

Research Article

Complementarity of National and International Courts on Protection of Indigenous Peoples' Right to Ancestral Lands in the Contemporary World

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Abstract

Protection of indigenous peoples' rights is one of the contentious matters in the modern world history. While subjecting indigenous peoples to modern civilization, state governments have forcefully evicted them from their ancestral lands in pursuit for environmental conservation or economic development goals. This has adversely affected indigenous peoples' right to ancestral lands protected by various international, regional and national instruments. While seeking for justice, national courts have strictly applied judicial restraint approach to award inadequate judicial remedies to the victims. Being aggrieved, indigenous peoples have sought for remedies before international courts and tribunals which issue declarative orders and award compensation to victims. These orders by international bodies cannot be effective unless enforced by local courts. This raises a complementarity of national and international courts in protecting indigenous community's right to ancestral lands, and revival of judicial activism approach in interpretation of national and international human rights instruments. This paper critically evaluates two competing judicial approaches in interpretation of laws by national and international judicial bodies. It eventually recommends for a human rights approach towards effective protection of indigenous peoples' right to ancestral lands. The paper applies doctrinal methodology in evaluating different literature, legal instruments and precedents by national and international judicial bodies.

Keywords

Indigenous Peoples, Ancestral Lands, Judicial Restraint, Judicial Activism and Court

1. Introduction

Protection of indigenous people has now become a critical concern of international community than it was 50 years ago. Different human rights reports indicate that most states tend to disregard interests of the indigenous communities and concentrate much on economic development activities. Most times, indigenous communities are forcefully evicted by the national governments from their traditional/ancestral lands on

different grounds, such as public interest, national interest or environmental conservation. Because of this vulnerability, international community adopted different instruments recognizing and protecting indigenous peoples' rights including right to self-determination. Nevertheless, there is evidence that indigenous peoples' rights are still downtrodden by national governments; hence a need for intervention by the

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national courts and international courts.

The critical question is what should be the role of the courts when national government's acts tend to violate indigenous people's rights? Should courts sit behind closed doors tied up by notions of separation of powers and adversarial principles? Or should courts take an active role in holding national governments accountable for contravening indigenous peoples' rights secured by state constitutions and international law? This paper seeks to analyze the role of national courts in protecting the indigenous peoples' right to internal self-determination in Modern States. The paper is descriptive and applies doctrinal methodology in collection and analysis of information from published scholarly works, reports and precedents by national and international courts.

2. An Overview of Indigenous Peoples or Communities

Indigenous peoples or community can be identified taking into account distinct features which distinguish them from other ordinary groups of people. To date, there is no common definition which best describes indigenous community; but scholars, experts and judges have established key features of an indigenous community. The United Nations Special Rapporteur on Minorities defined the term as: 'Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on 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 [1].

Similarly, the African Commission on Human and Peoples' Rights through its Working Group on Indigenous Populations/Communities adopted three criteria to identify indigenous population. First indicator is self-identification of the group basing on common values and tradition. Second indicator is a special attachment of the population to and use of their traditional land, which is of fundamental importance for their collective physical and cultural survival as peoples. The last indicator is that a population must be facing a state of subjugation, marginalization, dispossession, exclusion, or discrimination because they have different cultures, ways of life or mode of production than the national hegemonic and dominant model [2].

Nevertheless, the African Court on Human and Peoples' Rights in the case of *African Commission on Human and Peoples' Rights vs. Republic of Kenya* explained relevant factors to be considered when distinguishing an indigenous community. These factors include: the presence of priority in time with respect to the occupation and use of a specific ter-

ritory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist [3].

Thus, indigenous peoples are considered by the international community to be vulnerable population because of their traditional settings, values and susceptibility to discrimination. This is a reason why the international community adopted several instruments for protection of indigenous community, including the United Nations Declaration on the Rights of Indigenous Peoples of 2007, the American Declaration on the Rights of Indigenous Peoples of 2016, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental matters in Latin America and the Caribbean (known as Escazú Agreement) of 2021 and the Indigenous and Tribal Peoples Convention of 1991. Similarly, the international community created global institutions to promote indigenous peoples' rights, including the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the UN Special Rapporteur on the Rights of Indigenous Peoples (UNSR). Principally, the above instruments provide for rights specific to indigenous persons, inter alia, the right of participation and self-determination which are contained in 'the principles of consultation and free, prior and informed consent.

Despite the above legal instruments, indigenous communities still face violations and abuses in the form of unlawful evictions. These evictions are driven by government policy directives for environmental conservation or investment purposes. Surprisingly, there have been contradicting and mixed reactions by the international community, civil society organizations and government organs on whether or not the evictions were valid. On one hand, national governments tend to justify evictions based on its powers to determine policy matters, including adoption and implementation of development programmes, projects and plans for the benefit of the people. This argument is based on the principle of sovereignty over natural resources whereby the government, claim to be representative of the people and custodian of the public good, public interest and public purpose.

On the other hand, the international community and civil society organizations have declined to support evictions of indigenous people on different grounds such as lack of prior, free and informed consent; lack of prompt and adequate compensation and lack of public utility in the projects so established. These two conflicting approaches appear to have adverse impact on the right of the indigenous community to own and dispose of natural resources, including their ancestral lands. This conflict could only be resolved by the courts of record and international courts through interpretation of laws

and treaties.

The dilemma facing national courts in today's globalized world is whether to decide the matter in favour of the executive or indigenous communities. Whereas the former would mandate national courts to strictly adhere to principle of separation of powers, the latter would require national courts to rule in favour of the victims through adherence to human-right instruments protecting indigenous communities. This article critically evaluates two approaches by courts or judges in interpretation of laws against the need to protect indigenous peoples' right to natural resources, including ancestral lands in the contemporary legal order.

3. Judicial Approaches in Interpretation of Laws and Effect on Protection of Indigenous Peoples' Rights

Basically, there are two main approaches which guide judges' interpretation of laws in the dispensation of civil justice. Each of these two approaches has far reaching effects and implications on administration of justice for the vulnerable groups, including indigenous communities. The first approach is known as judicial restraint. This dictates that an adjudicator must interpret the laws within the limits set by the Constitution and legislations enacted by the Parliament. It calls for judges to limit their power and adhere strictly to the texts of the law.

It implies that the court should not take active role in law and policy making, functions of which are vested into other organs of the government under the celebrated doctrine of separation of powers. This means that courts must not nullify administrative and legislative actions unless there are extenuating circumstances warranting court intervention.

The above view is supported by Shemton who states that 'the judiciary today, in dealing with the acts of their coordinate legislators, owe to the country no greater duty than that of keeping their hands off these acts whenever it is possible to do so' [4]. Similarly, Choudhary argues that when adjudicating any matter 'courts should rely on legislative purpose, stare decisis and rigorous application of judicial interpretation' since they lack policy-making authority [5]. Thus, judicial restraint approach of interpretation only limits the court's power to determination of disputes in accordance with the law and precedents.

Basically, the judicial restraint approach of interpretation is built on two strong bases. One, that the judiciary is a creature of the Constitution, hence it must resolve disputes within the ambits set by the same. Being custodian of the constitution and rule of law in any country, judicial officers must be bound by the core values and attributes under the principle of independence of judiciary. This is supported by various scholars, such as Peter who avers that the court should be the guardian of the constitution and not the lord of the constitution [6]. Further, Bolick stipulates that judges should never re-write

statutes, exercise legislative or executive powers, but only enforce the laws in accordance with the Constitution and the oath of office [7].

Two, judges are not elected by the people but appointed by the senior member of the executive; hence they play a limited role within the democratic process. Manuel regards court as 'anti-majoritarian body' composed of small number of individuals not elected by the people; hence not accountable to the people [8]. It means that judiciary should not intervene in legislative enactments or executive decisions which result from lawful political processes because judges are not elected by the people. Mainly legislative acts and administrative decisions are guided by public policy preferences, including citizens' individual needs and desires which cannot be overruled by the court. Thus, judiciary is expected to be modest in any attempt to overrule the results of democratic process. Shemton argues that when the court is considering any nebulous constitutional provision, it 'should always rule in favour of the legislature, executive or other government agency' [9]. This implies that the court must not look into constitutionality of the government act but whether there was proper, reasonable and valid exercise of power [10].

Generally, judicial restraint approach of interpretation of laws prohibits judges from invalidating government acts, even when the acts violate individual rights or lead to injustice. This approach appears to respect the traditional roles of the courts which squarely regards the government as a partner; hence helping to preserve a balance among the three branches of government. Further, it seemingly upholds the government power over policy matters and respect over its citizens. However, strict adherence to judicial restraint leaves a lot to be desired in terms of protection of human rights, including indigenous rights to ancestral lands. It mandatorily obliges the judge to uphold statutes or government acts considered to be unconstitutional or against human rights. This is likely to subject court's powers to technocrats and politically-biased institutions, hence eroding the courts' role to protect human rights and safeguard rule of law in the country.

The above deficiencies led to the rise of another approach to judicial interpretation, known as judicial activism. This term has been described differently in terms of meaning and content wise. John describes it in terms of 'hero judges' who act as guardians of liberty working together to strengthen the role of the government [11]. Johnny & Zimmermann describe judicial activism as a condition used to describe certain tendencies of judges who consider outcomes, attitudinal preferences and other extra judicial matters when interpreting the law [12]. Similarly, Tauqir describes the term judicial activism as 'the use of judicial power to articulate what is beneficial for society in general and people at large regarded as 'justice' [13]. He regards judicial activism as 'active process of implementation of rule of law, essential for preservation of functional democracy'. Similarly, Ujala provides that judicial activism is one way of addressing inequalities in the society for the people who do not have ability to influence

policy decisions by providing legal avenue for challenging injustices in the society [14].

The above scholars regard judicial activism as a proactive way by which the judiciary would protect the rights of innocent citizens (social justice) from unfair acts of the political government body (described as political injustices). Thus, it is a process whereby judges and courts are vested with powers to overturn past decisions or acts of government if there is belief that decisions were unfair, erroneous, or against public interests [15]. This means that a judge's focus or emphasis should not be to protect the government's will but the people's will (public utility). The court ought to declare any act by the government or parliament which contravenes the constitution, any law or citizen's rights to be a nullity; hence unenforceable at law.

Basically, judicial activism is built on three notable justifications. First, that due regard of human rights, principles of equality and equity by court is essential for protection and promotion of the constitution and rule of law in any country. Bolick provides that if the legislature produces garbage and the court is asked to interpret it, then it is the duty of the court to return garbage based on principle of 'garbage in garbage out' [16]. This means that if the government passes decisions (both administrative and legislative) which appear to be inconsistent with the constitution or fundamental human rights and values, the court must nullify or set aside the impugned decision. Secondly, judicial activism ensures that judges interpret laws to reflect contemporary values, social needs and communal interests; hence filling gaps in legislations [17]. This implies that law development is not only a function of legislature or executive but also the judiciary as equal chances of filling gaps through precedent. Since the law is not static but dynamic depending on socio-economic and political factors prevailing in the society, it is the obligation of the court to act as agents of social change.

Thirdly, judicial activism ensures that the government and the legislature make decisions within the established constitutional boundaries [18]. Peter argues that the court should apply the law as a tool of empowerment where government actions appear to be incorrect [19]. Further, Kumar avers that judicial activism is necessary for correction of legislative or executive failures [20]. As a common law principle, the High Court is vested with inherent powers to ensure that government and legislative decisions do not transgress constitutional limits through judicial review. This is likely to guarantee accountability of the government, limit powers of the government and safeguard sovereignty of the people.

However, several critics against judicial activism approach have been raised by various scholars on various grounds. John argues that hero judges (activists) have possibility of threatening 'working of constitutional system and do nothing to fix the problems' [21]. Likewise, Kumar specifies that if practiced in a country judicial activism may undermine the principle of separation of powers [22]. This is when judiciary is given power to create laws of their own through interpretation,

hence overstepping and interfering functions of the legislature. This is likely to create high chances of conflicting decisions between the judiciary and other arms of the government. On the other hand, Manuel argues that courts should not venture into policy matters because they are not elected by the people, and such matters are very technical, hence require solid expertise which judges lack [23].

Impliedly, the above scholars mean that judges are not best placed to assess correctness of policy and administrative decisions passed by technocrats who exercise discretionary powers. Principally, any administrative body vested with discretionary powers is given freedom to decide any particular question based on their own opinions [24]. This is also supported by Mensah who states that anybody given discretionary power has freedom to choose between various options; create standards or vary general standards in order to meet set objectives, within the legal and political framework [25]. In such situations, such decisions cannot be determined to be right or wrong by the court in any objective way [26]. However, discretionary powers must always be exercised cautiously in good faith, uninfluenced by irrelevant motives, reasonably performed and within statutory bounds of discretion [27].

Notwithstanding the above critics, judicial activism is important now that ever when speaking of protecting indigenous rights to access and use their natural resources, including ancestral lands. This is because of various reasons. First, indigenous peoples regardless of localities or origin, are still faced with socio-economic risks compared to ordinary modern societies, such as poor health facilities, lower levels of education, inadequate and crowded housing, lower income levels and higher rates of unemployment. Secondly, indigenous peoples do not control their own traditional lands, live short lives, have no access to clean water and their survival depends squarely on traditional practices such as hunting and gathering. Thirdly, climate change phenomenon and outbreak of COVID-19 have adversely affected indigenous peoples' lives leading to death and displacement of people [28].

Fourth, indigenous peoples in different parts of the World still face harsh realities of life, including violation of human rights by state authorities, high levels of marginalization, exclusion and discrimination. The most common and notable forms of human right abuses to indigenous peoples in the modern world today include forced evictions from the ancestral lands without prior, free and informed consent and non-payment of compensation for loss of ancestral lands [29]. For example, in 1991 the government of Uganda evicted the Batwa indigenous community from their Forest home for establishment of a National Park without proper consultation and payment of compensation [30]. Similarly, in the year 2008 the government of Cambodia unlawfully evicted 600 indigenous families and granted 20,000 hectares (equal to 49,000 acres) of land to a Thai company for establishment of sugarcane plantations [31].

On the other hand, in July 2019 the twenty (20) govern-

ments of India were ordered by the Supreme Court of India to evict 1.5 million indigenous families living in forest land on reason of conserving the environment. This followed a decline by the governments to grant petitions by indigenous families for legal right to live and work on the forest land as required by the provisions of the Forest Right Act of 2006 [32]. Equally, the government of Kenya in November 2023 was reported to have forcefully evicted 7000 Sengwer indigenous families from Mau Forest on conservation reasons, notwithstanding the order of the African Court of Human and Peoples Rights of 2017 which directed the government of Kenya to demarcate and offer the Ogiek community titles to the territory they traditionally lived [33].

Likewise, the government of Tanzania from June 2022 evicted the Maasai indigenous peoples of Loliondo and relocated them to Msomera in Tanga region for reasons related to conservation of the environment, subject to payment of compensation and provision of social services including house facilities and schools. Notwithstanding, some members of international community including the World Bank criticized the government of Tanzania in the Maasai evictions for grossly violating international instruments protecting indigenous rights.¹ Despite the above critics, it has been recently reported that the government of Tanzania is expected to evict 20,000 people for expansion of Ruaha National Park through a USD 150 million REGROW project funded by the World Bank.

Given increased pressure over resources for national development, including land which belong to indigenous communities, states must adopt legal and policy measures to implement the United Nations Declaration on the Rights of Indigenous Peoples [34]. Furthermore, there is need for strengthening of judicial approaches towards interpretation of national and international instruments. National and international courts should now be the mouth piece for the vulnerable population in the modern society characterized of forceful evictions of indigenous peoples. This would require strict application and interpretation of international instruments protecting indigenous peoples 'rights to ancestral lands. A true and practical example on how to protect indigenous peoples to ancestral lands can be borrowed from interpretation by various international courts as explained hereunder.

4. Best Practice by International Courts on Protection of Indigenous Peoples' Rights to Ancestral Lands

Different international courts in the world have applied international human rights instruments to protect indigenous peoples' right to own and dispose of natural resources, in cases where states have evicted indigenous persons from their

ancestral lands. The key issues that have been addressed by the tribunals revolve around participation of the people in the form of consultations and informed consent and compensation. The African Commission on Human and Peoples' Rights (hereinafter referred to as African Commission), African Court on Human and Peoples' Rights (hereinafter referred to as African Court); the Inter-American Court of Human Rights and the East African Court of Justice, have appealed to national governments to protect rights of indigenous persons to own and dispose of natural resources, including ancestral lands. Few of the judicial precedents by international courts deserve special mention.

The first case is *Centre for Minority Rights Development (Kenya) and Minority Rights Group International, on behalf of Endorois Welfare Council vs. Kenya* [35] whereby the government of Kenya evicted a number of Endorois families from their ancestral land in order to create a game reserve. The purpose for eviction was promotion of tourism activities in order to increase revenue collection, but the affected victims were not in any way consulted. The applicants referred the matter to the Commission in order to protect the rights of the Endorois people. It was observed that the government had violated the peoples' right to self-determination by failure to consult with the community and inadequate involvement in the process of developing the area as tourist site.

It was further observed that subsequent restriction on access to land also violated the community right to development as prescribed under the UN Declaration on the Right to Development. Thus, the African Commission recommended that the government of Kenya promptly recognize rights of ownership by providing Endorois people with ancestral lands in restitution, and pay compensation for their losses. Further, the government was required to ensure that Endorois families benefit from royalties and employment opportunities within the game reserve.

The second case was determined by the African Court on Human and Peoples Rights in the case of *African Commission on Human and Peoples' Rights vs. Kenya* [36]. The facts of this case were such that on 14 November 2009, the Commission received a Communication from the Centre for Minority Rights Development (CEMIRIDE) joined by Minority Rights Group International (MRGI), both acting on behalf of the Ogiek Community of the Mau Forest. The case concerned the eviction notice issued by the Kenya Forestry Service in October 2009, which required the Ogiek Community and other settlers of the Mau Forest to leave the area within 30 days. Then, on November 23, 2009 the Commission issued an order for provisional measures requesting the respondent to suspend implementation of the eviction notice pending determination of the matter.

Until 12 July 2012, the government of Kenya had not made any response to the Commission and the complaints about violations of the rights were still imminent. Thus, the Commission under article 5(1)(a) of the Protocol for establishment of African Court referred the matter to the Court for deter-

¹ The government of Tanzania has formed a special committee for investigation of alleged violations and abuses in the eviction of the Maasai from Loliondo in the Ngorongoro Conservation Area.

mination. It was alleged that the Ogiek indigenous minority ethnic group in Kenya were to be evicted on the grounds that the forest constituted a reserved water catchment zone, and that it was part of government land under Section 4 of the Government Land Act. Such eviction order adversely affected the survival of the Ogieks who were not involved in the decision leading to their eviction. The notice for eviction was generally regarded as 'perpetuation of the historical injustices suffered by the Ogieks.'

The Court recognized the Ogieks as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability, and thus held that Kenya had violated the provisions of the ACHPR by removing the Ogiek peoples from their ancestral lands contrary to their right to freely dispose wealth and natural resources. The court further invoked article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) [37] to rule out that Kenya had violated its obligation by forcibly removing the Ogiek families from their lands without consultation and prior informed consent. Thus, notwithstanding justifications by Kenyan government based on conservation of environment, the Ogiek people and families were granted right to occupy their ancestral lands, as well as use and enjoy the said land and its associated resources.

The third instance on protection of indigenous peoples' rights to own and dispose of property freely is presented by the Inter-American Court on Human Rights (hereinafter referred to as Inter-American Court) in the case of *Kalina and Lokono Peoples vs. Suriname* [38]. The facts of the case are that complainants' right to ancestral land was curtailed by the state through creation of nature reserves under the 1954 Nature Protection Act (as amended in 1980 and 1992),³ whereby hunting and fishing activities were forbidden. These reserves covered approximately 59,800 hectares out of 133,945 hectares claimed by the complainants. Further, the state had granted part of the land which originally belonged to the Kalina and Lokono Peoples⁴ to the third parties, including one Tjang Sjin, who was declared a lawful owner by the Supreme Court in Suriname.

Similarly, the state granted sand mining concessions on the land on which the complainants had a logging license, and authorized construction of a casino in the community of Wan Shi Sha without consultation. Other activities that were authorized by the state include: construction of highway, logging activities, mining of gravel and kaolin, and poaching which allegedly caused the destruction of sacred trees used for religious purposes. The complainants unsuccessfully challenged

unlawful encroachment of their traditional land in the state courts. It was observed by national courts that indigenous peoples had no legal capacity to do so and that there was nothing like 'community property' for the complainants; hence this petition.

The Inter-American Court was called to address three issues. First, whether indigenous peoples had right to juridical personality in the light of the provisions of articles 21, 25, 1(1) and 2 of the American Convention on Human Rights? Secondly, whether indigenous peoples had a right to collective property and right to participate in public affairs as per articles 1(1) and 2 of the American Convention on Human Rights? Thirdly, whether indigenous peoples had a right to judicial protection as per article 1(1), 2 and 13 of the American Convention? Both the Commission and the representatives of the complainants submitted that the state had violated their right to self-determination, including refusal to recognize them as a lawful group of people capable of owning ancestral land, unlawfully restriction of their right to collective property and curtailment of their right to participate in the public affairs.

While responding to the above issues, the state acknowledged that it was aware of the indigenous peoples' rights under the Inter-American jurisprudence, but it submitted that such concept did not exist in the Surinamese laws where only individuals and corporate entities could claim ownership rights. Further, it was submitted that the state had not curtailed indigenous peoples' rights but the state was making a thorough study on how the same could be realized. The state further submitted that mining concessions and other development projects were for the 'common good of the people' and 'environmental conservation' purposes.

The Inter-American Court held, inter alia, that the complainants had special right to be involved in the decision-making process in all projects that affected them as provided under the provisions of UNDRIP and American Charter on Human and Peoples' Rights. The court further held that members of the Kalina and Lokono peoples had the right to enjoyment of their property in keeping with their community-based tradition, as guaranteed under article 21 of the American Convention, article 1(2) of both ICCPR and ICESCR and article 27 of the ICCPR.⁵ Similarly, the Court observed that the State had violated article 3 of the American Convention by failing to recognize the collective exercise of the juridical personality of the complainants. Finally, the court opined that in order to demarcate and grant title to traditional area, other factors specific to the rights of indigenous people must be taken into account, including full guarantees over

2 The Ogiek community in Kenya comprised about 20,000 members out of which 15,000 do reside in the greater Mau Forest Complex, a land mass of about 400,000 hectares along seven administrative districts in Kenya.

3 The reserves include: WiaWia nature Reserve created in 1966, the Galibi Nature Reserve in 1969 and the Wane Kreek Nature Reserve in 1986.

4 The Kalina and Lokono people consisted of 8 villages that are parties to this case, with a total population of around 2,026 persons in 2005. Their main subsistence activities included: agriculture, fishing, hunting and gathering non-timber forest products such as fruits.

5 This Court had made similar findings in the cases against Paraguay of the *YakyeAxa, Sawhoyamaya and XákmokKásek* communities, where it was established that: (a) the traditional possession by the indigenous peoples of their lands had equivalent effects to the full title granted by the State; (b) the members of the indigenous peoples who, for reasons beyond their control, had left or lost possession of their traditional lands retained the right to property over them, even in the absence of legal title, unless the lands had been lawfully transferred to third parties in good faith, and (c) the members of the indigenous peoples who had involuntarily lost the possession of their lands to innocent third parties, had the right to recover them or to obtain other lands of the same size and quality.

their ancestral lands.

The fourth incidence involving indigenous communities was determined by the Inter-American Court is evidenced in the case of *Sawhoyamaxa Indigenous Community vs. Paraguay* [39] whereby the Court found out that Paraguay had violated the provisions of the American Charter on Human Rights by displacing people from their traditional territory and denying them right to freely own and dispose their ancestral lands. The facts of this case are such that the petitioners were displaced from their traditional communities towards the end of the 19th Century when the British businessmen acquired land through the London Stock Exchange as a consequence of the debt owed by Paraguay after the so-called War of the Triple Alliance. The South American Society settled the cattle estate in the Chaco area since 1901 and started evangelization and pacification of the indigenous communities, and finally employed them in the cattle estates.

Further, non-indigenous occupation of the Northern Chaco which had started by the end of the 19th Century was extended after the Chaco War between Bolivia and Paraguay (1933-1936). Thus, both Indians and traditional community members became employees and farmhands of the new owners. This increased the restrictions for the indigenous population to access their traditional lands and depended on their salaries for the living. By 1991, the Sawhoyamaxa Indigenous Community⁶ started claiming back their ancestral land, and the Paraguay government did not reject such claims. However, the holders of titles were not willing to leave the claimed land, despite interventions by state departments including members of the Congress.

As a result, members of Sawhoyamaxa indigenous community were forced to live in compacted places of 'Santa Elisa' and 'KM 16', whereby the living conditions were so bad. There was no drinking water, no food, poor health services, no indigenous school, and flooding of the area, leading to death of 35(thirty-five) members. Early 1999 the President of Paraguay declared to the community an emergence state owing to lack of lands. Prior this declaration, there was struggle for sovereign rights of indigenous peoples until July 21, 1998 when the President of Paraguay issued Executive Order No. 22008, whereby the Sawhoyamaxa Indigenous Community was recognized as a legal entity.

Despite official recognition of the community, no effective measures were taken by the government to ensure that indigenous people had access to ancestral lands; hence the matter was reported to the Inter-American Commission and finally brought before the Inter-American Court by both the Commission and Representatives of the Sawhoyamaxa indigenous community. The Court held, *inter alia*, that Paraguay had violated the provisions of articles 2, 1(1), 8 and 21 of the American Convention on Human Rights in relation to judicial protection and right to fair trial since its legislation failed to provide for an effective judicial remedy aimed at

protecting legitimate land claims laid by indigenous communities in Paraguay.

Further, it was held that Paraguay had failed to take legislative and administrative steps to secure the Sawhoyamaxa Community members' ownership rights over their ancestral lands, including right to access and control the natural resources, which when deprived of entitles the claimants the right to the restitution of traditional lands. Likewise, such decision was maintained by the Inter-American Court in the case of *Mayagna (Sumo) Community of Awas Tigni vs. Nicaragua* [40] whereby the Court held that the community's right to own its ancestral lands demanded that the government's decision to exploit the community's natural resources be subject to full participation of the community taking into account the customs of that particular community [41].

Apart from the Inter-American Court, the American Commission of Human Rights had the opportunity to determine matters of indigenous peoples' right to ancestral lands in the case of *Maya Indigenous Communities vs. Belize* [42]. It was claimed by the complainants that the State had violated the Rights of the Toledo Maya indigenous communities in relation to their lands and natural resources. This was occasioned by granting numerous concessions for logging and oil development to developers on a total of over half a million acres of land that were traditionally used and occupied by the Maya communities in the Toledo District. It was further alleged that such concessions which were granted without consent of the peoples were causing environmental harm to the Maya communities, particularly damaging essential water supplies, threatening access to and use of Maya sacred sites, and straining plant and wildlife population.

Prior submission of the complaint to the Inter-American Commission, the petitioners had unsuccessfully sought for remedies in the local courts since December 2, 1996 and no administrative steps had been taken to remedy the situation. The Commission observed that consultation and consent were required in order to protect indigenous peoples' right to property, as a way of the state to guarantee equality of all people before the law. Failure to do so amounted to violation of the indigenous peoples' right to freely dispose of natural resources.

The last but not least is the case of *Ololosokwani Village Council & 3 Others vs. Attorney General of Tanzania* [43] whereby the appellants were forcefully evicted from their ancestral land within the Serengeti National Park, allegedly to have unlawfully resided in the reserved area. The dispute arose in the period between 2012 and 2013 and the government called for a peaceful determination of the border conflict between the Maasai community who claimed to have a valid title over piece of land for pastoral activities. However, it was not until the year 2017 when they were evicted from the land. Alleged by the eviction, filed Reference No. 10 of 2017 in the first Division of this Court under article 6(c), (d) and article 7(2) of the EAC Treaty read together with article 15(1) of the Protocol for Establishment of the East African Common

⁶According to the census conducted in 2006, the Sawhoyamaxa Community had 407 members, grouped in approximately eighty-three dwelling places.

Market.

During hearing of the reference, appellants argued that the land in dispute was their legitimate community land in which they resided for a long period of time. They sought for necessary orders, including: a declaration that the respondent had violated the provisions of the Treaty and its Protocol; an order to stop the respondent from conducting said evictions, arresting and detaining of some community members; an order for restitution and reinstatement of the appellants, members and residents for their damaged properties, and an order as to payment of compensation and damages. It was submitted by the respondent that the reference was prematurely made for failure to exhaust local remedies, that it was bad in law for contravening the policy objectives underlined in the National Land Policy and the Constitution of the United Republic of Tanzania and that the said evictions were lawfully carried out without infringement of human rights including right to dignity and right to property.

The trial court held that it had jurisdiction to hear and determine the matter as provided by the constitutive documents of the EAC, including article 27 of the EAC Treaty [44]. On the requirement to exhaust local courts responsible for land disputes, the trial court held that exhaustion of local remedies was not a requirement for filing a reference before the East African Court of Justice [45]; hence the reference did not offend the principles of the National Land Policy. On whether or not evictions were lawful, the trial court held that since the appellants did not provide evidence with regard to ownership of the area in dispute, and basing on proclamation order made by the President, GN No. 235 of 21st June 1968 [46], the boundaries remained as set in the government order. Nevertheless, the court disregarded expert evidence for lack of specificity on the location of beacons marking the boundary of the Serengeti National Park. The trial court dismissed the reference for lack of merit.

Aggrieved by this order, the appellants filed an appeal to the appellate Division of the East African Court of Justice. Among its grounds of appeal was that the trial court erred in law by disregarding expert evidence tendered by a Kenyan national⁷ and the evidence provided in the affidavits of nine (9) respondent witnesses which were not contested by the respondent during cross examination. The Appellate Court held that since the trial court had power to summon any person before it to produce any document for ends of justice, and based on jurisprudence by international courts with regard to discretionary powers of the court, it was not proper for the trial court to disregard evidence by the said expert without requiring production of the same.

Further, the appellate court observed that the trial court did not properly apply the standard of proof, namely proof on balance of probability as supposedly required. Specifically,

the court stated the following:

“We are satisfied that granted the manner in which the Trial court handled these issues, the Appellants were justified in contending that the Court had used as far much higher standard of proof against them. The Appellants had produced a report showing the villages were outside the National Park, whilst the Respondent contended that the Villages were within the Serengeti National Park...the Trial court was expected to determine the matter on a preponderance of evidence, not on the basis of absolute certainty.” (emphasis mine).

The court observed that judges are required to take into account that the promotion of access to justice, equity and social justice prevails at all times. Thus, the appeal was allowed and the trial court judgment set aside. Finally, the court remitted the case to the trial court to resolve the three contesting issues on the balance of probability, namely: (i) whether or not the applicants were evicted from the Serengeti National Park or from respective villages; (ii) whether the acts, omissions and conducts of the respondent violated articles 6(d) and 7(2) of the Treaty and article 15(1) of the Protocol on the Establishment of the East African Common Market Protocol? ; and (iii) what remedies are parties entitled to? Since this case is still pending in the court, it is not prudent to make any comment on whether or not the rights of Maasai community were violated by the government. However, this paper commends the interpretation approach of the Appellate Division of the East African Court of Justice which safeguards civil justice of the appellants.

5. Complementarity of National and International Court Redress Mechanism for Effective Protection of Indigenous Peoples' Right to Ancestral Lands

The discussion in the previous sections of this paper shows varying degrees in terms of roles by national and international courts in protection of indigenous people's right to manage, exploit and dispose of property. Basically, seven (7) critical points have been substantiated. First, that national courts in various parts of the world are reluctant to recognize and enforce international legal instruments protecting indigenous people's right to ancestral lands. Secondly, that national governments mostly violate rights of indigenous people on the reasons related to environmental conservation or development purposes, including foreign investments; hence a need for domestic court intervention. Thirdly, that the mechanisms available for protection of indigenous peoples' rights to ancestral lands by courts is through provisions on free, prior and informed consent and provisions on prompt, fair and adequate compensation for loss of ancestral lands, which if violated by national governments constitute grounds for pursuing legal

⁷ It was contended that the survey report tabled by a non-national had defects for lack of description as to research and residence permits (evidence that the said expert had visited Tanzania and complied with national laws) These issues were raised during cross examination whereby the said expert observed that he had the said permits which could be produced on demand.

recourse.

Fourth, that national courts have mostly applied laws in favour of national governments, a phenomenon that has adversely affected interests of indigenous peoples and necessitated international court redress mechanisms. This calls upon the complementarity of national and international judicial mechanisms in protection of indigenous communities. Thus, both national and international courts need to interpret legal instruments in favour of the indigenous peoples, who belong to the most vulnerable groups in the modern society. Fifth, national and international courts should not apply technical rules of evidence to the disadvantage of indigenous persons. This demands both courts to apply a human rights approach in interpretation of legal instruments, which is nothing but judicial activism. Basically, courts in the modern times must always demand governments to take appropriate legislative and administrative measures to protect the interests of the affected victims, indigenous peoples. The minimum standards to be observed by courts should include: 'adhere to the meeting culture of the communities; giving people the opportunity to be represented by persons or organizations of their own choice and informing them in advance on the respective topic in an understandable language.

Sixth, is that protection of indigenous community's rights is the collective responsibility of both state and non-state actors such as Non-Governmental Organizations (NGOs), professional bodies and International Government Organizations (IGOs). There is need for active participation of various stakeholders in safeguarding rights of indigenous peoples through advocating for policy changes, domestication of international treaties, institution of petitions in courts and financing of the same before national and international courts.

The last but not least, national laws should provide access to judicial remedies to all citizens from various states, subject to minimum procedural rules. This requires national governments to adopt necessary arrangements to allow citizens to access international courts when their rights are violated by national governments by ratifying relevant instruments providing for competence of the court to hear and determine complaints filed by individuals and civil society groups. Eventually, international courts would provide system of checks and balance for national courts from various parts of the world; hence achieving civil justice for the indigenous peoples.

6. Conclusion and Recommendation

Protection of indigenous peoples' right to ancestral lands in the modern times remains a critical issue. As a global community, we share common but differentiated responsibility towards realization of civil justice for the vulnerable indigenous communities. While national governments are vested with policy and administrative functions over land use and planning, there is an overriding obligation to safeguard indigenous peoples 'rights to ancestral land by national courts.

Where justice to victims is not guaranteed by state courts, then victims must be allowed to access international courts. Hence, complementarity of judicial redress mechanisms is essential for effective protection of indigenous peoples' right to ancestral lands. This would either require provisions in the state laws which expressly permit citizens to access international court redress mechanisms or state authorities should ratify international instruments which vests competence to international bodies to determine human rights violations, subject to ordinary principle on exhaustion of local remedies.

Furthermore, since indigenous peoples' rights are mostly violated by executive machineries during evictions from community lands, then national and international courts must apply human rights approach in interpretation of national and international laws. This calls for revival of judicial activism by national and international courts and application of procedural and technical rules in favour of the indigenous communities. By so doing, both national and international courts will directly protect indigenous peoples' rights when violated by national governments on reasons related to public policy, public interest or national development. Finally, state courts should provide for mechanisms or rules to enforce decisions of international courts and tribunals for effective redress of harm to victims, which currently appear to be non-existent in most African countries. The indigenous communities must be protected at any cost for sustainable cultural and world heritage.

Abbreviations

AG	Attorney General
ACHPR	African Charter on Human and Peoples Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNGA	United Nations General Assembly
NGOs	Non-governmental Organizations
IGOs	Inter-governmental Organizations
EACJ	East African Court of Justice
EAC	East African Community
Inter-Am. C. H. R	Inter American Court of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
UNSR	United Nations Special Rapporteur on the Rights of Indigenous Peoples
UN	United Nations

Author Contributions

Rwebangira, Gaspardus is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflicts of interest.

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