H13 p229.

<sup>44</sup> As above H11 and H12 p 228-229.

<sup>45</sup> As above. H10-H13.

<sup>46</sup> *Tellis and others v Bombay Municipal Corporation and others* [1987] LRC (Const) 351 SC (The case was about the forcible eviction of pavement and slum dwellers in the city of Bombay, India who contended that it violated their right to life).

*Tellis case* in the *Kemai case* by arguing that while admittedly the right to life was wide and far reaching as found in the *Tellis case*, it was the Kenyan court's opinion that what was protected was deprivation of life beyond the established procedures of law.<sup>47</sup> Such an interpretation is restrictive and one that fails to read beyond the purpose and object of the clause in the Constitution. Indeed according to the Court the eviction of the Ogiek was within the legal parameters and that in any case they had never challenged the many evictions they claimed to have endured until as late as the present matter.<sup>48</sup>

In so finding, the Kenyan High Court misses the point in that, while the Ogiek had not previously challenged the matter in Court, they had employed the resources they thought would best ventilate their rights which included peaceful mediation and political negotiations with the state since 1968. It is on record that the Ogiek continued to resist and return to their traditional territory; the forest.<sup>49</sup> The Court's argument also fails to consider some fundamental barriers that could have prevented the community from contesting the evictions in a court of law such as indigence, illiteracy, lack of appropriate legal knowhow and capacity and such others that inhibit most indigenous peoples from espousing violation of their fundamental human rights. The community was also relying on their customary laws and traditions to prove ownership of the lands which is subordinated by other written laws.

It is submitted that in certain cases particularly those involving poor communities as was the case in the present case whose outcome would have far reaching implications to a community courts of law should consider all these factors before dismissing their case on such a technicality. It is also submitted that that on the basis of the comparative common law jurisprudence which has persuasive value in Kenyan courts, indigenous peoples in Kenya can equally be accorded protection of their land rights which are mainly the prime basis of their livelihood. The right to life as is advanced by the other courts includes protection of ones livelihood. In the case of indigenous peoples, that it entails protection of the traditional lands.

Kenya is also a party to a number of international and regional treaties whose monitoring mechanisms have called upon member states to interpret the right to life positively.<sup>50</sup> The UN

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<sup>47</sup> *Kemai case*, 13.

<sup>48</sup> *Kemai case*, 13.

<sup>49</sup> See Kimaiyo JT, *Ogiek land cases and historical injustices*, 1902-2004, vol 1, Ogiek Welfare Council, 2004, 22-30.

<sup>50</sup> See Chapter three of this thesis on the relevant treaties that Kenya has ratified. These relevant ones for the right to life include the ICCPR, ICESCR, and the African Charter.

Human Rights Committee has for instance noted that ‘the right to life has been too often narrowly interpreted (...) the expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures...’<sup>51</sup> Such measures would include according legal recognition and protection to the traditional lands of indigenous peoples. That is due to the fact that the traditional lands of indigenous peoples are vital for their survival and livelihood.

The African Commission has positively interpreted the right to life to require states to the African Charter to protect the land of indigenous peoples’ whose survival they are dependent upon.<sup>52</sup> In the *Social and Economics Rights Action Centre (SERAC) and another versus Nigeria*, the African Commission found that the pollution and environmental degradation of Ogoni land by the government agents and private actors was a violation of the right to life of the Ogonis.<sup>53</sup> According to the African Commission the acts of the state ‘affected the life of the Ogoni community as a whole.’<sup>54</sup> Implicitly the Commission also found a link between the right to food and the rights to life and dignity which are protected by the African Charter.<sup>55</sup> In finding a violation of the right to food by Nigeria in the SERAC case, the Commission called on the state not to destroy the Ogoni’s food sources or ‘prevent them from feeding themselves’.<sup>56</sup> Indigenous peoples’ food sources are predominantly their traditional lands and as such preventing them from accessing and controlling the resources that are vital for their basics sustenance is a violation of their right to life.

### **5.2.2 Non discrimination and equality**

Section 70, of Kenya’s Constitution sets the tone for the non discrimination nature of the enjoyment of fundamental rights in Kenya. It provides in part that ‘every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions,

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<sup>51</sup> Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003, p. 128.; See Article 6 of the ICCPR which Kenya is a party.

<sup>52</sup> See *Social and Economics Rights Action Centre (SERAC) and another versus Nigeria* (2001) AHRLR 60 (ACHPR 2001), 260 para 67 see also para 70.

<sup>53</sup> As above; see article 4 of the African Charter which Kenya is a party.

<sup>54</sup> As above.

<sup>55</sup> As above para 64-66; articles 4 and 5 of the African Charter.

<sup>56</sup> As above para 65 and 66.

colour, creed or sex'.<sup>57</sup> The enjoyment of these rights is 'subject to respect for the rights of others and for the public interest' as well as the specific limitations envisaged in each of the enshrined rights.<sup>58</sup> Section 82 of the Constitution defines discrimination and is the express provision that outlaws its practice.<sup>59</sup>

By virtue of these provisions, indigenous peoples are protected from discrimination from exercising their land rights according to their preferred mode of tenure. Tribe is one of the express grounds stipulated as a possible basis for discrimination. The fact that it is expressly acknowledged means that all tribes are equal in the eyes of the Constitution and are entitled to equal treatment by the law.<sup>60</sup> Their land and resources are therefore protected by the Constitution as equitably as are lands and resources belonging to all other Kenyans. Discrimination by the law or practice against their preferred mode of land use, control, access and ownership is by extension prohibited.

It is arguable that the non discrimination provisions<sup>61</sup> enshrined in Kenya's Constitution provide at least in theory a constitutional basis for indigenous peoples to assert their land and resource claims in accordance with the preferred way of life. However, while the non discriminatory clause in the Constitution seems to protect communities relying on customary laws, the repugnancy clause ousts their applicability in case of a conflict with written laws.<sup>62</sup> Courts of law in Kenya have generally given more weight to the ouster clause than its overall effect which is to discriminate against particular groups who seek reliance on their traditional laws.<sup>63</sup> [Discuss some cases here.....](#)

However, notwithstanding these provisions, discriminatory practices against indigenous peoples persist in Kenya.<sup>64</sup> Indeed the State recently acknowledged that in the past it did not take any

<sup>57</sup> Section 70 Constitution of the Kenya Constitution.

<sup>58</sup> As above.

<sup>59</sup> See section 82 (1) (2); According to Section 82(3) discriminatory means 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other connection, political opinions, colour, creed or sex whereby persons of one such description are not made subject or accorded privileges or advantages which are accorded to persons of another description'.

<sup>60</sup> See section 82(1) (2).

<sup>61</sup> Section 82 of the Constitution.

<sup>62</sup> Insert references

<sup>63</sup> Cite applicable case law

<sup>64</sup> See Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006( APRM report), 14; See also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 22-24; International Work Group for Indigenous Affairs (IWGIA), 2007, *The Indigenous World 2007*, 468.

active measures to preserve and protect minorities in Kenya.<sup>65</sup> In a bid to rectify that situation it stated that ‘there has been a gradual acceptance of their status and there are efforts being made to not only recognise these minorities, but also encourage their survival and protection’.<sup>66</sup> Similarly, a recent study by the African Union’s NEPAD Peer Review Mechanism<sup>67</sup> reveals that ‘post-independence politics in Kenya have been characterized by ethnicity, reflecting patterns of super-ordinate and subordinate ethnic relations and inequality’.<sup>68</sup> Indigenous peoples whose population sizes are generally inferior to the dominant tribes have thus endured policies that did not take account of their particular circumstances, preferred way of life and cultural dynamics.<sup>69</sup>

It is instructive to note that similarly situated common law countries such as South Africa and Botswana have employed non discrimination clauses to protect their indigenous peoples land rights. The South African Constitutional Court for example in the landmark decision on *Alexkor Ltd & another versus Richtersveld Community & others* held that failure to respect indigenous customary property rights is invariably discriminatory.<sup>70</sup> Apart from progressively interpreting constitutional provisions against discrimination, states have an obligation to ensure that marginalised communities by virtue of their particular circumstances are protected according to their cultural and preferred way of life.

The Sesana case in Botswana highlighted the relative powerlessness indigenous communities may be when pitted against dominant communities.<sup>71</sup> Justice Dow proceeded to hold that ‘equal treatment of un-equals can amount to discrimination’.<sup>72</sup> The significance of such a position in the Kenyan context can not be underestimated given the fact that most indigenous peoples have historically been marginalized in practice and in law to the extent that it is imperative that measures are instituted to address the discrimination. Some of the measures may require affirmative action and special mechanisms to redress the historical injustices committed against indigenous peoples.

Given that non discrimination is a constitutionally entrenched right in Kenya it should be interpreted with the aim of according all Kenyans equal protection of the law. Such an approach

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<sup>65</sup> Second Periodic Report of Kenya to the UN Human Rights Committee, para 212.

<sup>66</sup> Second Periodic Report of Kenya to the UN Human Rights Committee, para 212.

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<sup>68</sup> APRM Report 14.

<sup>69</sup> See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 22- 24

<sup>70</sup> *Alexkor Ltd & another versus Richtersveld Community & others* para 34.

<sup>71</sup> Sesana case H9.3

<sup>72</sup> As above, H9.3(33).

would be in tandem with international standards and developing jurisprudence in other common law countries which Kenya shares a legal tradition.<sup>73</sup> Applicable international standards and norms require states not to discriminate against indigenous peoples customary laws with regard to their lands.<sup>74</sup> The United Nations Committee that monitors the implementation of CERD<sup>75</sup> which Kenya is a party has implored upon states 'to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.'<sup>76</sup>

Some of the relevant international instruments prohibiting discrimination include the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) both of which Kenya is party.<sup>77</sup> Article 2(1) of the ICCPR stipulates that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>78</sup> Further, article 26 of the Convention guarantees equal protection before the law.<sup>79</sup> The norms enshrined in articles 2(1) and 26 have been invoked to give effect to the rights of indigenous peoples.<sup>80</sup> The African Charter on Human and Peoples'

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<sup>73</sup> Cite examples

<sup>74</sup> See CERD article 5(d)v

<sup>75</sup>International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention).

<sup>76</sup> U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIII: Rights of Indigenous Peoples*, U.N. Doc. A/52/18 Annex V (Aug. 18, 1997), para 5.

<sup>77</sup> ICCPR ratified by Kenya on 1 May 1972; CERD ratified on 13 September 2001.

<sup>78</sup> See also Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para 18 describing discrimination as 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms'.

<sup>79</sup> Article 26, ICCPR 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

<sup>80</sup> See also with reference to minorities General Comment No 23, para 6.2 'Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to

Rights similarly prohibit discrimination on the basis of various grounds including race, ethnic origin, language, social status and other status.<sup>81</sup> Inclusion of ethnic origin as one of the grounds may be deemed as a tacit acknowledgment of the ethnic diversity on the continent and the need to respect and ensure that each group irrespective of its political or social status deserves equal treatment and protection of the law. These non discrimination provisions are important standards in indigenous peoples' pursuit for recognition and protection of their lands and resource rights. According to Thornberry, the most direct non discriminatory standards that have the potential to give meaning to indigenous peoples rights are provisions of the CERD.<sup>82</sup>The Committee on the Convention of the Elimination of All Forms of Racial Discrimination (CERD) which monitors the implementation of the Convention and has called on states parties to among others:<sup>83</sup>

- i. Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- ii. Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- iii. Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- iv. Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- v. Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages;
- vi. Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.

The Committee recognizes that discrimination lies at the root of indigenous dispossession and jeopardizes the survival of indigenous peoples as distinct cultures.<sup>84</sup> The issue of land features prominently and the Committee has called for the protection of indigenous peoples communal lands as a means of eliminating violations of the human rights of indigenous peoples resulting from discriminatory land rights policies and laws.<sup>85</sup>

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enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population..."; see Thornberry P, 131..

<sup>81</sup> See articles 2; 3 and 19 of the African Charter.

<sup>82</sup> See Thornberry P, The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination, in Castellino J & Walsh N (ed) *International Law and Indigenous Peoples*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, 17.

<sup>83</sup> General Recommendation 23, Committee on the Elimination of Racial Discrimination, 51st Sess. at 122, *U.N. Doc. A/52/18, annex V* (1997).

<sup>84</sup> General Recommendation 23 as above note 75.

<sup>85</sup> Andrew Huff, Indigenous land rights and the new self-determination, *16 Colo. J. Int'l Envtl. L. & Pol'y*, 2005, 328.

Like the HRC the Committee considers periodic state reports, and in its observations it has criticized the lack of meaningful legal recognition of communal indigenous lands within states, decrying the resultant instability of indigenous life.<sup>86</sup> The Committee has also called upon states to ‘protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories’.<sup>87</sup> Of particular interest is the affirmation by the CERD that the doctrine of *terra nullius* is racially discriminatory and as such inconsistent with principles of fundamental human rights norms.<sup>88</sup> In the wake of the *Mabo decisison*<sup>89</sup> in Australia which rejected the doctrine of *terra nullius*, the CERD hailed the judgment terming it a significant development for indigenous peoples’ land rights.<sup>90</sup>

Non-discrimination further demands that adequate and appropriate consultation and participation mechanisms are instituted to ensure that indigenous peoples are involved in the ownership, control and management of their traditional lands and resources. In this regard, the CERD has Committee has recommended that state parties ‘ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent’.<sup>91</sup>

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<sup>86</sup> See Andrew Huff as above; Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 50th Sess., Supp. No. 18, para. 536, *U.N. Doc. A/50/18/Supp. No. 18* (1996) (discussing Nicaragua); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 51st Sess., Supp. No. 18, paras. 45-55, *U.N. Doc. A/51/18/Supp. No. 18* (1996) (discussing Colombia); *id.* para. 189 (discussing Finland); *id.* para. 309 (discussing Brazil); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 52nd Sess., Supp. No. 18, paras. 92-93, *U.N. Doc. A/52/18/Supp. No. 18* (1997) (discussing Guatemala); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 53d Sess., Supp. No. 18, paras. 293-99, *U.N. Doc. A/53/18/Supp. No. 18* (1998) (discussing Cambodia); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 54th Sess., Supp. No. 18, para. 202, *U.N. Doc. A/54/18/Supp. No. 18* (1999) (discussing Costa Rica); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 56th Sess., Supp. No. 18, para. 335, *U.N. Doc. A/56/18/Supp. No. 18* (2001) (discussing Sri Lanka); *id.* para. 400 (discussing the United States); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 57th Sess., Supp. No. 18, paras. 74-76, *U.N. Doc. A/57/18/Supp. No. 18* (2002) (discussing Costa Rica); *id.* paras. 330-31 (discussing Canada).

<sup>87</sup> As above.

<sup>88</sup> Ninth Periodic Report of Australia, CERD/C/223/Add.1, CERD Report in A/49/18, paras. 540.

<sup>89</sup> *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

<sup>90</sup> Ninth Periodic Report of Australia, CERD/C/223/Add.1, CERD Report in A/49/18, paras. 540.

<sup>91</sup> General Recommendation 23: Rights of Indigenous Peoples, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997).

The ILO Convention No169 similarly urges states to consult indigenous peoples, ‘with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands’.<sup>92</sup> Indeed according to one of the fundamental principles of the ILO Convention No 169 ‘the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation of plans and programmes for national and regional development which may affect them directly.’<sup>93</sup> Accordingly consultation should be prior to the project commencement preferably during the design stage in order to ensure that indigenous peoples’ views are taken into account. It should be conducted in good faith with the overall aim of seeking agreement or consent of the affected peoples using appropriate procedures and institutions that are representative of the indigenous peoples themselves. Consultation should therefore not be merely passing information to indigenous peoples about envisaged projects but should encompass the principles of prior, free and informed consent.<sup>94</sup> In terms of the ILO Convention No 169 consultation and participation of indigenous peoples should also take place when considering legislative and administrative measures impacting upon and affecting them.<sup>95</sup>

The UN Special Rapporteur on Indigenous Peoples similarly advises that a better practice to address the problem of indigenous peoples’ exclusion ‘from a human rights and ecological perspective would be to involve the pastoralist and forest communities in the management and benefits’ of such projects.<sup>96</sup> The Special Rapporteur has therefore called upon states to respect indigenous peoples’ rights to consultation and participation ‘based on the full recognition of indigenous peoples’ rights to their lands, territories and natural resources’.<sup>97</sup>

### **5.2.3 The property clause**

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<sup>92</sup> ILO Convention No 169, article15(2); see also UN Declaration on Indigenous Peoples, article 30 (providing for the right of indigenous peoples ‘to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources’).

<sup>93</sup> As above article 7(1).

<sup>94</sup> As above article 16.

<sup>95</sup> As above article 6(1) a.

<sup>96</sup> Report of the UN Special Rapporteur on Kenya( note 90 above) para 54.

<sup>97</sup> See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90, 21 January 2003, para 66.

The fundamental basis for the protection from deprivation of property in Kenya is section 75 of the Constitution. The section provides in part:

(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-

- a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
- b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
- c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

The Constitution therefore protects against deprivation of property of all descriptions.<sup>98</sup> Land constitutes property and is accordingly secured by that provision. However, although the provision, like the one on the right to life envisages negative duties (protection from deprivation) it similarly imposes positive obligations on the state to ensure it is realized by rights holders. The property clause is particularly important for indigenous peoples by its express recognition and acknowledgement that there may be various interests or rights over property of diverse descriptions.<sup>99</sup> Property includes land and natural resources.<sup>100</sup> This is construed to encompass all forms of property holding including communal and individual.<sup>101</sup> Such property may only be deprived from the rights holders in accordance with established legal mechanisms and procedures upon 'prompt payment of full compensation'.<sup>102</sup> Accordingly, indigenous peoples' property rights, are constitutionally protected and in the event of any abrogation are entitled to espouse them before the Kenyan High Court.<sup>103</sup>

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<sup>98</sup> Section 75

<sup>99</sup> Constitution of Kenya Section 75(1).

<sup>100</sup> See Section 2(19) of the Interpretation of General Provisions Act Cap 2 Laws of Kenya which defines immovable property as 'including land and other things attached to the earth or permanently fixed to anything attached to the earth'.

<sup>101</sup> See The Response by Kenya in *Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE)* on behalf of the Endorois Community, before the African Commission on Human and Peoples Rights, para 3.1.2 stating that : Land as property is recognized under the Kenyan Legal system and the various methods of ownership are recognized and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land otherwise called the group ranches or the trust lands managed by the County Council within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land and gives effect to such rights, interests or other benefits in respect of the land as may, under the African Customary Law for the time being in force and applicable thereto vests in any tribe, group, family or individual( *currently still under consideration in file with the author*).

<sup>102</sup> As above, section 75(1)c.

The property clause in the Kenyan constitution protects deprivation of property and not a right to ensure that everyone is entitled to property. Some legal entitlements to certain rights associated with the property are a prerequisite to claim deprivation. Land and natural resources as property embodies a bundle of rights which include user rights (*usufructus*), ownership, access and control.<sup>104</sup> The Kenyan Constitution protects and guarantees these rights in accordance with the applicable legal title/holding of the property. This is governed by a myriad of statutes that regulate ownership, access, use and control of the land.<sup>105</sup>

Different indigenous peoples in Kenya own, control, access and use lands according to any of the applicable land regimes as governed by the various land laws in force. Some indigenous peoples demand protection of both their communal territories and individual land holdings. The Ogiek for example while seeking protection of their communal forests have also sought to secure individual land holdings which they have registered or acquired individual titles.<sup>106</sup> The pastoralists on the other hand demand recognition and protection of their group land rights.<sup>107</sup> The state should recognise and protect whatever form of land tenure indigenous people elect to exercise; individual or communal.

However, Kenya's land tenure regime is mainly tailored to protect and guarantee private/individual land tenure. While the Constitution makes express provisions for protection of lands according to community needs and aspirations under trust lands<sup>108</sup> (surveyed in greater detail later in the Chapter) the current land laws and policies have 'facilitated the erosion of

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<sup>103</sup> Section 84 of the Kenyan Constitution stipulates that any person may apply to the High Court for redress in case of violation of any of the fundamental human rights and freedoms enshrined in the Constitution.

<sup>104</sup> See Onalo, PL, *Land law and conveyancing in Kenya*, Heinemann, Nairobi 1986, 18; See also *Report of the Constitution of Kenya Review Commission, Volume One, The Main Report*, Nairobi, 2003, 311.

<sup>105</sup> Some of these laws include those creating and defining substantive property rights in land Registered Land Act (Cap 300), the Indian Transfer of Property Act, 1882; those providing for transition from customary land tenure to individualisation of tenure systems by registration Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283), the Registration of Titles Act (Cap 284); registration of group interests (Land (Group Representatives Act (Cap 287) and those regulating transactions in land (Land Control Act (Cap 302). Other applicable laws include those regulating land use such as the Agriculture Act (Cap 318), the Public Health Act (Cap 242) the Chiefs Act (Cap 128) and the Physical Planning Act (Act no 6 of 1996) see *Report of the Constitution of Kenya Review Commission, Volume One, The Main Report*, Nairobi, 2003, 315; see also Wanjala SC Land Ownership and Use in Kenya: Past Present and Future, in Wanjala SC (ed) *Essays on Land Law, The Reform Debate in Kenya*, University of Nairobi, 2000, 25-41.

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Constitution of Kenya sections 114-120.

communal land tenure rights'.<sup>109</sup> Such a situation emerges from the fact that most indigenous peoples' traditional lands and territories, are not registered to an individual and are instead held in trust by county councils which can part with the lands to individuals upon registration.<sup>110</sup>

To exacerbate the problem, some of the lands claimed by indigenous peoples have been declared government land or protected lands with little if any consultation with the traditional land holders (indigenous communities) or 'prompt payment of full compensation' as required by the Constitution.<sup>111</sup> The argument being that such lands vest in the states and that the indigenous communities making such claims have no legal proof that they are the title holders over those lands. The irony of the matter is that an expectation of proof of title is engendered by the state, through formal legal procedural requirements often an uphill battle given the hierarchy of Kenyan laws which favour individual land title holdings.

The dispossession of the traditional lands of indigenous peoples constitutes a violation of their fundamental rights to property. However, as discussed in the preceding section indigenous peoples' property rights with regard to their traditional land are on the basis of their customary laws. These laws are considered subsidiary to written laws. Through Kenyan written laws indigenous peoples were and continue to be disinherited their traditional lands. That is notwithstanding the fact that the communities' lands constitute property which is protected by the Constitution on the basis of their African customary laws.<sup>112</sup>

The Constitution protection of property of any description<sup>113</sup> would include communal land as sought by certain indigenous communities such as the pastoralists. However 'both the rigidity of the constitutional provisions on property and land as well as the weak protection of rights of people occupying the so-called "communal" land are problematic and contribute to social instability'.<sup>114</sup> Such land is of paramount importance to communities whose livelihoods are dependent on it. It is therefore imperative that the Constitution gives accords equal protection to all forms of land ownership from deprivation. In order to rectify that anomaly courts of law have a

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<sup>109</sup> See Lenaola I, Jenner HH, Wichert T, Land tenure in pastoral lands, in Juma C and Ojwang JB (ed) *In Land we Trust, Environment, Private Property and Constitutional Challenge*, Zed Books, London, 1996, 242.

<sup>110</sup> Section 115-116 of the Constitution.

<sup>111</sup> Section 75 of the Constitution.

<sup>112</sup> Section 82(c).

<sup>113</sup> See section 75.

<sup>114</sup> See Shadrack B O Gutto, Land and property rights in modern constitutionalism: Experiences from Africa and possible lessons for South Africa, in Smokin C Wanjala, *Essays on land law: The Reform debate in Kenya*, Faculty of Law, University of Nairobi, 2000,246.

duty to give a positive content to the property clause to give regard to indigenous peoples' lands rights.

The Constitution permits compulsory acquisition of property for the public benefit.<sup>115</sup> However such expropriation by the state must be accordance with established legal procedures and upon payment of prompt and full compensation.<sup>116</sup> Individuals and communities who are aggrieved by such expropriation have a right of direct access to the High Court of Kenya to seek remedies. Proof of title to the appropriated land is required before such a determination of the appropriateness of the compulsory acquisition and the amount of compensation. In such circumstances, indigenous peoples who may not have legal titles to these lands, have often lost their lands without any compensation on the basis that the lands belong to no one. Courts of law have a duty to rectify such rigid interpretations that base their determination of title holders to registered proprietors. The courts ought to look beyond the written laws to establish ownership of lands claimed by indigenous people's based on their African customary laws and traditions. Where there is need to expropriate such lands on public interest prompt and full compensation should be made to these communities.

It is also of paramount importance that indigenous peoples are consulted whenever decisions regarding their lands are made. Courts have the capacity to rule on whether indigenous peoples were appropriately consulted before a decision either to expropriate their lands is made. Any other form of acquisition of communal lands for private purposes by individuals and/or corporations should be set aside unless made for the benefit of the community after due consultation and within established legal procedures. The property clause may also be employed to provide for restitution of lands already dispossessed illegally or on the basis of discriminatory laws and practices. Indigenous peoples could invoke the protection from deprivation of property clause to claim lands that were expropriated from them. However, there are various limitations in this regard. That includes the constitutional protection of title holders to property. It is in this regard that various legal reforms to remedy that situation are proposed in chapter six of this thesis.

Indigenous peoples' traditional lands constitute property which has been entrenched in international instruments as a right.<sup>117</sup> Article 14 of the African Charter entrenches the right to property. The right to property as sought by indigenous peoples has been interpreted to take into

<sup>115</sup> Constitution, section 82(1) a, b.

<sup>116</sup> As above, section 82(1) c.

account their preferred communal land tenure.<sup>118</sup> The Inter American Commission in interpreting the right to property in the American Convention on Human Rights has affirmed that the right includes the traditional lands and resources of indigenous peoples.<sup>119</sup> The right to property includes 'communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state'.<sup>120</sup> The ILO Convention NO 169 has also emphasized on the need for states to respect and protect the collective aspects of indigenous peoples land. Article 14(1) of that Convention affirms that:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

While, Kenya is not party to some for those instruments such as the ILO Convention No 169 and therefore not bound by its provisions, its standards reflect the demands made by indigenous peoples all over the world including those in Kenya.<sup>121</sup> As such, the Convention provides a meaningful framework upon which states committed to protect indigenous peoples rights could draw inspiration to uphold its internationally accepted norms which are aimed at protecting indigenous peoples. Indeed, according to article 60 of the African Charter 'the Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United

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<sup>117</sup> See the African Charter on Human and Peoples' Rights article 14: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. See comparable provision under the Inter American Convention on Human Rights article 21 which provides inter alia that 'Everyone has the right to the use and enjoyment of his property....No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'.

<sup>118</sup> Anaya J( note 3 above) 145; *Awas Tingni case*( note 133 above) para 146-151.

<sup>119</sup> *Mary and Carrie Dann versus United States*, Case 11.140, Report No. 75/02, Inter-American Court of Human Rights Doc. 5 rev. 1 at 860 (2002), para 130; see also *Maya Indigenous Communities versus Belize para 115-120*; See also the decision of the Inter-American Court on Human Rights on the *Awas Tingni case*, para 148 & 149.

<sup>120</sup> As above.

<sup>121</sup> In fact no African country has ratified this treaty although six African countries ratified its predecessor the ILO Convention No 107 of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi- Tribal Populations in Independent Countries adopted at the 40<sup>th</sup> Session of the International Labour Conference on 26 June 1957(Tunisia, Malawi, Guinea-Bissau, Ghana, Egypt and Angola) sourced from <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>> accessed on 20 June 2007. ILO Convention No 107 comprises of essentially most of the subject in the ILO Convention 169: land , health and social security, labour and education, but was faulted leading to its replacement due to its integrationist and assimilationist perspective. For a detailed expose of the two Conventions see Swepston L, *The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption*, in Cohen CP(ed) *Human rights of indigenous peoples*, Transnational Publishers, Ardsley, New York (1998),17-36; see also Thornberry P, 320-367.

Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members'. The ILO Convention fits within this international law framework.<sup>122</sup> In which case even in deputed that could go beyond the domestic level such as at the African Commission and the African Court on Human and Peoples Rights, these institutions would be informed and inspired by the international norms during their deliberations on allegations of human rights violations against indigenous peoples. Therefore although not binding and some not applicable such as the those by the Inter-American Commission, these standards point to developing jurisprudence that recognizes indigenous peoples land rights.

The ILO Convention 169 further provides for recognition of indigenous land tenure systems,<sup>123</sup> which typically are based on long-standing custom and traditions. These systems regulate community members' relative interests in collective landholdings, and they also have bearing on the character of collective landholdings *vis-a-vis* the state and others. Article 15 of the Convention requests states to safeguard indigenous peoples' rights to the natural resources throughout their territories, including their right 'to participate in the use, management and conservation' of the resources. The concept of indigenous territories embraced by the Convention is deemed to cover 'the total environment of the areas which the peoples concerned occupy or otherwise use.'<sup>124</sup>

The Convention further calls on states to take steps to identify lands that are traditionally occupied by indigenous peoples, to guarantee effective protection of indigenous peoples' rights of ownership and possession,<sup>125</sup> and to safeguard their rights to natural resources in the lands occupied by them, including the use, management, and conservation of these lands.<sup>126</sup> Indigenous peoples 'shall not be removed from the lands that they occupy' except where such removal is 'considered necessary as an exceptional measure' upon which the 'relocation shall take place only with free and informed consent'.<sup>127</sup> The provision further demands that 'where

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<sup>122</sup> The ILO is now one of the specialized agencies of the UN, see articles 57 and 63 of the United Nations Charter. See Thornberry P, 323.

<sup>123</sup> ILO Convention 169 art. 17(1).

<sup>124</sup> ILO Convention 169 art 13(2).

<sup>125</sup> As above art. 14(2).

<sup>126</sup> As above art. 15(1).

<sup>127</sup> As above art. 16(1)-(2).

consent can not be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations'.<sup>128</sup> Such regulations and national laws should be in tandem with applicable international human rights standards and norms. 'Whenever possible, indigenous peoples shall have the right to return to their traditional lands as soon as the grounds for relocation cease to exist'.<sup>129</sup> If 'return is not possible they shall be provided with lands of equal quality and status to those previously occupied and full compensation for any resulting loss or injury'.<sup>130</sup> These norms are particularly important since they accord indigenous peoples the right to participate on issues affecting their lands and resources and to be consulted appropriately at all times in that regard.

United Nations Declaration on the Rights of Indigenous Peoples also stipulates important standards for the protection of indigenous peoples' rights to land and resources. Article 26 of the Declaration provides that 'indigenous peoples have the right to own, use, develop and control the lands, territories and resources....' It further calls on states to 'give legal recognition and protection to these lands, territories and resources' 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.<sup>131</sup>

The Convention on Biological Diversity<sup>132</sup> is yet another important instrument which Kenya is a party<sup>133</sup> that lays down some useful norms recognising the land and natural resource rights of indigenous peoples. In the words of the Convention state parties shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices...'.<sup>134</sup> The biological diversity of indigenous peoples encompasses their traditional lands and natural resources which shall be respected, preserved and protected in accordance with their cultures and lifestyles. The Convention encourages the equitable sharing of the benefits arising from the utilization of indigenous peoples' knowledge, innovations and practices.

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<sup>128</sup> As above Art 16(2)

<sup>129</sup> ILO Convention 169, art. 16(3).

<sup>130</sup> ILO Convention 169, art. 16(4);(5).

<sup>131</sup> Article 26 of the UN Declaration on Indigenous Peoples.

<sup>132</sup> Convention on Biological Diversity, adopted in 1992.

<sup>133</sup> Ratified on 22 July 1994.

<sup>134</sup> Convention on Biological Diversity article 8(j).

Other important standard setting mechanisms such as the World Bank have also adopted useful policies that point to useful emerging standards aimed at protecting indigenous peoples land and resource rights.<sup>135</sup> Although such policies are for internal purposes by the Bank in reviewing its engagement with states on projects that affect indigenous peoples and are not adopted by states, they are based on applicable norms of existing international human rights instruments.<sup>136</sup> While not binding, they are play a crucial role in states engagement with indigenous peoples, especially in most countries that have world bank funded projects. It is important to note that although Kenya has employed the World Bank policies in its efforts to borrow funds from the World Bank ostensibly for ‘indigenous peoples benefit’.<sup>137</sup> Of particular importance is the Policy’s acknowledgment ‘that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend’.<sup>138</sup> The Bank requires that projects it finances shall ensure that a process of free, prior and informed consultation is undertaken which includes those impacting upon indigenous peoples’ lands and resources.<sup>139</sup>

The right to property is also linked to the right to self determination in international law which is relevant for indigenous peoples in the pursuit of their land rights.<sup>140</sup> The principle to self determination was laid out by the UN Charter of 1945 as one of its fundamental principles.<sup>141</sup> The principle has since been entrenched in common article 1 of the two International Covenants on Human Rights which provides that ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development ‘.<sup>142</sup> Of key importance to indigenous peoples protection of their land and natural resources, is the Convention’s further provision attendant to the right to self

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<sup>135</sup> World Bank Operational Manual, Operational Policies (OP 4.10) January 2007.

<sup>136</sup> For example it is obvious that the Policy relies on standards enunciated by the ILO Convention No 169 particularly Part II on land and the work of the UN Working Group on Indigenous Populations that resulted in UN Declaration on the Rights of Indigenous Peoples.

<sup>137</sup> See the Government of Kenya, Indigenous Peoples Planning framework for the Western Kenya Community Driven development and Flood Mitigation Project and the Natural Resource Management Project-Final report December 2006(in file with the author).

<sup>138</sup> Operational Policy Manual(OP 4.10) para 2.

<sup>139</sup> As above para 1 & 2.

<sup>140</sup> See James Anaya, *Indigenous Peoples in International Law*, Oxford, ( 2<sup>nd</sup> ed, 2004).

<sup>141</sup> Article 2 of the UN Charter. The other principles are: peaceful settlement of disputes; and prohibition of the threat or use of force.

<sup>142</sup> See International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly on 16 December 1966 and entered in force on 23 March 1976, 999 *UNTS* 171, *Article 1(1)*; International Covenant on Economic Social and Cultural Rights, adopted by the UN General Assembly on 16 December 1966, and came into force on 3 January 1976, 993 *UNTS* 3, article (1).

determination, that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international co-operation, based upon the principal of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'<sup>143</sup> It is also instructive to note that the African Charter on Human and Peoples' Rights entrenches self-determination as a right, worded in an almost similar fashion with the International Bill of Rights.<sup>144</sup>

While the principle of self-determination as enunciated in the UN Charter has found expression in several instances notably, the end of colonialism, general ban on the use of force, granted all racial groups access to government, it is its modern application as a human right it is bound to afford indigenous peoples a ground for seeking justice and equality in relation to their traditional lands rights.<sup>145</sup> Anaya aptly captures this position and its rationale that deserves to be quoted at length:

International human rights texts that affirm self-determination, and authoritative processes that have been responsive to self-determination demands, point to core values of freedom and equality that are relevant to all segments of humanity, including indigenous peoples, in relation to the political, economic, and social configurations with which they live. Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values – they are not themselves the essence of self determination. And for most peoples – especially in light of cross-cultural linkages and other patterns of interconnectedness that exist alongside diverse identities – full self-determination, in real sense, does not require or justify a separate state and may even be impeded by establishment of a separate state. It is rare in the post colonial world in which self determination understood from a human rights perspective, will require secession or the dismemberment of states.<sup>146</sup>

Indigenous peoples in most states do not demand for self determination that amounts to secession but seek human rights that accrue with its application in 'the pursuit of their political, economic, social and cultural development within the framework of an existing state'.<sup>147</sup> Such

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<sup>143</sup> As above common article 1(2).

<sup>144</sup> African Charter on Human and Peoples Rights adopted by the Organisation of African Unity on 27 June 1981 and came into force on 21 October 1986, ILM 58(1982) article 20 & 21. Some of the relevant provisions include article 20(1) provides 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.' Article 21(1) 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived.'

<sup>145</sup> Anaya SJ, 8.

<sup>146</sup> As above.

<sup>147</sup> Cassese A, 62, citing the words of the Supreme Court of Canada in Reference re Secession of Quebec case 1998) 161 DLR (4<sup>th</sup>) 385, 437-8; See also Anaya SJ, 9; Shaw MN, 271; Scheinin M, Indigenous peoples' rights under the International Covenant on Civil and Political Rights, in Castellino J & Walsh N (ed) *International Law and Indigenous Peoples*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, 9.

application has been termed as 'internal self determination'.<sup>148</sup> Relative to indigenous peoples' quest for recognition and protection of their traditional land and resources, the right to self determination has been invoked to prevent states from regarding these lands as *terra nullius (subject to no one)*.<sup>149</sup> The principle has also been appealed to invalidate treaties entered into between indigenous peoples and colonial and dominating powers as well as those lacking 'prior and genuine consultation' of these groups.<sup>150</sup>

UN Human Rights Committee, the treaty monitoring body of the ICCPR has observed that exercise of the right to self-determination is essential for the realisation of other human rights.<sup>151</sup> Indeed, the Committee has relied upon article 1 of the ICCPR (which is the basis for self determination) to interpret other rights protected by the Covenant. In the case of *Apirana Mahuika et al Versus New Zealand*,<sup>152</sup> the Committee observed that 'the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27'.<sup>153</sup> That position by the Committee is significant to indigenous peoples in relation to their land and resource claims since by virtue of article 1 of the ICCPR they have a right to 'freely pursue their economic, social and cultural development'.<sup>154</sup> The Committee has also emphasised that 'the right to self determination requires, *inter alia* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence'.<sup>155</sup> Indigenous peoples depend almost entirely on their traditional lands and resources for their subsistence as will be illustrated in the immediate ensuing chapter. However while the standards enumerated in article 1 of the ICCPR are applicable to indigenous peoples given that the 'Committee has concluded that they qualify as 'peoples' pursuant to the

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<sup>148</sup> Cassesse, 61; Shaw MN 273.

<sup>149</sup> As above, 63, 81: See also Shaw MN, 424-6; Western Sahara ICJ advisory Opinion, 16 October, 1975, ICJ Reports, 1975, 12.

<sup>150</sup> As above; See also generally Brownlie I (Brookfield FM ed), *Treaties and Indigenous Peoples*, Clarendon Press, Oxford, 1992.

<sup>151</sup> Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), para 2; See Shaw MN, 272.

<sup>152</sup> *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

<sup>153</sup> As above, paragraph 9.2; See similar views by the Committee in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000), para 10.3; Article 27 of the Convention provides that 'in those states in which ethnic, religious or linguistic minorities exist, persons belonging such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

<sup>154</sup> ICCPR article 1(1).

<sup>155</sup> See Concluding Observation of the Human Right Committee on Canada, UN Doc, CCPR/C/79/Add.105(1999) para 8 in reference to ICCPR article 1(2).

right to self determination',<sup>156</sup> some procedural hurdles exist in their bid to realise this right under the Convention. This is due to the Committee's interpretation that self determination is a collective right and as such 'an individual could not claim under the Optional Protocol to be a victim of a violation of the right to self-determination enshrined in Article 1 of the Covenant, which deals with rights conferred upon peoples as such'.<sup>157</sup> Despite this restrictive interpretation, on occasions when the Committee has been seized of communications by individuals alleging violation of the right to self determination, it has proceeded to review facts submitted by applicants to ascertain whether they raise issues under other articles of the Covenant.<sup>158</sup> The Committee has found a link and reformulated alleged breaches of self-determination (article1) with issues under article 27 of the Convention.<sup>159</sup> The Committee's jurisprudence and standards as established by article 27 of the Convention are revisited in the discussion (which immediately follows) of the right to culture as a fundamental standard in indigenous peoples recognition and protection of their land and resource rights.

Under the African human rights system, individuals and as members of collectives have a right to approach the African Commission on Human and Peoples' Rights to espouse any of the fundamental rights enshrined in the Charter including the right to self determination.<sup>160</sup> In fact

<sup>156</sup> See As above, para 8; see also 'Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999); Concluding Observation on Norway, UN doc. CCPR/C/79/Add.112(1999); Concluding Observation on Australia, UN doc. CCPR/CO/69/AUS(2000); Concluding Observation on Denmark, UN doc. CCPR/CO/70/DNK(2000); Concluding Observation on Sweden, UN Doc. CCPR/CO/74/SWE (2002)' all cited in Scheinin M, 12 fn 35-39.

<sup>157</sup> See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990) para 13.3; *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) para 6.3; *JGA Diergaardt et al Versus Namibia*( note 24) para 10.3; See Shaw MN, 272.

<sup>158</sup> See for example *Lubicon Lake Band Versus Canada*, para 13.4; Shaw MN, 272-3 arguing that 'the right to self determination provides an overall framework for the consideration of the principles relating to democratic governance'; see also Castellino J, *The Right to land, international law & indigenous peoples*, in Castellino J & Walsh N (ed) *International Law and Indigenous Peoples*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, 110.

<sup>159</sup> *Lubicon Lake Band Versus Canada* para 32.2; See Thornberry P, 129.

<sup>160</sup> For a detailed discussion on admissibility under the African Charter see Viljoen, F, *Admissibility under the African Charter*, in in Evans and Murray R (ed) *The African Charter on Human and Peoples' Rights, The system in practice, 1986-2000*, Cambridge (2002) 61-99; See also the African Charter article 56 which provides that: Communications relating to human and peoples' rights referred to in article 55 (relates to communications other than inter-state communications) received by the Commission shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news disseminated through the mass media,

one of the unique features of the African Charter is that it 'exemplifies the interplay between individual and group rights'.<sup>161</sup> These 'rights phrased as 'peoples' rights' are stipulated on the basis of equality, right to existence, own and dispose of wealth and natural resources, development, peace and security and satisfactory environment'.<sup>162</sup> While the jurisprudence of the African Commission on espousing group rights and particularly the right to self determination is not very developed, it has had occasion to consider their application in among others the *Katangese*<sup>163</sup> and the *Ogoni* cases.<sup>164</sup> While the Commission did not find a violation of the right to self-determination in the *Katangese* case, it affirmed its applicability in 'any of the following ways 'independence, self government, local government, federalism, confederalism, unitarism any other form of relations that accords with the wishes of the people'.<sup>165</sup> In an apparent endorsement of internal self-determination the Commission was of the view that 'Katanga is obliged to exercise a variant of self determination that is compatible with the sovereignty and territorial integrity of Zaire'.<sup>166</sup> The Commission's view is similar to that later held by the Supreme Court of Canada in *Reference re Secession of Quebec* case that 'international law expects that the right to self determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states'.<sup>167</sup> From the foregoing it is unlikely that the Commission or the soon to be established court would ever grant the right to self determination that would challenge the territorial sovereignty of a state on the continent. However it is intrusive to note that indigenous peoples including those self identifying as such in Africa, do not seek to exercise the right beyond the

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5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
  6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
  7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

<sup>161</sup> African Charter articles 19-24; See Alston, P 'Peoples' Rights: Their rise and fall' in Alston P (ed) *Peoples' rights* Oxford (2000) 266.

<sup>162</sup> See Ouguergouz, F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (2003) 203; Nobel, P 'The Concept of 'Peoples' in the African Charter on Human and Peoples' Rights' in Nobel, P (ed) *Refugees and development in Africa*, Uppsala, Scandinavian Institute of African Studies (1987) 15.

<sup>163</sup> Communication 75/92, *Katangese Peoples Congress versus Zaire*, 8th Annual Activity Report in (2000) AHRLR 72 (ACHPR 1995) 72-73 (*Katangese* case).

<sup>164</sup> Communication No. 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights versus Nigeria* Decided at the 30<sup>th</sup> ordinary session, Oct 2001, 15<sup>th</sup> Annual Activity Report, in (2001) AHRLR 60 (ACHPR 2001) 60-75 (SERAC case)

<sup>165</sup> *Katangese* case, para 4.

<sup>166</sup> As above para 6.

<sup>167</sup> *Reference re Secession of Quebec* case As above note 18, 385, 436.

territorial boundaries of independent states.<sup>168</sup> Instead, they demand recognition and respect for their preferred way of life in accord with principles of equality and justice.<sup>169</sup> Such recognition and protection of attendant rights by the state, guarantees peoples' right to existence as enshrined in article 20 of the African Charter whose provisions are akin to common article 1 of the ICCPR and ICESCR on the right to self determination.

In the exercise of the right to self determination, international standards underscore peoples' ability to 'freely dispose of their wealth and natural resources'.<sup>170</sup> More importantly the standards make it mandatory that that 'in no case shall a people be deprived of its own means of subsistence'.<sup>171</sup> The African Commission has had occasion to deliberate on this matter in the SERAC case<sup>172</sup> and found that Nigeria breached the Ogoni's group rights relative to articles 21,<sup>173</sup> and 24<sup>174</sup> of the African Charter.<sup>175</sup> According to the Report of the African Commission's Working Group on Indigenous Populations/Communities in Africa, the Ogoni are indigenous peoples in Nigeria and as such some of the jurisprudence the case establishes is considered to have set important standards that would apply to other indigenous groups on the continent.<sup>176</sup> Apart from finding violation of the group rights of the Ogonis, and of special significance to indigenous peoples' land rights that emerged from the Commission's deliberations of the case, is the express acknowledgement that 'with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs'.<sup>177</sup> Furthermore the Commission reaffirmed the relevance and applicability of international standards in the

<sup>168</sup> Anaya SJ, 8

<sup>169</sup> As above.

<sup>170</sup> Common article 1 (1) ICCPR and ICESCR and article 21 African Charter.

<sup>171</sup> As above.

<sup>172</sup> SERAC case, para 45, 55-58.

<sup>173</sup> Article 21:1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

its 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of property as well as to an adequate compensation.

the 3. The free disposal of wealth and natural resources shall be exercised without prejudice to obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.

free 4. State parties to the present Charter shall individually and collectively exercise the right to disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

their 5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable peoples to fully benefit from the advantages derived from their national resources.

<sup>174</sup> Article 24: All people shall have the right to a general satisfactory environment favourable to their development.

<sup>175</sup> SERAC case para 70.

<sup>176</sup> Report of the African Commission's Working Group of Experts 18.

<sup>177</sup> SERAC case para 45.

determination of matters before it alleging violation of the African Charter's provisions.<sup>178</sup> The Commission also called upon the state to engage and consult its peoples by availing appropriate mechanisms on issues and development projects that affect them.<sup>179</sup>

The African Charter as has the International Bill of Rights has provided a useful framework and avenue for indigenous peoples to espouse their fundamental human rights including collective rights. In the Ogoni case the Commission held that the conduct of the Nigerian Government demonstrated a violation of the collective rights of the Ogonis.<sup>180</sup> Indigenous peoples may therefore find recourse by invoking the international standards pursuant to the right to self determination as established internationally and regionally whenever violation of their land and resource rights occurs. That could be before existing treaty monitoring mechanisms such as the UN Human Rights Committee and regionally the African Commission on Human and Peoples Rights or the soon to be established African Court on Human and Peoples Rights.<sup>181</sup>

Specific instruments that enshrine indigenous peoples' rights, such as the ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries<sup>182</sup> and the recently adopted UN Declaration on the Rights of Indigenous Peoples<sup>183</sup> reiterate that self determination is crucial to indigenous peoples' realization of their fundamental human rights. Article 1(2) of the

<sup>178</sup> As above, para 48 & 49.

<sup>179</sup> As above para 71.

<sup>180</sup> As above para 63.

<sup>181</sup> See Protocol establishing the Court adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, on 9 June 1998. OAU/LEG/MIN/AFCHPR/PROT (III). Although the court had already received the requisite number of ratifications and technically come into force on 25 January 2004 for its establishment the 3<sup>rd</sup> Ordinary Session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec. 45 (111) which is yet to gain the requisite ratifications to come into force. Judges for this Court were elected for this African Court on Human Rights Court by the AHG/AU at its 6<sup>th</sup> Summit in Khartoum, Sudan and it is soon hoped to become operational.

<sup>182</sup> ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>183</sup> See Declaration on the Rights of Indigenous Peoples; The adoption of the declaration was a culmination of 'more than two decades of negotiations at the United Nations among Member States, with the participation of indigenous peoples from around the world, addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own visions of economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and Indigenous Peoples' see statement of the UN High Commissioner for Human Rights Louise Arbour on the adoption of the Declaration at <[www.ohchr.org](http://www.ohchr.org)> accessed on 13 September 2007.

Convention for instance stipulates that 'self determination as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention applies'. In a tacit concession of the possible limitations of the modern application of the principle of self-determination in independent sovereign states, the Convention further provides ' that the use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'.<sup>184</sup> It appears that the drafters of the Convention sought to limit the application of the term 'peoples' to internal self determination rather than the extreme form of exercising the right that would amount to secession.<sup>185</sup> This would be in conformity with the contemporary application of the term 'peoples' relative to self determination which is not limited to 'mutually exclusive peoples'.<sup>186</sup> Indeed, while self determination was initially understood within the framework of decolonization it has since evolved to the 'state acceptable' exercise of the right within the existing territorial framework of independent states.<sup>187</sup> Accordingly, the term 'peoples' applies to indigenous peoples for purposes of internal self-determination which would entail unequivocal demarcation and protection of their lands and natural resources in accordance with their cultures and preferred tenure.

Similarly, the UN Declaration on the Rights Indigenous Peoples whilst guaranteeing the right to self determination limits its application to 'matters relating to internal and local affairs'.<sup>188</sup> The provisions guaranteeing self determination were some of the most contentious and caused lengthy delays throughout the negotiations but an eventual compromise limiting the exercise to internal and local affairs was reached.<sup>189</sup> While the Declaration is not binding on states, and as such not creating legal obligations amongst states, it is a unique instrument negotiated by states and its intended beneficiaries.<sup>190</sup> It outlines important norms that would serve as a guide and framework in the protection of indigenous peoples all over the world.<sup>191</sup> Importantly the Declaration will serve as a yardstick of states' compliance with their international human rights

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<sup>184</sup> ILO Convention (No 169) article 1(3).

<sup>185</sup> See a detailed expose of the implication of the term 'peoples' in Anaya J, 100-103.

<sup>186</sup> As above, 101-2.

<sup>187</sup> Shaw MN, 230.

<sup>188</sup> Declaration on the Rights of Indigenous Peoples, 3 & 4.

<sup>189</sup> See a more detailed discussion of the debates surrounding the drafting of the Declaration relative to the principle of self determination in Thornberry P, Self determination and indigenous peoples: Objections and responses, in Aikio P & Scheinin M (Ed) *Operationalising the right to of indigenous peoples to self-determination*, Institute for Human Rights, Abo Akademi University, Turku/Abo 2000, 45-46.

<sup>190</sup> Thornberry, P, *Indigenous Peoples and Human Rights*, Manchester University Press, Manchester, 2002) 25-26.

<sup>191</sup> See <[www.iwgia.org/sw248.asp](http://www.iwgia.org/sw248.asp)> accessed on 20 May 2007.

obligations relative to indigenous peoples' rights in their domestic legal order. Such compliance could be measured within the framework of existing human rights treaty monitoring mechanisms such as the HRC, CERD, the African Commission and the African Court on Human and Peoples' Rights in exercising their mandates.<sup>192</sup>

#### **5.3.4 Protection from deprivation of liberty**

The Constitution of Kenya section 72 protects the right to personal liberty. In Kenya, the right has been invoked to seek protection from deprivation of ones freedom in the event of detention or incarceration in the execution of a sentence or lawful court order, prevention of spread of contagious disease, and persons of unsound mind.<sup>193</sup> [Cases....](#)

The liberty clause in the Constitution is potentially in support of claims of violation of indigenous peoples' rights to their lands and resources. This is particularly in circumstances where the state has constrained indigenous peoples' ability to exercise their rights relative to their traditional lands and resources in accordance with their preferred way of life. Some indigenous peoples in Kenya such as the Maasai and other pastoralists practice a nomadic mode of animal husbandry. A nomadic lifestyle demands that people move from one place to another dependent on the availability of pasture, water and salt licks. Such a way of life often conflicts with sedentary lifestyles which is normally encouraged and preferred by the state. Some of the conflicts that emerge from such clashes of the different modes of life usually pit indigenous peoples and the rest of the population. The state and the current legal framework is often in favour of sedentary communities on the basis that they have proof of title to the lands through registration.<sup>194</sup> For indigenous communities, however, their only proof to their traditional lands and resources is mainly based on their customary law (trust lands) apart from lands registered as group ranches.<sup>195</sup>

Even within trust lands, communities' liberty to exercise their way of life is restricted by a myriad of by-laws that sometimes do not take account of the groups' traditions and customs.<sup>196</sup> Given that the right to be protected from deprivation of liberty is constitutionally guaranteed as a

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<sup>192</sup> See for instance article 60 of the African Charter; See also article 7 of the Protocol to the African Charter establishing the African Court on Human and peoples Rights.

<sup>193</sup> Section 72(1)a-j.

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<sup>196</sup>

fundamental human right, indigenous peoples may invoke it to seek protection of their traditional lands and natural resources.

The right from deprivation of liberty has been interpreted in other common law jurisdiction as denoting more than the right not to be restrained.<sup>197</sup> The Botswana High Court in *Sesana* subscribed to the analysis of the United States Supreme Court that liberty ‘denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’<sup>198</sup> Although Kenyan courts are yet to adopt this extended view, it presents some persuasive arguments that could be applicable in Kenya. In such instance the protection from deprivation from liberty would entail the enjoyment by indigenous peoples of their freely chosen way of life which is closely connected to their lands and natural resources.

### 5.3.5 Trust lands

Chapter nine of Kenya’s Constitution deals with trust lands. Trusts lands are “vest in the county councils within whose jurisdiction it is situated.”<sup>199</sup> The county councils (local authorities) hold those lands “for the benefit of persons ordinarily residents on that land.”<sup>200</sup> The importance and vulnerability of those lands is underscored by its express protection by the Constitution. The Constitution further gives legitimacy to customary law by stipulating that rights, interests or other benefits in respect of trust lands shall be governed by the customary law of the ordinary residents.<sup>201</sup> However, the application of the customary law of the residents is constrained by the same Constitution vide its requirement that such law must not be “repugnant to any written law”.<sup>202</sup> Therefore despite Kenya’s Constitutional provisions for trust lands, it fails to guard against deprivation of those lands by non-ordinary residents. Indeed, according to Lenaola, Jenner and Wichert ‘the constitutional provisions for trust lands, while nominally providing

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<sup>197</sup> See for example *Sesana* H1(7).

<sup>198</sup> *Mayer v The State of Nebraska* (1923) 262 US 390 at 399 cited in *Sesana* as above.

<sup>199</sup> Section 115 Constitution.

<sup>200</sup> Section 115(2).

<sup>201</sup> As above.

<sup>202</sup> As above.

nominal protection for African customary law, also legitimize the continuation of the colonial land system that was designed to transfer customary rights from indigenous communities to settlers”.<sup>203</sup>

The low legal status of customary law in Kenya’s hierarchy of sources of law has therefore not prevented individuals from expropriating trust lands. On the basis of legislation, outsiders who are not ordinary resident within the trust lands territory have continued to expropriate indigenous peoples’ lands. Their action are justified by what Okoth Ogendo blames on the fact that “customary law was expressly subordinated to colonial enactments and received principles of the common law of England, the doctrines of equity and statutes of general application. Hence, in terms of hierarchy, customary law was essentially residual even in contexts where it would normally exclusively apply”.<sup>204</sup> Accordingly, as long as the status of customary law remains subordinate to written laws and limited by the repugnancy clause, trust lands in Kenya will always be subject to expropriation by non-residents.

The potential and capacity for trusts lands to protect and give meaning to indigenous peoples’ land rights is therefore constrained by the same Constitution that seeks to protect it. Its subordination of customary law to written laws ‘in effect, extinguishes customary rights’ to land.<sup>205</sup> The Constitution further provides that trust lands shall cease to exist upon registration as either government land or private land in accordance with the law.<sup>206</sup> The relevant laws for that purpose include: Land Control Act;<sup>207</sup> Land Adjudication Act;<sup>208</sup> Land Consolidation Act<sup>209</sup> and the Land (Group Representatives) Act.<sup>210</sup> The laws that regulate and provide for a mechanism to register lands in Kenya include: Registered Land Act;<sup>211</sup> Land Titles Act;<sup>212</sup> Government Lands Act;<sup>213</sup> Registration of Titles Act<sup>214</sup> and Registration of Documents Act.<sup>215</sup> Upon registration the

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<sup>203</sup> See Isaac Lenaola, Hadley H. Jenner and Timothy Wichert, Land tenure in pastoral lands in Calestous Juma and JB Ojwang(ed) *In land we trust, Environment, Private property and constitutional change*, Zed Books, African Centre for Technology Studies(ACTS), 1996, 231.

<sup>204</sup> HWO Okoth Ogendo, The Tragic African Commons: A century of Exploration, suppression and submersion, 1 *University of Nairobi Law Journal* (2003) 111.

<sup>205</sup> Lenaola, Jenner, and Witchert, 243.

<sup>206</sup> See section 116 of the Constitution.

<sup>207</sup> Land Control Act (Chapter 302 )Laws of Kenya.

<sup>208</sup> Land Adjudication Act (Chapter 284)Laws of Kenya.

<sup>209</sup> Land Consolidation Act (Chapter 283)Laws of Kenya.

<sup>210</sup> Land (Group Representatives) Act (Chapter 287)Laws of Kenya.

<sup>211</sup> Registered Land Act(Chapter 300)Laws of Kenya.

<sup>212</sup>Land Titles Act(Chapter 282)Laws of Kenya.

<sup>213</sup> Government Lands Act(Chapter 280)Laws of Kenya.

<sup>214</sup> Registration of Titles Act(Chapter 281)Laws of Kenya.

<sup>215</sup> Registration of Documents Act(Chapter 285)Laws of Kenya.

trust land is set aside which extinguishes 'any rights, interests or other benefits in respect of that land that were previously vest in a tribe, group, family or individual under African customary law'.<sup>216</sup>

The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya revealed the difficulty indigenous peoples have to endure to reclaim their lands once it is registered to outsiders.<sup>217</sup> In one particular case the Commission found that despite the adjudication and registration process of land in Iloodo-Ariak in Kajiado district to persons who were not local residents to the exclusion of some rightful inhabitants ( Maasai indigenous peoples), attempts to seek legal redress was hampered by barriers erected by the Registered Land Act.<sup>218</sup> The RLA confers an absolute and indefeasible title on the registered owner.<sup>219</sup> Indigenous peoples' customary rights in their traditional lands are to that extent extinguished in favour of the registered owners' interests. Such disregard of African customary law of the local inhabitants entrenches the discrimination of indigenous peoples and compromises their ability to realise their legal claims to their traditional lands.

It has not helped that courts of law in Kenya have often followed the reasoning that a registered owner of land acquires an absolute and indefeasible title (unless obtained fraudulently or is required by the state for public interest).<sup>220</sup> Kenyan courts of law have also endorsed the statutory position that for first registrations, irrespective of the land being acquired fraudulently

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<sup>216</sup> See section 117(2)

<sup>217</sup> See Report of the Commission of Inquiry into the Illegal Allocation of Public Land, Republic of Kenya, Government Printers, Nairobi, June 2004, 140-142.

<sup>218</sup> As above.

<sup>219</sup> See section 27 of the RLA which provides that: Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease; see also See section 28 of the RLA. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;...;See also section 2143(1) of the RLA.

<sup>220</sup> See Wanjala SC, Themes in Kenyan land reform, 174; cite some case law.....

such title can not be cancelled or rectified.<sup>221</sup> Such reasoning has resulted in illegal acquisition of title to land through first registration particularly in trusts lands mainly indigenous peoples.

Through first registration irrespective of whether acquired through fraudulent means individuals have appropriated lands belonging to indigenous peoples. Most of the indigenous peoples have no titles to their traditional lands which are held in trust by the county council. County council in breach of the trust relationship illegally disposes off the lands often in collusion with the Commissioner of Lands.<sup>222</sup>

It appears that the objective of the law in protecting first registrants is to deny local communities an opportunity to challenge the illegal acquisitions. It is submitted that such an illegality can not be righted through registration or acquisition of title. The Commission of Inquiry into Illegal/Irregular Allocation of Public Land holds a similar view that illegally acquired titles (despite being first registrations) are not likely to stand a constitutional challenge.<sup>223</sup> However such a position may not hold in view of the fact that trust lands are governed by customary law which is subordinate to written law. In which case, the position of the RLA would be upheld by the Courts. In any case such a constitutional challenge<sup>224</sup> has never been mounted in Kenya and as such the possibilities can only be speculated.

The Constitution further accords the President, extensive powers to set aside trust land for various purposes.<sup>224</sup> Such purposes include for purposes of the Government of Kenya, a public body corporate or company and for purposes of prospecting for or the extraction of minerals. However, lack of clear procedural safeguards has led to the abuse of power “by government officials in collaboration with professionals and individuals”.<sup>225</sup> Such abuse of power has led to illegal allotment of trust lands to individuals and companies who are not even inhabitants of the

<sup>221</sup> See section 143 of the RLA .(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default..

<sup>222</sup> See Report of the Commission of Inquiry into the Illegal Allocation of Public Land, Republic of Kenya, Government Printers, Nairobi, June 2004, 16.

<sup>223</sup> As above, 16.

<sup>224</sup> Section 118 of the Constitution.

<sup>225</sup> See Report of the Commission of Inquiry into the Illegal Allocation of Public Land, Republic of Kenya, Government Printers, Nairobi, June 2004, 53.

area solely for private gains.<sup>226</sup> For instance, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya established that 'large tracts of trust land in Narok, Kajiado and Laikipia districts' traditionally occupied by the Maasai indigenous peoples, 'were illegally allocated to some powerful individuals by County councils'.<sup>227</sup> Indeed, some of the current land conflicts in Kenya are traced to the exercise by its founding President Jomo Kenyatta, to award large tracts of lands as political rewards to his friends and kinsmen. Kenyatta successor former, President Daniel arap Moi followed in his footsteps and allocated vast amounts of lands for political patronage in what is today a phenomenon where a few individuals in the country own virtually most of the arable land in Kenya.<sup>228</sup>

Kenya's parliament may also grant powers to the County Council through an Act of Parliament to set aside trust "for use and occupation by a public body for public purposes; for purposes of prospecting for or the extraction of minerals; or to any person whom in the opinion of the council is likely to benefit the persons ordinarily resident in that area...".<sup>229</sup> While the law is clear that such setting aside of trust land should be for the benefit of the public and/or the residents of the county council on various occasions such lands have been set aside for purely private gains that have little if any gain to the inhabitants of the area. The current communication before the African Commission on Human and Peoples Rights by the Endorois is a case in point.<sup>230</sup> Mining and prospecting licenses were awarded to a private company on land held in trust by the Council on behalf of the Endorois who allege that they do not derive any benefits from such allotment of their land to the private company.

According to international standards indigenous peoples' cultures and traditions including the preferred way of managing and controlling their lands deserve protection by state parties. The unique culture and traditions of indigenous peoples form the essence of their survival and heritage and determine the scope of their demand for most of the other fundamental human rights and freedoms.<sup>231</sup> Indigenous peoples' special attachment to their traditional lands and natural resources is founded on the need to preserve their distinct culture and way of life.<sup>232</sup> Indigenous peoples 'conceive of their land as a substance endowed with sacred meanings,

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<sup>226</sup> As above.

<sup>227</sup> As above, 143.

<sup>228</sup> As above pg 9.

<sup>229</sup> Section 117(1).

<sup>230</sup> See the Endorois communication.

<sup>231</sup> Daes Study on Indigenous Peoples and Land para.18; See also General Comment (note 22 above).

<sup>232</sup> As above; see also Brownlie, I, Rights of indigenous peoples in international law, in Crawford J, *The Rights of Peoples*, Clarendon Press, Oxford, 1988, 4.

which defines their existence and identity and to which they are inextricably attached'.<sup>233</sup> The 'entire relationship between the spiritual life of indigenous peoples and mother earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely'.<sup>234</sup> The survival of indigenous peoples' culture is therefore dependent on the protection of their land and resources rights.<sup>235</sup>

According to the UN Human Rights Committee 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law'.<sup>236</sup> That view by the Committee is an affirmation of the close nexus between indigenous peoples' culture and their traditional lands and resources (this issue is revisited in detail in chapter three).

Article 27 of the ICCPR (rights of persons belonging to minorities to enjoy their own culture) provides international norms that have been invoked to give meaning to indigenous peoples fundamental human rights. Although article 27 does not expressly mention indigenous peoples, according to the HRC, its provisions are applicable to these groups.<sup>237</sup> The Committee's jurisprudence similarly indicates that 'groups identifying as indigenous peoples fall under the protection of article 27 as "minorities"'.<sup>238</sup> Important international standards relevant for indigenous peoples land and resource rights' protection have emerged from the application of article 27 provisions.<sup>239</sup> The Committee has affirmed that 'the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong'.<sup>240</sup> Vide article 27, the Committee's jurisprudence has illustrated that there exists a close nexus between indigenous peoples' culture and their traditional forms of economic life which supported by their

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<sup>233</sup> Asiema JK and Situma FDP, *Indigenous peoples and the environment: the case of the pastoral maasai of Kenya*, 5 *Colorado Journal of International Environmental Law and Policy* (1994), 150.

<sup>234</sup> Cobo report, (note 10 above), para 196-197.

<sup>235</sup> Kymlicka W (note 23 above) 43.

<sup>236</sup> Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) para 7.

<sup>237</sup> See General Comment NO 23, note 54, para 3.2 and 7; Scheinin M, 5.

<sup>238</sup> Scheinin M, 4.

<sup>239</sup> See for example *Lubicon Lake Band Versus Canada* note 28; *Ivan Kitok Versus Sweden* note 28; *Apirana Mahuika et al versus New Zealand* note 23; Jouni E. Lansman et al. versus. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lansman et al. versus Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

<sup>240</sup> *Lubicon Lake Band v. Canada*, para. 32.2.

lands and natural resources. In the *Lubicon Lake Band case* the Committee found Canada to have violated article 27 of the Convention by ‘expropriating ‘the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration)’.<sup>241</sup> According to the Committee, the states actions ‘threatened the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.’<sup>242</sup> Earlier in the *Kitok case*, despite not finding a violation of article 27, the HRC, nonetheless established that where an ‘activity is an essential element in the culture of an ethnic community; its application to an individual may fall under article 27 of the Covenant’.<sup>243</sup> The activity in question in that particular case was reindeer herding, which is a traditional economic activity of the Sami, and constitutes part of their culture.<sup>244</sup>

The application of norms embodied by article 27 of the ICCPR to give effect to indigenous peoples land and resource rights has not been restricted to the HRC. The standards enumerated in article 27 of the ICCPR have been invoked before the Inter American Commission on Human Rights to find in favour of indigenous peoples with regard to their land and resources rights.<sup>245</sup> According to the Inter-American Commission the ‘culture of indigenous peoples encompasses the preservation of the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.’<sup>246</sup>

The ILO Convention No 169 similarly underscores the weight of culture of indigenous peoples in their relationship to their lands and territories. The Convention stipulates that states ‘in applying the provisions of Part II of the Convention, must respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspect of this relationship’.<sup>247</sup> The Convention also calls upon states to recognize indigenous peoples’ land tenure systems which are based on their traditions, customs and way of life.<sup>248</sup> Other key

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<sup>241</sup> As above, paras. 2.3; 33.

<sup>242</sup> As above para 33.

<sup>243</sup> *Ivan Kitok Versus Sweden para 9.2.*

<sup>244</sup> As above para 4.3.

<sup>245</sup> See *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para 52; 55; 154; See also *Mary and Carrie Dann v. United States*, Case 11.140, Report No.75/02, Inter-American Commission of Human Rights, Doc. 5 rev. 1 at 860 (2002), para 61;

<sup>246</sup> As above, para 120

<sup>247</sup> The ILO Convention No.169( note 9 above) article 13; Part II of the ILO Convention 169 deals with Land (articles 13-19).

<sup>248</sup> As above articles 13, 14 and 17.

and relevant standards for purposes of this discussion enshrined in the ILO Convention No 169 include the rights of ownership and possession; and the rights to participate in the use, management and conservation of the resources.<sup>249</sup>

The preamble to the UN Declaration on the Rights of Indigenous Peoples recognizes territorial rights as one of the inherent rights of indigenous peoples, deriving from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies. The Declaration also provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used.<sup>250</sup> They have the right to own, develop, control and use their lands and territories.<sup>251</sup> They also have the right to the restitution of the lands, territories and resources which have been confiscated, occupied, used or damaged without their consent or at least they have the right to just and fair compensation.<sup>252</sup>

#### 5.4 Applying the concept of indigenous title in Kenya (still developing this part)

The concept of indigenous title also known as native title/aboriginal title was described in the Mabo case by Justice Brennan of the High Court of Australia that 'native title has its origins in and is given its content by the traditional laws and customs acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.<sup>253</sup> The doctrine 'recognizes that those customary indigenous laws regarding land ownership which preceded common law, should be recognized as title generating'.<sup>254</sup> Such title emanates from recognition by courts over time that certain indigenous land rights should survive colonization.<sup>255</sup> The doctrine is based on principles of justice and equality and establishes rights in an indigenous community shown to be occupying the land at colonization.<sup>256</sup> Several characteristics consistently distinguish aboriginal

<sup>249</sup> ILO Convention No.169( note 9 above) articles 14 and 15 respectively.

<sup>250</sup> UN Declaration on Indigenous Peoples (note 9 above) article 25.

<sup>251</sup> As above, article 26.

<sup>252</sup> As above article 27.

<sup>253</sup> See Mabo Versus Queensland( No 2) (1992) 107 ALR 1, 58.

<sup>254</sup> See Jeremie Gilbert, Historical indigenous peoples land claims: A comparative and international approach to the common law doctrine on indigenous title, 56 *International and Comparative Law Quarterly*, 2007, 585.

<sup>255</sup> T. M Chan, 118; See also Bennet and Powell 449;Karin Lehmann, Aboriginal Title, Indigenous Rights and the Right to Culture, *South African Journal of Human Rights*, Vol 20, 91( 2004).

<sup>256</sup> T.M. Chan , 118; See also Richtersveld SCA decision, para 38-41.

title from common law property rights: aboriginal title is held communally, not individually; aboriginal title originates in pre-colonial systems of indigenous law; and once established, it is inalienable to anyone except the Crown or State Government.<sup>257</sup> The factors to consider in proving aboriginal title include occupation of the land at the time of colonization, period of occupation, exclusivity, continuity on land, social organization and traditional laws and customs with respect to the land; and the aboriginal right to the land must not be extinguished.<sup>258</sup>

Although the concept of 'indigenous title' is traced to the jurisprudence of the High Courts of Australia, New Zealand and Canada, it has been cited and invoked in a number of other common law jurisdictions.<sup>259</sup> These include among others South Africa,<sup>260</sup> Botswana<sup>261</sup> whose jurisprudence is compared to some the Kenyan cases.

In South Africa, the Supreme Court of Appeal pointed to the elements of aboriginal title as precedents for proving elements for a claim of a customary law interest.<sup>262</sup> The Supreme Court proved each of the elements of an aboriginal title claim but avoided finding a right under aboriginal title: that the indigenous Richtersveld Community was a discrete ethnic group<sup>263</sup>, who occupied the land for a long time<sup>264</sup> prior to and at the time of annexation;<sup>265</sup> they enjoyed the exclusive beneficial occupation of the land;<sup>266</sup> and they had a social and political structure,<sup>267</sup> that included laws governing the land<sup>268</sup> which they enforced.<sup>269</sup> The Constitutional Court relied on the same characteristics for purposes of to illustrate that the Richtersveld community had a right of indigenous law ownership.<sup>270</sup>

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<sup>257</sup> As above; Bennett and Powell 449; Laboni Amena Hoq 437.

<sup>258</sup> T. M Chan 119; Bennett & Powell 463-69.

<sup>259</sup> See Jeremie Gilbert, Historical indigenous peoples land claims: A comparative and international approach to the common law doctrine on indigenous title, 56 *International and Comparative Law Quarterly*, 2007, 585

<sup>260</sup> Richtersveld SCA decision, paras 15, 18..

<sup>261</sup> See Roy Sesana and others versus The Attorney General Miscellaneous No 52 of 2002 ( 13 December 2006).

<sup>262</sup> T. M Chan , 124.

<sup>263</sup> Richtersveld SCA decision, paras 15, 18.

<sup>264</sup> As above, paras 14, 22.

<sup>265</sup> As above, paras 14.

<sup>266</sup> As above paras 18, 22, 24.

<sup>267</sup> As above paras 15, 18, 19.

<sup>268</sup> As above paras 18, 19.

<sup>269</sup> As above para 29.

<sup>270</sup> Richtersveld Concourt decision note 15, para 62.

While similar characteristics are discernible in some of the claims made by indigenous communities in Kenya such as in the case of the Ogiek, the court claims that it did not have an opportunity to employ it for want of arguments in support of its application.<sup>271</sup> That means that the Court in the circumstances for lack of evidence to support the application of the concept decided to only rely on submissions adduced on the statutory provisions. Indeed the Court acknowledges this and notes that it “missed an opportunity to closely analyze the whole of the Kenyan land law, because the various land statutes and customary law were not argued, and the case was presented within the narrow limits of the forests legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere”.<sup>272</sup>

It is important to note here that even in South Africa while the doctrine of aboriginal title may indeed be applicable, the courts in that country elected to utilize the more straightforward route, which is reliance on the statutory restitution provisions.<sup>273</sup> Therefore while it is important to recognize and apply the doctrine of aboriginal title where there is such alternative cause of action, is useful to provide a clear route for restitution of lands through constitutional and legislative provisions. Chapter six examines some of the legal reforms that could be adopted in Kenya to provide such express protection.

## **5.6 Chapter conclusion**

This chapter has demonstrated that there are provisions within Kenya’s legal framework that can potentially be invoked to protect indigenous peoples land rights. These include constitutional guarantees of the right to life, personal liberty, non discrimination, and property rights, the trust lands provisions and applying the concept of aboriginal title. However, the possibilities presented by those provisions are hampered by restrictive interpretation and competing legal protection by the law for the legal title holders of the lands. By recourse to comparative jurisprudence and international standards the chapter has also demonstrated that a progressive judiciary can indeed rely on the existing laws to recognize and protect indigenous peoples’ land rights. However, relying on the judiciary alone for such interpretation is not enough due to various

<sup>271</sup> Francis Kemei and others versus the AG, High Court of Kenya at Nairobi Civil case no 238 of 1999(OS), para 41

<sup>272</sup> As above, para 41.

<sup>273</sup> See T.W. Bennett & C.H. Powell, *Aboriginal Title in South Africa Revisited*, 15 *South African Journal of Human Rights*, 450 (1999) See also T. M. Chan note 104, 118, see also Richtersveld LCC, para 48 where the Court intimated that the doctrine of indigenous title is an alternative remedy to restitution under the Restitution Act but fell outside the LCC’s jurisdiction.

limitations of the courts of law to have recourse to such alternative legal resources. It is therefore important to adopt certain amendments and reforms to the legal framework which is the subject of the next chapter.