SECURING THE INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES THROUGH HUMAN RIGHTS GUARANTEES: PROSPECTS AND CHALLENGES*

Abstract

The paper critically considers the challenges and prospects of securing the Intellectual Property Rights (IPRs) of indigenous people through human rights guarantees. The objective of the study is to assess and ascertain how human rights instruments can be used as a tool for the securing, protection and implementation of the IPRs of the indigenous peoples or communities. It argues that while Intellectual Property (IP) and human rights are distinct, they to a large extent have so many things in common historically. It thus posits that rather than relying on the global IP regimes for the securing of the IPRs of indigenous peoples, human rights guarantee can be used as a veritable tool to achieve same purpose. It takes a look the global attitude and national responses to securing indigenous peoples' IPRs, using the Indian experience as an example. The paper involves the use of doctrinal legal research methodology. It concludes with some recommendation that there should be a global human rights treaty on IP which adequately secures the IPRs of the indigenous peoples, which would lead to the successful actualization of the protection of the Traditional Knowledge (TK) and other traditional properties of indigenous peoples.

Keywords: Intellectual Property, Intellectual Property Rights, International Human Rights Law, Indigenous Peoples, Traditional Knowledge**,** Traditional Cultural Expressions.

1. Introduction

Indigenous peoples across the world continue to strive and struggle for the recognition, respect and protection of their human rights. Though their rights have received some very commendable global responses, their access to the total package of rights for all human beings remain an ongoing challenge globally.[1] One of the recent areas where indigenous people are facing serious and stiff opposition is in relation to the recognition of their intellectual property rights (IPRs) under intellectual property (IP) law. These rights include Traditional Knowledge, Traditional Cultural Expression (TCE), Genetic Resources (GRs) among others. Many postulations have been made on how best to secure the intellectual property rights of indigenous peoples but the angle this article intends to explore is through the human rights-based approaches. Its primary aim is to bring to fore some other dimensions to the debate which other authors might not have sufficiently dealt with. More importantly, it proposes a bottom-

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[1]See generally, S. Dersso, (ed) *Perspective on the rights of minorities and indigenous peoples in Africa* (PULP, 2010); C. Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime' (2004) 30 *Queen's Law Journal* 348-399, Available at <https://ssrn.com/abstract=2302426> accessed 12 April 2021.

top approach in establishing inextricable connection between human rights and intellectual property, through which IPRs of indigenous people can be adequately secured.

The article is therefore furcated into five main sections. Section I deals principally with the introduction. It sets the general tone for the whole paper. Section II critically takes a look at the intersection between international human rights (IHR) law and IP law. It considers this connection from both historical frame of reference and the emerging jurisprudence and developments on the nexus between these two branches of law. The right of indigenous peoples in international human rights law is the fulcrum of section IIII of this paper. The global intervention as well the interventions of the African Human Rights system in relation to the rights of indigenous peoples is equally considered in the section. Section IV considers how best to circumvent the wholesale violation of IPRs of indigenous peoples. It reflects on the global responses to the issue, if there exist any. The Indian robust intervention in this regard is considered, while the Nigerian IP law as it relates to the protection of traditional knowledge is also investigated in this section. Some recommendations and concluding remarks form the basis of section V of this paper.

2.0 **IPRs and International human rights law**

Can human rights law and IP law conveniently mix without any hassle? Or they are two branches of law which have unique and distinct history? This is most potent point to start any discussion or argument that calls for the securing of IP related rights through the human rights regime. This becomes more important if the group in question, in this case the indigenous peoples is a phenomenon that enjoys currency in the human rights fora. Various scholars have continued to hammer on the fact that both IHR and IP laws are though distinct but connected in some if not many ways and that there is no need to continue to treat them as oil and water which are incapable of been mixed.[2] That is both, branches are not totally two parallel lines that are incapable of meeting each other. This implies that either of the two branches are mutually reinforcing in deserving circumstances.[3]

2.1 **Historical connectivity between IP and IHR law**

Historically, intellectual property rights (IPRs) have always enjoyed some level of mention or protection in major human rights pieces of documents. For example, what can be considered as the "Bible" of human rights law which is the Universal Declaration of Human Rights (UDHR) conspicuously provide for some sorts of IPRs.[4] The International Covenant on

[2]P. K. Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *U.C. Davis Law Review*,(2007) Vol. 40, pp. 1039-1149, Michigan State University Legal Studies Research Paper No. 04-01 Available at <https://ssrn.com/abstract=927335> accessed 25 March 2021, 1042.

[3]L. R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' *Minnesota Journal of Law, Science & Technology* (2003) Vol. 5, p. 47, Loyola-LA Legal Studies Paper No. 2003-27, Princeton Law and Public Affairs Working Paper No. 04-003, Available at <https://ssrn.com/abstract=459120 or http://dx.doi.org/10.2139/ssrn.459120> accessed 12 March 2021.

[4]See articles 17of UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Availablehttps://www.refworld.org/docid/3ae6b3712c.html accessed 19 March 2021; B. Tiwari, 'Protection of Traditional Knowledge Under International Human *Rights' Indian Streams Research Journal* (Sept. 2014) Vol 4, Issue 8, Available at <https://ssrn.com/abstract=2496312> accessed 12 April 2021, 2.

Economic, Social and Cultural Rights (ICESCR) also contains extensive provisions on related IPRs.[5] Various regional human rights bodies have equally provided for IPRs related in their human rights instruments.[6] It suffices to say that the situation of IPRs in principally the UDHR, ICESCR and other regional human rights instruments reinforces the fact that some segments of IP law have always been part of human rights historically. Rajvanshi and Gupta have argued that there has been an acknowledgement of the inextricable links between human rights and IP law for several decades.[7] It can therefore be submitted that human rights and IP laws have come a long way in their interrelationship.

The above assertions do not in any way suggest that the two branches of law are one and the same but that there exists inherent interconnectedness between the two.[8] The main reason for the historical interplay between the two bodies is the fact that the rights of humans remain their central themes. The foreground agenda of human rights is to securing, respecting, protecting as well as the enforcement of all rights that accrue to all humans, and these rights include their intellectual property rights. However, the two bodies of law have developed independently despite their historical interconnectivity. [9] The independent evolution of these two bodies of law is the cause of the continuous strict bifurcation between the two notwithstanding their historical nexus. For instance, major international instruments of IP are seldom couched in the language of human rights neither do they make reference to human rights.[10]

However, the formal demarcation of various branches of law should never be seen as a bar to the interlinking of two or three branches for the practical purposes as would be demonstrated in this paper.

2.1. 2. Emerging global trends on the nexus between IPRs and IHR law

As the two bodies of laws continue to evolve independently, recent happenings have shown that the supposed formal gaps that exist between them are beginning to shrink. Unlike previously where issues around IP law are subjects for other legislations, IP issues are not only emerging as human rights but constitutional issues.[11] It has moved away from the private law to public law sphere.[12]10 out of 15 constitutions enacted in the last decade, including that of

[5] Article 15 (c) of the ICESCR.

[6] ……

[7]G. Rajvanshi and R. Gupta, 'Intellectual Property Rights vs. Human Rights: A Need to Re-Examine the Relationship between the Two to Enhance Social Being' (July, 16 2011), Available at <https://ssrn.com/abstract=1887024 or http://dx.doi.org/10.2139/ssrn.1887024> accessed 13 April 2021.

[8]L. R.Helfer, 'Toward a Human Rights Framework for Intellectual Property'(2007) *U.C. Davis Law Review* Vol. 40, p. 971, Vanderbilt Public Law Research Paper No. 06-03, Available at<https://ssrn.com/abstract=891303> accessed 15 April 2021.

[9]ibid.

[10]Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (n 4 above) 50.

[11]R. J. May and S. Cooper, 'The Logic of International Intellectual Property Protection' (January 13, 2016) Available at<https://ssrn.com/abstract=2736659 or http://dx.doi.org/10.2139/ssrn.2736659> accessed 25 March 2021, 2.

[12]R. J. May and S. Cooper, 'Literary Property: Copyright's Constitutional History and Its Meaning for Today' (July 1, 2013), *Perspectives from FSF Scholars*, (July 2013) Vol. 8, No. 19, Available at<https://ssrn.com/abstract=2314048> accessed 20 March 2021, 2; C. J. Buccafusco, and J.S. Masur, 'Intellectual Property Law and the Promotion of Welfare (January 25, 2017). Forthcoming in Research Handbook on the

North Korea gives constitutional status to intellectual property, which reinforces the fact that intellectual property has gained tremendous constitutional status globally.[13] Therefore, the constitutionalisation of IPRs has not only made the interconnection between IP and human rights more visible but easy to interrogate. This of course would want to make constitutional and human rights scholars who have hitherto seen IP law as a no-go area to begin to have a rethink on it.[14]

The constitutional revolution of IPRs is bringing a profound global change to IPRs regimes. This has led to the IP laws of many developing countries being strengthened.[15] The two bodies of law which over the years have been viewed by many as strange bedfellows are beginning to synthesis with each other across the globe.[16] Series of events in recent times have catapulted IPRs into the global human rights norm-creating bodies.[17]Human rights scholars in recent times are aggressively probing into the unexplored nexus between these two bodies of law. Those who are already well catered for in the current IP regime may not seek the need for the intersection between IP and human rights law but only those which the current IP regimes are skewed against, such as the indigenous people.[18] Some scholars have argued that the current IP regimes are not only tailored to suit the developed countries but are greatly insensitive to the plights of traditional societies in securing their IPRs, which include traditional knowledge (TK).[19]

Human rights bodies both at the global and regional spheres in recent times have continued to affirm the interconnectedness of human rights and IP law. For instance, EU Charter of Fundamental Rights (EU Rights Charter) is said to explicitly secure the protection IP related

Economics of Intellectual Property Law (Vol. I -- Theory) B. Depoorter& P. Menell, eds. (Edward Elgar Publishing), University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 790, U of Chicago, Public Law Working Paper No. 607, Available at<https://ssrn.com/abstract=2905936> accessed 20 March 2021, 2

[13]R. Kennedy, 'Was it Author's Rights All the Time? Copyright as a Constitutional Right in Ireland' (September 23, 2011), Dublin University Law Journal (2011) 33, 253–284, Available at <https://ssrn.com/abstract=2314861> accessed 25 March 2021, 10.

[14]R. J. May, and S. Cooper, 'Intellectual Property Rights Under the Constitution's Rule of Law' (September 1, 2014). Perspectives from FSF Scholars, Vol. 9, No. 31, Available at <https://ssrn.com/abstract=2509516> accessed 15 April 2021.

[15]K. E. Maskus, 'Intellectual Property Rights and Foreign Direct Investment' (May 2000). Centre for International Economic Studies Working Paper No. 22, Available at <https://ssrn.com/abstract=231122 or http://dx.doi.org/10.2139/ssrn.231122> accessed 20 March 2021, 1.

[16] P. K. Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *U.C. Davis Law Review* (2007) Vol. 40,pp. 1039-1149, Michigan State University Legal Studies Research Paper No. 04-01, Available at<https://ssrn.com/abstract=927335> accessed 20 March 2021.

[17]L. R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' *U.C. Davis Law Review* (2007) Vol. 40, p. 971, Vanderbilt Public Law Research Paper No. 06-03, Available at <https://ssrn.com/abstract=891303> accessed 15 April 2021.

[18]H. Travis, 'The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq' *Texas Weleyan Law Review*(2009) Vol. 15, 603, Available at <https://ssrn.com/abstract=1549804 or http://dx.doi.org/10.2139/ssrn.1549804> accessed 12 March 2021; where he argued rightly that IP policy ought to be focused on those who are threatened.

[19]R. Larson, 'Water, Worship, and Wisdom: Indigenous Traditional Ecological Knowledge and the Human Right to Water' *ILSA Journal of International & Comparative Law* (2012) Vol. 19, 10 Available at <https://ssrn.com/abstract=2045053> accessed 20 March 2021.

human rights. The European Court on Human Rights (ECHR) has recently handed down three decisions that deal pointedly with IPRs under the EU Rights Charter.[20] Though some authors have consistently maintained that the recognition of IPRs as part of human rights do per se make them fundamental human rights[21] while others have argued that the adoption of the UDHR has given the status of fundamental human rights of IPRs to everyone.[22] All categories of property whether intangible or tangible should be given equal status, therefore, where tangible property is given the status of fundamental human rights, it is logical to confirm same on intangible property as well. After all, there is really no sound basis for the discrimination which IP forms of property has continued in terms of their human rights categorization.[23]

Though the TRIPs agreements have set some minimum standards for the global protection for IPRs[24], some scholars have maintained that the current regimes of TRIPs do not adequately capture the IPRs of indigenous peoples.[25] Thus, there is a call to either adopt new human rights regimes on IP law that will extensively tackle the various challenges befalling world's minorities which are mainly indigenous peoples or people from traditional communities globally or review the current IP institutions.[26]The commencement of the framing of a human rights instrument on IPRs which though is still at the formative stage is one of the major trends on the intersection between human rights law and IP law.[27] The eventual adoption of a human rights treaty on IP would reinforce the view that human rights obligations are veritable vehicles for the protection and implementation of IPRs.[28] It is the hope of this writer that the said

[20]Kennedy (n 15 above) 16, the author further asserts that the recognition of copyrights as a fundamental right has enjoyed relatively high acceptance that they were in the 1930s.

[21]Rajvanshi and Gupta, (n 8 above) 4

[22]T. Ahmad, S. Adhikary, and I. Das, 'Protection of Bio-Cultural Property in the Cradle of Traditional Knowledge' (April 14, 2010) 4, Available at <https://ssrn.com/abstract=1589687 or http://dx.doi.org/10.2139/ssrn.1589687> accessed 7 April 2021.

[23]May, and Cooper, 'Intellectual Property Rights Under the Constitution's Rule of Law' (n 16 above) 3; M. Bois, 'Justificatory Theories for Intellectual Property Viewed Through the Constitutional Prism' *Potchefstroom Electronic Law Journal* (2018) Vol. 21, 2 Available at SSRN: <https://ssrn.com/abstract=3151320> accessed 20 March 2021.

[24]P. K. Yu, 'The Objectives and Principles of the TRIPs Agreement' *Houston Law Review* (2009) Vol. 46, pp. 797-1046, 980, Available at <https://ssrn.com/abstract=1398746> accessed 15 March 2021;Nirankar and S. Srivastav and A. J. Rickey, 'Globalization, Intellectual Properties Rights and North-Eastern Region of India: Some Issues (October 28, 2010) 8, Available at<https://ssrn.com/abstract=1825087 or http://dx.doi.org/10.2139/ssrn.1825087> accessed 7 April 2021; L. R. Helfer, 'Regime Shifting: The Trips Agreement and New Dynamics of International Intellectual Property Lawmaking' *Yale Journal of International Law* (2004) Vol. 29, p. 1, Loyola-LA Legal Studies Paper No. 2003-28, Princeton Law and Public Affairs Working Paper No. 04-004, Available at <https://ssrn.com/abstract=459740 or http://dx.doi.org/10.2139/ssrn.459740> accessed 7 April 2021; O. Arewa, 'Trips and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (Trips Symposium) (March 1, 2006),*Marquette Intellectual Property Law Review* (2006) Vol. 10, p. 156, Case Legal Studies Research Paper No. 06-05, Available at <https://ssrn.com/abstract=889384 or http://dx.doi.org/10.2139/ssrn.889384> accessed 20 March 2021.

[25] A. Bala, 'Traditional Knowledge and Intellectual Property Rights: An Indian Perspective' (November 1, 2011) 17, Available at <https://ssrn.com/abstract=1954924 or http://dx.doi.org/10.2139/ssrn.1954924> accessed 7 April 2021.

[26]P. K.Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' *U.C. Davis Law Review* (2007) Vol. 40, pp. 1039-1149, 1149, Michigan State University Legal Studies Research Paper No. 04-01, Available at <https://ssrn.com/abstract=927335> accessed 12 March 2021.

[27]Rajvanshi and Gupta, (n 8 above) 20.

[28]H. Brennan, R. Distler, M. Hinman, and A. Rogers, 'A Human Rights Approach to Intellectual Property and Access to Medicines' Yale Law School and Yale School of Public Health Global Health Justice Partnership Policy

instrument upon adoption would indeed remedy the grave injustice that has befallen peoples of indigenous communities as it pertains to their fundamental human rights to their intellectual properties.

3.0 **The Right of Indigenous Peoples under human rights law**

In order to be able to make a case for the securing and adequate protection of the intellectual property rights of indigenous peoples, it is imperative to first and foremost ascertain whether or not their human rights enjoy peculiar or general recognition and protection. From the outset, it must be submitted that indigenous peoples' human rights are protected from two angles, one is the specific human rights instruments that deal with them and the second is the general human rights frameworks. Viljoen has rightly opined that since most human rights pieces of document use words like 'everyone' or 'everybody' it is highly inconceivable to think that the indigenous peoples are not captured using such words in human rights treaties.[29]

3.1 **Global Recognition of the Rights of Indigenous Peoples**

The agitation for the concretization of the indigenous peoples' human rights at the global plane was first yielded to by the International Labour Organization (ILO) when it adopted ILO Convention 107 of 1957, which entered into force on 2 June 1959 wherein it refers to indigenous peoples as 'Indigenous and other Tribal and Semi-Tribal Population' but further ratification for it was achieved when the ILO Convention 169 became operational in 19991[30] However, one of the drawbacks of first ILO Convention 107 is that it painted indigenous peoples as being not advanced and proposed a process of assimilation for them.[31]

The adoption of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 has been touted as the first human rights document that extensively deals with the human rights of indigenous peoples in international law.[32]The issues surrounding the indigenous peoples or the indigenous question are as old as colonialism, therefore not relatively new in the human rights corpus.[33] UNDRIP is not just another human rights instrument but one that is very serious and strict on many issues that it touches on.[34]

The UNDRIP in its entire forty-six article did not define the term indigenous peoples. The framers must have thought it wise to leave it like that due to that the fact that it is not only a controversial term but highly contested among scholars. For the purpose of this paper,

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Paper No. 1 (August 2013) 7, Available at <https://ssrn.com/abstract=2323144 or http://dx.doi.org/10.2139/ssrn.2323144> accessed 20 March 2021.

[29]F. Viljoen, 'Reflections on the legal protection of indigenous people' rights in Africa' in *Perspectives on the rights of minorities and indigenous peoples in Africa* Solomon Dersso (ed) (PULP, 2010) 82.

[30]ibid 79.

[31]ibid 79.

[32]C. Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime' *Queen's Law Journal* (2004) 30, 348-399, 362 Available at <https://ssrn.com/abstract=2302426> accessed 7 April 2021.

[33]ibid 396.

[34]W. V. Genugten, A. Meijknecht, and S. Rombouts, 'Stateless Indigenous People(s): The Right to a Nationality, Including Their Own' *Tilburg Law Review* (2014) 19, 98-107, 98 Available at <https://ssrn.com/abstract=2501295> accessed 7 April 2021.

indigenous peoples can be defined as peoples occupying a particular geographical location which were initially not occupied before they came. Thus, for the purpose of convenience, indigenous peoples can be regarded as first timers or first settlers in a community not previously inhabited by others. A learned scholar has posited that 'the international (and dominant) understanding of the term 'indigenous' is closely linked to significant population movements spear-headed by colonial conquest, mass murder, dispossession and displacement, particularly in the Americas and Australasia'.[35]

Various rights contained in the UNDRIP are human rights that speak to the general or peculiar human rights challenges of indigenous peoples. The instrument started off by declaring that indigenous peoples are entitled to the full enjoyment of all human rights guaranteed to human beings collectively or/and individually.[36] This provision is very germane because it serves as a clear indicator that the indigenous peoples are entitled to rights contained in other human rights instruments. It equally tackles one of the major challenges facing minority groups all over the world the issue of equality[37] and freedom from discrimination.[38] It provides for their right to political participation,[39] education,[40] to practice their culture, their right to participate in matters affecting them directly or through their chosen representatives and their rights to traditional medicine among others.[41] The article that is most relevant to this paper is article 17(1) which states that 'Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law'. This article implies that all IPRs as recognized must or should be extended to peoples of indigenous communities without any form of discrimination. Their rights in their intellectual property, such Traditional Knowledge and Traditional Cultural Expression (TCE) must be secured and adequately implemented under the relevant international labour law.

3.1. 2 The African human rights system and the rights of indigenous peoples

African Charter on Human and Peoples' Rights (African Charter) does not leave anyone in doubt about its mission of protecting the rights of the collectives, communities or better put as peoples' rights. The addition of the phrase 'peoples' rights' makes it distinctive among other human instruments that came into operation before. Articles 19 to 27 of the African Charter can be regarded as the peoples' rights provisions because they all explicitly declare what the people in its coinage really mean.[42]Some of these peoples' rights in the African Charter include human rights to equality,[43] right to existence,[44] right to freely dispose their wealth and natural

[35]Viljoen (n 31 above) 75.
[36] Article 1 of the UNDRIP.
[37]Article 2 of the UNDRIP.
[38] F. Mackay, Indigenous Peoples' Rights and the UN Committee on the Elimination of Racial Discrimination' in Perspective on the rights of minorities and indigenous peoples in Africa Solomon Dersso (ed) (PULP, 2010) 155.
[39]Article 18 of the UNDRIP.
[40]Article 14 of the UNDRIP
[41]Article 24 of the UNDRIP.
[42]See the African Charter on Human Peoples' Rights, also known as the Banjul Charter.
[43]Article 19 of the African Charter.
[44]Article 20 of the African Charter.

resources,[45] right to economic and socio-cultural development,[46] right to peace,[47] and the right to satisfactory environment.[48]

From the elaborate peoples' rights in the African Charter distilled above, there are two major articles that are largely connected to the securing of the IPRs of indigenous peoples. The first is the right to freely dispose their wealth and natural resources which is contained in article 21. Wealth and natural resources cannot be said to exclude intangible wealth and resources which Traditional Knowledge (TK) or other forms of intangible intellectual property of indigenous peoples. The article declares that '[t]his right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it'.[49]The acknowledge of the drafters of the African Charter of the possibility of depriving peoples of their wealth and natural resources drives home the point for the need to adequately safeguard them. Thus, the commercial use of TK of indigenous peoples without prior permission or without any benefit accruing to indigenous peoples would violate this provision.

Another article that can be used to justify the protection of indigenous peoples' intellectual property protection under the African Charter is article 22 which bothers on economic, social and cultural development of indigenous peoples.[50] The development of the Traditional Cultural Expression (TCE) and the Traditional Knowledge (TK) of indigenous peoples would not blossom and flourish if they become object of theft or misappropriation. Thus, any attempt to steal indigenous TK or/and their TCE without proper acknowledgement would be a clear violation of this article. Peoples' culture would only develop only when it is given its full expression or allowed to be shared or showcased to the world. There can certainly not be any meaningful development for indigenous peoples whose TK are used by others without any benefits coming to their communities.

The African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights (African Courts) have had the opportunity to expound on the contents and contours of these rights which are provided for in the African Charter in some of the cases brought before them. One of such cases that would be considered for the purpose of this paper is the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (Endorois case)* decided by the African Commission,[51] The facts of the Endorois are that the complainants allege that the government of Kenya in violation of the African Charter, the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around lake Bogoria area of the Baringo and Koibatek Administrative Districts as well as in the Nakuru and Laikipa Administrative District within the Rift Valley Province in Kenya, without proper

[45]Article 21 of the African Charter.
[46]Article 22 of the African Charter.
[47]Article 23 of the African Charter.
[48]Article 24 of the African Charter.
[49]Article 21(1) of the African Charter.
[50]Article 22 (1) of the African Charter.
[51](2009) AHRLR 75 (ACHPR 2009) (Endorois Case)

prior consultations, adequate and effective compensation.[52]The complainants state that the Endorois are a community of approximately 60, 000 people, who for centuries, have lived in the lake Bogoria area…The complainants claimed that since 1978 the Endorois have been denied access to their land.[53]

It was the decision of the African Commission in the above case that government of Kenya violated several human rights of the Endorois as guaranteed under the African Charter. Some of their rights that were found to have been violated include the rights to their wealth and natural resources[54] their right to development among other rights.[55] Interestingly, one of the recommendations of the African Commission in the case is for the government of Kenya to pay the Endorois 'from existing economic activities and ensure that they benefit from employment possibilities within the reserve'.[56] Thus, the African Commission would be prepared to find a violation of the IPRs of indigenous peoples if they can show that their rights have been violated. Where economic gains have accrued to the person or corporate body that violate the rights, adequate compensation would most likely be awarded by the African Commission as it has done in the Endorois case.

4.0 Circumventing the continuous violation of the IPRs of the Indigenous peoples

Intellectual property rights of indigenous peoples are constantly under threat, due to inadequacy of the various regimes of IP law[57] as various yardsticks which have been put in place by the existing IP regimes do not take into cognizance the peculiarity of traditional intellectual property, and to deny indigenous peoples the protection of their TK is to deny them one of the most prized possession of human kind since the industrial revolution.[58] Despite the fact that the value of TK is often overlooked by so many people, it has been rightly submitted that 'knowledge that is no longer part of the so-called developed societies but retained by traditional societies, has, of late, gained attention because of its value, materially and otherwise'.[59] The appropriation of the intangible property of the indigenous peoples remain one of their major challenges in contemporary time.[60]

4.1 Global Protection of Traditional Knowledge system

Without the securing of the IPRs of the indigenous peoples at the global level, the wholesale violations of their human rights would not abate and most countries would not see the urgent

[52]Para 1 of the Endorois case.
[53]Para 2 of the Endorois case.
[54]Paras 255-268 of the Endorois Case.
[55]Paras 269-298 of the Endorois case.
[56]Para 1 (4) of the recommendations of the Endorois case.
[57]R. Larson, 'Water, Worship, and Wisdom: Indigenous Traditional Ecological Knowledge and the Human Right to Water' (January 20, 2012). ILSA Journal of International & Comparative Law, Vol. 19, p. 43, 2012, Available at SSRN: https://ssrn.com/abstract=2045053
[58]S. Ragavan, 'Protection of Traditional Knowledge' Available at <https://ssrn.com/abstract=310680 or http://dx.doi.org/10.2139/ssrn.310680> accessed 7 April 2021, 1.
[59]ibid 2.
[60]D. S. Karjala, and R. K. Paterson, 'Looking Beyond Intellectual Property in Resolving Protection of Intangible Cultural Heritage of Indigenous Peoples' (2003). Cardozo Journal of International and Comparative Law, Vol. 11, p. 633, 2003, Available at <https://ssrn.com/abstract=1438148> accessed 7 April 2021.

need to guarantee them in practice.[61] There is no gain saying the fact that due to the less access to technology by third world, they lack the capacity to adequately protect their TK. While there are no global regimes that adequately and specifically protect TK, they can however be protected through two ways, which are the positive and the defensive ways.[62] There are various definitions for TK but the one that appeals to this current writer is the one given by Anu Bala which states thus;[63]

> Traditional knowledge (TK) refers to knowledge that people of an indigenous community, in one or more society, based on experience and adaptation to a local culture and environment, have developed over time, and constantly shaped by innovations and practices of each generation.

From the above definition, it can be said that TK are some form of knowledge that are highly valued by indigenous societies and worthy of protection as a right under the IP regimes notwithstanding that they are in most cases largely intangible and unwritten. But it appears that the IP system was actually not designed to protect the TK of indigenous people as it has been argued by a scholar.[64]The continuous denial of the TK of its worthy protection under global regimes implies that indigenous communities never had knowledge and that the people of the developed countries are the only custodian of knowledge, which is rather unfortunate. In the absence of available succour for indigenous peoples' rights under IP regimes, the surest way to securing the rights would most likely be through the human rights route.[65]

4.1 Indian experience on the protection of Traditional Knowledge of indigenous people

India has chosen not to leave the fate of their indigenous peoples' IPRs in the hands of those who are not favourably disposed to accepting the 'propertiness' of their TK.[66] It has gone ahead to put adequate legislative and institutional mechanisms to protect the various forms of traditional intellectual property.[67] India has not just made the protection of TK a domestic affair but has gone ahead to fight for the IPRs of its indigenous people outside in order jurisdictions where their rights were violated or about to be misappropriated. These cases include the

[61]H. Travis, 'The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq (February 8, 2009). Texas Weleyan Law Review, Vol. 15, p. 601, 2009, Available at SSRN: <https://ssrn.com/abstract=1549804 or http://dx.doi.org/10.2139/ssrn.1549804> accessed 7 April 2021.

[62]A. Bala, 'Traditional Knowledge and Intellectual Property Rights: An Indian Perspective' (November 1, 2011). Available at SSRN:<https://ssrn.com/abstract=1954924 or http://dx.doi.org/10.2139/ssrn.1954924> accessed 7 April 2021.

[63] ibid 2.

[64]S. R. Frankel, 'Ka Mate Ka Mate' and the Protection of Traditional Knowledge (August 1, 2013). R. Dreyfuss and J. Ginsburg (eds) Intellectual Property at the Edge: The Contested Contours of Intellectual Property (2014, Forthcoming)., Victoria University of Wellington Legal Research Paper No. 5/2014, Available at SSRN: https://ssrn.com/abstract=2304651 accessed 7 April 2021.

[65]K. Hossain, 'Human Rights Approach to the Protection of Traditional Knowledge: An Appraisal of Draft Nordic Saami Convention' (October 4, 2014). Yearbook of Polar Law IV, 2012, 313-340, Available at SSRN: https://ssrn.com/abstract=2505490 accessed 7 April 2021.

[66]Bala (n 71 above)

[67]Tiwari, B, Protection of Traditional Knowledge Under International Human Rights (September 1, 2014). Indian Streams Research Journal, Vol 4, Issue 8, Sept. 2014, Available at SSRN: https://ssrn.com/abstract=2496312 accessed 7 April 2021.

Basmati rice case, the Turmeric case and the Neem case.[68] How Indian revolution on the protection of TK has been succinctly captured as follows;[69]

> In India, where the awareness of intellectual property law is very low, the momentum towards protection of the indigenous properties increased after the basmati, turmeric and neem disputes. The WTO and its "drug denying obligations" (high prices of drugs on account of product patent regime) served to increase this awareness. As a consequence of this, in December 1998, the First Inter-Ministerial Committee on Protection of Rights of Holders of Indigenous Knowledge was convened. The discussions included protection of traditional knowledge and the possibility of introducing local self-government for administering the communities and their knowledge. The issue of identifying local communities was highlighted in this meeting. Many of the local communities have lost their traditional identity (over a period of time). The knowledge of this community has also become generic over a period of time. With this in mind, various bills, including the Protection of Plant Varieties and Farmers Rights Bill, 1999, and the Bio Diversity Bills of 1999 were drafted

It can be seen from the above assertion that India was forced to take these drastic decisions because of the imminent threats been faced by its indigenous peoples. However, proactive states could borrow a leave from India by not necessarily waiting for the IPRs of its indigenous peoples to be threatened before taking such decision. Some of the institutions that have been put in place by India include the Traditional Knowledge Digital Library (TKDL) and the Traditional Knowledge Resource Classification (TKRC).[70]

4.1.2 Nigerian IP laws and Traditional Knowledge protection

One of the ways to check the attitude of any state towards an issue is to first of all check the placement of the issue in the constitution of that country. Intellectual property rights do not enjoy the prime of place in the Nigerian 1999 Constitution. The Nigerian IP law is grossly out of date and yet to be updated and this has continued to affect IPRs in Nigeria.[71] TK are not adequately protected under Nigerian law, though some scholars are beginning to call for the need to protect it.[72] There is great need for the Nigerian state to copy a lot from India in terms of protecting the TK of its people. After all, Nigeria is blessed with rich biodiversity.

It must be noted here that without Nigeria borrowing a leave from India, the stealing of the TK of its people would continue without any trace. It high time for the Nigerian state to begin the

[68]Bala (n 71) 5.
[69] D. Anderson, Against Supersession (January 10, 2011). Canadian Journal of Law and Jurisprudence, Vol. XXIV, No. 1, 2011, Available at SSRN: https://ssrn.com/abstract=1932549 accessed 7 April 2021.
[70]Bala (n 71) 12-14.
[71]K. Fatoba, 'Intellectual Property Rights – An Overview of Nigerian Legal Framework' (December 10, 2019). Available at SSRN: https://ssrn.com/abstract=3501898 or http://dx.doi.org/10.2139/ssrn.3501898> accessed 20 March 2021.
[72]A. A. Adewopo, 'Protection and Administration of Folklore in Nigeria' SCRIPT-ed, Vol. 3, No. 1, March 2006, Available at SSRN: https://ssrn.com/abstract=1127645 accessed 20 March 2021.

process of documenting traditional intellectual property of its people for both present and future generation, without this being done, Nigeria and its people would eventually lose out in monumental economic and developmental gains that come with the protection of TK.

5. Concluding remarks

No country or continent in the world can lay claim to the monopoly of knowledge, knowledge exists everywhere but the mode of conservation and transmission of it is what differs. Global regimes on any area of law must tackle issues from a broader perspective rather from frame of reference of a particular group of people or continent. The absence of adequate global mechanism for the securing the IPRs of indigenous peoples is a global challenge that must be urgently tackled. In tackling these challenges, I will like to propose the following possible prospects for the securing IPRs of indigenous peoples globally.

First and foremost, state governments of the indigenous peoples must begin the collation of TK at domestic level. This would in the long run force the international community to recognize it. Without proper documentation of TK at the domestic level, international agitation for its recognition may be a mirage. At least, India has set an awesome pace for others follow.

Second, there should be a global human rights treaty on IPRs that adequately captures the plights of indigenous communities and peoples. A unique parameter for assessing TK should be developed alongside with indigenous communities or through their chosen representative.

Third, domestic courts should begin to look at IPRs from both private and public points of view, so as uphold the human rights nature of them. With the continuous cross-fertilization between IP law and human rights law, IPRs would be better secured, most especially the IPRs of indigenous peoples.

With all the above recommendation dutifully implemented by states, the IPRs of indigenous peoples would be better secured, globally recognized and internationally implemented despite the various current challenges facing them.