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## Chapter

# The Role of International Law in Protecting Land Rights of Indigenous Peoples in Nigeria and Kenya: A Comparative Perspective

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## Abstract

This chapter explains the role of international law in protecting land rights of indigenous peoples (IPs) in Africa. It examines selected decisions of the United Nations Human Rights Committee and human rights treaty-based Monitoring Bodies such as Committee on the Elimination of All Forms of Racial Discrimination and Committee on Economic Social and Cultural Rights on land rights of IPs. It uses the case study of Abuja, Nigeria and a comparative approach to developments in relation to IPs' land rights in Kenya in the context of some concluding observations of the human rights treaties Monitoring Bodies, the African Commission on Human and Peoples' Rights as well as the decision of African Court on Human and Peoples' Rights to illustrate the significance of international human rights treaties and the African Charter on Human and Peoples' Rights in protecting land rights of IPs in Africa. The research method is largely doctrinal, it uses a case study method and it is comparative in its approach to Nigeria and Kenya in the context of how both countries engage with international law as well as the observations and decisions of relevant international human rights bodies on both countries discussed in this chapter.

**Keywords:** indigenous peoples, land rights, international law, Africa, Kenya, Nigeria

## 1. Introduction

Globally indigenous peoples (IPs) suffer from several kinds of injustices as a result of their low numerical numbers, political marginalisation and low economic power. Perhaps it is because of their vulnerability to marginalisation and discrimination by other dominant groups and the State that the international community has chosen through the instrumentality of international human rights law to make them direct subjects of international law. However, international law is not easily enforceable within the domestic jurisdiction of some States, making it difficult for subjects of international law to enforce their rights thereunder in the domestic jurisdictions of States where they live. This raises interesting academic issues about how to enhance a viable relationship between international law and national law.

It appears that the most controversial and dominant human rights issue that pertains to IPs is the challenges they face regarding dispossession of their ancestral

lands which they often depend upon for their survival. The need to protect land rights of IPs may quite often come into conflict with the interests of the State. As this chapter will demonstrate, there are incidences where State interests may have negative impacts on land rights of IPs, in the context of the powers of the State to manage and control land through national laws as is the case in Nigeria and Kenya. (For the situation in Kenya in relation to land rights of the Ogiek peoples, see [1]). A bit more detailed information on the situation in Nigeria will be introduced later in Section 2.2 in the context of the case study in this chapter.

This chapter aims to explain the significance of international law and African regional human rights law in protecting land rights of IPs in Africa. It mainly uses the case study of Abuja, Nigeria and a comparative approach towards developments in relation to IPs' land rights in Kenya, in the context of some concluding observations of human rights treaties Monitoring Bodies, decisions of the African Commission on Human and Peoples' Rights as well as that of the African Court on Human and Peoples' Rights, to demonstrate the relevance of international and African regional law in protecting land rights of IPs in Africa. The main purpose of the comparative analysis between Nigeria and Kenya is because both countries have similar land rights issues in relation to IPs. In addition, both States are Anglophone with similar plural legal systems. Therefore, the two States are apt for such comparative study.

To achieve the above objectives, the chapter examines some decisions, concluding observations, general recommendations and decisions of the United Nations Human Rights Committee (HRC) and human rights treaty-based Monitoring Bodies such as Committee on the Elimination of All Forms of Racial Discrimination (CERD), Committee on Economic Social and Cultural Rights (CESCR), the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) on land rights of IPs. It uses the case study of Abuja, Nigeria to illustrate the significance of the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) and the African Charter on Human and Peoples' Rights 1982 (African Charter) in protecting land rights of IPs in Africa.

Following this introductory Section 1, in Section 2 some introductory details about Nigeria, Kenya and the case study of Abuja, Nigeria will be introduced, in order to provide the reader with background information to the analyses that follow in Sections 3–6, through critical examination of the decisions, observations and general recommendations of international and regional human rights Monitoring Bodies as well as the African Court and African Commission. Before examining these international human rights instruments in detail, some background information on Nigeria, the case study of Abuja, and Kenya will be introduced in Section 2.

## **2. Nigeria and Kenya in comparative perspective**

This section is aimed at introducing the reader to Nigeria, the case study and Kenya in order to provide relevant background information to the analyses of the observations, statements and decisions of the relevant bodies discussed in this chapter, in the context of how to safeguard land rights of IPs in Africa using the relevant international human rights treaties that will be examined later in Sections 3–6. The essence of discussing the manner in which international law is treated within the domestic jurisdiction of Kenya and Nigeria, is to enable this chapter to determine what system would be better suitable for the protection of land rights of IPs within the domestic jurisdiction of African States in accordance with the provisions of the international human rights instruments discussed in this chapter.

## 2.1 An introduction to Nigeria

Nigeria is an African country with a population of about 100 and 70 million people. It is located in West Africa. It is a multi-ethnic and multi-religious country. Prior to British colonial rule, there were many pre-colonial African States in both northern and southern parts of the country [2, 3]. The pre-dominant mode of law in the pre-colonial era was customary law [4]. However, with the advent of colonial rule by Britain, most of the pre-existing indigenous States were brought together to form Nigeria in 1914 through the amalgamation of the Northern and Southern Protectorates of Nigeria [5]. During colonial rule, there was a gradual introduction of statutory English law which co-existed with customary law and Islamic law depending on the specific area of Nigeria [6]. With the growth of anti-colonial movements across the world, Nigeria became politically independent from colonial rule in 1960. Nigeria now has 30 States in addition to Abuja, the Federal Capital city.

Nigeria's legal system is plural, encompassing customary law, State law and Islamic law [7]. In the context of international law, it appears that the pre-existing political entities prior to British colonial administration had an engagement with international law through diplomatic relations with other African States and Europeans going back to the fourteenth century [8]. However, with the emergence of colonial rule the pre-colonial States lost their identities as they assumed the identity of the colonial Britain. Consequently, they lost the ability to engage with international law to colonial Britain [9]. However, upon attainment of political independence from Britain in 1960, Nigeria's sovereignty was restored and then became a subject of international law with obligations as such [10]. Upon independence, Nigeria informed the UN that it will accept and inherit its obligations from the United Kingdom if such international instruments are valid and applicable to Nigeria [11].

The contemporary relationship between Nigeria's national laws and international law has its origins in the Nigerian Independence Constitution 1960 which incorporated international human rights norms enshrined in the UN Charter, [12] the Universal Declaration of Human Rights (UDHR), 1948 [13] as well as the European Convention on Human Rights and Fundamental Freedoms (ECHR) [14]. Subsequent Nigerian constitutions have also succeeded in making provision for those rights [15]. Nigeria is a party to several international human rights treaties, (for some of these see, [16–19]). Currently, Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (Nigerian Constitution) incorporates these rights. Nigeria also has a domestic legislation which is a replica of the African Charter, [20] which makes its provisions directly enforceable before Nigerian courts of law. For general analyses of the impact of the African Charter on human rights litigation in Nigeria and Africa, see [21–23].

However, Section 1 (3) of the Nigerian Constitution proclaims the Constitution as supreme over any other law, so that in circumstances of conflict between the provision of the Nigerian Constitution and international law, the Nigerian Constitution shall prevail and such international law shall be void to the extent of its inconsistencies. Indeed, Section 12 (1) of the Nigerian Constitution provides that, no treaty which has been signed and ratified by Nigeria shall have the force of law in Nigeria's domestic jurisdiction unless such has been enacted as a legislation by the Nigerian legislature. The case study in this chapter will now be introduced in Section 2.2.

## 2.2 An introduction to the case study of Abuja, Nigeria

Abuja is the administrative capital of the Federal Republic of Nigeria, (see [24]). Abuja is specifically defined under the First Schedule to the Nigerian Federal Capital Territory Act 1976 (FCT Act) [25] (see also, [26]). Abuja is located in central Nigeria [27]. The peoples of Abuja belong to the following ethnic groups: the Gbagyi; the

Koro; the Gade; the Bassa; the Igbira; the Amwamwa; the Ajiri Afo; and Gwandara. Studies have shown that the peoples of Abuja have lived and occupied this territory prior to British colonial rule in Nigeria. (For anthropological notes on the history, culture and geographical locations of these peoples in Nigeria, see generally [28]. For more details about the peoples as IPs in international law, see [29].)

Their land rights issues began in 1976 with the compulsorily acquisition of their ancestral lands for building a capital city [30]. The Land Use Act 1978 (LUA) [31] is the principal legislation on land but it is not applicable in Abuja. Abuja is meant to be a symbolisation of the unity of Nigeria [32]. The FCT Act vests all of Abuja lands 'exclusively' in the Federal Government of Nigeria. Implying that customary land rights do not exist in Abuja. The compulsory termination of customary land rights in Abuja is backed by Section 279 (2) of the Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution). That section provides that 'The ownership of all lands comprised in the Federal Capital Territory, Abuja shall vest in the Government of the Federal Republic of Nigeria'.

In relation to the other 36 States that make up the Nigerian Federation, the LUA makes provision for two types of occupancy rights. First is 'statutory right of occupancy' and secondly 'customary right of occupancy'. For customary rights of occupancy, the Act provides that Local Governments may grant customary rights of occupancy to land in any non-urban area to any person or organisation for agricultural, residential, and other purposes, including grazing and other customary purposes related to agricultural use in the 36 States.

Although the LUA has had a negative effect on the customary land rights of Nigerians in general [33], aspects of customary land tenure law have been accommodated within the LUA. An example is Section 24 of LUA which preserves customary law rules governing devolution of property. Similarly, Section 29 of LUA provides that the holder or occupier entitled to compensation in respect of customary land rights, if compulsorily acquired, is a community and the Governor is empowered to direct payment of compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Therefore, Nigerians who are indigenous to the 36 States of Nigeria have benefited from this statutory accommodation of customary land rights (see Section 36 of LUA). This is not the case in relation to Abuja peoples whose customary land rights are terminated by the domestic laws and Constitution of Nigeria.

The above situation in the context of customary land rights in Abuja has been confirmed as the position of the law by the decision of the Nigerian Court of Appeal (CA) in the only known case on the issue as at the time of writing. In *Ona v Atenda* [34] the Nigerian CA relied on the provisions of the afore-mentioned FCT Act and the Nigerian Constitution when it held that no person can be entitled to compensation for the compulsory acquisition on the basis of customary land rights, except those rights are enshrined in a statute [35]. As the FCT Act predates the LUA, the preservation of customary land rights under the LUA cannot inure in favour of Abuja peoples. It will be demonstrated later in Sections 3–6, that this development is a violation of international human rights laws. This chapter shall now introduce some background information on Kenya in Section 2.3 as a background to the comparative discussion that follow in the remainder of this chapter.

### **2.3 An introduction to Kenya**

Like Nigeria, Kenya is also an African country. It is geographically located in East Africa. It is also a multi-ethnic and multi-religious country. It has a population of about 38 million people. Prior to British colonial rule, there were several indigenous States in existence in Kenya [36]. The pre-dominant mode of law then was also

customary law [37]. Just like Nigeria, the pre-colonial States engaged with international law through trade and diplomatic relations with other pre-colonial African and European States [36]. The emergence of colonial rule in Kenya began with the declaration of Kenya as the East Africa Protectorate on 15 June 1895 by the British [38]. Consequently, pre-colonial Kenya lost its sovereignty and identity to Britain as well as the ability to engage with international law.

The place of international law and particularly international human rights law in Kenya has not been as straight forward as it has been in Nigeria [39], as the 1963 Independence Constitution of Kenya did not make provision for international law or international human rights law in the domestic legal system of Kenya [40]. However, in 1969 a bill of rights was incorporated into the Kenya Constitution 1963 [41]. Like Nigeria, this was the influence of the UN Charter, UDHR and the ECHR [42]. It has also been argued that this development in Kenya was the result of the inclusion of international human rights norms in the Ugandan Constitution which was in turn inspired by the approach that had been adopted under the Nigerian Independence Constitution 1960 [43].

Prior to the adoption of the Constitution of the Republic of Kenya 2010 (Kenyan Constitution), Kenya's approach towards international law was dualist [43]. That is, a similar approach as discussed in the context of Section 12 (1) of the Nigerian Constitution in Section 2.1, where no international treaty can have the force of law in the domestic jurisdiction unless such has been enacted as domestic legislation. However, due to fairly recent Constitutional reforms, the Kenyan Constitution has abandoned its previous dualist approach (a similar approach under the Nigerian Constitution) towards international law [44].

Article 2 (6) of the Kenyan Constitution provides that any treaty that has been signed and ratified by Kenya shall have the force of law in Kenya. Implying that there is now no need for enacting domestic legislations to make such treaties enforceable in Kenya. This is a remarkable departure from what obtains under the current Nigerian Constitution. However, Article 2 (2) of the Kenyan Constitution affirms its supremacy over any other law just like the case with the Nigerian Constitution, implying that where there is conflict between the Kenyan Constitution and international law, the former shall prevail.

Kenya is home to several IPs such as the Ogiek and the Endorois amongst many others [45] and there has also been recent legal developments in relation to their land rights at regional and internal levels as demonstrated later in Sections 3–6. The notoriety of these cases in relation to land rights of IPs in Kenya and the decisions and observations of the relevant treaty Monitoring Bodies on the developments in Kenya, justifies the comparison with Nigeria to illustrate the significance of the international human rights instruments discussed later in this chapter, towards solving the human rights challenges that the case study introduced in Section 2.2. Indeed, since this chapter is mainly concerned about the significance of international human rights treaties in protecting land rights of IPs in Africa, this makes Kenya a good comparator with Nigeria in the context of the case study which was introduced in Section 2.2. In the remainder of this chapter, the case study of Abuja is used to illustrate the significance of international human rights treaties in the protection of land rights of IPs in the domestic jurisdiction of African States such as Nigeria and Kenya in Sections 3–6.

### **3. The role of the ICERD and the CERD**

The idea of 'racial discrimination' in the context of the ICERD is defined under Article 1(1) of the ICERD [46] as any distinction which has the tendency to exclude, restrict or offers preferential treatment based on any of the grounds specified therein

such as: 'race, colour, descent, or national or ethnic origin', which would ordinarily prevent the enjoyment and exercise of human rights 'on an equal footing' in 'the political, economic, social, cultural or any other field of public life'. A duty is imposed upon States to ensure the equal protection and enjoyment of human rights of racial groups or individuals belonging to them just as other members of society through the enactment of relevant laws. Under Article 2 (c) of the ICERD, States are mandated to eliminate all forms of racial discrimination by taking affirmative actions.

Furthermore, under Article 5, States are required '...to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...' in the enjoyment of the 'right to own property alone as well as in association with others' including 'economic, social and cultural rights'.

In the process of monitoring States' compliance with their commitments under ICERD, the CERD was established. Accordingly, CERD has stated that the provisions contained in the ICERD have an immediate effect [47]. Nigeria has signed and ratified the ICERD. The CERD has maintained that the provisions of the ICERD are relevant in the context of protecting the rights of IPs in general as contained in its 1997 General Recommendation No. 23 on IPs [48] (see also, [49]).

The CERD has maintained that 'a "hands-off," or "neutral" or "laissez-faire" policy is not enough' [50]. Indeed, the CERD's recommendations and official comments have made a number of States to review and amend their laws and policies which have negatively affected land rights of IPs [51]. For example, the CERD has utilised its 'Urgent Action Procedure' to encourage States to change discriminatory laws and policies. For example, New Zealand was the subject of an 'Early Warning Procedure' in 2004 in the context of New Zealand's Foreshore and Seabed Act (2004) because the law discriminated against the Māori [51]. Similarly, in March 2006, the CERD issued a similar decision against the United States (US) and stated that it must stop any further violation of the land rights of Western Shoshone [52]. Although there has been no case emanating from Africa as at the time of writing, the CERD has explained the relevance of the ICERD towards protecting land rights of IPs in Africa through Concluding Observations on the Periodic Reports submitted to it by both Nigeria and Kenya as demonstrated below.

In a 2011 Concluding Observation on Kenya [53], the CERD observed that the Kenyan Government was yet to respond positively to the decisions of the African Commission on the forced evictions of the Endorois and Ogiek from their ancestral lands without any adequate redress in contravention of Article 5 of the ICERD [54]. It then recommended that Kenya should take affirmative action in relation to the decision of the African Commission [54]. This illustrates that the ICERD's provisions are relevant in the context of safeguarding land rights of IPs in Africa.

Indeed, in a Concluding Observation on Nigeria [55], the CERD observed that Nigeria had not provided it with specific information about the list of minorities and precise figures about the ethnic composition of Nigeria to enable it assess how the ICERD's provisions are being complied with. It asked that such information should be produced to assist it in determining and identifying the groups that fall within the definition of 'racial discrimination' in accordance with Article 1 of the ICERD [56]. The CERD also raised concerns about the absence of a definition of 'racial discrimination' within Nigeria's domestic laws [57]. Another observation was that the main principles contained in the ICERD had not been incorporated into the domestic laws of Nigeria so that they could be used by litigants before the national Courts of Nigeria in order to comply with Article 2 of the ICERD [58]. The CERD was deeply concerned in relation to the provisions of the Nigerian LUA discussed in Section 2.2 and stated that its provisions were in contravention of the provisions of the ICERD [59].

Therefore, Nigeria's attention was drawn to the CERD's General Recommendation 23 on the rights of IPs and recommended that the Nigerian LUA be repealed and new legislation adopted which complies with the principles set forth in the ICERD on the exploitation and management of land [59]. The CERD also observed that the mere absence of complaints before it from Nigeria may be a consequence of the absence of appropriate legislative measures [59]. There is no evidence that Nigeria has complied with the recommendations made by the CERD as at the time of writing, as there are no documents showing this.

The constitutional and legislative termination of the customary land rights of Abuja peoples without adequate payment of compensation or resettlement is a violation of Articles 1, 2, 5 and 6 of the ICERD. The definition of racial discrimination under Article 1 of the ICERD demonstrates that Abuja peoples of Nigeria have and are being discriminated against in context of their customary land rights.

#### **4. The role of the ICCPR and HRC**

Under the substantive provisions of the ICCPR [60] the word 'peoples' is used without any specific definition as evidenced by the contents of Article 1 (1) and (2) [61]. In the specific context of protecting land rights of IPs, the ICCPR provides that all 'peoples' have the right to dispose of their wealth and natural resources and that in 'no case may a people be deprived of its own means of subsistence'. Like the ICERD, Article 26 of the ICCPR then further provides that '...all persons are entitled to equal protection under the law and prohibits discrimination on grounds of race, colour, sex, language, national or social origin, property, birth or other status'. Indeed, the ICCPR imposes obligations on States which require them to adopt legislations that give effect to its provisions. However, of particular relevance to land rights of IPs is the protection in the ICCPR accorded to 'linguistic minorities' and 'persons belonging to such minorities' of 'the right, in community with the other members of their group, to enjoy their own culture'.

The body enshrined with the responsibility of monitoring compliance with States' obligations under the ICCPR is the HRC, which is established by the ICCPR. The HRC has interpreted some provisions of the ICCPR and concluded that they serve as effective safeguards to the rights of IPs to practice their culture and to own their properties. For example, the HRC has maintained that Article 27 of the ICCPR in particular protects IPs' land rights (see [62]) as demonstrated by its decision in the case of *Aerela and Nakkalajarvi v Finland*. In addition to this, in its General Comment on Article 27 [63], the HRC maintains that '...culture manifests itself in many forms, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law' [64].

Indeed, Article 27 of the ICCPR provides for the rights of individual members of minority groups such as IPs to enjoy their culture but this is also complemented by the possibility that such rights can be exercisable 'in community with the other members of their group' [64]. To buttress this point, in *Lubicon Lake Band v Canada*, [65] the HRC was of the view that it had no problems with 'a group of individuals, who claim to be similarly affected, collectively to submit a communication', to it (see also [66]). Similarly, in *Sandra Lovelace v Canada*, [67] the HRC opined that a State cannot deprive a group of people of their right to practice their culture such as living and maintaining ties with reserves upon which they were born [67].

Although the ICCPR allows States to derogate from the rights guaranteed therein by State Parties, this can only happen in circumstances that endangers the very existence of the State itself. Indeed, this accommodation of the rights of States to

derogate from those rights is made subject to the proviso that such derogations must not be in conflict with a State's international law obligations and must not be done in a manner that discriminates against any person or group of persons on any of the prohibited grounds under the ICCPR.

As at the time of writing, there have been no case before the HRC emanating from Africa, but the HRC has had the opportunity to make comments on developments in Kenya through its Concluding Observation [68]. In making observations on the adoption of a new Kenya Constitution in 2010 [69], the HRC raised concerns about lack of clarity regarding Section 2 (6) of the Kenyan Constitution which makes provision to the effect that all international treaties ratified by Kenya shall become part of the laws of Kenya under the Constitution, without giving any specific clarity about the legal status of the ICCPR in that country [70]. Consequently, the HRC recommended that Kenya takes measures to ensure that the ICCPR was part of the domestic laws of Kenya [70].

In the specific context of land rights of IPs in Kenya, the HRC made references to its previous Concluding Observation [71], and noted that Kenya must adopt appropriate laws, policies and practices to safeguard IPs from being evicted from their lands without consultation and resettlement [72]. Specifically, the HRC also expressed serious concerns about the land rights of Ogiek and Endorois peoples in the context of their continuous evictions, despite their dependence on the occupation of such lands for their survival [73]. The HRC also observed that Kenya had not complied with the decision of the African Commission in relation to the land rights of the Endorois in disregard of Kenya's obligations under Articles 12, 17, 26 and 27 of the ICCPR [73]. The HRC then recommended that Kenya should take account of and respect the land rights of IPs to their ancestral lands [73].

The latest HRC Concluding Observation on Nigeria as at the time of writing was the one made in 1996 [74]. In that Concluding Observation, the HRC recommended that Nigeria should review its entire legal framework towards protecting human rights in Nigeria in line with the provision and principles set-out in the ICCPR [75]. In the particular context of protecting the rights of IPs, the HRC recommended that Nigeria should ensure it protects the rights of persons belonging to ethnic minorities and ensure that the specific provision of Article 27 of the ICCPR are fully protected and guaranteed [76].

To the extent that the provision of Section 297 (2) of the Nigerian Constitution [76], and Section 1 (3) of the FCT Act, [76] discussed in Section 2.2 provides that the entire land in Abuja, the FCT of Nigeria, belongs 'exclusively' to the Federal Government of Nigeria when compensation or resettlement of all the IPs has not been made, these constitute continuous violations of the rights of the IPs of Abuja to practice their culture both individually and in association with others as farmers, hunters and fishermen. Certainly, this situation clearly constitutes violations of Article 27 of the ICCPR, (see [77–80]). Evidence of non-payment of compensation or resettlement is the existence of a Bill on the issue currently before the Nigerian Parliament (see [81]).

## **5. The role of the ICESCR and the CESCR**

Without any specific definition, under the ICESCR [82] the word 'peoples' is also used, without definition. It provides that all 'peoples' shall enjoy economic, cultural development and social rights as well as the right to cultural freedoms. It also provides that in no circumstances should people be denied of their means of 'subsistence'. The body that has responsibility for monitoring States' compliance with their obligations under the ICESCR is the CESR which has stated that cultural rights are intertwined with other human rights [83]. In the context of IPs, the

CESCR accepts that IPs have the right to enjoy all the rights under the UN Charter and UDHR as collectives and as individuals [84]. The CESCR has maintained that because of the expansive nature of cultural rights, and the enjoyment of such rights is linked to the enjoyment of human existence [85].

The CESCR has made it clear that Article 15 (1) of the ICESCR implies that culture encompasses modes of production of food [86]. Consequently, it has cautioned that any limitation on cultural rights must be through the adoption of the least restrictive measures whilst considering various types of restrictions [87]. In the specific context of the case study of Abuja, the termination of customary land rights in that territory is anchored on the need for a capital for the State, which is in reality a legitimate State interest. However, the complete termination of customary land rights in Abuja, in such a place that have IPs who are predominantly farmers is the most restrictive measure. This is a contravention of Articles 1 (2) and 15 (1) of the ICESCR. The least restrictive measure would seem to be that the Government may retain the necessary parts needed for developing the Capital city, whereas, the customary land rights of Abuja peoples to the villages and farm lands is accommodated through amendments to the Nigerian Constitution and the FCT Act discussed in Section 2.2.

The CESCR has indeed acknowledged the urgent need to protect the cultural rights of IPs in a special way [88]. Accordingly, it has noted that there is a linkage between IPs' and the land, territories and resources which they have historically and contemporarily occupied and acquired [89]. States are imposed with a tripartite obligation as it relates to protecting cultural rights of IPs (the obligation to respect; the obligation to protect; and the obligation to fulfil) [90]. (For the specific meaning of each of these tripartite obligations in relation to cultural rights, see [91, 92]).

The ICESCR also prohibits discrimination in the enjoyment of human rights in a similar way as the ICERD and the ICCPR [93]. The CESCR also maintains that to eliminate discrimination States should ensure that their laws do not enhance discrimination on the prohibited grounds [94]. The CESCR encourages States to give special attention to groups of individuals who have historically been victims of discrimination through removing the conditions that encourage such discrimination [94]. The CESCR has stated the 'race and colour' encompasses ethnicity of individuals and groups [95]. Obviously, Article 2 of the ICESCR has correlation in the context of Abuja peoples. The discriminatory termination of their customary land rights, when such customary land rights exist to the benefit of Nigerians of other ethnic groups indigenous to the 36 States of Nigeria [96], is a contravention of Article 2 of the ICESCR.

Although the ICESCR permits States to derogate from the rights guaranteed under it, such derogations must however be limited by law (and this includes international law) [97]. Indeed, the CESCR has used Article 27 of the Vienna Convention on the Law of Treaties 1969 [98] (which provides that a State cannot rely on its domestic law to violate its treaty obligations) to maintain that States should in such circumstance amend their laws in order not to be in violation of treaty obligation [99]. In the context of Abuja, terminating land rights of Abuja peoples through the domestic laws of Nigeria cannot justify the violation of Nigeria's treaty obligations.

As Kenya has been making constitutional and law reforms in relation to customary land rights of Kenyans, it will be interesting to examine the observations and comments of the CESCR to such law reforms in the context of Kenyan State obligations under the ICESCR. The purpose is to demonstrate the relevance of the ICESCR in protecting customary land rights issues in Africa. In one of its Concluding Observation on Kenya [100], the CESCR was impressed with the adoption of the Kenyan Constitution, wherein all international treaties signed and ratified by Kenya such as the ICESCR were made directly enforceable before Kenyan domestic courts. But the ICESCR condemned the continuous delay by Kenya towards implementing the decision of the African Commission in the case relating

to the land rights of Endorois peoples [101]. Kenya was thus encouraged to respect that decision of the African Commission and to also ratify the International Labour Organisation Convention on Indigenous and Tribal Peoples 1989 (ILO 169) [102].

The CESCR also observed that there was no sufficient legislation in Kenya that seeks to tackle discrimination in line with Article 2 of the ICESCR. It then encouraged Kenya to adopt legislation that expressly prohibits discrimination in all its forms [103]. It also lamented on the continuous threat of eviction of IPs such as pastoralist communities in Kenya without adequate legal remedies [104]. Consequently, it suggested that Kenya should adopt legislations providing safeguards for the tenure right of various IPs communities in Kenya [105]. It would appear that the emphasis on legislative reforms in Kenya by the CESCR is an indication that a lot of reliance is placed upon States to put into effect the provisions of the ICESCR through the enactment and reforms of domestic laws.

This should be the position in Nigeria as well in relation to land rights of the IPs of Abuja. As at the time of writing, the last Concluding Observation on Nigeria by the ICESCR is the one made in 1998 [106], in it the CESCR merely condemned the lack of rule of law in Nigeria and noted that this was negatively impacting on the enjoyment of economic, social and cultural rights under the ICESCR [107]. In an earlier document [108], the CESCR observed that there had been numerous incidences of forced evictions of people across Nigeria from their homes [109]. It particularly lamented about the problematic issues about land and resource rights of minorities and IPs living in the oil-producing areas of Nigeria whose lands were being polluted by the exploitation of oil, and encouraged Nigeria about the need to protect the rights of Ogoni people [110]. The relevance of the African Charter in safeguarding the land rights of IPs in Africa will be considered in Section 6.

## **6. The role of the African charter in protecting land rights of IPs in Africa**

All the analyses above relate to the position of the law in the context of international human rights treaties. The main objective in this section is to examine the main African human rights instrument in the context of protecting land rights of IPs in Africa. Indeed, as the African Charter has been celebrated as an international human rights instrument made by Africans for Africans, it is important to examine the relevance of its provisions to land rights of IPs in Africa and the case study of Abuja [111]. According to the Constitutive Act of the African Union (AU Constitutive Act) [112], one of the main objectives of the African Union (AU) is to encourage international cooperation amongst African States by respecting the UN international human rights norms and the African Charter. It would then appear that the AU intends to use the African Charter as the over-arching framework for the promotion and protection of human rights in Africa [113]. The African Charter has been celebrated as an instrument that uniquely maintains a balance between collective rights of peoples and individual rights [114]. It also appears the focus on collective rights under the African Charter is intended to introduce an African dimension of human rights into the international regime on human rights [115].

Like its counterparts in other continents of the world, the African Commission has expressed its views on the human rights implications of protecting or violating the land rights of IPs in the context of Africa [116]. For example, in one of its Report on IPs [117], the African Commission expressly admitted that rights to land and natural resources are very important to the existence and survival of IPs [118]. It maintained that such rights are protected under Articles 20 (right to existence), 21 (right to freely dispose of their wealth and natural resources), and 22 (right to

economic, social and cultural development) of the African Charter. Indeed, Article 14 of the African Charter which protects the right of every individual to property, is exercisable by individual members of IPs and as collectives in Africa.

In an Advisory Opinion [119] on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the African Commission maintained that Article 21 (1) of the African Charter was similar with Articles 10, 11 (2), 28 (1) and 32 of UNDRIP [119]. The African Commission is also of the view that Articles 2 (right to the enjoyment of the rights in the African Charter without distinction of any kind including ethnic group) and 3 (right to equal protection of the law) are enjoyable by IPs [120]. Thus, the African Commission has concluded that when States do not safeguard IPs against discrimination, then they are in violation of Articles 2 and 3 of the African Charter [121]. Indeed, Article 17 (2) of the African Charter recognises the right to cultural life in community, a right that certainly inures in favour of IPs in Africa in the context of their land rights.

The African Commission is mandated to obtain guidance from the general body of international human rights law in reaching its decisions and conclusions. The African Commission invoked this mandate in the case of Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Ogoni case) [122]. In that case, the African Commission stated that the failure to involve the Ogoni people in the decision processes in the context of the exploitation of oil and gas on their traditional lands was in violation of their right to freely dispose of their natural resources and wealth as provided under the African Charter [123]. It also found that the Nigerian Government was in violation of Article 14 (right to property) of the African Charter in relation to the Ogoni peoples [124]. The African Commission emphasised the need for the general body of international human rights law to take into account the peculiar circumstances of Africa as economic, social and cultural rights as well as collective rights were essential issues in the African context [125].

In Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois case) [126], where the Endorois of Kenya claimed that they were forcibly removed from their traditional and ancestral lands, without prior consultations and payment of adequate compensation to them by the Kenyan Government, the African Commission again demonstrated its willingness to protect land rights of IPs in Africa using the African Charter [127]. The African Commission then held that Endorois' culture and traditional way of life were intrinsically linked with their ancestral lands—Lake Bogoria and the surrounding area [127]. It also found that the Endorois were unable to fully exercise their cultural and religious rights, and felt disconnected from their land and ancestors, as a result of the evictions [128]. It affirmed that were violations of the African Charter by the State of Kenya, [129] and it also maintained that land rights of Endorois peoples had been violated [130] such as their cultural rights [131] and their rights to natural resources in contravention of Article 21 of the African Charter [132].

In the most recent and perhaps the only case on the rights of indigenous peoples to be decided by a Regional Court in Africa as the time of writing—the case of the African Commission on Human and Peoples' Rights v The Republic of Kenya (Ogiek case) [133]—before the African Court, the Ogieks of the Mau Forests of Kenya, claimed that they are an indigenous minority ethnic group [134]. The Applicant alleged several instances of the violations of their land rights by the Kenyan Government [135]. In a provisional ruling, the African Court ordered the respondents to refrain from further violations of the land rights of the Ogieks until the determination of the substantive suit [136].

In its final judgement on this case [137], the African Court referred to Article 26 of UNDRIP and held that the rights enshrined therein are variable and inclusive of the rights of IPs to land as equally safeguarded under Article 14 of the African Charter [138] among other relevant provisions. It would therefore appear as

though, the African Court did not have trouble in holding that by evicting the Ogiek from their ancestral lands against their will, the respondent State (Kenya) had violated their rights to land as guaranteed by Article 14 of the African Charter and Article 26 of the UNDRIP [139].

It was the conclusion of the African Court that the Respondent State of Kenya had also in violated Article 1 of the African Charter which demands that State Parties to the Charter must protect and recognise all the freedoms and rights protected therein through the adoption of relevant legislations to bring those right into effect in their domestic jurisdiction [140]. The implication of this legally binding decision of the African Court illustrates the significance of the African Charter in protecting land right of IPs in Africa. It would therefore be legitimate to conclude on the basis of the above decision by the African Court that there is an emergent regional General Principle of International Law (GPIL) in the context of the African Charter, in which rights of IPs and in the context of this chapter, their rights to land should be respected and protected by African States. Therefore, the need for a viable relationship between international law and national is obvious if States are to be in compliance of their international human rights obligations.

## **7. Conclusions**

This chapter has examined the role and relevance of international human rights treaties and the African Charter in protecting land rights of IPs in Africa, through a comparative study of Nigeria and Kenya. It has demonstrated that the recent decision of the African Court in the Ogiek case, illustrates that land rights of IPs are germane human rights issues in the African context and certainly come within the purview of the African Charter and the international human rights treaties examined in this chapter. This is the first legally binding judicial decision by an international court on the rights of IPs in Africa. In this context, the decision of the African Court finally lays to rest the debates about whether there are IPs in Africa. The African Court has now legally affirmed the existence of IPs in Africa by crystallising the earlier decisions of the African Commission on IPs. This also signifies that there is now an emergent general principle of international law in the context of the African Charter in which rights of IPs and in the context of this chapter land rights should be respected and protected in Africa. State Parties to the African Charter are bound by the decision of the African Court and must now put in place appropriate legislative and policy measures to ensure that IPs' land rights are effectively protected and recognised by States. Credit must be giving to the Minority Right Group International which has been at the fore-front of promoting and championing the rights of IPs and minorities in Africa for pursuing and prosecuting the Ogiek case to the point of obtaining a favourable judgement. It is hoped that with this decision, African States would begin to take the rights of minorities and IPs within their jurisdiction more seriously.

Perhaps, more efforts could be made towards ensuring a viable relationship between the national laws of African States and international human rights law. This point is buttressed by the case study of Abuja which demonstrates that the Nigerian Constitution and the Nigerian FCT Act are clearly in conflict with the three international human rights treaties and the African Charter examined in this chapter in relation to the violation of the land rights of Abuja peoples. If Nigeria must respect its international human rights obligations, it would have to amend its Constitution and the FCT Act to accommodate and recognise the land rights of Abuja peoples.

One possible avenue for Nigeria to resolve the legal challenges posed by the case study of Abuja introduced in Section 2.2, is to embark on the kind of constitutional reforms that have taken place in Kenya in relation to how the Kenyan Constitution

have departed from the previous dualist approach to international law. It would therefore seem logical to suggest that Section 12 (1) of the Nigerian Constitution ought to be amended to make all international treaties signed and ratified by Nigeria part of the laws of Nigeria. This will then easily lead to harmonisation of Nigeria's domestic laws with the international human rights treaties examined in Sections 3–5 of this chapter. The current situation wherein Nigeria has signed and ratified the three international human rights treaties discussed in Sections 3–5, but those treaties cannot have the force of law in Nigeria until they are enacted as domestic laws is obsolete. Nigeria now needs to adopt the new approach under the Kenyan Constitution 2010 in order for it to be in compliance with its international human rights treaties obligations. It is hoped that such constitutional reforms may help in resolving the legal challenges demonstrated through the case study of Abuja in Section 2.2.

In conclusion, it has to be acknowledged that the success of law or constitutional reforms in one country does not necessarily mean that such reforms could be automatically transplanted with success in another country. Nigeria has a bigger population and is more diverse ethnically than Kenya. Therefore, the differences in political orientations of the diverse ethnic groups in Nigeria may make it more cumbersome for Nigeria to adopt similar constitutional law reforms as has taken place in Kenya.

Indeed, there are always different social, political and economic circumstances in all countries that do have an influence on the development and evolution of the law. This naturally makes the transplantation of law reforms from one country to another very challenging. Despite this general reality, there is actually no known social, economic, political or legal factor or factors that should prevent Nigeria from making similar constitutional reforms, in terms of adopting a more positive approach that allows all international treaties signed and ratified by Nigeria to have the force of law within Nigeria.

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## Conflict of interest

The author of this chapter declares no conflict of interest.

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[128] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya. Application No. 276/03, para. 156

[129] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya. Application No. 276/03, para. 162

[130] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya. Application No. 276/03, para. 238

[131] Centre for Minority Rights Development (Kenya) and Minority

Rights Group (on behalf of Endorois Welfare Council) v Kenya. Application No. 276/03, paras. 241-251

[132] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya. Application No. 276/03, paras. 268 and 298

[133] African Commission on Human and Peoples' Rights v The Republic of Kenya. Application No. 006/2012. This case emanated from the African Commission but was referred to the African Court

[134] Case Summary African Commission on Human and Peoples' Rights v the Republic of Kenya Application No. 006/2012. Available from: [http://en.african-court.org/images/Cases/Case%20Summaries/APPLICATION\\_006\\_OF\\_2012\\_CASE\\_SUMMARY.pdf](http://en.african-court.org/images/Cases/Case%20Summaries/APPLICATION_006_OF_2012_CASE_SUMMARY.pdf), at para. 1, [Accessed: 12 March 2019]

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[137] African Commission on Human and Peoples' Rights v The Republic of Kenya. Application No. 006/2012. Available from: <http://en.african-court.org/images/Cases/Judgment/>

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