



Graduate School of Development Studies

**Claiming Indigenous Land Rights from the Bottom Up:
Dispossession of the Ogiek in Mau Forest, Kenya**

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List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CKRC	Constitution of Kenya Review Commission
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
INGO	International Non-Governmental Organisation
IWGIA	International Working Group on Indigenous Affairs
KHRC	Kenya Human Rights Commission
MNG	Minority Rights Group International
NGO	Non-government Organisation
OWC	Ogiek Welfare Council
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UN	United Nations
WGIP	Working Group on Indigenous Populations
WGM	Working Group on Minorities

Abstract

The current situation of dispossession of the Ogiek from their land in Mau Forest, Kenya is the result of the adoption of the State's land and other policies that are similar to those adopted by the colonialist more than a century ago. In response the Ogiek have instituted several cases through the Kenya courts in an effort to once again access their ancestral lands. Not only has the Kenya government introduced land policies that have greatly affected the way of life of the Ogiek and it has also failed to meet its obligation at the national and international level in response to protecting the human rights of indigenous people.

In the light of thus, this paper attempts to demonstrate analytically how some historical and modern socio-political dynamics have continued to systematically deprive the Ogiek of their land and to assess the extent to which the platform on indigenous rights has helped them in their struggle for their land.

Relevance to Development Studies

Although indigenous peoples' lands are well endowed in terms of natural resources, they remain on the periphery of development. Their territories have become susceptible to economic activities like mining, logging and oil extraction which very often negatively impact their lives. As a result, they are prone to dispossession of their land, further aggravating their poverty levels and leading to infringement of their basic human rights. This paper therefore stresses that an appreciation of indigenous peoples' land rights will guarantee their right to develop their land in the way they see fit.

Keywords

Dispossession, indigenous peoples, land rights, vernacularisation, Mau Forest, Ogiek

Map of Kenya Showing Ogiek Areas in Mau Forest



Chapter 1

Introduction

“We are not only being dispossessed of our ancestral lands, our livelihoods are being killed. They say that we must develop: but tell me, where or what is this development?”

Towett, Kenya¹

Indigenous people all over the world need their human rights protected and supported. In the past, forced assimilation or genocide almost wiped out most indigenous people but today they have fallen prey to both local and international resource extractors (Lutz 2007: 28). Indigenous people are also victims of poorly thought out development plans. This is all with the excuse their way of life indigenous people is overwhelmingly different from the majority population and hence a ‘barrier’ to development. This has made the indigenous people of the world an easy target for both discrimination as well as theft of their land especially in situations where it is endowed with rich natural resources. Dispossession of indigenous people took place in the past through two different means: acquisition and extinguishment. These two approaches have been used by States today to dispossess indigenous people of their land. By acquisition – through occupation or conquest and by extinguishment – States have assumed indigenous ownership vanished with colonisation because indigenous rights were “extinguished” with the onset of colonialism (Gilbert 2006: 2).

1.1 Problem Statement

The Ogiek have been forcibly displaced from their ancestral land by both state and non-state actors without restitution and all this has been done in the name of development. Not only have the Ogiek been left out of development plans in Kenya, but they have been forced onto land that is not in keeping with their traditional hunter-gathering way of life (Ohenjo 2003: 1). The predicament for the Ogiek is mainly drawn from their resolve to defy the change to agricultural farming which is not in keeping with their cultural way of life (Barume 2005: 286).

The process of dispossession has continued from the colonial period to the present time. For the most part, this has involved the pronouncement of Ogiek ancestral land as forest reserves, degazettement and division of their land to other communities leading to loss of their rights over this land (Kimaiyo 2004: 17). The Ogiek have also lost land through reallocation of Mau Forests to politically well-connected individuals under the guise of ‘resettling squatters’ (Nation 2001: 8). Logging has been another factor in the destruction of forests in areas occupied by the Ogiek especially from the 1990s. Ohenjo (2003: 2) argues that the Ogiek have had their ancestral land taken over by private individuals under national land laws which support the cultivation of cash crops like tea, pyrethrum and flower farming. Pyrethrum in particular is bad for Ogiek honey-production because it is poisonous and kills bees.

Barume (2005: 365) explains how in response to these actions the Ogiek have taken the Kenyan government to court. Central to their argument is the claim that we cannot talk about protecting Ogiek indigenous way of life without first acknowledging their rights to the land in Mau Forest. In bringing a claim for their land, the Ogiek show a clear association between their ancestral land and the continued existence of their cultural distinctiveness (Barume 2005: 286).

1.2 Research Objective, Questions and Justification

The main argument in this paper is that national and international legal norms help to strengthen Ogiek claims to their ancestral land. According to Hodgson (2002b: 1095), “becoming indigenous” is one of many feasible political manoeuvres that has helped indigenous people gain a wider audience and boost the authenticity of the claims made by such groups. That is why many of these indigenous groups are “reframing” their age-old complaints and demands against their states in the vocabulary of the indigenous rights movement (2002b: 1095).

1.2.1 The research objective

The aim of this paper is to investigate and assess the use of national and international legal instruments by the Ogiek in their fight for access to their ancestral land and for protection of their cultural identity. The background to this paper is the Ogiek’s dispossession from their land and how they have sought to protect themselves against the threat this poses to their cultural identity through transnational and legal means.

1.2.2 Research question

The central question this paper examines is: How have the Ogiek invoked national and international legal instruments on rights of indigenous people to fight for improved access to their ancestral land and for protection of their cultural identity? The subsidiary questions are: How have Ogiek land rights been violated in relation to Kenyan law and Kenya’s international legal obligations? What are the consequences of the Ogiek using indigenous rights as the basis for access to their ancestral land?

1.3 Rationale for the Study

My interest in studying the Ogiek land issue is related to my concentration in the fields of anthropology and social justice issues at both a personal and academic level. On a personal level, I first encountered an indigenous pastoralist group called the El Molo from North Eastern Kenya during a geography class in the 1980s as far back as primary school. At that time they numbered about three hundred and as I grew up, I always wondered what became of this group that was already decreasing in numbers at the time I first learned about them. My second contact with an indigenous group was during my work in the North Rift where I met the Sengwer, also a pastoralist-indigenous community in Kenya whose interests have been as adversely

affected as the Ogiek (Lumumba 2004: 13) through land seizure and displacement.

Ruiz (in Kabeer 2005: 137) claims that during the last decade, demands for the rights of indigenous people and social movements in support of these efforts have slowly gained strength the world over. The unrelenting violation of the rights of the Ogiek has positioned them among the most dynamic indigenous peoples fighting for their land against a government (Barume 2005: 365). As Rael, an Ogiek woman confirmed: “Before our forests were cut down we had our culture and tradition (Ohenjo 2003: 2).” According to Gilbert (2006: xiv), for indigenous peoples, land is the main foundation for their cultural world view and provides for shared recognition, therefore land rights has to be viewed as one of the most serious concerns that has to be taken into account for the continued existence of indigenous people.

An outcome of this is that in spite of the diversity of indigenous people the world over, one common factor that links them together is their attachment to land. The exact nature of this association is more profound and is not limited to the material factor (Gilbert 2006: xiv). Land rights therefore have to be viewed as a representation of indigenous peoples identity and an appreciation of this is necessary to guarantee indigenous peoples’ cultural survival (Gilbert 2006: xv). Land is not only an economic resource but provides for identity

1.4 The Research Strategy

The purpose of this largely normative research is mainly evaluative while the major process was qualitative research using both qualitative secondary and primary data. The outcome of the research was basic research to provide some understanding of indigenous people’s land rights but without emphasis on its immediate application or use. The data was analysed using both thematic and comparative analysis (Dawson 2002: 116).

1.4.1 The research methodology

This paper assesses how successful the Ogiek have been in using indigenous rights as a podium for action in the fight for their ancestral land. In doing so this study used both primary and secondary data to provide explanations on how the Ogiek have used legal instruments at both the national and international level to fight for rights to their ancestral land. This research also addressed the extent to which Ogiek land rights have been violated in relation to Kenyan law and Kenya’s international legal obligations. The research involved the collection of secondary data in the form of books and journal articles. Other secondary materials including reports from the organisations visited were also used. This paper used legal treaties as part of the primary data since they are major sources of international law from which human rights issues are to be fulfilled, respected and protected mainly by the state.

This study was carried out in Nairobi, Kenya during the entire month of August, 2008. The timing of this research coincided with a Minorities Reforms Consortium that took place at the Hilton Hotel from the 6th to 8th of August, 2008. This minority stakeholders consultative forum had was organised by the

Centre for Minority Right Development (CEMRIDE), a national non-governmental organisation working in the area of public policy to ensure that the interests of marginalized groups especially minorities and groups including those of indigenous people are protected. CEMRIDE works in collaboration with other leading international human right organisations like the Minority Rights Group International (MRG) and the International Working Group for Indigenous Affairs (IWIGIA) to secure the rights of minorities and indigenous people the world wide. A whole range of themes were discussed during this meeting including the current and draft constitution of Kenya within the context of indigenous people land rights. It was possible to hold discussions with individuals from organisations participating at this forum and had also dealt with Ogiek land issues at length. Having all these key informants together in one place proved to be a plus for this research process not to mention the fact that many of them were willing to be interviewed during the meeting's long breaks.

Semi-structured interviews were conducted with individuals from organisations that have played a major role in the Ogiek land struggle in Kenya. They included people within: the Ogiek Welfare Council (OWC) for the Mau Forest Ogiek, the Kenya Human Rights Commission (KHRC) and CEMRIDE. An interview schedule was used because this research was mainly of a qualitative nature. Although the interview schedule was prepared in advance other related questions did come up during the interview so it was important to be flexible in the interview approach.

1.4.2 Limitations

There were some practical limitations during the research process especially regarding access to some key informants like the lawyers who handled the cases against the state on behalf of the Ogiek. It was not possible to book an appointment with them. It was also not easy to speak to key actors especially in international organisations that deal with indigenous issues because many of those who had worked with the Ogiek had since left.

The main methodological limitation in this paper was the lack of 'voices of the Ogiek.' This research was mainly a desk study because of limited time and resources to carry out a fact-finding tour in Ogiek territory in Mau Forest that is typically inaccessible during the long rains. The fact that I used qualitative data in a descriptive format made it more difficult to organise. Unlike quantitative data, it was not easy for me to categorise people's responses to various questions. The collection of this qualitative data tended to be more time-consuming than say quantitative because of my interest in a greater depth of information.

1.5 The Structure of the Paper

This paper contains six chapters. Chapter one presents the background to the research problem and the justification of the study. This chapter also provides the approach or methodology I used to address the research problem.

Chapter two looks into the concept of 'indigenous people' and how it has been constructed in human rights discourse and international law. Two main

socio-legal theories on human rights are introduced. The first socio-legal theory is Merry's vernacularization of human rights which looks at how the 'global becomes localized' or translated into different settings. The second socio-legal theory is Keck and Sikkink's human rights spiral which looks at the interacting legal layers between national and international law and the role of transnational actors in this process.

To highlight the Ogiek's fight for indigenous status and their lands, chapter three addresses the socio-political context of their land claim. Chapter three also provides some background information on Mau Forest and a brief history of the Ogiek people and their struggles.

The fourth chapter expounds on how the Ogiek have invoked national legal instruments to fight for rights to their land. The Ogiek have framed their land claims into the language of rights, in particular indigenous rights. Like many indigenous people all over the world, Ogiek are affected by the lack of a constitutional and legal framework for protection of their indigenous rights especially their rights to land. More specifically, the constitution of Kenya does not use the term 'indigenous'.

Chapter 5 illustrates how the Ogiek and other actors have translated transnational ideas like indigenous rights into local understanding in their fight for access to their ancestral land. A key aspect in this process is the role played by what Merry calls 'translators' or human rights mediators who put international human rights ideas into common terms using local situations where violations have taken place so as to strengthen global movements or causes.

The final chapter will provide the conclusion and reflections for this paper including the main argument in reference to the research questions.

Chapter 2

Conceptualising Indigenous Rights and How They are Mobilised

Indigenous people are: identified and identify themselves in relation to characteristics that can be traced to the time period before intrusion by other actors; what the consequences of these actions have been and how they continue to threaten the survival of their culture. Whereas the notion 'indigenous person' or 'peoples' is in itself subject to a lot of debate, it is within the human rights framework that the indigenous rights movement has flourished and continues to do. Human rights law has played an important role in indigenous peoples' land claims at both the national and international level. Socio-legal approaches like the human rights spiral of Keck and Sikkink and Merry's theory on vernacularisation of human rights examine the role of human rights perceptions at the international level and its impact on national legal systems and vice versa.

2.1 Indigenous People Defined

The importance of land rights for indigenous peoples is reflected in the definition of the term 'indigenous.' According to the *Oxford English Dictionary* 'indigeneity' is defined as an attribute of being 'indigenous' or 'indigenesness'. In the mid-17th century, 'indigeneity' referred to people or products 'born or produced naturally in a land or region (*Oxford English Dictionary* 1999).' The etymology of the word tells us that 'indigenous' means 'originating in the region or country where found'; the word comes from Latin *indigena*, a short form is *indu* (in, within) and *gen* (root) (Gilbert 2006: xv). Therefore, the idea of a particular historical attachment to a territory is a vital element in defining indigenesness (Gilbert 2006: xv).

In reference to the topic of the rights of indigenous people under international law, there is great importance in defining who indigenous people are (Gilbert 2006: xvi). Its current definition is not without controversy because the term has been taken up by a host of 'disenfranchised groups' out to promote their own interests (Hodgson 2002a: 1038). There is no agreed or legal definition although several attempts have been made to do so. The United Nations (UN) does not have a legally binding definition of indigenous peoples although the one used by Jose Martinez Cobo, a one time Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities is usually accepted as reliable. Cobo in his report, *The Study of the Problem of Discrimination against Indigenous Populations* states that:

Indigenous communities, peoples and nations are those which have a historical continuity with pre-invasion and pre-colonial societies that developed in their territories; consider themselves distinct from other sectors of 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 patterns, social institutions and legal systems (Gilbert 2006: xvi).

This is the main definition used in this research paper because it the one used by many indigenous movements when organising themselves in their own defence, and is also used by most international bodies (Radcliffe et al. 2005: 3).

2.2 Indigenous Peoples and the Human Rights Framework

Within the human rights framework indigenous people are groups with basic human rights concerns that warrant attention. The indigenous rights discourse builds on the human rights framework which has gradually formulated ideas about indigenous rights since the post-war period (Wilson 2003: 31). During the 1950s, the discourse was dominated by the International Labour Organisation (ILO) with the idea that indigenous person needed to be 'modernized'. However, from the 1970s to date it has been guided by the UN with the idea that the indigenous person is "the noble primitive close to nature" (Merry 1996: 69). According to Tenant (in Wilson 2003: 31), the concept has changed from 'indigenous populations' to 'peoples'. From the 1980s onwards, indigenous people have started having a greater say in the fight for their rights. Clearly the meaning of indigenous rights has changed over the last century as a result of indigenous activism across the world. This study considers the Ogiek an example of this.

Indigenous rights have been divided into seven categories (Griswold 1996: 95) within the Declaration of the UN Working Group on Indigenous Populations and they include:

- self-determination
- culture
- lands
- resources
- institution
- relations with surrounding states
- conflict-resolution
- the Declaration as a statement of minimum standards

The collective right of indigenous peoples to self-determination is one of the most popular demands placed before the Working Group and is even considered by many to be the corner-stone upon which all the other rights are based (Griswold 1996: 95). Self-determination is a contentious topic with regards to the rights of indigenous peoples because it is rooted in international law: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue economic, social and cultural development' – Article 3 of the UNDRIP (Griswold 1996: 96). However, according to Barsh (in Griswold 1996: 97), for the majority of indigenous people, having some say in decisions affecting them at the national level is more important than gaining local autonomy.

Indigenous land rights are closely related with the rights of indigenous people to self-determination (Barume 2001: 102). Self-determination is all about people's ability to exercise some degree of control over their lives.

[Land is] the raison d'être of indigenous peoples' culture Barsh (in Barume 2001: 102).

[There is an] urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. ... [B]ecause of the profound relationship that indigenous peoples have to their lands, territories and resources, there is need for a different conceptual framework to understand this relationship and a need for recognition of cultural differences that exist. Indigenous people have urged the world community to attach positive value to this distinct relationship, Daes (in Barume 2001: 102).

The label, "indigenous peoples' land rights" is fairly new (Gilbert 2006: xxii). The whole problem of land rights is all about giving back land to individuals who were dispossessed of their lands by unfair means, a concern that is correlated with the continuous process of the rejection of indigenous people's right. According to Gilbert (2006: xxii), human rights law faces the daunting tasks of offering compensation for past wrongs – land rights in this case therefore is not so much about 'creating new rights' but reinstating rights that had in the past been denied.

2.3 National Laws that Administer Land in Kenya

Rights over property have varied meanings and repercussion for the reduction of poverty because in many rural areas, ownership of land is seen as a sign of a person's social position as well as communal stature (Meinzen-Dick et al. 2007: 2). This situation in turn determines people's access to government provisions, authority in day to day politics as well as participation in shared networks and that is why all over the world, land and territories have become a major concern for indigenous persons (Meinzen-Dick et al. 2007: 2). For example, the Ogiek have for many years challenged the government's actions limiting their access to the Mau Forest.

Kenya does not have any legal mechanism that oversees land in the country though a number of statutes touch on the issue. There are over fifty statutes that deal directly with land while others merely make reference to it (History of Kenya n.d.). They include among others:

- Government Lands Act Cap 280
- Forest Act Cap 385
- Wildlife (Conservation and Management) Act Cap 476
- Trust Land Cap 291
- The Land (Group Representatives) Act Cap 287
- Registered Land Act Cap 300 (J. Kamau n.d.)

Land in Kenya is owned by four units: the state, local authorities, communities and individuals (Mbote and Oduor 2006: 7). Land entrusted to the county councils is called trust land and consists of what were formerly known as 'native reserves' or 'special areas' during the colonial period. The

Trust Land Act deals with this land which ideally is meant 'for the benefit' of the persons ordinarily already resident on the land (Kimaiyo 2004: 37). State ownership of land is controlled by the Government Land Act 280 while land owned by individuals is regulated by the Registered Land Act (Kimaiyo 2004: 37). Individual and state owned land has been given priority over other forms of ownership. The Land (Group Representatives) Act controls community land ownership and was introduced to include those who had been registered as land owners as part of a group. It is mainly used in pastoralist areas. The Forest Act provides the legal framework for management of key forests in the country, while the Wildlife Act takes care of the safety, preservation and management of wildlife in the country (Kimaiyo 2004: 38)

2.4 International Laws on Indigenous Peoples

International law deals with indigenous peoples' land rights from two main angles: firstly, through the broad discourse on human rights and secondly in terms of particular indigenous peoples rights (Gilbert 2006: xviii). One aspect to take into consideration is that neither global nor regional instruments on human rights like the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), (ICESCR), the Covenant on All Forms of Racial (CERD) or African Charter on Human and Peoples Rights (ACHPR) refer to indigenous people specifically (Gilbert 2006: xviii).

The UDHR for example, is non-binding although most its provisions are broadly accepted as creed of international law (V. Kamau 2007: 13). It does not include a clause on minorities or indigenous peoples for that matter because of its emphasis on the universal nature of human rights and that these are obligatory for all human beings and naturally this includes the Ogiek.

The ICESCR is a treaty based on the UDHR but does not explicitly mention indigenous people, however, Article 1 does provide for the rights of all people to freely dispose of their land and resources (V. Kamau 2007: 14). The Committee on Economic, Social and Cultural Rights, the treaty body for the ICESCR has shown concern for indigenous groups and other ethnic minorities by stressing the need for non-discrimination and equal level opportunities for participation by these groups in planning and decision-making processes in areas like education and health (Baderin and Mccorquodale 2007: 380). In a nutshell, indigenous peoples land claims are tackled through universal human rights dialogue, non-discrimination, social and cultural rights, civil and political rights and minority rights and human rights law. (Gilbert 2006: xviii).

There are some tools that deal specifically with indigenous people: the ILO treaty deals with indigenous people while the UNDRIP provides emerging standards specific to indigenous people.

2.4.1 Indigenous and Tribal Peoples Convention 169 and the International Labour Organisation

The ILO was the first among international organisations to use the concept of indigenous in its legal documents and it even went ahead to use it in

Conventions 107 and 169. To date the only definition that is legally binding to ratifying states is the one included in the Indigenous and Tribal Peoples Convention 169 that was adopted in 1989 by the ILO (Hodgson 2002a: 1038). According to Article 1 of the Convention, indigenous people are:

Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

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

According to Schenin (in Gilbert 2006: xvii), it is important to note that the 'legal approach to indigenous people puts a lot of stress on the dimension of a relationship of dispossession or subordination in relation to another group.' What is significant is that the ILO 1989 Convention states that 'self-identification as indigenous shall be regarded as a fundamental criterion for determining the groups which the provisions of the Convention apply (ILO 198 Article 1.2).'²

2.4.2 The United Nations Declaration on the Rights of Indigenous Peoples

The force of the indigenous rights movement is exceptional because it has been able to present its cause as a global one. In 1982, indigenous leaders successfully appealed to the UN to form a working group to consider the human rights of indigenous persons. The UN established a Working Group on Indigenous Populations (WGIP) in 2001 and its main achievement to date has been the establishment of a Permanent Forum on Indigenous issues. The UN believed that the establishment of this legal tool would serve to 'advance the codification of indigenous rights in national constitutions and legal systems (Cowan et al. 2001: 205).' The establishment of the UNDRIP after more than 30 years of indigenous activism is a major realization (Lutz 2007: 28). It is not a legally binding tool but an international instrument that clearly spells out the basic human rights of indigenous people. The UNDRIP was adopted by UNGA Resolution 61/295 on 13 September 2007 by a vote of 143-4 with eleven abstentions³ and four negative votes from the settler states of Canada, New Zealand, Australia and the United States, aka the CANZUS group (Keating 2007: 22).

Most of the requirements in UNDRIP already exist in a number of human rights norms or international law guiding principles, but the declaration goes a step further to provide for particular desires of indigenous groups that include among others: the right to self-identification, individual as well as collective rights, self-determination, cultural protection, heritage/cultural property including land and resources.

A number of articles in the Declaration more specifically Articles 10, 26, 27 and 28 deals with indigenous rights to land and resources. Article 10 (UN 2007: 6) states that:

Indigenous peoples shall not be forcibly moved from their land and territory. No relocation should take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on a just and fair compensation and, where possible, where possible or the option of return'

2.4.3 Indigenous Peoples' Land Rights and the International Covenant on Civil and Political Rights

Ironically, the ICCPR with no property or lands clause nor clear mention of the word indigenousness has become one of the most important tools on 'positive human rights treaty law for indigenous peoples' land claims (Scheinin 2004: 1).'

This is because of developments taking place with the Human Rights Committee, the treaty body set up under the Covenant and its following of the Optional Protocol to the ICCPR (Anaya 2004: 253). Scheinin (2004: 2) goes on to say that some cases regarding the rights of indigenous people in Sweden and Canada have been won on the basis of the Optional Protocol to the ICCPR as well as the Committee's comments and deliberations on periodic reports sent in by State parties. In reference to the topic on land, two points are provided for in the ICCPR and they are as follows: the right of all peoples to self-determination in Article 1 and the protection given under the view of 'culture' and 'minority' for indigenous peoples' in Article 27 (Scheinin 2004).

2.4.4 International Covenant on the Elimination on the Elimination of All Forms of Racial Discrimination and Indigenous Peoples

The ICERD is a second-generation human rights tool that is committed to the elimination of discrimination and the encouragement of understanding between races. The Committee on the Elimination of Racial Discrimination while examining reports from States parties particularly under Article 9 of the ICERD stated that the status of indigenous peoples has always been a "matter of close attention and concern (OHCHR 1997: 1)." The Committee is conscious of the fact that in many parts of the world indigenous peoples have been and continue to be discriminated against and deprived of their basic human rights and fundamental freedoms especially through the loss of their land and resources to colonists, companies and governments. Subsequently the conservation of their culture and their historical identity is under threat. The Committee has therefore called upon state parties to protect the rights of indigenous people especially their land rights and to go as far as is possible to provide some kind of compensation preferably in the form of land or territories in the cases where indigenous people have suffered dispossession of their land (OHCHR 1997: 1).

2.4.5 The African Charter on Human and Peoples' Rights

The ACHPR (also known as the Banjul Charter) is a regional international human rights tool that claims to protect human rights and basic freedoms in Africa. On 6 November 2000, the African Commission adopted a Resolution on the Rights of Indigenous People/Communities in Africa whose terms were the establishment of a Working Group on the Rights of Indigenous People/Communities in Africa' with the mandate to study the extent of indigenous peoples rights (Barume 2005: 379). In addition, the working group would look into the repercussions of the ACHPR on indigenous peoples with regard to their rights to: equality (Articles 2 and 3) dignity (Article 5), protection against domination (Article 19) on self-determination (Article 20) and the promotion of cultural development and identity (Article 22).

What is unique is about ACHPR in relation to other international human rights tools is that it protects collective rights by using the term 'peoples' in its provisions, including in its Preamble and by its very name, the African Charter on Human and '*Peoples*' Rights (ACHPR 2006: 21). Individual and collective rights are made available in the Charter and exist for all individuals including individual members of indigenous communities. The Charter also provides for the right to people to freely use their natural resources and in cases of dispossession they have the right to full reparation (V. Kamau 2007: 19). Therefore, land and resources of indigenous people should not be taken away from them without their consent and in the case that this happens, they have a right to make a complaint under Article 55 of the Charter.

2.5 Socio-Legal Perspectives and Indigenous Rights

Scholars within the discipline of the social sciences and law have developed a number of theoretical frameworks for an understanding between 'law' and society or socio-legal studies (Bower 1995: 1). Socio-legal approaches are more concerned with how ordinary people make use of law in everyday life and how belonging to a particular marginalized group like minorities or indigenous people may affect their capacity to bring about any social or legal change." The realm of law has been changed by the language of rights.

2.5.1 Vernacularisation of Human Rights

Across the world, globalized ideas like human rights are gradually being taken up and 'vernacularized' or translated in special contexts. In turn these have provided a platform for political action by groups like the indigenous movement to garner more concessions from their governments (Cowan et al. 2001: 204). Merry (in Wilson 2003: 30) states when indigenous people mobilise the human rights regime as the foundation for discussions about justice, they 'vernacularise' and globalise the law they use. For human rights to be effective, 'they need to be translated into local terms and situated within local contexts of power and meaning – they need in other words to be remade in the vernacular (Merry 2006a: 1).'²

Merry (in Wilson 2003: 18) says, whereas human rights were initially a Western ideal, framed in the 'hegemonic categories of Western Law', when examined the way it is used especially in the indigenous rights movement it

shows that this movement operates at three legal levels: global human rights law, national law and local law. Merry (in Wilson 2003: 29) goes on to say what indigenous people now speak is ‘a law which is a multilayered amalgam of United Nations resolutions, national law and local categories and customs – this is the process of legal globalisation and vernacularisation.’ Merry (in Wilson 2003: 29) asserts when different societies mobilise Western law in their demands for human rights, they reinterpret and transform it in line with their own legal conceptions and with the financing given by the global human rights system – they talk rights, reparation and claims – the language of law – but construct – new law out of the old.

There are two sides to this process, one is the incorporation of local understandings, and the other is the addition of global discourses. To a large extent the law mobilised in indigenous rights movements is becoming vernacularised in some what the same way languages became vernacularised over time says Merry (in Wilson 2003: 29). Transnational cultural appropriations are new and actually manifest some form of resistance to global homogenisation – ‘legal vernacularisation is part of a process of the emergence of new national identities (Wilson 2003: 18).’

In order to get some sense of the global-local interconnection, one needs to look into transnational cultural flows and how they relate to local cultural spaces because they are essential in understanding how human rights are produced from the global to the local level (Merry 2006a: 19). These three processes include ‘transnational consensus building’ that looks at how treaties or documents coming out of global conferences or UN meetings for example those dealing with indigenous people are produced through a process of negotiation and consensus building (Merry 2006a: 19).

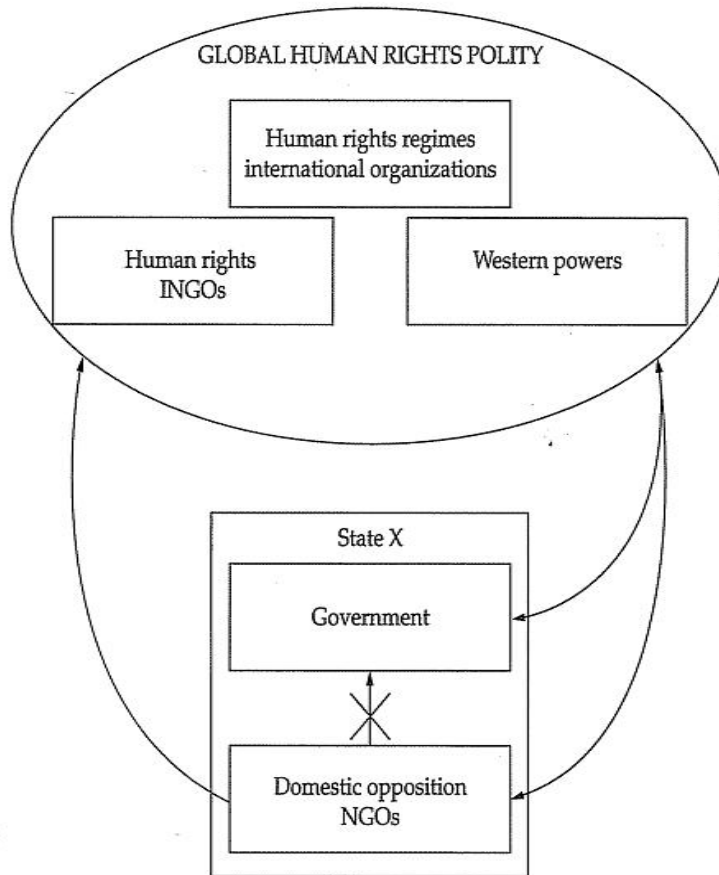
The second aspect of this cultural flow is the ‘transnational program implants’ that look at how ideas such as indigenism in South America are created in one place and transplanted to another into another area like Africa (Merry 2006a). The third cultural flow is the ‘localization of transnational knowledge’ by local actors who are the link between transnational actors and local activists and who also take part at transnational meetings and bring home what they have learned (Merry 2006a: 20).

A concept related to vernacularisation is legal consciousness. It is a form of ‘rights awareness’ that looks at the ‘ways law is experienced and understood by ordinary citizens’; legal consciousness has become the point of reference for some law and society academics (Silbey 2005: 326). Legal consciousness seeks to address issues of legal hegemony and how law continues to maintain its powerful hold despite the unrelenting gap between law in theory and practice (Silbey 2005: 323). Legal consciousness can be understood first, by reference to courts. For example judges may have an influence on the outcome of a case depending on the legal or even moral approach they may choose to use. This may result in framing and deducing issues differently resulting in a different judgement for a specific case (Starr 1992: 634). Secondly, legal consciousness relates to incorporation of global law into domestic law; it is translated into different settings – for example the vernacularization of law at the national level by the establishment of the Children’s Act as part of national law.

2.5.2 The Human Rights Spiral

Risse et al have come up with a five-phase 'spiral model' of human rights which takes into account activities taking place back to back at four levels in one model.

Figure 2.1
The 'Spiral Model'



Source: Risse et al, p 19

These four levels described in this model include:

- The international-transnational interactions among transnational operating international non-governmental organizations (INGOs), international human rights regimes and organizations, and Western states;
- The *domestic society* in the norm-violating state;
- The links between the societal opposition and transnational networks;
- The *national government* of the norm-violating state (Risse et al. 1999: 17).

This model (see figure 2.1) builds on previous work on transnational advocacy networks in human rights circles – a transnational advocacy network is what Keck and Sikkink (in Radcliffe et al. 2005: 2) call an ‘issue network’ – that is ‘an informal social network including clusters of activists, policy-makers, INGO officials, and state institutions, which pursue’ a particular issue or goal in this case indigenous claims. One case in point may be seen in the role played by such networks in treaty making, for example of the establishment of the International Criminal Court (ICC).

2.6 Summary

From what has been pointed out so far, the definition of indigenous peoples remains controversial as there is no legally accepted definition (Thornberry 2002: 38). However, it is correct to say that distinctive attachment to a particular land has to be looked as a crucial component to ‘indigeneness’. This is because territoriality is one of the key pointers of indigenous peoples – this unique relationship to the land has to be factored in the protection of indigenous people under international law (Gilbert 2006: xvii). Within international law as well as institutions, the concept ‘indigenous’ has been used to refer to a particular section of the people that embody familiar life situations entrenched in past suppression by colonialism. Indigenous people the all the world continue to be identified within this framework.

This paper applies socio-legal theories in analysing the function of the domestic legal concept of human rights at the international level and its impact on national legal systems and vice versa. This approach is useful in theorising about the rights of indigenous people. Firstly, the work of Risse and Sikkink (in Halliday and Schmidt 2004: 4) shows the importance of network actors connecting domestic and transnational spheres for the internalisation of norms.

Secondly, I have used Merry’s theory of vernacularisation in the context of analysing how indigenous rights are mobilised and claimed. Socio-legal theories of legal consciousness propose that institutional bias shape and determines the effect of law as actors may hold on to or snub certain understandings of law as the beginnings for legal action (Morgan 2007: 107).

The next chapter will look at the socio-political context of the Ogiek case with special reference to those living in Mau Forest. A brief historical background of land ownership in Kenya in particular reference to the Ogiek is necessary to understand their current situation with regard to their land issues.

Chapter 3

Dispossession of the Ogiek in the Mau Forest Complex

The term 'Mau' comes from the Ogiek word '*mooni*' which translates into "the coolest of coolest places (Sena 2006: 1)." The Mau Forest Complex is the largest chunk of indigenous trees found in the East African region. It is about 400 000 hectares in size and is located about 170 km north-west of the capital Nairobi and extends to the west bordering Narok and Kericho Districts to the south, Bomet to the south-west and Nakuru to the North (Sang 2001: 113). The forest is split into seven blocks: Maasai Mau, Ol'donyo Purro, Transmara, South West Mau (Tindet), Western Mau, Southern Mau and East Mau all of which are gazetted except Maasai Mau.

The Ogiek are found in all seven blocks more specifically East Mau where over 5000 of them reside. East Mau is an area that covers about 900 square km of forest land. It is located 30 km south of Nakuru stretching westwards to include eight forest stations of: Baraget, Sururu, Likia, Kiptunga, Mariashoni, Elburgon, Nessuit and Teret (Sang 2001: 113). It borders Narok District to the South, Naivasha Division to the East and covers the Divisions of Kiringet, Elburgon, Mauche, Njoro and Mau-Narok. East Mau is the leading producer of exotic trees in Kenya with 150 saw mills adjoining the forest not to mention the 200 or so illegal tractors and mounted saw benches scattered all over the forest (Sang 2002: 3). East Mau was declared Crown Land in the 1930s, turned into a Natural Reserve in the 1940s and officially gazetted in 1954 under the Forest Act 385. The main reason the colonial government declared East Mau a forest was to create a buffer zone between settlers in the 'white highlands' and the Nature Reserves (where the Maasai lived) in an effort to prevent their cows getting into contact with Maasai cattle (Sang 2002: 3).

3.1 Who are the Ogiek?

It is estimated that the Ogiek number about 20 000 and are dispersed across the East African region. The majority living in Nakuru district while others reside in Samburu, Mt Elgon, Koibatek, Nandi, Samburu and Narok in the Western and Rift Valley Provinces in Kenya while another community is found in Tanzania (Kimaiyo 2004: 7). They had been nicknamed Dorobo which was given to them by their neighbours the Maasai; the word '*il itorobo*' in Maasai means 'poor people who cannot afford cattle'. According to the Maasai cattle was a sign of wealth of which the Ogiek had none because they are mainly hunters and gatherers. The word Ogiek (singular *Ogiot*) means 'caretaker of all animals and plants (Kimaiyo 2004: 7).'

Although the Ogiek are traditionally hunters and gatherers (Barume 2005), today they also cultivate and keep animals as a result of interactions with other neighbouring communities but they mainly remain honey collectors (Salvadori and Salvadori 1984: 14). The Ogiek depend on the forest for their medicine and their food consists mainly of honey and wild game-meat (Odunga 2007). While the Ogiek did not customarily have a centralized political system, the clan (*Oret*) was the most essential entity made up of local groups and was the

'land holding unit' (Odunga 2007). The Ogiek are the among the last remaining forest-dwellers who survive mainly by gathering wild fruits and roots, hunting wild game and traditional bee-keeping and are therefore friendly to the environment on which they depend on. The Ogiek are uniquely specialized people intimately related to a particular ecosystem. They are incapable of retaining these essential characteristics, if that ecosystem is destroyed

3.2 Dynamics behind Dispossession of the Ogiek of their Indigenous Land

The Ogiek have been living in Mau Forest since time immemorial and there is no historical and anthropological evidence to challenge this fact (The Ogiek 2008). The Ogiek are believed to have settled in the coastal regions of East Africa as far back as 1000 AD but were driven out by slave traders and other migrating ethnic groups; this was their first dispersal. Some moved to live among the Maasai in Tanzania while others settled in the plains of Laikipia near Mt Kenya Forest further dispersing across parts of Kenya (Kimaiyo 2004: 8).

Severe infringement of Ogiek land rights started in 1856 when the Maasai community tried to take Ogiek lands in Mau and Laikipia leading to clashes between the two warring factions and loss of Ogiek land and peoples around Lake Naivasha (Sang 2001: 116). In 1903 the colonial government attempted to move them out of the forests near the Kenya-Uganda railway line so as to safeguard firewood for their locomotives. Those who resisted were arrested or killed further reducing their population (Kimaiyo 2004: 18). Between 1904 and 1911 the Maasai entered into agreement with the colonialist that led to the signing off of rights to land in Nakuru, Naivasha and Laikipia to settler farmers. This land deal led to the dispossession of the Ogiek and their first forcible eviction from their ancestral land between 1911 and 1914 to go and live with the Maasai (Kimaiyo 2004: 19). While in Narok, the Maasai asked them to give up their culture and adopt Maasai way of life including the language – those who refused moved out of these areas, the majority who remained behind were 'assimilated' to lead a life of slavery and today they are among the poorest Ogiek (Sang 2001: 117). A second eviction followed in 1918 to evict the Ogiek this time from Eastern Mau to Olpusi-Moru in Narok and once again some Ogiek would not budge. According to Kimaiyo (2004: 5) assimilating the Ogiek into neighbouring communities was aimed at 'extinguishing' their rights to make claims to their land in the future.

3.3 Recent Encroachment of Ogiek Land

The earliest intrusion of Ogiek lands by Kenyans began around 1958 when national identity cards were given to Africans for the second time by the colonial government (Sang 2001: 118). Some members of the Kalenjin ethnic group posed as Ogiek in the hope of having some share in the Ogiek land claim. Even as early 1968, Ogiek leaders had 'a vision' for their land rights as depicted in the sub-title of a magazine: *The Brave Tribe without a Home* (Kimaiyo 2004: 22). One of the Ogiek leaders had written to the head of state at the time, who in an attempt to draw attention to their predicament. According to

(Kimaiyo 2004: 22), in 1972 the Lake Nakuru Settlement Scheme was instigated by the local government in the area but the Ogiek declined to take part because they were afraid of any form of forced assimilation by their more dominant neighbouring ethnic groups. Within three years of this allocation the indigenous forests adjacent to the Lake Nakuru had all but disappeared.

In 1977 the Kenyan government began its harassment of the Ogiek. Government forces led by the Rift Valley Provincial Commissioner invaded Mau West Forest torching Ogiek houses and arraigning them in court on the charges of being 'illegal squatters in the forest (Sang 2002: 119).' The State's action not only led to loss of property but it also disrupted schooling for Ogiek children who eventually had to drop out due to lack of school fees. This move on the part of the State was meant to weaken their resolve to continue demanding for their land rights.

In 1987, the government banned the keeping of livestock and farming activities in forests, a ban that was applied selectively targeting mainly the Ogiek and other non-Kalenjin communities in the area (Kimaiyo 2004: 23). This once again led to the closure of Ogiek schools in East Mau. The District Commissioner informed the Ogiek on behalf of the government: "The government will not reconsider its decision on this [closure of schools in Ogiek land] on the ground that you are just a 'minute community' with no apparent effect, just like a drop in the oceans (Sang 2001: 119)." Surprisingly at the same time the government yet again established another settlement scheme in Ndoinet, Mau West for members of the Kipsigis ethnic group but the Ogiek in their typical custom declined to participate in this proposal (Kimaiyo 2004: 23).

By 1993 onwards, the Kenyan Government has steadily apportioned large huge areas of Mau Forest for distribution to members from other ethnic groups leading to clashes' with the Ogiek who saw the annihilation of the forests and the estrangement from their lands as a persistent risk to their survival. This was contrary to an initial agreement between the Ogiek and the government as stated by the Provincial Commissioner of the Rift Valley Province of the time. He assured the Ogiek that the forest belonged to them: "The forest belongs to you since it is your only remaining home... you should move in quickly and occupy the peripheries to prevent your land and trees from being encroached (Sang 2001: 119)."

However, their joy was short-lived because things started to take a turn for the worse. Their land which up to the time had been demarcated along clan lines under traditional rights, was allocated by a group of surveyors to give room for the settlement for about 80,000 new comers (Kimaiyo 2004: 24). Government officials and politicians alike, the main players in this scheme used their authority to dish out Ogiek land to their followers. It was at this stage that the Ogiek decided to make an impromptu visit to the Head of State who guaranteed them: "The land belongs to you [Ogiek] and you have got a right either to give or deny it to whoever you want (Sang 2004: 119)." After this declaration by the President, the Ogiek leaders came back home pleased that President had given his word that his government fully accepted the Ogiek as the rightful owners of Mau Forest. However, some politicians and civil servants were not happy with the President's decision and together they went behind the backs of the Ogiek and sought an audience with the President (Kimaiyo 2004: 26). Within a short period of the Ogiek were once again being

harassed in Mau Forest but this time round they sought other means to tackle their dilemma. In 1996, the Ogiek engaged an advocate to assist them in pursuing their rights to their ancestral land through lawful means.

Their action was triggered by a response to a memo that was produced by the Ogiek and distributed to all Members of Parliament. During question time in the parliament session, the Minister in the Office of the President stated that: “The Ogiek have been settled in Mau East Forest. They have 26 primary schools and 400 teachers. The Ogiek are being treated like any other landless Kenyans (Sang 2001: 120).” The Ogiek were disappointed with the government’s assertion, which was the exact opposite with the true situation on the ground prompting the Ogiek to file a constitutional land suit in June 1997.

3.4 Effect of the Loss of Land on the Ogiek

Having been marginalised for so long, the Ogiek have been weakened in all spheres of life. They live far below the minimum poverty threshold, with low standards of living and a poor economic foundation to provide a suitable living standard (Kabuye 2002: 62). A consequence of the loss of ancestral land for the Ogiek has been poverty, illiteracy and poor health with repercussions on Ogiek women being even more severe because very few have any property rights and therefore they tend to be poorer than Ogiek men (Ohenjo 2003: 2).

The Ogiek have lost their traditional skills and have instead been coerced into farming by the State, an occupation in which they are not skilled (ILO 2000: 80). The high altitude area in which Ogiek land is situated also makes it difficult to raise most crops. Ogiek producers are often taken advantage of by middlemen when they try and sell excess produce. One traditional occupation – honey production, could provide the Ogiek with a source of income but instead this activity is under threat from charcoal burning which destroys the forest but also kills the bees they indirectly depend on.⁴

High levels of poverty have resulted in equally high rates of illiteracy (more than 80%) because the cost of education is out of reach for most parents (Kimaiyo 2004: 17). Girls are more affected by this with many of them marrying young; prostitution has also emerged with many young mothers and women seeking to fend for themselves (Ohenjo 2003: 2). This has led to the spread of sexually transmitted diseases including HIV/AIDS, a situation that was uncommon among the Ogiek until recently (Kimaiyo 2004: 9).

Dropout rates for the Ogiek are especially high at secondary level. Primary schools are few and far between with no secondary school specifically serving the interests of Ogiek children so many of them who finish primary school have to go to boarding schools far away. In addition, the health standards of the Ogiek have deteriorated drastically over the years and this is because they have been barred from accessing medicinal plants in the forest. Most have no money to obtain adequate health services, for example in Mau there is only one doctor for every 6000 people (Ohenjo 2003: 2). Poverty, coupled with a lack of access to their local medicines has led to a low life expectancy for Ogiek people of about 46 years, with five out of ten children dying before the age of 5 (J. Kamau 2000).

3.5 Summary

This section of the paper has looked at the dynamics behind the Ogiek dispossession of their indigenous land. In the beginning, the Ogiek were found in almost all parts of the highlands in Kenya but, they have been gradually forced out by enemy ethnic groups, colonial settlers and now ‘new settler communities’ (The Ogiek 2008). Before the expulsions from Mau Forest began in 1910, they were more Ogiek than the estimated figures of 20 000 in the whole country and 5883 in East Mau.

Traditionally, the Ogiek are hunter-gatherers indigenous peoples surviving on hunting game and gathering honey in Mau Forest which up to 1954 had been set aside as guarded areas where human settlement had been banned.’ The colonialist established the forest and game laws that saw the criminalisation of Ogiek survival activity and resulted in further loss of their land was’(J. Kamau 2000: 4). This law led to the destruction of indigenous wood in exchange for inferior species like exotic conifer. This process culminated with the 1937/38 Kenya Land (Carter) Commission that advocated for the eviction of Ogiek from the forests. To the Ogiek conifer is ‘totally sterile, unproductive and useless for either bees or wildlife (J. Kamau 2000: 4).’ The colonialist used the destruction of the forests as ploy to evict the Ogiek but the main reason was for them to have access to the indigenous trees. Once again the Ogiek resisted.

According to scholars, development can be an impetus for ethnocide – a process in which ‘a culturally distinct people loses its identity (Stavenhagen 1990: 87)’ because of policies aimed at destroying their land, socio-political establishments, traditions and culture. If ordinary cultural practices link the Ogiek together, then removal of the Ogiek from Mau Forest which is historically their cultural sanctuary, serve to destroy and break up their culture. The next chapter will look into how the Ogiek have made claims for rights to their indigenous land through legal and non-legal the national level.

Chapter 4: Claiming Indigenous Land Rights at the National Level

One of the benefits of the growth of explicit indigenous rights is the high level of dealings between international human rights norms and national laws: indigenous peoples are looking to international law for support in their cases at the national level (Gilbert 2006: 298). Over the years there has been a tremendous increase in arbitration between various social groups like indigenous peoples expressed in a 'language of rights'. Indigenous rights have become resources for indigenous communities and national law itself has become the central mechanism to express indigenous land claims.

4.1 Advancing Indigenous Land Claims through the Courts

Six lawsuits⁵ have been filed by the Ogiek in Kenyan courts against the government and its effort to prevent the State from depriving them of their land (Kimaiyo 2004: 3). Some factions have had their cases clandestinely withdrawn while other Ogiek groups are thinking about filing new cases. In the same vein, over fifty criminal proceedings have been instigated against the Ogiek by the State and its collaborators. The action by the State and its allies has been done to frustrate Ogiek efforts to seek access to their ancestral land and protection of their cultural identity.

The legal process started in 1997 when the Ogiek resisted distribution of their land to non-Ogiek who had been settled on their in their areas. In April 1997, a Mr Joseph Letuya, an Ogiek, was arrested for defying delineation of his land and that of other Ogiek that had been combined into one portion of land and given to a senior government official. On 25 June, 1997 the Ogiek filed a Constitutional suit at the High Court Kenya in the now infamous: *Joseph Letuya and Others v. the Attorney General and Others (Case HCCA No.63/97)* seeking nullification of yet another settlement scheme, assertion of their culture and prevention of further allocations of East Mau Forest (Sang 2001: 120).

In this case the Ogiek have sued the government challenging the validity of the demarcation of their ancestral land. The outcome of this case (still under appeal as of May 2001) will have to tackle: the notion of ancestral land in Kenya, matters on indigenous land claims not only for the Ogiek but other disenfranchised groups, the government's tenure of land with customary claims by ethnic groups and the idea of legal pluralism (Mbote and Oduor 2006: 15). This will require an analysis of different legal traditions like customary law juxtaposed with national, international and trans-national law or what we would call 'blurring of legal cultures'. I support the whole idea of a people's right to culture because it provides protection against the homogenizing effects of globalisation. At the same time, cultural identity is a complex division especially at a era when communities are becoming more and more cosmopolitan state Appiah and Beck (in Barthel-Bouchier 2007: 14). I think what the world needs right now is less emphasis on cultural identities and more acceptance of multiculturalism with all the promise that comes with it.

On October 15 1997, the High Court issued an order limiting further allotment of Ogiek land until the case had been resolved in the courts. Almost

immediately the Ogiek of south-western Mau were asked to vacate their lands and in response to this order they filed another constitutional law suit known as the *Tinet Ogiek (S/Western Mau) v. the Republic of Kenya (Case HCCA No.228/99)* (Barume 2005: 387). The applicants claimed that the inappropriate use of the environment by the State was a threat to their right to life as protected by the Kenyan Constitution. On 22 March 2000 the High Court ruled in support of the Government of Kenya. On the matter that the Ogiek were hunters and gatherers the judges ruled:

Hunting is illegal in Kenya. The eviction is for the purpose of saving the whole of Kenya from a possible environmental disaster: It is being carried out for the common good within statutory powers (Barume 2005: 387).

On the subject of a claim for dependence on the forest as a source of their living for their bee-keeping activities, the judges ruled:

There is no reason why the Ogiek should be the only favoured community to own and exploit our natural resources, a privilege not enjoyed by or extended to other Kenyans (Mbote and Oduor 2006: 14).

From these rulings, it is clear the judges did not connect the removal of indigenous people from their lands with their right to life as a growing international jurisprudence maintains (Barume 2005: 388). No international instruments were referred to in this case yet Kenya is a signatory to a number of legal tools that touch on the rights of indigenous people. Most important of all, the judges failed to deal with fact that other Kenyans do not use the forest the way the Ogiek do (Mbote and Oduor 2006: 14). In addition, no discussion on the judges knowledge of conservation issues was carefully examined before the trials began (Mbote and Oduor 2006: 14).

In April 2000, the Ogiek lodged an appeal against the judgement of 22 March 2000 and obtained a stay of execution pending the appeal. In response to this action, on February 16 2001, the Kenyan government issued a 28-day notice to de-gazette twelve portions of forest lands, including more than 100 000 acres of Mau Forest. A few days later, the Ogiek filed yet another lawsuit before the courts with the aim of quashing the notice. To date none of the Ogiek land cases have been concluded. The Ogiek and their lawyers are concerned about the delaying tactics and lack of respect for court orders which have been viewed as a deliberate move on the part of Government to discourage the Ogiek. The Ogiek are now contemplating making claims for their land rights through regional tools like the African Court on Human and Peoples' Rights. This may be possible once they can prove they have exhausted all local remedies or that they deem them unsuitable.

4.2 Community Mobilisation around Land Rights

If the discourse on 'indigeneity' – the assertion and pursuit of indigenous difference (Decosta and Decosta 2006: 6), is examined as a network, then one can examine it at the global and local level. At the global level, the civil,

political, and cultural rights of indigenous peoples are now protected by agencies such as the International Labour Organization and the United Nations Working Group on Indigenous Peoples. Locally, in Kenya, such discourse is manifested at the grass roots activism by local non governmental organizations and representatives of National Human Rights Commissions. The local exists as the interface between the indigenous populations and the global discourse (Nair 2006: 2).

The Ogiek have resisted the assault on their lands over the years from the colonial times to present day by mobilizing themselves as community groups and taking their allegations to court. Civic bodies include the Ogiek Integral Project (ORIP) and the Ogiek Welfare Council (OWC) that have made it possible for the Ogiek people to mobilise as a group to defend their rights which they view as fixed in their identification as a distinct people (Mbote and Oduor 2006: 2). In 1996, Ogiek from Maresionik, Tiner and Nakuru came together to form the Ogiek Welfare Council. Though their application for authorized registration was initially denied by government officials, they have persistently made known their land problems through the media, representation in international conferences, demonstrations, petitioning through Parliament, delegations to the president and now law suites (Kratz 2002: 232). What I find unique about their struggle is that it was the result of a grassroots enterprise. Long before there was any talk of a transnational indigenous rights movement on the international scale, the Ogiek through their clan leaders had began to mobilise their community to fight for their rights to their land.

For a community as simple as the Ogiek the extent to which they see themselves as 'rights bearing citizens' is quite remarkable. This is exemplified by the number of cases the Ogiek have brought against the State in the fight for their ancestral land. Rights consciousness is the degree to which people define themselves as rights bearing subjects and claims rights (B.Oomen, lecture, 15 May 2008). Rights consciousness is the awareness of rights to be claimed against others, especially the State. People are generally mindful of the fact that they have rights and that neither the State nor other citizens for that matter should take away. The Ogiek may have expressed their faith in these rights at a simple level and probably misunderstood the actual content of the rights they are demanding leading to an exaggeration of their claims and possibilities through the legal system. Having said that, in the world today even if members of the public do not understand the exact content of these rights they are still willing fight for these rights and claim entitlements to them because of what is there is so much at stake for them.

Ironically, if there is any place where facets of rights consciousness needs to be built up, it is within the judiciary system in Kenya as has been illustrated by the judges handling of the Ogiek land cases. I believe 'the best guarantee of rights is provided for by the combination of active NGO advocacy work and a non-corrupt judiciary.' During one of the Ogiek delegations to the President at the time after they had filed cases in the court, President Moi is on record for having laughed saying: "Let the matter go on. I have no worry because I am also that court." Clearly a verdict in the Ogiek case could not have been fair in the light of these comments made to the Ogiek by the Head of State.

4.3 Land and the Legal Framework in Kenya

The laws in Kenya with respect to land have negatively affected the Ogiek's way of life resulting in abuse of their fundamental rights to livelihood. For example, under the Government Lands Act Cap 280, the President through the Commissioner of Lands can give out any unalienated land to anyone he pleases (J. Kamau 2000). Unfortunately for the Ogiek, most of their land falls within the Forest Act and is therefore considered in this case to be 'unalienated'. Secondly, the Forest Act gives the Minister in-charge sweeping powers to pronounce and change forest boundaries and even go as far as declaring a that a forest 'ceases' to be a forest by merely giving a 28-day announcement using Kenyan Gazette Notice (Kimaiyo 2004: 39). The same Act gives the Minister in-charge the mandate to provide licences for use of forest products; no wonder the Ogiek have found themselves in contravention of this law for using honey from the Forest without 'permission' from the Minister (J. Kamau 2000).

In a related case, the Wildlife (Conservation and Management) Act Cap 476 bans hunting without a license clearly in violation of Ogiek hunter-gathering activities (J. Kamau 2000). In addition there is the Trust Land Act Cap 285 that stipulates, all land that is not registered is under the directive of local authorities as Trust Land; whereas a number of Kenyan ethnic groups have land allocated to them under this Act, the Ogiek have been left out of these allotments (Kimaiyo 2004: 38). Finally there is the Registered Land Act Cap 300 under which an individual can obtain land by acquiring 'freehold interest' on the land once they are registered implying supreme ownership. Such land acquires the status of private land and it is through this Act of Parliament that the Ogiek have lost most of their land (Kimaiyo 2004: 37).

The government of Kenya therefore has jurisdiction over Ogiek ancestral lands through three Acts of Parliament: Forests Act (1957), the Government Lands Act (1970) and the Wildlife (Conservation and Management) Act (1977) (Kimaiyo 2004: 35). According to these laws, the government is under no obligation therefore to consult the Ogiek with reference to development projects because their ancestral land is either gazetted as national game reserves or as government forests. I think all these conflicting statutes dealing with land in Kenya need to be homogenised into laws that deal with the situation on the ground. This is complicated by the fact that Kenya has no laws that deal directly with land although the government is in the process of formulating a National Land Policy that will provide a basis for the right to use, manage and own land in the country.

One of the proposals put forward by the Ogiek is the enactment of an Ogiek Land Act. This will give the Ogiek the right to make a home in Mau Forest not just for themselves but for future generations. In the definition on indigenous people, one of the key factors is the territorial link of indigenous peoples to their territories. Gilbert(2006: xvi) states there are three sequential levels to this territorial attachment: *past, present and future*. Gilbert goes on to say that in this case indigenous people are those who live, carry on living and wish to continue their particular attachment to a defined territory. The Ogiek have

also called for the degazettement of Mau Forest and its preservation under the Ogiek Land Act as a territory set aside exclusively for them.

4.4 Indigenous People and the Constitution

The Constitution is the highest law or principal system in a country. The Ogiek believe their land problems can be traced back to the independence Constitution of Kenya (current) which made no special provision to protect the rights of minority communities. Most of the laws in Kenya are modelled to allow individual claims but not collective rights yet group identity is an essential feature for indigenous identity (Makoloo 2005: 20). Chapter V of the current Kenyan Constitution deals with human rights under the banner: *Protection of Fundamental Rights and Freedoms of the Individual*. In reference to this heading and connecting its stand to section 84 of the current Constitution (that deals with enforcement of the protective provisions), a judge recently stated:

The scheme of the protection of fundamental rights envisaged by our constitution is one where the individual as opposed to community or group rights are the ones enforced by the courts...the emphasis is clear. Except for a detained person for whom someone else may take up the cudgels, every other complaint of alleged contravention of fundamental rights must relate the contravention himself [sic] as a person...there is room for representative actions or public interest litigation in matters subsumed by section 70-83 of the Constitution.⁶

This in essence means cases brought before the courts by indigenous people as a group would be unsuccessful on technical legal grounds. Such a stand has its foundation in the development of Kenya's legal system that is based on the ideology of Western jurisprudence that rights only exist as properties of individuals (Makoloo 2005: 20). This goes against a growing trend in the world that is beginning to give recognition to collective identities mostly linked together by social-economic or cultural ties. Having said this, a number of practical difficulties still remain including lodging cases through the courts. Many times indigenous people are not aware that their rights have been abused, by whom and what action they can take and where. Hiring a lawyer does not come cheap although civic bodies may assist but at the same time the Kenyan system does not provide legal assistance (Makoloo 2005: 20)⁷. There are mechanisms for defending the rights of indigenous people at the international level but this may require the exhaustion of domestic remedies, which means those affected will have to suffer a great deal for a long period of time.

The current Constitution of Kenya does not use the term 'indigenous' or 'minorities' for that matter. Its broad terms against discrimination can be seen as the nearest qualification for indigenous people: '[N]o law shall make any provision that is discriminatory of either of itself or in its effect.'⁸ It deals with protection from discrimination which is defined as:

affording different treatment of different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex...”⁹

Therefore discrimination against indigenous people is forbidden. On the other hand, it is important to note that the Parliament of Kenya has not endorsed laws to put in place this provision (Makoloo 2005: 21). The only mechanism left for the enforcement of this right is the courts system which is slow, complicated and expensive.

In addition, the current Kenyan Constitution does not distinguish the idea of land right based on ‘immemorial occupation and use’, also known as ‘Aboriginal title’ or ‘Native title’ of indigenous groups over their lands (Barume 2005: 377). Indigenous people have interest in their land and this interest is expressed in the notion of Native or Aboriginal title, which are in themselves *sui generis* rights (Gilbert 2006: 84). The current Kenyan Constitution deals with trust lands¹⁰, a term used to refer to lands managed by government-appointed county councils which have a history of not supporting collective land rights of indigenous peoples in Kenya. Trust lands is a way of incorporating communal ownership in general land tenure system by combining ideas of customary law with philosophy behind the individual title (Kimaiyo 2004: 107). A similar notion could be said to be the assumption behind the Land (Group Representatives) Act that can be viewed as an intermediary law from the collective tenure by pastoralist groups to individual possession. The concept of trust lands is in no way different from the notion of Native Title that the Ogiek are proposing as the Ogiek Act. In fact the idea of trust lands as protected in Section 114 of the current Constitution were put in place to safeguard owners of the land under customary tenure from dispossession in the event that subdivision for personal title occurred (Kimaiyo 2004: 107).

Barume (2005: 377) has argued that the native title theory would be particularly relevant to the Kenyan situation. I concur with Barume because an indigenous title is a collective right to land, an aspect that may suite the Ogiek case although collective ownership still poses a challenge for human rights law. Indigenous title would entail the right to continue site-specific activities and hence the notion of trespassing on government lands would not arise (Kimaiyo 2004). The Ogiek need a trust land of their own where they can uphold their customary rights and other interests. (J. Kamau 2000) According to Gilbert (2006: 84) the notion of indigenous title raises the question of compensation and recognition of customary land use by indigenous people. However, under the current Kenyan Constitution the section on Trust Land states that: ‘no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law,’ making it unmistakably clear that it does not give much consideration to the land rights of indigenous communities, which are largely based on customary law (Barume 2005: 377).

One major development has raised hopes for the Ogiek in the struggle for their land rights. In 2001, the Constitution of Kenya Review Commission (CKRS) was formed. The Ogiek used this opportunity to bring their views to

the CKRS. However there are challenges in integrating the varied hopes of all Kenyans into a single document but this can be checked if guided by two overriding principles, that Constitution is: 'operative and manifestly fair'. This will go a long way helping to remedy and eliminate injustices, indignities and inequalities and create a climate of tranquillity – what Rawls, Sen and Nussbaum call the 'good life'. Most important of all it will promote nation-building.

The latest draft Constitution of Kenya puts more emphasis on the Bill of Rights¹¹ – the corner stone of the whole Constitution including its statutes. The draft Constitution has provisions for marginalized or indigenous people although it does not deal explicitly with these rights (Mbote and Oduor 2006: 11). Article 43, for example provides that 'marginalized groups are entitled to enjoy rights and freedoms' as set out in the Bill of Rights that are based on fairness, taking into account their unique conditions and requirements (Makoloo 2005: 21). Article 43(3) goes on to outline some of the conditions in place to ensure compliance with this provision. The term marginalized group or community is defined in Article 306 of the draft Constitution which is the first time Kenya will be acknowledging group rights as a term in relation to minorities or indigenous people (Makoloo 2005: 21).

Kenya was well on the way to the path of 'building a culture of constitutionalism' or a human rights culture at the domestic level through the Constitution Review process which has all but stalled. The Bill of Rights within the Constitution can only be realised by a 'justiciability or the implementation mechanism' through a court empowered to apply those rights. The mechanism of enforcement calls for an independent judiciary that is 'respected and approved by the masses' which is not the case in Kenya. In many constitutional governments an official legal bill of rights is recognized by the government and in principle holds more authority than legislative bodies alone. The Kenyan Parliament is yet to endorse some statutes within the current Constitution.

4.5 Summary

From the local to the international level, the Ogiek have resisted continued infringement of their land rights. At the local level, the main strategies to make claims have been: participation in the Kenya Land Reform and Constitution Review processes, through protests including advocacy work by civic organisations. The Ogiek have only recently made direct claims against the Kenyan Government for their land rights by appealing to the national courts. The court cases have been frustrating and now the Ogiek are more convinced than ever that their land rights can only be fully realised through an all inclusive constitution. This chapter has looked at how ideas of legal pluralism, human rights and indigenous rights have become resources for indigenous people and how law has become the essential instrument to claim rights. The next chapter will look at how ideas about indigenous peoples land rights are increasingly being taken up and vernacularized or translated in particular social contexts, often providing vital influence for Ogiek people in their struggles to gain greater concessions from their governments.

Chapter 5: Translating Indigenous Land Rights

In many circumstances indigenous peoples' representatives have used international legal instruments to fight for their rights and in many circumstances with some success. One of the main appeals for indigenous people under international law is for recognition of their land rights. However, according to Richard Falk, 'unless internalisation by citizens of countries actually takes place, the impact of international standards is likely to be uneven and sporadic, both domestically and globally (Halliday and Schmidt 2004: 3).'

5.1 Indigenous Translation by Community Actors

According to Merry, 'local actors who are the link between transnational actors and local activists and who also take part at transnational meetings and bring home what they have learned (Merry 2006a: 20).' Members of the Ogiek community have taken part in at international meetings that deal with indigenous issues and have presented these proceedings to other members but even with all these cultural flows, one has to take into account the global inequalities of resources and power that exist at all levels (Merry 2006a: 20). Translation takes place in an unlevel playing field and as such intermediaries are influenced by those who provide them with resources (Merry 2006b: 40).

One such individual was a representative of the Ogiek Peoples Development Program (OPDP) who took part at a meeting for the United Nations Human Rights Sub-Commission on the Promotion and Protection of Minorities Working Group on Minorities, 10th Session from 1st -5th March, 2004 in Geneva, Switzerland. He made some recommendations to the Working Group On Minorities (WGM) asking to try and come up with lasting solutions by contacting the Kenyan government to settle Ogiek in their ancestral lands in Mau Forest and allow them to have a full control of their resources and rights as stipulated in the ICCPR article 1.1 and the ICESCR 1.1 of which Kenya is party to.

In response to the land court case: constitutional suit no. HCCA 635/97 dating 1997 be finalised. On behalf of the Ogiek community he was requesting WGM to call on the Kenyan government to ensure that justice prevails in this case as per United Nations Declarations on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Finally he proposed that Ogiek people should allowed to participate in decision making in all the political spheres and development in Kenya, this should include political representations through special seats to be allocated to them in parliament as per ICCPR Article 25, ICERD Article 5, and the United Nations Declarations on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article2.3.

What I found interesting about civic mobilisation among the Ogiek was the number local Ogiek organisations that represent their land interests. For an ethnic group that represents less than one percent of the Kenyan population I felt ten groups one too many. To begin with the Ogiek have spilt themselves into two groups: the Mau Forest Ogiek and the Elgon Forest Ogiek and yet

these two groups don't see eye to eye on many issues although they have a shared problem of land dispossession. The Mau Forest Ogiek are the most affected by land dispossession and their plight has been highlighted in this paper. The Mau Forest Ogiek interests are represented by the: Ogiek Welfare Council (OWC), Ogiek Peoples' Development Program (OPDP), Ogiek Women's Consortium, Ogiek Rural Integral Projects (ORIP) and the Ogiek Cultural Initiatives Programme (OCIP). The case is the same to the Elgon Forest Ogiek. Many stated intermediaries are influenced by those who provide them with resources and this may help explain the sudden growth of local organisations representing Ogiek interests. According to Hodgson (2002b: 1086) despite efforts to promote harmony and present a common agenda at times indigenous rights movements are split by sometimes antagonistic 'disagreements over priorities, competition over resources, and tensions over membership and representation.

CEMRIDE, another local organisation, 'put the Ogiek issue onto the international agenda at the Working Group on Minorities'. CEMRIDE, an organisation committed to strengthening the capacities of indigenous peoples and minorities has been working in collaboration with the Minority Rights Group and together they both submitted a statement on the status of the Ogiek struggles in July 2003 to the Commission on Human Rights. According to an official with CEMRIDE, the government took the issue on board actually had a meeting with CEMRIDE. The Lands Minister at that time also began consultations with the Ogiek people. They believe all this is due to the international focus, which began with the WGM. They used the statements they made at the WGM to lobby the government. Now that CEMRIDE has an official statement from the President that minority rights have to be protected in the new Constitution, they believe that the fact that they tabled these issues at the WGM contributed to these developments, and made it easier for them to gain access to the government. Officials at CEMRIDE state for most minorities or indigenous people, the WGM is the 'only avenue of access to the UN system'. This case illustrates extent to which the Ogiek have appealed not only to national organisations but to human rights regimes at the international level to put pressure on their government to grant them their land rights

5.2 Civic Advocacy and Indigenous Rights

Lobbying and advocacy form part of the strategy the Ogiek have used to fight for rights to their land. The Kenya Human Rights Commission has worked directly with the Ogiek in their fight for their land. It all began when the Ogiek approached the KHRC for unity and support when the Ogiek were facing yet another expulsion from Mau Forest. On 31 March 2000, 11 members of staff for KHRC were arrested and taken to court after they were caught holding discussions with members of the Ogiek society; their bail application was turned down. On April 1 2000, the President of the time, Moi said that the Ogieks were 'being incited' by human rights activists in move largely seen as an effort to manipulate the case facing the KHRC activists (J. Kamau 2000). The President said that the government would not hesitate to arrest the inciters.

The human rights activists for the KHRC were arrested for performing plays for a group of children during a civic program exercise among the Ogiek. On 3 April 2000, three Ogiek were arrested and charged for conducting agitation and for holding a 'public rally at Sotik Primary school without notifying a regulating officer.' This was related to the civic education visit by officials from the KHRC. Others included the councillor for Chepakundi who had been arrested following the cancellation of a public rally he had called to discuss the Kiptagich land, which bordered President Moi's Kiptagich Tea Estate. Following all those threats human rights activists were now forced to enter the Ogiek land anonymously, police checks were been put into place to trap those who tried to enter the Ogiek forests. A KHRC lands official at the time was quoted as saying, 'no amount of intimidation will deter us from educating the Ogieks (J. Kamau 2000).' Although the KHRC officials were released by Molo court this as a result of protests by the international human rights organisation, Amnesty International. The KHRC represent itself as a transnational organisation when it opened offices both in Kenya and Boston/USA. It fast became the major donor-funded organisation which provided information to interested local and international observers alike. It went as far as copying the working methods of Amnesty International including it's working style by publishing Quarterly Repression Reports.

With time the Ogiek realized that their demand for settlement on land they had occupied since time immemorial was not bearing fruit so they decided to seek other avenues raised a number of issues. The evolving constitutional reform process in the country provided a window of opportunity for the Ogiek to raise issues were of primary concern to them (KHRC 2001: 2). As a result, the Ogiek community decided to put together their position on a number of issues pertaining to constitutional reform. These issues included: 'environmental protection, indigenous knowledge in medicine and conservation, delivery of justice, the role of Public Administration in ordinary lives of people, the broad scale of human rights, and indeed the question of citizenship and civic participation in Kenya (KHRC 2001: 2)'. The KHRC facilitated the holding of two informal workshops in September and December 2000 respectively. In addition, the KHRC staff made two field trips to the Mau Escarpment to interact with the community and experience at first hand human rights abuses on the ground. We have the 'books' or law as sources of rights, they are inherent within us but at times 'rights have to be experienced' either through mass protest or by an organisation even though it is not legalised.

The Report by the Special Rapportuer on Indigenous Rights stated the following about the current state of affairs in Kenya in 2006:

Most of human rights violations experience by pastoralists and hunter-gatherers are related to their access to and control over land and natural resources. Historical injustices derived from colonialism, linked to conflicting laws and lack of clear policies, mismanagement and land-grabbing, have added to the present crisis (Hannan 2008: 31)

5.3 Kenya's Obligation under International Law

Although Kenya is a signatory to several international and regional treaties it is not fulfilling the obligations set for. Top among them is the ICCPR. Though Kenya ratified the ICCPR on May 1 1972 it never enacted a law specifically protecting indigenous people therefore, the protection of indigenous peoples land rights in the context of Article 27 has not been reflected in Kenya (Barume 2001: 377). The Human Rights Committee has gone a step further on several decisions regarding indigenous peoples just like the Ogiek suggesting that the scope of the right to protection under Article 27 includes rights over ancestral lands which such communities' cultures depend (Barume 2001: 378). This individual petition mechanism is not, however available to the Ogiek since Kenya is not party to Optional Protocol 1 to the ICCPR nor has Kenya complied with its reporting obligations as required by Article 40 of the ICCPR, in fact since Kenya submitted its initial report in 1979, it has four overdue reports that should have been submitted for the years: 1986, 1991, 1996 and 2001 respectively (Barume 2001).

Kenya has also been discussing the implementation of ICERD, concentrating mainly on only the discrimination faced by indigenous peoples in the country. A seminar was organized by the Ministry of Justice and Constitutional Affairs under the auspices of the United Nations Development Programme (UNDP) and required the involvement of government in collaboration with civil society organizations. The seminar was followed by a meeting to discuss preliminary findings. While the seminar went well, the next meeting was dominated by government officials whose agenda seemed to derail the discussions, which ended rather discordantly. The process is still ongoing and positive results are expected. One factor that has to be taken into account when dealing with the implementation of human rights law is that it is according to Merry it is 'voluntary system' and hence the requires the goodwill of government to implement.

The UNDRIP seeks to ensure that "the body of international law does what it set out to do: protect and promote the rights of all peoples." It brings indigenous peoples to the forefront helping them to claim their rights thus boosting their standing in local political resistance. Kenya became one of three countries in Africa to abstain from voting on the UN Declaration on the Rights of Indigenous Peoples in September 2007. While Kenya's position on the concept of indigenous peoples has always been negative many indigenous peoples felt that the fact that it did not vote against the Declaration demonstrates a softening of its position. Two aspects may have contributed to this change. Firstly, the amount of lobbying undertaken by indigenous peoples locally and internationally, facilitated by IWGIA. This serves to underscore the significance and timeliness of the lobbying effort.

At the regional level, Kenya has ratified the African Charter of Human and Peoples' Rights, which unlike the ICCPR, does not require the ratification of a separate international instrument for individuals to petition before the African Commission of Human and Peoples' Rights. However, the Commission has shown little interest in engaging in indigenous issues. Some believe that the Kenyan government's agreement to host one of the Working

Groups's consultation meetings in January 2003 constitutes a change in its attitude to indigenous issues. The Ogiek have been exploring the option of accessing the African Commission with their cases if their actions in domestic courts continue to suffer set backs. It is not just about networking but learning new skills. Within the framework of a constitutional review in Kenya, the Ogiek have defined and claimed recognition as a distinct indigenous minority (Stavenhagen 2004: 2). Ogiek are of the opinion that their way of life is unique and therefore fall under the category of indigenous people just like the San of South Africa or the Aborigines of Australia.

In recent years international legal instruments have argued for the recognition of indigenous peoples rights should be framed in a discourse of special rights and multiculturalism rather than a universalist discourse of human rights. Multiculturalism presents a critique of difference-blindness found in classical liberal concepts of rights and citizenship where obligations (Cowan et al. 2001: 205) concentrate on the individual, arguing that the presence of universal human rights alone is insufficient to protect and advance the rights of indigenous people. I support the idea of 'differentiated citizenship' as presented by Young and Kymlicka (Cowan et al. 2001) because they support a whole encompassing of identity that recognizes difference and also all the historical failings that have been denied to marginalized people like the Ogiek.

5.4 Summary

International norms concerning indigenous people are realized by state actors mainly through local decision making processes. The types of human rights protection which groups like the Ogiek are seeking are primarily individual human rights protection, just like those enjoyed by other interest groups all over Kenya. However, by using the notion of indigenous rights, their claims go a step further – the Ogiek seek the right to acknowledgment as indigenous peoples, protection of their cultures and unique ways of life. A major issue for them is the protection of collective rights and access to their traditional land and natural resources upon which their entire livelihood depends.

The last chapter will provide a conclusion and reflection in reference to my research question

Chapter 6: Conclusions

This paper sought to answer the following: How have the Ogiek invoked national and international legal instruments on rights of indigenous people to fight for improved access to their ancestral land and for protection of their cultural identity? The main argument of this paper is that national and international legal norms help to strengthen Ogiek land claims to their ancestral land. The opposite is the case because whereas in theory they are meant to provide protection to disenfranchise groups, in practice the situation on the ground is very different.

If there is one conclusion I think it is important to go beyond the grand generalities and the hopes of international human rights law in order to understand the impact of the global human rights movement. I think socio-legal theory is the weaker part of doctrinal analysis

One of the aims of the social sciences could be to put the 'human' back in the human rights law and this has been demonstrated in this paper by the use of a socio-legal approach to understanding how international law is translated in everyday life and practice. According to Keck and Sikkink through the mobilization of international networks of human rights experts and local NGO activists, a "politics of shame" can serve to counter the wave of inactivity by treaty ratifications or what Hafner-Burton and Tsutsui in (Morgan 2007: 109) brand "the paradox of empty promises."

References

- ACHPR (2006) *Indigenous Peoples in Africa: The Forgotten Peoples?* International Working Group for Indigenous Affairs. <http://www.achpr.org/english/Special%20Mechanisms/Indigenous/ACHPR%20WGIP%20Report%20Summary%20version%20ENG.pdf> (accessed 3 October 2008).
- Anaya, J. (2004) *Indigenous Peoples in International Law*. New York: Oxford University Press.
- Baderin, M. and R. Mccorquodale (eds) (2007) *Economic, Social and Cultural Rights in Action*. Oxford: Oxford University Press.
- Barthel-Bouchier (2007) 'A Right to Culture?' [electronic version]. http://www.allacademic.com/meta/p_mla_apa_research_citation/0/9/6/8/9/pages96897/p96897-1.php (accessed 7 October 2008).
- Barume, A. (2001) *Heading Towards Extinction? Indigenous Rights in Africa: The Case of the Twa of the Kabuzi-Biega National Park, Democratic Republic of Congo*. Copenhagen: International Working Group for Indigenous Affairs.
- Barume, A. (2005) 'Indigenous Battling for Land Rights: The Case of the Ogiek in Kenya', in J. Castellino et al. (eds), *International Law and Indigenous People* (pp. 365-391). Leiden: Nijhoff.
- Bower, L. (1995) 'Law and Society', *PoLAR: Political and Legal Anthropology Review* 18(2): 139-142.
- Cowan, J., M.-B. Dembour and R. Wilson (eds) (2001) *Culture and Right Anthropological Perspectives*. Cambridge: Cambridge University Press.
- Dawson, C. (2002) *Practical Research Methods*. Oxford: How to Books Ltd.
- Decosta, R. and R. Decosta (2006) *A Higher Authority Indigenous Transnationalism and Australia*. Sydney: UNSW.
- Gilbert, J. (2006) *Indigenous Peoples' Land Rights Under International Law*. New York: Transnational Publishers.
- Griswold, A. (1996) 'State Hegemony Writ Large: International Law and Indigenous Rights', *PoLAR: Political and Legal Anthropology Review* 19(1): 91-104.
- Halliday, S. and P. Schmidt (eds) (2004) *Human Right Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*. Oxford: Hart Publishing.
- Hannan, L. (2008) 'Trouble in Paradise Tourism and Minorities: A Kenya Case Study' [electronic version]. www.minorityrights.org/download.php?id=463 (accessed 12 August 2008).
- History of Kenya (n.d.). Retrieved 5 May 2008, from <http://www.ogiek.org/>.
- Hodgson, D. (2002a) 'Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas', *American Anthropologist* 104(4): 1037-1049.
- Hodgson, D. (2002b) 'Precarious Alliances: The Cultural Politics and Structural Predicaments of the Indigenous Rights Movement in Tanzania', *American Anthropologist* 104(4): 1086-1097.
- ILO (2000) *Traditional Occupations of Indigenous and Tribal Peoples*. Geneva: ILO.
- Kabeer, N. (ed.) (2005) *Inclusive Citizenship Meanings and Expressions*. New York: Zed Books.

- Kabuye, C. (ed.) (2002) *Indigenous Knowledge for Biodiversity and Development*. Nairobi: National Museums of Kenya.
- Kamau, J. (2000) 'The Ogiek: The Ongoing Destruction of a Minority Tribe in Kenya' [electronic version]. <http://www.ogiek.org/report/ogiek-ch1.htm>.
- Kamau, J. (n.d.) Ogiek: History of a Forgotten Tribe. Retrieved 4 April 2008, from <http://www.ogiek.org/report/ogiek-ch1.htm>.
- Kamau, V. (2007) 'Achieving Sustainable Development and Indigenous Rights'. PhD thesis MA Thesis, Universidade Eduardo Mondlane, Maputo.
- Keating, N. (2007) 'UN General Assembly Adopts Declaration on the Rights of Indigenous People', *Anthropology News* 48(2): 22-23.
- KHRC (2001) *We, the Ogiek Our Stand on the Constitution*. Nairobi: Kenya Human Rights Commission.
- Kimaiyo, T. (2004) *Ogiek Land Cases and Historical Injustices 1902-2004*. Nakuru: Ogiek Welfare Council.
- Kratz, C. (2002) *The Ones that are Wanted: Communication and the Politics of Representation in a Photographic Exhibition*. Berkeley: University of California Press.
- Lumumba, O. (2004) 'The National Land Policy in Kenya Addressing Historical Injustices' [electronic version]. http://www.caledonia.org.uk/land/documents/kla_issues_paper.pdf (accessed April 15, 2008).
- Lutz, E. (2007) 'Indigenous Rights and the UN', *Anthropology News* 4(2): 28-28.
- Makoolo, M. (2005) 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity'. London: Minority Rights Group.
- Mbote, P. and J. Oduor (2006) *Following God's Constitution The Gender Dimensions in the Ogiek Claim to Mau Forest Complex*. <http://www.ielrc.org/content/a0602.pdf> (accessed April, 15 2008).
- Meinzen-Dick, R., P. Kameri-Mbote and H. Markelova (2007) 'Property Rights for Poverty Reduction' [electronic version] (accessed 10 August 2008).
- Merry, S.E. (1996) 'Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993', *PoLAR: Political and Legal Anthropology Review* 19(1): 67-82.
- Merry, S.E. (2006a) *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago.
- Merry, S.E. (2006b) 'Transnational Human Rights and Local Activism: Mapping the Middle', *American Anthropologist* 108(1): 38-51.
- Morgan, B. (ed.) (2007) *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship*. Burlington: Ashgate Publishing Ltd.
- Nair, M. (2006) 'Defining Indigeneity: Situating Transnational Knowledge' [electronic version]. http://www.uzh.ch/wsf/WSFocus_Nair.pdf (accessed September 8, 2008).
- Nation (2001) 'Church Queries State Over Forest'. *Sunday Nation*.
- Oduka, D. (2007) Gripe of Ogiek Now Forced Into 'Modernity'. Retrieved 5 October 2008, from <http://www.ogiek.org/news-1/news-post-07-08-3.htm>.
- The Ogiek (2008). from <http://www.survival-international.org/tribes/ogiek>.

- OHCHR (1997) 'General Recommendation No. 23: Indigenous People' [electronic version]. <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (accessed 2 November 2008).
- Ohenjo, N. (2003) 'Kenya's Castaways: The Ogiek and National Development Processes' [electronic version]. <http://www.minorityrights.org/?lid=738> (accessed 14 April 2008).
- Oxford English Dictionary* (1999). Oxford: Oxford University Press.
- Radcliffe, S., N. Laurie and R. Andolina (2005) 'Indigenous People and Political Transnationalism: Globalization From Below Meets Globalization From Above'. Oxford.
- Risse, T., S. Ropp and K. Sikkink (eds) (1999) *The Power of Human Rights International Norms and Domestic Change*. Cambridge: Cambridge University Press.
- Salvadori, A. and C. Salvadori (1984) *People and Cultures of Kenya*. London: Transafrica Book Distributors.
- Sang, J. (2001) 'The Ogiek in Mau Forest' [electronic version]. http://www.forestpeoples.org/documents/africa/kenya_eng.pdf (accessed 17 September 2008).
- Sang, J. (2002) 'The Ogiek Land Question' [electronic version]. <http://www.cpsu.org.uk/downloads/Joeph%20Sang.pdf> (accessed 17 July 2008).
- Scheinin, M. (2004) 'Indigenous Peoples Land Rights Under the International Covenant on Civil and Political Rights' [electronic version]. http://www.galdy.org/govat/doc/ind_peoples_land_rights.pdf (accessed 5 May 2008).
- Sena, K. (2006) 'Mau Forest: Killing the Goose but Still Wanting the Golden Eggs' [electronic version]. <http://www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/IndigenousAffairs/IA4-2006%20articles/Kenya.pdf> (accessed 27 September 2008).
- Silbey, S. (2005) 'After Legal Consciousness' [electronic version]. http://web.mit.edu/~ssilbey/www/pdf/after_legal.pdf (accessed 2 November 2008).
- Starr, J. (1992) 'Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans', *American Ethnologist* 19(3): 633-634.
- Stavenhagen, A. (1990) *The Ethnic Question Conflicts, Development and Human Rights*. Tokyo: United Nations University Press.
- Stavenhagen, A. (2004) 'Indigenous Peoples in Comparative - Problems and Policies'.
- Thornberry, P. (2002) *Indigenous Peoples and Human Rights*. Manchester: Manchester University Press.
- UN (2007) 'United Nations Declaration on the rights of Indigenous Peoples' [electronic version]. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 4 September 2008).
- Wilson, R. (ed.) (2003) *Human Rights Culture and Context Anthropological Perspectives*. London: Pluto Press.

Notes

¹ Joseph Towett Kimaiyo is the Chairperson of the Ogiek Welfare Council, quoted in Nyang'ori Ohenjo, Kenya's Castaways: The Ogiek and National Development Processes 1 (2003).

² Naturally, national constitutions and legislations still have legal precedence over such international conventions.

³ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine abstained.

⁴ The Ogiek are known as the 'honey-hunters of Kenya'.

⁵ Other cases filed by the Ogiek include: Joseph Letuya & 21 Others v. The Ministry for Environment and Natural Resources (Nairobi HCCC No.228/01); Simon Kiwape & 19 Others v. Muneria Naimodu & 2 Others (Civil Case No.19/97) and the Narok & Representatives v. Ministry of Lands (Nairobi HCCC No. 421/02)

⁶ The parts mentioned constitute the full range of rights and freedoms under the Kenyan Constitution.

⁷ The State will provide free legal counsel in cases where a person has been charged with murder, treason or offences that carry the death penalty so long as an individual can prove they cannot get one for themselves.

⁸ Article 82(1) of the Kenyan Constitution.

⁹ Article 82(3) of the Kenyan Constitution.

¹⁰ Chapter IX of the current Constitution is devoted exclusively to 'Trust Lands'.

¹¹ The Bill of Rights includes: the right to life; equality and freedom from discrimination, the right to health, education, food, water, sanitation and environment; the right to language, culture, freedom of association, assembly, religion etc.