

PROTECTION OF CULTURAL RIGHTS OF INDIGENOUS PEOPLES
UNDER THE ICCPR/ICESCR AND THE AFRICAN CHARTER: A
COMPARATIVE STUDY

by Jennifer Gitiri

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PROFESSOR: Istvan Pogany, Boldizsar Nagy.

Central European University

1051 Budapest, Nador utca 9.

Hungary

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organization
NGO's	Non-Governmental Organizations
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

ABSTRACT

This thesis examines the theoretical and conceptual framework that guides the entire realm of cultural rights of indigenous peoples. Some of the concepts like culture and the term indigenous do not have a universally accepted definition and are usually interpreted depending on the context. However, bodies like ILO, the Human Rights Committee and the African Commission have attempted to offer some guidelines and working definitions. The first chapter unpacks these terms and theories and provides an analysis of how each of them is used in the context of cultural rights of indigenous peoples.

The second chapter delves into the issues that are at the core of the cultural rights of indigenous peoples like self-identification, self-management, self-determination as well as the right to non-discrimination. This chapter offers a detailed explanation of these themes that form part of the identity of indigenous peoples rights.

The third chapter concludes by assessing the monitoring and enforcement mechanisms under international human rights instruments and the African Commission on Human and Peoples Rights. It further examines case law from the African Commission and interrogates the inadequate enforcement procedures. Finally, the thesis interrogates the scope of ‘peoples’ rights within the African Commission and how it interprets these rights. In conclusion, this thesis reiterates the importance of the protection and preservation of the cultural rights of indigenous peoples which is fundamental to their cultural heritage.

INTRODUCTION

The most fundamental rights to maintain our specific cultural identity and the land that constitutes the foundation of our existence as a people are not respected by the state and fellow citizens who belong to the mainstream population. In our land and natural resources are the means of livelihood, the media of cultural and spiritual integrity for the entire community as opposed to individual appropriation. The process of alienation of our land and its resources were launched by European colonial authorities at the start of the century and has been carried on to date after the attainment of national independence. Our cultures and ways of life are viewed as outmoded, inimical to national pride and a hindrance to progress.¹

The right to culture is an important aspect in international² and regional human rights discourse that goes beyond cultural integrity and access to cultural heritage but is a key element of human dignity.³ However, the right to culture has not been strongly expressed in the same way as other rights, such as civil and political rights which have gained prominence. The reason is that a dominant view of human rights has emerged that has de-emphasized social, economic, cultural and other rights variously known as third generation rights.⁴ There is a general held view that civil and political rights are more deserving of enforcement while second (social, economic and cultural) and third generation rights (environment and development) are only to be progressively realized.

¹ Moringe Parkipuny, 'The Indigenous Peoples Question in Africa' (Statement Before the United Nations Working Group on Indigenous Population 5th Session, 1987), available at www.cwis.org/fwdp/Africa/parkpikny.txt accessed on 10 February 2015.

² Article 27, the Universal Declaration of Human Rights states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. "; Article...Convention on the Rights of the Child, 1989: child belonging to an ethnic, religious, linguistic, or indigenous minority "shall not be denied the right, in community with Other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language. "6; article 5 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.

³ Simon S.C Tay, 'Human Rights Culture and the Singapore Example', (1996) 41 *McGill Law Journal* 743; Cindy Holder, 'Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law', (2008) 7 *Alternatives* 33.

⁴ L. Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981) at 32.

The two major international human rights instruments namely, the International Covenant of Economic, Social and Cultural Rights (ICESCR)⁵ and International Covenant on Civil and Political Rights (ICCPR),⁶ have provisions for cultural rights, however, it is not clear whether the right is specific to indigenous peoples. Article 1 of the ICCPR provides that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁷ Article 26 of the ICCPR is the right to non-discrimination that prioritizes equality: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour ... or other status.”⁸ Article 15 of the ICESCR requires State parties to protect the right to culture by requiring them to recognize the right of everyone to take part in cultural life⁹ This view is reflected in the reports and actions of international human rights instruments that have ignored the right to culture.¹⁰ Article 15 is further amplified by the UN Committee on Economic, Social and Cultural Rights,¹¹ which identifies the obligation of states to respect, protect and promote the right to culture for indigenous peoples. The General Comment 21, which clarified economic, social and cultural rights acted as an inspiration for regional human rights instruments.¹²

⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution on 16 December 1966.

⁷ UNPO: Self-determination - UNPO : Unrepresented Nations and ..., <http://www.unpo.org/article/4957> (accessed March 26, 2015).

⁸ International Covenant on Civil and Political Rights, <http://www.unesco.org/most/rr4iccpr.htm> (accessed March 26, 2015).

⁹ Article 1 (a), ICESCR.

¹⁰ P. Alston, "The Right to Development" in *Human Rights Yearbook*, vol. 1 (New York: Hutchinson, 1988) at 1.

¹¹ General Comment 21.

¹² Amanda Barratt, 'Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21', (2011) 11 (2) *African Human Rights Law Journal* 560.

However, the African Charter on Human and Peoples Rights (ACHPR) could not benefit much from the General Comment because it avoided controversial issues touching on self-determination like secession and the obligations of states in international law to return land that belonged to indigenous peoples.¹³ The African response to the dominant view of international human rights is at odds with the right to culture. This argument is propounded by, among others, indigenous peoples to whom the right to culture is an integral part of their belonging.¹⁴ In Africa, “culture is the supreme ethical value, more important than human rights in particular.”¹⁵

The African concept of the right to culture differs from the provisions of ICCPR and ICESCR in several respects. First is the idea of individual rights espoused by Article 15 of the ICESCR, which is in contra-distinction with the ACHPR focus on collective rights. Second, although Article 1 of ICCPR provides for collective rights, the idea of self-determination that it propagated was unacceptable. There were conflicting interpretations of Article 1 of ICCPR from the start and Article 46 severely limited the scope of application of the right to self-determination. For the most part, African countries were uncomfortable as it would encourage secessionist groups.¹⁶ Thus, African countries established an African Charter on Human and Peoples Rights.¹⁷ The charter clarified the African concept of human rights, its limits and with respect to the right to culture provided that: “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal

¹³ KN Bojosi and GM Wachira ‘Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 382; W van Genugten ‘Protection of indigenous peoples on the African continent: Position seeking, and the interaction of legal systems’ (2010) 104 *American Journal of International Law* 29.

¹⁴ Cindy Holder, ‘Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law’, (2008) 33 *Alternatives* 15.

¹⁵ Simon S.C Tay, ‘Human Rights Culture and the Singapore Example’, (1996) 41 *McGill Law Journal* 751

¹⁶ Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007) http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf (accessed 10 February 2015) para 16

¹⁷ Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986

enjoyment of the common heritage of mankind.”¹⁸ However, State obligations to restitute indigenous peoples grabbed ancestral land has been resisted by states such as Kenya¹⁹ and Nigeria.

This thesis proposes analyses the tension that exists between universal application of human rights and cultural relativism espoused by the ACHPR. Universality is propagated by international human rights regime which views western human rights as superior as compared to African ones. The indigenous peoples oppose this on the premise that a proper understanding of human rights must be alive to existing differences and cultural orientation of indigenous peoples. They insist that universal norms propagate an insufficient understanding of human rights.

Ultimately, this thesis highlights the importance of preservation and protection of cultural rights because as Weissner noted, “ *the safeguarding and flourishing of their cultures is thus the preeminent basis of indigenous peoples’ claim...*”²⁰ Besides, all the rights claimed by indigenous peoples are essential cultural rights no matter how they are interpreted by the various instruments.²¹

In addition, this thesis seeks to answer the following questions: first, to what extent is the right to culture protected in the international human rights instruments, secondly, how does the protection and promotion of the right to culture by the African Charter on Human and Peoples Rights compare with similar protection in international human rights law. Finally, it looks at the monitoring and enforcement mechanism and establishes how effective they are in ensuring the protection and promotion of cultural rights of indigenous people.

¹⁸ Article 22, ACHPR.

¹⁹ See *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois case*).

²⁰ Siegfried Wiessner, Culture and the Rights of Indigenous Peoples in Ana Vrdoljak (ed) “The Cultural Dimension of Human Rights” Vol. XXII/1, OUP, 2013 at 118.

²¹ *Ibid* at 125.

CHAPTER ONE

1.1 THEORETICAL AND CONCEPTUAL FRAMEWORK

The right to culture for indigenous peoples has been part and parcel of the international human rights regime since UDHR in 1948. However, the right to culture has not been treated equally like other rights, such as political, civil, social and economic rights, because it is not considered fundamental for universal application.²² The development of a universal standard for cultural rights is difficult because embracing cultural diversity, religious and regional factors play an exceedingly important role in conceptualizing human rights.²³ This is reflected in the failure to define the minimum content of the right to culture and the context in which they apply whether it be individuals or communities.²⁴ Besides, the right to culture lacks an internationally recognized definition with the effect that its enforcement even at national level remains problematic and vague. The narrative tends to show that a universal human rights regime is equated to domination by western culture.²⁵

The promotion, protection and enforcement of the right to culture is further compounded by the evidential threshold required by the courts. For example, courts demand proof of continuous application of the culture or tradition.²⁶ This requirement disregards the fact that traditional cultures were suppressed and marginalized during the period of colonialism in Africa. It becomes clear that proof of culture places unnecessary burdens on claimants who have in fact adapted to changes and lost not only their heritage, but their culture due to state policies of assimilation. The

²² Sally Merry, 'Changing Rights, Changing Culture' in Jane Cowell et al, *Culture and Rights: Anthropological Perspectives* (Cambridge University Press: Cambridge, 2001) at 31.

²³ Simon S.C Tay, 'Human Rights Culture and the Singapore Example', (1996) 41 *McGill Law Journal* 743.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Mohsen Al Attar Ahmed, 'Indigenous Cultural Heritage Rights in international Law', (2008) *Human Rights and the First Nations Law* 330.

effect of subjecting indigenous peoples to prove their rights using this interpretation compromises their ability to get justice. This perpetuates the claim often made that cultural rights are not enough to justify continued dispossession of individual peoples' heritage.²⁷

1.2 THEORETICAL FRAMEWORK

1.2.1 Universalism *vis-a-vis* Cultural Relativism

International human rights discourse is dominated by two competing themes of whether human rights are universal or whether the claims of cultural relativism should be acknowledged.²⁸ The theoretical foundation of the right to culture has not escaped this debate. In international law, the right to culture is based on the premise that human rights are universal, and no amount of culture or religion can vary that fact.²⁹ The right to culture can be inferred from various human rights like freedom of association, expression, religion, etc. At the same time, while human beings have a right to enjoy their own culture, no culture can require an individual to forfeit certain basic rights, such as the right to life or to physical integrity/inviolability. Thus, practises such as Suti in India or female genital mutilation – however culturally authentic – are a denial of basic rights. The idea of universalism contends that human beings are united within certain entities that cannot be erased by other considerations of cultural or otherwise.³⁰ The gist of this formulation is that human rights apply to the individual and not a group or collective rights.

Proponents of universalism, on the contrary, contend that the idea of leaving human rights to be subject to religion or culture gives leeway for human right violations. Scholars such as Yash Pal

²⁷ Jeffrey Sissons, *First People: Indigenous Cultures and Their Future* (Reaktion Books: London, 2005) at 140.

²⁸ Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual* at 319.

²⁹ Preamble, UDHR.

³⁰ Donnelly J. *Universal Human rights in Theory and Practice* (Ithaca, New York: Cornell University Press, 1989) 49.

Ghai support this view and explain that a rejection of universalism is a device used by dictators to perpetrate human right violations against their own people.

The scope of cultural relativism propounded by African and Asian countries after attaining independence grew out of the desire to reject Western ideological domination after emerging from Western political domination. The thrust of cultural relativism is that universal application of human rights represents an alien idea of human rights that is often narrow.³¹ This is exacerbated by its link to Western ideology. The argument by cultural relativists is that culture in Africa is so pervasive that it affects every endeavour of human activity including protection and protection of the right to culture.

1.2.2 Individual people vis-a-vis collective peoples/ groups/ communities

The term ‘collective rights’ has encountered fierce opposition because initially, human rights declarations only comprehended the dichotomy between the state and the individual. Secondly, during the cold war, collective rights were perceived to be closely related to “the collectivization of individually held lands and industrial properties in various totalitarian revolutions and takeovers of the time”.³² However, according to Weissner, this is not the case for what the indigenous peoples lay claim to. Their claims are “typically based on their existential need to survive and flourish as a culture, not as a political or economic unit. Indigenous peoples are also not competing for economic or political power with the state.”³³

Granted, collective rights are necessary for individuals to realize their dreams and flourish as social animals as was propounded by Aristotle.³⁴ Furthermore, “interaction with and reliance

³¹ M E Spiro, ‘Cultural Relativism and the Future of Anthropology’, (1996) 1 *Cultural Anthropology* 259.

³² Siegfried Wiessner, Culture and the Rights of Indigenous Peoples in Ana Vrdoljak (ed) “The Cultural Dimension of Human Rights” Vol. XXII/1, OUP, 2013 at 120.

³³ Ibid.

³⁴ Kullmann, ‘Der Mensch als politisches Lebewesen bei Aristoteles’, 108 *Hermes* (1980) at 419.

upon others are *conditiones sine qua non* for human existence.”³⁵ I believe that collective rights are necessary for indigenous peoples to thrive and practice their culture which cannot be achieved in isolation. Collective rights are also intergenerational and transmitted from one generation to the next. This is particularly evident in cultural rights of indigenous peoples which are passed on for generations and which can only be exercised and enjoyed collectively. This thesis, therefore, speaks of the collective rights to culture of indigenous peoples. Weissner has particularly argued that:

Culture, in particular, is a group phenomenon; it cannot be developed by the solipsistic effort of an individual human being. The concept of an ‘individual culture’ has been rejected, with good grounds, particularly in the context of indigenous peoples. Collective rights are thus “essential for the protection of cultural diversity and indispensable to the protection of indigenous peoples and their ways of life.”³⁶

Conversely, Hannun emphasizes that Article 27 of ICCPR refers to individual rather than group rights.³⁷ Further, he uses the term ‘group rights’ and ‘collective rights interchangeably. Packer, on the other hand, draws a distinction between group rights and collective rights. These rights according to Packer should be ‘group rights’ as the groups “have freely and voluntarily formed and agreed to pool their individual rights for specific purposes.”³⁸ He finds the idea of collective rights disturbing because it connotes ‘monolithic entities within which individual freedoms and rights are subjugated to some amorphous ‘collective’ will often articulated by self-proclaimed and self-interested representatives”.³⁹ In this thesis, however, I will use the term ‘collective’ rights understood as rights held by groups, communities or peoples.

³⁵ Supra note 32 at 121.

³⁶ Ibid at 124.

³⁷ Hurst Hannun ‘The Concept and Definition of Minorities’ in W. Weller (ed) Universal Minority Rights (OUP,2007), at 69.

³⁸ John Packer, ‘Problems in Defining Minorities’ in Fottrell & Bowring (eds.), Human Rights in the New Millennium (Nijhoff, 1999) at 241-44.

³⁹ Ibid at 241.

Furthermore, the African Commission emphasized the importance and affirmed its commitment to collective rights in the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria case*,⁴⁰ where the Ogoni were referred to as ‘people’, ‘communities’, and ‘society’.¹⁶

1.3 CONCEPTUAL FRAMEWORK

This thesis deals with two concepts: culture and indigenous peoples that have been defined in a very broad manner. To bring clarity, this section offers a definition of the two concepts that is used throughout the thesis.

1.3.1 Defining Culture

The contextual interpretation of the concept of culture in international law is broadly defined in three ways: in the context of international trade, culture is seen as a product or commodity that can be sold on the market.⁴¹ Second, culture is seen as representing human practice and at another level as the “highest creative activities” in art, music, dance and literature.⁴² Third, in anthropology, culture is a way of life of a particular people at a specific time in history.⁴³ I believe the latter definition agrees with how indigenous people would prefer to be defined. The three interpretations represent what is recognized as cultural rights of indigenous people, namely: the right to education, information, cultural identity, participation in cultural life, protection of national and international cultural property and heritage, enjoyment of the benefits of scientific

⁴⁰ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria available at, <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (accessed March 26, 2015).

⁴¹ Mohsen Al Attar Ahmed, ‘Indigenous Cultural Heritage Rights in international Law’, (2008) *Human Rights and the First Nations Law* 330.

⁴² Symonides Januzz, ‘The Implementation of Cultural Rights by the International Community’, (1988) 60 (1) *The International Journal of Communication Studies* 7.

⁴³ Supra note 26 at 331.

progress and its application, benefit from moral and material interests resulting from any scientific, literary and artistic production and the right to international cultural co-operation.⁴⁴

UNESCO defines culture as a “dynamic value system of learned elements with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and the World, to communicate and develop their creative potential”.⁴⁵

This thesis will adopt both the UNESCO definitions of culture.

1.3.2 Defining Indigenous Peoples

Just like culture, the term indigenous peoples’ does not have a precise definition and even the UN has not tried to offer one.⁴⁶ According to Special Rapporteur Daes, the distinguishing characteristic of indigenous peoples is their lack of dominance and marginalization that is different from majority communities. The UN has, however, outlined four criteria that would be useful in identifying indigenous peoples, this would include:

occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification, as well as recognition by other groups, as a distinct collectivity and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.⁴⁷

The position of the African Commission’s Working Group of Experts on Indigenous Peoples mirrors that of the UN criteria, that is, the term indigenous peoples cannot be strictly defined.⁴⁸

This is because, according to the indigenous peoples who insist on self-definition, adopting a strict definition would exclude certain groups that properly qualify to belong.

⁴⁴ Supra note 42 at 10.

⁴⁵ UNESCO (Canadian Commission), A Working Definition of Culture (1977) iv, The Constitution of UNESCO was signed on 16 Nov. 1945 and came into force on 4 Nov. 1946: 4 *UNTS* 275 (1945).

⁴⁶ E Daes *Working Paper on the Concepts of Indigenous People* UN Doc E/CN.4/Sub.2/AC.4/1996/2 para 9, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d7db0fc1256b3a003eb999/\\$FILE/G9612980.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d7db0fc1256b3a003eb999/$FILE/G9612980.pdf) (accessed 10 February 2015).

⁴⁷ Ibid.

⁴⁸ African Commission’s Working Group of Experts on Indigenous Populations/Communities *Report of the African Commissions’s Working Group of Experts on Indigenous Populations/Communities* (2005).

This is further complemented by the Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights who described indigenous communities as:

...peoples and nations are 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 in those territories, or parts of them. 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, social institutions and legal systems.⁴⁹

From the definition, it is clear that indigenous peoples consist of people who predate existing nation states and despite efforts by colonial policies to assimilate them; they have also retained much of their cultural identity.

The second chapter will expound on the themes that form the fundamental basic of the cultural rights of indigenous people. It will interrogate the need for self-identification in defining indigenous peoples, self-management, the rights to self-determination and the right to non-discrimination.

⁴⁹ José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Document E/CN.4/Sub.2/1986/7Add.4, Para. 379.

CHAPTER TWO

2.1 THEMES AT THE HEART OF INDIGENOUS PEOPLES RIGHTS

2.1.1 Self- Identification

Indigenous peoples insist on self identification as a way of protecting their right to culture. Self-identification both as indigenous and as a people is very fundamental, thus, according to Cobo, “an indigenous person is one who belongs to the indigenous populations through self-identification as indigenous.”⁵⁰

Furthermore, self-identification of indigenous peoples is necessary because of the difference in cultures. In the Endorois case, the African Commission emphasized the importance of self-identification and agreed that “the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion.”⁵¹ Hence, the African Commission expounded on self-identification of indigenous peoples’ as follows:

... cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially.⁵²

The ILO Convention 169 is the first international legal instrument to recognize self identification as a distinct feature of the indigenous peoples by stating that; “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the

⁵⁰ Jose Martinez Cobo, Report on the study of the Problem of Discrimination Against Indigenous Populations. E/CN.4/RES/1986/35.

⁵¹ Endorois case para 162.

⁵² African Commissions’ Working Group of Experts on Indigenous Populations/Communities *Report of the African Commissions’ Working Group of Experts on Indigenous Populations/Communities* (2005).at 89.

provisions of this Convention apply.”⁵³ The criteria of self-identification has been adopted and used as a distinguishing feature of indigenous peoples. In addition, Self-identification has an objective and subjective Criteria

The objective criteria should meet the requirements of article 1.1 of the ILO Convention 169. The gist of the criteria is that the person belongs to the group through his/her customs, traditions, special laws or regulations. Such persons should also have a historical connection to the area they inhabit prior to colonization or establishment of existing boundaries. Self-identification extends to indigenous peoples who despite efforts aimed at assimilating them they have managed to retain their social, economic, political and cultural ways of life.⁵⁴ Subjective criteria, on the other hand, conjures such a person or group identifying himself/herself as belonging to this group as either a tribal or indigenous peoples.⁵⁵

2.1.2 Self- Management of Indigenous Peoples

The ILO Convention 169 is the genesis of the right of indigenous peoples’ quest for self-management. It provides *inter alia* that, “recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, religions, within the framework of the States in which they live.”⁵⁶ The aim of self-management is to enable indigenous peoples to take charge of their lives, destiny and better recognition of their culture, customs and traditional norms and way of life.⁵⁷ This is in addition to offering indigenous peoples’ better control of the cultural, social and

⁵³ Article 1.2, ILO Convention 169.

⁵⁴ Ibid. Article 1.1 (B).

⁵⁵ International Labour Organization, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (ILO: Geneva, 2003) at 9.

⁵⁶ Preamble, ILO Convention 169.

⁵⁷ Supra note 55, at 10.

economic aspects of their development. Self-management is important in ensuring that “indigenous and tribal peoples have the opportunity and the real possibility to manage and control their lives and to decide their own future”⁵⁸. This is the surest way to protect their right to culture. This can be illustrated by the self-management after the establishment in 1979 of the Greenland Home Rule in Denmark through the passing of the Home Rule Act in 1978 which gave the Greenlandic people more autonomy to govern their own affairs.⁵⁹

2.1.3 Indigenous Peoples Self-Determination

International law recognized the right to self-determination as one that is available to peoples.⁶⁰ Articles 1 (2)⁶¹ and 55⁶² of the UN Charter confirm that the most important objective of the UN is the promotion of the right to self-determination. According to Holder, the right to self-determination has been identified as a critical one if indigenous peoples are to enjoy their right to culture.⁶³ The right of indigenous peoples to self-determination is provided for in ICCPR⁶⁴ and ICESCR.⁶⁵ Although the right to self-determination is not specific to indigenous peoples, the reading of the ICCPR gives an indication that it is would be beneficial to indigenous peoples as a form of protecting their cultural integrity. Article 2 (1), further makes reference to indigenous peoples to the extent that they should be able to get beneficial interests in their wealth which could be equated to cultural wealth such as ornaments, works of art and craft and indigenous

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ UNPO: Self-determination - UNPO : Unrepresented Nations and ..., <http://www.unpo.org/article/4957> (accessed March 26, 2015).

⁶¹ “To develop friendly relations among nations, based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace.”

⁶² “With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self determination of peoples, the United Nations shall...”

⁶³ Cindy Holder, *Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law*, (2008) 33 *Alternative* 8.

⁶⁴ Article 1 (1), ICCPR: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

⁶⁵ Article 1, ICESCR.

knowledge.⁶⁶ State parties to the ICCPR are required to protect indigenous peoples' right to self-determination.⁶⁷ The ICESCR on its part equates the right to self-determination for indigenous people to acquisition of political, economic and cultural rights.⁶⁸

Articles 1 of ICCPR and ICESCR were benchmarks for African states who made use of them and included the right to self-determination in the ACHPR which provides that: "All peoples shall have unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."⁶⁹ This was despite the fact that the African continent at the time had many liberation movements based on ethnicity, thus there was fear that it would have encouraged more liberation movements.⁷⁰

Similarly, the UNDRIP under Article 3 expressly provides that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁷¹

During the drafting of UNDRIP, states were reluctant to include the right to self-determination because they viewed it as a threat to territorial integrity.⁷² In the end, a compromise was reached with the inclusion of Article 46 paragraph 1 which states that the rights conferred under the Declaration do not give rise to an express right to secession. It provides that;

⁶⁶ "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

⁶⁷ Article 1 (3), ICCPR: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

⁶⁸ Article 1(1), ICESCR: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

⁶⁹ Article 20 (1), ACHPR.

⁷⁰ Alnashir Vishran, *Reappraising the Right to Self Determination of Minorities and Indigenous Groups: A Case Study of Quebec and Lessons for Africa* (LLM Thesis: University of Nairobi, 2006) at 16.

⁷¹ Article 3, United Nations Declaration on the Rights of Indigenous Peoples.

⁷² Catherine J. Magallanes, *ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples*, Victoria University of Wellington Legal Research Papers (2012). Paper No 50/2012 at 9.

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.⁷³

Many States emphasized that the right to self-determination is to be exercised within the confines of the principles of State sovereignty and territorial integrity. Argentina specifically stated that it had voted for the declaration because of the inclusion of Article 46 which was “to reconcile references to the right to self-determination with principles pertaining to the territorial integrity, national unity and organization structure of each state.”⁷⁴

Namibia, on the other hand, made it clear that “the exercise of the rights set forth in this Declaration [including the right to self-determination] were subject to the limitations determined by the constitutional frameworks and other national laws of States.”⁷⁵

Despite the foregoing, indigenous peoples like other people have a right to secession where necessary and appropriate.⁷⁶

2.1.4 Indigenous Peoples’ Right Non-Discrimination and Equality

The right to non-discrimination and equality is one that is common to the international human rights instruments, as well as the ACHPR. Although the instruments do not expressly mention discrimination and equality with regard to indigenous peoples, it is clear that the cultural practices of indigenous peoples’ can be used to discriminate against them. The right to non-discrimination and equality can be used by the indigenous peoples as a protective device to the enjoyment of the right to culture. Thus, if indigenous peoples have to practice their culture, it must be devoid of any form of discrimination and must be protected. Accordingly, the UDHR

⁷³ UNDRIP Article 46 para 1.

⁷⁴ Supra note 72 at 9.

⁷⁵ Ibid.

⁷⁶ Ibid at 10.

provides that, “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁷⁷ Article 2 (1), 2 (2) and 2 of ICCPR⁷⁸ and ICESCR⁷⁹ and ACHPR⁸⁰ respectively also mandate State parties to promote and respect the principle of non-discrimination on grounds of race, gender, sex, religion and language.

Moreover, equality is a central theme in entire human right regime, in the ACHPR it has been provided in Articles Article 3: “Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.” Article 19 provides that: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

Therefore, the right to non-discrimination and equality should be adhered to especially concerning indigenous peoples who are often discriminated upon due to their culture or way of life. They are often marginalized and deprived off their fundamental rights.

⁷⁷ Article 7, UDHR.

⁷⁸ “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁷⁹ The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁸⁰ “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

CHAPTER THREE

3. 1 MONITORING AND ENFORCEMENT MECHANISMS

Introduction

Reporting mechanisms for human rights violations are meant to enhance the implementation and enforcement of human rights instruments. Most human right instruments were established with the mindset that implementation would be automatic. However, this has not always been the case especially for second-generation rights that are largely perceived as progressive in nature. Cultural rights belong to this category of rights. This chapter analyses the monitoring and reporting system of international human rights and the ACPHR on the right to culture. Particular attention is given to monitoring frameworks encapsulated in the ICESCR and the ACHPR.

3.1.1. Reporting and Monitoring System under ICESCR

The reporting mechanism under the ICESCR is the Committee on Economic, Social and Cultural Rights (CESCR).⁸¹ The reporting procedure requires State parties to outline the initiatives taken to promote cultural heritage of indigenous peoples and create "favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs".⁸²

The most important contribution of the Committee is the release of General Comment 21 which is an attempt to elaborate Article 15 (1) (a) of the ICESCR on the right to cultural life.⁸³ General Comment 21 is a crucial intervention in the clarification of the right to culture for indigenous peoples. It answers most of the questions left out by existing human right instruments such as the

⁸¹ UN Doc. E/1991/23, Annex IV.

⁸² Guidelines on Treaty-Specific Documents to be Submitted by State Parties under Arts 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 13th January 2009, UN Doc E/C.12/2008/2 at 14, paras 67 and 68.

⁸³ Amanda Barratt and Ashimizo Afadameh-Adeyemi, 'Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21', (2011) 11 *African Human Rights Law Journal* 569.

recognition and identification of indigenous peoples. Further, the question of collective rights for indigenous peoples is succinctly dealt with putting rest to fears by African states that recognition of these rights would mean encouraging civil strife⁸⁴ or secession.⁸⁵

General comment 21 further elaborates the Minimum Content principle as the standard bearer for enforcement of socio-economic and cultural rights. Minimum Content is met in respecting, protecting and promoting human rights.⁸⁶ Consequently, the gist of the General Comment 3 is the concept of minimum core obligations which must be met by a state party.

“The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d’être*.”⁸⁷

The concept can be used as a benchmark for other human right instruments such as the ACHPR to monitor compliance with treaty obligations. The indication is that core minimum are non derogable and once a state party does not meet them, it would amount to a violation of the right in question.⁸⁸ However, the concept is subject to progressive realization as it is weighed against existing availability of resources.⁸⁹

The work of the ESCR Committee is complemented by the optional Protocol to the ICESCR.

However, its work is ineffective as a monitoring agent because it does not have a mechanism to

⁸⁴ Comments made by Rwanda during debates on the Draft Declaration on 26 November 2006 (United Nations. 61st General Assembly. Third Committee. 53rd Meeting UN Doc GA/SCH/3878) <http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm> (accessed 20 February 2015).

⁸⁵ Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007) http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf (accessed 20 February 2011) para 16.

⁸⁶ P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) at 13-14.

⁸⁷ ESCR Committee General Comment 3: The nature of states parties’ obligations (UN Doc E/1991/23) para 10.

⁸⁸ A Chapman ‘Core obligations related to the right to health and their relevance for South Africa’ in D Brand & S Russell (eds)

Exploring the core content of socio-economic rights: South African and international perspectives (2002) 35 37

⁸⁹ ESCR Committee General Comment 3 para 10..

deal with individuals who wish to report human right violations.⁹⁰ Currently, only NGOs have access to the committee. If many more states were to ratify the Optional Protocol, then it would give the ESCR such mandate. Sadly, only 42 countries have ratified the Protocol allowing for individual complaints as against 160 who have ratified the ICESCR. Ratification would make it easier for the committee to assess the level of compliance of human rights obligations by states.⁹¹

3.1.2 Reporting and Monitoring System of the ACHPR

The African Commission has distinguished itself in the protection of the right to culture for indigenous peoples. This has been ably illustrated by the guiding the progressive development of peoples rights despite the many setbacks.⁹² This was accomplished through the African Commission giving content to the right to culture for the Ogoni people of Nigeria as peoples within the understanding of the Charter and, therefore, desirous of protection.⁹³ To that extent many scholars such as Alston,⁹⁴ have commented that the Commission has taken the right to culture from being ‘aspirational’ to the level of justiciable claims within the mandate of the Commission.⁹⁵

Two cases will be analyzed: *Centre for Minority Rights Development & Others v Kenya*⁹⁶ and *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*⁹⁷ to illustrate how the African Commission has tried to implement and enforce the right to culture for indigenous

⁹⁰ FIAN International.

⁹¹ Ibid.

⁹² Wilmien Wicomb Henk Smith, Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision’, (2011) 11 (2) *African Human Rights Law Journal* 422.

⁹³ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁹⁴ P Alston ‘Peoples’ rights: Their rise and fall’ in P Alston (ed) *Peoples’ rights* (2001) 259 287, quoted in R Murray & S Wheatley ‘Groups and the African Charter on Human and Peoples’ Rights’ (2003) 25 *Human Rights Quarterly* 236.

⁹⁵ R Murray and S Wheatley ‘Groups and the African Charter on Human and Peoples’ Rights’ (2003) 25 *Human Rights Quarterly* 226.

⁹⁶ (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case)

⁹⁷ (2001) AHRLR 60 (ACHPR 2001).

peoples. The difficulty in enforcement of the right to culture is that it is oftenly linked to the enjoyment of other rights such as the right to land, environment, religious beliefs and the right to benefit from indigenous knowledge as well as inadequate enforcement mechanisms that can hold States to account. This connotes that the right to practice cultural rights is linked to property rights especially for indigenous peoples like the Endorois who are hunters and gatherers.⁹⁸ For example they bury their dead near the lake (Bogoria) as well as perform religious ceremonies.⁹⁹ The Lake, therefore, becomes a focal point for the practice of their culture in so far as religious beliefs and practices are concerned.

Ultimately, the ACHPR prohibits the violation of the right to culture¹⁰⁰ which takes different forms such as loss of ancestral land, indigenous knowledge, creating circumstances which make it difficult to exercise their livelihood for example through the dispossession of land.¹⁰¹ The right to culture is also broad to include any activity that interferes with the of indigenous peoples ability to retain their cultural values as well as practice their culture in the best way they know best.¹⁰²

3.1.3 Enforcement Mechanisms

The Commission has affirmed its commitment to using various standards in asserting socio-economic and cultural rights on the African continent. Whereas it has not established its own standards, it has used some of the standards enunciated by the ESCR committee. In the Ogoni case for example, the Commission announced that it “will apply any of the diverse rights

⁹⁸ Endorois para. 79.

⁹⁹ Ibid.

¹⁰⁰ Article 22, ACHPR.

¹⁰¹ International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: the Forgotten Peoples?: The African Commission's work on indigenous peoples in Africa* (IWGIA: Copenhagen, 2006) at 18.

¹⁰² Ibid.

contained in the Charter” including the right to culture.¹⁰³ This approach is considered radical because it announces the inherent indivisibility and equality of human rights.¹⁰⁴ However, the Commission has loudly been accused, and rightly so, for failing to have a systematic approach in dealing with the right to culture. That it lacks consistency, fails to evaluate competing interests and shallow. This is demonstrated in the underdeveloped nature of the jurisprudence on the right to culture.¹⁰⁵

Furthermore, whereas the Commission has adopted minimum core content of the right to culture encapsulated in the ESCR General Comment 3 on the right to culture, it has used very little ‘reasonable standards’ as developed by courts in South Africa.¹⁰⁶ According to Young,¹⁰⁷ the Commission has used the ‘essence approach’ to define the minimum content. That notwithstanding its contention that the right to culture cannot be restricted in any way as to do so would “undermine its enduring aspects”. For example, in the *Endorois* case the very act of disrupting their way of life destroyed their pastoralist way of existence through relocation and limiting access to pastures. This was tantamount to denying them “the very essence of their right to culture.”¹⁰⁸ In effect, States have an obligation not to impose restrictions the effect of which would be to limit the scope of their cultural way of life. This is an aspect that can be considered

¹⁰³ *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni* case) para 68.

¹⁰⁴ GJ Naldi ‘The African Union and the regional human rights system’ in M Evans & R Murray *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008) 20 30.

¹⁰⁵ Sisay Alemahu Yeshanew, ‘Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples’ Rights: Progress and perspectives’, (2011) 11 (2) *African Human Rights Law Journal* 331.

¹⁰⁶ *Republic of South Africa v. Grootboom & Others*, [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

¹⁰⁷ K Young ‘Conceptualising minimalism in socio-economic rights’ (2008) 9 *ESR Review* 67.

¹⁰⁸ *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) paras 250-251.

as coming under the purview of minimum core content although the commission has not said so specifically.¹⁰⁹

It is therefore suggested that the African Commission in building up its jurisprudence needs to fuse the standards of the core content and the reasonableness in adjudication matters relating to the right to culture.¹¹⁰

3.1.4. Endorois Case

Facts of the Case

The Endorois case¹¹¹ was filed by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG), on behalf of the Endorois Community. The Endorois are a pastoral community who has lived near Lake Bogoria in Kenya for centuries. However in 1973, the government of Kenya gazetted their land as a Game Reserve and as a result of the dispossession they were unable to access it for purposes of hunting and gathering fruits. They claim that their rights to property, religion, culture and free disposal of natural resources were violated.¹¹² They do not claim to have title to the land but have proof of customary ownership along the concept of 'aboriginal title'. This title is not recognized in Kenyan law which considers communal ownership as inconsistent with the modern concepts of property rights.

Commission Holding

The African Commission in its findings observed that displacement violated "the right to preserve one's identity through identification with ancestral lands, cultural patterns, social

¹⁰⁹ Supra note 104 at 325.

¹¹⁰ Ibid. at 332.

¹¹¹ Supra note 107.

¹¹² Ibid at para. 1,2,3.

institutions and religious systems."¹¹³ Further, that the removal of the Endorois from their ancestral land followed that they had been denied the community's right to culture, "rendering the right, to all intents and purposes, illusory."¹¹⁴

The most important holding by the court in relation to the right to culture is that the "justification for the doctrine of customary or aboriginal title is the protection of culture." Consequently, the African Commission found that Kenya had violated Articles 1, 8, 14, 17, 21 and 22 of the African Charter and made *inter alia* the following recommendations.

- Recognize rights of ownership to the Endorois and Restitute Endorois ancestral land.
- Ensure unrestricted access to Lake Bogoria and the surrounding sites for religious and cultural rites and for grazing their cattle.
- Provide adequate compensation for all the loss suffered by the community.
- Engage in dialogue with the Complainants to ensure the effective implementation of these recommendations.
- The government to report within three months from the date of notification, on the implementation of these recommendations. The African Commission availed its good offices to assist the parties in the implementation of the recommendations.

Despite these recommendations, enforcement has been slow on the part of the Kenyan government which raised the question of enforceability of decisions by the Commission. The weak enforcement mechanisms in Africa pose an enormous challenge to the protection and enhancement of cultural rights in Africa. Usually, there is neither commitment nor political will by governments to redress violations of cultural rights of indigenous peoples. Therefore, there is

¹¹³ Ibid at, para 157.

¹¹⁴ Ibid, para 251.

need for a more comprehensive and strict enforcement mechanism to ensure that these rights are realized and protected.

3.1.5 The Ogoni Case¹¹⁵

Facts of the Case

This was not a case on the violation of the right to culture but it gained relevance on account of its findings on the concept of peoples which has a direct correlation to the right to culture. The Ogoni people of Nigeria alleged that the Nigerian National Petroleum Company (NNPC) and an oil consortium exploited oil reserves in Ogoniland with very little regard to their local health and environment. The Consortium disposed toxic waste in the environment, in local waterways which violate the international environmental standards. The failure to properly maintain facilities by the consortium resulted in oil spills that were avoidable thus contaminating the water, causing diseases and other health risks. The Nigerian government on its part condoned the practice by failing to monitor the operations of the oil company. Instead, the government used its forces to suppress the Ogoni people, in the process displacing them from the ancestral lands.

Commission Holding

The Commission held that the Federal Republic of Nigeria was in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights. The Commission asked the Nigerian government to stop attacks on the Ogoni, compensate the victims of human right violations. More fundamentally, it recognized the Ogoni as 'peoples' in which case the protection of their environment would allow them practice customary practices.

¹¹⁵ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

3.1.6 Content to the Scope of ‘Peoples’ Rights under the African Commission

The commission delayed in giving content to the scope of peoples. This was acknowledged by its comments made during the Endorois decision, that:

Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of ‘peoples’. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESCR do not define ‘peoples’.¹¹⁶

Although the Commission was vindicated in the *SERAC*¹¹⁷ decision when the African Commission finally accepted the Ogoni as ‘peoples’ within the understanding of the African Charter, some felt that it came too late in the day. This according to Wicomb and Smith¹¹⁸ was disappointing in view of the fact that the Commission had a unique position of bringing the African perspective on the human rights discourse to the fore while moving away from the international jurisprudence that generally failed to articulate the African view point on the right to culture. As it has been observed:

normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of ‘peoples’. It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three generations of rights.¹¹⁹

The Commission needs to be brave enough in providing content on African on African rights to culture for indigenous peoples without having to rely so much on international human rights

¹¹⁶ *Endorois* para 147.

¹¹⁷ Supra note 114.

¹¹⁸ Wilmien Wicomb Henk Smith, Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision’, (2011) 11 (2) *African Human Rights Law Journal* 44.

¹¹⁹ *Endorois* para 149.

jurisprudence which has little appreciation for the exclusivity of indigenous peoples' right to culture.

3.1.7 Lessons Learned

The Endorois laid down more principles in light of justiciability of the right to culture especially in linking it to property rights and the right to use land without a title document representing ownership. The Commission measured the eviction of the Endorois against the standards of proportionality and participatory consent in line with Article 14 of ACHPR.¹²⁰ The state was found to have violated other rights analogous to the right to culture namely: the right to property, development, denial of participation in earning the communities consent, inadequate compensation and environmental protection due to the failure to carry out both environmental and social audit.¹²¹ The Commission considered whether by limiting the Endorois right to property was in line with preserving communities' ability to survive. Furthermore, the Commission viewed State actions in vesting right to property affected its ability to guarantee the right to culture.¹²²

The Commission despite its limitations in resources and enforcement power, is on the right trajectory by adopting a broader interpretation of the cultural rights especially of indigenous peoples. In particular, recognizing and elaborating the concept of peoples in the African context is commendable.

¹²⁰ The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

¹²¹ *Endorois* case (n 37 above) paras 238 & 281-298.

¹²² Article 14. ACHPR.

Conclusion

Reporting and monitoring of human rights is a very imperative exercise in the enforcement and implementation of human standards in international, regional and domestic human right systems. Although international and regional human right instruments provide for a reporting and monitoring system, the systems are found ineffective due to inadequate enforcement of judgments, limited and lack of admissibility for individual claims, insufficient funding and manpower, lack of political will and the instruments' over-reliance on the state and NGOs for reporting. These internal weaknesses undermine the ability of the reporting systems to be effective in protecting human rights violations. Some of the weaknesses such as failure to admit individual claims could be cured if many more countries could ratify the two Optional Protocols to the ICESCR and ACHPR. Among other benefits, it would clarify and broaden the enforcement and implementation of human rights and the right to culture, in particular.

CONCLUSION

Whilst different international and regional instruments have attempted to offer a definition of the term ‘indigenous people’, it still lacks a universal definition. The rights to culture has also for decades been overlooked and sidelined in many human rights discourse, thus, being subjected to the periphery despite being provided for in the ICCPR, the ICESCR and the African Charter of Human and Peoples’ Rights. Culture is also subject to varying definitions. Despite international human rights instruments providing for the protection and promotion of the right to culture for indigenous peoples, many of them still experience widespread human rights violations.¹²³

The greatest challenge faced by indigenous peoples in the protection of their right to culture is the desire by dominant communities to eliminate their cultural distinctiveness. According to Coombe’s,¹²⁴ this aspect not only unites indigenous peoples but at the same time defines their common identity as victims of conquest and colonial domination. This pattern never changed for indigenous peoples even after many States attained independence. The desire to assimilate indigenous peoples primarily involved subsistence, education and failure to abide by international treaty obligations.¹²⁵

The cultural right of indigenous peoples has not enjoyed similar status as other rights, thus, as Holder observes,¹²⁶ the treatment of the right to culture in international legal documents as an object translates the right to culture as one of access and consumption. The right is, therefore, made to appear less significant to human dignity than other rights such as civil, political, social

¹²³ United Nations report *The state of the world’s indigenous peoples* (2009).

¹²⁴ Rosemary J Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, (2008) *Human Rights and First Nations Law* 311.

¹²⁵ Ronald Niezen, *The Origin of Indigenism: Human Rights and Politics of Identity* (University of California Press: Berkeley, 2003) at 87.

¹²⁶ Cindy Holder, ‘Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law’, (2008) 33 *Alternatives* 15.

and economic rights. This has aided in concealing the fact that violating the rights of indigenous peoples to culture and other rights has a nexus that justifies the perception that the right to culture is less important.

This notwithstanding, the right to culture for indigenous peoples is as basic as the protection of other fundamental rights like the right to free speech, association, fair trial, freedom from torture to mention but a few.

The Committees on Economic, Social and Cultural Rights and Civil and Political Rights as well as the African Commission have taken great strides through the reporting and enforcement to ensure protection and preservation of cultural rights of indigenous peoples. However, a lot remains to be done to ensure implementation.

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