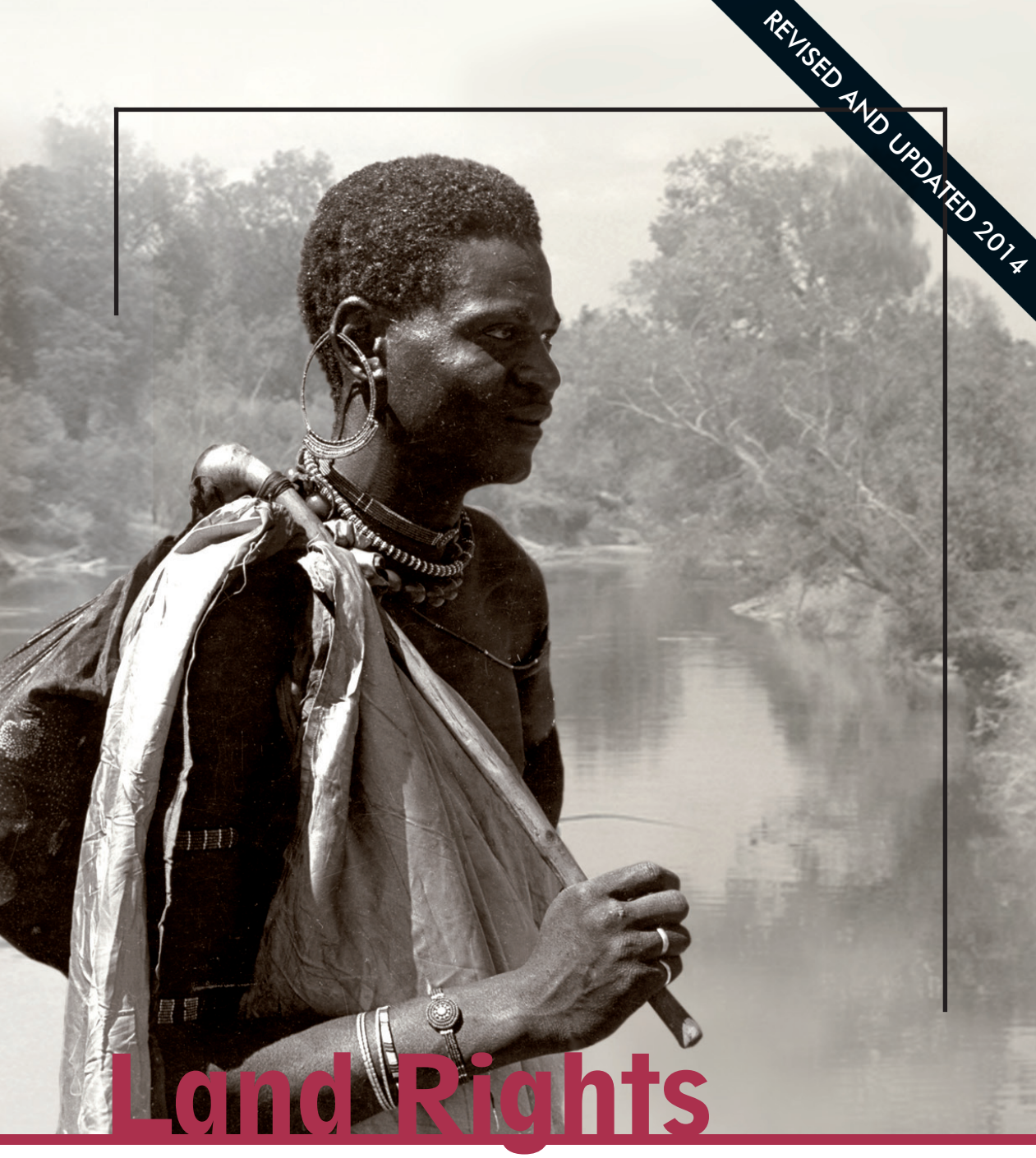

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Land Rights of Indigenous Peoples in Africa

Albert Kwokwo Barume

LAND RIGHTS OF INDIGENOUS PEOPLES IN AFRICA

With Special Focus on Central, Eastern and Southern Africa

Second edition – revised and updated

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This book is dedicated to all African indigenous peoples who have lost or continue losing their ancestral lands

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PREFACE TO THE SECOND EDITION

This book was first published in 2010. Dealing with an issue that up till then had received little attention, it was immediately well received by a large audience, that included scholars, university students and activists interested in the situation of Africa's indigenous peoples and their land rights. Today, the book is out of print but still very much in demand since its theme remains highly relevant.

It has therefore been decided to re-print the book but in a revised and updated version that reflects some of the latest developments affecting indigenous peoples and their land rights situation.

These developments have taken place at the international, regional and national levels. Several of these developments have been positive since they offer new opportunities for the promotion of indigenous rights, including the protection of indigenous land rights. At the international level, the U.N. Declaration on the Rights of Indigenous Peoples has had a contagious effect on the work of many U.N. institutions (treaty bodies, U.N. agencies) highlighting the importance of a human rights approach and the relevance of the concept of "indigenous peoples". At the continental level, the recognition of the existence of indigenous peoples in Africa has gained momentum and the indigenous movement has been strengthened. This reflects the developments at the international level but is also very much the result of the adoption by the African Union (AU) of the Report of the African Commission for Human and Peoples' Rights (ACHPR) on indigenous populations/communities (2005) and the work of the African Commission's Working Group on Indigenous Populations/Communities which includes country visits and reports, and sensitization efforts. Other relevant developments have been the adoption by AU in 2009 and 2010 of two highly relevant policy framework papers addressing land policies and pastoralism respectively; and the present undertaking by the African Development Bank to develop its own policy on indigenous peoples. The newly created African Court on Human and Peoples' Rights has indigenous peoples-related cases among the first ones to rule on.

At the national level, constitutional revision processes and new legislations have in some countries, like, for instance Kenya and Congo Brazzaville, taken a step further the legal protection of indigenous peoples in Africa. Several other African countries, including Namibia, Uganda, Cameroon and Angola, have, through the Human Rights Council-led Universal Periodic Review (UPR) process, recognized the existence of indigenous peoples on their territories and taken commitments to address their situation. Other important developments have been the first African ratification of ILO Convention No. 169 on indigenous and tribal peoples by the Central African Republic (CAR) in August 2010; the adoption by DR Congo, Kenya and Tanzania of Indigenous Peoples Frameworks; the consistent reference to indigenous communities in most climate change or REDD+ related documents and policies; and the provision of ethnically disaggregated population data in some national censuses.

These positive developments must not hide the fact that the situation of indigenous peoples on the ground has hardly changed. Poverty, discrimination, exploitation and human rights abuses remain deeply ingrained characteristics of the situation of indigenous peoples in Africa. The implementation gap when it comes to laws and policies has still not been bridged; indigenous land rights continue to be violated in the name of modernization and commercialization; indigenous communities are still being forcibly evicted, experiencing in the process loss of human lives and property, as well as gross human rights violations.

Disconcerting is also the fact that the few legal victories the indigenous peoples have had, have brought few truly positive changes in their lives. In South Africa, it took several years, a new court case and quite a few court hearings before the Constitutional Court's landmark decision in favour of the Richtersveld Community began to be implemented, and the community is currently facing numerous problems as a result of this protracted process; in Botswana, the High Court rulings regarding the rights of the CKGR indigenous residents to live in the reserve and to get special hunting licenses for their subsistence hunting have not been implemented. Entry into the CKGR is only allowed for San with a special permit, and it was first in 2011, that the San won an appeal case giving them the right to re-open a water borehole that had been sealed off by the government and which to date provides the only drinkable water in the Reserve. In Kenya, the Endorois are still waiting for the ACHPR decisions to be fully carried out.

Indigenous peoples, therefore, continue to struggle for their rights. As always, they do this in many ways by lobbying, going to court, etc., but a significant trend is the increased use of international mechanisms such as the UPR process, the various U.N. treaty bodies (e.g., CCPR, CESCR, CERD) to which indigenous organizations in recent years have been contributing with shadow reports and sending representatives who can lobby their own government representatives as well as representatives from other countries. Private companies, international financial institutions and conservation agencies have also started showing greater interest in indigenous peoples' rights, as a way to reduce both operational and reputational risks.

The book has been revised and updated in two ways. Within the more general chapters in Part I and III, data such as demographic information, statistics, etc., have been updated and supplemented by new data. Regarding Part II and its chapters on Kenya, Tanzania and Southern Africa respectively, a follow-up on some of the legal cases has been added whenever relevant and a brief overview of new important court cases is given; at the end of chapter V (Kenya) and chapter VI (Tanzania) an update of the section on "the legal and policy landscape" includes some of the most recent developments within these fields. Chapter X on Main Instruments and Mechanisms and chapter XI on Relevant Global and Regional Instruments have been substantially updated to reflect the enhanced importance these instruments give to, and are given by, indigenous peoples. In chapter XII, a few findings and recommendations based on post-trial experiences have been added.

It is our hope that this second edition of the book will be a useful tool and source of information for all those who seek to improve the situation and secure the land rights of indigenous peoples in Africa.

IWGIA and Albert Kwokwo Barume

PREFACE

There are indigenous communities in Africa. These are communities whose ways of life were not taken into account by most post-colonial African policies, a historical injustice that has led to their particular severe marginalization, including dispossession of ancestral lands and inaccessibility to several rights and freedoms enjoyed by the rest of their fellow citizens. Within this human rights-related meaning of the concept "indigenous", understandably not all Africans can be considered as being indigenous. Communities such as the San of Southern Africa,[1] the hunter-gatherers of African tropical forests and the pastoralists of arid lands in several parts of Africa call not for special rights but for redress of historical injustices and enjoyment of all rights on the same footing as the rest of their countrymen and -women.

In 2003, the African Commission on Human and Peoples' Rights (ACHPR) adopted a first ever Report on Indigenous Populations/Communities in Africa. This report highlights, among other things, the cultural uniqueness of African indigenous peoples and the historical injustices they have suffered, before making major recommendations to various stakeholders, including African states and governments. By adopting this report, the African Commission has domesticated the issue of indigenous peoples' rights, and they can therefore no longer be labeled as western-oriented or copied human rights claims.

A main conclusion of the ACHPR report is that the protection of the rights to land and natural resources is fundamental for the survival of indigenous communities in Africa. Lands are, *all over the world,* central to indigenous peoples' demands because, more than constituting a mere source of income, ancestral territories are the basis for their livelihood, way of life, culture and existence as communities. Africa is no exception to this paradigm; on the contrary, ancestral lands remain for many African communities, and particularly those who self-identify as indigenous peoples, sacred and embedded with spiritual or cultural values that cannot otherwise be protected and preserved.

But the issue of indigenous rights to land and to the natural resources pertaining to their land has always been a complex and sensitive issue and indigenous peoples everywhere have for centuries experienced dispossession, forced removals and discrimination. This has also been the case in Africa, starting during colonial times where many indigenous peoples lost their land to European settlers and continuing up to this day, where they see their traditional lands increasingly being threatened, encroached on or expropriated for the benefit of conservation interests, agro-industries, commercial plantations, mineral exploitations, and other economic activities.

1 San were formerly called Bushmen—and in Botswana, Basarwa—but these terms are considered by many as derogatory and have been replaced by the term San. San is a generic term and the distinct linguistic groups among the San designate themselves by their own name, as for instance, Khwe, Nharo, ǂKhomani, etc.

Indigenous peoples have not let this happen without reacting in some way or another. In some cases, as this book will show, they have even gone to court and filed their cases against the powerful, whether colonial authorities, governments or corporate companies.

And how has the judiciary dealt with this human rights thematic in Africa? As this book will show, defending the land rights of indigenous peoples in court has been a legal battle uphill with few successes since, even when the court has ruled in their favour, their rights have not always been restored. Why? What went wrong? What could have been done otherwise? What lessons can be learned from the land-related court cases indigenous peoples have filed in Africa? What issues should judges, lawyers and concerned peoples consider in order to better defend the land rights of indigenous peoples in African courts? These are some of the key questions that need to be put and which this book aims at answering.

In other words, the purpose of this book is to look at the issue of land and land rights in the context of Central, Eastern and Southern Africa. A special focus of the book is to analyse some of the land cases filed by indigenous peoples in order to draw some lessons learned and recommendations that may benefit indigenous peoples and their organizations in the future, but also help those who want to support their cause. In this regard, the book also intends to consider existing international legal frameworks relevant to the rights of indigenous peoples over their lands in order to see how African indigenous peoples can make better use of international law and existing jurisprudence to defend or protect their rights in courts.

This book stems from more than fifteen years of observations, research, analysis and interaction with indigenous communities in Africa. As a lawyer by training with a doctorate in international human rights law and a focus on indigenous peoples' rights, the author has also made an extensive reading of legal and non-legal literature on the rights of minorities in general and of those of indigenous peoples in particular; he has carried out numerous interviews, visited indigenous communities, and participated in several regional/international meetings on indigenous peoples' issue. Two indigenous NGOs, the Ogiek Welfare Council (OWC) and the Community Research and Development Services (CORDS), based in Kenya and Tanzania, respectively, have contributed to the data collection.

The choice of law cases from Kenya, Tanzania, South Africa and Botswana as illustrations is justified by the fact that these countries have for long been at the forefront of the conflict between indigenous communities' claims to their ancestral lands and the demand for land created by the countries' free-market oriented economies coupled with emerging strong conservation interests. Furthermore, these four countries host indigenous communities that not only identify themselves as culturally dependent on their lands but have to a larger extent than in any other African countries chosen the judiciary as one of their main means of action to protect their ancestral lands.

This book does not aim at presenting a detailed account of the various human rights violations indigenous peoples suffer in Africa, a subject to which many publications have contributed and continue to contribute largely. It also does not present a complete list of land-related law cases filed by or involving African indigenous peoples.

Throughout, this book refers to one or a few indigenous peoples per country or per region as examples. Since the purpose of this book is not to present an overall picture of the peoples who in Africa identify themselves as indigenous peoples nor what human rights violations they face, the examples should not be understood as exclusive of non-cited peoples or communities who identify

themselves as indigenous in the same country or region, or are recognized as such by the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Similarly, this book contains very little, if anything at all, on West and North Africa, a limitation due to the writer's lack of reliable information from these regions.

The book comprises three parts. Part I (chapters I to IV) is an introduction to the concept "indigenous", how it has evolved over the years and why it is relevant for Africa. Special focus is given to the issue of land—its importance for the well-being and survival of indigenous peoples; the process of land dispossession experienced by indigenous peoples and its multiple causes; and the reactions and strategies indigenous peoples have used to defend their land rights.

Part II (chapters V to VII) gives an illustrative presentation of the standard of protection of indigenous peoples' land rights in African courts and how it has evolved over the years. The few court cases from Kenya and Tanzania presented in this book reveal that, despite very early attempts in the 1900s by indigenous Maasai from Kenya to use courts as mechanisms of protection of their ancestral lands, judges every time failed the communities and ruled in favour of the settlers. In 1912, the East African Court of Appeal sheltered behind the theory of "act of State" to declare itself incompetent in dealing with the claims made by the Maasai that an eviction from their ancestral lands was illegal. Against all expectations, Kenyan and Tanzanian post-colonial judges continued on the same path, upholding almost every time the supremacy of written laws over customary tenures and on occasions making rather illogical rulings. In 1984, and after concluding that a defendant occupied unlawfully a disputed land, a Tanzanian High Court found refuge behind the small number of the indigenous plaintiffs to argue that restitution to a Barabaig indigenous community of land unlawfully lost was no longer possible given that only a few individuals had appeared in court. More recently (2000), a Kenyan High Court relied on an assumption that the Ogiek indigenous peoples had lost their ancestral way of life and therefore could no longer claim to have a culture that would not be able to survive outside their directly traditional lands. Any excuse appears to be used by judges and governments to avoid challenging government policies and redressing the historical injustices suffered by indigenous peoples. Many cases are dismissed on various technicalities that judges always tend to find.

However, a trend of hope for a better judicial protection of indigenous peoples' right to land in Africa can be seen in two recent cases from Southern Africa. In 2003, there was a first ever recognition of the concept of "aboriginal title" in Africa when the Constitutional Court of South Africa ruled that the Richtersveld community's customary land rights were not extinguished following the invasion of their lands by colonial and current South African State. Furthermore, this court upheld that indigenous peoples' right in their ancestral territories included also rights over natural resources such as minerals. A similar ruling, but not with the same strong language, was made in 2006 by Botswana's High Court following an eviction of the San from the Central Kalahari Game Reserve (CKGR).

Part III (chapters VIII to XI) describes some of the specific features of indigenous land rights and takes on the questions "Is it really true that indigenous peoples' rights to land are not arguable in African courts?" and "How could they be argued in court?" In order to argue for indigenous land rights in a court case, lawyers, judges and even communities need to comprehend the complexity and the particular features of these rights. This is the purpose of chapter VIII, which looks, among other things, at the collective aspect of indigenous land rights, and how indigenous peoples' land rights therefore differ from the ordinary, modern individual right of land ownership. It then presents

a range of potential arguments as well as material that could be used to defend indigenous peoples' rights to lands. For instance: is the concept "aboriginal title" applicable in Africa to the extent of being relevant and arguable in court? If so, what are the theories or principles behind this concept and are these principles applicable to the continent or arguable in courts? Did colonization and later the creation of modern African States extinguish all pre-existing land rights of traditional communities? Have all indigenous African communities abandoned the fight and accepted that their pre-existing rights were extinguished following the creation of states?

The three following chapters examine the main legal instruments that can be brought into use for the protection of indigenous peoples' land rights. Chapter IX gives a survey of how indigenous peoples' land rights are being provided for by national constitutions in various countries around the world and how the constitutions in African countries deal with the same issue. Chapter X and chapter XI analyse the various international legal instruments and mechanisms that have been developed over recent years, including the newly adopted U.N. Declaration on the Rights of Indigenous Peoples, and demonstrates that international law remains by far the best instrument available for the protection of indigenous peoples' right to lands in Africa. Most African States have adopted the U.N. Declaration and have ratified treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). But also other global legal frameworks like ILO Convention No. 169, the Convention on Biological Diversity, some of the UNESCO Conventions, the humanitarian laws or laws of war as well as the policies of international financial institutions, such as the Operational Policy 4.10 (OP 4.10) of the World Bank, contain norms that can be used in court to advocate for indigenous peoples' rights to lands. The African States have furthermore all ratified the African Charter on Human and Peoples' Rights, whose increasing use by indigenous peoples could be seen as linked to the adoption of the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. A number of land-related communications by indigenous peoples are currently under consideration by the African Commission.[2] Finally, there are also inter-states organizations and even bilateral development partners to Africa that have adopted pro-indigenous policies which could be used to argue for indigenous peoples' land rights in courts.

The book concludes in chapter XII by looking at some of the lessons, which can be drawn from the various case studies and which are relevant to indigenous peoples as well as to their lawyers. On this basis, a number of observations and recommendations are listed.

It is the hope of the author that this book can fulfill to some extent the challenging task of providing judges, lawyers, scholars, researchers, lecturers, human rights trainers and activists, community leaders and communities themselves, with a range of supporting legal and multidisciplinary arguments and justifications that can be put to use in the protection of indigenous peoples' right to land in Africa.

2 One such communication was made by the Endorois (Kenya) in 2003. In May 2009, the African Commission responded by adopting a decision that found the Kenyan government guilty of violating the rights of the Endorois community by evicting them from their lands to make way for a wildlife reserve. This decision, which has subsequently been approved by the African Union in January 2010, creates a major legal precedent by recognising, for the first time in Africa, indigenous peoples' rights over traditionally owned land and their right to development. See African Commission Communication 276/2003, *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Community) v. Kenya* at www.minorityrights.org/download.php?id=748

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I am equally grateful to my beloved wife Dafina, my daughter Atosha, my son Yene and all the members of my family, alive and at eternal rest. Their immeasurable love and encouragements together with that of several friends lightened my way towards the accomplishment of this challenge.

Dr. Albert Kwokwo Barume

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACP	African, Caribbean and Pacific (countries)
ADB	Asian Development Bank
ADSDPP	Ancestral Domain Sustainable Development and Protection Plan (Philippines),
AfDB	African Development Bank
ANCSA	Alaska Native Claims Settlement Act
APRM	African Peer Review Mechanism
ASALs	Arid and Semi-Arid Lands (Kenya)
AU	African Union
AUC	African Union Commission
B.C.	British Columbia (Canada)
BCLR	Butterworth's Constitutional Law Reports (South Africa)
BCTC	British Columbia Treaty Commission (Canada)
BEAC	British East African Company
BIA	Bureau of Indian Affairs (USA)
BLM	Bureau of Land Management (USA)
BP	Bank Procedures (World Bank)
BWHC	Botswana High Court
CA	Court of Appeal
CADT	Certificate of Ancestral Domain Title (Philippines)
CAIP	Commonwealth Association of Indigenous Peoples
CALT	Certificate of Ancestral Land Title (Philippines)
CAPRi	Common Agricultural Policy Regionalized impact
CAURWA	Communauté Autochtone du Rwanda
CBD	Convention on Biological Diversity
CBO	Community Based Organization
CCPR	United Nations Human Rights Committee
CCRO	Certificate of Customary Rights of Occupations (Tanzania)
CCT	Constitutional Court of South Africa
CEDAW	United Nations Convention/Committee on the Elimination of Discrimination Against Women
CEMIRIDE	Kenyan Centre for Minority Rights and Development (Kenya)
CERD	U.N. Committee on the Elimination of Racial Discrimination
CESCR	U.N. Committee on Social, Economic, and Cultural Rights

CHA	Controlled Hunting Area (Botswana)
CHRLD	Commonwealth Human Rights Law Digest
CHOGM	Commonwealth Heads of Government Meeting
CISA	Indian Council of South America
CKGR	Central Kalahari Game Reserve (Botswana)
COMIFAC	Commission des Forêts en Afrique Centrale
COP	Conference of Parties (CBD)
COPORWA	Communauté des Potiers du Rwanda (Rwanda's Potter Community)
CORDS	Community Research and Development Services (Tanzania)
CPA	Communal Property Association (South Africa)
CPR	Common property resources
CSD	Commission on Sustainable Development
CSO	Civil Society Organization
CV	Civil [case] (Tanzania)
Danida	Danish International Development Agency
DFID	Department for International Development (U.K.)
DGPA	Dynamique des Groupes de Peuples Autochtones (DRC)
DWNP	Department of Wildlife and National Parks (Botswana)
E.A.C.A.	East African Court of Appeal
E.A.L.R.	East African Law Register
E.C.	European Commission
ECOSOC	U.N. Economic and Social Council
ECOWAS	Economic Community of West African States
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EU	European Union
FAO	U.N. Food and Agriculture Organization
FFP	Forest Peoples Programme (UK based NGO)
FIMI/IIWF	Foro Internacional de Mujeres Indígenas/International Indigenous Women's Forum
FPIC	Free, prior and informed consent
GCA	Game Controlled Area (Tanzania)
GDP	Gross Domestic Product
GEF	Global Environment Facility
GEI	Green Economy Initiative
GIAHS	Globally Important Agricultural Heritage Systems
GIZ	Deutsche Gesellschaft fûr Internationale Zusammenarbeit (German Agency for International Cooperation –formerly GTZ)
GPS	Global Positioning System
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (German Agency for Technical Cooperation)—today GIZ.
HC	High Court
HRC	Human Rights Council

HWC	Human-wildlife conflict
IACHR/CIDH	Inter-American Commission on Human Rights/ Comisión Interamericana de Derechos Humanos
IASG	Inter-Agency Support Group (U.N.)
ICC	Indian Claims Commission (USA)
ICC	Indigenous cultural communities (Philippines)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
I.C.J.	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association (World Bank)
IDB	Inter-American Development Bank
IDP	Internally Displaced Person
IFAD	International Fund for Agricultural Development
IHL	International Humanitarian Law
IIFB	International Indigenous Forum on Biodiversity
IIFCC	International Indigenous Forum on Climate Change
IIWF/FIMI	International Indigenous Women's Forum/Foro Internacional de Mujeres Indígenas
ILC	Indigenous Land Corporation (Australia)
ILO	International Labour Organisation
IMF	International Monetary Fund
IPA	Indigenous Protected Area
IPACC	Indigenous Peoples of Africa Coordinating Committee
IPP	Indigenous Peoples Plan (World Bank)
IPRA	Indigenous Peoples' Rights Act (Philippines)
IWBN	Indigenous Women's Biodiversity Network
IWGIA	International Work Group for Indigenous Affairs (International NGO based in Denmark)
KADU	Kenya African Democratic Union
KAI	Pastoralists and Hunter-Gatherers Katiba Initiative (Tanzania)
KANU	Kenyan African National Union
KNBS	Kenya's National Bureau of Statistics
KSC	Kenya Stakeholders Coalition
KWS	Kenyan Wildlife Society
LAPSSET	Lamu Port Southern Sudan-Ethiopia Transport Corridor
LCC	Land Claims Court (South Africa)
LHRC	Legal Human Rights Center (Tanzania)
LPI	Land Policy Initiative (African Union)
LOIPR	List of Issues Procedure (CCPR)

LRC	Legal Resource Center (South Africa)
MBIFCT	Mgahinga and Bwindi Impenetrable Forest Conservation Trust (Uganda)
MDB	Multilateral Development Bank
MDG	Millennium Development Goal
MGR	Mkomazi Game Reserve (Tanzania)
MP	Member of Parliament
MPIDO	Mainyoito Pastoralist Integrated Development Organisation (Kenya)
NAFCO	National Agricultural and Food Corporation (Tanzania)
NAGPRA	Native American Graves Protection and Repatriation Act (USA)
NATO	North Atlantic Treaty Organisation
NBSAP	National Biodiversity Strategy and Action Plan
NCA	Ngorongoro Conservation Area (Tanzania)
NCAA	Ngorongoro Conservation Area Authority
NCHR	National Commission on Human Rights (Philippines)
NCIC	National Cohesion and Integration Commission (Kenya)
NCIP	National Commission on Indigenous Peoples (Philippines)
NCSSD	National Conservation Strategy for Sustainable Development (Tanzania)
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental OrganisationOrganization
NHRI	National Human Rights Institutions
NLP	New Land Policy (Kenya)
NCR	Native Customary Rights (Malaysia)
NSGRP	National Strategy for Growth and Reduction of Poverty (Tanzania)
NTA	Native Title Act (Australia)
NZLR	New Zealand Law Reports
OAS/OEA	Organization of American States/ Organización de los Estados Americanos
OAU	Organisation Organization of African Unity
OBC	Ortello Business Corporation (Tanzania)
OD	Operational Directive (World Bank)
ODA	Overseas Official Development Assistance
OEA/OAS	Organización de los Estados Americanos/ Organizsation of American States
OP	Operational Policy (World Bank)
PC	Private Council (UK)
PRSP	Poverty Reduction Strategy Paper
REDD	Reducing Emissions from Deforestation and Forest Degradation
RENAPAC	Réseau National des Peuples Autochtones du Congo
RM	Malaysian Ringgit (currency)
SADC	Southern Africa Development Community
SAGCOT	Southern Agricultural Growth Corridor of Tanzania
SCA	Supreme Court of Appeal (South Africa)

S.C.R.	Supreme Court of Canada
SCZ	Supreme Court of Zimbabwe
SI	Survival International (International NGO based in the UK)
SUHAKAM	The Human Rights Commission of Malaysia
TANAPA	Tanzanian National Park Authority
TASAF	Tanzania Social Action Fund
TCWP	Tanzania-Canada Wheat Programme
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
TNRF	Tanzania Natural Resources Forum
Tshs	Tanzanian Shillings
U.N.	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCT	United Nations Country Team
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNHCHR	United Nations High Commission on Human Rights
UNICEF	United Nations' Children Fund
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNPO	Unrepresented Nations' and Peoples' Organization
UNWGIP	United Nations Working Group on Indigenous Populations
UPR	Universal Periodic Review
USAID	United States Agency for International Development
VGDA	Village Grazingland Development Area (Tanzania)
VGDC	Village Grazingland Development Committee (Tanzania)
VLA	Village Land Act (Tanzania)
VLC	Village Land Certificate (Tanzania)
WB	World Bank
WD	Wildlife Division (Tanzania)
WGIP	Working Group on Indigenous Populations
WHO	World Health Organisation
WIMSA	Working Group of Indigenous Minorities in Southern Africa
WMA	Wildlife Management Area (Botswana)
WRM	World Rainforest Movement
ZAR	South African Rand (currency)

PART I CONCEPTUALISING INDIGENOUS LAND RIGHTS IN AN AFRICAN CONTEXT

CHAPTER I
THE TERM "INDIGENOUS" – AN EVOLVING CONCEPT

This chapter constitutes an indispensable starting point for anyone interested in the rights of indigenous peoples in Africa, a continent where the term "indigenous" is often misunderstood for various reasons, including an opinion that most Africans are indigenous to the African continent.

Etymologically, the term "indigenous" derives from the Latin word "*indigena"* made up of two words, namely *indi*, meaning "within" and *gen* or *genere* meaning "root".[3] In other words, the term "indigenous" refers to "born in", "something that comes from the country in which it is found", "native of", or "aborigine", in contrast to "foreign" or "brought in".

To reach its current understanding in international law, the meaning of the term "indigenous" seems to have evolved through several distinct phases. The first meaning of the concept, referred to hereafter as "the colonial meaning", can be considered as an alteration of the term's etymological understanding for colonial purposes. The second meaning of the term "indigenous" can be seen as having emerged in the aftermath of the creation of the United Nations and the decolonization process, and was confirmed by the adoption of ILO (International Labour Organization) Convention No. 107 in 1957. Finally, it seems that the current understanding of the term "indigenous" is the result of the process starting with the Martínez Cobo study launched in 1972[4] that lead up to the adoption of ILO Convention No. 169 in 1989, as well as of subsequent efforts to develop the concept by—among others—the U.N. Working Group on In-

3 Charles Annandale, *Home Study Dictionary* (London: Peter Haddock Ltd., 1999), p. 374. See also *Collins School Dictionary* (UK: HarperCollins Publishers, 1993), p. 370, and Longman *Dictionary of Contemporary English*, 3rd ed. (Harlowe: Longman, 1995), p. 724.

4 The Martínez Cobo study was completed and adopted in 1986/7. Available online from the Web site of UNPFII: http://www.un.org/esa/socdev/unpfii

digenous Populations (WGIP, established in 1982), the World Bank[5] (OD 4.20 in 1991 and OP 4.10 in 2004) and the African Commission on Human and Peoples' Rights (2003).

The colonial meaning of the concept "indigenous"

During the colonial era, the term "indigenous" was applied to all peoples found in colonized territories, regardless of whether or not they had been born there or were newcomers. Terms like "natives", "aborigines", "populations found on these territories", were used interchangeably. It is also interesting to note that the Berlin Conference of 1885, too, failed to make a distinction between people found in the various colonized territories.[6]

The earliest work of the International Labour Organization (ILO) similarly reveals that the colonial meaning of the term "indigenous" was slightly different from its etymological understanding. ILO was created along with the League of Nations in 1919 by the Peace Conference that followed World War I. On the basis of the understanding that achieving peace and security depended upon good standards of protection afforded to the social and economic needs of people, the League of Nations was meant to focus on peace and security, whilst the ILO addressed social and economic issues.[7] ILO's Constitution stated:

> Universal and lasting peace can be established only if it is based upon social justice ... and privation to large numbers of people [can] produce unrest so great that the peace and harmony of the world are imperiled ...[8]

The issue of "indigenous" was one of the first to be dealt with by the ILO,[9] although it was not until 1936 that it adopted Convention No. 50 on the Recruitment of Indigenous Workers,[10] its first native-related instrument. By "indigenous", this convention meant as stated in Article 2(b): "workers belonging to or assimilated to the indigenous populations of the dependent territories of Members of the Organization and workers belonging to or assimilated to the dependent indigenous populations of the home territories of Members of the Organization".[11] This Convention and its *travaux prépara-*

5 In 1982, the World Bank developed a policy statement on "Tribal People in Bank-Financed Projects". The World Bank has subsequently, in 1991, issued Operational Directive (OD) 4.20 on "Indigenous Peoples", which was replaced, in 2004, by Operational Policy (OP) 4.10. Available from the Bank's Web site: http://www.worldbank.org

6 General Act of the Conference of Berlin, February 26, 1885. Article 6 of the chapter on Freedom of Trade in the Basin of the Congo as well as several other dispositions contained in the Act refer to the populations found on the concerned territories by the colonial powers as "native" populations or tribes.

7 Clive Archer, *International Organizations* (London: George Allen and Unwin, 1983), pp. 3 and 11-18.

8 Preamble of the ILO Constitution. Available from http://www.ilo.org/dyn/normlex/en

9 In 1921, the ILO conducted a study on indigenous workers and, in 1926, it established the Committee of Experts on Indigenous Workers.

10 ILO Convention No. 50 Concerning the Regulation of Certain Special Systems of Recruiting Workers—also called C50 Recruiting of Indigenous Workers Convention. For full text, see http://www.ilo.org/dyn/normlex/en

11 Convention No. 50 was drafted by the Committee of Experts on Indigenous Workers set up by the International Labour Conference, the governing body of the ILO, during its 31st session in 1926. The Committee was given the mandate of framing standards of protection of this specific category of workers. ILO Convention No. 50 appears to be the first indige-

toires[12] seemed to give a double meaning to the term "indigenous". On the one hand, in an understanding closer to the etymology of the term, ILO Convention No. 50 meant by "indigenous", those peoples who were natives, "born in non-independent territories", or, in other words, "*indigenous by origin".* Delegates and government representatives mandated to draft this Convention thus made it clear that the convention was "dealing with the subject of native labour", and that if ratified, it would apply in particular to the African colonies, but also to other colonized territories. British delegates to these drafting sessions also said that ILO Convention No. 50 was expected to deal with populations of all the territories under its Colonial and Dominions Offices, such as Swaziland.[13]

On the other hand, ILO Convention No. 50 was also meant to apply to "workers ... assimilated to the dependent indigenous populations of the home territories of Members of the Organization",[14] even though such people considered as *"indigenous by assimilation"* might have come from somewhere else, as migrants or non-white settlers. In South Africa, for example, native or indigenous workers included: "(a) those who were engaged on the farms owned by Europeans; (b) the detribalized industrial workers in the towns; and (c) those who came out from the native reserves in the British Protectorates, Portuguese East Africa, Southern Rhodesia and Nyasaland".[15] With such an understanding, many Indians as well as many other Asian people were considered as assimilated to "indigenous workers". Colonized populations were indeed called indigenous not because they were natives of a land on which they were born but because they were under foreign domination.[16] Thus, the etymological meaning appeared to be broadened to include all non-westerners.

Having taken into account most of the suggested amendments, ILO Convention No. 50 was widely ratified by most big colonial powers.[17] Its understanding of the term "indigenous" prevailed up to the late 1950s,[18] when ILO Convention No. 107 was adopted with a new meaning for the term "indigenous".

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nous-related text drafted by the Committee set up 10 years earlier. See International Labour Organization, *International Labour Conventions and Recommendations 1919-1951*, vol. I. (Geneva: International Labour Office, 1996), p. 277.

12 *Travaux préparatoires* (French for "preparatory works") are the official record of a negotiation including the various documents (e.g., reports of discussions, hearings and floor debates) produced during the drafting of a Convention, a treaty or an agreement.

13 International Labour Conference, "Proposed International Labour Obligations in respect of Non-Self-Governing Territories". Report IV(1), 29th session (Montreal, 1946), p. 11.

14 Ibid.

15 International Labour Conference, "Records and Proceedings", 19th Session (Geneva: International Labour Office, 1935), p. 414. The statement referred to was made by Mr. Bellinger, a Workers' adviser of the British Empire.

16 Andrew Gray, "The Indigenous Movement in Asia", in *Indigenous Peoples in Asia,* edited by R.H. Barnes, A. Fray, and B. Kingsbury (Ann Arbor: Association for Asian Studies Inc., 1995), p. 37.

17 International Labour Conference, "Information and Reports on the Application of Conventions and Recommendations", Report III(I), 39th session (Geneva: International Labour Office, 1956a), p. 247: the United Kingdom ratified ILO Convention No. 50 on 22 May 1939 with reserve that it was not applicable to Aden, Bermuda, Cyprus, Falkland Island, Gibraltar, Malta, St. Helena and Zanzibar. Japan's ratification occurred on 8 September 1938 and it was said to be applicable to all the Pacific Islands that Japan had under its power from the League of the Nations' mandate. New Zealand's ratification occurred on 8 July 1947 and Belgium's on 26 July 1948.

18 The exact wording and meaning of the term "indigenous" were later referred to in ILO Convention No. 64 of 1939 on "regulation of written contracts of employment…", ILO Convention No. 65 on "penal sanctions for breaches of contracts of employment…", and ILO Convention No. 104 of 1955 abolishing the penal sanctions for breach of contract of employment. See http://www.ilo.org/dyn/normlex/en

ILO Convention No. 107

Towards the end of World War II, a change emerged in the attitude of colonial powers towards colonized populations because the latter contributed, among other things, to the war efforts but also because several colonial powers could no longer economically and militarily sustain the same presence overseas as before the War. This is the context in which ILO Recommendation No. 70 on Social Policy in Dependent Territories that enjoined its members to "promote the well-being and development of the peoples of dependent territories", was adopted in 1944.[19] Together with ILO Convention No. 82 concerning Social Policy in Non-Metropolitan Territories (1947),[20] these two documents could be regarded as having paved the way for further instruments concerning the well-being of populations in dependent territories. The United Nations Charter had also just been adopted (1945), stating, among others, "the principle of equal rights and self-determination of peoples".[21]

It was in such an environment that Resolution 275(III) by the U.N. General Assembly requesting the Economic and Social Council (ECOSOC) to carry out a "Study of the social problems of the aboriginal populations and other under-developed social groups of the American continent"[22] was passed in 1949.

None of the above mentioned documents contained anything on the meaning of the term "indigenous". The drafters of ILO Convention 107, however, could not avoid having to deal with the definition problem, since it built on previous work done by the Committee of Experts on Indigenous Labour and its report on the "living and working conditions of indigenous populations in independent territories".[23] At its session of June 1956, the International Labour Conference set up a Committee on Indigenous Populations,[24] with a mandate to analyse this report and to recommend a draft text on indigenous populations' rights. At the following session of the International Labour Confer-

19 ILO Recommendation No. 70 in its opening statements remarks that "the economic advancement and social progress of the peoples of dependent territories have become increasingly a matter of close and urgent concern to the States responsible for their administration". See in International Labour Organization, *International Labour Conventions and Recommendations 1919-1951,* vol. II. (Geneva: International Labour Office, 1996), p. 402. Article 1 of the recommendation stated that "All policies designed to apply to dependent territories shall be primarily directed to the well-being and development of the peoples of such territories and to the promotion of the desire on their part for social progress".

20 For text of ILO Convention No. 82 (and others), see Normlex Web page at http://www.ilo.org/dyn/normlex/en

21 Article 1 of the Charter of the United Nations (1945).

22 U.N. General Assembly Resolution 275 (III) of May 11, 1949. Available online at http://www.un.org/documents/ga/res/3/ares3.htm. See Dusan J. Djonovich (ed.), *United Nations Resolutions*, Series I, (New York, N.Y.: Ocean Publications, 1974), p. 264. It is said that the Study was never carried out because in order to do so, a request from all affected States was required and such a request was never made. See also S. James Anaya, *Indigenous Peoples in International Law,* (New York, N.Y., and Oxford, UK: Oxford University Press, 1996), p. 44.

23 International Labour Conference, "Living and Working Conditions of Indigenous Populations in Independent Territories". Report VIII(1), 39th session (Geneva: International Labour Office, 1956b).

24 The Committee on Indigenous Populations was set up on 7 June 1956 by the International Labour Conference. It was composed of 45 members, amongst them 30 Government members, 5 Employers' members and 10 Workers' members. The Committee grounded its work on studies on the conditions of indigenous populations in independent territories undertaken by the Committee of Experts on Indigenous Labour during its sessions of March 1951 and May 1954. It also received a great deal of materials and needed information from the responses of Governments to the questionnaire proposed by the Committee of Experts. See also in International Labour Conference, "Living and Working Conditions" (1956b), p. 3.

ence, the Committee presented a draft text bearing the title: "Convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations".[25] This Draft defined the term "indigenous" as:

> [P]eoples who are indigenous because of some historical event such as conquest or colonization and who are still living in the tribal or semi-tribal form; and [on the other hand] people ... whose social and economic conditions are similar to those of the people defined under the previous subsection.[26]

Ecuador welcomed this definition of the term "indigenous",[27] but the draft text presented by the Committee was not so well received by other conference delegates.[28] In relation to the meaning and the scope of the term "indigenous", numerous delegates accused the Committee of having gone beyond its original mandate. Discontented delegates argued that the term "indigenous" should not include social groups other than those recognized as the first inhabitants of independent countries.[29]

Other delegates proposed additional elements to be included in the definition of the term "indigenous". The United Kingdom's delegate, for instance, whilst objecting to the insertion of "other tribal and semi-tribal populations" in the scope of the definition of the concept "indigenous", recommended that the term "indigenous", should also include former immigrants.[30] Several other delegations took the view that "indigenous people" should be understood as those who had been reduced to poverty and social marginalization as a result of injustice and exploitation.[31]

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25 International Labour Conference, "Living and Working Conditions", Report VIII (1), (1956b).

26 International Labour Conference, "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", Report VI (1), 40th session, (Geneva: International Labour Office, 1957a), p. 3.

27 International Labour Conference, "Living and Working Conditions", Report VIII (2), (1956b), p. 10. The government of Ecuador considered that "clauses (a) and (b) satisfactorily convey the social implications of the expressions 'indigenous people ...".

28 International Labour Conference, "Protection and Integration", Report VI (1) (1957a), p. 3.

29 International Labour Conference, "Records of Proceedings", 40th session (Geneva: International Labour Office, 1957b), p. 36. An Employers' delegate from Australia, for example, criticized the Committee saying that "instead of dealing only with the living and working conditions of these people, the Committee has changed the title and more important ... considered the protection and integration of indigenous and other tribal and semi-tribal populations regardless of whether they were indigenous or not ...".

30 United Kingdom proposed that the term "indigenous" refer to people "who retain their separate identities either by virtue of customs or traditions or as a result of special laws and regulation and whose social, cultural and economic conditions are in consequence substantially behind those of the rest of the population ... For the purpose of this Convention, the term 'indigenous people' includes immigrants whose social and economic conditions are comparable to those referred to above ...". See in International Labour Conference, "Protection and Integration", Report VI (2) (1957a), p. 10.

31 This was the view of Mr. Sabrosso, a Workers' delegate from Peru, who suggested that "indigenous people" be understood as those who have been reduced to poverty and social marginalisation as a result of the injustice and exploitation they have suffered. The government of Honduras took a similar view stating that it was not necessary to speak of "conditions ... prior to conquest or colonization ...", because the concept "indigenous" should simply mean people living under lower social, economic and cultural status. The Brazilian government delegation suggested that the words "descendants of people who inhabited the country at the time of ..." be deleted from the definition of the term "indigenous" because the question of who lived where and when could be a difficult one in some parts of the world. For the government of Ceylon, the scope of the term "indigenous" should be wide enough to include "people whose main tribal characteristics have disappeared ...".

Finally, it was agreed that the Convention would apply to:

a. descendants of people who inhabited the country at the time of conquest or colonisation, who lead a tribal or semi-tribal existence more in conformity with the social, economic, and cultural institutions of the period before conquest or colonisation than with the institutions of the nation to which they belong; or who are governed by special legislation; and
b. people with a tribal or semi-tribal structure whose social and economic conditions are similar to those of the people defined under (a).[32]

It emerges from these provisions that, once again, two meanings were attached to the term "indigenous": paragraph (a) brought into the meaning of "indigenous" the idea of "*indigenous by antecedence"* or origin; and paragraph (b) included within the scope of the Convention, people who would qualify as indigenous "*by similarity"*, meaning people who were not indigenous by origin but whose conditions of life were similar. However, in both cases, for people to be considered indigenous under ILO Convention 107, they still needed to be maintaining their "tribal way of life".

A government of New Zealand representative and rapporteur of the Committee tried unsuccessfully to rally states to the inclusive approach in the definition of the term "indigenous", saying that "any single definition of the word "indigenous" would not satisfy more than a handful of people".[33]

Indeed, ILO Convention No. 107 did not get much support from former big colonial powers, which voted against it,[34] and they could have blocked it, if it had not received backing from delegates mainly from newly decolonised territories.[35]

However, by the mid-80s,[36] "the paternalist language of Convention No. 107 [and its approach were said to have become] ... unacceptable".[37] Its provisions, such as those of Article 2 that states, "*Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries*", were severely criticized. Consequently, ILO Convention No. 107 was revised and with this revision came a new understanding of the term "indigenous".

32 International Labour Conference, "Living and Working Conditions", Report VIII (2), (1956b), p. 9.
33 Ibid., pp. 42-43.
34 The United States, the United Kingdom, and Australia, among others, did not vote for this Convention.
35 The proposed convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries was adopted during the 26th Congress of the 14th session of the International Labour Conference. As a whole, it was adopted by 165 votes to 14, with 22 abstentions. See in International Labour Conference, "Records of Proceedings", 41st session (Geneva: International Labour Office, 1958), p. 417.
36 In 1986, the Committee of Experts on the Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107) had already issued a report underlining the need for a partial revision of the Convention. See in International Labour Conference, "Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)", Report VI (2), 75th session (Geneva: International Labour Office, 1988a), p. 1.
37 International Labour Conference, "Records of Proceedings", 75th session, (Geneva: International Labour Office, 1988b), p. 32/1.

A modern human rights-based understanding of the term "indigenous"

The need for protection of indigenous cultures, traditions, lands, and right to self-identification, together with the necessity to put in place mechanisms that would let indigenous peoples be consulted on issues that are important to them, can be considered as the leitmotiv behind the main amendments to ILO Convention No. 107 by its successor, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

With regard to the meaning of the term "indigenous", the drafting Committee of the new Convention suggested the following changes to ILO Convention 107:[38] Paragraph 1(a) of Article 1 of ILO Convention No. 107 was to be kept unchanged, apart from inserting the term "cultural" between the words "social" and "economic".[39] In paragraph 2 to Article 1, the Committee proposed that the words "members of tribal or semi-tribal populations" be deleted and replaced by either "peoples" or "populations". Finally, the Committee recommended the deletion of the entire paragraph 2 of Article 1 and its replacement by a statement on the principle of "self-identification".

The formulation of Article 1 of the new Convention (ILO No. 169) went through without major amendments.[40] However, the use of the term "peoples" in the definition of those to whom the Convention was meant to apply raised a major controversy, which was resolved by the adoption of a third paragraph to Article 1, stating that:

> *The use of the term **peoples**... shall not be construed as having any implications as regards the rights which may attach to the term under international law.*[41]

ILO Convention No. 169 was thus adopted to apply to:

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

(b) *peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state bounda-*

38 International Labour Conference, "Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)". Report IV (1), 76th session (Geneva: International Labour Office, 1989), p. 6.

39 Article 1(1a) of ILO Convention No. 107 speaks about, "*members of tribal or semi-tribal populations in independent countries, whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations ...*"

40 Amendments proposed by various delegates were minor, like the proposition by Norway to insert the terms "establishment of present states boundaries" before the word "colonization" in paragraph 1(b) of Article 1. This amendment was not adopted.

41 Article 1(3) of ILO Convention No. 169.

> *ries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.*

However, it was emphasized in paragraph 2 that:

> *Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.*

As one can see, the above Article 1, on the one hand, lists factors that could be considered elements regarding the scope of the term "indigenous" and, on the other hand, it emphasizes the principle of self-identification. Is this a contradiction? The Japanese government delegates to the drafting sessions of ILO Convention No. 169 considered that there was an apparent contradiction between the two first paragraphs of Article 1 and argued that "the scope of the Convention [was] being ambiguous with the introduction of the notion of self-identification as a fundamental criterion".[42]

One should not read a contradiction in the combination of self-identification and the list of indigenous peoples' characteristics. An adviser to the Danish government and, at the time, Rapporteur of the Drafting Committee, gave a hint of what the rationale might be behind this article. He made it clear that the drafters addressed the issue of which individuals are "indigenous" with an inclusive and comprehensive understanding. More specifically, he said that the Convention was meant to be a "significant expression of … concern for peoples who … suffered discrimination, injustice, dispossession and shameful treatment".[43]

This means that, contrary to the opinion that "ILO Convention No. 169 [has] succeeded in delimiting [its] scope of application", in terms of the persons it applies to (*ratione personae*),[44] it can be argued that what the drafters had in mind whilst outlining the provisions of paragraphs (a) and (b) of Article 1 was not to make a strict definition of the term "indigenous", but to offer guidance, to facilitate a better understanding of communities which could identify themselves as indigenous.

Andrew Gray, a well-known anthropologist and for many years Director of the International Work Group for Indigenous Affairs (IWGIA), shares the view that the drafting Committee of ILO No. 169 did not define the term "indigenous". He makes indeed a useful distinction between "defining [indigenous] ... and establishing procedures to exercise the right of self-determination". In other words, he does not understand the "guiding factors" as indirect definitions of indigenous, but as elements that help to comprehend which groups enjoy "the right of self-identification" protected by ILO Convention No. 169. Indeed, he argues that guiding factors must "be operational in order to serve international objectives and in particular to allow an understanding of the many different cultures; second, ... [it must] be functional to allow participation of the indigenous

42 See in International Labour Conference, "Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)". Report IV (2A), 76th session (Geneva: International Labour Office, 1989), p. 13.

43 International Labour Conference, "Records of Proceedings", 75th session (1988b), p. 31/1.

44 See Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", 12 *Harvard Human Rights Journal* 57 (1999), p. 112.

peoples; third, ... [it must] be flexible in order to be able to respond to new situations in the dynamic process of recognizing indigenous people's rights".[45]

Similarly, the opinion within the U.N. Working Group on Indigenous Populations is that a definition of the term "indigenous" would undermine the credibility of all the efforts made under the United Nations.[46] It is feared that "the diversity of the world's indigenous communities is such that no single definition is likely to capture the breadth of their experience and their existence, but may in fact exclude particular groups in its efforts to establish a defined category of indigenous peoples".[47] Indigenous communities themselves have also categorically rejected any attempt made by governments to define "indigenous peoples", stating that such matters "should be determined by the world's indigenous peoples themselves".[48]

This broad understanding of the term "indigenous", based upon guiding criteria combined with the principle of self-identification, is widely argued by numerous other international bodies. The World Bank, as discussed further in this book, underlines criteria such as attachment to ancestral territories or natural resources, being a culturally distinct community and the principle of self-identification.[49]

In her Working Paper on the Concept "Indigenous People", Ms. Erica-Irene A. Daes, then Chairperson Rapporteur of the U.N. Working Group on Indigenous Populations, emphasizes the following guiding criteria: (a) priority in time, with respect to the occupation and use of a specific territory; (b) voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity and; (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[50] Ms. Daes insists particularly on factors

45 Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Providence, R.I. and London: Berghahn Books, 1997), p. 15.

46 Erica-Irene A. Daes, "Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People—Working Paper on the Concept 'Indigenous People'". U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, pp. 20-21 (1996a). Available online at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.AC.4.1996.2.En?Opendocument (1996a). See also David Weissbrodt, S. Garrigues and R. Kroke, "An Analysis of the Forty-Ninth Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities", 11 *Harvard Human Rights Journal,* 221 (1998), p. 243.

47 Tony Simpson, *Indigenous Heritage and Self-determination*, IWGIA Document No. 86 (Copenhagen: IWGIA, 1997), p. 22.

48 Statement by the Aboriginal and Torres Strait Islander Commission at the 14th Session of the U.N. WGIP re: A Definition of "Indigenous Peoples" - 28 June 1996. U.N. Doc. E/CN.4/Sub.2/1996/2/Add.1, paras. 153-154. Available online at http://cwis.org/fwdp/Oceania/96-13037.txt

49 World Bank, Operational Directive 4.20 on Indigenous Peoples, of September 17, 1991 refers to "indigenous" as including any group attached to ancestral territories or to the natural resources, self-identifying and identified by others as members of a distinct cultural group, etc. Accordingly, this Operational Directive considers that "the terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes', ... are social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process ...".

50 Daes, "Working Paper on the Concept 'Indigenous People'", (1996a), para. 69. See also Erica-Irene A. Daes, "Paper presented at the Pacific workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples", Suva, Fiji, September 1996, p. 28 (1996b).

such as "experience of subjugation, marginalization, dispossession, exclusion or discrimination ... as essential if one is to comprehend the wide spectrum that the term indigenous could cover".[51]

The International Alliance of Indigenous and Tribal Peoples of the Tropical Forest insists upon another guiding element, namely the maintenance of practices and customs regulating the harmony between communities and the environment in which they live.[52]

The United Nations Declaration on the Rights of Indigenous Peoples does not define the term "indigenous" nor does it mention explicitly to whom it applies. This could be seen as one of its differences with previous instruments, including ILO Convention No. 169. Its Preamble does, however, state a number of main human rights violations that indigenous peoples tend to suffer from.

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

One could consider these and similar provisions of the Declaration as guiding factors for identification of indigenous peoples.

The *Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities* also enshrines the principle of self-identification and lists a number of characteristics. It states indeed that, "a strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us identify who indigenous peoples and communities in Africa are".[53] The Report also shows that the culture and ways of life of African indigenous peoples differ from those of dominant communities and that their survival depends strongly on access to ancestral lands.[54]

The Draft Declaration of the Organization of American States on the Rights of Indigenous Peoples can be regarded as also embracing this liberal understanding of the term "indigenous", since it only "defines the personal scope of the document, without, however, spelling out the meaning of the term 'indigenous peoples' itself".[55]

Several scholars have elaborated on this issue. James Anaya, for example, gives most emphasis to the issue of attachment to "ancestral lands in which [indigenous] live, or would like to live".[56] Patrick Thornberry speaks of an association with "a particular place, not an amorphous space".[57] In the same vein, Andrew Gray builds upon the fact that some continents can still experience "intergroups domination", "relocations", "transmigration" and similar movements of peoples, to argue for

51 Daes, "Working Paper on the Concept of 'Indigenous People'"(1996a), p. 22.

52 International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, *Indigenous Peoples, Forests and Biodiversity*, IWGIA Document No. 82 (London and Copenhagen: International Alliance and IWGIA, 1996), p. 100, but also pp. 76-7 and 80.

53 African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities—submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa" adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session*. (Banjul, The Gambia and Copenhagen: ACHPR and IWGIA, 2005), p. 87.

54 Ibid., p. 89.

55 Wiessner, "Rights and Status of Indigenous Peoples"(1999), p. 105.

56 Anaya, *Indigenous Peoples in International Law* (1996), p. 4.

57 Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002), p. 37.

a "pragmatic definition" which can be applied to all tribal, aboriginal and other groups, that consider their territorial base to be under external threat. He refers, for instance, to the case of more than three million non-native people relocated onto indigenous lands in West Papua by the Indonesian government.[58]

Thus, despite the pressure for a formal definition by many governments,[59] it remains almost unanimously accepted that self-identification should prevail on any other guiding factor.

Why do certain communities self-identify as "indigenous peoples"?

As a human rights concept, no community was born indigenous. Certain events prompted some communities to use the term "indigenous peoples" as a way to claim specific denied rights. Had those events never occurred anywhere, the concept "indigenous peoples", as currently understood in international human rights law, wouldn't have existed. There would be Maori, Aborigines, Mayas, Yanomami, Batwa, San, Maasai, Ogiek, Saami, Sengwer and others, but they would not need to self-identify as indigenous peoples, as a way to seek justice.

The concept of indigenous peoples is indeed a human rights construct aimed at redressing specific violations of rights linked to cultural identities, livelihoods, and cultural existence as community. Factors that make certain communities self-identify as indigenous peoples, as a way of seeking redress and justice, are to be found in most working definitions[60] or meanings of the term "indigenous peoples". They include "conquest", "settlements", "subjugation" "domination" and "colonisation".

Whether it is Latin America, North America, the Pacific, Europe, Asia or Africa, the above factors have several features in common, including:

- Establishing hierarchy between cultures or civilisations, leading to cultural annihilation and loss of identity by the victims;
- Stereotyping the way of life of the victims, as a strategy to justify denial or confiscation of rights;
- Denying equality for the sake of supremacy and confiscation of properties;
- Making the victims lose control over their lives, well-being, future and development;
- Leading to extreme poverty of the victims because of among other the loss of their lands and with it their livelihoods and knowledge.

The global indigenous peoples movement has links with the civil rights and the decolonisation movement due to its similar, if not identical, causes and effects.

58 Gray, "The Indigenous Movement in Asia" (1995), p. 51.

59 Russell L. Barsh, "Indigenous Peoples and the U.N. Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force", *Human Rights Quarterly,* 18, (1996), pp. 791-3 and 809.

60 ILO Convention No.169 in its Article 1 has a working definition of the term "indigenous peoples". The World Bank Operation Policy 4.10 on indigenous peoples does also contain a working definition. Similarly, the UN Study on the problem of discrimination against indigenous peoples by J Martinez-Cobo contains as well a working definition.

In most cases, discriminatory practices against indigenous peoples are grounded in racial ideologies and theories developed by the perpetrators, with a view to justifying their actions and ensuring success to their enterprise. In her paper "Colonialism and the Science of Race Difference", Dr. Deirdre Howard-Wagner,[61] depicts how scientific race theories helped the Australian colonial system control, marginalise, dispossess and exclude. She provides a detailed account of scientific racial theories that made most Australian believe Aborigines couldn't possibly own land, thereby believing "Australia was ...uninhabited".

Professor Joshua Castellino,[62] a leading scholar in international law, stresses that the *terra nullius* doctrine "took on racist overtones", referring to territories inhabited by people who were not socially and politically organised and therefore could not possibly own lands. Subsequently, the concerned communities' traditional way of using and occupying lands would equally be stereotyped or labelled as inconsistent with modern ways of life and therefore not be allowed to survive.

This explains partly why the U.N. Committee on Elimination of Racial Discrimination (CERD) has adopted a specific General Recommendation XXIII on indigenous peoples, indicating among others that

> *[t]he situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination."*

The General Recommendation calls upon states to, among others,

> *[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;"*

The CERD refers widely to indigenous peoples' lands rights in this General Recommendation for a reason. Often, subjugated indigenous peoples suffer an attack on their cultural identities through land dispossession. As explained by Darlene M. Johnston,[63] in her essay on "Native Rights as Collective Rights: A Question of Group Self-Preservation", land is for indigenous peoples their collective identity, and people, land and cultures are indissolubly linked. Indigenous cultures are often not allowed to survive, as they are a constant reminder of the perpetrated injustices.

But, how relevant and applicable are all these principles and norms of international law in Africa?

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61 Deirdre Howard-Wagner, "Colonialism and the Science of Race Difference", in TASA/SAANZ Joint 2007 Conference Proceedings *Public Sociologies: Lessons and Trans-Tasman Comparisons,* edited by B. Curtis, S. Matthewman and T. McIntosh (Auckland: University of Auckland, 2007).

62 Joshua Castellino, "The Rights to land, international law and indigenous peoples", *International Law and Indigenous Peoples*, edited by Joshua Castellino and Niamh Walsh (Boston: Martinus Nijhoff Publishers, 2005), p.92.

63 Darlene M. Johnston, "Native Rights as Collective Rights: A question of group self-preservation", in *The Rights of Minority Cultures,* edited by W. Kymlicka (New York: Oxford University Press, 1999), pp.193-4.

CHAPTER II
RELEVANCE AND APPLICABILITY OF THE CONCEPT "INDIGENOUS" IN CENTRAL, EASTERN, AND SOUTHERN AFRICA

As already mentioned, the African continent has now domesticated the concept "indigenous peoples" with the adoption by the African Commission on Human and Peoples' Rights of the Report of its Working Group of Experts on indigenous populations/communities.

It is often asserted that "far too little is known of the indigenous groups in Africa"[64] or that "in Africa ... it is very difficult to come across communities which retain all their pristine tribal characters".[65] Others have even said that all Africans are indigenous to the continent. Overall opinions on indigenous peoples in Africa are diverse and on occasions contradictory, revealing that "Africa poses thorny problems of definition, because most Africans consider themselves to be indigenous peoples who have achieved decolonisation and self-determination".[66] The South African judge Gildenhuys, in his ruling in the *Richtersveld* case, asked himself the question "whether the doctrine of indigenous title forms part of [South African] law" and answered that, to his "knowledge, [the notion of aboriginal title had] never been recognised in any reported court decision".[67]

The definition of the term indigenous by the Martínez Cobo Report to the U.N. Sub-Commission on the Prevention of Discrimination of Minorities (1986) has been criticised for, among other things, "potentially leaving out indigenous peoples in Africa, Asia, and other places that are oppressed by equally 'original' inhabitants of neighbouring lands that have now become the dominant groups of their society".[68]

Alfonso Martínez in his study on Treaties criticizes the Cobo Report for "tend[ing] to lump together situations that ... should be differentiated because of their intrinsic dissimilarities". According to him, "these dissimilarities hinge on a number of historical factors that call for a clear distinction to be made between the phenomenon of the territorial expansion by indigenous nations into adjacent areas and that of the organized colonization, by European powers, of peoples inhabiting,

64 Wiessner, "Rights and Status of Indigenous Peoples" (1999), p. 89.

65 Benedict Kingsbury, "Indigenous Peoples as an International Legal Concept", in *Indigenous Peoples in Asia*, edited by R. H Barnes, A. Fray and B. Kingsbury (Ann Arbor: Association for Asian Studies Inc., 1995), pp. 22-3.

66 Russell L. Barsh, "The World's Indigenous Peoples" (2000). Available at Calvert Investment Online at http://www.calvert.com/pdf/white_paper_barsh.pdf

67 *Richtersveld and Others v. Alexkor Ltd. and Another*, 2001 (3) SA 1293 (LCC), p. 46.

68 Wiessner, "Rights and Status of Indigenous Peoples" (1999), p. 111.

since time immemorial, territories on other continents". He goes on to say that "many representatives of what [is described] as state-oppressed groups/minorities/peoples in Africa and Asia have brought their case before the Working Group on Indigenous Populations for lack of other venues to submit their grievances" but in his view "post-colonial Africa and Asia autochthonous groups/minorities/ethnic groups/peoples ... cannot ... claim for themselves, unilaterally and exclusively, the 'indigenous' status in the United Nations context" but "should be analysed in other fora of the United Nations than those that are currently concerned with the problems of indigenous peoples, in particular in the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities." Martínez concludes that "the term 'indigenous'—exclusive by definition—is particularly inappropriate in the context of the Afro-Asian problématique and within the framework of United Nations activities in this field."[69]

What does the term "indigenous peoples" mean in Africa?

The term "indigenous peoples" is a human rights construct, which has been contextualised for Africa by the regional human rights body, known as the African Commission on Human and Peoples' Rights (hereafter the African Commission).

In post-colonial Africa, the term "indigenous peoples" does not mean first habitants of a given land or country. Instead, the concept refers to a limited number of African communities, whose cultural identities face extinction as a result of prejudiced views of their livelihoods and ancestral ways of and occupying using lands. These are mostly hunter-gatherers and nomadic pastoralist communities.

In its conceptual Report of 2005, the African Commission concludes that

> The term indigenous peoples is a term through which those groups – among the variety of ethnic groups within a state ... who experience particular forms of systematic discrimination, subordination and marginalisation because of their particular cultures and ways of life and mode of production... It is a term through which they can voice the human rights abuses they suffer from - not only as individuals but also as groups or peoples. If genuinely understood in this way, it is a term through which the concerned groups can seek to achieve dialogue with the governments of their countries over protection of fundamental individual and collective human rights.[70]

This human rights-based meaning of the term "indigenous peoples" should not be confused with its etymological or generic one, presented in most dictionaries as meaning "originating from", and which comes to the minds of most people in Africa when they hear the word indigenous peoples. In its conceptual Report of 2005, the African Commission agrees also that "definitely all Africans

69 Alfonso Martínez, "Study on Treaties, Agreements and Other Constructive Agreements between States and Indigenous Populations" (U.N. Doc/E/CN 4/Sub 2/1999/20, 22 June 1999), paras. 88, 90 and 91. Available at: http://www.ohchr.org/EN/Issues/IPeoples/Pages/SeminarTreaties.aspx

70 ACHPR, *Report of the Working Group of Experts* (2005), p. 102.

are indigenous as compared to the European colonialists who left all of black Africa in a subordinate position",[71] but this is not the meaning of the term "indigenous peoples" under African international human right law.

The types of particular discriminations and historical injustices that lead some African communities to claim indigenous status, as understood by the human rights framework, include the fact that most post-colonial African land laws were based on a premise that for traditional use and occupation of lands to be legally recognised and protected, it needed to be visible, permanent and sedentary. It was never taken into account that certain African traditional communities use and occupy lands almost invisibly and in a non-sedentary way, leaving behind almost no sign. These are mostly hunter-gatherers and pastoralist communities that have a nomadic lifestyle, move around large areas, and whose livelihoods are based on hunting, gathering and continuing search for pastures, and thereby cannot be tied to one fixed place. The lands traditionally used and occupied by these communities looked thus as if they were unoccupied, empty, unused or belonging to no-one (*terra nullius*). Consequently, these lands were either declared state-owned, given to private owners or simply taken by neighbouring dominant communities. This explains partly why most lands claimed as ancestral lands by communities that self-identify as indigenous peoples in Africa (mostly hunter-gatherers and nomadic pastoralists) are either public lands, protected areas, privately owned or occupied by other communities.

Furthermore, negative ideologies and discriminatory views underpin the land dispossessions suffered by hunter-gatherers and nomadic pastoralists. Nomadic lifestyle, relentless search for pastures, hunting and gathering were and continue to be stereotyped as backward, outdated, and unfriendly to national development and destined to disappear or fully integrated into the mainstream sedentary way of life construed around cropping and erecting durable structures on privately owned lands. Yet, hunting and gathering as well as nomadic pastoralism are livelihoods like any others that should enjoy equal consideration and protection. In the same vein, the African Commission concluded also that "the favouring of settled agriculture over hunting, gathering and nomadic cattle herding has been instrumental in both marginalising and stigmatising some people and inspiring them to identify as indigenous groups".

In a number of African countries, certain aspects of hunting, gathering and nomadic pastoralism have been transformed into criminal offences. In other cases, racial ideologies are often used to deny members of these African communities the right to human dignity or to be considered as full human beings entitled to all rights, including to lands. In a 2009 Report by the African Commission it is shown that the

> [P]ractice of "Pygmies' masters" still persists in [some African countries]. This consists of an individual or a family holding Aka individuals or entire Aka families in their home or on their lands. The beneficiaries of this practice often talk about the Aka as "my Pygmies", implying a proprietary relationship.[72]

71 Ibid., pp. 86-87.

72 ACHPR, Report on Regional Sensitization Seminar on "The Rights of Indigenous Populations/Communities in Central Africa", 13 – 16 September 2006. (Banjul & Copenhagen: ACHPR & IWGIA, 2009), p. 15.

Some of these "Pygmies" have been passed down in the families as inheritance to their current "masters", whilst other "masters" have returned from the forests accompanied by "Pygmies" who then become "theirs". Can one expect such a "master" to accept that "their pygmies" can own land on the same footing as themselves?

Professor Sidsel Saugestad, a leading anthropologist who has studied the San peoples of Botswana for several decades, indicates that San are often referred to in Botswana as Stone Age people.[73]

The international human rights regime on indigenous peoples is almost the only existing framework designed to redress social exclusion based on historical injustices, such as loss of ancestral lands and collective identity, unrecognised livelihoods, disregarded traditional economies, cultures and ways of life.

Departing from the above human rights-based meaning of the term "indigenous peoples in Africa", the African Commission came to the following key concluding remarks:

1. Indigenous peoples in Africa does not mean first habitants of a given region or country;
2. Indigenous peoples are not found in all African countries because the historical injustices mentioned above do not occur in all of them, and consequently, not all African can claim to be indigenous under the human rights-based meaning of the term;
3. Indigenous peoples in Africa do not seek special or new rights. Instead, they demand no more than enjoyment of all rights on an equal footing with their fellow nationals. There is ample evidence confirming that indigenous peoples rate of access and enjoyment of several are bellow national averages;
4. Indigenous peoples in Africa do not seek the right to self-determination for the purpose of secession. On the contrary, the concept is reputed to be a tool for inclusive governance, conflict resolution and sustainable development;
5. Indigenous peoples in Africa are not just minorities, considering that in many African countries several ethnic groups can qualify as minorities, a concept which is also growing in scope to include religious, linguistic, sexual orientation and other groups.[74]

The contextualisation of the concept "indigenous peoples" by the African Commission has enhanced dialogue and eased tensions between several African states and sections of their national populations that self-identify as indigenous peoples. It has also started to inspire domestic legal and policy frameworks on the continent, with a view to ensuring equality. In 2011, the Republic of Congo (Congo-Brazzaville) became the first African country to adopt a specific law on indigenous peoples targeting specifically "pygmies" peoples. Known as Law No. 5-2011 of 25 February 2011 *"portant sur la promotion et la protection des droits des populations autochtones"* (on the Promotion and Protection of Indigenous Populations). This 48 articles (sections)-long law is entirely devoted to indigenous peoples estimated to be 43,400 in Congo. It covers a wide range of rights, including on lands, health, employment, education, culture and participation in public affairs.

73 Sidsel Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance and the First People of the Kalahari* (Tromsoe: Faculty of Social Science, University of Tromsoe, 2001), p. 100ff.

74 See ACHPR, *Report of the Working Group of Experts* (2005).

In 2010, the Central African Republic became the first African State to ratify the ILO Convention No.169 on indigenous and tribal peoples. Numerous other African countries, including Namibia, Cameroon, DR Congo, Morocco, Kenya and Burundi have either adopted specific policies, programmes, institutions or ensured that communities that self-identify as indigenous people are represented in key political institutions, such as Parliament. Cameroon, Kenya, DR Congo and Gabon have adopted indigenous peoples planning framework or development programmes in compliance with the World Bank Operational Policy 4.10 on indigenous peoples that requires safeguard standards for any World Bank-funded project likely to have an impact on indigenous peoples.

As shown previously, ILO Convention No. 169, the U.N. Declaration and the Report of the African Commission on Human and Peoples' Rights provide for the principle of self-identification and a set of guiding factors for identification, which should be understood as elements to facilitate a better understanding of the situation of indigenous peoples. The most important are:

- Self-identification;
- Non-dominant status within a wider society;
- History of particular subjugation, marginalisation, dispossession, exclusion, or discrimination;
- Land rights prior to colonization or occupation by other African groups; and
- A land-based culture and willingness to preserve it.

In the following sections, this chapter examines the applicability of the principle of "self-definition"[75] and other "guiding factors" regarding indigenous peoples in Africa, in general, and in some parts of the continent, in particular. It also touches upon the question of whether or not there should be a formal definition of the term "indigenous".[76] But it does not, unlike several other studies,[77] intend to come up with a working definition.

Self-identification

The principle of "self-identification", as articulated in Article 1.2 of ILO Convention No. 169 and Article 3 of the U.N. Declaration on the Rights of Indigenous Peoples, recognizes to any community or peoples the freedom to define itself/themselves as "indigenous". In Central, Eastern and Southern Africa, numerous communities self-identify as indigenous peoples.[78] These include in

75 Article 1.2 of ILO Convention No. 169 reads: "*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply*".

76 For more on opinions on as to whether or not a definition of the terms indigenous is imperative, see Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy", *92 The American Journal International Law* (1998), p. 415ff.

77 Several studies, such as the Martínez Cobo Report, have their own working definition. See, e.g., the World Bank OP 4.20 (1991). See also Gray, "The Indigenous Movement in Asia" (1995), pp. 37-8.

78 African Commission, *Report of the Working Group of Experts* (2005), pp. 15-19.

Central Africa, the "Pygmies"[79] of the African tropical forests and the Mbororo. In Eastern Africa, there are the Hadzabe, Akie, Ogiek, Yaaku, Sengwer, Maasai, Samburu, Turkana, Barabaig, Pokot, Orma, Rendille, Karamajong, and numerous others. In Southern Africa there are the San, the Nama and the Himba. Representatives of these communities are active through various platforms such as the Indigenous Peoples of Africa Co-ordinating Committee (IPACC),[80] and at several regional/or international meetings on indigenous issues in Africa and world-wide.[81] The following few illustrative examples show how these communities or peoples exercise this freedom.

The Central African indigenous hunter-gatherers, known generically as the "Pygmies", self-identify as indigenous peoples. Depending on sources, they are estimated to number between 350,000 and several millions.[82] In a letter addressed to the President of their country, the Batwa "Pygmies" of Rwanda not only state their aboriginal title over a number of forests, but also call upon their government to address their claim to lands on the basis of ILO Convention No. 169 and other international instruments, which provide for the rights of indigenous peoples.[83] Because of claiming indigenous status, the Batwa of Rwanda have experienced difficulties in their relationship with the government, which considers the concept "indigenous" as a threat to national unity. Not only Batwa representatives from Rwanda and Burundi, but also Mbuti, Bagyeli, and Baka representatives from the Democratic Republic of Congo and Cameroon have been regular attendants at the sessions of the former U.N. Working Group on Indigenous Populations, the U.N. Permanent Forum on Indigenous Issues, and the African Commission on Human and Peoples' Rights as well as at several other international gatherings. At the 16th session (1998) of the U.N. Working Group on Indigenous Populations, for example, members of the Batwa community from Rwanda and the Democratic Republic of Congo together stated that their communities consider themselves as the first nations of their respective countries,[84] an assertion that is widely accepted.[85] The consistent work of these groups at the United Nations level has made it possible that, in one of the final reports of the fifty-seventh session of the U.N. Commission of Human Rights, it was recommended that:

79 "Pygmy" is a generic term for a large number of indigenous groups living mostly in Central Africa. As some of these groups find the term derogatory and prefer to use their own names, it is now common to write "Pygmy" with inverted commas.

80 The IPACC was created in 1997 by a number of African indigenous peoples. This network of indigenous organizations includes among its members organizations representing the San of Southern Africa, the Batwa of Central Africa, the Maasai, the Barabaig and the Ogiek of Eastern Africa, and the Tuareg and the Ogoni from West Africa. See Web site at http://www.ipacc.org.za/represent.html

81 In September 2001, for example, representatives from Maasai, Batwa, Ogiek, and several other communities that consider themselves indigenous took part in a conference on Indigenous and Protected Areas in Africa, held in Rwanda. Each one of these communities restated in its presentation its indigenousness as the basis for its land claims.

82 There is no comprehensive census of the indigenous Pygmy peoples, and their number has always been based on estimates. While earlier estimates for the Democratic Republic of Congo (DRC) said around 250,000, recent reports put the number to 660.000 (almost 1 per cent of the total DRC population) and civil society organizations even argue that there may be as many as 2 million (3 per cent of the population). See, e.g., World Bank, "Democratic Republic of Congo - Strategic Framework for the Preparation of a Pygmy Development Program" (2009); The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA, 2012), p. 461.

83 The letter was written by a member of the Batwa community of Rwanda and head of a platform of Batwa. See Web site of Héritiers de la Justice at http://www.heritiers.org/caurwaletpresi.html

84 See Web site of Héritiers de la Justice: http://www.heritiers.org/kapupugeneva.html

85 Jerome Lewis, *The Batwa Pygmies of the Great Lakes Region* (London: Minority Rights Group International, 2000), p. 6.

> The Governments of Burundi, the Democratic Republic of the Congo, Rwanda, and Uganda should recognize the Batwa as indigenous peoples and demonstrate their commitment to respecting that people's rights by fulfilling the obligations they had entered into under the African Charter on Human and Peoples' Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. They should also ratify and implement ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and support the adoption of the Draft Declaration on the Rights of Indigenous Peoples.[86]

The Mbororo is another community that identifies itself as indigenous. They are predominantly pastoralists and live in several African countries, notably Cameroon, Nigeria, Chad, and the Central African Republic. In all these countries, they ground their indigenous status on a particular way of life (nomadic or semi nomadic pastoralism) threatened by other communities' dominant way of life.[87] In numerous national, regional, and international fora, this community has claimed to suffer particular discriminations related to its wish to maintain its way of life.

In Eastern Africa, the Maasai (estimated to number well over a million) self identify themselves as indigenous peoples to lands stretching over Kenya and Tanzania.[88] They could be considered as amongst the most active Eastern African communities with regard to claiming indigenous status and all this involves, including rights over resources. As early as 1912, the Maasai of Kenya were already in court to proclaim and protect their indigenous lands against the colonial government. Despite ruling against the Maasai plaintiffs, the court recognized that they were sovereign over their lands.[89]

The Maasai have also used regional and international stages to proclaim their indigenousness. At the 1999 "Conference on Indigenous Peoples from Eastern, Central, and Southern Africa", held in Arusha (Tanzania),[90] a representative of the "Maa Development Association"—a Kenyan Maasai development organisation—stated: "The Maasai comprise some of the indigenous peoples of East Africa".[91] On the same occasion, a representative of the Maasai community of the Kiteto District in the Arusha area of Tanzania declared: "We are the people of South Maasai Steppes, we live on semi-arid land. We value our livestock and natural vegetation with relative resources ... we struggle to protect our land, which is home to all the habitats we know

86 U.N. Commission on Human Rights, Summary Report, 57th Session (2001), para. 30. U.N. Doc. E/CN.4/2001/SR.15, 2 April 2001. Available at http://www.unhchr.ch/huridocda/huridoca.nsf

87 Albert Kwoko Barume, "Etude sur le cadre légal pour la protection des peuples indigènes et tribaux au Cameroun" (Genève: Organisation internationale du travail, 2005a), p. 25. See also the African Commission's *Report of the Working Group of Experts* (2005).

88 In Kenya, the Maasai live in the areas of Narok and Kajiado in the southern part and Nakuru and Laikipia in the central part of the country and total according to the 2009 census some 840,000. The Maasai of Tanzania are mainly found in the areas of Ngorongoro, Simanjiro, Kiteto, and Oldoinyo le Engai, and estimations put their number at 450,000. See Web site of Maasai-Infoline: http://maasai-infoline.org/TheMaasaipeople.html

89 *Ol le Njogo and 7 Others v. The Honorable Attorney General and 20 Others*, Civil Case No. 91 of 1912 Court of Appeal for Eastern Africa [1913], 5 E.A.L.R. 70. Text of judgment (May 1913) available online at http://www.geocities.com/olmorijo/land_case.htm

90 This conference was organized by PINGOs Forum—a Tanzanian umbrella organization for pastoralists and hunter-gatherers—and the International Work Group for Indigenous Affairs (IWGIA).

91 Mary Simat, "The Situation of the Maasai Women", *Indigenous Affairs* 2/1999, pp. 39-39. Copenhagen: IWGIA.

in our ecosystem".[92] Similarly, at a conference held in Kigali/Rwanda on Indigenous Peoples in Conservation Areas, representatives of Maasai communities living in the Ngorongoro area of Tanzania showed how their communities considered themselves as indigenous to the Serengeti.[93] Maasai representatives have also been regular attendants of numerous relevant gatherings, including the annual sessions of the former United Nations Working Group on Indigenous Populations, the U.N. Permanent Forum on Indigenous Issues, and the African Commission on Human and Peoples' Rights, as reported by several documents.[94]

According to the 2009 census, the Ogiek of Kenya number 78,000 people.[95] Many self-identify as indigenous to the Mau Forests, which they consider as their motherland and which they have occupied and used since time immemorial.[96] As noted before, they have been in court against the Kenyan government on a number of occasions, each time claiming to be indigenous to the Mau Forest. In a Memorandum to the Kenyan Parliament dated July 1996, the Ogiek claimed to have a "birth right … [on their] ancestral land in the Mau Forest".[97] Similarly, in 2000, they made a submission to the Njonjo Land Commission, in which they stated "our history has shown that we are environmentally friendly. Our land tenure system is also environmentally friendly …" Referring to the Memorandum, they further asked the members of Parliament to "help us live in our ancestral land and retain both our human and cultural identities as Kenyans of Ogiek origin".[98] Like many other groups, the Ogiek are regular attendants of almost all indigenous peoples-related meetings and gatherings, occasions that they also use to claim their indigenous status.

In Southern Africa, the indigenous hunter-gatherers, known generically as the San and whose number is estimated at around 107,000,[99] live scattered over several countries but are, nevertheless, seen as constituting one culturally homogeneous community that considers the savannahs and semi-arid areas of Southern Africa, including most of the Kalahari, as their ancestral land.

The San have been rather vocal about their indigenous status and filed several land claims. In a case presented before the South African government on the basis of the Land Restitution Act, the

92 Statement by Saruni Ndelelya representing Kinnapa Development Programme, a local non-governmental organization operating in the Kiteto District of Arusha in Tanzania, at the Conference on Indigenous Peoples of Eastern, Central, and Southern Africa, Arusha/Tanzania, January 18-22, 1999 (unpublished).

93 M. Kaisoe, and W. Ole Seki, "The Conflict between Conventional Conservation Strategies and Indigenous Systems: The Case Study of Ngorongoro Conservation Area" in *Indigenous Peoples and Protected Areas,* edited by John Nelson and Lindsay Hossack (Moreton-in-Marsh, UK: Forest Peoples Programme, 2001), p. 141.

94 Maasai representatives, for example, attended the 13th, 17th, and 18th sessions of the U.N. Working Group on Indigenous Populations. See reports of the U.N. Working Group on Indigenous Populations on the Web site of the United Nations High Commission for Human Rights: http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/WGPopulations%20En?OpenDocument&Start=1&Count=15&Expand=3.

95 See KNBS 2009 Population and Housing Census. Ethnic affiliation. http://www.knbs.or.ke

96 Ogiek Welfare Council, Memorandum submitted to all members of Parliament, July 1996, Nairobi Kenya.

97 Ibid.

98 The Ogiek submission is available online at http://www.ogiek.org/report/ogiek-app1.htm. The Land Review Commission, known as the Njonjo Land Commission, was set up by the Kenyan government in 2000 to assess, amongst other things, land claims by various communities. The Commission was named after its Chairperson, Charles Njonjo, member of the Kenyan Parliament.

99 African Commission, *Report of the Working Group of Experts* (2005), p. 16.

‡Khomani San stated that they were the original occupants of the Kalahari and declared that "the San would cease to exist as distinct peoples unless a means is found to reverse the process that had evicted them from their lands".[100] The San living in Botswana have also attempted to have their indigenous status recognized and consequent rights to lands set aside for them.[101] San representatives have attended several sessions of the U.N. Working Group on Indigenous Populations and other relevant fora, on all occasions stating their indigenousness.[102] Since 1996, the San of Southern Africa have been represented by their own networking organisation, WIMSA (Working Group of Indigenous Minorities in Southern Africa), which coordinates the activities of elected San Councils in Botswana, Namibia and South Africa.

The Himba, a community that lives on lands stretching over northern Namibia, consider themselves as indigenous to these lands, which are affected by several development plans, including the building of a hydro-power dam.[103] Mr. Kapika, a local Himba leader speaking at a village meeting in 1995, stated, in relation to the Epupa Dam: "We do not want it. This is our land".[104] The following year, a group of members of this community addressed a letter to the Namibian government re-stating their indigenous claim to the lands of the Epupa area: "The area which will be affected is the area where our households are, there are people living all over—it is impossible for us to give this land away! It is where the graves of our ancestors are—we cannot give this land away".[105]

The Himba have also claimed their status as indigenous at various regional and international gatherings. One of their representatives to a seminar on "Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples" held in Arusha/Tanzania in May 2000, re-stated his community's indigenousness. Similar statements have also been made by Himba delegates at sessions of the United Nations Working Group on Indigenous Populations.[106]

The principle of self-identification is paramount for indigenous peoples and it appears to be upheld by states' practice in Africa. Indeed, as it will be shown later, an increasing number of African countries

100 Roger Chennells, "The ‡Khomani San of South Africa", in *Indigenous Peoples and Protected Areas in Africa: From Principles to Practice,* edited by J. Nelson and L. Hossack (Moreton-in-Marsh, UK: Forest Peoples Programme, 2003), p. 276.

101 Robert K. Hitchcock, "Background Notes on the Central Kalahari Game Reserve and Ghanzi Land and Resources" (n.d.). See Web page of the Kalahari Peoples' Fund, http://www.kalaharipeoples.org/documents/ghanzi.htm

102 The San were represented, for example, at the 16th, 17th and 18th session of the U.N. Working Group on Indigenous Populations.

103 Andrew Corbett, "A Case Study on the Proposed Epupa Hydropower Dam", *Indigenous Affairs*, Dams, Indigenous Peoples and Ethnic Minorities, no. 3-4 (Copenhagen: IWGIA, 1999), p. 80. See also Web site of the International Rivers Network : http://www.internationalrivers.org/resources/epupa-campaign-materials-3667

104 See Irin News, at http://www.irinnews.org/Report/76311/NAMIBIA-Dam-will-mean-our-destruction-warn-

105 The full text of this statement by the Himba community to the government of Namibia can be accessed on the Web site of the International Rivers Network, http://www.internationalrivers.org/resources/epupa-hydropower-scheme-%E2%80%93-public-hearing-4331

106 Seminar on "Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples" held in Arusha, United Republic of Tanzania on 13-15 May 2000. This seminar was co-organized by the U.N. Working Group on Indigenous Populations and the U.N. Working Group on Minorities and endorsed in resolution 1999/20 of the Sub-Commission on the Promotion and the Protection of Human Rights. U.N. Doc. E/CN.4/Sub.2/AC.5/2000/WP.3, 18 May 2000.

tend not to require a formal definition as a precondition for addressing human rights violations facing such communities.

Non-dominant sector of society

One of the characteristics of indigenous peoples is that they belong to the non-dominant sector of society. There are a number of factors that may contribute to this situation, among others, their numerical inferiority, their ways of life and social organization, and their distinctive cultures. It should be noted, however, that indigenous peoples, as a matter of fact, sometimes constitute a majority but are nonetheless dominated by a minority group that controls the state apparatus and decides which rules and norms should apply in the country. This was, until recently, the case in Bolivia and still is the case in Guatemala.[107] Belonging to a non-dominant sector, therefore, also has to do with exclusion based on racial discrimination, cultural discrimination (customs, languages, religions, etc.) and the exercise of power (military, political, economic, etc.) by an economic and political elite, often the direct descendants of the colonizers.

Are all these factors relevant in the case of Africa?

Numerical non-dominance

The "non-dominant" guiding factor is often explained by the numerical inferiority of the indigenous peoples. With regard to Central, Eastern, and Southern Africa, this may have some bearing since most African indigenous peoples are numerically small in the countries in which they live, as illustrated by the following few examples.

In Central Africa, the "Pygmies" of the African tropical forests, which stretch over Cameroon, Central African Republic, Gabon, Equatorial Guinea, the Republic of Congo, the Democratic Republic of Congo, Rwanda, Burundi, and Uganda, have been estimated to total between 350,000 and more than a million,[108] whereas altogether these countries have a population exceeding 154 million people. National censuses in these countries have hitherto seldom provided ethnically disaggregated population data and the number of indigenous people has usually been based on estimates. This is no longer always the case and ethnically disaggregated data is beginning to appear. In Uganda, for instance, the 2002 census registered less than 7,000 Batwa or 0.03 per cent of the population;[109] in Congo Brazzaville, statistics on the country's autochthonous population have recently become available too, and show that the indigenous population numbers 43,400 people and thus represents 1.2 per cent of the total national population of 3,697,490 (2007);[110] in Rwanda, the

107 In December 2005, Evo Morales, who identifies himself as indigenous, became the president of Bolivia.

108 See footnote 82.

109 See Uganda Bureau of Statistics (2002), "The 2002 Uganda Population and Housing Census, Population Composition", October 2006, Kampala, Uganda at http://www.ubos.org

110 See Web site of the Congolese National Institute of Statistics (INS) at http://www.cnsee.org/

Batwa are believed to represent about 0.4 per cent of the whole population, the two other ethnic groups (the Tutsi and the Hutu) making up the remainder of the national population estimated at approximately 10.7 million.[111]

In Kenya, the latest census (2009) shows that the total population ascends to more than 38 million, and that the largest groups are the Kikuyu (17 per cent), the Luhya (13 per cent), the Kalenjin (12 per cent), and the Luo (10 per cent). The various indigenous hunter-gatherer and pastoralist groups total approximately 6 million or 15 per cent of the total population. The Maasai are estimated to be 840,000 and the Ogiek 78,000, while the Turkana number almost a million and the Pokot 635,000.[112]

In Tanzania, with a population of well over 44 million,[113] the Hadzabe are estimated to number between 1,500 and 3,000 people depending on the sources[114] and the Maasai some 450,000, whereas the largest ethnic group, the Sukuma, is estimated to have more than 5 million people.

In Southern Africa, the San are estimated to total around 107,000 with approximately 50,000 San in Botswana, 40,000 in Namibia, 4,500 in South Africa, 1,300 in Zimbabwe, 9,700 in Angola and 1,600 in Zambia.[115] In all these countries, the San are numerically small communities. In the case of Namibia, for instance, they only represent 2 per cent of the national population, estimated at 2.1 million people.[116] The Himba of Namibia are believed to number some 15,000.

This numerical inferiority could explain why indigenous peoples are so often regarded as minorities,[117] a concept that has been much debated.[118]

111 Estimates from 2011. See Unrepresented Nations and Peoples Organization (UNPO), Alternative Report submitted to the UN Committee on the Elimination of Racial Discrimination at the 78th Session during the consideration of the 13th – 17th Periodic Reports of the Republic of Rwanda (January 2011) at UNPO Web site http://www.unpo.org

112 As opposed to the previous census (1999) the 2009 census includes data on ethnic affiliation. See Web site of the KNBS "2009 Population and Housing Census" (2011): http://www.knbs.or.ke/

113 Projection for 2010 based on 2002 Census (IFAD, Rural Poverty Portal). A national census was held in 2012 but its final results have not been publicized yet.

114 See Andrew Madsen, The Hadzabe of Tanzania: Land and Human Rights for a Hunter-Gatherer Commu-nity. IWGIA Document No. 98 (Copenhagen: IWGIA, 2000), p. 14; and PINGOs Forum "A Report on Hadzabe Livelihood (2010) at PINGOs Forum Web page: http://www.pingosforum.or.tz

115 African Commission, *Report of the Working Group of Experts*, (2005), pp. 16-17

116 According to National Census 2011 - Preliminary results, at http://www.gov.na/documents/10180/34849/2011_Preliminary_Result.pdf/0ea026d4-9687-4851-a693-1b97a1317c60

117 There exist several distinctions between indigenous and minorities. Indigenous communities are sometimes seen as a special category of minorities. See, for instance, Athanasia S. Akermark, *Justification of Minority Protection in International Law* (London: Kluwer, 1997), p. 20; and Will Kymlicka and Will Norman (eds.) in *Citizenship in Diverse Societies* (Oxford and New York: Oxford University Press, 2000). The latter two authors argue in their "Introduction" (pp. 18-24) that there are four types of minorities: firstly, "national minorities", which include stateless nations and indigenous peoples; secondly, "immigrant minorities", which include people with citizenship or rights to become citizens, people without rights to become citizens ("metics"), and refugees; thirdly, "religious groups", including "isolationist" and "non-isolationist" religious groups; and fourthly *sui generis* groups, which include "African Americans, Roma (gypsies), Russians in former Soviet states, etc." These various opinions, which consider indigenous peoples as a type of minorities, also reveal that the scope of the concept "minorities" has become so broad that it may no longer suit the special nature of indigenous peoples' claims and rights.

118 Several distinguished scholars have expanded on the issue of minority rights. See, for instance, Geoff Gilbert, "Minority Rights in Europe", *Netherlands Yearbook of International Law*, Vol. XXIII, 1992, pp. 69-74; Leslie Green, "Internal Minorities and their Rights", in *Group Rights,* edited by J. Baker (Toronto: University of Toronto Press, 1994), p. 105; Dave Ingram, *Group Rights* (Kansas: University Press of Kansas, 2000), p. 107. This last author distinguishes, for example, a gathering of individuals with "societal culture" from those without. With regard to the former, he refers to

However, it has also been argued that the term "minorities" cannot be regarded as being broad enough to provide protection for some groups that require particular attention, such as indigenous communities.[119]

Two factors could be considered as the main differences between "minorities" and "indigenous". First, minorities' rights are generally framed in individual terms,[120] whereas those of the indigenous are, or should be, worded in collective terms.[121] Minorities' rights are indeed individual rights that can be enjoyed or exercised as a group. Secondly, and perhaps more importantly, unlike minorities, the "indigenous" are characterized particularly by their strong cultural bond to their lands, without which they would not exist as a cultural entity and their lives would be in great danger. John Borrows calls this tie a "landed citizenship", which he defines as "loyalties, allegiance, and affection related to the land … the water, wind, sun, and stars are part of this federation … [Indigenous] teachings and stories form the constitution of this relationship, and direct and nourish the obligations this citizenship requires".[122]

Furthermore, minorities, either linguistic, ethnic or religious, are often identified with regard to a given state in which they are numerically small. Indigenous communities tend not to identify themselves with a given state but with a given land area that can be demarcated within a state or region. Indigenous peoples claim their rights on the basis of social factors that existed long before the "State" as an institution. In other cases, indigenous peoples identify themselves with a whole region comprising different states. This is, for instance, the case of the "Pygmies" in Central Africa. In Eastern Africa, many Maasai continue to resist the Kenyan and Tanzanian governments' efforts to try and integrating them, by holding two identity cards, because members of this community identify themselves more with their lands, which stretch over the two countries, than with the two states.

Non-dominant ways of life, societal model and other factors

In Africa, the non-dominant characteristic of indigenous peoples has also something to do with their ways of life as hunter-gatherers and pastoralists,[123] which increasingly are threatened by the dominant way of life based on agriculture, industrial farming and modern development. As Hugh Brody

indigenous communities, whereas for groupings of individuals without a "societal culture" he refers to such groups as immigrants, refugees, guest workers, and former colonizers.

119 See, for instance, Henry J. Steiner and Philip Alston, *International Human Rights in Context* (New York: Oxford University Press, 1996), p. 1010.

120 Ibid., p. 80. Article 27 of the ICCPR is considered as protecting individual rights enjoyed as a member of a minority group. See also Peter Juviler, "Are Collective Rights Anti-human: Theories on Self-Determination and Practice in Soviet Successor States", *Netherlands Quarterly of Human Rights* 3/1993, p. 277: "The 1966 U.N. Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights ascribe rights of self-determination to 'peoples' not to 'minorities'".

121 Article 14 of ILO Convention No. 169 on land rights speaks of "the rights of ownership and possession of the peoples concerned …"

122 John Borrows, "Landed Citizenship: Narratives of Aboriginal Political Participation", in *Citizenship in Diverse Societies,* edited by W. Kymlicka and W. Norman (Oxford and New York: Oxford University Press, 2000), p. 326.

123 It should be noted that indigenous peoples in many Latin American and Asian countries are often small-scale agriculturalists and the characteristic of non-dominance in these countries relates more to the discrimination and marginalization indigenous peoples are subjected to by mainstream society on account of their ethnic and cultural distinctiveness.

writes, "... then came a revolution that transformed almost the entire surface of the earth: agriculture ... [so] any landscape that is not farmed is wild and therefore of little economic use".[124]

Agriculture is, however, not a mere act of tilling lands but also a way of life that comes with numerous other social factors such as sedentary life style, accumulation and storage of harvest, exclusive ownership and similar mechanisms. This is what is happening in Central, Eastern and Southern Africa, where agriculture and large scale cattle farming, have become the dominant way of life and threatens to extinguish all other ways of life including hunting, gathering and nomadic pastoralism. Hunting and gathering as well as pastoralism are seen as being detrimental to conservation efforts or as "backward" and uneconomical ways of life that have no place in a "modern" world. As shown further on, apart from a few countries like Ethiopia, the constitutions of most African states do not protect land use and occupation by nomadic communities.

Governments and the international donor community give instead priority treatments to agriculture and industrial farming, as well as to mining, the building of hydroelectric dams, the creation of national parks, and many other activities that are leading to the reduction of forests, bushes and grazing lands. Often, this results in tensions, and sometimes even open conflicts, between sedentary agriculturalists and nomadic communities.[125]

Pressure on grazing and forested lands also has to do with population growth and land scarcity. An increase of agricultural production depends largely on both the size of the cultivated land and the number of people working on it. As the number of cultivators continues to grow, the problem of land shortage arises. This often leads to a dispersal of community members in search of new areas suitable for cultivation. Pastoralists and hunter-gatherers, on the other hand, tend not to increase so rapidly in number. Pastoralists do not require much labour force to carry out their main subsistence activities (herding), and in the case of hunter-gatherers, the need for mobility and the availability of resources could be seen as one of the factors that encourage them to limit their numbers. Families thus avoid having several small children at the same time. Data has shown that while the Kenyan national population annual growth rate was 4 per cent, the growth rate of the Maasai and other pastoral people was approximately 2.2 per cent, or almost half of the national average.[126] The same phenomenon has been observed amongst the Hadzabe, the "Pygmies" and the San of Tanzania, the Republic of Congo and Southern Africa, respectively.[127]

In the past, and as a result of their relative small numbers, pastoralists and hunter-gatherers did not often face the problem of land shortage. They also enjoyed larger areas of lands than their cultivator counterparts. Having the benefit of large and often fertile lands when many people are land-hungry has indeed contributed to the discrimination and land grabbing that indigenous peoples endure.

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124 Hugh Brody, *The Other Side of Eden: Hunter-Gatherers, Farmers and the Shaping of the World* (London: Faber and Faber, 2000), pp. 120 and 149.

125 Ben Cousins, "Tenure and Common Property Resources in Africa", in *Evolving Land Rights, Policy and Tenure in Africa,* edited by C. Toulmin and J. Quan (London: Department for International Development, International Institute for Environment and Development/Natural Resources Institute, 2000).

126 Shannon Kishel, E. Mcalpin, and A. Molloy, "The Maasai Culture and Ecological Adaptations". Mimeo. Denison University, Ohio. http://www.denison.edu/enviro/envs245/papers/Massai/Maasai2.html, Accessed December 10, 2003.

127 See, e.g., the Congolese Centre National de la Statistique et des Etudes Economiques (CNSEE): at http://www.cnsee.org/index.php?option=com_content&view=article&id=143:rgphpopautocvolume&catid=43:analyse-rgph

History of severe discrimination

This section does not depict all the types or forms of discriminations that indigenous peoples experience. It could also be argued that there are several groups, who, just like indigenous peoples, face severe discrimination and that discrimination therefore should not be considered as a characteristic particular to indigenous peoples.

So, what is noteworthy or particular about the discriminations indigenous peoples suffer from? With regard to the situation in Central, Eastern, and Southern Africa, it is a fact that mainstream societies look at them as "backward", "primitive", etc., and leave them only one option—to assimilate into the dominant culture, and in that process give up their ways of life, their culture, their language, etc., or, in one word, their identity. For instance, many African states in which "Pygmies" live believe that the education of indigenous children is a simple matter of getting these children away from their communities and getting them into modern schools where they can be educated just like other children.

Indigenous peoples tend to resist these measures and policies designed by their states to "civilise" them, and this struggle for their land-based cultural survival, their "societal cultures", often clashes with the interests of the states in which they live. In Andrew Gray's words, "indigenousness is an assertion by people directed against the power of outsiders",[128] including the power of the states. Most Kenyan and Tanzanian indigenous peoples, as well as several other indigenous peoples living in Central, Eastern, and Southern Africa consider their respective governments to be outside powers established on their lands.

The indigenous Ogiek are in court against the Kenyan government's policy, which for long has aimed first at de-gazetting the Mau Forest and then at dividing it into individually held land plots, a scheme that land-hungry communities, such as the Kipsigis, have welcomed. In Kenya, too, the Maasai community is resisting government policies of land individualisation. The Hadzabe and the Barabaig in northern Tanzania have several times resisted compulsory schooling of their children as well as the efforts made by their governments to transform them into agriculturalists, considered to be the only rational way of life[129] or "legitimate occupancy" of land.[130] Actions taken by indigenous peoples in resistance to being "civilised" or assimilated range from open conflicts, legal challenges, lobbying at the international level against their states' policies, voluntarily ignoring the expropriation measures taken by the state by continuing to "clandestinely" use the contentious lands, burning down the resources on lands taken away from them by governments, etc.

In 2005, legal status was denied a Rwandan indigenous NGO, *Communauté des Autochtones du Rwanda* (CAURWA), on the grounds that their use of the term "*autochtone*" (indigenous) and their claim of cultural identity as Batwa indigenous peoples amounted to a breach of the Rwandan Constitution, which prohibits any act that may divide the Rwandan society along ethnic lines. The

128 Gray, "The Indigenous Movement in Asia" (1995), p. 40.

129 Madsen, *The Hadzabe of Tanzania* (2000), p. 20, writes: "The objective of the Government became the transformation of these communities into what officials viewed as the more rational mode of life of sedentarised agriculture ..."

130 James Woodburn, "Indigenous Discrimination: The Ideological Basis for Local Discrimination against Hunter-Gatherers Minorities in Sub-Saharan Africa", *Ethnic and Racial Studies,* 20, no. 2. (1997), p. 350.

indigenous community-based NGO argued unsuccessfully that the term "Batwa" symbolized their cultural identity, which they wanted to maintain. In order to survive as an NGO with a legal status, CAURWA had eventually no other option than changing its name to *Communauté des Potiers du Rwanda* (Rwanda's Potter Community - COPORWA).

When indigenous peoples actively resist cultural assimilation policies and laws, dominant communities or the state apparatus tend to respond by violating and denying their rights in the name of national unity and similar principles. Unless a causal link is established between, on the one hand, indigenous peoples' resistance to cultural assimilation and, on the other hand, the particular discrimination and repressions carried out by dominant communities or the state apparatus, it is difficult to understand the distinctiveness of the discrimination that indigenous peoples tend to suffer from.

On numerous occasions, African officials have argued that indigenous peoples tend to auto-exclude themselves from modern life, national programmes and policies. The "Pygmies" of Central African forests, the Mbororo, the Hadzabe, the San and numerous other communities are thus often accused of sidelining themselves, of not taking their destiny into their own hands, as other Africans did with modernity after colonialism.

Obviously this "auto-exclusion thesis" developed by some African elites does not stand in front of realities as they manifest themselves in Uganda, for instance, where Batwa children, who dare attending primary school declared free for all, are ridiculed and subjected to mockery by other children because of looking filthy and being badly clothed. A pregnant Baka woman from Cameroon died after being denied medical attention by a nurse for being unclean.[131] The African Commission on Human and Peoples' Rights' Report on Indigenous Populations/Communities compiles numerous examples of particular discriminations suffered by indigenous peoples in Africa, including, for instance, the fact that some "Pygmies" are not considered to be citizens of the country in which they live.[132] But one of most recurrent discrimination and common to all countries is the denial that indigenous peoples enjoyed land rights prior to the formation of states— whether colonial or independent.

Land rights prior to colonization or to the occupation by other African groups

Indigenous peoples' land rights are grounded on immemorial occupation. People living on traditional lands and territories have strong cultural, historical and emotional connections to these lands and territories. Such lands have throughout time shaped the way of life of the communities involved. Without these lands, indigenous communities are unable to survive as cultural distinct entities.

As shown by international and a number of African jurisprudences, indigenous land rights are not proven by written modern land titles, but by testimonies and accounts of immemorial occupation and use. In order to prove indigenous peoples' land rights, it is often necessary to bring in not only the beneficiaries but also researchers, historians, anthropologists to testify, and to use ar-

131 Barume, "Etude sur le cadre légal" (2005a).

132 African Commission, *Report of the Working Group of Experts* (2005), pp. 34-37.

chives and similar sources of historical information. This is because, in most African cases, indigenous peoples' land rights existed long before the current modern system of land ownership and written history.

Generally, the issue of "rights prior to colonization or occupation by other African groups"[133] raises the question of whether indigenous means "original" or "prior" occupants. The interest for this analysis resides not in what each one of these concepts means, but rather how relevant they are in Central, Eastern, and Southern Africa. Are communities claiming indigenous status in these parts of Africa the original inhabitants of the lands they claim?

In many parts of Africa, people's movements have been less well documented than in other regions, to the extent that it is difficult to know who lived where and when. A further problem arises where the process of some communities being culturally overpowered by others is still taking place. Some have thus argued for the term "prior" in addition to "original".[134] In the Australian *Mabo* case, for instance, the term "prior" was chosen rather than "original", because, although the Meriam people[135] had been occupying the [contentious] Torres Strait Islands for generations before the first European contact, Justice Brennan, at the same time, also acknowledged that the original inhabitants of the islands were not the Meriam people, but probably Melanesian people who had come from Papua New Guinea.[136]

Andrew Gray similarly points out that the Chakma of the Chittagong Hill Tracts are not the original inhabitants of these lands, on which they settled after the Arakanese and Tripurans.[137] A recent study on Cameroon by the author of this book shows that Mbororo, living in that country, arrived from elsewhere too, but still claim indigenous status.[138] Nor are the Maasai the original occupants of their lands. Survival International reckons they arrived in the region known today as Maasailand (southern Kenya and northern Tanzania) around the fifteenth century.[139] Basil Davidson, on the other hand, believes that the Maasai reached Kenya long after 1545, establishing themselves along the Mount Ngorongoro near what is now Tanzania's border to Kenya.[140] The Himba are in the same way recorded to have originated from the Great Rift Valley in Central Africa around the fourteenth century A.D.[141] Not being the "original inhabitants", however, does not make the Maasai or the Himba less indigenous than the

133 Wiessner in his paper on "Rights and Status of Indigenous Peoples" (1999), p. 115, argues that, "Indigenous peoples are thus best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially, and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion, and discrimination. …"

134 Gray, "The Indigenous Movement in Asia" (1995), p. 39.

135 The Meriam people live on Mer (or Murray) Island, one of the Torres Strait Islands, off the northern coast of Queensland, Australia.

136 *Mabo and Others v. The State of Queensland* (No. 2) [1992] 175 CLR 1, per Brennan J., at 2.

137 Gray, "The Indigenous Movement in Asia" (1995), p. 39.

138 Barume, "Etude sur le cadre legal" (2005a), p. 26.

139 See Web site of Survival International at http://www.survival.org.uk/index2.htm. Survival International is an international NGO that campaigns for the rights of indigenous peoples worldwide.

140 Basil Davidson, *Africa in History* (London: Phoenix Press, 1992), p. 148.

141 United States' Department of State, Bureau of African Affairs, Background Notes on Namibia. Available online at http://www.state.gov/r/pa/ei/bgn/5472.htm

"Pygmies", the Hadzabe or the San, who are widely recognized as the first peoples of the African tropical forest, the forest around Lake Eyasi in northern Tanzania and the Kalahari, respectively.[142]

In other words, as far as the present situation in Central, Eastern, and Southern Africa is concerned, there are a number of communities, such as the "Pygmies", the San and the Hadzabe, whose indigenousness is argued, among other things, on the basis of being the original inhabitants of their lands. However, there are other communities, like the Maasai and the Mbororo, which are not necessarily the original inhabitants of their lands, but who have lived for so long (and prior to colonization) on a given land or region that their culture and way of life have become dependent on such lands.

Land-based culture

A land-based culture is also one of the main guiding factors that help understanding and identifying indigenous peoples. However, given the scope and weight of indigenous peoples' land rights, this issue will be dealt with in the next chapter.

Conclusion

From what has been discussed in this chapter, it emerges that there is no international binding instrument that indicates precise procedures to be followed by a community for declaring itself indigenous. Each community tends to exercise that freedom according to its national or regional context. In Central, Eastern, and Southern Africa, communities tend to proclaim their indigenousness through numerous means, including presentations and statements made at national, regional, international indigenous-related meetings as well as land claims, court cases and resistance against evictions, as further chapters will show.

At its fifteenth session, in 1997, the U.N. Working Group on Indigenous Populations concluded that a definition of indigenous peoples at the global level was not possible at that time, and that this did not prove necessary for the adoption of the Declaration on the Rights of Indigenous Peoples. It also said that the concept of indigenous must be understood in a wider context than only the colonial experience.[143]

In the process of adoption of the United Nations Declaration on the Rights of Indigenous Peoples, however, most of the African states—also designated as the "African Group"—objected to the principle of self-identification by saying that "the absence of a definition of indigenous peoples in

142 Woodburn, "Indigenous Discrimination", (1997), p. 354. See also Woodburn, "The Political Status of Hunter-Gatherers in Present Day and Future Africa" in *Africa's Indigenous Peoples: "First Peoples" or "Marginalized Minorities"?,* edited by Alan Barnard and Justin Kenrick (Edinburgh: Centre of African Studies, University of Edinburgh, 2000), p. 3.

143 U.N. Working Group on Indigenous Populations, Report of the WGIP on its fifteenth session (July-August 1997). U.N. Doc. E/CN.4/Sub.2/1997/14, para.129. Available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1997.14.En?Opendocument

the text creates legal problems for the implementation. It is therefore important that the Declaration's jurisdictional clause defining the rights holders should be included in the text".[144]

The African Commission on Human and Peoples' Right appeased the worries of African political leaders by underlining the principle of self-identification enshrined by ILO Convention No. 169, and stressing that "a strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us to identify who the indigenous peoples and communities in Africa are."[145]

Unlike the situation on other continents where indigenous means first inhabitants as opposed to the colonizers and their descendants, in Africa the concept of "indigenous peoples" refers to communities who have been long forgotten or overlooked for the sake of post-colonial development programmes and projects relating to, among other things, nature conservation, exploitation of natural resources, public infrastructure and industrial agriculture. These communities have seen their ways of life being considered as backward, ridiculed and destined to disappear. In each African country where they live, these communities, whose way of life is negatively looked upon, are easily identifiable by the rest of their fellow citizens and governments. These peoples or communities are largely hunter-gatherers and nomadic pastoralists whose methods of occupation and use of the land have not been legally recognized and protected. In many African countries, hunting, gathering and nomadism were not and are still not considered as being "civilized" and development-oriented ways of using the land. This is not only because agriculture has become the main way of life, but also because lands used by hunter-gatherers and other nomadic communities in most cases look as if they are not occupied or are no-man's land *(res nullius)*. In the Americas, Australia, and New Zealand, the concept of indigenous referred to peoples having been conquered, colonized, displaced, and even exterminated by the newcomers. In contrast, the colonization process in Africa appears to have been somewhat less malignant. Nevertheless, here, too, people were subjugated and displaced first by the colonial powers and later by post-independence mainstream societies. It is in response to these historical injustices suffered by a number of African communities that the African indigenous movement should be seen. The call to justice and equal enjoyment of all rights and freedoms by these communities goes via the human rights international framework called "indigenous movement". This is indeed the human rights meaning of the term "indigenous" in Africa, which therefore should be differentiated from its general meaning by which each African can legitimately call himself or herself indigenous to the continent.

Belonging to a non-dominant sector of society, suffering from particular discriminations and having a land-based culture should not be regarded as elements of any formal definition of who are indigenous peoples in Africa, but as characteristics that help anyone to identify or understand those who consider themselves as indigenous.

It is therefore arguable that not all Africans are indigenous peoples, because, as understood in current international law, someone is indigenous in relation to a given, well-identified area of land.[146] This implies that an African community cannot be indigenous to the entire continent, not even to an

144 African Group, Draft Aide Memoire to the United Nations Draft Declaration on the Rights of Indigenous Peoples, New York, 9 November 2006. See also chapter X, this volume.

145 The African Commission, *Report of the Working Group of Experts* (2005), p. 87.

146 Gray, "The Indigenous Movement in Asia" (1995), p. 36.

entire country, but instead to a precise land that can be demarcated and seen as culturally important. There has to be a land to which a claimant community is culturally strongly attached. This is the situation also in Central, Eastern, and Southern Africa, where indigenous communities or peoples do not claim just any land or all lands of their respective countries. On the contrary, most African indigenous communities claim lands that are precisely identified, lands to which they can prove that they relate culturally. The San do not claim the whole of Southern Africa. Nor do the Bagyeli or the Batwa claim the whole of southern Cameroon or the entire national territories of Rwanda and Uganda. This human rights meaning of the term "indigenous" should therefore be distinguished from its general meaning on the basis on which each African could identify himself or herself as indigenous to the continent.

It should also be noted that most African indigenous peoples tend to use interchangeably the terms "communities" and "peoples". The African regional human rights system seems also to prefer the terminology "communities", rather than "peoples". It is argued that, whereas societies, organizations, clubs, and similar groupings are established by deliberate and voluntary actions of their members, communities "are groups based upon unifying and spontaneous factors essentially beyond the control of members of the group".[147] Communities are presented as entities that exist as cultural units,[148] and cannot be regarded as a mere aggregate of individuals. They are featured by a sense of belonging together, willingness to preserve "solidarity between them and sharing a common heritage and common destiny".[149]

The use of the term "communities" together with indigenous seems indeed more appropriate in Africa. Firstly, this concept implies the idea of culture, living together, sharing common values, and being willing to preserve a certain way of life, all of which are characteristics that appear closer to African indigenous peoples' claims. Secondly, the term "communities" is less politically charged than "peoples". It can be considered as appropriate for building up trust between indigenous communities and their states, since most African indigenous communities do not claim statehood, but autonomy, self-governance, and control over their lands and resources.[150] Thirdly, the term "communities" is unlikely to include any aggregate of individuals like the concepts "minorities" and "groups". There is also an emerging interchangeable use of the terms "communities" and "peoples" in various indigenous-related international human rights discourse, particularly on lands seen as the cornerstone of indigenous peoples' existence.

147 Nathan Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 29.

148 Oliver Mendelsohn and Upendra Baxi (eds.), *The Rights of Subordinated Peoples* (Delhi: Oxford University Press, 1994), p. 120.

149 Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p. 331; Lerner, *Group Rights* (1991). p. 32.

150 In Africa, there is not a single indigenous community which claims statehood. Neither do the Maori, nor the American Natives. Regarding Asia, Andrew Gray shows that with the exception of the people of East Timor, West Papua and Nagaland, most indigenous communities do not claim statehood nor use decolonisation as a legal argument. See Gray, "The Indigenous Movement in Asia" (1995), p. 55.

CHAPTER III
THE LANDS OF INDIGENOUS PEOPLES: IMPORTANCE AND JUSTIFICATION

This chapter focuses on the importance and role of ancestral lands, on how indigenous peoples' survival depends on these lands as it has always done, and on how philosophical and historical grounds lead us to believe that indigenous peoples' rights to ancestral lands survived the creation of current African modern states.

Land as the incarnation of culture

In international human rights law doctrine, culture is sometimes understood as being a "cluster of social, and economic activities, which gives a community its sense of identity".[151] The United Nations Human Rights Committee (CCPR) in a General Comment (1994) writes:

> 3.2 ... To enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities ...
> 7. ... Culture manifests itself in many forms, including a particular way of life associated with the use of land resources especially in the case of indigenous peoples. That right may include such traditional activities as fishing and hunting ...[152]

This Comment is usually seen as the most explicit legal linkage between indigenous peoples' right to lands and their culture.

151 Nigel Rodley, "Conceptual Problems in the Protection of Minorities: International Legal Development", *Human Rights Quarterly* 17 (1995), p. 59.

152 CCPR, General Comment 23, Article 27 (Fiftieth session, 1994a). Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. at 158 (2003). Available online at http://hrlibrary.ngo.ru/gencomm/hrcomms.htm. See also Raoul Wallenberg Institute, *Collection of General Comments or Recommendations adopted by U.N. Human Rights Treaty Bodies*, Vol. 1.: *Human Rights Committee* (Lund, Sweden: Raoul Wallenberg Institute, 2006), p. 69. Available online at http://www.rwi.lu.se/publications/books/treatycom.shtml

It has also been said that "the survival of indigenous cultures throughout the world is heavily dependent on protection of their lands"[153] because removals of such communities from their lands often endanger not only their cultural values, such as language, link to their ancestors, sacred sites, etc., but also the lives of their members.[154] In her final report on the relationship between indigenous peoples and their lands, Ms. Erica-Irene A. Daes, then Chairperson Rapporteur of the U.N. Working Group on Indigenous Populations, stated that the relationship between indigenous peoples and land has "various social, cultural, spiritual, economic, and political dimensions and responsibilities".[155] Indigenous peoples do not indeed claim just any land, but lands which have cultural importance for them.[156] For indigenous peoples, lands are not only for providing food, medicine, fuel, grazing and browsing for livestock, fish and game, but also, and perhaps more importantly, lands have "non-market values such as ... water retention, inheritance value, aesthetic, shade, initiation sites, sacred areas, and the prevention of soil erosion, [which] are rated highly in [an indigenous] community".[157]

Indigenous peoples have indeed "a distinctive and profound spiritual and material relationship with their lands".[158] They "view their relationship with the land as central to their collective identity and well-being ... People and land and culture are indissolubly linked ... [lands express] the rights of ... communities to self-preservation ... The foundational right accorded to collective entities capable of bearing rights would be meaningless without a right to the continued possession and enjoyment of their land".[159] Lands are simply "the raison d'être of [indigenous peoples'] culture".[160] That alien activities on indigenous peoples' lands undoubtedly can threaten the "way of life and culture" of such peoples, has also been emphasized by the Human Rights Committee.[161]

"There is ample evidence of the "special connection between indigenous and the lands".[162] For example, during the proceedings of the *Mabo* case in Australia, several elders of the Meriam people were brought to testify on their community's immemorial occupation and cultural uses of Mer (Murray) Island. Similarly, in all the legal cases of the Barabaig against NAFCO (National Agricul-

153 Will Kymlicka, *Multicultural Citizenship*, (Oxford: Clarendon Press, 1995), p. 43.

154 This was also stated in the *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Canada), which emphasized the special bond between indigenous peoples and their lands. For text of case, see http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html

155 Erica-Irene A. Daes, "Study on Indigenous Peoples and their Relationship to Land". Final Working Paper by the Special Rapporteur to the Commission on Human Rights. U.N. Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, para. 20. Available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.21.En?Opendocument

156 Ian Brownlie and F.M. Brookfield, *Treaties and Indigenous Peoples* (Oxford: Clarendon Press, 1992), p. 39.

157 Cousins, "Tenure and Common Property" (2000), p. 161.

158 Ibid.

159 Darlene M. Johnston, "Native Rights as Collective Rights" (1999), pp. 193-4.

160 Barsh, "Indigenous Peoples and the U.N. Commission" (1996), p. 801.

161 See, for instance, the *Lubicon Lake Band v. Canada* case, CCPR, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990), para. 33. Mr. Bernard Ominayak, Chief of the Lubicon Lake Cree Indians, (Alberta, Canada), initiated the communication against the Canadian government accused of having violated, amongst other things, Article 1 of the Covenant by allowing industrial companies to exploit the resources of the Lubicon Lake Band's traditional territory. The Communication is available at http://hrlibrary.ngo.ru/undocs/session38-index.html

162 Ian Brownlie, "Rights of Indigenous Peoples in Modern International Law", in *The Rights of Peoples*, edited by J. Crawford (Oxford: Clarendon Press, 1988), p. 4.

tural and Food Corporation) in Tanzania, numerous Barabaig elders were brought from their villages to testify why their lands were and continued to be culturally important for their survival as a community (see Part II of this volume). One of the lawyers, who acted for the plaintiffs, underlined the irreplaceable cultural value that these Tanzanian indigenous people accorded to their lost lands. With regard to sacred graves, various testimonies were recorded by Barabaig elders providing information that individuals who played important roles within this community were not buried in the same way as other community members. Their graves often took more than two years to build, as they required very special skills and a lot of materials because of their size and their cultural value. The areas, where these graves were located, were generally used by the Barabaig for seasonal gatherings. All these graves were bulldozed by NAFCO, against whom the Barabaig community later went to court.

Because sites such as graves have more than a symbolic value, the Maasai living within the Ngorongoro area close to the forest reserve of Karatu District (part of the Highlands of Tanzania) are challenging the ban which prevents them from gaining access to these forest lands. Not only are these lands important for grazing, particularly during the dry season, but also, and more importantly, the Karatu forests host grave sites and traditional medicinal plants.

Amongst the Mbendjele ("Pygmies") of Congo-Brazzaville, the forest plays a unique and paramount role:

> Women ... give birth to their children in the forest just outside camp. The forest inhabits the Mbendjele as much as they inhabit the forest. The forest is idealised as the perfect place for people to be. Every day Mbendjele conversations are obsessed with the forest, with different tricks and techniques for finding wild foods, about stories of past hunting, fishing or gathering trips, or of great feasts and forest spirit performances (*massana*) that occurred, or will occur in the near future. The forest links people to the past. Different areas in the forest are talked about in terms of the remembered ancestors that spent time there and the events that occurred. When Mbendjele die, they believe they go to another forest where *Komba* (God) has a camp. They will remain in *Komba*'s forest camp until they are told to take another path and are born into this world again.[163]

The Himba of Namibia believe that the construction of the Epupa dam on their lands will potentially inundate more than 160 of their ancestral graves.

> For the Himba, a grave is not just the location of the physical remains of a deceased person—it is a focal point for defining identity, social relationship and relationship with the land, as well as being a centre for important religious rituals. ... Graveyards are usually located near a watercourse ... [which makes these areas] heavily loaded with emo-

163 Jerome Lewis, "Forest People or Village People: Whose Voice will be Heard?" in *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'?,* edited by Alan Barnard and Justin Kenrick (Edinburgh: Centre of African Studies, University of Edinburgh, 2001), p. 7.

> tions, as the points where communities congregate, the starting point of annual cattle migrations.[164]

As put by Andrew Corbett, "the key point is not the physical fact of the graves themselves, but the connection between the graves, the family's history and the community's system of land tenure and decision-making".[165]

Similarly, an elder of the South African ‡Khomani San, who was interviewed during the process of reclaiming their ancestral lands from the South African government, stated: "Without the Kalahari ... we are nothing. In the Kalahari, we know where we belong, we know what to do with the land, we know who we are".[166] This is very much corroborated by what the author of this book saw and heard during his visit to San communities in the Kalahari, in November 2002.

However, the strong tie between indigenous communities' livelihood and culture with their lands should not be confused with the relation that we might all have, as members of the human race, to some resources, such as the ozone layer, marine life, international waters and similar resources. In her famous publication, *Governing the Commons: the Evolution of Institutions for Collective Action,* Elinor Ostrom uses the concept of "common property resources" (CPR), which is defined as resources used by many individuals in common and difficult to own.[167] Although this understanding of CPR could include the "collective lands of indigenous communities", one can see that the perception of the CPR, as resources "used by many individuals in common", gives the impression of insisting on "use" as the principal and main tie between the CPR and people.

This understanding of CPR seems not to underline the fact that, for indigenous communities, land is not just for use, but also and more importantly, land sustains their whole livelihood and culture. Furthermore, the indigenous communities also have a distinctive and profound spiritual and material relationship with their lands.[168] For indigenous peoples "their relationship with the land is central to their collective identity and well-being. ... People and land and culture are indissolubly linked ... [lands express] the rights of ... communities to self-preservation. ... The foundational right accorded to collective entities capable of bearing rights would be meaningless without a right to the continued possession and enjoyment of their land."[169]

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164 Corbett, "A Case Study" (1999), p. 85.

165 Ibid.

166 Chennells, "The ‡Khomani San of South Africa" (2003), p. 278.

167 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action,* Series Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990), p. 1. The CPR concept considers resources such as air, coastal or marine life, ozone layer, and fishing stock as CPR simply because these resources are indispensable for the existence of humankind, and not because they shape a livelihood, a culture, or a way of life of a particular community. Furthermore, damage to some of the CPR affects all communities, regardless of their way of life. We are all, as human beings, affected in the same way by the reduction of the ozone layer, deforestation, pollution and destruction of similar resources.

168 Ibid., p. 1.

169 Johnston, "Native Rights as Collective Rights" (1999), pp. 193-4.

Right to lands and right to life

Indigenous peoples' right to lands is so important that many have linked it with some aspects of the right to life. Many examples from Africa seem to corroborate this view. In the late 1960s, when the Batwa of eastern Democratic Republic of Congo were being expelled from their homelands—later to become the Kahuzi-Biega National Park—they numbered up to 6,000. In less than fifty years, these figures have approximately halved, due to the non-adaptation of these Batwa to any other type of lifestyle outside their forests.[170]

Before the beginning of their expulsion from the Mau forests in the early 1910s, the Ogiek of Kenya were also said to number far more than their current number, which today is estimated to be some 78,000 countrywide and 5,883 in the East Mau.[171] Forced to face a new way of life outside their natural environment, the life expectancy of the Ogiek has dropped drastically, as underlined by an Ogiek representative.[172]

Kenyan pastoralists such as the Maasai "feel especially attached to the land because they depend on its resources for the survival of the herds and people, and without it, they cannot survive especially since they do not also have the skill necessary for survival outside the pastoral sector".[173] Lotte Hughes gives a detailed account of the forced eviction of the Maasai from their ancestral lands and how it affected them.[174]

In Tanzania, the government's attempts in 1927 and 1939 to settle the Hadzabe and make them give up their nomadic lifestyle, which the government regarded as a cause for their non-integration into mainstream Tanzanian social life, led "to real disaster: outbreak of disease occurred and people died. In both cases the policy was abandoned quite quickly and the Hadzabe involved were allowed to return to their independent nomadic life".[175] Recent attempts to do the same or push the Hadzabe into a sedentary lifestyle have also been unsuccessful, as the Hadzabe often move out of the settlements as soon as they are moved in.[176]

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170 Albert Kwokwo Barume, *Heading Toward Extinction? Indigenous Rights in Africa: The Case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo*, IWGIA Document No. 101 (Copenhagen: IWGIA and FPP, 2000), p. 16.

171 Ogiek groups are also found scattered in other parts of the Mau Forest Complex as well as in the forested highlands and catchment areas of Western Kenya (Nandi county, Mount Elgon). See World Bank, IPP198 "Indigenous Peoples Planning Framework for the Western Kenya Community driven Development and Flood Mitigation Project" (2006), p. 18.

172 Statement made by an elder Ogiek met at Nakuru, Kenya, during a training-discussion on the existing alternatives ways for an international action against the measures of the government of Kenya with regard to the Ogiek's lands. More than 50 members of the Ogiek community took part in this training organised by the Ogiek Welfare Council, a local NGO created by the Ogiek, and the Forest Peoples Programme (FPP), a British NGO working with indigenous peoples worldwide. The author of this volume contributed to this training as a facilitator.

173 Naomi Kipuri, "Indigenous Peoples in Kenya: An Overview". Available online at http://www.Whoseland.com/paper6, p. 4.

174 Lotte Hughes, *Moving of the Maasai: A Colonial Misadventure* (London: Palgrave Macmillan, 2006a).

175 James Woodburn, "Minimal Politics: The Political Organisation of the Hadza of North Tanzania" in *Politics in Leadership: A Comparative Perspective*, edited by W.A. Shack and P.S. Cohen (Oxford: Clarendon Press, 1979), p. 249.

176 Madsen, *The Hadzabe of Tanzania* (2000), p. 20.

The San population of the Kalahari also decreased as a result of their expulsion from their lands. Since the early 1900s, many were forced to leave their lands, most of which were transformed into large cattle farms and national parks, such as the Etosha Game Reserve in Namibia (1954),[177] the Central Kalahari Game Reserve (1961) in Botswana and the Kalahari Gemsbok National Park (1931)[178] in South Africa. One researcher notes that:

> Today, the San of Southern Africa are the second largest population of former foragers in Africa. These peoples were the aboriginal groups who resided in an area stretching from the Congo-Zambezi watershed in Central Africa to the Cape. They once existed in relatively large numbers, with as many as 150,000 - 300,000 people dispersed widely in the region. Today, after centuries of conflict, genocide, assimilation and exploitation, they number 100,000 people and can be found in six of the countries of Southern Africa.[179]

Whereas several experts[180] and UNESCO documents[181] therefore have used the terms "ethnocide" and "cultural genocide" in relation to the forced removals of indigenous peoples from their lands, there are no international instruments which recognize that forced expulsions may amount to violations of the right to life. Attempts to include the concept "ethnocide" into the scope of the crime of genocide during the *travaux préparatoires* of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide were unsuccessful.[182] Neither do comments by the United Nations Human Rights Committee (CCPR) on the right to life refer to the expulsion of indigenous peoples from their culture-based lands. The CCPR strongly—albeit implicitly—hinted in the *Lubicon Lake Band case v. Canada* at a relationship between indigenous peoples' right to lands and the right to life of members of these communities. Considering the seriousness of the allegations made by the author of the communication, Chief Bernard Ominayak, "that the Lubicon Lake Band was on the verge of extinction, [the Human Rights] Committee requested Canada, under rule 86 of procedures 'to take interim measures of protection to avoid irreparable damage to [the author of the communi-

177 The Etosha Game Reserve was established in 1907 but the Hai//om San were first evicted in 1954.

178 The ǂKhomani San live in South Africa, in the southern area of the Kalahari. They were resettled when part of their lands was turned into the Kalahari Gemsbok National Park in 1931. This Park has since 1999 formed Africa's first transfrontier park with the Gemsbok National Park in Botswana under the name of the Kgalahadi Transfrontier Park.

179 Krystina Bishop, "Squatters on Their Own Lands: San Territoriality in Western Botswana", 31 *Comparative and International Law Journal of Southern Africa,* 92, 1998, p. 14.

180 Julian Burger and Paul Hunt, "Towards the International Protection of Indigenous Peoples' Rights", *Netherlands Quarterly of Human Rights (NQHR)* 4/1994, pp. 413-4. See also Fergus McKay, "The Rights of Indigenous Peoples in International Law: A briefing paper for the Department for International Development" (unpublished, 2000), p. 7. Article 7(2) of the U.N. Declaration on the Rights of Indigenous Peoples states that "i*ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children or the group to another group*".

181 UNESCO Declaration of San José on Ethno-Development and Ethnocide in Latin America (1981). See UNESCO, Meeting of Experts on Ethno-Development and Ethnocide in Latin America, Final Report, San José, Costa Rica (7-11 December 1981); and UNESCO, Meeting of Experts on the Study of Ethno-development and Ethnocide in Africa, Final Report, Ouagadougou, Upper Volta (31 January – 4 February 1983).

182 Burger and Hunt, "Towards the International Protection" (1994), p. 414. See also Maivân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, New York: Transnational Publishers, Inc., 2000), p. 27.

cation] and other members of the Lubicon Lake Band'." [183] The Committee seems to have recognized that there is a connection between indigenous peoples' collective right to exist as a cultural entity and the right to life of their members.[184]

The Inter-American Commission on Human Rights has also adopted a broad understanding of the right to life in its decision on a number of communications, including the case of the Yanomami indigenous peoples, whose lands were affected by a highway project promoted by the Brazilian government. In response to allegations of violating Article 1 of the American Declaration of the Rights and Duties of Man regarding the right to life, the Commission ruled, amongst other things, that "invasion was carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others".[185] In a similar communication before the Inter-American Commission on Human Rights, members of the Miskito indigenous people alleged that the government of Nicaragua violated, amongst other things, their right to life and the right of their community to exist as a distinct cultural entity, by expropriating their lands.[186]

In its Report on the Situation of Human Rights in Ecuador, the Inter-American Commission on Human Rights likewise concluded that, in relation to indigenous peoples' right to lands, it is necessary to understand:

> … [O]n the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded. … For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life and the geographical space necessary for the cultural and social reproduction of the group.[187]

More recently (May 2002), the African Commission on Human and People's Rights ruled that, regarding the destruction of Ogoniland by the Shell Petroleum Development Company, "the Federal Republic of

183 CCPR, Communication No. 167/1984 *The Lubicon Lake Band v. Canada* (1990), para. 29.3.

184 Burger and Hunt, "Towards the International Protection" (1994), pp. 413-4.

185 Inter-American Commission on Human Rights, Resolution No.12/85, Case No. 7615 (Brazil), March 5, 1985. See OEA, Annual Report 1984-85, OEA/Ser.L/V/II.62 doc.10rev.1. October 1985.

186 During the 1980's political turmoil and the "Contra" war, in Nicaragua, several Miskito communities living on the Atlantic Coast of the country and on the border to Honduras became victims of forced relocation. Because they tried to resist, the Sandinista government committed several human rights violations against the Miskito, including rape, murders and torture. In February 1982, the Miskito lodged their first complaint before the Inter-American Commission on Human Rights. See the IACHR's Report on the Situation of Human Rights of a Segment of the Nicaragua Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 26 of May 1984. Available at: http://www.cidh.oas.org/countryrep/Miskitoeng/toc.htm. See also Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System,* IWGIA Document No. 106 (Moreton-in-Marsh and Copenhagen: Forest Peoples Programme & IWGIA, 2002), p. 32.

187 Inter-American Commission on Human Rights, "Report on the Situation of Human Rights in Ecuador", OEA/Ser.L/V/II.96, Doc. 10 rev.1 (1997), p. 89.

Nigeria [violated amongst others] the right to life of Ogoni as articulated by] article 4 … of the African Charter on Human and People's Rights", by allowing Shell to carry out a number of actions.[188]

Recent jurisprudence, too, has several times linked the evictions of indigenous peoples from their lands with the right to life of these communities. Examples of this can be found in Malaysia, India and Colombia.

In *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors,* a hunter-gatherer indigenous community of the Linggiu Valley in Malaysia alleged violations of, amongst other things, their right to life and lands following their government's agreement with the Singapore government to build a dam on their hunting and gathering lands. Citing a number of other cases in which the same view was upheld, the Malaysian Court of Appeal ruled that "the lower court made the correct finding as to liability. It is a well-established principle that deprivation of livelihood may amount to deprivation of life itself".[189]

In the same vein, "Indian courts have interpreted the scope of the constitutional right to life expansively to forbid all actions of both state and citizen that disturb the 'environmental balance'."[190] This principle underpinned the ruling in *Indian Council for Enviro-Legal Action v. Union of India and Ors.*[191] This case involved a number of peoples inhabiting the village of Bichhri in Rajasthan, who alleged that the government of India was violating, amongst other things, their right to life by failing to control and stop pollution caused by a local factory. The court built an argument on the constitutional right to life to order appropriate governmental regulatory measures.

In *Organización Indígena de Antioquía v. Corporación Nacional de Desarrollo del Choco*, "the Constitutional Court of Colombia held that the constitutional rights to life, work, property and cultural integrity of an indigenous community had been infringed upon …" by the illegal cutting down of trees on their lands.[192]

In its recent decision on the Endorois case, the African Commission, too, found that the eviction of the Endorois from their traditional lands was a threat to their rights to religious freedom and to culture, as well as a denial of their pastoralist way of life.[193]

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188 This case was filed in November 1995, following death penalties carried out on nine leaders of the Movement for the Survival of the Ogoni People (MOSOP), a movement that fights for the rights of Ogoni communities in Nigeria. In June 2009, Shell agreed to pay US$15.5 millions in an out-of-court settlement of a legal action in which it was accused of having collaborated in the execution of the writer Ken Saro-Wiwa and eight other leaders of the Ogoni tribe.

189 *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors,* [1998] 2 MLJ 158, (1998) 2 CHRLD 281. The Court of Appeal mentioned in its argument the following cases in which the same view was upheld: *R Ramachandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (Mal FC), *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (Mal CA) and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor* [1996] 1 MLJ 481 (Mal CA) cited). See the Web site of Interights at http://www.interights.org/showdoc/index.htm?keywords=Malaysia&dir=databases&refid=2095.

190 Carl Bruch, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa,* (Washington: Environmental Law Institute, 2000), p. 30. This publication gives also a long list of other cases in which the right to life versus environmental degradation was referred to by Indian courts. Text of publication available at the Web site of the Environmental Law Institute, http://www.elistore.org/reports_detail.asp?ID=527

191 *Indian Council for Enviro-Legal Action v. Union of India and Ors.,* 2000(5)SCALE286 See Web site of National Law School of India at http://www.nlsenlaw.org/waste-management/case-laws/supreme-court/indian-council-for-enviro-legal-action-v-union-of-india-uoi-and-or.2000

192 Bruch, *Constitutional Environmental Law,* (2000), p. 34.

193 See ACHPR Communication 276/2003 (2009) and chapter V, this volume.

So if the right to land of indigenous peoples is so closely and directly linked to the right to life of indigenous individuals, it is therefore arguable that this right to land could be considered as non derogatory, meaning it cannot be suspended even in a situation of a state of emergency, when a state can strike a fair and just "relationship between a particular objective and the administrative or legislative means used to achieve that objective".[194]

The linkage of land to the right to life of indigenous peoples is of key importance. Another important linkage is the linkage between indigenous peoples' ancestral lands and their languages.

Ancestral lands and indigenous languages

For indigenous peoples, as shown by the above few examples, lands are "intimately related to its holders' identity, of which it is an essential component".[195] The usage of indigenous languages is an important part of this identity. As noted by Kymlicka,

> Modernisation involves the diffusion throughout a society ... of a common culture, including standardized language, embodied in common economic, political, and educational institutions, one of the most important determinants of whether a culture survives is whether its language continues to be used.[196]

In most parts of the world, indigenous languages are endangered. This is especially the case of those languages that have no script (the case of 80 per cent of all languages in Africa!). This is, among other reasons, the consequence of national language policies. In post-independence Tanzania, the main political objective was to create a nation with "a system of generalised identification ... a unified education system and a unifying language".[197] This was also the case in Botswana, where Setswana is the only local official language.

In some cases, there appears to be a striking and strong link between the expulsion of indigenous peoples from their lands and the disappearance of their languages. At the same time, however, there are also indigenous peoples around the world who have lost their languages but still hold on to their lands, and inversely, there are those who have retained their language but lost their lands. Examples of both can be found among indigenous peoples in Central, Eastern, and Southern Africa.

The "Pygmies" of the Ituri region, in the north-west of the Democratic Republic of Congo, and to some extent the Mbendjele of Congo-Brazaville, as well as the Baka of the east of Cameroon, still live on most or at least part of their lands and have maintained their language. The Baka of Cameroon call

194 Gránne De Búrca, "The Principle of Proportionality and its Application in the EC Law", in *Yearbook of European Law,* vol. 13, edited by A. Barav and D.A. Wyatt (London: Clarendon Press, 1982), pp. 105-150.

195 L.P. Delville, "Harmonising Formal Law and Customary Land Rights in French-speaking West Africa, in *Evolving Land Rights, Policy and Tenure in Africa,* edited by C. Toulmin and J. Quan (London: Department for International Development, International Institute for Environment and Development/Natural Resources Institute, 2000), p. 116.

196 Kymlicka, *Multicultural Citizenship* (1995), p. 111.

197 Woodburn, "The Political Status of Hunter-Gatherers" (2000), p. 6.

God *Komba*, spirit *molili*, a soothsayer *nganga*, witch *ndoki*, village *mboka*, and animal *nyama*.[198] These terms and countless others are not just similar but almost identical in meaning and even spelling amongst the Mbuti of the Ituri region of the Democratic Republic of Congo, and the Mbendjele Yaka of northern Congo-Brazzaville.[199] What these striking resemblances between the languages used by three indigenous peoples living thousands of miles from each other could suggest is that these communities once had one common language that has survived, despite being separated from one another, following the division of Africa into modern states. According to the French anthropologist, Serge Bahuchet, the "Pygmies" of the African tropical forests were not much affected by the colonial system because of their nomadic life style.[200] This could explain why, despite having their lands divided into different countries, these peoples maintained their language.

Although the Maasai have lost most of their lands, they have retained their Maa language. The Maasai, however, have actually never been forced to integrate into other communities. Whether in Tanzania or in Kenya, every time the Maasai were moved out of their lands, they were allocated another piece of land, although smaller and less valuable.[201] One could argue that this is one of the reasons why their language has survived.

The British anthropologist James Woodburn points out that, because the Hadzabe of Tanzania have remained on their lands until recently, and the fact that they have kept their distance, both socially and culturally, from neighbouring groups, this could be regarded as the reason why their language is seen as "wholly unintelligible to their neighbours".[202]

On the other hand, there are indigenous peoples who have been expelled from their lands and scattered in different directions and have subsequently lost their languages. The communities that appear to have been most affected in this way are the hunter-gatherers. These communities' numeric inferiority and the prejudices, from which they suffer on the part of other communities, could be considered as the main reasons why their languages tend not to survive "integration" into other communities.

198 Daniel Boursier, "Réflexion sur l'évangélisation des Baka", *Vivant Univers* No. 396 Novembre-Décembre 1991, pp. 26-7.

199 Lewis, "Forest Peoples or Village Peoples" (2001a), pp. 61-69.

200 Serge Bahuchet, "Les pygmées changent leur mode de vie", *Vivant Univers* No. 396, Novembre-Décembre 1991, p. 5.

201 See M.M.E.M. Rutten, *Selling Wealth to Buy Poverty: The Process of the Individualization of Landownership Among the Maasai Pastoralists of Kajiado District, Kenya, 1890-1990*. (Saarbrüchen - Fort Lauderdale: Verlag Breitenbach Publishers, 1992), pp. 173-200. The author shows consistent evidence of different actions by colonial and post-colonial Kenyan authorities consisting in moving Maasai from one place to another. Tundu Lissu, in his paper "Policy and Legal Issues on Wildlife Management in Tanzania's Pastoral Lands: The Case Study of the Ngorongoro Conservation Area", *Law, Social Justice and Global Development, (LGD)* 2000 (1), p. 1, comments on various treaties between the Maasai and Tanzanian authorities. As in Kenya, Maasai were moved to new lands every time their ancestral lands were needed by the government. Lissu's paper is available online at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/lissu/#a8.1

202 Woodburn, "Indigenous discrimination" (1997), p. 251. On the other hand, the Akie, another hunter-gatherer group living in Tanzania, have lost their original language and today speak Maa. This has happened in step with increased pressure on their land and the ensuing environmental changes that have made it difficult for them to pursue their particular lifestyle, and forced them to settle and cultivate crops and/or breed animals. See, e.g., Florian Schöpperle, "The Economics of Akie Identity: Adaptation and Change among a Hunter-Gatherer People in Tanzania" (2011).

For instance, in the eastern part of the Democratic Republic of Congo, where the Batwa have been completely expelled from their lands, most members of these hunter-gatherer communities now speak either *Mashi*, *Kitembo* or *Kihavu*, which are the languages of the main ethnic groups into which the Batwa were forced to integrate.[203] The situation is the same in Rwanda, where the Batwa, although they argue that, at one time in history, they had their own language, today speak *Kinyarwanda*, the language of the main ethnic groups, the Tutsi and Hutu.

Members of the Ogiek people, who, in pre-colonial times, moved southwards from what is now known as Kenya and into Tanzania, also lost their original language and currently speak a dialect that is closer to the language of their neighbours, the Maasai.[204]

As victims of, and trying to hide or escape from prejudices, hunter-gatherers are often ashamed to speak their own languages. This was, for example, the case with the ǂKhomani San of South Africa: "Adults and children alike were ashamed of being San, and in a trend repeated by other hunter-gatherer peoples the world over, they increasingly assumed the ways and languages of their oppressors". Consequently, "the old language spoken by the San [fell] ... into disuse ... [and] was prematurely declared to be officially dead in 1970".[205] Today, it is estimated that there are far less than a thousand people who can still speak *N/u,* (name of the traditional ǂKhomani San language), without which it would not have been possible for the San activists and community members to locate the different waterholes, hunting areas, ritual places, etc., which, once put together, established the San rights over the Kgalagadi Transfrontier Park of South Africa.

203 M. Kapupu, "Etude du milieu des pygmées voisins du Parc National de Kahuzi-Biega, zones rurales de Kabare et Kalehe". A study commissioned by the German Agency of International Cooperation (GTZ), 1996, p. 8.

204 Sang, "Kenya: The Ogiek in Mau Forest" (2003), p. 115.

205 Chennells, "The ǂKhomani San of South Africa" (2003), pp. 278-279. One San elder interviewed during the reclaiming process stated: "My mother did not teach me N/u language because she was ashamed to speak it. I want to make sure that all the young people can learn the language, and can know that they own the Kalahari, where we all came from".

CHAPTER IV
INDIGENOUS PEOPLES' LAND DISPOSSESSION: CAUSES AND REACTIONS

Despite their cultural importance, the lands of indigenous peoples continue to be encroached and alienated. This chapter looks at the main causes of these dispossessions and how African indigenous peoples tend to react.

Main causes of land dispossession

Agriculture as central for national economies

As pointed out by Hugh Brody, agriculture has transformed the entire Earth to the extent that any unfarmed land is considered as being of little economic use.[206] Most governments focus on modern development paradigms at the expense of traditional ways of production, and Africa is no exception when it comes to considering agriculture as central for national economies. In many cases, local communities, including indigenous peoples, are forced out of their lands without due compensation to make way for cultivation. The U.N. Committee on Social, Economic, and Cultural Rights (CESCR) reached the conclusion that "many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counterproductive in human rights terms".[207] Or, as Chris Jochnick puts it: "Human welfare and the environment have been increasingly left to the vagaries of market, with government playing almost second role in trying to ensure a basic level of welfare for their populations".[208]

The need for economic growth, free movement of capital and, as highlighted by Samir Amin,[209] control and access to natural resources, have become the overriding objective for many states.

206 Brody, *The Other Side of Eden* (2000), pp. 120 and 149.

207 CESCR, General Comment No. 2 (on Article 22). U.N. Doc. E/C.12/1990/23 (1990), para. 7. Available at http://hrlibrary.ngo.ru/gencomm/epcomm2.htm. See also Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Field for the Promotion of Human Rights", *Human Rights Quarterly,* 21 (1999), p. 78.

208 Jochnick, "Confronting the Impunity" (1999), p. 64.

209 Samir Amin, "The Challenge of Globalisation: Delinking" in *Facing the Challenge: Responses to the Report of the South Commission,* edited by the South Centre (London: Zed Books, 1993), p. 133.

This explains partly why most Central, Eastern, and Southern African states have declared themselves to be the sole owners of all land, including lands belonging to indigenous communities. "The States continue to hold legally defined *de jure* ownership rights over land ... in much of rural Africa, while rural communities and individuals exert *de facto* rights which are partly defined in terms of customs and partly by ongoing adaptations of practices and rules to changing circumstances".[210]

Generally, the land claims of states are grounded on the assumption that lands used or occupied by communities are unoccupied, poorly developed, or vacant.[211] These are generally lands belonging to communities with a nomadic lifestyle whose use and occupation of lands are almost invisible. These communities are mostly hunter-gatherers and pastoralists.

In the 1960s and early 1970s, agricultural lands in Kenya and Tanzania were put under strong government control. In Kenya, the opening of the "White Highlands" of Kenya and the introduction of settlement schemes, which gave African cultivators access to land bought from departing European farmers, confirmed that the post-colonial development paradigms did not depart from an agricultural system type, and in 1973, the Rural Lands (Planning and Utilisation) Act No. 14, enabled the government to bring all communities into cultivation. In Tanzania, a socialist-type of land policy known as *Ujamaa* was introduced in the late 1960s, and cultivation was considered to be the mode of subsistence "capable of generating growth from the [country's] own resources, while, at the same time, benefiting the majority of the people".[212] Many saw in the *Ujamaa* policy an attempt to transform all communities into cultivators.[213] People were moved into villages to work on common lands and expected to achieve a quota of cash crops.

The focus on agricultural land has been further illustrated by the fact that the majority of land legislation enacted in both Kenya and Tanzania has been in relation to cultivated lands. In Kenya, hunter-gatherers like the Ogiek, the Yaaku and the Sengwer have seen their livelihood undermined as the result of land alienation for farming purposes. The traditional lands of the Maasai pastoralists have been lost to expanding farming populations, private ranches, wheat estates, etc. A 2011 study by John Letai,[214] an Oxfam GB Regional Pastoralist Adviser in Nairobi, presents the following picture of land occupation in Laikipia, which is known as part of the Maasai's traditional lands:

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210 Cousins, "Tenure and Common Property" (2000), p. 169.

211 Ibid., p. 155. Bernard Cousins also shows (p. 166) that, as far as land use in African rural areas is concerned, there is a clear shift from rule to practice in the analysis of land rights and tenure in Africa. It is not always what the law says, but what the practice is: "Despite efforts in many parts of rural Africa to clarify land rights and regulate processes of allocation ... and transfer, access to resources remains subject to contest and negotiation. Access has continued to hinge on social identity and status, and hence on membership of groups and networks ..."

212 See Ringo Tenga, "Legislating for Pastoral Land Tenure in Tanzania: The Draft Land Bill" (1998a), p. 3. Available online at http://www.whoseland.com/paper8.html; see also A.S.Z. Kiondo, "Structural Adjustment and Land Reform Policy in Tanzania: A Political Interpretation of the 1992 National Agricultural Policy", in *Agrarian Economy, State and Society in Contemporary Tanzania,* edited by P. G. Forster and S. Maghimbi (Aldershot: Ashgate Publishing Co., 1999), p. 44.

213 Rodger Yeager and Norman N. Miller, *Wildlife, Wild Death: Land Use and Survival in Eastern Africa* (Albany: State University of New York Press, 1986), p. 24.

214 John Letai, "Land Deals in Kenya: The Genesis of Land Deals in Kenya and its Implication on Pastoral Livelihoods: A Case Study of Laikipia District" (2011), see on: http://landportal.info/sites/default/files/land_deals_in_kenya-initial_report_for_laikipia_district2.pdf

- 40.3 per cent is controlled by 48 individuals or entities that own large ranches
- 27.21 per cent is owned by small-holders for agriculture purposes. These pieces of lands between 2-5 acres are individually owned by mostly settlers from other areas
- 7.53 per cent are forest reserves
- 7.45 per cent is under group ranches, owned by pastoralist communities and are located in the drier northern parts of the region. Because of these group ranches' location and limited capacities many pastoralists are forced to search for new pastures
- 6.58 per cent is Government Lands used for various purposes including military activities, research, agriculture and national youth service
- 1.48 per cent is used for large farms mostly owned by influential individuals
- Rest of land is under unspecified use.

In Tanzania, the Mang'ola area—a traditional Hadza area—has become the principal onion farming area in all of East Africa, and in 1978-1981 72,000 ha of the Barabaig prime pasture land was alienated by the parastatal National Agriculture and Food Corporation (NAFCO) in order to develop a state wheat scheme. The Strategic Plan for the Implementation of the Land Acts of 2005 clearly reflects that the government of Tanzania is committed to modernize the agricultural sector and make land an important commercial asset. One of its conclusions is that "pastoralists have to be given land and told to settle" (*meaning nomadic tradition has to stop*).[215] More recently, the Poverty Reduction Strategy Papers (PRSPs) of Cameroon, Congo, Rwanda, Uganda, and several other African countries clearly indicate the central role to be played by agriculture in national economies.[216]

In arid and semi-arid areas, where crop cultivation is not an option, large scale commercial cattle farming has been promoted instead. This has happened to the detriment of, for instance, the San in Botswana and Namibia, the Maasai of Northern Tanzania and the nomadic pastoralists of northern Kenya (Rendile, Kenyan Somalis, Turkana, etc.) who all have seen their traditional lands for hunting, foraging and grazing being fenced in and their access to vital resources like water holes, hunting grounds and rangelands denied.

The focus on agriculture including cattle farming, and large scale encroachment of the lands of indigenous peoples by farmers has thus prevented most African governments from paying attention to other ways of land use, including hunting, gathering and pastoralism.

Perpetuation of pre-colonial land control by individuals and governments

Pressure on Kenya to liberalize the agricultural land market was mostly grounded on the failure by the settlement schemes and group ranches to kick-start national production. The Tanzanian

215 United Republic of Tanzania, *Strategic Plan for the Implementation of the Land Laws, SPILL* (Dar es Salaam: Ministry of Lands and Human Settlements Development, 2005), p. 14. http://www.ardhi.go.tz/sites/default/files/SPILL_FINAL-REPORT.pdf

216 All PRSPs can be found on the World Bank's Permanent URLW http://go.worldbank.org/FXXJK3VEW0

Ujamaa policy was declared a failure because of its inability to increase the production of agricultural products such as cotton, tobacco, pyrethrum, and other cash crops.[217]

As shall be seen in the Kenyan and Tanzanian case studies on land laws and policies (Part II of this book), options of individual land holding tend to affect negatively land rights of indigenous peoples. The 1999 Tanzanian land laws show striking similarities with their Kenyan counterparts, some of which were passed more than fifty years ago.[218] For example, under the Kenyan Land (Group Representatives) Act and the Land Adjudication Act, both from 1968 and still in force, an individual member of a "group ranch" may apply for a legal delimitation of his or her plot of land and consequently for an individual title. Similarly, under the 1999 Tanzanian Village Land Act, a village member can apply for an individual registration of part of the land of a given village. In both cases, the most feared consequence is that, once individually registered, such part of the village land or group ranches can then be alienated at will by its owner, even to outsiders.[219] Both mechanisms provide indeed for a gradual individualization of community lands.[220]

Furthermore, under both systems, lands are managed and administered by elected members of the villages or members of the ranches, and the government keeps enormous powers of control and directive over these managing bodies. As Karuti Kanyinga puts it, in neither country the powers over lands are vested in community institutions.[221]

Looking at the whole continent and beyond the Kenyan and Tanzanian cases, it can be rightly argued that the post-colonial African leaders "failed to foresee the traps and snares that lay ahead… They accepted the colonial legacy—whether of frontiers or of bureaucratic dictatorship—on the rushed assumption that they could master it".[222] The independence of most African states was underpinned, amongst other things, by a legal setting meant to perpetuate and protect the interests and property rights of the former colonial powers, foreign companies and investments.[223] This was done through the introduction of the Bill of Rights into the constitutions of the newly independent states:

> In the late fifties and early sixties when the colonies were nearing independence, the issue of Bill of Rights came to the fore. It was raised by the very Powers that had been suppressing it for years. But this time there was a good reason for it. The colonisers were leaving. The colonised were ascending into power. What of the property taken over during the whole period of colonialism by nationals and companies of the colonial powers? This had to be protected.

217 G. M. Fimbo, *Essays in Land Laws of Tanzania* (Dar es Salaam: University of Dar es Salaam Press, 1992), p. 10.

218 With the adoption of a new National Land Policy (2009) and a new Constitution (2010), Kenya has opened up for a revision of its land laws, and several laws have already been repealed and substituted by new ones. See update in chapter V, this volume.

219 Issa G. Shivji and Wilbert B.L. Kapinga, *Maasai Rights in Ngorongoro, Tanzania* (Dar es Salaam: Hakiardhi (The Land Rights and Resources Institute, 1998), p. 100.

220 Ibid., p. 101.

221 Karuti Kanyinga, *Re-Distribution from Above: The Politics of the Land Rights and Squatting in Coastal Kenya* (Upssala, Sweden: Nordiska Afrikainstitutet, 2000), p. 53. See also Rasmus Hundsbæck Pedersen, "The Forgotten Villages – Land Reform in Tanzania". (Copenhagen, DIIS Policy Paper, 2011), p. 3-4. Available from http://www.diis.dk

222 Davidson, *Africa in History* (1992), p. 181.

223 Issa G. Shivji, "The Right of Peoples to Self-Determination: An African Perspective", in *Issues of Self-Determination*, edited by W. Twining (Aberdeen, Scotland: Aberdeen University Press, 1989b), p. 19.

> Therefore the issue of the individual rights, especially the rights to own private property and state protection of the same, became one of the main topics of discussion on independence.[224]

Commenting on constitutional changes in post-apartheid South Africa and Uganda, Issa G. Shivji argues that constitutional changes amongst African states often result from a need for these states to "re-establish their credibility with the Western World",[225] and guarantee individual rights[226] so as to protect the interests of former colonial masters and foreign settlers. It can be seen, indeed, that most constitutions of African post- colonial states strongly protect individual ownership of land and very few provide for collective ownership of community lands, on which extractive industries and protected areas have been or are being implanted.

Strong conservation interests

The objective of developing a tourist industry has led large land tracts used by nomadic communities to become protected areas. In Tanzania for example, in 1961, at the time of independence, Tanzania had one national park, one conservation area and a number of reserves.[227] In 2012, the country had the highest percentage of protected areas not only in East Africa but in Africa as a whole, namely 39.2 per cent of its territorial area.[228] A powerful Ministry of Natural Resources and Tourism has been created to oversee the work of various divisions and conservation institutions, including the Wildlife and the Forestry Divisions; Tanzania National Park (TANAPA); and the Ngorongoro Conservation Area Authority (NCAA). Recent figures (2011) indicate that "that the total contribution of Travel & Tourism to Gross Domestic Product (GDP) was 13.3 per cent ... and visitor exports generate 17.7 per cent of total exports".[229] Tourism has since the 1990s been the second largest foreign exchange earner

224 Legal Aid Committee, *Essays in Law and Society* (Dar es Salaam: Faculty of Law, 1985), pp. 12-3; see also Shivji, "The Right of Peoples" (1989b), p. 19.

225 Issa G. Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy*, Southern Africa Political Series (Harare, Zimbabwe: Southern Africa Printing & Publ. House, 1991), p. 27.

226 H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in *State and Constitutionalism,* edited by I.G. Shivji (1991a), p. 4.

227 United Republic of Tanzania, *Report of the Presidential Commission Inquiry into Land Matters,* (Dar es Salam, Tanzania and Uppsala, Sweden: Government of the United Republic of Tanzania/Ministry of Lands, Housing and Urban Development, and the Nordiska Afrika Institutet, 1994), Vol.1, p. 263.

228 Compared with 2007, the coverage of protected areas in Tanzania has increased with 2.5 per cent. There are 348 protected areas in the country lin other East African countries protected areas cover the following percentages of the territorial area: Uganda: 15.0, Ethiopia: 17.54, Kenya: 12.30, and Eritrea: 4.26. See IABIN Inter-American Biodiversity Information Networks at http://www.iabinpatn.org/default.aspx#/countries/search

229 World Travel and Tourism Council, Travel and Tourism – Economic Impact 2012 – Tanzania at http://www.wttc.org/research/economic-impact-research/country-reports/t/tanzania/

after agriculture.[230] At a certain time, Tanzania was making an annual amount of about US$1.3 million on entry fees and concessions in the Serengeti National Park alone.[231]

As for Kenya, there are now 348 protected areas covering approximately 12.3 per cent of the national land area,[232] and, in 2011 tourism accounted for 13.7 per cent of the GDP, making it the third largest contributor to Kenya's GDP after agriculture and manufacturing.[233] The conservation sector has emerged as having the potential of becoming Kenya's largest earner of foreign exchange, and it is already today Kenya's third largest foreign exchange earner after tea and horticulture. Tourism has been identified as one of the key drivers in achieving the goals of the government's Vision 2030. [234]

This trend of promoting conservation interests has also led to forced evictions of indigenous peoples. Well-known cases include, in Kenya, the removal of Maasai pastoralists from Amboseli (1973) to make way for the Amboseli National Park, and of Samburu pastoralists to make way for the Laikipia National Park (2009-2010);[235] in Tanzania, the eviction of Maasai pastoralists from Mkomazi (1988) to make way for the Mkomazi National Park, and from the Mbarali District (2006-2007) to eventually allow doubling the size of the Ruaha National Park; [236] and in eastern Democratic Republic of Congo (1970), the eviction of the Batwa from the Kahuzi-Biega forests when their homelands of were gazetted as a National Park without their prior and informed consent.[237] Nor did, for example, the Maasai of the Ngorongoro Conservation Area in Tanzania, the Bagyeli of Cameroon, the Hadzabe of Tanzania, the Batwa of Uganda Rwanda and the ǂKhomani San of South Africa, get consulted in relation to the creation of the Serengeti National Park, the Amboseli National Park, the Campo Ma'an National Park, the Ngorongoro Conservation Area and the Mgahinga and Bwindi National Parks, the Nyungwe Forest, and the Kgalagadi Transfrontier Park, respectively. In all these cases, community land rights were ignored as if they had never existed. And

230 See Tanzania Invest at http://www.tanzaniainvest.com/economy/profiles/tanzania-economy accessed 11 January 2013. Many investors are foreign companies like, e.g., the United Arab Emirate Safaris Limited, and their interests have sometimes resulted in the eviction of pastoralists (see chapter VI) See also J. Kweka, "Tourism and the Economy of Tanzania: A CGE Analysis". Paper presented at the CSAE Conference on Growth, Poverty Reduction and Human Development in Africa, 21-22 March 2004, Oxford, UK. Available at: http://www.csae.ox.ac.uk/conferences/2004-GPRaHDiA/papers/1f-Kweka-CSAE2004.pdf

231 Lucy Emerton and Iddi Mfunda, "Making Wildlife Economically Viable for Communities Living around the Western Serengeti, Tanzania", Evaluation Eden Series, Working Paper No.1 (London: International Institute for Environment and Development (IIED), 1999), p. 17. Available online at: http://www.iied.org/pubs/

232 While the number of protected areas has increased from 291 (2007) to 342 (2012), the increase in coverage has only been 0.15 per cent. See IABIN Inter-American Biodiversity Information Networks. http://www.iabinpatn.org

233 See World Travel and Tourism Council at http://www.wttc.org/site_media/uploads/downloads/kenya2012_2.pdf

234 J. Mwanjala, "An Overview of Wildlife and Tourism Management in Kenya". Paper presented on behalf of Kenya Wildlife Service at the 3rd International Institute for Peace through Tourism (IIPT) African Conference on Peace through Tourism, held in Lusaka – Zambia, February 6th-11th, 2005; Ministry of Tourism (Kenya), http://www.tourism.go.ke/ministry.nsf/pages/facts_figures, 12 December 2008.

235 See Cultural Survival Web site: http://www.culturalsurvival.org/news/kenya

236 See Martin T. Walsh, "Study on Options for Pastoralists to secure their Livelihood: Pastoralism and Policy Processes in Tanzania—Mbarali Case study" (2008). At http://www.tnrf.org/files/E-INFO-RLTF_VOL2-PART2_Walsh-M_2008_Pastoralism_and_Policy_Processes_in_Tanzania.pdf

237 Barume, *Heading Towards Extinction*? (2001), p. 70.

most of the conservation areas in these countries are under regimes according to which human habitation or use of these lands by communities are prohibited.[238]

Strong logging and mining interests

In numerous other cases, indigenous peoples' lands are conceded to private or public business, including farming, fishing and logging companies.

For many countries of Central Africa, the logging sector has become one of the main sources of national income. In Cameroon, for example, the forestry sector with an annual log production of more than 2.3 million cubic meters (2010), is the state's third source of hard currency (after oil and agricultural products). It accounteds for 6 per cent of the GDP in 2004.[239]

In the Republic of Congo, the forestry sector produces about 1.5 million cubic meters per year and the sector was still in 2010, placed second in terms of contribution to the GDP (5,6 per cent), to exports (10 per cent) and to employment.[240] In the Democratic Republic of Congo, where forests cover some 167 million hectares, forecasts estimate that logging which today remains low (300,000 cubic meters per year) due, inter alia, to the security situation, could potentially reach 6 million cubic meters a year and thereby contribute significantly to the country's economy.[241]

In 1999, the Central African countries adopted a regional forestry policy known as the 1999 Yaoundé Forest Declaration, and its action plan—the Convergence Plan—thereby committing themselves to unite their efforts to ensure conservation and sustainable management of their forest ecosystems.[242] Accordingly, most Congo Basin countries have recently passed on new forest laws (the Republic of Congo in 2000, the Democratic Republic of Congo in 2002 and the Central African Republic in 2008), and some progress has been made towards sustainable forest management (i.e., validation of forest titles granted to private sector, management plans, forest certifications, etc.),[243] despite numerous and serious implementation gaps.[244] Several Central African countries

238 Emerton and Mfunda, *Making Wildlife Economically Viable* (1999), pp. 3-5.

239 See Carlos de Wasseige, et al. (eds.), *Les forêts du bassin du Congo - Etat des Forêts 2010* (Office des publications de l'Union Européenne, Luxembourg, 2012), p. 45. At http://www.observatoire-comifac.net/edf2010.php

240 In 2010, around 16 000 people were formally employed in the forestry sector. See The Republic of Congo, Poverty Reduction and Growth Strategy Paper 2012-2016).Brazzaville: Ministry of Economy, Planning, Land Reform and Integration (2012), p. 220. At World Bank Permanent URL http://go.worldbank.org/FXXJK3VEW0

241 Albert Kwoko Barume, "Le nouveau code forestier congolais et les droits des communautés forestières". Paper presented at the Workshop on the Implementation process of the Forestry Code of the Democratic Republic of Congo, Kinshasa 17-19 November 2003, Working Group on Forests and Rainforest Foundation, p. 3. Available online at http://archive.niza.nl/docs/200501181516531833.pdf.

242 See COMIFAC's Web site: http://www.comifac.org/la-comifac-1/sommet-des-chefs-detat-et-de-gouvernement?searchterm=Brazzaville+2005 See also FAO Web site, http://www.fao.org/docrep/009/a0970e/a0970e11.htm

243 Some 14 million ha in the Congo Basin are under formal management, 4,5 million ha have been granted FSC (Forest Stewardship Council) certification. See Wasseige et al. (eds.), op.cit. (2012), p. 45.

244 These gaps are due, among other things, to a lack of institutional capacity and enabling environments—the six primary forested countries of COMIFAC have an average 2010 Corruption Perception Index ranking of 149.3 out of 178 countries as defined by Transparency International. Cited in COMIFAC Briefing and Orientation Report, Yaoundé: COMIFAC, USFS International Programs (May 2011), fn. 53, p. 26. At http://rmportal.net/library/content/usda-forest-service/central-african-forest-commission-comifac-briefing-and-orientation-report

have also U.N. REDD National Programmes (DRC, Republic of Congo) or are REDD partner countries (Cameroon, Central African Republic, Gabon).

However, the forest sector is also seen as a sector which has the potential to contribute to the countries' economic growth and particularly to the growth of foreign trade and employment, and hence linked to poverty reduction.[245] This may well lead to an increase logging concessions,[246] forest plantations (oil palms), processing industries (sawmills), access roads, the influx of workers all of which may impact negatively on indigenous peoples.[247]

A number of indigenous peoples' lands are also rich in minerals, including gold, diamonds, and coltan. This is the case of the CKGR in Botswana which is reported to be rich in diamonds and from which the San were expelled in 2002. The mineral known as coltan, used in the mobile phone industry, is exploited on Batwa's ancestral lands, now a national park (Kahuzi Biega), in the Democratic Republic of Congo. Another project to exploit more than 50 million cubic tons of cobalt/nickel in the middle of Cameroon's tropical forests[248] will surely affect ancestral lands of indigenous Baka ("Pygmies") people. Oil exploitation is also increasingly affecting land rights of African indigenous peoples as the continent continues its exploration efforts pushed by world powers in search for market diversification.[249] Lands of the Bagyeli in Cameroon were also used for the construction of the Tchad-Cameroon oil pipeline.

Nation-state building

Unlike other continents, where the civil rights movement emerged in a context of relatively long-established independent states, against which victimized communities and groups were reacting, in Africa this human rights movement emerged simultaneously with the decolonisation process.[250] Consequently, the ideals and ideas that were behind this movement were "hijacked" by the new

245 See the various countries' Poverty Reduction and Growth Strategy Papers at http://go.worldbank.org/FXXJK3VEW0

246 The percentage of forested areas covered by logging concessions ranged from 12 per cent in RDC (2011); 34 in Cameroon (2009); 43 in RCA (2009); and 44 in Gabon (2009), to 75 per cent in Congo (2010). See Wasseige et al., op.cit. (2012), p.44.

247 See The International Work Group for Indigenous Affairs (IWGIA) and Plan, "Cameroon: What future for the Baka", IWGIA report No. 13, written by Aili Pyhälä. (Copenhagen: IWGIA and Plan, 2012), p. 25 ff.

248 Geovic Cameroon's mine permit covers 1,250 sq km and provides exclusive production rights to seven large cobalt-nickel-manganese deposits. Two of the seven deposits are already planned for mining and production. See Web site of Geovic Company: http://www.geovic.net - See also The Indigenous Working Group for Indigenous Affairs (IWGIA), "Cameroon" (Copenhagen: IWGIA 2012), p.25 ff.

249 In Kenya, Chinese and British companies have been exploring for oil on Samburu and Turkana land, and in 2011, a British company struk oil in Turkana.

250 The year of independence for the following Sub-Saharan countries (in alphabetical order) is: Angola (1975), Benin (1960), Botswana (1966), Burkina Faso (1960), Burundi (1962), Cameroon (1960), Congo DR (1960), Republic of Congo/Congo Brazzaville (1960), Ivory Coast (1960), Djibouti (1977), Equatorial Guinea (1968), Eritrea (1993), Gabon (1960), Gambia (1965), Ghana (1957), Guinea Bissau (1973), Guinea (1958), Kenya (1963), Lesotho (1966), Liberia (1847), Madagascar (1960), Malawi (1964), Mali (1960), Mauritania (1960), Mauritius (1968), Mozambique (1975), Namibia (1990), Niger (1960), Nigeria (1960), Rwanda (1962), Senegal (1960), Sierra Leone (1961), Somalia (1960), South Africa (1910), Sudan (1956), Swaziland (1969), Tanzania (1964), Togo (1960), Uganda (1962), Zambia (1964) and Zimbabwe (1980).

post-colonial African political elites. These elites wrongly assumed that the idea of "self-identity", cited amongst other principles of this movement, referred to states as formalized at the 1885 Berlin Conference and that the term "peoples" meant states.[251]

It emerged indeed that the post-colonial African political affairs were underpinned by two objectives, which in fact could not ever have prompted a human rights culture or a strong civil society. Firstly, in the name of national unity, considered as an antidote to the danger of "tribalism" leading to secession, the new political leaders in Africa opted for nation-states policies.[252] Promoting the identity of communities was regarded as an obstacle to national unity and a source of instability. Thus "it became a … strategy of the new governments to subsume the national self-determination rights of ethnic groups into the rhetoric for the betterment of all … and national unity".[253] In other words, "nation-building thus became the overall task of the newly independent countries", which intensified chauvinism and oppression of or discrimination against ethnic groups, such as the Hadzabe, the Maasai, the "Pygmies", and several other groups that attempted to claim an identity of their own.[254]

Thus, unlike America where the civil rights movement boosted civil society, in Africa the "democratic revolution aborted"[255] and the destruction of civil society became an approach taken by many dictatorships imposed upon the continent after independence.[256] Since then, the African "neo-colonial State has tended, for its own reproduction, to usurp and obliterate the autonomy of civil society and therefore the very foundation of democracy".[257] This behaviour has meant that the first generation of leaders of the newly independent African states failed to "recognise how damaging the division of Africa into modern states [by the colonial system] was to the identity of many peoples".[258] Julius Nyerere, president of Tanzania from 1961 to 1985, for example, warned against any attempt to try to redesign the African map.[259] Consequently, they endorsed the "balkanization" of several communities, such as the "Pygmies", the San, the Maasai, the Mbororo and other peoples who found themselves living in several different states.[260]

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251 At what is known as the 1958 Accra First Conference of Independent African States, the post- colonial new African leaders stated "We, the African States assembled here in Accra, in this our first Conference, conscious of our responsibilities to humanity and especially to the peoples of Africa, … affirm the following fundamental principles … respect for the sovereignty and territorial integrity of all nations". The same line of understanding or using, indistinctively, the terms "nations", "peoples" and "states" was later also taken by the U.N. General Assembly's Resolution 1514 (XV) of December 14, 1960 on decolonization.

252 Shivji, *State and Constitutionalism* (1991), p. 31; Shivji, "The Right of Peoples" (1989a), p. 35.

253 Lerner, *Group Rights* (1993), pp. 128-130.

254 Ernest Wamba-dia-Wamba, "Discourse on the National Question", in *State and Constitutionalism,* edited by I. Shivji (1991), p. 60; Shivji (ibid.), p. 33. Shivji elaborates also on the impact of the building of "nation-states" on national struggles and self-determination. Citing the cases of Rwanda, Burundi, Ethiopia, Tanzania, Sudan, and Nigeria, he underlines the oppression and discrimination that characterized most post-colonial Sub-Saharan African states in dealing with the cultural identity of their communities. Eritreans, Tigreans, Oromos, and Somalis are all communities that were denied their identity by the political leaders of Ethiopia. The Katangese community of the Democratic Republic of Congo was denied its right to self-determination.

255 Issa G. Shivji, *The Concept of Human Rights in Africa,* (London: CODESRIA Book Series, 1989b), p. 5.

256 Shivji (ed.), *State and Constitutionalism* (1991), p. 39.

257 Shivji, "The Right of Peoples" (1989a), p. 5.

258 Barume, *Heading Towards Extinction?* (2001), p. 24.

259 Davidson, *Africa in History* (1992), p. 184.

260 The "Pygmies" are found in Gabon, Central African Republic, Democratic Republic of Congo, Rwanda, Burundi, and Uganda. The San live in Botswana, South Africa, Namibia, Angola, Zambia and Zimbabwe as a result of the division

This acceptance of the colonial legacy by the political elite of the newly independent African states was furthered by the militarization of the continent's politics. As noted by Eboe Hutchful, "it is estimated that between January 1956 and the end of 1985 there were sixty successful coups".[261] However, these coups did not resolve the ever-existing friction and divergent interests that characterized the relation between states and communities.[262]

The current African political leaders cannot be seen as being in a position to do better than their predecessors in relation to indigenous rights. Most Central, Eastern, and Southern African political leaders tend to compensate "their economic weakness and political instability by denying their peoples the right to struggle and organize in opposition, protest, and revolt".[263] Other African leaders simply deny the existence of social and economic problems,[264] and therefore do not attempt any sort of "redistributive policy".[265] However, knowing deep down that they are failing their people, including indigenous communities, most current African political leaders live in fear of radical democratic tendencies or civil societies' call for justice, land restitution, to the extent that they could be described as "men concerned primarily with power and self-interest, not with real people facing real problems in the World".[266] Thus land rights of several social groups are often contested since states do not seem ready to abandon the doctrine of state ownership.[267] In other words, most "land laws in Africa … are products of politics … They have been enacted by and are directed at benefiting the ruling group in each country" and never the communities.[268]

There have been, nevertheless, some positive changes in the attitude of a number of governments. The old rhetoric of denying the existence of indigenous peoples seems to be somewhat on the wane. This should be seen as the result of, inter alia, the whole process around the adoption of the UNDRIP and pressure from the African Commission on Human and Peoples' Rights (ACHPR), as well as from the international donor community, in particular the World Bank,[269] not to mention the increasingly stronger indigenous movement in Africa.

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of southern Africa into states. The Maasai live in Kenya and Tanzania and feel that they belong to the same community that existed before the Berlin Conference of 1885. The Mbororo are found in several African countries including Cameroon, Central African Republic and Nigeria.

261 Eboe Hutchful, "Reconstructing Political Space: Militarism and Constitutionalism in Africa", in *State and Constitutionalism,* edited by I. Shivji (1991), p. 183.

262 Ibid., p. 187.

263 Shivji, "The Right of Peoples", (1989a), p. 103.

264 Davidson, *Africa in History* (1992).

265 Alicia Puyana, "New Challenges for Developing Countries", in *Facing the Challenge: Responses to the Report of the South Commission,* edited by the South Centre (London: Zed Books, 1993), p. 285.

266 Noam Chomsky, "World Orders, Old and New", in *Facing the Challenge: Responses to the Report of the South Commission,* edited by the South Centre (London: Zed Books, 1993), p. 140.

267 Delville, "Harmonising Formal Law" (2000), p. 121.

268 Patrick McAuslan, "Only the Name of the Country Changes: Diaspora of European Land Law in Commonwealth Africa", in *Evolving Land Rights and Tenure in Africa,* edited by *C.* Toulmin, and J. Quan (London: DFID/IIED, Natural Resources Institute, 2000), p. 92.

269 The World Bank has been very active when it comes to taking the interests and needs of hunter-gatherer communities into consideration. An example are the many Indigenous Peoples' Plans that have been elaborated by the WB and endorsed by, e.g., Kenya, DRC, and Tanzania. Hitherto, the WB has, however, been reluctant to use OP4.10 in the case of nomadic pastoralists' rights.

All these institutions have played an important role in highlighting the need to redress the situation of indigenous communities, in particular when it comes to acknowledging their existence, their human rights, and to some extent their rights to land and natural resources. Several countries recognize today the existence of indigenous communities although they still may be termed "marginalized" communities. Kenya's new 2010 Constitution, for instance, refers to "marginalized communities" but does it in a language very close to that of the UNDRIP. Indigenous communities are included in the national census (Uganda, Kenya, and Republic of Congo) and the Day of the World's Indigenous People is now officially celebrated in many places. The DRC, Tanzania and Kenya have adopted Indigenous Peoples Programme Frameworks (IPPF). A specific law on Indigenous Peoples has been passed in the Republic of Congo, the CAR has adopted ILO Convention No. 169 on Indigenous Peoples and Namibia has developed programmes for the San population while there are on-going discussions in the country on possibly developing a San/indigenous peoples policy.

Pressure/support from international donors

Pressure from international donors can sometimes also contribute to loss of lands by indigenous peoples. In both Kenya and Tanzania, official development assistance (ODA) and the World Bank have played and continue to play an important role in the conceptualization, design, and implementation of these countries' land laws and policies impeding on native communities' land rights. International donors have not only been pressing for the liberalization of land ownership, but also providing important support for new laws, reforms, and projects, which are blamed for the continuing assault on an already weak and almost non-existent system of protection afforded to native communities' land rights. In Kenya, as will be shown later (chapter V), the strong criticisms and pressures that led to the gradual abolition of the group ranches came from, among others, the World Bank, which argued that the scheme was preventing other Kenyan groups from acquiring land in Maasai districts and thus not promoting a liberal use of land.[270] The current privatisation process that the land sector is undergoing in this country could be regarded as strongly supported by these international financial institutions and donors.[271] In Tanzania, and commenting on the land reform process in the late 1990s, Ringo Tenga wrote that "the World Bank and the IMF were at the centre of the stage" and "that funds but also human expertise were provided by the British Overseas Development Administration [today known as the British Department for International Development (DFID)], which has come in to complete the task of assisting in drafting a new land code".[272]

A recent example of donor agencies' negative influence has been the resumption in 2009 of the ban on cultivation within the Ngorongoro Conservation Area, allegedly as the result of pres-

270 Rutten, *Selling Wealth* (1992), p. 476.

271 Kanyinga, *Redistribution from Above* (2000), p. 50.

272 Tenga, "Legislating" (1998a), p. 6. The two Tanzanian Land Acts were drafted by Patrick McAuslan, a law scholar and expert in land laws. Auslan has worked with numerous land related legal reforms in many developing countries on behalf of various foreign development agencies, such as the British DFID.

sure from the U.N. and international conservation agencies and threats of removing the area from the UNESCO World Heritage list. Re-introducing the ban happened at a time when the pastoralists had lost almost 80 per cent of their livestock due to the worst drought in Tanzania's history. No longer able to cultivate their small plots of potatoes, corn and beans, death from hunger and malnutrition have been reported in the NCA for the past few years.[273]

In a number of cases, donors' support to governments continues even when violations of indigenous peoples' rights are taking place. In the conservation sector, accounts by Bourn and Blench attest that:

> Tanzania has received a wide range of donor support for wildlife conservation since 1990, and increasing emphasis has been given to involving local communities in the process, and exploring ways in which the benefits of maintaining wildlife can be equitably shared. GTZ has been active in and around the Selous, and the EU in the Serengeti and Ngorongoro region; and DFID in and around the Ruaha. USAID supported the Planning and Assessment for Wildlife Management (PAWM) project in the early nineties.[274]

In Kenya, similar supports from ODA and the World Bank have been ever-present in numerous conservation related projects including fencing National Parks and trying to provide alternative arrangements for communities depending on these areas. Such was the case in 1977, when the Bank provided funds for a pipeline project that aimed at channeling water out from springs located inside the fenced Amboseli National Park to Maasai communities, whose only watering resources were those springs to which they no longer had access. After the end of the project and having functioned for some years, the system broke down for lack of maintenance and fuel and the conflict between the Maasai community and the Park re-emerged.[275] Whatever might be said about this World Bank project, it did not solve the fundamental problem, namely the fact that Maasai people are prevented from enjoying part of their ancestral lands.

The focus on agriculture as pillar of national economies, the protection of individual ownership of lands, strong conservation, logging and mining interests as well as the need for nation-state building and pressure from the donor community emerge as main causes of indigenous peoples' land dispossession in most parts of Africa. In other words, states, extractive industries and conservation agencies, three of the world's most powerful actors, battle the world's most vulnerable, poor, and powerless communities, namely, indigenous peoples. Yet, most indigenous peoples in Africa have not given up on their lands lost to outsiders. On the contrary, they appear to have developed a range of reactions against their dispossession.

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273 See, e.g., The International Working Group on Indigenous Affairs (IWGIA), "Tanzania: Hunger in a World Heritage Site. Where is the World?" (21 December 2012) at http://www.iwgia.org/news/search-news?news_id=732

274 Bourn and Blench, *Can Livestock and Wildlife Co-exist?* (1999), p. 11.

275 Ted Cheeseman, "Conservation and the Maasai in Kenya. Trade off or Lost Mutualism" (n.d). Available online at: http://www.environmentalaction.net/aa_kenya_policy.htm

African indigenous peoples' reactions to land dispossession

"They took the land on paper, but the land on the ground is ours."[276]

Indigenous communities in Central, Eastern, and Southern Africa appear to react to these state-led land dispossessions in two major ways: through immediate reactions and through long-term strategic reactions.

Immediate reactions

Amongst the most common immediate reactions of Central, Eastern, and Southern African indigenous communities to their land dispossession are "clandestine" use and occupation, often sustained by small-scale violent actions.

The Batwa of the Kahuzi-Biega Forest in eastern Democratic Republic of Congo continue to enter and use the resources of the forest despite the government's interdiction to do so. Quite often, Batwa are arrested, detained and "subjected to brutal and inhuman treatments in order to deter them from entering the Park".[277] In 1995, tens of hectares of the Kahuzi-Biega National Park were burned down, obviously by people who were reacting to their expulsion from their lands.

The Batwa of the Nyungwe Forest in Rwanda have continued to use these forests clandestinely, despite the Presidential Decree of March 13, 1992 that made "clandestine" use of forest a criminal offence.[278] The Nyungwe Forest Conservation Project that is essentially funded by the American organization Wildlife Conservation Society also has a strong anti-poaching policy. Those who are caught within this forest are fined up to 5,000 Rwandan francs (an equivalent of more or less US$10). This amount of money is almost unaffordable for most of the Batwa. In 1997, hundreds of hectares of this forest were mysteriously burned down by unidentified people.

In Uganda, the Batwa are forbidden to enter into the Bwindi National Park. However,

> [T]he majority ... still use it for vital subsistence and religious activities. They risk imprisonment or fines if caught but their dependence on forests is so fundamental to their way of life that they cannot be expected to stay away from it. The Batwa still collect honey and seasonal vegetables, lay traps for small game, collect herbal medicines and other forest products (vines for ropes, bamboo, etc.) and visit ancestral sacred sites for rituals and to make

276 Statement by an elder Maasai of Iloodoariak/Kenya, cited by Sammy Oleku Ole Roore in "The Iloodoariak Land Scandal", in *Pastoralists in the Horn of Africa,* Minority Rights Group Report of a Workshop on Social and Economic Marginalisation, 8-10 December 1998, Nairobi-Kenya, p. 6.

277 Barume, *Heading Towards Extinction?* (2001), p. 82.

278 The Presidential Decree of 1992 makes a reference to the provisions of Article 446 of the Rwandan Penal Code, which prohibits cutting of protected trees and other resources.

> offerings. According to park officials, it has proved impossible to prevent the Batwa from using the forest despite the military guards and regular patrols." [279]

The Hadzabe of the Yaeda Chini and Meatu District areas of Tanzania are also regularly arrested and harassed for hunting on lands that they consider being their homelands, but which now belong to private hunting companies.[280] The Hadzabe from the area northwest of Balangida are also often arrested and detained on the same grounds of hunting illegally on lands which they consider theirs, but which are now exploited by the Robin Hurd Hunting Company.

The Ogiek in Kenya, too, rely on continuing use and occupation of their lands, the Mau Forests, despite the risk of being arrested, detained, and even tortured. A member of the Ogiek community met during a fieldwork visit confirmed cases of rape of Ogiek women by forest guards, as a means to force their husbands to leave their lands. Cases of burning down parts of the Mau forests have also occurred. But no-one knows whether this is because of the frustration of the Ogiek community.

The San also continue to use and live in the Central Kalahari Game Reserve (CKGR) despite several evictions by the Botswana government. Similarly, their Namibian fellows continued to "clandestinely" use lands taken away from them by the government for conservation purposes.[281]

However, in comparison with other communities, hunter-gatherer communities rarely resort to violence. It is argued that hunter-gatherers do not often react violently to the loss of their lands because they only constitute small groups and because of their political insignificance combined with the lack of strong political institutions capable of organising a strong resistance.[282]

While indigenous pastoralists communities also react with "clandestine" use and occupation as immediate answers to actions aimed at preventing them from using or occupying lands that they believe to be theirs, they sometimes resort to violence. This happens when they are confronted with aggressive game wardens and law enforcers trying to hinder their herds' access to life sustaining resources, such as grazing and water.

Several cases of such violent confrontations have taken place in Kenya and Tanzania. In Kenya, clashes involving Maasai are principally based on land and water but also express the Maasai's deep frustrations over being repeatedly betrayed by broken promises. A case in point is the conflict around Amboseli National Park that for years has been characterized by serious conflicts between the Maasai pastoralists and the Kenyan Wildlife Society (KWS) because the long term benefits the Maasai were promised as compensation for moving out never materialized.[283]

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279 Penninah Zaninka, "The Impact of (Forest) Nature Conservation on Indigenous Peoples: The Batwa of South-Western Uganda; A Case Study of the Mgahinga and Bwindi Impenetrable Forest Conservation Trust", in *Indigenous Peoples and Protected Area in Africa: From Principles to Practice,* edited by J. Nelson and L. Hossack (Moreton-in-Marsh: Forest Peoples Programmes, 2003), p. 182.

280 Madsen, *The Hadzabe of Tanzania* (2000), pp. 73-5. Andrew Madsen gives accounts of frequent arrests and even imprisonments of Hadzabe for allegedly hunting on lands conceded to private hunting companies, such as the Tanzania Game Trackers Ltd.

281 James Suzman, *Minorities in Independent Namibia*, Minority Rights Group International Report (London: MRG, 2002), p. 24.

282 Woodburn, "Indigenous Discrimination" (1997), p. 352.

283 The promised benefits included guaranteed access to water supplies, compensation for tolerating wildlife, increased infrastructure (i.e., schools, clinics), and direct benefits from tourism. The government, however, failed to provide

Clashes between Maasai and Kikuyu communities in Kenya are relatively frequent. This happened, for instance, in January 2005, in the central Rift Valley when youths from the two communities fought using machetes, spears, bows and arrows and clubs. At least 15 people were killed. Many more were injured and thousands of people fled their homes. Evidence suggests that the clashes were mostly a result of competition for dwindling water for livestock.

> "The bone of contention is the use of River Ewaso Kedong whose volume of water has been reduced drastically because of the current drought. The Maasai, who live downstream, claim their neighbours upstream, the Kikuyu, are using the river water for irrigation, thereby complicating the drought situation for them and their livestock."[284]

The same factors have been cited as major causes of friction among communities living in the arid northern and eastern districts of the country, where disputes over grazing and water also occur between different groups of indigenous pastoralists. This is for instance, the case in Northern Kenya, where there have been a number of violent conflicts have taken place between, among others, the Turkana and the Samburu.[285] Due to the easy access to automatic arms in the region, some of these conflicts have become extremely violent and bloody. In some cases, government forces have intervened and carried out security operations against suspected cattle rustlers. In 2009, for instance, after an incident of cattle rustling in which the Samburu raided the Meru (farmers) and the Borana (indigenous pastoralists), security agents forced the Samburu to return all the livestock but continued nevertheless their punitive action, resulting in the displacement of more than 2,000 Samburu and the confiscation of their animals. At least 40 Samburu people were killed, herds of animals were illegally driven away and a series of other human rights abuses were committed.[286]

In Tanzania, confrontations have taken place in the Northern Highlands Forest Reserve (NHFR) in the Ngorongoro Conservation Area (NCA), where in March 1997, for instance,

> [A]n armed squad of NCAA's game wardens raided Nainokanoka herdsmen who were grazing their herds of cattle in that part of the forest which forms Irkeepusi Village. Three

these benefits. For example, the water pipeline worked for only a couple of years due to lack of maintenance, wildlife fees became sporadic and stopped after 1981, and direct benefits were almost non-existent. In 1981,the Maasai reacted by illegally entering the park, spearing animals in protest and spearing the PVC pipeline in hopes of getting some water. See Leela Hazzah and Stephanie Dolrenry, "Coexisting with Predators". Paper presented at Nature,Wildlife, People – A symposium on wildlife protection and people's livelihoods, September 2007. Accessible online at http://www.india-seminar.com/2007/577.htm; see also Cheeseman, "Conservation and the Maasai in Kenya" (n.d).

284 Navaja Ole Ndaskoi, quoting *The East African*, January 24, 2005 in "The Roots Causes of Maasai Predicament". Available online at http://www.galdu.org/govat/doc/maasai_fi.pdf (n.d.), p. 17.

285 See, for instance, James Bevan, "Between a rock and hard place: Armed Violence in African Pastoral Communities." Report commissioned by the government of Kenya, the Swiss Confederation and UNDP (2007). The report gives an overview of land disputes that have developed into violence and looks at some of the root causes. Available online at http://www.genevadeclaration.org/fileadmin/docs/regional-publications/Armed-Violence-in-African-Pastoral-Communities.pdf

286 For more details see The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2010* (Copenhagen: IWGIA, 2010), pp. 481-2.

> herdsmen were severely assaulted and beaten with the iron ends of their own spears while their '*sime*' (machete) were used to slash their herds of cattle with. Some 15 herds of cattle belonging to nine villagers were either killed, maimed or lost in the ensuing stampede. Maasai warriors mobilised immediately for war against the NCAA game wardens. A potential bloodbath was only averted after the intervention of the Maasai *Laigwanak*, the District Commissioner and the Member of Parliament for Ngorongoro District.[287]

But conflicts over land use or water resources may also pit Maasai against farmers. In December 2000, violent clashes between Maasai cattle herders and farmers in Morogoro Region,

> ... left 31 people, mostly women and children, dead. The clashes between Maasai nomads and farmers ... had been in progress since the end of October, but worsened during four days of fighting. ... The 8 December attack was in revenge for the killing of two Maasai tribesmen and the slaughtering of 35 cows by the farmers ... The combination of revenge and sheer anger at the confiscation of their herds compounded a conflict over land use to which there is no clear solution in sight.[288]

Long-term strategic reactions

In addition to the various immediate reactions to their land dispossession, the indigenous communities of Central, Eastern, and Southern Africa appear to have developed long-term strategies for reclaiming their lands. These counter-attacking strategies could be grouped into three categories, as the following few illustrative examples show. The first two approaches (legal challenge and lobbying advocacy) appear to take a strategy whereby educated members of indigenous communities act on behalf of their fellows to challenge states. In contrast, the third approach (revival of community history) could be considered as a strategy that consists of first mobilizing communities' belief in their land rights and culture, before making collective claims for the lands in question.

Legal challenges

This approach consists of legal challenges or court cases filed by indigenous communities against their governments or private companies. To date, such cases have been filed mainly in Kenya, Tanzania, South Africa and Botswana and they will be specifically discussed in Part II of this book. If successful, a legal challenge can lead to the titling of indigenous peoples' lands.

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287 For a more detailed account of this incident as well as of other similar incidents in the NHFR area, see Lissu, "Policy and Legal Issues" (2000).

288 IRIN Central and Eastern Africa – Weekly Round-up 50, 9-15 December 2000. Available online at http://iys.cidi.org/humanitarian/irin/ceafrica/00b/0028.html

Lobbying and advocacy

There are indigenous communities in Central, Eastern, and Southern Africa that have opted for the lobbying and advocacy approach. This approach consists of rallying as many influential actors as possible to their cause, and getting the injustices they suffer from put on the agendas of national and international debates.

In 2000, the Bagyeli of Cameroon, for example, went to Washington where they had an opportunity to discuss the possible impact on their way of life of the planned oil pipeline between Chad and Cameroon.[289] Following a meeting with World Bank officials, the Bagyeli representatives called upon the Bank to make sure the following arrangements were made before the beginning of the project:

a. full participative consultations with the Bagyeli communities are carried out again, by a team independent of the local elite, in a culturally appropriate manner so that the Bagyeli are fully informed of the negative and positive impacts of the pipeline;
b. the Cameroonian Government is educated about the general situation of Pygmies in Cameroon;
c. the Cameroon Government formally regularises the land tenure situation of Pygmies and allocates land to them;
d. measures are put in place to combat the inequalities which exist between the Bantu and the Pygmies, facilitate access to schooling, health services, and help Pygmies to obtain official documentation such as birth certificates and identity cards.[290]

The World Bank postponed its final decision on the project for a few weeks after this submission by the Bagyeli community before reactivating the whole process. In November 2002, a World Bank's inspection panel was finally sent to Cameroon for a fact-finding mission. Later on, the project was implemented, an Indigenous Peoples Development Plan was adopted and a number of corrective measures, even though regularly criticized, were put in place.

A similar approach was taken by the "Pygmies" of the Democratic Republic of Congo in 2005 when an advocacy group—Dynamique des Groupes des Peuples Autochtones (DGPA)—filed a formal complaint to the World Bank Inspection Panel. This initiative not only resulted in an investigation by the Panel but also in a number of recommendations, among others to work together with the government, development partners and key stakeholders, on a "Pygmy Development

289 The 665 miles long oil pipeline from Chad to Cameroon was approved by the World Bank in June 2000. The World Bank provides up to US$240 million of the US$3.5 billion needed for the whole project.This Project has been subject to much criticism from indigenous communities because they felt that their existence is threatened by this pipeline. For more about this project and its implication on indigenous communities, see the Web site of the Forest Peoples Programme (FFP): http://www.forestpeoples.org/briefings.htm

290 Letter by the representative of the Bagyeli indigenous community to the World Bank. See on Web site of World Rainforest Movement, at http://www.wrm.org.uy/alerts/june00.html

Strategy".[291] After an extensive survey of Pygmy communities, conducted by DGPA, a report delineating a "Strategic Framework for the Preparation of a Pygmy Development Program" was issued in 2009 by the World Bank,[292] and officially validated by the DRC government in 2011. DGPA has since then organized a Parliamentary Group of MPs for the Defence of the Rights of the Autochthonous Pygmy Peoples and the improvement of the relations between the Autochthonous Peoples and their neighbours (2012); and published an Atlas of Autochthonous Peoples.[293]

The lobbying and advocacy approach adopted by the Batwa of Rwanda has been to address, in early 2001, an open letter to the president of Rwanda, raising a number of issues particularly affecting their community and calling upon the government of Rwanda to provide a special protective regime for the Batwa.[294] The Batwa community of Rwanda also hosted the first African conference on "Indigenous Peoples and Protected Areas in Africa: from Principles to Practice", which was held in Rwanda in September 2001. Attended not only by several representatives from international lobby and support groups for the cause of indigenous peoples but also by highly placed local government officials,[295] this conference served the Batwa of Rwanda to raise the profile of their situation. One outcome has been a number of government programmes within health, land and housing and education that have benefited the Batwa.[296]

The Ugandan Batwa, who were expelled from their lands, now known as the Mgahinga and Bwindi National Parks famous for hosting the mountain gorillas, also use the lobbying and advocacy approach in their struggle for regaining control over their lost lands. The "Mgahinga and Bwindi Impenetrable Forest Conservation Trust (MBIFCT)" was created by the Ugandan government with a World Bank's grant of more than US$4 million. One of the duties of this Trust is to support the Batwa community through a number of projects. Since 1995, when the Trust became operational, most of the current efforts by Ugandan Batwa to regain control over their lands and resources have focused on getting involved in the activities and objectives of the Trust as much as possible as well as trying to get the World Bank to understand their case.[297]

Despite being established on lands and resources over which the Batwa of Uganda claim indigenous land rights, the Trust did not for a long time have one single member of the Batwa community on its Management Board, which is mainly composed of representatives from the government, the tourist industry, and even other local communities.[298] However, in an attempt to try to get

291 For details on Inspection Panel and the DRC see http://go.worldbank.org/2217YRD010

292 Available from https://openknowledge.worldbank.org/handle/10986/3150

293 See DGPA Web page at/ http://dgpa.cd/

294 See the full text (in French) of the letter written by a representative of the Batwa community of Rwanda to their President on the Web site of Héritiers de la Justice: http://www.heritiers.org/caurwaletpresi.html

295 In addition to more than 50 representatives of indigenous communities from Rwanda, Burundi, Uganda, Democratic Republic of Congo, South Africa, Cameroon, Kenya, and Namibia, the conference was attended by representatives from the Swedish Society for Nature Conservation, the World Wildlife Fund, and the Forest Peoples Programme.

296 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2010* (Copenhagen: IWGIA, 2010), p. 507.

297 Penninah Zaninka, "The Impact of (Forest) Nature Conservation" (2003), pp. 11-15. See also The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2005* (Copenhagen, Denmark: IWGIA, 2005). Available on http://www.iwgia.org

298 The Trust Management Board is composed of nine (9) voting members, with one member from each of the following governmental bodies: Uganda National Park, the Forest Department, the Wildlife Clubs of Uganda, CARE (an inter-

the Batwa involved in its activities, the Trust organized in 1999 a workshop which, for the first time, involved more than five Batwa. In September 2000, the Trust bought 101 acres of land outside the limits of the Parks for the Batwa community, but due to an unexpected decrease in MBIFCT funds in 2002, it was only possible to purchase land for a little more than half of those originally targeted for the assistance,[299] and "the Batwa who received land did not receive training on how to manage the land and leverage the land to produce sustainable income. This factor was further compounded by the fact that those who received land grants did not actually receive the deeds to the property, limiting their actual control over the property asset".[300]

Therefore, and since the Trust continues to fund the other aspects of the National Park, including the park guards who forcibly prevent Batwa from entering the forest, most Batwa feel that the Trust does not work in their interests and that the World Bank's funds instead have been used instead to enable the government to enforce their eviction from their traditional lands.[301] Consequently, the Batwa of Uganda continue contacting Uganda's major donors such as the World Bank, the USAID, and the Dutch government, some of which are also non-voting members of the Trust and lobby for their case.[302] One result has been that the Dutch embassy in Kampala, for example, has agreed to fund the representation and participation of the Batwa in the work and institution of the Trust.[303]

In Kenya, and due to the numerous obstacles that their court cases have been facing, (see chapter V in Part II) the indigenous Ogiek community has combined the legal avenue with a lobbying and advocacy approach. Over the years, Ogiek representatives have thus met with the Kenyan President (1995), addressed a memorandum on their land issue to the Kenyan Parliament (1996); presented petitions before the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land, (2004),[304] and set up an electronic mailing list that helps dispatching information and updating the members of their lobbying and support network on any development relating to their claims. A few years ago Maasai representatives went to Washington to lobby the World Bank to stop funding the Magadi Soda mine in Kenya. In 2013, Sengwer indigenous indigenous peoples filed a complaint to the World Bank's Inspection Panel alleging violation of their land rights and Operational Policy 4.10 on indigenous peoples by a World Bank-funded project on forest management by the Kenyan Government.[305] In recent years, the Ogiek

national development agency), the Institute for Tropical Forest Conservation, the Ugandan Tourism Association, and one representative from the Districts of Kisoro, Rukungiri, and Kabale.

299 The project then changed to supporting the education of Batwa children and the Trust has also built a number of schools attended by a few Batwa children.

300 See First Peoples Worldwide, "OKICIYAB "to help each other"—Promoting Best Practices in Indigenous Community Development" for report on the Mgahinga Bwindi Impenetrable Forest Conservation Trust (MBIFCT) for the Batwa in Uganda. (June 30, 2006), p. 50 ff. At http://fnbc.info/sites/default/files/documents/OkiciyabFinalReportNA6302006.pdf

301 See Zaninka, "The Impact of (Forest) Nature Conservation" (2003), p. 15. See also Zaninka and Justin Kenrick, "Uganda: The Batwa organize to reassert their rights", *World Rain Forest Movement (*WRM) *Bulletin* nº 62, September 2002 at http://www.wrm.org.uy/bulletin/62/Uganda.html

302 Ibid., p. 11. The USAID and the Dutch embassy in Kampala are amongst the non-voting members of the Trust.

303 See Zaninka, "The Impact of (Forest) Nature Conservation" (2003), p. 12.

304 This Commission was established to address contentious land issues throughout Kenya.

305 See on the World Bank website: http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:23350855~pagePK:64129751~piPK:64128378~theSitePK:380794,00.

and the Maasai as well as all the other indigenous communities in Kenya have been strongly involved in the constitutional and legal reform process leading up to the elaboration of the new National Land Policy (2009) and the adoption by referendum of the new constitution (2010). Currently, they are very active in the concrete implementation of the land policy and the Constitution, including the latter's provision regarding community lands. In relation to the Truth, Justice and Reconciliation Commission established in 2008 to look at historical injustices with respect to land dispossession, the indigenous peoples of Kenya have testified and contributed to the Commission's work and indigenous issues figure prominently in the Commission's final Report findings and recommendations.[306]

Indigenous peoples in Tanzania, too, have been active in key policy processes including the constitutional reform process that started in 2011. In late 2011, pastoralist and hunter-gatherer organizations created a Technical Working Group (the Pastoralists and Hunter-Gatherers Katiba Initiative, KAI) charged with coordinating their meaningful participation in the constitution-making process. Indigenous peoples have equally attempted to influence policy processes with a bearing on livelihoods in Tanzania. Pastoralist and hunter-gatherer organizations including Pastoral Women Council (PWC), the Parakuyo Indigenous Community Organization (PAICO-DEO) and two umbrella organizations, PINGOs Forum and Tanzania Pastoralists and Hunter-Gatherer Organizations (TAPHGO), have conducted several fact-finding missions in order to highlight the situation on the ground in general as well as to document specific eviction cases.[307]

East African indigenous peoples are also increasingly using the media in their advocacy work, producing, for instance, radio programmes, issuing press releases, alerting the press, opening a Facebook account and using global web movements as Avaaz to promote their cases.

In 1997, two traditional leaders of the Himba community in Namibia toured Europe, visiting Germany, Belgium, Great Britain, Norway and Sweden. In all these countries, they met not only with grass roots campaign groups interested in hearing what impact the Epupa Dam would have on Himba communities but also with various political leaders.[308] Similar lobbying activities have been undertaken by the San, travelling, for example, several times to the USA to raise awareness of their situation in the CKGR.

Indigenous peoples have also become increasingly active on international advocacy fronts such as the African Commission on Human and Peoples' Rights and relevant U.N. Treaty Bodies, and African indigenous peoples have been Chairs of the UNPFII and EMRIP. By presenting shadow reports to the ACHPR, to CERD, etc., making urgent requests to the U.N. Special Rapporteur on Indigenous Peoples or submitting stakeholder reports to the Human Rights Council prior to a Universal Periodic Review (UPR), indigenous peoples are able to highlight their situation at the international level and thereby put pressure on their governments; they may also participate in these fora and thus be able to inform and lobby government delegations directly.

306 See, e.g., TJRC, Report of the Truth, Justice and Reconciliation Commission, (Nairobi: TJRC, 2013), Vol. 4, p. 45ff.

307 See, for instance, the Web sites of PINGOs Forum (htpp://www.pingosforum.or.tz) and PWC (http://www.pastoralwomenscouncil.org)

308 See http://www.earthlife.org.za/campaigns/other/epupa.htm

Finally, African indigenous peoples are now all the time more participating in specifialized international processes such as those going on within the framework of the CBD and the UNFCCC.[309]

Revival of the community's history

Thirdly, and as stated earlier, unlike the two first approaches that use top-down strategies, some indigenous communities have opted for a bottom-up strategy. This approach consists, for a community, of first reconstructing its historical values such as culture, social structures, ancestral land use and language, before challenging the state with their claims.

This seems to be the case of the ǂKhomani San of South Africa who, after realising that, as in most African countries, including South Africa, the laws do not state for the principle of aboriginal title, convinced themselves that "a strategy to reclaim land would need to be more creative than a direct legal challenge". The ǂKhomani San also believed that legal challenges could be costly, confusing, divisive, lengthy, and thwarted by the lack of independence that affects many African judiciaries.[310]

In 1996, the San decided to launch their claim to their indigenous lands and to base it on a multidisciplinary research and cultural reconstruction, which was made possible thanks to a systematic recording, from the few remaining San's elders, of their cultural values and the different sites used, occupied, and owned by the community. The research also compiled resources relating to the San language, reconstructed the San's genealogic lines, and re-created or restored the lost sense of pride in being San.[311]

Through these efforts, the community members came to believe in their right to the lands, and thanks to the technology of GPS (Global Positioning System) they were able to make their own maps of these lands. Once all these elements were assembled, the ǂKhomani San then confronted the South African government with their demand to have their aboriginal lands given back to them. At first, this San community was given 40,000 hectares of farmlands outside the Kgalagadi Frontier Park, and in March 1999, the government of South Africa, recognizing the rights of the ǂKhomani, awarded them in addition 25,000 hectares in the southern part of the Park, as well as commercial and symbolic rights in and to the remainder of the Park.[312]

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309 Indigenous peoples from Kenya, Tanzania, Uganda, Ethiopia, Rwanda, Cameroon, the Democratic Republic of Congo, the Republic of Congo, Burkina Faso and Angola have submitted shadow reports to the ACHPR; a coalition of 10 indigenous peoples' organizations in Kenya have submitted a separate stakeholder report on violations of the rights of indigenous peoples to the UPR process (2010); and Kenyan indigenous organizations participated in preparing a shadow report to the CESCR (2011). Indigenous peoples in Tanzania have likewise submitted stakeholder reports to the UPR (2011) and a shadow report to the CESCR (2011). Indigenous peoples in Cameroon submitted a stakeholder report to the UPR in 2013.

310 Chennells, "The ǂKhomani San" (2003), p. 274.

311 Ibid. Chennells writes: "It was decided to base the ǂKhomani land claim upon a solid bedrock of practical research, which would not only establish and confirm the ancient rights of the San to the land in question, but at the same time, the history and culture of the San community ..."

312 According to a personal communication by one of the San leaders who took part in the negotiation process, the community intends to use their regained lands for various activities, including eco-tourism, camping trails, tourism lodge and permanent settlement.

Numerous other indigenous communities in Central, Eastern, and Southern Africa have been working on awareness raising as an advocacy tool, but the ǂKhomani San's approach continues to be considered as quite special given the length of its process, the anthropological materials it generated and its outcome.

In concluding terms, it appears that depending of the national socio-political context an indigenous community might prefer legal challenges to advocacy or combine both. However, indigenous communities should keep their options open and be ready to switch from one strategy to another every time the context changes or the original strategies do not work. In fact, numerous indigenous communities are combining several strategies for claiming back their ancestral lands' right.

One could argue that research and land titling are other strategies used by indigenous peoples. Indeed, some indigenous organizations use research and data collection as a way to strengthen their advocacy work. This is for instance the case in Kenya, where the Ogiek have used the Participatory 3-Dimensional Modelling (P3DM) as a strategy to engage Kenyan agencies on their rights to their ancestral territory in the Mau forest. This inspired a group of Batwa representatives from Uganda to eventually replicat the strategy and complete their own three-dimensional modelling of their ancestral territory, the Bwindi Impenetrable National Park, in 2011.

Batwa organizations both in Burundi and in Rwanda, have undertaken comprehensive land rights surveys to document the deplorable land rights situation of the Batwa people in Burundi. A leading Batwa organization. But generally, such research is carried out as a tool for lobbying, strengthening a legal challenge or demonstrating either pre-existing land rights or highlighting human rights situations of indigenous communities.

Similarly, land titling could be a result of either a lobbying, legal challenge or a community revival strategy. This is for instance the case of some pastoralist organizations in Tanzania, that have based their land titling claims on the provisions in the Village Land Act (see chapter VI). This land-titling approach has been successfully pursued in Latin America; in Africa, however, so far, this has not been the case since the legal framework is generally not conducive to such activities.

PART II THE JUDICIARY AND INDIGENOUS PEOPLES' LAND RIGHTS

This part presents and analyses court cases from Kenya, Tanzania, South Africa and Botswana, as examples that illustrate, on the one hand, an old fashioned or colonial-like approach that continues to deny indigenous peoples the right to their ancestral lands; and on the other hand, a new trend where judges are willing to adapt modern laws to local cultures and to draw on international jurisprudence.

The few cases referred to in this book are mere illustrations of attempts by African indigenous peoples to involve judges in their quest for justice on lands. This does not mean there have not been other court cases filed by indigenous peoples relating to land rights or other rights.

The court cases are grouped regionally. The presentation of the various cases is divided in four sections dealing respectively with background facts and the claimants' arguments, the defendants' core legal points, the ruling and reasoning of the court and some concluding observations on the result and impact of the court case. Whenever relevant, short updates are included giving an overview of what has happened with the court cases and whether new important cases have been filed.

In the case of Kenya and Tanzania, which are the main focus of this Part II, the cases are followed by an analysis of the legal and policy landscape in the two countries in relation to indigenous peoples' land rights. Updates on important developments that have occurred since this book was first written back in 2009 are also provided.

CHAPTER V
INDIGENOUS PEOPLES' LAND CLAIMS IN KENYA

This chapter illustrates the legal battle of Kenyan indigenous peoples by presenting a number of land-related lawsuits filed by Maasai, Ogiek and Endorois. It also provides the general legal, social and political context of these cases.

The Maasai and their land case

The Maasai are indigenous peoples living in both Kenya and Tanzania and their total population is estimated to be 1,290,000.[313] The Maasai are pastoralists and have a semi nomadic lifestyle. In Kenya, the Maasai, who are estimated to number 840,000, claim large areas of the Rift Valley, including Laikipia, as part of their ancestral lands.

Ol le Njogo and 7 Others v. The Honorable Attorney General and 20 Others. Civil case No. 91 of 1912 (5 E.A.L.R. 70), also known as the colonial Maasai case

Background facts and claimants' arguments

On 10 August 1904, a treaty, to become known as the Anglo-Maasai treaty, was signed between the Chief Lybon Lenana,[314] on behalf of the Maasai community, and Sir Donald Stewart, on behalf of the British Crown:

313 This and the following figures are based on the ethnically disaggregated 2009 census for Kenya and estimations for Tanzania, where censuses are not disaggregated. Both figures should be taken with some caution. See also Web site of the Maasai Association at http://www.maasai-association.org/welcome.html

314 The *lybon* is the ritual and spiritual leader of the Maasai; his authority is based on his mystic and medicinal/healing powers.There are some inconsistencies with regard to the spelling of the name of Chief Lybon Lenana. *Lybon* (plural form: *lyboni)* is sometimes spelled *laibon*, *loibon*, *olaibon* (in plural: *loiboni*, *oloiboni*, *olaiboni),* and Lenana (which is the spelling used in the Agreement as reproduced on the Web page of the Kenyan Coalition for Constitutional Reforms) is sometimes spelled Olonana (see, e.g., Rutten, *Selling Wealth*, 1992).

We, the Undersigned, being the Lybons and Chiefs (representatives) of the existing clans and sections of the Masai [sic] *tribes in the East Africa Protectorate, having this 9th day of August, 1904 met Sir Donald Stewart, His Majesty's Commissioner for the East Africa Protectorate, and discussed fully the questions of a land settlement scheme for the Masai, have, of our own free will, decided that it is for our own best interest to remove our people, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.*

We have, after having already discussed the matter … given this matter every consideration, and we recognise that the Government, in taking up this question, are [sic] *taking into consideration our best interests.*

Now we, being fully satisfied that the proposals for our removal to definite and final reserves are for the undoubted good for our race, have agreed as follows:

That the Elburgu, Gekunuki, Loita, Damat, and Laitutok sections shall remove absolutely to Laikipia. ...

…

And by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley, to be used by the Government for the purposes of European settlement. Further, that the Kaptei, Matapatu, Ndogalani, and Sigarari sections shall remove into the territory originally occupied by them to the south of Donyo Lamuyu (Ngongo), and the Kisearian stream. …

…

In addition to the foregoing, Lenana, as Chief Lybon, and his successors, to be allowed to occupy the land lying in between the Mbagathi and Kiserian Streams from Donyo Lamuyu to the point where both streams meet. ...

…

In addition to the foregoing, we asked that a right of road to include certain access to water be granted to us to allow of [sic] *our keeping up communications between the two reserved areas, and further, that we be allowed to retain control of at least 5 square miles of land … whereat we can carry out our circumcision rites and ceremonies, in accordance with the custom of our ancestors.*

…

We ask, as a most important point in this arrangement, that the Government will establish and maintain a station on Laikipia, and that officers whom we know and trust may be appointed to look after us there.

In conclusion, we wish to state that we are quite satisfied with the foregoing arrangement, and we bind ourselves and our successors, as well as our people, to observe them.

> *We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as race shall exist, and that European or other settlers shall not be allowed to take up land in the settlement. ...*[315]

According to this agreement, about 11,200 Maasai were moved across the railway,[316] away from their ancestral lands in the Rift Valley and confined in two reserves. One reserve was in Laikipia in the northern highlands, the other in the south on the border with German East Africa/Tanzania. This last reserve was divided in two located in the Narok and the Kadjado areas, respectively.[317] The evacuated lands were immediately occupied by hundreds of white settlers.

Despite the fact that, in 1904, both parties had agreed that *"the settlement now arrived at shall be enduring so long as the Masai as race shall exist and that European or other settlers shall not be allowed to take up land in the settlement",* a few years later, in 1911, the British colonial authorities then administering Kenya broke their promise and managed to conclude another treaty with a number of local Maasai leaders. As a result of this new agreement, the "northern" Maasai were moved again, at gunpoint, from Laikipia to an extended Southern Maasai Reserve. Upward of 20,000 people and at least 2.5 million livestock were moved between 1911 and 1913.[318]

Unhappy with this second treaty and acting on their behalf as well as on that of all the other Maasai of Laikipia, some members of the Maasai indigenous community decided to file a lawsuit before a Kenyan High Court, claiming that having not signed the 1911 treaty they were still bound by the 1904 treaty and, thus, still entitled to Laikipia. They argued that the 1911 agreement was "obtained under duress and is further not binding as it has not received the approval of the tribe". Furthermore, the plaintiffs claimed that the 1904 and 1911 signed documents were mere agreements and not treaties.

The plaintiffs asked the court to declare void and null the 1911 civil agreement for breaching terms of the previous one concluded in 1904. They further argued that this second agreement was concluded with individuals who did not represent the Maasai as a tribe. The suit named as defendants three colonial officials including the Attorney General, R.M. Combe, as well as twenty Maasai men who had collaborated with the government, among them Segi, the Maasai Paramount Chief. The defendants were accused of having conspired to cause both physical and economic suffering on the Maasai resulting from the forced move.

Defendants' core legal points

The Attorney General of the then colonial power argued that treaties were acts of states and therefore not disputable in Protectorate courts. In fact, the colonial government argued that the Maasai

315 For text of treaty, see Web site of Coalition for Constitutional Reforms (CCR) – Kenya: http://www.ccr-kenya.com/Resources/53.html

316 The newly completed Uganda-Kenya railway.

317 See Lotte Hughes, "Rough Time in Paradise: Claims, Blames and Memory Making Around Some Protected Areas in Kenya". *Conservation and Society* 5, no. 3 (2007), pp. 307–330. Available online at http://www.conservationandsociety.org/cs-5-3-307.pdf

318 Ibid.

people constituted a nation and therefore the agreements were not mere civil contracts but treaties or "acts of states", which cannot be disputed in a municipal court. It thus avoided any debate on the facts.

Ruling and reasoning of the court

The High Court judge ruled in favour of the colonial government by dismissing the case on technicalities. He supported the Attorney General's argument that treaties are acts of states and therefore cannot be dealt with in Protectorate courts.[319]

> *[T]he other parties to this agreement were persons whom the Commissioner and the Governor, acting on behalf of the Crown, chose as representatives of the Masai Tribe with whom the Crown could enter into such agreements. The Masai tribe as living within the limits of the East Africa Protectorate are not subjects of the Crown, nor is East Africa British territory. But East Africa, being a Protectorate in which the Crown has jurisdiction is in relation to the Crown, a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners, who, in return for that protection, owe obedience.*
>
> *...*
>
> *In my opinion, there is here no legal contract as alleged between the Protectorate Government and the Masai signatories of the agreements, but the agreements are in fact treaties between the Crown and the representatives of the Masai, a foreign tribe living under its protection....*
>
> *...*
>
> *Now, are the acts of defendants complained of by the plaintiffs Acts of State?*
>
> *The answer to this is, in my opinion, contained in my finding that both the agreements are in fact treaties. For it follows from that finding that there was no such contractual relationship as alleged between the parties, and that in this action the plaintiffs are seeking by means of the court to enforce the provisions of a treaty. The Paramount Chief himself could not bring such an action, still less can his people ...*
>
> *As regards the plea of duress and the want of approval of the tribe to the second agreement, as affecting its validity, it is not within the competence of this court, having held the agreement to be a treaty, to consider its validity as affected either by the pourparlers before its signature or a want of authority on the part of the signatories.*
>
> *...*
>
> *I hold therefore on the issue before me that the acts of the defendants complained of by the plaintiffs are in fact Acts of State, which are not cognisable by a municipal court.*

319 *Ol le Njogo and 7 Others v. The Attorney General and 20 Others,* Civil Case No. 91 of 1912, 5 E.A.L.R. 70. Available online at http://www.ccr-Kenya.com/Resources/53.html

The Crown, acting through its Commissioner, first made one treaty with the Masai, and subsequently acting through the Governor modified that treaty by another, and I cannot do better than to adapt to the present case the concluding words of Lord Kingstown in giving judgement in the Privy council in the case of Secretary of State for India v. K. B. Sahaba (XIII Moore 22*): "It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations in which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy".*

The action is dismissed with costs.

This decision by the High Court was confirmed in appeal by the Eastern African Court of Appeal (E.A.C.A.). This court ruled indeed that the protectorate was a foreign country; that the Maasai remained foreigners to the colonial power and as a tribe they amounted to a nation with whom treaties could be made.

Concluding observations and results/impact of the court case

The rulings by the two courts have been much criticised for the dismissal of the case on technicalities. It is believed that any debate on the core issues raised by the plaintiffs could have had a different outcome[320] and one can see why the colonial government did not want to go that way. The "Act of State" argument by both courts, which led them to rule that the 1904 and 1911 agreements were treapties and not mere civil contracts, is equally very disputable. Patrick McAuslan[321] wonders what element of sovereignty the Maasai remained with during colonial time, but says that ruling that the Maasai remained a sovereign nation was the only way the courts could take "refuge [behind the] British colonial constitutional doctrine of act of State". How could the Maasai remain sovereign over their lands when the Crown Land Ordinance of 1902, had already transformed all Kenyan communities into mere tenants of the Crown? This question reveals that the courts' reasoning was legally flawed, lacked logic and to some extent was dishonest.

The Maasai were given leave to appeal to the Privy Council in Britain, then highest Court of Appeal in the whole British colonial empire. But no such action was taken in time. It is believed the plaintiffs faced a financial problem and could not raise enough resources in time to finance such costly procedures that required travelling to Britain. Even if the plaintiffs had had the necessary resources, the same defendant Government was still the one to make the arrangements for such travels.

320 Even officials within the Colonial Office were uneasy about the case and the 1913 judgment. One of them went as far as concluding that he could not imagine the Privy Council supporting the judgment if it was brought before them on appeal. See Robert M. Maxon, *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative 1912-1923* (Madison, N.J.: Fairleigh Dickinson University Press, 1993), pp. 64-65.

321 Patrick McAuslan, "Land Law and the Making of British Empire", in *Modern Studies in Property Law*, edited by Elisabeth Cooke (London: Hart Publishing, 2007), pp. 258-9.

The Maasai land case hundred years later

The Maasai community has never recovered from the loss and betrayal they endured as the consequences of the Anglo-Maasai Treaty in 1904 and the Agreement in 1911. Complaints about the land alienation and its consequences have been articulated publicly on several occasions, as for instance in August 2004, on the hundredth anniversary of the Treaty. Claiming that the 99 years lease conceded by the Maasai in 1904 had now expired, Maasai tribes in Laikipia district gathered to demand the return of their ancestral territory.[322] Private ranches were invaded and one elder was shot by the police. Demonstrations were subsequently organized in major towns and in Nairobi demonstrators were dispersed by tear gas and arrested when they tried to present a petition to the British High Commission.[323]

In the area of Mau Narok, and under the leadership of Moses Ole Mpoe, the Maasai community, had for long challenged the occupation of 30,000 acres of Maasai ancestral homeland that had forced the community to live outside its borders.[324] In 2004, the community filed a case in the High Court of Nakuru[325] but the case was dismissed in 2005 because, among others, it was "related to a matter that took place over 50 years previously in the colonial era". Following research into the history of the land,[326] a new court case was filed in Kenya's Superior Court in January 2010 by 52 petitioners representing the Maasai community and led by Meitamei Olol Dapash. The suit is being argued by two lawyers; the opposition has hired a double figure number of lawyers to represent the interests of those who have occupied and profited from the land since the 1970s or before.

In September 2010, the government, without regard for the pending lawsuit, purchased 2,246 acres of the original Powys Cobb's 30,000 acres land to resettle Internally Displaced conflict victims (IDPs). The community tried to prevent the settlement of IDPs until the conclusion of the court case, but leadership of the movement received death threats, arrests were made, and military police occupied the land in question.[327] The first court hearing took place in December 2011. While the

322 This territory of one million ha, mainly in the Rift Valley, is now subdivided among white ranch-owners, and black small-scale farmers.

323 See Lotte Hughes, "Malice in Maasailand: the historical roots of current political Struggles". Paper presented at the international colloquium "At the frontier of land issues", Montpellier(2006b), p. 10. At http://www.mpl.ird.fr/colloque_foncier/Communications/PDF/Hughes.pdf

324 Maasai community elders claim that Mau Narok was promised to them in the 1911 Agreement between Maasai leadership and the British government. Instead, the land was gradually taken from the community during the colonial era, by means that were illegal even under British colonial law. At Independence in 1963, the Maasai and other indigenous communities were excluded from the land allocation policies developed by the British and KANU, the political party that brought Jomo Kenyatta to power.

325 *Moses Lesiamon Ole Mpoe & another v. Commissioner of Lands & 4 others*. HC Nakuru, Civil Case 341 of 2004.

326 This research conducted by Prescott College (USA) supports the claims of the Maasai community elders. See Meitamei Olol Dapash, Mary Poole, and Kaitlin Noss "Historical Injustice at Mau Narok: A Century of Maasai Land Rights Denied". May, 2010. At http://www. maasaicpp.files.wordpress.com/2009/02/final-paper-mau-narok-may-2010

327 In December 3, 2010, Moses Ole Mpoe and another Maasai activist were killed in very suspicious circumstances. Arrest orders were later issued for two members of the Mbiyu Koinange family. See http://maasaicpp.wordpress.com/land-rights-updates/

case has not progressed beyond the preliminary state, the government has caved in to the agitations of the Maasai community and has not proceeded to settle IDPs on this specific land.

The Ogiek and their land cases

The Ogiek are indigenous peoples living in Kenya Depending on sources, they are estimated to number between 20,000 and 78,000 countrywide.[328] Around 6,000 live in the East Mau Forest, one of the Mau Forest Complex' seven forested areas on the western side of the Rift Valley—i.e., South West Mau (Tinet), East Mau, Mau Narok, Transmara, Maasai Mau, Western Mau and Southern Mau. The Mau Forest Complex, considered by the Ogiek as their ancestral lands, covers more than 400,000 hectares, and as the source of at least 12 major rivers it is the country's largest water tower providing more than 40 per cent of the Kenyan supply of fresh water.[329]

Joseph Letuya, Patrick Kibet Kuresoy and Others v. The Attorney General, The PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner of Nakuru, Wilson Chepkwony, Director of Forest. Miscellaneous Civil Application No. 635 of 1997

Background facts and claimants' arguments

In the early 1990s, the government of Kenya started allocating individual land plots to non Ogiek in and around the Mau Forest, on land the Ogiek consider as their ancestral lands. Large numbers of non Ogiek presented as landless were being settled on the disputed lands. Following these land allocations, some members of the Ogiek indigenous community started being forcibly evicted. The Ogiek found that these actions by the government amounted to a violation of their customary rights in the disputed land. So, on 25 June 1997, Mr. Joseph Letuya and twenty-one other Ogiek individuals filed a case in the High Court of Kenya against a number of government representatives, namely the Attorney General, the Provincial Commissioner of the Rift Valley Province, the Rift Valley Provincial Forest Officer, the District Commissioner of Nakuru, Wilson Chepkwony, and the

328 The 2009 census puts their number at 78,000 while some Ogiek reckon their population to be around 60,000. See KNBS "2009 Population and Housing Census" (2011). Sang, "Kenya: "The Ogiek in Mau Forest" (2003), pp. 114-5. See also Kai Schmidt-Soltau, "Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project (WKCDD/FM) and the Natural Resources Management Project (NRM)", Final Report. (Nairobi: Republic of Kenya, 2006), p. 143.

329 See Republic of Kenya, Rehabilitation of the Mau Forest Ecosystem-A Project Concept prepared by the Interim Coordinating Secretariat, Office of the Prime Minister, on behalf of the government of Kenya (2009c), p. 5. http://www.kws.org/export/sites/kws/info/maurestoration/maupublications/Mau_Forest_Complex_Concept_paper.pdf See also Albert Kwoko Barume, "Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya", in *International Law and Indigenous Peoples,* edited by Joshua Castellino and Niamh Walsh (Boston: Martinuus Nijhoff Publishers, 2005b), pp. 365-392.

Director of Forestry. The disputed lands are commonly known as the East Mau Forest and were gazetted against the wish of the Ogiek.

The plaintiffs argued that the allocation of their ancestral lands to individuals who were strangers to their community infringed their constitutional rights. They requested the court to declare that:

1. The right to life—protected by section 71 of the [Kenyan] Constitution—of every member of the Ogiek community in Mau Forest, including the applicants, has been contravened and is being contravened by forcible evictions from the parcels of land in the Mau Forest and pretended settlements by the Rift Valley Provincial Administration.
2. The eviction of the Ogiek community from their land in Mau Forest by the Rift Valley Provincial administration is a contravention of their right to protection of law, and their right not to be discriminated against under sections 77, 81 and 82 of the Constitution.
3. The pretended settlement scheme under which the Rift Valley Provincial Commissioner, the Forest officer and the Nakuru District Commissioner are allocating land to persons from Kericho, Bomet, Transmara and Baringo Districts in the Mariashoni location, Elburgon division and Nessuit location, Njoro division, Nakuru district occupied by the applicants ... [is in breach of] the Agriculture Act and the Forests Act and is null and void.[330]

The applicants underscored also that they had lived in the East Mau Forest since time immemorial, long before the creation of the Kenyan state and that their livelihood derived from it.

> Before the birth of our nation, our ancestors were living in the Mau Forest as food gatherers and hunters. Upon the introduction of the colonial rule, our ancestral land was declared a forest. Since that declaration of our ancestral land as a forest, members of our community have led a very precarious life which has been deteriorating.[331]

Furthermore, the plaintiffs requested from the High Court an order or injunction restraining the respondents or the government of Kenya from any further allocations on the disputed land.

Referring to the legal basis of their claims, the plaintiffs contended that:

1. Section 71 of the Constitution guarantees every one the enjoyment of the right to life which includes protection of one's means of livelihood as the Supreme Court of India has held in *Olga Tellis v. Bombay Municipal Corporation* (1996) AIR 180 (S;)
2. Sections 78 and 82 of the Constitution protect each community's right to live in accordance with its culture;

330 *Joseph Letuya and Others v. The Attorney General and Others,* Miscellaneous Civil Application No. 635 of 1997.
331 Ibid.

3. The international human rights jurisprudence recognises the right to development of the disadvantaged sections of the political community like the Ogiek and that this right has been and is being contravened.[332]

Defendants' core legal points

Local officials argued that the government had decided to carry out a settlement scheme on the disputed lands so as to address the problem of land shortage faced by numerous other Kenyans. It was also argued that the disputed land was part of public land on which the Ogiek had no special right. The defendants, who were beneficiaries of the contested allocations, argued that they had lawfully acquired rights to the disputed land.

Ruling and reasoning of the court

On October 25, 1997, the High Court responded favourably to one of the applicant's demands with an order that there should be no further allocation of the debated lands until the suit had been heard and determined.

After the court's order of 1997, there came no further action, not even a further hearing as the case kept being postponed. This until 30 January 2001, when the minister for Environment made the following announcement in the press:

> In accordance with the provisions of section 4(2) of the Forests Act, the minister for Environment gives twenty eight (28) days' notice, with effect from the date of the publication of this notice, of his intention to declare that the boundaries of the Eastern Mau Forest will be altered ... [by] approximately 35,301.01 hectares. ...

This notice, published in the Official Gazette on 16 February 2001, concerned primarily the land subject of the court case filed by the Ogiek. The size of the disputed land was to be reduced with up to more than 35,000 hectares, which were to be put to other uses by the government. This was considered by the plaintiffs as a breach of the 1997 High Court's decision that ordered the government not to take any further action on the disputed land until the matter was concluded in court. Thus, in March 2001, the Ogiek plaintiffs asked the same court (High Court of Kenya) to quash the Gazette notice published by the minister for Environment and to order that no action be taken on the basis of this Gazette notice. The plaintiffs argued that:

> (1) the said Gazette Notice of 2001 is a blatant violation of the order of the High Court of 1997; (2) the said Gazette Notice has in the circumstances of this case no legal basis; (3) the respondent, both in his capacity as a citizen of Kenya and a minister in the Government

332 Ibid.

> of Kenya, is bound at all times to respect, obey and uphold orders of this honourable court; (4) the said Gazette Notice is a contempt to court by the respondent.[333]

Since then, no other judicial decision has been taken in this case despite numerous attempts by the Ogiek to activate the process. In the meantime, the government has continued with forced evictions of communities, including Ogiek communities, in the area. A common 2007 report based on investigations by several international and national NGOs, notably Amnesty International, the Centre on Housing Rights and Evictions, Kenyan Land Alliance, Hakijamii Trust and Kenyan National Commission on Human Rights, concluded that,

> Incidents of forced evictions have been reported in different areas of the Mau Forest since 2004, affecting thousands of families. ... The cases of eviction in Mau Forest, discussed in this report, reveal a failure by the authorities to abide by international human rights and standards in respect of evictions. The notice provided was inadequate and confusing and there was no consultation with residents or effort to find an alternative to evicting them from their homes. None of the evictions was carried out on the basis of a court order; on the contrary, a court injunction halting evictions was ignored.[334]

In July 2008, Kenya's prime minister established a "Task Force on the Conservation of the Mau Forest Complex" to look into the Mau question. The Task Force published its report in March 2009, recommending, among other things, that all settlers be evicted from the Mau complex as soon as possible. Kenya's parliament adopted the report in September 2009 and it was feared that many of the Ogiek people would now be evicted from the Mau Forest.

Concluding observations and results/impact of the court case

1. This case represents one of the best illustrations of delays being used as tactics by a government against indigenous peoples' court cases on lands. In this case, a government buys time to engineer new actions and assaults on the disputed lands. This is also a case that could be taken to international mechanisms such as the African Commission on Human and Peoples' Rights given that the unwillingness of the judges and collusion with the government seem apparent.

2. The major lesson drawn from this case is the relevance of asking for intermediary measures, similar to the Court Order that the Ogiek plaintiffs asked and obtained from the Kenyan High Court, in order to stop the situation from worsening as the court case proceeds. Even if it apparently did not prevent the Kenyan government from further actions, asking intermediary measures are highly recommendable in similar cases.

333 Ibid.

334 Amnesty International et al., "Kenya Nowhere to go: Forced Evictions in Mau Forest". Briefing Paper, May 2007. Available online at: http://www.asiapacific.amnesty.org/library/Index/ENGAFR320062007?open&of=ENG-398

Francis Kemei, David Sitienei and Others v. The Attorney General, the PC Rift Valley Province, Rift Valley Provincial Forest officer, District Commissioner Nakuru. Miscellaneous Civil Application No. 128 of 1999

Background facts and claimants' arguments

This court case was initiated by ten plaintiffs representing 5,000 other members of the Ogiek community of the Tinet Forest in south western Mau Forest, one section of the lands the Ogiek peoples claim as their ancestral lands and on which they have lived since time immemorial.

After being declared and gazetted as Forest Reserve during colonial time, there were numerous unsuccessful attempts in the early 1990s to evict the Ogiek from the disputed lands. Even when the government managed to evict some, they returned into the forest almost immediately. According to the Forests Act (Cap 385), no cutting, grazing, removal of forest produce or disturbance of the flora is allowed in such natural reserves, except with the permission of the forest authorities. It is also prohibited to be found in a forest area between 9 p.m. and 6 a.m. Similarly, it is strictly prohibited building within a gazetted forest.

In 1999, the government of Kenya through the District Commissioner issued a 14 days ultimatum. A few days later, the ultimatum was followed by another order to vacate the disputed lands or risk a forceful eviction by the government.

In prevention of such a strong action by the Government, ten members of this Ogiek community decided in June 1999 to challenge the threat of eviction in court. In so doing, the plaintiffs, who managed to also represent 5,000 other members of their community, alleged that they depend, for their livelihood, on this forest since they are primarily food gatherers, hunters, peasants farmers, beekeepers and their culture is associated with this forest where they have their residential houses. They argued that their culture is basically concerned with the preservation of nature so as to sustain their livelihood and that the Tinet Forest was their ancestral land on which they depend for physical and spiritual survival. On these grounds, as developed further in their affidavits, the plaintiffs asked the court to declare that:

1. Their eviction from Tinet Forest by the government contravenes their rights to the protection of the law, to not be discriminated against, and to reside in any part of Kenya;
2. Their right to life has been contravened by the forcible eviction from the Tinet Forest;
3. The government compensate the plaintiffs; and
4. The defendants pay the costs of the suit.

Defendants' core legal points

The respondents presented their defence argument around four main points. They claimed and argued that:

1. The plaintiffs were not the genuine members of the Ogiek community and that they had not been living in Tinet forest since time immemorial.
2. The plaintiffs had entered illegally in the Tinet forest, after the government had shelved its plan to degazette this forest as it was considered one of the main water catchments. Since then, the government has been trying to have the plaintiffs evacuate this protected land.
3. Rights and freedoms enshrined in the Constitution are subject to limitations designed to ensure that their enjoyment by individuals does not prejudice the rights and freedoms of others or public interests.
4. The plaintiffs were not landless as they claimed to be. That, in fact, since colonial time, members of this community had been resettled with other Ogiek.
5. The eviction was not discriminatory, as all illegal occupiers of the disputed lands would be asked to leave. It was also argued that the plaintiffs were no longer depending on forest resources

Ruling and reasoning of court

In March 2000, the High Court made an interesting starting point:

> *These people do not think much of a law which will stand between them and the Tinet Forest. In particular, of the Forests Act, they say … that it found them there in 1942 when it was enacted*.

This reasoning could have led the High Court to develop an argument for an aboriginal title, showing that the rights of the Ogiek indigenous peoples to the disputed lands were ancient with respect to government measures. Unfortunately, the court did not go that far; it ruled against the plaintiffs by firstly attacking the community's alleged environmentally-friendly culture:

> *Whilst in their undiluted culture, the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house, or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which bee-hives can be lodged, from which honey can be collected, and from which fruits and berries can be gathered.*

Secondly, in disagreement with the plaintiffs' argument of a violation of their right to life in case of their eviction, the High Court judges made reference to an Indian case that they did not find compelling when applied to the Ogiek case:

> *We were referred to the Indian case of* Tellis and Others v. Bombay N Municipal Corporation and Others *[1987] LRC (Const) 351, on the first point concerning the right to life as one of the*

constitutional fundamental rights. It was a case of the forcible eviction of pavement and slum dwellers in the city of Bombay, India. When we read the case, we found its main thrust on this point to be that, although the right to life was a wide and far reaching right, and the evidence suggested that eviction of the petitioners had deprived them of their livelihood … the Supreme Court of India … found and decided and concluded that Bombay Municipal Corporation were justified in removing the petitioners, even though these pavement and slum dwellers were probably the poorest of the poor on the planet Earth. …

[The] Tellis case is not, therefore, helpful to the present applicants. The applicants are not the poorest … records show that they by themselves or by their ancestors were given alternative land during the colonial days, and such alternative land for Tinet Forest was compensated. All along they have had a fair opportunity to come to the court to challenge the many evictions that have gone on before, but they have never done so till this late.

Thirdly, the High Court judges disconnected land ownership from untroubled land use and occupation:

To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc., is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it. This is like to say, that to climb Mount Kenya you must own it; to fish in our territorial waters of the Indian Ocean you must dwell on, and own the Indian Ocean; to drink water from the weeping stone of Kakamega you must own that stone; to have access to the scenic caves of Mount Elgon you must own that mountain. But as we all know, those who fish in the Lake Victoria do not own and reside on the lake. … there is no reason why the Ogiek should be the only favoured community to own and exploit the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans.

The judges went on arguing that:

If hunting and gathering in a territory were in themselves alone to give automatic legal proprietary rights to the grounds and soils we hunt and gather upon, then those who graze cattle nomadically in migratory shifts everywhere according to climatic changes would have claimed ownership of every inch of every soil on which they have grazed their cattle. ...

The High Court avoided confronting the plaintiffs' argument built upon the theory of aboriginal title and survival of customary land right following succession of powers and sovereigns as presented in the Australian *Mabo* case. The unease of the High Court is very obvious. Firstly the judges argued to have not been provided with the necessary materials and arguments by the plaintiffs:

> *We have missed the opportunity to closely analyse the whole law of our land, statutes and customary laws were not argued for, and the case was presented within the narrow limits of the forest legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere. Although we were denied the opportunity by lack of full and any serious argument on, and analysis of, the various relevant land statutes, customary law rights, and common law, we read the Mabo case, but found that the material facts in it, and which led to the propositions of principle there, cannot be fairly likened to those obtaining in the instant case.*

Secondly, the High Court judges argued that, contrary to the plaintiffs in the *Mabo* case, the respondents were nomadic and therefore not able to establish long lasting use and occupation of a given land, implying thus that only sedentary life style could generate rights over lands:

> *The applicants there [*in the *Mabo* case*] had a culture and rights sharply different from those of the applicants in the instant case. Theirs was a life of settled people in houses in villages in one fixed place, with land cultivation and crop agriculture as their way of life. They lived in houses organised in named villages, and one would be moving from one village to another. Land was culturally parcelled out to individuals, and boundaries are terms of known landmarks. Gardening was of the most profound importance to the inhabitants at and prior to early European contact. … In that kind of setting, those peoples' rights were to the land itself. Our people of Tinet Forest were concerned more with hunting and gathering, with no territory fixity. They traditionally shifted from place to place in search of hunting and gathering facilities. …Whether a people without fixity or residence could have proprietary rights to any given piece of land, or whether they only had rights of access to hunting and gathering grounds—whether a right of access to havens or birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found—were not the focus of the arguments in this case; and the material legal issues arising from the various land law regime were not canvassed before us as they were in the Mabo case.*

The High Court judges concluded then by stating that,

> *The pre-European history of the Ogiek and the plaintiffs was not presented … in court [and that nothing showed] early history to … confer them with any land rights. … For these reasons the Court dismisses all prayer sought. … In the context of this case, we know no safer ways for this country and for these litigants, than dismissing this case with costs to the respondents.*

Concluding observations and results/impact of the court case

1. The High Court made a questionable assumption that most Ogiek people have moved away from traditional way of life and embraced modernity. This unfunded assumption was

made in order not to accept the plaintiffs' arguments that their indigenous way of life was threatened of extinction and that they could not survive outside their ancestral lands, the Tinet Forest.

2. The High Court refused to be dragged into international jurisprudence. The Ogiek's lawyers referred indeed to a court ruling in India that linked an eviction with a violation of the right to life of the evictees. The community's lawyers also referred to the Australian *Mabo* case and argued for an aboriginal title of the Ogiek that survived the transformation of the lands in dispute into a forest reserve. On both occasions, the High Court simply argued that the facts and the contexts were different from the situation in Kenya.
3. What is very particular and obvious in this case is the High Court's effort or apparent deep belief that a nomadic life style over a land cannot be considered as source of legal rights. It was explicitly argued, for example, that "*if hunting and gathering in a territory were in themselves alone to give automatic legal proprietary rights to the grounds and soils we hunt and gather upon, then those who graze cattle nomadically in migratory shifts everywhere according to climatic changes would have claimed ownership of every inch of every soil on which they have grazed their cattle".* Had it been a case by agriculturalists that had established large farms and habitations on the disputed land, would a similar reasoning and conclusion have been made?
4. What would have happened if the Richtersveld case in South Africa (see chapter VII of this book) had already been ruled upon by the Constitutional Court of South Africa? In this case, the Constitutional Court recognized the notion of aboriginal title in Africa as argued by the lawyers of the Ogiek. This underlines indeed the importance of international law and standards.
5. This case also reveals that despite having the law on their side and even being defended by competent lawyers who grapple very well with international standards, indigenous peoples are in most cases denied justice in Kenya.

On 19 October 2001, the disputed forest land was degazetted by Notice No. 148 published in Kenya Gazette Legislative Supplement No. 147 of 2001. Once again, in March 2005, the plaintiffs went to the same High Court and requested an "Order of prohibition to prohibit the Respondents, their agents, servants and/or officers from preparing, processing and/or issuing title deeds in respect of [the disputed land]". The case is yet to be heard and decided upon. In the meantime, some of the plaintiffs continue to live on their lands.

Recent developments in the Ogiek case

While the Ogiek have been waiting for their case to be heard, various reports have cautioned that the degazettement of forest reserves,[335] illegal encroachments by settlers and indiscriminate log-

335 In 2001, some 60,000 has were degazetted and excised to be used for resettling the Ogiek and other IDPs. Many other groups, however, also settled in the area.

ging[336] have led to the destruction of over 100,000 hectares of forest since 2000, including important catchment areas. This has put Kenya's largest water tower at risk, with far-reaching environmental and economic consequences.[337] The same reports have also indicated that the environmental degradation was not due to the indigenous Ogiek and Maasai living in the Complex but to a "staggering level of illegal and irregular allocations of public lands under the administrations of both Presidents Kenyatta and Moi, for largely patronage purposes".[338]

In 2009, the "Task Force on the Conservation of the Mau Forest Complex" came up with its own report in which it recommended that the forests in the Complex should be rehabilitated and preserved by evicting the beneficiaries of the land allocations.[339] The eviction process should be carried out in three phases: 1) Eviction of encroachers (without title deeds of any sorts); 2) Eviction of those living in the forest but without title deeds or with illegally acquired title deeds; and 3) Eviction of settlers with valid title deeds. The Task Force report furthermore recommended that those who were rightfully settled and holders of valid title deeds should be evicted and compensated according to the defined procedures.

Kenya's parliament adopted the report in September 2009, and evictions took place that same year,[340] a number of the evicted Ogiek ending up on the outskirts of the forest or in isolated IDP satellite camps, living in emergency-like conditions without meaningful access to health or educational facilities.[341] This prompted the Ogiek to initiate litigation before the African Commission and provisional measures were subsequently issued by ACHPR urging the Kenyan government to desist from any action to remove the Ogiek from their ancestral land pending the determination of the case by the Commission. During 2010, such provisional measures continued to provide a tool for advocacy groups within the community to engage with both the ICS—the Interim Coordinating Secretariat tasked with implementing the recommendations of the Task Force's 2009 report—and other actors within the Kenyan government. A body called the Ogiek Council of Elders, consisting

336 The government, for example, imposed in early 2000 a partial logging ban but exempted three big logging companies, with disastrous consequences. See Kanyinke Sena, "Mau Forest: Killing the goose but still wanting the golden eggs" (2006) at http://www.iwgia.org/iwgia_files_publications_files/IA_4-06_Mau.pdf

337 More then twelve major rivers have their source in the Mau Forest Complex. These rivers sustain several lakes (Victoria, Nakuru, Bogoria, Naivasha, Natron, Elementaita and Turkana) and numerous conservation areas.The water of these rivers also support key economic sectors downstream, including: energy, tourism, agriculture (cash crop as, e.g., tea plantations, as well as subsistence agriculture), livestock and drinking water. See UNEP report: "Mau Complex and Marmanet forests. Environmental and economic contributions - Current state and trends" (May 2008) p. 5 ff. at http://www.unep.org/pdf/Mau-Complex_20May08.pdf

338 See Amnesty International et al., "Nowhere to go" op.cit. (2007), p. 15. At http://www.amnesty.org/en/library/info/AFR32/006/2007 See also International Land Coalition, "Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon". Report prepared by Erin O'Brien in collaboration with The Kenya Land Alliance, (2011), p. 30. At http://landcoalition.org

339 Republic of Kenya, Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex, (Nairobi: government of Kenya, 2009b) at http://www.kws.org/export/sites/kws/info/maurestoration/maupublications/Mau_Forest_Complex_Report.pdf

340 See U.N. Special Rapporteur on Indigenous Peoples' communication in "Cases examined (June 2009 – July 2010) XIX Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau Forest Complex". U.N. Doc. A/HRC/15/37/Add.1, 15 September 2010. At http://unsr.jamesanaya.org/cases-2010/19-kenya-alleged-eviction-of-the-ogiek-indigenous-peoples-from-the-mau-forest-complex

341 See HRC (Human Rights Council) "Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Mission to Kenya, Addendum U.N. Doc. A/HRC/19/54/Add.2. (2012b), p. 17.

of 60 Ogiek elders, was established to this effect and some dialogue has been taking place.[342] There has been no major progress, however, and a concrete policy/programme guaranteeing the land and natural rights of the Ogiek has yet to be put in place.[343]

By 2011, the government had managed to undertake phase 1 and 2 evictions as recommended by the Task force, but the process stalled at phase 3 due to the complexities of compensations and the "high voltage" beneficiaries involved. The stalling may also have been due to the forthcoming general elections (originally planned for 2012 but postponed and carried out in March 2013) and the fear of political repercussions the eviction may have on some of the political ambitions of some of the personalities in Kenya. In June 2011, the Ministry of Lands announced that it had received Ksh. 1 Billion from the Treasury, for the resettlement of the Mau and Embobut forests evictees. The minister of Lands also said that the resettlement will focus on the affected and eligible persons. It will be done under a statutory framework governing the Settlement Fund Trustees in consultation with the Interim Coordination Secretariat of the Mau and Embobut forests. The funds will be used for acquisition of land, which will be done in collaboration with the Ministries of Agriculture, Special Programmes, Internal Security, area Members of Parliament, and other relevant stakeholders.[344] In March 2012, the African Commission took the decision to refer the matter to the African Court on Human and Peoples Rights on the basis that it had received a complaint on behalf of the Ogiek community of the Mau forest and that there was evidence of serious and mass human rights violations guaranteed under the African Charter on Human and Peoples' Rights.[345]

A year later (March 2013), the African Court, following the line of arguments presented by the African Commission on Human and Peoples' Rights, ordered the government of the Republic of Kenya to immediately halt any eviction of Ogiek from their ancestral forests and postpone any distribution of land in the contested forest area, pending the decision of the court on the matter. The order also enjoins the government of Kenya to report on execution of the measures in 15 days.[346]

The Endorois and their land case

The Endorois are an indigenous pastoralist community depending on livestock, including cattle, sheep, and goats. Their estimated population is 60,000. Like many other pastoralist communities in Kenya, the Endorois have traditionally occupied and used large areas of the Baringo District in Rift Valley and sometimes roamed as far north as to the Laikipia plains.

The problems of the Endorois started in 1973 when part of their lands, namely the Mochongoi Forest, was gazetted as a state forest, causing a loss of large grazing areas for the Endorois com-

342 See Republic of Kenya, Government's response to U.N. Special Rapporteur on Indigenous Peoples. U.N. Doc. A/HRC/15/37/Add.1, 15 September 2010.

343 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 414 and 2012 (Copenhagen: IWGIA, 2012), p. 427.

344 Ministry of Lands, Thursday, 23 June 2011 at http://www.lands.go.ke

345 This was the first opportunity for the Court to deal with a case involving indigenous peoples' rights.

346 *African Court on Human and Peoples' Rights v. Government of Kenya,* Application 006/2012 Order of Provisional Measures. At http://www.african-court.org/en/images/documents/Orders-Files/ORDER__of_Provisional_Measures_African_Union_v_Kenya.pdf.

munity. The disputed lands are found around Lake Bogoria, known previously as Lake Hannington, in the Rift Valley province. The lake and its surroundings were gazetted in 1973 as the Lake Hannington Game Reserve, and when the lake's name changed to Bogoria in 1978, re-gazetted under the name of Lake Bogoria Game Reserve. The Lake Bogoria is known for its geysers, boiling pools, hot springs, flamingos and pelicans. The surrounding area, which together with the lake constitutes the Game Reserve, protects Kenya's remaining herd of greater Kudu.

Following these gazettements, an estimated 400 Endorois families were displaced after receiving a compensation, which many have disputed or considered inappropriate.[347]

William Arap Ng'asia & 29 Others suing on the behalf of over 43,000 Other Members of the Endorois Community v. Baringo County Council and Koibatek County Council (1997-2000).
HC - Nakuru, Miscellaneous Civil Application No. 522 of 1998

Background facts and claimants' arguments

In August 1997, William Arap Ng'asia and Others lodged with the High Court at Nakuru a Miscellaneous Civil Application No. 214 of 1997 (dated 4 August 1997) for leave to file a representative constitutional reference case on behalf of the Endorois Community's 43,000 members and against the Baringo and Koibatek County Councils. Leave was granted and the substantive application was filed as High Court Miscellaneous Civil Application No. 522 of 1998.

The applicants claimed that they were "peasant nomadic pastoralists residing on trust land areas peripheral to the Lake Bogoria Game Reserve ... [that] all the lands within these boundaries were what the British Colonial Administration after 1895 called Endorois location".[348] They went on to state that "their ancestral land parcel of approximately 30-50 km radius around Lake Bogoria was set aside by the defendants to create Lake Bogoria Game Reserve sometime in 1973". The plaintiffs highlighted also the cultural value of the disputed land, including leaking sites for livestock, medical plants that grow around the lake and spiritual sites for traditional ceremonies. They stated that "Lake Bogoria was formed when, due to inequities and sins of some clans and families of the community, the ground sunk with them one night after a heavy rain, hence the lake was formerly known as Lake Hannington. The families that survived the tragedy of the lake formation are the present day Endorois of Kapsaragi and Kapsogomo".[349]

Due to a procedural error, the application had, however, to be withdrawn and the applicants to subsequently seek—and be granted—fresh leave to commence a representative suit on behalf of

347 See Cynthia Morel and Korir Singoei, "Matter: Right to Land, Case 151, Kenya 1" (Applied Human Rights Association (AHRA), July 2004). Available online at http://www.ilsbu.com/cases_page/default.htm.

348 *William Arap Ng'asia & 29 Others v. Baringo County Council and Koibatek County Council,* HC - Nakuru, Miscellaneous Civil Application No. 522 of 1998.

349 Ibid.

the Endorois community. The Miscellaneous Civil Case No. 183 of 2000 thereafter proceeded to the High Court of Kenya at Nakuru on 19 August 2000.[350]

The plaintiffs requested from the High Court:

1. A declaration that the land around Lake Bogoria is the property of the Endorois community held in trust for their benefit by the County Council of Baringo and the County Council of Koibatek …
2. A declaration that the County Council of Baringo and County Council of Koibatek are in breach of trust fiduciary duty to the Endorois Community because of their failure to utilise the benefits accruing from the game reserve to the benefit of the community …
3. A declaration that the applicants and the Endorois community are entitled to all the benefits generated through the game reserve exclusively and/or in the alternative the land under game reserve should revert to the community under the management of Trustees appointed by the community …
4. An award of exemplary damages arising from the breach of the applicants constitutional rights.

Defendants' core legal points

The two defendants, namely Baringo and Koibatek County Councils, argued that the disputed lands had been gazetted as a game reserve, and that according to Sections 114 and 115 of the Kenyan Constitution, Trust Lands are vested in County Councils.

Ruling and reasoning of the court

In 2002, the High Court ruled against the plaintiffs despite recognising them as customary residents of the disputed lands. The judges grounded their ruling against the applicants firstly on the mechanisms of Trust Lands' management as provided for by the Constitution and secondly on compensation allegedly paid to communities when the Lake Bogoria and surrounding lands were gazetted as game reserve.

As expressed by the judge:

Lake Bogoria Game Reserve is gazetted in accordance with the provisions of the relevant Acts and especially under Wildlife (Conservation and Management) Act cap. 376, Laws of Kenya … Section 114 of the Constitution is an interpretation section which defines what is a Trust Land under the Constitution. Section 115 vests Trust Land on County Councils and section 117 makes provisions for the County Council to set apart an area of Trust Land for certain purposes but it can only do so in accordance with an Act of Parliament. …. Both

350 See Morel and Singoei, "Matter: Right to Land" (2004).

sections 115 and 117 have a proviso. The proviso is to the effect that no right, interest or other benefit under African Customary Law shall have effect for the purposes of the Act so far as it is not repugnant to any written law… .

By so arguing, the judges aimed at showing that the disputed lands were legally under the defendants' management and that no customary law can be accepted to overrule such a written law. The judges also argued that the "*law does not allow individuals to benefit from the natural resource simply because they happen to be born close to that natural resource*".

Furthermore, the judges argued that legal procedures for compensation were strictly respected at the time of events and that if the plaintiffs did not agree with the compensation scheme, they should have appealed, which they did not do.

The applicants have admitted in affidavits that, when the disputed land was set apart for use as a game reserve, meetings were held and compensation paid… It was upon the applicants and other residents who were affected to make use of their right of appeal and appeal against the award of compensation …. We note that none of the claimants appealed…. It is now too late to complain.

Having so argued, on 19 April 2002, the High Court judges concluded that they:

[H]ave considered all the relevant material placed before [them] and [they] have come to the inevitable conclusion that this application is unfortunate and cannot succeed… The application dated 19th August 2000 is dismissed in its entirety with costs to the respondents.

Concluding observations and results/impact of the court case

1. Right from the start, the High Court declared primacy of written laws over customary norms as a strategic move to undermine all further arguments of the plaintiffs based on immemorial customary use and occupation of the disputed lands. The ruling therefore logically listed a number of legal procedures that were followed in declaring the land in dispute a game reserve.
2. The ruling against the plaintiffs was also grounded on the fact that they did not appeal against the compensation given to them at the time of eviction. It was argued that if the plaintiffs had not been content with the compensation, they should have appealed, which they did not do. Logically, it was assumed that the plaintiffs were happy with the compensation since they did not complain and that it was now too late to do so. Whether or not these statements are correct and fair, the fact is that any indigenous community unhappy with compensation measures should appeal against them immediately. Accepting some kind of compensation and later arguing the contrary will always undermine claims.
3. In 2003, the Endorois people, assisted by the Kenyan Centre for Minority Rights and Development (CEMIRIDE), took the case to the African Commission on Human and Peo-

ples' Rights under the provisions of Article 55 of the African Charter on Human and Peoples' Rights. The Endorois [the complainants] were seeking a declaration that the Republic of Kenya was in violation of the African Charter's Articles 8 (right to freely practice their religion), 14 (right to property), 17 (cultural rights), 21 (right to natural resources and in case of spoliation, the right to the lawful recovery of property as well as to an adequate compensation) and 22 (right to development). They were also seeking restitution of their land with legal title and clear demarcation as well as compensation for the loss the community has suffered through the loss of property, development and natural resources, as well as the freedom to practice their religion and culture. In 2004, the African Commission issued an Urgent Appeal to the government of the Republic of Kenya, requesting it to stay any action or measure in respect of the subject matter pending the decision of the African Commission. During its 40th Session in 2006, the Commission declared the Endorois case admissible and in accordance with rule 111 of its internal regulations. In 2009, the Commission issued its findings, namely that Kenya [the Respondent State] is in violation of the above mentioned Articles of the African Charter; that the Endorois are an indigenous community and a distinct people, sharing a common history, culture and religion and having a status, which entitles them to benefit from the African Charter's provisions protecting collective rights. The Commission therefore recommends, among other things, that the Respondent State (Kenya) recognize "the rights of ownership to the Endorois and restitute Endorois ancestral land".[351] This case shows that a representative suit can be successfully filed with the African Commission on Human and Peoples' Rights.

Latest developments in the Endorois case

This ruling by the African Commission was the first to elaborate substantially on what are the rights over land of African indigenous peoples. However, although the African Commission required Kenya to take steps to return the Endorois' land and compensate them within three months of the date of the ruling, implementation of the ruling, several years on, remained a mirage.[352] On the contrary, the Endorois community continued experiencing land rights abuses. Since 2002, parts of their ancestral land have been demarcated and sold by the Respondent State to third parties and concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. Both mining operations and the demarcation and sale of land have continued despite the

351 ACHPR Communication 276/2003. Besides the findings and recommendations already quoted, the Commission furthermore recommends that the Respondent State (i.e., Kenya) ... b) ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious an cultural rites and for grazing their cattle; c) pay adequate compensation to the community for all the loss suffered; ... f) engage in dialogue with the Compainants for the effective implementation of these recommendations and g) report on the implementation of these recommendations within three months from the date of notification. The Communication was adopted by the AU assembly in January 2010. For more information on the case, see http://www.minorityrights.org/download.php?id=748

352 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 413, and 2012 (Copenhagen: IWGIA, 2012), p. 426.

request by the Commission to the President of Kenya to suspend these activities pending the outcome of the present communication.

In 2011, the most important action taken at the national level with regard to implementing the Endorois decision was Parliament's request for an implementation status report from both the Ministry of Justice and the Ministry of Land. Unfortunately, none of the two ministries offered any substantial response to this request, on the grounds that the government of Kenya had not been formally presented with the ruling from the African Commission.[353] The evasiveness of the state's response to its own parliament contrasted sharply with its commitment during the 48th session of the African Commission, as well as in the context of the U.N. Universal Periodic Review (UPR) process, where it committed—without reservation—to implementing the decision.[354]

However, and despite ACHRC's sustained efforts, it has not been possible to get any substantial information on implementation from the government's side. It has therefore been decided to organize a high level workshop in Nairobi in September 2013 with a view to get a first hand information on the status of implementation from both the community and the government, and discuss ways and means of implementing the decision, and possibly develop a joint road-map for the implementation of the same.[355]

In June 2011, the World Heritage Committee decided to add the Kenya Lake System in the Great Rift Valley (Kenya) to UNESCO's World Heritage List. This system includes Lake Bogoria;[356] the inscription, however, was done without involving the Endorois in the decision making process and without obtaining their free, prior and informed consent. This prompted three women from the Endorois community to submit a petition to the African Commission on Human and Peoples' Rights in October 2011. Responding to this petition and subsequent advocacy by several Kenyan and international NGOs, the Commission adopted an important resolution on the protection of indigenous peoples' rights in the context of UNESCO's decision to designate Lake Bogoria a World Heritage site. The Commission specifically found that the "inscription of Lake Bogoria ... contravenes the African Commission's Endorois Decision and constitutes a violation of the Endorois' right to development under Article 22 of the African Charter." It therefore called upon the government of Kenya, the World Heritage Committee and UNESCO to "ensure the full and effective participation of the Endorois in the decision-making regarding the 'Kenya Lake System' World Heritage area, through their own representative institutions".[357]

353 A signed and sealed copy of the decision was subsequently sent to the state.

354 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA 2012), p. 426.

355 Workshop participants consist of members of the Kenyan government, including the Attorney General; members of the ACHPR's Working Group on Indigenous Populations/Communities; representatives of international organizations, including the Special Rapporteur on the rights of indigenous peoples, Prof. James Anaya; national stakeholders; and Endorois Community representatives.

356 The other lakes are Lake Nakuru and Lake Elementaita, and the entire system covers a total area of 32,034 ha.

357 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA 2012), p. 427.

Legal and policy landscape in Kenya relating to indigenous peoples' land rights

During colonial times

Unlike Tanzania that for many years was a territory under mandate and under the control of the League of Nations, Kenya never had an independent eye overlooking the management of the colony, and this lack of international control has had a significant impact on the situation in Kenya in general and on the land tenure system in particular.

In 1885, Kenya became part of a British dependency that included Zanzibar and Uganda and was under the charter of a private company, the British East Africa Company (BEAC), soon to become the Imperial East Africa Company (IBEAC).[358] In 1895, the British Foreign Office took over what now became the East African Protectorate. In 1920, Kenya was declared a Crown Colony, while Uganda and Zanzibar remained protectorates until independence in 1962 and 1963, respectively.

Caring for the land rights of African communities was never a priority in Kenya. The Kenyan colonial system was designed to settle Europeans and other foreign farmers on indigenous peoples' lands, as was the case in South Africa, New Zealand, Australia, and many other places where this type of colonial system operated.[359] The highlands (later to be designated as the White Highlands) were the most sought after areas, due to their pleasant climate and agricultural potential.[360]

In order to control Uganda, at the time seen as a strategic country due to its command of the Nile's headwaters, the British government considered it important to secure the new protectorate's access to the sea and enormous resources were consequently injected into Kenya through various projects, such as the building of the first railway line linking the interior of Kenya and Uganda with the port city of Mombassa. But by the turn of the century, the European "scramble for Africa" was over and the British government no longer had the same strategic interests in Uganda. Understandably, the issue of "how to develop sufficient local export production to generate freight revenues to make the railways pay and tax revenues to support the developing state apparatus" became compelling. The railway, at the same time, provided adequate communication for the development of inland freehold and long-term

358 The BEAC (from 1888 the IBEAC) was created in 1885, as a commercial private company with the mandate to help the British government open up East Africa and gain control of the interior up to the head water of the Nile through either treaties or conquests. See also R.L. Tignor, *The Colonial Transformation of Kenya,* Series: Eastern African Studies (Princeton, New Jersey: Princeton University Press, 1976), p. 16; Kanyinga, *Re-Distribution from Above* (2000), pp. 34-5; Rutten, *Selling Wealth* (1992), p. 171.

359 This was not the case in Uganda, where malaria and sleeping sickness in the beginning kept white settlers away. Later, the British authorities stated as a principle that Uganda should remain an African state with several semi-independent monarchies and a large African farming community producing cotton, coffee and tea for export.

360 H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi, Kenya: African Centre for Technology Studies, 1991b), p. 8.

leasehold land grants for ranch development by white farmers.[361] The Foreign Office decided to make Kenya pay part of the bill by making it a settlement colony.[362]

Following the arrival of the settlers in Kenya, communities became either squatters or confined to native reserves.[363] In both cases, communities enjoyed a severely limited "right of occupancy" over their lands. A colonial agent, quoted by Okoth-Ogendo, stated:

> I am afraid that we have got to hurt their (the communities) feelings, we have got to wound their susceptibilities and, in some cases, I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move communities from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law an indisputable right to eject them.[364]

Settlement policy was based on a number of assumptions, including that "an excessive livestock population was destroying the vegetation and soil",[365] that "customary systems of land tenure [were] inimical to the goals of increasing agriculture output and rural income",[366] and that the traditional economy was to be "transformed in order to take forward the process of modernisation".[367] In other words, the colonial system was determined to write off pre-existing customary land tenure, regarded as an obstacle to making the Protectorate profitable. Between 1903 and 1906, 60,000 acres of Kikuyu land were taken over by white settlers,[368] and by 1926, European settlers had acquired a total of 463,864 acres, three times more than in Tanzania.[369]

The Kenyan colonial system achieved such enormous results in such a short period of time because of the use of violence. "Punitive expeditions" were carried out to crush any native resistance against the settlement schemes.[370] Apart from the Maasai community, which entered into

361 See J. C. Ng'ethe "Group Ranch Concept and Practice in Kenya with Special Emphasis on Kajiado District", Available online at http://www.fao.org/wairdocs/ILRI/x5485E/x5485e0t.htm. See also Bruce Bernan, *Control and Crisis in Colonial Kenya: The Dialectic of Domination*, (London, Nairobi, Athens, Ohio: Currey, Heinemann Nairobi, Ohio University Press, 1990), p. 50; Tignor, *The Colonial Transformation of Kenya* (1976) p. 18; Okoth-Ogendo, *Tenants of the Crown* (1991a), pp. 7-9; Kanyinga, *Redistribution from Above* (2000), pp. 35-6; Rutten, *Selling Wealth* (1992), p. 173.

362 See Kanyinga, *Redistribution from Above* (2000), p. 35, and Bernan, *Control and Crisis* (1990), p. 51.

363 Okoth-Ogendo, *Tenants of the Crown* (1991b), p. 53. The term "reserve" meant land set aside by the colonial system for dispossessed indigenous peoples. These lands were later called "Trust Lands". See also Smokin C. Wanjala, *Land Law and Disputes in Kenya*, (Nairobi: Oxford University Press, 1990), p. 3; Rutten, *Selling Wealth* (1992), pp. 176-7.

364 Okoth-Ogendo, *Tenants of the Crown* (1991b), p. 58.

365 Tignor, *The Colonial Transformation* (1976), p. 10.

366 Jack Glazier, *Land and the Uses of Tradition among the Mbeere of Kenya,* (Lanham, MD: University Press of America, 1985), p. 2.

367 Ibid.

368 See Rutten, *Selling Wealth* (1992), p. 174, and Tignor, *The Colonial Transformation* (1976), p. 326. According to Tignor, by 1959, "nearly 780,000 acres of land [in the Kikuyu District of Kiambu-Limuru alone] had been consolidated out of a total of 999,000 acres of fragments farmed under the traditional tenure system".

369 Tignor, *The Colonial Transformation* (1976), p. 25.

370 Ibid., pp. 20-21, Rutten, *Selling Wealth* (1992), p. 171.

several treaties with the colonial authority,[371] meaning that they had to abandon their traditional homelands, other communities were facing "the effect of the ... military strength in a series of campaigns, called euphemistically ... punitive expeditions, which were designed ... to punish dissident African groups".[372] Some of these expeditions resulted in more than 1,500 victims.[373]

Furthermore, following the enactment of the Native Authority Ordinance 1902, the mechanisms of designation and the functions of traditional chiefs were significantly modified, with an impact on the system of land administration. Kenya became administratively divided into provinces, districts and locations, without consideration of pre-colonial sociological settings. Provincial Commissioners took charge of the provinces, the District Commissioners were responsible for the districts, and the chiefs were in charge of the locations.[374]

These "headmen [or native chiefs] were not worthy individuals who commanded respect in their local areas",[375] and native chiefs eventually came to look more like "salaried public servants directly accountable to the District Commissioner"[376] than trustees of a traditional way of life and customs. Their new functions included recruiting labour, keeping roads clean, maintaining public order, and collecting taxes. Kanyinga argues that "the imposition of new forms of administrative authorities and the subsequent concentration of powers in the institutions of indirect rule, particularly that of the chiefs, undermined the traditional and customary structures of land administration, thereby shaking the basis for social and political security, and of a secure land tenure system itself. The economic organization was similarly disrupted ... Political unrest developed as land problems intensified".[377]

The Kenyan Crown Land Ordinance of 1923 declared most lands "Crown Land" on the assumption that "Africans owned land only in terms of occupational rights and that the chiefs and heads of clans did not hold any sovereignty over their land".[378] As pointed out by Maini, the rationale behind this argument was that "there did not exist a valid custom by virtue of which ... tribes ... either collectively or by individual members, can assert a right of ownership over or alienate land".[379] Accordingly, the Ordinance extended the scope of the term Crown Land to include "all lands occupied by the native tribes and all land reserves for the use of any members of any native tribes".[380] Unlike the settlers, who could hold titles of "conclusive evidence" of absolute and indefeasible

371 For a more elaborate account, see Okoth-Ogendo, *Tenants of the Crown* (1991b), p. 30, See also Rutten, *Selling Wealth* (1992), pp. 181 and 464.

372 Tignor, *The Colonial Transformation* (1976), p. 21.

373 Ibid.

374 Section 2 of the Trust Land Act, CAP. 288. For text, see http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

375 Tignor, *The Colonial Transformation* (1976), p. 42.

376 Glazier, *Land and the Uses of Tradition* (1985).

377 Kanyinga, *Re-distribution from Above* (2000), p. 33.

378 Okoth-Ogendo, *Tenants of the Crown* (1991b), p. 11. Okoth-Ogendo shows that, the Foreign Office, whilst still considering all "unoccupied lands" as belonging to the indigenous peoples, requested an expert legal view on the issue. On December 13, 1899, the view from London was that Her Majesty had power of control over "waste and unoccupied land" in protectorates and that, if Her Majesty considered it appropriate, could declare such lands "Crown Lands".

379 Krishan M. Maini, *Land Law in Eastern Africa* (Nairobi: Oxford University Press, 1967), p. 27.

380 Ibid., p. 15.

proprietorship,[381] communities were recognised with a "right to occupation" on reserves, becoming thus "tenants at the will of the Crown".[382]

By end of the 1920s, Kenyan communities' grievances over lands had reached a peak. The reserves had become congested and incapable of responding to the needs and claims of communities; at the same time, the high number of squatters on settlers' farms led to a review of labour regulation, which occasioned more displacements or evictions from settler farms and therefore more unrest in the reserves and the White Highlands.[383] Realizing the political explosiveness of the situation,[384] the colonial authority made an attempt to diffuse these tensions by setting up the Kenyan Land Commission in 1931. Its purpose was to hear claims by communities over lands and possibly compile some rule over the then disappearing "pre-colonial land tenure system".[385] Unfortunately, nothing came out of the claims made by the communities.[386] Instead, new ordinances and amendments were passed in 1938/39 that reinforced the rights of Europeans to exclusive occupation and ownership of land. Land sales between Europeans and Africans were prohibited, contracts between settlers and non-settlers discouraged.[387]

Pre-independence: towards the individualisation of land tenure

After World War II, its economic and imperial power severely undermined, Britain came to realize the need for integrating the African "subjects" into the colonial economy. This would serve two purposes: increase the production of export cash crops required to support the post-war reconstruction process in Britain and maintain order in the colony. The view that African farmers were not supposed to compete with the settlers[388] slowly gave way to the idea of land tenure reforms and "to devise a means of providing a better title to land in the native Land Units". This had already been recommended by the Kenyan Land Commission's Report (1934) and advocated by the colonial administration as early as in 1949.

However, the increased congestion in the reserves, the declining land-carrying capacity, several failed resettlement schemes for squatters and the disappointed hopes of the communities in

381 Section 23 of the Kenyan Crown Land Ordinance No. 26 of 1919: "The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all ... as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner".

382 Kanyinga, *Re-distribution from Above* (2000), p. 38.

383 Ibid., p. 41.

384 Okoth-Ogendo, *Tenants of the Crown* (1991b), p. 55.

385 Gavin Kitching, *Class and Economic Change in Kenya: The Making of an African Petite Bourgeoisie* (New Haven, Conn.: Yale University Press, 1980), p. 282.

386 The Kenyan Land Commission heard thousands of claims from communities and compiled a 1,200 page report of evidence and memorandums. See Kitching, *Class and Economic Change* (1980), p. 282.

387 Christian Graeffen, "Comments" to F.M. Ssekandi presentation on "Social, Political and Equity Aspects of Land and Property Rights", at World Bank Regional Workshop on Land Issues in Africa and the Middle East, Kampala, 2002. Available online at www.landcoalition.org/pdf/wbasekd.pdf

388 African farmers were thus gradually granted permission to grow high-value export crops, as, for instance, tea. See Donald B. Freeman, *A City of Farmers: Informal Urban Agriculture in the Open Spaces of Nairobi, Kenya* (Montreal, Quebec, Kingston, Canada: McGill-Queen's Press - MQUP, 1991).

general prompted in 1952 what is known as the Mau Mau uprising. A state of emergency was declared (1952-1959), but it also became apparent that the land question could no longer be ignored.

By then, as Kanyinga puts it, "the Government appeared implicitly to have abandoned the idea of community control in favour of a slow individualisation benefiting those who were considered progressive farmers".[389] This was put in evidence in 1955 by the Swynnerton Plan.[390] This plan "was devised partly in response to the Mau Mau emergency [and] was expected to create a stable class of relatively wealthy [freehold] farmers who ... would help stabilize society. That desire completely overshadowed any concern for the equitable distribution of resources, as the ... plan, a clear application of 1950s evolutionist 'modernization' theory in economics, made clear".[391] The Plan stated:

> In the past, the Government policy has been to maintain the tribal system of tenure so that all peoples have had bits of land and to protect the African from borrowing money against the security of his land. In the future ... former Government policy will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country.[392]

The strategies proposed by the Swynnerton Plan were individualization of tenure through land consolidation and registration, and improved agricultural production through extension services. The plan was supported in 1955 by the East African Royal Commission Report, which further recommended a multi-racial approach to agrarian policy,[393] and in 1956, the colonial government declared it as its policy "to encourage the emergence of individual land tenure amongst Africans where conditions are ripe for it, and, in due course, to institute a system of registration of negotiable title." [394]

The Swynnerton Plan also promoted extensive communal grazing in pastoral districts. It identified five conditions for sound and productive use of rangelands, namely limiting the numbers of resident stock to the carrying capacity of the land; assuring an adequate system of permanent water supplies; controlling and managing grazing at a productive level. These conditions presaged in many ways some of the assumptions on which group ranches were eventually to be formed.[395]

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389 Kanyinga, *Re-distribution from Above* (2000), p. 42.

390 R. J. M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya* (Nairobi: Government Printer. 1955).

391 Francis M. Ssekandi, "Social Political and Equity Aspects of Land and Property Rights" (2002), p. 11. Paper presented at World Bank Regional Workshop on Land Issues in Africa and the Middle East, Kampala, 2002. Available online at www.landcoalition.org/pdf/wbasekd.pdf. For an elaboration on the "modernization" theory, see, e.g., Freeman, *A City of Farmers* (1991), p. 77.

392 Swynnerton, *A Plan* (1955), p. 10, quoted in Francis M. Ssekandi, "Social Political and Equity Aspects" (2002), p. 12.

393 See Paul Maurice Syagga, "Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective" in *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives,* edited and published by Society for International Development, Eastern Africa Regional Office, (Nairobi, Kenya, 2006), p. 297.

394 Lillian W. Njenga "Towards Individual Statutory Proprietorship from Communal Ownership" (2004). Available at http://www.fig.net/commission7/nairobi_2004/papers/ts_01_3_njenga.pdf

395 See B.E. Grandin "The Maasai: Socio-Historical Context and Group Ranches" in *Maasai Herding: An analysis of the Livestock Production System of Maasai Pastoralists in Eastern Kajiado District, Kenya,* ILCA Systems Study 4, edited by Solomon Bekure et al. (Addis Ababa, Ethiopia: ILCA - International Livestock Centre for Africa, 1991), chapter 3. Many grazing

The Swynnerton Plan resulted in several pieces of legislation, most importantly the Land Consolidation Act of 1959 (Cap 283), and the Land Registration (Special areas) Act of 1959, which introduced a registration system for individually held plots of land within the reserves or special areas, with the immediate effect that "once lands become registered under any of the systems discussed, it becomes subject to English law and no longer to customary law".[396]

One of the last laws, to be passed before independence was the Registered Land Act of 1963.[397] This Act—in force until 2012—made provision for the registration of land as well as for the registration of lease of agricultural tenancies and its legal consequences. According to Okoth-Ogendo, it "was carefully drafted to make it clear, inter alia, that the rights of an individual proprietor were not liable to be defeated by anything not shown in the register. Indeed, the act went so far as to convert all "customary rights of occupation" into tenancies from year to year, thus giving the registered owner the power, upon giving one year's notice, to terminate such occupation." [398]

Post Independence: the Africanization of land policies

All these measures, however, did not extinguish the communities' call for land restitution, and before independence, the new Kenyan political elite[399] had already come under enormous pressure from various communities denouncing the unfairness of the colonial land policies, and reclaiming their lost lands. This was coupled with a growing feeling of insecurity among the European settlers, who had become more willing to sell up and leave Kenya.

As a consequence and following independence in 1963, the Kenyan government endeavoured Africanizing its land policy. One of the measures taken was to open up high-potential areas, such

schemes, each with a livestock officer-in-charge, were started in various districts throughout the country but turned out to have little success. Most schemes ended in the 1960s by being divided in individual ranches of varying sizes.

396 Wanjala, *Land Law* (1990), pp. 9-10. Other legislation included, the Native Land Tenure Rules of 1956 regarding machinery for the adjudication and consolidation of native lands; the Native Lands Registration Ordinance of 1959 and, the Land Control (Native Lands) Ordinance of 1960 to control land transactions within the adjudicated areas. These two pieces of legislation are the forerunners of the Registered Land Act of 1963 (repealed by Act 3 in 2012) and the Land Control Act of 1967 that operate in Kenya to the present day. See Syagga, "Land Ownership and Use in Kenya" (2006).

397 Registered Lands Act of 1963 CAP 300 (September 1963). Its introduction resulted in the repeal of all the provisions of the Land Registration (Special areas) Act of 1959. This excluded the adjudication and consolidation provisions whereby the Land Registration Act was changed to the Land Consolidation Act of 1959.

398 CAP 300 - Sections 27, 28, 30. See H.W.O. Okoth-Ogendo "The Perils of Land Tenure Reform: the Case of Kenya" in *Land Policy and Agriculture in Eastern and Southern Africa,* edited by J.W. Arntzen, L.D. Ngcongco, and S.D. Turner. Selected Papers Presented at a Workshop organised by the United Nations University in Gaborone, Botswana, 14-19 February 1982 (Tokyo: United Nations University Press, 1982).

399 On the eve of the Kenyan independence, two major political groups emerged. On the one hand, there was the KANU (Kenyan African National Union) made up essentially of Kikuyu and Luo, the two biggest ethnic groups of Kenya. On the other hand, there was the KADU (Kenya African Democratic Union) made up essentially of small pastoralist communities, such as the Maasai, Luhya, etc. In all the pre-independence negotiations, the latter wanted to have their land rights constitutionally protected, as individuals and as communities. In this sense, the passing of the Land (Group Representatives) Act of 1968 could be considered as a compromise reached by both parties. See also Kanyinga, *Re-distribution from Above* (2000), pp. 47-52.

as the former White Highlands of Kenya,[400] and implement "settlement schemes, through which Africans were given access to land bought from departing European farmers".[401] Another measure was the creation of "group ranches".

According to Grandin, "by 1970, about 1.2 million ha of land had been transferred and adjudicated African farmers in the high-potential areas**.** This figure should be seen in contrast to only 0.21 million in the range areas, including individual farms, ranches and group ranches. However, land was given to the landless, unemployed and 'progressive' African farmers, and was not returned to the groups which occupied them traditionally.**"** [402]

The Maasai colonial land losses, for instance, were never recouped. Yet, the situation in Maasailand was critical. From occupying prior colonization an area of 155,000 sq. km, stretching from Mt Elgon and the Loriyu Plateau in the north to Kibaya in the south (today in Tanzania), this area of land had by 1913 been reduced to 40,000 sq. km. This remaining "reserve" is roughly congruent with present-day Narok and Kajiado districts. In the following decades and right up to the 1950s, more land, including important dry-season grazing areas, was lost to peasant farmers, in particular Kikuyus, who themselves had been chased away from their homelands by European settlers. Under the National Parks Ordinance of 1945, the Kajiado Maasai furthermore lost access to two areas bordering the District: Nairobi National Park and Tsavo National Park. This Ordinance also established a game reserve in Amboseli (3,248 sq. km), and game conservation areas at Kitengela (583 sq. km) and West Chyulu (368 sq. km), restricting the use of these areas by the Maasai. Maasai complaints about the encroachment of cultivation into dry-season grazing were common between 1940 and 1955. A drought in 1948-50 increased conflicts between the Maasai pastoralists and non-Maasai peasant farmers.[403]

In 1965, the Lawrence Mission on Land Consolidation and Registration was appointed to assess the problem of landlessness that several communities were facing, as a result of the pre-existing processes of consolidation and registration.[404] The Lawrence Report noted:

> We are conscious of the limitations imposed by the fact that the Kenya Government has for several years been widely committed to a policy of individual absolute ownership ... In some of the semi-arid areas of the country, it would be wasteful and even harmful to register an individual ownership of land which is badly eroded or denuded of grass cover, for the

400 Just before Independence, the departing colonisers negotiated a scheme by which white settlers were bought out of their farms by the in-coming Kenya government. The money for this purchase was made available as a loan by the British government. This agreement was heavily criticized by certain KANU members who found that it was not justifiable "to buy that which had been forcefully wrenched from them". See Horace Njuguna Gisemba, "A Short History of Land Settlements in the Rift Valley" (2008). Available online at http://allafrica.com/stories/200805150607.html

401 Kitching, *Class and Economic Change* (1980), p. 316. Under a number of government settlement schemes (the most notable being the Million Acre scheme), some half a million people were resettled on land purchased from the settlers. See Alexandrino Njuki, "Cadastral Systems and Their Impact on Land Administration in Kenya". Paper presented at International Conference on Spatial Information for Sustainable Development, Nairobi, Kenya, October 2001. Available online at http://www.fig.net/pub/proceedings/nairobi/njuki-TS10-2.pdf

402 Grandin, "The Maasai" (1991).

403 Grandin, "The Maasai" (1991).

404 Gerald Holtham and Arthur Hazlewood, *Aid and Inequality in Kenya* (London: Croom Helm and the Overseas Development Institute, 1976), p. 116; Rutten, *Selling Wealth* (1992), p. 266.

> owners may be unable to subsist, let alone derive a cash income from holding until remedial action has been taken to restore the land to productive capacity.[405]

The Lawrence Commission made several recommendations, among others the need in range areas to provide for improved livestock husbandry among the pastoralist communities. This eventually led to the enactment of two pieces of legislation, which were to impact on Kenya's pastoralist population. One was the Land Adjudication Act of 1968,[406] which facilitated the creation of group ranches on Trust Lands, where individual ownership was not appropriate given environmental conditions and the close-knit nature of pastoralist communities, by providing for the recording of rights and interests in customary lands, and their assignment to their customary users. The other was the Land (Group Representatives) Act of 1968 which provided for the governance and administration of group ranches. [407]

These two laws symbolize the first major attempts by the Kenyan new political elite to respond to land claims of communities in legal terms. With the exception of the 1976 Wildlife (Conservation and Management) Act (amended in 1989), and unlike Tanzania, which enacted two major Land Acts in 1999, Kenya has had to wait until 2011 before important new land laws or related legislation were passed. Accordingly, as far as community rights to lands are concerned, the right of "occupation" stated by the Trust Land Act of 1939[408] and the right of "ownership" recognized by the Land Adjudication Act remained until 2011, strictly speaking, the only Kenyan legal attempts to address the claims of communities for their collective right to lands.

Aimed at protecting the poor members of communities against rich and influential individuals who could easily secure titles on the reserves,[409] the Land Adjudication Act and the Land (Group Representatives) Act used, for the first time in the legal history of Kenya,[410] the expression "group's rights" of ownership over land. To some extent, these Acts applied to communal lands, even if the Land Adjudication Act included provisions for the dissolution of group ranches and thus the individualisation of these lands.

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405 J.D. Lawrence et al., *Report of Mission on Land Consolidation and Registration in Kenya, 1965-66* (Nairobi 1966) pp. 34-5.

406 Land Adjudication Act, 1968, CAP 284: An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto (Preamble). According to Article 2, "interest", in relation to land, includes absolute ownership of the land. This Act was still in force in mid-2013.

407 Land (Group Representatives) Act, CAP 287: An Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith and purposes incidental thereto (Preamble). This Act was still in force in mid-2013. See also Njenga "Towards Individual Statutory Proprietorship from Communal Ownership" (2004).

408 Trust Land Act of 1939, CAP 288, Articles 13 and 69. Still in force in mid-2013.

409 Rutten shows that in the Maasai section of Kaputiei alone, by 1965, 22,000 ha (out of 322,000 ha) had been allocated to 28 families out of a total of approximately 8,400. See Rutten, *Selling Wealth* (1992), p. 268. Once individual titles were secured, land could then be alienated to outsiders or non-members (ibid., pp. 265-6).

410 As already shown, one of the colonial strategies for accessing native lands was to destroy any sort of collective holding of lands. This was done through a range of measures, such as the abolition of the traditional institutions on which the system was built, the individualisation of land holding and similar measures.

Group ranches: creation and subdivision

A group ranch has been defined as a livestock production system or enterprise where a group of people jointly own freehold title to land, maintain agreed stocking levels and herd their individually owned livestock collectively.[411] The selection of members to a particular group ranch is based on kinship and traditional land rights.[412] Group members elect group representatives to constitute a management committee that oversees pasture management and water development.[413]

Group ranching was seen by the government as a way of modernizing pastoralists in general and the Maasai in particular,[414] through the commoditization of their herds, while at the same time providing an evolutionary mode of transformation based on the traditional ways of the pastoralists.[415]

Although there were Maasai who were consulted about the desirability of group ranches and were involved in their formation, these were primarily educated Maasai tied into the national political system. However, most researchers agree that the majority of the Maasai did not accept or even understand certain features of the group ranch (such as grazing quotas, boundary maintenance and the management committee). Their reasons for accepting the idea of group ranches were therefore at odds with those of the government. They primarily saw group ranching as a way to secure their land against further incursions by government, by non-Maasai cultivators and by the elite Maasai. Another reason was the perceived possibility of increasing their traditional wealth base (livestock numbers) through the provision of water facilities, disease control and dips funded by supporting projects.[416]

Group ranching soon proved to be a failure. The objectives envisioned by the government were not met. Livestock numbers were increasing beyond the carrying capacity of the land with ensuing environmental degradation, and the Maasai were not particularly market-oriented.[417] By the early 1980s, mounting pressure from several stakeholders to subdivide the group ranches was spearheaded by Kenya's

411 Ministry of Agriculture, 1968, quoted by J. C. Ng'ethe in "Group Ranch Concept" (1992).

412 According to Article 2 of Land Adjudication Act, "group" means a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner. See also J. C. Ng'ethe, "Group Ranch Concept" (1992).

413 Ester Mwangi, "The Transformation of Property Rights in Kenya's Maasailand: Triggers and Motivations" CAPRi Working Paper (Washington D.C.: International Food Policy Research Institute 2005), n. 2. Available at http://www.capri.cgiar.org

414 Group ranches were established in different parts of Kenya (the Rift Valley with Kajiado, Narok, Samburu, Laikipia, Baringo and West Pokot, South Nyanza, the Eastern Province and the Coast Province) and affected different pastoralist groups, although the majority of group ranches were to be found in Maasai core areas, such as Kadiado and Narok. See J. C. Ng'ethe "Group ranch concept" (1992), at http://www.fao.org/

415 Ibid., p. 8.

416 Mwangi, "The Transformation of Property Rights" (2005), p. 10. Kenya Livestock Development Policy (KLDP) I and II with support from, among others, the World Bank, was to be the main tool through which the group ranch concept was to be implemented. See Ng'ethe, "Group Ranch Concept" (1992).

417 Instead of commercializing their production, the Maasai followed their traditional livelihood strategies, keeping a high percentage of female livestock to ensure sufficient milk as well as to guard against draught periods (in order to be able to rebuild their herd), and only selling a minimum number of animals to meet their financial commitment to the ranch.

president, Daniel Arap Moi, who, on several occasions between 1983 and 1989, voiced his support for the process of subdivision.[418] Financial institutions, such as the World Bank, too, "openly condemned [the system of] preventing other Kenyans, [not belonging to a given ranch]" from acquiring or using ranch lands.[419] A sudden demand for wheat and barley by Kenya's new middle class, furthermore, inspired investment in Green Revolution technologies, converting to agriculture land that had forever been considered too dry for agriculture, and making Narok District Kenya's leading producer of both wheat and barley by the mid-1980s.[420]

These developments coincided with an increasing disenchantment among the Maasai, who found that group ranching had deeply altered their indigenous system of land administration and land use patterns. As pointed out by Okoth-Ogendo, authority of land was now excercised by "a completely new medium ... namely the group representatives. Although the Land (Group Representatives) Act is fairly general about who may hold office as a group representative, the emerging practice appeared to be that those elected to office were people who were at least able to read and write". This meant that in areas with low levels of literacy as for instance in the Maasai areas, "those assuming office as representatives tended ... to be the younger, less influential members of indigenous society. This tended to slow down decision-making ... since most decisions taken by the representatives still carried very little weight unless they were also channelled through indigenous levels of authority." As for the pattern of land use, "it was altered by severely restricting the nomadic character of pastoral communities without first improving their ability to adapt to semi-sedentary living. In particular, adequate steps were not taken to reduce the people's dependence on seasonal availability of water and stock feed. One consequence of this was that in order to minimize drought risks, clans and families often found it necessary to split herds and join different ranching schemes, a course of action that was apt to put great strain on the social institutions of pastoral society." [421]

But there were other concerns besides mismanagement and lack of access to dry-season rangelands. Increasing group ranch populations, discord between age-sets concerning registration of new members, unsanctioned allocations to unauthorized individuals, difficulties in enforcing livestock quotas, etc., were problems that created insecurity among group members and eventually pushed them to support subdivision.[422] At the same time, "the individual title was viewed as the gateway to development. A title to land represented complete and secure ownership, but more. It could be used as collateral to acquire loans for farm and livestock improvement; it could be used as security against which unforeseen circumstances such as illness could be confronted".[423]

By the early 1980s, many group ranches therefore began opting for the possibility provided by the law of sub-dividing into individual plots. As reported by Rutten, within the Kajiado District alone,

418 As opposed to the President, government officials from the Departments of Lands Adjudication and Range Planners from the Ministry of Livestock Development were cautious and indeed stopped short of openly discouraging group ranches against subdivision.

419 Rutten, *Selling Wealth* (1992), p. 476.

420 Cheeseman, "*Conservation and the Maasai"* (n.d.), p. 4.

421 Okoth-Ogendo "The Perils of Land Tenure Reform" (1982).

422 Shauna BurnSilver and Esther Mwangi "Beyond Group Ranch Subdivision: Collective Action for Livestock Mobility, Ecological Viability and Livelihoods" (Washington, D.C.: International Food Policy Research Institute, 2007), p. 5. Available online at http://www.capri.cgiar.org/pdf/capriwp66.pdf

423 Mwangi, "The Transformation of Property Rights" (2005), p. 24.

by "1990 almost 80 per cent of the ranches had decided to get rid of the group ranch structure and become individual land owners instead".[424] By 2000, and out of a total of 321 group ranches in Kenya—the large majority to be found in the two most densely Maasai populated districts (Kajiado and Narok)—104 had been subdivided and 109 were in the process of being subdivided. Only 39 were in operation, the others were either dormant or to be subdivided.[425]

As the Land (Group Representatives) Act did not provide detailed rules regarding dissolution of "group ranches", the Land Adjudication and Range Department[426] designed mechanisms and rules to preside over the subdivision of "group ranches" into individually held parcels of lands.[427] Although these rules continue to preside over an increasing number of group ranch subdivisions, they have never been sent to Parliament to be passed into law.

The consequences of the dissolution of group ranches have been wide ranging. Once lands were individually owned, poverty has motivated some households (that is, the male household heads) to sell in their effort to survive. In other cases, individual lands have been fraudulently appropriated by rich and influential people through various corrupt arrangements. In the opinion of M.M.E.M. Rutten, "none of those who allowed this process [of dissolution of group ranches] to start fully realised the possible negative side effects it could have for a large number of Maasai people, their children, the district's ecology, the livestock economy …".[428] Mostly because, once divided into plots of individually owned pieces of land, former group ranches could be alienated to outsiders. As shown by several reports, once a subdivision of a group ranch is completed, the majority of those who gain access to these lands are non-Maasai, including private companies, rich politicians, civil servants, and businessmen.[429]

Furthermore, individually owned plots appear, in most cases, to be too small to accommodate the lifestyle of pastoralists. They have had to adapt to "dramatic changes in pastoral land use, [going] from a system predicated on extensive seasonal movement and intensive, short-duration grazing of successive areas of the pastoral landscape, towards one based on intensive, long-term grazing of private parcels where households have ostensibly fewer options for mobility",[430] particu-

424 Rutten, *Selling Wealth* (1992), p. 303.

425 Figures from the Range Management Division of the Ministry of Agricultural and Rural Development (MoARD) quoted in Yacob Aklilu et al., "An Audit of the Livestock Marketing Status in Kenya, Ethiopia and Sudan" (Nairobi:Organization of African Unity/Interafrican Bureau for Animal Resources, 2002), pp. 18-19. Available online at http;//www.eldis.org/fulltext/cape_new/Akliliu_Marketing_vol._1.pdf
Shuana BurnSilver and Esther Mwangi "Beyond Group Ranch Subdivision: Collective Action for Livestock Mobility, Ecological Viability and Livelihoods" (Washington D.C.: International Food Policy Research Institute, 2007), p. 2. Available online at http://www.capri.cgiar.org/pdf/capriwp66.pdf

426 The Land Adjudication and Range Department of the Kenyan government was in charge of overseeing the running of group ranches, and therefore should have been the one to design measures and rules for the abolition of the scheme.

427 These rules stipulate that the decision has to be taken by at least 60 per cent of the concerned ranch members. Then an authorisation to subdivide has to be applied for at the "Divisional Land Control Board". After the required consent of the Registrar of Group Representatives—a body in charge of registering all group ranches—a demarcation process takes place, after which each group member can apply for an individual plot. For more details on the steps leading to the dissolution of a group ranch, see Rutten, *Selling Wealth* (1992), pp. 301-3.

428 Ibid., p. 484.

429 Ibid., p. 300.

430 BurnSilver and Mwangi "Beyond Group Ranch subdivision" (2007), p. 2.

larly since individualisation has introduced practices such as fencing, which clearly goes against the pre-existing customary-based norm of "non-exclusive use" of lands.[431]

Thus, the last vestige of any sort of communal land holding in Kenya has begun to disappear. Group ranches still exist in Kenya, but they are under threat of subdivision as pressure for individualisation continues to build up, particularly from the young generation of the few communities that still hold on to the group ranch system. However, considering that "the official policy of the Kenyan government is the extinguishment of customary tenure through systematic adjudication of rights and registration of title, and its replacement with a system akin to the English freehold",[432] it is difficult to see how the scheme of "group ranches" will be able to survive in the long run.[433]

Current land related policy processes

In 2003, the Ministry of Lands in consultation with other stakeholders spearheaded a National Land Policy formulation process. In May 2007, after a wide-ranging consultative process that included the participation of indigenous organizations, a final Draft National Land Policy was made public. In June 2009, this Draft was approved by government and eventually adopted in December by Parliament. With the vision "to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity",[434] it has raised hopes by stating that,

> [1] Land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed. The rights of these groups will be recognised and protected. Measures will be initiated to identify such groups and ensure their access to land and participation in decision making over land and land based resources.[435]

It should also be noted that the Policy addresses women's land rights.

Besides including the "restitution of land rights to those that have unjustly been deprived of such rights",[436] it also "recognizes and protects customary rights to land",[437] stating that the government shall lay out, in the Land Act" a clear framework and procedures for the recognition, protection and registration of community rights to land and land based resources, taking into account

431 Rutten, *Selling Wealth* (1992), pp. 480 and 483. There are obvious changes in Maasai lifestyles. Wage labour is said to be playing an increasingly important role. There are also changes in pasturing techniques and they now have, for example, livestock of camels and other previously unknown types of animals.

432 H.W.O. Okoth-Ogendo, "Land Policy Development in East Africa: A survey of Recent Trends". Paper for the DFID Workshop on "Land Rights and Sustainable Development in sub-Sahara Africa, Berkshire, 16-19 February 1999, p. 5. Available online at http://www.oxfam.org.uk/resources/learning/landrights/downloads/eafover.rtf

433 Wanjala, *Land Law* (1990), p. 11. Some of the group ranches that have not been subdivided have today taken up alternative income generating activities (e.g., wildlife conservancies, tourism, etc.). See J.C. Letai, "Land Deals in Kenya" (2011) p. 3.

434 Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, (Nairobi: Ministry of Lands, 2009a), p. ix.

435 Ibid., p. x.

436 Ibid., para. 174.

437 Ibid., p. ix.

multiple interests of all land users, including women",[438] and for "resolving the problem of illegally acquired trust land".[439] It also provides for the creation of a National Land Commission mandated, among other things, to "set up a Land Titles Tribunal, which will determine the *bona fide* ownership of land that was previously public or trust land".[440] Furthermore, the new policy document pays particular attention to "pastoral land issues", deriving the conclusion that:

> Pastoralism has survived as a livelihood and land use system despite changes in life styles and technological advancements. This tenacity of pastoralism testifies to its appropriateness as a production system.
>
> Colonial and post-colonial land administration in the pastoralist areas led to the deprivation of land management rights from the traditional institutions thereby creating uncertainty on the access, control, and exploitation of land based resources including grazing lands, water, and salt licks among others.[441]

The government shall therefore "recognise pastoralism as a legitimate land use and production system" [442] and "provide for flexible and negotiated cross boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit to facilitate the nomadic nature of pastoralism".[443] The role of women in pastoral systems and their special problems such as lack of access to land use rights are recognized and their rights in pastoral areas should be protected.[444]

Regarding so-called vulnerable groups such as pastoralists, hunter-gatherers, etc., the government shall develop mechanisms for redistribution of land and resettlement in order to secure access to land and land based resources. It should also "facilitate their participation in decision making over land and land based resources" and "protect their land rights from unjust and illegal expropriation".[445]

Potentially, this new National Policy could redefine the relationship between the country's marginalized indigenous peoples and the state.

Conservation areas and wildlife have not been a matter of contention in any major legislation since the 1976 Wildlife (Conservation and Management) Act. An amendment to this Act was passed in 1989, but left untouched the abolition of the land rights of communities, whose place of ordinary residence is within the conservation areas. In 2007, Kenya finalized a Draft Wildlife Management Policy.[446] This policy did not deal with indigenous land rights but specified that "wildlife will be utilized in a manner that does not impinge on cultural values, compromise the quality and value

438 Ibid., para. 66 (d)i.
439 Ibid., para. 66 (d)ii.
440 Ibid., paras. 41 and 62 (b).
441 Ibid., paras. 180 and 181.
442 Ibid., para. 183 (a).
443 Ibid., para. 183 (f).
444 Ibid., paras 182 and 183 (e).
445 Ibid., para 197 (b), (c) and (d).
446 Republic of Kenya, Final Draft Wildlife Management Policy, (Nairobi: Ministry of Tourism and Wildlife, 2007b). Available online at http://www.tourism.go.ke/ministry.nsf/doc/DRAFT_WILDLIFE_POLICY.pdf/$file/DRAFT_WILDLIFE_POLICY.pdf

of the resource, or degrade the carrying capacity of supporting ecosystems, in accordance with the principle of sustainable use." [447] It also provided that "benefits accruing from wildlife will be shared equitably among stakeholders, especially paying due regard to communities living within wildlife areas".[448] In order to remedy what it called "increasing human-wildlife conflict (HWC)", the Draft Policy saw the need for ensuring "that local communities and landowners are involved in putting in place measures that mitigate HWC"[449] and proposed among other things to "erect and maintain game barriers and other approved deterrent measures to minimize HWCs." [450]

This 2007 Draft Policy was immediately criticized for its entrenched conservationist attitudes and its views on the rights of indigenous communities living in or near protected areas. In March 2007, indigenous communities living adjacent wildlife ecological zones thus issued a press release against the policy, noting with consternation that the "policy document is contrary to their views" and that they were especially concerned about issues related to communitiy participation and wildlife trust funds and to the reintroduction of sport hunting.[451]

A new Forests Act was passed in 2005 and a Forest Policy adopted in 2007.[452] They provide for broad-based collaboration with forest communities, recognizing their traditional cultures and values but do not mention the rights of communities in forested lands, which are considered to be public lands.

Conclusion

This chapter has shown that Kenyan indigenous peoples' right to land enjoys no protection by the judiciary. However, it is noticeable that obstacles are far from deterring these peoples; instead, they devise new strategies and are, for instance, increasingly using historians, researchers and historical archival material to substantiate their cases.

Contrary to Tanzania, where—as will be shown in chapter VI—there have at least been a few High Court judges who have ruled in favour of customary land rights, there has never been such a trend in Kenya, where historical unfair land dispossessions seem to never have been questioned by the judiciary. One explanation of this could be found in the different history of these two countries. This does not preclude, however, the persistent need in both countries, for sensitizing judges on the rights of indigenous peoples.

Right from the early 1900s, when the Maasai went first to court, until now, with the Endorois people and others seeking redress, Kenyan judges have been unsympathetic to the land rights of indig-

447 Ibid., Section 3.3.1. (d).

448 Ibid., Section 3.3.1 (e)

449 Ibid., Section 9.3.

450 Ibid., p. 25.

451 In March 2007, indigenous communities living adjacent to ecological wildlife zones thus issued a press release against the policy, noting with consternation that the "policy document is contrary to their views" and that they were especially concerned about issues related to communitiy participation and wildlife trust funds and to the reintroduction of sport hunting. See Web site of IWGIA at http://www.iwgia.org/sw24404.asp

452 Republic of Kenya, The Forests Act (2005) and Sessional Paper No.1 on Forest Policy (Nairobi: Ministry of Environment and Natural Resources, 2007c). Both documents can be accessed online at http://www.kfs.go.ke/html/forest%20act.html

enous peoples. Kenyan judges tend to take a very traditional approach in almost all land court cases lodged by indigenous peoples. Generally, these judges hold on to national written legislations and consider customary law as a source of rights only if it is in accordance with written laws. This reflects a failure to understand that land dispossession of indigenous peoples and their claims to ancestral lands are a consequence of unfair and unjust laws passed without their consent. Efforts by indigenous peoples to bring in international jurisprudence on "aboriginal title" and other Kenyan international obligations have been systematically resisted by the judiciary, which remains unwilling to challenge government policies and sometimes uses delays as tactics.

When it comes to indigenous peoples, Kenyan land policies have remained fairly unchanged for decades. However, the past few years have seen the development of new policies and legislation on wildlife and land, culminating in 2009 with a new Draft Wildlife Policy and the adoption of the new National Land Policy (December 2009). The new National Land Policy represents potentially a big step forward in the recognition of indigenous peoples' rights. An open question is therefore how these two new policies eventually will play together. It should not be forgotten that Kenyan government policies and practices are, to a large extent, motivated by the interests of the political and economic dominant sectors. A case in point is the practice that consists of "degazetting" protected areas so that non-indigenous outsiders can be settled or granted individual rights on these lands. The Ogiek community[453] has been fighting for the past twenty years against this practice, which is clearly motivated by political (electoral) interests. Another example is the influence of the Kenyan conservation/tourist sector. Up through the 1980s, this sector emerged as having the potential of becoming one of "Kenya's largest earners of foreign exchange", and it has proved to be just that.[454] At the same time, it also demonstrated its potential of attracting external funding mostly from large environmental and wildlife funds but also from institutions such as the World Bank, which is said to have provided tens of millions of US dollars to the Kenyan conservation sector.[455] The benefits drawn by the Kenyan government and the local county councils have similarly been substantive, prompting commentators as Ted Cheeseman to talk about "a 'mining attitude' toward park resources" and to note that "wildlife is now singularly utilized through the tourist trade, exacerbating the gap between who pays for wildlife and who benefits from it." [456]

Those who have hitherto paid for wildlife have in most cases been the indigenous communities living in the vicinity of national parks and reserves. In the case of Amboseli, for example, "the National Park is only a tiny part of the 6,000 sq.km Amboseli ecosystem. … Without these surrounding areas, wildlife populations are unsustainable".[457] Yet, not only have these communities not seen any benefits in form of investments and projects, they have often, as in the case of national parks,

453 See Web site of Ogiek Welfare Council at http://www.ogiek.org

454 Tourism accounted for 13.7 per cent of the Gross Domestic Product (GDP) in 2011, making it the third largest contributor to Kenya's GDP after agriculture and manufacturing, and Kenya's third largest foreign exchange earner after tea and horticulture. See World Travel and Tourism Council at http://www.wttc.org/site_media/uploads/downloads/kenya2012_2.pdf See also Cheeseman, "Conservation" (n.d), p. 10.

455 Norman N. Miller, "Land Use and Wildlife in Modern Kenya", in *Wildlife, Wild Death: Land Use and Survival in Eastern Africa,* edited by R. Yeager and N.N. Miller (New York: State University of New York Press, and the African –Caribbean Institute, 1986), p. 78; Cheeseman, "Conservation" (n.d.), p. 10.

456 Cheeseman, "Conservation" (n.d.), pp. 5 and 9.

457 Ibid., p. 11.

lost access to areas which they used traditionally and on which they are highly dependent. In the case of Amboseli National Park, this has several times generated violent and bloody conflicts between the Maasai and the park management. If Kenyan wildlife and its ecosystem are to be preserved, conservation interests will therefore have to be balanced with the rights of communities living within as well as outside the concerned areas,[458] and the need to solve the environmental degradation caused by failed pastoral policies.

Recent developments within the legal and policy landscape in Kenya

After the devastating ethnic conflicts in the aftermath of the December 2007 elections,[459] Kenya underwent a process of political and economic healing, while at the same time resuming the constitutional and legal reform process commenced in 2002. As a result, the legal and policy landscape has experienced some remarkable changes, which have already had a certain impact on indigenous peoples' rights in general and land rights in particular.

The new National Land Policy (NLP)

The new National Land Policy (2009)[460] provides a far better framework for the protection of collective community lands than had been the case so far and indigenous peoples were very active in lobbying for it. The most important innovations of the NLP include the re-categorization of land into public, community and private land; a policy to use land productively and sustainably, and to share benefits with the local population. Land issues requiring special intervention[461] are listed (Art. 3.6) and mechanisms for resolving them are to be put in place taking into account the land reform principles of redistribution, restitution and resettlement in order to facilitate access to, and utilization of, land and land-based resources.

The new Constitution

A new Constitution[462] was adopted by popular referendum in 2010. This marked the end of several years' deliberations, consultations and drafting, in which indigenous civil society organizations played an important role. The final document is a clear break with the past and provides several avenues for the pursuit and strengthening of indigenous peoples' individual and collective rights. It

458 See, e.g., Rutten, *Selling Wealth*, 1992, p. 323.
459 In early 2008, more than 1,000 Kenyans were killed and 300,000 made homeless in post-election ethnic violence.
460 See full text of Land Policy at http:// www.ardhi.go.ke
461 These land issues include among others: (a) Historical injustices; (b) Pastoral land issues; (c) Coastal region land issues; (d) Land rights of minority and marginalized groups; and (e) Land rights of women.
462 See text of Constitution at http://www.kenya-information-guide.com/kenya-constitution.html

defines the notion of "vulnerable and marginalized minorities" in a way consistent with UNDRIP language. It promotes and protects indigenous languages; recognizes the cultural and intellectual rights of marginalized communities and their right to dual citizenship, which may benefit communities who live on both sides of the border. Articles 19-59 provide for a plethora of rights and freedoms, including the use of affirmative action programs at all levels. Devolution—i.e., the transfer of decision-making to authorities at subnational level—will increase the participation of marginalized communities in governance, and the Constitution also provides for marginalized communities' representation within political parties, parliament, country assemblies and public service.

The Constitution includes an entire chapter on Land and Environment and reflects to a large extent the 2009 National Land Policy and its principles, such as, among others, (a) equitable access to land; (b) security of land rights; and (f) gender equity in law, customs and practices related to land and property in land (Art. 60). Land is categorized into public, community and private land. Under Art. 63, community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. This includes lands lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and ancestral lands and lands traditionally occupied by hunter-gatherer communities. However, there are several caveats. Land can be converted from one category to another; community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively; and the state may still regulate the use of any land in the interest of defense, public safety, public order, public morality, public health or land use planning (Art. 66).

The Constitution also provides for the creation of a National Land Commission, and for the revision by parliament of existing land laws and sectoral land use laws as well as the enactment of new legislation.

The creation of new institutions

The first two important commissions were established already in 2008—the National Cohesion and Integration Commission (NCIC) to address the problem of ethnic discrimination within the public sector,[463] and the Truth, Justice and Reconciliation Commission (TJRC).[464] The latter is particularly important for indigenous peoples' land rights since it was assigned with the task of investigating, analyzing and reporting the gross human rights violations and other historical injustices that have occurred in Kenya between 12 December 1963 and 28 February 2008.[465] It was also made responsible for identifying and specifying the victims of the violations and abuses and to make appropriate recommendations for redress, including reparations. To this effect, the TJRC conducted, starting in April 2011, a series of hearings in various parts of the country, looking, inter alia, into the irregular and illegal acquisition of public land; the marginalization of communities; ethnic violence and tensions; and crimes of a sexual nature against female victims. A good example of this mechanism's

463 See NCIC Web site: http://www.cohesion.or.ke

464 See The Truth, Justice and Reconciliation Act (2008). Web page of TJRC: http://www.tjrckenya.org

465 These two dates refer to Kenya' Independence day and to the agreement signed by President Kibaki and ODM leader Raila Odinga to end Kenya's political crisis, respectively.

usefulness for indigenous peoples have been the hearings in Northern Kenya where the grievances of the Wagalla Somali were brought to the fore in March 2011 and women victims were finally able to bear witness to the anguish of the rapes and abuses they had endured.[466] TJRC released in May 2013 a report on its findings on the injustices committed to Kenyans by past regimes and individuals. Indigenous peoples' narrative of the nature and scope of violations of their individual and collective rights constitute a part of this final report and is expected to provide an important step towards national understanding of—and perhaps empathy towards—the challenges faced by these communities in the 50 years of Kenya's turbulent post-independence history.[467]

In 2008 too, the Ministry of State for the Development of Northern Kenya and other Arid Lands was created in recognition of the region's marginalization and underdevelopment compared with the rest of the country. The Arid and Semi Arid Lands (ASALs) cover more than 80 per cent of Kenya and are home to about 10 million people and approximately 70 per cent of the national livestock herd. Yet, due in part to conscious public policy choices, they have the lowest development indicators and the highest incidence of poverty in the country.[468]

The creation of this new ministry shows an increasing understanding and appreciation of the pastoral production system, something which is also reflected in the National Land Policy section on pastoral land issues

Specifically land issues related institutions have also been established. With some delay, the National Land Commission was finally inaugurated in early 2013. The Commission is tasked to play a pivotal role since it will be in charge of recommending a national land policy to the state; advising the state on a comprehensive programme for the registration of titles throughout Kenya; and conducting research related to land and the use of natural resources. It will furthermore initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; encourage the application of traditional dispute resolution mechanisms in land conflicts; and make recommendations to appropriate authorities among other. To oversee land matters at the county level, the Commission will set up County Land Management Boards.

How these new institutions will function and whether they will benefit indigenous peoples is too early to say. There have been substantial delays in their set up and organization, in approving and appointing staff, etc., and many have complained over the lack of funds. In mid-2013, the County Land Management Boards still had to be sworn in. As a consequence, the new institutions are all facing major backlogs. The newly appointed chairman of the powerful National Land Commission has stated that the Commission will correct the historical injustices that have bedeviled Kenya for the last 50 years. He also acknowledges, that it will not be an easy task and that right now the "greatest challenge … is the very high expectations of Kenyans but as time goes by, as we implement our mandate, I think we shall bring down the temperatures once the people see that major issues are being addressed".[469]

466 See The International Work Group for Indigenous Affairs (IWGIA), "Kenya Update 2011" at http://www.iwgia.org

467 The Report can be downloaded from TJRC Web site at http://www.tjrckenya.org See also The International Work Group for Indigenous Affairs (IWGIA) Kenya Update 2011 at http://www.iwgia.org

468 See Ministry's homepage at http://www.northernkenya.go.ke/

469 See "We'll correct injustices – Land Commission", Capitalfm (March 20, 2013) at http://www.capitalfm.co.ke/news/2013/03/well-correct-injustices-land-commission/

New legislation relevant for indigenous peoples

New land related legislation

The Constitution stipulates that several of its provisions (e.g., related to devolved government) will be suspended until the first elections have been held. Other provisions, in particular regarding land and environment (e.g., legislation related to Community Land, regulation of land use and property, etc), are to be enacted within a timeframe ranging from 18 months to five years.[470] However, Kenya's parliament has already passed several acts and enabling laws, some of them of great importance for indigenous peoples' land rights. These include

- The Land Registration Act (No. 3 of 2012) revises, consolidates and rationalizes the registration of titles to land. According to this law, all land including communal land is to be registered.[471]
- Land Act (No. 6 of 2012) provides for the sustainable administration and management of land and land based resources, and for connected purposes.[472]
- The National Land Commission Act (No. 5 of 2012) makes further provisions as to the functions and powers of the National Land Commission established by the Constitution in order, inter alia, to resolve land-related historical injustices.
- The Law establishing the Environment and Land Court (Act 19 of 2011). This superior court will hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and make provision for its jurisdiction functions and powers, and for connected purposes.[473]

A number of bills are currently being formulated. One , the Community Land Bill, will be enacted by 2015 as required by the Constitution and will include substantive provisions on the administration and management of community land. A Task Force appointed in September 2012 is presently travelling around the country collecting views.[474]

Another bill under preparation is the Evictions and Resettlement Bill that is supposed to establish an appropriate framework for evictions based on internationally acceptable guidelines.

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470 See Fifth Schedule of Constitution.

471 This law repeals The Indian Transfer of Property Act, 1882; The Government Lands Act, Cap. 280 (1915); The Registration of Titles Act,(Cap. 281 (1920); The Land Titles Act, Cap. 282 (1908);The Registered Land Act, Cap. 300 (1963).

472 This Act repeals The Wayleaves Act, Cap. 292 (1912) and The Land Acquisition Act, Cap. 295 (1968).

473 The Act repeals the old Land Disputes Tribunal Act (1990), and disputes previously handled by the Ministry through district land tribunals will now be taken before the Environment and Land Court which has the status of a High Court and a jurisdiction to offer services across all the 47 counties.

474 Several concerns have been raised in connection with the fact that the Land Act hardly deals with community land and that it states in Article 9 (d) that "Community land may be converted to either private or public land in accordance with the law relating to community land enacted pursuant to Article 63(5) of the Constitution" without elaborating on why, when and how this conversion will be carried out. See "Bill raises hope on community land" (21 March 2012) at http://www.standardmedia.co.ke/m/story.php?id=2000079762&pageNo=1

In 2010, the draft Wildlife policy and bill were modified in order to harmonize them with the new Constitution and correct some serious operational deficiencies. After a lengthy process of consultations, validations and revisions, the Wildlife (Conservation and Management) Bill 2013 was approved by Cabinet in June 2013 and enacted in December 2013. This legislation is vastly different from the existing Act. It is commended, inter alia, for "incorporating many cross–cutting measures that bring on board, for the first time, community, private sector and governmental bodies on to one playing field. There are also a number of areas of potential controversy such as powers over private land/sanctuaries and conservancies, the apparent centralization of managerial responsibilities over wildlife to within KWS, and the provisions relating to easements and exchange of national parks".[475] Most disturbing is also the fact that subsistence hunting is considered to be an offence and will be harshly punished.[476]

Finally, and in order to ensure sustainable use of land, a National Land Use Policy is being prepared.

Other relevant laws

Other laws that are of fundamental importance for indigenous peoples include laws relating to the reform of the judiciary and the way in which the judiciary is dealing with claims presented to it by local communities. The Supreme Court Act (Act No. 7 of 2011)[477] as well as the Vetting of Judges and Magistrates' Act, (Act No. 2 of 2011)[478] are already transforming the way in which the judiciary is dealing with claims presented to it by local communities, and giving the poorest and hitherto excluded sectors of Kenyan society the possibility to be heard in court. Several judges and magistrates have already been found "unsuitable to serve", including a judge handling the Samburu case (see below). Another example is the *Ibrahim Sangor Osman et al. v. The Hon. Minister of State for Provincial Administration & Internal Security* court case,[479] where the High Court in Embu awarded a global sum of KShs. 224,600,000 (US$ 2,670,750), or US$ 2,378 to each of the 1,123 evictees from Medina within Garissa town of Northern Kenya, as damages following their forced eviction from their ancestral land. The court found that a number of the petitioners' fundamental and other rights, includ-

475 Kenya Rangelands Coalition (KRC) "Alternative policy/comments to the draft wildlife policy" (unpublished).

476 See Articles 97 of the Wildlife (Conservation and Management) Act 2013, at http://www.kenyalaw.org

477 Article 31(e) on Rules provides that the Registrar is empowered, "in order to promote access to justice, to waive, reduce, or postpone the payment of a fee required in connection with a proceeding or intended proceeding, or to refund, in whole or in part, such a fee that has already been paid, if satisfied on the basis of criteria prescribed under paragraph (f) that - (i) the person otherwise responsible for payment of the fee is unable to pay or absorb the fee in whole or in part; or (ii) unless one or more of those powers are exercised in respect of a proceeding that concerns a matter of genuine public interest, the proceeding is unlikely to be commenced or continued".

478 This act sets up a Board to vet the suitability of all the Judges and Magistrates in office prior to the promulgation of the new constitution to continue serving in accordance with the values and principles set out in Article 10 and 159 of the new constitution.

479 *Ibrahim Sangor Osman & 1,122 others v. The Minister of State for Provincial Administration and Internal Security & 10 others* [2011] eKLR Constitutional Petition No. 2 of 2011, High Court at Embu. For details on case see "Evictees awarded over 200 million shlllings as damages for violation of their rights" at http://www.kenyalaw.org/kenyaLawBlog/?p=348

ing the right to fair administrative action, had been violated by virtue of the eviction from the alleged public land and the consequent demolition of property by the Kenya police. Whether this recent court ruling marks a decisive departure from former practices remains yet to be seen.

There has also been a marked increase of community-led struggles and efforts to obtain conservatory court orders against projects threatening their livelihoods. Deploying the provisions of the new constitution on land and human rights, indigenous communities in the Tana Delta in the Coast Region have worked with the Nairobi-based legal institution Kituo Cha Sheria to obtain conservatory court orders against a multinational company, Bedford, and rebuff its attempts to acquire thousands of hectares of land for growing jatropha and developing the bio-fuel industry. In another part of the country, the Pokot community has put up resistance to the Turkwel Gorge Hydro-electric Project, a mega-development project to which they have already lost a substantial portion of their land and from which they will receive limited benefits in terms of employment or domestic electricity supply while paying a huge price in terms of environmental damage to their land.[480]

Not all the core concerns of indigenous peoples have been met by constitutional implementation. The Elections Act (2011), as well as the Political Parties Act (2011), have been critised for not clearly articulating mechanisms for the political participation of indigenous peoples in terms of Article 100 of the Constitution as revealed in the Il-Chamus case.[481]

Present and future challenges

While there have been some true advances, the main challenge faced by indigenous peoples remains the evident gap that still exists between policies and legislation on the one hand and their implementation on the other. Land alienations, accompanied by violent evictions, the torching of homes, assaults and theft of cattle in which government police all too often are allegedly implicated still continue to occur as was the case during the recent creation of the Laikipia National Park, an area of 17,000 hectares that the Samburu indigenous people contest and consider as part of their traditional lands. The land was owned by former Kenyan President Moi and then bought by a conservation organization, the African Wildlife Foundation, with the financial help of Nature Conservancy. This case illustrates the continuing clash of indigenous peoples' rights with private and conservation interests in Kenya.[482] A court case filed by the Samburu against Moi is currently being heard.[483]

480 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA 2012), p. 425.

481 In 2007, the Constitutional Court ruled that the Ilchamus should be considered as a special interest group and therefore have the right to nominate a Member of Parliament to the current house. But the Electoral Commission of Kenya dismissed the Ilchamus' application. See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2009* (Copenhagen: IWGIA, 2009), p. 480.

482 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA, 2012), p. 428-429.

483 See Cultural Survival at http://www.culturalsurvival.org/search/search_by_page/Samburu

Other concerns have to do with the implementation of Kenya's Vision 2030,[484] which through a series of flagship projects aims to "transform Kenya into a newly industrialising, 'middle-income country'". Some of these projects will affect indigenous peoples. This is for instance the case of the so-called Enabler and Macro Project, LAPSSET,[485] which involves "the development of a new transport corridor from the new port of Lamu through Garissa, Isiolo, Mararal, Lodwar and Lokichoggio to branch at Isiolo to Ethiopia and Southern Sudan. This will be comprised of a new road network, a railway line, oil refinery at Lamu, oil pipeline, Isiolo and Lamu Airports and a free port at Lamu (Manda Bay) in addition to resort cities at the coast and in Isiolo. It will be the backbone for opening up Northern Kenya and integrating it into the national economy".[486] It will also "open up" and impact on large tracts of lands used by hunter-gatherers (as, e.g., the Boni, the Dahalo, the Waata in Lamu county and the Yaaku in Laikipia) and pastoralists (as, e.g., the Borana, the Orma, the Kenyan Somali, the Rendille and the Samburu).

Concluding remarks

In conclusion, it can be said that the changes in the political and legal landscape of Kenya offer important opportunities for indigenous peoples. The question remains, however, to what extent they will be able to access these opportunities despite their consistent efforts[487] and how the national development objective will be reconciled or aligned with the protection of indigenous peoples' rights, including over ancestral lands. A critical issue is how the implementation of the many new laws and policies, especially with regard to land and human rights, will be undertaken in the years to come.

484 The Kenya Vision 2030 was launched in 2008 and is to be implemented in successive five-year Medium-Term Plans, with the first such plan covering the period 2008 – 2012.

485 Acronym for the Lamu Port Southern Sudan-Ethiopia Transport Corridor.

486 See homepage of Vision 2030 at http://www.vision2030.go.ke/

487 See, e.g., chapter IV, this volume.

CHAPTER VI
INDIGENOUS PEOPLES' LAND CLAIMS IN TANZANIA

This chapter presents and examines some of the court cases that have involved the Barabaig and the Maasai of Tanzania. It concludes with an overview of the historical and socio-political context as well as of the current legal landscape in which indigenous peoples' land rights have developed in Tanzania.

The Barabaig and their land cases

The Barabaig are indigenous pastoral people living in Hanang District, in the newly created Manyara region, in Northern Tanzania.[488] They are estimated to be more than 70,000 people. In the late 1960s, the government of Tanzania decided to increase the production of wheat in order to reduce the country's dependency on foreign imports, and in 1968, with support from Canada, the Tanzanian Ministry of Agriculture initiated the Bassotu Wheat Complex in Hanang District. Ten thousand acres of land were put under wheat cultivation. In 1970, the project was handed over to the National Agricultural and Food Corporation (NAFCO), which was to develop large-scale commercial wheat farming. For that purpose, NAFCO targeted to acquire an additional 72,000 acres of arable land, which was to be used for wheat growing under what is generally known as the Tanzania-Canada Wheat Programme (TCWP). By the late 1970s, seven farms—the Sechet, Gawal, Gaidagamoud, Waret, Murjanda, Mulbadaw, and Bassotu farms—of about 10,000 acres each, had been developed, covering about 12 per cent of the Hanang District. These seven farms encircled and/or covered more than 72,000 acres of pastureland which included the Barabaig's residential areas, their holy shrines, their graveyards, as well as water and salt sources for both human and animal consumption. The Barabaig protested and went to court to sue both NAFCO and the government in 1981 and 1988. A third case filed in 1989 was dismissed by the court.[489]

488 African Commission, *Report of Working Group of Experts* (2005), p. 31.

489 In 1989, the *Ako Gembul and 100 Others v. Gidagamowd and Waret Farms Ltd and NAFCO* case (HC – Arusha, CV#12/1989) whereby 101 Barabaig pastoralists in Hanang District presented the claim over 20,000 acres of pasture lands appropriated by NAFCO as Waret and Gidagamowd farms, was dismissed on the grounds that 1) the government has priority in Food Security and the acquisition of the Barabaig land is proper, as national interest overrides all other interests; 2) the suit is bad in law as it should have been consolidated with the *Yoke Gwaku* Case (HC – Arusha, CV#52/1988). See Sengondo E. Mvungi, "Experiences in the Defence of Pastoralist Rights in Tanzania: Lessons and Prospects" in *A Study on Options for Pastoralists to Secure their Livelihoods in Tanzania*, edited by Ringo Tenga et al. (Arusha: Tanzania Natural Resource Forum, 2008), p. 3.

Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation (NAFCO). HC – Arusha, CV# 10/1981

Background facts and claimants' arguments

The members of the Barabaig community of Mulbadaw Village consider the land they live on as their ancestral home. In the 1970s, the government of Tanzania handed these lands to the National Agricultural and Food Corporation (NAFCO) for wheat farming. The company subsequently moved into the area with tractors, destroying the pasture lands, graves, houses and crops of the Barabaig community.

Sixty seven village members and the Village Council sued NAFCO before the High Court for trespassing on village lands, interfering with customary land rights and damaging properties. The Barabaig plaintiffs claimed that the disputed lands were their ancestral home since time immemorial. One witness, who had worked as supervisor for the "Operation *Vijiji*", one of the policies implemented during the *Ujamaa* period (see further on in this chapter), stated that well before the establishment of Mulbadaw village by the government and the starting of commercial activities on the lands in question, the communities, to which the 67 plaintiffs belonged, had lived in the Mulbadaw area for as long as one could remember.

The plaintiffs asked the court to declare NAFCO's activities on the disputed lands as amounting to trespassing; to recognize the disputed land as legally and customarily belonging to them; and to be granted damages for trespass and other related sufferings.

Defendant's core legal points

The defendant (NAFCO) contended that it had entered the land lawfully with the blessings of the government and the party leaders in Hanang District and Arusha Region. It also argued that the land it occupied was land for which it held a valid right of occupancy. Three documents of right of occupancy were presented in court for that purpose. One defense witness presented an application by NAFCO for 22,793 acres of land at Bassotu that was approved by a letter of the Regional Land Advisory Committee in 1973.

Ruling and reasoning of the court

The High Court had to deal basically with the following three main questions:

1. Whether the plaintiffs were the lawful owners of the said farming land and pastureland;
2. Whether the defendants destroyed the plaintiffs' houses, their stored crops and acres of land with maize and beans;
3. Whether the defendants' actions were lawful.

The High Court judge ruled in favour of the Village Council as holder of rights over the disputed lands:

> *Although the first issue was framed based on ownership, I find that once the village council, the first plaintiff, establishes lawful possession, it has established the preliminary requirement for a suit in trespass to land. In view of this, I do not consider the defendants' argument that Mulbadaw Village Council had no formal rights of occupancy over the land within the Boundaries.*

Furthermore, the High Court ruled on two accounts in favour of the 67 Barabaig individual plaintiffs.

Firstly, the court found that these Barabaig individuals held customary land rights over the disputed lands for having lived there as long as one could remember. The 1923 Land Ordinance, as later amended in 1928,[490] made indeed a distinction between a "granted right of occupancy",[491] which individuals could be granted by the government, and a "deemed right of occupancy", considered as arising out of customary use and occupation of lands.[492] A further legal point was made that such customary land rights were not extinguished under the Land Acquisition Act (No. 47 of 1967).[493] One of the first legal assaults of the *Ujamaa* policy on pre-existing rights of communities to land, was the 1967 Land Acquisition Act. This Act mandated the Tanzanian president to: "acquire any land for any estate or term where such land is required for any public purposes"[494] and defined a vacant land as land not "efficiently used or occupied".[495]

Secondly, the High Court found that it was "*proved to the extent required in civil cases or even more that the plaintiffs' growing crops, stored crops and houses were destroyed by the defendants*". Thus the case was won by the plaintiffs and the court ruled that compensation be paid to them.

490 The 1928 amending Ordinance to the Land Ordinance of 1923 was meant to bring into consideration the right of occupancy flowing out of customary use and occupation. The scope of the Ordinance was thus widened to accommodate occupier of land under customary law (Act. No. 7 of 1928). See also Fimbo, *Essays in Land Laws* (1992), p. 3. Since then, the ordinance has been repealed and replaced in 1999 by the Village Land Act, (Cap 113 R.E 2002), and the Land Act, (Cap 114 R.E 2002).

491 Sections 6 and 7 of the Ordinance provided for the "granted right of occupancy". This right could only be enjoyed for 99 years and was conceived as an individualistic understanding of land ownership, which favours individual titling, exclusive use, and similar characteristics. Even though groups of people could apply for a "granted right of occupancy", this did not make the scheme less individualistic as a group registration was only one step before a division of such land into individually owned plots of land. This right was designed mainly for Europeans and Asians. See also Fimbo, *Essays in Land Laws* (1992), p. 2.

492 Maini, *Land Law in Eastern Africa* (1967), pp. 85-6; Chachage, "Land Issues" (1999), p. 61; Ringo Tenga, *Pastoral Land Rights in Tanzania: A Review* (London: IIED Drylands Programme: Pastoral Land Tenures Series, 1992), p. 3.

493 Land Acquisition Act (No. 47 of 1967). Cap 118 R.E 2002.

494 Ibid., Section 3.

495 Ibid., Section 12(a).

National Agricultural and Food Corporation (NAFCO) v. Mulbadaw Village Council & 66 Others. CA – Dar-es-Salaam, CA# 3/1986

Dissatisfied with the High Court's decision, the defendants decided to appeal. In appeal, the court ruled on technicalities and argued that a village council could not own land on the basis of customary law. The judge went on saying that an administrative unity does not necessarily imply that the land within its jurisdiction belongs to it. He referred to the rule that a village council could acquire land only by allocation to it by the District Development Council, as specified by the Village and *Ujamaa* Villages (Registration, Designation and Administration) Act, 1975.

Furthermore, the Justice of Appeal ruled that the few plaintiffs who testified could not represent all the others. In fact, the few plaintiffs who testified before the court had also been given mandate by the High Court to represent numerous other village members. This was pursuant to Order 1, Rule 8 of the Civil Procedure Code Act of 1966,[496] which permits a suit to be filed by one or several persons on behalf of numerous others provided that they all have the same interest in the same subject matter. The Court of Appeal ruled that, in any event, each villager had to prove his own case and that each claim was different from the other in terms of date of possession, of acreage, of the method of acquisition and so on.[497]

More remarkably, the Court of Appeal held that none of the villagers who had testified could be said to have held land on customary tenure, as none of them had established, or even averred that he was a native of the Hanang district. They were thus not "occupiers" in terms of the Land Ordinance.

> *If the villagers who had testified could have established that, as natives, they had right of occupancy by virtue of customary tenancies then the view of the Judge is that such villagers in this case could only be evicted or dispossessed under provisions of the Land Acquisition Act No.47 of 1967.*

Indeed, the Court of Appeal ruled that

1. *None of the villagers who had testified could be said to have held land on customary tenure, as none had established, or even averred that he was a native;*
2. *The Mulbadaw Village Council did not own any land because there was no evidence of any allocation of land to it by the District Development Council;*
3. *The fact that the village council succeeded the previous unincorporated village in its administrative function over a specified area confers no title of any type over such land on the village council;*

496 Cap 33 R.E 2002.

497 *National Agricultural and Food Corporation (NAFCO) v. Mulbadaw Vill age Council and 66 Others,* CA - Dar es Salaam, CA#3/1986. In the initial case of 1981, the 67 Barabaig villagers claimed to represent their entire community. But the Court of Appeal denied them *locus standi* (i.e., the right of the litigant to act or be heard).

4. *Since the villagers were cultivating and planting with permission of the appellant … as licensees, they can claim damages in trespass for the destruction of their property by the appellant.*[498]

Concluding observations or results/impact of the two court cases

1. These two cases illustrate a situation where the two court cases in the same country can make two fundamentally different rulings because of departing from different perspectives in their reasoning. On the one hand, the High Court ruled in favor of the indigenous plaintiffs by going beyond written laws to look into customary unwritten rules of land management and ownership in Tanzania. It thus underlined the immemorial occupation and use of the disputed land by the plaintiffs as an important factor that any subsequent written law cannot just write off in the African context, where customs and traditions are still much alive. On the other hand, the Court of Appeal based its reasoning on Tanzanian written laws, on which depends the validity of customary laws.
2. The issue of representation rose in this case when a number of villagers alleged to act in the name of many others. This was not accepted by the Court of Appeal and one lesson to be drawn could be ensuring that the claims of each claimant are the same as that of the others. Note that the law in Tanzania provides for certain requirements to be met in order for aggrieved persons to be able to file a representative suit. These are: (i) there must be numerous persons; (ii) these numerous persons must have the same interest; (iii) the intended representative must obtain permission of the court; and (iv) notice must be given to all parties to a suit.
3. The plaintiffs and their lawyers did not make use of international law and standards. This was understandable at the time, since indigenous peoples-related universal standards and jurisprudence were not yet known on the continent. However, it continued to be the case in many other lawsuits long after these standards and jurisprudence had finally become known in Africa.
4. Delaying tactics were obviously used in this case and it was clear that the Judge of Appeal avoided addressing the core issues of the case by hiding behind technicalities.

Yoke Gwaku and 5 Others v. National Agricultural and Food Corporation (NAFCO) and Gawal Farms Limited. HC – Arusha, CV# 52/1988

Background facts and claimants' arguments

Hundreds of families pertaining to the Barabaig pastoralist indigenous community lived in the Gawal area, one of the land areas attributed by the Tanzanian government to NAFCO and Gawal Wheat Farm Limited, two farming companies. As soon as they were attributed the disputed lands,

498 Ibid.

the two companies moved in with tractors and agricultural machinery, destroying a number of properties belonging to this Barabaig community.

This lawsuit was initiated in 1988 by six Barabaig individuals, who, at the same time, also applied for an authorization to represent in court more than 700 other community members. Due to a preliminary objection raised by the defendants' council on the fact that the public notice of the case did not list all the plaintiffs, the High Court of Arusha ruled that public notice must be directed to identifiable interested persons. Therefore the court found that the suit couldn't be said to have been filed for and on behalf of 788 persons, apart from the six plaintiffs who were listed in the public notice.

The plaintiffs claimed that the land, which was occupied and used by the defendants, constituted their ancestral lands and that of other members of their tribe. They claimed also that both NAFCO and Gawal Wheat Farm Limited forcefully and unlawfully evicted them from their lands. So they asked the court: (1) to declare the defendants' acquisition of that land null and void and (2) to order that the defendants be evicted from it and be permanently barred from ever-entering it.

Considering that the defendants were thought to have set fire, destroyed homesteads, crops, livestock, household goods, gravesites and sacred shrines of the Barabaig, these plaintiffs also asked the court to order the defendants to pay damages to all the persons affected by the evictions and the destructions.

The plaintiffs called in several witnesses, including international researchers such as Charles Robert Lane, then a Senior Research Associate of the International Institute for Environment and Development in London, United Kingdom, who gave evidence as an expert witness. He explained to the court how, for example, the Barabaig had migrated south to the Serengeti plains, and then to the Ngorongoro highlands, finally settling, within the last 150 years, in various places along the Rift Valley, including the Hanang District.

Defendants' core legal points

The defendants alleged that the land now occupied by one of them had been lawfully acquired and that all normal procedures leading to its acquisition had been followed. They argued that, after identifying suitable land for wheat growing, they made a formal application for it to the regional authorities through the District authorities in 1979. A response to the application was received in 1981 by way of a letter from the District Development Director. The letter authorized NAFCO to start a farm in Gawal under certain conditions, some of which were to provide for cattle routes and residential land for people living south of the farm, in Gawidu. The defendants underlined also that a list of persons to be compensated had been made and payment made to each and everyone. They also showed that they occupied the disputed lands following a District Council's decision and an approval of this decision by the office of the Tanzanian prime minister.

Ruling and reasoning of the court

The three main questions to be dealt with by the court were:

1. Whether the plaintiffs had title in the land in dispute;
2. Whether the defendants lawfully acquired title to the land under dispute;
3. Whether the plaintiffs had suffered damages and loss as a result of the defendants' trespass.

On the issue of whether the plaintiffs had title in the land in dispute, the High Court ruled that only three of the plaintiffs had founded claims of customary rights over the disputed lands and that:

> *A person can prove that he owns land under customary tenure by showing that such land was allocated to him by an authority which is competent to do so or by showing that he inherited it from a past parent. Thus, although the first plaintiff did not give the acreage of land which he inherited from his father, I have no doubt from the evidence that he, in fact, owned land in Ghama.*

Only three of the plaintiffs, who testified before the judge, could, according to him, prove they were native occupiers of the disputed lands. For instance, the first plaintiff, Yoke Gwaku, said he owned land in Ghama, now part of Gawal Wheat Farm. He argued that he inherited the land from his father and grandfather; and that he used it partly for pasture and cultivation. NAFCO (one of the defendants) ploughed up the area around his *boma*,[499] thus forcing him to move out. He acknowledged that the Village Council allocated him other land in Mulbadaw, but this new land was inadequate for his needs. He also accepted that he was paid some compensation but argued that it was not a fair and full compensation. He said that when he was evicted he owned about 1000 head of cattle, 100 goats and 40 sheep. At the time of giving evidence, he owned only 60 head of cattle, 10 goats and 20 sheep. He blamed the decimation of his livestock on the defendants who took from him the pastureland on which his livestock depended. He wanted the court to restore to him the land he lost to the defendants.

Given that each and every plaintiff was to prove he or she was a native of the area and held customary rights in the land in dispute, the claims of the plaintiffs who did not testify were dismissed. The court argued that these plaintiffs did not succeed to prove they traditionally owned the lands.

On the issue of whether the defendants lawfully acquired title to the land under dispute, the court ruled that the first defendant (NAFCO) did not hold a valid title with regard to the three plaintiffs' areas of land and that NAFCO had therefore all along been trespassing on those pieces of land.

On the issue of whether the plaintiffs had suffered damages and loss as a result of the defendants' trespass, the court ruled that the three plaintiffs suffered damages and therefore awarded to the first plaintiff general damages amounting to Tanzanian shillings (Tshs) 500,000 and another

499 Traditional house of the Barabaig (as well as of the Maasai).

Tshs 10,000 as compensation for the grave of his grandfather; the second plaintiff was awarded 100,000 and the sixth plaintiff 50,000.

Although the court found that NAFCO had trespassed over the lands of the three successful plaintiffs and ordered the company to pay compensation, it did not nullify NAFCO's land title or order the return of the lands in dispute to the plaintiffs. As Sengondo E. Mvungi notes, "since only a few individuals gave evidence, the court felt constrained to nullify the whole title over extensive lands to benefit a few pastoralists! Therefore, although the trespass was proved, the remedies could not be granted as prayed." [500]

The plaintiffs were not in agreement with the verdict of the High Court and launched an appeal, which is still pending. But according to Mvungi "several years later, the Court of Appeal was moved by an advocate who claimed to have no instructions from the claimants to strike down the appeal."[501] The parties to this case, including the appellants, seem no longer to believe in a judicial outcome. The situation on the ground remains unchanged.

Concluding observations and results/impact of the court case

Six members of an indigenous community tried to represent in court 788 other members. But because the public notice in a newspaper did not have the names of all the 788 plaintiffs, the court found that the suit was not filed for and on behalf of all. It is difficult to understand why the community's lawyers did not restart the whole procedure instead of proceeding with only six plaintiffs.

A number of plaintiffs accepted before the initiation of the court case some sort of compensation, which they later declared unfair. This is a practice that can compromise successes of court cases and it is not recommendable. Indigenous peoples or individuals should rather refuse a compensation they consider to be unfair than accepting it and then later declare it to be unfair.

It is interesting to note that the plaintiffs brought in researchers as witnesses, who presented the court with a wide range of historical facts on the Barabaig and their ancestral relationship to lands. Even if this testimony did not seem to make a major impact, identifying potential researchers who could testify before court is a practice that indigenous communities about to start a legal battle for their lands should consider.

The lack of detailed evaluation of damages suffered by the plaintiffs is noticeable in the presentations of different witnesses as well as in the plaintiffs' statements before the judge. This did surely have a negative impact on the amounts of compensation awarded by the court to the three successful plaintiffs. It is therefore recommendable that indigenous peoples do all they can to estimate exactly the damages suffered and that they do this as early in the process as possible, since, as years pass on, it becomes more difficult to reconstruct facts.

It is striking that the court declared NAFCO's occupation of the disputed land unlawful but failed to declare it null and return it to the plaintiffs. This is an illustration of courts' unwillingness to challenge governments' position and avoiding by all means making landmark decisions. This can be

500 Mvungi, "Experiences" (2008), p. 5.
501 Ibid.

deduced from the following words of a former Chief Justice: "I do not agree with the jurists who say to the effect that the courts are bound to administer the law even if heaven fall. Obviously any law, the administration of which causes heaven to fall cannot be law in the proper sense. Such so called law which causes instability must be a law of the jungle." [502]

This is also a court case that shows how delays are used as a tactic aiming at exhausting indigenous peoples' patience and funds. Today, international mechanisms such as communications to the African Commission on Human and Peoples' Rights should be considered in cases like this one, given that the appeal seems unlikely to proceed.

Update on the NAFCO Wheat Complex and the Barabaig

Wheat farming on the arid lands of the Barabaig turned out to be an unviable project, and in 1996– or less than 30 years after NAFCO had seized the Barabaig's pastureland and started developing the seven wheat farms–the whole project came to a halt. Following this failure, the government decided in 2005 to sell five out of the seven wheat farms to private investors.[503] As for the remaining two—the Warret (12,000 acres) and the Gawal (10,000 acres) farms—instead of being privatized, they should be handed back to the people of Hanang living in the villages bordering the farms and including the Barabaig community. That the government agreed to return the land was to a large extent the result of the efforts and lobbying made by a constellation of social movements.[504]

The returned land was to be used for agriculture and pastoralism in equal measures. However, due to misunderstandings, conflict of interests between the villagers and the Hanang District Council, boundary issues, etc., the distribution of the farms stalled,[505] so the Barabaig continued their struggle. In 2005, Barabaig women demonstrated against the manner in which their lands were being allocated to outsiders, while the Barabaig were being refused any land allocations, and in 2006, knowing that they would not be given a fair share of the redistribution of land that was once theirs, the pastoralists moved their livestock back to parts of the land that had been taken from them by NAFCO, and a significant number of them settled there as a strategy of land recovery.

Many issues have remained unsolved to this day and the Barabaig in Hanang District continue to face harassments.[506] For years, the Barabaig and others have also been complaining about the

502 Francis L. Nyalali, "The Social Context of Judicial Decisions Making". Paper presented at a workshop on The State of Human Rights in Tanzania, held at the British Council Hall, Dar es Salaam, 3 July 1998.

503 Mulbadaw farm was sold to the Haydom Lutheran Hospital/Friends of the Haydom in Norway; Three other farms were sold to a foreign owned company, the RAI group, and one remained unsold (in 2008). See LARRRI/HAKIARDHI, "The State of the then NAFCO, NARCO and Absentee Landlords' Farms/Ranches in Tanzania", Tanzania: LARRRI/HAKIARDHI), 2009.

504 Ibid., p. 17.

505 By the end of 2008, the process of distributing Gawal farm still remained incomplete.

506 In December 2009, there arose serious clashes between the citizens of Mogitu village and land surveyors from the Hanang District Council. The latter wanted to survey the land for allocation to the general public, including farmers who are allegedly polluting the water catchment areas around Mount Hanang. The villagers of Mogitu were resisting distribution of their land on the grounds that it belonged to them. The resistance and ensuing riots involving the police and farmers from the highlands led to five Barabaig people being seriously injured and 19 Barabaig villagers, including their chairperson, arrested and put on remand for eight days. Charges were pressed against the chairperson and

fact that much land on the five privatized farms is not being used but lies idle. This was also criticized by the Hanang MP and minister of State in the Prime Minister's Office (Investments and Empowerment), Dr Mary Nagu, who during a visit to the district in 2012 said "there was evidence that some of the companies or individuals who took over the farms have failed to develop them" and "that the government would repossess the farms if the firms failed to run them profitably".[507]

The loss of prime pasturelands in the 1970s forced many Barabaig to migrate to other districts and regions of Tanzania. Discrimination against the Barabaig in the places they moved to has been an evergrowing problem as they are perceived as intruders with no respect for other peoples' property or cultures. The Barabaig are constantly discriminated against and they have been involved in a number of violent evictions.[508]

The Maasai and their land cases

The following two cases—later consolidated into one—involve the indigenous Maasai people of Mkomazi. The Maasai are pastoralists with a semi-nomadic lifestyle and they are estimated to number some 450,000 people in Tanzania.[509]

Mkomazi is located in the northern part of Tanzania. Most of it was gazetted as a Game Reserve in 1951. This Game Reserve is known for its diverse fauna and a controversial 17.5 km long solar-powered electric fence prevents local communities from entering and using it clandestinely. The creation of this game reserve was expected not to affect the land rights of the Maasai communities. The Wildlife Conservation Act of 1974,[510] which repealed and replaced the Fauna Conservation Ordinance that created Mkomazi Game Reserve, indeed exempts a "person whose place of ordinary residence is within the reserve" from the general rule relating to the requirement for permits.[511]

In 1988, government officials ordered a forcible remove of all Maasai out of the Game Reserve, (by now upgraded into a National Park), so as to provide more security to wildlife. An estimated 4,000 to 10,000 community members—who consider the reserve their ancestral lands to which they are entitled—were evicted without due compensation or any provisions for relocation.[512]

several villagers. The district council, however, suspended the land survey. See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2010* (Copenhagen: IWGIA, 2010), p. 498.

507 "Wheat farms lie idle for decade" *The Citizen,* Monday, 10 December 2012, at http://www.thecitizen.co.tz/news/4-national-news/27696-wheat-farms-lie-idle-for-decade.html

508 Barabaig have been evicted from Mbeya and parts of the Morogoro region (2006), from grazing land close to Lake Manyara in Babati district, Manyara region (northern Tanzania) (2008), and from the Endagulda village in Mbulu District (2009). See Tanzania section in The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2007, 2009* and *2010* (Copenhagen: IWGIA, 2007, 2009, 2010).

509 This is an estimate since the Population Census of 2002 does not disaggregate data by ethnic affiliation. The figure includes the Arusha Maasai, a sedentary agro-pastoralist community, that culturally shares a number of customs and rituals with the pastoralist Maasai.

510 Cap 283 R.E 2002.

511 Section 7(a) of Act No. 12 of 1974.

512 The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World* 1997/98, (Copenhagen: IWGIA, 1998), p. 299. Available at: http://www.iwgia.org.

After attempts to get the Tanzanian government to change its mind had failed, a number of Maasai decided to lodge two cases challenging the eviction. By then, six years had elapsed since the eviction happened.

Lekengere Faru Parutu Kamunyu and 16 Others v. the Minister for Tourism, Natural Resources and Environment and 3 Others. HC – Moshi, CV#33/1994

And

Kopera Keiya Kamunyu and 44 Others v. the Minister for Tourism, Natural Resources and Environment and 3 Others. HC – Moshi, CV# 33/1995

Background facts and claimants' arguments

In court, the Maasai argued, among other things, breach of their customary land rights, destruction of their properties, killing of their livestock, and negative impact on their way of life. As detailed by Ringo Tenga, the plaintiffs claimed that:

1. Their constitutional right to live and enjoy their respective lives has been infringed;
2. They have, without due process been denied their basic right to reside in their traditional and ancestral lands;
3. Unlawful eviction constitutes a serious infringement of the claimants' customary land rights of natives of Tanganyika as recognised by land laws of Tanzania as well as the constitutional right to property;
4. They now find themselves in drought conditions, with their dwindling livestock lacking grazing and water and surround[ed] by settled villages;
5. No plans to relocate the claimants have been made;
6. Shortage of grazing for their livestock has attracted exorbitant fines of up to Tshs 400,000 for livestock straying into the Mkomazi Game Reserve (MGR);
7. They have suffered frequent beating and general harassment by employees of MGR;
8. They have lost cattle, goats, sheep and donkeys estimated at 10 billion shillings due to diseases and starvation;
9. They have lost access to customary holy places and sacred shrines;
10. Loss of grazing lands has led to vicious deprivation of the plaintiffs' employment, livelihood and ultimately, their right to life;
11. Evictions without compensation and alternative grazing land have reduced the Maasai pastoralists into squatters surrounded by hostile agricultural communities;
12. The claimants' pastoral activities have been criminalized.

The plaintiffs' lawyers submitted that the Land Ordinance of 1923 only required proof of occupation and use of land to establish a customary title to land. The Maasai plaintiffs established that they had been in MGR for generations, using the vast plains of Alilalai Lamwasuni as the community's common property for grazing and community life. Further, the authorities had listed or registered them and allowed them to keep their pre-existing rights as required by the Fauna Conservation Ordinance and the Wildlife Conservation Act of 1974.

The lawyers argued also that according to principles protecting the constitutional right to property, a land owned by a community can only be acquired by the government in accordance with the Land Acquisition Act of 1967, whose procedures require establishing a public purpose that justifies the acquisition. This is followed by a consultative process where, upon agreement, the rights-holders are compensated and/or given alternative land. In case of disagreement, the parties have recourse in the courts. These procedures were not followed in this particular case, and therefore all actions taken should be declared null, void, and unconstitutional.[513]

Defendants' core legal points

The defendants, represented by the Attorney General, argued that the disputed lands were lawfully gazetted as a protected area since 1951, that the residents were given notice with enough time to leave the Game Reserve and that the government had no other choice than the use of force after the plaintiffs had refused to leave the area voluntarily. The Attorney General argued also that alternative lands were provided to the plaintiffs in Handeni, Kiteto, and Ruvu. He contended furthermore that the plaintiffs were mere licensees residing on the disputed lands and had no longer the right to remain in the Game Reserve after the government had revoked their licenses. The Attorney General argued also that the plaintiffs should have lodged a Constitutional Petition rather than a suit, given that they claim a violation of Constitutional rights. Finally the defendants' representative argued that the plaintiffs' claim for compensation should be thrown out because of being overdue or not presented within the three years required by the Tanzanian Statute of Limitations of 1971, given that the eviction occurred in 1988 and the case was filed in 1994.[514]

Ruling and reasoning of the court

The High Court made several points:

1. Regarding the issue of representation, the High Court ruled against the idea that a number of Maasai could represent others in court: "*The judgment shall not canvas the pasto-*

513 Ringo Tenga, "Legitimizing Dispossession: The Tanzanian High Court's Decision on the Eviction of Maasai Pastoralists from Mkomazi Game Reserve", *Cultural Survival Quarterly*, Issue 22.4 (31 January 1999).

514 Tanzanian Statute of Limitations of 1971, Cap 89, R. E 2002.

ral Maasai community en masse for the reason that this is not a representative suit". Accordingly, the High Court dealt only with 38 plaintiffs out of 53, who appeared in court.

2. Regarding the claim of customary rights by the plaintiffs, the High Court ruled that "*the plaintiffs held customary land rights at Umba Game Reserve, a portion of the Mkomazi Game Reserve*". The court also ruled that the eviction of the Maasai plaintiffs from Umba Game Reserve was unlawful because it did not comply with procedures specified by the Land Acquisition Act of 1967. But the judge went on arguing that since the eviction occurred in 1988 and the case was filed more than five years later, the case had been overtaken by events and therefore a return of the plaintiffs' traditional lands was no longer possible: "*the unlawful eviction took place in May 1988, over more than five years ago. In that regards the suit has been overtaken by events*".
3. The High Court ruled also in favour of a violation of the plaintiffs' right to property protected under article 24 of the Constitution and awarded each of them a compensation of Tshs 300,000, (more or less US$450). The judge found that game scouts and militiamen effecting the eviction assaulted pastoralists, harassed their families, mothers with newly born babies had to be carried and dumped into the bush in the rush of the eviction, cattle, donkeys and calves strayed into the wilderness where they were lost or devoured by beasts; *bomas*, huts, kraals, cattle, domestic articles, food stuffs, veterinary medicines, cash and ornaments got lost or razed down by the fires the game scouts started. Families were dislocated and broken up. In short the plaintiffs were seriously inconvenienced, put through a great crisis and thrown out of the reserve without assistance for resettlement in terms of alternative land.
4. Finally the High Court ruled that alternative lands should be provided to the plaintiffs "*so that the pastoral plaintiffs can resettle on a self-help basis.*"

Lekengere Faru Parutu Kamunyu & Others v. Minister of Tourism, Natural Resources and Environment & Others. CA-CVA#53/1998, unreported (1999)

The plaintiffs were not happy with the decision of the High Court, against which they appealed immediately. In 1998, the Court of Appeal made the following decisions in its ruling:

1. It agreed with the High Court on the issue of representation and ruled that the case concerned only the plaintiffs that had testified;
2. The Court of Appeal overturned the High Court's decision that the plaintiffs enjoyed customary right in the disputed land:

> *We now come to substantive points, and we begin by considering whether the Maasai community of which the appellants are members, had an ancestral customary land title over the whole of the Mkomazi Game Reserve. We have carefully considered the indisputable surrounding circumstances which gave rise to this case, and it is apparent that the Maasai community or tribe in question was not the first tribe to*

arrive in the geographical area which is the subject of this case. It is apparent that the Maasai were new arrivals in the area, preceded by other tribes, such as the Pare, Shambaa and even the Kamba. It would seem that the Maasai, as a nomadic tribe, began to reach the area in the second half of the 1940s and their presence was still scanty at the time the Mkomazi Game Reserve was established in 1951. That explains why they were not involved in the consultations which preceded the creation of the Game Reserve. That being the position; we are bound to hold that the Maasai Community in question did not have ancestral customary land title over the whole of the Mkomazi Game Reserve. We are aware that the learned trial Judge found that such title existed in a portion of the Game Reserve, that is, Umba Game Reserve. The Respondents have not cross-appealed against the finding, but since that finding of the learned trial Judge is inconsistent with our overall finding, we have to invoke our revisional jurisdiction provided under Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 so as to set aside such finding which is inconsistent with ours. We do so accordingly, and find that no such title existed in the Umba Game Reserve.[515]

Concluding observations and results/impact of the court case

1. Sengondo E. Mvungi makes an interesting critical reading and analysis of this decision by the Court of Appeal,[516] underlining a number of wrong assumptions upon on which the Court of Appeal seemed to ground its reasoning. Firstly, the court assumed that the plaintiffs were not the first inhabitants of the disputed land and therefore could not claim customary rights over it. This court's reasoning was not correct because "the first people may have abandoned the land, or just disappeared. The groups that follow and subsequently establish long usage would not be held ransom to the fact that there existed some people in the areas some-time in the past. What is required is proof of long use over time that is not contradicted by a superior title."[517] It is not necessary to be first to claim indigenous rights over a land. This has been widely proven including in the Australian *Mabo* case, where the claimant indigenous peoples were recognized as having arrived from elsewhere. Furthermore, it is almost impossible to tell which community lived where first in Africa. The Court of Appeal seemed even to distance itself from the Tanzanian legislation. This was indeed a justice badly rendered that could have prompted further national or international legal challenges.
2. The time that had lapsed between the dispossession and the filing of the case appears as an excuse by the first judge to deny justice to the plaintiffs. In numerous cases, indigenous peoples were expelled from their lands for tens or hundreds of

515 Mvungi, "Experiences" (2007), p.11, quoting the Certified Unreported Judgment (n.d.), p. 16-17.
516 Ibid., pp. 11-14.
517 Ibid., p. 14.

years before taking legal actions. One could mention for example the restitution of tens of thousands of hectares to the South African ǂKhomani San on the basis of the Land Restitution Act. Had the High Court of Tanzania aimed at redressing historical injustices, it would have not only declared the eviction unlawful but also ordered a return of the plaintiffs to their ancestral lands in addition to compensation. This makes it imperative for communities' lawyers acting in this kind of cases to make as much as possible reference to any existing relevant international jurisprudence in an attempt to try and move judges away from traditional ways of thinking. Taking the case to higher courts or international bodies such as the African Commission on Human and Peoples' Rights could have been further options, which seem to never have been considered by the plaintiffs.

3. This case demonstrates also that indigenous communities should file land-related lawsuits as soon as they are dispossessed or evicted from their lands in order not to give judges cheap excuses.
4. The importance of properly filing a representative suit must be underlined once more as something to deal with carefully in similar cases.

Recent indigenous land cases

For the past few years, there have been a number of land related conflicts where Maasai and other indigenous pastoralists as well as hunter-gatherers have been forcibly evicted from their traditional lands. These evictions often result in the loss of human lives, the destruction of property, the decimation of cattle and goat herds and gross human rights violations. In several cases, the indigenous communities have sought redress through legal means but because of huge land case backlogs in the High Court—Land Division[518] and the District Land and Housing Tribunals, many cases remain pending for long periods of time. In some cases, the court may issue an injunction ordering the respondents to suspend the eviction, but the following examples also show that the government does not seem to respect court injunctions or the fact that a court case is pending.

The Loliondo Case

***LHRC (Legal Human Rights Center) & Others v. AG & Others*. Misc. Civil Case No. 15 of 2010 at High Court of Tanzania in Arusha**

This case has been filed to challenge the constitutionality of the forceful evictions of pastoralists in Loliondo, Ngorongoro District (Northern Tanzania) in 2009. The case also seeks a declaration that the land use within the Loliondo Game Controlled Area (LGCA) by villagers does not offend any

518 This court was established in 2001 as the court of first instance in land matters of the value above fifty million Tanzanian Shillings and as an appellate court for matters originating from the District Land and Housing Tribunals. It applies the following laws: Land Disputes Act No. 2 of 2002, Land Act No. 4 of 1999, Village Act No. 5 of 1999, and Civil Procedure Code No. 49 of 1966 and any other enabling Laws.

known law and is in accordance with article 24(1) of the 1977 Constitution of the United Republic of Tanzania. The LHRC and PINGOs Forum are representing the victims in legal action. As of October 2013, the case had still not been heard since the High Court in Arusha had been unable to ensure a forum of three judges as required in constitutional cases.

Background facts and claimants' allegations

This conflict started in 1992 between eight registered Maasai villages within the Loliondo Game Controlled Area (LGCA) in Loliondo and Sale Divisions, Ngorongoro District (Northern Tanzania) and the Ortello Business Corporation (OBC), a company believed to be owned by a senior official from a country in the Middle East. That year, the Tanzanian government granted OBC a licence to hunt wildlife within the Loliondo and Sale Divisions.[519] As a result, the Maasai pastoralists lost control over important parts of their village lands that were fundamental for their livelihoods, and although the said villages and village lands are legally recognized under the laws of Tanzania, people were not consulted.[520]

This new situation fueled the competition and conflicts over land property and property rights on common lands in the area where different stakeholders (outsiders and locals)[521] have been more or less involved. Several incidences of open violence have occurred in the 1990s, as for instance in 1995 between the Maasai and the Sonjo (farmers) communities.

In 2009, this long state of uneasy overlapping claims exploded into violence when in an attempt to carve out a wide livestock-free zone around the OBC hunting concession, the Tanzanian Field Force unit, a paramilitary internal security unit, forced up to 300 households from eight Maasai villages in the Loliondo division to relocate. During this operation, it is alleged that more than two hundred Maasai bomas were totally burnt; women were raped; more than 3,000 people were left homeless without food and other basic needs and more than 50,000 cattle were left without grass and water.[522]

An investigation team has also established that there was a close link between the police conducting the evictions and OBC, and that the evictions were aimed at protecting the Corporation and clearing the fields for hunting. The investigation team furthermore established that, most of the villages had not for a long time benefited from the existence of the Ortello Business Corporation. [523]

In March 2013, and although the case is still pending, the minister for Natural Resources and Tourism, who is one of the respondents in the case, issued a public statement to the effect that the boundaries and size of Loliondo Game Controlled Area will be reduced from 4,000 to 1500 sq km,

519 This permit, which ever since has been renewed every five years, did not extinguish the rights of the people to own, use and live in their ancestral land in legally established villages.

520 In particular the Land Act, Cap. 113, the Village Land Act, Cap. 114 and the Local Government (District Authorities) Act, Cap. 287. These land laws state that the rights of villagers over village lands is non-derogable by any law or authority and that whenever there is a conflict between the Land Act and any other law, the provisions of the Land Act shall prevail.

521 External stakeholders include the government, parastatal corporations, tour operators and OBC; local stakeholders include the pastoral Maasai and the Sonjo farmer communities.

522 FEMACT, "Loliondo Findings" (19-21 August 2009), p. 6ff. at http://www.tgnp.org

523 FEMACT, op.cit., p. 9.

in order to "solve long existing conflict in the area, to rescue the ecology of Serengeti National Park, the Ngorongoro Conservation Area and the Loliondo Game Controlled Area".[524]

The case is yet to be concluded.

The Soitsambu case

Soitsambu Village Council v. Tanzania Breweries (TB) and Tanzania Conservation Ltd (TC).
Civil case, 2010 at HC, Land Division

This case was originally filed in February 2010 on behalf of the Maasai pastoralists living in Soitsambu Village to challenge the right of TB and TC, a subsidiary of Thomson safaris, a US-based tourism safari company, to forcefully evict them from their ancestral lands. The plaintiffs were also seeking an order recognising their ownership of the disputed land. The court ruled in favour of the defendants and dismissed the case in May 2013. The plaintiffs refiled their case in June 2013.[525]

Background facts and claimants' allegations

Sukenya Farm, where the plaintiffs claim to have lived for generations, was, until recently, part of the Soitsambu Village, which borders with the Ngorongoro Conservation Area and the Serengeti National Park. The plaintiffs claim that from 1984 to 2003 the authorities allocated more than 12,000 acres to TB, without plaintiffs' consent. The plaintiffs argue that because the land was not used by TB for 19 years, and in accordance with Tanzanian land law, it had reverted back to common village ownership. The plaintiffs further claim that in 2006, TB leased the disputed land to TC without consulting with the plaintiffs and without obtaining their consent to do so. It is alleged that in 2006, TC employees burned, damaged and removed plaintiffs' homes and possessions from Sukenya Farm. The plaintiffs charge that they have been subjected to beatings, shootings, harassment, extrajudicial arrests and detention by TC employees and by the local authorities whenever they try to access the grazing and water sources on the farm. Both TB and TC deny all allegations and claim that the allocation of the disputed land to TB and the subsequent lease to TC were done in accordance with the law. TC also asserts that a 2008 investigation carried out by the Office of the Prime Minister of Tanzania regarding plaintiffs' claims cleared TC of all charges.

In August 2010, the plaintiffs asked the court to issue an injunction, barring the defendants from preventing the plaintiffs from grazing cattle on the Sukenya Farm. The application was dismissed by the court due to a technical error in the pleadings and an amended application was filed in September 2010. Both defendants contested the interim application, stating that the Soitsambu Village Council had no legal standing to represent the plaintiffs because it no longer governed Sukenya Farm. In

524 See Press Statement from Civil Society Organizations in Tanzania regarding plans by the government to alienate land in Loliondo (April 2013). http://www.pingosforum.or.tz

525 This and the following section are based on the *Corporate Legal Accountability Quarterly Bulletin* (Issue 10, September 2013), published by Business & Human Rights Resource Centre (http://www.business-humanrights.org).

January 2013, the judge upheld the objections of the defendants and dismissed the application (though awarded no costs because the matter had been by frustrated by circumstances).

Regarding the main suit, the defendants raised various preliminary objections in an attempt to get the case dismissed without consideration of the merits. In one such objection, the defendants argued that the parties, the subject matter and the plaintiffs' claims were the same as in a previous lawsuit, because in the 1980s a small number of villagers had contested the legality of the land transfer to TB. In May 2011, the judge ruled in favour of the companies on this claim and dismissed the case. The plaintiffs appealed and in May 2012 the Court of Appeal found in their favour. It reversed the lower court's decision and held that the facts needed to rule on this objection by the defendants could not be determined without consideration of all the evidence. The matter was therefore sent back to the High Court. In May 2013 the HC dismissed it on a similar technical point to that which had resulted in the dismissal of the injunction application.

New proceedings were filed at the end of June 2013 naming Soitsambu, Sukenya and Mondorosi villages as plaintiffs and joining the local District Council and Commissioner for Lands as additional defendants. The plaintiffs have indicated they intend to file a renewed injunction application soon.

The Meatu case

Jitungulu Bwandi on behalf of 4000 Residents of Seven Villages in Meatu District v. Meatu District Executive Director, Ms Upendo Sanga. **Miscellaneous Land Case No. 19 of 2011 HC (Land Division) at the (Zonal) Tabora Chambers**

Background facts and claimants' allegations

Meatu District is one of the eight districts of the Shinyanga Region of Tanzania.[526] It borders the Serengeti National Park and is inhabited by different communities, including the Hadzabe (hunter-gatherers), the WaTaturu (pastoralists) and the Sukuma (agro-pastoralists), who all have historical ties to the land. During the villagization programme in the 1970s, most of them were moved from their ancestral land into seven centralized villages. In 1998, the Frankfurter Zoological Society (FZS) helped set up a community wildlife management area, the Makao WMA, which covers 80,000 hectares and is adjacent to the Maswa Game Reserve and Ngorongoro Conservation Area.[527] Apparently, only 30 per cent of the villagers were in agreement with having a WMA but for long nothing happened. In 2009, the local authorities

526 The following is mainly based on PINGOs Forum, "Fact finding report of Meatu Pastoralists' and Hunter-Gatherers' Eviction: The underline reasons, legal position and facts". (Arusha: PINGOs Forum, 2012). Available at htpp://pingosforum.or.tz

527 Wildlife Management Area (WMA) is a mechanism established for implementing community wildlife management in Tanzania. WMAs consist of portions of village land set aside for purposes of wildlife conservation and the development of wildlife-based enterprises such as tourism and tourist hunting. In order to establish WMAs, villages must develop land use plans and by-laws, as well as establish a community-based organization (CBO) that is granted user rights to wildlife by the Wildlife Division of the Ministry of Natural Resources and Tourism (MNRT). WMAs were first formally adopted in Tanzania with the 1998 Wildlife Policy (revised 2007). This Policy recognized that for the future of wildlife in Tanzania it is essential that wildlife generate economic benefits to the rural communities who live alongside wildlife, and for wildlife to be a competitive economic form of land use at the local scale. WMAs were first legally es-

leased the WMA to an investor for wildlife investment purposes. In early 2011, the authorities issued a six-month notice for people to vacate the area by June 30 2011, claiming that they had invaded a forest reserve and that they and their cattle were responsible for the environmental degradation in the area. If failing to leave voluntarily, the villagers would be forcefully evicted. Although the eviction exercise was expected to affect over 3,500 adults and 4,138 children, as well as cattle and goats herds, the notice did not say whereto the people could relocate nor whether they would receive compensation. According to reports, the eviction exercise was to cost over 80 million TZS (around 50,000 USD).

Following the eviction notice and other threats, and with the support of PINGO's Forum and the Legal Human Rights Centre (LHRC), pastoralists from the seven villages filed a case in the High Court opposing the district council's decision to evict them from their customary land. On the first hearing the application was rejected by the judge for being badly instituted and the application was withdrawn for amendment. However, by order of the court, the eviction was halted and over the weekend, troops of soldiers who had been dispatched to execute the eviction were called back to their barracks.[528]

Nevertheless, on November 10, 2011, and although the court case was still pending, the authorities ordered the forced evictions of 7,000 Wataturu, Sukuma, and Hadzabe people from their land, burning their homes, destroying their property, as well as displacing 70,000 livestock. Allegedly, no compensation was offered, and thousands, including over 1,000 Hadzabe hunter-gatherers, have lost the means to provide for themselves.

Land cases in the Morogoro region

The eastern-central Morogoro region is the third largest regions of Tanzania and stretches from Arusha and Tanga regions in the northeast to Ruvuma and Lindi regions to the Southeast. Two of its districts, the Kilosa and the Kilombero districts have since 2000 experienced recurrent violent conflicts between pastoralists and peasants, which have led to several legal cases.

Halmashauri Ya Kijiji Cha Mabwegere (Mabwegere Village Council) v. Hamis (Shabani) Msambaa & 32 others. HC (Land Division)–Arusha, LC 23/2006 and *Halmashauri Ya Kijiji Cha Mabwegere v. Hamis (Shabani) Msambaa & 32 others.* CA-Dar es Salaam 53/2010

Background facts

Mabwegere is a pastoralist's village but has not been recognized as such by its neighbouring villages despite the claim by the former to have obtained all the legal documents required for a village registration. Peasants have over the years been trespassing into Mabwegere and taken land from

tablished through the WMA Regulations of 2002 (revised 2005) and are now established in the Wildlife Conservation Act of 2009. See http://www.tnrf.org/files/WMA_summary.pdf

528 See "Meatu Forest eviction exercise aborted" by Marc Nkwame in *Daily News*, 3 July 2011 http://dailynews.co.tz/home/?n=21378

the livestock farmers and at one point the District Commissioner of Kilosa ordered that the beacons planted in the survey on Mabwegere be uprooted.

On this basis, the appelants asked for the reallocation of beacons, the eviction of the trespassers (the respondents) and compensation for hardships and loss of use of the said land. The case was dismissed by the trial judge, alleging "that the appellants were not able to point out specifically which part of the village the respondents had trespassed." This line of argument was upheld by the Court of Appeal, and the case was therefore dismissed. However, the CA determined the status of Mabwegere as a "legally registered village" with territorial jurisdiction and recognized its boundaries as those mapped in 1989.

76 Pastoralists of Kilosa District v. the Kilosa District Authority.
HC—Dar es Salaam 22/2012

Background facts and claimants allegations

The defendants demand compensation of Tsh 12 billions for losses incurred during their eviction from Kilosa District in 2009.

At the time more than 2000 pastoralists were evicted in order to give way to large scale commercial wheat cultivation. As a result, more than 20,000 livestock were lost,[529] and the district collected more than Tsh 800m in fines from the pastoralists. Forced to sell their remaining livestock on the market in Dar es Salaam at a throw away price, and with no help available pastoralist families have become destitute.

1,994 Kilombero Pastoralists and Farmers v. the Kilombero District Authority.
HC-Dar es Salaam 212/2012

Background facts and claimants allegations

The events that took place in Kilosa District in 2009 also affected the pastoralists living in the neighbouring Kilombero Valley Flood Plain.[530] However, the government subsequently bowed to local and international pressures and announced that it was going to suspend evictions from across the country including the Kilombero Valley. In 2010, the government conducted sensitization campaigns throughout the District and agreements including land demarcations and land use plans were reached with both peasants and pastoralists.[531]

529 Statement made by PAICODEO at ACHPR's 48th session in Banjul, The Gambia, in 2010.

530 Kilombero Valley Flood Plain became a Ramsar site in 2002. The valley is located in the two districts of Kilombero and Ulanga in Morogoro region, covering an area of 596,908 acres.

531 See Gerald Kitabu, "Three sides of Kilombero evictions drive: Rare species, cattle burden, foreign investments" in IPPMedia, 11.01.2012, at http://www.ippmedia.com/frontend/?l=47877

In October 2012, however, and in clear violation of these agreements, a forceful eviction dubbed "Operation Save Kilombero Valley" was officially launched by the Acting Morogoro Regional Commissioner. The operation was allegedly carried out by a 120-member squad from the Tanzania police force, game rangers and militiamen. Random killings, demolition of homes, and unbridled lawlessness soon followed. In November 2012, as a result of the legal steps taken by the pastoralists, the courts ordered the government to stop the eviction in Kilombero Valley until such a time when the primary cases have been heard. The injunctions issued at the end of November 2012 were however ignored by government,[532] and the evictions—originally scheduled to last 6 days—went on throughout December 2012 and well into 2013. Estimations are that over 5,000 Kilombero villagers, farmers and livestock keepers have been rendered landless as a result of the operation and 380,000 livestock have been evicted or lost, many being impounded and auctioned.[533]

While the government cites the need to restore the environment and protect rare species in the Ramsar site, some analysts say that the recent eviction can be explained by the large number of foreign investors looking for land in Morogoro region, especially in Kilombero and Ulanga districts.[534] Others believe that the evictions are also about giving room for the SAGCOT (Southern Agricultural Growth Corridor of Tanzania) Programme (see the section on Recent developments within the legal and policy landscape of Tanzania below). Morogoro Regional Commissioner, has thus stressed that if livestock keepers are left to destroy the environment, "Morogoro will fail to attain its State-assigned goal of becoming the national grain reserve through SAGCOT."[535]

Legal and policy landscape in Tanzania relating to indigenous peoples' land rights

During colonial times

In 1919, following the end of the First World War, German East Africa came under the control of the League of Nations. The territory was later divided into three mandated countries, of which two were given to Belgium (Rwanda and Burundi) and one—under the name of Tanganyika Territory—to Britain.[536] In 1946, after the collapse of the League of Nations and World War II, Tanganyika be-

532 The Morogoro Regional Commissioner and four other officials have been ordered by the High Court (Land division) to appear in court on February, 20, 2013 for contempt of court.

533 See Kitabu, "Three sides of Kilombero", op.cit. (2012); see also "Situation in Tanzania" presentation by Adam Ole Mwarabu at Third Multi-stakeholder Platform meeting, (22-24 January 2013, Intercontinental Hotel, Nairobi, Kenya), p.19 at http://www.livestockdialogue.org/fileadmin/templates/res_livestock/docs/2013_nairobi/presenations/23/PRESENTATION_BY_ADAM_OLE_MWARABU.pdf

534 Ibid.

535 Habari Leo [Dar es Salaam] December 1, 2012, quoted in The International work Group for Indigenous Affairs (IWGIA), The Indigenous World 2013, (Copenhagen: IWGIA, 2013), p. 389).

536 The United Republic of Tanzania consists of the mainland, formerly known as Tanganyika, and the island of Zanzibar. From 1890 to 1918, Tanganyika was part of German East Africa while Zanzibar was a British protectorate from 1890 to 1963. Tanganyika gained independence in 1961, Zanzibar in 1963. The two territories were united in 1964. For more details see Rosemary E. Galli (ed.), *The Political Economy of Rural Development: Peasants, International Capital and the State* (Albany, N.Y.: State University of New York Press, 1981), p. 113.

came a British Trust Territory, since, according to the UN Charter, all territories formerly under the League of Nations' mandate were to be covered by the trusteeship regime.[537]

As a territory under mandate, Tanganyika, as the country was called until 1964, was not like other colonies. The League of Nations set a string of rules, including the protection of the rights of local populations.[538] This was later reinforced by the Charter of the United Nations, which also made it clear that under the Trusteeship system, the wishes, values and customs of the inhabitants of a trust territory must be given priority.[539]

It emerges, however, that during the period up to World War II large areas of land were taken away from traditional communities. Between 1923 and 1926, an average of 24,000 acres per year, or approximately a total of 120,000 acres of lands, were alienated on behalf of foreigners.[540] In its 1926 Report, the Permanent Mandates Commission of the League of Nations set up to oversee the British administration of Tanganyika heavily criticized the provisions of the 1923 Land Ordinance, which stated that "the whole of the lands of Tanganyika, whether occupied or unoccupied on the date of the commencement of this Ordinance, are hereby declared to be public lands".[541] The Commission's central issue was whether, by stripping the communities of their pre-colonial full ownership of their lands,[542] the Ordinance was in breach of the terms of the Mandate regarding the need to "respect the rights and safeguard the interests of the local population".[543]

Following up on this report, the colonial government passed another more pro-indigenous communities law in 1928,[544] which provided for the deemed right of occupancy deriving out of customary use and occupation of land and said to be "as [protective and] good as a written document or right of occupancy under the Land Ordinance".[545] Thus, indigenous peoples maintained some sort of control over their homelands. James Woodburn confirms that, "the British administrators who replaced the Germans during the First World War were content to leave the Hadzabe area, occupied by a hunter-gatherer community of northern Tanzania, much as it

537 Article 77 of the United Nations Charter. The Charter's chapter XII deals with the Trusteeship system.

538 Article 6 of the Mandate Agreement between the League of Nations and Britain (1922) relating to the administration of Tanganyika.

539 Article 76 of the U.N. Charter: "The Trusteeship system shall ... promote the political, economic, social ... advancement of the inhabitants of the trust territories".

540 Peter G. Forster and Sam Maghimbi (eds.) *Agrarian Economy, State and Society in Contemporary Tanzania* (Aldershot: Ashgate Publishing Co., 1999), p. 43.

541 Section 3 of the 1923 Land Ordinance, CAP 113.

542 The 1926 Report by the Permanent Mandates Commission of the League of the Nations showed some doubts about the Land Ordinance in the following terms: A "Land Ordinance was drafted in 1923 and has since been enacted ... doubt had arisen whether native occupiers of communal land, to whom no certificate of occupancy had been issued, would be recognised as occupiers under the principal ordinance and be entitled to protection against arbitrary disturbances which that Ordinance gives". See also in Fimbo, *Essays* (1992), p. 66. Many scholars have indeed shown that land was collectively owned amongst most pre-colonial Tanzanian indigenous peoples. Also individuals could use and occupy land to its full extent although the proprietorship was vested in communities. See, e.g., Sally Falk Moore, *Social Facts and Fabrications: "Customary Law" in the Kilimanjaro 1880-1980* (Cambridge, UK: Cambridge University Press, 1986), p. 62; Tenga, *Pastoral Land Rights* (1992), p. 10; Eugene Cotran, "Customary Land Law in Kenya, Uganda and Tanzania", in UNESCO, *Le droit de la terre en Afrique,* (Paris: G.P. Maisonneuve et Larose, 1971), pp. 91-100.

543 Article 6 of the British League of Nations Mandate over Tanganyika.

544 Ordinance No. 7 of 1928.

545 Fimbo, *Essays* (1992), p. 66.

was".[546] Indeed, several scholars believe that most of the "customary land laws of Tanzania [remained] untouched" by the colonial system.[547]

One strong indication of the survival of the notion of collective holding of land by local communities during this era of colonial-type land laws was the recognition by the colonial ruler of a number of customary mechanisms such as the semi-feudal Nyarubanja tenure system. The beneficiaries of this mechanism were usually traditional chiefs favorable to colonial rule, whose duties and rights were later regulated by the Bukoba Chiefs Act in 1930, amended later in 1938 as the "Nyarubanja Rules" under the Native Authority Ordinance.[548]

In an attempt to keep within the margins of the international mandate, the colonial master of Tanganyika furthermore opted for a colonial system that would consist of incorporating the communities, and some of their ways of life, within the overall program of the government.[549] This could explain why in some cases, when the colonial government needed to resettle a number of communities in new areas, it resorted to "agreements", as was the case in 1958 regarding a Maasai community of the Western Serengeti.[550] However, by the end of the 1950s, 40 per cent of Tanzania's arable lands were owned by foreign farmers.[551] A number of communities, nevertheless, had kept their lands, which they continued to use and occupy collectively according to their customs and traditions.

The Ujamaa era

After independence, in 1967, Tanzania introduced *Ujamaa* in an attempt to Africanise its land laws through a policy that considered the agricultural sector "as capable of generating growth from the [country's] own resources, while at the same time benefiting the majority of the people".[552] This policy was called by the Swahili words of *Ujamaa Vijijini*, meaning "socialism within villages" (also known as "villagization"). It consisted of "translocating" people in groups to what was called *"Ujamaa* villages", where individuals, sometimes of different cultural backgrounds, lineages and clans, were expected to work on communal farms with which they had no

546 Woodburn, "Minimal Politics" (1979), p. 247.

547 Maini, *Land Law* (1967), p. 89.

548 Cotran, "Customary Land Law" (1971), p. 108.

549 See Chachage, "Land Issues" (1999), p. 62, and Kiondo, "Structural Adjustment" (1999), p. 43.

550 The Agreement between the Maasai and the colonial authority stated as follows: "We, the Laigwanak (elders) of the Ngorongoro and Loliondo division of the Maasai district, agree on behalf of all the Maasai living in these areas to renounce our claim to all those parts of the Serengeti plains lying within the Northern and Lake provinces, which lie to the west of the line shown to us by the District Commissioner, on the 13th and 14th March and the 20th of April 1958. ...We understand that, as a result of this renunciation, we shall not be entitled henceforth in the years to come to cross this line which will become the boundary of the new Serengeti National Park and which will be demarcated. We also understand that we shall not be entitled to reside in or use in future the land lying to the west of this line, which we have habitually used in the past. ... We agree to move ourselves, our possessions, our cattle and all other animals out of this land by the advent of the next short rains, that is before the 31st December 1958. ...Witnessed by us at Ngorongoro this 21st day of April 1958." See Shivji and Kapinga, *Maasai Rights* (1998), p. 74.

551 Chachage, "Land Issues" (1999), p. 63.

552 Ringo Tenga, "Processing a Land Policy: The Case of Mainland Tanzania", available online at http://www.whoseland.com/paper7.html, (1998b), p. 3; Kiondo, "Structural Adjustment" (1999), p. 44.

cultural tie or bond. By 1977, 90 per cent or more of the Tanzanians lived in some 7,300 villages.[553] This African adaptation of socialism was construed around the principle that Tanzania was to regain its economic independence by providing for itself. The principle of "self-reliance" (*kujitegemea* in Swahili) was always attached to the term *Ujamaa*, as stated in the 1967 Arusha Declaration.[554]

This policy, which attempted to transform all Tanzanian communities into farmers by designing and imposing the way lands should be used and occupied,[555] emerged as a radical political change in Tanzania.[556]

The policy was also intended to be a reaction to the then surviving colonial economic system, accused of plundering national resources for the sake of individual interests.[557] Numerous private companies, which had existed since colonial time, continued to hold large parts of the most fertile lands in Tanzania.

The policy was crafted on the idea that land together with people, good policies and good leadership were "the four prerequisites of development".[558] Accordingly, private land ownership was prohibited and the "State retained the sole right to allocate land for cultivation and housing through allotment".[559] "The state was supposed to bring social services, industries, and infrastructure to the people who, in return, were expected to accept a high degree of economic control".[560] In one way or another, people were moved into *Ujamaa* villages, where they were deemed to work on communal lands.

The *Ujamaa* policy could be regarded as having had two major effects on communities' land rights based on customary tenure. On the one hand, it implicitly abolished the communal aspect of the "deemed right of occupancy" on agricultural lands. On the other hand, it could be argued that it somehow preserved the customary right of communities found within conservation areas and on other reserved lands. There had never been a law explicitly abolishing the "deemed right of occupancy". Instead, the *Ujamaa* decision makers firstly opted for the destruction of the institutional framework or the sociological pillars on which the customary land tenure was based so that everything would fall apart, once the foundation had been destroyed. Secondly, the legislator designed a strategy that consisted of uprooting local communities from lands with which they had cultural ties.

553 Yeager and Miller, *Wildlife, Wild Death* (1986), p. 25.

554 The Arusha Declaration was made public by the Tanzanian president, Mr. Nyerere, in 1967. It consisted in nationalizing private enterprises, business and farmlands with the intent of boosting self-reliance built upon agriculture and farming by the state. See Issa G. Shivji, *Class Struggles in Tanzania* (London: Heinemann, 1976), p. 79.

555 Yeager and Miller, *Wildlife, Wild Death* (1986), p. 24.

556 Kiondo, "Structural Adjustment" (1999), p. 44.

557 J.K. Nyerere, *Ujamaa: Essays on Socialism* (London: Oxford University Press, 1968), p. 106.

558 Ibid., p. 29.

559 Donna O. Kerner, "Land Scarcity and Rights of Control in the Development of Commercial Farming in Northeast Tanzania", in *Land and Society in Contemporary Africa*, edited by R.E. Downs and S. P. Reyna (Hanover, NH: University Press of New England, 1988), p. 169.

560 Chachage, "Land Issues" (1999), p. 58.

Towards a new agricultural policy

By 1980, the Tanzanian economy was assessed as not performing.[561] At the same time, Tanzania was also hit by the international economic turmoil caused by the 1970s oil crisis.[562] This combination of factors made Tanzania succumb to pressure from international financial institutions, and thus abandon its socialist system. Instead, the country embarked on the capitalist track. With the agricultural sector as a central pillar, efficient land management and a reinforced private sector were expected to play a key role in the ultimate goal of good food supplies and sufficient foreign exchange.[563]

Accordingly, in 1983, the Tanzanian government adopted a *National Agricultural Policy*, aimed at increasing rural productivity. This Policy proposed the establishment of individually owned plots of land within the *Ujamaa* villages. For a village as a whole, the Policy proposed a "right of occupancy" that would not last more than 99 years.[564] The state would, however, continue to be the sole absolute owner of all Tanzanian lands and the District Councils, as organised by the Local Government Act of 1982, were given the role of management and allocation of lands in most rural areas.

The new policy did little, if anything at all, to restore to communities their lands, which in addition to being a major source of income were also the symbol of their cultural existence. On the contrary, following the suggestions made by the World Bank and the donor community in support of land titling,[565] the policy "encouraged the development of a class of big farmers" at the expense of the poor peasant masses.

The trend of ignoring customary claims to lands went on until 1987, when the "Prime Minister issued an Extinction of Customary Land Rights Order, ... which extinguished customary land rights in Arumeru, Babati, Hanang, and Mbulu Districts. In July 1989, the Prime Minister issued another order ... which covered areas in Hanang District, which Barabaig pastoralists of Hanang were claiming in court".[566]

The Shivji Report

However, the continuing burning desire for, and claims of communities to, their customary land rights—demands which had to be reconciled with the need for Tanzanian economic growth—prompted, among other things, the establishment of what is known as the Presidential Commission

561 Ibid., p. 59. The production of cotton was declared to have declined by 20.1 per cent, tobacco by 4.5 per cent and pyrethrum by 11.5 per cent. Many other products also had declining production rates. See also Fimbo, *Essays* (1992), p. 10.

562 Kiondo, "Structural Adjustment" (1999), p. 45.

563 Ibid., p. 47; Chachage, "Land Issues" (1999), pp. 58 and 68; Wøien and Lama, *Market Commerce as Wildlife Protector?* (1999), p. 8; Bourn and Blench, *Can Livestock and Wildlife Co-Exist* (1999), p. 44; Yeager and Miller, *Wildlife, Wild Death* (1986), p. 128.

564 Kiondo, "Structural Adjustment" (1999), p. 48; Chachage, "Land Issues" (1999), p. 66.

565 Tenga, "Legislating" (1998a), p. 3.

566 Tenga, *Pastoral Land Rights* (1992), p. 23.

of Inquiry into Land Matters.[567] In late 1992, this Commission submitted its report, commonly referred to by the name of its author as "the Shivji Report".[568] This Report underlined the "dichotomy ... between the peasant/pastoral sector governed by customary land tenure under the deemed right of occupancy and the plantation/urban sector governed by statutory ... system under the granted right of occupancy".[569]

Giving particular attention to the pre-existing collective holding of lands by communities, the Shivji Report concluded that the 1980s Tanzanian understanding of customary land tenure was similar to the one in pre-colonial time, when traditional authorities held effective powers over lands.[570] Furthermore, the Shivji Report criticised the government's introduction of the "process of original adjudication and issuance of titles", which it argued "became, to some extent, a process of dispossessing original rights-holders while improving the land holding of others".[571]

Accordingly, the Shivji Report proposed that there should be two types of lands: on the one hand, "national lands" that would be administered by a National Lands Commission, and on the other hand, "village lands" that would be managed by village assemblies composed of all the adult village members. In relation to village lands, the Shivji Report recommended also a formalisation of customary titles through a process of local adjudication by the elders, which could result in the issuance of customary titles. The councils of elders would compile a village lands register. Land transactions between village members would be allowed, but land dealings between members of a village with outsiders would not be possible without the consent of the elders.

The mechanisms of "village land" management, as recommended by the Shivji Report, were not the exact match of the pre-colonial mechanisms for collective land holdings. However, they could be regarded as the closest-ever alternative to the pre-colonial customary land tenure in Tanzania, where "rights in lands [were never] vested in any individual but in ... groups such as a tribe or the political authorities or the clan or family groups, and ... although an individual could have the right of use of the land, the ultimate reversion [was] in the community".[572]

Despite the important remarks made by the Shivji Report in support of customary land rights of communities, the National Environment Management Council,[573] which is the architect of the 1995 Tanzania National Conservation Strategy for Sustainable Development (NCSSD), re-focused the debate on laying the ground for a market-oriented resources management:

567 Tenga, "Legislating" (1998a), pp. 4-5.

568 The Report was published in 1994. See United Republic of Tanzania, *Report of the Presidential Commission,* Vol.1 (1994).

569 Ibid., p. 140.

570 Ibid., pp. 146-7.

571 Ibid., p. 116 and 118.

572 Cotran, "Customary Land Law" (1971), p. 90.

573 Following the adoption by Tanzania of the objectives and resolutions of the 1972 Stockholm Conference on the interdependency between, on the one hand, the natural environment and, on the other hand, human habitation, the Act No. 19 of 1983 established a National Environment Management Council with the task to advise the government on environmental issues. Given that conservation areas at the time covered about 26 per cent of Tanzania's land area, the collaboration between this Council and any land law-related work was regarded as essential. See in *Report of the Presidential Commission* (1994), p. 273.

> The existing land legislation, land bill and institutional set-up for land tenure are inadequate to deal with dynamic changes such as the changeover to a market-oriented economy, privatisation, increased urbanisation, population increase, etc. They fail to provide incentives for more efficient use of resources, including investments for land improvements and development.[574]

Furthermore, in addition to the political willingness to make agricultural lands the power-engine of the new free market economic orientation in Tanzania, a new conservation policy was adopted aiming at increasing the contribution of this sector to the country's economy from 2 to 5 per cent of GDP by 2017.[575] The tourist industry was also identified as an important sector for Tanzania.[576] In order to achieve this, the new conservation policy was designed to incite the private sector "to invest in the wildlife industry, [in order to take]... advantage of the prevailing political stability and sound investment policies".[577]

As already mentioned in chapter IV, these efforts paid off quickly. In the 1990s, the figures were beyond projections. "Between July 1990 and August 1993, the number of investment projects approved in the country was 80 in tourism, 58 in agriculture, and 41 in natural resources".[578] In 1994, tourism contributed up to 7.5 per cent of GDP and provided up to 25 per cent of total foreign exchange earnings.[579] The Tanzanian National Park Authority (TANAPA) was making an annual amount of about US$1.3 million on entry fees and concessions in the Serengeti alone.[580]

This new shift towards an increased role of conservation and wildlife protection was to impact on the land rights of traditional communities because wildlife in Tanzania as well as in Kenya depends significantly on grazing lands outside the boundaries of protected areas, where the communities' cattle herds and the wildlife compete for the same resources.[581]

It is on this socio-economic and legal background that the new Tanzanian land laws were drafted.

Tanzanian twin Land Acts and traditional communities' right to lands

The need for a reformed agricultural sector compatible with the principles of the free-market economy and the increasingly undeniable role that the conservation sector was playing in the Tanzanian economy were the two driving forces behind the crafting of the twin Land Acts, namely the Land Act and the Village Land Act, both adopted in 1999.[582] These two Acts cover three

574 United Republic of Tanzania, *Tanzania National Conservation Strategy for Sustainable Development (NCSSD),* (Dar es Salaam: National Environment Management Council & Republic of Tanzania, May 1995).
575 Bourn and Blench, *Can Livestock and Wildlife Co-Exist* (1999), p. 10.
576 Yeager and Miller, *Wildlife, Wild Death* (1986), pp. 32-3.
577 Bourn and Blench, *Can Livestock and Wildlife Co-Exist* (1999), p. 10.
578 Chachage, "Land Issues" (1999), p. 67.
579 Wøien and Lama, *Market Commerce* (1999), p. 9.
580 Emerton and Mfunda, "Making Wildlife Economically Viable" (1999), p. 17.
581 Wøien and Lama, *Market Commerce* (1999), p. 9.
582 During their drafting process, these two Acts were merged into one single Act and referred to as the Land Bill. At the end, they were presented before Parliament as two separate, but related Acts, the Tanzanian Land Act (Act No. 4 of

types of lands: "general land", "reserved land" and "village land". The general land is understood as "all public land, which is not reserved or village land", including unoccupied and unused village land;[583] and "the reserved land" as those set apart for national parks, game reserves, forest reserves, marine parks and public recreation parks. Both the general and reserved lands are regulated by the Land Act, whereas "village lands" are regulated by the Village Land Act.

"Right of occupancy" and claims of traditional communities living on agricultural land, as regulated by the Village Land Act

Like its principal predecessor, namely the 1923 Land Ordinance, the new Tanzanian Land Act of 1999 declares that all lands shall continue to be "public land vested in the President as trustee for and on behalf of all citizens of Tanzania".[584] Accordingly, communities, individuals, as well as any other right holder can only enjoy and exercise the right of occupancy and use of lands.[585]

According to the Village Land Act, the holders of the "right of occupancy" are the villagers. The Act defines the term "village" as an entity registered as such under the Local Government (District Authority) Act 1982,[586] the Land Tenure (Village settlement) Act 1965, and "any law or administrative procedure in force at the time before [the Village Land Act 1999] comes into operation".[587] The Act defines also the term "villager" as "any person ordinarily resident in a village or who is recognised as such by the village council of the village concerned".[588] The Act goes further by stating that any aggregate of individuals can apply for a village status, provided that its members "have been in peaceful, open and uninterrupted occupation of, or have similarly used for pastoral purposes, village land for not less than twelve years". A "village", (*vijiji* in Swahili), could also result from "settlement and resettlement of people in villages commenced or carried out during and at the time between the first day of January 1970 and the thirty-first day of December 1977 for or in connection with the purpose of implementing the policy of villagisation".[589]

Most of the estimated 11,000 "villages" in Tanzania[590] are relics of the *Ujamaa* policy. By legitimising the artificial groupings created during the *Ujamaa* period, the Village Land Act clearly shows that it does not comprehend the term villagers as members of communities with cultural

1999) and Village Land Act (No. 5 of 1999), that both were passed on May 21, 1999. See also Tenga, "Legislating" (1998a), p. 6.

583 Village Land Act 1999, Section 2.

584 Land Act 1999, Section 4, and Village Land Act 1999, Part II (1).

585 Village Land Act 1999, Section 2. A village's "right of occupancy" of land is defined as "a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law".

586 Local Government (District Authorities) Act 1982, Section 22.

587 Village Land Act 1999, Section 7(1).

588 Ibid., Part I (2).

589 Ibid., Part I (2). See also Section 15.

590 See Rasmus H. Pedersen, "The Forgotten Villages — Land Reform in Tanzania" DIIS Policy Brief (Copenhagen: DIIS, 2011), p. 2.

ties to a given land, or people sharing common values that they wish to protect and preserve through a collective ownership and control of their customary lands. In other words, the Village Land Act does not consider "villagers" as amounting to communities understood as "groups based upon unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of members of the group".[591] Instead, "villages" are understood by the Act as mere groupings established by deliberate and voluntary actions of their members.

This may have serious implications for indigenous peoples. The village of Mongo Wa Mono, for example, which was allegedly established in recognition of the right of its original inhabitants, the Hadzabe, has 1,700 members, including only approximately 500 Hadzabe.[592] Village land is established by a "certificate of village land".[593] According to the Village Land Act 1999, village land, such as that of Mongo Wa Mono, should be under the management of a Village Council, a body elected by all the members of the village.[594] This electoral mechanism means that the original inhabitants of the village of Mongo Wa Mono, the Hadzabe, have no control over their lands because of being a numerical minority and therefore without a chance of winning the electoral majority of the Village Council.[595] Moreover, the government can transform a village land into a general public land, without consulting the concerned villagers. In other circumstances, a village council can be stripped of its management role of village land.[596] Despite the weaknesses of this mechanism, it is still an option that is being pursued by pastoralist organizations active on titling village lands in several districts in northern Tanzania as a way of trying to safeguard pastoral lands on a collective basis.

More indicative is the fact that the Village Land Act recognizes the possibility for a villager to apply for an individual title on village lands.[597] The immediate consequence of this alternative is that a villager, who has secured an individual title on an area of a village land, may then at will dispose of this land and sell it to outsiders.

In conclusion, it appears that the broad understanding of the concept "villager", the mechanism of election of members of Village Councils, and the possibility of individual titling on village lands, all put together, indicate that the "right of occupancy" and "certificate of village land" do bring in risks of land individualization.[598] This is also the opinion of Shivji, who argues that "individualisa-

591 Lerner, *Group Rights* (1991), p. 29.

592 Madsen, *The Hadzabe of Tanzania* (2000), p. 29.

593 Village Land Act 1999, Section 7(5). The Certificate of Village Land is established in the name of the President of the Village Council.

594 Ibid., Section 8 (1).

595 In October 2011, however, the Hadzabe living in the Yaeda Valley were granted a Collective Community Land Certificate (equivalent to a VLC and encompassing more than 20,000 ha) and some of the community members were issued with CCRO. See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA, 2012), p. 444-445.

596 Village Land Act 1999, Section 8.

597 In fact, the Village Land Act provides for the "customary right of occupancy", which is an individual right granted on village lands. See Section 25 on Procedure for application for right of occupancy.

598 Issa G. Shivji, "Protection of Peasants and Pastoral Rights in Land: A Brief Review of the Bills for the Land Act 1998 and the Village Land Act 1998". Paper presented to the Parliamentary Committee for Finance and Economic Affairs' Workshop on the Bills for the Land Act and the Village Land Act, Dodoma, 26th-28th January 1999, (1999a), p. 5; and Issa G. Shivji, "Lift the Whip. Palaver: The Land Bills", *The African*, Tanzania, 1999, (1999b), p. 2.

tion has never meant individual ownership in freehold. It really means the defining of heritable, negotiable, and transferable land rights exclusively owned by a defined legal entity, be it an individual or a group of individuals".[599] In a technical analysis of the practical implications of the Acts, Geir Sundet concludes that:

> The relative ease with which the executive can appropriate village land is the aspect of the Village Land Act that has been criticised most. … There would also be a considerable risk in further proliferation of the violent conflicts over land. The impact on smallholder security of tenure will probably be negative. It follows that it does not seem likely that the Village Land Act will be conducive to economic growth and/or improved food security.[600]

"Reserved land" and the right of communities living within conservation areas regulated by the Land Act

Section 14 of the afore mentioned Village Land Act of 1999 stipulates that the rights of people, whose ordinary place of residence is within conservation areas, should continue to enjoy their rights in accordance with previous legislation, such as the 1974 Wildlife and Conservation Act, which provides for a special right to enter and reside within conservation areas for the benefit of communities whose place of ordinary residence is within these areas.[601] There is also the Game Park Laws (Miscellaneous Amendments) Act No. 14 of 1975[602] that, for example, states that the Authority in charge of management of a game park:

> [S]hall ... safeguard and promote the interest of Maasai citizens of the United Republic engaged in cattle ranching and dairy industry within the Conservation Area.[603]

It appears indeed that the Village Land Act allows for the right of people who ordinarily live or reside within conservation areas to be automatically transformed into "customary right of occupancy". The Land Act 1999 provides furthermore for the leasing of a granted right of occupancy to any person. These provisions could for example provide a legal basis for allowing the Maasai to lease ward or village land within the NCA (Ngorongoro Conservation Area) to tour operators should they so de-

599 Issa G. Shivji, *Not Yet Democracy: Reforming Land Tenure in Tanzania* (Dar es Salaam: IIED/Hakiardhi, Faculty of Law University of Dar es Salaam, 1998), p. 101.

600 Geir Sundet, "The 1999 Land Act and Village Land Act: A Technical Analysis of the Practical Implications of the Acts". Working Draft (February 2005), available online at http://www.oxfam.org.uk/resources/learning/landrights/east.html#Tanzania.

601 Section 7.1(a) of the Wildlife (Conservation and Management) Act No. 12 of 1974 states that "No person other than … a person whose place of ordinary residence is within the reserve" shall be allowed to enter in such area without an authorisation. Similar provisions are found in the 1951 Fauna Conservation Ordinance (Section 6 of CAP. 302 Supp. 64) and the Forest Ordinance of 1959 (Section 9 (3) of CAP. 389 Supp.65).

602 The Game Parks Law (Miscellaneous Amendments) Act No. 14 of 1975 includes the Ngorongoro Conservation Area Ordinance.

603 Ibid., Section 5A.

sire, as it is happening in villages outside the NCA. This could also enable the Maasai to use the land rights conferred upon them through customary rights of occupancy to leverage tourism benefits in the absence of village land titles.

However, the land rights recognized to communities and villages seems limited in weight and far from constituting land ownership rights. For instance, the president of the Republic of Tanzania could, at will, grant a right of occupancy on reserved lands to anybody, including a foreigner, provided that such a beneficiary has an investment certificate from the Investment Promotion Centre. Furthermore, the Ngorongoro Conservation Area Authority (NCAA) has statutory power to regulate land and its uses within the NCA, which reduces the ability of the Maasai to enjoy the land rights they hold.[604] Indeed, it seems unlikely that the Maasai residing in the NCA will ever obtain full land ownership (land titles) within the NCA given the powers of the government over these lands.

In 2007, the government of Tanzania presented a Draft Grazinglands Management and Utilisation Bill, which provides for the creation of Village Grazingland Development Areas (VGDAs) and Village Grazingland Development Committee (VGDC). As Ringo Tenga writes, the Draft "Bill [yet to be adopted as law] does not directly refer to pastoralists' participation in the VGDC" And he adds "Pastoral communities are not directly recognised in the Bill as having customary titles, written or unwritten, over grazing land." [605]

Noticeably, the current Tanzanian Land Laws do not offer a better protection to communities living in conservation areas than pre-existing standards, despite being passed after the conclusion of the 1994 Presidential Commission of Inquiry into Land Matters, which stated that, "there is a need for the resolution of conflict of interests in the conservation areas sector. Ultimately, the survival of all the conservation areas will depend on the contiguous communities". The Commission went on adding that "the sooner the interests reconcile, and the contiguous villages internalize the values of conservation, the more assured will be the future of [conservation areas]".[606] These recommendations called for redress so that cases such as the electric fencing of the Mkomazi Game Reserve (MRG) by the George Adamson Wildlife Conservation Trust[607] and the evictions of ordinary residents of these areas would no longer occur.[608]

It thus appears that in relation to the protection of collective rights to communal lands, the Tanzanian Land Acts could be seen as in line with a free market-oriented system of land management. In this perspective, Ringo Tenga argues that, according to current Tanzanian land laws,

604 Shivji and Kapinga, *Maasai Rights* (1998), pp. 29-30.

605 Ringo Tenga, A. Mattee, N. Mdoe, R. Mnenwa, S. Mwungi and M. Walsh, "Current Policy, Legal and Economic Issues". Main report of *A Study on Options for Pastoralists to Secure their Livelihoods*, (2008), pp. 40 and 43. Available online on the Web site of Tanzania Natural Resource Forum http://www.tnrf.org

606 United Republic of Tanzania, "Report of the Presidential Commission" (1994), p. 275.

607 The electrified fence is now reported to be 41 km long and capable of harming animals as well as human beings. See Tenga, "Legislating" (1998b), p. 7.

608 See for instance the already mentioned *Lekengere Faru Parutu Kamunyu and 16 Others v. Minister for Tourism, Natural Resources and Environment and 3 others,* HC-Moshi CV# 33/1994. In this case, the applicants claimed that they had been forcibly evicted from their homelands in violation of several domestic laws including the Wildlife Conservation Act 1974. See, for more details, Tenga, "Legislating" (1998b).

> [L]and, which may be fully allocated and managed by the Village Council, appears to be land that is not traditionally owned. The customary institutions do not appear to have been significantly affected by the reforms. Actually the VLA (Village Land Act) reserves space for customary land law in the regulation of land tenure. In doing so a potential conflict or grey area exists in terms of land management—is it the responsibility of the Village authorities or of traditional land allocation authorities?
>
> Second, common lands, which in many cases include grazing land, appear to be "no man's land" [and], as such, subject to the exclusive management of Village authorities by virtue of the VLA. For pastoralists, this raises a critical concern in that without pro-active response to this ambiguity the VLA virtually dispossesses the pastoralists from their grazing lands.[609]

In recent years, the government of Tanzania has taken a number of initiatives related to the Land Acts. These initiatives include, among others, the Land Bank Scheme that identifies land suitable for investment and is supported by the Investment Act of 1997, which allows non-citizens to own land for the purpose of investment; the Land Amendment Act of 2004, which creates a legislative framework that allows the sale of "bare" lands and promotes the use of land as collateral; and the "Programme to formalize the Assets of the Poor of Tanzania and strengthen the Rule of Law" (also known as MKURABITA), which promotes land registration.[610] Many of these initiatives have, with the words of William Ole Nasha, turned land into "a pure commodity, devoid of its cultural and spiritual values".[611] They have also paved the way for many of the private investments that have led to the eviction of pastoralists from areas in for example Mbeya, Iringa and Morogoro Regions,[612] and have threatened the land rights of the Hadzabe of Yaeda Chini and Mongo wa Mono.[613]A number of pastoralist organizations have also expressed fear that pastures may be looked at as "bare" or "idle" land and then be identified for investment purposes.[614] The Strategic Plan for the Implementation of the Land Laws, SPILL (2005), whose aim is to make the land laws operational, also clearly reflects that the commitment of the government is to modernize the agricultural sector in Tanzania and, in that relation, make land an important commercial asset. The Plan has two essential strategies—to seden-

609 Tenga et al., "Current Policy, Legal and Economic issues" (2008), p. 44.

610 See, for instance, Celestine Nyamu-Musembi, *Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa*. IDS Working Paper 272. (Brighton, UK: Institute of Development Studies, IDS, University of Sussex, 2006). As pointed out by Chris Maina Peter in "Human Rights of Indigenous Minorities in Tanzania and the Courts of Law", *International Journal on Minority and Group Rights* 14 (2007), p. 470, "There is now intense pressure on the Government from both donors and international financial institutions such as the IBRD and the International Monetary Fund to commoditise land itself and make it available as collateral for loans from commercial banks."

611 William Ole Nasha, "Reforming Land Tenure In Tanzania: For Whose Benefit?" An Haki Ardhi Paper accessible at http://www.hakiardhi.org/HA-Docs/WILLIAM%20FINAL%20SUBMISSION.pdf

612 Rie Odgaard, "Assessment Report from Tanzania" submitted to IWGIA, August 2009 (unpublished).

613 In this particular case, the Tanzanian government had granted a hunting concession to a private company, the UAE Safaris Limited. The Hadzabe community had not been consulted and, by all accounts, did not consent to this grant. The case was taken up by Tanzania's Legal and Human Right Center (LHRC) and other local human rights organizations and due to their pressure, the UAE Safaris Limited eventually desisted from its project. See LHRC's "Tanzania Human Rights Report 2007", p. 61, and "Tanzania Human Rights Report 2008", p. 75, accessible at http://www.humanrights.or.tz

614 Odgaard, "Assessment Report" (2009).

tarize pastoralists and change their production system into a ranching system, and to introduce a system of minimum acreages for farmers through a resettlement scheme.[615] The rights of hunters and gatherers are not mentioned at all by the Plan.[616]

Other land-related policy processes have also an important bearing on indigenous peoples' land rights. A case in point is the revised Draft of the Wildlife Conservation Act No. 9 of 2008. This draft introduces several restrictions in terms of access to grazing areas for pastoralists as well as to other restrictions on various types of uses. It also includes provisions of heavy punishment in cases of non-compliance with the conditions set up by the Act.[617] The Act will thus affect not only pastoralists but also hunter-gatherers and poor farming communities who depend on access to such areas for their livelihood.[618]

The situation for pastoralists and indigenous peoples in general in Tanzania has thus worsened over the past 5-10 years. Policies and legislation have continued to undermine their land rights, and areas, on which these people use to sustain their livelihood, have been further reduced since 2006.[619] Most disturbing are the recent evictions of pastoralists and their livestock from Ihefu in Usangu Plains, Mbarali District in 2006 and 2008,[620] and the evictions from Kilosa district in Morogoro Region[621] and Loliondo division in Ngorongoro District[622] in 2009, just to mention a few that have reached the headlines in the press. That some of these incidents are in fact part of an official policy towards pastoralists, and not just isolated cases, cannot be dismissed seen in the light of the Strategic Plan for the Implementation of the Land Laws, among others.

Conclusion

It has been shown in this chapter that, in general terms, the Tanzanian judiciary has not provided the protection it should to indigenous peoples' land rights. There have been a few attempts of positive decisions by a very limited number of Tanzanian judges, whose decisions have been systematically overturned in Appeal. Delays and governmental policy-oriented rulings have

615 United Republic of Tanzania, *Strategic Plan*, (2005), pp. 9 and 14.

616 Odgaard, "Assessment Report" (2009).

617 United Republic of Tanzania, *Draft Wildlife Act of 2008* (Dar es Salaam: Ministry of Natural Resources), Part IV, V and VIII, available at http://www.tnrf.org. See also F.P. Maganga, "Tanzania's New Wildlife Law and its Implications for Rural Livelihoods". Power point presentation. Mimeo. (Dar es Salaam: Institute of Resource Assessment, University of Dar es Salaam, 2009).

618 See, e.g., Debate on the Wildlife Act of 2008 on the homepage of Tanzania Natural Resource Forum at: http://www.tnrf.org

619 See, e.g., Tenga et al., "Current Policy, Legal and Economic issues" (2008); LHRC "Tanzania Human Rights Report 2007.

620 Martin T. Walsh, "Study on Options for Pastoralists to secure their Livelihoods: Pastoralism and Policy Processes in Tanzania. Mbarali Case Study." In *A Study on Options for Pastoralists to Secure their Livelihoods in Tanzania,* Vol.2 - Case studies (Arusha, Tanzania: CORDS, PWC, IIED, MMM Ngaramtoni Centre, TNRF and UCRT, 2008). Available online on the Web site of Tanzania Natural Resource Forum http://www.tnrf.org/node/7487?group=57

621 See IWGIA Alert, March 2009. Accessible at http://www.iwgia.org/sw33422.asp Mwarabu.

622 See IWGIA Alert, August 2009. Accessible at http://www.iwgia.org/sw153.asp#516_30073

equally characterized the court cases initiated by indigenous peoples in quest for justice on their ancestral lands. This trend has almost everything to do with the national legal and policy landscape shaped since colonial time and up to now. It transpires indeed that, even if relatively strong communal land rights survived during colonial time because of Tanzania's international status under the League of Nations/the United Nations, the *Ujamaa* era had a strong negative impact on indigenous peoples' land rights, as people were moved around into artificial villages managed by institutions set up by the state. The current legal and socioeconomic setting, too, is increasingly unsupportive of indigenous peoples' claims to lands. The will for a free market oriented agricultural sector and a strong and lucrative tourist sector appears as having been the main driving force behind the crafting in 1999 of the twin Land Acts, namely the Land Act and the Village Land Act, as well as subsequent policy developments and legislation, all of which have further exacerbated the situation of indigenous land rights in Tanzania.

Recent developments within the legal and policy landscape

At the overall level, there have been few changes in the legal and policy landscape of Tanzania since 2009. Nor has the situation of the hunter-gatherers and pastoralists changed much if not for the worse in terms of land dispossession, forceful evictions and human rights violations.

The concept of "indigenous peoples"

The concept of "indigenous peoples" remains a contentious issue for some people in Tanzania.. The official position is that "the term 'indigenous peoples' is not applicable as all Tanzanians of African descent are indigenous to Tanzania". However, the government "recognizes the vulnerability of some of the marginalized communities and to this end it has been responsive to their needs and it will surely continue to do so".[623] Nonetheless, the first steps towards the recognition of the concept seem to have been taken. In early 2012, Tanzania Social Action Fund (TASAF), a government of Tanzania funding facility supported by IDA (World Bank Group)[624] issued a Draft TASAF III Indigenous Peoples Policy Framework (IPPF), in which both the Hadzabe and The Barabaig are "initially" listed, awaiting "[f]urther screening by the Bank ... to see which other groups meet OP 4.10 criteria

623 UPR, Report of the Working Group on the Universal Periodic Review—United Republic of Tanzania. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/19/4/Add.1, (12 March 2012), Recommendation No. 86/48, p. 5. During the UPR process, several countries, Treaty Bodies, the UNCT and other stakeholders had urged the Tanzanian government to reconsider its policy under which the notion of indigenous peoples was unrecognized. See, e.g., UPR, Compilation U.R. of Tanzania, U.N. Doc. A/HRC/WG.6/12/TZA/2 (2011c), p. 11.

624 TASAF provides a mechanism that will allow local and village governments to respond to community demands for interventions that will contribute to the attainments of specific Millennium Development Goals. TASAF III targets people living under the basic needs poverty line (currently 33.6 per cent of the population). See Web site: http://www.tasaf.org

of Indigenous Peoples".[625] As noted in TASAF's Operational Manual, the implementation of TASAF III sub-projects will also require compliance with other safeguards policies, that together with the IPPF "have been approved by the government and IDA for this Project.[626]

The Government of Tanzania is indeed yet to endorse and understand fully the meaning of the term "indigenous peoples in Africa" as conceptualised by the African Commission and specified earlier.

The constitutional reform process

This proces is currently on-going.[627] The most critical issues at stake are the separation of powers, the presidential powers, the right to education and health and the right to information. After some delay, the demand for a broad participatory consultation process was finally met in late 2011, and a broader representation within the Constitutional Review Commission was secured. Seeing this as a rare opportunity to articulate their issues into the new constitution, pastoralists and hunter-gatherers have formed a coalition—the Katiba Initiative (KAI)—in order to ensure that indigenous communities could give their opinions and submit their comments to the the National Constitutional Review Commission.[628] KAI, which has been recognized by the Constitutional Review Commission as one of the official constitutional stakeholders fora, has managed to have important provisions that touch on the rights of pastoralists and hunter-gatherers included in the first draft Constitution released in June 2013.[629] The new Constitution is expected to be promulgated in April 2014. Between now and then, pastoralists and hunter-gatherers still have an important work to do to protect the important gains made so far and even more importantly to agitate for more rights in the final draft of the constitution.[630]

Land issues

Land, security of tenure and access to natural resources (forest produces in the case of hunter-gatherers and grazing areas in the case of pastoralists) remain the main concern of Tanzania's indigenous peoples. Since 2006, land related conflicts, often followed by land dispossession

625 See Draft IPPF (2012), p.1. http://www.tasaf.org

626 The other safeguards policies are the Resettlement Policy Framework (RPF) and the Environmental and Social Management Framework (ESMF). See TASAF III Operational Manual (2013), p. 6. http://www.tasaf.org

627 The current Constitution dates from 1977 and has been amended fourteen (14) times from 1979 to 2005. Pressures for a review began to emerge in earnest in the late 1980s. After almost three decades and several Commission Reports, the process was resumed in 2011.

628 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA, 2012), pp. 438ff.

629 Pastoralism is recognized as a livelihood on an equal footing with other traditionally favored sectors of the economy like farming and fishing; and as a land use system that deserves to be allocated national resources for its development. The Draft Constitution also recognizes traditional hunting rights and guarantees hunter-gatherers the right to hunt and collect fruits in their traditional lands. (PINGOs Forum, personal communication, August 2013).

630 Ibid.

and evictions of indigenous peoples, have affected pastoralists and hunter-gatherers. Examples include the evictions of pastoralists in Ihefu (2006), Kilosa (2008), Loliondo (2009), Vilima Vitatu (2010) Kilombero and Ulanga (2012), just to mention a few.[631]

Some of these conflicts originate in the continued expansion of protected areas for conservation purposes[632] or for tourist related developments—as for example, trophy hunting concessions—[633] which limits indigenous peoples' access to their traditional resources. Other conflicts stem from the competition between pastoralists and crop farmers over scarce resources. While not a new phenomenon, it seems to have been exacerbated due to several factors. Climate change with major droughts in 2009/10 and 2011/12[634] particularly in the northern part of the country, coupled with restrictions in the use of traditional fall out places in Kilindi (Tanga Region), Kilosa (Morogoro) Usangu (Mbeya) and the deltas on the coast is one factor, which has compelled many pastoralists to give up their nomadic lifestyle and become agro-pastoralists or forced them to migrate in search of grazing.

Another factor is the growing pressure for access to land-based resources by national and foreign investors. In order to develop the country's agricultural potential and to articulate its Kilimo Kwanza (Agriculture First) green revolution policy (2008), the government formed in 2010 the Southern Agricultural Growth Corridor of Tanzania (SAGCOT,) a multi-partnership initiative,[635] by which Tanzania invites foreign companies to invest in crops like sugarcane, maize, rice and cassava.[636] Two other areas of investments are commercial ranching which is promoted by the National Livestock Policy, and large-scale bio-fuel projects, for which about 640,000 ha have been formally allocated by the government through the Tanzania Investment Centre. Such state-driven

631 See PAICODEO, Report on the State of Pastoralists' Human Rights in Tanzania: Survey of ten districts of Tanzania Mainland 2010/2011 (Tanzania: PAICODEO, 2013).

632 More than 39 per cent of Tanzanias land area is today protected and many national parks are continuously seeking to get more land by grabbing land from bordering villages. See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), pp. 384-386.

633 Large areas of Tanzanian community land (Village Land) that are adjacent to wildlife protected areas and often contain large numbers of animals, have been leased out by the Ministry of Natural Resources and Tourism as trophy hunting concessions since the 1980s, when hunting was opened up to private operators after formerly having been controlled by a parastatal corporation. Community-level approval is not sought or required for approval of these concessions on community lands. See Fred Nelson et al., "Land Grabbing and Political Transformation in Tanzania" (2012), p.13. Paper presented at the International Conference on Global Land Grabbing II, October 17-19, 2012, organized by the Land Deals Politics Initiative (LDPI). http://www.cornell-landproject.org/download/landgrab2012papers/nelson.pdf

634 The Hadzabe and Akie suffer from the reduced availability of water, wild plants and fruits and have to move further away in order to find sufficient food. The situation of the pastoralists is also highly precarious. With rising temperatures, changes in the timing of natural springs and drying of pan dams compel them to cover up to 30 km to get water. There has also been loss of grass, and this has led to less milk and less food. The animals do not fetch the same prices as before since they are thin and sick, and because of the reduced volume of rainfalls coupled with reduced mobility, growing populations and an increased livestock density, pastoralists find it more difficult to anticipate, cope with, resist and recover from the impact of drought. The loss of livestock have been substantial—2009 being the worst year with examples of Maasai having lost up to 70 per cent of their livestock.

635 The Southern Corridor encompasses nearly 300,000 sq km stretching along both sides of the infrastructure backbone that extends from the Indian Ocean and Dar es Salaam and inland to the Zambian border. SAGCOTis largely funded by international donors.

636 See TNRF, "Understanding Land and Investments in Tanzania", TNRF policy brief (March 2012) at http://www.tnrf.org

development programmes or private investment projects are often the true reason for land evictions although these are camouflaged as environmental considerations.[637] There has been, however, an increasing local and international criticism that major investors were grabbing large chunks of land, often displacing small-scale farmers and local communities, and in December 2012, the government decided that from 2013 on, restrictions will be put on the size of land that single large-scale foreign and local investors can "lease" for agricultural use.[638]

The issue of tenure security

As noted earlier one of the reasons why it is possible to alienate land from the pastoralists and hunter-gatherers is that their rights are not well provided for in Tanzania's formal land legislation. This has prompted pastoralist and hunter-gatherer communities to pursue the option of getting their lands titled as village lands and with the support of NGOs, to apply for Certificates of Customary Right of Occupancy (CCROs). The process is cumbersome, lengthy and costly as it obliges the indigenous community to, inter alia, form a village with recognized boundaries;[639] receive a Village Land Certificate (VLC) from the Commissioner of Lands; and elaborate a participatory village land use plan (PVLUP), designating zones for agricultural and livestock purposes, respectively. . However, getting a CCRO does not necessarily solve all problems. Even with titles, encroachments may not stop;[640] the titling of pastoral lands may also open up for land privatization and thus threaten pastoralists' collective land rights; finally, lands held by individual villages are generally not sufficient to sustain pastoralist production systems.

Critical is also the fact that it is relatively easy for the President to acquire village land, in particular "empty" pastoral lands, in the name of "public interest"and allocate such lands to outside interests.[641] Village land is by this action transferred to either one of the two other land categories as defined by the 1999 Land Acts. This transfer is irreversible even when the "outside interest" stops its activities and this is therefore one of the concerns CSOs have raised in connection with SAGCOT.

The Wildlife Conservation Act (2009) has further enhanced this possibility by providing that pastoralists need written permission in order to graze livestock in Game Controlled Areas (GCA)

637 See, e.g., the Kilombero evictions mentioned above in section on Indigenous peoples and recent land cases, supra.

638 See "Curbing Tanzania's 'Land Grabbing Race'" By Orton Kiishweko, *IPS NEWS* 12 December 2012 at http://www.ipsnews.net/ CSOs have furthermore recommended that Tanzania could also strengthen existing national instruments for regulating corporate behaviour, and promote existing quality investments as well as look for sustainable financing activities.See TNRF policy brief, op.cit (2012).

639 This requires a prescribed number of individuals, which makes it difficult for hunter-gatherers to form a village. The Hadzabe living in the Yaeda Valley who were granted a Collective Community Land Certificate in 2011.

640 See, for instance the Loliondo case (above, this chapter). Since encroaching on pastoralist land continued nonetheless, CORDS now also facilitates villages in issuing individual CCROs for citizens in the affected areas. See Rasmus H. Pedersen, "Tanzania's Land Law Reform: the Implementation Challenge". DIIS Working Paper 37 (Copenhagen: DIIS, 2010:), p. 13.

641 The Constitution, the 1967 Land Acquisition Act and the land laws of 1999 all permit the President to acquire general, village or reserved land for public purposes. Public purposes include public works, commercial development, environmental protection and resource exploitation. See LARRRI, "Accumulation by Land Dispossession and Labour Devaluation in Tanzania. The Case of Biofuel and Forestry Investments in Kilwa and Kilolo". (Dar es Salaam: LARRRI/HAKIARDHI, 2010), pp. 11-12. At http://www.hakiardhi.org

even when these areas overlap with village lands. As almost all (GCAs) in the Ngorongoro District encroach on village lands, the government has come up with the Ngorongoro Land Use Plan aiming at demarcating the required land for Game Controlled Area from village lands (see above).

The Wildlife Conservation Act has also introduced new regulations by which the Wildlife Division has taken control over the income generated by some villages from so-called non-consumptive utilization of wildlife, including the modest incomes generated by Maasai women through manufacturing and selling artifacts and other products for the tourist market. These regulations are neither clear nor transparent as to how much money is to be redistributed to the village governments and the CBOs (in the case of WMAs) who previously controlled the processes and the funds they received. In general, it can be said that there remains little if any trace of the WMA policy's initial promise of decentralization and community control of wildlife. In fact, there has rather been a steady recentralization of the wildlife sector in Tanzania, coupled with a growing resistance by communities of the government's 'community-based approach' to wildlife conservation.[642]

Legal redress

Seeking legal redress for land dispossession, evictions and human rights violations is not easily available. Land disputes can be heard by both formal and informal tribunals. Village councils can establish adjudication committees, with members elected by the village assembly. The primary mode of dispute resolution in these forums is negotiation and conciliation. However, these committees are not always very effective and they may also be biased against indigenous hunter-gatherers like the Akie.[643] Tanzania judicial infrastructure in the rural areas remains poor, with few courts of law and few judicial officers.[644] The majority of persons who need legal representation are therefore forced to represent themselves or seek independent legal aid providers. Legal aid providers can be costly since the government only provides free legal aid in the case of major offences and this, taken together with the other constraints, makes the access to justice very difficult. And lengthy because of backlogs within the judicial system.

Tanzanian tribunals have been critized for not being free from executive and government influence and often tending to openly side with the "development" thesis of the government.[645] Whether this also will be the case in the pending cases mentioned earlier is not to say. What can be observed, however, is the government's lack of respect of the judiciary since it disregards court injunctions (as in the Kilombero case) or continues with its activities although they are the subject of a lawsuit being heard in court (as in the Loliondo and Meatu cases).

642 See Tor A. Benjaminsen et al., "Wildlife Management in Tanzania: Recentralization, Rent Seeking, and Resistance" (2011), at http://www.amandlapublishers.co.za/

643 See Schöpperle, "The Economics of Akie Identity", Leiden. (2011).

644 The number of advocates in Tanzania translates into 1 advocate for 31,000 Tanzanians.

645 See Peter,"Human Rights of Indigenous Minorities in Tanzania and the courts of law". *International Journal on Minority and Group Rights*, Vol.14, No.4 (2007), p.35.

Future challenges: modernization and commercialization

The recognition in 2005 by the National Strategy for Growth and Reduction of Poverty 2005-2009 (NSGRP) of "pastoralism as sustainable livelihood" had raised hopes that the way the government dealt with the issue of pastoralism and pastoralists would change.[646] This has however not been the case. NSGRP II 2010/11 - 2014/15 does not even mention the word pastoralism! Instead, modernization and commercialization seem to have become buzz-words when it comes to official policies dealing with the agricultural and the livestock sectors.

The development of the latter sector (often referred to as the "livestock industry"), as outlined by the National Livestock Policy (2006) and the subsequent Livestock Sector Development Strategy (LSDS, 2010) and Livestock Sector Development Programme (LSDP, 2011), is based on the Tanzania Development Vision 2025 (1999),[647] and its vision of a modernized and to a large extent commercially run livestock sector with pastoral land demarcation, titling and the elimination of mobility being key proposals to increase the productivity of the sector.

The (draft) National Land Use Framework Policy 2009-2029 proposes an increase of commercial farming and ranching land from 2 percent to 18 percent. And up to 12 million hectares of prime grazing and settlement land is slotted for replacement by ranches.[648] The Grazing-land and Animal Feed Resource Act of 2010 (based on the Draft Grazing-land and Utilisation Bill of 2007, mentioned above) has as its main objective to lay down clear mechanisms for the management and control of grazing lands and animal feed resources. It also stipulates that grazing lands have to be demarcated and animals to be confined to one place depending on the land carrying capacity.[649] Pastoralist organizations have pointed out that the Act is designed for commercial livestock keeping and presents a number of potential problems that may undermine pastoralism as a livelihood system. The proposals to have separate area for crops and livestock could underestimate the part played by mixed farming, and make it very difficult for pastoralists if they lost their dry-season grazing areas. Pastoralists also generally keep large numbers of animals and therefore require huge portions of land for rotational grazing.[650] Other potential problems include the way rangelands will be managed and used; the establishment of a National Grazing Lands Council, and an Animal Feed Resources Advisory Council without proper non-governmental pastoral and agro-pastoral representation and the creation of a "Livestock

646 See IIED, "Strengthening Voices: How pastoralist communities and local government are shaping strategies for adaptive environmental management and poverty reduction in Tanzania's drylands." Text: Helen de Jode, Ced Hesse (London, Dublin and Arusha: IIED, KDSC, TNRF, 2011), p. 11. At http://pubs.iied.org/G03105.html

647 The Tanzania Development Vision 2025 states that:-"By year 2025, there should be a livestock sector, which to a large extent shall be commercially run, modern and sustainable, using improved and highly productive livestock to ensure food security, improved income for the household and the nation while conserving the environment" as quoted in LSDS (2010), p. 19. See . http://www.mifugo.go.tz/documents_storage/Livestock%20Sector%20Development%20Strategy.pdf

648 See "Feature: Understanding Lands and Investments in Tanzania", REPOA Newsletter Issue no 3, January-June 2012 at http://www.repoa.or.tz/documents_storage/Feature_Understanding_Land_and_Investments_in_TZ.pdf

649 See text of law at http://www.mifugouvuvi.go.tz/animal-feeds-act-2010

650 Andrew Coulson, "Kilimo Kwanza: A New Start for Agriculture in Tanzania?"(n.d.) at http://www.btsociety.org/app/images/events/kilimo_kwanza_paper.pdf

Inspector" vested with the power to control the so-called "stock rate"— or the number of livestock permitted within a given unit of land and take measures if such rate is exceed.[651]

Conclusion

The United Republic of Tanzania has since its independence in 1961 denied the existence of indigenous peoples, undervalued their livelihood systems and repeatedly violated their fundamental rights and more particularly their land rights. Whilst this hostile environment persists, the indigenous peoples of Tanzania and their organizations have been actively struggling for their land rights—at the local and national levels resisting evictions, filing court cases, etc., and at the international level, producing shadow reports, and "list of issues" as inputs to the monitoring done by the Treaty Bodies' committees and the UPR process and sending communications to complaint mechanisms like the Special Rapporteur on Indigenous Peoples and the ACHPR.[652]

Indigenous peoples have also taken advantage of the possibilities for participatory consultations and representations that more recent national policy processes have provided, forming lobby and advocacy groups such as the Pastoralist Livelihood Task Force (PLTF), the Pastoralist Parliamentarian Group, and the National Indigenous Peoples' Coordinating Committee on REDD (NIPCC-REDD).

Right now, however, the indigenous peoples of Tanzania are putting their hopes in the new constitution. Through the Katiba initiative, they have been able to mobilize and present their opinions to the Constitutional Review Commission. The hope is that the new constitution will, for the first time, "address the land issue in a fair manner and in a way that can minimize - if not eliminate - land-induced conflicts." [653]

651 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 428.

652 Indigenous organizations are also using the electronic media like the online activist network Avaaz that has taken up the issue of forced evictions in Tanzania, with a global petition heading towards 2 million signatures (May 2013).

653 See The International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World 2013* (Copenhagen: IWGIA), p. 390.

CHAPTER VII
INDIGENOUS PEOPLES' LAND CLAIMS IN SOUTHERN AFRICA

This chapter deals with the *South African Richtersveld* case and the Botswana *Central Kalahari Game Reserve* case. These two cases are used as illustrations of a new trend that raises some hopes for a better protection of African indigenous peoples' land rights by the judiciary.

The Richtersveld community in South Africa and their land claim

Richtersveld is a territory of almost half a million hectares situated in the north-western corner of the Northern Cape Province known as Namaqualand. It is sparsely populated and the four villages, namely Kuboes, Sanddrift, Lekkersing and Eksteenfontein, have a total population of only about 15,000, some of whom belong to the Nama people—a larger indigenous group also found in Namibia. The Nama have lived on these lands since time immemorial and share the same culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoe-Khoe and San forefathers. The Nama self identify as indigenous to this land, as underlined by the *Report of the Working Group of Experts of the African Commission on Indigenous Populations/Communities* as well as other researchers.[654]

Following the discovery in the 1920s of diamonds in the area, the South African government seized the disputed land from its inhabitants. At that time, the Union of South Africa was part of the British Empire and the land was claimed as "Crown land". In 1957, a fence was erected around the land, permanently denying its access to the Richtersveld community. In 1994, the ownership of the land passed to a diamond mining company called Alexkor Ltd, whose only shareholder was the South African state.

654 See, e.g., Roger Chennells and Aymone du Toit, "The Rights of Indigenous Peoples in South Africa", in *Indigenous Peoples' Rights in Southern Africa,* edited by Robert K. Hitchcock and Diana Vinding, IWGIA Document No. 110 (Copenhagen: IWGIA, 2004), p. 98.

Richtersveld Community and Others v. Alexkor Ltd and Another 2001 (3) SA 1293 (LCC)

Background facts and claimants' arguments

In 2001, the Richtersveld community lodged a claim for restitution of land on the basis of section 2(1) of the Restitution of Land Rights Act 22 of 1994.[655]

The post-apartheid, interim Constitution of South Africa (1993) provides that

> *A person or a community shall be entitled to claim restitution of a right in land from the State if*
> a. *such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and*
> b. *such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.*[656]

On the basis of this provision, the South African Parliament passed what is known as the "Restitution of Land Rights Act", which, amongst other things, states that "*a person shall be entitled to … restitution of a right in land if (a) he or she is a person or community dispossessed of rights in land after 19 June 1913 as a result of past racially discriminatory laws or practices*".[657]

The Richtersveld community argued that the land in dispute was its ancestral home since time immemorial, that it had been taken away as a result of past racially discriminatory laws or practices and that its aboriginal title survived the arrival of colonization and the establishment of the South African state. The people of Richtersveld claimed that they had the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources. They contended:

> *The Richtersveld people held title to the subject land and that such title was not at any time prior to 19 June 1913 lawfully extinguished or diminished. They submit that this title falls within the definition of "right in land", as contained in the Restitution of Land Rights Act. In terms of the definition, "right in land" includes:*

655 *Richtersveld Community and Others v. Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC).

656 Constitution of South Africa, 1993 (Interim Constitution, 1994-1996), Chapter 8, section 121 (2). This provision is repeated in a slightly amended version in the 1996 Constitution of South Africa, Chapter 2, article 25 (7): "*A person or community dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices, is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*" The full text of the two constitutions can be accessed at http://www.confinder.richmond.edu

657 Restitution of Land Rights Act 22 of 1994, Article 2 (1) (a). Available online at http://www.info.gov.za/acts/1994/a22-94.pdf

> *"any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question"…*
>
> *Their right in land is alleged to be:*
> a. *ownership; alternatively*
> b. *a right based on aboriginal title allowing them the exclusive beneficial occupation and use of the subject land, or the right to use the subject land for certain specified purposes (i.e., habitation, cultural and religious practices, grazing, cultivation, hunting, fishing, water trekking and the harvesting and exploitation of natural resources); alternatively*
> c. *"a right in land" over the subject land acquired through their beneficial occupation thereof for a period longer than 10 years prior to their eventual dispossession.*
>
> *The plaintiffs alleged that they were dispossessed of their rights in land by legislative and executive state action after 19 June 1913 as a result of racially discriminatory laws and practices. They aver that they did not receive any compensation at all in respect of the dispossession, alternatively, that they did not receive just and equitable compensation….*[658]

Consequently, the plaintiffs asked the Land Claims Court (LCC) to order a restitution of their rights in land under the Restitution Act.

According to the Supreme Court of Appeal, the Richtersveld community had further contended that it possessed the above mentioned rights

> *… [U]nder indigenous law and, after annexation, under the common law of the Cape Colony or international law which protected the rights acquired under indigenous law. In the alternative, it was contended that the rights which the Community held in the subject land under its own indigenous law constituted a "customary law interest", a right in land within the meaning of the Act, even if these rights were not recognised or protected. These rights were also asserted in relation to the right of beneficial occupation for a continuous period of not less than 10 years that had been found by the LCC.* [659]

Defendants/appellants' core legal points

Before all three courts (Land Claims Court, Supreme Appeal Court and the Constitutional Court), Alexkor Ltd and the Government of the Republic of South Africa—first as defendants, later as appellants—kept two major core arguments, namely that "whatever rights the Richtersveld people

658 *Richtersveld Community and Others v. Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC), at para. 6.

659 As referred in *Alexkor Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), at para. 47.

might have had in the Richtersveld, were extinguished before 19 June 1913", as a result of the annexation of that land by the British Crown in 1847 and that their own mining rights had been granted in compliance with the Precious Stones Act 1927. Accordingly, they argued that the dispossession was not a "result of past racially discriminatory laws or practices" provided for under section 2(1) of the Land Restitution Act 1994.

The respondents also argued that the Crown Lands Acts of 1860 and 1887 (the Acts) had extinguished the rights of the Richtersveld community.

Ruling and reasoning of the Land Claims Court

The first judgment in this case was that of the Land Claims Court (LCC), which acknowledged that the Richtersveld community had rights over the disputed lands on the basis of "beneficial occupation for a continuous period of not less than 10 years". This very same court, however, also ruled that the claimants' rights were extinguished following the annexation of Richtersveld by the British Crown on 23 December 1847 to become part of the Cape Colony.[660] The court argued further that the land dispossession suffered by the claimants was not a result of "past racially discriminatory laws or practices", and therefore could not be restituted under section 2(1) of the Land Restitution Act.[661] On 22 March 2001, Judge Gildenhuys rejected the plaintiffs' argument based on the doctrine of aboriginal title, ruling that:

> *To the extent that any of the rights claimed by the plaintiffs is dependent on the realisation or* [sic] *aboriginal title, such rights are dubious, because it is uncertain whether the doctrine of indigenous title forms part of our law, and if it does, what its scope and content are. It has, to my knowledge, never been recognised in any reported court decision. Even if it does form part of our law, it is uncertain whether such title would have survived the actions of the Government in making the subject land over to others.*[662]

Richtersveld Community and Others v. Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA)

The second ruling in what is now known as the Richtersveld case was that of the Supreme Court of Appeal of South Africa, before which the community lodged an appeal against the judgment made in 2001 by the Land Claims Court.

Ruling and reasoning of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) made a favorable judgment on 24 March 2003, asserting that:

660 *Richtersveld Community and Others v. Alexkor Ltd and Another,* 2001 (3) SA 1293 (LCC), at paras. 37-43.
661 Ibid., at paras. 76-96.
662 Ibid., at para. 46.

1. The Richtersveld community was in exclusive possession of the whole of the Richtersveld, including the subject land, prior to annexation by the British Crown in 1847.
2. The Richtersveld community's rights to the land (including precious stones and minerals) were akin to those held under common law ownership. These rights constituted a "customary law interest" and consequently a "right in land" as defined in the Act.
3. These rights survived the annexation and the LCC erred in finding that the community had lost its rights because it was insufficiently civilized to be recognised.
4. When diamonds were discovered on the subject land during the 1920s the state ignored the Richtersveld community's rights and, acting on the premise that the land was Crown land, dispossessed the Richtersveld community of its rights in the land in a series of steps amounting to "practices" as defined in the Act and culminating in the grant of full ownership of the land to Alexkor.
5. These practices were racially discriminatory because they were based upon the false, albeit unexpressed premise that, because of the Richtersveld community's race and lack of civilization, they had lost all rights in the land upon annexation.

In other words, the SCA held that the manner in which the Richtersveld Community was dispossessed of the subject land amounted to racially discriminatory practices as defined in the Act, and that the plaintiff was "*entitled … to restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones)*"…[663]

Contrary to the conclusion arrived at by the Land Claims Court, the court also ruled that the disputed land was not a *terra nullius* at the time of annexation.

Alexkor Ltd and Government of South Africa v. Richtersveld Community and Others - 2003 (12) BCLR 1301 (CC)

The third and last judgment in this case was that of the Constitutional Court of South Africa, before which Alexkor and the South African government lodged an appeal against the decision by the Supreme Court of Appeal (SCA).

Ruling and reasoning of the Constitutional Court

The Constitutional Court ruled in favor of the Richtersveld community, thereby confirming the decision made by the SCA. Its ruling was based on a number of arguments related to the nature of the rights in land of the Richtersveld Community prior to annexation in 1847 and up to 1913, the characteristics of indigenous law and whether the rights of the Community had been extinguished after 1913 and on what grounds.

The Constitutional Court asserted that

663 Ibid., at para. 111.

The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights [n.: compare *Oyekan & Others v. Adele* [1957] 2 All ER 785 at 788G-H]. *Those rights cannot be determined by reference to common law. …*

…

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution [n.: see, for example, *Pharmaceutical Manufacturers Association of South Africa and Another in re Ex Parte the President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 29]. *Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights* [n.: Section 39(2) of the Constitution]. *…*

…

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.[664]

Dealing with the characteristics of indigenous law, the court pointed out that,

… [I]ndigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life … [n.: See *Ex Parte Chairperson of the Constitutional Assembly : In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC)]

In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. …

…

… [W]e would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.[665]

The court also remarked that

664 *Alexkor Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others*, 2003 (12) BCLR 1301 (CC), paras. 50 and 51.

665 Ibid., at paras. 52, 53 and 54.

> *[T]he dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions.*
> *…*
> *The determination of the real character of indigenous title to land therefore "involves the study of the history of a particular community and its usages".*[666]

As for the rights of the Richtersveld community prior to annexation in 1847 by the British Crown, the court concluded:

> *In the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.*
> *….*
> *We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. … Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.*[667]

Regarding the legal consequences of the annexation of the subject land in 1847, pursuant to the Annexation Proclamation, the court ruled that,

> *In our view there is nothing either in the events preceding the annexation of Richtersveld or in the language of the Proclamation which suggests that annexation extinguished the land rights of the Richtersveld Community.*
> *…*
> *The SCA adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and [we endorse the SCA's conclusion] that the rights of the Richtersveld Community survived annexation.*[668]
> *… [T]he applicable law in the Cape Colony at the time of annexation respected and protected land rights of the indigenous people. No act of State or legislation extinguished the*

666 Ibid., at paras. 56 and 57. The quote is from *Amodu Tijani v. Secretary,* Southern Provinces, Nigeria [1921] 2 AC 399 (PC).
667 *Alexkor Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others*,2003 (12) BCLR 1301 (CC), at paras. 62 and 64.
668 Ibid., at paras. 68 and 69.

> *land rights of the Richtersveld Community subsequent to annexation but before 19 June 1913. The Crown Lands Acts* [of 1860 and 1887] *relied upon by Alexkor did not have that effect.*[669]

After having reached the conclusion that "*the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld Community possessed in the subject land and that such right was not extinguished prior to 19 June 1913*",[670] the court looked at the steps taken by the state after 19 June 1913:

> *The position of the Richtersveld Community began to change from 1926 onwards with the discovery of diamonds on the subject land. It was common cause that, if the Richtersveld Community's rights survived beyond 1913, it was ultimately dispossessed of the land by the end of 1993.*
>
> *…*
>
> *The Precious Stones Act did not recognise the rights of those, like the Richtersveld Community, who were at the time the owners of land under indigenous law. This was because their rights had not been registered. … The effect of this Act was that all occupants of the land except those who were registered surface owners, or those who occupied at the instance of the surface owners, lost their right to occupy and exploit the land.*
>
> *This law in effect rendered the occupation of the subject land by the Richtersveld Community unlawful and dispossessed it of the rights it had as owner of the land. …*
>
> *The evidence shows that the State subsequently treated the subject land as its own, required the Community to leave it, exploited it for its own account and later transferred it to Alexkor. All this happened after 1913 and effectively dispossessed the Community of all its rights in the subject land. These rights included the right to occupy and exploit the subject land, including its minerals.*[671]

The court finally resumed its arguments by declaring that it "*found that the Richtersveld Community held ownership of the subject land under indigenous law, which included the rights to minerals and precious stones*"[672] and making the following order that,

> *… [S]ubject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.*[673]

669 Ibid., at para. 76.
670 Ibid., at para. 82.
671 Ibid., at paras. 83, 89, 90, and 91.
672 Ibid., at para. 102.
673 Ibid., at para. 103 (a).

Concluding observations and results/impact of the court cases

1. Like many other African courts, the Land Claims Court grounded its whole reasoning on national laws and paid no consideration to customs and traditions that tend to govern land tenure systems in most African rural areas. It consequently concluded that since the disputed lands were formally annexed by the government, communities lost all rights in it.
2. The Supreme Court of Appeal (SCA) took a rather different reasoning approach by going beyond national laws to find references in contemporary international jurisprudence. Citing cases such as *Mabo v. The State of Queensland* and *Delgamuukw v. British Columbia,* the court argued that "*a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people.*"[674] The court noted further the importance of witnesses' accounts and presentations by multi-disciplinary researchers:

   > *Evidence was given by three anthropologists and an archeologist for the appellant concerning the history of the appellant communities, the land they and their forebears occupied and their traditional laws, customs and practices forming part of their distinctive aboriginal culture".*[675]

3. The Constitutional Court of South Africa made in fact a landmark decision that will, for a long time to come, have a major impact on the legal protection of indigenous peoples' right to lands.[676] By itself, this judgment contains most of what one could advise a lawyer of an indigenous community to take as legal arguments.
4. In its first lines of argument, the Constitutional Court states for the primacy of indigenous law over written common law and indicates that the validity of the former should not be dependant of its compliance with the latter.[677] Once this was done, the rest of the argument followed logically. The "*Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system*", the court argued. The court underlined further major particularities of indigenous law, including its dynamism and its links with culture, stressing that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses, if necessary.[678]
5. The Constitutional Court did not distinguish lands rights from mineral rights, like several African legislations and judges have done. According to the court, "*under the indigenous law of the Richtersveld Community, communal ownership of the land included communal own-*

674 *Richtersveld Community and Others v. Alexkor and Another*, 2003 (6) BCLR 583 (SCA), para. 23.

675 Ibid., at para. 12.

676 T. M. Chan, "The Richtersveld Challenge: South Africa Finally Adopts Aboriginal Title", in *Indigenous Peoples' Rights in Southern Africa,* edited by Robert K. Hitchcock and Diana Vinding, IWGIA Document No.110 (Copenhagen: IWGIA, 2004), p. 129.

677 See *Alexkor Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others*, 2003 (12) BCLR 1301 (CC), para. 50.

678 See ibid., at para. 54.

ership of the minerals and precious stones".[679] This is an extremely important statement that could have a major positive impact on indigenous peoples' right to lands throughout Africa.

6. The court meets also one of this book's points, namely that change in sovereignty does not *per se* extinguish pre existing property rights. As stated by the Constitutional Court,

   [The SCA] found that the majority of colonial decisions favoured an approach that a mere change in sovereignty is not meant to disturb the rights of private owners … The SCA adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation. [The Constitutional Court] endorses that conclusion.[680]

7. Finally, the Constitutional Court, like the Supreme Court of Appeal, did refer widely to relevant foreign cases, which helped to bring into its reasoning a number of contemporary principles, such as the notion of "aboriginal title". This case could indeed be considered as the first one on the African continent to uphold explicitly the notion of "aboriginal title", which can no longer be considered as alien to Africa. What impact this ruling will have on other African judges is what remains to be seen.

The Richtersveld community after the Constitutional Court's decision

The Richtersveld community's struggle did not end with this landmark decision. Ahead laid several years of further court cases and hard negotiations with the government and Aleksor regarding the restitution package.

While the community's legitimate claim to the land had been confirmed, the issue regarding the scope and nature of restitution was still to be determined by the Land Claims Court (LCC). A first court case—*Richtersveld Community v. Alexkor Ltd. and Government of South Africa*, Case No.151/98 (LCC)—was settled in April 2004,[681] when the LCC decided that the Richtersveld community was to "receive both restoration and compensation in satisfaction of its claim for restitution" and that the state was to "repair the damage to the land [as a result of past mining activities], insofar as it is feasible to do so and to pay compensation for it insofar as it is not".

Subsequently, attempts were made between the community and the government to reach an out-of-court settlement on the level of compensation but no agreement could be made because of disagreement on valuations. In November 2005, the prospect of lengthy and costly legal proceedings prompted the Richtersveld community and its legal advisers—the Legal Resource Centre, LRC—to file yet another case in the LCC against the Government, the Chief Land Claims Commissioner, the Legal Aid Board and Alexkor Ltd seeking an order that legal aid be provided so the Applicant (i.e., the Richtersveld community characterized "as a very poor community that cannot

679 Ibid., at para. 64.

680 Ibid., at para. 69.

681 The case was heard at Cape Town on 1 April 2004 before Gildenhuys AJ and Wiechers (assessor) and decided on 29 April 2004. See at http://www.saflii.org/za/cases/ZALCC/2004/9.pdf

afford, from their own resources, to employ lawyers or other advisors") would have "effective access to court" as guaranteed by the South African Constitution (sect. 34) as well as "expert services" and "effective representation in the Land Claim Court".[682]

On 11 November, the LCC issued an order based on an agreement between the parties, by which the Chief Land Claims Commissioner "will in terms of Section 29 (4) of the Restitution of Land Rights Act 22 of 1994 exercise his discretion and make available such funds as are necessary to enable the Applicant to prosecute its claim under Case no 151/98, subject to the conditions set out herein".[683]

After months of court hearings and negotiations a Deed of Settlement was finally signed in April 2007 by Public Enterprises Minister Alec Erwin and community representatives, restoring to the community 84,000 hectares of land and the mineral rights to that land. It also provided a R190 million payment to compensate for the diamonds removed by Alexkor Ltd and the transfer of 49 per cent of the Alexkor shares to the community now known as Richtersveld Sida !hub Communal Property Association (CPA).[684] The settlement also included the establishment of a joint mining venture between the CPA and Alexkor, known as the Pooling Sharing Joint Venture (PSJV).

The South African cabinet approved the agreement on 8 August 2007 and in October 2007 —or four years after the Constitutional Court's decision—a LCC order formally confirmed the agreement to be valid and binding.[685]

Some stakeholders, however, saw the Deed of Settlement as a major compromise from what had originally been claimed from Alexkor and government.[686] This was notably the case of the Legal Resource Centre—since 1998 a close partner of the Richtersveld community who had provided pro bono legal advice and representation throughout the entire land claim struggle. The secretive and unexpected manner in which the signing of the Deed took place led to the LRC resolving in

682 Before going to court, the applicant had in vain requested an amount of R5,428,463 first from the Legal Aid Board and then from the Chief Land Claims Commissioner, contending that government and Aleksor Ltd. were using public money to pay for their legal proceedings. See *Richtersveld Community v. the Government of the Republic of South Africa, the Chief Land Claims Commissioner, the Legal Aid Board and Alexkor Ltd,* 2005, Case No. 63/05 (LCC), § 6, 7, 8 and 22 at http://www.lrc.org.za/Docs/Judgments/LC-Richtersveld-Heads.pdf

683 See *Richtersveld Community v. the Government of the Republic of South Africa, the Chief Land Claims Commissioner, the Legal Aid Board and Alexkor Ltd,* 2005, Case No. 63/2005 (LCC), Order of Court 11 November 2005. At, http://www.lrc.org.za/Docs/Judgments/LC-Richtersveld.doc

684 The state, previously the sole shareholder in the mines, would keep a controlling stake of 51 per cent, setting the platform for a recapitalisation of the mine, which had to embark on urgent exploration to open up new mining areas. See *Mining Weekly*, "LRC chose to stop Richtersveld Representation – Community", 18th May 2007. http://www.miningweekly.com/article/lrc-chose-to-stop-richtersveld-representation-community-2007-05-18

685 *Settlement Agreement, Land Claims Court Order of 12 October 2007*, Case No. 151/1998. See Terance Fife, "Richtersveld Restitution Implementation Challenges". Paper presented at the Conference on 'Land Divided: Land and South African Society in 2013, in Comparative Perspective', University of Cape Town, 24 – 27 March 2013, p. 1. At http://www.landdivided2013.org.za/sites/default/files/Fife%20Richtersveld%20Restitution%20Challanges%20LAND%20Conf%20%202013.pdf

686 The land claim had been for: 1) More than R1.5bn for the loss of income from diamond mining; 2) Repairs of the environmental damage caused by mining to the value of R1.067bn; 3) A solatium of R10 for the dispossession which took place; and 4) Restoration of the right to ownership of the mining area stretching from Port Nolloth to Alexander Bay. See Fife, op.cit. (2013), p. 2.

May 2007 that it would not involve itself with the Richtersveld CPA for the next five years.[687] In September 2007, an "action committee" was organized by opposing groups from the Richtersveld community, seeking to block the LCC's formal confirmation of the Settlement Agreement.

It is also interesting to note that during the process, the claim changed from being an indigenous Nama claim to being recognised as a community claim shared by not only the original Nama inhabitants but also by the Bosluis Basters, who had moved into the area in 1949.[688]

The Court Order not only confirmed the extent of properties to be transferred to the claimants and the monetary value of financial compensation. It also set up the framework for the Pooling Sharing Joint Venture between Alexkor and the Richtersveld claimants as well as the Companies and Trusts to be created to implement the Deed of Settlement.[689]

The current status of the Restitution Award shows that most properties have been transferred to the community and most of the financial compensation has been paid, including R190,000,000 in extraordinary reparation (in three instalments) and R50,000,000 for the recapitalization of the agricultural and maricultural enterprises. Interests earned from these funds have been used for two rounds of dividend payments to the 3,100 members of the Richtersveld Sida !hub CPA, each receiving a total amount of R4,500 in direct financial benefit.

The Restitution Settlement Agreement as outlined by the Court Order has been implemented by the CPA leadership and their nominated attorneys – Bisset Boehmke McBlain. This has included forming eight entities grouped in two sets of organizational structures (the Community Trust Structure and the Investment Trust Structure), establishing the various entity boards,[690] nominating and electing Community and Independent Directors and Trustees, securing office space and furniture, coordinating meetings and processes, and preparing for the transfer of assets from Alexkor and government. An enormous undertaking which as pointed out by Terance Fife, has resulted in "a complex web of business".

The Court Order also called for a development plan which "shall not be binding but shall be taken into account by the CPA and the other entities … when they take planning, development and land-use decisions". After an extensive research and planning process at the village and committee level in 2009 and 2010, a comprehensive development plan was finally produced. It is worth noting one of the main conclusion of the research process:

> Sida !hub [CPA] is vulnerable and wounded by the legacy of its political and economic history, its isolation, harsh climate and the struggles to overcome and survive. The result is that the community and its leadership have lost faith, trust, leadership, structures, policies

687 See article in *Mining Weekly* 2007-05-18, at http://www.miningweekly.com/article/lrc-chose-to-stop-richtersveld-representation-community-2007-05-18

688 Ibid. The Basters are the descendants of Cape Colony Dutch and indigenous African women.

689 See Fife, "Richtersveld Restitution", op. cit. (2013), pp.9-10.

690 These entities include (i) Richtersveld Investment Trust; (ii) Richtersveld Community Trust; (iii) Richtersveld Investment Holding Company; (iv) Richtersveld Self-Development Company; (v) Richtersveld Agricultural Holding Company (which had four subsidiary companies – fodder, ostriches, citrus and mariculture); (vi) Richtersveld Property Company; (vii) Richtersveld Mining Company; and (viii) Richtersveld Environmental Rehabilitation Company. See Fife, "Richtersveld Restitution" (2013), p. 8.

> and capacity / or never built capacity to tackle social, educational and economic development. Sida !hub is not ready for development.[691]

The research further notes that events and realities in the political, economic, cultural and environmental field have had a lasting effect on behaviour, worldview, beliefs and relationships within the community and may negatively affect the implementation processes related to the Deed of Settlement:

> The one issue that has impacted most negatively on relationships in the Richtersveld in the recent history is the Land Claim against Alexkor. Throughout the long legal battle, the community and its leaders were united, but this changed dramatically when the leaders negotiated a settlement with the defendants (the State and Alexkor). The depth and nature of the wounds resulting from this "Settlement" cannot be underestimated. As the practical implications of some of the clauses and conditions in the Settlement become clear, new reasons for accusations and conflict emerge.[692]

These findings and insights have proven to be right. CPA has indeed been marred by numerous conflicts. There have been court cases between the CPA Committee and the community members, and allegations' relating to fraud, nepotism, incompetence, and conflict of interest, are regularly directed at leadership figures within the Committee. Since 2011, there have also been disputes and conflicts within the Committee itself. There is a mounting criticism and dissatisfaction with the Settlement Agreement—which is now increasingly seen as a politically driven process wherein former minister of Public Enterprises, Alec Irwin, led negotiations as a means to restructure Alexkor, and resolve the land claim in one swoop.

As stressed by Fife, if the Richtersveld community has to take on the very complex settlement agreement, and attain a more meaningful community, social, economic and political development, there has to be a process of community healing, and the government and other stakeholders must re-commit to working with the CPA and the other entities to ensure that governance is improved and capability built.[693]

The San of Botswana and the Central Kalahari Game Reserve case

The San (formerly known as Bushmen) are indigenous to Southern Africa and live in several countries in the region. The African Commission on Human and Peoples' Rights estimates their number

691 Development Plan, Volume 1, p. 32, quoted by Fife,b op.cit.. p. 6.
692 Development Plan, Vol 3, p. 18, quoted by Fife, op.cit. , pp. 6-7.
693 See Fife, op.cit., p. 37-38.

at approximately 107,000 people with a majority of about 50 per cent living in Botswana.[694] San in Botswana are commonly called Basarwa or Remote Area Dwellers.[695]

The central Kalahari Desert is known to be part of the ancestral lands of the San of Botswana. In 1961, the British colonial regime set up the Central Kalahari Game Reserve (CKGR) "with the aim of not only nature conservation but also of protecting the rights of the 5,000 or so people (mostly San) living within its 52,347 sq-km who wanted to maintain hunting and gathering as part of their lifestyle".[696]

This is one of Africa's most remote, unspoiled wilderness areas, well known for its lions and a variety of wildlife. It is also known to have diamond deposits.

In 1997, the government of Botswana started moving the San out of the CKGR to new settlements such as New !Xade and Kaudwane. But until 2002, some few hundred San continued to live inside the Reserve, seen as their ancestral residential place and recognized as such by section 14(3)c of the 1966 Constitution of Botswana, which stated that restriction may be imposed "*on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen*".[697]

*Sesana and Others v. The Attorney General (*52/2002) [2006] BWHC 1 (13 December 2006). Also known as the Central Kalahari Game Reserve (CKGR) case

Background facts and claimants' arguments

On 31 January 2002, the Botswana government ceased the basic and essential services that it used to provide to the CKGR residents (San and Bakghaladi)[698] still living inside the CKGR. These services were: 1) the provision of drinking water on a weekly basis; 2) the maintenance of the supply of borehole water;[699] 3) the provision of rations for registered destitutes; 4) the provision of rations for registered orphans; 5) the provision of transport for the residents' children to and from boarding school;[700] 6) the provision of healthcare through mobile clinics and ambulance services.

694 African Commission, *Report of Working Group of Experts* (2005), p.16.

695 The terms Bushmen and Basarwa are generally considered to be derogatory and will therefore in this section only be used when reference is made to official documents.

696 Michael Taylor, "The Past and Future of San Land Rights in Botswana", in *Indigenous Peoples' Rights in Southern Africa,* edited by Robert K. Hitchcock and Diana Vinding, IWGIA Document No. 110 (Copenhagen: IWGIA, 2004), p. 152.

697 This subsection (3)c was deleted from Section 14 by the Constitutional (Amendment) Act of 2005 which also amended the sections 77, 78 and 79 of the Constitution in order to render the Constitution "tribally neutral".

698 These Bakgalagadi belong to another ethnic group but have been living in the CKGR for several generations and their livestyle is today very similar to that of the San.

699 There was only one borehole with potable water in the CKGR. The San were not allowed to make their own boreholes but had to store the water delivered by the Department of Wildlife and National Parks in large tanks. In 2002, the authorities destroyed the tanks and sealed off the borehole with cement.

700 Transport was provided at the beginning of the school term and at the end, respectively.

This decision was taken by the government despite previous and ongoing negotiations between the government's Department of Wildlife and National Parks (DWNP) and the San regarding sustainable and fair management of the resources in the area on the basis of their continued residence in the CKGR.

In February 2002, 243 San and Bakgalagadi applicants brought a court case before the High Court, claiming that,

1. The termination by the government with effect from 31 January 2002 of the following basic and essential services to the Applicants in Central Kalahari Game Reserve (CKGR) is unlawful and unconstitutional [follows a list of the services, see above];
2. The Government is obliged to
   a. Restore ... the basic and essential services that it terminated with effect from 31 January 2002;
   b. Continue to provide to the Applicants the basic and essential services that it had been providing to them immediately prior to the termination of the provision of these services; and
   c. Restore land to the possession of those Applicants, whom the government forcibly removed from the Central Kalahari Game Reserve (CKGR) after the termination of the provision to them of the basic and essential services referred to above, and who have been unlawfully despoiled of their possession of the land which they lawfully occupied in their settlements in the CKGR.[701]

At first, the application was dismissed on technical grounds. This decision was appealed and, in July 2002, the Court of Appeal took the view that the parties should first formulate and agree on the issues to be dealt with. In early 2003, the Court of Appeal observed that there were material disputes of facts and that such disputes could only be resolved by the hearing of oral evidence. The Court of Appeal made a Consent Order, which essentially turned the relief sought by the Applicants into questions for consideration and answering by the High Court.[702]

Defendants' core legal points

The defendant or respondent (the Government of Botswana) maintained that it had been justified in terminating the services as they were too expensive to maintain on a long term basis; that they never were meant to be permanent; and that the residents of the settlements in the CKGR had repeatedly been consulted before the services were terminated. The respondent also denied that the applicants were forcibly or wrongly deprived of the land they occupied in the CKGR on the grounds that the CKGR is state land and the settlements were situated on state lands. Conse-

701 *Sesana and Others v. The Attorney General (*52/2002) [2006] BWHC 1, per Dibotelo, para. 1. Roy Sesana has, for many years, been the chairperson of the San organization, First People of the Kalahari (FPK).

702 Ibid., at para. 3.

quently, argued the defendants, the applicants had neither ownership nor right of tenancy to the CKGR. To the question of whether the applicants lawfully occupied the land in their settlements in the CKGR before the 2002 relocations, the government argued that the occupation by the applicants of the land in the settlements in the CKGR was unlawful because the CKGR is owned by the government. Finally, the respondents also maintained that human residence within the reserve posed disturbance to the wildlife there and was contradictory to the policy of total preservation of wildlife.

Ruling and reasoning of the court

The trial commenced in July 2004. Prior to the first hearings, the judges had conducted an inspection *in loco* of the new settlements of Kaudwane and New !Xade outside the CKGR, and of the settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Old !Xade inside the CKGR. The final judgment was given on 13 December 2006, after 130 days of trial spread over a period of just over two years.

The questions for consideration and answering by the High Court were the following.

1. whether the termination with effect from 31 January 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and unconstitutional.
2. whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve;
3. whether subsequent to 31 January 2002 the Appellants were:
    a. in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve;
    b. deprived of such possession by the Government forcibly or wrongly and without their consent
4. whether the Government's refusal to:
    a. issue special game licences to the Appellants;
    b. allow the Appellants to enter into the Central Kalahari Game Reserve unless they are issued with a permit is unlawful and unconstitutional.

The case was presided over by a panel of three judges—Chief Justice Maruping Dibotelo, Justice Unity Dow and Justice M. P. Phumaphi. In a non unanimous judgment, the court ruled that:

1. *The termination in 2002 by the Government of the provision of basic and essential services to the Applicants in the CKGR was neither unlawful nor unconstitutional.* (Dow J dissenting).
2. *The Government is not obliged to restore the provision of such services to the Applicants in the CKGR.* (Dow J dissenting).

3. *Prior to 31 January 2002, the Applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR.* (Unanimous decision).
4. *The Applicants were deprived of such possession by the Government forcibly or wrongly and without their consent.* (Dibotelo J dissenting).
5. *The Government's refusal to issue special game licenses to the Applicants is unlawful.* (Unanimous decision).
6. *The Government's refusal to issue special game licenses to the Applicants is unconstitutional.* (Dibotelo dissenting).
7. *The Government's refusal to allow the Applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional.* (Dibotelo dissenting).[703]

As mentioned by Justice Dow, it was a judgment one to three and each Justice therefore delivered in open court a full stand-alone judgment in order to substantiate their positions.

Chief Justice Maruping Dibotelo's line of reasoning was "traditional" and based on Botswana jurisprudence; he concluded in favour of the respondents in five (5) out of seven (7) rulings. The two other judges—Justice Dow and Justice Phumaphi—on the other hand, took a more "modern" stance.

This was especially the case of Justice Unity Dow whose approach differed significantly from that of her two colleagues. She began thus by stating that she held the position "*that while each of the various questions could very well be answered as stand-alone questions, there is significant inter-play and inter-connectedness between the questions, making such an approach too narrow and too simplistic*." She said, for instance, that,

> *While the termination of services may, by itself, not raise constitutional questions, the consequence of such termination may well do. If, for example, it is found that the termination of services had the consequence of forcing the Applicants out of the Reserve, then the termination would necessarily raise such constitutional questions, as for example, the right to movement. And in view of the acceptance by the parties that the services were basic and essential, their termination, if that is found to have been unlawful, will necessarily raise the constitutional question of whether the right to life has been abridged"*[704]*.*

For Dow, the question of relocation was therefore the core issue and the first to be dealt with. Having once ruled the relocation to be unlawful and unconstitutional, the logical consequence was that the other actions taken by the Botswana government were unlawful and unconstitutional. Accordingly, her ruling was in favour of the applicants on all seven questions.

Justice Dow also found "*that the fact the Applicants belong to a class of peoples that have now come to be recognised as 'indigenous peoples' is of relevance*" and referred to the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), which Botswana has ratified, and to

703 Ibid., per Dibotelo, at para. 55.
704 Ibid., per Dow, at para. H.1. b.

its Committee's Recommendation XXIII on indigenous peoples' equal rights.[705] She also pointed out that "*the current wisdom, which should inform all policy and direction in dealing with indigenous peoples, is the recognition of their special relationship to their land*",[706] and referred to Martínez Cobo's statement regarding indigenous peoples' special relationship to their land.

As for Justice Phumaphi, his overall approach was similar to that of Chief Justice Dibotelo, with whom he sided on the two issues related to service delivery. On the other issues, however—including issue 4 on whether the applicants were deprived of their land by the government forcibly or wrongly and without their consent—he ruled in favour of the applicants, and just like Justice Dow, used the term "indigenous" when referring to the San. He also based his arguments on international jurisprudence, making substantial quotes from the Australian *Mabo* case to sustain his view that the San had had "native titles" that had been extinguished neither by the Proclamation on Crown Lands (1910) nor by the creation of the Game Reserve, nor by the 1966 Constitution of Botswana.[707]

On the question of whether the applicants were consulted before the termination of basic services by the government, both Chief Justice Dibotelo and Justice Phumaphi found that the legal concept of "legitimate expectation" (of continued service delivery) was not applicable and that witness evidence showed that the applicants had been duly consulted.[708] For these same reasons, both Justices ruled "*that the Government is not obliged to restore the provision of services*". Justice Dow, who gave a dissenting ruling, held that since "*the termination of basic and essential services was intended to force relocation*"[709] her assessment of that relocation being "*forced, wrongful and without consent applies to this issue as well.*" Regarding whether the termination was constitutional or not, she concluded that "*the right to life is a constitutional right and the termination of essential services was in essence, a breaching of that right*", since it endangered life.[710]

To the question of whether the applicants were in legal possession of the disputed land before the settlements of 2002, the response was affirmative and unanimous.[711] The same was the case with the answer to the question "whether the Applicants lawfully occupied the land in their settlements in the CKGR before the 2002 relocations". Chief Justice Dibotelo answered:

> *I do not agree that the occupation of land in the settlements in the CKGR by the Applicants was unlawful even though the CKGR is state land and is owned by the Government, the fact of it being state land having been conceded by the Applicants as I stated earlier. I take the view that the occupation of this state land by the Applicants was lawful for the simple reason that their occupation had not been lawfully terminated by the Government; and*

705 CERD (Committee on the Elimination of All Forms of Racial Discrimination), General Comment XXIII, U.N. Doc A/52/18, Annex V, at para. 4 (d). The General Comment requires of States Parties to: "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".

706 *Sesana and Others v. the Attorney General,* per Dow, at para.H.1.f.

707 Ibid., per Phumaphi, at para. 92.

708 Ibid., per Dibotelo, at paras 28-29 and 31-33; per Phumaphi, at paras. 41-42 and 48-49.

709 Ibid., per Dow, at paras H.12 and H.13.

710 Ibid., per Dow, at para. H.12.4.

711 Ibid., per Dibotelo, at para. 38.

> *until such occupation was lawfully terminated by the owner of the CKGR, it could not be successfully contended in my view that the Applicants occupied the land in their settlements unlawfully. As this was state land, the Applicants occupied it at the sufferance or passive consent of the Government but that did not and could not mean in my judgment that their occupation of that land was unlawful, especially when regard is had to the fact that both the British Government and its successor in title, i.e., the Botswana Government, allowed or permitted the Applicants to remain on and use that land over many years. For the avoidance of doubt, therefore, I find as a fact that the occupation of the land in the settlements by the Applicants in the CKGR was lawful.*[712]

Although the ruling on this issue was unanimous, Dow and Phumaphi based their reasoning on slightly different premises, namely the fact that the Applicants were indigenous to the area and had lived in the CKGR prior to it becoming Crown Land, and had remained on the land when it became a game reserve and then state land upon Botswana attaining independence. In a line of argumentation very similar to that used in the Richtersveld case, Justice Phumaphi concluded "*that their 'native rights' had not been extinguished neither by the Proclamation in 1910 on Crown Lands, nor the creation of the game reserve*" and quoted the *Mabo* case as relevant to the case.[713]

Regarding the relocation process, however, Chief Justice Dibotelo was alone in finding that the applicants had not been deprived of their land by the government forcibly or wrongly and without their content, and stated: "*the termination of the provision of services was never a reason or ground for their relocation, otherwise their witnesses would have said so in their evidence*".[714] He further contended that

> *I have already found … ample evidence from both the Applicants and Respondent which proves that the Applicants were consulted and even told that the provision of services to them in their settlements was temporary before the decision to terminate the provision of those services was made by the Government, and that as a result, the termination of the provision of those services by the Government was lawful. Arising from those findings it cannot, in my view, be successfully contended that the Applicants were forcibly or wrongly deprived of possession of the land they occupied in their settlements in the CKGR by the Government*".[715]

Both Justice Dow and Justice Phumaphi based their affirmative ruling on whether relocation had been wrong and without the consent of the relocatees on a critical review of the circumstances and processes of the 2002 relocation and on the evidence given by witnesses to the applicants. Justice Dow saw a crucial factor in the fact that the government had been ambiguous and unclear in its policy prior to January 2002, thereby adding to the confusion among the CKGR residents as to the government's intentions. She also held that the respondent had failed to take into consideration

712 Ibid., per Dibotelo, at para. 40.
713 Ibid., per Phumaphi, at para. 69-82.
714 Ibid., per Dibotelo, at para. 45.
715 Ibid., per Dibotelo, at para. 47.

how relocation might disrupt the culture of the applicants and threatened their very survival as a people. Once the respondent executed its decision,

> [*I*]*t failed to appreciate the importance of the fact that the Applicants lived in families, compounds and small settlements … [were] linked together by blood, marriage, mutual-cooperation and general inter-dependence. And true consent by any one to relocate could hardly be obtained unless the family, the compound and in some instances the whole settlement was taken as a unit*.

Justice Dow also considered that the respondent should also have taken into consideration the relative powerlessness of the applicants and provided culturally appropriate consultations:

> *The average non-politicised Applicant, illiterate, dependant upon Government services, without political representation at the high political level, was hardly in a position to give genuine consent. It was the Respondent's obligation to put in place mechanisms that promoted and facilitated true and genuine consent by individuals, families and communities.*[716]

In relation to hunting rights, Chief Justice Dibotelo and his two colleagues agreed that the refusal to issue special game licenses was unlawful: the Director (of the DWNP) had acted outside the powers granted to him by law and the applicants had not had an opportunity to be heard before his decision. However, the Chief Justice did not find that the government's refusal to issue such licenses was unconstitutional,[717] nor did he find the refusal to allow the Applicants to enter the CKGR unless they have been issued with a permit unlawful and unconstitutional since he considered that "*the receipt of compensation in the form of money as well as new plots in the settlements outside the CKGR was in replacement of the rights of the Applicants to occupy and possess land in the settlements inside the Reserve*".[718] Dow's standpoint, on the other hand, was that

> *[A]ny rights that were lost as a result [of the relocation] were lost wrongfully and unlawfully. Any attempt to regulate the enjoyment of those rights by permits, when such permits were not, prior to the 2002 relocations, a feature of the enjoyment of such rights, is an unlawful curtailment of the right of movement of the Applicants. It is unlawful and unconstitutional*.[719]

Concluding observations and results/impact of the court case

1. This case reveals the importance of constitutional recognition or protection of indigenous peoples' rights. The fact that the Botswana Constitution of 1966 provided for a special

716 Ibid., per Dow, at para. H.9.
717 Ibid., per Dibotelo, at para. 51.
718 Ibid., per Dibotelo, at para. 53.
719 Ibid., per Dow, at para. H.21(17-18).

treatment on behalf of the San emerged as critical to the case. This is also believed to be the reason for the amendment of the Constitution in 2005 and the repeal of its section 14 (3)c.

2. A similarity this case has with others in this volume is the use of delay-tactics. In this instance, it took almost four years before a decision was reached. The court recessed several times, at times because money had run out for the San, but also because technicalities were invoked, expert witnesses gave lengthy and technical evidence that was "*by and large, a waste of time*",[720] or because the witnesses of the applicants were "cross-examined" at exaggerated length by the respondent's representative.
3. This is a case where international campaigning actions were combined with legal action and the former seemed to accelerate the latter. International and national NGOs such as Survival International and the Botswana Centre for Human Rights, DITSHWANELO, undertook a number of campaigning activities on this case while the court hearings were being held.
4. Conducting an inspection *in loco* proved also highly recommendable since it brought the judges closer to the realities and conditions of life of the concerned indigenous people, both in the CKGR settlements from where people had been relocated and in the new settlements outside the CKGR where they now live.
5. The use of a large number of witnesses for the applicants, who were themselves victims of relocation, seemed also to help and is recommendable. The four hundred pages judgment reveals the extent to which witnesses' accounts were used by the three judges.
6. This case is also a good illustration of a successful collective representative suit, which is the ideal option when the capacities are there and the concerned indigenous community is fully aware of the implications. The government of Botswana, however, has subsequently taken the position that only the listed applicants have the right to return to the CKGR, thus disregarding the rights of former CKGR residents in general.
7. It is interesting to note that the applicants made clear that "*their legal claim is not to ownership, but to a right to use and occupy the land they have long occupied, unless and until that right is taken from them by constitutionally permissible means"*. It is difficult to understand why the San decided not to claim ownership. Was it because such right could have been difficult to prove? Or was it because the right of use and occupation is broad enough to accommodate their livelihood? The judgment and the case's proceedings do not provide us with a clear answer to these questions, which could inspire strategic legal choices by other indigenous communities.
8. The fact that a state is declared sole owner of all lands should not prevent indigenous communities from initiating legal actions for protection of their right to use and occupation of what they believe are their ancestral lands. This case reveals that a court can declare a state sole owner of a land and at the same time rule in favor of the right to use and occupation by an indigenous community. This case demonstrates also that being owner of a land does not automatically give a state the right to expel at will indigenous communities from it.

720 Ibid., per Dow, at para. F. 2.

9. The San's lawyers referred widely to international law and jurisprudence such as the Australian *Mabo* case, and this seemed to pay off.
10. Like the South African Constitutional Court judge did, Judge Phumaphi relied on the principle that pre-existing rights were not extinguished following the change in sovereignty. He contended that the immemorial occupation of the disputed land by the San, as confirmed by many historical accounts, amounted to ownership under customary law. Quoting substantially the ruling in the *Mabo* case, he concluded that "*the Bushmen are indigenous to the CKGR which means that they were in the CKGR prior to it becoming Crown Land*"[721] and that:

    The reasoning of the Australian Court is quite persuasive, but this Court would not readily endorse any action taken by the State to extinguish the "native rights" of citizens, unless it is done in accordance with the Constitution of the Republic of Botswana. I have earlier said the evidence indicates that the Bushmen were in the area now known as the CKGR prior to 1910, when the Ghanzi Crown land which included the CKGR was proclaimed. It therefore follows that they must have claimed "native rights" to land, which has since become the CKGR, as they keep referring to it in their evidence as "their land", like many other inhabitants of the then Bechuanaland, who claimed rights to the land they occupied …

    …

    The rights of the Bushmen in the CKGR were not affected by the proclamation of the land they occupied to be Crown land, as they continued to live on it, and exploit it without interference from the British Government.[722]
11. This case reveals the positive input that each judge's separate legal opinion supporting or dissenting from the majority decision can have. Lawyers of indigenous communities could consider persuading judges to express dissenting opinions depending on the circumstances.
12. This case also highlights the problem of the implementation of judgments. The High Court made its decision on 13 December 2006, but three years later not much has been done in terms of implementing the court's ruling.[723] San continue nevertheless to move back into the CKGR although they risk being stopped and harassed by guards from the Department of Wildlife and National Parks.

Latest developments in the CKGR

Today, now more than six years later, the remarks made above remain true: the implementation of the Court's rulings is still lagging behind and more than 500 San have moved back into the CKGR.

One of the Court's rulings declared that the government's refusal to allow the San into the CKGR without a permit was unconstitutional. The government, however, holds on to its position

721 Ibid., per Phumaphi, at para. 67.

722 Ibid., per Phumaphi, at paras. 79-81.

723 See Survival International: http://www.survival-international.org/tribes/bushmen for up-dates.

that the ruling applies only to the 189 San named in the original court papers and refuses to allow the others to enter the reserve without a permit. Permits are temporary and the San risk arrest if they "overstay".[724] This has not deterred the San from continuing to move back into the CKGR and today it is estimated that some 500 have returned and settled in six of their old communities.[725] In March 2013, the San decided to take the government to court for illegally refusing them access to their ancestral land in the Central Kalahari Game Reserve (CKGR).

Another of the Court's ruling was that government's refusal to issue special game licenses to the Applicants was both un-lawful and un-constitutional. Yet, the CKGR residents have not been granted any licenses for the past six years, even though they have made formal applications to the minister of Environment, Wildlife, and Tourism.[726]

The CKGR residents have instead been increasingly met with accusations of illegal hunting. In May 2012, a Special Support Group from the Botswana Police was deployed at Metseamonong in the CKGR in order to control "the situation" and spent time searching people and arresting them. By the end of the year, over 20 people, some of them children, had been arrested in the CKGR and in the nearby resettlement sites of New !Xade and Kaudwane. There were allegations of mistreatment, torture, and brutalization of people who were suspected of having illegal wildlife products. Some of these individuals were later brought up on trial and were charged substantial fines.[727]

Government has also tried to make life difficult for the residents by denying them access to water. Up to 2011, it thus prohibited the re-opening of the Mothomelo borehole—sealed off with cement in 2002 when the evictions took place—as well as the drilling of new wells elsewhere in the CKGR. This prompted the San to once more challenge their government by starting litigation in 2009 in order to get the permission to re-commission the Mothomelo borehole and to drill for water elsewhere in the CKGR, (in both cases to be at their own expenses). At first, the High Court dismissed their application.[728] In August 2010, the African Commission on Human and Peoples' Rights issued a press release and sent an Urgent Appeal to the President of Botswana, arguing

> The right and access to water are essential to the full enjoyment of the right to life and all the rights contained in the African Charter. A denial of such right is a denial of the basic right and the denial of the right to life as enshrined in the article 4 of the African Charter.[729]

724 See Survival International, http://www.survivalinternational.org

725 These communities (with number of inhabitants in 2012) are Gope (24), Gugamma (65), Kikao (25, Metseamonong (120), Molapo (130) and Mothomelo (150). Kikao has recently been destroyed by a bush fire and has been abandoned (R.K.Hitchcock, personal communication).

726 See The International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 430.

727 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 428.

728 *Matsipane Mobetlhanyane, Gakenyatsiwe Matsipane and further applicants v. Attorney General of Botswana* –HC MAHLB 000393-09 (July 2010).

729 See "Rights of San people violated in Botswana", August 2010 at IWGIA Web site http://www.iwgia.org/news/search-news?news_id=32 ; in November 2010 a San from the CKGR, spoke at the ACHPR's 48th Ordinary Session about the situation in the CKGR.

In January 2011, Botswana's Court of Appeal ruled that the San could use their old borehole and sink new ones as well in the reserve.[730] Still, it took almost a year to reopen the Mothomelo borehole and other boreholes drilled in the CKGR have yielded only salty water. Mothomelo therefore remains the only source of potable water for the indigenous residents of the CKGR. This means that the San living in the other communities have to travel to Mothomelo, depend on water substitutes (e.g., wild melons, sip holes, etc.), or leave the reserve to get water at the resettlement locations, with little or no guarantee that they will be allowed to return to the CKGR since most of them have not been issued with permits.[731]

The government of Botswana has always argued that one of the reasons for evicting the San and the Bagkalagadi from the CKGR was that human residence within the reserve was disturbing the wildlife there and was contradictory to the policy of total preservation of wildlife. This continues very much to be the argument today when the government is criticized by, inter alia, the U.N. Special Rapporteur[732] and the ACHPR,[733] for ignoring the 2006 High Court judgment and its harassment of the CKGR residents by denying them the right to enter/leave the reserve, to access water and subsistence hunting, and to enjoy their fundamental human rights.

It is therefore extremely disconcerting to note the other developments that have taken place in the CKGR. One development contradicts the government's strong denials of any suggestion that the San were moved to make way for mining, since Gem Diamonds bought in 2007 an exploration interest in Gope/Ghaghoo (45km within the eastern border of the CKGR and an area previously occupied and used by the San) for US$34 million. The site's total in situ value is today estimated to be US$3.3 billion.[734] As remarked by the U.N. Special Rapporteur,

> The Government's position that habitation of the reserve by the Basarwa and Bakgalagadi communities is incompatible with the conservation objectives and status of the reserve appears to be inconsistent with its decision to permit Gem Diamonds/Gope Exploration Company (Pty) Ltd. to conduct mining activities within the reserve, an operation that is planned to last several decades and could involve an influx of 500–1,200 people to the site, according to the mining company.[735]

730 *Matter between Matsipane Mobetlhanyane, Gakenyatsiwe Matsipane and further applicants v. Attorney General of Botswana*. Court of Appeal Civil Appeal No. CACLB-074-10 High Court Civil Case No. MAHLB-000393-09 Heard 17 January, 2011 and delivered 27 January, 2011. See also Bonolo Ramadi Dinokopila "The right to water in Botswana: A review of the Matsipane Mobetlhanyane case" in *African Human Rights Law Journal,* Vol. 11 No. 1(2011) 11.

731 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (2013), p. 426.

732 James Anaya visited Botswana in March 2009. See "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, on the situation of indigenous peoples in Botswana" A/HRC/15/37/Add.2 (2010), p. 21-22 at http://unsr.jamesanaya.org/docs/countries/2010_report_botswana_en.pdf

733 See ACHPR, "Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana". Adopted at 47th Ordinary Session, 12 -26 May 2010, Banjul, Gambia. Two of the recommendations (63 and 64) deal with the need to implement the 2006 decisions of the High Court.

734 The site's total carat resource has recently been upgraded to 20.5 million carats,. See Gem Diamonds' Web site at http://www.gemdiamonds.com/gem/en/operations/botswana/ Accessed May 2013.

735 See James Anaya "Report on the situation of indigenous peoples in Botswana" op.cit. (2010), p. 18.

There are currently plans for another mine—a copper-silver mine—that will, if it gets the go-ahead, affect a portion of the northwestern part of the reserve.[736]

Another dismal development was the opening in 2007 of a tourist lodge by Wilderness Safaris. This "specialist in luxury ecotourism" is a subsidiary of Wilderness Holdings whose board of directors is closely linked to Ian Khama, the current president of Botswana, and his family. The Kalahari Plains Camp is located well within the CKGR, not far from Deception Valley. This 10 tents camp offers a main area including "an inviting swimming pool and deck area", and "Solar power provides all the electricity and hot water in the camp."[737] Another luxury lodge is in the north western part of the reserve, at Tau Pan, where people traveling through the area to their communities in their reserve have been told that they cannot be in the area because 'it is private'.

It should also be mentioned that hundreds of hunting licenses have been issued yearly to non-citizen hunters entering Botswana through safari companies, while the San's subsistence hunting in the CKGR and elsewhere in Botswana is being harshly punished.[738]

Finally, recent events and new legislation give cause for great concern. In 2011, two government ministers, the minister of Foreign Affairs and International Co-operation and the minister of Environment, Wildlife and Tourism visited some of the CKGR communities. They did not discuss the issue of water—instead they allegedly suggested that there was going to be a "third relocation" since the land in the CKGR was a game reserve and that people were therefore not supposed to be living there. In reaction to these remarks, the communities of the CKGR called for a meeting with the government, but their request was not answered,[739] and there were no meetings of the CKGR Negotiating Group in 2011 and 2012, despite Botswana government promises that they would be held.[740] A meeting was held in March 2013, though, but no progress was made.

In 2012, the CKGR communities as well as several other indigenous communities in Western and Central Botswana were told by their District Councils and other officials that they must leave the places where they have lived, in many cases for generations, and resettle elsewhere. When they asked where they should go, whether they would receive moving allowances and compensation, and whether new services would be provided at alternative locations, government officials refused to answer. Some community residents were told that they had to leave their areas because they were "in

736 In July 2012, a consultation was held by Hana Mining Company at Mothomelo in the Central Kalahari to get feedback from residents of the CKGR. Their reactions so far have been mixed. Much depends on whether it will give some employment opportunities to the CKGR communities—until now this has not been the case in Gope. See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 428.

737 See http://www.wilderness-safaris.com/botswana_kalahari/kalahari_plains_camp/introduction/ The international NGO, Survival International (SI), subsequently launched an international campaign "Don't swim while Bushmen go thirsty". The petition that calls on Wilderness Safaris to move its lodge off the CKGR has been signed by 30,000 people. See http://www.ethicaltraveler.org/2011/02/botswanas-bushmen-win-fight-for-the-right-to-water/ and SI at http://www.survivalinternational.org

738 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 429.

739 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (2012), p. 498.

740 This Group consists of Botswana government representatives, members of the Residents Committee of the CKGR (two representatives each from five communities), and the CKGR NGO Coalition.

a wildlife corridor" and that their livestock would disturb the breeding of wild animals.[741] Elsewhere in Botswana, several San managed community trusts have also been asked to resettle.[742]

These relocations should be seen in the light of two important policy initiatives formally announced in 2012. One is the ban on hunting of wildlife in public land and in controlled hunting areas (CHA) as a measure to stop the alledgedly sharp decline in wildlife species and protect Botswana's tourist interests. The ban—officially to begin on 1 January 2014—is already in effect. There is still some confusion and uncertainty in Botswana regarding the scope of the proposed ban but it seems that it will not affect private game ranches. The question asked by concerned people is whether it should be seen as a legitimate effort to protect wildlife and help the Botswana economy, or whether is it a strategy aimed at reducing access to land and wildlife resources for rural people, many of them extremely poor, and allowing wealthier individuals to get access to those lands and resources?[743]

The other policy initiative is the new Botswana Draft Land Policy. This policy applies to the majority of land in the country but the policy document is not clear about what will happen to settlements in remote areas, where sizable numbers of indigenous people reside. According to some observers, the Draft also deals with communal/collective use and ownership of land which "has proven to be unsustainable due to economic changes. The absence of exclusive rights to land for these communities does not improve their economic well being and does not accord them secure land rights". The policy says where appropriate, formal settlements will be established for these groups and titles granted to those allocated land."[744]

The future of the CKGR residents and their' land rights—as well as the land rights of the indigenous peoples in Botswana in general –seems in other words more uncertain and insecure than ever.

Conclusion

Both the Richtersveld and the CKGR cases seemed to indicate a new trend of a pro-active judiciary with a better understanding of the internationally developed standards of protection of indigenous peoples' rights. An African court making a bold reference to landmark international rulings such as the *Mabo* case of Australia was something of a milestone as far as indigenous rights were concerned in Africa. One could hope that this new development would grow in strength, and inspires judges, lawyers, and indigenous communities in other parts of Africa.

741 This is in particular the case of the Ranyane community in Ghanzi District. See Survival International at http://www.survivalinternational.org/news/9253

742 For many years, local communities in Botswana have been encouraged to establish community trusts that were allowed to make decisions about wildlife resources, including whether or not to use the resources for their own purposes (for either subsistence or commercial purposes, that is, for sale), or alternatively, to enter into joint venture agreements with private safari company partners. See R.K. Hitchcock et al. "The Economics of Community-Based Natural Resource Management in /Xai/Xai, Ngamiland, Botswana (n.d., in review).

743 See Robert K. Hitchcock, "Subsistence Hunting and Social Justice Issues in Botswana" (2012) at http://www.justconservation.org/subsistence-hunting-and-social-justice-issues-in-botswana

744 See *The Monitor,* "Botswana Land up for Auction", 27 August 2012 at http://www.mmegi.bw/index.php?sid=1&aid=809&dir=2012/August/Monday27

These concluding remarks from 2009 only remain partly valid and subsequent developments both in the Richtersveld and the CKGR have shown that a legal victory is only a first step, albeit an important one, in the struggle for land rights. Implementing the court decisions remains entirely in the hands of those who have just been defeated in court—i.e., the government and its institutions. The victorious part—i.e., the indigenous peoples and their representatives in court (i.e., lawyers)—on the other hand often face a number of problems, some very concrete (lack of funding, lack of skilled people to implement the court's decisions, negotiate settlements, put pressure on relevant authorities, etc.), others of a more psychological nature (the lasting effect that events and realities related to a court case have on behaviours, worldviews, beliefs and relationships within a community) as pointed out by the Development Plan Report for Richtersveld Community.

It is therefore important that indigenous peoples are prepared to deal with the implications of a court case and that their situation post-judgment is closely monitored by local supportive human rights institutions and civil society organizations as well as by international and regional human rights mechanisms and that all these institutions are ready to help out whenever the indigenous peoples deem it necessary.

PART III INDIGENOUS PEOPLES' LAND RIGHTS IN AN INTERNATIONAL AND AFRICAN PERSPECTIVE

CHAPTER VIII
CHARACTERISTICS AND FOUNDATION OF INDIGENOUS PEOPLES' LAND RIGHTS

This chapter deals with some of the different points of discussion that are crucial and ever emerging in most debates relating to indigenous peoples and their right to lands. These are the issue of groups' rights and collective rights, including looking at the scope and the holders of these rights; the concept of parallel use of lands by indigenous peoples; the notion of *terra nullius*; and the issue of coexistence between indigenous peoples' claims to ancestral lands and modern states. A final section looks at the African jurisprudence when it comes to the notion of indigenous peoples' land rights.

Characteristics of indigenous land rights

Group rights

The rights of indigenous peoples to lands are group rights,[745] a concept that draws on the practice adopted by European states from as early as the seventeenth century.[746]

745 See Ingram, *Group Rights* (2000), p. 103. A similar argument is found in Lyndel V. Prott, "Cultural Rights as Peoples' Rights in International Law", in *The Rights of Peoples,* edited by James Crawford, (Oxford: Clarendon/Oxford University Press, 1992), p. 97.

746 Lerner, *Group Rights* (1991), pp. 7-12. As early as the seventeenth century treaties, such as the 1648 Treaty of Westphalia, the 1660 Treaty of Oliva and the 1678 Treaty of Nimeguen, "incorporated clauses ensuring certain rights to individuals or groups" based on various factors, such as religion. This practice of treaties continued during the eighteenth century, with, for example, the Treaty of Paris between France and Great Britain in 1763, which included a clause on the protection of Roman Catholics, who constituted a minority within the part of Canada ceded by France.

On the basis of what is known as a "triple value scheme", it is argued by Ronald Garet that a human being consists of an unbroken grouping of three indispensable components, namely "personhood, communality, and sociality ... [which] schematizes our fundamental rights".[747] Personhood is the ground for the individual rights of each one of us towards self-accomplishment. "Communality is the ground of the right of groups to maintain themselves and to pursue their distinctive course, whereas sociality is the ground of the right of the existence of States and other artificial groupings created by men ... To rob the existence of communality, of the communal celebratory process, which forms the substance of much of our experience, would be to deny one ethical constituent of our humanity".[748] Garet thus concludes that "groups have a fundamental right to their communality, just as persons have a fundamental right to their personhood".[749] This is to say that "our most urgent interests lie not merely in individuated goods such as personal liberty and exclusive property but also in collective goods".[750]

The protection of groups' rights does not automatically flow out of the protection of individual rights and vice-versa, as demonstrated by the North American *Wisconsin v. Yoder* case from 1972.[751] This case involved members of a religious community known as the "Old Order Amish". Alleging that high school attendance would have a negative impact on the religious beliefs of their children, the Amish refused to send their children to school after completing eighth grade. Taken to court, they were found guilty by the Wisconsin Circuit Court of violating the state law on compulsory schooling for children under the age of sixteen. This decision was later overturned by both the Wisconsin Supreme Court and the US Supreme Court, on the grounds that "the respondents' conviction for violating the State's compulsory school-attendance law violated some of their rights as a group". What is interesting in this case, is that it involved three different types of legal claims: first, individual rights of the Amish children to complete their education; secondly, the state's claim for law enforcement; and thirdly, the claim of a religious group for the protection of its way of life. Could it be argued that a ruling in favour of the individual claims involved in this case could automatically result in the protection of the Amish Community's claim? One answer to this question is that "the confinement of [this case] to individual rights is troubled by the fact that the model of individual free exercise does not accommodate the control over individuals" by a community.[752]

It is also possible that a need for protection of "group rights" violates individual rights; and this is likely to happen in indigenous communities. One can consider for example practices such as forced marriages and several other customary practices that indigenous women suffer from for the sake of preserving the culture and traditions of their communities. This is indeed a ques-

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Broader and more comprehensive treaties, based on the principle of protection of minority groups, were signed in the nineteenth century. In 1878, for example, the Berlin Treaty contained protective dispositions on behalf of groups such as the Turks, the Greeks and the Romanians, who found themselves under the rule of the newly constituted autonomous Bulgarian Principality. The International Convention of Constantinople of 1881 did the same with regard to Muslim populations that were living in Greek-controlled territories.

747 Ronald Garet, "Communality and Existence: The Rights of Groups", 56 *Southern Californian Law Review,* 1983, p. 1016.

748 Ibid., p. 1002.

749 Ibid., p. 1017.

750 Green, "Internal minorities" (1994), p. 103.

751 *Wisconsin v. Yoder,* 406 U.S. at 219 (1972).

752 Garet, "Communality and Existence" (1983), p. 1031.

tion of balance between individual human rights and the right of a group to exist and maintain its identity. An interesting case in this respect is that of Sandra Lovelace, a Canadian indigenous woman who, in 1977, after having been married to a non Indian person and lived for several years outside her community—*in casu* a reserve—was not allowed to return to her reserve after her marriage had broken down. This was consistent with the Indian Act passed by the government of Canada in 1876 and according to which indigenous persons who had spent a certain time outside their reserve would lose their Indian status and no longer be able to return to their reserve. The government alleged to thus protect the Indian culture and territories. Unhappy with this decision, Sandra Lovelace submitted a complaint against the Canadian government to the United Nations' Human Rights Committee (CCPR) alleging a breach, among others, of Article 27 (Right to enjoy a culture) of the ICCPR.[753] In 1980, CCPR found that:

> *Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.*[754]

Subsequent to this conclusion by the CCPR, Sandra Lovelace was allowed back into the Tobique Reserve and the Canadian government amended the Indian Act accordingly.

The major contribution of this debate on the rights of indigenous individuals versus the rights of their communities is what the CCPR called "reasonable and objective justification" or fair balance struck between the protection of the rights and freedoms of the individual and the interests of the community or society as a whole, as required by the human rights principle of "proportionality". This is an extremely relevant point for indigenous women who are denied a number of rights and freedoms—including that of access to land and resources—on the grounds that it goes against the "group's" interests. Indeed, a number of negative cultural practices such as female genital mutilation, forced and under age marriages affect numerous African indigenous women in the name of communities' culture.

Collective rights

International documents dealing with indigenous peoples such as ILO Convention No. 169 (Article 13.1) and the U.N. Declaration on the Rights of Indigenous Peoples (Preamble) not only emphasize the special relationship indigenous peoples have with the lands or territories which they oc-

753 Article 27 of the ICCPR guarantees the right to persons belonging to minorities to "enjoy their own culture, to profess and practise their own religion, or to use their own language".

754 CCPR, Communication Nº 24/1977, *Sandra Lovelace v. Canada*. U.N. Doc. CCPR/C/OP/1 at 83 (1984), para. 17. Available online at http://hrlibrary.ngo.ru/undocs/session13-index.html

cupy or otherwise use but also stress the collective aspects of this relationship. The U.N. Declaration, for instance, recognizes and reaffirms that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples."

What are collective lands?

Collective lands are lands possessed under the traditional laws and customs observed by their indigenous inhabitants,[755] without option of division into individual plots. Terms like "aboriginal title", "native title" or "indigenous title" are often used indistinctively to refer to the right to such lands and to denote the "pre-sovereignty occupation" of these lands.[756] In the *Mabo* case,[757] for instance, the Australian High Court decided that indigenous people have rights that existed before colonisation and which still exist. This right is, among other names, called "native title". Generally speaking, indigenous peoples' collective lands are of a wide scope, vested in the community as a whole and used in a non-exclusive way.

Collective lands in Africa

In Africa, collective lands range from hunting and gathering areas to grazing areas, grasslands, forests, mixed savannah, wetlands, mountain sides, lakes, rivers, costal areas, fishing grounds, etc.,[758] all vested in the indigenous communities without option of individualization, as stated by the doctrine of native title. These communities also claim to have a collective right to the natural resources pertaining to these lands.[759]

The following few illustrative examples reveal that different words are used by indigenous communities in Central, Eastern, and Southern Africa with reference to their collective lands. The Mbendjele ("Pygmies") of the Republic of Congo call their forest *ndima angosu* (our forest). However, within the forest, different areas are called by different names according to their use. The *mooko* is the firm ground where it is good to camp, dig yams and a place popular with duikers. *Djamba* is the marsh, where trees are shorter, making the honey easier to collect. Mbendjele's collective lands include also the *pbai* (salt licks around a small stream that has been cleared of forest trees by elephants), *esobe* (small encapsulated savannahs), and *eyanga* (openings in the forest with still water in the centre) where visibility is good and therefore makes it perfect for hunting.[760] In this community, the "notions of exclusive individual ownership are only applied to ritual and

755 See, e.g., *Mabo v. Queensland* (No.2) (1992), per Brennan, at para. 61.

756 Andie D. Plamer, "Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony after *Delgamuukw v. B.C.*", 38 *Alberta Law Review* 1040 (February 2001), p. 1046.

757 *Mabo v. Queensland* (1992), Decision.

758 Cousins, "Tenure and Property" (2000), p. 160.

759 Juviler, "Are Collective Rights Anti-Human?" (1993), p. 269.

760 Jerome Lewis, "Whose Forest is it anyway?" Draft paper presented at the Property and Equality Workshop, MPI, Halle, March 2001, (2001b), p. 7.

mystic knowledge" and the Mbendjele refer to their lands as "our forest", an illustration of "a collective claim, not an individual one".[761]

The Hadzabe of Tanzania, whose land tenure system is similar to that of the "Pygmies", distinguish the *tangoto* (open land) from the *chikiko* which refers to lands with thick forest where big game such as buffalo can be found. The Hadzabe also consider all the hills (*han!a)* around the Lake Eyasi as part of their ancestral lands. For them "rights are not asserted by individuals or by groups over [collective] areas ... and other resources they contain. Anyone can and does live, hunt, and gather anywhere he or she wishes without restriction".[762]

The Maasai of both Kenya and Tanzania categorize land according to climate, topography and usage. Climatically, the land is divided in three categories: the wet highlands (*osupuko*), the dry low lands (*orpukel*) and the land between the two (*oloirishrisha*). Topographically, they divide it in mountains (*il doinyo*) and plains (*angata*). When it comes to usage, the land can be that which is immediately behind the homesteads (*auluo*), that which is reserved for calves (*olokeri*) or that which is available for cattle (*ngujit o ngishu*).

The San of Botswana, call their homelands, including lands in the Central Kalahari Game Reserve (CKGR), *n!oresi* (traditional territories, *n!ore* in singular).

Who holds the right to collective land?

> *The land belongs to the Maasai by virtue of right. It belongs to the young and to the old, the born and those yet to be born....* [763]

Unlike many other rights, indigenous peoples' right to lands is "vested not in an individual or a number of identified individuals but in a community"[764] and not even in the chiefs or political leaders.

Although members of several hunter-gatherer communities pay respect to the elder of each band or *Kombati*, as he is called amongst the Mbendjele of the Republic of Congo, the elder does not actually play any role whatsoever as far as land use and occupation are concerned. "No one should claim exclusive ownership ... the notion that an individual, apart from *Komba* (God), could own land, rivers and forest ... evokes suspicion, incomprehension and mockery".[765] One of James Woodburn's conclusions, following his extensive observation of the Hadzabe of Northern Tanzania, is that the decision of moving a camp, for example, is not even taken by the elder of a band: "Movement of a whole camp depends on a series of *ad hoc* individual decisions, not on the decision of a leader or on consensus reached in discussion".[766]

However, most states and other actors in Central, Eastern, and Southern Africa, have, in recent times, been trying to introduce or force the notion of representation on indigenous communities. In

761 Ibid.
762 Woodburn, "Minimal Politics" (1979), p. 245.
763 Statement by a Maasai from Iloodoariak in Kenya, quoted in Oleku Ole Roore, "The Iloodoariak Land Scandal" (1998), p. 6.
764 *Mabo v. Queensland* (1992), per Brennan, at para. 52.
765 Lewis, "Forest People or Village People" (2001a), p. 64.
766 Woodburn, "Minimal Politics" (1979), p. 253.

Namibia, the Traditional Authorities Acts of 1995 and 2000 prompted the various San groups to constitute themselves as communities under the central jurisdiction of a Chief. While it has somewhat strengthened their political position, the results are mixed and the government's disregard for the traditional leaders when it comes to land issues "can be seen as a continuation of the legacy of disrespect and discrimination afforded to San people".[767] In Namibia, too, for the Himba community to use the services of lawyers and other support groups in their case against the construction of the Epupa Dam on their lands by the Namibian and Angolan governments, a body of local leaders was constituted to represent the views of the community.[768] So did the ǂKhomani San of South Africa during their struggle that has resulted so far in 40,000 hectares of their land being given back to them.[769] The Ogiek of Kenya also found themselves almost forced to bring all their elders together in order to try to enter into negotiations with their national authorities.[770]

The notion of representation seems alien to many hunter-gatherer communities in Central, Eastern, and Southern Africa. This is not to be confused with the existence of individuals with a strong influence on other community members, due to their knowledge or experience. Among the San of the Kalahari, for example, each family or band had an *!Ari=aub*, which means "hero" or someone who does valuable work for the community. In most cases, such a person would have a strong knowledge of the characteristics, boundaries, and natural resources of the *koros* or communal lands, as well as, for example, the ability to identify the footprints of any trespasser and to share information with his entire community.[771] Joram Useb, a San from Namibia who has done research on the notion of leadership amongst his community, asserts that "during an extensive survey conducted in most [San] … villages … it was established that all community groups interviewed had a similar idea of the meaning of leadership: the communities' definition of a leader refers to his/her social attitudes and skills of informed decision-making, as well as the capacity to give advice. The common definition is that a leader has to serve the people, but is not allowed to represent them unless he/she is requested to talk on their behalf".[772]

This is equally true among the Batwa of the Kahuzi-Biega in the Democratic Republic of Congo, where any individual, who tends to make himself look more important than the others, is generally subjected to

767 Richard Pakleppa, "Civil Rights in Legislation and Practice – A Case Study from Tsumkwe District West, Namibia" in *Indigenous Peoples' Rights in Southern Africa*, edited by Robert K. Hitchcock and Diana Vinding, IWGIA Document 110 (Copenhagen: IWGIA, 2004), p. 90; *The Indigenous World 2007* (IWGIA, 2007), p. 504.

768 Corbett, "A Case Study" (1999), pp. 87-8.

769 The ǂKhomani San of South Africa launched in 1994 a claim to their aboriginal lands under the new South African (Interim) Constitution. Several ǂKhomani San groups were put together and represented by lawyers, as well as by a number of their leaders. Amongst other tactics and materials put together for strengthening their land claims was the mapping of their lands, the first exercise of this kind in Central, Eastern, and Southern Africa, at least so far as indigenous communities are concerned. For more details regarding this land claim, see chapter IV, this volume. Such mapping has also been done in Botswana, in the CKGR, for instance, as part of the San's efforts to assert their traditional land and resource rights.

770 Following the institution in 1930 in Kenya of the Carter Land Commission with the mission to look into local communities' land claims, the Ogiek sent a group of their elders who presented the case of their community on October 17, 1932. See in Sang, "Kenya: The Ogiek in Mau Forest" (2003), p. 7.

771 Joram Useb, "'One Chief is Enough!' Understanding San Traditional Authorities in the Namibian Context", in *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'*, edited by A. Barnard and J. Kenrick (Edinburgh: Centre of African Studies, 2001), p. 19.

772 Ibid., p. 3.

much criticism and gossip. The Mbendjele and Yaka (Republic of Congo), as well as the Bagyeli (Cameroon), also recognize the important role of guidance that the elders play in the celebration of various cultural ritual ceremonies. However, none of these communities recognizes any role for elders in relation to land use, occupation or ownership. The *Poisionik* or the traditional council of elders among the Ogiek assists the community in solving disputes and carrying out a number of rituals but never issues rules on land use and occupation.

James Woodburn understands this absence of the notion of chief or representative among most hunter-gatherer communities as something that has to do with the "egalitarian immediate-return social organization … in which internal social differentiation of power, wealth, and status is minimized and social relationships are based on sharing and mutuality".[773]

Among the Maasai, a *loibon* (or lybon),[774] although he serves "as a kind of trustee in matters concerning the land",[775] does not actually allocate lands or set rules for land use or occupation; nor can he prevent a Maasai from grazing his herds on a specific part of the Maasai land. The Maasai rely also on a Council of Elders, which is a rather informal institution that is called upon when a common serious problem arises amongst the members of a community. However, this institution does not have the power to allocate land or to set regulation for its use.

The Maasai's tradition of not recognising that their traditional political institution has the prerogative to determine rules concerning land occupation and use, could explain why the 1904 treaty between the British colonial authorities and a number of Maasai leaders that resulted in moving Maasai communities from more arable land to Laikipia and the southern part of the country, was denounced almost immediately by the people themselves, on the grounds that "the agreement was obtained by duress, and is further not binding as it [had] not received the approval of the tribe".[776]

M.M.E.M Rutten illustrates this disconnection between the institution of *loiboni* and the people, as far as land use and occupation are concerned. With reference to the removal of the Maasai from Laikipia towards the south in 1911, this author shows that Lenana, the *loibon* at the time, acted in complicity with the colonial authorities, and misled his community by alleging that the move southwards was to take place for cultural purposes. Many Maasai resisted their leader's plan to move, and eventually went to court in an attempt to nullify the agreed move.[777]

This same tradition could also explain why the Maasai of the Ngorongoro area of Tanzania consider that the *Ilaigwanak* (term which refers to traditional institutions that play a role in cultural activities as well as in a number of social issues) have become manipulated and controlled by the

773 Woodburn, "Indigenous Discrimination" (1997), p. 352.

774 See supra footnote 282.

775 Glazier, *Land and the Uses of Tradition* (1985), p. 195.

776 *Ol le Njogo and 7 Others v. The Attorney General and 20 Others,* 5 E.A.L.R. 70, Vols. V-VII [1913-1918], pp. 79 and 94. During the appeal of this case, Justice Morris Carter also touched upon the issue of whether those who signed the two treaties in the name of the Maasai community could possibly do so: "I am of the opinion that the Court cannot go into the question of whether the government has selected the right persons with whom to make such treaties … the Village Headmen Ordinance, which deals with the appointment of headmen for villages, has not the effect, which the Appellants (Maasai) attach to it, of precluding the government from recognising persons as chiefs of a tribe. …". See also Rutten, *Selling Wealth* (1992), p. 177.

777 Rutten, *Selling Wealth* (1992), pp. 179-181: "The Maasai lost the case on the grounds that they were not British subjects".

government and conservation authorities. In a similar vein, the "Pastoralist Council" in Tanzania, which was meant to advance Maasai's interest in the Ngorongoro Conservation Area, was considered by many ordinary Maasai as nothing more than a recent creation pushed through by Government to try to insert the idea of representation amongst the Maasai for land use, ownership, and occupation.[778]

Non-exclusive land use of collective lands

Indigenous peoples' landholding systems are also characterized by the principle of parallel use of lands by various and even different communities; and the exercise of indigenous peoples' right to lands is often not exclusive. In Leslie Green's expression, "this is an inexcludable and non-rival use of lands according to which the part used by one person or community does not perceptibly limit the space used by others because the collective enjoyment of such lands is what constitutes their values".[779]

Smokin Wanjala, a Kenyan scholar, understands this parallel use of lands by different communities as a demonstration of different rights enjoyed by different communities over the same land. Such rights are, for example, the right to graze domestic animals, the right to till, the right to pick firewood, the right to hunt, and the right to place honey barrels.[780]

Indeed, in most pre-colonial Central, Eastern, and Southern African countries, land use was regulated by the customary principle of "non-exclusive use", which made it possible for the same land to be used by different communities. It helped to accommodate different life styles and the simultaneous or consecutive exploitation of the same land. The claims made by the Dorobo (Ogiek) to consider all the forests in which they hung honey barrels as theirs were thus just as acceptable as the claims of other communities who used the very same forests for hunting, religious ceremonies, grazing or other activities: "most East African peoples did not look on land use in an exclusive way".[781] Part of the Mau Forest of Kenya, for instance, is regarded as Maasai land but was simultaneously used by the Ogiek and the forest was until government intervention one undivided piece of land.

Anthropologists also attest that amongst the Hadzabe of Tanzania, "no effort is made even to limit the use of the land to members of their own tribe".[782] So is the Central Kalahari Game Reserve, which is claimed by the San peoples, but also used by the Bakgalagadi who have lived there for many generations.

In addition to easing various communities' access to needed resources, the practice of parallel or non-exclusive use of lands also facilitates and maintains interaction and exchange be-

778 Kaisoe and Ole Seki, "The Conflict" (2001), pp. 23-4.
779 Green, "Internal Minorities" (1993), p. 103.
780 Wanjala, *Land Law* (1990), p. 2.
781 Kitching, *Class and Economic Change* (1980), pp. 282-3.
782 Woodburn, "Minimal Politics" (1979), p. 245.

tween various indigenous communities.[783] The non-exclusive use of lands and its resources appears to go beyond the usual inter-communal rivalries and denigration. For example, despite the fact that the Maasai consider the Ogiek as "backward", the latter perform the circumcision of the Maasai boys, a ritual highly respected and essential for the passage from youth to warriors and elders.[784]

Despite some governments' attempts to abolish the rule of non-exclusive use and occupation of land through various mechanisms of gradual individualisation, such as the group ranches in Kenya and village lands in Tanzania, the practice of parallel use of lands continues to exist amongst several indigenous communities in Central, Eastern, and Southern Africa, albeit to a limited extent. Lands around the Lake Eyasi in northern Tanzania continue to be used by Maasai, Hadzabe, and Barabaig people,[785] despite mounting inter-communal tensions due to increasing land scarcity. The same is observed among the Ogiek of Kenya, who do not object to other communities' use of the Mau Forests, so long as their indigenous rights are recognized. The Serengeti ecosystem[786] continues in the same way to be used simultaneously by the Hadzabe and the Wandorobo[787] of Tanzania, and the Maasai of both Kenya and Tanzania.[788]

In Central Africa, parallel use of land is also practiced. Despite considering themselves as the first inhabitants of the forests in which they live, the Mbendjele of Congo-Brazzaville do not prevent other communities from using them.[789] This is also the case in the Democratic Republic of Congo, where neighbouring communities to the Batwa, (Batembo, Bashi and others), tend to use Batwa lands for sporadic hunting, without conflict arising because parallel use of indigenous communities' lands by others has never been seen by the former as impeding their culture. Mbororo pastoralists in Cameroon, Central African Republic, and Chad do also pasture on lands that are used for other purposes by other communities.

Parallel use of lands by different communities is thus an important principle in most African indigenous communities' sustainable management of their resources, as it prevents each community from overusing its own lands and resources. Within the African environment characterized by lack of clear cut boundaries between various communities' lands, the norm of non-exclusive use of lands also helps various communities to interact culturally.

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783 Bahuchet, "Les Pygmées" (1991), p. 5. Commenting on the relationship between the "Pygmies" and their agriculturalist neighbours, Bahuchet notes that the two communities lived in complementarity, both culturally and economically. He cites, for example, the case of the *jengi* ritual of a "Pygmy" group in Cameroon, which consisted of circumcising "Pygmies" and non-Pygmies boys in one ceremony.

784 Woodburn, "Indigenous Discrimination" (1997), p. 357.

785 Madsen, *The Hadzabe* (2000), pp. 41-2.

786 What is known as the "Serengeti ecosystem" is an area of lands covering 25,000 square km of north western Tanzania and south western Kenya. It contains three important protected areas, namely the Maasai Mara National Reserve of Kenya, the Ngorongoro Conservation Area and the Serengeti National Park of Tanzania. It also includes less strict government-controlled conservation areas, where some consumptive utilisation and hunting are allowed under strict regulations. This is the case of the Grumeti, Ikorongo, Kijereshi and Maswa Game Reserves in Tanzania. See also in Emerton and Mfunda, *Making Wildlife Economically Viable* (1999), p. 5.

787 A hunter-gatherer community, also sometimes called "Akie".

788 Emerton and Mfunda, *Making Wildlife Economically Viable* (1999), p. 4.

789 Lewis, "Forest People or Village People" (2001a), p. 64.

The foundation of indigenous land rights

Terra nullius versus indigenous title

The doctrine of native title questions the concept of *terra nullius*. This concept has been used to describe different situations where land was considered as "belonging to no one". Originally defined as land that was unclaimed by a sovereign state recognized by European powers, *terra nullius* has also been used in relation to land that was uncultivated or land characterized by the absence of "civilized society",[790] thereby giving legal force to the claiming and settlement of lands occupied by "backward" people, where no system of laws or ownership of property was held to exist. It was in particular used in the Australian context when Governor Bourke, in 1835, proclaimed that indigenous Australians could not sell or assign land, nor could an individual person acquire it, other than through distribution by the Crown.[791] In 1971, in the controversial *Gove Land Rights* case, Justice Blackburn ruled that Australia had been *terra nullius* before European settlement, and that there was no such thing as native title in Australian law.[792]

In 1975, the International Court of Justice (I.C.J.) in its Advisory Opinion on Western Sahara asserted that the land, on which Spain, Morocco, and Mauritania all claimed to have sovereignty, had not been *terra nullius* prior to Spanish colonization: "at the time of colonization, Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them".[793]

In Australia, court cases in 1977, 1979, and 1982 brought by or on behalf of Aboriginal activists tried to challenge the notion of *terra nullius* with reference to this I.C.J. ruling. These cases were rejected by the courts, but the Australian High Court eventually left the door open for a reassessment of whether the continent should be considered "settled" or "conquered". It was first in 1992, with the *Mabo* case, that the court demonstrated that the concerned lands were not *terra nullius* before the arrival of the colonial power and finally ruled, by a majority of six to one, that native title to land is recognized by the common law of Australia, throwing out forever the legal fiction that when Australia was "discovered" by Captain Cook in 1788 it had been *terra nullius*, an empty or uncivilized land. As evidence of a general rejection of the applicability of the *terra nullius* doctrine, the Australian High Court cited the Advisory Opinion of the International Court of Justice on Western Sahara.

Scholars have built upon this to underline that the notion of aboriginal title is based on immemorial occupation and use and that "for the purpose of native title, occupation is not the same as com-

790 Michael Connor, "The Invention of Territorium Nullius". Available online at: http://www.michaelconnor.com.au/USERIMAGES/usedinventionterritorium.pdf

791 Governor Bourke's Proclamation 1835 (UK). See in National Archives of Australia accessed at http://www.foundingdocs.gov.au/item.asp?dID=42

792 The *Gove Land Rights* case is also known as *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. For summary, see http://www.atns.net.au/agreement.asp?EntityID=1611

793 International Court of Justice (I.C.J.) Western Sahara: Advisory Opinion. I.C.J. Reports 1975, p. 12. Available online at: http://www.icj-cij.org/docket/files/61/6195.pdf

mon-law possession. Rather, it is any acknowledged connection with land arising out of traditional rights to use it".[794] In other words, the means of proof of indigenous peoples' right to lands are often different from those of modern property rights, which generally are based on land titles.

Indigenous peoples' right to lands and the existence of states

In 1923, Cayuga Chief Deskaheh from the Haudenosaunee Nation in Canada, travelled to Geneva as the representative of the Six Nations of the Iroquois to present the concerns of his people to the League of Nations—the predecessor of the United Nations. Unfortunately, he was not granted an audience by the League and was thus not able to express the suffering of his people in the hands of the Canadian colonial government. A similar attempt was made in 1925 by a Maori religious leader, W.T. Ratana, who wanted to protest the breaking of the 1840 Treaty of Waitangi that recognized Maori ownership of their lands. He, too, was denied access.

These apparently failed attempts, nevertheless, became a landmark for the indigenous movement, even though more than three decades had to elapse before the international community began paying attention to indigenous issues.

The emergence of the indigenous movement has been traced back to the 1960s and linked with the decolonisation process and the civil rights movements, which, it is argued, "contained many elements for consciousness-raising that have become a major aspect of the indigenous movement".[795] The 1960s also witnessed the development of the human rights movement that took off in the aftermath of the Second World War, and its coronation with the adoption of the two Covenants (the International Covenant on Civil and Political Rights, ICCPR, and the International Covenant on Economic, Social and Cultural Rights, ICESCR), which both recognize the right to self-determination, including among others the right of peoples to control their destiny and resources.[796]

Following the extermination policies perpetrated against indigenous peoples such as the Maori of New Zealand, the Aborigines of Australia, the native Indians of the Americas and many others, it had also become morally compelling to redress the historical injustices these communities had suffered since the establishment of modern states on their ancestral lands. It appears indeed that as the states established on indigenous peoples' lands got older, the issue of justice for the first occupants became more and more morally compelling.[797]

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794 T.W. Bennett and C.H. Powell, "Aboriginal Title in South Africa Revisited", 15 *South African Journal of Human Rights* 4, 1999, p. 465.

795 Gray, "The Indigenous Movement", (1995), p. 43: "The late 1960s saw indigenous mobilization springing up throughout the Americas."

796 The ICCPR and the ICESCR were adopted in 1966. Article 1 is common for both Covenants and States that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. …"

797 By the time the civil rights movement was taking place, most American states had had at least hundred years of independence. The United States got its independence in 1776, Mexico; Colombia and Chile in 1810; Guatemala, Honduras, El Salvador and Costa Rica in 1821; Ecuador and Brazil in 1822; Bolivia in 1825; and Canada in 1867. Independence came later to Australia (1900), and much later to Indonesia (1945), the Philippines (1946), India and Pakistan

Theories of justice and succession of sovereignty

On which grounds could one argue for indigenous peoples' rights to lands? Did the creation of current African states extinguish pre-existing indigenous peoples' right to land?

The Berlin Act of 1885, that carved up Africa and defined the current borders of African states,[798] underlined, in its Article 35, the obligation for colonial powers "*to insure the establishment of authority … sufficient to protect existing rights*",[799] and to "*watch over the preservation of the native tribes*".[800] The importance of these provisions has been recognized in several cases. In the 1912 Maasai case, it was argued by the Court of Appeal that "*the declaration of a protectorate over an uncivilized region is deemed … to carry with it the obligation of establishing the authority mentioned in Article 35 of the Berlin Act*".[801] In more explicit terms, the judge was of the opinion that "*whatever the interior economy of the Maasai was, they … were sovereign over all the tracts of land included in the documents of this case*".[802]

A member of the International Court of Justice (I.C.J.) in the Western Sahara case, M. Bayona-Ba-Meya also referred to the Berlin Conference's principle of respect for pre-existing rights. He argued that before the Berlin Conference, African entities enjoyed sovereignty over their lands given "the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty".[803]

Justice Brennan in his ruling on the *Mabo* case[804] refers to the I.C.J. and in particular to Mr. Bayona-Ba-Meya and what he calls his "spiritual notion" of land as opposed to the materialistic concept of "*terra nullius*". This notion "*amounts to a denial of the very concept of* terra nullius *in the sense of a land which is capable of being appropriated by someone who is not born therefrom.*"[805] Justice Brennan then goes on to conclude that "*a mere change in sovereignty does not extinguish native title to land*".[806] He further argues that "*… that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous*

(1947), Sri Lanka (1948) and Malaysia (1957). In Africa, Libya was the first country to become independent in 1951, while Ghana was the first among the sub-Sahel countries (1957).

798 See Christopher Weeramantry and Nathaniel Berman, "The Grotius Lecture Series", in 14 *American University International Law Review* 1515 (1999).

799 Article 35 of the Final Act of Berlin Conference, 1885. The Berlin Conference of 1885 was a gathering of most of the European colonial powers that resulted in the division of Africa into the states that exist today.

800 Article 6 of the Final Act of Berlin, 1885.

801 *Ol le Njogo and Others v. The Attorney General and Others*, [1912], p. 92. See chapter V, this volume, for more details on this case.

802 Ibid., p. 99.

803 M. Bayona-Ba-Meya is quoted by Julie Cassidy in "Sovereignty of Aboriginal peoples", *9 Indiana International and Comparative Law Review,* 65 (1998), p. 168. See also in Separate Opinion of Vice President Ammoun available on I.C.J.'s website at http://www.icj-cij.org/docket/files/61/6205.pdf, pp. 77-78.

804 *Mabo and Others v. Queensland* (No.2) [1992], per Brennan J., at para. 40.

805 Ibid. (quoting I.C.J.'s Vice President Ammoun), at para. 40.

806 Ibid., at para. 61.

people, does not acknowledge their laws and observe their customs. …".[807] He also states that "*native title is not extinguished unless there be a clear and plain intention to do so*"[808] and that such an intention "*is not revealed by a law which merely regulates the enjoyment of native title*".[809]

Showing that the proposition of absolute Crown ownership has a feudal basis, and that "*it is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty*",[810] Justice Brennan made it clear in his ruling that "*there is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony*". Or—quoting Roberts-Wray—that,

> *If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of Government. The second is title to the country ...*
> *This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute.*[811]

In reaching all the above conclusions, Justice Brennan based his reasoning on what he called "contemporary notions of justice and human rights",[812] and more specifically on what is known today as the principle to respect indigenous communities' prior and informed consent:

> *… [I]t may be assumed that, on 1 August 1879, the Meriam people knew nothing of the events in Westminster and in Brisbane that effected the annexation of the Murray Islands and their incorporation into Queensland and that, had the Meriam people been told of the Proclamation made in Brisbane on 21 July 1879, they would not have appreciated its significance. The legal consequences of these events are in issue in this case. Oversimplified, the chief question in this case is whether these transactions had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of, and exclusive power to confer title to all land in the Murray Islands. The defendants submit that that was the legal consequence of the Letters Patent and of the events which brought them into effect. If that admission be right, the Queen took the land occupied by the Meriam people on 1 August 1879 without their knowing of the expropriation; they were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.*[813]

807 Ibid., at para. 67.
808 Ibid., at para. 75.
809 Ibid., at para. 76.
810 Ibid., at paras. 47 and 52.
811 Ibid., at para. 45. The quote is from K. Robert-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966), p. 625.
812 Ibid., at para. 29. Brennan also states (at para. 42): "a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".
813 Ibid., at para 23.

The judicial reasoning in the *Mabo* case could also be regarded as grounded on the "equality argument" in a context of "multicultural citizenship",[814] where "group-differentiated rights" for "national minorities", including indigenous communities, should be recognized. Liberal egalitarian theory emphasizes indeed the importance of rectifying un-chosen inequalities",[815] i.e., inequalities that have been un-deservedly imposed on someone or, in this case, on an entire people.[816] Unlike ordinary immigrants who are considered to have made a voluntary choice to leave their original "societal culture," most indigenous peoples have never made the choice to abandon their "societal culture" or lands for the sake of newly established multinational states.[817]

Given that most indigenous communities have never opted to leave their "societal culture" and because they still show a "deep bond with their own culture" [818] "the question is not, how should the State act fairly in governing its [indigenous communities], but what are the limits to the State's right to govern them".[819]

The argument here is that where the integration of indigenous communities into the mainstream culture of their states was not voluntary, which appeared to be the case for the Ogiek of Kenya, the San of the Kalahari, the Hadzabe of Tanzania, the Batwa of the Ugandan Mugahinga and Bwindi forests, and several other African indigenous communities, then such communities are entitled to claim their self-determination, "which can be exercised by renegotiating the terms of [being parts of their respective states]".[820] Even with respect to communities, such as the Maasai and several Canadian natives, which are reported to have agreed to cede their lands through treaties, it could be also argued that, "autonomy is also justified on the historical agreement, in so far as [it is assumed that these communities] never [handed] to the ... government jurisdiction over certain issues".[821] It is contended in relation to Africa that, "chiefs ... could seldom [understand] or never ... understood the intentions" behind land cession treaties signed between them and Europeans.[822] It would be otherwise difficult to understand why the Maasai went to court against the Treaty signed by a number of their leaders with the British colonial authority, as presented in chapter V of this book.[823] With regard to this case, Court Justice Morris Carter argued that "until there is annexation, formal or otherwise, a protectorate is a foreign country, and the rights held over it are still distinguished from territorial sovereignty by however thin a line."[824]

What the argument mentioned in the *Mabo* case implies, otherwise, is that property rights do "not collapse or evaporate when the sovereign is removed, but survive ... [succession of

814 Kymlicka, *Multicultural Citizenship* (1995), p. 108.
815 Ibid., p. 109.
816 John Rawls, *A Theory of Justice,* rev. ed. (Oxford: Oxford University Press, 1999), p. 86.
817 Kymlicka, *Multicultural Citizenship* (1995), p. 96.
818 Ibid., p. 95.
819 Ibid., p. 118.
820 Ibid., p. 117.
821 Ibid., p. 117.
822 Davidson, *Africa in History* (1992), p. 286.
823 The Maasai refused to call it a "treaty", using the term "agreement" instead. See Ndaskoi, "The Roots Causes" (n.d.), p. 8. Available online at http://www.galdu.org/govat/doc/maasai_fi.pdf.
824 *Ol le Njogo and Others v. The Attorney General and Others*, p. 92. What is now modern Kenya was a British protectorate from 1895 to 1920, after which it became a colony.

state or sovereignties]".[825] It is argued that "property ... is prior to the formation of states"[826] or better that "property rights are fundamentally independent of state sovereignty and, hence, changes in (or even the complete absence of) sovereignty or government do not affect them".[827] In theory, states are products of "social contracts", according to which all contracting parties accept to put themselves under its rule, and in return the State accepts to preserve their rights, including property rights.[828]

This is also the line of argument taken through the provisions of Article XVIII(3) of the Inter-American Draft Declaration on the Rights of Indigenous Peoples, which states that "where property and user rights of indigenous peoples arise from rights existing prior to the creation of those states, the States shall recognize the titles of indigenous peoples. ... This shall [not] affect any collective community rights over them".[829]

The survival of indigenous peoples' right to lands following the arrival of colonial powers is further substantiated by the use of treaties made by several colonial powers for acquiring their territories.[830] For instance, the International Congo Society[831] concluded several treaties with "legitimate sovereigns" in the Congo basin.[832] In its Advisory Opinion, the International Court of Justice also refers to the use of treaties in the Western Sahara case.[833]

Several African communities have contested, right from the start, the allegation that their pre-existing land rights were extinguished as a result of occupation or conquest of their territories. All these principles and theories seem to have inspired number of African decisions.

African jurisprudence

In the 1919 *Re Southern Rhodesia* case, the Ndebele[834] community of Southern Rhodesia argued that their right to lands survived conquest. In reference to their claim, Lord Summer, a member of

825 L. Benjamin Ederington, "Property as a Natural Institution: The Separation of Property from Sovereignty in International Law", 13 *The American University International Law Review* 263, 1997, (LexisNexis) n. 142.

826 Ibid., n. 21.

827 Ibid., n. 3.

828 Peter Laslett, *John Locke's Two Treatises of Government* (Cambridge, England: Cambridge University Press, 1964), p. 101.

829 IACHR, Proposed Declaration on the Rights of Indigenous Peoples,as approved by the IACHR on February 26, 1997, at its 1333rd session, 95th Regular Session, O.A.S. Doc. OEA/Ser/L/V/II.108.Doc. 62 (2000). Available online at http://www.cidh.org/indigenas/chap.2g.htm

830 M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green and Co., 1926), p. 39.

831 The International Congo Society was founded on November 17, 1879 by King Leopold II of Belgium to further his interests in the Congo.

832 Lindley, *The Acquisition and Government* (1926), p. 42.

833 See International Court of Justice (I.C.J.), *Western Sahara, Advisory Opinion,* (1975), p. 16.

834 The Ndebele are Bantu-speaking people who live primarily around the city of Bulawayo, Zimbabwe. They originated early in the nineteenth century as an offshoot of the Nguni of Natal, moving first to Basutoland (now Lesotho) and ultimately to Matabeleland in Southern Rhodesia (now Zimbabwe). They are a farming and herding people numbering

the Judicial Committee of the Privy Council,[835] argued that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them",[836] and that:

> *According to the argument, the natives before 1883 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveler, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white … settlement … pioneered by the Company.*[837]

In a similar case, following a notice that certain lands in Apapa, in the Southern Provinces (Nigeria), were acquired by the Nigerian colonial government, Chief Oluwa went to court in 1921 claiming compensation in the name of his community, which he argued was the owner of the lands in question. Acting on appeal, the Privy Council argued that:

> *No doubt there was a cession to the British Crown, along with the sovereignty, of the radical title or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected … It is not admissible to conclude that the Crown is, generally speaking, entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives.*[838]

The Council went further arguing that "*a mere change in sovereignty is not to be presumed to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly*".[839]

There are several other cases supporting this argument. The Privy Council took the same line of reasoning in *Sobhuza II v. Muller and Others*, in 1926 when a Swaziland chief went to court in the name of his community to claim that "the Crown had no rights to dispossess the natives of their lands".[840] In relation to indigenous rights in Nigeria, Lord Denning argued in 1957 that, in dealing

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835 The Judicial Committee of the Privy Council was the supreme appellate tribunal for the British Empire, and had the duty of determining appeals from some 150 jurisdictions in overseas possessions and dominions of the Crown as well as from certain domestic jurisdictions. Today, the Judicial Committee is still the court of final appeal for a few Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. Only very few countries—most of them in the Caribbean and in the Pacific—use the JC, Jamaica being by far the largest. New Zealand opted out in 2003. See http://www.privy-council.org.uk

836 *Re Southern Rhodesia* [1919] AC 211, at paras. 233-4.

837 Ibid., at para. 234. The legal contest was a result of a resolution in April 17, 1914 by the Legislative Council of Southern Rhodesia, which stated that lands in Southern Rhodesia had not been alienated by the British South Africa Company (a corporate that was said to conquer land on behalf of the Crown).

838 *Amodu Tijani v. Secretary, Southern Provinces, Nigeria*, 2 A.C. [1921], 399 (PC), per Viscount Haldane, at 407.

839 Ibid.

840 *Sobhuza II v. Muller and Others* [1926] AC 518-19.The case was not won by the appellant, but the ruling stated a number of interesting principles relating to control of land by indigenous communities.

with the claims, the court "*will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected*".[841]

Similar land claims based on the notion of "indigenous title" have been made recently by various African communities. The *Mabo* case (1992) was referred to by members of the Ogiek indigenous community of Kenya, acting as plaintiffs in a legal case against their government's action on the Mau Forest (see chapter V of this book), which this community considers as its land. The judge, unfortunately, did not respond to the plaintiffs' claim based on the *Mabo* jurisprudence.[842]

Similarly, the Kxoe community of Western Caprivi, Namibia, went to court in 1997 claiming aboriginal title over lands that the government of Namibia was considering itself to be the sole owner of. The case never proceeded further because of political impediments.[843]

As also shown earlier (chapter VI) in the Tanzanian case *National Agricultural and Food Corporation (NAFCO) v. Mulbadaw Village Council and Others*, members of the Mulbadaw village (mostly Barabaig indigenous people) in Hanang District, North Tanzania, failed in their appeal when the judge rejected their aboriginal claim to lands on the grounds that they were not the natives of the area.[844] In the similar case filed by the Barabaig against NAFCO and Gawal Farms Ltd case (see chapter VI),[845] the court rejected the collective claim by the plaintiffs based on immemorial occupation and held that it could only deal with the case on an individual basis. The Tanzanian Court of Appeal of Arusha also denied *locus standi* to a group of Maasai who claimed, in the name of their community, aboriginal-type land rights over the Mkomazi Game Reserve.[846] Both cases indeed raised the question of "[on] who are the [collective] rights bestowed, is it individual members of the group or is it the collectivity itself";[847] and more importantly the judges refused to give authority to the notion of aboriginal title still very much alive within countries of Common Law traditions, such as Tanzania.

In some British Commonwealth countries, the decisions taken by the Judicial Committee of the Privy Council are considered persuasive. In Jamaica, for example, it is still the final court of appeal.[848] So it continues to be in Mauritius. In other countries, such as Kenya, the decisions of this

841 *Adeyinka Oyekan v. Mussendiku Adele* [1957], 1 WLR 876, per Lord Denning, at 880.

842 See the history of the Ogiek's legal battle on their Web site: http://www.ogiek.org/report/ogiek-ch7.htm

843 Norman Tjombe, "The Applicability of the Doctrine of Aboriginal Doctrine in Namibia: A Case for the Kxoe Community in Western Caprivi, Namibia". Paper presented at the Southern African Land Reform Lawyers Workshop, 21 February 2001, Robben Island, South Africa.

844 *National Agricultural and Food Corporation (NAFCO) v. Mulbadaw Village Council and 66 Others* (CA – Dar es Salaam, CA#3/1986). The villagers who were involved in this case were not all native to the land they were claiming, because during the *Ujamaa* policy in Tanzania, people were grouped into artificial or government-created villages.

845 *Yoke Gwaku and 5 others v. NAFCO and Gawal Farms Limited* (HC – Nakuru, CV#52/1998). For more cases of indigenous communities claiming aboriginal titles on land in Tanzania, see, for example, Tenga, "Legislating" (1998a) and Peter, "Human Rights of Indigenous Minorities" (2007).

846 See *Lekengere Faru Parutu Kamunyu & 16 Others v. Minister of Tourism, Natural Resources and Environment & Others* (HC – Moshi, CV#33/1994) in chapter VI, this volume.

847 Gilbert, "Minority Groups" (1992), p. 79.

848 Keith Highet and George Kahale III, "International Decisions", 88 *American Journal of International Law* 775 (October 1994). In the case *Pratt and Morgan v. Attorney-General for Jamaica* ([1993] 4 All E.R. 769, the appellants were asking for the Judicial Committee of the Privy Council to decide on whether the death row to which they had been subjected did not amount to an act of torture, inhuman and degrading treatment.

colonial legal relic are given certain persuasive authority.[849] In the Zambian case *Chetankumar Shantkal Parekh v. The People* (1995), the judge clearly referred to decisions by the Privy Council as persuasive reference.[850] As shown in the *Mabo* case, it is indeed believed that "aboriginal title" is mostly relevant in countries that inherited the common law system, because the fact of possessing significantly contributes to a claim of ownership.

In countries with "civil law" systems, some scholars argue that the notion of aboriginal title could be applicable as "an equitable principle of constitutional common law". In two Canadian cases, the defendants unsuccessfully argued that, because Quebec had always been under the tradition of French law, and because this system of law had never recognized the principle of "aboriginal title", natives of Quebec could not claim aboriginal title.[851] However, René Calinaud has argued that *la possession prolongée* or unchallenged, prolonged possession is a means of proof of land ownership, in addition to the norm in most civil law countries that the right to property in land is to be established by statute and written titles following acts of donation, sale, etc.[852] He shows indeed that, despite the fact that the French "Code Civil" was introduced in the Polynesian region of Tahiti in 1866, customary land laws of the original inhabitants of this region continued to be applied until the late 1980s.[853]

It emerges from the above sections that the notion of "aboriginal title" or indigenous peoples' land rights is relevant and arguable in most of Africa. The Richtersveld case seems to be a case in point: in this case, aboriginal title was claimed by the Richtersveld community (see presentation of case in chapter VII, this volume), but rejected by the first court, which ruled

849 Highet and Kahale III "International Decisions" (1994). The opinion that decisions by the Privy Council continue to enjoy persuasive authority in Kenya is that of many Kenyan lawyers met by the author during fieldwork trips. This view is also shared by the Kenyan Legal Aid Project. One member of this Project is quoted saying that decisions by the Privy Council have helped them in several cases. The Weekly Law Reports CD-ROM "has literally transformed our practice enabling us to provide authorities for several constitutional cases, such as an application to release prisoners who had been awaiting trial for four years, based on Privy Council cases drawn from the Justis database. Given the lack of legal materials in Kenya it would not be too much an exaggeration to say that such CDs can make the difference between life and death for those on death row". See Justis Web site at: http://www.context.co.uk/

850 *Chetankumar Shantkal Parekh v. The People [1995]* SCZ/11a (unreported). The case involved individuals who were refused bail and appealed against the refusal. The judge ruled: *"We propose to dwell on these cases in a short while but the clear position we have come to is that we agree with the Privy Council and the Appellate Division in Zimbabwe and will dispose of this appeal as they did theirs and we will reject the Kenyan approach, which coincided with Mr. Mwanawasa's. Our conclusion based on these cases, which are of very high persuasive value and which dealt with provisions very similar, if not identical to ours, is that there is nothing unconstitutional in a provision which prohibits or restricts the grant of bail pending trial."*

851 The two cases *(R. v. Côté* [1996] 3 SCR 139 and *R. v. Adams* [1996] 3 SCR. 101) are referred to by Bennett and Powell, "Aboriginal Title" (1999), p. 14. The cases are found in [1996] 138 DLR (4th) 385, paras 42ff and [1996] 138 DLR (4th) 657, paras 32-3. Judge Lamer ruled against the defendants and upheld that the doctrine of aboriginal title is also applicable under the civil system.

852 René Calinaud, "Les principes directeurs du droit foncier polynésien", in *Revue Juridique Polynésienne,* no. 7 (2001), p. 746: « Ailleurs, dans les quelques îles qui ont échappé à ce système, la preuve de la propriété ne peut se faire que suivant les règles du code civil, règles qui sont donc ici supplétives, c'est-à-dire au moyen d'un acte écrit s'il en existe (vente, donation, partage, etc.) et s'il n'est pas contredit par un autre, au moyen de la possession prolongée ou encore de ce que la jurisprudence dénomme 'les présomptions les meilleures et les mieux caractérisées'.»

853 Ibid., p. 746.

> *To the extent that any of the rights claimed by the plaintiffs is dependent on their aboriginal title, such rights are dubious, because it is uncertain whether the doctrine of indigenous title forms part of our law, and if it does, what its scope and content are. It has, to my knowledge, never been recognised in any reported court decision. Even if it does form part of our law, it is uncertain whether such title would have survived the actions of the Government in making the subject land over to others.*[854]

Fortunately for the Richtersveld community, on appeal the Constitutional Court of South Africa held, among others, that "*the determination of the real character of indigenous title to land … 'involves the study of the history of a particular community and its usages'. So does its determination of content*".[855] It consequently concluded that "*the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law*".[856] Commenting on this very same case, T.M. Chan argues that the Constitutional Court's finding of "indigenous law ownership" was equivalent to ownership under the doctrine of aboriginal title.[857]

This ruling is an unprecedented landmark in recent jurisprudence that corroborates the relevance of the notion of "aboriginal title" in Africa. From this ruling and others referred to in this chapter, it also emerges that there exists an African jurisprudence dating back from colonial times and up to now, which confirms that indigenous communities pre-existing land rights were not extinguished with the arrival of colonial powers and later of modern states, even if it resulted in indigenous communities losing, and continuing to lose, their lands.

854 *Richtersveld Community and Others v. Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC), at 46.

855 *Alexkor Ltd and Government* v. *Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), at 57, quoting *Amodu Tijani v. The Secretary*. at 404.

856 Ibid., at 62.

857 Chan, "The Richtersveld Challenge" (2004), pp. 126-127.

CHAPTER IX
CONSTITUTIONAL RECOGNITION AND STATES' PRACTICE REGARDING INDIGENOUS PEOPLES' RIGHTS

North America

Canada

In the Americas, Canada was one of the first countries to devote an entire section of its 1982 Constitution Act[858] to the "Rights of Aboriginal Peoples in Canada". Article 35 provides that

1. *The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed;*
2. *In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada;*
3. *For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.*

The existence of aboriginal title had, however, already been recognized in 1973 by the Canadian Supreme Court in its ruling on *Calder v. The Attorney General of British Columbia*.[859] Although the Nishga's appeal was dismissed, the fact that the Canadian Supreme Court had held that Aboriginal title is part of Canadian law, and that the Nishga had once held such title, provided the impetus for the overhauling of the land claims negotiation process in Canada.[860]

858 Canada's constitution is not a single written document, but is made up of acts of the British and Canadian Parliaments, as well as legislation, judicial decisions and agreements between the federal and provincial governments. The Constitution Act of 1982 is divided into seven parts. Part I is the Charter of Rights and Freedoms, Part II is on the Rights of Aboriginal Peoples in Canada.

859 *Calder v. The Attorney General of British Columbia* [1973] S.C.R. 313, (1973). The case was initiated in 1968 by the Nishga Tribal Council against the Government of British Columbia. Available online at http://www.canlii.org

860 The case failed both at trial and in the Court of Appeal. The Supreme Court overturned the Court of Appeal's finding in recognising the possible existence of Aboriginal rights to land and resources, but was equally divided on the issue of whether the Nishga retained title. The appeal was ultimately dismissed on a technicality. See http://www.atns.net.au/agreement.asp?EntityID=2359. In 2002, the Nishga'a signed a self-government agreement with the government of British Columbia.

The basis for aboriginal title was later expanded on in *Guerin v. The Queen*, (1984),[861] and, most importantly, in *Delgamuukw v. British Columbia* (1997).[862] The latter was a groundbreaking ruling since it contains the first definitive statement on the content of Aboriginal title in Canada. It also describes the scope of protection afforded by this title under subsection 35(1) of the Constitution Act 1982; defines how the title may be proved; and outlines the justification test for infringements of the title.

The Supreme Court's decision also confirmed that, pursuant to section 91(24) of the Constitution Act 1876, the federal government has exclusive jurisdiction with respect to Indians and their lands, and that provincial legislatures are thus unable to effect extinguishment of title.[863] It was largely in response to this holding that the Canadian federal government established, in 1973, a coherent federal and national policy for the negotiation and settlement of Aboriginal land claims. This policy also reconciled most of the historical differences between individual provinces in Canada.

Claims were from now on divided into two broad categories—specific and comprehensive claims. Specific claims are claims that arise from the breach or non-fulfillment of government obligations found in treaties, agreements, or statutes, while comprehensive claims are based on the assertion of unextinguished aboriginal title to land and resources. Subsequent to extensive consultations with Aboriginal and other groups, the Comprehensive Land Claims Policy was amended in 1986 to provide greater flexibility in land tenure and better definition of subjects for negotiation. In 1991, the Indian Specific Claims Commission was created as an appeal mechanism for First Nations. Its mandate is to address disputes arising out of the specific claims process.

The federal government has subsequently introduced the Inherent Right Policy 1995, whereby self-government arrangements may be negotiated as a part of comprehensive claims agreements. In 1998, the Canadian government affirmed that treaties will continue to be the basis for the ongoing relationship between Aboriginal people and the Crown. In 2003, the Specific Claims Resolution Act was enacted in response to the push for a revised specific claims process that provides effective dispute resolution, with litigation as a final resort.[864]

But the land claim process has been slow. In 2004, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, not-

861 *Guerin v. The Queen* [1984] 2 S.C.R. 335. (1984). The Supreme Court refers specifically to Section 18 (1) of the Canadian Indian Act in force at the time. Available online at http://www.canlii.org

862 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010. In this case, the appellants, 35 Gitksan and 13 Wet'suwet'en hereditary chiefs, claimed "ownership" of and jurisdiction over 58,000 square kilometers in British Columbia based on historical facts asserted by oral traditions. Thus, one of the questions addressed by the Court was whether oral tradition could be considered as a means of proof of title over lands. The judge dismissed the appellants' claim and ordered a new trial. He explicitly advised the parties to settle their dispute through negotiations instead of litigations. Available online at http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html

863 Mary C. Hurley, "Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v. British Colombia*". Law and Government Division, January 1998, revised February 2000. Available online at http://www.parl.gc.ca/information/library/PRBpubs/bp459-e.htm

864 For more information, visit http://www.atns.net.au/agreement.asp?EntityID=2257

ed that out of about 1,300 specific claims filed, 115 were being negotiated and 444 had been resolved, while 38 were being reviewed by the Indian Specific Claims Commission.[865] Since 1973, 20 comprehensive land claim agreements covering about 40 per cent of Canada's territory have been signed. Most of these agreements have been made with Inuit peoples in the northern part of the country, where the largest comprehensive claim was settled in 1993, leading in 1999 to the creation of the Nunavut Territory. The first modern treaty in British Columbia was the Nishga Final Agreement in 1996. It is also the first treaty in Canada to incorporate both land claims and constitutionally protected self-government provisions.[866]

The situation in British Columbia (BC) is somewhat different from that of the rest of Canada since most First Nations in BC have not signed or adhered to treaties. In order to facilitate the process of comprehensive land claims/treaty negotiations between BC and its First Nations, the British Columbia Treaty Commission (BCTC) was established in 1992 as a tri-partite body of which Canada, BC and the First Nations are full parties.

The treaty process started in 1997 and by the end of 2009, 60 First Nations, representing about 2/3 of BC's aboriginal people, were participating. They have to go through five difficult and lengthy stages of negotiations that lead up to a final agreement that has to be approved by vote by the First Nation in question and by the provincial legislature before being ratified in the federal parliament. As of 2013, there are 44 nations negotiating an Agreement-in-Principle (stage 4) and 7 negotiating a final agreement. Two have reached stage 6, i.e., "Treaty implemented". One of these, the Maa-nulth First Nations of Vancouver Island—some 2,000 people—entered the treaty process in January 1994, signed the final agreement in 2006 and ratified it in 2009. That same year, the federal government gave Royal Assent to the Maa-nulth First Nations treaty (Bill C-41, 2009), and the treaty took legally effect on April 1, 2011. The treaty means that the Maa-nulth First Nations own in fee simple an area of approximately 24,498 hectares, including 22,342 hectares of former provincial Crown land, 2,064 hectares of former Indian reserve land and 92 hectares of private land purchased from willing sellers.[867]

United States

The 1787 Constitution of the United States reflects "the belief that Indian tribes constituted separate nations within the sovereign borders of the United States, and that therefore tribal members were not taxed, or given any of the rights of citizens of the U.S." [868] The Constitution granted Con-

865 Rodolfo Stavenhagen, Mission to Canada. U.N. Doc. E/CN.4/2005/88/Add.3, 12 December 2004, para. 44. Available at http://www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm

866 The Nishga Final Agreement came into effect in 2000. See Indian Affairs and Northern Development, "General Briefing Note on the Comprehensive Land Claims Policy of Canada and the Status of Claims" (Montreal: Comprehensive Claims Branch Claims and Indian Government Sector, March 2007). Available on line at http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/gbn/gbn-eng.asp

867 See Web site of the BCTC at http://www.bctreaty.net/files/updates.php

868 Tim Vollmann, "Recognition of Traditional Forms of Ownership of Land and Natural Resources by Indigenous Peoples in the Jurisprudence and Legislation of the U.S.A." Presentation for the Panel on Traditional forms of ownership in the legislation and practices of the Region, Organization of American States Washington, D.C., November 7, 2002. Available online at http://www.oas.org/consejo/CAJP/docs/cp10445e04.doc

gress the power to regulate commerce with the Indian tribes,[869] and empowered the president to make treaties with them subject to the consent of the Senate.[870] To this day, most American Indian affairs are dealt with administratively by the federal government[871] and at the policy level by several congressional committees.

Most American Indian legislation also continues to be regulated at the federal level[872] and is recorded in Statutes at Large which is codified in Title 25—Indians—of the United States Code.[873] Title 25 includes laws regarding land issues and land claim settlements, but treaties or similar agreements signed by the U.S. federal government with Indian tribes and judicial decisions (usually Supreme Court rulings) are equal important sources of American Indian Law, which therefore presents a complex combination of statutes, rules, regulations, tribal laws, treaties, and agency and judicial decisions.[874]

In order to claim land, a tribe must be federally recognized.[875] There are today, more than 560 such tribes including 223 village groups in Alaska, and some 275 reservations in the U.S.A. The federal government holds some 225,000 sq km in trust for tribes and individuals. Individual Native Americans in the U.S. who own trust land can sell this land or turn it into a normal fee simple title, subject to the government's authorization.[876]

Indian Law distinguishes between "aboriginal title" (based on possession and use since time immemorial) and "recognized title" (based on a treaty or agreement whereby the U.S. has confirmed the Indians' right to the land).[877]

"Aboriginal title" has since early nineteenth century been considered as a "right of occupancy". This means that the fee simple to Indian title land is held by the government rather than by the Indians, but that grants of Indian lands take effect *subject* to the Indian right of occupancy.[878] This interpretation of Aboriginal title has never been questioned and a string of

869 U.S. Constitution, Article I, Section 8, Clause 3.

870 Ibid., Article II, Section 2. The Constitution has since been amended twenty-seven times, the first ten amendments being known as the Bill of Rights.

871 The Bureau of Indian Affairs (BIA) is an agency of the federal government within the Department of the Interior charged with the administration and management of the land held in trust by the United States for Native Americans in the U.S., Native American Tribes and Alaska Natives.

872 Congress may allow state jurisdiction to prevail if no federal statutes apply to a given situation.

873 The U.S. Code is available online at http://www.gpoaccess.gov/uscode/

874 For more information, see Researching American Indian Law at http://www.law.umkc.edu/faculty/profiles/stancel/indian.htm

875 Indian tribes or groups may be recognized by the federal government and/or by the states. The federally recognized tribes are eligible for funding and services from the Bureau of Indian Affairs (BIA). The state-recognized tribes or groups are not guaranteed funding from the state or the federal government. State-recognized Indian tribes are not federally recognized; however, federally recognized tribes may also be state-recognized. See National Conference of States Legislatures at http://www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized-tribes.aspx

876 See Bureau of Indians Affairs, "Answers to Frequently Asked Questions". Available online at http://usa.usembassy.de/etexts/soc/bia.pdf

877 See Keith H. Raker, "Reservation of Rights: A look at Indian Land Claims in Ohio for Gaming Purposes" (2005). Available online at http://www.tuckerellis.com/news/Reservation%20of%20Rights.pdf

878 *Fletcher v. Peck* [1810] 6 Cranch 87 ruled that the fee simple to Indian title land is held by the government rather than by the Indians who nonetheless have a right of occupancy entitling them, as per *Johnson v. M'Intosh* [1823] 8 Wheat. 543, to "a legal as well as just claim to retain possession of it, and use it according to their own discretion". Both cases can be found online at: http://www.findlaw.com/casecode/

Supreme Court decisions has continued to protect Indian title from government grants, whether issued before or after the independence of the United States, by either making the grant subject to that title or interpreting the grant to exclude the Indian lands.[879] Subsequent rulings[880] have also established that the "right of occupancy" entitles Native Americans to the complete beneficial interest, including timber and mineral rights, regardless of the uses they traditionally made of the land.

This, however, does not preclude that the government may extinguish aboriginal title through a taking of the subject lands "either by purchase or by conquest",[881] and Indians do not have a constitutional right to compensation for congressionally authorized taking of their lands unless their title has been recognized. This was, for instance, the case in the *Tee-Hit-Ton Indians v. United States* (1955),[882] where the U.S. Supreme Court argued that an original Indian title

> *[I]s not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.*[883]

The *Tee-Hit-Ton* decision continues to be upheld and applied by United States courts.[884]

"Recognized title" stands in stark contrast to "aboriginal title" since it is title to Indian property that has been created, or *recognized*, by action of the federal government, typically by federal treaty or statute.[885] The primary goal of treaties was to obtain Indian lands via purchase. Indian property with recognized title may or may not have been part of the aboriginal territory of the tribe. In fact, the federal government has in the past designated certain lands as Indian property even though a tribe has no aboriginal claim to these lands whatsoever. [886]

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879 Kent Mc Neil, "Extinguishment of Native Title: The High Court and American Law", *Australian Indigenous Law Reporter* [1997] AILR 41. Available online at http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AILR/1997/41.html?query=%20Extinguishment

880 See *United States v. Shoshone Tribe of Indians,* [1938] 304 U.S. 111 (1938), at 115-18; *Otoe and Missouria Tribe of Indians v. United States,* [1955] 131 F. Supp. 265, 272 (Ct. Cl. 1955). Available online at http://www.findlaw.com/casecode/

881 The Court in *Johnson v. M'Intosh* (1823) also ruled that right of occupancy was protected while the Indians were "in peace", but could be extinguished "either by purchase or by conquest" by the European powers or the United States after it became an independent nation.

882 *Tee-Hit-Ton Indians v. United States*, [1955] 348 U.S. 272, February 7, 1955. The United States had taken certain timber from Alaskan lands, which the Indians said belonged to them. They asked for compensation. Available online at http://laws.findlaw.com/us/348/272.html

883 Ibid., at II (a). The Court foreheld that the Indians, whose claims to ownership of land had not been recognized by Congress and who had used "land in a manner similar to nomadic States Indians", were not entitled to compensation for United States' taking of timber from occupied land. Ibid., at paras. 4. and 5.

884 As in the case of *Karuk Tribe of California, et al. v. United States*, [2000] (Court of Appeals for Federal Circuit 2000) 209 F.3d 1366. Available at http://www.laws.findlaw.com/fed/995002r.html

885 The United States first treaty with an Indian tribe was concluded in 1778 and until 1871some 370 Indian Treaties were signed. Since then, relations are established by Congressional Acts, Executive Orders or Executive Agreements. See http://usa.usembassy.de/etexts/soc/bia.pdf

886 Raker, "Reservation of Rights" (2005).

The primary advantage of recognized title is its relative permanence. It is more difficult for the federal government to extinguish claims to lands to which Indians have recognized title. In contrast to aboriginal title, a taking of lands to which an Indian tribe has recognized title is compensable under the Fifth Amendment.[887]

Although the unfairness of the treaty negotiation process was long recognized, it was not until 1946 that Congress created the Indian Claims Commission (ICC) to allow tribes to make claims against the United States based on unconscionable transactions.[888]

The Claims Commission was an attempt to recognize, settle, and extinguish American Indians' legal claims to land and resources in exchange for financial compensation.[889] By the time the commission expired thirty-three years later (1979), more than a half billion dollars had been awarded. But many tribes wanted property rights, not money, and, in a few cases, tribes refused to accept a financial settlement, continuing instead to assert claims for land transfer or resource use.[890]

A case in point is that of the Sioux Indians of South Dakota, who, in 1979, were awarded the largest Indian land settlement in American history—US$105 million dollars—for the illegal seizure of the Black Hills in 1880, but refused to accept the money. They wanted the land instead, for it represented more than just an economic opportunity—they saw it as a chance once again to be reunited as one nation in their traditional homeland. Since then, no solution has been found and the money in the interest bearing accounts of the tribes is today close to $1 billion dollars.[891]

Another example is the struggle of the Western Shoshone Nation for the recognition of their land and treaty rights, which started back in the 1940s and has not yet been settled. This struggle has taken on a variety of forms, including the use of political, legal and international mechanisms.[892] After having exhausted their domestic legal remedies, the Western Shoshone thus sought international recognition of their land rights before two international forums: the Inter-American Commission on Human Rights (IACHR) of the Organization of American States in 1993, and the Committee for the Elimination of Racial Discrimination (CERD) of the United Nations in 1999 in relation with the U.S.

887 The Fifth Amendment is part of the Bill of Rights adopted in 1791. It states, among other things, that "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

888 The commission heard claims that had been filed prior to 1951 until its expiration in September, 1978. Claims not adjudicated before the commission expired were transferred to the U.S. Court of Claims.

889 Anne Flaherty, "This Land is My Land: The Politics of American Indian Land Claims Settlements". Draft Paper prepared for the American Political Science Association Annual Conference; Chicago, Illinois (August 2007), p. 1, quoting Rosenthal (1990).

890 Ibid., p.7.

891 Tim Giago, "A Story Dying to be Told" *Lakota Country Times,* September 25, 2008, available at http://www.lakotacountrytimes.com/news/2008/0925/tim_giago/

892 In 1985, the Supreme Court held in the *United States v. Dann* case [1985] 470 U.S. 39, that the Western Shoshone had been paid because the government had placed funds into a trust account in the name of the Western Shoshone, and that such payment barred the Dann sisters from raising Western Shoshone title as a defense against the federal government's trespass charges. The underlying basis of the Court's decision was that American Indians are classified under the U.S. Indian law system to be "wards" of the United States government. Thus, the Court deemed that the U.S. federal government could pay itself as the Indians' "guardian" and say that therefore the Indians had been paid. The Dann's response was that they were grazing their cattle on Western Shoshone land as recognized in the Treaty of Ruby Valley, in 1863. For more information, see: http://www.law.arizona.edu/depts/iplp/international/westernShoshone.cfm

periodic report. Both forums expressed their concerns and made recommendations to the U.S. government.[893]

In 2005 and 2006, following the approval by the Bureau of Land Management (BLM) of Canadian multinational Barrick Gold's request to explore 30,000 acres in an area around 15 miles from Mt. Tenabo, a site sacred to the Western Shoshone nation located in Nevada, Western Shoshone groups submitted several petitions for Urgent Action to CERD. In its decision under the special "Early Warning and Urgent Action" procedure, CERD urged the U.S. government to halt any plans to appropriate Western Shoshone territory for private development or environmentally destructive government projects.[894]

In its February 2008 Concluding Observations, CERD reiterated Decision 1(68) in its entirety[895] but this did not deter the BLM in approving an expansion of Barrick Gold's activities that involved the construction of a massive, open-pit cyanide heap-leach gold mine on Mt. Tenabo. Attempting to halt the mine, a coalition of non-profit organizations and Western Shoshone representatives filed suit in federal court.[896] Although U.S. courts eventually issued a limited injunction pending further environmental assessment, Barrick Gold was allowed to continue most operations and the mine began production in 2010. The injunction was lifted in 2011, and further challenges to the mine have failed in U.S. courts.[897]

While the Indian Land Claims Commission dealt with most treaty litigation, the Congress has resolved previously unsettled cases. An example is the Alaska Native Claims Settlement Act, (ANCSA), the largest land claims settlement in United States history signed into law in 1971. ANCSA was intended to resolve the long-standing issues surrounding aboriginal land claims in Alaska, as well as to stimulate economic development throughout Alaska. The settlement extinguished Alaska Native claims to the land by transferring titles and compensation to twelve Alaska Native regional corpora-

893 The IACHR recommended in 2002 the United States to "review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration". It further writes that "The State (i.e., the U.S.) has not provided the Commission with updated information regarding compliance with the recommendations in this case", and that it has received information from the Petitioners that the United States has done nothing to comply with the Commission's recommendations and that their rights have been further violated. See IACHR Annual Report 2007, at paras. 585 and 586. Available online at http://www.iachr.org/annualrep/2007eng/Chap.3q.htm. The Committee on Elimination of Racial Discrimination (CERD), in its Conclusions and Recommendations in 2001, expressed concerns over the fact that "treaties signed by the [U.S.] Government and Indian tribes, described as 'domestic dependent nations' under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government". See para. 400 in CERD, Conclusions and Recommendations, United States of America, 14/08/2001. A/56/18, at 380-407. For text, see http://hrlibrary.ngo.ru/country/usa2001.html

894 CERD, in its Decision 1(68) also criticized the U.S. government for levying fees and restrictions on Western Shoshone people for using their own land and urged the government to negotiate formally with tribal leaders on unresolved land-ownership issues. U.N. Doc. CERD/C/USA/DEC/1 (2006b). At http://www2.ohchr.org/english/bodies/cerd/early-warning.htm

895 CERD, Concluding Observations, United States of America. U.N. Doc. CERD/C/USA/CO/6, (2008a) at para. 19.

896 *South Fork Band Council v. United States Department of the Interior,* 588 F.3d 718 (9 Cir. 2009).

897 See CERD, "Report on Effects of Canadia Transnational Corporate Activities on the Western Shoshone Indigenous Peoples" submitted to CERD by the Western Shoshone Defense Project in relation to Canada's 19th and 20th Periodic Reports, January 2012. http://www2.ohchr.org/english/bodies/cerd/docs/ngos/WesternShoshone_Canada80.pdf

tions and over 200 local village corporations. A thirteenth regional corporation was later created for Alaska Natives who no longer reside in Alaska.

The existence of the Claims Commission created the impression among many people in the U.S. that the debt owed indigenous people for the conquest and taking of their aboriginal lands was now being paid in full. This, however, overlooked two important facts: (1) a significant amount of land in the West was never the subject of a treaty of cession; and (2) many other lands, particularly in the East, were the subject of transactions never approved by Congress, as required by the Nonintercourse Act of 1790.[898]

Several eastern Indian tribes have during the past years brought lawsuits seeking the recovery of lands based upon claims that the 1790 Nonintercourse Act had been violated.[899] Legislative settlements have been successfully negotiated with tribes in Rhode Island (Narragansett), Connecticut (Mashantucket Pequot, who now own the largest casino in the U.S.), South Carolina (Catawba), and Florida (Seminole and Miccosukee).[900]

While a fair amount of American Indian land claims have been settled in the past decades, many others have been dismissed or are still pending.[901] Litigation tends to be lengthy, complex and expensive.

Neither Canada nor the United States have adopted ILO Convention No. 169, and both countries voted against the U.N. Declaration on the Rights of Indigenous Peoples in 2007. Both countries, however, revised their position and endorsed the Declaration in 2010. But their endorsement was not unqualified. The Canadian government indicated that it had endorsed the Declaration "in a manner fully consistent with Canada's Constitution and laws". Such a qualification could serve to perpetuate the status quo and is largely viewed as an attempt to minimize the effect of the Declaration. The U.S. administration stressed that the Declaration's principles were aspirational but not obligatory, thus clearly rejecting the notion of the UNDRIP's binding powers.[902]

Latin America

Before the 1980s, few, if any, Latin American constitutions referred to the rights of indigenous peoples, although some of the countries had passed laws dealing with indigenous issues, as for instance in **Brazil** where the *Estatuto do Indio* (Statute of the Indians or Law 6.001/73) was introduced in 1973. This law stated, among other provisions, that "the lands occupied by [Indians] in accordance with their

898 Vollmann, "Recognition of Traditional Forms of Ownership" (2002), p. 7. Congress adopted the first Indian Nonintercourse Act in 1790. This act reserved the right to acquire Indian lands to the United States to the exclusion of individuals and states, and that a sale of Indian lands was not valid unless "made and duly executed at some public treaty, held under the authority of the United States".

899 Ibid., pp. 7-8.

900 See, e.g., *South Carolina v. Catawba Indian Tribe, Inc.* 476 U.S. 498 (1986) at htpp://www.findlaw/com/casecode; *Mashpee Tribe v. New Seabury Corp.* 592 F.2d 575 (1st Cir. 1979); *Narragansett Tribe v. Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I. 1976)—both at htpp://www.altlaw.org.

901 See, e.g., the Web page of Native American Rights Fund at http://www.narf.org/cases/index.html#older

902 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 58 and pp.67-68.

tribal usage, customs and tradition, including territories where they carry on activities essential for their subsistence or that are of economic usefulness, constitute territory of the Indians".[903]

Brazil was also the first country in Latin America to give a constitutional status to the concept of indigenous lands when the undemocratic Constitution of 1967 was replaced by the 1988 Federal Constitution. In its Article 231, paragraph 2, the new Constitution defines indigenous lands as:

> *Lands traditionally occupied by the Indians are those that they have inhabited permanently, used for their productive activity, their welfare and necessary for their cultural and physical reproduction, according to their uses, customs and traditions.*

The 1988 Constitution also granted greater rights to indigenous peoples and several of its provisions are in contradiction with the *Estatuto do Indio*, which is very much grounded in the antiquated view that Indians have to be protected and eventually integrated into mainstream society.[904]

The Brazilian Federal Constitution of 1988 is therefore considered by many as a watershed, a benchmark,[905] and it was soon followed by other constitutions in the region that recognized the social-diversity of their countries.

The 1992 Constitution of **Paraguay** contains an entire Chapter V that deals with "Indian peoples", and in which the state "*recognizes the existence of Indian peoples, defined as ethnic groups whose culture existed before the formation and constitution of the State of Paraguay*".[906] Article 64 provides that:

1. *Indian peoples have the right, as communities, to a shared ownership of a piece of land, which will be sufficient both in terms of size and quality for them to preserve and to develop their own lifestyles. The State will provide them with the respective land, free of charge. This land, which will be exempt from attachments, cannot be divided, transferred, or affected by the statute of limitations, nor can it be used as collateral for contractual obligations or to be leased. It will also be exempt from taxes;*
2. *The removal or transfer of Indian groups from their habitat, without their express consent, is hereby prohibited".*[907]

In 2008, **Ecuador** adopted a new Constitution.[908] While the former 1998 Constitution also had provisions specifically addressing "indigenous peoples", the new Constitution, already in its Article 2, recognizes indigenous languages as part of the national heritage and the right of indigenous

903 See IACHR (Inter-American Commission on Human Rights), Resolution 12/85, case 7615 (Brazil), March 5, 1985. OAS/Ser.L/V/II.66 Doc.10 rev.1 October, 1985. Available at http://www.cidh.oas.org/casos/84.85.eng.htm

904 The 1988 Constitution (see at http://www.confinder.richmond.edu) does not call for the integration of indigenous peoples into Brazilian society, but ensures them, on the contrary, the right for them to be different from the rest of the country. In 1994, a new statute of the Indians was proposed and approved by a special commission of the Chamber of Deputies, but the passage of the bill has been blocked up until now. See http://www.socioambiental.org/

905 See Instituto Socioambiental, "ISA 10 Years", p. 5. Available at: http://www.socioambiental.org/e/inst/mm/melh_2004_ing.pdf

906 Constitution of Paraguay (1992), Article 62 (see at http://www.confinder.richmond.edu).

907 Ibid., Article 64.

908 The Constitution is available at http://www.confinder.richmond.edu

peoples to use these languages as official languages. Chapter 4 on the "Rights of communities, peoples and nationalities" includes in its Article 58, twenty-two paragraphs on their collective rights, including their right to their communal lands and the right to participate in the use, enjoyment and administration of the renewable natural resources in their lands. While the old Constitution spoke about their right to be consulted, Article 58 (7) introduces the concept of prior, free and informed consent when it comes to development plans on their lands. As in the old Constitution, indigenous peoples have the right to not be displaced from their ancestral lands.

The 1999 Constitution of **Venezuela**[909] states in chapter VIII – Rights of Native Peoples, Article 119:

> *The State recognizes the existence of indigenous peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life. It shall be the responsibility of the National Executive, with the participation of the indigenous peoples, to demarcate and guarantee the right to collective ownership of their lands, which shall be inalienable, not subject to the law of limitations or distrait, and nontransferable, in accordance with this Constitution and the law.*

The Constitution (Article 120) furthermore stipulates that:

> *Exploitation by the State of the natural resources in indigenous habitats shall be carried out without harming the … integrity of such habitats, and likewise subject to prior information and consultation with the indigenous communities concerned. Profits from such exploitation by the native peoples are subject to the Constitution and the law.*

In **Mexico**, the Constitution, which goes back to 1917 (and has been amended numerous times), was amended in 2001 to recognize and guarantee the legal, social and economic rights of indigenous peoples. Article 2 thus states that,

> *The nation is pluricultural based originally on its indigenous tribes which are those that are descendants of the people that lived in the actual territory of the country at the beginning of the colonization and that preserve their own social, economic, cultural, political institutions. … They are integral communities of an indigenous tribe those that form a social, economic and cultural organization.*[910]

In **Bolivia**, a constitutional revision process was initiated by the newly elected Evo Morales government in 2005. The process has been marked by deep political divisions but, in October 2008, the Congress approved a draft constitution that in January 2009 was passed with a comfortable majority by national referendum. Strengthening the rights and power of Bolivia's indigenous majority, the Con-

909 The Venezuelan Constitution is available at http://www.confinder.richmond.edu

910 Text available online at http://www.juridicas.unam.mx/infjur/leg/legmexfe.htm

stitution incorporates the principles of the United Nations Declaration on the Rights of Indigenous Peoples; it recognizes the pluri-national character of the state, indigenous languages as official languages, and indigenous autonomy. This autonomy

> [*C*]*onsists of self-government and the exercise of self-determination for rural indigenous nations and native peoples who share territory, culture, history, language, and unique forms of juridical, political, social, and economic organization.*[911]

Local indigenous governments will also be allowed to levy some taxes and appropriate the funds as well as to carry out community justice according to their traditional practices—as long as government laws are not violated.

Many other Latin American countries recognize in their constitutions their ethnic and cultural diversity, define themselves as pluricultural nations and guarantee the social, economic and cultural rights of indigenous peoples. Many countries have engaged in land reform processes, including land demarcation and titling, in favour of indigenous peoples. Land issues, however, continue to affect indigenous peoples, especially in relation to mining, oil exploration and conservation policies.

Most Latin American countries have ratified ILO Convention No. 169 and all, with the exception of Colombia who abstained, voted in favour of the UN Declaration on the Rights of Indigenous Peoples in 2007. Colombia has since then reversed its position and endorsed the Declaration (2009).

The Pacific and Asia

Australia

The legal claims of the Aboriginal peoples and Torres Strait Islanders on their lands are guaranteed by the 1993 Australian Native Title Act, which "*recognises and protects native title*" and "provides *that native title cannot be extinguished contrary to the Act*".[912]

According to Section 223 (1)

> *[T]he expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
>
> *a. the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
>
> *b. the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
>
> *c. the rights and interests are recognised by the common law of Australia.*

911 Article 289 of the new Bolivian Constitution 2009. See http://www.confinder.richmond.edu

912 Australian Native Title, Section 10. The 1993 Native Act contains essentially laws that help to determine whether a native title exists on a given part of lands or waters. See http://www.comlaw.gov.au/

Section 223 (2) furthermore stipulates that "*rights and interests includes hunting, gathering or fishing rights and interests*".[913]

The Act was part of the federal government's response to the High Court's decision in the *Mabo v. Queensland* case,[914] which held that "*that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer*",[915] and found that Australian common law can recognize the rights and interests over land and water possessed by indigenous peoples in Australia under their traditional laws and customs—i.e., their "native title". The Act also established a national machinery—the National Native Title Tribunal—that assists people to resolve native title issues over land and waters and acts as a mediator.[916] The Tribunal likewise administers the so-called future act processes which are proposed activities or developments generally related to mining that attract the right to negotiate (but not to veto).

The Native Title Act (NTA) has been amended several times. In 1998, it was done against the express wishes of Aboriginal and environmental groups, who saw it as a deliberate act from the government's side—very much prompted by the 1996 *Wik Peoples v. The State of Queensland* case—to largely extinguish native title. The High Court in the *Wik* case had ruled that native title rights could only be extinguished by deliberate act; they could co-exist with pastoral leases, but where there was inconsistency, the pastoral lease would prevail.[917] The 1998 amendments redefined the nature of pastoral leases, increased the powers of the mining and pastoral industries and state governments at the expense of native title claimants, imposed new and unrealistic requirements on native title claimants, and largely replaced the right to negotiate about future developments with a right to be consulted.[918]

Recent initiatives relevant for indigenous land rights include the Indigenous Protected Area Programme launched in 1997[919] and the creation of the Indigenous Land Corporation (ILC) in 2005.[920]

913 Ibid., Section 225.

914 *Mabo and Others v. Queensland* (No.2) [1992]. The case involved indigenous peoples from the Murray Islands in the Torres Strait. The communities living on these islands since before the arrival of European settlers and known as the Meriam people, claimed to have maintained their native rights on these lands despite the arrival of Europeans. Available online at http:// www.aiatsis.gov.au

915 Ibid., at para. 97.

916 However, applications made under the Native Title Act for a determination of native title or for compensations for the loss of native title, etc., are under the responsibility of the Federal Court of Australia.

917 *The Wik Peoples v. The State of Queensland & Ors*; *The Thayorre People v. The State of Queensland & Ors* [1996] HCA 40 (23 December 1996). Can be accessed at http://www.austlii.edu.au/databases.html - High Court cases. See also Web site of Australian Institute of Aboriginal and Torres Strait Islanders Studies at http://ntru.aiatsis.gov.au – Native Title Research Unit.

918 See, for example, http://www.nlc.org.au/html/land_native_amend.html

919 An Indigenous Protected Area (IPA) is an area of indigenous-owned land or sea where Traditional Owners have entered into an agreement with the Australian government to promote biodiversity and cultural resource conservation. The IPA programme is part of the Australian government's national reserve system. See, e.g., http://www.facsia.gov.au/indigenous/specific_evaluations07/page6.htm, accessed January 2009.

920 The ILC was established by the *Aboriginal and Torres Strait Islander Act 2005* as an indigenous controlled "statutory authority to assist indigenous people to acquire and manage land to achieve economic, environmental, social and cultural benefits". Its work is based on a National Indigenous Land Strategy (NILS) which was updated in 2013. See Web site at http://www.ilc.gov.au

Since then, there have been further amendments to the NTA,[921] such as the Native Title Amendment Act (No.1) 2010,[922] Native Title (Notices) Determination 2011 (No. 1),[923] while The Native Title Amendment (Reform) Bill 2011 for an Act to amend the Native Title Act 1993 to further the interests of Aboriginal and Torres Strait Islander Australians is still being debated.[924]

However, the most important development in recent years has been the process towards a constitutional recognition of indigenous Australians. It started in 2008 when Prime Minister Kevin Rudd pledged his support for such recognition. In 2010, the National Congress of Australia First Peoples was created as an independent and representative national voice and an advocate for the recognition of the status and rights of the First Nation Peoples in Australia. The same year, the government committed itself to hold a referendum on the issue by 2013. A panel of indigenous and non-indigenous experts was established to advise on a model and process and its report was issued in January 2012.[925] In September 2012, the government announced it would delay the referendum, citing concern at low levels of public awareness. Instead, and as an interim measure to help build momentum for a future referendum, it tabled a Bill of Recognition in the Parliament. This Bill was passed in February 2013 by the Australian federal parliament as The Aboriginal and Torres Strait Islander Peoples Recognition Act 2013.The Act has a two-year sunset clause to force the parliament to introduce a real referendum on changes to the Constitution.

New Zealand

New Zealand's constitutional arrangements can be found in a number of key documents, which, together with New Zealand's constitutional conventions, form the nation's Constitution. Key written sources include the Constitution Act 1986, the New Zealand Bill Of Rights Act 1990, the Electoral Act 1993, the Standing Orders of the House of Representatives and the Treaty of Waitangi.[926] This Treaty, which dates back to 1840, is today widely accepted to be a constitutional document, which establishes and guides relationships between the Crown in New Zealand (as embodied by the New Zealand government) and Maori.[927]

921 For detailed information on Native Title, see Native Title Resource Guide – National Overview Updated to December 31, 2010 (at http://www.aiatsis.gov.au/ntru/resources.html

922 This Act provides for a representative Aboriginal or Torres Strait Islander body or native title claimant to be notified and afforded an opportunity to comment on acts which could affect native title, and for compensation for any impact on native title rights and interests.

923 This revised Determination aims to clarify and define terms, and brings it in line with the NTA following recent legislative amendments.

924 For more details see, e.g., Submission of the Australian Institute of Aboriginal and Torres Strait Islander Studies, January 2012 at http://aiatsis.gov.au/ntru/documents/130131-AIATSIS-NativeTitleAmendmentBill2012-2013Submission.pdf

925 Expert Panel, "Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel", January 2013. Available online at www.youmeunity.org.au and at www.fahcsia.gov.au

926 Aspects of the Constitution are also found in United Kingdom and other New Zealand legislation, judgments of the courts, and broad constitutional principles and conventions. See at http://www.confinder.richmond.edu

927 New Zealand Ministry of Justice, The New Zealand Legal System accessed at http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.html

Native title was recognized under the common law of New Zealand as early as 1847 in the case of *R v. Symonds*.[928] Apart from confirming the existence of common law native title in New Zealand, this decision also noted its recognition in accordance with the country's founding document—namely, the Treaty of Waitangi (1840).[929] The Native Rights Act 1865 also supported Maori native title rights, but already in 1877, the *Wi Parata v. Bishop of Wellington* case[930] reversed these earlier interpretations, concluding that the Treaty of Waitangi had no effect and denying the existence of customary law.[931]

In the 1970s, growing Maori protests about unresolved Treaty grievances led to the establishment of the Waitangi Tribunal (1975).[932] This permanent commission of inquiry hears reports and makes recommendations on claims by Maori that have been or may be "prejudicially affected" by laws, actions and policies of the Crown that are contrary to the principles of the Treaty of Waitangi of 1840.[933] In 1985, the Tribunal was given retrospective jurisdiction to examine Crown actions affecting Maori since 1840.

In cases of justified claims, and since it is not a court but rather a commission of inquiry, the Tribunal can only make recommendations relating to land restitution, regardless of the size and current use of such land. Settlements continue therefore to be negotiated through the Maori Land Court,[934] which, together with the Maori Appellate Court, operates in a tribunal-type manner and deals with issues relating to lands held communally by Maori communities—Maori Lands. According to some estimates, Maori lands cover 4.5 per cent of New Zealand's land area or some 1,305,698 hectares. In 1993, the Maori Land Act was passed and provides for various working mechanisms applying to Maori land.[935]

The Maori land rights' struggle, however, goes on. In November 2004, the government enacted the Foreshore and Seabed Act, thereby removing the right of the Maori to seek ownership of the

928 *R v. Symonds* (1847) N.Z.P.C.C. 387. For summary, see http://www.atns.net.au/agreement.asp?EntityID=1744

929 The Treaty of Waitangi was signed in 1840 between the British Crown and the Maori chiefs of what is now known as New Zealand. See, e.g., http://www.waitangi-tribunal.govt.nz/treaty/

930 *Wi Parata v. Bishop of Wellington* [1877] 3 NZLR 72. For summary see http://www.atns.net.au/agreement.asp?EntityID=1745

931 See Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), "A Comparison of Native Title Laws", 2004 (Updated 2007), available online at http://www.aiatsis.gov.au – Native Title Research Unit.

932 The Waitangi Tribunal takes its name from the 1840 Treaty and was established under the Treaty of Waitangi Act 1975. The tribunal may have up to 17 members, who sit in divisions as small as three (3), of whom one member must be Maori. Sittings are usually headed by a member with legal training or a judge of the Maori Land Court. The chairperson is the Chief Judge of the Maori Land Court. Once a claim under the Treaty of Waitangi has been lodged, there ensues a process of negotiation seeking to achieve a fair and just settlement of Crown historical breaches of the Treaty. The Treaty settlement process is intended to be reparative and to provide redress for historical misconduct. The government does not provide full compensation for losses suffered historically by Maori, but negotiates a compromise. See Web site of Tribunal at http://www.waitangi-tribunal.govt.nz/

933 According to section 6 of the Treaty of Waitangi Amendment Act 2006, the Waitangi Tribunal is not permitted to register claims submitted on or after 2 September 2008 that are either new historical Treaty claims or historical amendments to contemporary claims. See http://www.waitangi-tribunal.govt.nz/

934 The Court was originally established as the Native Land Court under the Native Land Act 1865. It has been called the Maori Land Court since 1954.

935 See at the following Web site: http://www.kennett.co.nz/maorilaw/index.html#contents

foreshore and seabed.[936] This legislation was subsequently criticized by both the Committee on the Elimination of Racial Discrimination[937] and the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.[938] Since then, however, some *iwi* (clans) have chosen to negotiate agreement within the bounds of the act and the first agreement was ratified in October 2008.[939] In September 2008, the *Central North Island Forests Land Collective Settlement Act of 2008* was passed. It will return 176,000 hectares of forested land to seven *iwi*, who are members of the Central North Island Collective[940] and to the Trust Holding Company, CNI Iwi Holdings Limited.

Since then many more treaty settlements have been or are in the process of being concluded.[941] The settlement process takes several years and goes through a series of steps—from establishing well-founded claims and negotiating to ratifying the agreement—before a settlement deed can be issued and the legislation to fully implement it has been passed. The settlement deed usually includes (i) an historical account, acknowledgements and Crown apology; (ii) a cultural redress that, inter alia, safeguards the claimant group's rights and access to customary food-gathering sources; and (iii) financial and commercial redress.[942]

One reason for the increased number of settlements may be that compared with the lengthy and costly Waitangi Tribunal processes, entering into direct negotiations with the government may be more expeditious and less costly for a tribe since the government provides claimants funding. For the government, treaty settlements present the advantage of being concluded only with large natural groupings of claimants for all their historical claims (e.g.,all the claims of a large tribe, or all the claims of a cluster of smaller tribes). Settlements are furthermore final and settle all of the historical claims of a given claimant group and both the Crown and the claimant group accept that it is not possible to fully compensate the claimant group for their grievances.

In his report on the situation of Maori People in New Zealand, the Special Rapporteur on the rights of indigenous peoples notes that "The Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have

936 This legislation was prompted by a ruling made in 2003 by the Court of Appeal according to which Maori could seek customary title to areas of the New Zealand foreshore and seabed, and overturning assumptions that such land automatically belonged to the Crown. The Court of Appeal followed overseas precedence, and held that legislation must be explicit if it is to extinguish customary rights to land. There were massive demonstrations against the Act prior to its adoption and it became a political issue. For more information, see, e.g., http://www.converge.org.nz/pma/fsinfo.htm#ong

937 CERD, Procedural Decisions on the Elimination of Racial Discrimination, New Zealand [Foreshore and Seabed Act 2004], March 2005. U.N. Doc. CERD/C/DEC/NZL/1. Available online at http://www1.umn.edu/humanrts/cerd/decisions/newzealand2005.html

938 Rodolfo Stavenhagen, Mission to New Zealand. U.N. Doc. E/CN.4/2006/78/Add.3 13 March 2006 (2006), at paras. 43-55. Available at http://www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm

939 See Agreement between Ngati Porou and the Crown at Ngati Porou Web site: http://www.ngatiporou.com/sitemap.asp

940 The land will be vested in a trust holding company, CNI Iwi Holdings Limited, in which 86 per cent of the assets are hold by the indigenous collective. Accessed January 2009 at http://www.scoop.co.nz/stories/PA0809/S00538.htm,.

941 For an overview of tribes in the settlement process, see Web site of Office of Treaty Settlements at http://www.ots.govt.nz/

942 Ibid.

provided significant benefits in several cases." The Special Rapporteur, however, also notes some shortcomings, in particular Maori concerns regarding settlement negotiations and "the perceived imbalance of power between Maori and government negotiators", and one of his recommendations is that the government should explore and develop means of adressing these concerns.[943]

In the Pacific, only Fiji has ratified ILO Convention No. 169 (1998). When it comes to the United Nations Declaration on the Human Rights of Indigenous Peoples (2007), both Australia and New Zealand/Aotearoa voted against while Samoa abstained. All three countries have since revised their position and Australia and Samoa adopted the Declaration in 2009, while New Zealand/ Aotearoa made a "qualified endorsement" of the Declaration in 2010, indicating that the Declaration will be implemented within New Zealand's existing legal and constitutional framework, thus suggesting that it does not anticipate legal or constitutional change in order to give effect to its obligations.

Malaysia

The Federation of Malaysia consists of two geographical regions separated by the South China Sea—Peninsular Malaysia and Malaysian Borneo that consists of the states of Sabah and Sarawak and the federal territory of Labuan.[944] Collectively called Orang Asal, the indigenous peoples of Malaysia represent around 12 per cent of the country's population (28.6 million), the largest concentrations being found in Sabah and Sarawak (approx. 50 per cent).[945]

The Federal Constitution of Malaysia (1957-2007)[946] explicitly recognizes the indigenous peoples of Sabah and Sarawak as "Natives" and protects their customary rights, including native customary tenure rights. It does not, however, provide any special protection to the Orang Asli, the indigenous peoples of Peninsular Malaysia. They have since 1954 been subject to the "Aboriginal Peoples Act",[947] that aims "to provide for [their] protection, well-being and advancement" but in fact only provides for their "usufructuary rights"' or rights to use the land and its resources.

This has resulted in the vast majority of Orang Asli essentially being tenants on their traditional lands, and the government being able to at will affect lands occupied by Orang Asli communities to other uses. Despite being recognized and protected by the Constitution,[948] the indigenous peoples of Sabah and

943 See James Anaya, The situation of Māori People in New Zealand. U.N. Doc. - A/HRC/18/35/Add.4, 31 May 2011 (2011a).

944 Peninsular Malaysia gained its independence from the British in 1957 under the name of Federation of Malaya. The Federation of Malaysia dates from 1963 and consisted originally of the Peninsular Malaysia, Singapore, Sabah and Sarawak. Singapore eventually became independent in 1965.

945 See Christian Erni (ed.), *The Concept of Indigenous Peoples in Asia – A Resource Book* (Copenhagen: IWGIA, 2008), p.407-408.

946 The Constitution of Malaysia (first introduced as the Federal Constitution of Malaya) has been amended several times, latest in 2007. Accessible at http://www.confinder.richmond.edu

947 For text of Aboriginal Peoples Act 1954, Act 134, see Web site of FAO: faolex.fao.org/docs/texts/mal33568.doc

948 The definition and extent of Native Customary Rights (NCR) are, however, being disputed. In 2000, the Sarawak Land Code Amendment Bill restricted the NCR rights in accordance with the provisions of the Land Code and the adat (customary laws and practice).

Sarawak have not fared much better, and large tracts of their lands have been taken over forcibly by state authorities for logging, commercial plantations, dams and other infrastructural purposes.

The indigenous communities have reacted in many ways, and have since the 1970s filed many court cases. Some of these have been successful but most of the time it takes years before a final judgment is given, as decisions in favour of the indigenous plaintiffs are usually appealed by their opponents and in some cases end in the Federal Court.

This has been the case of the Temuan people forcibly evicted in 1995 by government authorities and others from their ancestral lands, needed for building a high way leading to Kuala Lumpur international airport. In 2002, a High Court ruling upheld customary land ownership rights of the Temuan people and requested state authorities and all other defendants to compensate the plaintiffs for loss of property.[949] In September 2005, the Malaysian Court of Appeal upheld the High Court`s 2002 ruling that the Temuan tribe is the customary owner of disputed land, from which they were forcibly evicted for the purpose of building public infrastructures.[950] Unhappy with that second ruling in favour of the Temuan peoples, state authorities and all other appellants have appealed to the Federal Court seeking reversal of the previous court rulings. In early 2009, the newly elected government of Selangor state decided to withdraw the appeal, and in 2010, after negotiations with the Attorney-General's Chambers, both sides agreed to a settlement of RM6.5 million for the Temuan plaintiffs, the 26 affected Temuan families to be compensated based on the size of land taken from them. A more recent case has been the ruling on 19 December 2012 by the High Court in favour of the Semelai-Orang Asli in the Kampung Bukit Rok/Kampung Ibam land rights case. The state authority had failed to administratively gazette 2,023 hectares of their traditional lands which were approved for gazetting in 1974. Instead, the state government gave a significant portion of the land to Felcra Berhad to be developed as an oil palm plantation for neighbouring (non-Orang Asli) villagers.[951]

In Sarawak and Sabah, too, several landmark judgments have been delivered in favour of indigenous applicants, upholding the concept of Native Customary Rights—such as *The Sarawak Government v. Nor Nyawai* (2008), *The Sarawak Government v. Madehi Salleh* (2009), and (in Sabah), *The Rambilin binti Ambit v. Assistant Collector for Land Revenues Pitas*, No. K 25-02-2002 (High Court of Sabah and Sarawak, Kota Kinabalu, September 28, 2010).[952]

However, hundreds of indigenous communities across Malaysia continue to face illegal land grabbing by government and corporations. In 2011-2012, the Human Rights Commission of Malaysia (SUHAKAM) conducted a National Inquiry on the Land Rights of Indigenous Peoples in Malaysia and has come up with a number of important recommendations, including the establishment of a Native

949 *Sagong Tasi & ORS v. Kerajaan Negri Selangor & ORS* [2002] 2 MLJ 591 [Civil Suit No. MTI-21-314-1996] Judgment 12 April 2002. See http://www.malaysianbar.org.my/selected_judgements

950 *Kerajaan Ngeri Selangor and 3 Others v. Sagong bin Tasi and 6 Others* [2005] 2 MLJ 591. Can be accessed at http://www.malaysianbar.org.my/selected_judgements/kerajaan_negeri_selangor_3_ors_v_sagong_bin_tasi_6_ors_2005_ca.html

951 See https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/court-rules-part-of-malay-reserve-land-in-bera-belonged-to-orang-asli/483660601677871

952 For details on these court cases see SUHAKAM (the Human Rights Commission of Malaysia) Report on National Inquiry on the Land Rights of Indigenous Peoples in Malaysia (2013), chapter 5 "Judicial Development". At http://sarawakreport.org/suhakam/suhakam-chapter1.html

Title Court or a special court to deal with the backlog of cases in the civil court and the establishment of an Independent National Commission on Indigenous Peoples.[953]

The Philippines

The 1987 Constitution of the Philippines has several provisions of relevance to indigenous peoples, which are called "indigenous cultural communities" (ICC).[954] The state, among other things, recognizes and promotes the rights of ICC "within the framework of national unity and development"[955] and "subject to the provisions of this Constitution and national development policies and programs" commits to protecting "the rights of ICC to their ancestral land to ensure their economic, social, and cultural well-being".[956] The Constitution also includes several provisions that, taken together, could serve as a basic framework for recognizing and promoting indigenous peoples' rights.

In 1997, the Philippine Congress adopted the Indigenous Peoples' Rights Act (IPRA), which created the National Commission on Indigenous Peoples (NCIP), a body aiming to promote and protect indigenous rights, including rights to lands and culture, and the mechanisms of free, prior and informed consent (FPIC). IPRA also created the so-called indigenous peoples' Consultative Bodies, which shall be convened by the NCIP and be consulted regularly to advise the NCIP on matters relating to problems, aspirations and interests of the indigenous peoples of the Philippines.

Aside from legal inconsistencies and ambiguities in IPRA itself, there are political factors that weaken the law and hamper its full implementation.[957] In his mission report from the Philippines, the former U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, therefore recommended that

> [T]he National Commission on Human Rights (NCHR) expand its activities in the area of indigenous rights and incorporate and train an increasing number of indigenous legal defenders to be active in taking up the human rights grievances of indigenous peoples. NCHR could, for example, spearhead a movement to create a broader structure to determine and certify prior, free and informed consent by indigenous peoples, whenever necessary."[958]

953 See SUHAKAM, op.cit. (2013), chapter X Recommendations. At http://sarawakreport.org/suhakam/suhakam-chapter1.html

954 The term "indigenous peoples" was first introduced by IPRA that uses the expression "indigenous Cultural Communities/Indigenous Peoples."

955 Constitution of the Philippines (1987), Art. II Sec. 22. Available online at http://www.chanrobles.com/philsupremelaw1.htm

956 Ibid., Art. XII Sec. 5.

957 For more information, see, e.g., the Web site of IWGIA at http://www.iwgia.org – Country Profile: The Philippines.

958 Rodolfo Stavenhagen, Mission to the Philippines. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. U.N. Doc. E/CN.4/2003/90/ Add.3, 5 March 2003 (2003b). Available from http://www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm

In 2012, the NCIP commemorated the 15th year of the promulgation of the Indigenous Peoples' Rights Act's. NCIP's land-related mandate includes recognizing indigenous peoples' ownership of their territories by awarding them a Certificate of Ancestral Domain Title (CADT) or a Certificate of Ancestral Land Title (CALT), assisting indigenous communities in producing an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP), and, upon the free and prior informed consent of the ICCs/IPs concerned, issue a FPIC compliance certificates prior to the grant of any license, lease or permit for the exploitation of natural resources affecting the interest of the ICCs/IPs and their ancestral domains.

Progress has been disappointingly slow. Only 159 CADTs, totalling 4.3 million hectares, have been approved since 2002, benefiting almost a million indigenous people (out of an estimated indigenous population of 12 million).[959]

Most approvals were given in 2008 and 2009, but since then their number has declined sharply and no CADTs were approved in 2011 and only two in 2012.[960] Regarding CALTs, 257 titles (comprising 17,000 ha) have benefited less than 9000 indigenous people, and 91 ADSDPP have been formulated for nearly 2 million ha, affecting 66,000 people. On the other hand, when it comes to issuing FPIC Compliance Certificates for development projects, including mining and bio-fuel plantations, the NCIP has been much more diligent: 334 have been issued since 2004 for a total of 731,268 ha and affecting 660,867 indigenous peoples.[961] For the majority of the indigenous communities in the Philippines, therefore, the struggle for the recognition of their rights to their territory and self-determined development continues.

In Asia, only Nepal (2007) has ratified ILO Convention No. 169. As for the U.N. Declaration on the Rights of Indigenous Peoples, Bhutan and Bangladesh abstained.

Western Europe

In Western Europe, one of the indigenous communities most frequently referred to is the Saami,[962] found in Finland, Sweden, Norway and Russia. In some of these countries, the Saami have enjoyed good standards of protection of their rights, including the right to lands, and the Saami language is taught in schools and even in some universities. In 1956, the Nordic Sámi Council was established to

959 The Philippines has 110 ethnolinguistic groups. Disagregated data from the 2010 census are not yet available, but according to 2005 estimates there were at the time 12 million indigenous people. See National Statistic Coordination Board at http://www.nscb.gov.ph/metagora/

960 The NCIP claims that the reason of these delays was that "it wanted to ensure that better titling procedures were in place before proceeding with more such approvals". What they refer to is the fact that there has been a lack of clarity regarding the jurisdiction of three main departments (Environment, Agrarian reform and the NCIP) which caused conflicts and the delay if not stalling of titling processes in the past. With the Administrative Order 01 (JAO1) a mechanism is now allegedly in place for conflict resolution. See The International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), pp. 241-244.

961 See NCIP Web page at http://www.ncip.gov.ph/ (accessed 06.06 2013). See also Erni (ed.), *The Concept of Indigenous Peoples in Asia* (Copenhagen: IWGIA 2008), p. 429-430.

962 The Saami are thought to be descended from the people who settled in the Scandinavian Peninsula after the last Ice Age, about 7,500 years BC.

promote cooperation amongst the Saami in Finland, Norway, and Sweden. This council has twelve members, four from each country. Currently, a draft Nordic Saami Convention is being discussed by the respective Nordic governments and the presidents of the three Saami parliaments. This is the first attempt to create a regional treaty specifically concerning indigenous peoples, anywhere. After years of debate, a model for negotiations on the Nordic Saami Convention was agreed upon in November 2010 and negotiations began in 2011 with the aim of being completed within five years.[963]

In 1988, the Parliament of **Norway** passed a new Act inspired by the U.N. Covenant on Civil and Political Rights of 1966. This Constitutional Act §110a provides recognition and protection of the Saami language, culture and society. The following year, Norway recognized the Saami's political rights by establishing the Saami Parliament, and in 1990, Norway ratified LO Convention No. 169 as the first European country to do so. However, it was to take more than a decade before the first broad effort of implementing the Convention took place through the adoption, in 2006, of the Finnmark Act. This was also the first time substantial consultations as recommended by Article 6 of the ILO Convention were carried out between the Norwegian Parliament and the Saami Parliament. The Finnmark Act and the legislative adoption of the recent (2007) Agreement on Consultation Procedures between the government and the Executive Council of the Saami Parliament have been seen as the first progressive steps towards indigenous self-governance in Norway.[964]

Sweden also has a Saami Parliament (1993) and particular measures aiming at protecting the way of life of the Saami have been taken as, for instance, the 1971 Reindeer Husbandry Act which, as argued by the Swedish government in the *Ivan Kitok v. Sweden* case[965] before the Human Rights Committee, aims to "secure the preservation and well-being of the Saami". A long standing request of the Saami to be distinguished from other minority groups was met in January 2010, when the Swedish Constitution was amended to explicitly recognize the Saami as a people.[966] However, it should be said that the Saami consider that the Swedish government has yet to make more efforts towards full enjoyment of their rights and the UN Special Rapporteur heavily criticized

963 Under the agreed model, the negotiations will be carried out between three delegations, each with a maximum of six persons, which must include both representatives of the respective governments and Sami parliaments. For text of the proposed Convention, see http://www.regjeringen.no/upload/BLD/Vedlegg_5_d.pdf

964 The Finnmark Act establishes a new autonomous organisation for the administration of land, water and resources in Finnmark called the Finnmark Estate (*Finnmarkseiendommen*). An area the size of Denmark is being transferred from the state to this autonomous organization. See Johan Mikkel Sara, "Indigenous Governance of Self-Determination. The Saami model and the Saami Parliament in Norway". Paper presented at the Symposium on "The Right to Self-Determination in International Law", The Hague, Netherlands, 29 September-1 October 2006. Available at http://www.unpo.org/downloads/JohanMikkelSara.pdf

965 CCPR Communication No. 197/1985 (1988). U.N. Doc. CCPR/C/33/D/197/1985 (1988). Available at http://hrlibrary.ngo.ru/undocs/session33-index.html. The communication before the Human Rights Committee was made by Mr. Kitok against the Swedish government on the grounds that the Swedish Reindeer Husbandry Act of 1971 violated the provisions of articles 1 and 27 of the ICCPR. CCPR ruled in favour of the Swedish government by arguing that in the interest of preservation of a community's welfare, individual rights could be limited under certain circumstances.

966 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 34.

Sweden in his 2011 report for its failure to tackle the most pressing issues for Sami, in particular those related to land and resource rights.[967]

In **Finland**, which also has a Saami Parliament (1996), Section 121 of the 1999 Constitution states that "*in their native region, the Saami have linguistic and cultural self-government, as provided by an Act*".

In **Russia**, the 1,600 Saami living on the Kola Peninsula are included in the so-called "numerically small indigenous peoples of the North, Siberia and the Far East". These indigenous peoples are recognized and protected by the Constitution and three framework laws. However, these are declarative and their provisions have remained largely theoretical. This is true first and foremost for land rights. The Saami have thus been gradually forced off their traditional grazing land by a steady expansion of industry, forestry, mining, etc.[968]

Greenland became a Danish colony in the early eighteenth century. Its indigenous inhabitants belong to the Inuit people who live in the North American Arctic. In 1953, the Danish Constitution changed the status of Greenland and this Arctic island became an overseas county of Denmark. In 1978, the Danish government passed the Greenland Home Rule Act[969] that granted Greenlanders a wide range of powers through their local government and parliament. As stated by Erica A. Daes, the 1978 Greenland Home Rule Act was "one of the best examples of constructive framework legislation to accommodate the rights and aspirations of indigenous peoples". The Act provided for strong ownership of land on behalf of the Greenlander Inuit who, not only had the power of decision over the use of their lands, but more importantly, enjoyed the power of veto over development activities.[970]

A few years ago, Greenland negotiated an agreement with Denmark regarding greater self-governance, and in late 2008, a referendum on self-rule was held. It passed with 75 per cent voting for greater autonomy. The new arrangement came into force in June 2009. Apart from securing more self-governance, it will also allow Greenland to take over the control of revenues from potential oil, gas and mineral finds.

Besides Norway, the only European countries to have ratified ILO Convention No. 169 are Denmark (in 1996), the Netherlands (1998) and Spain (2007). The main obstacle to its ratification by Finland and Sweden is the issue of land rights. Finnish legislation does not recognise any special land rights to the Sámi people and reindeer husbandry is not reserved for Sámi people in Finland, unlike in Norway and Sweden. In Sweden, the laws on Sámi land rights do not fit with Article 14 of the Convention, and the political will to adapt national legislation in order to ratify the Convention seems to be lacking.[971]

967 James Anaya, 2011b, "Report of the Special Rapporteur on the rights of indigenous peoples James Anaya—Addendum: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland. U.N. Doc. A/HRC/18/35/Add.2 , (6 June 2011), p. 14.

968 For more information, see, e.g., IWGIA Web page: http://www.iwgia.org/regions/arctic/sapmi

969 The Greenland Home Rule Act (Act No.56) of 21 February 1978 came into force on 1 May 1979 following a referendum in Greenland.

970 Daes, "Indigenous Peoples and Their Relationship to Land" (2001), para. 109.

971 See The International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 34.

European countries voted for the U.N. Declaration on the Rights of Indigenous Peoples, with the exception of the Russian Federation, which abstained.

Constitutional provisions regarding indigenous peoples in Africa

An overview of the constitutions of most Central, Eastern, and Southern African states corroborates the view that these states do not provide any sort of special protection to their indigenous communities. Only a few of them recognize the multi-cultural and -ethnical diversity of their inhabitants. A recent joint publication by the ILO and the ACHPR documents constitutional, legal and administrative measures relevant to indigenous peoples in twenty four (24) African countries. This publication is highly recommended to anyone interested in the enforcement, the protection and the promotion of the rights of indigenous peoples on the continent.[972]

Central Africa

The 2004 Constitution of the **Central African Republic**[973] does not use the term "indigenous" nor does it contain special provisions for such communities. However, it is based on the principle of equality by what is known as the principle *Zo Kwe Zo* (all human beings are equal), enshrined in the Constitution. The Constitution also recognizes "cultural and ethnic diversity" and states that the "*Central African people … is resolved to build a State based on the rule of law and a pluralist democracy that guarantees security of persons and their belongings, protection of the weakest, including vulnerable persons, minorities*" and "*the full enjoyment of rights and fundamental freedoms*".[974] In early 2010, the Central African Republic became the first African country to ratify ILO Convention No. 169. The Convention entered into force on 11 August 2011 and since then, the country has been in the process of implementing it.

The 1972 Constitution of **Cameroon,** amended in 1996 and in 2008, mentions human rights in its Preamble. The Preamble, which is to be considered as an integral part of the Constitution,[975] states "*The Republic of Cameroon … shall recognize and protect traditional values that conform to democratic principles, human rights and the law*";it also states that no discrimination on the

972 ILO and ACHPR, *Constitutional and Legislative Protection of Indigenous Populations in Africa, ILO and ACHPR* (Geneva and Banjul, The Gambia: ILO and ACHPR, 2009).

973 Constitution of Central African Republic is available online at http://confinder.richmond.edu/

974 Preamble of the Constitution of the Central African Republic. In French, it reads "*Le Peuple Centrafricain … est résolu de construire l'Etat de droit fondé sur une démocratie pluraliste, garantissant la sécurité des personnes et des biens, la protection des plus faibles, notamment les personnes vulnérables, les minorités et le plein exercice des libertés et droits fondamentaux"*. Available online at http://confinder.richmond.edu/

975 Constitution of Cameroon, Article 65 states: "*the preamble shall be part and parcel of this Constitution*". Full text available online at http://confinder.richmond.edu/

grounds of race, religion, etc. shall be tolerated, and more specifically that: "*the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law*".

Although the Cameroonian Constitution, by using the term "indigenous population", puts itself in a class of its own, Cameroon, like many other African countries, has never passed a law dealing specifically with the protection of indigenous peoples' rights. A Draft law on Marginal Populations, presented in 2008, is still under scrutiny but the government has officially committed itself to the celebration of the annual Indigenous Day.

The 1991 Constitution of the **Republic of Gabon,** as amended in 1997 and 2000**,** does not contain an explicit recognition of indigenous communities or minorities' rights. However, it states—but without any further details—that the right to property can be enjoyed and exercised individually or collectively.[976] One of its most important land-related laws, the 2001 Forest Code, provides for mere usage rights of any communities over forests (community forests), without making any specific reference to its indigenous peoples, the "Pygmies", albeit recognized as the oldest inhabitant of African tropical forests.[977] The country's land tenure system is mainly regulated by the Law 14/63 of 8 May 1963, which states that all lands belong to the government and that communities hold no right over lands unless explicitly granted by the state. In other words, occupation and use, be it immemorial, does not grant legal rights over lands.[978]

The 2002 Constitution of the **Republic of Congo** does not *expressis verbis* provide for indigenous communities. There is only a provision on the right to culture.[979] The new Forest Code from 2000 does not either provide for a special protection of the "Pygmies". It uses instead the terms "local populations" and "local communities" entitled to usage rights, which include hunting, collecting and pasture.[980] Unfortunately, non timber products from usage rights such as hunting products cannot be commercialised.[981] However, the passing in December 2011 of a law regarding the promotion and protection of indigenous peoples (*Loi portant promotion et protection des peuples autochtones en République du Congo*) has raised great expectations.[982] This legal instrument is also

976 Constitution of Gabon, Article 1(10). Full text of Constitution as per 2000 is available online at http://www.droitsdelhomme-france.org/IMG/Constitution_du_Gabon.pdf

977 Law No. 016/01 Portant Code forestier en République Gabonaise. See, e.g., Volker Kohler & Franz Schmithüsen, "Comparative Analysis of Forest Laws in Twelve Sub-Saharan African Countries". FAO Legal Papers Online #37 (Rome: FAO, July 2004). Available online at http://www.fao.org/legal/pub-e.htm,

978 Joseph Comby, "Quel cadastre, pourquoi faire ? Exemple du Gabon". An online article: http://perso.orange.fr/joseph.comby/cadastre_Gabon.html

979 Constitution of the Republic of Congo, Article 22 states that everybody should enjoy his or her right to a culture. For full text of Constitution, see http://confinder.richmond.edu

980 The new Forest Code, Article 40 states (in French): "*Les populations locales jouissent de droits d'usage leur permettant de: (1) récolter les perches, gaulettes et autres produits ligneux nécessaires à la construction et à l'entretien de leurs habitations, meubles, ustensiles domestiques et outils, ainsi que les bois morts et les plantes d'intérêt culturel, alimentaire ou médicinal; (2) chasser, pêcher et récolter les produits dans les limites prévues par la loi; et (3) établir des cultures ou des ruches et faire paître leur bétail ou récolter du fourrage.*"

981 Ibid., Article 42 .

982 The law received presidential approval in February 2011. The law promotes and protects the rights of indigenous peoples to lands and resources. Specifically, it states that indigenous peoples, collectively and individually, have a right to own, possess, access and use the lands and natural resources that they have traditionally used or occupied

the first of its kind in Central Africa and elsewhere in Africa and could set a good precedent for a better protection of indigenous peoples in Africa. The government has also decided that the term "population autochtone" should be used instead of "Pygmées" which is seen as "derogatory and discriminating". A National Action Plan on the Improvement of the Quality of Life of Indigenous Peoples, 2009-2013, has been developed jointly by the Ministry of Health, Social Affairs and Family, UNICEF and RENAPAC and establishes significant targets and goals within the fields of health, education and citizenship and legal protection.

The 2006 Constitution of the **Democratic Republic of Congo**[983] does not use the term "indigenous" but its Article 13 does prohibit, among others things, racial and ethnic discrimination, stating that:

> *No Congolese shall be discriminated against in relation with access to education and to public services nor should a Congolese be discriminated against, whether by a law or an act of the executive, on the basis of his/her religion, family origin, social condition, residence, opinions, political beliefs, race, ethnicity, culture, or language.*[984]

The Constitution devotes furthermore the entire chapter 3 of its second part to "collective rights" and states in its article 51 that:

> *The State shall ensure and promote peaceful and harmonious coexistence of all national ethnic groups. It shall also ensure the protection and promotion of vulnerable groups and minorities. It shall guarantee their development.*[985]

More interestingly, the Constitution protects both private and collective ownership: "The State guarantees the right to individual or collective property acquired according to the law or to customs."[986] One could read this recognition of collective ownership on the basis of customary law as an important entry point for strong claims of indigenous peoples' right to land.

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for their subsistence, pharmacopeia and work (art. 31). The state is obliged to facilitate delimitation of these lands on the basis of indigenous customary rights, and has a duty to ensure legal recognition of the title according to customary rights, even in cases where indigenous peoples do not previously possess any kind of formal title (art. 32). In 2012, the Indigenous Day was celebrated and the Congolese National Institute of Statistics now provides statistical data on the "population autochtone",. See http://www.cnsee.org/

983 The Constitution of DRC (2006) is available in French online at http://www.confinder.richmond.edu/

984 Author's translation. The original text in French reads: "*Aucun Congolais ne peut, en matière d'éducation et d'accès aux fonctions publiques ni en aucune autre matière, faire l'objet d'une mesure discriminatoire, qu'elle résulte de la loi ou d'un acte de l'exécutif, en raison de sa religion, de son origine familiale, de sa condition sociale, de sa résidence, de ses opinions ou de ses convictions politiques, de son appartenance à une race, à une ethnie, à une tribu, à une minorité culturelle ou linguistique.*"

985 Author's translation. The original text in French reads: "*L'Etat a le devoir d'assurer et de promouvoir la coexistence pacifique et harmonieuse de tous les groupes ethniques du pays. Il assure également la protection et la promotion des groupes vulnérables et de toutes les minorités. Il veille à leur épanouissement.*"

986 Author's translation. The original text in French reads: "*L'Etat garantit le droit à la propriété individuelle ou collective, acquis conformément à la loi ou à la coutume.*"

In 2002, the DR Congo passed a new forest code,[987] which also does not use the term indigenous peoples or communities, but nevertheless contains provisions on community forests and benefit sharing that could be valuable for the promotion and protection of indigenous peoples. Article 22 of this Code provides for instance that a community could transform part of or all its customarily occupied forests into a community-controlled and managed concession. However, a number of implementing measures of the Congolese Forest Code do use the word "indigenous communities", including a 2008 prime ministerial decree on the commission for conversion of logging titles[988] and a legal text on a national consultative council on forest (Conseil Consultatif National des Forêts),[989] which provides that one member of the council must be an indigenous person.

In June 2009, a "Report delineating a Strategic Framework for the Preparation of a Pygmy Development Program" was validated through a national workshop organized by the Ministry of Environment, Nature Conservation and Tourism (MECNT).[990] In October 2011, a national Indigenous Pygmy Forum organized under the High Patronage of the President of the Republic recommended to have a national multi-donor round table to reframe the national strategies, including those for indigenous peoples. The first draft of a specific bill of law on the promotion and protection of indigenous rights in the DRC was developed in 2012 and is expected to be submitted to parliament end of 2013.

Eastern and Horn of Africa

In 2005, **Burundi** ratified a new Constitution, which does not use the term indigenous but talks about ethnic diversity.[991] However, this national legal framework provides for a power sharing mechanism between the three ethnic groups that live in the country, namely the Hutu, the Tutsi and the indigenous "Pygmy" community known as the Batwa. Article 164 of the Constitution specifies indeed that three Members of Parliament should come from the Batwa indigenous community[992] and Article 180 stipulates the same level of Batwa representation in the Senate. The 2010 Electoral Code explicitly recognises the protection and inclusion of minority ethnic groups within the general system of government.

The post-genocide government of **Rwanda** has been very hesitant to amend its June 2003 Constitution[993] or pass minority or community-friendly legislation, given the fact that the 1994 genocide

987 Loi No.011/2002 du 29 août 2002 portant Code Forestier de la République Démocratique du Congo.

988 Décret No. 08/02 of 21 January 2008.

989 Décret No. 08/03 of 26 January 2008.

990 The report was sponsored by the World Bank and is based on participatory field work in indigenous communities carried out between September and December 2008 by the member organizations of the NGO network Dynamique des Groupes de Peuples Autochtones (DGPA), which includes most of DRC's indigenous Pygmy and Pygmy support organizations. The report can be downloaded at https://openknowledge.worldbank.org/handle/10986/3150

991 Constitution of Burundi, Article 2. Full text available at http://confinder.richmond.edu

992 Ibid., Article 164 states that Parliament is constituted by at least 100 members—60 per cent Hutu, 40 per cent Tutsi, including a minimum of 30 per cent women, elected by universal vote; and three members from the Twa ethnic group coopted in accordance with the electoral code.

993 The Rwanda Constitution is available online at http://www.cjcr.gov.rw/eng/**constitution**_eng.doc

was rooted, amongst other things, in bitter inter-ethnic rivalries. Trying to heal the country from such divisions, the 2003 Constitution does not mention any sort of special regime on behalf of a given social group but states in its Preamble that "*We have the privilege to have a same country, a same language, a same culture…*" and in Article 9 (2) that a fundamental principle is "*the eradication of ethnic, regional and other divisions and the promotion of national unity*".

Regarding land rights, the Constitution recognizes the right to private propriety, individual or collective.[994] The land question has been and remains a major issue. Faced with the resettlement of more than 1.5 million returning refugees.[995] Rwanda opted for the so-called "villagization" policy. This policy became highly controversial since it grouped people into villages without consideration of their culture, former residence, etc. In 2004, after several years of debates, a new land policy was launched, followed in 2005 by a new national land law. This law promotes land consolidation and may, according to international observers, make it more difficult for the Batwa to keep the little land they still own, as it will give the government complete authority over land use, potentially subjecting owners to loss of land without compensation.[996]

The **Ethiopian** Constitution (1994) provides for the "rights of peoples". This constitution uses particularly unusual wording given the context of the aspiration of African states to promote national unity. It states that "*human rights and democratic rights of citizens and peoples shall be respected*";[997] Article 39 provides specifically for the "*rights of Nations, Nationalities and Peoples*"; and paragraph 5 of this Article defines the term "people" (without an "s") as a synonym of the terms "nation" and "nationality":

> *A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.*

The right to self-determination for these groups, including the right to secession,[998] is also enshrined in the Constitution. With regard to land, it also demarcates itself from the general African trend. Firstly, it states that the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and the "peoples of Ethiopia";[999] secondly, and more remarkably, it provides pastoralists with a special protective regime:

994 Article 29: "*Toute personne a droit à la propriété privée, individuelle ou collective*."

995 Following the 1994 genocide, more than 2 million people fled Rwanda to neighboring countries.

996 See http://www.irinnews.org/InDepthMain.aspx?InDepthId=9&ReportId=58606 and The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2007* (IWGIA, 2007), p. 495.

997 Constitution of Ethiopia (1994), Article 10. Full text available online at http://www.findlaw.com/01topics/06constitutional/03forconst/index.html

998 Ibid., Article 39 (1). Article 39 (2) stipulates that "*Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history*".

999 Ibid., Article 40 (3).

Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.[1000]

However, the Ethiopian government has since 2010 embarked on a "policy of transformation" that flagrantly disproves these constitutional rights. This policy includes leasing out large tracts of pastoral lands to foreign investors for cash crop cultivation purposes, and aims to resettle 1.5 million people by 2013 in four regions: Gambella, Afar, Somali, and Benishangul-Gumuz. Thousands of pastoralists are already or will be affected by this policy.[1001]

Kenya's constitution was adopted in 2010[1002] and is the result of several years' deliberations, consultations and drafting, a process in which civil society, religious groups and other interest groups as well as indigenous organizations played an important role.[1003]

The Constitution is a clean break with the old Constitution (1963) and as already mentioned in chapter V (see "Recent developments within the legal and policy landscape of Kenya"), provides several avenues for the pursuit and strengthening of indigenous peoples' individual and collective rights. Although it does not use the concept of "indigenous peoples" about it defines "a marginalized community"in a way consistent with UNDRIP language as:

a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
d) pastoral persons and communities, whether they are—(i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole (Art. 260).

1000 Ibid., Article 40 (5).
1001 For further details see IWGIA Web page at http://www.iwgia.org/regions/africa/ethiopia
1002 The Kenyan Constitution is available online at http://www.kenyalaw.org/klr/index.php?id=741
1003 In the early 1990s, calls for a multi-party system and constitutional reforms eventually led to some constitutional amendments and, in 1997, to the Constitution of Kenya Review Act. This Act was amended in 2001 to provide a comprehensive and participatory review of the constitution and the option to draft a new document that would open up the country to wide-ranging political and institutional reforms ensuring socioeconomic development and the protection of human rights. The review process was delayed several times and produced three draft constitutions before a referendum to approve or reject the third proposed draft constitution was held in November 2005. Sixty-seven per cent of the voters rejected the draft and the process was thereafter stalled due to, among other things, the elections and the post-elections political crisis. In March 2008, a new agreement on the constitutional reform was reached, and a Constitution of Kenya (Amendment) Act passed. A new Draft Constitution was elaborated and validated by 68 per cent of the voters in a popular referendum on 4 August 2010.

Besides promoting and protecting a number of rights and freedoms, the Constitution includes an entire chapter on Land and Environment.[1004]

Many of the provisions of the Constitution depend on the parliament to enact the necessary legislation. This is notably the case of several articles dealing with marginalized communities (e.g., Arts. 63 and 100), and this process may take up to five years (Art. 261). While the new constitution has a high potential for indigenous peoples and their rights, it leaves a great deal up to the development of new laws, which may well be slow.

The 1995 Constitution of **Uganda** (amended in 2005), in its statement regarding "National objectives and directive principles of state policy" stipulates that

> *Every effort shall be made to integrate all the peoples of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.*

and that

> *Everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs.*[1005]

Even though the Constitution does not use the term "indigenous peoples" in its current meaning, Article 10 on citizenship nevertheless specifies that:

> *The following persons shall be citizens of Uganda by birth—*
>
> *a. every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926, and set out in the Third Schedule to this Constitution. …*

The Third Schedule lists the 56 "Ugandan Indigenous Communities as at 1st February 1926" and includes, among others, the Batwa.

The Ugandan Constitution also provides "Protection of rights of minorities" and "Right to culture and similar rights"[1006] and institutes an independent Human Rights Commission, which among other things, is tasked "*to monitor the Government's compliance with international treaty and convention obligations on human rights*" [1007]

Regarding land, the Ugandan Constitution makes the following provisions in Article 237:

> *1. Land in Uganda belongs to the citizens of Uganda and shall vest in them. …*
> *2. Land in Uganda shall be owned in accordance with the following land tenure systems*

1004 Refer to Chapter V for details.
1005 Constitution of Uganda (1995), Section III (ii) and (iii) on National unity and stability. Available online at http://www.confinder.richmond.edu
1006 Ibid., Articles 36 and 37.
1007 Ibid., Articles 51, 54 and 52.1 (h).

a) customary; b) freehold; c) mailo;[1008] *and d) leasehold.*

4. *On the coming into force of this Constitution—*
   a. *all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and*
   b. *land under customary tenure may be converted to freehold land ownership by registration.*

The 1977 Constitution of **Tanzania**, (last amended in 2005), does not specifically provide for indigenous peoples. Nor does it use the words "indigenous" and "minorities". It only recognizes the general principle of non-discrimination.[1009] Because of this lacuna, a number of early attempts by lawyers to make a case for indigenous communities' right to lands were built upon the constitutional right to property.[1010]

Tanzania is in the process of writing a new constitution. Pastoralists and hunter-gatherers have taken this as an important window of opportunity. They have mobilized through a coalition called the Pastoralists and Hunter/Gatherers Katiba Initiative (KAI), hosted by PINGO's Forum, to articulate their issues and lobby for their inclusion in the new constitution (see this volume, chapter VI, for details).

Southern Africa

Like Rwanda, the Constitution of **South Africa** (1996) is based upon the desire to heal the state from its history of racial discrimination. This is stated in the Preamble as well as in Section 1 (b).[1011] However, despite articulating the principle of equality of all before the law, the Constitution of South Africa also provides that in order "*to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken*".[1012]

The cultural, linguistic, and identity rights of the very diverse groups and communities that live in South Africa are also protected. Section 31, states:

1. *Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to:*
   a. *enjoy their culture, practice their religion and use their language; and*
   b. *form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*

1008 Ibid., Article 237 (3). *Mailo*—a kind of feudal tenure—was introduced by the British in 1900 and gave land to some individuals to own in perpetuity. The owner of Mailo land was and is entitled to a certificate of title.

1009 Constitution of Tanzania, Chapter 3, Sections 12 and 13, which deals with human rights. Full text of Constitution available online from http://confinder.richmond.edu

1010 Ibid., Section 24 states the right to property. See also Shivji and Kapinga, *Maasai Rights* (1998), pp. 31-5, and Tenga, *Pastoral Land Rights* (1992), p. 24.

1011 The full text of the 1996 Constitution of South Africa is available online at http://confinder.richmond.edu

1012 Constitution of South Africa (1966), Section 9 (2).

> *2. This right in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights*

The Constitution of South Africa also recognizes the status, functions, and role of traditional chiefs,[1013] and section 235 recognizes the right to self-determination of communities:

> *The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.*

Although not referring to the term "indigenous", the Constitution of South Africa appears, nevertheless, to have taken a very progressive approach and set a good legal framework for communities to reclaim back indigenous lands. Regarding property rights, the Constitution of South Africa thus provides that:

> *A person or community dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices, is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*[1014]

This provision was already included in the 1993 Interim Constitution[1015] and in 1994, The Restitution of Land Rights Act, No. 2 of 1994 established a Commission on Restitution of Land Rights and a Land Claims Court. Restitution became also part of the national Land Reform programme launched in 1994. As described in chapter VII of this book, these various legal and institutional provisions were instrumental in both the Richtersveld court case and in the ǂKhomani land claim.

Like the Constitution of South Africa, the Constitutions of almost all other Southern African countries with a political history of racial discrimination, refrain from using the term "minorities" and "indigenous", arguably because there has always been this fear that this would resuscitate the old evil of racial discrimination. Perhaps with the same fear in mind, they all contain recognition of the principle of non-discrimination.

This is the case of the Constitutions of **Malawi**, (1994, latest amended in 2001), **Mozambique** (2004) **Lesotho** (1993),[1016] and of the new Constitution of **Zimbabwe** (2013).[1017] The Draft Constitution of **Zambia** (2012), however, includes an article (Art. 60) on Minority and Marginalized Groups

1013 Ibid., Sections 211 and 212.

1014 Ibid., Section 25 (7).

1015 Interim Constitution of South Africa (1993), Article 8 (3),b and Articles 121-123. Available online at http://confinder.richmond.edu

1016 The full text of these constitutions is available online at http://confinder.richmond.edu

1017 The new Constitution was approved in a constitutional referendum by 94.5 per cent of the voters on 17 March 2013. Text at http://www.swradioafrica.com/Documents/Final%20draft%20Constitution%2025%20January%202013.pdf

which provides for affirmative action programmes to ensure these groups participation, representation and equal opportunities.[1018]

Botswana's Constitution (1965) in its Chapter II provides for the "*protection of fundamental rights and freedoms of individuals*". However, in relation to the protection of freedom of movement articulated in section 14, the Constitution allows in subsection (3)(c),

> *[T]he imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen".*[1019]

This provision has specifically been of importance to the residents of the CKGR since it protected their way of life and culture by preventing non-San to settle in the Reserve; the provision was also invoked in the court case as an argument for the residents' rights to remain in the Reserve. In 2005, however, a Constitutional (amendment) Act was passed with the stated purpose of making the Constitution tribally neutral. Besides revising Sections 77, 78 and 79 that hitherto had regulated the selection of members to the House of Chiefs and gave special rights to the eight main tribes in the country thereby clearly discriminating the so-called minor tribes, the Act also abrogated Section 14 (3)(c) under pretence that it was discriminatory to non-San by limiting their freedom of movement. Human Rights organizations in Botswana saw this as a political expedient, given the pending decision at the time of the CKGR case. Although the Act has been passed by parliament and assented to by the president, it has not yet commenced and consequently, the current status of Section 14 (3)(c) is not clear.[1020]

The 1990 Constitution of **Namibia** does not specifically recognize the rights of indigenous peoples, but provides in Article 10 (2), that "*No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status*"; and in Article 19, that "*Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution*".[1021] Customary law is also recognized,[1022] and Article 102(5) states that a Council of Traditional Leaders shall be established in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice. This has prompted several San groups to elect a chief that could represent them in the Council. So far, only a few of the established San traditional authorities have been formally recognized by government. [1023]

1018 Draft Constitution available at http://www.zambian.com/zambia-constitution-2012-first-draft.pdf The Human Rights Commission (Zambia) in its "Submission to The Technical Committee On Drafting The Zambian Constitution" (2012, p. 21) criticizes this article for being "vague and too long winded and a more focused definition is needed. Under international law marginalised groups are usually discriminated against on the basis of language, religion or culture. In Zambia there are no such groupings and thus there is need to make clear who this provision relates to".

1019 See http://www.idasa.org.za/gbGovDocs.asp?RID=1

1020 See the website of DITSHWANELO – the Botswana Human Rights Center at http://www.ditshwanelo.org.bw

1021 The full text of the Namibian Constitution is available online at http://confinder.richmond.edu

1022 Article 66 (1) reads: "Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law …"

1023 The Traditional Authorities Act (1995) provides, among other things for the official recognition of Chiefs and Traditional Authorities (Councillors).

When it comes to land, neither indigenous land rights nor native titles are legally recognized.[1024] The Constitution has instead perpetuated the situation created before independence where a vast number of people were dispossessed of their land and restricted to certain parts of the county, the so-called communal areas (reserves). By explicitly stating that,

> *[L]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned*,[1025]

the Constitution has further dispossessed the majority of Namibians from ownership of land and has limited their capacity to participate in the national economy.[1026] Most indigenous peoples in Namibia, like the San and the Khoesan, live on communal lands but only an infinite per centage of them have rights of occupancy in these communal areas.[1027] A governmental resettlement programme for the San has not had the expected results on the ground.[1028]

In 2010, the Namibian cabinet approved the establishment of a Division for San Development under the Office of the Prime Minister (OPM), which is an important milestone in promoting the rights of indigenous peoples/marginalised communities in Namibia.

Although few African Constitutions make any reference to the rights of their indigenous communities, it deserves mentioning that a number of African states have taken steps that denote an emerging sensibility towards indigenous peoples. These steps are, for instance, the restitution of several tens of thousands of hectares of lands to the ǂKhomani San by the South African government; the adoption of a law on indigenous peoples by the government of the Republic of Congo; the organization by that same country of the first African government hosted international seminar on indigenous peoples' rights entitled "International Forum for Indigenous People of Central Africa" and held in April 2007 in Brazzaville; the adoption by the Cameroonian government of an Indigenous Peoples Development Plan and the elaboration of similar plans in Gabon, the Democratic Republic of Congo, Kenya and Tanzania; the inclusion of a Batwa representative in a national land commission by the Burundian government; the new Kenyan National Land Policy that together with the new Constitution addresses many issues related to indigenous peoples' land; and, not least, the recent ratification by the Central African Republic of ILO Convention No. 169.

This ratification was a major breakthrough and so far, no other African country has ratified ILO Convention No. 169 regardless of the many recommendations made by the international community and the efforts by national Civil Society and Human Rights organizations. With respect to the U.N. Declaration of Indigenous Peoples' Rights, the vast majority of African states ended by voting

1024 Sidney L. Harring, "Indigenous Land Rights and Land Reform in Namibia" in *Indigenous Peoples' Rights in Southern Africa*, edited by Robert K. Hitchcock and Diana Vinding. IWGIA Document 110 (Copenhagen: IWGIA, 2004), p. 66.

1025 Article 100 of the Constitution of Namibia.

1026 Clement Daniels, "Indigenous Rights in Namibia" in *Indigenous Peoples' Rights in Southern Africa*, edited by Robert K. Hitchcock and Diana Vinding. IWGIA Document No. 110 (Copenhagen: IWGIA, 2004), p. 44

1027 Harring, "Indigenous Land Rights" (2004), pp. 64-68.

1028 Daniels, "Indigenous Rights" (2004), p. 57.

in favour, including countries such as Botswana that had been openly opposed to it at the beginning.[1029] None voted against and only three—Burundi, Kenya and Nigeria—abstained.[1030]

Conclusion

This chapter shows that a large number of countries, including a few African ones, provide either constitutional or legal protection to indigenous peoples' right to lands. In relation to Africa, it emerges also that a country can provide constitutional protection for its indigenous communities without using the term indigenous, as shown by the Burundian and South African Constitutions. It also comes out of this chapter that a country might use the term indigenous in its constitution without any further legislative action, as seems to be the case of Cameroon. So, one should be careful about the mere use of the term indigenous in constitutions without attaching explicit rights to it. Similarly, countries with constitutions containing measures of positive discrimination on behalf of certain categories of their populations should be explicit on who are the holders of such rights in order to avoid confusion. These are remarks valid also for North and South America, Asia and South Pacific where there are often gaps between the legal provisions and the conditions of life of indigenous communities.

It is also noticeable that numerous African constitutions—if not all—refer to international human rights instruments as references and sources of standards. An example is the Preamble of the Constitution of the Republic of Congo that declares that

> *The fundamental principles proclaimed and guaranteed by the 1945 Charter of the United Nations, the 1948 Universal Declaration of Human Rights, the 1981 African Charter on the Human and Peoples' Rights and all duly ratified pertinent international texts … are an integral part of the present Constitution*.

This is an entry point that African judges, lawyers, civil society organizations and indigenous communities should eventually use to safeguard and protect the rights of indigenous peoples.

It emerges also from the chapter that there is indeed an increasingly widespread practice by states and numerous other international actors for recognising and accepting, in different ways, indigenous peoples' rights and in particular their right to lands. One way has been through constitutional amendments or, sometimes, the adoption of new constitutions that include—to varying extent—the notion of ethnic pluralism and indigenous peoples' specific rights, including their collective land rights. This practice is most visible in the Americas and Western Europe but examples can also be found in the Pacific region and Asia. However, this practice is yet to find its way in Africa, where few countries have constitutions that specifically recognize indigenous peoples, let alone their right to lands.

There are also countries such as South Africa, which have taken indirect actions to restore rights to communities, including indigenous communities who before had been unfairly denied these rights.

1029 See Albert Kwokwo Barume, "Responding to the Concerns of the African States" in *Making the Declaration Work*, edited by Claire Charters and Rodolfo Stavenhagen. IWGIA Document No. 127 (Copenhagen: IWGIA, 2009), p. 180.

1030 Ibid.: "It should be noted, however, that 15 African countries were absent from the room."

It seems, on the whole, that states and other international actors increasingly feel that the recognition of indigenous peoples' land rights responds to compelling values and principles of "humanity", fairness, and justice. This trend was recently confirmed by the adoption by a large number of states (144 out of 159), including African states, of the United Nations Declaration of the Rights of Indigenous Peoples.

It can therefore be argued that the protection of indigenous peoples' right to land can be considered an obligation deriving from duties vis-à-vis "the international community as a whole",[1031] or, in other words, a ''norm of customary international law''.[1032]

On this basis, the current Special Rapporteur James Anaya has argued that some aspects of indigenous land rights can be regarded as having been widely accepted as customary international law.[1033] It is this book's opinion that such an argument could be used by African judges, lawyers and communities when dealing with indigenous land claims.

1031 Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing and the International Criminal Tribunal for the Former Yugoslavia", *Criminal Law Forum* 6 (2) (1995), pp. 257-314.

1032 Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998), p. 5. On p. 7, this author points out that a norm of customary international law consists of an objective element and a subjective one. The objective component, which is understood as states' practice, consists of material acts, such as treaties, decisions of international and national courts, national legislation, diplomatic correspondences, opinions of national legal advisers, and practices of international organizations. Brownlie comments further that states' practice may even be revealed through policy statements, press releases and comments on drafts produced by international bodies. In addition to the objective component, an international custom must contain a subjective element known as *opinio juris*, which distinguishes a norm of customary law from a mere usage. It could be understood as a common and widely accepted belief among states that a given practice has become as binding as a conventional international obligation. The understanding is that they are compelling values and principles of 'humanity', fairness and justice.

1033 Anaya, *Indigenous Peoples in International Law* (1996), pp. 50-56.

CHAPTER X
MAIN U.N. INSTRUMENTS AND MECHANISMS RELEVANT FOR INDIGENOUS LAND RIGHTS

This and the following chapter examine how indigenous peoples' rights to lands, territories and natural resources are protected by international law and what international and regional mechanisms indigenous peoples, including African indigenous peoples, can use when claiming these rights.

The present chapter looks at the United Nations system and how it has dealt with indigenous peoples' land rights.

The first section of the chapter focuses on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose adoption by the U.N. General Assembly in September 2007 constituted a milestone in the history of indigenous rights and must be considered as a major achievement for indigenous peoples, worldwide. This section also looks at some of the U.N. Declarations and U.N. conferences and summits that preceded UNDRIP but contributed to raising the general awareness of indigenous peoples and their rights. The section finally surveys some of the U.N. mechanisms specifically targeting indigenous peoples.

UNDRIP can indeed be seen as the culmination of a long process during which human rights in general but indigenous rights in particular—including their rights to lands, territories and resources—have been defined, recognized and enshrined in binding international legal instruments. The second section of this chapter looks at these legal instruments and at the two sets of bodies set up by the United Nations system mandated to monitor State parties' human rights records (U.N. Charter-based bodies) and their compliance with their treaty obligations (Treaty-based bodies). The section starts by looking at the mechanisms and procedures established by the Charter-based Human Rights Council. These include the U.N. Special Rapporteur on indigenous peoples' rights (Special Procedures) and the Expert Mechanism on Rights of Indigenous Peoples, EMRIP, (Advisory body)—two bodies specifically mandated to deal with the promotion and the protection of indigenous peoples' rights—and the Universal Periodic Review (UPR), which involves a review of the human rights records of all U.N. member states and is increasingly becoming relevant for indigenous peoples too. The section then turns to the most relevant U.N. Treaties—i.e., the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW).

These international instruments have been ratified by almost every African country (for list of ratifications, see Appendix 2, Tables 1& 2), and their implementation is being monitored by their respective treaty body or committee—i.e., CCPR, CESCR, CERD and CEDAW.[1034]

The section finally also deals with ILO Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries. Adopted in 1989, this Convention can be seen as one of the results of the momentum generated by the Martínez Cobo study and the indigenous movement in the 1970s, and it is of particular relevance for indigenous peoples since it is the only legally binding instrument that exclusively concerns itself with the rights of indigenous peoples. Although the convention has been ratified so far by a mere 22 countries,[1035] including the Central African Republic—as yet, the only African country to do so—it is considered worldwide as a standard setting instrument and, together with the UNDRIP, is used as a reference whenever indigenous rights are being raised.

The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations has worked consistently on the issue of indigenous peoples since 1971, when José Martínez Cobo was appointed by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities to carry out a study on "the problem of discrimination against indigenous populations".[1036] This work by the United Nations culminated in 2007 with the adoption of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).[1037] In other words, it took more than 20 years of intense work—first by the Working Group on Indigenous Population (see below), later by the Ad Hoc Working Group on the Draft Declaration—to draft a declaration and get it adopted, first by the Human Rights Council in 2006, later by the U.N. General Assembly in 2007.

Although a Declaration is not legally, "the fact that the [UNDRIP] text is consistent with international law and its progressive development, and more importantly the purposes and principles of the U.N. Charter, ensures that it will play a dynamic and lasting role in the future of specific indigenous/state relations and international law generally".[1038] **It is therefore expected**

1034 Ten different human rights treaty bodies monitor the implementation of the 10 core international human rights treaties. There is an ongoing discussion about the reform of the Treaty bodies, and following a process of almost three years of consultations, the High Commissioner for Human Rights launched her report on the strengthening of the treaty body system in June 2012 (A/66/860). In her report, she described the problems faced by the treaty body system and put forward proposals for change. More information at: http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx and at http://www.ishr.ch/treaty-body-reform

1035 As per September 2013. See at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0

1036 ECOSOC (United Nations Economic and Social Council) Resolution 1589(L), May 21 1971. Text available at http://www.un.org/ga/search/view_doc.asp?symbol=E/RES/1589(L). The Cobo study was released in 1986/7.

1037 The Declaration was adopted in September 2007 by 144 votes in favour, 4 against (Canada, Australia, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine). U.N. Doc. A/RES/61/295. For full text, see http://undesadspd.org/IndigenousPeoples.aspx

1038 Dalee Sambo Dorough, "Human Rights" in *State of the World's Indigenous Peoples*, edited by the UNPFII. (New York: United Nations, 2009), p. 198.

that it will become a standard setting document in the same way as ILO Convention No. 169.

The rights to lands, territories and resources have a prominent place throughout the Declaration. Its Preamble thus expresses concern for "*the dispossession*" of lands, territories and resources suffered by indigenous peoples, preventing them "*from exercising, in particular, their right to development in accordance with their own needs and interests*." Accordingly, it therefore recognizes the "*urgent need to respect and promote … especially [indigenous peoples'] rights to their lands, territories and resources*", and it is through the "*control by indigenous peoples over developments affecting them and their lands, territories and resources*" that they will be able "*to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.*"[1039]

Several UNDRIP articles address indigenous peoples' land-related concerns. Article 8.2(b) and (c) respectively deal with the prevention of and redress for dispossession of lands, territories or resources as well as the prevention of any form of forced population transfer. The issue of forced removals is reiterated in Article 10, which stipulates that

> *... No relocation shall take place without the need for free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*

Article 28.1 and 2 elaborates further on the right to redress and the modalities of a

> *... just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*

Article 25 recognizes the special relationship that indigenous peoples have with their lands, and establishes their

> *... right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

Article 26 confirms that this right to lands, territories and resources also includes *"their right to own, use, develop and control these lands, territories and resources*", and urges states to "*give legal recognition and protection to these lands, territories and resources … with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned*". In this regard, Article 27 requires that

1039 UNDRIP, Preamble.

> *States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

Article 23 addresses indigenous peoples' right to determine their own priorities for development, and thus links lands, territories and resources with the ability to exercise human rights, including the human right to development. This right is further elaborated in Articles 29, 30 and 32 that deal respectively with indigenous peoples' right to conserve and protect the environment and productive capacity of their lands or territories and resources; their right to protect these lands and territories from military activities; and their right to determine and develop priorities and strategies for the development and use of their lands or territories and resources. Article 32 furthermore specifies that

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

From 29 June 2006—when the Draft Declaration[1040] was adopted by the Human Rights Council with favorable votes from only three African countries, namely Cameroon, South Africa and Zambia—to its adoption by the U.N. General Assembly in September 2007, more than a year elapsed. This delay was due to concerns expressed by African states and governments, which led to important negotiations. It should be noted that during these negotiations, African states agreed to accept the above articles on land rights in exchange of a specific provision on territorial integrity, which was inserted in Article 46.1. This article reads:

> *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.*

This means that the vast majority of African states and governments have committed themselves to recognize, protect, and promote indigenous peoples' rights to lands as long as these rights don't become a threat to territorial integrity. This deal and understanding should be kept

1040 For more details on the process and summary of the content of the Draft, see Web page of the U.N. Working Group on Indigenous Populations: http://www.ohchr.org/EN/Issues/IPeoples/Pages/WorkingGroups.aspx

alive and infused into domestic efforts by African states to implement the Declaration. It is therefore to be recommended that lawyers working on behalf of indigenous communities remind the judges of this context every time a land-related lawsuit involving indigenous communities is concerned. Furthermore, the Declaration will certainly strengthen the international conviction that indigenous peoples' land rights are part of international law.

Recent developments

The fifth anniversary of the adoption of the Declaration was commemorated on 17 May 2012. In the course of these five years, UNDRIP has not only received increased support with the adherence of the four countries that in 2007 had voted against it (Australia, New Zealand, Canada and U.S.A) and of two of the countries that had abstained (Colombia, Samoa). It has also become an important frame reference, leading to the consolidation of a human rights based approach to indigenous issues. In a few countries, mainly in Latin America, the Declaration has become an integral part of constitutional reform processes;[1041] it is used by U.N. Treaty bodies like CCPR, CESCR and CERD in their periodic reviews and by states during the UPR processes to highlight the situation of indigenous peoples; and it has inspired the policies of international institutions like IFAD,[1042] as well as national legislation in, for instance, the Republic of Congo.

In 2010, the U.N. General Assembly decided to organize in 2014 a high-level plenary meeting of the General Assembly to be known as the World Conference on Indigenous Peoples. Its purpose will be to adopt measures to pursue the objectives of the UNDRIP.[1043] In response to this resolution indigenous peoples have developed a number of initiatives aimed at ensuring that indigenous peoples are able to participate in this event, as well as in the preparatory[1044] and post Conference processes. These efforts culminated in May 2013 with the Global Indigenous Preparatory Conference in Alta (Norway) and the adoption of the "Alta Outcome Document", a set of recommendations based on four overarching priority themes, including one on indigenous peoples' lands, territories and resources.[1045]

Whilst the World Conference is seen as an opportunity to raise awareness of indigenous peoples' rights and push for their greater recognition, it will also be a test that will show the com-

1041 Right after the adoption of the UNDRIP, Bolivia made the Declaration binding as national law and its principles were incorporated in its 2009 Constitution. It can also be said that the new Kenyan Constitution has to a certain degree been inspired by the Declaration.

1042 IFAD (the International Fund for Agricultural Development) adopted in 2009 a policy on indigenous peoples, which explicitly recognizes the principle of free, prior and informed consent. In 2011, IFAD established an Indigenous Peoples' Forum as a consultative group within the organization. See www.ifad.org/english/indigenous/documents/ip_policy_e.pdf

1043 U.N. General Assembly Resolution A/RES/65/198 of December 2010 (2011). The World Conference on Indigenous Peoples will be held at the Headquarters of the U.N. 22-24 September 2014.

1044 The President of the U.N. General Assembly has appointed an indigenous co-facilitator to work together with the state appointed Ambassador and an Indigenous Global Coordinating Group (GCG) has been formed. See the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 444 ff.

1045 Text of Alta Outcome Document, at http://www.wcip2014.org/wp-content/uploads/2013/06/Adopted-Alta-outcome-document-with-logo-ENG.pdf

mitment of states to implement the principles of the UNDRIP by securing that indigenous peoples' right to full and effective participation at all stages of preparation and decision-making of the High Level Plenary of the General Assembly is being respected.[1046]

Other U.N. declarations, conferences and summits

Prior to the adoption of the Declaration on the Rights of Indigenous Peoples, there had already been several U.N. declarations and conferences that were relevant for indigenous peoples and their land rights.

Among the most important declarations are the U.N. Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992),[1047] which, in its Article 1, states that

1. *States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.*
2. *States shall adopt appropriate legislative and other measures to achieve those ends.*

and the UNESCO Universal Declaration on Cultural Diversity (2001),[1048] which, in its Article 4 on human rights as guarantees of cultural diversity, establishes that,

> *The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.*

A number of U.N. conferences and summits have likewise dealt with indigenous issues, including land rights. To name a few examples: it was following the United Nations Conference on Environment and Development, held in Rio de Janeiro in June 1992, that the Convention on Biological Diversity (CBD) was adopted, providing, among other provisions, for the rights of indigenous communities (see section on CBD in this chapter). But this Conference also adopted the Rio Declaration and Agenda 21. These two instruments establish international legal standards that recognize indigenous peoples' unique relationship to their lands and go towards protecting their rights to their traditional knowledge and practices in the area of environmental management and conservation.[1049]

1046 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 444ff.

1047 U.N. Doc. A/RES/47/135 at http://www.un.org/documents/ga/res/47/a47r135.htm

1048 See http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

1049 Of particular relevance is Section 3, Chapter 26 of Agenda 21 "Recognizing and strengthening the role of indigenous people and their communities". The full text is available online at englishhttp://www.unep.org/Documents.Multilingual/Default.asp?documentid=52.

In 1993, the Vienna World Conference on Human Rights adopted, amongst other recommendations, that the "General Assembly proclaim an international decade of the world's indigenous people, to begin from January 1994, including action-orientated programmes, to be decided upon in partnership with indigenous people". Recommendation 32 further stated, "In the framework of such a decade, the establishment of a permanent forum for indigenous people in the United Nations system should be considered".[1050]

Two years later, the World Summit for Social Development (Copenhagen, 1995) in its para. 32 recognized traditional rights to land and other resources and indigenous traditional knowledge systems.[1051]

The issue of indigenous peoples was also given attention and consideration at the 2001 Durban (South Africa) United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. This Conference's final Declaration recognized

> [T]he invaluable contributions of indigenous peoples to political, economic, social, cultural and spiritual development throughout the world to our societies, as well as the challenges faced by them, including racism and racial discrimination.

One of its recommendations was therefore that "indigenous peoples [should be consulted] on any matter that may affect their physical, spiritual or cultural integrity."[1052]

That same year, the World Summit on Sustainable Development (Johannesburg, 2001) identified indigenous communities as one of the groups that deserve particular attention by states.[1053] This Summit adopted the Johannesburg Plan of Action, which, in a number of paragraphs, refers to indigenous rights regarding access to land and resources as well as to their traditional knowledge. Article **7**(h), for instance, states that the eradication of poverty includes actions that will "provide access to agricultural resources for people living in poverty, especially women and indigenous communities, and promote, as appropriate, land tenure arrangements that recognize and protect indigenous and common property resource management systems".[1054]

U.N. mechanisms targeting indigenous peoples

The Martínez Cobo Report was submitted during the years 1981-1984[1055] and created, together with the advocacy of the indigenous movement, a momentum that led to the establishment of the

1050 The full text of the Vienna recommendations is available online at http://www.unhchr.ch/hridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En

1051 For further information, see Web site of the World Summit for Social Development at http://www.un.org/esa/socdev/wssd/text-version/

1052 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Final Declaration, available online at http://www.un.org/events/wssd/

1053 For further information, see Web site of the World Summit on Sustainable Development at http://www.johannesburgsummit.org/)

1054 For full text of Johannesburg Plan of Action, see: http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm

1055 The Martínez Cobo study can be accessed at http://undesadspd.org/IndigenousPeoples/LibraryDocuments.aspx

first U.N. mechanism targeting indigenous peoples, namely the U.N. Working Group on Indigenous Populations (WGIP) in 1982. More were to follow.

The U.N. Working Group (WGIP)

This Working Group was created by the U.N. Economic and Social Council (ECOSOC) in 1982[1056] with a two-fold mandate: to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples and to give attention to the evolution of international standards concerning indigenous rights. One of the WGIP's main achievements was to start the drafting of the U.N. Declaration on the Rights of Indigenous Peoples. It also commissioned and published a number of important standard-setting studies on crucial issues such as indigenous peoples' relationships to land, agreements between states and indigenous populations, etc. As an international platform, it served indigenous communities, encouraged organisations from different parts of the world to share their experiences, and most importantly to advocate their case together. Each year, its annual session would gather almost 1,000 indigenous representatives from around the world. The WGIP was abolished in 2006 when the new Human Rights Council was established in replacement of the Commission of Human Rights.

The two International Decades of the World's Indigenous Peoples

The international Decades have brought focus on indigenous peoples. The First Decade (1994-2004) was proclaimed by the U.N. General Assembly on 21 December 1993. At the same time, the General Assembly instructed the Commission on Human Rights to work for the establishment of a permanent forum.

The first Decade achieved a number of important advances, the two major ones being the establishment of the U.N. Permanent Forum on Indigenous Issues in 2000 and the appointment, in 2001, of a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people by the Commission on Human Rights.[1057]

The Second Decade was adopted by the General Assembly's Resolution 59/174 (2005-2014). One of its five main objectives is to "promot[e] full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent."[1058]

1056 See ECOSOC Resolution 1982/34 of May 1982.

1057 Other achievements of the First Decade are: the celebration of an annual day for indigenous peoples (U.N. General Assembly Resolution 49/214 of 23 December 1994, para. 8); the establishment of a fellowship programme within the office of the High Commissioner for Human Rights (U.N. General Assembly Resolution 50/157 of 21 December 1995); and the creation of a voluntary fund for indigenous peoples to fund indigenous peoples' participation in U.N. meetings and provide indigenous peoples with support for small projects. See Web site of the United Nations High Commission on Human Rights: http://www.ohchr.org/en/Issues/IPeoples/Pages/InternationalDecade.aspx

1058 See UNPFII Web page at http://undesadspd.org/IndigenousPeoples/SecondDecade.aspx for more details on the Second Decade.

A midterm assessment report concluded in 2010 that substantive advances had been made towards the achievement of the goal and objectives of the Second Decade, mentioning in particular the impact made by the adoption of UNDRIP, the role of UNPFII and the work done by indigenous organizations. However, it noted also the existence of a major gap between intentions at the policy level and the actual implementation of specific objectives of the Decade. There remains, for instance, "a substantial lack of systematic mainstream engagement and mechanisms for direct participation within international institutions, development programmes and project-related activities in areas or on issues relating to indigenous peoples and relatively few international institutions have developed guidelines, institutional policies or safeguard policies on engagement with indigenous peoples".[1059]

The Second Decade comes to an end in 2014.

The Permanent Forum on Indigenous Issues

The UNPFII was established in 2000 by the Economic and Social Council (ECOSOC)[1060] as an advisory body to the Council. It has had its own Secretariat since 2003.

The Forum has a broad mandate, namely to discuss economic and social development, culture, the environment, education, health and human rights, and to advise the Economic and Social Council and the U.N. system on all matters pertaining to its mandate; promote the coordination and integration of indigenous issues in the U.N. system; raise awareness about indigenous issues; and produce material to inform about indigenous issues. It consists of 16 members acting in an individual capacity as independent experts on indigenous issues. Eight of these members are nominated by governments and eight by the president of ECOSOC on the basis of a broad worldwide consultation with indigenous groups. This parity composition makes it a unique body: for the first time in their history, indigenous peoples are on an equal footing with members nominated by the states in a permanent U.N. body.

The Forum convenes once a year in New York and gathers a large number of indigenous representatives, who have the status of observers and therefore the right to make verbal interventions in order to express their views and recommendations on the different issues included in the working agenda. Each session has a special theme, and in May 2007, at its sixth session, the special theme was "Territories, Lands and Natural Resources". The final report of this session indicates that "the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples' movement and of indigenous peoples and organizations everywhere."[1061]

1059 U.N., Report by the Secretary General, "Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People". U.N. Doc. A/65/166, 2010 (2010a). See UNPFII Web page at http://undesadspd.org/IndigenousPeoples/SecondDecade.asp

1060 ECOSOC Resolution 2000/22 of July 2000. Document available at http://www.un.org/esa/documents/ecosoc-mainres.htm

1061 United Nations Permanent Forum on Indigenous Peoples Issues, Report of the Sixth Session (14-25 May 2007). U.N. Doc. E/2007/43, E/C.19/2007/12. Available online at the Web site of UNPFII, http://undesadspd.org/IndigenousPeoples.aspx

An Inter-Agency Support Group (IASG) has been established with the mandate to support and promote the mandate of the Forum within the United Nations system. It is composed of 31 U.N. agencies such as UNDP, WHO, the World Bank and ILO.[1062]

The Permanent Forum is today providing "a high-level forum in which the voices of indigenous peoples can be heard" and has "increased awareness of their issues and the need for their inclusion in development processes, including the Millennium Development Goal processes".[1063]

The Permanent Forum has also "galvanized support, visibility and engagement with regard to indigenous issues, as illustrated by the increased participation and voluntary reporting of Member States, United Nations agencies and other intergovernmental organizations, as well as the increased number of indigenous peoples' representatives participating in the yearly session of the Permanent Forum".[1064]

The Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples

This mechanism was established in 2001 with the mandate to present annual reports on particular topics or situations of special importance regarding the promotion and protection of the rights of indigenous peoples; to undertake country visits; to exchange information with governments concerning alleged violations of the rights of indigenous peoples; and to undertake activities to follow-up on the recommendations included in his reports. The first Special Rapporteur (Rodolfo Stavenhagen 2001-2008) attended a session of the African Commission on Human and Peoples' Rights and visited numerous countries including South Africa (2005) and Kenya (2006).[1065] He also published important reports that, among other topics, deal with land rights.[1066] A new Special Rapporteur (S. James Anaya) was appointed by the Human Rights Council in March 2008. His mandate is to investigate human rights violations against indigenous peoples on the basis of, among other things, complaints received from indigenous organizations or individuals and provide recommendations to the U.N. Human Rights Council and governments around the world to improve their situations.

1062 Further members of this Agency can be found on the following Web site: http://undesadspd.org/IndigenousPeoples/InterAgencySupportGroup.aspx

1063 See U.N. Organization, "Midterm assessment", (2010a), §22. The Forum has, for instance, asked the Human Rights Committee (CCPR), which oversees the implementation of the ICCPR, to "require" State parties to report on how they are giving effect to indigenous peoples' right to self-determination under Article 1 of the ICCPR and Article 3 of the UNDRIP. See, e.g., The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011), p. 496.

1064 See U.N., Report "Midterm assessment", (2010a), §26.

1065 The former Rapporteur's Country Visit Reports can be accessed at http://www2.ohchr.org/english/issues/indigenous/rapporteur/visits.htm

1066 See, e.g., Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people submitted in accordance with Commission resolution 2001/65, Fifty ninth Session, Item 15 of the provisional agenda (human rights and indigenous issues). U.N. Doc. E/CN.4/2003/90, 21 January 2003. (2003a) Available online at http://www.iwgia.org/sw7652.asp

In 2010, the Human Rights Council renewed the mandate of the Special Rapporteur for a further three-year period and, in doing so, changed the title of the mandate from "Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people" to "Special Rapporteur on the Rights of Indigenous Peoples".[1067]

The Special Rapporteur has since 2008 undertaken several country visits, including visits to African countries such as Botswana (2010), the Republic of Congo (2011) and Namibia (2013).[1068] He has also contributed to the development of capacity on indigenous peoples in Africa, including through his participation to sessions and activities of the African Commission's Working Group on indigenous populations/communities. The Rapporteur also receives a large number of communications from indigenous and other civil society organizations, which he follows up with letters, observations or urgent appeals to the governments concerned. In 2012, for instance, urgent appeals were sent to Ethiopia, Kenya and Cameroon.[1069]

The Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established in 2007 as the result of the adoption, by consensus, by the Human Rights Council, of Resolution 6/36. Its mandate is to assist the Human Rights Council in the implementation of its mandate by providing thematic expertise and making proposals to the Council pertaining to the rights of indigenous peoples. The mechanism consists of five independent experts, including a representative of Africa, and the resolution 6/36 clearly recommends that the Council, in its selection and appointment process, gives due regard to experts of indigenous origin. The annual meeting of the Expert Mechanism is open to the participation—as observers—of states, United Nations mechanisms, U.N. bodies and specialized agencies as well as to indigenous peoples' organizations, non-governmental organizations, national human rights institutions, academics, etc. At its second session in August 2009, a "Study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education" was presented and adopted.[1070]

EMRIP has now a well-established position within the Human Rights Council (HRC), with the authorization, together with the Special Rapporteur, to conduct interactive dialogues with the HRC. EMRIP also receives an increasing number of requests from the Council. In addition

1067 UNHRC's resolution 15/7 of 2010.

1068 The Rapporteur's Country Visit Reports can be accessed at the current Special Rapporteur's home page http://unsr.jamesanaya.org

1069 For list of cases, see http://unsr.jamesanaya.org/

1070 Besides this study on education" (2009), the Expert Mechanism has completed the following studies and reports: "Study on Indigenous peoples and the right to participate in decision making" including a progress report and a final report, as well as recommendations (2011); "Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples" (2012a); "Report on Indigenous peoples and the right to participate in decision making with a focus on extractive industries"(2012b); and "Report/Summary of responses from questionnaire seeking the views of states on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples" (2012c). All reports are available at: http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx

to the annual request for EMRIP to examine a specific thematic area, these requests have included a questionnaire on the implementation of the UNDRIP[1071] and a contribution to the exploration of the modalities for the World Conference on Indigenous Peoples. EMRIP also regularly provides briefings to U.N. Human Rights Treaties.[1072]

In 2011, EMRIP finalized its study on "Indigenous Peoples and the right to participate in decision making" and prepared an initial review of Human Rights Council's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" as they relate to Indigenous peoples and the right to participate in decision-making with a focus on extractive industries.[1073]

The U.N. Human Rights Council (HRC)

The two mechanisms mentioned above, the U.N. Special Rapporteur and EMRIP, are under the Human Rights Council, as "Special Procedures" and "Advisory body", respectively.[1074] The Human Rights Council was created in 2006.[1075] It has a membership of 47 elected states among which 13 are Africans, and is the principal human rights political body of the United Nations. Its mandate is to promote universal respect for the protection of all human rights and fundamental freedoms for all, to address situations of human rights violations and to promote the effective coordination and mainstreaming of human rights within the United Nations system.

Once a year, the HRC dedicates a special session to indigenous rights, where the Special Rapporteur and the Expert Mechanism's chairperson present their respective reports and participate in an interactive dialogue with the HRC, participating states, and observer NGOs. As part of this official HRC session, it has since 2011 become established to organize an expert panel on issues related to the rights of indigenous peoples.[1076] Each year, the HRC adopts a resolution entitled "Human Rights and Indigenous Peoples" which refers to the work presented and to the future work of the Special Rapporteur and the EMRIP.

Indigenous concerns are also included in other aspects of the HRC's work. In 2011, the HRC endorsed the Guiding Principles on Business and Human Rights, establishing the Guiding Principles as the authoritative global standard for preventing and addressing adverse im-

1071 The questionnaire was prepared and sent to states in November 2011.

1072 See EMRIP Webpage at http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx

1073 HRC/EMRIP, "Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries". U.N. Doc. A/HRC/EMRIP/2012/CRP.1, 2012 (2012d). http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1_en.pdf

1074 A third mechanism is The Voluntary Fund for Indigenous Populations that enables indigenous peoples to attend the sessions of the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, the Human Rights Council, including its Universal Periodic Review mechanism, and the treaty bodies. In accordance with a Human Rights Council resolution, these mechanisms all work in close cooperation with each other as well as with other mechanisms within the United Nations system with a mandate specific to indigenous peoples.

1075 The Human Rights Council replaced the Commission on Human Rights. Its member states are elected for a three years period by the U.N. General Assembly on the basis, *inter alia*, of an equitable geographical distribution.

1076 In 2012, the panel discussed indigenous peoples' access to justice.

pacts on human rights arising from business-related activities. A Working Group (WG) was formed in 2012, and during its first year of work, the WG has discussed the issue of indigenous peoples on several occasions, in particular in connection with extractive industries operations. The first annual Forum on Business and Human Rights took place in December 2012 and included a panel discussion on "Business affecting Indigenous Peoples".[1077]

The Universal Periodic Review (UPR)

This key mechanism within the HRC regularly examines the human rights records of all U.N. member states, assessing the fulfillment of states' obligations and commitments, enhancing the states' capacity and sharing best practices among states and other stakeholders.[1078] Various countries, including African countries, with indigenous populations have been reviewed over the past years and received recommendations regarding indigenous peoples.[1079] The number of indigenous issues raised and the number of recommendations vary greatly, however, and are on the whole few. As for the responses given by the states, they too vary, ranging between accept and pure rejection.

For indigenous peoples, the main question is to get their issues included in the review process. One way to do this is to prepare and submit shadow reports and lobby during the review.[1080] The UPR process is, however, plagued by structural shortcomings that limit its effectiveness (limitation in length of submissions, in NGOs' participation allowed only in the session when the state report is being adopted and only for very short communications, etc.) Indigenous communities need therefore to adopt innovative approaches to ensure their issues capture the attention of the UPR process. The approach adopted by Kenyan NGOs and CSOs up to the 2010 review is a good example of this: indigenous communities joined a wider stakeholder coalition (KSC-UPR) that included their national human rights institution, and participated in preparing a single multi-stakeholder report.[1081] Some of the benefits of this approach included placing indigenous issues at parity with other human rights issues, the uptake of and advocacy for indigenous issues on the part of the national human rights institution, consultations with the state prior to the review and the exposure to wider platforms for lobbying and advocacy during the review in Geneva. As the UPR embarks on its second cycle of reviews, there is also a need to look at how the states are implementing the recommendations made by the UPR. States are expected to convert the recommendations into actionable policy inter-

1077 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 472.

1078 For further details on the UPR mechanism, see UPR Info's website at http://www.upr-info.org

1079 These include Botswana (2008), Cameroon (2009), Kenya (2010) Rwanda, Uganda and Tanzania (2011).

1080 See, e.g., the process for Tanzania in the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2012* (Copenhagen: IWGIA, 2012), pp 442-443 and 540.

1081 See Kenya National Commission on Human Rights, "Accounting For Human Rights Protection Under The UPR: The Difference Kenya's Stakeholders Made" (September 2011) at http://www.knchr.org/Portals/0/InternationalObligationsReports/Accounting_For_Human_Rights_Protection_Under_the_UPR.pdf See also the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2011* (Copenhagen: IWGIA, 2011).

ventions, while stakeholders are expected to advise the state and monitor the rate of implementation.[1082]

In 2011, the open-ended intergovernmental working group on the review of the work and functioning of the HRC came up with a number of recommendations for changes to the UPR. These were later adopted on 25 March 2011 as resolution 16/21. Two of these changes deal with the role of National Human Rights Institutions (NHRIs) and the role of NGOs and may be relevant for indigenous peoples.[1083]

U.N. Human Rights Treaties and their respective treaty bodies

Four Human Rights Treaties are particularly relevant: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Convention on the Elimination of Discrimination Against Women (CEDAW).

ICCPR and indigenous peoples' right to lands

This Covenant (1966) is considered as the main universal international instrument that protects the rights of indigenous peoples, and its Articles 1 and 27 as the two major provisions protecting indigenous peoples' right to lands.

Article 1 on self-determination
This article stipulates that

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*

1082 See, for instance, KSC-UPR, "Universal Periodic Review: An Assessment by Stakeholders of Government's performance in implementation of UPR Recommendations - Annual Progress Report 22nd September 2010 - 21st September 2011 (2011) at http://www.upr-info.org/IMG/pdf/follow-up_kenya_stakeholders_annual_progress_report_2011.pdf

1083 These changes regard (1) the Role of NHRIs: NHRIs with A status will have a dedicated section in the summary of other stakeholders' information and will be given the floor directly after the State under Review during the adoption at the HRC plenary session; and (2) the Role of NGOs: states are encouraged to conduct broad consultations with all relevant stakeholders on the follow-up. Other relevant stakeholders are encouraged to include information on the follow-up to the preceding review in their contributions. See UPR INFO, "New Modalities for the Second Cycle" at http://www.upr-info.org/IMG/pdf/new_upr_modalities_second_cycle.pdf

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

The question is whether indigenous peoples' right to lands can be considered as included within the scope of the right to self-determination?

The right to self-determination is recognized by almost all international human rights instruments, including the Charter of the United Nations,[1084] the two Covenants[1085] and the African Charter.[1086] However, none of these instruments elaborate on the meaning of this right. This question did preoccupy the drafters of the ICCPR, but no final decision was taken.[1087] Nor has the Human Rights Committee—a body made of independent experts mandated to oversee the implementation of the ICCPR by States parties—expanded on the scope of the right to self-determination.[1088] One human rights researcher even argues that the Committee "has demonstrated an unwillingness to consider allegations of denial of the right to self-determination because [they consider the] area [as] politically charged".[1089]

An example of this is the conclusion reached by the CCPR on the communication submitted by the Chief of the Lubicon Lake Band against the Canadian government. The Canadian government had granted leases to private companies for exploitation of oil, gas, and other resources, on the lands of the Lubicon Cree of Alberta Province, Canada. As a result of the commercial exploitations carried out on their lands, the Lubicon Cree's way of life and health were adversely affected. In 1984, Chief Bernard Ominayak, claiming to represent all members of his tribe, accused the Canadian government of violating its international obligations under the provisions of Articles 1 and 27 of the ICCPR.[1090] Regarding Article 1, however, the Committee avoided addressing the self-determination claim by stating in May 1990 that,

1084 Article 1, paragraph 2 of the U.N. Charter states that the United Nations aims "*to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*".

1085 Article 1 of the two Covenants—the ICCPR and the International Covenant on Economic and Social Rights (ICESR)— are identical.

1086 The African Charter, chapter 1, Article 20. 1, states that, "*All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen*." The Charter can be downloaded at http://www.hrcr.org/docs/Banjul/afrhr.html. See also in Thornberry, *International Law* (1991), p. 21.

1087 Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht and Boston: Martinus Nijhoff Publishers, 1987), p. 32. A number of delegates to the drafting sessions of the ICCPR proposed unsuccessfully that the right to self-determination be given a precise content and that it includes "the right of every person to participate, with all the members of a group inhabiting a compact territory, to which he belongs ethnically, culturally, historically or otherwise, in free exercise of the right to secede and to establish a politically and economically independent State, and the right to choose the form of this government".

1088 All documents issued by the CCPR can be accessed at the UNHCHR Treaty Body database at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx and http://www1.umn.edu/humanrts/google/localsearch.html

1089 Mary Ellen Turpel, "Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Development and the Continuing Struggle for Recognition", *Cornell International Law Journal* 579 (1992), p. 585.

1090 CCPR Communication No. 167/1984 *The Lubicon Lake Band v. Canada* (1990).

> [T]he Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such.[1091]

Nevertheless, in its General Comment 12 of 1984 on "the right to self-determination of peoples" in Article 1 of the ICCPR,[1092] the CCPR gives a strong hint that the right to self-determination could be exercised and enjoyed without upsetting the territorial integrity of states: "With regard to paragraph 1 of Article 1, States parties should describe the constitutional and political process which in practice allow the exercise of this right".[1093] The Committee continues by stating: "Paragraph 2 [of Article 1] affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely 'to dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.'"[1094]

Commenting in 1999 on a State party report by Canada, the CCPR recognized that indigenous peoples could enjoy the right to self-determination within a state:

> The right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee also recommended that the practice of extinguishing inherent aboriginal rights should be abandoned because it is incompatible with article 1 of the Covenant.[1095]

While the CCPR has not been very active in relation to the right to self-determination, other U.N. bodies and human rights experts have, in contrast, addressed this right. In his 1981 Study on the Right to Self-Determination,[1096] Aureliu Cristescu, the United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, elaborates on the

1091 Ibid.

1092 CCPR General Comments 12, Article 1 (Twenty-first session, 1984). Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. U.N. Doc. HRI/GEN/1/Rev. 1 at 134 (2003).

1093 Ibid., para. 4.

1094 Ibid., para. 5.

1095 CCPR Concluding Observations, Canada. U.N. Doc./CCPR/C/79/Add.105. (1999), para. 8.

1096 Aureliu Cristescu, "The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments". Study prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981). This Study was requested by the Commission on Human Rights to the Sub-Commission through resolution 10 (XXIX) of 22 March 1973. The formulation of the mandate was to study "the historical and current development of the right to self-determination on the basis of the Charter of the United Nations and the other instruments adopted by United Nations organs, with particular reference to the promotion and protection of human rights and fundamental freedoms".

content of this right. He indicates, amongst other issues, that "peoples", "nations", and "states" are all holders of the right to self-determination. Further, he argues that the right to self-determination should not only be understood as meant to deal with colonialism; but also as a legal means to ensure permanent sovereignty of peoples over their natural wealth and resources.[1097] This is based on the understanding that "the term 'peoples' applies not only to States but also to other entities".[1098]

In this same vein, several expert opinions have identified a distinction between "internal self-determination" and "external self-determination". The former is understood as including rights, such as the right to autonomy and self-governance,[1099] whereas the latter is considered as referring to the claim for statehood. However, this distinction is not reflected in any universal international human rights instrument.[1100] It is seen as an invention of political thinking,[1101] and as not being part of the traditional legal literature on self-determination.[1102] Principle VIII of the Helsinki Final Act (1975) also enunciates that

> *[B]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue, as they wish, their political, economic, social, and cultural development.*[1103]

The right to self-determination has been linked to the right of indigenous peoples over their natural resources. Judge Weeramantry, in his dissenting opinion in the East Timor case before the International Court of Justice,[1104] thus argued that the East Timorese people had the right "*to determine how their wealth and natural resources should be disposed ... [and that] any action which may in fact deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination*".[1105]

1097 Cristescu, "The Right to Self-Determination" (1981), pp. 43-45.

1098 Ibid., pp. 38-9.

1099 See Allan Rosas, "Internal Self-Determination", in *Modern Law of Self-Determination,* edited by Christian Tomuschat, (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 239. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, UK.: Cambridge University Press, 1995), p. 101.

1100 Cassese, *Self-Determination* (1995), p. 103.

1101 Gudmundur Alfredsson, "Self-Determination and Indigenous Peoples", in *Modern Law of Self-Determination,* edited by Christian Tomuschat, (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 50.

1102 Ibid., pp.53-54. Alfredsson, for instance "believes that we should call the right offered by their correct names and not try to advocate their image by doubtful labelling". See also Douglas Sanders, "Self-Determination and Indigenous Peoples", in *Modern Law of Self-Determination,* edited by Christian Tomuschat, (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 80.

1103 The Helsinki Final Act closed the Conference on Security and Co-operation in Europe (CSCE) held in Helsinki, Finland July-August 1975. Principle VIII is one of the ten principles enumerated in the Act's "Declaration on Principles Guiding Relations between Participating States". The Final Act is available online at http://www.hri.org/docs/Helsinki75.html. See also in Lâm, *At the Edge of the State,* (2000), p. 130.

1104 International Court of Justice, Case Concerning East Timor *(Portugal v. Australia)* Judgment June 1995. Available on line at http://www.icj-cij.org/docket/index.php?sum=430&code=pa&p1=3&p2=3&case=84&k=66&p3=5

1105 The United Nations did not recognize Indonesia's invasion of the former Portuguese colony, East Timor, in 1978. Instead, it continued recognizing Portugal as the administrating power although Portugal was *de facto* prevented from exercising its responsibilities as such. In 1989, Australia signed the Timor Gap Treaty with Indonesia regarding the joint exploration of petroleum resources within East Timor's seabed. As a result, Portugal brought Australia before the International Court of Justice, claiming that "Australia has failed to respect the rights of Portugal as the administrating Power … and the right of the people of East Timor to self-determination and related rights" and that the Timor Gap Treaty was in violation of a *jus*

The view that the right of indigenous peoples over their natural resources, including lands, constitutes an integral part of their right to self-determination is indeed corroborated by many authors.[1106] It is argued that the right to self-determination could be satisfied "also through unitarism, multipartism, confederation, federalism or other relations that conform to the wishes of the peoples".[1107] On the same note, the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) indicates that, by the virtue of their right to self-determination, indigenous peoples "*freely determine their political status and freely pursue their economic, social and cultural development*" (Article 3); indigenous peoples, in exercising the right of self-determination, furthermore have "*the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions*" (Article 4). However, UNDRIP Articles 3 and 4 should be read in conjunction with Article 46, which, as already mentioned, was amended at the request of the African states and governments, which feared that the right to self-determination could negatively impact on their territorial integrity.

These various interpretations of the right to self-determination may be useful to the CCPR when it addresses this issue. However, it is important to recognize that the provisions of ICCPR Article 1 have not been a frequent fertile ground for the indigenous peoples' legal battle, because states remain resistant to consider indigenous communities as "peoples".

Nevertheless, slow changes may be taking place, as evidenced in 2000 by the CCPR's decision in *Apirana Mahuika et al. v. New Zealand,* where 19 Maori individuals, claiming to represent several Maori tribes, alleged, amongst other things, violations of ICCPR Articles 1 and 27 by New Zealand.

The plaintiffs had traditional fishing rights that were protected by the 1840 Waitangi Treaty, and later by the 1983 Fisheries Act. In 1986, a system of fishing quota and control over Maori commercial fishing was introduced by the New Zealand government, prompting a number of Maori to file a court case on violation of their fishing rights, as protected by the 1983 Act. Following a number of events, a group of Maori and the government of New Zealand reached an agreement, which resulted in the 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act. According to this Act, the New Zealand government would provide Maori with the financial help they needed to buy a fishing company and, in return, the Maori would renounce all present and future fishing claims.

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cogens obligation. While stressing the importance of self-determination as "*one of the essential principles of contemporary international law*", the I.C.J. dismissed the possibility of exercising its jurisdiction since it "*would necessarily have to rule upon the lawfulness of the conduct of a State [i.e., Indonesia, which is not a party to the case], as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources*".

1106 Cassese, *Self-Determination* (1995), pp. 188-9. See also Yoram Dinstein, "Collective Human Rights of Peoples and Minorities", 25 *International and Comparative Law Quarterly* 25, 102 (1976), p. 110. This author argues that the right over natural resources is simply a right closer to the right to self-determination.

1107 U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff Publishers, 1997), p. 53. See also Martin Scheinin, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights", in *International Law and Indigenous Peoples*, edited by Joshua Castellino and Niamh Walsh (Boston: Martinus Nijhoff Publishers, 2005), p. 9.

The authors of the Communication before the CCPR alleged that this Settlement Act violated, amongst other things, their rights to self-determination and to enjoy their culture. The CCPR declared itself unable to address claims relating to self-determination under the procedure of individual communication. However, in an unprecedented line of argument, the Committee, in paragraph 3 of its Communication, importantly recognized that the authors' claims relating to "*issues under Articles 14(1) and 27 [should be examined] in conjunction with Article 1*". It "*noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of Article 1 to the authors' claims under Article 27*" and added (in paragraph 9.2) that "*The provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27*".[1108]

Article 27 on cultural rights

This article states that,

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

Article 27 of the ICCPR is today seen as the most prominent protection provided by international law to land rights of indigenous peoples. This derives from a direct link established between indigenous peoples' right to lands and their cultures. In general terms, "culture" is understood as "an evolving achievement of artistic and scientific creation" of a society,[1109] a "way of life", or better, a "cluster of social and economic activity, which gives a community its sense of identity".[1110] A culture is understood as a "complex whole, which includes knowledge, beliefs, art, law, custom and other capabilities, and habits acquired by man as a member of society".[1111]

1108 CCPR Communication No 547/1993: *Apirana Mahuika et al. v. New Zealand*. Seventieth session (2000). U.N. Doc. CCPR/C/70/D/547/1993 October 2000 (2000c). Para. 3 reads: "*When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27.*" Para. 9.2 reads: "*The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in Part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.*"

1109 Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in *Economic, Social and Cultural Rights: A Textbook,* edited by A. Eide, Catarina Krause and Allan Rosas (London: Martinus Nijhoff Publishers, 1995), p. 231.

1110 Rodley, "Conceptual Problems" (1995), p. 59.

1111 Thornberry, *International Law* (1991), p. 188.

The right to culture is one of the most debated rights in international law, in part because of the constant evolution of its scope.[1112] The right to culture is recognized in terms similar to those of the ICCPR by several other instruments and texts,[1113] including the Limburg Principles[1114] and the Maastricht Guidelines.[1115] Most of these instruments, however, do not, unfortunately, elaborate on its scope.[1116]

The CCPR's General Comment 23 on Article 27 of the ICCPR explicitly links indigenous peoples' right to lands and their right to culture. It states in para. 7:

1112 Janusz Symonides, "Cultural Rights: A Neglected Category of Rights", *International Social Science Journal*, Vol. 50, 1998, p. 560. John Packer, "On the Content of Minority Rights", in *Do We Need Minority Rights?* edited by J. Räikkä (Netherlands: Kluwer Law International, 1996), pp. 130-141.

1113 See, for instance, Article 15 of the Universal Declaration of Human Rights: "*Everyone has the right to freely participate in the cultural life of the community, to enjoy the art and to share in scientific advancement and its benefits … Everyone has the right to the protection of the … material interests resulting from any scientific literacy or artistic products of which he is the author*"; Article 15 of the Covenant on Economic, Social and Cultural Rights: "*The States Parties … recognize the right of everyone: a) to take part in cultural life, b) to enjoy the benefits of scientific progress and its applications, c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*"; Article 15 of the European Framework Convention for the Protection of National Minorities (1995): "*The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them*". See also this Convention's Article 5 (1) on the promotion of "*the conditions necessary for persons belonging to national minorities to maintain and develop their culture*" and Articles 5(2) and 6(1) that prohibit any policy of assimilation. This Convention is seen as having been adopted in order to address the absence of a specific minorities-disposition in the European Human Rights Convention. See Council of Europe document H (95) 10, available online at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG; and Gilbert, "Minority Rights in Europe" (1992), p. 94. See also the African Charter's Article 22: "*All peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity*"; Article 17: on the right of "*every individual [to] freely take part in the cultural life of his community … [and more specifically on] the promotion and protection of morals and traditional values recognized by the community*"; Article 16 of the American Convention on Human Rights, 1969 (at http://www.oas.org/juridico/English/treaties/b-32.html): "*Everyone has the right to associate freely for … cultural … and other purposes*"; and Article 1 of the UNESCO Declaration of the Principles of International Cultural Cooperation, November 4, 1966 (see http://portal.unesco.org/en/ev.php-URL_ID=13147

1114 The Limburg Principles were adopted by ECOSOC in 1986 and aim to provide parties to the Covenant on Economic, Social and Cultural Rights, with guidelines for their implementation. See in U.N. Doc. E/CN 4/1987/17. Appendix 1. Text available at http://www.acpp.org/RBAVer1_0/archives/Limburg%20Principles.pdf. See also in *Human Rights Quarterly* 9 (1987), pp. 122-135.

1115 The Maastricht Guidelines (1997) are nothing more than an updated version of the Limburg Principles. They were adopted in the spirit of being used by those "who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional, and international levels". See Urban Morgan Institute for Human Rights et al., "The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights", *Human Rights Quarterly* 20, no. 3 (1998), pp. 691-704.

1116 However, several scholars have attempted to delineate the right to culture. Eide, for instance, considers the right to culture as including: (a) a right to participate in community life, (b) a right to enjoy art, (c) a right to share advantages and benefits of scientific advancement, (d) a right to the moral and material protection of interest resulting from scientific, literary or artistic products, (e) a right to use one's own language, (f) and a right to profess and practice one's own religion (Eide, "Economic, Social and Cultural Rights", 1995, p. 232); Göran Melander argues that the right to education, the right to information and the right to freedom of expression can also be considered as related to culture. See Melander, "Article 27", in *Universal Declaration of Human Rights: A Commentary*, edited by A. Eide et al. (Norway: Scandinavian University Press, 1993), p. 430); Symonides, on the other hand, argues in "Cultural Rights" (1998), p. 560, that "the right to education is generally considered to be a cultural right".

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[1117]

If it is beyond controversy that the right of indigenous peoples to their lands is an integral part of the scope of Article 27 of the ICCPR, what does this mean conceptually in terms of states' international obligations?

In relation to the Maastricht guidelines, it has been noted that, "like civil and political rights, economic, social, and cultural rights impose three different types of obligations on states: the obligation to respect, protect and fulfil".[1118] The international obligation of "respect" requires states to refrain from interfering with the right to enjoy rights,[1119] in other words, to provide a kind of "*laissez vivre*".[1120] The obligation of "protection" binds states to prevent violations of rights by a third party.[1121] This can be considered to be a horizontal responsibility, which requires states to act against "threats posed by all sources, whether governmental or private".[1122]

The fact that indigenous peoples should attain a "*laissez-vivre"* and be protected against third party's actions was upheld in the decision of the CCPR in the aforementioned *Lubicon Lake Band* case and the *Länsman* case, against Canada and Finland respectively.

Regarding the *Lubicon Lake Band* case, one of the allegations was that the Canadian government by granting leases to private extraction corporations violated among others the Lubicon Cree's right to dispose of natural wealth and resources and the right to enjoy a culture. In 1990, the CCPR concluded, in what has been described as an "expansive decision",[1123] that the commercial exploitation of natural resources that was taking place on Lubicon Cree lands, threatened the "way of life and culture" of this community and amounted to a "violation of Article 27 [by Canada] so long as they [continued]".[1124]

In *Länsman et al. v. Finland*, a group of Saami alleged that Finland violated the provisions of Article 27 by granting a private company authorisation to extract stones from Mt. Riutusvaara, which the Saami consider as sacred land and important for their traditional reindeer herding. Even if the CCPR found that there was no violation of Article 27, it did emphasize the plaintiffs' cultural ties with Mt. Riutusvaara.[1125]

1117 CCPR, General Comment 23, Article 27. U.N. Doc. HRI/GEN/1/Rev.1 at 158, 1994 (1994a) See also Raoul Wallenberg Institute, *Human Rights Committee* (2006), p. 72.

1118 Urban Morgan Institute for Human Rights et al., "Maastricht Guidelines" (1998), p. 693.

1119 Ibid., pp. 696-7.

1120 Packer, "On the Content of Minority Rights" (1996), p. 154.

1121 Urban Morgan Institute for Human Rights et al., "Maastricht Guidelines" (1998), pp. 696-7.

1122 Packer, "On the Content of Minority Rights" (1996), p. 155.

1123 Benedict Kingsbury, "Claims by Non-States Groups in International Law", *Cornell International Law Journal*, vol. 25 (1992), p. 490.

1124 CCPR, Communication No. 167/1984 *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*. U.N. Doc. CCPR/C/38/D/167/1984, March 1990 (1990).

1125 CCPR Communication No. 511/1992 *Länsman et al. v. Finland*. Fifty-second session, 1994. U.N. Doc. CCPR/C/52/D/511/1992 (1994), para. 9.6 (1994b). Available online at http://hrlibrary.ngo.ru/undocs/session52-index.html

Finally, regarding the third obligation to "be fulfilled", states parties are required to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights.[1126] As noted by Nowak,[1127] this obligation implies that states put in place institutions and procedural safeguards "aimed at protecting specific rights". This obligation was elaborated upon by the CCPR in its conclusions in *Kitok v. Sweden.*[1128]

According to the Swedish 1971 Reindeer Husbandry Act, a Saami who leaves his community or has not been involved in the community's activities for more than three years, could lose his or her membership and be prevented from practising reindeer husbandry in addition to other cultural activities that are generally carried out on Saami lands. This legislation is considered to be a means to protect and preserve the Saami culture. When Mr. Kitok, a Swedish Saami, wanted to return home and become once more an active member of his Saami community, his application was turned down. He appealed his community's decision to a Swedish court, which ruled against him. This was the basis for Kitok's communication against Sweden before the CCPR, in which he alleged that the Swedish government violated his right to culture by failing to overturn his community's decision.

The CCPR found that Sweden was not in violation of the provisions of Article 27 by not allowing Mr. Kitok to return to his community. It argued that Sweden was under the international obligation to protect the Saami culture and that, in doing so, Sweden could lawfully restrict rights of individual members of the Saami community. The Committee argued that a "restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole".[1129]

It emerges from these cases that states are frequently required to balance the right to culture of indigenous peoples on the one hand, and other competing interests, such as investments and similar public or private interests, on the other hand. This was, for instance, the case in the *J.G.A. Diergaardt et al. v. Namibia* (2000). The CCPR ruled that although the Rehoboth Baster community had lived on the disputed land for more than one hundred years, it could not establish a strong tie between the community's way of life and the land in question.[1130]

It is recommendable to indigenous activists and other persons interested in land rights issues to use the mechanism of the CCPR. Under the rules of the Optional Protocol to the Covenant, an individual or a group of individuals can complain to its Committee for violation of one or several provisions of the ICCPR by a state. The most explicit decisions on land rights of indigenous peoples have been made following claims of violation of ICCPR Article 27 to the CCPR. The Committee has so far never dealt with a complaint made by an African indigenous person or group of persons, despite the fact that many African countries with indigenous peoples are parties to both the Covenant and its Optional Protocol.

1126 Urban Morgan Institute for Human Rights et al., "Maastricht Guidelines" (1998), pp. 696-7.

1127 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. (Kehl-Strassburg-Arlington: N.P. Engel Publisher, 1993), p. 37.

1128 CCPR Communication No. 197/1985 *Ivan Kitok v. Sweden*. U.N. Doc. CCPR/C/33/D/197/1988 (1988).

1129 Ibid., para. 9.8.

1130 CCPR, Communication No. 760/1997 *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*. U.N. Doc. CCPR/C/69/D/760/1997, 2000 (2000b). The case involved the Rehoboth Baster community that accused the Namibian government of land dispossession. The community alleged, amongst other things, that their rights protected under Article 27 of the ICCPR were violated by the government.

The CCPR has, however, criticized reports submitted by African states parties, for failing to report on the human rights situation of indigenous peoples under Article 27. Concluding on the third report of the Democratic Republic of Congo in April 2006, the CCPR pointed out:[1131]

> While noting the State party's comments on the government's policy of preserving the cultural identity of the various ethnic groups and minorities (paragraph 294 of the report), the Committee is concerned at the marginalization, discrimination and at times persecution of some of the country's minorities, including Pygmies (Article 27 of the Covenant).
>
> The State party is urged to provide detailed information in its next report on measures envisaged or taken to promote the integration of minorities and the protection of their rights and to guarantee respect for their cultures and dignity.

Concluding on a report by Gabon in 2000, CCPR stated,

> The Committee is concerned to note that the State party denies the existence of minorities in its territory. The Committee is concerned to note that the steps taken to guarantee the rights of people belonging to minorities, as set forth in Article 27 of the Covenant, are inadequate, particularly with regard to the Baka people.[1132]

In 2000, when dealing with the Republic of Congo, the Committee wrote,

> The Committee regrets the lack of specific information on the different ethnic groups in the Congo, particularly the Pygmies, and on measures taken to guarantee, simultaneously, the full and equal enjoyment of their civil and political rights and respect for their rights under Article 27, to enjoy their own cultural traditions [and recommends that] more detailed information on this matter and on the measures taken to protect the rights of persons belonging to minority groups ... be provided in the State party's third periodic report.[1133]

Similar concerns on indigenous peoples were unfortunately not raised by the Human Rights Committee in relation to reports by the Central African Republic and Kenya during the same session. One reason could be that there was no shadow report submitted by indigenous groups, communities or NGOs. The mechanism of "shadow or complementary reports" by third parties is indeed recognized in almost all United Nations and regional human rights machineries. It consists of a third party providing the monitoring committees of the U.N. treaty bodies (and other regional human rights machineries) with supplementary information that can be helpful in balancing official opinions on a given situation of human rights.

1131 CCPR Concluding Observations, Democratic Republic of the Congo. U.N. Doc. CCPR/C/COD/CO/3 2006 (2006).
1132 CCPR,Concluding Observations, Gabon. U.N. Doc. CCPR/CO/70/GAB, November 2000 (2000b).
1133 CCPR, Concluding Observations, Republic of the Congo. U.N. Doc. CCPR/C/79/Add.118, March 2000 (2000c).

Recent CCPR activities

New Reporting Guidelines

In 2010, the Committee adopted new reporting guidelines, which, inter alia, require specific information regarding the situation of indigenous peoples.[1134]

Under Article 1, information should be given on

- The ways and means by which the State party recognizes and protects the rights of indigenous peoples, if any, to ownership of the lands and territories that they traditionally occupy or use as sources of livelihood.

- The extent to which indigenous and local communities are duly consulted, and whether their prior informed consent is sought in any decision-making processes affecting their rights and interests under the Covenant; relevant examples should be provided.

Under Article 27, States parties should provide general information on

> [T]he ethnic, religious or linguistic minorities exist on the territory of the State party, including indigenous communities constituting a minority…." and on the measures taken to ensure that their members enjoy their cultural, religious and linguistic rights.

More specifically about indigenous peoples, the Guidelines stipulate information as to

- Which measures have been taken to ensure that indigenous peoples present on the territory of the State party can exercise their cultural rights and lead their particular way of life which may be associated with the use of land resources and traditional activities such as fishing or hunting.

- Which measures have been taken to ensure the effective participation of members of minority communities in decisions that affect them.

- Whether, and in which numbers, members of minority groups are represented in central and local government and hold elective offices, participate in the conduct of public affairs and have access to public service.

Recent Concluding Observations

In recent years, only a few African countries have submitted periodic reports to the CCPR. The Committee has dealt with indigenous issues in some of its Concluding Observations as in the cases of

1134 CCPR, Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights. U.N. Doc. CCPR/C/2009/1, 2010 (2010a).

Rwanda (2009),Tanzania (2009), Ethiopia (2011) and Kenya (2012), while no mention is made on the situation of indigenous peoples in the case of Cameroon (2010).

Regarding Tanzania, the Committee in its Concluding Observations expressed its concern

> … that the State party does not recognize the existence of indigenous peoples and minorities in its territory…[1135] It also notes with concern reports that the traditional way of life of indigenous communities has been negatively affected by the establishment of game reserves and other projects.

And recommended that

> … the State party should, as a matter of urgency, carry out a study regarding minorities and indigenous communities in the State party, and adopt specific legislation and special measures to protect, preserve and promote their cultural heritage and traditional way of life. The State party should also consult indigenous communities before establishing game reserves, granting licenses for hunting, or other projects on "ancestral" or disputed lands".[1136]

The information received from Tanzania on the implementation of the Concluding Observations of the Committee does not include a comment on these particular recommendations, but neither do the follow-up letters sent by the Committee soliciting information about the implementation of certain recommendations.[1137]

In August 2010, Kenya submitted its third periodic report. Regarding Article 27, reference was made to the new constitution concluding that

> When the new constitution comes into force and is fully operationalized, then Kenya will, to a large extent have fulfilled the requirements of article 27 of the Covenant although as had been recognized during the presentation of the first report, the rights to one's language, culture and religion have always been guaranteed both under the current Constitution and other laws." [1138]

In its final observations (2012), the Committee, nevertheless, expressed its concerns at "reports of forced evictions, interference and dispossession of ancestral land" (the Ogiek) and the failure by the government to implement the decision of the African Commission on Human and Peoples' Rights in the Endorois case. The Committee recommended that, in planning its development and natural re-

1135 In 2007, Tanzania stated in its periodic report that regarding Article 27, "no government study [in Tanzania] has been carried out to establish whether these [indigenous] groups exist …There are, however, mixed feelings within the societies as to whether or not these groups exist. Those who believe that these people exist, draw their evidence from minority groups such the Hadzabe of the central part of the country - Singida, the Maasai of the eastern part of the country – Arusha". See CCPR, Fourth periodic reports of States parties, United Republic of Tanzania, U.N. Doc. CCPR/C/TZA/4, 2007, para. 178 (2007).

1136 CCPR, Concluding observations, Tanzania. U.N. Doc. CCPR/C/TZA/CO/4, 2009, para. 26 (2009).

1137 Ibid.

1138 CCPR, Third periodic report of States parties – Kenya. U.N. Doc. CCPR/C/KEN/3, 2011, para. 210 (2011a).

source conservation projects, the State party should respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected".[1139]

In the light of these Concluding Observations, it is disconcerting to note that in the case of Cameroon, whose fourth periodic report was examined more or less at the same time (2010), the Concluding Observations make no remarks regarding the situation of the Baka and the Mbodoro.[1140]

The new LOIPR procedure

At its ninety-seventh session in October 2009, the Committee decided to implement a new optional reporting procedure—the "List Of Issues" procedure or LOIPR—designed to assist States parties in the preparation of focused reports and to strengthen their capacity to fulfil their reporting obligations in a timely and effective manner. According to this procedure, the Committee will prepare and adopt lists of issues to be transmitted to States parties prior to the submission of a report. The States parties' replies to the lists of issues will constitute their subsequent periodic report under article 40 of the Convention.[1141]

The LOIPR procedure is optional and will be assessed after a pilot period of five years (from 2010). However, it could present an interesting entry point for indigenous and civil society organizations since the list of issues to be prepared by the members of the country report task force will be based on a country file provided by the Committee's secretariat and relying on information and documentation received from a large number of institutions, including, inter alia, reports from national human rights institutions (NHRIs) and from non-governmental organizations (NGOs). The LOIPR procedure further states that "all stakeholders, in particular NHRIs and NGOs, should be given sufficient time to provide the Committee with relevant input prior to the drafting and adoption of LOIPRs" since "The list of countries that will be examined according to the new procedure will be made public on the Office of the High Commissioner for Human Rights website ... at least nine months prior to the session during which the LOIPR is to be adopted by the Committee".[1142] This means that LOIPR will also have the advantage of shortening the whole country review process, which now spans over several years.

1139 CCPR, Concluding Observations Kenya. U.N. Doc. CCPR/KEN/CO/2-3, July2012 (2012).

1140 See CCPR, Concluding Observations Cameroon. U.N. Doc. CCPR/C/CMR/CO/4, 2010 (2010b). It should be noted that in the list of questions prepared for Cameroon's fifth periodic review (scheduled for 2013), question 27 asks for information on measures taken to improve "the representation of minority groups such as the Baka, the Bakola, the Bedzang and the Mbororo (commonly known as Pygmies [Sic!]) in national public life, since such representation seems to be extremely limited at the present time." See List of issues prior to the submission of the fifth periodic report of Cameroon, U.N. Doc. CCPR/C/CMR/Q/5, 2011 (2011b).

1141 See CCPR, Focused reports based on replies to lists of issues prior to reporting (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure). U.N. Doc. CCPR/C/99/4, adopted during ninety-ninth session, 2010 (2010c).

1142 Ibid., paras. 13 & 14.

ICESCR and indigenous peoples' rights to land

This Covenant (1966) protects the economic, social and cultural rights of all members of the human family. Apart from its Article 1 on self-determination, which it shares with ICCPR, the Covenant's two most relevant articles for indigenous peoples and their land rights are Article 2 (2) and Article 11 (1).[1143]

Article 2 (2) on Non discrimination
This paragraph stipulates that

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

Article 11 (1) on Adequate housing
This paragraph states that

> *The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co- operation based on free consent.*

Several General Comments have subsequently elaborated on some of the concepts included in these two articles. These comments show why the Covenant is highly relevant for indigenous peoples.

Regarding Article 2 (2), General Comment No. 20 (2009)[1144] clarifies the Committee's understanding of its provisions, including the scope of state obligations—i.e., the many facets of discrimination—and the prohibited grounds of discrimination. Para. 18 states:

> The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

Regarding Article 11 (1), Comment No. 4 of 1991 clarifies that "the right to housing should not be interpreted in a narrow or restrictive sense", but be seen "as the right to live somewhere in

1143 Text of Convention and other CESCR related documents are available from http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx and http://www1.umn.edu/humanrts/google/localsearch.html

1144 CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2). U.N. Doc. E/C.12/GC/20, 2009 (2009a).

security, peace and dignity". Regarding the concept of "adequate" housing, the Committee believes that besides taking into account a number of factors—social, economic, cultural, climatic, ecological, etc.—other aspects of the right must also be taken into account, including

> (a) Legal security of tenure. Tenure takes a variety of forms, ... including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.

Consequently, the Committee concludes that "forced evictions are prima facie incompatible with the requirements of the Covenant".[1145]

In 1997, after "having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated", the Committee issued General Comment No. 7 in order to provide "further clarification as to the implications of such practices in terms of the obligations contained in the Covenant". The Comment specifically mentions indigenous peoples as suffering disproportionately from the practice of forced eviction, adding that

> The non-discrimination provisions of articles 2.2 and 3 [1146] of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.[1147]

The Comment recommends, inter alia,

> [T]hat all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.[1148]

1145 CESCR, General Comment No. 4 on The right to adequate housing (Art. 11 (1). U.N. Doc. E/1992/23 (1991), paras. 7 & 8. The Comment also underlines (para. 6) that the reference to "himself and his family" must not be read "as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups".

1146 CESCR, General Comment No. 7 on The right to adequate housing: forced evictions (Art.11.(1). U.N. Doc. E/1998/22 (1997), para. 1. The Comment defines the term "forced evictions" "as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."

1147 CESCR, ibid., para. 10. Article 3 states that "The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".

1148 CESCR, General Comment No. 20. U.N. Doc. E/c.12/GC/20 (2009) para. 13 (2009a).

The Committee also considers a number of procedural protections to be applied in relation to forced evictions, including

a) an opportunity for genuine consultation with those affected;
b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
g) provision of legal remedies; and
h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts".[1149]

And States parties are furthermore requested to provide various types of information pertaining directly to the practice of forced evictions. This includes information relating to

a) the number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction
b) legislation concerning the rights of tenants to security of tenure, to protection from eviction and
c) legislation prohibiting any form of eviction.[1150]

Aware that various development projects financed by international agencies within the territories of States parties have resulted in forced evictions, the Committee recalls its General Comment No. 2 (1990) which states, inter alia, that

> international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account".[1151]

Recent CESCR activities

New CESCR Reporting Guidelines

In 2009, the CESCR adopted new guidelines for States parties' periodic reporting.[1152] These guidelines are very explicit when it comes to what kind of information regarding indigenous peoples

1149 Ibid., para. 15.
1150 Ibid., para. 19.
1151 Ibid., para. 17.
1152 CESCR, Guidelines on Treaty Specific Documents to be submitted by States Parties under Articles 16 and 17 of the Interntional Covenant on Economic, Social and Cultural Rights. U.N. Doc. E/C.12/2008/2 (2009b).

States parties should provide, also when compared to the guidelines adopted by CCPR almost two years later. In relation to the rights recognized in the Covenant, the treaty specific document should thus indicate/provide

3 (c) Mechanisms in place to ensure that a State party's obligations under the Covenant are fully taken into account in its actions as a member of international organizations and international financial institutions, as well as when negotiating and ratifying international agreements, in order to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined;

3 (g) Statistical data on the enjoyment of each Covenant right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, on an annual comparative basis over the past five years.

The document should also provide specific information in relation to each of the general provisions of the Covenant.

Article 1 of the Covenant

7. In what manner has the right to self-determination been implemented?
8. Indicate the ways and means by which the State party recognizes and protects the rights of indigenous communities, if any, to ownership of the lands and territories which they traditionally occupy or use as traditional sources of livelihood. Also indicate the extent to which indigenous and local communities are duly consulted, and whether their prior informed consent is sought, in any decision-making processes affecting their rights and interests under the Covenant, and provide examples.

Article 2

10. ... provide disaggregated and comparative statistical data on the effectiveness of specific anti-discrimination measures and the progress achieved towards ensuring equal enjoyment of each of the Covenant rights by all, in particular the disadvantaged and marginalized individuals and groups.

Article 11

A. The right to the continuous improvement of living conditions

43. Indicate

b) Targeted policies and programmes to combat poverty... and the economic and social exclusion of individuals and families belonging to the disadvantaged and marginalized groups, in particular ethnic minorities, indigenous peoples and those living in rural and deprived urban areas.

D. The right to adequate housing

53. Indicate whether there are any disadvantaged and marginalized individuals and groups, such as ethnic minorities, who are particularly affected by forced evictions and the meas-

ures taken to ensure that no form of discrimination is involved whenever evictions take place.

54. Indicate the number of persons and families evicted within the last five years and the legal provisions defining the circumstances in which evictions may take place and the rights of tenants to security of tenure and protection from eviction.

Recent Concluding Observations

Most African countries have ratified ICESCR—one exception being Botswana (see Appendix 2, Table 1). Since 2009, several African countries have submitted their periodic reports to the CESCR (e.g., Kenya 2008, DRC 2009, Cameroon 2011, Ethiopia 2012, Tanzania 2012, and Rwanda 2013). Having not submitted its report, the Republic of Congo replied to the List of issues prepared by the Committee's Task Force and the Observations of the Committee were elaborated on the basis of these replies (2013).

In all these cases, the Concluding Observations of the CESCR Committee address the situation of indigenous peoples, the discrimination they suffer from, and the status of their economic, social and cultural rights, as the case may be.[1153]Particularly relevant for the land rights of indigenous peoples in Africa, is the special attention given to the multiple cases of forced evictions. It should also be noted that the Concluding Observations use concepts like, inter alia, "free, prior and informed consent", "participation in decision-making" and "adequate compensation".

In its Concluding Observations for Kenya (2008), the Committee notes the lack of prior notice and provision of adequate alternative housing or compensation in the cases of demolition of dwellings and forced evictions of pastoralist communities in the Rift Valley, forest dwellers such as the Mau Forest Ogiek, and the Committee recommends that the State party consider including a provision in its new draft Constitution

> ... to ensure that evictions are only used as a last resort, adopt legislation or guidelines strictly defining the circumstances and safeguards under which evictions must take place ... and ensure that each victim of forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy.[1154]

Regarding Tanzania (2012b), the CESCR Committee is concerned that

> ... pastoralist and hunter-gatherer communities have been forcibly evicted from their traditional lands for the purposes of large scale farming, creation of game reserves and expansion of national parks, mining, construction of military barracks, tourism and commercial game hunting. The Committee is concerned that these practices have resulted in a critical

1153 See, in particular, CESCR, Concluding Observations for Cameroon (2011), the Republic of Congo (2013a) and Rwanda (2013b).

1154 CESCR, Concluding Observations, Republic of Kenya. U.N. Doc. E/C.12/KEN/CO/119, 2008, paras. 31 and 35 (2008). The Kenyan government introduced in August 2012 a bill on Evictions and Resettlement Procedures.

> reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food.

The Committee recommends that such projects on ancestral lands

> ... should be preceded by free, prior and informed consent of the people affected. It recommends that the State party ensure that vulnerable communities, including pastoralist and hunter-gatherer communities, are effectively protected from forced evictions from traditional lands. It also recommends that past forced evictions and violations that have taken place during those evictions are properly investigated, that perpetrators are brought to justice, that the findings are made public, and that those evicted are offered adequate compensation.[1155]

In the case of the DRC (2009c), the lack of participation in decision taking is noted, and the Committee expresses concern

> ... that representatives of indigenous communities were not invited to take part in the second session of the interministerial commission in charge of reviewing illicit logging contracts although the session was devoted to the signature of contracts between local authorities and logging companies.

It recommends that

> ... the State party ... ensure that forestry projects are centred on advancing the rights of forest-dependent peoples and conducted only after comprehensive studies are carried out, with the participation of the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned activities.[1156]

This is also the case of Cameroon(2011), where the Committee

> remains concerned that... some groups do not have the same economic, social and cultural rights as the rest of the population. The Committee also regrets the lack of a comprehensive policy on indigenous peoples.

The Committee therefore urges the State party

> to adopt a consistent and comprehensive policy to promote the right of indigenous peoples to an adequate standard of living...[and] to guarantee the economic, social and cultural rights of indigenous peoples when major projects outlined in the growth and employment

1155 CESCR, Concluding Observations on the initial to third report of the U.R. Tanzania. U.N. Doc. E/C.12/TZA/CO/1-3, 2012, para. 22 (2012b).

1156 CESCR, Concluding Observations, Democratic Republic of the Congo. U.N. Doc. E/C.12/COD/CO/4, 2009, para. 14 (2009c).

> strategy paper are launched. It therefore also recommends that the State party raise the awareness of indigenous people to their right to be involved in decision-making that affects them throughout the various phases of those projects.[1157]

In subsequent paragraphs, the Committee notes with concern the high number of reported cases of forced evictions and demolitions of houses conducted without sufficient notice, and without provision of adequate compensation or alternative accommodation and the Committee urges the State party to ensure that, in practice, no one is left homeless as a result of eviction. It further points out that the system of land tenure is out of step with the country's economic and cultural situation, and that it makes some indigenous population groups and small-scale farmers vulnerable to land grabs. The Committee therefore urges Cameroon

> … to speed up the process of land reform, to guarantee the right of indigenous population groups and small-scale producers to ancestral and community lands and to ensure that obstacles to land ownership, in particular those faced by women, are removed.[1158]

Another, related, concern is that, despite its legal recognition of the cultural rights of indigenous peoples living on its territory, the State party has moved some communities, such as the Baka Pygmy community and the Mbororo community, away from their ancestral lands, which have been opened to third parties for logging, thereby forcing those communities to adapt to other dominant cultures in the country. The Committee recommends that the State party

> take effective measures to protect the right of each group of indigenous people to its ancestral lands and the natural resources found there, and to ensure that national development programmes comply with the principle of participation and the protection of the distinctive cultural identity of each of these groups.[1159]

The right to consultations and influence decision making is put forward in the case of Ethiopia (2012), where the construction and operation of the Gilgel Gibe III hydro-electric dam will have a significant negative impact on the traditional practices and means of subsistence of indigenous peoples who rely on the Omo River, and the Committee

> … urges the State party to initiate, prior to construction of hydro-electric projects, comprehensive impact assessments as well as extensive consultations with affected communities, involving genuine opportunities to present views and influence decision-making.[1160]

1157 CESRC, Concluding Observations, Cameroon. U.N. Doc. E/C.12/CMR/CO/2-3, 2011, para. 10 (2011a) .
1158 Ibid., paras. 23 & 24.
1159 Ibid., para. 33.
1160 CESCR, Concluding observations, Ethiopia. U.N. Doc. E/C.12/ETH/CO/1-3, 2012, para. 24 (2012a).

ICERD and indigenous peoples' rights to land

The most relevant article for indigenous peoples in the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD, 1965)[1161] is Article 1.

Article 1 on racial discrimination

This article states that:

> *The term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.*

In its General Comment no. 18 (1989), the Human Rights Committee has shed more light on the scope of the concept "discrimination", which obliges states to take:

> [A]ffirmative actions in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific actions to correct those conditions.[1162]

However, it was not until the 1997 General Recommendation XXIII of the Committee on the Elimination of Racial Discrimination (CERD)[1163] that the non-recognition of indigenous peoples' right to lands was explicitly referred to as amounting to an act of racial discrimination:

> Discrimination against indigenous peoples falls under the scope of the [anti-racial] Convention. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories and resources.[1164]

Since then, CERD has become very instrumental and vocal in relation to indigenous peoples' right to lands, and in 1998, CERD flagged out an indigenous land issue in relation to the periodic report of Cameroon:

1161 ICERD entered into force January 4, 1969. U.N. Doc. A/6014 (1966). The text of the Convention is available online at, e.g., http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx

1162 CCPR, General Comment No.18 Non discrimination. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para. 10.

1163 The Committee (CERD) is the monitoring body of ICERD. Documents from CERD are available from http://www2.ohchr.org/english/bodies/cerd/index.htm and http://www1.umn.edu/humanrts/google/localsearch.html

1164 CERD, General Recommendation XXIII Rights of indigenous peoples (Fifty-first session, 1997). U.N. Doc. A/52/18, annex V at 122 (1997), adopted on August 18, 1997.

> Protection of the rights of minorities and indigenous peoples to enable them to live in harmony in their environment is, especially as regards the Pygmies and Boro, a subject of concern in the light of article 2, paragraph 2, of the Convention and of the Committee's General Recommendation XXIII on the rights of indigenous peoples.[1165]

It went on to recommend that:

> With a view to promoting and protecting the rights of minorities and indigenous peoples…, the State party [should] take all appropriate measures, particularly as regards deforestation that may harm such population groups.

In 2003, CERD made an interesting concluding observation on the second to tenth periodic reports by Uganda:

> The Committee is concerned by reports of the difficult human rights situation of the Batwa people, particularly in relation to the enjoyment of their rights over lands traditionally occupied by them, and requests information on their situation in accordance with General Recommendation XXIII.[1166]

Similar remarks were made by CERD on the eighth to sixteenth periodic reports by Tanzania in March 2007:

> The Committee notes with concern the lack of information from the State party regarding the expropriation of the ancestral territories of certain ethnic groups, and their forced displacement and resettlement (art. 5).
>
> The Committee notes with concern the lack of information on certain vulnerable ethnic groups, notably nomadic and seminomadic populations, inter alia the Barabaig, Maasai and Hadzabe, on the difficulties they allegedly face due to their specific way of life and on special measures taken to guarantee the enjoyment of their human rights (arts. 5 and 2).[1167]

Recommending in the latter case that

> [T]he State party provide detailed information on the situation of nomadic and seminomadic ethnic groups and on any special measures taken with a view to ensuring the enjoyment of their rights under the Convention, notably their freedom of movement and their right to participate in decisions which affect them.[1168]

1165 CERD, Conclusions and Recommendations, Cameroon. U.N. Doc. CERD/C/304/Add.53 (1998). Paras. 9 and 17.
1166 CERD, Conclusions and Recommendations, Uganda. U.N. Doc. CERD/C/62/CO/11 2003, para. 14. L (2003).
1167 CERD, Conclusions and Recommendations, Tanzania. U.N. Doc. CERD/C/TZA/CO/16, 2007, paras. 14 and 16 (2007A).
1168 Ibid.

Concluding on the fifth and sixth periodic reports submitted by the Botswana government, CERD noted with concern in 2006:

> [T]he discrepancy between the information provided by the State party that residents of the Central Kalahari Game Reserve have been consulted and have agreed to their relocation outside the Reserve, and persistent allegations that residents were forcibly removed, through, in particular, such measures as the termination of basic and essential services inside the Reserve, the dismantling of existing infrastructures, the confiscation of livestock, harassment and ill-treatment of some residents by police and wildlife officers, as well as the prohibition of hunting and restrictions on freedom of movement inside the Reserve (Articles 2 and 5).[1169]

It therefore recommended:

> [T]hat a rights-based approach be adopted during the negotiations. To that end, the State party should, in particular, (a) pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; (b) protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means; (c) study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned.[1170]

Within the framework of its efforts to prevent racial discrimination, the CERD may also decide to initiate urgent action procedures aimed at responding to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. An increasing number of indigenous peoples are using this mechanism, which can, among other things, lead to a country visit. In 2007, Batwa from the Democratic Republic of Congo used it in relation to forest reforms, which were seen as not taking into account the rights of its most ancient inhabitants.

The Convention against racial discrimination has become an important venue for the protection of indigenous peoples' rights in general and those over lands in particular.

Recent CERD activities

New reporting guidelines

CERD adopted new reporting guidelines in 2007.[1171] Paragraphs 10 and 11 of these revised guidelines relate to indigenous peoples, stressing the need to provide more quantitative documentation on the ethnic characteristics of the States parties' population, including demographic indicators, in

1169 CERD, Conclusions and Recommendations, Botswana. U.N. Doc. CERD/C/BWA/CO/16 (2006), para. 12.
1170 Ibid.
1171 CERD, Guidelines for the CERD Specific Document to be Submitted by States Parties under Article 9, Paragraph 1 of the Convention. U.N. Doc. CERD/C/2007/1, 2007 (2007b).

order to make it possible to assess the number of persons who might be treated less favourably on the basis of their ethnic characteristics. Information should also be provided on mother tongues, languages commonly spoken, or other indicators of ethnic diversity.

The Guidelines also require "specific information on relevant groups of victims or potential victims of racial discrimination, in particular… indigenous peoples, "in order to ascertain to what extent all persons within the state's jurisdiction, and particularly members of groups protected by the Convention, in practice enjoy, free from racial discrimination, all the rights and freedoms referred to in article 5 of the Convention.[1172]

Recent CERD Concluding Observations

Several African countries have submitted reports since these guidelines were introduced. They include Namibia (2008), the Republic of Congo (2009), Cameroon (2010), Rwanda and Kenya (2011). In each of its examinations, the CERD Committee gives a prominent place to indigenous issues and this concern is reflected in the various Concluding Observations that comment, as the case may be, on the lack of quantitative and specific data on indigenous peoples, the use of inappropriate terminology like "marginal population groups... which stigmatizes the minorities referred to" and in general on the discrimination and marginalization indigenous peoples face in the exercise of their civil, political, economic, social and cultural rights.[1173]

The rights of indigenous peoples to land and resources are also highlighted and the Committee makes frequent use of terms like consultations, free, prior and informed consent and fair compensation in its recommendations to States parties. The Committee also encourages the States parties, "in consultation with the indigenous communities concerned, to demarcate or otherwise identify the lands which they traditionally occupy or use" (Namibia);[1174] "to take urgent and adequate measures to protect the rights of indigenous peoples, and especially of the Pygmies to land" (Congo)[1175] or to establish in domestic legislation the right of indigenous peoples to own, use, develop and control their lands, territories and resources (Cameroon)[1176]. In the case of Kenya (2011), and referring to the Endorois and the Ogiek, the Committee urges the State party to respond to the decisions made by the African Commission on Human and Peoples' Rights and "to ensure that all marginalised communities and peoples involved are redressed as ordered". While commending Kenya on its new National Land Policy and the institution of a National Land Commission, the Committee recommends that Kenya "take measures without delay to operationalize the machinery and mechanisms for addressing land problems fairly taking into account historical contexts of land ownership and acquisition."[1177]

1172 CERD, Guidelines for the CERD Specific Document to be Submitted by States Parties under Article 9, Paragraph 1 of the Convention. U.N. Doc. CERD/C/2007/1 (2007b).

1173 See, e.g., CERD, Concluding Observations, Cameroon. U.N. Doc CERD/C/CMR/15-18, 2010, para. 18, (2010).

1174 CERD, Concluding Observations, Namibia. U.N. Doc. CERD/C/NAM/CO/12, 2008, para. 19 (2008b).

1175 CERD, Concluding Observations, Congo. U.N. Doc. CERD/C/COG/CO/9, 2009, para. 14 (2009).

1176 CERD, Concluding Observation, Cameroon, op.cit., para. 18.

1177 CERD, Concluding Observations Kenya. U.N. Doc. CERD/C/KEN/CO/1-4, 2011, paras. 17-19 (2011b).

Early warning and urgent action procedure

According to the revised 2007 guidelines, CERD shall act under early warning and urgent action procedure to address serious violations of ICERD in an urgent manner.[1178] This can take the form of decisions, statements and letters. The situation of indigenous peoples in African countries has been taken up by CERD in a number of letters to States parties since 2010, urging them to provide comprehensive information on specific, alleged violations of the Convention and measures taken to remedy the situation.

Letters of concern have been sent, for instance, to the Botswana government (2010) regarding the lack of implementation of the High Court decision in the CKGR case; to Cameroon on two occasions—in 2010 regarding the lack of compensation to indigenous communities whose lands have been taken over by the sugar company Susucam and in 2013 regarding a proposed forest bill that does not provide an adequate protection of the indigenous communities; to Tanzania regarding the treatment of Maasai pastoralists—twice in the case related to Soitsambu village (2009 and 2011) and once on the situation in Ngorongoro (2013); to Ethiopia regarding the situation in Gambella (2011 and 2012) and to Kenya regarding the situation of the Samburu (2012).[1179]

CEDAW and indigenous women's rights to land

The Convention on the Elimination of Discrimination Against Women (CEDAW) was adopted in 1979 and is one of the six core international human rights instruments.[1180]

CEDAW does not refer directly to indigenous women. Its most relevant article for indigenous women is Article 14 which deals with rural women.

Article 14

This article states that:

1. *States parties shall take into account problems faced by rural women and the particular significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.*
2. *States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development…*

1178 The new guidelines (2007b) identify a number of indicators prompting early warning and urgent action procedure and what measures can be taken. See ICERD and CERD, A Guide for Civil Society Actors, Prepared by Daisuke Shirane (The International Movement Against All Forms of Discrimination and Racism, IMADR, 2011), p. 20ff. At http://www2.ohchr.org/english/bodies/cerd/docs/ICERDManual.pdf

1179 For further details, see http://www2.ohchr.org/english/bodies/cerd/index.htm

1180 For text of Convention, see http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

Paragraph 2 goes on listing the rights of rural women within a number of areas (e.g., health, education, etc.). It does not mention the right of individual women to have property or land but it does requires that states ensure that women are treated on an equal basis with men, and are not discriminated against when owning or administering property. It thus provides for the right of rural women to participate in development planning and community activities; to access production resources including credit, technology and marketing facilities and to receive equal treatment in land, agrarian reform and land resettlement schemes, rights that are relevant for indigenous women.[1181]

While the Convention does not take up indigenous women's specific concerns, CEDAW as all human rights treaties, "is not a static document, but is interpreted and reinterpreted in accordance with the prevailing circumstances and conditions at a given period in time." This can be noted in the work of CEDAW's monitoring Committee (CEDAW), and "[w]hile indigenous women used to be practically invisible in the work of this Committee, in recent years, in particular after the adoption of UNDRIP (2007) indigenous women's concern have featured more prominently in the dialogue between the Committee and member states." [1182] In its reporting procedure, among others, the Committee has urged various states to adopt policies and special measures in order to increase indigenous women's participation in decision making. The Committee has also in a recent General Recommendation (No. 28) highlighted that women may be affected by intersecting forms of discrimination including race, ethnicity, religion and belief and has recommended that states legally recognize such intersecting forms of discrimination and prohibit the negative effects this has on women.[1183]

This new trend is important since the Convention is one of the most widely ratified treaties with 187 member states as of May 2013 and is legally binding upon these states.[1184]

In Africa, practically all the states have ratified the Convention (see Appendix 2, Table 1).[1185] However, much remains to be done in order for indigenous women and their concerns to be given the space they deserve in the work of the Committee, including in the CEDAW review processes.[1186] An urgent task for indigenous women's organizations and support NGOs is therefore to provide information and educating the members of the Committee.

1181 See Ellen-Rose Kambel, "A Guide to Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination Against Women". 2nd edition (Moreton-in-Marsh, U.K.: Forest Peoples Programme, 2012).p. 15. At http://www.forestpeoples .org

1182 Ibid., p. 3.

1183 CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. U.N. Doc. CEDAW/C/GC/28, 2010, para. 18 (2010b). Other General Recommendations have dealt with the health status of indigenous women and the specific concerns of older indigenous women.

1184 As of July 2013, of the 193 U.N. member countries, only six have not ratified it, namely Iran, Palau, Somalia, Sudan, Tonga and notably: the United States of America. Most states in which indigenous women live are therefore likely to be a party to the Convention. For status of ratification, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

1185 In Africa, only Somalia and Sudan have not ratified CEDAW

1186 As noted by Kambel, the CEDAW Committee's review of the situation of indigenous women does not seem to be a systematic and there is also a clear difference in the geographical representation of indigenous women. Most of the Committee's attention goes to indigenous women in Canada, the US and Latin-America, whereas the numerous indigenous women in Asia and Africa are barely mentioned (Ibid., p. 9). Since 2009, only two out of 12 Concluding Observations dealing with African countries specifically mention indigenous women, namely the Batwa women in Uganda (U.N. Doc. CEDAW/C/UGA/CO/2, 2010a) and pastoralist women in Ethiopia (U.N. Doc. CEDAW/C/ETH/CO/6-7, 2011b).

This is particularly important when it comes to the issue of land rights. CEDAW, like other U.N. bodies, tends to advocate the issuing of alienable individual land titles to women as a way to end discrimination against women with respect to land rights and to combat poverty. This was, for instance, explicitly stated in 1997 when the Committee recommended that the government of Australia should "ensure women's equal access to individual ownership of native land"; and implicitly in its recent Concluding Observations to Kenya, where the Committee recommends to "Establish a clear legislative framework to protect [rural] women's rights to inheritance and ownership of land".[1187] Ellen-Rose Kambel rightfully remarks that "[i]ssuing individual titles to women would threaten indigenous strategies to gain recognition of their collective land rights as a necessary condition for the preservation and development of their identity and the social, economic and cultural survival of their communities" and concludes that it is therefore " critical … to engage in a dialogue with the members of the Committee (and other UN bodies) in order to counter the dominant views on women's land rights (from a perspective of having access to credit and economic empowerment). And to explain the importance of collective land for indigenous women, with its cultural, social, economic as well as spiritual dimensions".[1188]

The CEDAW Committee is currently preparing a general recommendation on Article 14, and has established a working group on rural women that has come up with a concept paper[1189] to be discussed during General Discussion on Rural Women scheduled for October 2013. Indigenous women are specifically mentioned in the concept paper and many of the issues to be discussed are highly relevant for indigenous women's access to land and natural resources. Collective land rights are not specifically mentioned but one proposed measure is that governments "[E]nsure that in the registration of land for collective use, especially among indigenous peoples, the names of all female and male members of the community who use the land, are clearly stated".[1190]

CEDAW created in 1999 an Optional Protocol (OP-CEDAW) which has been ratified by several African countries (see Appendix 2, Table 1) This protocol allows women to file individual complaints about violations of their rights.[1191]

ILO Convention No. 169 and indigenous peoples' right to lands

As already mentioned, ILO Convention No. 169 is the only legally binding instrument that addresses exclusively indigenous peoples' rights.[1192] It recognizes "*their rights of ownership and pos-*

1187 See Concluding Observations: Australia. U.N. Doc. A/52/38/Rev.1 (July 97), part II, para. 405.3; and Concluding Observations: Kenya. U.N. Doc. CEDAW/C/KEN/CO/7 2011, para. 42 (2011a).

1188 See Kambel, op.cit. (2012), p. 11.

1189 CEDAW, "Concept Note for the General Recommendation on Article 14 of CEDAW" (n.d.) at http://www.ohchr.org/Documents/HRBodies/CEDAW/RuralWomen/ConceptNote_GR_Article14.pdf

1190 Ibid., p.12.

1191 In April 2012, the Committee agreed with an indigenous woman from Canada, that the state had violated her right to non-discrimination in relation to property rights (*Cecilia Kell v. Canada*, Communication No. 19/2008, U.N. Doc. CEDAW/C/51/D/19/2008, (2012). The complaint concerned the removal of the victim's name from jointly held marital property on the reserve where she was residing. Cited in Kambell, op.cit. (2012), p. 4.

1192 All ILO Conventions and their status of ratification can be accessed at the ILO Database on International Labour Standards, NORMLEX, at: http://www.ilo.org/dyn/normlex/en/

session over the lands which they traditionally occupy"; their right to "*use lands not exclusively occupied by them but to which they have traditionally had access for their subsistence and traditional activities*"; and their "*right to participate in the use, management and conservation of the natural resources pertaining to their lands.*"[1193]

The principle in ILO Convention No. 169 that recognizes indigenous peoples' rights to their lands can be seen as building upon ILO Convention No. 82 concerning Social Policy in Non-Metropolitan Territories (1947).[1194] In its article 8(c), this Convention stipulates the need for "*control, by the enforcement of adequate laws or regulations, of the ownership and use of land and resources to ensure that they are used, with due regard to customary rights, in the interest of inhabitants of the [non-metropolitan] territories*". The same norm was also adopted by the drafting Committee of ILO Convention No. 107, which proposed a similar provision, namely that: "The property rights, either collective or individuals, as the case may be, of indigenous peoples over the lands they traditionally occupy should be recognized".[1195]

Several state representatives at the International Labour Conference, which was to adopt ILO Convention No. 107,[1196] objected to the use of the term "property" in the definition of the right which was to be recognized to indigenous peoples over their lands. Amongst the grounds for objection was the view that the ties of indigenous peoples to their lands would not amount to a full property right.[1197] Thus, the term "property" was substituted by "ownership" in the final text of the Convention's Article 11:

> *The right of ownership, collective or individual, of the members of the populations concerned over the lands, which these populations traditionally occupy, shall be recognised.*[1198]

An interesting question emerges at this point. Did ILO Convention No. 169 amend its predecessor's position not to recognize the indigenous peoples' full property rights over their lands? The *travaux préparatoires* of this convention go some way to answer this question and are the focus of this section.

A thorough reading of the records of the drafting sessions of this Convention reveals that instead of recognising strong property rights of indigenous peoples over their lands, ILO Convention No. 169 responded to indigenous peoples' land claims by recognising three separate rights, namely a "right of ownership and possession", a "right to use" and a "right to participate in the use, management and conservation of resources". As the following analysis shows, each one ofthese rights has a different scope and is meant to apply to a different element of indigenous peoples' land claim.

1193 ILO Convention No. 169 (1989), Articles 14.1 and 15.

1194 Article 8(c) of ILO Convention No. 82 (1947) Concerning Social Policy in Non-Metropolitan Territories. See in International Labour Organisation, *International Labour conventions and recommendations 1919-1951* (1996), p. 498.

1195 International Labour Conference, "Protection and Integration" (1957a), p. 31.

1196 ILO Convention No. 107 has been ratified by six African countries, namely Angola, Egypt, Ghana, Guinea Bisau, Malawi and Tunesia, and is still in force.

1197 The government of the United Kingdom thus suggested that the word "property" be deleted "since it is assumed that the provisions of Article 11 are not intended to be restrictive in this sense". See also International Labour Conference, "Protection and Integration" (1957a), p. 21. The employer representative from Mexico also proposed that the term "ownership" be used instead of "property", without any fundamental reason. See International Labour Conference, "Records of Proceedings" (1958), p. 727.

1198 ILO Convention No. 107, Article 11.

The right to "ownership and possession"

The initial text of Article 14.1, as proposed by the drafting Committee of ILO Convention No. 169, was formulated as follows: "The peoples concerned shall be accorded *exclusive* rights of ownership, possession, and *control* to the largest practicable portion of their traditional territories" (emphasis added).[1199]

The use of two strong terms—namely "*exclusive*" and "*control*"—were not considered acceptable by several state representatives, and both terms were eventually deleted from the provisions of Article 14.1 that ended up looking as follows:

> *The rights of ownership and possession of the peoples concerned over the lands, which they traditionally occupy, shall be recognised.*

This limited right of "ownership and possession" is designed to apply to lands that indigenous peoples traditionally used and which they still occupy or have recently occupied, as revealed in a statement by some delegations to the drafting sessions.[1200] This meaning has been acknowledged by the ILO governing body.[1201] An increasingly strong opinion argues also that the wording "land they traditionally occupy" used in Article 14.1 could to some extent include also any territory ever occupied or lost lands.[1202]

ILO Convention No. 169 thus guarantees indigenous peoples' right of ownership and possession over lands that they still occupy and those they recently lost unfairly or without their free and informed consent.

The "right to use"

Article 14.1 of ILO Convention No. 169 also articulates the right of indigenous peoples "to use lands not exclusively occupied".

In general, the right to use is understood as being limited and insecure. Some define it as "a right to enjoy a thing belonging to another and to take the fruits thereof".[1203] It is by nature a temporary right to use something which may be owned by another proprietor.

1199 International Labour Conference, "Partial revision" (1989), p. 34.

1200 Ibid., p. 35. The United States proposed the following formulation: "The rights of ownership and possession of the [peoples/populations] concerned over the lands which have been reserved for their use or which they currently occupy and for which they have a tradition of use and possession shall be recognized ..." Although the exact wording of this U.S. proposition was not adopted, the idea that ownership and possession was recognized only to lands still occupied by indigenous peoples was adopted.

1201 Ibid., p. 36.

1202 Lee Swepston, "A New Step in International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989", *Oklahoma City University Law Review* 15 (fall 1990), pp. 677–714.

1203 P.A. Crépeau and J.E.C. Brierley, *Code Civil* (Montréal, Canada: Société Québécoise d'Informations Juridiques, 1981), Article 487.

As stated earlier, the "right to use" was designed by the delegates to the drafting sessions of ILO Convention No. 169 to apply to "lands not exclusively occupied [but land to which indigenous peoples] traditionally had access for their subsistence and traditional activities". Alternatively, as put by the drafting Committee, "those portions of [indigenous] traditional territories which have been occupied or are used by other persons".[1204]

This is indeed a very weak right and that weakness was highlighted during the drafting session. The Swedish government thus made an important observation, indicating that such a limited and weak right to use would have a most negative impact upon nomadic indigenous peoples, whose historical rights are essentially based upon "use", and who do not tend to settle in one place but require extensive areas of land for their cattle herding, fishing, hunting and religious ceremonies.[1205] The pertinence of this Swedish remark is seen as having influenced the wording of the last sentence of Article 14(1) in the adopted text, which states: "*Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect*".

ILO Convention No. 169 thus provides for indigenous peoples' usage right of lands beyond what is considered as theirs, or lands that they use in conjunction with other peoples. These territories or lands appear like a kind of buffer zone outside the lands on which indigenous peoples enjoy the right of ownership. These lands or territories might be the property of other persons or entities but indigenous peoples' usage right must be accommodated.

The "right to participate in the use, management and conservation of the resources"

A third type of right of indigenous peoples over their lands is articulated by Article 15, which gives indigenous peoples certain rights regarding natural resources such as mineral sub-surface resources, fauna, flora, sea-ice, etc., pertaining to their land.[1206]

While the inclusion of the right to "participate in the use, management and conservation" is important because it indicates that indigenous peoples must be consulted in processes relating to the development of their traditional lands or lands that they use, the text that was eventually adopted was not as strong as anticipated.

The issue was the degree of control indigenous peoples should have in cases in which the state retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to the lands. During drafting, there was some debate and the Colombian government raised a proposal to make the consent of indigenous peoples mandatory by inserting the words "obtain

1204 Article 14.1 of the draft text of ILO Convention 169.

1205 International Labour Conference, "Partial revision" (1989), p. 35.

1206 ILO Convention No. 169, Article 15 reads as follows: "1. *The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these people to participate in the use, management, and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these people, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources … The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*"

consent" in order to guarantee "a direct participation of the peoples concerned in the control and management".[1207] Yet this proposal was not adopted.[1208]

In the view of a Workers' delegate from Denmark, the non-adoption of the obligation to obtain consent watered down the principle of free and informed consent by implicitly authorising a removal of indigenous peoples from their lands without their consent.[1209] This lack of a right to meaningful participation is reinforced by a provision in Article 16.2 which explicitly states that "where their consent cannot be obtained, relocation shall take place ... following appropriate procedures".

ILO Convention No. 169 thus failed to restore indigenous peoples' full property rights over their own land. As eloquently put by Ms. Sharon Venne, an Indian Cree from Canada:

> The revised Convention proposes an unacceptably ambiguous definition of the term "lands" in a manner that could curtail our territorial rights. Only land rights based on present, and not past, occupation are explicitly recognized ... we are outraged and bitter at the prejudicial treatment of our territorial and resources rights by the tripartite Committee.[1210]

Whatever weaknesses it bears, ILO Convention No. 169 remains the only binding instrument that guarantees indigenous peoples' right of ownership over their ancestral lands. Similar to initial concerns expressed by African countries towards the UN Declaration on the rights of indigenous peoples, a number of African states fear that the ratification of ILO Convention 169 could further ethnic divisions of their national populations. The situation in countries that have ratified this Convention reveal that the states have nothing to fear. In several countries, the ratification of ILO Convention No. 169 has on the contrary been advantageous since it tends to improve the human rights situation and opens up a constructive and democratic dialogue with indigenous peoples. As noted earlier, there are a few African countries that have taken or are in the process to take legislative or policies measures directed at indigenous peoples. The implementation of these measures would be facilitated by a ratification of ILO Convention No.169.

The ratification of ILO Convention No. 169 is therefore highly recommendable. Indeed, its ratification by the Central African Republic is a very positive step and it can only be hoped that other African countries will follow suit.

Recent developments

The ILO Convention No. 169 on indigenous and tribal peoples is to date ratified by 22 states.[1211] The ILO Committee of Experts on Application of Conventions and Recommendations (CEACR)

1207 International Labour Conference, "Partial revision" (1989), p. 37.

1208 The Australian government, for instance, argued that despite the requirement to consult with indigenous peoples, they should not be given the power to veto states' actions or projects.

1209 International Labour Conference, "Partial revision" (1989), p. 31-35.

1210 Ibid., p. 31-7.

1211 15 in Latin America and Caribbean, 4 in Europe (Norway, Denmark, the Netherlands and Spain), 1 in the Pacific (Fiji), 1 in Asia (Nepal) and 1 in Africa (Central African Republic).

has been particularly active on indigenous peoples' rights over the last years, highlighting mostly the importance of indigenous peoples' right to be consulted or the States' duty to consult indigenous peoples. In 2010, the CEACR made a general observation on indigenous peoples, through which it concluded that "consultation and participation" were the cornerstone of Convention No. 169 on which all its provisions are based.[1212]

The Central African Republic remains to date the first and only African country to have ratified ILO Convention No. 169. The issue has been brought up in many international processes, and several African countries, as for instance Cameroon and Republic of Congo, have been directly urged to accede the Convention.[1213] Through its Programme to Promote ILO Convention No. 169 (PRO 169), ILO aims at promoting the rights and improving the socio-economic situation of indigenous and tribal peoples, in compliance with the principles of ILO Convention No. 169. PRO 169 collaborates with the African Commission on Human and Peoples Rights[1214] and has field coordinators in a number of ILO offices in Africa. Country level activities are conducted in Burundi, Cameroon, Kenya and Namibia addressing policy reform, capacity-building of government and indigenous partners as well as local economic development.[1215]

1212 See on the Website of the ILO at: http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2011-100-1A).pdf

1213 See, for instance, CERD, Concluding Observations, Cameroon (CERD/C/CMR/15-18, 2010), para. 22; UPR, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 - Congo. U.N. Doc. A/HRC/WG.6/17/COG/1 (25 July 2013), para. 36.

1214 A comprehensive research on the situation of indigenous peoples led in 2009 to the copublication by ILO and ACHPR of *The Constitutional and Legislative Protection of Indigenous Populations in Africa* (Geneva and Banjul: ILO & ACHPR, 2009).

1215 See, http://www.ilo.org/indigenous/Aboutus/PRO169/lang--en/index.htm

CHAPTER XI
OTHER RELEVANT GLOBAL AND REGIONAL INSTRUMENTS

Several other important global and regional instruments deal with indigenous peoples' land rights. The first section of this chapter looks at the Convention on Biological Diversity, the Commission on Sustainable Development and the U.N. Frame Convention on Climate Change and their related processes. It then turns to the UNESCO Conventions, the Geneva Conventions and other international humanitarian and criminal laws. This book considers these as the most relevant areas of international law as far as indigenous peoples' rights to lands are concerned,[1216] and most of them have been ratified by the African countries (see Appendix 2, Table 2).

Turning to Africa, a second section examines the African regional frameworks such as the African Charter, the AU policies, the African Commission on Human and Peoples' Rights and its Working Group on Indigenous Populations/Communities and the African Court on Human and Peoples' Rights.[1217] These are of special importance for African indigenous peoples and they, too, have been endorsed by most African countries (see Appendix 2, Table 3).

A final section makes a brief survey of multilateral banks and major donor policies targeting indigenous peoples.

The Convention on Biological Diversity and indigenous peoples' land rights

The Convention on Biological Diversity, commonly known as CBD, is a prominent international instrument that has become essential in the protection of indigenous peoples' rights regarding, among others, their traditional knowledge and practices related to land and natural resources and protected areas.[1218] Its articles 8(j) and 10(c) provide respectively that States parties should as much as they can:

> *[R]espect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval*

1216 The chapter, therefore, does not deal with international instruments such as, for instance, the Convention on the Rights of the Child, which contains specific provisions on indigenous children, too (Article 30), but does not deal specifically with land rights.

1217 In 2008, the AU adopted a protocol that merges the Court with the African Court of Justice. Once this protocol has been ratified by a sufficient number of states, the Court will be named the African Court of Justice and Human Rights.

1218 The Convention can be accessed at http://www.cbd.int

and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.

And

Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements …

As presented by the Convention, traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world.[1219] The relevance of this matter led the Conference of Parties (COP) to the creation of a Working Group on Article 8(j), with the mandate to address the implementation of this article and related provisions of the Convention. This working group is open to all Parties and indigenous and local communities' representatives play a full and active role in its work. In 1996, the third Conference of the Parties (COP3) indigenous organizations created the International Indigenous Forum on Biodiversity (IIFB),[1220] which, in 2000, was officially acknowledged by COP5 as a valuable advisory body to the CBD. As such, the IIFB enhances the presence and voices of indigenous peoples within all CBD processes and meetings. It promotes linkages between the work of the CBD on protected areas and the implementation of Article 8(j), and, at the same time, it promotes indigenous and cultural diversity approaches in environment and development. In 1998, an Indigenous Women's Biodiversity Network (IWBN) was established to draw attention to indigenous women's "full and effective participation in the conservation and sustainable use of biological diversity within their communities, as well as their rights as knowledge holders".[1221]

In 2004, COP7 adopted what is known as the *Akwé: Kon guidelines.* These voluntary guidelines provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impacts of proposed developments on sacred sites and on lands and waters they have traditionally occupied or used. Moreover, guidance is provided on how to take into account traditional knowledge, innovations and practices as part of the impact-assessment processes and promote the use of appropriate technologies. They also suggest a ten-step process for impact assessment of proposed development projects with regards to Article 8(j).[1222]

Each State party to the CBD appoints a focal point, mandated to liaise between the Convention's bodies and government.[1223] Indeed, a National Focal Point is a key part of implementing the CBD, as it is expected to collect and share information, raise awareness and report on progress

1219 Traditional knowledge tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds.

1220 IIFB can be accessed at http://www.indigenousportal.com/Biological-Diversity/

1221 See "Statement on behalf of the Indigenous Women's' Biodiversity Network (IWBN)". U.N. Doc. E/C.19/2004. Available at http://www.un.org/esa/socdev/unpfii/pfii/documents/other%20docs/Doc%20Netherlands%20Centre.htm

1222 For full text of Guidelines, see http://www.cbd.int/programmes/socio-eco/traditional/akwe.aspx

1223 See list of contacts of all national focal points at http://www.biodiv.org/doc/lists/nfp-cbd.pdf.

concerning the CBD on numerous issues, including indigenous peoples' rights. In numerous countries, these focal points are in permanent contact with indigenous peoples and communities.

Each State party to the CBD must produce regular reports on the progress or measures taken to implement the Convention, and elaborate a National Biodiversity Strategy and Action Plan (NBSAPs). There are guidelines on developing and implementing all these international obligations, which require active participation of indigenous peoples. All these CBD mechanisms are yet to be fully, meaningfully and strategically used by many African indigenous communities, which could for example maintain regular contacts with national focal points or contribute to national reports, national biodiversity strategies and plans. Indigenous organizations could do the same with the Indigenous Forum. There is for instance a recent work done by a group of NGOs reviewing Uganda's implementation of the CBD Programme of Work on Protected Areas (PoWPA).[1224] These are important policy documents likely to interest even judges and lawyers involved in indigenous peoples-related court cases.

Recent developments within CBD

In 2010, COP10 adopted two important documents – the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, and a new Strategic Plan for Biodiversity 2011-2020.

The Nagoya Protocol[1225] provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: "the fair and equitable sharing of benefits arising out of the utilization of genetic resources and based on the appropriate access to genetic resources and the appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and on appropriate funding". Indigenous peoples should take into account the Protocol, in particular its provisions on access to traditional knowledge held by indigenous and local communities when it is associated with genetic resources, which may strengthen the ability of these communities to benefit from the use of their knowledge, innovations and practices. The Protocol, on the other hand, is fairly controversial, since it does not recognize indigenous peoples' rights on genetic resources within their territories.

The new Strategic Plan is comprised of a shared vision, a mission, five strategic goals and 20 targets, collectively known as the Aichi Biodiversity Targets.[1226] Target 18 is especially important for indigenous peoples since it establishes that:

1224 Forest Peoples Programme, UOBDU and Care International, "The Indigenous Batwa People and Protected Areas in Southwest Uganda: A review of Uganda's Implementation of the CBD Programme of Work on Protected Areas". Available online at Web site of Forest Peoples Programme: http://www.forestpeoples.org/documents/conservation/uganda_review_cbd_pa_jan08_eng.pdf

1225 The Protocol shall enter in force 90 days after the date of deposit of the fiftieth instrument of ratification. By mid-2013, several African countries, including CAR, Congo, DRC, and Kenya have signed the protocol, while a few others (Botswana, Ethiopia, Gabon, Rwanda and South Africa) have approved, accessed or ratified it. See CBD's homepage at http://www.cbd.int

1226 See the Strategic Plan at http://www.cbd.int

> [B]y 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.

The imprint of indigenous concerns in both the Protocol and the Aichi targets bear witness to the active involvement of indigenous peoples and their organizations in the processes leading up to the adoption of the two documents. The IIFB and the IWBN participate in several working groups and have been instrumental in proposing substantive discussions which have resulted in some positive decisions adopted by the COPs.[1227] Increasingly relevant are the discussions that have taken place on customary sustainable use. The CBD is now developing a new program of work (as part of the PoW on article 8(j) and article 10) and in the framework of these discussions, attention has been given to indigenous customary use practices, such as bush meat[1228] and pastoralism.[1229]

Today, most African countries have elaborated and adopted National Biodiversity Strategies and Action Plans (NBSAPs) and 33 out of 53 African countries have implemented a Programme of Work on Protected Areas (PoWPA). However, as noted by CBD itself, "While these are commendable achievements, there are still some areas that are lagging behind. The social costs and benefits, the effective participation of indigenous and local communities and the diversification of various governance types need more commitment and resolute actions".[1230]

The Commission on Sustainable Development (CSD) and the Rio +20 process

The first Earth Summit in 1992 was the point of departure of various biodiversity related processes and mechanisms in which indigenous peoples have actively participated.[1231] This was also the case for Rio +20—the U.N. Conference on Sustainable Development marking the 20th anniver-

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1227 See the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2010* (Copenhagen: IWGIA, 2010), p. 609-610.

1228 The growing scale and commercialization of bush meat hunting and trade across range states, and an increasing trend of organized illegal international trade in bush meat, is a great threat to food security and livelihoods in many countries, as well as a major cause of biodiversity loss. Recent CBD discussions emphasize the importance of full and effective participation of indigenous peoples and local communities in the development of policies and measures to better manage tropical and sub-tropical wildlife. See SBSTTA 15 Recommendation XV/6 on Sustainable use of biodiversity and Annex at https://www.cbd.int/recommendation/sbstta/default.shtml?id=12973); see related documents at http://www.cbd.int/doc/?meeting=LGBUSHMEAT-02

1229 Regarding pastoralism, see CBD booklet "Pastoralism, Nature Conservation and Development" (CBD 2010) at http://www.cbd.int/development/doc/cbd-good-practice-guide-pastoralism-booklet-web-en.pdf.

1230 See CBD at http://www.cbd.int/protected/overview/default.shtml

1231 Apart from the CBD convention, the Summit's outcome includes the Rio Declaration on Sustainable Development, the Commission on Sustainable Development (CSD), Agenda 21, the Framework Convention on Climate Change (UNFCCC) and the Forest Principles.

sary of the Earth Summit in 2012—where a major theme to be discussed was the Green Economy Initiative (GEI). Indigenous peoples prepared for Rio +20 by developing a strategy and establishing an Indigenous Global Coordinating Committee to prepare and submit an indigenous input to the Rio +20 Zero Draft document. This input was based on five key messages, one of which (no. 4) refers to "Safeguarding of the lands, territories and resources, and associated customary management and sustainable use systems".[1232]

Throughout the inter-sessional and preparatory meetings—from January 2012 – June 2012 in New York—indigenous representatives lobbied heavily for the five key messages to be included in the official document and several regional preparatory meetings were held in order to include regional positions and strategies into the global indigenous process.[1233]

A large number of indigenous representatives participated in the Rio +20 official meeting in Rio de Janeiro (20-22 June 2012) and more than 500 participated in the parallel event, the World Indigenous Peoples' Conference on Territories, Rights and Sustainable Development—Kari-Oca II. The Kari-Oca II Declaration, which was delivered to leaders at Rio +20, reaffirms the key role of indigenous peoples' cultures and values, and the right of Mother Earth, and rejects the push to "commodify" nature and ecosystems. The declaration reflects the critique raised in various indigenous forums of GEI and rejects REDD as one of "many false solutions to climate change".[1234] Indigenous peoples also organized an International Conference on Sustainable Development, where indigenous peoples' experiences, perspectives and practices with respect to sustainable development were shared by some 200 participants. The conference adopted a Declaration that was launched at a side event to the official meeting.[1235]

The outcome document of the Rio +20 conference, "The Future We Want", is divided into six chapters. Each chapter includes paragraphs relevant to indigenous issues. However, the sections on forests (§193-196) and mining (§227-278) fall short of indigenous expectations since they neither refer to indigenous peoples nor reflect a human rights approach.[1236]

Another outcome of Rio +20 was the decision to replace the Commission on Sustainable Development (CSD) with a high-level political forum for sustainable development. CSD has since 1993 been entrusted with the monitoring and promotion of the implementation of the Rio (1992) outcomes, including Agenda 21, which, inter alia, gives extensive and formal recognition to indig-

1232 See the Manaus Declaration "Indigenous Peoples in Route to the Rio + 20 Conference", (August 2011) at http://tebtebba.org/index.php/content/195-ips-and-rio-20 See also the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 487.

1233 An Indigenous Pan African meeting on Sustainable Development was organized in Arusha (April 2012). The Arusha Declaration can be accessed at: http://www.iwgia.org/iwgia_files_news_files/0499_IPs_Pan_African_Rio_Plus_20_Arusha_declaration_-_Final.pdf

1234 The name (Kari-Oca II) refers to the first indigenous peoples' event that took place parallel to the official Rio Conference in 1992. Over 500 indigenous leaders signed the Kari-Oca II Declaration, which was subsequently delivered to the Brazilian government. See text of Declaration at http://www.iwgia.org/news/search-news?news_id=544

1235 See the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), p. 489. See also Tebtebba at http://tebtebba.org

1236 See the outcome document at http://sustainabledevelopment.un.org/futurewewant.html Its §109 includes a reference to indigenous peoples and particularly mentions enhanced access to secure land tenure, knowledge and appropriate and affordable technologies, among others, as well as "the importance of traditional sustainable agricultural practices, including traditional seed supply systems, including for many indigenous peoples and local communities."

enous peoples and recommends the incorporation of indigenous peoples' rights and responsibilities into national legislation.[1237] CSD has also been very consistent in promoting the participation of the Major Groups to which indigenous peoples belong. It is still unknown what mandate this new political forum will have and what consequences it will have for indigenous peoples.

The U.N. Framework Convention on Climate Change and the U.N. REDD Programme

The U. N. Framework Convention on Climate Change (UNFCCC) is an international treaty created at the Earth Summit in Rio in 1992 to tackle the growing problem of global warming and related harmful changes in the climate. Its Kyoto Protocol was adopted in 1997 to legally bind developed countries to emission reduction targets,[1238] and in 2007, the Conference of the Parties (COP13), adopted the Bali Action Plan, a comprehensive process to enable the full, effective and sustained implementation of the Convention.[1239]

As victims of the climate crisis that undermines their traditional lifestyles and affected by the policies and actions that are being negotiated under the UNFCCC, indigenous peoples and the International Indigenous Forum on Climate Change (IIFCC) have been involved in the process since 2000. While still waiting for UNFCCC's approval of an Ad Hoc Working Group on Indigenous Peoples and Climate Change which would allow them to actively participate in the COP meetings in the same way as in the CBD COPs, indigenous peoples have over the years arranged several international meetings, such as the International Indigenous Peoples' Summit on Climate Change that took place in Anchorage, Alaska, in 2009.[1240] The summit resulted in an important global indigenous position paper on climate change, the Anchorage Declaration, that outlines what indigenous peoples demand from the UNFCC process:

> We uphold that the inherent and fundamental human rights and status of Indigenous Peoples, affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), must be fully recognized and respected in all decision-making processes and activities related to climate change. This includes our rights to our lands, territories, environment and natural resources as contained in Articles 25–30 of the UNDRIP. When specific

1237 Agenda 21 (1992), chapter 26.1.

1238 The Protocol's first commitment period started in 2008 and ended in 2012. The second commitment period began on 1 January 2013 and will end in 2020.

1239 See Bali Action Plan at http://unfccc.int/key_steps/bali_road_map/items/6072.php The process has been conducted under a subsidiary body under the Convention, the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) up to December 2012, when AWG-LCA concluded its work and most discussions were terminated or moved to the other two subsidiary bodies for Scientific and Technological Advice (SBSTA) and for implementation. In 2012, COP18 adopted the Durban Platform for Enhanced Action (ADP) that will lead the COP discussions towards an overall binding agreement on emissions reductions in 2015.

1240 The Anchorage Conference gathered more than 300 indigenous representatives from across the world who produced important background documentation on how indigenous peoples experience the changing climate, how their lifestyles, culture and very survival is threatened, and how they contribute to adaptation and mitigation.

> programs and projects affect our lands, territories, environment and natural resources, the right of Self Determination of Indigenous Peoples must be recognized and respected, emphasizing our right to Free, Prior and Informed Consent, including the right to say "no". The United Nations Framework Convention on Climate Change (UNFCCC) agreements and principles must reflect the spirit and the minimum standards contained in UNDRIP.[1241]

In 2010, governments drew up the Cancun Agreements that represent key steps forward in capturing plans to reduce greenhouse gas emissions, and to help developing nations protect themselves from climate impacts and build their own sustainable futures. The COP16 decision document underlines several time the importance of the effective participation of indigenous peoples in all aspects dealing with climate change; and the need to respect the knowledge and rights of indigenous peoples.[1242]

In October 2011, indigenous peoples met in Oaxaca, Mexico at the invitation of the government of Mexico, in order to prepare for and to discuss strategies and priorities for their involvement at the COP17. The Oaxaca Action Plan of Indigenous Peoples[1243] identifies a series of key challenges that indigenous peoples will work to overcome. These include the lack of implementation/operationalisation of the positive elements of the Cancún Agreements, particularly relating to respect for the rights of indigenous peoples, and the establishment of mechanisms for their full and effective participation in climate change processes on all levels.

The U.N. REDD programme

Another important outcome of the 2007 COP13 was an agreement on "the urgent need to take further meaningful action to reduce emissions from deforestation and forest degradation". The U.N. REDD Programme was launched in 2008 as one of several mitigation measures and supports nationally-led REDD+ processes, promoting the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-dependent communities, in REDD+ implementation.[1244]

Support from the U.N. REDD Global Programme is delivered to partner countries through seven integrated work areas, one of which is "Increasing Engagement of Indigenous Peoples and other Forest Dependent Communities" and indigenous rights issues have had a significant place

1241 See Anchorage Declaration 2009, p. 1 at http://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf See also the International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2010* (Copenhagen: IWGIA, 2010), p. 598.

1242 Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session (FCCC/CP/2010/7/Add.1) at http://unfccc.int/2860.php

1243 The Oaxaca Action Plan of Indigenous Peoples: From Cancún to Durban and beyond can be downloaded from http://www.iwgia.org/human-rights/un-mechanisms-and-processes/un-framework-convention-on-climate-change-unfccc

1244 See U.N. REDD Web site at http://www.un-redd.org/ The programme builds on the convening role and technical expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP).

within the negotiations on forest conservation.[1245] The U.N. REDD Programme works with 16 partner countries in Africa, including DRC, Congo, and Tanzania who receive direct support for U.N. REDD National Programmes.

It is generally believed that REDD+ has the potential to deliver substantial social and environmental benefits in addition to reducing carbon emissions. However, there are also potential risks associated with its implementation and indigenous peoples remain particularly anxious to ensure a human rights approach. They have also pushed for improving the existing mechanisms for the full and effective participation of indigenous peoples by, inter alia, setting up an Indigenous Peoples' Expert body which would act as a technical advisory body and a consultative resource during negotiations.[1246] At the local level, the challenge facing indigenous leaders and communities is to gain access to the tables where decisions are taken and implementation plans formulated, to critically assess the potential threats and benefits and to make informed decisions.[1247] A recent report shows that there are in particular numerous challenges to applying the FPIC principle and that they "are due in large part to the delay by states to incorporate their international obligations into their national laws, but also due to the fact that there is little guidance about how to apply the FPIC principle on the ground in initiatives that threaten community rights." [1248]

The UNESCO Conventions

UNESCO also pays particular attention to indigenous peoples' rights and several of its Conventions could provide protection to indigenous peoples' land rights. This is, for instance, the case of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage Heritage and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, which both could provide protection to indigenous peoples' rights to lands, even though the former have been increasingly criticized for transforming indigenous lands into World Heritage sites without proper consultation and putting pressure on governments to adopt measures that negatively affect indigenous peoples' exercise of their traditional livelihood.[1249] In 2011, the African Commission came up with a resolution urging

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1245 Indigenous representatives also participate in several other global climate change related mechanisms such as the Forest Carbon Partnership Facility, the Forest Investment Programme (FIP), the Green Climate Fund (GCF) as well as in national bodies such as the National Task Forces on REDD+.

1246 See IIPFCC's Statement to the UNFCCC- Subsidiary Body for Implementation (SBI), 25 May 2012, Bonn, Germany at http://www.aippnet.org/home/daily-sharing/847-unfccc-2012-international-indigenous-peoples-forum-on-climate-change-iipfcc-statement-to-the-unfccc-subsidiary-body-for-implementation

1247 See IWGIA Web page at http://www.iwgia.org/environment-and-development/redd

1248 See Forest Peoples Programme et al., "Les peuples autochtones et le consentement libre, informé et préalable". (Moreton-in-Marsh: Forest Peoples Programme, 2013), foreword in English, p. 7. Available online at Web site of Forest Peoples Programme: http://www.forestpeoples.org/sites/fpp/files/publication/2013/05/premier-numero-foatas-peuples-autoctones-et-clipmay2013.pdf

1249 Recent examples already mentioned include the Kenya Lake System, which was inscribed on UNESCO's World Heritage List without involving the Endorois in the decision making process (see Chapter V) and the resumption in 2009 of the ban on cultivation within the Ngorongoro Conservation Area (Tanzania), allegedly as the result of pressure from the U.N. and international conservation agencies and threats of removing the area from the UNESC World

> ... the World Heritage Committee and UNESCO to review and revise current procedures and Operational Guidelines, in consultation and cooperation with the UN Permanent Forum on Indigenous Issues and indigenous peoples, in order to ensure that the implementation of the World Heritage Convention is consistent with the UN Declaration on the Rights of Indigenous Peoples and that indigenous peoples' rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas.[1250]

In response to these criticisms, the World Heritage Committee came up with a decision in 2011, in which the Committee encourages states to involve indigenous peoples in decision-making, monitoring and evaluation of the state of conservation of World Heritage sites and to respect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in indigenous peoples' territories." [1251]

However, it is in particular two other conventions that are relevant for indigenous land rights, namely the Convention on the Promotion and Protection of the Diversity of Cultural Expressions (2005) and the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.

The UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions

This Convention states that,

> *The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.*[1252]

Article 7 of this Convention states also that the protection of indigenous territories is part of measures to be taken by states in order to promote and protect the culture of these communities:

> *Parties shall endeavour to create in their territory an environment that encourages individuals and social groups:*

Heritage list. See also The International Work Group for Indigenous Affairs (IWGIA), *Indigenous Peoples and World Heritage Sites*, edited by Stefan Disko and Helen Tugendhat (Copenhagen: IWGIA, forthcoming).

1250 Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site # 197, adopted by the ACHPR at its 50th session in 2011. See Web site of ACHPR http://www.achpr.org/sessions/50th/resolutions/197/

1251 See Committee Decision 35COM 12E on the Global state of conservation challenges of World Heritage properties. At http://whc.unesco.org/en/decisions/4406

1252 UNESCO Convention on Cultural Expressions (2005), Article 2. For full text of Convention, see http://www.unesco.org/culture/en/diversity/convention.

a. to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;
b. to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

This is an instrument that more than 35 African countries have ratified.[1253] Policies and laws are expected to be adopted by all parties, which are also required to create an environment encouraging individuals and groups to create and disseminate their own cultural expressions. Since indigenous peoples' culture is tied to their lands, any measures taken in that respect are likely to have a positive impact on the communities' land claims.

The 1954 Hague Convention and indigenous land rights

This UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict including its Protocols is, together with the Geneva Conventions (see below), among the more than 100 international humanitarian laws that deal with people's rights in case of armed conflicts. The Hague Convention could be relevant for indigenous peoples as far as it looks at the protection of cultural property, defined as being "movable or immovable property of great importance".[1254] It does not list, however, what should be understood as "cultural property of great importance". It can, nevertheless, be argued that lands are of great importance to all indigenous peoples and in addition to being a means of survival, they are often the pillar of these peoples' whole culture. In other words, one can argue that "lands" of indigenous peoples could be considered to be included amongst the cultural properties protected by the 1954 Hague Convention.

In line with this broad understanding of the concept "cultural property", Thomas Adlercreutz argues that "culturally valuable land" should be protected by various domestic laws.[1255] This is the case in Sweden, where the Swedish Act on Cultural Monuments includes graves, burial grounds, places of cult, etc., amongst the properties to be protected because of their cultural values.[1256] Similarly, the United States' Native American Graves Protection and Repatriation Act (NAGPRA),[1257] defines a native cultural patrimony as any tribal property or object necessary for the tribe's culture, way of life, traditions, and maintenance of its history.[1258] It has been said that this issue must be "central to the Native American culture or group".[1259] This view is also held by Andrew Corbett who, examining the possible effect on communities

1253 See Appendix 2, this volume and Table 2. For full text of the 1954 Hague Convention, see http://www.icrc.org
1254 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Article 1. The Convention and its two Protocols are accessible online at http://www.icrc.org/ihl.nsf
1255 Thomas Adlercreutz, "Property Rights and Protection of Cultural Heritage in Sweden", *International Journal of Cultural Property* 7, no. 2 (1998), p. 410.
1256 Ibid., p. 418.
1257 U.S. Code, Title 25, Section 3001(3) (D) (1994). Available from http://www.gpoaccess.gov/uscode/
1258 Dawn Elyse Goldman, "The Native American Graves Protection and Repatriation Act: A Benefit and a Burden: Refining NAGPRA's Cultural Patrimony Definition", *International Journal of Cultural Property* 8, 1 (1999), p. 229.
1259 Ibid., p. 232.

of the proposed Epupa hydropower dam in Namibia, argues that the Himba's burial sites are an important part of this community's culture and that their destruction would dangerously affect the livelihood of this community's members.[1260] Therefore by intending to protect cultural sites, such as burial sites, it is possible that international and domestic instruments have implicitly recognized that parts of, if not all, indigenous peoples' lands constitute a cultural patrimony that deserves protection.

The second Protocol to the 1954 Hague Convention, which entered into force on 9 March 2004, is expected to strengthen the protection afforded to cultural heritage during both international and non-international armed conflicts.[1261] Equatorial Guinea and Gabon are among the first African states that have ratified it. This instrument is also expected to provide more understanding and guiding principles for a better interpretation of the norm of "military necessity", which is often referred to in international humanitarian law.[1262] However, this text seems to consider only movable cultural properties. Such an understanding could be detrimental to indigenous peoples' land rights given than land is not a movable property.

The Geneva Conventions and other international humanitarian and criminal laws

The Geneva Conventions—a whole system of legal safeguards that cover the way wars may be fought and the protection of individuals in time of war—are at the core of international humanitarian law.[1263] Most relevant for indigenous peoples are the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), and Protocols I and II to the Geneva Conventions relating to the Protection of Victims of International and Non-International Armed Conflicts, respectively (1977). International criminal laws deal with international crimes and include among other legal instruments, the charter and statutes of various international tribunals.

International humanitarian and criminal laws do not provide any special protection for indigenous peoples. Yet, this section of the world's population is particularly affected by armed conflicts, be they international or internal. Research shows, for example, that the Batwa of Rwanda were particularly affected by the 1994 genocide as they were caught in the fight between the two main ethnic groups.[1264] In the Democratic Republic of Congo, the alleged acts of war crimes—including crimes against hu-

1260 Corbett, "A Case Study" (1999), pp. 84-5.

1261 Jan Hladik, "Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (March 15-26 1999)", *International Journal of Cultural Property*. 8, no. 2 (1999), p. 527.

1262 Françoise Hampson, "Military Necessity", in *Crimes of War: What the Public Should Know,* edited by Roy Gutman and David Rieff (New York and London: W.W. Norton, 2007). Available online at http://www.crimesofwar.org/thebook/military-necessity.html. Hampson. defines the norm of "military necessity" as "a legal concept used in international humanitarian law (IHL) as part of the legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects".

1263 The four Geneva Conventions were adopted in 1864, 1906, 1929 and 1949 respectively. The three oldest Conventions were revised in 1949. There are three amendment protocols to the 1949 Geneva Conventions, Protocols I and II adopted in 1977 and Protocol III adopted in 2005. For more information, see International Committee of the Red Cross Web site at http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions

1264 Jerome Lewis and Judy Knight, *The Twa of Rwanda*, IWGIA Document No. 78 (Copenhagen and UK: IWGIA and World Rainforest Movement, 1995), pp. 62-69. These two authors estimate that up to 30 per cent of the Twa population (approx. 6-9,000) died or were killed between October 1993 and June 1995, and a similar number fled outside the country (pp. 92-93).

manity and acts of cannibalism—committed against Batwa in the Ituri area are thought to have a link with traditional belief that these peoples' flesh contains magical bulletproof powers. Similarly, many fighters believe that sexual relations with "Pygmy" women have a curative effect on a number of diseases, including HIV/AIDS. Dorothy Jackson, in her report on Twa women in the Great Lakes Region, writes that, "perpetrators of the armed conflict in the region have inflicted appalling sexual violence on women of all backgrounds, contributing to an increase in HIV/AIDS infection".[1265] In most cases, the ancestral lands of these indigenous peoples—usually forested areas—are turned into operational bases of armed militia, with all the type of problems that such an occupation entails. In DR Congo, for example, both sides in the conflict often used "Pygmies" as guides and on numerous occasions retaliatory actions by either side have been directed at "Pygmies", accused of siding with enemies.

Both sets of legal instruments are nevertheless relevant since it is possible to interpret several of their provisions in a way that includes indigenous peoples' rights to land.

Fourth Geneva Convention and indigenous peoples' rights to land

Article 49 of the Fourth Geneva Convention prohibits deportation of civilians, non-combatants, and other protected persons from their homes, except if their security is under threat.[1266] Furthermore, "*Persons thus evacuated shall be transferred back to their homes, as soon as hostilities in the areas in question have ceased*". Protocol I elaborates on these same provisions, and states that

> *[S]hall be regarded as grave breaches of this Protocol … the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.* ...[1267]

Protocol II, furthermore, states in its Article 17 on Prohibition on Forced Movement of Civilians that

1. *The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.*

1265 Dorothy Jackson, *Twa Women, Twa Rights in the Great Lakes Region of Africa* (London: Minority Rights Group International, 2003), p. 13. Twa women are also at added risk from the cultural practices of the dominant society. In all four countries covered by this report, Twa women told about the belief that if a non-Twa man has a backache he can cure it by sleeping with a Twa woman. This belief prevails also in the Republic of Congo. See also FIMI/IIWF, "Mairin Iwanka Raya: Indigenous Women Stand against Violence". A Companion report to the United Nations Secretary General's Study on violence against women (New York: FIMI/IIWF, 2006).

1266 See Web site of the International Committee of the Red Cross: http://www.icrc.org for full text of Fourth Geneva Convention and its Protocols.

1267 Article 85.4(a) of Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. See Web site of the International Committee of the Red Cross: http://www.icrc.org.

2. *Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.*[1268]

In what could be considered a more specific language, the Articles 54.2 of Protocol I and 14 of Protocol II prohibit acts of destruction of "objects indispensable to the survival of civilian populations", including drinking water, livestock, and so on. These provisions give rise to two important considerations. First, the terms "objects indispensable to the survival of civilian populations" implies objects without which the civilians in question would not survive. It becomes thus important to understand the criterion that makes an object indispensable to the survival of a civilian population and whether or not the lack or destruction of such an object would lead to forced movement or starvation.

In this regard, could the lands of indigenous peoples be considered as "indispensable for their survival" within the meaning of the two Protocols? Commenting on NATO's action in Kosovo, it has been argued that "the NATO attack on the factories at Pancevo [which] may have rendered the city's water supply useless" has to be assessed on the basis of, amongst other issues, whether the action left "the civilian population with such inadequate food and water as to cause its starvation or force its movement".[1269] If livestock and agricultural areas for the production of foodstuffs, which are *expressis verbis* referred to by Protocols I and II to the 1949 Geneva Conventions,[1270] constitute objects indispensable to the survival of agricultural and pastoralist communities respectively, then hunting and gathering lands on which hunter-gatherer communities depend should be considered to be included in the scope of these provisions in the two Protocols. Relevantly, the provisions in both Protocols use an open-ended language—"such as"—in listing objects that should be considered as indispensable to the survival of civilian populations. This suggests that indigenous lands and other objects could be included in the scope of these provisions, depending upon the situation on the ground.

International criminal law and indigenous land rights

Deportation and transfer of populations, including the act of ethnic cleansing, has frequently occurred in recent times in various parts of the world, such as in Yugoslavia. J.M. Henckaerts quotes in his book, *Mass Expulsion in Modern International Law and Practice,* a 1994 *Human Rights Watch Report* that defines ethnic cleansing as "the forcible deportation and displacement, execution, confinement in detention camps or ghettos" of civilian populations. He also refers to

1268 Article 17 of Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. There are numerous examples of indigenous communities that have been forced to leave their lands by the warring factions. One case is that of the Miskito in Nicaragua who were forcefully removed by the Nicaraguan government during the Contra War from their territories along the Honduras border.

1269 Aaron Schwabach, "Environmental Damage Resulting from the NATO Military Action against Yugoslavia", *Columbia Journal of Environmental Law* 25, 1 (2000), p. 127. Available at Social Science Research Network's (SSRN) Web site: http://ssrn.com/abstract=224028

1270 Article 54 of Protocol I and Article 14 of Protocol II to the 1949 Geneva Conventions.

the evidence submitted to the International Criminal Tribunal for the Former Yugoslavia (ICTY) by the U.S. government on cases of mass forcible expulsions and deportation of civilians, to argue that the international crime of "ethnic cleansing" is developing in scope.[1271] Is it possible that this definition of crime might further develop to include acts often committed by states to force indigenous communities out of their lands for conservation and other economic interests? This possibility should be further investigated with more focused research.

Henckaerts also argues that acts of deportation, forcible expulsion or uprooting of civilians from their homelands could amount to the crime of genocide. But then he indicates that this is not entirely self-evident as generally ethnic cleansing aims to remove a population from a certain area, without the intent of destroying it as a group.[1272]

It must be emphasised again that this branch of international law does not provide specifically designed protection for indigenous peoples' right to lands. However, as the scope of several international crimes evolves, necessary changes could be consequential. Importantly, a United Nations' report already states that acts, which destroy the rainforests and threaten the existence and well-being of forest-dwelling indigenous and tribal peoples, can be considered as ethnocide, whether the acts are deliberate or negligent. This report supports the view that ethnocide is a crime against humanity.[1273] However, the concept of ethnocide is referred to in neither the Charter of the Nuremberg Tribunal (1945), the Nuremberg Principles (1950), the Statutes of both the International Criminal Tribunal for the Former Yugoslavia—ICTY (1993) and the International Criminal Tribunal for Rwanda—ICTR (1994),[1274] nor in the Draft Code of Crimes against the Peace and Security of Mankind (1996).[1275]

African legal instruments and institutions

There are a number of African regional instruments and institutions that are relevant to indigenous peoples, in general, and to their right to lands, in particular. They include human rights legal instruments such as the African Charter on Human and Peoples' Rights, human rights institutions like the African Commission on Human and Peoples' Rights (ACHPR) and organizations with a more economic development focus such as, among others, the New Partnership for African Development (NEFAD).

1271 Jean Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995), p. 163.

1272 Ibid., p. 164.

1273 Benjamin Whitaker, "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide". Report prepared by the Special speaker, B. Whitaker, for ECOSOC. U.N. Doc. E/CN.4/Sub.2/1985/6, at 17.

1274 The ICTY statutes were prepared and adopted by Security Council resolution 827 (1993) of 25 May 1993 and are available online at http://www2.ohchr.org/english/law/itfy.htm. Those of the ICTR were likewise prepared and adopted by Security Council resolution 955 (1994) of 8 November 1994. Available online at http://www2.ohchr.org/english/law/itr.htm.

1275 Code established by the International Law Commission. For full text, see: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf

The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights came into force on 21 October 1986 after its adoption in Nairobi, Kenya, by the Assembly of Heads of States and governments of the then Organisation of African Unity (OAU). The OAU was disbanded in July 2002 and has since been replaced by the African Union (AU).

The African Charter is credited with a number of particular features.[1276] It states in its Preamble that "*virtues of … historical tradition and the values of African civilization … should inspire and characterize [African States Members']reflection on the concept of human and peoples' rights*". It also does not distinguish civil and political rights from economic, social and cultural rights.

Its Article 17 states that:

1. *Every individual shall have the right to education;*
2. *Every individual may freely take part in the cultural life of his community;*
3. *The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.*

Furthermore, the African Charter is almost the only human rights instrument stating the rights of peoples, including communities within states. Articles 19 to 24 provide for these rights, such as the right to self-determination, which can also be enjoyed by a community within a given state. For instance, Article 19 asserts that "*All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.*"

Guidelines by the African Commission on Human and Peoples' Rights[1277] on the above mentioned Article 17 indicate that states shall take "overall policy and specific measures aimed at the promotion of cultural identity as a factor of mutual appreciation amongst groups, communities".[1278] In 2000, for instance, the government of Mauritania was found to have violated Article 17 for discriminating against black sections of its population. The African Commission on Human and Peoples' Rights concluded indeed that "language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence".[1279]

Article 20 of the African Charter dealing with the right to self-determination could also be considered as relevant to the protection of indigenous peoples' right to lands, since it is understood to include also the rights to self-governance, autonomy and control over resources, as clearly presented by the African Commission on Human and Peoples' Rights in a legal Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples:

1276 The full text of the Charter is available at http://www.hrcr.org/docs/Banjul/afrhr.html

1277 The African Commission on Human and Peoples' Rights is the treaty-based monitoring body of the African Charter. It is based in Banjul in The Gambia, and holds annual meetings during which states report on the implementation of the African Charter and other international instruments are examined.

1278 African Commission of Human and Peoples' Rights, 1990 Activity Report, *Human Rights Law Journal* 1990: 417. See also Barume, *Heading towards Extinction* (2000), pp. 115-6.

1279 Collectifs des veuves et ayants droits, Association mauritanienne des droits de l'homme C/ Mauritanie, 13ième Rapport d'activités de la Commission Africaine 1999-2000, ACHPR/RTP/13th, Annex V, Paragraph 137.

> The notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.[1280]

Article 21 of the African Charter enshrines the right of all peoples "*to freely dispose of their wealth and natural resources*". Article 22 provides for the right of all peoples "*to their economic, social, and cultural development*". These provisions have been used by the African Commission on Human and Peoples' Rights to enhance the protection of indigenous peoples' rights to lands. In 2002, for instance, the government of Nigeria was found to have violated Article 21 by allowing oil exploitations that had devastating effect on the well-being of the Ogoni people. On this same occasion, the African Commission linked the right to life of individual Ogoni, protected under Article 4 of the Charter, with the effects that oil exploitation had on their lands.[1281] In its 2007 Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, the African Commission stated in relation to Article 21 of the Charter that:

> Similar provisions are contained in many other instruments adopted by the AU such as the African Convention on the Conservation of Nature and Natural Resources whose major objective is: "*to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour*" (Preamble) and which is intended "*to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge*" ...[1282]

One could also use Articles 2 and 3 of the African Charter to advocate before courts the right of indigenous peoples to lands. This is an argument to be built around the principle of equal protection by the law and that of non-discrimination. Since in most African countries, customary land ownership, use and occupation is recognized for most agriculturalists, it is arguable that non recognition of land use and occupation by nomadic hunters, gatherers, and pastoralists communities amounts to a discriminatory practice and an unequal protection by the law.

Relevant AU policies

In recent years, the African Union (AU) has adopted two policy framework documents that are highly relevant for indigenous peoples. In July 2009, the AU adopted a framework drafted by the

1280 African Commission on Human and Peoples' Rights, Advisory Opinion on the United Nations Declaration on Rights of Indigenous Peoples (2007), para. 22, p. 6. See Appendix 1, this volume. Also available at www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf

1281 Fergus MacKay, "African Commission on Human and Peoples' Rights", (Forest Peoples Programme, 2001). Available at: http://www.forestpeoples.org/documents/africa/af_com_brf_human_rights_oct01_eng.shtml

1282 African Commission on Human and Peoples' Rights, Advisory Opinion (2007), para. 35. See Appendix 1, this volume.

Land Policy Initiative (LPI)[1283] entitled "Framework and guidelines on land policy in Africa—Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods". The purpose of this framework is to articulate "some of the principles which should inform the development, content and implementation of land policies in African member states".[1284] The document notes that "the marginalization of particular ethnic groups with respect to access to adequate land remains a perpetual source of conflict" and stresses that land policy reforms must address the concerns of "certain categories of indigenous people such as the San of Botswana; the Herero of Namibia; the Bakola, Bagyeli and Batwa of the countries of Central Africa; and the Ogiek of Kenya", whose marginalization "has become contentious".[1285]

It promotes a participatory and inclusive process, that takes into consideration that "land is fully embodied in the very spirituality of society", the prerequisite for stakeholder consultations and the need to blend tradition and modernity in land rights regimes.

In October 2010, the African Union released a Policy Framework for Pastoralism in Africa—Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities.[1286] This Policy Framework contains guiding and cross-cutting principles, two main objectives, and a set of strategies for each objective. The two objectives are (i) to secure and protect the lives, livelihoods and rights of pastoral peoples and ensure continent-wide commitment to political, social and economic development of pastoral communities and pastoral areas; and (ii) to reinforce the contribution of pastoral livestock to national, regional and continent-wide economies.

Both policy frameworks are presently being followed up. The LPI is thus assisting AU member states in developing or reviewing their land policies as well as in implementing and evaluating these policies. Regarding the policy framework on pastoralism, its implementation action plan and institutional and resource mobilization strategy were validated during a two days meeting in August 2012. This meeting also validated pastoralist's stakeholders in the policy framework implementation process.[1287] Indigenous organizations should closely monitor these two processes in order to ensure that vital interests are being taken into account.

1283 The Land Policy Initiative was established in 2006 as a joint programme of the tripartite consortium consisting of the African Union Commission (AUC), the African Development Bank (AfDB) and United Nations Economic Commission for Africa (ECA). Its purpose is to enable the use of land to lend impetus to the process of African development. The programme is governed by a Steering Committee that meets periodically, while a joint secretariat implements day to day activities. The secretariat is assisted by an African Taskforce on Land.

1284 See AU, "Framework and guidelines on land policy in Africa—Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods" (Addis Ababa: AU, ADB and ECA, 2009), p. 14. Available at http://www.achpr.org/instruments/framework-guidelines-land-policy/

1285 Ibid., p. 23.

1286 AU, "Policy Framework for Pastoralism in Africa, Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities" (Addis Ababa: AU, Department of Rural Economy and Agriculture, 2010). Available at http://www.achpr.org/instruments/policy-framework-pastoralism/

1287 See Report from African Union workshop on supporting pastoralists on Web site of Pastoral and Environmental Network in the Horn of Africa (PENHA) http://www.penhanetwork.org/pages/African%20Union

The African Commission on Human and Peoples' Rights (ACHPR)

The establishment of the African Commission was provided for by the African Charter and was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. A few years later, a permanent Secretariat was secured for the Commission in Banjul, The Gambia.

The ACHPR is composed of 11 commissioners elected by secret ballot by the Assembly of Heads of States and Governments of the African Union (AU) for a 6-year renewable term. Its mandate is to promote and protect human and peoples' rights in Africa and to interpret the African Charter on Human and Peoples' Rights. The Commission focuses on promotional activities, which includes awareness-raising, fact-finding missions as well as documenting and collecting information relating to human and peoples' rights in Africa through various mechanisms as for instance Special Rapporteurs and Working Groups within specific areas of concern. During each session, the ACHPR also examines the periodic reports of African states, in accordance with Article 62 of the African Charter on Human and Peoples' Rights.

The ACHPR Working Group on Indigenous Populations/Communities

It took the African Commission of Human and Peoples' Rights (ACHPR) almost fifteen years to address the issue of indigenous peoples' rights seriously. The very first steps were taken in 1999, during the 26th ACHPR session in Kigali, Rwanda, when the Commission began debating the human rights situation of indigenous populations/communities and a Committee made up of three Commissioners was constituted with the mandate to consider the issue of indigenous peoples in Africa and advise accordingly. In 2000, during the 28th Ordinary Session in Benin, the situation of indigenous peoples was for the first time included as a separate item on the agenda and a "Resolution on the Rights of Indigenous Populations/Communities in Africa" was adopted resolving to set up a working group with the mandate to:

- Examine the concept of indigenous peoples and communities in Africa
- Study the implications of the African Charter on the human rights and well-being of indigenous communities especially with regard to:
  – the right to equality (Article 2 and 3)
  – the right to dignity (Article 5)
  – the protection against domination (Article 19)
  – the right to self-determination (Article 20) and
  – the promotion of cultural development and identity (Article 22)
- Consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities
- Submit a report to the African Commission.[1288]

1288 See The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2001-2002*, (Copenhagen: IWGIA 2002), 452-456. See also African Commission, *Report of the Working Group of Experts* (2005), p. 69.

The Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa was officially established by the African Commission at its 29th Ordinary Session in Libya, in 2001. It is a small task force to which a few people are nominated by the African Commission in their personal capacity as experts. It was originally composed of three Commissioners and four—three indigenous and one independent—experts. The mandate of the Working Group has been renewed every two years since its establishment. In 2007, the number of experts was increased with two new members.[1289]

The Working Group came up with its report in 2003.[1290] In this report, which was received with unprecedented acknowledgement by the African regional human rights body, the Working Group concluded that there are indigenous peoples in Africa, that they suffer from particular discrimination, that the African Charter on Human and Peoples' Rights provides special protection to those communities, which suffer from particular discrimination. The report made also numerous recommendations to the African Commission on Human and Peoples' Rights.

Today, this Report has become a valuable document for advancing rights of indigenous peoples on the continent. In relation to lands, the Report states clearly that "the protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both to Articles 20, 21, 22, and 24 of the African Charter."[1291]

The Working group bases its work on the African Charter as well as on four other main legal instruments: the ILO Convention No.169 Indigenous and Tribal Peoples Convention, 1989; the United Nations Declaration on the Rights of Indigenous Peoples, 2007; the AU Policy Framework for Pastoralism in Africa (2010) and the AU Framework and Guidelines on Land Policy in Africa (2010).[1292]

The Working Group has since its inception, undertaken numerous activities. These include, among others, 17 country visits (of which three were follow-up visits).[1293] The country missions review indigenous peoples' human rights situation in a given African country based on meetings with all relevant stakeholders (government officials, national human rights institutions, civil society and international organizations, academic institutions and indigenous communities) in order to gather as much information as possible and to establish a dialogue about indigenous peoples' situation in

1289 For more information, see IWGIA's website at http://www.iwgia.or

1290 The Report was published by the ACHPR in cooperation with the International Work Group for Indigenous Affairs (IWGIA) in 2005 in English and French under the title *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities—submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa" adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session*. A summary of the Report, *Indigenous Peoples in Africa: The Forgotten Peoples?* has been published in English, French, Arabic and Portuguese, and is also available in Tamazight, Fulani, Kirundi and Maa. Available in English online at http://www.iwgia.org/sw2186.asp and http://www.achpr.org/english/_info/wgip_others.htm

1291 ACHPR, Report of the Working Group (2005), p. 21.

1292 See Web page of the Working Group at htt://www.achpr.org/mechanisms/indigenous-populations/

1293 Visits have been made to Burundi (April 2005), Botswana (June 2005), Namibia (July – August 2005), Libya (August 2005), Congo Brazzaville (September 2005 and March 2010), Niger (February 2006), Uganda (July 2006), Central African Republic (January 2007 and March 2012), Gabon (September 2007and July 2012), Rwanda (December 2008), Burkina Faso (February 2009), Democratic Republic of Congo (August 2009) Kenya (March 2010) and Tanzania (February 2013).The Working Group's country visits reports can be accessed at the Web sites of the ACHPR—http://www.achpr.org—and IWGIA—http://www.iwgia.org/sw2186.asp

the country. Another kind of activity are the sensitization seminars that seek to raise awareness about the African Commission's policy and work on indigenous issues. The seminars are also intended to provide a platform for dialogue between various national stakeholders as well as between these stakeholders and the African Commission. To date, regional sensitization seminars have been held in Cameroon, Ethiopia, and the Republic of Congo. Media sensitization seminars have been held in Tanzania and Rwanda.[1294]

The Working Group has also, in collaboration with the ILO and the Human Rights Centre of the University of Pretoria in South Africa, produced a report on constitutional and legislative provisions relevant to indigenous peoples' rights in twenty four African countries.[1295] The Working Group also co-organizes, with the University of Pretoria's Centre for Human Rights and the ILO, a one-week intensive course on the rights of indigenous peoples in Africa each year.The latest ACHPR publication (in collaboration with the International Work Group for Indigenous Affairs – IWGIA) is a manual designed as a training tool for indigenous rights activists in Africa.[1296] It is also intended to be a practical instrument for use in the training of judicial officers, lawyers, media activists and government officials on indigenous rights in Africa. In 2011, the Working Group produced a video film entitled "A Question of Justice: The Rights of Indigenous Peoples in Africa" which is being widely distributed to all stakeholders. The film has been officially launched in many countries (Tanzania, Kenya, Cameroon, DRC, CAR, Republic of Congo, Burundi, Uganda, Gabon). Finally, it should also be mentioned that the Working Group is involved with the promotion of indigenous peoples' human rights at the international level where it seeks to collaborate with all relevant U.N. human rights mechanisms as well as with other human rights' regional mechanisms such as the Inter-American Commission on Human Rights and the ASEAN Intergovernmental Commission on Human Rights.

In 2009, the Working Group decided that urgent human rights situations relating to indigenous peoples should be brought to the attention of the Working Group so that the Working Group could make urgent appeals to governments on critical issues. Since then, urgent appeals have been sent to the president of Tanzania (in 2009 and 2010, concerning the serious human rights abuses that were being committed in relation to the forced evictions and destruction of property belonging to the Maasai community in Loliondo, northern Tanzania),[1297] and to the governments of Botswana (in 2010, regarding the situation facing the San communities in the Kalahari Desert, especially in relation to their right to access water on their ancestral land) and Rwanda (2011, regarding the destruction of Batwa huts, leaving several thousand Batwa without shelter or food).

Compared with the situation some thirteen years ago (2000), when the situation of indigenous peoples for the first time was put on the agenda of an ordinary session of the African Commission as a separate item,[1298] major progress have been made in highlighting the rights of indigenous

1294 Publicly available reports are being produced from all these visits and seminars. See Web sites of ACHPR and IWGIA.

1295 The government of Tanzania finally replied to the appeal in December 2010.

1296 ILO/ACHPR, Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries (Geneva and Banjul, The Gambia: 2009).

1297 ACHPR & IWGIA, *Manual on the Promotion and Protection of the Rights of Indigenous Populations / Communities through the African Human Rights System* (Banjul, The Gambia & Copenhagen: ACHPR & IWGIA, 2012)

1298 In October 2000 at the 28th Ordinary Session of the African Commission.

peoples throughout Africa and within the Commission itself. Indigenous concerns are today taken on by the Commission on a regular basis and during the different state report examinations, for instance, the Chairperson of the Working Group makes sure that the issue of indigenous peoples' rights is raised and clarified. Shadow reports submitted by NGOs and indigenous organizations also provide alternative sources of information and assist the ACHPR's commissioners in asking substantiated critical questions on indigenous peoples during the constructive dialogue with the state and in the drafting of the concluding observations. The Commission has also adopted several resolutions dealing with indigenous rights.[1299]

The African Court on Human and Peoples' Rights

Since the creation of the Working Group on Indigenous Populations/Communities, the African Commission has remained interested in the human rights situation of indigenous peoples via numerous other mechanisms including the examination of States parties' periodic reports. The African Commission also receives land-related communications. This was, for example, the case of the indigenous Endorois people of Kenya claiming ancestral lands around the Lake Bogoria. As already mentioned, the Commission has recently concluded this case in favour of the Endorois people and has issued a number of strong recommendations to the government of Kenya. Complaints can be filed by individuals, NGOs, groups of individuals and indigenous peoples, either on their own behalf or on behalf of others. The author (i.e., the person/entity submitting the complaint) need not reside in the state against which the complaint is made. Allegations must be about "*a series of serious or massive"* violations of human and peoples' rights by a State party to the Charter. There are indeed very particular procedures and formalities to respect as detailed in a publication by Forest Peoples Programme.[1300]

Until recently, however, there has not been any mechanism to enforce decisions taken by the Commission. This has prompted the interest in establishing an African human rights court, and in April 2005, at the 37th session of the ACHPR, a resolution was adopted on the establishment of an African Court on Human and Peoples' Rights to sit in Arusha/Tanzania. The appointment of judges took place in January 2006 and the Court became fully operational in 2010-2011. In the meantime (2008) the AU decided to merge the court with the African Court of Justice under the name of the African Court of Justice and Human Rights and setting up two sections—a General Affairs Section and a Human Rights Section. Only the latter shall be competent to hear all cases relating to human and/or peoples' rights[1301] Meant to issue legal binding decisions, this section of the court can be seized by the African Commission on Human and Peoples' Rights and

1299 See, e.g., the Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, (# 153, 46th Session, 2009); Resolution on the Protection of the Rights of Indigenous Women in Africa, (# 190, 49th Session, 2011); and Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site (#197, 50th Session, 2011). See at Web page of the ACHPR at http://www.achpr.org

1300 See Forest Peoples Forests Programme Web site: http://www.forestpeoples.org/documents/africa/af_com_brf_human_rights_oct01_eng.shtml

1301 A Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court was adopted on 9 June 1998 and entered into force in 2004. OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). See also the Web site of the court: http://www.african-court.org/en

states, and in certain circumstances by NGOs and individuals.[1302] The first indigenous rights case to come before the court has been the Ogiek case and on 15 March 2013, the Court issued provisional measures to ensure that the Ogiek people of the Mau forest cannot be evicted by the Kenyan government, while the matter continues before the court.

Other African regional bodies

There are several other African sub regional organizations with rules and laws that could be helpful in ensuring a better protection and promotion of indigenous peoples' right to lands. The most relevant seems to be the **Southern African Development Community (SADC)** that comprises 14 African countries from DR Congo and southwards. Article 3.2(g) of its Forestry Protocol[1303] provides for respect of communities' rights, stating that, in order

> *[t]o achieve the objectives of this Protocol, States Parties shall co-operate by*
> *…*
> *promoting respect for the rights of communities and facilitating their participation in forest policy development, planning, and management with particular attention to the need to protect traditional forest-related knowledge and to develop adequate mechanisms to ensure the equitable sharing of benefits derived from forest resources and traditional forest-related knowledge without prejudice to property rights.*

This Protocol insists also on occupation of lands by communities (Articles 12 and 16). Similar principles and rules are upheld in SADC's Protocol on Wildlife Conservation and Law Enforcement.[1304]

The New Partnership for African Development (NEPAD) is another institution that has developed rules that could contribute to the protection of indigenous peoples' right to lands. One of its mechanisms is known as the African Peer Review Mechanism (APRM), an instrument voluntarily acceded to by member states of the African Union (AU) and put in place to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the African Union's Declaration on Democracy, Political, Economic and Corporate Governance. In 2005, for instance, the APRM recommended an in-depth dialogue between the government of Rwanda and the Batwa after the following finding:

1302 As noted in the ACHPR & IWGIA Manual, it is significantly more difficult for individuals or advocacy organizations to bring cases to the African Court than to the African Commission since Article 34(6) of the Protocol provides that NGOs with observer status with the African Commission or individuals are only able to submit individual petitions in circumstances where the State party lodging a complaint or responding to a complaint has filed a declaration recognizing the African Court's competence to hear and determine individual petitions. In 2012, only Mali, Malawi, Tanzania, Ghana and Burkina Faso had made declarations under Article 34(6) recognizing the competence of the African Court to receive and determine individual complaints. See ACHPR & IWGIA, Manual (2013), p. 18.

1303 The text of the Protocol on Forestry is available online at http://www.sadc.int/index.php

1304 Available online at: http://www.sadc.int/index/browse/page/164

> With respect to the Batwa minority, the approach adopted by the authorities was based on a policy of assimilation. There appears to be a desire to obliterate distinctive identities and to integrate all into some mainstream socio-economic fabric of the country.[1305]

The Economic Community of West African States (ECOWAS) has legal instruments that provide for the rights to culture, environment and non discrimination but they do not contain anything specific regarding the protection of indigenous peoples' land rights.

Multilateral Development Banks

Development Banks provide financial support and professional advice for economic and social development activities in developing countries. The term Multilateral Development Banks (MDBs) typically refers to the World Bank Group[1306] and four regional development banks: the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Development Bank and the Inter-American Development Bank (IDB).[1307]

Another important international financial mechanism is the Global Environment Facility (GEF) that has become the largest funder of projects to improve global environment.[1308] Although the GEF is an independent financial entity, its projects and programmes are implemented through agencies, as for instance the UNDP, the World Bank, and the AfDB.

The World Bank as well as the Asian Development Bank,[1309] the Inter-American Development Bank,[1310] the European Development Bank[1311] and the GEF[1312] have all developed policies or strat-

1305 NEPAD, African Peer Review Mechanism (APRM), Country Review Report of the Republic of Rwanda, November 2005, paras. 153 and 156: http://www.nepad.org/2005/files/aprm/FINAL_RWANDA_REPORT_SEPT_22_2006.pdf

1306 The World Bank Group is made up of five institutions: the International Bank for Reconstruction and Development and the International Development Association—IDA—(known as the World Bank), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).

1307 The regional banks are characterized by a broad membership, including both borrowing developing countries and developed donor countries, and not limited to member countries from the region. Each bank has its own independent legal and operational status—but with a similar mandate and a considerable number of joint owners, the MDBs maintain a high level of cooperation.

1308 The GEF has since 1991 assisted countries in meeting their obligations under the conventions that they have signed and ratified, such as the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change, the U.N. Convention to Combat Desertification (UNCCD), etc. GEF provides grants for projects related to the following six focal areas: biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants.

1309 On Asian Development Bank (ADB)'s policy "Sharing Development with Indigenous Peoples" and other policy documents, see http://www.adb.org/IndigenousPeoples/default.asp

1310 On Inter-American Development Bank (IDB)'s Strategy for Indigenous Development, see http://www.iadb.org/sds/IND/site_401_e.htm

1311 On European Development Bank's "Guidance Note on Indigenous Peoples" (2010), see http://www.ebrd.com/pages/research/publications/guides/indp.shtml

1312 On GEF's Focal Area Strategies and Strategic Programming for GEF-4 (2007), see http://thegef.org/interior.aspx?id=18428

egies that deal with indigenous peoples. Unlike its continental counterparts, the African Development Bank (AfDB) does not have an indigenous peoples policy, although the existence of indigenous populations/communities on the African continent has been recognized by AU and ACHPR. The absence of such a policy has been strongly criticized[1313] and in February 2013, the Bank agreed to host a Forum on Indigenous Peoples Development Issues in Africa, in which representatives from the ACHPR Working Group and indigenous organizations among others participated. The purpose of the Forum was, inter alia, to "inform the Bank's decision to establish guidelines and programmes on indigenous peoples, in accordance with international standards to ensure, functional and culturally-sensitive mechanisms for full and effective consultation, participation, of indigenous peoples on programmes which may affect them directly". The outcome of the forum, however, is not expected to be a stand-alone safeguard policy on indigenous peoples but it is anticipated that the Bank's new set of environmental and social safeguard policies will explicitly recognize the rights of indigenous peoples in some form. This is a positive step forward for AfDB and reflects a growing acceptance of indigenous peoples' rights on the continent.[1314]

The World Bank and indigenous peoples' land rights

The World Bank remains the most relevant multilateral development bank in an African context, with almost 800 active projects across the continent,[1315] including GEF funded projects.

Operational Directive (OD) 4.20

The World Bank's first major effort towards better protection of indigenous peoples' land rights resulted in the 1991 Operational Directive (OD) 4.20 on indigenous peoples—in force until 2005. As a positive input, the Directive provided a broad understanding of the concept "indigenous peoples", and required prior consultation with indigenous groups, whose lands were to be affected by Bank supported projects.[1316]

Following consultations, borrowers were required to present an "indigenous peoples development plan", which, among many other prerequisites, should ensure "a proper protection of the rights of indigenous peoples".[1317] Regarding land, the indigenous development plan should give "[p]articular attention… to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction."[1318] Furthermore, "when local legislation [regarding land ten-

1313 See, e.g., Web site of the CSO Coalition on the African Development Bank , http://www.coalition afdb.org.
1314 See "African Development Bank set to introduce Indigenous Peoples standards for the first time" at http://www.forestpeoples.org
1315 As per June 2013. See World Bank projects portfolio for Africa on http://www.worldbank.org
1316 World Bank, OD 4.20, para. 8. Can be accessed at http://www.austlii.edu.au/au/journals/AILR/2003/14html
1317 Ibid., para. 15.
1318 Ibid., para. 15(a).

ure] needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples."[1319]

However, when it came to communities' right not to be removed from their homeland, OD 4.20 contained ambiguous and problematic provisions that in fact limited indigenous peoples' rights to land.[1320]

In 1993, the Inspection Panel, a three-member body, was created to provide an independent mechanism, whereby groups of two or more citizens, who found that they or their interests had been—or could be—directly harmed by a project financed by the World Bank, could present their concerns through a request for inspection.

On the African continent, both OD 4.20 and the Inspection mechanism have been used. In 2000, for example, and following the World Bank's participation in the financing of the US$3.7 billion Tchad-Cameroon pipeline project that affected, amongst others, the "Pygmies" of Cameroon, the Cameroonian government drew up, as required by OD 4.20, a US$600,000 "Indigenous Peoples Plan" covering a 28 year period. In 2002, the Panel received a Request for Inspection based on a complaint by, among others, indigenous communities who claimed that the World Bank did not live up to its own policy standards. The inspection took place in 2003, but since the Inspection Panel is not a judiciary body and its decisions are not binding for the World Bank, not much came out of this procedure in terms of benefits to the communities. The Inspection Panel has also taken up a complaint from "Pygmies" living in the Democratic Republic of Congo, and who believe that ongoing reforms of the forest sector sustained by the Bank fail to protect their rights. As a result of this action, measures are currently being considered by the Congolese government and its international partners in order to raise the standards of protection and recognition of the rights of indigenous peoples affected by forest reforms.[1321] Despite the criticism that may be leveled against the Inspection Panel, it remains a mechanism available to indigenous peoples.

Operational Directive 4.20 has been criticized for not having been "fully respected, partly because of uncertainties of interpretation and significant practical difficulties of implementation ... also because of the innovative character of the policy and the unfamiliarity of some task managers with indigenous peoples' issues".[1322] Indigenous peoples have also been critical and consistently demanded that World Bank policies provide, among other things, for their right to free, prior and informed consent and the recognition and protection of territorial rights. They have also pointed out that the World Bank Group's own evaluations demonstrate consistent failures to adhere to its own policy prescriptions and that compliance, enforcement and grievance mechanisms must be incorporated into project instruments.[1323]

1319 Ibid., para. 15(c).

1320 See, e.g., ibid., para. 15(c).

1321 See, e.g., Roger Muchuba, "The Indigenous Voice in the REDD process in the Democratic Republic of Congo", *Indigenous Affairs* 1-2/09 on REDD and Indigenous Peoples (Copenhagen: IWGIA 2009).

1322 Kingsbury, "Indigenous Peoples in International Law" (1998), p. 443.

1323 Fergus MacKay, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or more of the same?" *The Arizona Journal of International and Comparative Law Online,* 22, 1 (2005), pp. 68-69. Available online at http://www.law.arizona.edu/journals/ajicl/AJICL2005/vol221/vol221.htm

Operational Policy (OP) and Bank Procedures (BP) 4.10

On May 10, 2005, the Executive Directors of the World Bank approved a revised safeguard policy on indigenous peoples—OP/BP4.10—in substitution of the Operational Directive 4.20. The result of a protracted and contentious revision process, including a number of workshops with indigenous participants, OP/BP4.10, however, does not live up to the expectations of indigenous peoples, even though certain of its elements may be considered improvements.[1324]

When dealing with land and land rights, OP/BP4.10 is far more detailed than OD 4.20.[1325] Indigenous peoples' close ties "to land, forests, water, wildlife, and other natural resources" are thus recognized as well as the need for "special considerations … if the project affects such ties". Paragraph 16 thus stipulates that particular attention is to be given to:

a. the customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods;
b. the need to protect such lands and resources against illegal intrusion or encroachment;
c. the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources; and
d. Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices.[1326]

Regarding land tenure, paragraph 17 stipulates that the Indigenous Peoples Plan (IPP) sets forth an action plan for the legal recognition of land ownership, occupation, or usage. Such legal recognition may take different forms. If these options are not possible under domestic law, the IPP includes measures for legal recognition of perpetual or long-term renewable custodial or use rights."[1327]

Paragraph 20 concerns physical relocation, which should be "avoided" and is an option only "in exceptional circumstances, when it is not feasible to avoid [it]". In such cases, "the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process".[1328]

In his critical analysis of the final Draft World Bank Operational Policy 4.10, Fergus MacKay points out that the terminology used in the above mentioned paragraphs 16 and 17 is often confusing and undefined, and that "there is not a clear statement in the OP that prior resolution of and adequate guarantees for indigenous peoples' rights to lands, territories, and resources are required in relation to all projects that affect indigenous peoples' lands, territories and

1324 Ibid., p. 97.
1325 The text of OP/BP4.10 is available online at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html
1326 World Bank, OP/BP4.10, para. 16.
1327 Ibid., para. 17.
1328 Ibid., para. 20.

resources".[1329] He also argues that "the conversion of customary rights to individual ownership rights without the express free, prior and informed consent of the affected indigenous peoples is contrary to human rights law and indigenous peoples' cultures and customs".[1330] On the other hand, certain paragraphs, especially Paragraph 20 on physical relocation, represent a significant evolution in thinking within the Bank.[1331]

But as critiques note, the extent of the potential improvements in OP 4.10 ultimately turns on the definition of what the World Bank's Operational Policy calls "free, prior and informed consultation" resulting in "broad community support". OP/BP 4.10 states that,

> For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.[1332]

Free, prior and informed consultation is understood by the World Bank as a

> [C]ulturally appropriate and collective decisionmaking process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a veto right for individuals or groups.[1333]

The World Bank has been severely criticized for using the word "consultation" rather than "consent", which is enshrined in the U.N. Declaration on the Rights of Indigenous Peoples. This is obviously an issue to be addressed by the World Bank if it has to be consistent with international law. The Bank is also criticized for not defining what "broad community support" means and for not providing

> [A]ny prompt and simple mechanism for indigenous peoples to challenge and complain about faulty or false assessments of broad community support nor require that such support and the conditions thereof be subject to written agreements between the borrower and affected indigenous peoples. Without prompt and effective grievance, complaints and verification mechanisms, adherence to OP/BP4.10 is largely dependent on the good will of the borrower and the Bank.[1334]

In 2008, responding to a complaint by several NGOs working on indigenous peoples' rights in DR Congo, the Inspection Panel of the World Bank came up with the following conclusion:

1329 MacKay, "The Draft World Bank Operational Policy 4.10" (2005), p. 92.
1330 Ibid.
1331 Ibid., p. 95.
1332 World Bank, OP 4.10, para. 1.
1333 Ibid., para. 1n4.
1334 MacKay, "The Draft World Bank Operational Policy 4.10" (2005), p. 98.

> The Panel found, however, that there was a failure during project design to carry out the necessary initial screening to identify risks and trigger the safeguard policies so that crucial steps would be taken to address needs of the Pygmy peoples and other local people.[1335]

Recent developments

According to a Learning Review on the Implementation of the World Bank's Indigenous Peoples Policy published in 2011,[1336]132 projects worldwide triggered OP 4.10 in the period July 2005-June 2008, equivalent to about 12 percent of the total number of all projects approved by the World Bank during the same period.[1337] In Sub-Saharan Africa, however, the percentage of projects that triggered OP 4.10 was only 1.43 % of the projects (or 25 projects out of 1.748). This percentage has probably increased since then as recent surveys show much higher percentages in countries like DRC[1338] and Kenya.[1339]

The above mentioned Learning Review concludes that there is scope for improvement in all the regions, "both in terms of triggering the policy, once there is evidence that distinct, vulnerable, social and cultural groups, meeting the criteria of OP 4.10 (para. 4) are present, and ensuring quality in complying with the policy provisions".[1340] It does not, however, address the issue of which vulnerable groups should be targeted and it should be noted that the current Indigenous Peoples Plans (IPPs) or Planning Frameworks (IPPFs) in African countries only address the situation of hunter-gatherers—in DRC, the "Pygmies"; in Kenya, the Ogiek, the Sengwer, the Waata, and the Aweer/Boni—and in the latter country of a single agro-pastoralist group, the Ilchamus. To date, no pastoralist groups have been the subject of IPPs or IPPFs.

The review also highlights areas that require further improvement in order to ensure full compliance with the policy and "noting that many projects targeting or impacting Indigenous Peoples do not address issues related to land and resource rights, which are important to the wellbeing of Indigenous Peoples, [it recommends that] the Bank should pay special attention to identifying and addressing these issues.[1341]

The World Bank is currently undertaking a two year "review and update" of eight of its ten social and environmental safeguard policies, including OP 4.10. Although World Bank Group President Jim Yong

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1335 World Bank Africa, New Release No. 2008/188/AFR, See complete report of the Inspection Panel at: http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FINALINV

1336 See Operations Policy and Country Services (OPCS) Working Paper "Implementation of the World Bank's Indigenous Peoples Policy—A Learning Review (FY 2006-2008)" (August 2011) at http://go.worldbank.org/IBZABS9UU0

1337 A positive finding to be noted was that, during this period, there had been a small increase (from 12 in 1992-2004 to 15 in 2005-2008) in the number of self-standing Indigenous Peoples projects.

1338 Ever since the World Bank's Inspection Panel, acting on a formal complaint made in 2005 by Pygmy organizations and support organizations in DRC, came up with the conclusion that there had been a failure during the design of two projects, the WB has heightened its attention to safeguards issues. In DRC, almost 50 per cent of the Bank's active projects in late 2011 had triggered OP.4.10 and included an Indigenous Peoples Plan (IPP) or an Indigenous Peoples Planning Framework (IPPF). See IFAD Country Technical Note at http://www.ifad.org/english/indigenous/pub/documents/tnotes/congo_dr.pdf

1339 In Kenya 12 WB projects (or every third active projects in January 2012) have triggered the WB OP 4.10, including IPPs. See IFAD Country Technical Note at http://www.ifad.org/english/indigenous/pub/documents/tnotes/Kenya.pdf

1340 See OPCS Working Paper, op.cit. (2011), p. vi.

1341 Ibid. (2011), p. viii.

Kim has publicly committed the Bank to ensuring that the review process will not result in dilution of existing standards, serious concerns remain about both the content and scope of the review and the process for public consultation on the development of a new safeguard framework. The Permanent Forum on Indigenous Issues, indigenous peoples and civil society organizations have urged the Bank to review its policies and to bring them into line with legal standards arising from international human rights law as outlined in the Declaration.[1342] It is also hoped that a new integrated framework will include binding standards on key emerging issues, including human rights, FPIC and land acquisition, among others. It is expected that the review team will present an integrated safeguard policies framework in late 2013.[1343]

Major donor agencies targeting indigenous peoples

United Nations agencies and indigenous land rights

Several U.N. agencies have developed policies or guidelines on indigenous peoples, with clear statements regarding land rights. This is the case of the United Nations Development Programme in its policy statement "UNDP and Indigenous Peoples: A Practice Note on Engagement" (2007),[1344] which, among other things, states that

> UNDP promotes the recognition of indigenous rights to lands, territories and resources; laws protecting indigenous lands; and the inclusion of indigenous peoples in key legislative processes;

and

> recognizes the rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands.[1345]

In its "Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies", the United Nations High Commissioner for Human Rights (UNHCHR) underlines that "efforts must be made to secure indigenous peoples' right to the lands (including forests, grazing lands and other common property resources) on which they depend for their food."[1346]

1342 See Review of World Bank operational policies. U.N. Doc. E/C.19/2013/15 at http://undesadspd.org/IndigenousPeoples.aspx

1343 See Forest Peoples FPP E-Newsletter "Safeguarding Human Rights in International Finance" (April 2013), at http://www.forestpeoples.org See also Review and Update of the World Bank Safeguard Policies at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html

1344 Available online at http://www.undp.org/biodiversity/pdfs/CSODivisionPolicyofEngagement.pdf

1345 UNDP, *UNDP and Indigenous Peoples: A Practice Note on Engagement* (2007), paras. 29 and 30.

1346 The OHCHR Draft Guidelines are meant to help countries eligible to debt cancellation streamline human rights into their efforts and policies to fight poverty. See http://www2.ohchr.org/english/issues/poverty/guidelines.htm. The author of this book was one of the consultants who contributed to this project commissioned by the Office of the U.N.

It should also be mentioned that through their participation in the Inter-Agency Support Group to the UNPFII, most United Nations agencies have now stepped up their involvement with indigenous peoples. To name a few: the U.N. Food and Agriculture Organization (FAO) has initiated a wide programme on conservation and adaptive management of Globally Important Agricultural Heritage Systems (GIAHS) aiming to establish the basis for the global recognition, conservation and sustainable management of such systems and their associated landscapes, biodiversity, knowledge systems and cultures. In Africa, one of the systems and sites identified are the Traditional Maasai Pastoral Rangeland Management (Kenya and Northern Tanzania).[1347] The International Fund for Agricultural Development (IFAD) has also a long tradition for working with indigenous peoples, notably with the purpose of ensuring their land rights.[1348] In 2009, IFAD adopted its Policy on Engagement with Indigenous Peoples. In 2013, in response to the request of indigenous peoples that have repeatedly asked for a more systematic dialogue with United Nations agencies, IFAD held the first global meeting of the Indigenous Peoples' Forum at IFAD.[1349]

The European Union and indigenous peoples' right to lands

The development of a European Union policy on indigenous peoples is relatively recent. In 1998, the Council of Ministers of the European Union adopted a Council Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Members States, which provides the main guidelines for support to indigenous peoples.

In this Resolution, the Council calls for "concern for indigenous peoples to be integrated into all levels of development cooperation, including policy dialogue with partner countries". It also encourages "the full participation of indigenous peoples in the democratic processes of their country" within an approach that "asserts they should participate fully and freely in the development process", recognizing "their own diverse concepts of development" and "the right to choose their own development paths", including "the right to object to projects, in particular in their traditional areas" and "compensation where projects negatively affect the livelihoods of indigenous peoples". It thereby acknowledges the importance that indigenous peoples attach to their own self-development, that is, the shaping of their own social, economic and cultural development and their own cultural identities. The Resolution states, "indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a potential resource to the entire planet".[1350]

High Commissioner for Human Rights. The human rights approach is today endorsed by many states' donor agencies, like for instance those of Sweden, Norway and the United Kingdom.

1347 See http://www.fao.org/sd/giahs/africa.asp

1348 See http://www.ifad.org/english/indigenous/index.htm

1349 See Website of IFAD at http://www.ifad.org/english/indigenous/forum/index.htm

1350 European Commission, Council Resolution of 30 November 1998: "Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States". 214th Council Meeting – Development. Brussels (1998b). Available online at http://www.ec.europa.eu/external_relations/human_rights/ip/docs/council_resolution1998_en.pdf. The Resolution was grounded on the European Commission, "Working Document of the Commission on Support for Indigenous

In 2002, a Review of Progress of Working with Indigenous Peoples—as required by the 1998 Council Resolution—restated the need for recognition of indigenous peoples' right to land.[1351] Following the review, a Conference on Indigenous Peoples, was held in Brussels in June 2002 with indigenous representatives. On the basis of the conclusions reached at this conference, the Council adopted on November 18, 2002 a document entitled "Conclusions on indigenous peoples issues". In this document, the Council recalls its commitment to the 1998 Resolution and invites the Commission and the member states to continue implementing it. It also invites the Commission to "mainstream indigenous peoples issues into the European Union's policies, practices and work methods. Where relevant, indigenous peoples should be able to fully and effectively participate at all stages of the project cycle (programming, identification, planning, implementation, and evaluation".[1352] In 2005, the Council and the representatives of the member states issued a joint statement entitled "The European Consensus on Development" which confirmed earlier commitments, stating, among other things, that, "the key principle for safeguarding indigenous peoples' rights in development cooperation is to ensure their full participation and the free and prior informed consent of the communities concerned".[1353]

The EU has also been very instrumental in the adoption of the Convention on Biological Diversity and numerous other international processes and instruments dealing with indigenous peoples. Since 1999, the rights of indigenous peoples have been included as a thematic priority under the European Instrument for Democracy and Human Rights (EIDHR), which has become an important source of funds for research and development projects focusing on indigenous peoples.[1354] It is also understood that the EU is in the process of integrating support for promoting the rights and issues of indigenous peoples within the European Commission's cooperation with the ACP (African, Caribbean and Pacific) countries.

National donor agencies

Within Europe, and apart from countries like Sweden, Norway and Finland that have their own indigenous communities (the Saami), there are also individual European countries, without self-identified indigenous peoples, which have introduced relevant standards for the protection of indigenous peoples into their development aid policies. These countries include Denmark that

Peoples in the Development Co-operation of the Community and the Member States" (1998a). This Document is available online at http://www.ec.europa.eu/external_relations/human_rights/ip/work_doc98.pdf

1351 European Commission, "Review of progress of working with indigenous peoples", Brussels, 11.6.2002, COM (2002) 291 final (2002a). Available online at http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0291:FIN:EN:PDF

1352 The Conclusions of the EU Council (2002b) are available (as a summary) online at http://www.europa.eu/legislation_summaries/development/sectoral_development_policies/r12006_en.htm

1353 European Commission, "The European Consensus on Development – Joint statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission" (2005). Available online at http://ec.europa.eu/development/icenter/repository/eu_consensus_en.pdf

1354 See on the Web site of the European Union: http://ec.europa.eu/comm/external_relations/human_rights/doc/com02_291.htm

issued the Danish Strategy for Support to Indigenous Peoples in 1994. This strategy proposes the integration of indigenous issues into policy-dialogue and development practices and increased financial support to projects addressing the issues of self-determination, land-rights, capacity building, bilingual education, and the sustainable use of natural resources. It also proposes that programme components and projects address territorial and environmental issues of indigenous peoples through assistance to the conservation, improvement, and sustainable use of the territories, lands, and natural resources. A revised version of this Strategy was adopted in 2004. This strategy aims at integrating the concern for indigenous peoples at all levels of Denmark's foreign policy and development cooperation, and raise indigenous issues through policy dialogue with partner countries.[1355] In 2011, the Danish Foreign Ministry published "How to Note Indigenous Peoples" with the purpose of translating the strategic directions into hands-on guidance and inspiration for Denmark's efforts to ensure that the enabling normative framework for indigenous peoples' rights leads to real improvements on the ground.[1356]

The Norwegian Agency for Development Cooperation (NORAD)'s policy is entitled "Norway's Efforts to Strengthen Support for Indigenous Peoples in Development Cooperation—A human rights-based approach" and. was adopted in 2004.[1357] It states, inter alia, that Norway will "continue to include and strengthen the human rights perspective in Norway's efforts to support indigenous peoples" and "intensify efforts to support indigenous peoples, particularly in Africa and Asia".

The cross-sectoral Strategy of the German Federal Ministry for Economic Cooperation and Development (BMZ) entitled "Human Rights in German Development Policy—Strategy" was adopted in 2011 and serves as a frame of reference for the activities undertaken by among others GIZ (Deutsche Gesellschaft fûr Internationale Zusammenarbeit). It states that "Human rights are a guiding principle for German development policy… and form the overarching framework for development policy that is aimed at the strategic promotion of the rights of….. indigenous peoples and other marginalized social groups".[1358] Other European countries, like Spain, have adopted strategies for their cooperation with indigenous peoples.[1359]

1355 Danish Ministry of Foreign Affairs (DANIDA), 2004, Strategy for Danish Support to Indige- nous Peoples. Available online at http://www.netpublikationer.dk/um/5717/index.htm

1356 Available at http://danida-publikationer.dk/?sc_lang=en

1357 Available at http://www.norad.no/en/tools-and-publications/publications/publication?key=109549

1358 The Strategy is available at http://www.bmz.de/en/publications/type_of_publication/strategies/Strategiepapier305_04_2011.pdf

1019 Spanish Strategy Paper for Cooperation with Indigenous Peoples (1997) has been updated in 2006 and is available online at http://www.aecid.es/galerias/programas/Indigena/descargas/ecepi.pdf

1359 Spanish Strategy Paper for Cooperation with Indigenous Peoples (1997) has been updated in 2006 and is available online at http://www.aecid.es/galerias/programas/Indigena/descargas/ecepi.pdf

CHAPTER XII
GENERAL CONCLUSIONS AND RECOMMENDATIONS

Africa is home to a number of communities that identify themselves—and are being identified by the African Commission on Human and Peoples' Rights—as indigenous. These communities are characterized by having, for centuries, "experienced subjugation, marginalisation, dispossession, exclusion or discrimination"[1360] by colonial powers and modern nation-states. They, nevertheless, persist, as confirmed by the 2005 Report of the African Commission on Human and Peoples' Rights, in attaching a multidimensional importance to their ancestral lands. For these communities, lands are not just commodities but the base for their way of life and survival as distinct peoples. Yet, their access to these lands is constantly being threatened by the building of nation-states, industrial farming, free market-oriented land management, conservation interests, mining, logging, fishing, and other extracting activities, thereby putting their very existence in jeopardy.

This is the reason why African indigenous communities, when their land rights are being denied or threatened, resist as best as they can and why they sometimes have used judicial venues as a way of addressing their predicament.

Yet, as this book has shown, there is a long way to go in terms of protection of indigenous peoples' rights to lands by the African judiciary, and indigenous communities seeking legal redress face a number of constraints.

Like other indigenous communities, African indigenous communities base their land claims on immemorial or —for some nomadic pastoralists—centuries long occupation and use of specific land areas. For many years, the concept of *terra nullius* was used worldwide to contest indigenous peoples' land rights. In 1975, however, the International Court of Justice in its Advisory Opinion in the Western Sahara case,[1361] established that the lands of indigenous peoples were not *terra nullius* at the time of conquest and a succession of sovereigns does not affect pre-existing property rights. In other words, the rights of African indigenous communities were not extinguished by the formalization of European colonization in 1885 or the subsequent creation of modern African states. Furthermore, relevant principles of social justice indicate that communities that have never made the free choice to abandon their "societal culture" should be entitled to "external protection" aiming at protecting such communities' cultural identities. This line of argument was later used in

1360 Daes, "Working Paper on the Concept of "Indigenous People" (1996a), para. 69 (d).
1361 International Court of Justice (I.C.J.) *Western Sahara: Advisory Opinion* (1975), p. 12.

Australia (the *Mabo* case), and more recently in Southern Africa (see chapter VII, this volume). However, the concept of Aboriginal title is yet to find fertile ground in African courts.

Another constraint is the issue of "indigenousness". As discussed in chapter II, the concept of "indigenous peoples" has only recently been domesticated in Africa with the adoption by the African Commission on Human and Peoples Rights of the Report of its Working Group of Experts on Indigenous Populations/Communities, and as chapter IX shows, only a few African Constitutions make any reference to the rights of their indigenous communities. Many African governments even do still not recognize the existence of indigenous populations within their borders.

It comes, therefore, as no surprise that national legislations, in particular laws concerning land and land-related issues, do not provide any specific recognition or protection of the livelihoods and needs of indigenous populations. Taking the example of Kenya and Tanzania, it thus appears that land laws and policies since colonial time have evolved through three mainstream types of legislation. The first category of these laws, which could be called "colonial-type land laws", includes not only the major colonial land legislation, but also a number of post-colonial laws, which were no more than a re-statement of colonial policies, and as a rule promoted sedentary agriculture rather than nomadic pastoralism. The second type of land laws are those that were enacted mainly from the late 1960s, and which were aimed at shaping an African-grown economic approach as well as addressing the situation of landlessness faced by countless former colonised people. Commercial agriculture was now seen as the adequate solution. The last and third category consists of land laws passed in reaction to the failure of the "African economic renaissance", and which tie Kenya and Tanzania to the free market economy as well as to conservation interests. In both countries, it is clear that existing land and conservation laws contain almost no explicit provisions that provide specifically for the rights of indigenous peoples. Consequently, communities in both countries have been forced out of their lands for the sake of economic and conservation interests. As this book shows, the situation is very similar in Central and Southern African countries.

African indigenous peoples' organizations should therefore, among other things, lobby for a revision of the constitutions of their respective countries so that the existence and special status of indigenous peoples are recognized. Another priority should be to promote land and land-related legislation recognizing collective property rights and protecting the specific land use and occupation by nomadic and semi-nomadic indigenous peoples. The work done by the ACHPR Working Group in disseminating information on indigenous peoples and their human rights situation, and organizing sensitization seminars for governments and AU representatives is important in this aspect. Another recommended initiative to be taken by indigenous organizations is lobbying for the adoption of ILO Convention No. 169.

A third constraint, which is particular clear from the cases discussed in this book, is the attitude of the African judiciary, which, in line with most African governments, considers the concept of "indigenous rights" as, at best, controversial. The recent judgments quoted in this book show that, barring judges in South Africa and Botswana, the majority of judges neither understand nor recognize indigenous peoples' customary land rights and often dismiss the way of life of nomadic hunter-gatherers and pastoralists as being irrelevant (the allegation being that they have moved away from their traditional way of life and embraced modernity) or incompatible with property rights (see, e.g., the Ogiek cases in Chapter V). Judges also seem to tend giving primacy to written laws and

governments' policies over indigenous peoples' claims and customary tenure rights. They also tend to hold on to any technicality they can come across, including delaying tactics, to deny justice or to avoid challenging established interests.

Sensitising African judges on rights of indigenous peoples could be beneficial and lay grounds for a better protection of indigenous peoples' rights. A recommendation to the African Commission's Working Group of Experts on Indigenous Populations/Communities would be to include the judiciary as a new target group for their sensitization seminars.

It appears also that Kenyan and Tanzanian judges dealing with indigenous land-related lawsuits dismiss or do not refer to international standards or jurisprudence. This despite the fact that Kenya and Tanzania, as practically all other African states, have ratified or signed up most of the international instruments that protect indigenous communities, notably, the ICCPR, the ICESCR, the Convention on Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on Biological Diversity, the African Charter, and, with the exception of Burundi, Kenya and Nigeria (who abstained), the U.N. Declaration on the Rights of Indigenous Peoples.

Since few African countries have taken domestic legislative measures that protect and promote the rights of indigenous peoples, reference to international jurisprudence and instruments would constitute an important alternative source of law in support of indigenous land claims. A good example of how this can be done is the positive trend that has emerged from South Africa and Botswana, and which consists of a new judicial approach to indigenous peoples' rights to lands. In recent rulings, judges from these two countries have gone beyond domestic standards and grounded their arguments on the concept of aboriginal title which, it is argued, was not extinguished as a result of indigenous peoples' land dispossession by sovereign modern states. These decisions have gone as far as recognizing rights of indigenous peoples on lands that had become protected areas and rich mining sites. These rulings should—and are likely to—inspire judges from other parts of the African continent. Other sources of inspiration should be the work of the African Commission on Human and Peoples' Rights on the issues of indigenous peoples (as, for instance, in the recent decision regarding the Endorois people) and the U.N. Declaration on the Rights of Indigenous Peoples.

Such a new approach, however, implies that the judiciary is informed about and subsequently trained in using international jurisprudence and instruments. It is therefore recommended that such an aspect be taken up by the ACHPR Working Group and included in their sensitization seminars.

Observations and recommendations

Throughout this book, there have been a number of recommendations made in relation to improving the protection of the rights of indigenous peoples via other channels than the judiciary. The following list of recommendations, which in no way is exhaustive, relates, however, specifically to court cases and the whole process that surrounds them. They highlight some of the lessons that can be learned by indigenous peoples and their lawyers from the examples given in this book.

Because court cases are lengthy—most cases are heard by two, sometimes three different courts—and extremely costly in terms of fees to lawyers, transport, accommodation and instruction of witnesses, it is important to make extensive and in-depth preparations, collecting, for instance, archival or other historical evidence, calling on local and foreign expertise, taking judges to sites, etc., and becoming familiar with procedures and rules in order to avoid a case being dismissed on technicalities. Other aspects that may also be useful taking into account are the use of international mechanisms and international jurisprudences, of states' periodic reports to the treaty bodies and these bodies' observations.

1. It is recommended that indigenous communities carry out legal feasibility studies prior to lodging court cases. Successful court cases require financial resources and competent lawyers. Many indigenous communities have lost court cases for lack of necessary funds. In other cases, long delays are often caused by the time it takes for a community to raise funds (see the *CKGR* case in chapter VII). It can also be difficult to find a lawyer who is willing to take on a case of an indigenous community or who understands and grasps the notion of indigenous peoples' rights to land. This is partly due to the lack of teaching on the subject of rights of indigenous peoples in many African law schools. Whatever the situation is, such a feasibility study could provide an idea on not only the costs but also the legal arguments available or intended to be used by lawyers.

2. It is recommended to take account of regional or even local differences when preparing a case. In Tanzania, for instance, there have been cases where pastoralist peoples' customary land rights have been to some extent recognized by lower judges (see the Barabaig and the Maasai cases in chapter VI) but not by higher judges. The picture is a bit different in Kenya, where customary rights seem to enjoy less protection in written laws. In South Africa, it was the higher courts that recognized the validity of indigenous law.

3. Indigenous communities should lodge their complaints in courts as soon as incidents occur or as soon as they find out that they do not agree with compensation measures. In the Maasai cases involving the Mkomazi Game Reserve (chapter VI), torts-related claims of the plaintiffs were thrown out because the suit was filed more than three years after the facts. Letting several years elapse before filing a suit could be counterproductive since it might affect the quality of witnesses' accounts as well as the chances for collecting evidences; the outside support might also lose momentum.

   On the other hand, there are numerous cases where indigenous peoples have been expelled from their lands for hundreds or tens of years before taking legal actions. One could mention for example the restitution of tens of thousands of hectares to the South African ǂKhomani San on the basis of the Land Restitution Act. In this kind of cases, it is imperative for community lawyers to make as much as possible reference to any existing relevant international jurisprudence in an attempt to try and move judges away from traditional ways of thinking. Taking the case to higher courts or international bodies such as the African Commission on Human and Peoples' Rights could be further options.

4. It is recommended that any indigenous community taking its land grievances to court should list all the plaintiffs in the lawsuit. Otherwise, the plaintiffs might have to apply first for a leave to institute a representative suit on their own and on behalf of others, as done among others in the Kenyan Tinet Ogiek case (*Francis Kemai and others v. The Attorney General*) where ten individuals were allowed to plead and represent 5,000 other members of the community. However, such permission is not always granted, and in the Tanzanian cases examined in chapter VI, the attempts to represent others in court failed. Another aspect is that non-listed plaintiffs may be excluded from benefiting from the court's ruling, as it turned out to be the case in the *CKGR* case (see chapter VII).

5. It is recommended to go beyond traditional legal means of proof as they may not always be sufficient when indigenous communities suing for their ancestral lands have to prove that they are natives of such lands. Other means must be found, as, for instance, in the case of the ǂKhomani San, who based their land claim on a multidisciplinary research and cultural reconstruction which in turn made it possible to identify and locate the different waterholes, ritual places, hunting areas, etc., and enabled them to map their land (see chapter VII). In the Tanzanian Gawal case (*Yoke Gwaku and 5 others v. NAFCO*, chapter VI), the concerned Barabaig indigenous community called upon an anthropologist who had done research in their community to testify for them. Historians, social scientists and other knowledgeable persons may, based on their work with a community, shed important light on indigenous peoples' claims.

6. Indigenous plaintiffs should make references to national legal documents, like, e.g., the Constitution, whenever relevant. Although most African constitutions do not mention indigenous peoples, they do have clauses on equal rights, on the prohibition of discrimination and sometimes even on the protection of minorities, which can be invoked in a court case.

7. The fact that a state is declared sole owner of all lands should not prevent indigenous communities from initiating legal actions for protection of their right to use and occupation of what they believe are their ancestral lands. The *CKGR* case (chapter VII) reveals that a court can declare a state sole owner of a land and at the same time rule in favor of the right to use and occupation by an indigenous community. This case demonstrates also that being owner of a land does not automatically give a state the right to expel at will indigenous communities from it.

8. It is recommendable to base indigenous peoples' land rights court cases on strong rights, such as the right to life, to food security, etc.; invoking several other rights that are non derogatory, could also make a good strategy. In human rights theory and principles, certain rights (right to life, etc.) are to be respected and protected at any time and cost by governments. They also cannot be suspended, even in case of a state of emergency. The two Ogiek cases in Kenya (chapter V) and the cases regarding *Mkomazi Game Reserve*

in Tanzania (chapter VI) show the benefits of arguing for strong rights, including the right to life of the members of a community. A similar approach was also taken by one of the judges in the *CKGR* case (chapter VII).

9. It is also recommended that indigenous communities and their lawyers ground their arguments on theories of social justice, which have emerged as persuasive in numerous court battles for indigenous peoples' lands, such as the *Mabo* case in Australia and the *Richtersveld* case in South Africa. The judicial reasoning in the *Mabo* case, for instance, could be regarded as grounded on the liberal egalitarian theory that emphasizes the importance of rectifying un-chosen inequalities: given that most indigenous communities have never opted to leave their societal culture and because they still show a deep bond with their own culture, the question is not, how should the state act fairly in governing its [indigenous communities], but what are the limits to the state's right to govern them (see chapter VIII).

10. Indigenous peoples and their legal teams are recommended to go beyond domestic written laws and use historical, cultural and sociological evidences as well as bringing to shore unwritten customary land-related laws. In numerous cases, judges tend to focus on domestic laws, paying no considerations to customs and traditions. The *Endorois* case (chapter V) and that of the San of Botswana (chapter VII) are good illustrations of this situation. Judges, who have positively land-marked this area of human rights, have instead, in most cases, grounded their thinking on historical injustices and facts generally uncovered by existing domestic legal instruments. In the *Tinet Ogiek* case (chapter V), for example, the Kenyan court found reasons not to take into account the Australian *Mabo* case jurisprudence possibly because of the positive impact such a judgment would have had in favour of the plaintiffs. However, it is interesting to notice that the judges did not dismiss the applicability of the *Mabo* case jurisprudence in the African context. They recognized that had the plaintiffs and the defence team provided them with relevant customary law, land statutes, and consistent principles of common law as was done in the *Mabo* case, they might have taken them into account.

11. It is recommended that an indigenous community make an evaluation report or assessment of damages suffered by its members as a result of land dispossessions, forcible removals and similar acts. The *Mkomazi Game Reserve* case (Tanzania, chapter VI) reveals that a lack of such evaluation can lead to unjust compensation measures. International and national NGOs may help making such reports. It is therefore recommendable that indigenous peoples do all they can to estimate exactly the damages suffered and that they do this as early in the process as possible, since, as years pass on, it becomes more difficult to reconstruct facts

12. It is recommendable that indigenous peoples or individuals rather refuse a compensation they consider to be unfair than accepting it and then later declare it to be unfair. In one of

the Barabaig cases (*Yoke Gwaku and 5 others v. NAFCO,* chapter VI), a number of plaintiffs accepted before the initiation of the court case some sort of compensation, which they later declared to be unfair. Such a practice is counterproductive and can compromise the success of a court case.

13. Having the judges visit the disputed lands or the settlements where the evicted indigenous peoples live after dispossession is recommended. This can contribute to the judges' assessment of the implications the loss of land and relocation may have on the livelihood of the plaintiffs.

14. It is recommended that lawyers representing indigenous communities should be acquainted with relevant international jurisprudence that can enlighten and inspire their line of arguments. It could also be advantageous for communities in court to refer to relevant positive jurisprudence from other African countries, even if it might not be binding upon the judge. This is likely to bear more fruits now with the ruling of the Constitutional Court of South Africa in the *Richtersveld* case and to some extent the *CKGR* case in Botswana (chapter VII). The African Commission's recent communication on the *Endorois* case may also be used as an important reference.

15. Legal teams representing indigenous communities should—whenever relevant—refer to international instruments protecting indigenous peoples' rights to lands, especially when they have been ratified by the concerned country. With the exception of the *Richtersveld* case, most other cases examined in this book make no such reference. Obviously, this fact comforted the judges in their national-laws-oriented thinking. Had the plaintiffs, at least, referred to international instruments and the doctrine of aboriginal title, this would have prompted a judge's response. This disregard of international standards by the courts is probably one of the reasons why the Endorois community decided to take its case before the African Commission on Human and Peoples' Rights.

16. Now that the U.N. Declaration on the Rights of Indigenous Peoples has been adopted, it is recommendable that communities and their lawyers use some of its provisions, which could be considered as universally accepted principles of justice.

17. It is also recommendable that indigenous communities and their legal teams make extensive use in courts of state reports, expert reports, concluding observations by treaty bodies related to the ICCPR (CCPR), the ICESCR (CESCR), the Convention against Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against all Women (CEDAW), and the CBD, as well as concluding observations of the ACHPR in order to shed more light on a number of issues. Sometimes, states argue one thing in court and say the contrary in their periodic reports to treaty bodies or in similar official documents. Other documents such as reports of the African Peer Review Mechanism could also be useful to look into.

18. It is recommended to consider using international mechanisms when governments make obvious use of delay tactics. For example, none of the numerous court cases filed by the Ogiek indigenous community in Kenya have been dealt with in time. While endless court cases continue, orders to encroach more Ogiek land are issued; more non-indigenous families are being settled on the disputed lands and titles deeds are even processed. In the example from Botswana, (chapter VII), the case—initiated in early 2002 and closed in late 2006—was delayed first on technicalities, later because the attorney general went on a sabbatical leave and later because of lengthy witness hearings. At a certain point, funding for the San ran out, causing another delay. In the end, the court case turned out to be the most expensive ever. Such prolonged and strategic delays could justify concerned communities to think of international mechanisms. Most international mechanisms can only be used after all domestic remedies have been exhausted. However, it is arguable that long delays amount to inefficiency of domestic remedies and there is jurisprudence that backs obvious delaying as proof of inefficient domestic remedies. Communications or complaints by indigenous peoples can be brought to the African Commission on Human and Peoples' Rights, the U.N. Human Rights Committee (CCPR), the Committee on the Elimination of Racial Discrimination (CERD) and the Special Rapporteur on the Rights of Indigenous Peoples. These are some of the international mechanisms available to indigenous peoples. There is also the CERD mechanism of urgent action, which could be well combined with court cases in order to prevent escalation of a given situation. These international mechanisms are relevant in Africa since most countries are parties to these instruments.

19. Court procedures are often very lengthy. It is therefore recommendable that indigenous people request the court for intermediary measures, similar to the Court Order that the Ogiek plaintiffs of East Mau asked for and obtained from the Kenyan High Court, in order to stop the situation from worsening as the court case proceeds.

20. Indigenous peoples and their lawyers should be careful when considering combining court cases with international attention and similar high level campaigning activism. At a certain level, this strategy seemed to pay off in the San case in Botswana since it did provide the San with funds and a lawyer. But it also exacerbated the government's and to a certain extent the general public's hostile feeling towards the San. So one might think of striking the right balance.

Observations and recommendations: an update

The above mentioned observations and recommendations remain to a very large extent valid in 2013: even though some of the constraints identified in 2009 are less prominent today, indigenous peoples' land rights still need to be protected.

Among the more positive changes that open up for some new windows of opportunity when it comes to asserting the rights of indigenous peoples, the following can be mentioned:

1. The issue of "indigenousness": examples from DRC, Congo Brazzaville, Uganda, Burundi, and Kenya, show that the concept—if not the term itself—of "indigenous peoples" is far more domesticated today than it used to be.[1362] This can be attributed to a number of factors: at the overall level, there has been a general trend towards putting emphasis on human rights issues and using a human rights-based approach; regarding indigenous peoples more specifically, one should mention the influence of the UNDRIP and the pressure put by various international monitoring mechanisms (UPR, HRC, CERD, CESCR), the World Bank (with respect to hunter-gatherers) and other U.N. agencies (e.g. IFAD); and finally and maybe more important, one should stress the impact of the work done at the regional level by ACHPR and its Working Group on indigenous populations/communities, in conjunction with an increasingly stronger indigenous movement and civil society at the national level.

2. Regarding the judiciary, one must note the example of Kenya where new legislation has been implemented in order to reform the judiciary and the way in which it is dealing with claims presented to it by local communities, including the possibility for destitute claimants of waiving, reducing or postponing the payment of fees.[1363] While one swallow doesn't make a summer, it can be hoped that the recent rulings, by the African Commission in the Endorois case and by the African Court of Justice and Human Rights in the Ogiek case, will inspire not only the Kenyan judiciary but that of other countries as well. The African Court also represents an important new opportunity for indigenous communities seeking the recognition of their land rights. The new law on Indigenous Peoples in Congo-Brazzaville should also be mentioned.

3. The increased use by indigenous organizations of international monitoring mechanisms (i.e., providing shadow reports, making Urgent Appeals, etc.) has entailed that references to international jurisprudence and instruments are now very much part of their discourse. At the same time, indigenous issues have acquired a more prominent place in the guidelines and recommendations of these monitoring mechanisms and indigenous peoples have gained access to more mechanisms (e.g., UPR, EMRIP, Urgent Appeals of the ACHPR). These developments are bound to increasingly inspire the African judiciary when dealing with indigenous issues.

1362 The new Constitution of Kenya as well as its new land policy represent milestones when it comes to addressing the land rights of indigenous peoples; other examples are the adoption of ILO Convention No. 169 by CAR, the new law on Indigenous Peoples in Congo-Brazzaville, and the on-going work in DRC regarding the drafting of a Strategy for Pygmies.

1363 See chapter V this volume, section "Recent developments".

These overall advances must not hide the fact that the situation of indigenous peoples on the ground has hardly changed. Poverty, discrimination, exploitation and human rights abuses remain deeply ingrained characteristics of the situation of indigenous peoples in Africa and indigenous peoples continue to face many constraints when it comes to the protection of their land rights.

1. One gap that has still not been bridged is the one between policies and legislation on the one hand and their implementation on the other: at the end of the day, it is not so much the Constitution or new legal texts that matter, but the way they are put in practice. It is not even the judiciary rulings that matter, but whether the government will abide by them: the *CKGR* case in Botswana and the *Endorois* case in Kenya are two cases where governments have failed to do so. Another disturbing trend is seen in the lack of respect for the judiciary. Both in Kenya and in Tanzania, examples of flagrant contempt of court have been experienced, when on-going court cases and court injunctions are disregarded by local and national authorities.[1364]

2. The threat from economic and commercial interests on indigenous land rights, too, remains and has even increased. Commercial agriculture, including ranching, is more than ever a priority in most countries as are nature conservation, tourism, mining, oil exploration, and various climate change mitigation measures. Large scale schemes like LAPSSET (Kenya) and SACGOT (Tanzania) are two glaring examples, Botswana's new land policy a third.

3. The protection of indigenous peoples' land rights must therefore remain a priority both at the national and the international level. It is also to be expected that with the current democratization trend in Africa growing stronger, protection through legal means will acquire more importance and in that respect the recommendations given in 2009 remain valid.

The post-trial situation experienced in recent years by some of the indigenous communities too provides a few important observations. :

1. The recent developments in the Ogiek and the Endorois cases indicate that the combination of a national strategy with appeals to the two regional human rights institutions (the ACHPR and the African Court) can have a positive effect for the involved communities.

2. Post-trial developments in the Richtersveld and the CKGR cases clearly show that a legal landmark victory is only a first step in the struggle for land rights since the implementation of the court decisions remains entirely in the hands of those who were defeated in court—i.e., the government and its institutions. The victorious part—i.e., the indigenous communities and their legal representatives—on the other hand, continue facing a number of concrete problems, (e.g., funding issues, lack of skilled people, etc.) that make it difficult

1364 As, e.g., in the Mau Narok (Kenya) and the Loliondo cases (Tanzania).

to follow up on court decisions, negotiate settlements and putting the necessary pressure on the authorities responsible for implementing the court's decisions.

3. As shown in both the *Richtersveld* and the *CKGR* cases, indigenous communities who have won a high court case may still be faced with the need to instigate new court cases in order to claim and follow-up on the rights that the high court rulings has accorded them.

4. The struggle for land rights may impact psychologically on the involved indigenous communities, even when the struggle ends with a landmark victory. In the case of the Richtersveld community, it has, according to a recent report, left a long lasting impact on people's behavior and worldviews and negatively affected intra-communal relations.

Based on these findings, the following recommendations can be made:

1. In order to ensure that a country's government respects and complies with international/regional recommendations and rulings, indigenous and civil society organizations within the country as well as international/regional bodies must monitor the situation and sustain their pressure on the government.

2. Indigenous communities and their supporters must be fully informed and prepared to deal with the possible implications of a court case in terms of follow-up litigations, post-trial strategies, and possible psychological impacts on the community.

3. The post-trial situation of indigenous communities must be closely monitored by local supportive human rights institutions and civil society organizations as well as by regional and international human rights mechanisms, and all these instances must be ready to support by putting pressure on governments and help out whenever the indigenous communities deem it necessary.

4. Indigenous organizations should make fully use of the various international and regional monitoring bodies by submitting shadow reports, communications, etc., whenever possible. An alternative way of submitting shadow reports is to do it in collaboration with national human rights organizations, thereby mainstreaming indigenous issues and improving the chances of getting them tabled during the reviewing processes.

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UPR (Universal Periodic Review by the United Nations Human Rights Council)

2011a National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 - United Republic of Tanzania. U.N. Doc. A/HRC/WG.6/12/TZA/1. At http://www.ohchr.org/EN/HRBodies/UPR/PAGES/TZSession12.aspx

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USEFUL WEB SITES

This list is by no means exhaustive but is meant to group some of the main Web sites used in this book and which may be of use for further research.

U.N. System

U.N. General Assembly documents
http://www.un.org/ga
Office of the High Commissioner for Human Rights
http://www.ohchr.org/EN/Pages/WelcomePage.aspx
Indigenous peoples and the U.N. System
http://www.ohchr.org/EN/Issues/IPeoples/Pages/IndigenousPeoplesIndex.aspx
U.N. Permanent Forum
http://undesadspd.org/IndigenousPeoples.aspx
U.N. Special Rapporteur on the Rights of Indigenous Peoples
http://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx
http://www unsr.jamesanaya.org
EMRIP (Expert Mechanism on the Rights of Indigenous Peoples)
http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx
UPR (Universal Periodic Review)
http://www.upr-info.org
Human Rights bodies (access to Charter based and Treaty based bodies)
http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx

Core human rights documents, including human rights treaties and other primary international human rights instruments can also be accessed at the two Web sites of the University of Minnesota Human Rights Library:
http://hrlibrary.ngo.ru/google/localsearch.html
http://www1.umn.edu/http://www1.umn.edu/humanrts/google/localsearch.html

Global and regional organizations

ILO database on International Labour Standards, including Conventions. At NORMLEX:
http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO:::

CBD (Convention on Biological Diversity)
http://www.cbd.int
UNESCO (general)
http://www.unesco.org/
UNESCO Conventions
http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html
UNFCCC (U.N. Frame Convention on Climate Change)
http://unfccc.int/
ICRC (International Committee of the Red Cross), with a section on international humanitarian law
http://www.icrc.org
AU (African Union)
http://www.au.int
ACHPR (African Commission on Human and Peoples' Rights)
http://www.achpr.org
African Court of Human and Peoples' Rights
http://www.african-court.org/en/
IACHR (Inter American Commission on Human Rights)
http://www.cidh.oas.org/DefaultE.htm
European Union
http://europa.eu/index_en.htm
EU cooperation on indigenous peoples
http://europa.eu/legislation_summaries/development/sectoral_development_policies/r12006_en.htm

Multilateral Development Banks

World Bank
http://www.worldbank.org
Inter American Development Bank
http://www.iadb.org
Asian Development Bank
http://www.adb.org
African Development Bank
http://www.afdb.org

Global, regional and national legal databases

The International Court of Justice
http://www.icj-cij.org

Worldwide legal database
http://www.worldlii.org/
Constitutions database
http://www.confinder.richmond.edu/
SAFLII (Southern African Legal Information Institute) - Legal databases from South Africa and other southern African countries
http://www.saflii.org/
The Privy Council, UK
http://www.privy-council.org.uk/
The International Centre for the Legal Protection of Human Rights—Database on Commonwealth and International Human Rights Case Law
http://www.interights.org/search/index.htm
Kenya Law Reports
http://www.kenyalaw.org/update/
U.S.A. Supreme Court (since 1805) and Federal Appellate case reports (since 1950) database
http://www.altlaw.org
Database on U.S. state and federal laws (including resources pertaining to constitutions, statutes, cases, etc.)
http://www.findlaw.com/casecode/
U.S. Code (e.g., Title 25 – Indians)
http://www.gpoaccess.gov/uscode/
Canadian Legal Information Institute (CANLII) (Canadian legislation, case laws, etc.)
http://www.canlii.org/en
Australasian Legal Information Institute (AustLII) (Australian legislation and court judgments)
http://www.austlii.edu.au/
New Zealand Legal Information Institute (Case law, legislation, etc.)
http://www.nzlii.org/databases.html

Web sites specialized in indigenous issues

Australian Institute for Aboriginal and Torres Strait Islanders (AIATSIS)
http://www.aiatsis.gov.au
The NativeTitle Research Unit (NTRU) is part of AIATSIS and specialized in native title legislation and case law
http://www.ntru.aiatsis.gov.au/index.html
The Agreements, Treaties and Negotiated Settlements (ATNS) project provides information, historical detail and published material relating to agreements made between indigenous people and others in Australia and overseas
http://www.atns.net.au/default.asp
Indigenous Rights in Aotearoa (New Zealand)
http://www.converge.org. nz/pma/indig.htm

Centre for Human Rights, University of Pretoria (South Africa) hosts the Indigenous Peoples' Rights Database
http://www1.chr.up.ac.za/

African regional and national NGOs

Regional

Indigenous Peoples of Africa Coordinating Committee—IPACC (based in South Africa)
http://www.ipacc.org.za

African Court Coalition
http://www.africancourtcoalition.org

DRC

Dynamique des Groupes de Peuples Autochtones (DGPA)
http://WWW.dgpa.cd/

Les Heritiers de la Justice (DRC).
http://www.heritiers.org

Kenya

Maasai Association (Kenya)
http://www.maasai-association.org

MPIDO-Mainyoito Pastoralist Integrated Development Organisation (Kenya)
http://www.mpido.org

Ogiek Welfare Council (Kenya)
http://www.ogiek.org

Rwanda

Community of Rwandese Potters/Communauté des Potiers Rwandais (formerly Caurwa)
http://www.coporwa.org/batwa.html

Tanzania

Community Research and Development Services—CORDS (Tanzania)
http://www.cordstz.org

PINGO's Forum
http://www.pingosforum.or.tz

Legal and Human Rights Centre (Tanzania)
http://www.humanrights.or.tz

Tanzania Natural Resource Forum
http://www.tnrf.org

International NGOs

International Work Group for Indigenous Affairs (IWGIA) (international NGO based in Denmark)
http://www.iwgia.org

Cultural Survival (USA)
http://www.culturalsurvival.org
Minority Rights Group International (U.K.)
http://www.minorityrights.org/
Survival International - the movement for tribal peoples (U.K.)
http://www.survivalinternational.org/
World Rainforest Movement (international NGO based in Uruguay)
http://www.wrm.org.uy
Forest Peoples Programme—FPP (UK based NGO)
http://www.forestpeoples.org

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APPENDICES

1. ADVISORY OPINION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana.

Introduction

1. At its 1st Session held on the 29th June 2006 in Geneva, the United Nations Human Rights Council (UNHRC) adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). This Declaration is the result of a process of negotiation, which began in March 1995, under the auspices of the former United Nations Commission on Human Rights (UNHRC), during which an inter-session working group prepared the draft.

2. During its consideration by the 3rd Committee of the United Nations General Assembly (UNGA) in New York, the adoption of this resolution was brought before a certain number of countries as well as the group of African States which expressed a number of concerns which had been submitted to the State Parties in the form of an aide-memoire of the African Group dated 9th November 2006.

3. Having been seized of the issue, the Assembly of Heads of State and Government (AHSG) of the African Union (AU), meeting in Addis Ababa in January 2007, took a decision aimed at requesting the deferment of the consideration by the UNGA of the adoption of the said Declaration with a view to opening negotiations for making amendments, in order to take into consideration the fundamental preoccupations of the African countries, namely:

    a. The definition of indigenous peoples;
    b. The issue of self-determination;
    c. The issue of land ownership and the exploitation of resources;
    d. The establishment of distinct political and economic institutions
    e. The issue of national and territorial integrity

4. Seized of this matter during its 41st Ordinary Session (Accra, Ghana, 16 – 30 May 2007), the African Commission on Human and Peoples' Rights (ACHPR), deliberated on the issue and on the recommendation of its Working Group on Indigenous Populations/Communities (WGIP), passed a Resolution which underlined the fact that the concept of indigenous populations in the African Continent had been the subject of extensive study and debate resulting in a report adopted by the ACHPR in November 2003 at its 34th Ordinary Session. [Report of the African Commission's Working Group of Experts on Indigenous Populations /Communities, adopted at the 34th Ordinary Session in November 2003, which fact was included in the 17th Annual Activity Report of the African Commission later noted and authorized for publication by the 4th Ordinary Session of the AHSG of the AU held in January 2005 in Abuja, Nigeria (Assembly/AU/Dec.56 (IV))].

5. Following its adoption of the said report, the ACHPR in its jurisprudence has interpreted and shed some light on matters similar to the concerns voiced by the AHSG of the AU on the draft UN Declaration and to that end, decided to ask, at its 41st Ordinary Session held in Accra, Ghana, its WGIP to draft an Advisory Opinion on the various concerns expressed by the African States on the UN Declaration for submission to and discussion with key AU organs concerned with the matter before and during the AU Summit scheduled to take place in Accra, Ghana, from 1st to 3rd July 2007.

6. The ACHPR has interpreted the protection of the rights of Indigenous Populations ***within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties,*** in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.

7. Within this context, the present Advisory Opinion is being submitted on the basis of the relevant provisions of **Article 45(1)(a) of the African Charter** which gives mandate to the ACHPR to:

> ***Collect documentation, carry out studies and research on African problems in the field of Human and Peoples' Rights … and, if need be, submit opinions or make recommendations to the Governments.***

8. In providing this Advisory Opinion, the ACHPR also relies on its well established jurisprudence in interpreting the provisions of the African Charter, which is one of its mandates under Article 45 (3) of the African Charter:

> ***Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.***

I. On the lack of a definition of indigenous populations

9. The lack of a definition of the notion of indigenous populations in the draft UN Declaration is considered as likely to create major juridical problems for the implementation of the Declaration. The aide-memoire of the African Group of November 2006 even indicates that this "would be not only legally incorrect but could also create tension among ethnic groups and instability between sovereign States".

10. From the studies carried out on this issue and the decisions it has made on the matter, **the ACHPR is of the view that, a definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.**

11. Thus, the major characteristics, which allow the identification of Africa's Indigenous Communities is the favored approach adopted, and it is the same approach at the international level. [See the Report of the ACHPR's WGIP, adopted by the ACHPR].

12. The concept in effect embodies the following constitutive elements or characteristics, among others [See page 93 of the Report of the ACHPR's WGIP, adopted by the ACHPR]:
    a. Self-identification;
    b. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
    c. A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

13. Moreover, **in Africa, the term indigenous populations does not mean "first inhabitants" in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.** This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the Continent.

II. On the question of self-determination and territorial integrity

14. In its preamble, the UN Declaration on the Rights of Indigenous Peoples states *"the fundamental importance of the right of all persons to self-determination and considers that*

no provision of the present Declaration can be invoked to deny a people, whatever they may be, of their right to self-determination exercised in conformity with international law."

15. Article 3 of the Declaration specifies that Indigenous Peoples *"freely determine their political status and freely pursue their economic, social and cultural development." Article 4 states that "in the exercise of their right to self-determination, the indigenous peoples have the right to autonomy or self-government in everything that concerns their internal and local affairs as well as ways and means to finance their autonomous activities."*

16. In reaction to these provisions, the aide-memoire of the African Group of November 2006 re-affirms: *"To implicitly recognize the rights of indigenous peoples to self-determination in paragraph 13 of the preamble and in Articles 3 and 4 of the Declaration may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation to a specific section of the national population, thus threatening the political unity and territorial integrity of any country".*

17. The ACHPR advises that articles 3 and 4 of the Declaration should be read together with Article 46 of the Declaration, which guarantees the inviolability of the integrity of Nation states. Article 46 of the Declaration specifies *"that nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN".*

18. In the opinion of the ACHPR, Articles 3 and 4 of the Declaration can be exercised only in the context of ***Article 46 of the Declaration which is in conformity with the African Commission's jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity.***

19. **In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others.** This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized.

20. In this context, Article 20(1) of the African Charter is drafted in similar terms: *"all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen".*

21. It is true that the decision of the AU Summit of January 2007 on the subject re-affirms in its preamble the reference to the UNGA Resolution 1514(XV) of 14 December 1960,

which recognizes the rights to self-determination, and the independence of the populations and territories under colonial domination or under foreign occupation.

22. The fact remains however that **the notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.**

23. In its jurisprudence on the rights of peoples to self-determination, the ACHPR, seized of Communications/Complaints claiming for the enjoyment of this right within State Parties, has constantly emphasized that these populations could exercise their right to self-determination in accordance with all the forms and variations which are compatible with the territorial integrity of State Parties. [See Communication 75/92 of 1995 - the Katangese People Congress vs. Zaire, reported in the 8th Annual Activity Report of the ACHPR].

24. In this respect, the report of the ACHPR's WGIP states that, "the collective rights known as the peoples' rights should be applicable to certain categories of the populations within Nation States, including the indigenous populations but that ... the right to self-determination as it is outlined in the provisions of the OAU Charter and in the African Charter should not be understood as a sanctioning of secessionist sentiments. The self-determination of the populations should therefore be exercised within the national inviolable borders of a State, by taking due account of the sovereignty of the Nation State" (Experts' Report of the ACHPR, p. 83/88).

25. Several States in Africa and elsewhere share this meaning of the right to self-determination taken either from its perspective of identity for the preservation of the cultural heritage of these populations, or from its socio-economic perspective for the enjoyment of their economic and social rights within the context of the specificities of their way of life.

26. However, if it is taken from the political perspective, the right of Indigenous Populations to self-determination refers mainly to the management of their "internal and local affairs" and to their participation as citizens in national affairs on an equal footing with their fellow citizens without it leading to a total territorial break up which would happen should there be violation of the territorial integrity of the State Parties. Therefore this mode of attaining the right to self-determination should not at all be confused with that which issued from the Resolution 1514(XV) of the 14th December 1960 which is applicable to the populations and territories under colonial dominance or foreign occupation and to which the UN Declaration, which is the objective of this Advisory opinion, does not refer to at all.

27. In consequence, the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional lev-

els, should be understood as encompassing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties.

28. From another angle, the question is also raised in terms of determining the exact meaning and scope of Article 9 of the UN Declaration, which stipulates:

> *"Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in conformity with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."*

29. On this point, the document representing the aide-memoire of the African Group of November 2006 states that there is: *"a real danger that the tribal communities may interpret this clause as meaning that they can chose to belong to a country whilst they live in the territory of another".*

30. **The ACHPR observes that trans-national identification of indigenous communities is an African reality for several of the socio-ethnic groups living on our Continent and which co-habit in perfect harmony with the principle of territorial integrity and national unity.** Furthermore it would be erroneous to think that certain trans-border cultural activities anchored in the ways of life and the ancestral productions of these communities can imperil the national unity and integrity of the African countries.

31. **In this regard, trans-border identification of indigenous communities or nations has not resulted in any challenge to the question of citizenship or nationality being governed by the internal laws of each country.**

III. On the right of indigenous peoples to land, territories and resources

32. The UN Declaration states in its preamble that: *"the control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions and to promote their development according to their aspirations and needs."*

33. In the comment relating to the provision contained in the draft aide-memoire of November 2006 by the African Group, it is stated that the said provision "is impracticable within the context of the countries concerned. In accordance with the constitutional provisions of these countries, the control of land and natural resources is the obligation of the State".

34. On this issue, Article 21(1) of the African Charter states that: *"all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."*

35. Similar provisions are contained in many other instruments adopted by the AU such as the African Convention on the Conservation of Nature and Natural Resources whose major objective is: *"to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour"* (preamble) and which is intended *"to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge,"* which is similar to the provisions of Article 10, 11(2), 28(1) and 32 of the UN Declaration.

36. With regard to Article 37 of the UN Declaration on the rights of indigenous peoples, it states: *"the indigenous populations have a right to the effect that treaties, agreements and other constructive arrangements signed by the States or their successors be recognized, honored, respected and applied by the States"*. In its aide-memoire the African Group states having "serious reservations" on the possible repercussions of this article.

37. On this point, the UN report on treaties and agreements signed between the States and indigenous peoples shows that apart from the case of the Maasai in East Africa where the agreement with the British Colonial administration went through a judicial procedure, there is nowhere on the African continent where other indigenous communities have signed a historic agreement or treaty with a State. Moreover, these agreements have never resulted in the emergence of entities that have the characteristics of international sovereignty.

38. Consequently, it seems that this concern is predicated on fears relating to the reality of other continents, e.g., North America, where countries recognize its validity and implement agreements signed with indigenous communities and people living on their territories.

IV. On the right of indigenous peoples to establish separate political and economic institutions

39. This concern was expressed by referring to Article 5 of the UN Declaration on the rights of indigenous peoples which states that: *"indigenous peoples have the right to maintain and consolidate their separate political, legal, economic, social and cultural institutions,*

by maintaining the right, if that is their choice, to fully participate in the political, economic and cultural life of the State".

40. In its comments on the issue, the aide-memoire of the African Group of November 2006 is of the view that this article "contradicts the constitutions of a number of African countries which, if adopted, would create constitutional problems for the African Countries".

41. In this context, it is pertinent to reiterate the provision of Article 46 of the UN Declaration which guarantees the inviolability and integrity of Member States: ***"that nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN."***

42. Moreover, Articles 5 and 19 of the Declaration appears to merely restate the right to culture and development and the duty of the state to take into account cultural rights while fulfilling its obligations to guarantee the right to development similar to the provisions of Article 22(1) and (2) of the African Charter.

43. It is appropriate in this regard to recall the definition given to the notion of culture by the Southern African Development Community (SADC) which means "…The totality of a people's way of life, the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or a social group, and include not only arts and letters, but also modes of life, the fundamental rights of the human being, value system, traditions and beliefs", as well as the pertinent provisions of the African Cultural Charter that make reference to it as "a balancing factor within the nation and source of enrichment among the different communities."

Conclusion

44. On the basis of this Advisory Opinion, the ACHPR recommends that African States should promote an African common position that will inform the United Nations Declaration on the rights of indigenous peoples with this African perspective so as to consolidate the overall consensus achieved by the international community on the issue.

45. It hopes that its contribution hereof could help allay some of the concerns raised surrounding the human rights of indigenous populations and wishes to reiterate its availability for any collaborative endeavor with African States in this regard with a view to the speedy adoption of the Declaration.

2. LIST OF TREATIES, CONVENTIONS, ETC., ADOPTED, SIGNED AND/OR RATIFIED BY AFRICAN COUNTRIES

TABLE 1

Status of Ratification of ICERD, ICCPR, ICESCR, CEDAW, UNDRIP, ILO Conventions No. 107 and No.169

Treaties, Conventions, etc. Year of adoption/ entry in force Countries /Year ratification	ICERD[a] 1966/1969	ICCPR[b] 1966/1976	ICESCR[c] 1966/1976	CEDAW[d] 1979/1981		UNDRIP[e] 2007	ILO CONVENTIONS	
				Convent-tion	O.P.		No. 107[f] 1957/1959	No. 169[f] 1989/1991
Algeria	1972	1989	1989	1996		2007	1976	Not party
Angola	Not party	1992	1992	1986	2007	2007	Not party	Not party
Benin	2001	1992	1992	1992		2007	Not party	Not party
Botswana	1974	2000	Not party	1996	2007	2007	Not party	Not party
Burkina Faso	1974	1999	1999	1987	2005	2007	Not party	Not party
Burundi	1977	1990	1990	1992		Abstained	Not party	Not party
Cameroon	1971	1984	1984	1994	2005	2007	Not party	Not party
Cape Verde	1979	1993	1993	1980	2011	2007	Not party	Not party
Central African Republic	1971	1981	1981	1991		2007	Not party	2010
Chad	1977	1995	1995	1995		Not present	Not party	Not party
Comoros	2004	Signed 2007	Signed 2008	1994		2007	Not party	Not party
Congo	1988	1983	1983	1982		2007	Not party	Not party
Côte d'Ivoire	1973	1992	1992	1995	2012	Not present	Not party	Not party
Dem. Rep. Congo (DRC)	1976	1976	1976	1986		2007	Not party	Not party
Djibouti	2006	2002	2002	1998		2007	Not party	Not party
Egypt	1967	1982	1982	1981		2007	1959	Not party
Equatorial Guinea	2002	1987	1987	1984	2009	Not present	Not party	Not party
Eritrea	2001	2002	2001	1995		Not present	Not party	Not party
Ethiopia	1976	1993	1993	1981		Not present	Not party	Not party
Gabon	1980	1983	1983	1983	2004	2007	Not party	Not party
Gambia	1978	1979	1978	1993		Not present	Not party	Not party
Ghana	1966	2000	2000	1986	2011	2007	1958	Not party
Guinea	1977	1978	1978	1982		2007	Not party	Not party
Guinea Bissau	Signed 2000	1992	1992	1985	2009	Not present	1977	Not party
Kenya	2001	1972	1972	1984		Abstained	Not party	Not party
Lesotho		1992	1992	1995	2004	2007	Not party	Not party
Liberia	2001	2004	2004	1984		2007	Not party	Not party
Libya	1968	1970	1970	1989	2004	2007	Not party	Not party

Treaties, Conventions, etc. Year of adoption/ entry in force Countries /Year ratification	ICERD[a] 1966/1969	ICCPR[b] 1966/1976	ICESCR[c] 1966/1976	CEDAW[d] 1979/1981		UNDRIP[e] 2007	ILO CONVENTIONS	
				Convent-tion	O.P.		No. 107[f] 1957/1959	No. 169[f] 1989/1991
Madagascar	1969	1971	1971	1989		2007	Not party	Not party
Malawi	1996	1993	1993	1987		2007	1965	Not party
Mali	1974	1974	1974	1985	2000	2007	Not party	Not party
Mauritania	1988	2004	2004	2001		Not present	Not party	Not party
Mauritius	1972	1973	1973	1984	2008	2007	Not party	Not party
Morocco	1970	1979	1979	1993		Not present	Not party	Not party
Mozambique	1983	1993	Not party	1997	2008	2007	Not party	Not party
Namibia	1982	1994	1994	1992	2000	2007	Not party	Not party
Niger	1967	1986	1986	1999	2004	2007	Not party	Not party
Nigeria	1967	1993	1993	1985	2004	Abstained	Not party	Not party
Rwanda	1975	1975	1975	1981	2008	Not present	Not party	Not party
Sao Tomé and Principe	(Signed 2000)	1995	(Signed 2000)	2003		Not present	Not party	Not party
Senegal	1972	1978	1978	1985	2000	2007	Not party	Not party
Seychelles	1978	1992	1992	1992	2011	Not present	Not party	Not party
Sierra Leone	1967	1996	1996	1988		2007	Not party	Not party
Somalia	1975	1990	1990	Not party		Not present	Not party	Not party
South Africa	1998	1998	2007	1995	2005	2007	Not party	Not party
Sudan	1977	1986	1986	Not Party		2007	Not party	Not party
Swaziland	1969	2004	2004	Par		2007	Not party	Not party
Togo	1972	1984	1984	2004		Not present	Not party	Not party
Tunisia	1967	1969	1969	1983	2008	2007	1962	Not party
Uganda	1980	1995	1987	1985		Not present	Not party	Not party
United Rep. of Tanzania	1972	1976	1976	1985	2006	2007	Not party	Not party
Zambia	1972	1984	1984	1985		2007	Not party	Not party
Zimbabwe	1991	1991	1991	1985		2007	Not party	Not party
TOTAL COUNTRIES 53*								
TOTAL PARTIES	**50**	**52**	**48**	**51**	**24**	**35**	**6**	**1**

a International Convention on the Elimination of All Forms of Racist Discrimination: http://www.ohchr.org/EN/HRBODIES/Pages/HumanRightsBodies.aspx

b International Covenant on Civil and Political Rights: http://www.ohchr.org/EN/HRBODIES/Pages/HumanRightsBodies.aspx

c International Covenant on Economic, Social and Cultural Rights: http://www.ohchr.org/EN/HRBODIES/Pages/HumanRightsBodies.aspx

d Convention on the Elimination of All Forms of Discrimination Against all Women and its Optional Protocol: http://www.ohchr.org/EN/HRBODIES/Pages/HumanRightsBodies.aspx

e United Nations Declaration on the Rights of Indigenous Peoples: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

f ILO Conventions No. 107 and No. 169: http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO

Note

* At its independence in 2011 South Sudan became a member of the United Nations, bringing the total number of members up to 54. However, South Sudan has yet to become party to key international human rights treaties, and is therefore not included in this table.

TABLE 2
Status of Ratification of CBD, UNFCCC, UNESCO, Geneva and Hague Conventions

Treaties, Conventions, etc.	CBD[a]	UNFCCC[b]	UNESCO	4th Geneva Convention		Hague Convention	
			C.CULT. EXP.[c]	Convent.[d]	Protocols I/II[e]	C. & Protocol I[f]	Protocol II[g]
Year of adoption/ entry in force	**1992/1993**	**1992/1994**	**2005/2007**	**1949/1950**	**1977**	**1954/1956**	**1999/2004**
Countries /Year ratification							
Algeria	1995	1993	Not party	1960	1989/1989	Not party	Not party
Angola	1998	2000	2012	1984	1984/1984	2012/ Not party	Not party
Benin	1994	1994	2007	1961	1986/1986	2012/2012	2012
Botswana	1995	1994	Not party	1958	1979/1979	2002/ Not party	Not party
Burkina Faso	1993	1993	2006	1961	1987/1987	1969/1987	Not party
Burundi	1997	1997	2008	1971	1993/1993	Not party	Not party
Cameroon	1994	1994	2006	1963	1984/1984	1961/1961	Not party
Cape Verde	1995	1995	Not party	1984	1995/1995	Not party	Not party
Central African Republic.	1995	1995	2012	1966	1984/1984	Not party	Not party
Chad	1994	1994	2008	1970	1997/1997	2008/ Not party	Not party
Comoros	1994	1994	Not party	1985	1985/1985	Not party	Not party
Congo	1996	1996	2008	1967	1983/1983	Not party	Not party
Côte d'Ivoire	1994	1994	2007	1961	1989/1989	1980/ Not party	Not party
Dem.Rep.Congo (DRC)	1994	1995	2010	1961	1982/2002	1961/1961	Not party
Djibouti	1994	1995	2006	1978	1991/1991	Not party	Not party
Egypt	1994	1994	2007	1952	1992/1992	1955/1955	2005
Equatorial Guinea	1994	2000	2010	1986	1986/1986	2003/ Not party	2003
Eritrea	1996	1995	Not party	2000	Not party	2004/ Not party	Not party
Ethiopia	1994	1994	2008	1969	1994/1994	Not party	Not party
Gabon	1997	1998	2007	1965	1980/1980	1961/1961	2003
Gambia	1994	1994	2011	1966	1980/1989	Not party	Not party
Ghana	1994	1995	Not party	1958	1989/1989	1960/1960	Not party
Guinea	1993	1993	2008	1984	1984/1984	1960/1961	Not party
Guinea Bissau	1995	1995	Not party	1974	1986/1986	Not party	Not party
Kenya	1994	1994	2007	1966	1999/1999	Not party	Not party
Lesotho	1995	1995	2010	1968	1994/1994	Not party	Not party
Liberia	2000	2002	Not party	1954	1988/1988	Not party	Not party
Libya	2001	1999	Not party	1956	1978/1978	1957/1957	2001
Madagascar	1996	1999	2006	1963	1992/1992	1961/1961	Not party

Treaties, Conventions, etc.	CBD[a]	UNFCCC[b]	UNESCO	4th Geneva Convention		Hague Convention	
			C.CULT. EXP.[c]	Convent.[d]	Protocols I/II[e]	C. & Protocol I[f]	Protocol II[g]
Year of adoption/ entry in force	**1992/1993**	**1992/1994**	**2005/2007**	**1949/1950**	**1977**	**1954/1956**	**1999/2004**
Countries /Year ratification							
Malawi	1994	1994	2010	1968	1991/1991	Not party	Not party
Mali	1995	1994	2006	1965	1989/1989	1961/1961	2012
Mauritania	1996	1994	Not party	1962	1980/1980	Not party	Not party
Mauritius	1992	1992	2006	1970	1982/1982	2006/ Not party	Not party
Morocco	1995	1995	2013	1956	2011/2011	1968/1968	2013
Mozambique	1995	1995	2007	1983	1983/2002	Not party	Not party
Namibia	1997	1995	2006	1991	1994/1994	Not party	Not party
Niger	1995	1995	2007	1964	1979/1979	1976/1976	2006
Nigeria	1994	1994	2008	1961	1988/1988	1961/1961	2005
Rwanda	1996	1998	2012	1964	1984/1984	2000/ Not party	Not party
Sao Tomé and Principe	1999	1999	Not party	1976	1996/1996	Not party	Not party
Senegal	1994	1994	2006	1963	1985/1985	1987/1987	Not party
Seychelles	1992	1992	2008	1984	1984/1984	2003/ Not party	Not party
Sierra Leone	1994	1995	Not party	1965	1986/1986	Not party	Not party
Somalia	2009	2009	Not party	1962	Not party	Not party	Not party
South Africa	1995	1997	2006	1952	1995/1995	2003/ Not party	Not party
Sudan	1995	1993	2008	1957	2006/2006	1970/1970	Not party
Swaziland	1994	1996	2012	1973	1995/1995	Not party	Not party
Togo	1995	1995	2006	1962	1984/1984	Not party	Not party
Tunisia	1993	1993	2007	1957	1979/1979	1981/1981	Not party
Uganda	1993	1993	Not party	1964	1991/1991	Not party	Not party
United Rep. of Tanzania	1996	1996	2011	1962	1983/1983	1971/ Not party	Not party
Zambia	1993	1993	Not party	1966	1995/1995	Not party	Not party
Zimbabwe	1994	1992	2008	1983	1992/1992	1998/ Not party	Not party
TOTAL COUNTRIES 53*							
TOTAL PARTIES	**53**	**53**	**39**	**53**	**51/51**	**29/17**	**9**

a Convention on Biological Diversity: http://www.cbd.int
b United Nations Framework Convention on Climate Change: http:/www.unfccc.int

c Convention On the Protection and Promotion of the Diversity of Cultural Expressions: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES

d 4th Geneva Convention: http://www.icrc.org/ihl.nsf

e Protocol I on Protection of Victims of International Armed Conflicts; Protocol II on Protection of Victims of Non-International Armed Conflicts: Both at http://www.icrc.org/ihl.nsf

f The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its Protocol I were signed on the same date. Both at http://www.icrc.org/ihl.nsf

g Protocol II to the Hague Convention at http://www.icrc.org/ihl.nsf

Note

* At its independence in 2011 South Sudan became a member of the United Nations, bringing the total number of members up to 54. However, South Sudan has yet to become party to key international human rights treaties, and is therefore not included in this table.

TABLE 3

Status of Ratification of the African Charter, and its Protocols on the establishment of an African Court on Human and Peoples' Rights, on the statute of the African Court of Justice and Human Rights and on the Rights of Women in Africa.

African Charter and Protocols[a]	African Charter on Human and Peoples' Rights	Protocols to the African Charter on Human and Peoples' Rights		
		On the establishment of an African Court on Human and Peoples' Rights[b]	On the Statute of the African Court of Justice and Human Rights[c]	On the Rights of Women in Africa
Year of adoption/ entry in force	**1981/1986**	**1998/2004**	**2008/**	**2003/2005**
Countries[1] /Year[2]				
Algeria	1987	2003	(Signed 2009)	(Signed 2003)
Angola	1990	(Signed 2007)	(Signed 2012)	2007
Benin	1986	(Signed 1998)	2012	2005
Botswana	1986	(Signed 1998)	Not party	Not party
Burkina Faso	1984	1998	2010	2006
Burundi	1989	2003	Not party	(Signed 2003)
Cameroon	1989	(Signed 2006)	Not party	2012
Cape Verde	1987	Not party	Not party	2005
Central African Republic.	1986	(Signed 2002)	Not party	(Signed 2008)
Chad	1986	(Signed 2004)	(Signed 2009)	(Signed 2004)
Comoros	1986	2003	Not party	2004
Congo (Republic of)	1982	2010	2011	2011
Côte d'Ivoire	1992	2003	(Signed 2009)	2011
Dem. Rep. Congo (DRC)	1987	(Signed 1999)	(Signed 2010)	2008
Djibouti	1991	(Signed 2005)	Not party	2005
Egypt	1984	(Signed 1999)	Not party	Not party
Equatorial Guinea	1986	(Signed 1998)	Not party	2009
Eritrea	1999	Not party	Not party	(Signed 2012)
Ethiopia	1998	(Signed 1998)	Not party	(Signed 2004)
Gabon	1986	2000	(Signed 2008)	2011
Gambia	1983	1999	(Signed 2009)	2005
Ghana	1989	2004	(Signed 2009)	2007
Guinea	1982	(Signed 2003)	(Signed 2008)	2012
Guinea Bissau	1985	(Signed 1998)	(Signed 2012)	2008
Kenya	1992	2004	Not party	2010
Lesotho	1992	2003	(Signed 2011)	2004
Liberia	1982	(Signed 1998)	(Signed 2011)	2007
Libya	1986	2003	2009	2004
Madagascar	1992	(Signed 1998)	Not party	(Signed 2004)
Malawi	1989	2008	Not party	2005
Mali	1981	2000	2009	2005
Mauritania	1986	2005	Not party	2005
Mauritius	1992	2003	Not party	(Signed 2005)

TABLE 3 (continued)

African Charter and Protocolsa	African Charter on Human and Peoples' Rights	Protocols to the African Charter on Human and Peoples' Rights		
		On the establishment of an African Court on Human and Peoples' Rights[b]	On the Statute of the African Court of Justice and Human Rights[c]	On the Rights of Women in Africa
Year of adoption/ entry in force	**1981/1986**	**1998/2004**	**2008/**	**2003/2005**
Countries[1] /Year[2]				
Mozambique	1989	2004	(Signed 2011)	2005
Namibia	1992	(Signed 1998)	Not party	2004
Niger	1986	2004	(Signed 2009)	(Signed 2004)
Nigeria	1983	2004	(Signed 2008)	2004
Rwanda	1983	2003	Not party	2004
Sao Tomé and Principe	1986	(signed 2010)	(Signed 2010)	(Signed 2010)
Sahrawi Arab Democratic	1986	(Signed 2010)	(Signed 2010)	(Signed 2006)
Republic[3]				
Senegal	1982	1998	(Signed 2008)	2004
Seychelles	1992	(Signed 1998)	Not party	2006
Sierra Leone	1983	(Signed 1998)	(Signed 2009)	(Signed 2003)
Somalia	1985	(Signed 2006)	Not party	(Signed 2006)
South Africa	1996	2002	Not party	2004
Sudan	1986	(Signed 1998)	Not party	(Signed 2008)
South Sudan[4]	(Signed 2013)	(Signed 2013)	(Signed 2013)	(Signed 2013)
Swaziland	1995	(Signed 2004)	Not party	2012
Togo	1982	2003	(Signed 2009)	2005
Tunisia	1983	2007	(Signed 2012)	Not party
Uganda	1986	2001	Not party	2010
United Rep. of Tanzania	1984	2006	(Signed 2009)	2007
Zambia	1984	(Signed 1998)	(Signed 2010)	2006
Zimbabwe	1986	(Signed 1998)	Not party	2008
TOTAL COUNTRIES 54				
TOTAL PARTIES	**53**	**26**	**5**	**36**

a All African Charters and Protocols at: http://www.au.int/en/treaties

b Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African court on Human and Peoples' Rights. The Protocol has been signed by 51 member states and ratified by 26 (December 2013).

c Protocol to the African Charter on the Statute of the African Court of Justice and Human Rights. This protocol confirms the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union and was adopted in 2008. The Protocol has been signed by 24 member states and ratified by five (August 2013). It will enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) member states.

Notes

1 The African Union has 54 members

2 Year (of signature) or year of ratification.

3 The Sahrawi Arab Democratic Republic (SADR) was proclaimed in 1976. The SADR government controls about 20-25% of the territory it claims. It has been a full member of the African Union (AU), formerly the Organization of African Unity (OAU), since 1984. Morocco withdrew from the OAU in protest and remains the only African nation not within the AU. SADR is not a member of the United Nations.

4 South Sudan became independent in 2011 and became member of the United Nations and the AU in the same year.