CASUALTIES OF MODERNIZATION: SECURING LAND RIGHTS OF INDIGENOUS PEOPLES

(*Lessons from Kenya, South Africa and Australia)*

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DECLARATION

I declare that this thesis is based on my original analysis and has never been submitted in any other institution of learning. Every external source of information therein has been duly acknowledged and referenced as such.

I certify that this thesis is in accordance with the requirements for the partial fulfillment of the Master of Arts in Human Rights Law for the Central European University.

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Jackline Mwende Mwanthi

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Date

LIST OF ABBREVIATIONS

ACHPR	-African Commission on Human and Peoples' Rights
CEMIRIDE	- The Centre for Minority Rights Development
CERD	- Committee on the Elimination of Racial Discrimination
DFID	-Department for International Development
eKLR	-Electronic Kenya Law Reports
FAO	- Food and Agriculture Organization
ICCPR	-International Convention on Civil and Political Rights
ICERD	- International Convention on the Elimination of All Forms of Racial Discrimination
ILO	-International Labour Organization
IPWG	-Indigenous Peoples Working Group
IWGIA	-International Working Group on Indigenous Affairs
KLR	-Kenya Law Reports

KNCHR	-Kenya National Commission on Human Rights
MRC	- The Minority Reforms Consortium
MRG	-Minority Rights Group
SA	- South Africa
SACC	- South Africa Constitutional Court
UN	-United Nations
UNDRIP	-United Nations Declaration on the Rights of Indigenous Peoples
UNPFI	-United Nations Permanent Forum on Indigenous Issues
WGIP	-Working Group on Indigenous Populations

SUMMARY

This thesis examines the contemporary theoretical frameworks in claiming rights of indigenous peoples by analyzing the debates around the prevailing 'no-definition' approach for indigeneity, the contradictions and complications brought about by the self-determination discourse as well as the concept of minorities. The analysis of this thesis is based on the comparison between indigenous peoples' situation in South Africa, Kenya and Australia.

The thesis comprise of four chapters with the first chapter dwelling much on the various understandings of the concept of indigeneity within the context of various international human rights frameworks and the pitfalls these variants have fallen into. It also will trace the genesis and development of the concept of indigenous peoples in the national and international regimes and explore the politics of definition which have arisen as a result and what this has portended to indigenous peoples rights protection.

In each definition that has been advanced regarding indigenous peoples, the thesis interrogates whether territorial connection stands out as a foundation within which indigenous peoples rights can be understood. The last part of chapter one looks at the theoretical and practical application of the current definitions within the framework of the three commonwealth jurisdictions identified earlier on. The concept of minorities versus indigenous is explored particularly in the light of the African contextual understanding versus western context and how the significance of that debate has impacted on indigenous peoples rights in general.

Second chapter looks at the nature of the claims made by indigenous peoples and explores the inherent connection these claims have with their territories. The anthropological and

sociological perspectives are invoked to better reinforce the understanding of this special connection indigenous have with land. Through back up from the two discourses, this chapter elevates the connection with territory as the backbone for all the indigenous claims.

Subsequently, the chapter assesses how land permeates so profoundly in indigenous peoples' life and the deep spiritual connection they have towards land compared to the non-indigenous who view land as a commodity. Lastly, this chapter is alive to the threat of modernization to indigenous welfare and attempts to strike a balance between the two adversaries that deviates from assimilation as a solution for tackling the indigenous peoples' claims to accommodation of indigeneity within modernization.

Land in an indigenous person's perspective is not just a means to an end but an end in itself since it is considered to be the very epitome of indigeneity. This peculiar embodiment of land has been compared and contrasted with the modernization adversary in a bid to achieve a fair compromise between the indigenous and the non-indigenous without necessarily undermining the concept of indigeneity.

The third chapter looks at the overlaps in the international human rights laws which directly influence the understanding of the indigenous peoples' claims and particularly the land claim. The flipside of the prevailing use of the self-determination concept as the contemporary synonym to the rights of indigenous peoples, the minority rights relation with indigenous and the question of individual versus collective rights has been explored in a greater detail. The thesis deviates from the self-determination alignment in a bid to un-package the intrinsic land claim of indigenous peoples in a bid to give it more prominence.

The last chapter dwells on scenarios and case studies from the selected indigenous populations in Kenya, South Africa and Australia and tries to fit them within the theoretical inferences arrived at in the previous chapters. This chapter highlights issues brought up by

the discussion in the previous chapters and subjects them to tests against the case studies. In conclusion, this thesis reiterates that the protection of indigenous peoples' rights has to stem from the understanding regarding their special connection to their territories.

INTRODUCTION

The year 2011 falls within the Second International Decade of the World's Indigenous Peoples[1] and there still being no clear *sui generis* in offing as regard to indigenous peoples' rights protection, this thesis will develop a discussion that will interrogate the existing principles within which rights of indigenous peoples are anchored both in international human rights law as well national frameworks. This will be examined through the lenses of territorial connection and the value this approach adds to the vindication of indigenous peoples' rights.

Since there is no established suffix to the word indigenous, references from different authorities have oscillated between 'people', 'peoples', 'populations', 'communities' to 'groups' when referring to members associated with indigeneity, for the purposes of this thesis the Cobo reference of 'communities', 'peoples' and 'nations' will be used.[2]

The discussion will be limited within the three jurisdictions specified earlier. It will not concentrate on all case law and international documents in relation to indigenous peoples but will base its arguments on the ones that contribute in a significant way to the issues and principles under discussion. These principles will revolve around the issue of definition of indigenous peoples, self-determination, minority rights and the issue of individual rights versus group rights. The discussion in part would attempt to un-package the land claim from

[1] The first international decade of the worlds indigenous was from 1995-2004 as declared by the United Nations. Two years after the elapse of the first decade the UN declared yet another second decade to run from 2006 to 2015. This was through the General Assembly resolution A/RES/59/174.

[2] The 'Cobo definition' was coined from the very first official attempt to understand indigenous peoples advanced by the Special Rapporteur José Martínez Cobo report on the Study on the *Problem of Discrimination Against Indigenous Populations*, E/CN.4/RES/1986/35.

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a myriad of other claims and bring it to the forefront as the principle anchorage for all other indigenous claims.

Land being the foundation for indigenous peoples, it provides the backbone to their livelihood and it is the primary source of their cultural, social and spiritual identity. Dispossession of ancestral lands is one of the main problems facing indigenous peoples all over the world. Many countries, both in Western world and Africa view the modes at which indigenous peoples sustain their livelihood as retrogressive and detrimental to aspirations of modernization.[3] This together with the challenge of not being able to clearly connote the definition of indigenous peoples of the world forms the genesis of the challenges associated indigenous peoples' rights protection.

The very first obstacle in the protection of indigenous peoples being the failure to underscore the importance of land, there are different and widely accepted definitions of indigenous peoples which seemingly appear oblivious of the critical affiliation indigenous peoples have towards land. In essence land in these definitions is understood as just one of the many rights the indigenous peoples demand for but not a core.

There are different prevailing approaches that have been advanced to advocate for the rights of indigenous peoples. The self-determination approach which has been termed as a breakthrough appears on face value to isolate the indigenous peoples claim from the claims of minorities but on a closer scrutiny, the rights claimed under self-determination are the same rights pursued by minorities. The aspect of land has not been able to feature in an overarching

[3] FAO, *Policy on Indigenous and Tribal Peoples*, United Nations 2007, Pp.1-2

way in the discourse of self-determination which as a result reduces it to a mere minority rights claim which just got a new name.

In the face of all the above, a non-ideological aspect that have proved problematic is modernization. Development initiatives, policies and laws in many countries where indigenous communities reside are aimed at progressively doing away with their subsistence ways of living. This makes it impossible to sustain indigenous peoples' livelihood.[4] Surprisingly some of these laws and policies especially in Africa were crafted by former colonial governments but they continue to persist in post-independent States.[5] As Joseph Kieyah writes,

> "The national legal framework of most African countries still largely mirrors the policies and designs of their respective former colonial governments. This framework remains hostile to indigenous peoples. The absence of sufficient legal protection has left many of these peoples vulnerable to legal usurpations and evictions".[6]

The colonial inherited policies and laws in question were geared at dispossessing indigenous peoples of their lands, property and natural resources. This together with the immergence of private land tenure system does not favour collective ownership and utilization of land, which is characteristic of indigenous communities.[7] This can be demonstrated through the Kenyan

[4] Barnard A., *Hunters and Herders of Southern Africa: A Comparative Ethnography of the Khoisan Peoples.* New York; Cambridge: Cambridge University Press, 1992. Pp. 15-20

[5] In South Africa, *The Native Land Act of 1913* sought to disposes the black population during the apartheid era, In Kenya, *Crown Lands Ordinance of 1902* limited the amount of land an indigenous person could own. In Australia *The Waste Lands Act* confined the aborigines in 'reserves' which undermined their lifestyle and facilitated dispossession.

[6] Kieyah J., *Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review,Spring 2007, 15 Penn St. Envtl. L. Rev. p.397

[7] FAO, *Policy on Indigenous and Tribal Peoples*, United Nations 2007, Pp 5-6

example as further explained by Kieyah that,

> "The British government pursued land policies that were unfavorable to the [indigenous peoples] land rights… Later, the independent Kenya government adopted policies and laws skewed toward land privatization. These laws favored agriculturists at the expense of the [indigenous peoples]."[8]

Indigenous peoples are diverse in nature, culture and the way they utilize land and land resources. They however, have one thing in common; they make up some of the poorest population in the world today and continue to be thus because of living in marginalized areas.[9] This situation applies to all indigenous peoples starting from the Ogiek of Mau Forest in Kenya, the Bushmen of Kalahari Desert of South Africa to the Aborigines of the Torres Strait Island of Australia. This is so because they are constantly in competition for land use with the more favoured and powerful non-indigenous populations.

The immediate need of indigenous peoples is not only acquiring land and utilizing natural resources necessary to support their way of but also the appreciation of the land connection. This appreciation should be demonstrated through how they are universally defined and understood[10] but this is rarely the case since most of the widely accepted understandings of indigenous peoples had not yet internalized the territorial connection aspect.

[8] Kieyah J.,*Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review Spring 2007, 15 Penn St. Envtl. L. Rev. p. 399

[9] Hall G., *Indigenous Peoples, Poverty, and Development*, Georgetown University (2010) In this draft manuscript prepared for the World Bank, Gillette Hall observed that indigenous peoples are the most poor and marginalised. Marginalization in this sense means that regions in which government have 'neglected' as unproductive and so no or little of overall States resources reach those areas to benefit the people residing there.

[10] This is according to the position paper *Nature: poor people's wealth*, by Friends of the Earth International prepared for the UN World Summit and the Review of the 14th -16th Millennium Development Goals (2005)

Numeral international law frameworks have been established requiring the recognition of indigenous peoples, by not only according them their land rights but also in preservation of their cultures and self determination. Despite those frameworks, attaining the land rights has been a slow and painful journey for indigenous peoples across the world.[11] This is a challenge that this thesis will attempt to interrogate.

[11] ibid

CHAPTER ONE

1.0. CONCEPTUALIZATION AND CONTEXUALISATION OF INDIGENEITY

1.1 The Politics of Definition

> *"In the forty-year history of indigenous issues at the United Nations and even longer history at the ILO, considerable debate has been devoted to the question of the definition or understanding of indigenous peoples. But no such definition has ever been adopted by any United-system body."*[12]

The above statement highlights the prevailing situation regarding the definition and the understanding of indigenous peoples. The analysis of some of the existing attempts to demystify indigeneity to be a universally applicable and understood concept, appear to have fallen in to complexities the moment the significance of the land claim was undermined. This is a trend which can be observed from the first mention of indigenous peoples by the ILO 169 to the latest admission by the UNWGIP that the term has become elusive and complex to define.

1.1.1 The 'Cobo' Definition

The first working definition by Jose Martinez Cobo, the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities depicts indigenous peoples and nations as

> "… those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.

[12] United Nations Permanent Forum on Indigenous Issues Secretariat report , *State of the World's Indigenous Peoples*, United Nations, New York, 2009, p.2 ST/ESA/328

> They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[13]

According to Cobo, having the above definition was not enough and other factors had to be put in consideration when defining indigenous peoples and thus he further stated other factors like the "occupation of ancestral lands …,Common ancestry…, Culture in general…, Language…,residence on certain parts of the country…and other relevant factors".[14]

Cobo definition projects a dual category of objective and subjective elements of indigeneity with the first category of the duality keen on "ancestry, culture and language", the second being on "self-identification and acceptance".[15] However, land as a central component in understanding indigenous peoples is left out under the brackets of *other relevant factors*. This is a clear depiction that from the start of conceptualizing the understanding of the term indigenous, less attention has been given to land as a reference within which claim for rights of indigenous peoples can emanate.

What cannot be deduced explicitly from the Cobo definition regarding indigenous peoples is the idea of connection to territory leans more on the social and cultural components of indigeneity. Cobo fails to give a concrete definition perhaps because of the fixation to try and include all the complexities of different indigenous peoples under one definition.

[13]Cobo J.M., *The Study on the Problem of Discrimination Against Indigenous Populations*, E/CN.4/RES/1986/35

[14] Ibid

[15] Luis W., *Mining and Indigenous Peoples in Guatemala: The Local Relevance of Human Rights*. University of Ghent 2010 p.19

Had Cobo definition commenced on the premise of territorial connection as the main facet in understanding indigenous peoples, then the difficulties and ambiguities that arise because of the question of contextual diversity would not arise. This is because regardless of different contexts applicable to indigenous peoples, the concept of land is the only one that remains undisputedly universal.

1.1.2 The ILO definition

The International Labour Organization's Convention No.169 of 1989 which replaced the over three decades' old Convention 107 offers the criteria for identifying indigenous peoples but just like Cobo falls short of maintaining a concise definition of who indigenous peoples really are.[16] However, it introduced the concept of tribal people who are defined as;

> "…People in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations." [17]

Regarding the above ILO understanding, it can be assumed that the economic component referred to in the definition is land, given that land is the main capital within which production beyond subsistence consumption occurs. In the case of indigenous peoples, land is not utilized or owned for economic gains but forms a foundation within which all other components of their livelihood are hinged. It therefore follows that land cannot be mentioned with the same weight with other components which essentially draw their meaning from the intrinsic value of land.

[16] The International Labour Organization's Convention (ILO) No. No.169 revised the ILO No. 107 by replacing the usage of the word 'populations' with 'people' and made a distinction between indigenous and tribal people and replaced the notion of less advanced culture with a distinct culture among others.

[17] International Labour Organization's Convention (ILO) No. 169 Art. 1(a)

The ILO definition tends to shy away from pinning down territorial connection as the component that drives any cultural, social and economic activities conducted by indigenous peoples. A closer scrutiny show that the understanding of the indigenous peoples as depicted by the convention appears to be a hybrid between the Cobo definition and its depiction of tribal people as clearly portrayed in Article 1 (b) of the convention that indigenous peoples are;

> "Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country; or geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions." [18]

The above understanding of indigenous peoples could be termed as not being far from a basis for a self-determination claim which has been widely accepted as the frontage within which rights of indigenous peoples are currently pursued. It is not surprising therefore that the first objection to the ILO definition was not based on the content per se but on the extent of perceived lack of active participation by the indigenous communities during its formulation.

When the ILO definitions where being crafted some commentators claim that no indigenous organizations were involved. Such commentators like Bradley Reed Howard, an Anthropology professor and a scholar on indigenous peoples issues cites support for these sentiments from indigenous peoples right advocates that the convention[19] "totally ignores the

[18] Ibid. 1(b)

[19] Howard B.R, *Indigenous people and the State; Struggle for Native Rights*, Northern Illinois University Press , Illinois, 2003 pp.122-124

indigenous world view and is therefore irreconcilably written from [non-indigenous] point of view."[20] This perhaps could be the reason why the land claim was submerged in the process.

The issue of inclusive involvement notwithstanding, the convention has slightly fallen to the Cobo trap of open-ended generalization. It also tends to draw it's inspiration from loose historical context which presents a blurred demarcation between the indigenous and non-indigenous communities especially when subjected to the Kenyan and South African context whereby with this approach there is a danger of labeling every community in Africa as indigenous.

1.1.3 The UNWGIP contribution

In a move which appears to be an improvement to the earlier definition by Cobo, The UN Working Group on Indigenous Populations later in 1995 prepared a "criteria"[21] of factors, which are supposed to expound on the understanding of indigenous peoples, but they too failed to give a concise definition.

The list of criteria identified by the UNWGIP based on "historical antecedence, cultural distinctiveness, self-identification, and non-dominance" has fallen to the same Cobo- trap which tends to encompass everything about indigenous peoples. It has also downplayed the land connection. The only slight connection to territory is the component of *prior occupancy* which the working group emphasizes.

[20] Ibid p.124

[21] The criteria developed by the *U.N Working Group on Indigenous Populations (WGIP)* under the lead of special rapporteur Erica-Irene Daes in 1995 considered the following as crucial in the understanding of indigenous peoples; Time factor in regard to residing and using the land in question, Cultural distinctiveness which is willingly passed on from one generation to the other, self identity and recognition by government authorities as indigenous peoples and history of 'subjugation, marginalization, dispossession, exclusion or discrimination". The WGIP was quick to point that this was not to be construed as a comprehensive definition since these factors are contextually subjective.

It is crucial to note that if the understanding of indigenous peoples is to be pegged on prior occupancy, a challenge is in the offing. This is so because for example the Maasai of Kenya who are basically the symbol of indigeneity in Kenya, cannot claim to be the Kenya's first people because they migrated from elsewhere. "There exist other peoples …who antedate [the Maasai] historically, yet are not included in the indigenous peoples' movement".[22]

From the above situation, it therefore follows without saying that if the connection to territory as a requirement of indigeneity was awarded status as the driving component in this case then, the ambiguities brought about by contextual application of the UNWGIP understanding of indigenous peoples would not occur.

The approach by the African Working Group on Indigenous Peoples (which is attached to the African Commission) tends to borrow from the UNWGIP by also undermining the need to have a concrete definition in favour of criteria that does not emphasis on territorial connection in understanding indigenous peoples.

It is quite notable that both the UNWGIP and the African Working Group unlike Cobo, however recognized that there are ideological differences in that "members of the African indigenous peoples have difference experiences, histories and demands, different from those of the international indigenous peoples' movement"[23] without necessarily overloading the understanding of indigeneity, but again apart from trying to narrow down the contents of the

[22] Indigenous Peoples, Poverty and Development

[23] Dersso S.A., *Perspectives on the rights of minorities and indigenous peoples in Africa*, Pretoria University Law Press (2010), p.113

definition there is still 'excess baggage' which can fit conveniently within the land connection approach.

1.1.4 The FAO understanding

Other understandings of Indigenous populations are by *Food and Agriculture Organization* of the United Nations (FAO) that indigenous peoples are specific population groups generally characterized by wanting to maintain a strong attachment to particular geographical locations and ancestral territorial origins, often expressed spiritually and through a sense of responsibility towards that territory; seeking to remain culturally, geographically and institutionally distinct from the dominant society, resisting full assimilation into the greater national body and tending to preserve elements of their own socio-cultural, economic and political ways of living and knowing, often based on distinctive languages and cultures.[24]

From the above understanding two issues are problematic; one, it is not necessarily that indigenous peoples would like to maintain specific geographical location since some like the pastoralists move from one place to another. Actually what has altered this kind of movement in recent times is the confinement of indigenous peoples in specific geographical places and in the face of further confinement, they have asserted those specific territories as theirs. Otherwise indigenous people were originally free moving.

As indicated earlier in the introductory part of this thesis indigenous peoples live in the most marginalized regions in their countries. It would be a shaky assumption to believe that they chose to be where they are today. If anything indigenous peoples are more strongly defined through the kind of livelihood they prefer than the geographical preference.

[24] FAO, *The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide*. Rome, (2009), p. 5

Secondly, the issue of ancestral origin is a challenge especially in Africa, because history indicates that most communities migrated and thus depending on the ancestral connection to define an indigenous person might be misleading to some extent unless this connection is linked to a deeper spiritual connection land which transcends a mere ancestral connection.

1.1.5 The UNPFII position

In above several moves that can be termed as 'playing safe', a tight definition of indigenous peoples has been left 'floating' in a miasma of vagueness. The debates which are raised question whether definition is really necessary or the mere acknowledgement of rights of indigenous peoples is just enough. The following extract from the report of the UN secretariat on Permanent Forum on Indigenous Issues sums up the controversy for now;

> "… [O]bservers from indigenous organizations developed a common position that rejected the idea of a formal definition of indigenous peoples at the international level to be adopted by States. Similarly, government delegations expressed the view that it was neither desirable nor necessary to elaborate a universal definition of indigenous peoples. Finally, at its fifteenth session, in 1997, the Working Group concluded that a definition of indigenous peoples at the global level was not possible at that time, and this did not prove necessary for the adoption of the Declaration on the Rights of Indigenous Peoples. Instead of offering a definition, Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples underlines the importance of self-identification, that indigenous peoples themselves define their own identity as indigenous".[25]

The above paragraph comes out like a good move since it leaves room for the accommodation of different manifestations of *indigenousness*, which are unlikely to be subjected to universal parameters of a single definition. It would be crucial to note however,

[25] United Nations Permanent Forum on Indigenous Issues Secretariat report, *State of the World's Indigenous Peoples*, United Nations, New York, 2009, p5. ST/ESA/328

with this approach many African communities who practice distinct cultures, language and where dominated at some point in their history will want to claim the indigenous status.

An open-ended avenue to claim identity as indigenous will be a challenge in Africa whereby it is easy for numerous communities to claim ancestry to the lands they reside in, but that does not make them indigenous. This is because they do not possess that intrinsic connection with their territories and do not sorely depend on land in the manifestation of the aspects of their life.

1.2 Two Schools of Thought

Scholars like Patrick Thornberry and The UN Special Rapporteur James Anaya have struggled to explain the concept of indigeneity. Anaya's understanding is that indigenous peoples are the original descents of lands which were invaded and dominated by other inhabitants and highlights that the difference between these two is the level of connection each of the indigenous grouping has on land.[26]

Thornberry however is not tied down to one specific direction of looking at indigenous peoples. He believes that the factor of land relationship is paramount, so are the other issues which are pegged on self-determination. Therefore what this portends is that the issue of indigenous peoples should be looked more holistically than just having a focal point on land.[27] This is a position this thesis slightly deviates from as it will be portrayed subsequently.

[26] Anaya J.S., *Indigenous Peoples in International Law* , Oxford Univ. Press (2004)

[27] Thornberry P., *Indigenous Peoples and Human Rights*, Manchester University Press, (2002) Pp 44-45

Anaya and Thornberry present two facets of how various scholars have aligned themselves to explain indigeneity. The Anaya school of thought represents an understanding that recognizes the territorial connection but pegs this to the need for a history of prior colonization. Prior invasion cannot precede the connection to land in defining indigenous peoples since colonization was not a target for only indigenous peoples but nations consisting of both indigenous and non-indigenous populations.

The approach by Thornberry is the one propagated by proponents of the self-determination discourse which appears to have won itself recognition beyond just a mere debate of approaches to a possibility of forming part of the international customary law regarding indigenous peoples. The issue of self-determination and its shortcomings as an avenue for seeking rights of indigenous peoples will be explored in greater details in Chapter Two.

1.3 Conjectural vs. Practical

The quagmire of definition goes beyond the theoretical arguments and as Rodolfo Stavenhagen, the former UN Special Rapporteur on the rights of indigenous peoples found out. He observed that "[t]he term indigenous is frequently used interchangeably with other terms, such as "aboriginal", "native", "original", "first nations", or else "tribal" or other similar concepts"[28].

The above situation thwarts the efforts of having a shared understanding on what universally should constitute indigenous peoples' mechanism of protection. When the indigenous peoples are examined careful, they possess different cultural aspects which are distinct from each other in form. At the base of all these rights claim of indigenous peoples, however is land,

[28] Refer to the Report of the Special Rapporteur on the *Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen. A/HRC/6/15

which means therefore that any understanding of indigenous peoples that has no central link to land has never been able to address satisfactorily the issue of indigenous peoples' rights.

In demonstrating the discrepancy between theory and practice, as applied in the jurisdictions subject to this thesis, Kenya and South Africa appear to have been entangled in a web which makes it harder to distinctly cordon indigenous peoples within a homogenous framework. When the emphasis to land is not given prominence as the major component in defining indigenous peoples in these countries, then it appears that almost all the people of Africa do poses the characteristics akin to indigenous peoples as described in the previous chapter.

In South Africa, it is appears that there are two analogous understanding of indigenous peoples , one refers generally to all South Africans of African ancestry while the other relies on Cobo definition, which refers to non-dominant communities with distinctive territorial and cultural identities.[29]

The above state of affairs is similar in Kenya and other African countries where by the lack of a clear distinction between indigenous peoples and the rest of the population is used as a facade to deny them of their land rights. In Kenya the term 'indigenous', 'minority' and 'marginalized' are used interchangeably.[30] The rights of communities which identify themselves as indigenous is captured through Article 56 of the Kenyan Constitution which provides for the rights of minorities and marginalised groups.

[29] Hitchcock R., etal, *Indigenous peoples' Rights in Southern Africa*, Copenhagen (2004) p. 144

[30] This can be observed in the leading organisations dealing with indigenous people's right like The Centre for Minority Rights Development (CEMIRIDE) and The Minority Reforms Consortium (MRC) whose focus of minorities includes indigenous peoples. CEMIRIDE which is an NGO and MRC which is a coalition of Civil Society Organisations were the ones who submitted the communication to the African Human Rights Commission regarding the dispossession from their lands of the Endorois community by the Kenyan government to pave way for wildlife reserve.

The Constitution of Kenya does not set the criteria to identify indigenous peoples/communities. However, the interpretation of 'marginalised communities' as used in the constitution is elaborated to capture the following;

a. "A community that, because of its relatively small population or *for any other reason*, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
b. A *traditional community* that, out of a need or desire to preserve its *unique culture* and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
c. an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
d. pastoral persons and communities, whether they are–
    i. nomadic; or
    ii. a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole".[31]

Going by the understanding in Kenya and also South Africa therefore, majority of people in both countries would qualify to be called indigenous. This is so because it very possible to group them depending on cultures, traditions, and/or livelihoods into indigenous peoples, religious minorities, ethnic minorities and linguistic minorities.[32] This is where then the tie breaker card of land should come in and separate the genuine indigenous and the quasi indigenous.

[31] Constitution of Kenya(2010) Article 260

[32] Aluanga L., *Banjul ruling offers ray of hope to the minorities* in The Standard Newspaper, April 28, 2010 at http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000004406&cid=259&story=Banjul%20ruling%20offers%20ray%20of%20hope%20to%20the%20minorities last accessed on 30/11/2011

In order for the land claim to achieve towering legitimacy over the other claims associated with indigenous peoples, it is necessary for land to be placed in a kind of a dais. This is because with the exclusion of land as the overarching component in definition and understanding indigenity, the other claims associated with indigenous peoples will always face the danger of disintegrating to claims of non-indigenous nature.

In Kenya, South Africa and indeed across the Africa, whenever indigenous peoples' inferences are invoked they are always in reference to language and customary law. These are claims which have been easily granted by States since they appear less threatening to governments and the rest of the population compared to the land claim. When a State claims to have given indigenous peoples right to worship, language or even the famed self-determination right, but does not explicitly recognize land as the core to these rights, then theirs becomes an exercise in futility.

The inclination to the notion that all African people are indigenous is an argument that has created confusion in identifying let alone recognizing indigenous communities in the real sense of the word. When the indigenous and minority groups in Kenya use the term marginalised to describe their situation, they use the modern analytical form of the concept which does not merely focus on territory in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from.[33]

The scenario described above is more prominent in Kenya because there is no distinct aspect that has been used to create a clear demarcation between indigenous peoples and minorities.

[33] African Commission on Human and Peoples Rights (ACHPR)/International Working Group on Indigenous Affairs (IWGIA) *Report of the African Commission's Working Group on Indigenous Populations/Communities*, Copenhagen, Denmark (2005), p.88

In most cases numbers or occurrence of discrimination has been the basis to identify minorities. Indigenous peoples movements in Kenya have found themselves entangled in this kind of notion which as a consequence has blurred the boundary between indigenous and minorities. When and if the element of territory is introduced, then a clear difference between minorities and indigenous begin to emerge.

In Australia the identity of Aborigines as the indigenous peoples of Australia is undisputed but that again that does not permeate to them being granted their rights. In the case study of the *Yorta Yorta* shows that all is not well as far as *prima facie* identification of indigenous peoples is concerned. The details of the *Yorta Yorta* case will be discussed in the last chapter.

CHAPTER TWO

2.0 THE LEGITIMACY OF THE LAND CLAIM AND THE COMPETING ADVERSERIES

2.1 Special Connection with Land

> *"The distinctive connection of indigenous peoples to the land has social, cultural, and spiritual dimensions that have not always translated well into law—even human rights law, despite its explicit regard for social and cultural concerns."*[34]

The study of indigenous peoples has been there as long as the history of anthropology has existed. For a long time the study has been the discourse of anthropologists who discovered new 'primitive' cultures and studied them using ethnographic analysis. One of the 'primitive' ways of indigenous peoples was the place of land in their lives. The misunderstanding of relationship between land and indigenous peoples was a rationale behind the *terra nullis* doctrine in Australia which declared indigenous peoples land as unoccupied and "the failure of indigenous peoples to *settle and cultivate* the land was offered as a justification for [dispossessing them]"[35]

The cultural anthropology first categorization of human progress has having taken place in three stages, from savagery through barbarism to civilization as advocated by some of the founders of anthropology, Lewis Henry Morgan and Edward Burnett Tylor has contributed to the misconception about indigenous peoples.[36] This approach gauges the economic aspect of communities' livelihoods and culture in relation to land and places them within a subjective

[34] Eric Dannenmaier *Beyond Indigenous Property Rights: Exploring The Emergence Of A Distinctive Connection Doctrine* p.84 Washington University Law Review Vol. 86:53

[35] ibid p.65

[36] Morgan L.H., and Tylor E.B., in *Cultural Anthropology: An applied perspective* by Thomson G.F., Wadsworth, Belmot (2008)p.64

hierarchy with those who use land for mass production and economic surplus being placed at the top of the hierarchy.

Howard disputes this first anthropological approach on indigenous peoples and accuses it of being laced with colonization undertones which depict indigenous peoples as 'savages' who are in need of civilization.[37] He is however quick to acknowledge that modern anthropologists have since disputed this approach and advocated for humanistic approach to Anthropology although he still finds that "they do not necessarily address specific issues associated with indigenous peoples' historical and contemporary anti-colonial struggles for existence".[38]

The approach and perspective propagated by first anthropologists unfortunately seems to have persisted beyond anthropology and curved itself a niche at the sub-consciousness and the consciousness of the 21st century understanding of indigenous peoples. This can be observed in the ILO convention 107 which created a hierarchical gap between indigenous and non-indigenous and emphasized on integration as a means to bridge the gap.[39]

The framers of the ILO 107 appear to have been under the impression that if indigenous peoples 'slowly' abandon their cultures, it will then solve the persistent land dispute between

[37] Howard B.R, *Indigenous people and the State; Struggle for Native Rights*, Northern Illinois University Press , Illinois (2003) p.24

[38] Howard B.R, *Indigenous people and the State; Struggle for Native Rights*, Northern Illinois University Press , Illinois, 2003 p.28 where he analyses Ashley Montagu's *Man's most dangerous Myth* and *The Dehumanization of Mankind* which disputes earlier anthropological approaches by Morgan and Tylor. Gary (Footnote 3) also disputes the Morgan and Tylor theory of human progress.

[39] The shortcomings of the ILO Convention No. 107 prompted its revision that denounced the integrationist approach and encourages letting indigenous peoples determinate their path of progression without undue pressures to assimilate.

non-indigenous and indigenous peoples since both would be viewing land through the same capitalistic view.

Indigenous peoples have a special connection with land which surpasses the product aspect of land as exercised by the modernization concept. As Howard asserts, in order to fully grasp the concept of indigenous peoples' claims, there is need for deep understanding of the intrinsic connection and relationship between land and other spheres of live of indigenous peoples.[40]

The concept of land in the view point of an indigenous person, be it an Ogiek in Mau Forest of Kenya, Khoisan in Kalahari desert of South Africa, or an Aborigine in Torres Strait Island of Australia it is fundamentally different from the non-indigenous populations. A sociologist, Duane Champagne in *Rethinking Native Relations with Contemporary Nation* could not have put it any better that;

> "Land is given as a sacred gift and sacred stewardship. People do not own land, but must care for the land... The Western emphasis on land as a resource that must be exploited and transformed into cultural valuable goods is very different. The world as resource for work of humans to transform into increasingly more productive and useful things is wholly foreign to native interpretations of nature and their place within the cosmic order. These fundamental differences in cultural epistemology are the root of conflict between nation-states and native communities."[41]

Aoife Duffy observes that the connection perpetuated by indigenous peoples in relation to land is manifested in their economic, social and political realities of their lives. For an

[40] Howard B.R, *Indigenous people and the State; Struggle for Native Rights*, Northern Illinois University Press , Illinois, 2003 p.97

[41] Champagne D., *Rethinking Native Relations with Contemporary Nation –States*, in Champagne etal, Indigenous People And The Modern State, AltaMira Press, Toronto (2005) p.7

indigenous person, land is the only means by which they can derive their subsistence. Land is also the foundation or ground by which cultural systems are developed and "harmonised with patterns of land use and tenure".[42]

Perpetuation of land to future generation whereby land is not viewed as a commodity but a body of custom is a unique characteristic of indigenous peoples. Indigenous peoples perceive themselves as custodians but not owners of land in a deeper way than the ordinary holding of land in trust on behalf of others. This has been illustrated further by Duffy that;

> "The deep spiritual connection with the land forms an essential element of the indigenous identity and concept of community. The relationship to the land is collective, rather than individualised; it is the entire community that is affiliated to a particular territory, burial site or place of worship. Land is not conceived in monetary terms, but as inextricably connected to indigenous culture".[43]

Indigenous peoples' concept of land ownership is based and vested on the community and no particular individual. Some indigenous peoples like the pastoralists owing to their nomadic lifestyle do not see the concept of ownership as applicable since they move from one place to another in search of grazing pastures for their cattle. What is considered as land wasting by non-indigenous populations when indigenous peoples leave trunks of land idle, is a strategy designed to give the land time to rejuvenate again before they can come back to do pastoralist, hunter-gathering or shift cultivation.[44]

An example is given of the Maasai of Kenya who are pastoralists and have their own customs and norms governing the communal use of land from one generation to the other. The land

[42] Duffy A., *Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, International Journal on Minority and Group Rights (2008), p.507

[43] ibid p.508.

[44] Bodley J.H, *Victims of Progress*, Washington State University, Mayfield Publishing Company, Toronto(1999), Pp.77-78

ownership is sacred in that no one among the group can claim ownership for a limited purpose. The community which is custodian does not have the right either to sell or lease the land for example because it is priceless and cannot be commercialized. This land does not belong to the present generation only for generations to come are believed to have a stake as well.[45]

In understanding further the relationship between indigenous peoples and their land, Deborah Macgregor introduces the concept of TEK[46], which for an ordinary person from 'mainstream society' is simply a body of knowledge developed through the constant interaction with environment. She asserts that "[o]ne of the most significant differences between Native and non-Native views on TEK is the fact that Aboriginal people view the people, the knowledge and the land as a *single, integrated whole.* They are regarded as inseparable".[47]

From what Macgregor argues, it is clear that stripping indigenous peoples off their lands is tantamount to depriving them of their existence; spiritual, social, cultural and subsistence since for the global industrialization proponents, land is a means to an end while to an indigenous person land is both the means and the end.

2.2 Casualties of Modernization?

> *"Native communities are generally relegated to the margins of contemporary nation-states and their issues often seen as problems of incorporation, integration, civilization and modernization. Native communities are seen as*

[45] Kodish S.L, *Balancing Representation: Special Representation Mechanisms Addressing The Imbalance Of Marginalized Voices In African Legislatures* Berkeley Electronic Press 2004 p.206

[46] Traditional Environmental Knowledge as been explained in a research supported by UNESCO 1993 book to mean "Traditional ecological knowledge (TEK) which represents experience acquired over thousands of years of direct human contact with the environment."

[47] McGregor D., Traditional Ecological Knowledge and Sustainable Development; Towards coexistence, in Blaser etal, *In the way of Development; Indigenous peoples, life projects and globalization*, Zed books, London, 2004, p.79.

> *"other" groups that must ultimately be brought within the pale of national community and culture.*[48]

Ethnocentrism is a concept used commonly by anthropologists to loosely denote the selfishness of people when they classify their own cultures as better and superior than that of others. According to John Bodley, the basic cause of the plight of indigenous peoples' rights is usually underpinned by the widely held ethnocentric views by non-indigenous populations. This kind of insensitivity can perhaps be portrayed through the High Court Judgment involving the Ogiek community in Kenya after challenging the unconstitutionality of their eviction from the Mau forest. The Court held that;

> "[T]he eviction did not deprive the plaintiffs of their right to their livelihood; because it did not preclude them from accessing the forest by seeking licenses and permits. The court justified the eviction by noting that *the eviction is for the purposes of saving the whole Kenya from a possible, environment disaster; it is being carried out for common good within statutory powers.* The modern socio-economic pursuits of the plaintiffs, moreover, were no longer consistent with forest conservation".[49]

The above judgment is not far from what Bodley points out. Bodley presents very interesting phenomena highlighting the difference between 'indigenousness' and 'non-indigenousness' perspectives. The latter emphasizes on the conservation and adaptation to ecosystem while the former capitalizes in what he terms as the 'culture of consumption' and gauges progress as directly proportional to consumption with anything less than that being seen as

[48] Champagne D., *Rethinking Native Relations with Contemporary Nation -States* in Champagne D., etal, *Indigenous People And The Modern State*, AltaMira Press, Toronto (2005) p.3

[49] Kieyah J. *Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review Spring 2007, 15 Penn St. Envtl. L. p 424

retrogressive.[50]

The picture created by Bodley is an upshot of globalizations which is characterized by immense social inequalities and throat cutting capitalism whereby only the fit is meant to survive. The indigenous lifestyle in sharp contrast is geared towards gratifying fixed essential survival needs which means that social stratification is an unviable and unknown concept since there always enough for everyone. The characteristic of this culture is that, it is "…stable, make light demands on their environments, and can easily support themselves within their own boundaries."[51]

The concept of cultural evolution as purported by the founders of Anthropology is agreeable, However, as much as it should be admitted that cultures change, this change does not depict a transmission from an inferior state of affairs to a more advanced one. This change should be attributed to factors emanating from the members who practice that culture and other natural factors which are not artificially induced. Modernization is one of the artificially induced factors which are large measured through large-scale economies and impact on land use and tenure systems.

The fact the indigenous peoples will change may not necessarily mean that they will abandon hunting and gathering , pastoralist way of life or the way they relate to land for the so called modern occupations. They could change through modification of what they do either to adapt

[50]Bodley J.H., *Victims of Progress*, Washington State University, Mayfield Publishing Company, Toronto, (1999), p.13. He observes that the foundation of modern economies are founded on the principle of consumption which can be evidenced through the complex and competing systems of marketing and advertising which scream 'more is better' even if you are not consuming it .Indigenous peoples in contrast do not accumulate more than the consumption capacity at any particular point in time.

[51]Ibid.p.13

different hunting or gathering techniques or adapt group ranches instead of nomadism but will still retain the spiritual connection with land.[52]

The most crucial aspect is that indigenous peoples should be allowed to determine their destiny which is founded on land without the undue burden of a requirement to assimilate placed on them. Just like any other category in need of protection, legal systems should carry with them the obligation to protect from interference. Development indicators should be objective and not pegged on the hierarchical gap portrayed between indigenous and non-indigenous on the way they contribute to mainstream economy of production and surplus.

The other form of modernization comes in the name of multinational enterprises that are not clearly regulated within the realm of international law. As earlier observed, the indigenous peoples' rights protection has not yet *crystallized* and thus it appears that the construction of international human rights law and the parameters by which multinational enterprises should operate was oblivious to indigenous peoples. This ambivalence in law to traditional body of law as Patrick Macklem observes has been to the benefit of the multinational corporations and a detriment to the indigenous peoples;

> "Much of international law governs relations among sovereign States by and through a distribution of sovereignty constructed on an exclusion of indigenous peoples from the community of nations. In recent years, international human rights law has begun to recognize the legal significance of indigenous cultures, territorial commitments, and forms of governance in ways that begin to enable legal scrutiny of multinational corporate activity. But international legal recognition to date has been

[52] Spencer P., *Nomads in Alliance: Symbiosis and Growth among the Rendille and Samburu of Kenya*. London: Oxford University Press. (1973) p.234

> partial and ambivalent, in part because indigenous rights pose unique challenges to traditional understandings of the international legal order."[53]

The individualistic approach to ownership of property and in this case land stems from the conflict between socialism and capitalism approaches with one emphasizing on net benefit for the group and other on net benefit to an individual. However the property ownership regime as it were differs with the indigenous peoples' concept of ownership and apart from the Banjul Charter, no regime has been able to "make an explicit link between indigenous peoples and their cultural or spiritual regard for the land [which should emphasise that] these communities ... have a property claim beyond the mere possessory rights".[54]

Property rights in the contemporary regimes are characterised by defining and putting in place demarcations of ownership in a bid to exclude intruders. The emphasis on the connection to land for indigenous peoples that goes beyond possession is a good ground to validate collective rights but unfortunately it is not in the scheme of the contemporary property rights as it were. Significantly, the distinct relationship with land for indigenous people could with time emerge into a doctrine that fronts the claims of indigenous people by putting emphasis beyond the physical claim to territory to demonstrate the the spiritual and cultural connection.[55]

[53] Macklem P., *Indigenous Rights and Multinational Corporations at International Law*, Hastings International and Comparative Law Review Spring (2001) p.475 Hastings Int'l & Comp. L. Rev. 475

[54] Eric Dannenmaier *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine* , WASH. U. L. REV. 53 p. 77

[55] Eric Dannenmaier *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine* , WASH. U. L. REV. 53 p. 77

CHAPTER THREE

3.0 INTERNATIONAL HUMAN RIGHTS LAW: OVERLAPS, CHALLENGES AND OPPORTUNITIES.

3.1 Individual Rights vs. Collective Rights debate

The human rights discourse is at ease in awarding rights to individuals other than groups. This can be traced back through the history and emergence of human rights discourse which stemmed from the uprising and demand for civil political rights which sought rights ascribed to individuals. The concept of collective rights emerged with the clique of the so called *second generation rights* which in the case of indigenous peoples can only be enjoyed in solidarity with others.

The debate on individual rights versus collective rights as far as indigenous peoples are concerned took a centre stage during the onset of The Declaration on the Rights of Indigenous Peoples, whereby some states refused to be party to it citing that the Declaration was not clear on how to reconcile individual and collective rights.[56] The lack of a clear approach on how to engage with these two facets of human rights has been translated through the way States caution treat and classify indigenous peoples.

The seemingly conflict between individual and collective rights arises since the rights under self-determination (which are claimed collectively apart from land) are the same rights which are claimed individually by other groups who are not indigenous. However, there is duality in manifestation of most rights awarded under self-determination. This implies that those rights can be enjoyed individuality as well as in association with others. When it comes to land

[56] The declaration came to force in September 2007 when 144 states voted for it, Canada, Australia, United States and New Zealand were against while other 11 states including Kenya abstained.

however, an indigenous person cannot enjoy the right to land in isolation. The conflict arises when prominence is given to individual rights before collective rights whereas for indigenous peoples the concept of individual ownership of any asset or property is unviable.

Rights of indigenous peoples are collective in nature and land is a central aspect of those rights.[57] Apart from the land being used communally, it is passed from one generation to the other. "Collective rights are intergenerational. Land rights must be understood from this perspective, as present generations have inherited the territory of previous ones, and are obliged to pass it on to future generations."[58] This means that the generational factor makes it even harder to divorce the collectiveness of rights.

In Kenya indigenous lands are vested under the county council on behalf of the indigenous peoples but this custodial relationship undermines the collectivity referred to in the case of indigenous peoples since the council assumes the mandate to negotiate on behalf of the indigenous people how to manage indigenous lands. Although this is captured in the law, it has little or no benefit to the indigenous peoples. This trend has also been observed by FAO as described below that;

> "Collective tenures do… present quite distinctive problems of their own. Lack of clarity in the law about which institutions own land and who is authorized to negotiate on behalf of the collective with third parties have led to misunderstandings, have facilitated manipulation by outside interests and have also allowed the mismanagement of communal resources by indigenous factions, individuals and elites, who may take advantage of the mismatch between market opportunities and indigenous land management

[57] Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work On Indigenous Peoples In Africa Transaction Publishers 390 Campus Drive / Somerset, New Jersey 2006

[58] Friends of the Earth international http://www.foei.org/en/get-involved/take-action/solidarity-work/collective-rights

systems to advance their personal interests at the expense of the wider group."[59]

As it has been discussed earlier, indigenous peoples around the world have persistently struggled for their collective right to land to be recognized. This right has been intrinsically intertwined with other rights such as religion, culture, livelihood and social identity which are in most cases exercised collectively.[60] It is not a wonder therefore, that the claims for indigenous peoples' rights have been advanced in form of collective rights rather than rights of individual nature.

The issue of collective rights is a unique one especially to the international human rights law and it is not until recently that international human rights law has slowly and reluctantly started to respond to claims of this nature. Going back to the Cobo definition, it starts well by saying that, "an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous…"[61] up to that point, the definition pretty fits within the realms of individuality of rights. Had Cobo definition ended there, then it would fit perfectly within the realms of international human rights law of individualizing rights.

A closer scrutiny of the Cobo definition alludes that this goes further and pegs the requirement for acceptance and recognition of an indigenous person as such to a group. The argument is that it "preserves for these communities the sovereign right and power to decide

[59] FAO, Indigenous Land Tenure : Challenges and possibilities http://www.fao.org/docrep/007/y5407t/y5407t04.htm

[60] Howard B.R, Indigenous people and the State; Struggle for Native Rights, Northern Illinois University Press , Illinois, 2003 pp3-7

[61] José Martínez Cobo report on the *Study on the Problem of Discrimination Against Indigenous Populations*, E/CN.4/RES/1986/35

who belongs to them, without external interference."[62] This is where the genesis of the problem is rooted and throws to disarray the concept of individuality of rights and puts to test the long held fact that rights are not to be determined by person(s) on behalf of another. This is where the challenge of balancing the individuality of rights and collectivity of rights within the same framework commenced because it appears that the Cobo did not envision the clash of the approaches in future. It becomes even harder to draw a demarcation between the two approaches when the concept of indigeneity is still 'floating' without a concrete definition.

Although the draft declaration has tried to advance the issue of indigenous peoples as collective, Article 5, 6 and 30 are talking purely on individual rights.[63] The African Charter so far can be termed as the international human rights document that has attempted to marry this distinction between the two groups of rights. The problem however is that apart from recognizing that these two approaches(individual and collective) to rights, these two documents have not provided a formula for reconciliation in the event these two conflict.

The preamble of the Banjul Charter urges that it is necessary for collective rights to depend on individual rights for them to be of essence to indigenous peoples. The assumption by the framers of the Charter is that when you award one person within a group rights in their individual capacity, then this translates to automatic fulfillment of group rights.[64] This is exactly the argument that portends that granting indigenous peoples' right to self-determination, then right to land and other rights will automatically be taken care of. This can

[62] Ibid

[63] The preamble of the Banjul charter requires " particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights"

[64] Brownlie I, *The Rights of Peoples in Modern International Law* in Crawford, *The rights of Peoples*, Clarendon Press, Oxford, 1988, p.6.

only be so if ideally one of the rights (land) has no overarching influence over others which in reality is not the case.

The battle between individual and group rights has been to the detriment of indigenous peoples since it also limits their vindication of their group rights in the case of the first optional protocol to the International Convention on Civil and Political Rights (OP-ICCPR). Using the contemporary and prevailing understanding in the international human rights law of construing indigenous peoples as a collective entity, communications through the first OP-ICCPR are automatically rendered inadmissible.

Under the OP-ICCPR, the self-determination claim has not been possible since considerations under the protocol are of individual nature and self-determination as understood does not fit within the realm of individual rights. Most interestingly, the rights under self determination can be narrowed down to territorial connection which can easily be addressed through the protocol without the collectivity card being pulled out.

When the more lenient Article 27 of the convention is invoked, it can only be utilized within the scope of the individual rights at stake.[65] This portends that the much relied upon self-determination has not been able to hold itself since restrictive interpretation of Article 27 in regard to indigenous peoples only survives when the constituents of self-determination are broken down to specifics.

A land claim appears to be more straight-forward and can put to rest the complexities self-determination if it is used to advance indigenous peoples rights. Although self-determination is a very powerful collective claim it does not necessary yield the same outcome. The

[65] Batalla Anna, *The Right of self-determination – ICCPR and the jurisprudence of the Human Rights Committee* October 2006 In this paper which was presented in The Right to Self-Determination in International Law symposium at the Hague, Netherlands., Batalla discussed several cases brought before the committee where self-determination as a claim was declared inadmissible under the Optional protocol.

overloaded nature of self-determination frontage makes it inadequate as an avenue to advance rights of indigenous peoples as highlighted in the following statement;

> "Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state… Nevertheless, the right to self-determination is recognized in international law as a right of process (not of outcome) belonging to peoples and not to states or governments. The preferred outcome of an exercise of the right to self-determination varies greatly... For some, the only acceptable outcome is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the essential aim of a struggle for self-determination".[66]

3.2 Special Kind of Minorities?

Indigenous peoples have found themselves in the middle of the recent international human rights law's struggle in defining who minorities are. They only meet some qualifying criteria of who can be defined as a minority under international law. They are numerically small compared to the rest of populations; they speak their own language and they practice their own religion. Of significance however, they articulate their religion, culture and language through land.

Acknowledging that minority rights genesis is thoroughly different in concept and context compared to indigenous peoples, the vigor in which international human rights law has accorded minorities is a necessary replication if land rights of indigenous peoples are to be

[66] Mapuche Foundation website article on S*elf-determination* dates 6th July 2006 http://www.mapuche.nl/english/selfdetermination060717.html last accessed in November 29, 2011

secured. It however would not be sufficient to include indigenous peoples as just mere minorities lest they fall prey of technicalities of application just like current minority categories.

The essence of instruments of rights protection should not just be the defining and clustering together of blind categories and criteria but there should be linkage between the distinct characteristics of categories in question with an element of disadvantage specific to the category in question. The main disadvantage that faces indigenous peoples is the threat to their lands because this directly translates to their survival.[67]

Looking at the Aborigines in Australia and the general protection of minorities in Australia, the rights accorded to minorities consist of substantive qualification of the aborigines claim. The only twist which cuts a clear distinction when comparing minority rights claim and indigenous peoples' rights claim is land. This is where the concept of special minorities came in. They are special in that apart from religion, culture and language, land is a crucial component which actually binds the aforementioned rights together, a feature that is absent in minority claims.

The international human rights framework has been reluctant to include indigenous peoples under the category of minorities from the premise that indigenous peoples will not gain more by being classified as such.[68] This far is agreeable but it is quite unfortunate if obliviousness to the minority component of indigeneity continues to be maintained. Indigenous peoples are

[67] Woodburn J., *Political Status of Hunter-Gatherers in present –day and Future Africa*, in Barnard A., *Africa's Indigenous Peoples: 'First Peoples' or Marginalized Minorities'?* Centre for African Studies, Scotland.(2001) p.1

[68] Anaya J.S., *Indigenous Peoples in International Law* , Oxford Univ. Press (2004) p.54

minorities with a special connection to land. Although self-determination is the difference that sets the claims of minorities and indigenous peoples apart, it does not bring with it special element that is unclaimed by any other group. Territorial connection remains the only element that no other group can claim apart from indigenous peoples.

Other differences have been cited between minorities and indigenous peoples on the types of claims they make. For minorities the claim is of civil and political nature while for indigenous peoples is of economic, social and cultural nature, the co-relationship between the two is that indigenous peoples use civil and political rights approach to advance economic, social and cultural claims.[69] Since political and civil rights involve an element of abstinence by the part of the State from interfering with rights, minorities rights claim might appear to be easy to achieve as compared to economic, social and cultural rights being claimed by indigenous peoples under self-determination.

The bone of contention regarding indigenous peoples on whether they can have rights collectively is the same debate on whether they qualify to be minorities under the international law. The position that this thesis will hold is that indigenous peoples are special kind of minorities and apart from being recognized as indigenous, they should be given a status of a special class within the minority classification which not only enables them to lay claim to the same individualized rights demanded by the minorities, but in addition advance their main claim to territory collectively.

[69] Fresa L.; *A new interpretation of the term 'indigenous people': what are the legal consequences of being recognised as 'minorities' instead of as 'indigenous people' for the indigenous people of the world?* University of Essex (1999 – 2000) p.79

3.3 The 'self-determination' Dominance

> *"The legitimacy of [Indigenous] government is not based on the mere fact that Indigenous people were prior occupants of the continent, but on the fact that they were prior sovereigns. Not only were they "here first," but when they were here first, they exercised sovereign authority."*[70]

The above statement is indicative of the one of the environments within which self-determination was hatched. In recognizing the indigenous peoples historical journey which starts from the colonial to post-colonial period, their claims have been persistently packaged as self-determination claims which places the land claim at the periphery or completely submerges it.

The debate on indigenous peoples in the international human rights arena has increasingly became synonymous with self determination which has been termed as a milestone of sorts. Regardless, the concept raised some concerns to the extent that the current draft declaration on indigenous peoples had to clarify in Article 46 that;

> "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". [71]

The above clarification was necessary to clear doubts of whether indigenous peoples would be involved in claims which would threaten the sovereignty of their respective States that

[70] Macklem P. *Distributing Sovereignty: Indian Nations and Equality of Peoples* as quoted by Bennett M.; *"Indigeneity" as Self-Determination* ,Indigenous Law Journal Fall, Vol 4, (2005) p.80

[71] *United Nations Declaration on the Rights of Indigenous Peoples*, Article 46

they reside in. However, judging from the debates long past the Declaration was established, the jitters this discussion raised are yet to settle. This is because the struggle for rights of indigenous peoples has not been fully fathomed as not territorial claim per se but claims of territorial connection. It is only when this realization is reached that the claims of indigenous will be understood to be distinct from threats to territorial integrity. But again such a possibility cannot be overruled since self-determination is a broad approach with numerous outcomes as it was discussed earlier.

The use of self-determination as a frontage for indigenous peoples' claim, although having been cleared as not implying for the need for self governance and succession remains a loaded claim which among others projects itself as a claim for use of language, culture and religion as well as other rights of civil and political nature. This automatically downplays the land claim and creates scattered avenues which do not yield a concise understanding and protection of indigenous peoples.

Although it could be argued that indigenous peoples' claim on land can be well articulated under seemingly politically stronger self-determination argument, this will make the land claim just one of the issues under self-determination and risks the danger of being overlooked because it is less political (unless of course when it is (mis)construed as a demand for secession).

The other challenge with the use of self-determination as a package for claiming indigenous peoples' rights is that this concept presupposes there was prior colonization. Naturally the remedy for colonization can only be through decolonization which does not have a standing in already independent States. One proponent of such school of thought is Mark Bennett who relates self-determination to colonial governance that deprived the indigenous peoples of

their self-governance[72] . The difficulty of this which this thesis tries to grapple with is the "how previously fully self-determining people, who still claim and have memory of self-determination, can be restored to being fully self-determining in the present" [73] within already post-independent States.

The above notwithstanding, the applicability of self-determination argument to claim land rights for indigenous peoples is yet to crystallize in international human rights law to an extend that it can be relied as a *jus cogens*[74]. In the light of the uncertainty in progression of self-determination for indigenous peoples towards customary international human rights realm, this thesis is projecting that land and self determination can be claimed as separate claims. Lucia Fresa advances the argument that is not far from this projection. She writes;

> "Land rights are indigenous-specific rights, which clearly differentiate indigenous peoples from minorities. Together with self-determination, of which they constitute the economic component, they are the most important claim. They are also the most neglected ones, due to the fact that they may go against the economic interests of the State. As already stressed, the very survival of indigenous peoples is at risk owing to the continuing threats to their lands".[75]

In adding to Fresa's analysis, this thesis goes further to attempt a kind of 'quasi hierarchy' which isolates and places land above all other claims but does not however delineate it in totality from the other rights under claim. The foundation for this approach recognizes that

[72] Bennett M.; *"Indigeneity" as Self-Determination* ,Indigenous Law Journal Fall, Vol 4, Issue 1 (2005) p.83

[73] Ibid p.75

[74] Bennett M.; *"Indigeneity" as Self-Determination* ,Indigenous Law Journal Fall, Vol 4, Issue 1 (2005) p.81

[75] Fresa L.; *A new interpretation of the term 'indigenous people': what are the legal consequences of being recognised as 'minorities' instead of as 'indigenous people' for the indigenous people of the world?* University of Essex (1999 – 2000) Pp.135-136

while the other claims may be facing progressive threat of forced assimilation, land is a component that does not require progression in order to alter its use and ownership especially in a capitalist economy. Drastic change in use, management and modification of land can happen overnight and indigenous peoples can only be casualties in such a contest.

CHAPTER FOUR

4.0 THE CHALLENGES, LESSONS AND ALTERNATIVES

4.1 Lessons from South Africa and Kenya

Constitutions are the first reference point when vindicating any form of rights because ideally statutory laws always draw inspiration from the constitution. In the three countries under discussion, constitutions have been referred to in some instances when the question of rights indigenous peoples has been raised.

In South Africa, owing to the history of oppression through the apartheid regime, the constitution was more encompassing and attempted to recognize South African communities who could be termed as indigenous. As for Kenya the first constitution which was a direct inheritance from the colonial government did not recognize many rights let alone recognize who indigenous peoples are. In Australia the first mention of indigenous peoples was inherent and deliberately discriminating against Aborigines. All in all after the repeal of the discriminatory clauses in the Australian constitution and enactment of a human rights friendly constitution in Kenya, there have still been challenges in the way those rights are integrated in the whole process of law as it will be discussed below.

The first challenge faced when interrogating the constitutions is the nature of right implied to. This means states have not been able to grasp the core of the indigenous peoples' claims. In Kenya for instance, prior to the enactment of the new constitution in August 2010, the bill of rights gave prominence only to civil political rights which could not then be invoked as extending to property rights let alone land rights of the indigenous peoples.

In all indigenous claims by indigenous people in Kenya, the claim for land has never taken a centre stage and they have always grappled unsuccessfully with self-determination approach while claiming for essentially land rights. The enactment of the new constitution which brought about the issue of 'marginalised' people is not specific to indigenous peoples but carries a whole range of other categories like women, people living with disabilities and so forth.

The above state of affairs together with lack of cooperation from Kenya government as the respondent State in a case filed before the ACHPR by CEMIRIDE and MRG was actually what necessitated admissibility of the communication to the African Commission on Human Rights on behalf of the Endorois community.[76]

In another Kenyan case which will be discussed later on, among other arguments the government 'convinced' the court that the Ogiek community had already abandoned their culture since they were benefiting from projects by the Catholic Church in the area. The land claim had it been used in this case and not merely culture, could have been a stronger claim because this is a community that had been disposed off their lands since the colonial times. Territorial connection alone stands as a formidable claim and could have been used more persuasively. The question of culture, religion, language and other rights claimed by indigenous peoples in this case comes in to merely demonstrate the contents of the land claim.

[76] According to Art.41 of the 276 / 2003 communication during the 37th Ordinary Session of the ACHPR to CEMIRIDE, Centre for Minority Rights Development (Kenya) and Minority Rights Group International (MRG) on behalf of Endorois Welfare Council v Kenya in 2005, the commission found the communication admissible owing to lack of cooperation from the Kenyan government.

The second challenge of the constitutional framework is the lack of identifiable parameters to capture all the indigenous peoples in a given jurisdiction. Apart from the Australia, generalizations and lumping different indigenous peoples together or with other non-indigenous community owing to their geographical proximity to each other is a blunder that has cost indigenous peoples of their rights in Kenya and to some extend South Africa. In Australia Aborigines the challenge of physically distinguishing Aborigines from the rest of the population is not an uphill task compared to Africa.

In South Africa, the Khoisan, the Nama and the Griqua are the main groups which could be termed as indigenous.[77] The apartheid system of South Africa apart from labeling all the South African of African descent as 'coloured' they were dispossessed of their lands[78]. After the abolishment of the apartheid system, the rest of natives were able to conform to lifestyles akin to their colonizers, but unfortunately for South African indigenous peoples they just moved from an oppressive white regime to another 'oppressive' black regime.

While the first constitution of Kenya was oblivious of indigenous peoples let alone their rights just as the predecessor British Government, the South Africa apartheid history and the Australian races power made indigenous peoples conscious of the consequences of marginalization which included land dispossession. In South Africa and Australia laws were used explicitly used to disposes indigenous peoples. In Kenya crafty treaties between colonial government and indigenous peoples were used to reinforce such laws.

[77] Schlebusch C, *Issues Raised By Use Of Ethnic-Group Names In Genome Study* , Nature International Weekly Journal of Science, 25 March 2010 , p.466. In the study Khoisan is understood to be a umbrella reference for the San and Khoe people who in turn consists of other sub groupings like the !Xun and Khwe and ‡Khomani

[78] Report of the Special Rapporteur on the *Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen

The self-determination Kenya was fighting for from the British rule, although it included taking back lands from the white settlers and give back to Kenyans, the equation of indigenous peoples was unfortunately not within this framework. Independent government continued to perpetuate dispossession of land for indigenous people long past independence as evidenced by the sessional paper no.10 which was was aimed at improving areas where considered as supporting the economy. According to the policy the indigenous people did not contribute to the economy. When this policy was done away decades later the damage had been done since indigenous peoples had already lost a huge chunks of their lands.[79]

In Kenya, the official government information on population is oblivious of the presence of some distinct indigenous peoples. The Ogiek, the Endorois and El chamus are all lumped together with other major communities who are totally different from them. The only group that has been isolated and identified as a whole for Kenya is the Maasai. Apart from that, the term indigenous is usually associated with rural folks and every community that has experienced a historical land disputes tend to classify themselves as indigenous. This adds more confusion when attempting to isolate the genuine indigenous peoples for protection.

The South African constitution has recognized the existence the Khoisan and the Nama peoples' rights but only as far as their languages are concerned. The only legal process that appears specific to land is through the restitution of Land rights Act passed to resolve in SA's historical land injustices. The law is however limited to instances after June 13th of 1913.[80]

[79] Sessional Paper No 10: African Socialism and its Implications to Planning in Kenya, Government Printers, Nairobi (1965). The policy highlighted in the sessional document condoned some of the regions in Kenya as low productive areas thus requiring less concern from the government. Such areas comprised of the regions where the colonial inherited agricultural economy was not viable.

[80] Article 6 (2) and Article 25 (7) respectively of the South African Constitution of 1996

This cut-off technically works against the indigenous South Africans who their dispossession happened prior to that date. Although, the South African government gave a commitment to recognize indigenous peoples with cabinet memorandums promising of policies to address the indigenous land issue, much is yet to be realized.[81]

In Kenya, the proposed National Land Commission will tackle historical land injustices from 1963, the year the country gained independence from the British government but history has it that independence governments were not the genesis of the dispossession of indigenous people but mere perpetuators of the colonial regime. The Kenyan constitution just like the South African one dwells on the language and in addition recognizes the indigenous technology in development and intellectual property rights but stays clear of the glaring land question.[82]

Both African countries have constitutions that appear to shy away from the land issue when referencing the indigenous peoples' rights. The effect of colonialism in both countries was to push to the periphery the communities who were considered indigenous and backward in the favour of agriculturalists who through this notion found their way into the comforts of the economic and political realm during colonisation. This framework of constitutionally sanctioned isolation and marginalisation was inherited by governments after independence in many other African countries and persists up to date.[83]

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[81] Report of the Special Rapporteur on the *Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen A/HRC/6/15

[82] The Constitution of Kenya Article 7(3) (b),11(2) (b), 69(1)(c)

[83] Report of the Special Rapporteur on the *Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen, A/HRC/6/15

There has not been foolproof approach to the issue of indigenous peoples in practice. Although the so much hyped self-determination has succeeded in giving a *voice of choice* to indigenous people, it still remains an elusive concept that seeks only for recognition and awareness of existence of indigenous peoples. The more tangible a land claim is remains muzzled and the attempt to use the statutory approach by the Australia (which appears a bit conscious to the land connection) has faced challenges as it will be discussed next.

4.2 The Landmarks

The protection of the Aborigines right to land and other rights affecting indigenous peoples in Australia has been through statutory rights rather than direct constitutional provisions whereby "Common Law plays an important role in recognizing and protecting these rights. In this role, Common Law has become an evolving legal system".[84] The hallmark of this is that statutory provisions appear to be more targeted and comprehensive legal framework of indigenous peoples land rights.

The Australian very first constitutional reference to indigenous peoples was outright hostile indigenous peoples. [85] This was so because of the racism background at the time when the constitution was being written but later the 1967 constitutional referendum sought to repeal the races power which directly discriminated against indigenous peoples to allow for the passing of laws on Aborigines.[86]

[84] Fernandez J.W, *Indigenous Communities and Mineral Development*, Mining, Minerals and Sustainable Development, Issue 51 April 2001 p.9

[85] (a) Federal Parliament was denied power to make law with respect to people of "the aboriginal race in any State": section 51(xxvi)) and (c) section 127 provided: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted

[86] Section 127 even made it unlawful to include Aborigines when counting the population of the Commonwealth.

The repealing of the races power constitutional provision which allowed Australian States to make laws specific to races was in a positive assumption that statutory laws will always be enacted to favour Aborigines. "However, nothing was put into the Constitution to indicate that such laws should be for their benefit or that such laws should not discriminate against them on the basis of their race".[87]

The repealing of the races power while it could have seen to 'decriminalize aboriginity', it brought with it complexities since apart from bringing the equality phrase into the law, it did not go deeper to interrogate the reasons behind the marginalization of Aborigines both in law and society in general. The repeal of the races power was not about land since the land claim was only projected later through a statutory provision which was triggered by the *Mabo* land mark decision on the native title.

The assumption that takes for granted the land connection when making laws for protecting the rights of indigenous peoples is demonstrated through the critics of the Australian legal regime who appear oblivious of the land component. One of such is George Williams who claims that the power granted through the constitution to pass laws regarding to indigenous peoples should be forward looking and not be misconstrued to be basis for discrimination. As a matter of fact he suggests that "[t]he best way to achieve this is to insert a new provision in the constitution that outlaws racial discrimination against any group in the community".[88]

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[87] Williams G., *Land, Rights, Laws: Issues of Native Title*, Native Title Research Title,Volume 5 ,Issues Paper No.1 p.6

[88] Williams G., *Old-style racism still in constitution* an opinion piece that appeared in Sidney Morning Herald on 14 Sept, 2010. Williams gives reference to the paradox of the 'races power' in section 51(xxvi) of the Australian constitution which was interpreted by the High Court in Kartinyeri v The Commonwealth to set a precedent that actually the races power clause can be invoked to either favour or discriminate.

The Williams approach again seems to downplay the intrinsic aspect of land as a constitutional right that should explicitly provided.

The commentators that come close to recognizing the land connection gap have opposed sharply suggestion to recognize the rights of indigenous peoples of Australia in the preamble of the constitution and criticized it as a "very attractive marketing message for Australians [that] will provide Indigenous peoples with no rights and have no impact upon their own rights".[89]

> "The preamble has no legal effect and has virtually no interpretive value in terms of the operative provisions of the Constitution. [It is assumed that indigenous] elders were talking about preambular recognition, however, the [indigenous] elders weren't simply speaking about preambular recognition – they were talking about recognition of their pre-existing land rights in the body of the Constitution."[90]

Since the preambles of a constitution is just a guiding principle behind the subsequent contents of the constitution, the holistic constitutional recognition of the rights of the Australian Aborigines will only happen if there are an accompanying substantial provisions in the body of the constitution which expressly put land connection at the centre.

Although among the three jurisdictions under discussion, Australia appears to be the country that has domestically and consciously put in place laws specifically on indigenous people, the spirit has not been recognizing the territorial connection but to the prohibition of racism and discrimination. This starts from the passage of the "Racial Discrimination Act by the

[89] Davis M., *Indigenous Rights And The Constitution: Making The Case For Constitutional Reform* , Indigenous Law Bulletin June / July 2008, Ilb Volume 7, Issue 6 p.7

[90] Davis M., *Indigenous Rights And The Constitution: Making The Case For Constitutional Reform* , Indigenous Law Bulletin June / July 2008, Ilb Volume 7, Issue 6 p.7

Australian Parliament and subsequent cases interpreting this law empowered Aborigines by prohibiting racially discriminatory actions".[91]

This approach which does not target the territorial connection as the reference point has fallen to the trap whereby while a government passed laws that are meant to prohibit discriminatory actions but in reality undermine "the effects of progressive court decisions and limits Aborigines' ability to pursue land claims… The controversy over native title rights reflects the importance of dealing with the fundamental legal concerns regarding land rights of indigenous people".[92]

Just like Kenya and South Africa, the Australia land regime was inherited from colonization and perhaps the most unfortunate one that out rightly disposed the indigenous peoples without any guise of treaty arrangements like in Kenya and therefore "Aborigines did not have any legal precedent within the post-colonial judicial system on which to base specific land rights claims."[93]

4.2.1 From Mabo to Wik to Yorta Yorta in Australia

The *terra nullius* doctrine was exercised in Australia under the British government and was used to brand the territories occupied by the indigenous peoples as unoccupied. The first affirmation of this doctrine against the native title was through the famous Gove land rights

[91] Article by *Sandy Wood* *The Human Rights Brief* ,*Washington College of Law* http://www.wcl.american.edu/hrbrief/v6i3/aboriginal.htm (last accessed in November 29, 2011)

[92] Ibid

[93] Ibid

case.[94] Gove was overturned 20 year later by the *Mabo* decision whereby for the first time the land was recognized as a right for indigenous peoples.

In arriving to this judgment, the court took the equality approach whereby discrimination was identified as the basis used when the government extinguished the native title and it took away land rights of the aborigines, a situation that did not affect the non-indigenous.[95] Although this decision was crucial in overturning the long-standing *terra nullis* doctrine, it has not succeeded in creating a sustainable rights protection for indigenous people in Australia because it never came explicitly to recognize the intrinsic connection indigenous peoples have with land apart from being the historical inhabitants of that particular land.

All in all, *Mabo* was not in vain for it could be credited for the establishment of the Native Title and thus gave a sense of hope to indigenous peoples that some progress was happening. It also quashed the assumption that before the colonial era the indigenous peoples operated on a legislative vacuum as far as land was concerned and introduced a new principle were oral evidence found was admissible.[96]

Regardless of the above however, the *Mabo* was blind to the special connection indigenous people have with land and what it came close to was equaling it with "the property interests

[94] Milirrpum v Nabalco Pty Ltd.

[95] Mabo v Queensland (No 2) (1992) HCA 23; and; Mabo v Queensland HCA 69; (1989) 166 CLR 186

[96] Dr. Lisa Strelein, *Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples From Mabo To Yorta Yorta*: Native Title Law In Australia Washington University Journal of Law and Policy 2005

of white farmers and private businesses".[97] This decision by not being candid about the land connection it portents numerous effects to the land interests of indigenous peoples.

Foremost, it did not provide for what lands could be said to fall outside the native title and hence created a legal question from the non-indigenous who "were concerned that native title claims would terminate their … leases or impinge upon their right to use land for … agriculture. Mining companies demanded protection of their ability to prospect and extract mineral wealth".[98]

The Native Title Act as a consequence of *Mabo* seemed to answer the first question of the scope of lands under protection but the quagmire of the nature of indigenous peoples connection with land weighed heavily on this issue since the law technically "limited the scope of aboriginal native title rights to include only traditional land uses such as fishing, hunting, and gathering across native lands, rather than outright ownership rights."[99]

Later on the *Wik Peoples v. Queensland* tried to answer the question of scope, but persistent lack of definite understanding of aboriginity concept of land saw the introduction of amendments to the native title.[100] The substance of the amendments demonstrated how completely isolated Aboriginal connection to land was evident since it limited the "the ability of Aborigines making native title claims to negotiate government sanctioned uses of pastoral land such as mining, as well as the right to negotiate terms of compensation for

[97] Article by *Sandy Wood* *The Human Rights Brief* ,*Washington College of Law* http://www.wcl.american.edu/hrbrief/v6i3/aboriginal.htm (last accessed in November 29, 2011)

[98] ibid

[99] Ibid

[100] The Howard government introduced the controversial Native Title Amendment Bill in September 1997 which was passed in July 1998 as the Native Title Amendment Act 1998 (NTAA).

permitting these uses. It also [exempted] commercial and residential leases from native title claims by Aborigines."[101]

In *Yorta Yorta*, the authenticity of Aboriginity came under sharp focus when the Court clarified that traditional laws and customs are not merely oral pronouncements but should also be based on continuous practice and be affirmed by people who claim to be indigenous. "The Court held that in order to prove native title, claimants must establish there has been an acknowledgment and observance of laws and customs on a substantially uninterrupted basis since sovereignty."[102] Clearly the bar was raised from the use of oral and historic evidence to claim land rights for indigenous peoples.[103]

While Kenya is battling to establish who an indigenous peoples amongst it's population are, in *Yorta Yorta*, Australia was requiring indigenous peoples to demonstrate the requisite connection to land. The argument advanced by this thesis is akin to the spirit behind *Yorta Yorta* although the similarity ends where the Court spells out the parameters for determining land connection. By requiring that there be an evidence of continued observance of traditional law and customs, the court placed undue burden to indigenous peoples which even goes contrary to the test applied for discrimination.[104]

[101] Article by *Sandy Wood* *The Human Rights Brief* ,*Washington College of Law* http://www.wcl.american.edu/hrbrief/v6i3/aboriginal.htm (last accessed in November 29, 2011)

[102] Jagger K., *Yorta Yorta native title case, in Find Law Australia* http://www.findlaw.com.au/articles/1293/yorta-yorta-native-title-case.aspx (last accessed on 29th November 2011)

[103] Ibid

[104] Native title in the High Court of Australia a decade after Mabo Sean Brennan www.gtcentre.unsw.edu.au/.../brennanNativeTitleinHighCourt.doc (last accessed on 29, November, 2011)

The test for territorial connection should be applied in such that the onus for discrediting claim for this connection should lie with the state. Otherwise the test should have used the land component subjectively by examining if land was the central component for the sustainability of culture and not vice versa. This is a very important approach because most of the indigenous peoples claiming for land rights already have been disposed from those land and therefore this might have had impact on their culture since land (which they do not have) is the determinant of this culture.

From the ground breaking Mabo, to the reconciliatory Wik, to the discouraging *Yorta Yorta* and the subsequent amendments of the substantive elements of the Native Title, a clear trend emerges that Australian legal regime has not yet grasped territorial connection as the core of indigenous peoples and still grappling with case claw that is yet to form a reliable *stare decisis.*

The aftermath of the unconscious downplay of indigenous peoples territorial connection both in historical and contemporary realities in Australia has not gone unnoticed by the Australian government who as a result attempted to seek solutions through the formation of tribunals. The working of tribunals however has not been able to internalize that claims by indigenous people have to be intertwined heavily with land.

4.2.2 Richtersveld Community of South Africa

In South Africa, the Nama people in the well-known Richtersveld case, sued the government after they were evicted to pave way for mining. In a landmark decision which was handed down in 2003 by the South Africa Constitutional Court, the right to collective land ownership and resources therein was upheld. Again just as the Australian case oral evidence was

admissible. The court also held that the Nama people had been dispossessed of their land prior to 1913.[105]

Both South Africa and Australia, although there is recognition of unwritten traditional law, the courts used the equality test to identify discrimination. [106] This is a test that can be applied to any group seeking protection and will only vindicate indigenous people where their indigeneity is not under question.

The SACC adopted an alternative by borrowing on the doctrine of the aboriginal title as originating from Australia. The court chose to rely on "comparative jurisprudence" rather than international law. The Court appears to play safe by avoiding the dynamics of invoking international law since they would have to grapple first with the controversial concept of indigenous peoples. From the statement there is a clear indication that as long as there no agreed definition of indigenous peoples their protection would always be elusive. In the case of South Africa,

> "Had international law been relied on, with its fuzzy response to African claimants generally and its positively hostile response to the Rehoboth Basters, another people of Khoesan descent, the issue of who or what constitutes an indigenous people could not have been so easily avoided. Additionally, if international law had been successfully invoked, the South African courts would necessarily have had to conclude either that the Richtersveld community's indigenous identity was legally irrelevant, in that South Africa's black African majority was equally indigenous…"[107]

[105] Land restitution was applicable to cases prior to 1913 the year of the Native Land Act was enacted, however the SA constitutional Court found racial discrimination to have been applied and upheld that the restitution principle was applicable in this case.

[106] *Richtersveld Community v Alexkor Ltd and Anor* 2001 . The court decided that the customary rights go beyond land and encompases minerals as well.

[107] Marianne W. Chow *Discriminatory Equality V. Nondiscriminatory Inequality: The Legitimacy Of South Africa's Affirmative Action Policies Under International Law*. Connecticut Journal of International Law 2008-

4.2.3 The Endorois case

The first positive milestone to the struggle of indigenous peoples in Kenya was not found within statute, constitution or tribunal but from the African Commission on Human and People's Rights after many years of domestic legal inability to vindicate the rights of indigenous peoples. The commission held that the eviction of the Endorois Community from the land they resided in to make room for a game reserve was a violation of their rights. [108]

The collaborative evidence was a video presented by WITNESS and the Centre for Minority Rights and Development (CEMIRIDE) which demonstrated that they lived in the lands they claimed to have been evicted from. This decision although it attempted to demonstrate how culture, traditions and customs deteriorated because of land dispossession has lacked resonance from Kenyan government because of differences on how the two institutions understand indigenous peoples. Two years after the decision, the Endorois community remains evicted.

4.2.4 The Maasai case

This was the first case by indigenous peoples in Kenya was brought before the Court of Appeals for Eastern Africa a century ago where it was challenging the 1904 and the 1911 colonial agreements with Maasai on land.[109] In this case 'self-determination' card was pulled to reach to the conclusion that the Maasai were already sovereign since they had a form of government through the traditional and customary chiefdoms and therefore were subjects to

2009 ,24 Conn. J. Int'l L. 291,Pp.521-523

[108] Centre for Minority Rights Development (Kenya) and Minority Rights Group International (MRG) on behalf of Endorois Welfare Council v Kenya

[109] Kieyah J., *Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review, Spring 2007, 15 Penn St. Envtl. L. Rev. p.418

such chiefdoms which was in turn capable of entering into a treaty with the Crown.

The above happened regardless that the traditional chiefdoms power had been demobilized by the same Crown after the onset of colonization and "only those chiefs who were appointed and therefore in the pay of the government could be recognized as tribal leaders".[110] This is a classic case of how much pregnant self-determination reference can give birth to a totally different concept that is totally contrary to indigenous peoples' inspirations. In real sense indigenous peoples require a solid claim like land since it is evident that self-determination is a fluid concept that the can be counter-productive.

4.2.5 The Ogiek Case

The struggles dispossess the Ogiek community from their Mau forest land in Kenya started with the colonial government which gazetted the forest in a bid to evict the community. After the colonial era the Government of Kenya degazetted part of the Mau forest in a plan to resettle communities including the Ogiek. "Later the government withdrew its proposal to degazette the forest, after discovering the potential environmental degradation from settling people in the forest".[111]

This was one of the many law suits filed by the members of the Ogiek community in a never-ending struggle to claim land rights after being faced with eviction from the Mau Forest. In this case the local Catholic Church joined as amicus curiae owing to the presence of churches amongst the area the Ogiek inhabited. The Court 'pulled a Yorta Yorta' on the Ogiek community and held that "this proved that the Ogiek had renounced their ancient traditions

[110] Ibid

[111] Kieyah J.,*Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review Spring 2007, 15 Penn St. Envtl. L. p.423

and had thereby forfeited their land rights".[112] In asserting that the Ogiek peoples did not have the evidence in terms of title deed or allotment to claim ownership of land demonstrates that the Court and the Kenyan state is yet to make a distinction between the nature of land ownership indigenous peoples have with the private/individual ownership characterized by non-indigenous communities.

The other error the court made that the legitimate aim of the government of seeking to protect the forest for the betterment of the humanity did not put into consideration the special connection to land of indigenous peoples whereby they are preservers of the forest rather than destroyers.[113]

[112] Kimaiyo T.J, *Ogiek Land Cases and Historical Injustices 1902-2004*, Ogiek Welfare Council, 2004 Pp.5-6

[113] Kieyah J.,*Indigenous Peoples' Land Rights In Kenya: A Case Study Of The Maasai And Ogiek People*, Penn State Environmental Law Review,Spring 2007, 15 Penn St. Envtl. L. Rev. p.426

CONCLUSION

The definition of indigenous peoples' still remains fluid with no universally agreed upon term although the Declaration on the Rights of Indigenous Peoples and the recent establishment of the United Nations Permanent Forum on Indigenous Peoples brings a ray of hope for the indigenous rights struggle.[114]

It is however, unfortunate that territorial connection has not been embraced as the guiding principle for protection of indigenous peoples owing to differences in contextual and conceptual understanding stemming from definition, relationship with minorities and the direction advanced by self-determination discourse. With this already unstable mix of issues, thrown in the discussion on individual versus collective the equation of indigeneity gets more complex.

The ideological differences brought about by the above complexities remotely form some of the basis why the draft declaration which is non-binding has been rejected by Australia, while Kenya abstained from it.[115] However, this should not prevent further development of mechanisms and frameworks of protection of indigenous peoples rights both national and internationally.

The self-determination is a strong political argument that could have passed the test of time but it is prone to distortion which could and have worked against indigenous peoples interests. This is not to say that this thesis does not acknowledge the multifaceted outcomes

[114] The Declaration was adopted by an overwhelming majority of the General Assembly, with 143 countries including South Africa voting in support, 4 voting against (Australia, Canada, New Zealand and the United States) and 11 including Kenya abstaining.

[115] Ibid. While the States which voted against the adoption of the Declaration cited concerns with the wording of particular articles, they also expressed a general commitment to the core principles of the Declaration.

and approaches associated with self-determination which seeks to address the indigenous issue holistically. However, diversity has also its limitations in that it becomes so general such that it fails to address the specific core of the problem.

Finally, land being the basis within which indigenous peoples rights should coalesce only establishes the internal core for deriving indigenous peoples' rights and therefore more theoretical and practical research will be needed to establish the external boundaries for this core.

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