

CHAPTER FOUR

THE POTENTIAL OF KENYA'S CURRENT LEGAL FRAMEWORK TO VINDICATE INDIGENOUS PEOPLES' LAND RIGHTS

4.1 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 recognize and protect indigenous peoples' land rights. As noted already, due to restrictive interpretation of these provisions by Kenyan courts, indigenous peoples' land claims have not always been successful.⁴⁰⁵ The chapter argues that the current legal framework nevertheless has the potential to protect indigenous peoples' land rights if progressively interpreted in keeping with international standards.

The development of Kenya's common law has long been influenced by case law from other common-law jurisdictions.⁴⁰⁶ Although such foreign case law is not binding, it is of persuasive value.⁴⁰⁷ Of particular significance is the rule laid down in *Kiplagat* that, where the facts and the legal question addressed in a foreign decision are similar to the case being decided, Kenyan courts should take judicial notice of the foreign decision, notwithstanding differences between the

⁴⁰⁵ See for example the Maasai and the Ogiek case studies as discussed in chapter three.

⁴⁰⁶ See some of the references by the Kenyan courts to decisions of other common law courts for example *RM and another v AG*, High Court of Kenya Nairobi Civil case no 1351 of 2002, sourced at <www.kenyalaw.org> (2006eKLR.) 9 accessed 10 February 2008.

⁴⁰⁷ As above.

two legal systems.⁴⁰⁸ According to the Court, while ‘the Constitution of the United States of America was absolutely unlike in Kenya ... in our view if the facts are sufficiently analogous and if the provisions of the law are similar then this court would be entitled to adopt some or part of the reasoning which is relevant to the situation in Kenya’.⁴⁰⁹ On that basis, this chapter seeks to rely on case law from jurisdictions whose constitutions and legal framework, although not the same as Kenya’s, are sufficiently similar as to admit of meaningful comparison. For example, unlike Kenya, some foreign jurisdictions, such as India, have adopted directive principles of state policy, which have guided their courts in interpreting these jurisdictions’ domestic legal framework.⁴¹⁰ While Kenya has not adopted directive principles of state policy and its Bill of Rights is mainly limited to civil and political rights, it is argued that a progressive interpretation of some of its constitutional provisions could result in recognition and protection of socio-economic rights.⁴¹¹

Kenyan Courts are also slowly beginning to take account of international instruments that have been ratified but not domesticated. For instance, in *RM and another v AG*, the Kenya High Court adopted the reasoning of Justice Musumali of the Zambian High Court in holding that:

⁴⁰⁸ See *Kenneth S Kiplagat v Law Society of Kenya* civil case No 542 of 1996. The Court took notice of *Kneller v State Bar of California* 496 US 1 that was decided in the Supreme Court of the United States.

⁴⁰⁹ *Kenneth S Kiplagat v Law Society of Kenya* (n 408 above).

⁴¹⁰ See the Constitution of the Republic of India promulgated in 1949. Kenya’s courts of law and legal practitioners in Kenya to rely heavily on English (Privy Council) and Indian (Supreme Court) jurisprudence; see *Paschim Banga Khet Mazdoor Samitty v State of West Bengal* AIR 1996) SC 2426 where the court positively interpreted the right to life to include provision of emergency medical treatment which is argued to have been an extension of the interpretation of the directive principles of state policy in conjunction with the right to life enshrined in its constitution. Case cited in K Kibwana & O Ambani ‘The case for constitutional articulation of directive principles of State policy in Kenya’ in M Odhiambo, O Ambani & W Mitullah(ed) *Informing a constitutional moment: Essays on Constitution reform in Kenya* (2005) 54.

⁴¹¹ See Kibwana & Ambani as above 49-59.

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.⁴¹²

Such a finding 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 Kenya, as with most other common-law jurisdictions, is that unless international instruments are domesticated they do not have the force of law.⁴¹³ In the case of *Okunda v Republic*, the East African Court of Appeal held that ‘the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict.’⁴¹⁴ Subsequent court rulings have reaffirmed the *Okunda decision* that ‘where there is no ambiguity, the clear provisions of the Constitutions prevail over International Conventions.’⁴¹⁵ In *Pattni & another v Republic*,⁴¹⁶ the High Court held that

⁴¹² See *Sara Longwe v Intercontinental Hotels Ltd* (1993) 4 LRC 221 cited in *RM and another v AG* (n 404 above) 9) (It is worthy to note that despite Kenya adopting the position of the Sara Longwe case, subsequent jurisprudence in Zambia have departed from that position as emerged from discussions with Professor Michelo Hansungule, Centre for Human Rights, University of Pretoria).

⁴¹³ See *RM and another v AG* (n 406 above) 9; see also *Okunda v Republic* (1970) EA, 453; *Pattni v Republic*, Miscellaneous Civil Application Nos 322 & 810 of 1999(consolidated) Kenya Law Reports (2001) KLR, 264.

⁴¹⁴ *Okunda v Republic* (n 413 above).

⁴¹⁵ *RM and another v AG* (n 406 above) 20.

⁴¹⁶ See *Pattni v Republic* (n 413 above) 264.

‘although international instruments testify to the globalization of fundamental rights and freedoms of an individual, it is the Constitution as a law which is paramount. However, the court can in appropriate cases take account of the emerging international consensus of values in the area of human rights.

Accordingly, unless international standards are domesticated, the provisions of the current legal framework continue to be the main basis for settling disputes.⁴¹⁷ Even where international standards are domesticated, the Constitution takes precedence. Where there is no constitutional conflict, the courts must determine whether the domestic law being applied is consistent with the State’s international obligations.⁴¹⁸ Where the domestic law is inconsistent with international norms and standards, Kenyan courts follow the Bangalore Principles, i.e. they give effect to the domestic law and ‘draw the inconsistency to the attention of the appropriate authorities’.⁴¹⁹ Such inconsistencies may provide a ground for law reform, as discussed in chapter six.

This chapter makes references to norms and standards and their interpretation by international and regional monitoring mechanisms as evidence of ‘emerging consensus of values in the area of human rights’ which courts of law in Kenya should take into account when adjudicating claims

⁴¹⁷ See *Pattni v Republic* (n 413 above) 264; The High Court reaffirmed that international norms, much as they could be of persuasive value, are not binding in Kenya save for where they are incorporated into the Constitution or other written laws. However, the judiciary has acknowledged and reaffirmed the application of Convention on the Elimination of Discrimination against Women (CEDAW) in Kenya, even in the absence of domestication. In the case of *Mary Rono v Jane Rono and William Rono*, (Unreported Civil Appeal No 66 of 2002, Court of Appeal sitting in Eldoret) the court in awarding daughters of a polygamous man (married under customary law) who had died intestate equal shares in the property, the court cited Article 1 of CEDAW as being applicable in Kenya.

⁴¹⁸ See *RM and another v AG* (n 406 above) 21-23.

⁴¹⁹ As above 21; see Bangalore Principles of 1989 reprinted in *Commonwealth Secretariat, Developing Human Rights Jurisprudence* vol 3, 151 Principle 8.

made by indigenous peoples.⁴²⁰ Indeed, some of the international norms and standards surveyed in support of indigenous peoples' land rights are found in Kenya's Constitution. However, the chapter argues that the interpretation of the constitutional provisions that seems to entrench those international standards has been restrictive and has often failed to give regard to indigenous peoples' land rights. A progressive interpretation of those standards by courts of law in Kenya, as has been done by other courts across the globe, would accord indigenous peoples due recognition and protection for their ancestral land rights.

As Williams has noted, the rationale for analyzing international standards that may be considered by courts of law in Kenya while adjudicating indigenous peoples land claims is 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'.⁴²¹ He continues:

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 practices violative of international human rights instruments and standards. Blatant state violators of international legal norms often pay the price of increasing isolation. Vitaly important 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

⁴²⁰ See *Pattni v Republic* (n 413 above) 264; see Wiessner (n 75 above) 57.

⁴²¹ Williams (n 75 above) 669; Wiessner (n 75 above) 57.

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.⁴²²

Indeed, today, international standards and norms play a significant role in regulating states' conduct and attitude towards their citizens.⁴²³ 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 courts have invoked and applied them whilst adjudicating disputes.⁴²⁴ Undoubtedly, the domestic legal framework is the most suitable and primary means of legal protection. International legal norms and standards are of little value unless they find application and implementation in national legal frameworks. Reference to international standards, norms and mechanisms in this chapter is intended simply to illustrate the potential these legal materials have if applied by Kenyan courts to protect indigenous peoples' land rights. The ultimate goal should be for these standards to become part of the domestic legal order.

While most of the standards discussed are of a general character and not specifically tailored to indigenous peoples' claims, some have emerged from indigenous peoples' participation in

⁴²² Williams (n 75 above) 669.

⁴²³ RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 296-345.

⁴²⁴ See some select examples of states that have domesticated international standards with regard to indigenous peoples' rights to land and resources in Anaya & Williams (n 77 above) 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* (n 72 above); South African case of *Alexkor Ltd v Richtersveld Community* (n 72 above).

international standard-setting mechanisms.⁴²⁵ While international law standards can be classified as either binding or non-binding, this chapter surveys them thematically and does not always differentiate between 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 the main standards surveyed here are those from international standard-setting mechanisms, most 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 certain international instruments, norms developed by international standard-setting mechanisms and regionally specific frameworks is made in a bid to tease out some of the applicable norms and standards 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, even in Kenya.

It is submitted that in a bid to redress the dispossession of indigenous peoples' land in Kenya, courts have a duty to give regard to developing common-law jurisprudence and international norms. This 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

⁴²⁵ Williams (n 75 above) 664-9; see for example the UN Declaration on the Rights of Indigenous Peoples.

impartial arbiters of disputes.⁴²⁶ Indeed, recourse to international standards and comparative jurisprudence while interpreting the Bill of Rights, as is the case in South Africa, may be necessary.⁴²⁷ While there is no such requirement under Kenya's Constitution, courts have, in certain instances, of their own accord resorted to comparative jurisprudence and recently international law norms to interpret the Bill of Rights.⁴²⁸

A progressive interpretation of the law that is consistent with international standards and comparative jurisprudence 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 disputes.⁴²⁹ That approach to interpretation was reiterated by the Constitutional Court of South Africa in its judgment on the constitutionality 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

⁴²⁶ M Darrow & P Alston 'Bills of Rights in comparative perspectives in P Alston (ed) *Promoting human rights through Bills of Rights: Comparative perspectives* (1999) 493.

⁴²⁷ See sec 39(1)(b) and (c) Constitution of the Republic of South Africa Act 108 1996: When interpreting the Bill of Rights, a court, tribunal or forum- must (b) consider international law (c) may consider foreign law; see also *S v Makwanyane* 1995 (3) SA 391 (CC) para 36-7 where the Court held that the Court may resort to both binding and non-binding international law to provide guidance as to the correct interpretation of particular provisions.

⁴²⁸ See for example *RM and another v AG* (n 406 above) 9.

⁴²⁹ *S v Makwanyane* (n 427 above) para 88.

protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.⁴³⁰

The Constitutional Court of South Africa has been particularly vigilant and afforded indigenous peoples protection of their land rights. One example is the case of *Alexkor Ltd & Another v Richtersveld Community and others*,⁴³¹ which will be analyzed in greater detail in chapter five. Although the Constitutional Court relied upon South Africa's domestic land restitution laws⁴³² to find violation of the community's land rights, it also and importantly held that the community possessed rights in the disputed lands before colonialism based on their indigenous laws.⁴³³ The Constitutional Court's willingness 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 jurisdictions that follow the common-law system, such as Kenya, courts take an adversarial approach to litigation. The legal expertise and evidence adduced is therefore an important component of the litigation process, and largely determines the outcomes of suits. However, most indigenous communities are indigent and generally do not have the resources to engage or retain counsel who are 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 arguments

⁴³⁰ As above; see also para 37 on the relevance of comparative human rights jurisprudence in the determination of cases.

⁴³¹ *Alexkor Ltd v Richtersveld Community* (n 72 above).

⁴³² Sec 25(7) Constitution of the Republic of South Africa; Restitution of Land Rights Act 22 of 1994 (SA).

⁴³³ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 62; 64.

based on custom, tradition, indigenous law as well as international law and jurisprudence. Therefore, apart from courts being progressive in the interpretation and use of available legal resources, there is a need to sensitize legal professionals representing indigenous peoples to the available jurisprudence and options for the protection of indigenous peoples' claims. The Ogiek case study discussed in chapter three highlighted the critical role of lawyers in adducing relevant arguments in support of indigenous peoples. In that particular case, 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 these lands.⁴³⁴ 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' rights, including comparative jurisprudence and international standards.

It is for some of these reasons that this chapter argues that the judiciary has the potential to rectify societal ills by constructively engaging and interpreting the legal framework so as to benefit the poor and the marginalized. Courts have an obligation to ensure that justice is achieved for all people equitably within a country.⁴³⁵ 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. This requires constructive engagement with litigants, meticulous research, and progressive interpretation of the applicable law.

⁴³⁴ See Kimaiyo (n 120 above) 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.

⁴³⁵ Gilbert (n 34 above) 610.

The Constitution of Kenya enshrines key clauses that protect the rights of individuals and marginalized groups.⁴³⁶ Although the language of the Kenyan Bill of Rights seems only to envisage individual rights,⁴³⁷ the Constitution makes provision for rights whose enjoyment demands recognition and protection of group rights.⁴³⁸ Relevant to the question of land rights of indigenous peoples are provisions related to the right to life,⁴³⁹ protection from deprivation of property,⁴⁴⁰ and protection from discrimination.⁴⁴¹ Another relevant constitutional enactment is the chapter on trust lands, which, although fraught with limitations, protects group rights, and provides the framework for the application of indigenous peoples' customary laws.⁴⁴²

4.2 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 has been argued in other jurisdictions, such as South Africa, that similarly worded provisions could 'also be interpreted positively as placing a duty on the state to protect

⁴³⁶ Secs 70-83 Constitution of Kenya.

⁴³⁷ Sec 70 as above 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.

⁴³⁸ Sec 82 on non discrimination and Chapter ix on Trust Lands as above.

⁴³⁹ Sec 71 as above.

⁴⁴⁰ Sec 75 as above .

⁴⁴¹ Sec 82 as above.

⁴⁴² Sec 114-120 as above.

the lives of its citizens’.⁴⁴³ While in Kenya the right to life is yet to find a positive interpretation, it has not precluded some members of indigenous communities from invoking the right to life in its positive dimension to demand protection of their right to a livelihood. In *Kemai and others v Attorney General and others*, discussed in chapter three, 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 Tinnet Forest’.⁴⁴⁴

The community argued that they had been ‘living in Tinnet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming.’⁴⁴⁵ 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 and protected for all Kenyans’.⁴⁴⁶ 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 on a protected area and emphasized that the ‘eviction from the forest did not bar the applicants from exploiting the natural resources of Tinnet forest, upon obtaining licences prescribed under the Forest Act’.⁴⁴⁷

⁴⁴³ See I Currie & J de Waal *The Bill of Rights Handbook* (2005) 285.

⁴⁴⁴ *Ogiek case* (n 3 above) 1.

⁴⁴⁵ As above.

⁴⁴⁶ *Ogiek case* (n 3 above) 1.

⁴⁴⁷ *Ogiek case* (n 3 above) 2.

In rejecting the community's claim that their right to life was violated by deprivation of their means to livelihood, the Court reasoned that the community did not prove that the 'alternative land given to them is a dead moon incapable of sustaining human life'.⁴⁴⁸ The main thrust of the Court's 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.⁴⁴⁹

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.⁴⁵⁰ While the constitutional right to life is yet to be positively interpreted by Kenya's courts, some common-law jurisdictions have interpreted the right to life to entail protection from deprivation of one's livelihood.⁴⁵¹ The *Ain O Salish Kendro (ASK) & others v Government of Bangladesh* case arose after the government of Bangladesh evicted a community in Dhaka to pave the way for a government project.⁴⁵² 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'.⁴⁵³

⁴⁴⁸ As above 14-16.

⁴⁴⁹ As above 13-14.

⁴⁵⁰ As above 13-16.

⁴⁵¹ See *Ain O Salish Kendro (ASK) & others v Government of Bangladesh & Others*, Writ Petition No 3034 of 1999, (1999) 2 CHRLD; see also *Kerajaan Negeri Johor & Another v Adong bin Kuwau & Others* [1998] 2 MLJ 158, (1998) 2 CHRLD 281 (Malaysia).

⁴⁵² *Ain O Salish Kendro (ASK) & others v Government of Bangladesh* as above 393.

⁴⁵³ As above 393.

Similarly, the Malaysian case of *Kerajaan Negeri Johor & Another v Adong bin Kuwau & others* involved allegations of the violation of the right to life by an indigenous hunter-gatherer community after the Government decided to build a dam on their traditional habitat without appropriate consultation and engagement.⁴⁵⁴ 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’.⁴⁵⁵

In *Makwanyane*, the South African Constitutional Court upheld the right to life as ‘the most fundamental of all human rights, the supreme human right’.⁴⁵⁶ Accordingly, the state is obliged by the Constitution to take positive measures to guarantee the right to life.⁴⁵⁷ Such measures in the Kenyan context would include the protection of the lands and natural resource rights of indigenous peoples on which they solely depend. Currie and de Waal argue that it is unlikely that the South African courts would need to extend the right to life to impose positive obligations on the state given that South Africa’s Constitution enshrines socio-economic rights whose interpretation would accord similar protection.⁴⁵⁸ While that is theoretically true, it is instructive to note that the South African Constitutional Court has linked the realization of socio-economic

⁴⁵⁴ *Kerajaan Negeri Johor & Another v Adong bin Kuwau & Others* (n 451 above) 281.

⁴⁵⁵ As above 281.

⁴⁵⁶ See *S v Makwanyane* (n 427 above) para 217; see also D Yoram ‘The right to life, physical integrity and liberty’ in H Louis (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981)114.

⁴⁵⁷ *S v Makwanyane* (n 427 above) para 117; 353.

⁴⁵⁸ See Currie and De Waal (n 443 above) 290.

rights to the right to life.⁴⁵⁹ In Kenya, where socio-economic rights are not expressly enshrined in the Constitution, the right to life presents one of the most realistic avenues for progressive interpretation likely to yield meaningful protection of the rights demanded by indigenous peoples that are necessary for their survival.

The Botswana case of *Sesana and others v Attorney General*⁴⁶⁰ which would similarly serve as persuasive authority in Kenya found that unlawful termination of basic and essential services of an indigenous community abridges the right to life.⁴⁶¹ The case is important in Kenya given the fact that the High Court in Botswana found a violation of the right to life and linked it to the denial of basic sources of the indigenous community's livelihood. It is particularly useful as a comparable persuasive authority given the fact that Botswana, like Kenya, does not have directive principles of state policy, and has also not enshrined socio-economic rights in the Constitution.

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.⁴⁶² The Court held that such forceful relocation and termination of services was unlawful and

⁴⁵⁹ See *Khosa & 2 others v Minister of Social Development & 2 others* 2004(6) SA 505 (CC) para 41, 44, 52, 80, and 82.

⁴⁶⁰ *Sesana and others v Attorney General* (n 72 above).

⁴⁶¹ As above, H12 (4); H13 p229.

⁴⁶² *Sesana and Others v Attorney General* (n 72 above) H11 and H12.

unconstitutional.⁴⁶³ The particular circumstances of the San and the Ogiek in Kenya are quite similar and it will be demonstrated in later sections that Kenya's 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 v Bombay Municipal Corporation and others* held that the right to life entailed positive duties on the state to guarantee a community's right to a livelihood, albeit linked to directive principles of state policy.⁴⁶⁴ Kenya's High Court sought to distinguish the *Tellis* case in the *Kemai case* by arguing that, while the right to life was wide and far reaching, what it protected was deprivation of life beyond the established procedures of law.⁴⁶⁵ Although Kenya does not have directive principles of state policy, such an interpretation is restrictive and fails to go beyond the purpose and object of the right to life clause in the Constitution. According to the Kenyan High Court, the eviction of the Ogiek was lawful and that, in any case, the community had never challenged the many evictions they claimed to have endured until the present matter.⁴⁶⁶

In so deciding, the Kenyan High Court ignored the fact that, while the Ogiek had not previously challenged their eviction in court, they had asserted their rights in other ways, including through

⁴⁶³ As above. H10-H13.

⁴⁶⁴ *Olga Tellis v Bombay Municipal Corporation* 1985, 3 SCC 545 -The Indian Supreme Court held that forced eviction would result in a deprivation of the ability to earn a livelihood. The Court further noted that the ability to earn a livelihood was essential to life and thus the forced evictions would result in a violation of the right to life as embodied in Article 21 of the Indian Constitution.

⁴⁶⁵ *Ogiek case* (n 3 above) 13.

⁴⁶⁶ *Ogiek case* (n 3 above) 13.

peaceful mediation and political negotiation with the state since 1968.⁴⁶⁷ The Court's argument also fails to consider fundamental barriers that could have prevented the community from contesting their evictions in court, such as indigence, illiteracy, lack of appropriate legal know-how and capacity. The community was also relying on their customary laws and traditions to prove ownership of their lands, which, as noted above, were subordinated to the written law.

It is submitted that in certain cases, particularly those involving poor communities where the outcome of the case would have far-reaching implications for the community, courts of law should consider all these factors before dismissing the case on a technicality. It is also submitted that, on the basis of the comparative jurisprudence surveyed above, which has persuasive value in Kenya's courts, indigenous peoples in Kenya should be accorded equal protection of their land rights as the prime basis of their livelihood. The right to life, in the view of these other courts, includes protection of one's livelihood. In the case of indigenous peoples, this means protection of their 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.⁴⁶⁸ The UN Human Rights Committee has for instance noted that 'the right to life has been too often narrowly interpreted ... [T]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive

⁴⁶⁷ See Kimaiyo (n 120 above) 22-30.

⁴⁶⁸ Some of the treaties that Kenya has ratified that protect the right to life include the ICCPR, ICESCR, and the African Charter.

measures.⁴⁶⁹ Such measures would include according legal recognition and protection to the traditional lands of indigenous peoples.

The African Commission has interpreted the right to life to entail the protection of the lands of indigenous peoples whose survival depends on access to such land.⁴⁷⁰ In *Social and Economics Rights Action Centre (SERAC) and another v Nigeria*, the African Commission found that the pollution and environmental degradation of Ogoni land by Government agents and private actors was a violation of the Ogoni people's right to life.⁴⁷¹ According to the African Commission, the acts of the Nigerian State 'affected the life of the Ogoni community as a whole.'⁴⁷² 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.⁴⁷³ 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'.⁴⁷⁴ Indigenous peoples' food sources are predominantly their traditional lands, and as such preventing them from accessing and controlling these resources constitutes a violation of their right to life.

⁴⁶⁹ 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 art 6 ICCPR.

⁴⁷⁰ See *Social and Economics Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), 260 para 67; para 70 (*SERAC* case).

⁴⁷¹ *SERAC* case (n 470 above) para 67 and 70; see art 4 of African Charter.

⁴⁷² *SERAC* as above.

⁴⁷³ As above para 64-66; arts 4 and 5 African Charter.

⁴⁷⁴ As above para 65 and 66.

4.3 Non-discrimination and equality

Kenya's Constitution provides for non-discrimination in 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, colour, creed or sex'.⁴⁷⁵ 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.⁴⁷⁶ Section 82 of the Constitution defines discrimination and is the express provision that outlaws its practice.⁴⁷⁷

By virtue of these provisions, indigenous peoples are protected from discrimination. Non-discrimination here would entail 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 this ground is expressly acknowledged means that all tribes are equal in the eyes of the Constitution and are entitled to equal treatment by the law.⁴⁷⁸ 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.

⁴⁷⁵ Sec 70 Constitution of Kenya.

⁴⁷⁶ As above.

⁴⁷⁷ See sec 82(1) (2) as above; According to sec 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'.

⁴⁷⁸ Sec 82(1) (2) Constitution of Kenya.

The non-discrimination provisions⁴⁷⁹ 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 their preferred way of life. However, while the non-discrimination clause in the Constitution seems to protect communities relying on customary laws, the repugnancy clause renders the applicability of customary law uncertain in case of a conflict with written laws.⁴⁸⁰ Courts of law in Kenya have generally given more weight to the repugnancy clause than its overall effect, which is to discriminate against particular groups who seek reliance on their traditional laws.⁴⁸¹

Notwithstanding these provisions, discriminatory practices against indigenous peoples persist in Kenya.⁴⁸² Indeed, Kenya recently acknowledged that in the past it did not take any active measures to preserve and protect minorities.⁴⁸³ In a bid to rectify this situation, it stated that 'there has been a gradual acceptance of their status and there are efforts being made to not only recognize these minorities, but also encourage their survival and protection'.⁴⁸⁴ Similarly, a recent study by the African Union's NEPAD Peer Review Mechanism⁴⁸⁵ reveals that 'post-

⁴⁷⁹ Sec 82 as above.

⁴⁸⁰ See Lenaola *et al* (n 169 above) 243.

⁴⁸¹ As above.

⁴⁸² See Kenya APRM Report (n 2 above) 14; Stavenhagen Kenya Mission Report (n 35 above) para 22-24; IWGIA (n 35 above) 468.

⁴⁸³ Second Periodic Report of Kenya to the UN Human Rights Committee (n 154 above) para 212.

⁴⁸⁴ As above para 212.

⁴⁸⁵ The New Partnership for Africa's Development (NEPAD) is 'a pledge by African leaders based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth in the world

independence politics in Kenya have been characterized by ethnicity, reflecting patterns of super-ordinate and subordinate ethnic relations and inequality'.⁴⁸⁶ Indigenous peoples whose population size is generally smaller than the dominant tribes have thus endured policies that did not take account of their particular circumstances, preferred way of life and cultural dynamics.⁴⁸⁷

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, as we have seen, in the landmark decision in *Alexkor Ltd and another v Richtersveld Community and others* held that failure to respect indigenous customary property rights is invariably discriminatory.⁴⁸⁸ Apart from progressively interpreting constitutional provisions against discrimination, courts have an obligation to ensure that marginalised communities by virtue of their particular circumstances are protected according to their preferred way of life and culture.

The *Sesana* case in Botswana highlighted the relative powerlessness of indigenous communities when pitted against dominant communities.⁴⁸⁹ The High Court held that 'equal treatment of un-

economy and body politic' (NEPAD Declaration (2001) adopted in Abuja, Nigeria in October 2001). The African Peer Review Mechanism (APRM) is a programme under NEPAD aimed at encouraging states to among others make self assessment on their human rights, rule of law and democratic standards. The APRM process has been significant in its forthright approach of engaging states in self-assessment of their economic and human rights record – including their deficiencies. Reports of the APRM which so far have covered Ghana, Rwanda, South Africa and Kenya have made useful recommendations to the states concerned which if implemented would transform the human rights landscape on the continent.

⁴⁸⁶ Kenya APRM Report (n 2 above) 14.

⁴⁸⁷ Stavenhagen Kenya Mission Report (n 35 above) para 22-24.

⁴⁸⁸ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 34.

⁴⁸⁹ *Sesana and Others v Attorney General* (n 72 above) H9.3.

equals can amount to discrimination’.⁴⁹⁰ 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 mechanisms to redress the historical injustices committed against indigenous peoples.⁴⁹¹ While affirmative action initiatives may be conceived as a form of preferential treatment, their true purpose is to correct existing inequality. As argued by Kameri-Mbote:

Substantive equality seeks to address the shortcomings of formal equal equality and seeks to ensure that equality is achieved. The quest for substantive equality will lead to some form of discrimination or differential treatment. This is justified on the account of levelling the playing field, it being recognised that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions.⁴⁹²

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. Where inequality exists, certain measures, including affirmative action initiatives, should be adopted to rectify the situation. Applicable international standards and norms require states not to discriminate against indigenous peoples’ customary law interests in their lands.⁴⁹³ The United Nations Committee that monitors the implementation of the International Convention on the Elimination of All Forms of

⁴⁹⁰ As above, H9.3 (33).

⁴⁹¹ See Kymlicka (n 124 above) 4.

⁴⁹² P Kameri- Mbote ‘Gender considerations in Constitution making: engendering women’s rights in the legal process’ (2003) *University of Nairobi Law Journal* 156.

⁴⁹³ Arts 5(d) (v) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Racial Discrimination (CERD),⁴⁹⁴ to which Kenya is a party, has implored 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.’⁴⁹⁵

The international instruments prohibiting discrimination include the ICCPR and CERD, both of which have been ratified by Kenya.⁴⁹⁶ 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’.⁴⁹⁷ Further, article 26 of the Convention guarantees equal protection before the law.⁴⁹⁸ The norms enshrined in articles 2(1) and 26 have been

⁴⁹⁴ As above.

⁴⁹⁵ CERD *General Recommendation XXIII* (n 71 above) para 5.

⁴⁹⁶ ICCPR ratified by Kenya on 1 May 1972; CERD ratified by Kenya on 13 September 2001.

⁴⁹⁷ See also HRC 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’.

⁴⁹⁸ Art 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.’

invoked to give effect to the rights of indigenous peoples.⁴⁹⁹ The African Charter on Human and Peoples' Rights similarly prohibits discrimination on the basis of various grounds, including race, ethnic origin, language, social status and other status.⁵⁰⁰ Inclusion of ethnic origin as one of the grounds may be deemed 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 of 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.⁵⁰¹ The Committee on CERD has called on states parties to among others:⁵⁰²

- 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;

⁴⁹⁹ See also with reference to minorities HRC General Comment No 23 (n 100 above) 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 enjoy and develop their culture and language and to practice 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 (n 37 above) 131.

⁵⁰⁰ See arts 2, 3 & 19 African Charter.

⁵⁰¹ See P Thornberry 'The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and caste/descent-based discrimination in J Castellino & N Walsh (ed) *International Law and Indigenous Peoples* (2005) 17.

⁵⁰² CERD General Recommendation 23 (n 71 above).

- 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 practice and revitalize their cultural traditions and customs and to preserve and to practice 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.⁵⁰³ 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.⁵⁰⁴

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, decriing the resultant instability of indigenous life.⁵⁰⁵ The Committee has 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

⁵⁰³ CERD General Recommendation 23 (n 71 above).

⁵⁰⁴ A Huff 'Indigenous land rights and the new self-determination' (2005) 16 *Colorado Journal of International Environmental Law & Policy* 328.

⁵⁰⁵ As above.

traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories’.⁵⁰⁶ Of particular interest is the affirmation by the Committee that the doctrine of *terra nullius* is racially discriminatory and as such inconsistent with principles of fundamental human rights.⁵⁰⁷ The Committee referred specifically to the Australian High Court’s decision in *Mabo*⁵⁰⁸ which rejected the doctrine of *terra nullius*, calling this judgment a significant development for indigenous peoples’ land rights.⁵⁰⁹

Non-discrimination further demands that adequate and appropriate consultation and participation mechanisms be instituted to ensure that indigenous peoples are involved in the ownership, control and management of their traditional lands and resources.⁵¹⁰ In this regard, the HRC 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’.⁵¹¹

ILO Convention No 169 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

⁵⁰⁶ Huff (n 504 above).

⁵⁰⁷ Ninth Periodic Report of Australia, CERD/C/223/Add.1, CERD Report in A/49/18, para 540.

⁵⁰⁸ *Mabo v Queensland* (n 72 above).

⁵⁰⁹ CERD Ninth Periodic Report of Australia (n 507 above) paras 540.

⁵¹⁰ HRC General Comment No 23 (n 100 above); *Länsman v Finland* (n 100 above) para 9.5; *see also at the Inter American Commission in Mary and Carrie Dann v United States* (n 73 above) para 140.

⁵¹¹ CERD General Recommendation 23 (n 71 above).

their lands’.⁵¹² Indeed, according to one of the fundamental principles of this convention, ‘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.’⁵¹³ Accordingly, consultation should take place prior to the project commencement, preferably during the design stage, in order to ensure that indigenous peoples’ views are taken into account. Such consultation 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 consist not merely of the passing of information to indigenous peoples about envisaged projects, but should also encompass the principles of prior, free and informed consent.⁵¹⁴ In terms of 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.⁵¹⁵

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

⁵¹² Art 15(2) ILO Convention No 169; see also art 30 UN Declaration on Indigenous Peoples (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’).

⁵¹³ Art 7(1) ILO Convention No 169.

⁵¹⁴ Art 16 as above.

⁵¹⁵ Art 6(1) (a) as above.

perspective would be to involve the pastoralist and forest communities in the management and benefits' of such projects.⁵¹⁶ 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'.⁵¹⁷

4.4 Protection from deprivation of property

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.

⁵¹⁶ Stavenhagen Kenya Mission Report (n 35 above) para 54.

⁵¹⁷ 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 Constitution therefore protects against deprivation of property of all description.⁵¹⁸ Rights in land constitute property and are accordingly secured by this provision. However, although the provision, similar to the one on the right to life, envisages negative duties (protection from deprivation) it similarly imposes positive obligations on the state to ensure that the protection it offers is in fact enjoyed. The property clause is particularly important for indigenous peoples by virtue of its express recognition and acknowledgement that there may be various interests or rights over property of diverse descriptions.⁵¹⁹ Property includes land and natural resources.⁵²⁰ This is construed to encompass all forms of property holding, including communal and individual property.⁵²¹ Rights holders may only be deprived of such property in accordance with established legal mechanisms and procedures upon prompt payment of full compensation.⁵²² Accordingly, indigenous peoples' land rights are constitutionally protected, and, in the event of any abrogation, they are entitled to assert them before the Kenyan High Court.⁵²³

⁵¹⁸ Sec 75 Constitution of Kenya.

⁵¹⁹ Sec 75(1) as above.

⁵²⁰ See sec 2(19) of the Interpretation of General Provisions Act Laws of Kenya Cap 2 -which defines immovable property as 'including land and other things attached to the earth or permanently fixed to anything attached to the earth'.

⁵²¹ See the Response by Kenya on the Endorois case (n 3 above) para 3.1.2 stating that: Land as property is recognized under Kenya's 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 on file with the author*).

⁵²² Sec 75(1) Constitution of Kenya.

⁵²³ Sec 84 as above 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.

The property clause in Kenya's Constitution protects against deprivation of property and does not encompass the 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 embody a bundle of rights, which include user rights (*usufructus*), ownership, access and control.⁵²⁴ The 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.⁵²⁵

Indigenous peoples in Kenya own, control, access and use lands according to 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 to which they have registered individual titles.⁵²⁶ The pastoralists, on the other hand, demand recognition and protection of their group land rights.⁵²⁷ The state should recognise and protect whatever form of land tenure indigenous people elect to use, whether individual or communal.

⁵²⁴ See PL Onalo *Land law and conveyancing in Kenya (1986) 18*; see also *Report of the Constitution of Kenya Review Commission, Volume One, the Main Report (2003) 311*.

⁵²⁵ 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 (n 21 above) 25-41.

⁵²⁶ Kimaiyo (n 120 above).

⁵²⁷ Lenaola et al (n 169 above) 256.

As already stated, Kenya's land tenure regime is mainly tailored to protect and guarantee private/individual land tenure. While the Constitution makes express provision for protection of trust lands according to community needs and aspirations⁵²⁸ (surveyed in greater detail later in the next Chapter), current land laws and policies have 'facilitated the erosion of communal land tenure rights'.⁵²⁹ 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.⁵³⁰

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.⁵³¹ That is done on the basis 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 of 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, which is often an uphill battle given the hierarchy of Kenya's laws which favour individual land 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

⁵²⁸ Sec 114-120 Constitution of Kenya.

⁵²⁹ See *Lenaola et al* (n 169 above) 242.

⁵³⁰ Sec 115-116 Constitution of Kenya.

⁵³¹ Sec 75 as above.

peoples' property rights derive from their customary laws. These laws are considered subsidiary to written laws. Through Kenya's written laws, indigenous peoples were and continue to be disinherited of their traditional lands. This is notwithstanding the fact that the communities' lands constitute property protected by the Constitution on the basis of their African customary laws.⁵³²

The constitutional protection of property of any description⁵³³ would include communal land as sought by certain indigenous communities. 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'.⁵³⁴ Such land is of paramount importance to communities whose livelihoods are dependent on it. It is therefore imperative that the Constitution accords equal protection to all forms of land ownership from deprivation. In order to rectify that anomaly, courts of law have a duty to give positive content to the property clause to have regard to indigenous peoples' lands rights.

The Constitution permits compulsory acquisition of property for the public benefit.⁵³⁵ However, such expropriation by the state must be in accordance with established legal procedures and upon payment of prompt and full compensation.⁵³⁶ Individuals and communities who are aggrieved by such expropriation have a right of direct access to the High Court to seek remedies. Proof of title

⁵³² Sec 82(c) Constitution of Kenya.

⁵³³ Sec 75 as above.

⁵³⁴ See SBO Gutto, Land and property rights in modern constitutionalism: Experiences from Africa and possible lessons for South Africa in Wanjala (n 21 above) 246.

⁵³⁵ Section 82(1) (a) (b) Constitution of Kenya.

⁵³⁶ Sec 82(1) (c) as above.

to the appropriated land is required before a determination of the appropriateness of the compulsory acquisition and the amount of compensation. In such circumstances, indigenous peoples, who may not be able to prove legal title to these lands, have often lost their lands without any compensation on the basis that the lands belong to no one. Courts have a duty to rectify such rigid interpretations that base their determination of title on registered proprietors. Courts ought to look beyond written laws to establish ownership of lands claimed by indigenous people based on their African customary laws and traditions.

Although the current Constitution of Kenya provides that land may be expropriated to promote the public benefit,⁵³⁷ courts might not interpret this provision to encompass land restitution and land redistribution. Indeed, as long as the Constitution does not expressly state that land redistribution and restitution amounts to public interest for purposes of expropriation, it is unlikely that such a move would withstand a constitutional challenge.⁵³⁸ To facilitate equitable land redistribution, an amendment to the Constitution to expressly provide for land redistribution as one of the grounds for compulsory acquisition of land would be required. This is due to the fact that while such an exercise would theoretically be in public interest for the sustenance of harmony and peace in the country, most of that land would be acquired to be granted to individuals, a position that the courts might adjudge not to be to the public benefit.⁵³⁹ According to AJ van der Walt, such a restrictive interpretation 'is not unfounded, because at least two

⁵³⁷ Sec 75(1) (a) as above.

⁵³⁸ See AJ van der Walt *Constitutional Property Law* (2005) 243, note 240.

⁵³⁹ See *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seeream* (1975) 27 WIR 329 (CA) (Trinidad & Tobago); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 (Australia) both cited in Van der Walt (n 538 above) 243, note 240.

foreign courts have indeed decided that an expropriation was not for a public purpose if the property was transferred to another private person'.⁵⁴⁰ It is therefore imperative to expressly include land redistribution as one of the public benefit purposes, to avoid such measures being declared unconstitutional.

In South Africa, the Constitution expressly defines the term 'public interest' as including 'the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'.⁵⁴¹ According to AJ van der Walt, 'to avoid the courts following the narrow interpretation the provisions in section 25(2) were framed to make this abundantly clear'.⁵⁴² Given that there is no guarantee that courts in Kenya will interpret public benefit to encompass land redistribution and restitution to individuals or communities, it is crucial that an express provision of a similar nature be adopted. Such a provision could also guard against arbitrary acquisition of land for other purposes in the name of public benefit, which would end up in the hands of undeserving individuals. It is instructive that the current Constitution provides that one may contest the legality of compulsory acquisition in the High Court as well as the amount and payment of compensation.⁵⁴³ That guarantee is important to ensure that such expropriation is only used for purposes for which it is designed. Where there is expropriation of lands on public interest prompt and full compensation shall be made to affected communities.

⁵⁴⁰ As above; see also cases where courts have indeed interpreted public purpose to include transfer of property to individuals for purposes of land reform as amounting to public interest in Van der Walt (n 538 above).

⁵⁴¹ See sec 25(4) (a) Constitution of South Africa.

⁵⁴² Van der Walt (n 538 above) 244.

⁵⁴³ See sec 75(2) Constitution of Kenya.

As stated earlier, it is 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 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.

Indigenous peoples' traditional lands constitute property as protected by international instruments.⁵⁴⁴ The norms and standards enumerated by these instruments are useful benchmarks for domestic courts while interpreting the constitutional provisions. The right to property as sought by indigenous peoples has been positively interpreted by the African regional human rights treaty monitoring body. In particular, the African Commission on Human and Peoples' Rights has held that land can constitute property for the purposes of article 14 of the Charter.⁵⁴⁵ The Commission has also held that the right to property includes the right to have access to one's property and not to have one's property invaded or encroached upon.⁵⁴⁶ The Commission has further recognised that 'owners have the right to undisturbed possession, use and control of their

⁵⁴⁴ Anaya (n 37 above) 142 citing art 17 of the Universal Declaration on Human Rights which states that 'everyone has the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'; see also arts 14, 20, 21 & 22 African Charter; Arts 1(2), 17, 23, 27 ICCPR. Art 14 African Charter provides: 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 art 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'.

⁵⁴⁵ *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples' Rights, Communication Nos. 54/91, 61/91, 98/93, 164/97 & 196/97 and 210/98 (2000) para 128.

⁵⁴⁶ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, African Commission, Communication. Nos. 140/94, 141/94, 145/95 (1999) para 54.

property however they deem fit'.⁵⁴⁷ The Inter-American Commission on Human Rights has also interpreted the right to property⁵⁴⁸ in the American Convention on Human Rights, as including the traditional lands and resources of indigenous peoples.⁵⁴⁹ 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'.⁵⁵⁰

ILO Convention No 169 also emphasizes the need for states to respect and protect the collective aspects of indigenous peoples' land. Article 14(1) of that Convention affirms the following:

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 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.⁵⁵¹ The Convention thus provides a meaningful framework to be emulated by municipal

⁵⁴⁷ *Huri-Laws v. Nigeria*, African Commission, Communication No. 225/98 (2000) para 52.

⁵⁴⁸ *Anaya* (n 37 above) 145; *Awas Tingni case* (n 72 above) para 146-151.

⁵⁴⁹ *Mary and Carrie Dann v United States* (n 73 above) para 130; see also *Maya Indigenous Communities v Belize* (n 73 above) para 115-120; see also *Awas Tingni case* (n 72 above) paras 148 & 149.

⁵⁵⁰ As above.

⁵⁵¹ 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 40th 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

jurisdictions. 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 provisions of various African instruments on human and peoples' rights, the Charter of the United 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 legal framework.⁵⁵² It follows that even in disputes beyond the domestic level, in forums such as the African Commission and the African Court on Human and Peoples' Rights, these institutions ought to be informed and inspired by international norms during their deliberations. Therefore, although not always binding, these international standards point to developing jurisprudence that recognizes indigenous peoples' land rights.

ILO Convention 169 further provides for the recognition of indigenous land tenure systems,⁵⁵³ which typically are based on long-standing custom and traditions. These systems regulate community members' relative interests in collective landholdings, and they also have a 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 natural resources

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 L Swepston *The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption* in CP Cohen (ed) *Human rights of indigenous peoples* (1998) 17-36; see also Thornberry (n 37 above) 320-367.

⁵⁵² The ILO is now one of the specialized agencies of the UN, see art 57 and 63 of the United Nations Charter; see Thornberry (n 37 above) 323.

⁵⁵³ Art 17(1) ILO Convention No 169.

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.’⁵⁵⁴

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,⁵⁵⁵ and to safeguard their rights to natural resources in the lands occupied by them, including the use, management, and conservation of these lands.⁵⁵⁶ 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’.⁵⁵⁷ The provision further demands that ‘where consent can not be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations’.⁵⁵⁸ 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’.⁵⁵⁹ 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

⁵⁵⁴ Art 13(2) ILO Convention No 169.

⁵⁵⁵ Art 14(2) as above.

⁵⁵⁶ Art 15(1) as above.

⁵⁵⁷ Arts 16(1) (2) as above.

⁵⁵⁸ Art 16(2) as above.

⁵⁵⁹ Art 16(3) as above.

or injury’.⁵⁶⁰ 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.

The United Nations Declaration on the Rights of Indigenous Peoples also provides important standards for the protection of indigenous peoples’ rights to land and natural resources.⁵⁶¹ The adoption of the Declaration took over two decades of global negotiations to accomplish, which importantly included the input of indigenous peoples.⁵⁶² However, before the eventual adoption of the Declaration, African states refused to support it,⁵⁶³ thus holding up the passing of an important tool for protecting the rights of indigenous peoples, due to a number of concerns.⁵⁶⁴

The reservations of the African group included the following issues:

- (a) the definition of indigenous peoples;
- (b) the issue of self-determination;
- (c) the issue of land ownership and the exploitation of resources;
- (d) the establishment of distinct political and economic institutions; and
- (e) the issue of national and territorial integrity.⁵⁶⁵

⁵⁶⁰ Art 16(4) & 16(5) as above.

⁵⁶¹ See articles 10; 26; 27; 28; and 29 UN Declaration on the Rights of Indigenous Peoples.

⁵⁶² See generally Anaya (n 37 above) 63-66.

⁵⁶³ See Resolution of Namibia on behalf of the Group of African States, UN GA, 61st Session, 3rd Comm., UN doc. A/C.3/61/L.57/Rev. 1, 2006; see also AU decision on the UN Declaration on the Rights of Indigenous Peoples, doc. Assembly/AU/Dec. 141 (VIII), 30 January 2007; Africa Group, *Draft Aide Memoire* (n 42 above).

⁵⁶⁴ See Resolution of Namibia as above.

⁵⁶⁵ See Advisory Opinion of the African Commission (n 43 above) para 3.

Following the initial reluctance by African states to adopt the Declaration, the African Commission on Human and Peoples' Rights issued an Advisory Opinion to members of the African Union, which reiterated the significance of this instrument to indigenous peoples all over the world, including those in Africa.⁵⁶⁶ The Advisory Opinion comprehensively responded to each of the African states' concerns. The gist of the opinion was to demonstrate that the apprehension on the part of African states was unfounded. The opinion clarified that the standards and norms enumerated by the Declaration were indeed consistent with the African Charter on Human and Peoples' Rights.⁵⁶⁷

Although there is no empirical evidence as to the influence the opinion had on African states in voting for the adoption of the UN Declaration on Indigenous Peoples,⁵⁶⁸ its considerable weight in their eventual decision to support the Declaration in New York can not be discounted.⁵⁶⁹ The Declaration is therefore a useful tool for indigenous peoples in Africa, as is the case across the globe, due to its entrenchment of standards and norms that seek to accord marginalised groups some dignity and equal treatment by the law.

⁵⁶⁶ See Advisory Opinion of the African Commission (n 43 above) para 3.

⁵⁶⁷ As above.

⁵⁶⁸ The UN Declaration on the Rights of Indigenous Peoples was adopted by a recorded vote of 143 in favour to 4 against, with 11 abstentions. While none of the Africa states voted against there were 3 abstentions (Burundi, Kenya and Nigeria), 14 other African states were absent during the vote see Press Statement, *General Assembly Adopts Declaration On Rights Of Indigenous People: 'Major Step Forward' Towards Human Rights For All, Says President*, UN Doc. GA/10612, (Sep. 13, 2007), available at <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> accessed 10 August 2008.

⁵⁶⁹ Interview with Robert Eno, during the 42nd Ordinary Session of the African Commission on Human and Peoples Rights in Congo, Brazzaville, on 16 November 2007, parts of which are reproduced in GM Wachira, *The African Court on Human and Peoples Rights*, Minority Rights Group International (forthcoming 2008).

Related to the issue of land rights, article 26 of the Declaration provides that ‘indigenous peoples have the right to own, use, develop and control their 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’.⁵⁷⁰

The Convention on Biological Diversity⁵⁷¹ is yet another important instrument, to which Kenya is a party,⁵⁷² which lays down 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’.⁵⁷³ The biological diversity of indigenous peoples encompasses their traditional lands and natural resources which shall be respected, preserved and protected in accordance with their culture and lifestyle. The Convention encourages the equitable sharing of the benefits arising from the utilization of indigenous peoples’ knowledge, innovations and practices.

⁵⁷⁰ Art 26 UN Declaration on the Rights of Indigenous Peoples.

⁵⁷¹ Convention on Biological Diversity adopted in 1992.

⁵⁷² Ratified on 22 July 1994.

⁵⁷³ Art 8(j) Convention on Biological Diversity.

Other standard-setting bodies, such as the World Bank, have also adopted policies that are in line with the emerging standards on the protection of indigenous peoples' land and resource rights.⁵⁷⁴ Although such policies are for the Bank's internal use 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.⁵⁷⁵ While not binding, they play a crucial role in states' engagement with indigenous peoples, especially in most countries that have World-Bank-funded projects. Kenya has on certain occasions espoused World Bank policies for purposes of borrowing funds ostensibly for 'indigenous peoples' benefit'.⁵⁷⁶ 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'.⁵⁷⁷ The Bank requires that the projects it finances ensure that a process of free, prior and informed consultation is undertaken. This requirement applies even to projects impacting upon indigenous peoples' lands and resources.⁵⁷⁸

⁵⁷⁴ World Bank Operational Manual, Operational Policies (OP 4.10) January 2007.

⁵⁷⁵ For example it is obvious that the Policy relies on standards enunciated by the ILO Convention No 169 particularly Part II on land. The work of the UN Working Group on Indigenous Populations that resulted in the UN Declaration on the Rights of Indigenous Peoples.

⁵⁷⁶ 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).

⁵⁷⁷ Para 2 World Bank Operational Policy Manual (n 574 above).

⁵⁷⁸ Para 1 & 2 as above.

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.⁵⁷⁹ The principle of self-determination is a fundamental pillar of the UN Charter.⁵⁸⁰ The principle has since been entrenched in common article 1 of the ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR). The article 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’.⁵⁸¹ Key to indigenous peoples’ protection is the Convention’s further provision on the right to self-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 principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.’⁵⁸² It is also instructive that the African Charter entrenches self-determination as a right, worded in an almost similar fashion with the International Bill of Rights.⁵⁸³

While the principle of self-determination as enunciated in the UN Charter, has found expression in several instances – notably the end of colonialism, the general ban on the use of force, and

⁵⁷⁹ See Anaya (n 37 above) 141-148.

⁵⁸⁰ Art 2 UN Charter; The other principles are: peaceful settlement of disputes; and prohibition of the threat or use of force.

⁵⁸¹ Art 1(1) ICCPR; Art 1(1) ICESCR.

⁵⁸² Common art 1(2) ICCPR & ICESCR.

⁵⁸³ Art 20 & 21 African Charter. 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.’

access by all racial groups to government – it is its modern application as a human right that affords indigenous peoples a ground for seeking justice and equality in relation to their traditional land rights.⁵⁸⁴ Anaya aptly captures this position and its rationale in a passage that is worth quoting 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.⁵⁸⁵

Indigenous peoples in most states do not demand self-determination in the form of secession but seek the application of this right in ‘the pursuit of their political, economic, social and cultural development within the framework of an existing state’.⁵⁸⁶ Such application has been termed

⁵⁸⁴ Anaya (n 37 above) 8; see also Thornberry (n 35 above) 317.

⁵⁸⁵ As above.

⁵⁸⁶ See A Cassese *International Law* (2005) 62 citing the words of the Supreme Court of Canada in Reference *re Secession of Quebec* 1998) 161 DLR (4th) 385, 437-8; MN Shaw *International law* (2003) 273; see Anaya (n 37 above) 9; M Scheinin M ‘Indigenous peoples’ rights under the International Covenant on Civil and Political Rights’ in J Castellino & N Walsh (ed) *International Law and Indigenous Peoples* (2005) 9; see also J Anaya ‘self determination as a collective human right under international law’ in P Aiko & M Scheinin (ed) *Operationalising the right of indigenous peoples to self determination* (2000) 3-18.

‘internal self-determination’.⁵⁸⁷ 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* (*belonging to no one*).⁵⁸⁸ The principle has also been invoked to invalidate treaties entered into between indigenous peoples and colonial and other dominant powers, as well as treaties lacking ‘prior and genuine consultation’ of these groups.⁵⁸⁹

The HRC has observed that exercise of the right to self-determination is essential for the realisation of other human rights.⁵⁹⁰ 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 v New Zealand*,⁵⁹¹ 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’.⁵⁹² This position 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

⁵⁸⁷ Cassese (n 586 above) 61; Shaw (n 586 above) 273; see also art 3 & 4 UN Declaration on the Rights of Indigenous Peoples.

⁵⁸⁸ Cassese (n 586 above) 63, 81; see also Shaw (n 586 above) 424-6; Western Sahara ICJ advisory Opinion (n 170 above) 12.

⁵⁸⁹ As above; see also generally Brownlie (n 66 above).

⁵⁹⁰ 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 (n 586 above) 272.

⁵⁹¹ *Mahuika et al. v New Zealand* (n 359 above).

⁵⁹² 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.

‘freely pursue their economic, social and cultural development’.⁵⁹³ The HRC has also emphasized 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’.⁵⁹⁴

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 right to self determination’),⁵⁹⁵ some procedural hurdles stand in the way of their attempt to realize 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’.⁵⁹⁶ 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

⁵⁹³ Art 1(1) ICCPR.

⁵⁹⁴ 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).

⁵⁹⁵ 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 (n 586 above) 12 fn 35-39.

⁵⁹⁶ See *Lubicon Lake Band v Canada* (n 73 above) para 13.3; *Ivan Kitok V Sweden*, Communication 197/1985, UN Doc. A/43/40 (1988), para 6.3; *JGA Diergaardt et al v Namibia* (n 592 above) para 10.3; see Shaw (n 586 above) 272.

Covenant.⁵⁹⁷ The Committee has found a link and reformulated alleged breaches of self-determination (article 1) with issues under article 27 of the Convention.⁵⁹⁸ 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 the recognition and protection of indigenous peoples' land and resource rights.

Under the African human rights system, individuals on their own and as members of collectives have a right to approach the African Commission on Human and Peoples' Rights to litigate any of the fundamental rights enshrined in the Charter, including the right to self-determination.⁵⁹⁹ In fact, one of the unique features of the African Charter is that it 'exemplifies the interplay between individual and group rights'.⁶⁰⁰ These 'rights phrased as 'peoples' rights' are stipulated on the

⁵⁹⁷ See for example *Lubicon Lake Band v Canada* (n 73 above) para 13.4; Shaw (n 586 above) 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 J Castellino 'The right to land international law & indigenous peoples' in Castellino & Walsh (n 586 above) 110.

⁵⁹⁸ *Lubicon Lake Band v Canada* (n 73 above) para 32.2; see Thornberry (n 37 above) 129.

⁵⁹⁹ For a detailed discussion on admissibility under the African Charter see Viljoen (n 396 above) 61-99; see also the art 56 African Charter which provides that: Communications relating to human and peoples' rights referred to in art 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,
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.

⁶⁰⁰ Arts 19-24 African Charter; see P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2000) 266.

basis of equality, right to existence, own and dispose of wealth and natural resources, development, peace and security and satisfactory environment'.⁶⁰¹ While the jurisprudence of the African Commission on 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*⁶⁰² and the *Ogoni* cases.⁶⁰³ In the *Katangese case*, the Commission did not find a violation of the right to self-determination. It, however, affirmed the applicability of this right in 'any of the following ways: 'independence, self government, local government, federalism, confederalism, unitarism, [and] any other form of relations that accords with the wishes of the people'.⁶⁰⁴ 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'.⁶⁰⁵

The Commission's view is similar to that later held by the Supreme Court of Canada in the *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

⁶⁰¹ See F Ouguerouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (2003) 203; P Nobel 'The concept of "peoples" in the African Charter on Human and Peoples' Rights' in P Nobel, P (ed) *Refugees and development in Africa* (1987) 15.

⁶⁰² Communication 75/92, *Katangese Peoples Congress v Zaire*, 8th Annual Activity Report in (2000) AHRLR 72 (ACHPR 1995) 72-73 (*Katanga case*).

⁶⁰³ *SERAC case* (n 470 above).

⁶⁰⁴ *Katanga case* (n 602 above) para 4.

⁶⁰⁵ As above para 6.

consistently with the maintenance of the territorial integrity of those states'.⁶⁰⁶ From the foregoing, it is unlikely that the Commission or the soon-to-be-established African Court would ever affirm a right to self-determination in a way that would challenge the territorial sovereignty of an African state. In any case, indigenous peoples, including those self-identifying as such in Africa, mostly do not seek to exercise this right beyond the territorial boundaries of independent states.⁶⁰⁷ Instead, they demand recognition and respect for their preferred way of life in accord with principles of equality and justice.⁶⁰⁸ 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'.⁶⁰⁹ More importantly, the standards make it mandatory that that 'in no case shall a people be deprived of its own means of subsistence'.⁶¹⁰ The African Commission has had occasion to deliberate on this matter in the *SERAC case*⁶¹¹ and found that Nigeria breached the Ogoni people's group rights relative to

⁶⁰⁶ *Reference re Secession of Quebec case* (n 586 above) 385, 436.

⁶⁰⁷ *Anaya* (n 37 above) 8.

⁶⁰⁸ As above; see *Gilbert* (n 34 above) 610.

⁶⁰⁹ Common art 1 (1) ICCPR & ICESCR; Art 21 African Charter.

⁶¹⁰ As above.

⁶¹¹ *SERAC case* (n 470 above) para 45, 55-58.

articles 21⁶¹² and 24⁶¹³ of the African Charter.⁶¹⁴ 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.⁶¹⁵ Apart from finding violation of the group rights of the Ogoni, the decision is important in that it expressly acknowledged 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'.⁶¹⁶ Furthermore, the Commission reaffirmed the relevance and applicability of international standards in the determination of matters before it alleging violation of the African Charter's provisions.⁶¹⁷ The Commission also called upon the state to engage and consult its peoples on issues and development projects that affect them.⁶¹⁸

⁶¹² Art 21:1 African Charter .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.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

⁶¹³ Article 24 African Charter: All people shall have the right to a general satisfactory environment favourable to their development.

⁶¹⁴ *SERAC case* (n 470 above) para 70.

⁶¹⁵ IWGIA & ACHPR (n 35 above) 18.

⁶¹⁶ *SERAC case* (n 470 above) para 45.

⁶¹⁷ As above para 48 & 49.

⁶¹⁸ *SERAC case* (n 470 above) para 71.

The African Charter, like the International Bill of Rights, provides a useful framework and avenue for indigenous peoples to enjoy 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 Ogoni.⁶¹⁹ Indigenous peoples may therefore find recourse in international standards pursuant to the right to self-determination as established internationally and regionally whenever violation of their land and resource rights occurs. Indigenous peoples may thus claim their entitlements before existing treaty monitoring mechanisms such as the HRC and regionally the African Commission or the African Court.⁶²⁰

Specific instruments that enshrine indigenous peoples' rights, such as ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries⁶²¹ and the recently adopted UN Declaration on the Rights of Indigenous Peoples,⁶²² reiterate that self-determination is crucial

⁶¹⁹ As above para 63.

⁶²⁰ See Protocol to the African Charter establishing the African Court on Human and Peoples' Rights 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 3rd 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 2nd 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 6th Summit in Khartoum, Sudan and it is soon hoped to become operational.

⁶²¹ ILO Convention No 169.

⁶²² See UN 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. The Declaration 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> accessed on 13 September 2007.

to the realization of indigenous peoples' fundamental rights. Article 1(2) of the 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 to 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'.⁶²³

It appears that the drafters of the Convention sought to limit the application of the term 'peoples' to internal self-determination in order to avoid the application of this right in its extreme, secessionist form.⁶²⁴ If so, 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'.⁶²⁵ 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.⁶²⁶ 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.

⁶²³ Art 1(3) ILO Convention (No 169).

⁶²⁴ See a detailed expose of the implication of the term 'peoples' in Anaya (n 37 above) 100- 103.

⁶²⁵ As above, 101-2.

⁶²⁶ Shaw (n 586 above) 230.

Similarly, the UN Declaration on the Rights of Indigenous Peoples, whilst guaranteeing the right to self-determination, limits its application to ‘matters relating to internal and local affairs’.⁶²⁷ 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.⁶²⁸ While the Declaration is not binding on states, and as such does not create international legal obligations, it is a unique instrument negotiated by states and its intended beneficiaries.⁶²⁹ It outlines important norms that would serve as a guide and framework in the protection of indigenous peoples all over the world.⁶³⁰ Importantly, the Declaration serves as a yardstick of states’ compliance with their international human rights obligations relative to indigenous peoples. 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.⁶³¹

⁶²⁷ Arts 3 & 4 UN Declaration on the Rights of Indigenous Peoples.

⁶²⁸ See a more detailed discussion of the debates surrounding the drafting of the Declaration relative to the principle of self determination see P Thornberry, Self determination and indigenous peoples: Objections and responses, in Aikio & Scheinin (n 75 above) 45-46.

⁶²⁹ Thornberry (n 37 above) 25-26.

⁶³⁰ See <www.iwgia.org/sw248.asp> accessed 20 May 2007.

⁶³¹ Art 60 African Charter; see also art 7 of the Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights.

4.5 Trust lands

Chapter nine of Kenya's Constitution deals with trust lands. Trusts lands 'vest in the county councils within whose jurisdiction [they are] situated.'⁶³² The county councils (local authorities) hold these lands 'for the benefit of persons ordinarily residents on that land.'⁶³³ The importance and vulnerability of these lands is underscored by their 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.⁶³⁴ However, as we have seen, the application of the customary law of the residents is constrained by the same Constitution through the requirement that such law must not be 'repugnant to any written law'.⁶³⁵ Therefore, despite its provisions on trust lands, the Constitution 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 providing 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'.⁶³⁶

⁶³² Section 115 Constitution of Kenya.

⁶³³ Section 115(2) as above.

⁶³⁴ As above.

⁶³⁵ As above.

⁶³⁶ See Lenaola *et al* (n 169 above) 231.

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 actions are attributed by Okoth-Ogendo to 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'.⁶³⁷ 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 them. The subordination of customary law to written laws 'in effect, extinguishes customary rights' to land.⁶³⁸ 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.⁶³⁹ The relevant laws for that purpose include: the Land Control Act;⁶⁴⁰ the Land Adjudication Act;⁶⁴¹ the Land Consolidation

⁶³⁷ HWO Okoth-Ogendo 'The tragic African commons: A century of exploration, suppression and submersion (2003)' *University of Nairobi Law Journal* 111.

⁶³⁸ *Lenaola et al* (n 169 above) 243.

⁶³⁹ See sec 116 Constitution of Kenya.

⁶⁴⁰ Land Control Act Laws of Kenya Cap 302.

⁶⁴¹ Land Adjudication Act Laws of Kenya Cap 284.

Act⁶⁴² and the Land (Group Representatives) Act.⁶⁴³ The laws that regulate and provide for a mechanism to register lands in Kenya include: the Registered Land Act;⁶⁴⁴ the Land Titles Act;⁶⁴⁵ the Government Lands Act;⁶⁴⁶ the Registration of Titles Act⁶⁴⁷ and the Registration of Documents Act.⁶⁴⁸ Upon registration, trust land is set aside, extinguishing ‘any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law’.⁶⁴⁹

The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya revealed the difficulty indigenous peoples have in reclaiming their lands once it is registered to outsiders.⁶⁵⁰ 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 were hampered by barriers erected by the Registered

⁶⁴² Land Consolidation Act Laws of Kenya Cap 283.

⁶⁴³ Land (Group Representatives) Act Laws of Kenya Cap 287.

⁶⁴⁴ Registered Land Act Laws of Kenya Cap 300.

⁶⁴⁵ Land Titles Act Laws of Kenya Cap 282.

⁶⁴⁶ Government Lands Act Laws of Kenya Cap 280.

⁶⁴⁷ Registration of Titles Act Laws of Kenya Cap 281.

⁶⁴⁸ Registration of Documents Act Laws of Kenya Cap 285.

⁶⁴⁹ Sec 117(2) Constitution of Kenya.

⁶⁵⁰ See Ndung’u Report (n 1 above) 140-142.

Land Act.⁶⁵¹ The RLA confers an absolute and indefeasible title on the registered owner.⁶⁵²

Indigenous peoples' customary rights in their traditional lands are to that extent extinguished in favour of the registered owner's interests. Such disregard for African customary law entrenches discrimination against indigenous peoples and compromises their ability to claim 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 required by the state in the public interest).⁶⁵³ Kenyan courts of law have also endorsed the statutory position that, for first registrations, irrespective of the land being acquired fraudulently, such title can not be cancelled or rectified.⁶⁵⁴ Such reasoning has resulted in the illegal acquisition of title

⁶⁵¹ As above.

⁶⁵² See sec 27 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 sec 28 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 sec 214 3(1) of the RLA.

⁶⁵³ See *Wanjala* (n 26 above) 174.

⁶⁵⁴ See sec 143 (1) of the RLA 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..

to land through first registration, particularly in trusts lands belonging mainly to indigenous peoples.

Through first registration, including by fraudulent means, individuals have appropriated lands belonging to indigenous peoples. Most of the indigenous peoples have no title to their traditional lands, which are held in trust by the county council. County councils, in breach of the trust relationship, illegally dispose of the lands, often in collusion with the Commissioner of Lands.⁶⁵⁵

It appears that the objective of the law in protecting first registrants is to deny local communities an opportunity to challenge these 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 withstand a constitutional challenge.⁶⁵⁶

However, such a position may not hold, in view of the fact that trust lands are governed by customary law, which is subordinate to the written law. Therefore, the position of the RLA would be upheld by the Courts. In any case, such a constitutional challenge has never been mounted in Kenya, and therefore the possibility of mounting a successful challenge is purely speculative.

The Constitution further accords the President extensive powers to set aside trust land for various purposes.⁶⁵⁷ Such purposes include for purposes of the Government of Kenya, a public body

⁶⁵⁵ See Ndung'u Report (n 1 above) 16.

⁶⁵⁶ See Ndung'u Report (n 1 above) 16.

⁶⁵⁷ Sec 118 Constitution of Kenya.

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’.⁶⁵⁸ Such abuse of power has involved illegal allotment of trust lands to individuals and companies who are not even inhabitants of the area solely for private gains.⁶⁵⁹ 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’.⁶⁶⁰ Indeed, some of the current land conflicts in Kenya are traced to the practice of its founding President Jomo Kenyatta of awarding large tracts of lands as political rewards to his friends and kinsmen. Kenyatta’s successor, former President Daniel Arap Moi, followed in his footsteps and allocated vast amounts of land for political patronage so that today relatively few individuals own most of the arable land in Kenya.⁶⁶¹

Kenya’s parliament may also grant powers to the County Council through an Act of Parliament to set aside trust land ‘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’.⁶⁶² While the law is clear

⁶⁵⁸ See Ndung’u Report (n 1 above) 53.

⁶⁵⁹ As above.

⁶⁶⁰ As above 143.

⁶⁶¹ As above 9.

⁶⁶² Section 117(1) Constitution of Kenya.

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 occasion such lands have been set aside for purely private purposes that have little if any benefit for 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.⁶⁶³ In this case, mining and prospecting licences 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 benefit from such allotment of their land to the private company.

According to international standards, indigenous peoples' culture and traditions, including their 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 their other fundamental human rights and freedoms.⁶⁶⁴ 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.⁶⁶⁵ Indigenous peoples 'conceive of their land as a substance endowed with sacred meanings, which defines their existence and identity and to which they are inextricably attached'.⁶⁶⁶ 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

⁶⁶³ See the *Endorois* case (n 3 above).

⁶⁶⁴ Daes Study (n 96 above) para.18; see also HRC General Comment No 23 (n 100 above).

⁶⁶⁵ As above; see also I Brownlie 'Rights of indigenous peoples in international law' in J Crawford, *The rights of peoples* (1988) 4.

⁶⁶⁶ Asiema & Situma (n 96 above) 150.

a material element to be enjoyed freely'.⁶⁶⁷ The survival of indigenous peoples' culture is therefore dependent on the protection of their land and resources rights.⁶⁶⁸

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.'⁶⁶⁹ The Committee's view affirms the close nexus between indigenous peoples' culture and their traditional lands and resources.

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.⁶⁷⁰ The Committee's jurisprudence similarly indicates that 'groups identifying as indigenous peoples fall under the protection of article 27 as "minorities"'.⁶⁷¹ Important international standards relevant for indigenous peoples land and resource rights' protection have emerged from the application of

⁶⁶⁷ Cobo's Report (n 50 above) para 196-197.

⁶⁶⁸ Kymlicka (n 124 above) 43.

⁶⁶⁹ HRC General Comment No 23 (n 100 above) para 7.

⁶⁷⁰ HRC General Comment No 23 (n 100 above) paras 3.2; 7 and 9; Scheinin (n 586 above) 5.

⁶⁷¹ Scheinin (n 586 above) 4.

provisions of article 27.⁶⁷² Through 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 supported by their lands and natural resources.

In the *Lubicon Lake Band* case, the UN Human Rights 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)'.⁶⁷³ According to the Committee, the state's 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.'⁶⁷⁴ 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'.⁶⁷⁵ 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.⁶⁷⁶

The application of norms embodied in 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 by the Inter American Commission on Human

⁶⁷² See for example *Lubicon Lake Band v Canada* (n 73 above); *Kitok v Sweden* (n 596 above); *et al v New Zealand* (n 359 above); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996); Länsman et al. v Finland (n 100 above) para 32.2.

⁶⁷³ *Lubicon Lake Band v Canada* (n 73 above) paras 2.3; 33.

⁶⁷⁴ As above para 33.

⁶⁷⁵ *Ivan Kitok v Sweden* (n 596 above) para 9.2.

⁶⁷⁶ As above para 4.3.

Rights to find in favour of indigenous peoples with regard to their land and resource rights.⁶⁷⁷

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.’⁶⁷⁸

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’.⁶⁷⁹ The Convention also calls upon states to recognize indigenous peoples’ land tenure systems which are based on their traditions, customs and way of life.⁶⁸⁰ Other key and relevant standards for purposes of this discussion enshrined in ILO Convention No 169 include the rights of ownership and possession; and the right to participate in the use, management and conservation of the resources.⁶⁸¹

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

⁶⁷⁷ See *Maya indigenous community of the Toledo District v Belize* (n 73 above) para 52; 55; 154; see also *Mary and Carrie Dann v United States* (n 73 above) para 61.

⁶⁷⁸ *Maya indigenous community of the Toledo District v Belize* (n 73 above) para 120.

⁶⁷⁹ Art 13 ILO Convention No169-Part II (Arts 13-19) ILO Convention 169 deals with Land.

⁶⁸⁰ Arts 13, 14 & 17 as above.

⁶⁸¹ Art 14 &15 as above.

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.⁶⁸² They have the right to own, develop, control and use their lands and territories.⁶⁸³ 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.⁶⁸⁴

4.6 Recognition and application of the concept of indigenous title in Kenya

The concept of indigenous title, which is also known as native title or aboriginal title, was described in the *Mabo* case by Justice Brennan of the High Court of Australia as having ‘its origins in and given its content by the traditional laws and customs acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’.⁶⁸⁵ The doctrine ‘recognizes that those customary indigenous laws regarding land ownership which preceded common law, should be recognized as title generating.’⁶⁸⁶ Indigenous title emanates from

⁶⁸² Art 25 UN Declaration on the Rights of Indigenous Peoples.

⁶⁸³ Art 26 as above.

⁶⁸⁴ Art 27 as above.

⁶⁸⁵ See *Mabo v Queensland* (n 72 above) 58.

⁶⁸⁶ See Gilbert (n 34 above) 585; see also S J Anaya ‘Maya aboriginal land and resource rights and the conflict over logging in Southern Belize’ (1998) 1 *Yale Human Rights & Development Law Journal* 30.

recognition by courts over time that certain indigenous land rights should survive colonization.⁶⁸⁷

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.⁶⁸⁸ Several characteristics consistently distinguish aboriginal 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.⁶⁸⁹

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 non-extinguishment.⁶⁹⁰

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.⁶⁹¹ These include South Africa⁶⁹² and Botswana,⁶⁹³ whose jurisprudence is compared to some of the Kenyan cases.

⁶⁸⁷ TM Chan ‘The Richtersveld challenge: South Africa finally adopts aboriginal title *in Hitchcock & Vinding* (n 96 above) 118; see also TW Bennett & K Powell ‘Aboriginal title in South Africa revisited’ (1999) 15 *South African Journal of Human Rights* 449; K Lehmann ‘Aboriginal title indigenous rights and the right to culture (2004) 20 *South African Journal of Human Rights* 91.

⁶⁸⁸ Chan (n 685 above) 118; see also *Richtersveld Community v Alexkor Ltd and another* 2003 (6) BCLR 583 (SCA) (*South Africa*) para 38-41.

⁶⁸⁹ As above; Bennett & Powell (n 687 above) 449; LAH Note ‘Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community v Alexkor Ltd and another*’ (2002) 18 *South African Journal of Human Rights* 437.

⁶⁹⁰ Chan (n 687 above) 119; Bennett & Powell (n 687 above) 463-69.

⁶⁹¹ See Gilbert (n 34 above) 585.

⁶⁹² *Alexkor v Richtersveld* (SCA) (n 688 above) paras 15, 18.

⁶⁹³ See *Sesana and others v Attorney General* (n 72 above).

In South Africa, the Supreme Court of Appeal, in the *Richtersveld* case, pointed to the elements for proving aboriginal title as precedent for proving elements of a customary law interest.⁶⁹⁴ The Supreme Court identified each of the elements of an aboriginal title claim but avoided finding a right under aboriginal title. The elements identified included the fact that: the indigenous Richtersveld Community was a distinct ethnic group,⁶⁹⁵ who occupied the land for a long time⁶⁹⁶ prior to and at the time of annexation;⁶⁹⁷ they enjoyed the exclusive beneficial occupation of the land;⁶⁹⁸ and they had a social and political structure,⁶⁹⁹ that included laws governing the land⁷⁰⁰ which they enforced.⁷⁰¹ The Constitutional Court, in its decision in this case, relied on the same characteristics to illustrate that the Richtersveld community had a right of indigenous law ownership.⁷⁰²

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 claimed that it did not have an

⁶⁹⁴ Chan (n 687 above) 124.

⁶⁹⁵ *Alexkor v Richtersveld* (SCA) (n 688 above) paras 15, 18.

⁶⁹⁶ As above, paras 14, 22.

⁶⁹⁷ As above, paras 14.

⁶⁹⁸ As above paras 18, 22, 24.

⁶⁹⁹ As above paras 15, 18, 19.

⁷⁰⁰ As above paras 18, 19.

⁷⁰¹ As above para 29.

⁷⁰² *Alexkor v Richtersveld* (n 72 above) para 62.

opportunity to employ it for want of arguments in support of its application.⁷⁰³ That means that the Court in the circumstances for lack of evidence to support the application of the concept decided to rely only on submissions adduced on the statutory provisions.⁷⁰⁴

On the basis of that finding by the court, it appears and indeed is arguable that had submissions been advanced proving the Ogiek's title to the land, the Court may have arrived at a different verdict. The Court sought to distinguish the Ogiek case and the Australian *Mabo* case, and by extension the application of the doctrine of aboriginal title in Kenya, on the basis that the community did not prove that they had proprietary rights over the land they claimed.⁷⁰⁵

According to the Court, the Ogiek:

were concerned more with hunting and gathering, with no territorial fixity. They traditionally shifted from place to place in search of hunting and gathering facilities. For such people climatic changes controlled their temporary residence. Whether a people without a fixity of residence could have proprietary rights to any given piece of land, or whether they only had rights of access to hunting and gathering grounds - whether a right of access to havens of birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found- were not the focus of the arguments in this case and the material legal issues arising from the various land law regimes were not canvassed before us as they were in the *Mabo* case.⁷⁰⁶

⁷⁰³ *Ogiek* case (n 3 above) 15, 16, 21.

⁷⁰⁴ As above.

⁷⁰⁵ *Ogiek* case (n 3 above) 16.

⁷⁰⁶ *Ogiek* case (n 3 above) 16.

The inference that one can draw from this reasoning is that the court did not consider ‘hunting and gathering with no territorial fixity’ as sufficient to establish proprietary rights.⁷⁰⁷ Alternatively, this passage seems to suggest that the Ogiek should have convinced the Court that despite shifting from place to place they did possess rights to the property in dispute.⁷⁰⁸ If indeed the Court was of the view that the community did not possess property rights to the land for lack of settlement, which seems to have been the case, this would confirm Kenyan courts’ reluctance to recognize rights in land on the basis of pre-colonial African customary law.

From the Court’s apparent questioning of whether a community without a fixed abode can legitimately claim rights to specific lands, the Court reflected the colonial view that such lands were unoccupied and could be appropriated.⁷⁰⁹ Such lands were erroneously regarded as waste lands or *terra nullius* (belonging to no one).⁷¹⁰ The doctrine of *terra nullius*, as we have seen, has since been challenged and declared racially discriminatory for seeking to marginalize indigenous peoples’ way of life and traditions.⁷¹¹ It is therefore unfortunate that the Kenyan High Court seemed to imply that the Ogiek, by virtue of their then lack of territorial fixity, had no proprietary rights to the lands they claimed. In other progressive jurisdictions, such as South Africa, the

⁷⁰⁷ As above.

⁷⁰⁸ As above 21.

⁷⁰⁹ See Law Officers to Foreign Office, 13 December 1989, Foreign Office Confidential Print 113, cited in Mweseli (n 229 above) 7.

⁷¹⁰ See the ICJ ruling on the invalidity and erroneous application of the doctrine in *Western Sahara, Advisory Opinion* (n 170 above) 12; see also the *Mabo v Queensland* (n 72 above) where the High Court in Australia the doctrine was declared unjust and discriminatory and therefore unacceptable; CERD Ninth Periodic Report of Australia (n 507 above) para 540.

⁷¹¹ As above.

Constitutional Court has held that ‘a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people’.⁷¹²

Historical accounts of the Ogiek indicate that they are likely to have been among the very first peoples of modern day Kenya.⁷¹³ According to Thomas Spear:

the Ogiek say that have always lived in the areas they inhabit today. This statement is reinforced by the traditions of their neighbours, all of whom recall that the Okiek (or people like them) as present in the area when they arrived and often credit Okiek with granting them land and facilitating their settlement. The kikuyu claim they obtained land from the Okiek (called Athi or Asi in their traditions and that many of the earliest Kikuyu clans were founded by assimilated Okiek.⁷¹⁴

While admittedly due to successive migrations among the early tribes of Kenya different communities were displaced and settled in various other places beyond their original lands, the Ogiek are said to have occupied the Mau forest area by the time of colonialism.⁷¹⁵ Indeed according to the Carter Land Commission Report of 1933:

There is one section of the Mau Dorobo which is usually known as Tinnet, who appear to have better claims than most to remain where they are. They reside in the south eastern Mau Forest, do not appear

⁷¹² *Alexkor v Richtersveld* (SCA) (n 688 above) paras 23-24.

⁷¹³ n 13 above.

⁷¹⁴ Spear (n 13 above) 49.

⁷¹⁵ Carter Report (n 252 above) 259 paras 972-985.

to have any very close association with any native tribe, and are strongly opposed to moving; some of them appear to have resided in or near the south eastern Mau forest for many great years.⁷¹⁶

From the foregoing it is evident that the Ogiek, by virtue of their occupation of the Tinnet area in Mau forest from time immemorial and on the basis of the customary laws, possessed proprietary rights to the land in question. In the Canadian case of *Delgamuukw*, the Court acknowledged that ‘conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title.’⁷¹⁷ Similarly, the Kenyan High Court should have found that the Ogiek had aboriginal rights in the land in dispute. As indicated in the Carter Land Commission Report of 1933, the community occupied the subject land for a ‘great many years’ and continued to do so way past the declaration of the area as a forest.⁷¹⁸

In dismissing the Ogiek claim, the Court seems to have implied that even if the Ogiek had aboriginal rights to the land in question, they had ceded them to the government.⁷¹⁹ Such an interpretation by the Court erroneously assumes that the fact that the state had regulated the use of the forest through gazettelement amounted to extinguishment of the aboriginal rights of the Ogiek. However, that is not necessarily the case since regulation does not automatically amount

⁷¹⁶ As above para 983.

⁷¹⁷ *Delgamuukw v British Columbia* (n 72 above) para 152 see also para 126, 153, 198 & 258; see also *Mabo v Queensland* (n 72 above) para 43.

⁷¹⁸ Carter Report (n 252 above) para 983.

⁷¹⁹ *Ogiek* case (n 3 above) 16.

to extinguishment of aboriginal rights.⁷²⁰ The Canadian Supreme Court, in *R v Sparrow*, held that whoever asserts extinguishment must prove clear and plain legislative intent to extinguish aboriginal rights.⁷²¹ The area in dispute in Kenya (Tinet forest) is reported to have been declared a forest area by the colonial authorities and therefore regulated by the Forest Act.⁷²² However, as was held in *Sparrow*, the legislation in question can only extinguish indigenous rights to land if it expressly states that this was the intention of the law.⁷²³ Similarly in Botswana, the High Court has held that the declaration of lands occupied by the San as a game reserve did not extinguish the community's rights to their traditional lands.⁷²⁴

More recently, the Supreme Court of Belize in 2007 reaffirmed that the 'mere acquisition or change of sovereignty did not in and of itself extinguish pre-existing title to or interests in the land'.⁷²⁵ In a similar vein, colonial rule could not have extinguished the aboriginal rights of the Ogiek and it was therefore erroneous for the Kenyan High Court to suggest that it did.⁷²⁶ In the Belize case, the Supreme Court also correctly held 'that neither the several Crown Lands Ordinances nor the succeeding National Lands Act 1992 expressly or by implication overrode or

⁷²⁰ See Supreme Court of Canada in *R. v Sparrow*, (1990) 1 SCR 1076.

⁷²¹ As above, 1076-7.

⁷²² Forests Act Laws of Kenya Cap 385; see *Ogiek* case (n 3 above) 10.

⁷²³ *R. v Sparrow* (n 720 above) 1076-77.

⁷²⁴ *Sesana and Others v Attorney General* (n 72 above) H.6 para 1.

⁷²⁵ In the Supreme Court of Belize, (A.D. 2007) consolidated cases of *Aurelio Cal in his own behalf and on behalf of the Maya village of Santa Cruz and others v the Attorney General of Belize and the Minister of Natural Resources and Environment Claim No. 171 of 2007* and *Manuel Coy in his own behalf and on behalf of the Maya village of Conejo and others v the Attorney General of Belize and the Minister of Natural Resources and Environment Claim No. 172 of 2007*, para 77.

⁷²⁶ *Ogiek* case (n 3 above) 4.

extinguished the already existing Maya people's rights and interests in their lands'.⁷²⁷ Indeed, the Privy Council had long before upheld the common-law position that colonial rule and laws could not simply disregard the rights of the original inhabitants of the colonized territory.⁷²⁸

Similarly, it is arguable the Kenyan Forest Act which was enacted during the colonial rule was not intended to dispossess communities that had rights over the land in question. In the words of Carter Land Commission Report of 1933, the Ogiek (Dorobo) 'had better claims that most to remain' in the forest.⁷²⁹ According to that Commission, the real reason the Ogiek were moved from the forest was not to protect the forest resource but to 'civilize' them.⁷³⁰ The bid to 'civilize' them was not only assimilationist in its design but also disregarded the community's wishes and customary laws and rights. It is therefore not surprising that the community time and gain returned to the forest, sometimes at the acquiescence of the state.⁷³¹ This practice illustrates the fact that the community believed that their customary rights to the Tinet forest were still intact. With no evidence to the contrary, those rights were not extinguished.

It is on record that the Kenyan High Court did not entertain arguments as to whether the enactment of the Forest Act had extinguished the aboriginal rights of the Ogiek, since they were

⁷²⁷ In the Supreme Court of Belize (n 725 above) para 86.

⁷²⁸ *Amodu Tijani v Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 at 407; see other common law cases that have upheld this position in (n 72 above; see also Gilbert (n 34 above) 583-612.

⁷²⁹ Carter Report (n 252 above) 260, para 983.

⁷³⁰ Carter Report (n 252 above) para 984.

⁷³¹ *Ogiek case* (n 3 above) 11 and 12.

not made.⁷³² Despite the lack of submission of arguments of extinguishment by the State, the Court erroneously held that the community ceded their rights over their traditional lands to the government.⁷³³ This finding was based on a narrow interpretation of the statutory provisions, which the court admits denied it an opportunity to analyze all of Kenyan land law.⁷³⁴ Had it done so, it is likely that it would have found that the Ogiek had an aboriginal right to the disputed land, requiring strict proof of extinguishment.

However, it is important to note that even in South Africa, where the doctrine of aboriginal title may indeed be applicable, the courts elected to utilize the more straightforward route of relying on statutory restitution provisions.⁷³⁵ Therefore, while it is important to recognize and apply the doctrine of aboriginal title where there is no 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.

⁷³² As above 15 & 16.

⁷³³ As above 16.

⁷³⁴ As above 15.

⁷³⁵ See Bennett & Powell (n 687 above) 450; see also Chan (n 687 above) 118, see also *Richtersveld Community and others v Alexkor Ltd and Another* 2001 (3) SA 1293 (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.

4.7 Chapter conclusion

This chapter has demonstrated that there are resources within Kenya's legal framework that can be used to vindicate indigenous peoples' land rights. These include constitutional guarantees of the right to life, non-discrimination and property rights, the constitutional trust lands provisions, and the concept of aboriginal title. However, the possibilities presented by these resources are attenuated by restrictive interpretation and competing legal protection for the holders of legal title to land. By recourse to comparative jurisprudence and international standards, the chapter has also demonstrated that a progressive judiciary could use existing laws to recognize indigenous peoples' land rights. However, relying on the judiciary alone for such recognition is not enough due to various limitations on courts in applying such alternative legal resources. It is therefore important that the existing legal framework in Kenya be reformed. This is the subject of chapter six. The next chapter, chapter five, surveys some of the legal measures that have been employed in two comparable jurisdictions, South Africa and Namibia, to vindicate indigenous peoples' land rights. In so doing, the chapter tries to identify measures that can be used to inform the development of a suitable legal framework for indigenous peoples' rights in Kenya.