



This publication provides an overview of status and trends regarding the constitutional, legislative and administrative protection of the rights of indigenous peoples in 24 selected African countries.

This report provides the results of a research project by the International Labour Organization and the African Commission's Working Group on Indigenous Communities/Populations in Africa with the Centre for Human Rights, University of Pretoria, acting as implementing institution. The project examines the extent to which the legal framework of 24 selected African countries impacts on and protects the rights of indigenous peoples.

For an electronic copy of this report and of the 24 country studies, see www.chr.up.ac.za/indigenous

Overview Report of the Research Project by
the International Labour Organization and the African Commission on Human and Peoples' Rights on
the constitutional and legislative protection of
**the rights of indigenous peoples
in 24 African countries**

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OVERVIEW REPORT

of the Research Project by the
International Labour Organization
and the African Commission on
Human and Peoples' Rights
on the constitutional and
legislative protection of the
rights of indigenous peoples
in 24 African countries



FOREWORD

When the African Commission on Human and Peoples' Rights (African Commission) was established more than two decades ago, the question, and the very concept of indigenous peoples in Africa was the least of its priorities. In fact, it was not until 1999 that the question of the rights of indigenous peoples first featured on the agenda of the African Commission. This seeming *lack of interest* was not deliberate but rather was a reflection of the general approach, perception or understanding of the general public and African decision-makers on the question of indigenous peoples in Africa. The seeming lack of information and insufficient literature on indigenous populations, coupled with the strong resistance from many African States to embrace the idea on the continent, meant that African NGOs did not have sufficient room to express themselves on the issue.

The African Commission was seen by civil society organizations on the continent as the most appropriate forum to table up the plight of indigenous populations. Thus, for at least four consecutive sessions, the African Commission was constantly reminded by African and international NGOs of the plight of indigenous peoples on the continent, characterized by marginalization, exploitation, dispossession, harassment, poverty, illiteracy, etc. The African Commission could no longer remain indifferent to the plight of indigenous populations on the continent, and thus decided to establish a Working Group on the Rights of Indigenous Populations to, inter alia, examine the concept of indigenous populations/communities in Africa.

After two years of research, the African Commission in 2003 adopted the report of the Working Group in a document entitled *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa*. This Report has stood the test of time and served national, regional and international audience in the area of indigenous rights, including students, lecturers, researchers, social workers, human rights activists and defenders, the African Union, as well as United Nations agencies.

One of the recommendations of the Working Group was the establishment of a full time Working Group on Indigenous Populations/Communities in Africa (African Commission

Working Group), composed of members of the Commission and independent experts to, inter alia, undertake studies and research on issues of indigenous populations on the continent. Since its establishment in 2003, the African Commission Working Group has undertaken four country visits to Botswana, Namibia, Niger, and Burkina Faso, and six research and information visits to Congo, Burundi, Uganda, Central Africa Republic, Gabon and Libya. These visits have revealed that while there are gradual improvements in the treatment of indigenous populations in some countries, the situation in other countries still remain a source of concern. They also reveal the need for concerted efforts to bring all relevant stakeholders on board to explore ways and means to enhance the promotion and protection of the rights of indigenous peoples on the continent

It is on this premise that the International Labour Organization (ILO) in collaboration with the African Commission, working through the Centre for Human Rights of the University of Pretoria, South Africa, as the implementing institution, decided to undertake a much more focused study, looking specifically at the **constitutional, legislative and administrative provisions** concerning indigenous peoples in 24 African countries, with a view to compare and share best practices. This study entitled *Overview report of the research project by the ILO and the African Commission on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries*, lasted for over three years, and involved full-time researchers who conducted desk as well as field research. The findings were validated at a workshop held in May 2009, prior to the 45th Ordinary Session of the African Commission, at which most of the researchers, representatives from the ILO, members of the African Commission, the implementing institution – the Centre for Human Rights – and other relevant stakeholders were present. The study was subsequently discussed and adopted by the Commission during its 45th Ordinary Session.

This depth of this joint study, running into hundreds of pages, is the first of its kind under the auspices of the ILO and the African Commission. While it does not claim to be exhaustive, it provides the most comprehensive information on indigenous issues in these 24

countries, and to that extent is relevant to all stakeholders: politicians, scholars, students, human rights activists, indigenous communities.

The level of our success in this study will be measured by the impact that these findings and recommendations will have in the lives of indigenous populations, the policies, regulations, laws and practices of states. If we pay heed to the findings of this study, we will be able to come up with suitable policies, administrative, legislative and constitutional measures to ameliorate the plight of indigenous populations/communities in Africa. In my view, therefore, the work has just begun.

Commissioner Musa Ngary Bitaye
Chairperson, African Commission's Working
Group on Indigenous Populations/
Communities in Africa (WGIP)

EXECUTIVE SUMMARY

A Introduction

World-wide, indigenous peoples are faced with injustices such as dispossession of historical land and resources and forced assimilation into the way of life of dominant groups. Indigenous peoples in Africa face even bigger challenges as a result of the fact that African States have been reluctant to acknowledge the very existence of indigenous groups within their territories.

This report provides the results of a research project by the International Labour Organization (ILO) and the African Commission's Working Group on Indigenous Communities/Populations in Africa (African Commission Working Group), with the Centre for Human Rights (CHR), University of Pretoria, acting as implementing institution. The project examined the extent to which the legal framework of 24 selected African countries impacts on and protects the rights of indigenous peoples. The main aims of the project were two-fold: firstly, to contribute to the development of a suitable policy and legal framework for the protection of the rights of indigenous peoples; and secondly, to build the capacity and raise the awareness of relevant actors amongst indigenous peoples and government institutions, in order to improve the promotion and protection of indigenous peoples' rights in African States. Two types of studies were undertaken as part of the research: desk and in-depth studies. Twenty-four countries were surveyed in the study, and ten in-depth studies were undertaken. These countries were identified on the basis of criteria discussed and agreed upon at the project launch workshop (in Yaounde, 2006). Full electronic versions of these reports, the overview report, and primary legal documents pertaining to indigenous peoples is contained in a data base developed as part of the project (www.chr.up.ac.za/indigenous).

Three elements were most consistently used to identify indigenous peoples in the study: the profound extent of marginalization suffered, self-identification, and dependence on land and natural resources for their collective survival as peoples. The report concludes that it is an undeniable reality that indigenous peoples exist in many African States, and in all regions of the continent.

Through ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), international human rights law provides important standards on the rights of indigenous peoples. However, no African State has as yet ratified ILO Convention No. 169, and UNDRIP is not a binding legal instrument. Nevertheless, African States have become State parties to many other international instruments that are of potential relevance to indigenous peoples, such as 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 (CERD), the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) of the ILO. Increasingly, the bodies monitoring these treaties have made concern for indigenous peoples an express part of their mandates. In particular, more recent concluding observations adopted after the examination of State reports make pertinent recommendations related to indigenous peoples to African States.

At the regional level, the inclusion of 'peoples' rights' in the African Charter on Human and Peoples' Rights (African Charter), which all States in Africa with the exception of Morocco had ratified, serves as a basis for the inclusion of indigenous peoples within its protective scope. The African Commission on Human and Peoples' Rights (African Commission) established a Working Group of Experts on Indigenous Populations/Communities to deal with the issue. By adopting a report of its Working Group, the African Commission has accepted that indigenous peoples exist in many African States, and that they are entitled to the protection under the African Charter.

However, due to the lack of domestication and follow up, the domestic effect of international law has remained limited.

B Summary of research findings

Overall summary

With a few notable exceptions, such as elements in the Constitutions of South Africa and the draft legislation in the Congo, States have not formally accepted the legal existence of indigenous peoples. The specific reasons for this reluctance to acknowledge the existence of indigenous peoples vary from State to State, but almost uniformly relate to the goal of not undermining nation-building and of maintaining national unity in multi-ethnic societies characterised by competition for limited resources. An important result of this denial is that governments' records, for example the national census, do not reflect the different ethnic groups and languages, including indigenous peoples, existing in the country.

However, the legal systems of most States contain numerous legal provisions that can provide entry points for a more adequate protection of the rights of indigenous peoples. All States have a number of legislative provisions, policies and programmes that could be exploited to protect and promote the rights of indigenous peoples. This has not been done sufficiently, partly due to obstacles inhibiting the ability of indigenous peoples to access justice, and partly because government officials and other important role players have not been sensitised to the plight of indigenous peoples. Similarly, the mandates and practices of State institutions, such as national human rights institutions, the office of the ombudsman and 'mediateur', have not been adjusted to include the representations and concerns of indigenous peoples. These and other institutions have the potential to take on board indigenous peoples' issues, as the National Human Rights Commission of Kenya has for example done. Only a few national institutions have been established to address specific aspects of indigenous peoples' situation.

While it is correct that the laws and policies of a number of States make reference to the situation and rights of 'vulnerable' and 'marginalised' communities or groups, the particular concerns of indigenous peoples may be easily overlooked if care is not taken to address their specificities within this context, rather than address them as a component of a broader grouping with different needs and challenges.

While the emphasis in this study is on the obligations of States, it should be stressed that non-State actors also have an important role to play in exploiting the existing legal regime to benefit indigenous peoples, and to align law, policy and practice with the specific needs of indigenous peoples. An example of a NGO that has made such contributions is the Working Group of Indigenous Minorities in Southern Africa (WIMSA) in Namibia. Indigenous communities themselves have demonstrated the value of organisation and the public articulation of their concerns. In some instances, major gains have followed periods or incidents of civil disobedience and protest by members of indigenous groups.

The more detailed findings of the report are discussed under eleven separate headings, each dealing with an aspect of particular concern to indigenous peoples.

I Recognition and identification

There is very little formal constitutional or legislative recognition of indigenous peoples in the laws of African States. The use of various forms of terminology in African legislation and policies to refer to those who are understood in international law to be indigenous peoples is inconsistent and even contradictory. However, a number of states have begun to recognize the specificities and specific needs of indigenous peoples and to legislate and develop policies and programmes aimed at these specific groups. Despite that the term 'indigenous peoples' is not officially used in national legislation in the countries examined, a positive trend of legislating can be detected in a growing number of African countries. Such legislation, policies and programmes remain *ad hoc* and do not in any of the cases examined provide a comprehensive framework for the recognition and identification of indigenous peoples and the protection of the broad spectrum of the rights that are recognised in international law. Nevertheless, it is an indication of a gradual acceptance of the fact that in most African societies there are specific groups that are in positions of subordination or marginalisation and that require special measures in order to be able to benefit from the individual rights that are accorded equally to all members of the national population. There is, in nearly all cases, a lack of specific criteria to identify those groups that are referred to by the wide range of terms that indigenous peoples are referred to in

legislative and policy instruments. One of the exceptions is the draft law on the rights of indigenous populations of the Congo.

2 Non-discrimination

One of the core claims of indigenous people is their right not to be discriminated against. The State itself is often guilty of discrimination in the exercise of indigenous peoples' cultural rights, and in resource allocation resulting in their relative deprivation as far as access to land, health and education is concerned. Perhaps more often the source of discrimination is not the State, as such, but other individual and groups. Members of indigenous communities often suffer discrimination resulting from social stigma and negative attitudes. States still have the duty to take measures to protect the rights of indigenous peoples, for example by adopting measures such as anti-discrimination legislation to give effect to their obligation to protect the rights of all its nationals. Although some States have adopted such laws, they do not specifically include protection for indigenous peoples.

Despite the profoundly negative effect of deeply-engrained and longstanding discrimination against indigenous peoples, no State has taken special measures to redress this dire situation. Where special measures are taken to combat discrimination, these are often aimed at specific groups within the national population, but rarely indigenous peoples. In addition, many of these measures are *ad hoc* and do not represent broader policy measures. However, they could represent entry points through which to better protect the rights of indigenous peoples, or explore ways in which existing measures can be improved and systematised.

3 Self-management, consultation and participation

There are a number of legal frameworks in the African region which provide for the participation and consultation of the population in general or specific populations, including marginalized groups. Although very few of these make specific provision for indigenous peoples, a number of them can be used as entry points to advance the participation of indigenous peoples in decision-making. Where laws containing provisions for specific groups do exist, they only relate to specific instances. In most instances, no mechanisms exist at all and it is often the case

that no further action is taken to address the difficulties that indigenous peoples have in exercising those rights. Despite that most African states provide for the right of all citizens to vote, they generally do not take into account that the conditions that individuals must fulfill in order to be able to vote are extremely difficult to meet for indigenous peoples, such as their lack of basic citizenship documents.

In the area of self-management, some legal frameworks allow for participation. In the forest areas in Central Africa, laws do provide for resource use and management for local communities. However, the fact that indigenous villages are not recognized as 'local communities' in their own right, and only as attachments to neighbouring villages, means that indigenous peoples have added difficulties in claiming their rights to land and natural resources in their own right. In many African countries' legislation recognizes customary law and traditional chiefs or authorities. This is an essential point for the participation of indigenous people and their representatives in decision-making. The mechanisms for such participation are weak and often inappropriate for the adequate inclusion of indigenous peoples in the design, implementation and monitoring of such strategies.

4 Access to justice

Access to justice requires that lawyers are available to assist people who need them, that the courts are not too remote and inaccessible to be used and that the language of the law is understandable to the people who need to rely on the law. Although the access to justice of *most people* living African States is very limited, the problems besetting the population as a whole are exacerbated in respect of indigenous peoples. Courts and other judicial fora are often geographically inaccessible, because they live in remote rural areas, or engage in nomadic lifestyles. Due to the disproportionate levels of poverty and illiteracy among them, indigenous peoples are less likely to be able to pay for legal services, or be aware of their rights and the possibilities of legal aid, if it exists. Recognition of Bantu customary law as the single form of recognised 'traditional' legal framework has further eroded access to justice of indigenous peoples. With a few exceptions, such as mobile court for some indigenous communities in South Africa, States have not taken measures to address this situation.

5 Culture and language

The protection of their distinct culture and language is a central element of indigenous peoples' survival. For these groups, language and culture are often interdependent and indivisible. States have paid little attention to the importance that indigenous peoples attach to the preservation of culture as an important element of their identity. All examined countries value national unity over cultural diversity, despite their national and international obligations. Similarly, indigenous languages are not accorded official recognition and therefore not used in the government media and schools. As a result, some indigenous languages have all but disappeared, and others such as Tamazight and Khoi, are under severe pressure. This situation is not only devastating to national heritage and cultural diversity but it also leads to the destruction of indigenous groups themselves. The study found that the non-implementation of laws, policies and constitutional guarantees is also common in most states.

A number of States (in particular the DRC and Gabon) have taken some steps to combat this state of affairs, including constitutional, legislative and policy measures. States have also established new institutions to deal with aspects of indigenous peoples' culture. Examples are the South African Commission for the Promotion of and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Amazigh High Commissioner in Algeria, and the Royal Institute for Amazigh Culture (IRCAM) in Morocco.

6 Education

Education is essential for the self-development of indigenous people and to empower them to fight domination and the consequences of such dominance. However, despite the constitutional and international endeavours to educate indigenous people, education for indigenous children in actual practice is neither free nor compulsory. Although the right to education is guaranteed in almost all African States, indigenous children still have difficulties accessing their right to education, in particular to education that is appropriate to their needs and cultures. The Ugandan government's Alternative Basic Education for Karamoja (ABEK) programme, which is designed to offer a curriculum and methods that are conducive for a

nomadic lifestyle, provides an example of a measure that takes an indigenous community's needs into account. Furthermore, in the area of basic primary education, general constitutional and statutory guarantees have been inadequate to speak to the specific needs and challenges of indigenous people. Adult literacy levels among indigenous peoples also remain low.

7 Lands, natural resources and environment

For many indigenous people, land not only provides them with the means of economic survival but it also forms the basis of their cultural identity, spiritual and social well-being. Ancestral land is often lost due to conservation programmes, the promotion of tourism and logging. The effect and loss is further compounded by the failure to provide alternative land and compensation. A number of the countries analysed in the study have either constitutional or other legal provisions that recognise some collective rights to property and lands. The requirement that indigenous communities should have legal status before being able to claim collective rights to land prevents many indigenous communities from being able to enjoy the rights provided in national law. Furthermore, due to the fact that indigenous peoples' methods of land use are often considered outdated, the assumption may be that indigenous peoples' lands are not used 'productively'. This could be considered to constitute a form of discrimination against indigenous peoples' forms of land use and traditional occupation. In many circumstances, the possibility to claim collective land rights is dependent on indigenous peoples being able to show a 'productive' use of land.

Factors such as the lack of consultation, compensation and the failure to provide alternative land have compounded the effect of land loss. The institution of individual land rights, as well as the vesting of lands customarily owned by indigenous peoples in the State, or the devalorisation of communal land rights, has had a profound effect on the rights of indigenous peoples. Such new land regimes also ranked agriculture, and individual land tenure, over collective, nomadic land use, including pastoralism and hunting-gathering. Further, with the introduction of conservation measures for protected areas and environments, the role of indigenous peoples in conserving and managing

such lands was undervalued. Governance is also a key issue that is directly linked to the rights of indigenous peoples to their lands.

Many African countries recognise *customary rights* as a form of right to land. This could be an important entry point for indigenous peoples. In addition, in a limited number of cases, customary rules existing side-by-side with national law and recognised in legislation allow for both collective and individual rights to land, although in most cases, such rights are not full ownership rights, and only consist of either possession or use rights.

8 Socio-economic rights

The denial of socio-economic rights is at the core of indigenous peoples' marginalisation. Indigenous people are often subjected to gross socio-economic human rights violations. Although reliable indicators are not always available, a picture emerges of relative deprivation in respect of the right to education, access to health care, property and employment. A number of international law provisions, both globally and regionally, can be identified as guaranteeing the socio-economic rights of indigenous peoples. In attempting to implement their international obligations, several African countries have ended up adopting a number of measures, ranging from constitutional, legislative to administrative, with a view to upholding particularly the socio-economic rights of indigenous peoples. These rights include the right to food, the right to health, the right to social security, the right to housing, the right to education, the right to land, and the right to property including intellectual property. In an example of a positive legal development, the CAR enacted legislation to prohibit the exploitation for commercial purposes of the oral traditions of cultural minorities of that country. The inclusion of concern about the Batwa in the Burundian Poverty Reduction Strategy Paper is a further example on which future developments could be based.

9 Gender equality

Gender equality relates specifically to equality of treatment under the law and equal opportunity. The question of gender is of significance to indigenous people and to indigenous women in particular because issues of discrimination as well as the disadvantages of socio-cultural

policies worsen the position of the indigenous woman. Gender equality, non-discrimination and the promotion of women's rights are closely related. Although most African States have ratified several international instruments containing prohibitions against discrimination on the grounds of sex, women still experience systematic inequality across a wide front. Indigenous women and girls suffer multiple and even greater disadvantages due to the socio-economic and cultural context in which they find themselves, which exposes them to forced and early marriage, violence and harmful cultural practices. Their levels of education are inferior to those indigenous men; and they are more exposed to the risk of HIV transmission. They are excluded from enjoying property rights and the right to succession. States have taken very few measures to address the specific vulnerabilities of indigenous women. This is mainly due to the fact that the general legal position enforces inequality between the men and women, often perpetuating cultural and religious conceptions. African States have taken very few measures to address the specific vulnerabilities of indigent and indigenous women. Generic provisions pertaining to the rights of women, such as constitutional protection against discrimination on the basis of sex, domestic violence legislation, and special measures, have not taken into account the peculiar needs of indigenous women, and have not been used to address their concerns.

10 Indigenous children

The law in most countries under review is particularly silent on indigenous children's issues. The reason for this omission may lie in the perception that laws dealing with children already address a special category of vulnerability within the general population. All children are open to exploitation and in need of special legal protection. Often, the needs of indigenous children may overlap with those of other vulnerable children. However, there seems to be little understanding for the extent of violations that indigenous children, in particular, are exposed to. Despite the possibility that indigenous children may benefit from general legal provisions, there is very little evidence that they actually do. In fact, there are clear indications that the inverse is true. Indigenous children constitute a particularly vulnerable sub-group, due in great measure to the fact that they are living in rural areas or in conditions of

migration under which social services do not reach them sufficiently or are inexistent. A number of recommendations are made, for example that governments should ensure that disaggregated data on children is collected so as to identify existing gaps and barriers to their enjoyment of human rights.

II Indigenous peoples in border areas and trans-boundary situations

Indigenous people are often dispersed across national borders. As a result, groups that are sociologically similar end up being ascribed different legal nationalities. Borders constitute barriers that inhibit or prevent their social and cultural interaction, and undermine the cohesion of the group. Particularly those groups who live transhumant and nomadic life styles, such as the Tuareg and Mbororo, often migrate over borders as part of their survival. Affected States have in their legal systems not addressed the situation of indigenous peoples' migration across official borders. The specific needs of these groups should be assessed and the consequences of their migratory patterns and shared realities should be brought into the ambit of the law.

C Recommendations

Based on these findings, the report makes a number of recommendations to States, the international community, civil society and the media. Some of the most salient recommendations are summarized here.

(a) To African States

National commissions of inquiry composed of national and international experts should be appointed to investigate and report on the position of indigenous peoples in every country. The investigation should also identify indigenous peoples in the country (if any).

Data collection measures would be key in assisting governments to identify the specific needs of indigenous peoples (and other ethnic groups) in the country, which would in turn assist in adopting measures to ensure substantive equality among them. Data should be obtained about all aspects of their lives, including their level of education, health indicators, access to socio-economic services such as health care and

drinking water, and their access to justice. As far as possible, this data should be disaggregated by age and gender, and be generated in consultation with indigenous peoples, to ensure it adequately reflects their own priorities and perceptions.

If indigenous peoples are present in a country, States must ensure their political and legal identification, using international and regional criteria. Governments should ensure reliable data collection to identify the specific needs of indigenous peoples (and other ethnic groups) in the country.

In the absence of a comprehensive law targeting indigenous peoples in the country, existing laws should be exploited to the full granting protection to indigenous peoples' rights. States should however also consider the adoption of a law dealing comprehensively with the rights of indigenous peoples, as is being done in the Congo.

In all matters affecting them, such as legislative measures, the development or conservation policies, programmes and projects, governance and administration matters, governments have to consult indigenous peoples.

Both as a result of a lack of familiarity with mechanisms available for their protection and the consequence of years of domination, marginalization and exclusion, indigenous people require special measures to protect their interests. States should therefore adopt and implement special measures to address the situation of deeply engrained and long-standing marginalisation and discrimination experienced by indigenous peoples due to their specificities.

Existing national institutions, such as national human rights institutions, should address the situation of indigenous peoples. If required, a revision of the mandates of such institutions to include indigenous issues should be undertaken, and indigenous peoples should be included as members of these institutions. States should further consider the establishment of a State institution specifically targeted at ensuring the protection of the rights of indigenous communities.

States should ratify ILO Convention No. 169, which defines the obligations of States towards indigenous peoples.

(b) To the UN, AU and other international organisations

UN and AU human rights treaty bodies have proven effective in a number of instances in their examination of the concerns of indigenous peoples. A systematisation of such examinations of indigenous peoples' situation within the context of the examination of States' reports would enable such bodies to enter into an ongoing dialogue with States and follow-up on previous discussions to monitor states' progress in the implementation of the rights enshrined in their establishing treaty for indigenous peoples. In particular, the reflection of this in any concluding observations should be disseminated as broadly as possible.

The potential of the Universal Periodic Review and African Peer Review Mechanism to address the concerns of indigenous peoples should be explored fully.

UN and other multi-lateral and bi-lateral agencies with programmes at the country level would be of value in assisting African

governments in implementing the recommendations outlined above.

(c) To civil society

Civil society groups should advocate for the effective consultation of indigenous peoples in all matters affecting them, and for the inclusion of the concerns of indigenous peoples in laws, policies and programmes. The inclusion of a concern for indigenous peoples in the teaching and research of academic institutions would ensure greater capacity building on the issue in the African region.

(d) To the media

The media should inform the general population about the concept of indigenous peoples, their particular needs and rights, and the urgency of addressing their concerns, and should contribute to diminishing negative stereotypes about indigenous peoples through the provision of accurate information.

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Abbreviations and acronyms

ABEK	Alternative Basic Education for Karamoja
ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
ARV	Antiretroviral
AU	African Union
CAR	Central African Republic
CAT	Convention against Torture
CBNRM	Community-Based National Resource Management Programme
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CHR	Center for Human Rights
CIB	<i>Congolaise Industrielle des Bois</i>
CKGR	Central Kalahari Game Reserve
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
EID	<i>l'Espace d'Interpellation Démocratique</i>
FGM	Female Genital Mutilation
GEF	Global Environment Facility
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IWGIA	International Work Group for Indigenous Affairs
ILO	International Labour Organization
IPDP	Indigenous Peoples Development Plan
IRCAM	Royal Institute for Amazigh Culture
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NDDC	Niger Delta Development Commission
OAU	Organisation of African Unity
OHCHR	UN Office of the High Commissioner for Human Rights
PASDEP	Programme for Accelerated and Sustainable Development to End Poverty
RADP	Rural Areas Dwellers Programme
SADC	Southern African Development Community
SASI	South African San Institute
SASC	South African San Council
SPRP	Strategic Poverty Reduction Paper
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
UNIPOBRA	<i>Unisson-nous pour la Promotion des Batwa</i>
USA	United States of America
WHO	World Health Organisation
WIMSA	Working Group of Indigenous Minorities in Southern Africa



A Introduction

Over the last few years, the plight of indigenous peoples has received increasing attention throughout the world. It is generally agreed that indigenous people are among the poorest and most vulnerable. Owing to their specific identities and attachment to their histories, environments, cultures, political organisations and languages, indigenous peoples have suffered and are still exposed to marginalisation, exclusion, stigmatisation and discrimination. Their attachment to their socio-political and economic specificities has resulted in perceptions across the world that indigenous peoples are 'different' and 'inferior'. Consequently, either by reason of colonisation or domination by larger groups, or the establishment of nation-States, indigenous peoples have often been subjected to various forms of injustice, ranging from dispossession of historical lands and resources to forced assimilation into the way of life of dominant groups. For indigenous peoples, the challenge has thus been to overcome these injustices while retaining their distinctness.

Indigenous peoples in Africa seem to face an even bigger challenge as a result of the fact that African States have been reluctant to acknowledge the existence of indigenous groups within their territories. Thus, in addition to the general state of human rights on the African continent, by reason of the non-recognition of their existence, indigenous peoples have specific human rights concerns in some areas, such as political representation and participation, discrimination, lack of access to land and natural resources, limited access to public infrastructure, denial of cultural rights and the degradation of their environment. Although developments in international human rights law have raised awareness about the importance of empowering victims of violations to demand the protection of their rights, this fact alone has not been sufficient to address the needs of indigenous peoples. Both as a result of a lack of familiarity with mechanisms available for their protection and the consequence of years of domination, marginalisation and exclusion, indigenous peoples require special measures to protect their interests.

I Background, aim and methodology of the report

Against this background, this project has constituted a three-year research initiative of the International Labour Organization (ILO) and the Working Group on Indigenous Communities/Populations in Africa of the African Commission on Human and Peoples' Rights (African Commission Working Group). The research sought to examine the extent to which the legal framework of African countries impacts on and protects the rights of indigenous peoples. The Centre for Human Rights (CHR), University of Pretoria, acted as the implementing institution. A Project Steering Committee, consisting of a representative of the ILO, the African Commission Working Group, the Centre for Human Rights, and an independent expert from a non-governmental organisation, the International Work Group for Indigenous Affairs (IWGIA), oversaw the project.

The main aims of the project were two-fold: The first aim was to contribute to the development of a suitable policy and legal framework for the protection of the rights of indigenous peoples. The second aim was to build the capacities and raise the awareness of relevant actors amongst indigenous peoples and government institutions, in order to improve the promotion and protection of indigenous peoples' rights in African States.

Using the principles of ILO Convention No. 169 and the African Charter as a reference framework, the research determines the extent to which the rights of indigenous peoples are protected at the national level. The research involves, *inter alia*, a comprehensive review of relevant international, regional and national standards, constitutions, legislation, case law, administrative measures and State policy and directives in the countries under study, with a view to determining the extent to which indigenous peoples' rights are protected within their domestic legal frameworks. The need for undertaking this research is premised on the fact that the rights guaranteed in ILO Convention No. 169 and the African Charter protecting indigenous peoples will not be meaningful unless they are guaranteed and implemented in national legal frameworks.

The project commenced with a workshop held from 18 to 20 September 2006. The workshop was hosted jointly by the ILO and the African Commission. The aim of the workshop was to explore the research methodology and processes to be adopted in the research project. The workshop was held in Yaounde, Cameroon, and participants in the workshop included members of the African Commission, the ILO, CHR, IWGIA, indigenous experts, other experts and researchers on subjects related to indigenous peoples, and NGOs working with indigenous peoples.


Two types of studies were undertaken as part of the research: desk reviews and in-depth studies.

- Desk research aimed to provide as much information as possible from existing documentation on the legal framework impacting on and protecting indigenous peoples in particular countries.
- In-depth studies were based on the initial desk research, but additionally aimed to provide a practical and detailed analysis of the level of implementation of the existing legal and policy frameworks concerning indigenous peoples. They aimed to identify and assess the practical measures, if any, in the country under study, aimed at enforcing the legal framework protecting indigenous peoples' rights. In-depth reviews consisted of a country visit during which researchers consulted and collaborated with government agencies and institutions, ILO, UN agencies, indigenous peoples' organisations and civil society organisations to undertake the research visits.

Twenty-four countries are surveyed in the study, by way of a desk review. They are:¹ Algeria, Botswana, Burundi, Burkina Faso, Cameroon, Central African Republic (CAR), Chad, Congo, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Gabon, Kenya, Mali, Morocco, Namibia, Niger, Nigeria, Rwanda, Tanzania, South Africa, Sudan and Uganda. In addition, in-depth studies were conducted in eight of these countries: Algeria, Burundi, CAR, Ethiopia, Kenya, Mali, Niger and South Africa. These countries were identified on the basis of criteria discussed and agreed upon

1. See Annexure A at the end of the report for a full list of reports, with authors.





at the project launch workshop, held in Yaounde in 2006. These criteria included the following:

- regional representation;
- the need to include countries where indigenous peoples' issues have not been researched thoroughly; and
- the self-identification of groups within a particular country as indigenous.

In respect of in-depth visits, the accessibility of the country for an in-depth visit research was also considered. While Morocco is not a member of the African Union, it was agreed that it would be included in the desk research owing to the progressive developments taking place in the country as well as its strategic importance in North Africa with reference to indigenous peoples' issues.

Researchers to conduct the desk reviews were identified for each country. Upon subsequent corrections by the researcher, the report was reviewed by a country reader. For most countries, a person well-versed in the law and with an excellent understanding of the situation of indigenous peoples of the country under study was identified as an expert reader. Wherever possible, an indigenous person was selected. After incorporation of the reader's comments and corrections, the ILO and Steering Committee provided their comments and eventual approval. This overview report was drafted on the basis of these country reports, submitted for comments from a broad range of actors and institutions, and presented to the African Commission for its approval. The Commission adopted the overview report at its 45th session, in May 2009, held in Banjul, the Gambia.

The report for each country is structured into three main parts. The first part briefly outlines the situation of indigenous peoples, and the background to the country as it applies to indigenous issues. Part two examines the legal protection of indigenous peoples in the country according to a list of themes. Part three draws conclusions and makes recommendations.

This overview paper is structured along the lines of the country reports.

An electronic data base, containing the full versions of the country reports, the final version of the overview report, as well as documents pertaining to indigenous peoples in respect of these countries, has also been developed.²

2 Limitations of the study

Constitutional and other legal provisions seldom deal explicitly with indigenous peoples. On the one hand, this lack of specificity may be the result of a negation of the existence of indigenous peoples. On the other hand, it may be assumed that indigenous peoples' protection is mostly subsumed under protective measures aimed at the general population or other vulnerable groups. The research project, therefore, had to mediate a careful course between describing the legal system in general terms, and highlighting the relevance and application of these provisions to indigenous peoples. Only in exceptional cases was it possible to refer to laws specifically targeting indigenous peoples.

2. See www.chr.up.ac.za/indigenous; the data is organized by country, document type and theme.

The lack of official State data or disaggregated statistics, and a lack of government information about the application (rather than mere formulation) of law similarly affected the study. As the scope of the study did not often allow for primary empirical data-collection about the situation of indigenous peoples and the actual implementation of laws, reliance had to be placed mostly on secondary data, which often was not available or unreliable.

With 24 countries from all sub-regions covered, the study can justifiably claim to provide a representative picture of the situation of indigenous peoples. However, quite clearly the study is not comprehensive, omitting as it does the experience of just over half of the continent. As the presence in a country of self-identified groups was a factor informing the choice of countries, the study is also skewed towards a particular experience of indigenous peoples.³

The quality of the various country reports varies, indicating some of the challenges in information-gathering, as well as a lack of adequate capacity to address indigenous issues from a human rights perspective in the African region. This, of itself, may be considered an initial conclusion from the experiences gained in undertaking this project.

3 The concept of 'indigenous peoples'

Given the lack of a commonly agreed-upon definition of the concept 'indigenous peoples', as well as a general consensus that, in fact, a universal definition of indigenous peoples may not be a *constructive* approach, and may serve to exclude some groups, at the Yaounde workshop, the identification of criteria that would assist in identifying the groups the research focuses on was discussed as a more *constructive* approach to this research. Although a common framework is followed, each of the country reports identifies indigenous peoples on a unique basis as different countries treat the issue differently. The following criteria, identified at the Yaounde Workshop, are intended to provide a guide to groups identifying themselves as indigenous peoples on the continent and are utilised for purposes of the research:⁴

- Indigenous peoples are socially, culturally and economically distinct.
- Their cultures and ways of life differ considerably from the dominant society and their cultures are often under threat, in some cases to the extent of extinction.
- They have a special attachment to their lands or territories. A key characteristic for most indigenous peoples is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer discrimination as they are regarded as 'less developed' and 'less advanced' than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalisation, both politically and socially.

3. As the study was undertaken over a protracted period of time, spanning three years, it was impossible to incorporate all the most recent developments in respect of all the countries under study, especially when a desk study had been conducted earlier on in the life of the project.

4. See also the *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', IWGIA (Copenhagen) and ACHPR (Banjul), 2005) and ILO Convention No. 169, Art 1.



- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.
- In addition to the criteria outlined above, participants highlighted the primary importance of self-identification, whereby the people themselves acknowledge their distinct cultural identity and way of life, seeking to perpetuate and retain their identity.

The three elements that were most consistently used to identify indigenous peoples in the study are the profound extent of marginalisation suffered, self-identification and dependence on land and resources for survival. It should be noted that further criteria may be in use at the national level.

The governments of some countries under study do not make use of the term 'indigenous peoples'. In Rwanda, for example, the term 'national communities historically most marginalised' (*'la communauté nationale historiquement la plus défavorisée'*) is used. Others make reference to '*populations marginales*' (marginalised populations) or vulnerable communities. In some instances, reference is made to the name of a specific ethnic group, such as the 'Batwa', rather than a category of the population. However, the merging of indigenous peoples into categories with a broader meaning or scope poses the risk that their specificities and internationally recognised rights are not sufficiently taken into account.

The aim of the research is not to provide a comprehensive list of indigenous peoples in the countries under investigation. The main groupings of indigenous peoples in each region are as follows, but this does not preclude the existence of other groups, and not all the groups covered in the country studies are listed here:

- **North and West Africa:** The Amazigh (or 'Berber') group constitutes the largest indigenous group on the continent. They are most populous in Morocco, where they constitute between 30% and 60% of the total population,⁵ and in Algeria, where they make up at least 15% of the total populace.⁶ In addition, the Amazigh are present in Tunisia, Libya and Egypt (around the Siwa oasis). Members of a sub-group of the Amazigh, the Tuareg, who live a more nomadic life-style associated with camels, are found in Niger, Mali, Burkina Faso, Algeria and Libya. Due to concerted campaigns of Arabisation and Islamisation in all North African States, the Amazigh identity is complex, and has become blurred and broadened. In the first instance, the Amazigh distinguish themselves by the use of the Tamazight language. A linguistically marked identity and an historical awareness ensure that their self-identification as 'indigenous' is generally quite strong. Although some members of the group have become urbanised, the majority still live in rural settings, adopting semi-nomadic (such as the Amazigh in Morocco) or nomadic (the Tuareg) ways of life and settlement. In Sudan, groups that may be considered as indigenous include the Dinka, the Nuer, the Azake and the Nubians.

5. See eg Middle East Encyclopedia, <http://www.mideastweb.org/Middle-East-Encyclopedia/amazigh.htm>; some estimates are as high as 80% (<http://phoenicia.org/berber.html>).

6. See Middle East Encyclopedia, <http://www.mideastweb.org/Middle-East-Encyclopedia/amazigh.htm>.

- **West and Central Africa:** The Peul, who may be generally described as a nomadic pastoralists, is the most numerous indigenous people in this region. They may be divided into the Fulbé (or Fulani), who are cattle breeders, and the Mbororo, who are more nomadic or transhumant, and whose lives are inseparable from and often spiritually connected to those of their herds of cattle (oxen). They have generally been animists, and engaged in ancestral worship, but many now subscribe to the Muslim religion. Traditionally, the Mbororo were truly nomadic, constantly moving from one area to another in search of grazing for their herds. Nowadays many are transhumant, seasonally migrating but returning to the same temporary settlements. The Peul people can be found all over West Africa, including in Burkina Faso, Cameroon, CAR, Chad, Mali, Mauritania, Niger, Nigeria and Senegal. Politically they are excluded and they are economically and socially marginalised. Smaller groups of indigenous peoples, such as the Ogoni and the Ijaws, also live in Nigeria.
- **Central Africa:** Living in forested areas, especially around the Great Lakes region, the most important indigenous grouping in Central Africa is the 'Pygmies'.⁷ Members of this group mostly are regarded and regard themselves as having a valid claim to being the original inhabitants of the forests of Central Africa. Various sub-groups live in and across the countries of the region, such as the Batwa, who live in Burundi, the Congo, the DRC, Rwanda and Uganda. Other groups include the Baka, Bayeli and Bedzan in Cameroon; the Babis, Babongo, Bakola, Mikaya, Mbenzele, Baka and Bagombe in the Congo; the Babongo, Bakoya, Baka, Barimba, Bagama and Bakoyi in Gabon; and the Aka in CAR and the Bambuti and Bacwa in the DRC. Dependent on hunting, gathering, fishing and pottery, these groups traditionally had an intimate link with their natural environment. They also share a common neglect and marginalisation, often driving them to the verge of extinction.
- **East Africa and Horn:** Indigenous peoples are more varied and diverse in the countries of the East and Horn of Africa. In Eritrea, for example, the Kunama and Nara meet the criteria of early settlement, social stigmatisation and economic marginalisation. However, their distinct traditional lifestyle of dependence on the land for survival has been eroded, partly due to encroachment on their lands. In Ethiopia, there are diverse groups of pastoralists such as Somalis, Afar, Boran, Karayu, Hamar, Tsemay, and Erfore with different levels of external influences, but most of them live across boundaries of the countries in the region. Numerous pastoralist communities are also living in parts of Sudan. In Kenya there is a plethora of groups who self-identify as indigenous and depend for their survival on pastoralism or hunter-gathering. These groups include the Anwer, Borana, Elmolo, Endorois, Gabra, Maasai, Munyayaya, Ogiek, Pokot, Rendille, Samburu, Sengwer, Somali, Turkana and the Yaaku. In Uganda, the three main groups are the Basongora, the Karamajongo and the Batwa. The Basongora is a pastoralist community with a nomadic lifestyle. Natural disasters, relocations and evictions due to the

7. The term 'Pygmy' is, however, considered derogatory by the peoples concerned, who prefer to be referred to by their group names (Baka, Batwa, etc.).





proclamation of nature reserves have placed much pressure on them, threatening their traditional lifestyles. The Karamajongo are a semi-nomadic warrior community, whose lifestyle and culture are under severe threat due mainly to environmental change and increased competition for land. The Batwa are a hunting and gathering people who are related to other similar Batwa groups in Rwanda, Burundi and the DRC. In Tanzania, there are hunter-gatherer communities, such as the Hadzabe, as well as pastoralists, such as the Barabaig and the Masaai, all living in the North.

- **Southern Africa:** The San is the most significant indigenous grouping in the sub-region. They inhabit the desert areas of Southern Africa. Sub-groups of the San (or Basarwa, as they are referred to in Botswana) include the Ju/'hoansi, Bugakhwe, //Anikhwe, Tsexakhwe, !Xoo, Naro, G/wi, G//ana, Kua, Tshwa, Deti, †Khomani, †Hoa, =Kao//aesi, Shua, Danisi, and /Xaisa (in Botswana), the Khure and Komani (in South Africa), and the Ovatie, Ovatombo and Ovazemba (in Namibia). These groups regard themselves and are mostly regarded by others as the 'original inhabitants' of the areas where they live, and self-identify as 'indigenous'. Although they have to varying degrees become part of the dominant culture and political economy, they tend to live nomadic lifestyles involving hunting and gathering. These modes of production make them closely dependent on natural resources. Despite the existence of a distinct San language, however, it has become extinct in several places. In addition to these main groups (and their sub-groups), a number of additional, smaller and country-specific groups exist. Examples are the Ovahimba of Northern Namibia, who live a traditional lifestyle in which their attachment to the land occupies a central position. This lifestyle places them at odds with that of the majority in society, and pushes them to the margins.

4 International law

Although the detailed findings of this study are discussed in Part B below, one of its core findings may be revealed here: African States negate or neglect the rights of indigenous peoples in their domestic law and practice. This finding underlines the important role of international standards as a beacon towards which legal reform and practice in these States may be steered. It is exactly under these conditions that the role of international law becomes more pronounced and potentially meaningful. It is therefore apt that this study examines how indigenous peoples' rights can be promoted through the (improved) implementation of international human rights law, and in particular, ILO Convention No. 169, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the African Charter on Human and Peoples' Rights (African Charter).

The two international instruments directed at indigenous peoples – ILO Convention No. 169 concerning Indigenous and Tribal Populations in Independent Countries and UNDRIP – most pertinently frame the discussion of the promotion and protection of their rights.

ILO Convention No. 169

Adopted in 1989, ILO Convention No. 169 entered into force in 1991. It is the binding international instrument that deals most explicitly with the rights of indigenous peoples. However, no African State has as yet ratified this Convention. ILO Convention No. 169 replaces ILO Convention No. 107 – the Indigenous and Tribal Populations Convention, adopted in 1957 – which was ratified by six African States⁸ and remains binding on those states that have ratified it but not yet ratified Convention No. 169.

UN Declaration on the Rights of Indigenous Peoples

After a lengthy drafting process within the UN, the Human Rights Council in June 2006 approved UNDRIP. Of the thirteen African members of the Human Rights Council, only four (Cameroon, Mauritius, South Africa and Zambia) voted in favour of UNDRIP. African States expressed concern and contributed to the deferral of UNDRIP's adoption by the UN General Assembly.⁹ The African Union adopted a unified position expressing concern regarding the UNDRIP,¹⁰ and welcomed the deferral of the UNDRIP's discussion by the UN. The African Union mandated the African group at the UN to guard Africa's interests and concerns about the 'political, economic, social and constitutional implications' of UNDRIP.¹¹ The African group released a memorandum setting out their concerns,¹² and proposed some further amendments to UNDRIP.¹³ In March 2007, a group of African academics issued a reply countering the African group's *Aide Memoire*.¹⁴ At its 41st session, in May 2007, the African Commission responded with the adoption of an Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, in which it tried to 'allay some of the concerns raised surrounding the human rights of indigenous populations' and reiterated 'its availability for any collaborative endeavour with African States in this regard with a view to the speedy adoption of the Declaration'.

Overcoming this initial resistance, and after some amendments to the initial text, the UN General Assembly on 7 September 2007 finally adopted UNDRIP. Thirty-five African States were among the 143 States voting in favour of UNDRIP; three abstained (Burundi, Kenya and Nigeria); and fifteen (Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea-Bissau, Mauritius, Morocco, Rwanda, São Tomé e Príncipe, Seychelles, Somalia, Togo, and Uganda) registered an absent vote. Only four States voted against UNDRIP: the United States of America; Canada, New Zealand and Australia.

8. Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia.
9. See eg the 'Draft Aide Memoire' of the African Group on the Declaration, dated 9 November 2006, New York, in which the Group expressed concern about eg the absence of a definition; the inclusion of the right to self-determination; and called for a 'deferment on the adoption of this Declaration' (para 9.1).
10. See African Union Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc Assembly/AU/Dec.141 (VIII) (30 January 2007).
11. AU Doc Assembly/AU/Dec.141 (VIII), para 3.
12. Africa Group Draft Aide Memoire: United Nations Declaration on the Rights of Indigenous Peoples (9 November 2006).
13. Africa Group Proposed Draft Text of the United Nations Declaration on the Rights of Indigenous Peoples (8 May 2007), available at http://www.ishr.ch/hrm/nymonitor/new_york_updates/african_text_draft_8_may_2007.pdf (accessed 24 September 2007).
14. African Group of Experts Response Note to 'The Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples' (21 March 2007). This note was signed by seventeen leading African experts on indigenous rights from a dozen different countries.



UN human rights treaties

Although none of the core UN human rights treaties deals specifically with the rights of indigenous peoples, a number of these treaties, notably 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 (CERD) and the Convention on the Rights of the Child (CRC), contain human rights standards relevant to indigenous peoples. The ICCPR (in Article 27) and the CRC (in Article 30)¹⁵ have provisions that relate most closely to indigenous peoples' concerns. Some of the monitoring bodies have elaborated upon the particular treaty's relevance to indigenous peoples. The CERD Committee for example adopted General Recommendations 8 (in 1990) on self-identification, and 23 (in 1997) on the rights of indigenous peoples. The CRC Committee has also on occasion included indigenous peoples' concerns in its General Comments.¹⁶

The States surveyed here have adhered to most of these UN human rights treaties. However, fewer have accepted the optional individual complaints mechanisms. Only a small number of complaints have been submitted. In only one individual communication against an African State, Namibia,¹⁷ the Human Rights Committee (HRC) decided a matter of importance to indigenous peoples, namely, the right to use a minority language in official correspondence with the government.

In respect of the obligation of States under these treaties to submit periodic reports, this obligation has generally been observed in respect of CRC. The record of African States under other treaties, in particular ICESCR, is less impressive. When afforded the opportunity, the treaty bodies have on occasion made recommendations to States concerning indigenous peoples when adopting concluding observations to State reports.

The CERD Committee, in particular, has in recent years devoted extensive attention to issues of indigenous peoples when examining State party reports, as exemplified by the examination of the most recent reports of Namibia, Botswana and Tanzania.

In its examination of Namibia's most recent State report, the CERD Committee expressed concern about the lack of recognition of the rights of ownership of indigenous communities over the lands which they traditionally occupied, and recommended that the State identify these lands and create domestic legal procedures to resolve land claims of indigenous communities.¹⁸ The Committee further encouraged the State to ensure that national parks established on the ancestral lands of indigenous communities allow for their sustainable economic and social development, and that it returns those lands and territories or provide adequate reparation measures where these communities have been deprived of their lands.¹⁹ It further

15. See also Arts 17 and 29 of the CRC.

16. See eg General Comment No. 9, 'The rights of children with disabilities' (2006) paras 79 and 80; and General Comment No. 11, 'Indigenous children and their rights under the Convention' (2009).

17. *Diergaardt v Namibia*, Communication 760/1997, UN Doc CCPR/69/D/760/1997 (6 September 2000). See also UN Doc CCPR/CO/81/NAM.

18. Report of the Committee on the Elimination of Racial Discrimination, UN Doc A/63/18 (2008), para 299.

19. Report of the Committee on the Elimination of Racial Discrimination, UN Doc A/63/18 (2008), para 300.

called on the State to address the situation of extreme poverty in which indigenous communities find themselves and to stimulate economic growth and development for these communities, especially with regard to education and health. In particular, the Committee expressed concern about the high rate of HIV infection among the San, their lack of access to identification documents, their low level of school attendance, and their comparatively low life-expectancy. Addressing the problem of the high incidence of rape of San women by members of other communities, the Committee recommended that the State adopt all measures necessary to ensure prompt, thorough and independent investigations into all allegations of rape of San women and that it increases its efforts aimed at combating prejudice against the San.²⁰


Botswana's combined fifteenth and sixteenth report, examined in 2005, provides another example.²¹ The CERD Committee took note of the relocation of the Basarwa from the Central Kalahari Game Reserve and recommended that the State refrain from taking action that would prejudice the results of the court case, which at that stage was on-going.²² Another area of concern that the Committee identified is the lack of access to justice of 'poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes'. The Committee therefore recommended that the State provide adequate legal aid and interpretation services, especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice.

In respect of Tanzania's most recently examined report,²³ the CERD Committee noted the lack of information on 'certain vulnerable ethnic groups, notably nomadic and semi-nomadic populations, *inter alia* the Barbaig, Maasai and Hadzabe',²⁴ and recommended that the State party provide detailed information on their situation.

In its concluding observations on Algeria's report, the HRC referred to the non-recognition of the 'Berber'²⁵ (in 1992),²⁶ and expressed concern in more detail about 'large sections of the population' including the Berber whose language rights are impeded as a result of the Arab Language Decree, which makes Arab the only language of public life (in 1998).²⁷ In its most recent concluding observations, the HRC did not deal with 'indigenous' or other minority issues.²⁸ Seemingly, these issues were overshadowed by more immediately pressing and flagrant human rights abuses pertaining to disappearances, torture, illegal detention and counter-terrorism measures. There is thus no consistent HRC practice of interrogating State compliance with Article 27, which provides for minority rights.

When the CRC Committee considered Algeria's State's report in 2005, the Committee devoted considerable attention to indigenous children. It first noted that its previous concerns regarding 'nomadic' children have not been

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20. Report of the Committee on the Elimination of Racial Discrimination, UN Doc A/63/18 (2008), para 303.
 21. UN Doc CERD/C/BWA/CO/16, 4 April 2006.
 22. Para 12.
 23. UN Doc CERD/C/TZA/CO/16, 27 March 2007.
 24. Para 16.
 25. The term 'Berber' is generally considered derogatory by those groups to which it refers. The term is no longer in common usage, and the people to whom it refers are the Amazigh of Northern Africa.
 26. Un Doc CCPR/C/79/Add.1, dated 25 September 1992, para 6.
 27. UN Doc CCPR/C/79/Add.95, dated 18 August 1998, par 15.
 28. UN Doc CCPR/C/DZA/CO/3, dated 12 December 2007.



addressed sufficiently. It then reiterated and expanded upon its previously-articulated concerns about birth registration, education and language.²⁹ The Committee proceeded to call on Algeria to provide disaggregated statistical data on particularly vulnerable groups, including Amazigh children,³⁰ and to explain what protection is provided to children belonging to minorities, in particular in order to protect the identity of Amazigh children.³¹ It should be noted that, although it makes reference to Article 30 of the CRC, which provides for the rights of minority and indigenous children, the Committee does not use the term 'indigenous', choosing instead to opt for the term 'minorities'. Another example of the Committee's engagement with the issue of indigenous children is its consideration of Congo's report in 2006.³²

Universal Periodic Review

The Universal Periodic Review by the Human Rights Council, established in 2006, provides a further opportunity for States' commitment to indigenous peoples' rights to be subjected to international scrutiny. As far as Africa is concerned, so far the reviews of Botswana and Algeria have raised concerns about indigenous issues. In respect of Botswana, a number of States posed questions about the full implementation of the judgment concerning the Basarwa in the Central Kalahari Game Reserve. In its presentation, Algeria informed the Working Group that, since 2002 the Constitution gave Tamazight the status of a national language and that more than 100 000 pupils have so far learnt Tamazight in State schools, and that a specific programme of teacher training has been set up to continue the teaching of Tamazight.³³ The *ad hoc* nature of the process and the lack of specific recommendations call into question the efficacy of the review process.

Special Rapporteur

In 2001, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was established. Since then, the Special Rapporteur has conducted on-site missions to three African countries, South Africa (in 2005),³⁴ Kenya (in 2006),³⁵ and most recently, in March 2009, to Botswana. In the report on Kenya, the Special Rapporteur recommends that the rights of 'indigenous pastoralist and hunter-gatherer communities' should be constitutionally entrenched and that 'specific legislation should be enacted 'including affirmative action where necessary'.³⁶ In respect of Botswana, the Special Rapporteur noted the improvements to the situation of indigenous peoples as a result of increased access to crucial services, but also took cognisance that the implementation of development programmes often does not 'take into account the language, culture and heritage of those most affected'.³⁷

29. UN Doc CRC/C/15/Add.269, dated 12 October 2005.

30. Paras 20 and 21.

31. Paras 83 and 84.

32. UN Doc CRC/C/COG/CO/1, dated 20 October 2006

33. UN Doc A/HRC/8/29 (23 May 2008).

34. UN Doc E/CN.4/2006/78/Add.2.

35. UN Doc A/HRC/4/32/Add.3.

36. UN Doc A/HRC/4/32/Add.3, para 91.

37. United Nations (News Flashes from the UN), UN Expert on Indigenous Peoples visits Botswana.


Other ILO Conventions

In addition to ILO Convention No. 169, a number of other ILO Conventions are relevant to the discussion. The most pertinent are ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation (Discrimination in Employment Convention), ILO Convention No. 138 concerning Minimum Age for Admission to Employment (Minimum Age), and ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour). All African States are party to ILO Convention No. 111, 47 have ratified No. 138, and 50 are party to No. 182. These are of particular relevance not only because of their content, but also due to the fact that they are ratified very widely. In the ILO Guide to Convention No. 111, 'Eliminating discrimination against indigenous and tribal peoples in employment and occupation' (the Guide), it is shown how that Convention promotes equal access to decent work of indigenous and tribal peoples. The Discrimination in Employment Convention defines the principle of equality of opportunity and treatment in the context of work and provides for certain steps and measures that ratifying States must take in order to respect, promote and realise this principle. The Guide sets out to identify situations that may involve discrimination against indigenous peoples. It contains two checklists, one providing guidance for the examination of concrete situations with a view to identifying discrimination that is contrary to the Convention; and one assisting indigenous and tribal peoples and relevant decision-makers in examining the national policy to promote equality of opportunity and treatment in employment and occupation in their countries. By prescribing the minimum age of employment as the age of fifteen, the Minimum Age Convention sets out to address child labour.

Together with the Worst Forms of Child Labour Convention, it speaks to an issue that disproportionately affects indigenous children. Indigenous children are often more vulnerable to the worst forms of child labour, especially as pastoralist production declines and children become more likely to work in cities, including in the tourism industry and as prostitutes. The Worst Forms of Child Labour Convention calls on States to eliminate these practices, as well as 'debt bondage' and 'serfdom', which frequently characterise the lives of indigenous children. Adopting a broad rights-based approach, the ILO's Handbook on Combating Child Labour among Indigenous and Tribal Peoples links the phenomenon of child labour to other contributing factors such as access to education and poverty. Other pertinent Conventions include the Forced Labour Convention No. 29 (1930).

African Charter

Although the African Charter does not explicitly deal with the rights of indigenous peoples, it is generally accepted that the concept of 'peoples' in the Charter applies to and encompasses indigenous peoples. This is also the view of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Working Group on Indigenous Populations). Initially opposed to the concept of indigenous peoples in Africa, it was not until the Commission's 29th ordinary session, through the intervention of former Commissioner Barney Pitso, that the Commission granted audience to the issue. Since then, it has been on the agenda of all the Commission's ordinary sessions. The Commission's Working Group was subsequently established (in 2001) to among others examine the concept of indigenous



populations/communities in Africa; study the implications of the African Charter on the well-being of indigenous communities; and consider appropriate recommendations for the monitoring and protection of the rights of indigenous populations/communities. Though African States have for the most part contended that the concept of indigenous peoples is irrelevant in Africa, this often refers to a different understanding of the concept of indigenous peoples than that which is understood in international law. Developments at the regional level, particularly under the African human rights system, reveal some laudable steps taken by African States in favour of indigenous peoples. These developments culminated in a report by the African Commission, the 2005 Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities,³⁸ which comprehensively recognises certain groups as indigenous peoples and suggests a legal framework for the protection of the rights of these marginalised African groups.

All African States, with the exception of Morocco, are party to the African Charter. On becoming a party, States automatically accept the right of individuals to submit complaints ('communications') to the African Commission. None of the three communications dealing with indigenous peoples' rights has as yet been finalised on its merits. The first case, *Bakweri Land Claims Committee v Cameroon*,³⁹ instituted on behalf of an 'indigenous minority' in Cameroon, the Bakweri, was declared inadmissible due to the non-exhaustion of local remedies. Even if the complaint alleged the violation of individual and peoples' rights, the admissibility decision does not reveal an attempt to define the Bakweri as an 'indigenous people'. In the second case, *Anuak Justice Council v Ethiopia*, the Anuak, who describe themselves as members of an 'indigenous minority group', principally claimed violations resulting from massacres, disappearances, detentions without charge, and the destruction of property. A third communication, *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois Community) v Kenya*,⁴⁰ submitted in 2003 and still pending, is more clearly linked to the alleged victims' membership of an indigenous group of people. The Endorois, a pastoralist group in Kenya numbering some 60 000, claim that their eviction from ancestral land to make room for a wildlife reserve (the Lake Bogoria Game Reserve) violates their rights as individuals (for example, their right to practice their religion) and their 'peoples' rights' (such as the right to dispose of wealth and the right to development).

It is difficult to analyse the African Commission's concluding observations adopted after the examination of State reports, as they are not published systematically. However, it appears from available information that the African Commission regularly engages reporting States on indigenous issues following the establishment of the Working Group on Indigenous Communities. At its 29th session in 2001, the Commission for the first time posed questions about the situation of indigenous peoples in reporting States.⁴¹ Since then, this aspect has featured consistently during the examination of State reports, and sometimes even as part of concluding observations. Following the consideration of its first periodic report at that session, Namibia became the first state to be targeted with concluding

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38. African Commission on Human and Peoples' Rights Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005).
 39. Communication 260/02, decided at the Commission's 36th session, Nov-Dec 2004, not yet contained in an Activity Report of the Commission.
 40. Communication 276/2003.
 41. Report of the Working Group on Indigenous Communities (2005) 78.

observations relating to indigenous peoples.⁴² In another example, the concluding observations adopted after examining South Africa's second report in 2005, recommended that South Africa 'undertake all appropriate measures to ensure that the rights of children belonging to minority groups, including the Khoi-Khoi and San, are guaranteed, particularly those rights concerning culture, religion, language and access to information'.⁴³ States still devote minimal attention to this aspect in their State reports, though, as exemplified by the recent Ugandan report, which merely states that Uganda is 'composed of 56 different indigenous communities', which are 'segregated under four major ethnicities', the Bantu, the Nilotics, the Nilo Hamites and the Luo.⁴⁴ In this instance, as in numerous others, NGOs prepared and informally submitted shadow or parallel reports,⁴⁵ often informing questions posed by Commissioners to government representatives.

Other African instruments

Other AU instruments, such as the Revised African Nature Convention, may also be of relevance to indigenous peoples. According to this Convention, States must respect the 'traditional rights and intellectual property rights of local communities including farmers' rights'.⁴⁶ The African Peer Review Mechanism (APRM) does not expressly require participating states to report specifically on the protection of indigenous peoples. Objective 9, under the general heading 'Democracy and Political Governance', dealing with the rights of 'vulnerable groups', is the most appropriate heading under which this important aspect could, and should, be covered. The Kenyan APRM does not make reference to 'indigenous peoples'. The report expresses criticism against the 'isolationist view and approach' of the different groups, who display no 'consciousness of the problems faced by other groups or how to collectively address the overarching issues that cut across the structural difficulties faced by individual groups'.⁴⁷ Similarly, the Rwanda APRM Report does not use the term 'indigenous', opting instead to refer to the 'Batwa minority'. The APRM Review Reports of Ghana and South Africa are silent on indigenous peoples' issues.

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42. The Commission emphasized that 'a commitment to human rights will help the state to manage tension ...'; it further noted the 'inadequate measures to address the special needs of the vulnerable groups such as the Himba and San'; and recommended that the Namibian government 'urgently introduce measures [...] to enable such groups to enjoy the rights under the Charter on the basis of equality with other groups in the country' (Concluding observations for the second report of Namibia, 29th Session (2001)).
 43. Conclusions and Recommendations on the First Periodic Report of the Republic of South Africa, 38th session of the Commission, 21 November–5 December 2005 (on file with author), para 34.
 44. Uganda's second Periodic Report <http://www.achpr.org/english/state_reports/40_Uganda%20periodic%20report_Eng.pdf> (accessed 12 December 2008) para 3.
 45. See 'Supplemental Report on the First Periodic Report of Uganda to the African Commission on Human and Peoples' Rights', submitted by the United Organisation for Batwa Development in Uganda (UOBDU), the Forest Peoples Programme (FPP) and International Working Group for Indigenous Affairs (IWGIA).
 46. Revised African Nature Convention, Art XVII(1) & (2).
 47. As above.

B Summary of research findings

I Recognition and identification

I.1 Introduction

Part I of the report outlines some of the main criteria that are used – by indigenous peoples themselves and by others – to identify indigenous peoples in Africa. With reference to the understanding of the concept of indigenous peoples in the international and regional legal framework for the identification of these peoples, this Chapter explores some of the approaches adopted at the national level – in the 24 countries that have been covered – for the identification and legal recognition of indigenous peoples. One of the key challenges facing indigenous peoples in the protection of their fundamental rights and freedoms is the lack of official recognition by the State of them as groups with specific needs, cultures and ways of life.

The international and regional framework for the identification of indigenous peoples

Before describing the status and trends in the legal recognition of indigenous peoples in the African countries covered by the research, it is first necessary to provide an overview of the international and regional legal and conceptual frameworks for the identification of these peoples.

The international community has not adopted a definition of indigenous peoples. In fact, the position of most international bodies charged with examining or addressing the rights of indigenous peoples (including the position underlying existing international legal instruments, such as ILO Convention No. 169 that specifically protects the rights of these peoples, as well as the position of the African Commission on Human and Peoples' Rights) is that a strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline major characteristics which may help us to identify who are the indigenous peoples and communities in Africa. In addition, the lack of a definition should by no means constitute an obstacle to addressing the substantial issues affecting indigenous peoples.

In 1986, the *Study on the discrimination against indigenous peoples* (Martínez Cobo Study) put forward an initial working definition of indigenous peoples.⁴⁸ However, the primary approach to the issue of identifying

48. 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.' *Study of the problem of discrimination against indigenous populations* (UN Doc E/CN.4/Sub.2/1986/7).

indigenous peoples has been that of using criteria to describe such groups, and not to apply a predetermined definition. The UN Working Group on Indigenous Populations' *Working paper on the concept of 'indigenous people'* lists a number of factors that are considered relevant to the understanding of the concept of 'indigenous' by international organisations and legal experts.⁴⁹ Furthermore, Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to the rights of indigenous peoples to decide their own identities and procedures of belonging.

ILO Convention No. 169 does not define who indigenous peoples are; rather, it contains criteria for the identification of these peoples in the countries where they exist. At the time of the Convention's drafting, it was considered that a definition of indigenous peoples may serve to exclude groups that may otherwise be able to benefit from enjoying the rights accorded by the Convention. The criteria contained in the statement of coverage in Convention No. 169 are both objective and subjective:

- Objective criteria include peoples in independent countries who are regarded as indigenous on the basis of historical precedence; and peoples who retain some or all of their own social, economic, cultural and political institutions, whose social, cultural and economic conditions distinguish them from other sections of the national community, or whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.⁵⁰ Here, historical precedence is not necessarily the only criterion with which to identify an indigenous people as such.
- In addition to these objective criteria, the Convention also states, in Article 1(2), that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply.


The Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (African Commission Working Group) was mandated by the Resolution on the Rights of Indigenous Populations/Communities in Africa, passed by the 28th Ordinary Session of the Commission in 2000, to *inter alia* examine the concept of indigenous populations/communities in Africa and to study the implications of the African Charter for these peoples. Among the considerations by the Working Group were those pertaining to the Articles of the African Charter that could be used for the protection of the rights of indigenous peoples. These were, among others, in the following areas:

- The rights of peoples/collective rights. Many indigenous peoples' very existence is threatened – in particular that of hunter-gatherer communities. In its report, the Working Group linked the collective rights of indigenous peoples to the rights of peoples as contained in the African Charter.⁵¹ The African Charter expressly

49. These are: priority in time, with respect to the occupation and use of a specific territory; The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

50. ILO Convention No. 169, Arts 1(1)(a) and 1(1)(b).

51. *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', IWGIA (Copenhagen) and ACHPR (Banjul), 2005, 20.



recognises and protects collective rights. It uses the term ‘peoples’ in its provisions, including the Preamble.

- Articles 20 and 22 of the African Charter emphasise that all peoples shall have the right to existence and to the social, economic and cultural development of their own choice and in conformity with their own identity. Such fundamental collective rights are to a large extent denied to indigenous peoples.⁵²
- Individual rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.

The Working Group stated that the term ‘indigenous peoples’ has come to have connotations and meanings that are much wider than the question of ‘who came first’. Furthermore, it raised the following points:

- The understanding of the term ‘indigenous peoples’ only in relation to European colonisation is not the point of departure in this particular debate.
- The overall present-day international framework relating to indigenous peoples should be accepted as the point of departure.
- An approach of identification should be used, with criteria for the identification of indigenous peoples instead of an actual definition.⁵³
- The principle of self-identification as expressed in ILO Convention No. 169 and by the UN Working Group on Indigenous Populations is a key principle that should also guide the further deliberations of the African Commission.⁵⁴

It further concludes that ‘... if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance’.⁵⁵

1.2 Legal and constitutional recognition of indigenous peoples in Africa

At the outset, it is clear that in Africa there is very little formal constitutional or legislative recognition of indigenous peoples as such in legislation. However, in practice, in some cases, these groups are referred to by their ethonyms in many countries, and often there may be an implicit acceptance that certain groups within the state boundaries identify themselves as indigenous peoples in accordance with the international understanding of the term. A number of states, such as Eritrea and Ethiopia, officially recognise the different ethnic groups residing within state boundaries. In Ethiopia, for example, the ‘nations, nationalities and peoples’ within the state are officially recognised in the Constitution and accorded specific constitutional rights’, but often it is the case that such formal recognition does not translate into the concrete implementation of rights in accordance with the differing needs of different groups. In addition, it is common in many cases for some smaller ethnic groups to be excluded from official recognition, to be subsumed within larger ethnic groups, as is for example the case with the Tekurir and

52. As above, 57.

53. As above, 88.

54. As above, 101.

55. As above, 92.

the Jeberti in Eritrea, the San groups in Botswana, and several indigenous peoples in Kenya.

At the other end of the scale, a number of States' constitutions and legislation do not reflect the ethnic composition of the country (such as the case, for example, with Egypt, whose Constitution refers to the Egyptian peoples as an Arab nation, thus indicating that it sees itself as homogenous, failing to officially acknowledge the existence of groups that are culturally distinct from the dominant Arab population). It is only in the equality clause of the Constitution that the very existence of linguistic, ethnic or religious differences among Egyptians is even implicitly indicated.⁵⁶ Nevertheless, Egypt has ratified the ILO's Indigenous and Tribal Populations Convention No. 107, which has been thus far been applied to the Bedouin population, although the approach has largely been integrationist.⁵⁷ In a similar fashion to the Egyptian Constitution, the Constitution of Algeria fails to acknowledge any groups other than the Arab population. It does not recognise the indigenous nature of the Amazigh population. The Constitution only combines State and religion, and recognises Algeria as '*L'Algérie, terre d'Islam, partie intégrante du Grand Maghreb, pays arabe, méditerranéen et africain ...*'⁵⁸ with Islam as the State religion,⁵⁹ and Arabic as the official national language.⁶⁰ Arab culture and the Islamic religion are considered as the sole real 'constants of the Algerian national identity'. Thus, the Amazigh identity is in reality extremely marginalised at the national level. Despite the recognition in 2002 of Tamazight as a national language, there has been no significant change in legislation or practice to reflect this.

Some Constitutions expressly forbid any reference to ethnicity at all. Such is the case with the Rwandan Constitution. No legal text in Rwanda uses the term 'indigenous', and the government does not recognise the term 'indigenous peoples'. However, the Batwa of Rwanda, and the 'Pygmies' of central Africa more broadly, are generally recognised as the first inhabitants of the region. However, particularly in Rwanda, the question of ethnicity is extremely sensitive, and politicised, and the State does not recognise the Batwa based on the reasoning that this may lead to tribalism. Rather, the Batwa are designated officially as 'historically marginalised communities'. Article 82 of the Constitution, for example, provides for special representation in the Senate, which is composed of twenty-six members, eight of which should be from communities that are historically the most marginalised.

Some Constitutions feature express provisions concerning all citizens' equality before the law as well as general non-discrimination provisions, and recognise cultural diversity within a given country, or the recognition of the diversity of ethnic groups within the State. The Constitution of Mali proclaims the defence of cultural and linguistic diversity of the national community.⁶¹ However, there is no recognition of indigenous peoples as

56. The equality clause under Art 40 reads: 'All citizens are equal before the law. They have equal public rights and duties *without discrimination between them due to race, ethnic origin, language, religion or creed*' (emphasis added).


57. ILO Committee of Experts on the Application of Conventions and Recommendations, Individual Direct Request concerning Convention No. 107, Indigenous and Tribal Populations, 1957 Egypt (ratification: 1959) 2005.

58. Preamble to the Constitution ('Algeria, land of Islam, integral part of the grand Maghreb, Arabic, Mediterranean and African country').

59. Art 2 of the Constitution.

60. Art 3 of the Constitution.

61. Preamble of the Constitution of Mali.



such in national legislation, despite the recognition of the Tuareg and Peul populations as indigenous communities by the African Commission's Working Group on Indigenous Populations/Communities, and their own self-identification as indigenous peoples.

A number of African Constitutions assure the specific protection of minorities, and some provide for the representation of specific ethnic groups in nationally-elected bodies (such as Burundi, which has quotas for ethnic groups including the Batwa in the National Assembly and Senate). No African Constitution, however, recognises the term 'indigenous peoples' specifically, with the exception of the Constitution of Cameroon of 18 January 1996, which states in its Preamble that the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law.⁶²

The Constitution of Burundi, for example, does provide a form of recognition to the Batwa, in that it recognises the ethnic and religious diversity of the country, and it provides specifically for Batwa representation in the National Assembly and the Senate.⁶³

The Ethiopian Constitution goes even further by opening with the words '[w]e, the Nations, Nationalities and Peoples of Ethiopia ...,' and further stating that 'all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia'.⁶⁴ According to the Constitution, a

Nation, Nationality or People' for the purpose of the 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.⁶⁵

Some parliamentary seats have been reserved by the Ethiopian Constitution to minority ethnic groups in the country without specifically mentioning who these minority groups are, leaving it to be identified at implementation level. Unlike most countries, which emphasise the individual, Ethiopia chose to draft its Constitution using collective terms. The Constitution recognises the multitude ethnic groups located in Ethiopia, but does not distinguish between 'nation, nationality or people' nor does it 'explicitly recognise national, ethnic, religious and linguistic minority or indigenous status'.⁶⁶ The Ethiopian Constitution affords all languages and cultures equal recognition, and each ethnic group 'has the right to develop and promote its own culture and preserve its own history'.⁶⁷ The rights of pastoralists are also specifically mentioned in the Constitution.

62. Preamble, Constitution of Cameroon, 1996. By virtue of Art 65 of the Constitution, 'The preamble shall be part and parcel of this Constitution.' However, no formal interpretation of the meaning of use of the term 'indigenous' in the Preamble exists. Doubt may be expressed as to whether the use of term 'indigenous' in this case refers to what is understood under UNDRIP.

63. Arts 164, and 180, respectively, of the Burundian Constitution.

64. Ethiopian Constitution, Art 8(1).

65. Ethiopian Constitution, Art 39(5).

66. United Nations Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' Report of the independent expert on minority issues, Gay McDougall, Mission to Ethiopia, UN Doc A/HRC/4/9/Add.3, para. 7, 28 February 2007.

67. United Nations Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' Report of the independent expert on minority issues, Gay McDougall, Mission to Ethiopia, UN Doc A/HRC/4/9/Add.3, para. 8, 28 February 2007.

As regards national legislation, only one country in the African region so far has drafted (but not yet enacted) national legislation on indigenous populations *per se*. The Republic of the Congo has drafted a comprehensive law on the rights of indigenous populations, specifically referring to the 'Pygmies' as being covered by the law. The *Exposé des Motifs* of the draft law places the draft law within the framework of Article 4(6) of the national Constitution, which provides for the protection of ethnic minorities. The law also refers to constitutional provisions of non-discrimination and the equality of all citizens, yet highlights the need for special measures in order to address the specific situation of the 'Pygmies'. The criteria used in the draft law to identify the groups to which it applies are, cultural identity and institutions, and customs and traditions that distinguish them from other groups, and the fact that the 'Pygmies' distinguish themselves from other groups according to these criteria.

*Au sens de la présente loi, on entend par populations autochtones, appelés Pygmées, les populations qui se distinguent des autres groupes de la population nationale par leur identité culturelle, leurs institutions et qui sont régies par des coutumes et traditions qui leur sont propres.*⁶⁸


In the Congo more generally, the terms 'indigenous' and 'Pygmies' are used synonymously, implying that it is implicitly accepted that the 'Pygmies' are the indigenous peoples of the country. In fact, the interchangeable use of the terms 'Pygmy', 'indigenous' and 'minority' is common in most Central African countries in policies, and discourse, if not in national legislation, which uses the latter two terms and not the term 'indigenous'.

In other cases indigenous peoples are specifically recognised in national legislation, or sometimes in official statements, as 'vulnerable' or 'marginalised' groups. Ethiopia's five-year Programme for Accelerated and Sustainable Development to End Poverty (PASDEP) can be mentioned as an example. They may also be referred to in such instances, by their ethonyms, as is the case in Burundi. In Cameroon, indigenous peoples are subsumed under the collective heading of 'marginalised populations', and legislation is currently being prepared to protect such groups. Whereas the preparation of such legislation is undoubtedly a positive step, the conflation of groups that identify themselves as indigenous peoples and fulfil the criteria set out in the international legal framework for the rights of indigenous peoples, with other groups that do not, is likely to result in such legislation falling short of providing adequate rights for indigenous peoples. Furthermore, the lack of any official criteria for identifying those groups to be covered by the proposed law means that, in effect, it will cover several named ethnic groups with vastly different needs and rights claims. This may prove substantially difficult to address in the framework of one law. Nevertheless, legislation pertaining to forest and resource issues, such as the 1994 Forestry Law, uses the terms 'indigenous populations' and 'village communities' interchangeably in places.

In the DRC, the Forest Code refers to local communities which have specific rights under the Code. The Code defines 'local communities' as '*une population traditionnellement organisée sur la base de la coutume et unie par des liens de solidarité clanique ou parentale qui fondent sa cohésion interne. Elle est*

68. 'For purposes of the present Law, the term 'indigenous peoples', also called 'Pygmies', is understood to comprise populations who distinguish themselves from other groups making up the national population, on the basis of their cultural identity, their institutions, and as being those who are governed by their own customs and traditions.'





caractérisée, en outre, par son attachement à un terroir déterminé.⁶⁹ Although the term 'indigenous' is not used, it clearly refers to indigenous peoples. Similarly, the Forest Code (Law No. 004/74) of the Republic of Congo, and of the Central African Republic (No. 90/003 of 1990) do not use the term 'indigenous peoples', but rather speak of 'local populations' or '*populations riveraines*'.

Other forms of recognition in constitutions and national legislation may be through the recognition of indigenous languages. In South Africa, the Constitution makes express mention of indigenous languages.⁷⁰ While the three indigenous languages are not given the same official status as other predominantly Bantu African languages, the fact that they are mentioned in the Constitution signals that the State acknowledges their importance. Section 6(2) of the South African Constitution refers to 'recognising the historically diminished status of the indigenous languages of our people'. Sections 30 and 31 of the Constitution (on language and culture as well as cultural, religious and linguistic communities respectively) have important guarantees on some of the fundamental rights of indigenous peoples, given that these provisions speak directly to minorities and cultural communities.

In other cases, indigenous peoples may be recognised, or identify themselves, as national minorities. This is the case in Kenya, where official recognition of indigenous peoples still remains controversial. However, the State has recently acknowledged that, while in the past it did not take any active measures to preserve and protect minorities in Kenya, 'there has been a gradual acceptance of their status and there are efforts being made to not only recognise these minorities, but also to encourage their survival and protection'.⁷¹ However, in the Kenyan case, the approach to recognition of the forty-two officially-recognised tribes 'is derived from colonial policy of promoting assimilation of smaller communities into other dominant groups'.⁷² This has had the effect of reducing the visibility or eliminating a number of smaller pastoralist and hunter-gatherer communities from national policy-making and budget allocations.⁷³

For the most part, indigenous peoples in Nigeria identify themselves as minorities due to a lack of official recognition, or a national debate on their recognition as indigenous peoples as such. A number of national laws in various countries also refer to groups that otherwise identify themselves as indigenous peoples, as minorities. The Preamble of the 2004 Constitution of the Central African Republic, for example, indicates that the CAR is 'a State founded on the rule of law, and based on democratic pluralism, which guarantees security of persons and property, the protection of the most vulnerable, in particular minorities, and the full exercise of freedoms and fundamental rights'.⁷⁴ Instead of referring to indigenous peoples, it speaks of

69. Art 17 of the *Code Forestier Congolais* ('a population traditionally organised on the basis of custom and united by clan-based or familial relationships, on which its internal social cohesion is based. It is further characterised by its attachment to a demarcated land area').

70. Sec 6(2) of the South African Constitution obliges the state to take practical and positive measures to elevate the status and advance the use of indigenous languages. Sec 6(5) of the Constitution promotes the protection of Khoi, Nama and San languages.

71. Second Periodic Report of Kenya to the UN Human Rights Committee, para 212.

72. Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 21.

73. As above.

74. '*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*'.

'minorities' and 'vulnerable persons'. In its 2006 report to the Human Rights Committee, the CAR referred to the 'Pygmy minority', but not within the context of Article 27 of the ICCPR which deals with the rights of minorities. In its concluding observations, the Committee did not place this discussion within the framework of Article 27.

Whereas recognition as a minority may afford some level of protection, the rights afforded to minorities within the framework of international law are substantially different in many areas to those afforded to indigenous peoples.

I.3 National policies and programmes

National development policies and programmes often target indigenous peoples specifically because either they inhabit areas that are rich in natural resources that are of direct economic value, or because they constitute among the most marginalised, and the poorest sectors of the national population. Poverty Reduction Strategies (PRSs) are an area of particular interest for indigenous peoples and a number of African PRSs actually address indigenous peoples directly – in particular those countries in the Central African region. The DRC's PRSs in 2006 and 2007 recognised the existence of indigenous peoples:


La RDC est le premier pays d'Afrique du point de vue de l'étendue de ses forêts et le plus important dans la préservation de l'environnement mondial. La forêt est essentielle à la survie et au développement d'au moins 40 millions de Congolais. Au sein de cette population, il faut mentionner particulièrement les peuples autochtones qui vivent à la lisière de la forêt et principalement des produits naturels de la biodiversité forestière, tant pour leur alimentation, leur habitat et leur santé que pour l'énergie bois (80% de toute l'énergie consommée dans le pays).⁷⁵

A number of other PRSs documents refer to 'vulnerable groups', 'minorities' or to indigenous groups by their ethnic group names, yet clearly address indigenous peoples. Examples include the Republic of Congo (which uses 'Pygmies', 'vulnerable groups' and 'minorities' interchangeably), the interim PRSs document of the Central African Republic, and the CAR's 2008 – 2010 PRSs document, which refer to 'ethnic minorities', although they cite both the 'Pygmies' and the Mbororo as two groups more seriously affected by poverty. In Ethiopia, the 2005 development plan (PASDEP) provides that 'human development indicators and poverty among [pastoralist] group are uniformly worse than elsewhere in the country, and they have proven difficult to reach with traditional services'.⁷⁶

A number of States in Africa have developed Indigenous Peoples Development Plans – largely within the framework of PRSs, sector programmes (for example, the Forest and Environment sectoral programmes

75. 'The DRC is the foremost African country in respect of its forests and the most important in the preservation of the global environment. The forest is essential to the survival and development of at least 40 million Congolese. Among this population, the indigenous peoples, who live on the edge of the forest and depend mainly on natural products from the biodiversity of the forest both for their alimentation, their living environment and their health, and for energy from wood (which constitutes 80% of all the energy consumed in the country), deserve particular mention.' *République Démocratique du Congo, Document de la stratégie de croissance et de réduction de la pauvreté (DSCR), juillet 2006, para.111, p.34 voir sur le site : [http://siteresources.worldbank.org/INTPRS1/Resources/Democratic-Rep-of-Congo-French\(July2006\).pdf](http://siteresources.worldbank.org/INTPRS1/Resources/Democratic-Rep-of-Congo-French(July2006).pdf)*

76. PASDEP, p. 50



in Cameroon and Gabon), and infrastructure programmes such as the road-building programme in the Democratic Republic of Congo. This is largely due to the requirements of World Bank Operational Policy No. 4.10 which requires specific action when investments of the Bank and the Global Environment Facility (GEF) affect the capacity of indigenous peoples, ethnic minorities or other groups to defend their interests and rights as regards lands and natural resources. Gabon's Indigenous Peoples Development Plan, for example, cites the Prime Minister:

*Les premiers habitants de notre pays, les pygmées, sont effectivement absents à l'occasion par exemple des échéances importantes. Non pas parce qu'ils refuseraient d'y prendre part; mais tout simplement en raison de ce que, d'une part ils n'ont pas de moyens et, d'autre part, ils n'ont pas de cartes d'identité.*⁷⁷

Thus, the Gabonese Indigenous Peoples' Plan explicitly recognises indigenous peoples ('Pygmies') as a group with specific needs, and a responsibility towards these peoples in forest-related issues. Recognition in this particular case is specifically linked to historical precedent. National legislation in this case, however, tells a different story. Law 0016101 of 31 December 2001 (*Code Forestier*), for example, makes reference to 'communautés villageois', although this would include indigenous peoples. In DRC, in the context of the road-building project (component 3 of the World Bank's project to support economic and social reunification) the Indigenous Peoples Plan not only uses the term 'indigenous', but also indicates that the 'Pygmies' are the indigenous peoples inhabiting the country.⁷⁸

In South Africa, 'the cabinet adopted a memorandum in 2004 setting out a policy process to recognise Khoe and San as vulnerable indigenous communities'.⁷⁹ This is a positive step towards the recognition of indigenous peoples in South Africa, and as illustrated by a variety of government and official statements, the Khoe and the San are regarded by the State as being an 'indigenous people' who have been marginalised and deserve special protection. However, the memorandum and public officials' statements have not been translated into an official policy recognising the Khoe and the San as the indigenous peoples of South Africa.⁸⁰

In Uganda, while there is no official government policy recognising indigenous people as understood internationally, there is a tendency to recognise some groups as marginalised and vulnerable or as minorities. The Ministry of Gender, Labour and Social Development has, for instance, recently embarked on an exercise to establish a data bank providing information on minority ethnic communities.⁸¹ While the Ministry uses the term 'indigenous peoples', together with 'minorities', it is clear from the rest

77. 'The first inhabitants of our country, the Pygmies, are effectively absent from, amongst others, important events. Not only because they refuse to take part therein, but quite simply because, on the one hand, they lack the means to do so, and on the other hand, because they do not have identity documents.' *République Gabonaise, Ministère de l'Economie Forestière, des Eaux, de la Pêche, de l'Environnement chargé de la Protection de la Nature, Plan de Développement de Peuple Autochtones du Programme Sectoriel Forêts Environnement, Rapport Final préparé par Dr. Kai Schmidt-Soltan, juillet 2005, 4.*

78. *République Démocratique du Congo, Plan des peuples autochtones, Composante 3 du Projet d'urgence et de soutien au processus de réunification économique et sociale (PUSPRES), Rapport final 2006.* See http://www.wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2007/10/09/000020953_20071009141319/Rendered/PDF/IPP248.pdf.

79. See IWGIA, *The Indigenous World* (2006) 516. The state has also established an Inter Departmental Working Group on Khoe and San Issues.

80. See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, 2 para 81.

81. Ministry of Gender, 2007.

of its study that reference is being made to minority ethnic groups and not 'indigenous peoples' as understood internationally. In Rwanda, despite the lack of official recognition of indigenous peoples as such, the National Commission of Unity and Reconciliation recognised, in 2006, that the Batwa had been systematically forgotten or ignored and merited special attention, recommending special measures in favour of the Batwa in terms of education and health issues.⁸²

I.4 Statements and documents in international fora

Sometimes the evolution of States' approach to indigenous issues can be gleaned through their reports and statements to international treaty supervisory bodies, or in other international fora. The General Assembly's vote to adopt the United Nations declaration on the Rights of Indigenous Peoples in September 2007 saw 143 votes in favour and only four votes against (Australia, Canada, New Zealand). Burundi, Kenya and Nigeria were the African States that abstained from the vote. Benin was the only African country to take the floor during the discussion just prior to the vote, indicating that it had been a sponsor of the draft from the very outset, as well as its conviction that it represents progress in the field of human rights and in particular the rights of indigenous peoples. Nevertheless, it highlighted the fact that it considered the text to have 'numerous imperfections, but that it remains desirable for it to be implemented on an interim basis while improvements are introduced so that it can be endorsed by all delegations'.⁸³

In some countries there is implicit recognition, sometimes by individual officials, that the legal non-recognition of indigenous peoples as such can be a barrier to the improvement of their situation. During its country visit to Burundi, for example, the ACHPR's Working Group encountered the Minister of Human Rights, who expressed a similar position.⁸⁴

Many States, however, are reluctant to lend visibility to their indigenous peoples. Consistent with its constitutional provisions, Egypt, in its periodic report to the Committee on the Elimination of Racial Discrimination, for example stated that

Egypt does not have any notable ethnic minorities. With regard to the nomads, the Berbers and the Nubians, reference has already been made ... to the fact that there is full homogeneity among all the groups and communities of which the Egyptian population consists since they all speak the same language, Arabic, which predominates in all the country's geographical regions, both desert and coastal.⁸⁵

The Country Rapporteur, Mr Diaconu, during the examination of the Country Report thus rightly observed that there existed 'no legislation or planned measure aimed to prevent or eliminate discrimination or protect the language or culture of all those groups, for example by guaranteeing mother-tongue or bilingual education'.⁸⁶


82. CAURWA, *Convention relative aux droits de l'enfant, Contre rapport présenté par CAURWA*, Kigali, 2004, 7.

83. General Assembly, Sixty-first session, Report of the 107th plenary meeting, 13 September 2007, New York, UN Doc A/61/PV.107, 16.

84. Report of the Working Group on Indigenous Populations/Communities of the African Commission, Research and information visit to Burundi, March-April 2005, 19.

85. CERD *16th Periodic Report* (n 20 above) para 362.

86. CERD, *Summary record of the first part (Public) of the 1484th meeting: Egypt*. UN Doc CERD/C/SR.1484 17/09/2002 para 9.



Or, States may claim, as many still do, that all peoples residing within their borders are 'indigenous', in the sense that they are indigenous to Africa, in contrast to colonial settlers. This is an understanding that is clearly not the point of departure in this debate, as confirmed by the Working Group on Indigenous Populations/Communities of the African Commission. In some States it has been argued that the cumulative effect of characterising all ethnic groups as indigenous peoples is that indigenous peoples have been unable to enjoy their collective rights as indigenous peoples and to have remedies for the violation of such rights. Such is the case made in an alternative report prepared for the African Commission concerning Uganda.⁸⁷

Some indication of the status of progress in the recognition of indigenous peoples at the national level can also be gleaned from States' reporting to international and regional treaty supervisory bodies or *fora* on indigenous issues. A number of African governments participate in the Sessions of the UN Permanent Forum on Indigenous Issues (DRC, Congo and South Africa are particularly prominent), and other relevant UN fora. South Africa nominated an indigenous person, Dr William Langeveldt (a Korana), to represent the State in the UN Permanent Forum on Indigenous Issues. In its last report to the Committee on the Rights of the Child, Gabon made use of the term 'indigenous' and implicitly recognised the 'Pygmies' as having this status:

Practically speaking, there are 40 ethnic groups, including a few minorities, but this situation does not prevent indigenous people from enjoying their cultural life, practising their religion or using their own language together with the other members of their group. Academically speaking, the children of minorities may continue to practice their culture freely while attending public educational facilities. With regard to criminal procedures, interpretation services are authorised.

For Gabon, this appears to represent an evolution in the sense of a gradual increase in the recognition of indigenous peoples, even if this has not yet translated into legal recognition, particularly given that in its reporting to the Human Rights Committee in 2002, the existence of minorities in the national territory had been denied.⁸⁸

A number of States in Central African and the Great Lakes regions have also referred to the situation of the 'Pygmies' in their reports to the UN treaty bodies – in particular, in reports under the CRC, which has specific provisions concerning indigenous children. Often, their reports use the terms 'Pygmy', 'indigenous' and 'local communities' in an interchangeable manner.

1.5 Citizenship

The question of legal identity is important since it is associated with the quest to belong and the capacity to exercise rights that accrue with that identity. Constitutions generally make provision for three forms of citizenship. These include citizenship by birth, citizenship by registration and citizenship by naturalisation. This is the case with Uganda and Kenya for example. Chapter

87. Forest Peoples Programme, United Organisation for Batwa Development in Uganda (UOBDU) and International Work Group for Indigenous Affairs *Supplement Report on the First Periodic Report of Uganda to the African Commission on Human and Peoples' Rights*, May 2006, 9.

88. Human Rights Committee, Concluding Observations on Gabon, UN Doc CCPR/CO/70/GAB, November 2000.

six of the current Constitution of Kenya provides for citizenship by birth, registration and naturalisation. The Kenya Citizenship Act Cap 170 governs the granting and loss of citizenship. Section 11 of the Children's Act 8 of 2001 provides that every child shall have a right to a name and nationality and where a child is deprived of his identity, the government shall provide appropriate assistance and protection with a view to establishing his identity. The Births and Deaths Registration Act Chapter 149 also stipulates that everyone born in Kenya must be registered as well as after death. A birth certificate upon such registration and one's name which is associated with the person's identity is issued.

However, certain communities, especially those living in inaccessible and remote places, often fail to register births because registration centres are centralised. This is particularly true if one is not born in a hospital as is the case with most rural people.⁸⁹ A birth certificate is important since it is the document that shows proof of birth place, clan and region and eventually is used to acquire a national identity card and passport. The Somali, for example, a group self-identifying as indigenous in Kenya, is one group which has had problems with identity documents. This is attributed to the historical marginalisation of the community and the infiltration of the Somalis from Somalia. They are therefore denied full citizenship rights which could include voting, travel, work and general rights and obligations of citizens.⁹⁰

In acknowledging the importance of identity, the South African Constitution provides for the right to citizenship. Section 3 of the South African Constitution provides for common citizenship for all South Africans. The Constitution further provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship, but are also subject to the same duties and responsibilities of citizenship. The South African Citizenship Act⁹¹ and the Restoration and Extension of South African Citizenship Act⁹² provide for the acquisition, loss and restoration of citizenship. The Restoration and Extension of South African Citizenship Act deals with persons who were deprived or did not gain citizenship as a result of the apartheid policy of creating Bantustan territories of Transkei, Bophuthatswana, Venda and Ciskei.

Citizenship laws often recognise the principle of *jus sanguini* (nationality of origin), which many indigenous groups would fall under. Legal identity is particularly important to indigenous peoples, as not only does it confer citizenship rights, but it can also serve to ensure that identified groups benefit from specific government policies and programmes. For indigenous peoples, the question of identity goes beyond citizenship. Being legally recognised as indigenous people should translate into the conferral of rights that accrue with indigenous identity such as rights to lands, territories and resources, culture and traditions, and consultation and participation.

However, even where there is implicit or explicit recognition of specific ethnic groups or indigenous peoples in national legislation on citizenship, this does not necessarily translate into the implementation of their basic rights. For example, a lack of birth certificates, citizenship documents and identity


89. Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on The Rights of the Child: Kenya, UN Doc CRC/C/15/ADD.160 (CRC, Kenya 2001) para 31.

90. See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 21.

91. Act 88 of 1995.

92. Act 196 of 1993.





cards remains a widespread challenge for indigenous peoples throughout the continent, and often hampers their access to social services, among other things. The right to a name and a nationality is a common feature of constitutions in Africa, supplemented by legislation on citizenship and registration. Often the implementation of such legislation is hampered, particularly in the case of indigenous peoples, by the inaccessibility of the locations in which indigenous peoples live, by the fact that often, registration centres are centralised (such as in the case of Kenya), or if they are decentralised, indigenous peoples may not be aware of relevant procedures for registration due to remoteness, or illiteracy. In some cases the discriminatory attitudes of the administration towards them also constitute a challenge. Even where programmes are put in place to provide birth certificates and other forms of identity documents free of charge to indigenous peoples, there are many other challenges. They are also less likely to be born in hospitals, and consequently their registration is not automatic at birth. In many cases discrimination and historical marginalisation play a significant role in the non-registration of indigenous peoples. Additionally, a number of indigenous groups living in areas that span the borders of one or more country may face additional citizenship challenges, particularly if they live nomadic or semi-nomadic lifestyles. This is the case in Congo:

La délivrance de cartes d'identité à des personnes autochtones est peu satisfaisante. L'éloignement des centres hospitaliers, des campements ou villages des peuples autochtones ne favorise pas l'accouchement des femmes autochtones dans les hôpitaux ou les centres de santé. Ce qui ne permet pas d'obtenir la déclaration de naissance qui est l'élément fondamental pour l'obtention de l'acte de naissance. Cette question, qui se pose aussi bien au niveau des populations bantoues des villages enclavés, se pose avec plus d'acuité en milieu autochtone.⁹³

Throughout Central Africa, the so-called 'Pygmy' peoples face similar challenges of access to identity documents. Even in States such as Rwanda, where citizenship laws recognise anteriority as a basis for citizenship, registration of children, and the possession of identity documents remain real challenges.

1.6 Conclusion

At the outset it is clear that there is very little formal constitutional or legislative recognition of indigenous peoples in African legislation. It is clear that the use of various forms of terminology in African legislation and policies to refer to those who are understood in international law to be indigenous peoples is at least inconsistent and even contradictory. Even within the legal framework of individual States, terminology in law and policy is used interchangeably, and often implies an implicit acceptance that at least indigenous peoples are groups that require specific rights to address their specific situations. Or, at the other end of the spectrum, a number of States are still extremely reluctant to acknowledge even this basic fact. However, a number of states have begun to not only recognise the specificities and specific needs of indigenous peoples, but also to legislate and develop policies

93. 'The issuing of identity cards to indigenous peoples is very unsatisfactory. The long distances between hospitals (health centres) and the indigenous peoples' campements or villages impede indigenous women from giving birth in hospitals or health centres. This does not allow them to obtain birth statements, which is a fundamental requirement to obtain a birth certificate. This issue, which also affects the Bantu populations living in isolated villages, arises more acutely in respect of indigenous peoples.' Rainforest Foundation/UK and OCDH, 2006, Indigenous Peoples' Rights in the Republic of Congo, London, p.69. See: www.rainforestfoundationuk.org/files/droits_autochtones_final.pdf.

and programmes aimed at these specific groups. Despite the fact that the term ‘indigenous peoples’, *per se*, is not officially used in national legislation in the countries examined (with the exception of draft legislation in one African country), a positive trend of legislating, or developing policies and programmes for those groups that could be considered as indigenous peoples, can be detected in a growing number of African countries.

Such legislation, policies and programmes remain *ad hoc* and do not in any of the cases examined provide a comprehensive framework for the recognition and identification of indigenous peoples and the protection of the broad spectrum of the rights that are recognised in international law, for example. Nevertheless, it is an indication of a gradual acceptance of the fact that in most African societies there are specific groups that are in positions of subordination or marginalisation and that require special measures in order to be able to benefit from the individual rights that are accorded equally to all members of the national population.

There is, in nearly all cases, a lack of specific criteria to identify those groups that are referred to by the wide range of terms that indigenous peoples are referred to in legislative and policy instruments. One of the exceptions is the draft law on the rights of indigenous populations of Congo. Whereas the lack of a formal definition or legal recognition of indigenous peoples as such should not prevent efforts to legislate their rights as specific groups, or to develop policies and programmes to address their needs – and it has been shown throughout this study, that the lack of legal recognition of indigenous peoples as such has certainly not prevented efforts from being undertaken to address their rights – the lack of recognition of the specificities of these groups, and the rights attached to them as indigenous peoples – could hamper such efforts.

Over the past ten to twenty years an increasing number of communities in Africa have come to identify themselves as indigenous peoples. Self-identification is key in the debate at national and regional levels regarding the legal recognition of indigenous peoples. Due to the impact of historical processes, these peoples have become marginalised in their own countries and need recognition and protection of their basic human rights.



2 Non-discrimination

2.1 Introduction

One of the core claims of indigenous people is their right not to be discriminated against. It is only when they are guaranteed effective protection against discrimination that indigenous people can enjoy fundamental human rights on an equal footing with other members of society. In order to achieve substantive equality and ensure non-discrimination against historically-marginalised groups, including indigenous peoples, there may be a responsibility on governments to adopt 'special measures'.

2.2 International law

The principle of non-discrimination is recognised in both international and national instruments and provides a framework on the basis of which indigenous people can seek protection against prejudice, neglect and marginalisation. This principle has acquired the status of customary international law⁹⁴ and *jus cogens*.⁹⁵ Examples of major international human rights treaties containing general non-discrimination provisions include the ICCPR and the ICESCR. The provisions of CERD are more specific, in that its Article 2(1)(a) requires State parties not to engage in any acts of racial discrimination against any persons or groups of persons. Under CERD, racial discrimination means any distinction drawn or exclusion based on a person's race, colour, descent, or national or ethnic origin, aimed to or actually depriving the person from enjoying his or her rights equally with everyone else.⁹⁶

ILO Convention No. 169 specifically guarantees to indigenous and tribal peoples the right to 'enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination', and reiterates that the provisions of the Convention apply 'without discrimination to male and female members of these populations'.⁹⁷ The principle of non-discrimination as articulated in this Convention is further incorporated into recruitment and employment procedures involving indigenous peoples.⁹⁸ In recognition of the historical and existing disadvantages that indigenous peoples encounter, the Convention also calls for the adoption of 'special measures',⁹⁹ which are enacted and implemented to enhance the status of equality between peoples, particularly with respect to those who have suffered disadvantages attributed to discriminatory laws and practices. ILO Convention No. 111 protects all workers against discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, and other criteria as may be determined by a ratifying state after consultation with representative employers' and workers' organizations. Both **direct and indirect discrimination** are covered by the Convention, which obliges States to undertake measures to eliminate discrimination on the grounds of, among

94. Defined by its universal acceptance and consistent practice by States.

95. No derogation is permitted from a *jus cogens* norm, as is laid down by Art 53 of the 1969 Vienna Convention on the Law of Treaties.

96. Art 1(1) of CERD.

97. Art 3 of ILO Convention No. 169.

98. Art 20 of ILO Convention No. 169 states that 'governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers'.

99. Art 4(3) of ILO Convention No. 169.

other factors, race, 'national extraction or social origin'.¹⁰⁰ The protection of Convention No. 111 applies to all aspects of employment and occupation, both public and private, and extends to education, training, employment, occupation (which could include traditional occupations of indigenous peoples), security of job tenure, and equal remuneration for work of equal value, among other things. The more recently adopted UN Declaration on Indigenous Peoples affirms that indigenous peoples are equal to all other peoples, while recognising the rights of all peoples to be different, to consider themselves different and to be respected as such.¹⁰¹

The twin principles of equality and non-discrimination are reinforced within African international jurisprudence, including in the African Charter. The African Charter states that every 'individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status'.¹⁰² Its reference to the term 'without distinction' logically suggests that these rights are available to everyone including individual members of communities who identify themselves as indigenous people. In Article 19, the African Charter specifically provides for the equality of all 'peoples' and proscribes the domination of a people by another. In *Malawi African Association and Others v Mauritania*,¹⁰³ the African Commission held that discrimination against black Mauritians as a result of a negation of the fundamental principle of equality of peoples in terms of Article 19 was a violation of that article. This finding arguably leads to the conclusion that any law that discriminates against a people or an ethnic group would amount to a violation of Article 19.

Viewed from the perspective of the nature of the 'discriminator', discrimination may take two forms: vertical and horizontal discrimination. Vertical discrimination is discrimination by the State against individuals, and takes the form of discriminatory laws, policies or programmes. Horizontal discrimination occurs between non-State actors (such as individuals or private companies), and takes the form of discriminatory attitudes, perceptions or behaviour against an individual or groups by other individuals or groups.

Focusing on the nature and effect of the discrimination, a distinction may be drawn between direct and indirect discrimination.¹⁰⁴ Direct (*de jure*) discrimination refers to an exclusion or disadvantage that is explicitly based on a factor such as indigenous status, for example a law allowing for the payment of inferior salaries to all indigenous employees. Indirect (*de facto*) discrimination refers to a hidden or subtle exclusion or disadvantage, and often only appears in the actual application or adverse impact of the law, and not from the provisions of the law as such. An example would be the requirement that applicants for employment must be able to write well in English, French or Arabic. Because of their attachment to their indigenous language, and high rate of illiteracy, the likelihood of meeting this


100. Art 2 of ILO Convention No. 111; see also ILO (2007) *A Guide to ILO Convention No. 111, Eliminating discrimination against indigenous and tribal peoples in employment and occupation*.

101. Arts 2 and 3 of the UN Declaration.

102. Art 2 of the African Charter.

103. (2000) AHRLR 149 (ACHPR 2000) 174.

104. See ILO (2007) *A Guide to ILO Convention No. 111, Eliminating discrimination against indigenous and tribal peoples in employment and occupation*, 11.



requirement may be disproportionately low among members of indigenous communities, thus leading to discrimination against them.

2.3 National trends

Constitutional and other legislative provisions

Many of the laws, State policies and practices that currently impact directly on the rights of indigenous peoples were promulgated during the colonial era. Botswana and Kenya provide pertinent examples.

An example of such a law is the Botswana Chieftainship Act,¹⁰⁵ adopted during the colonial period. The law recognises only the chiefs of the so-called 'eight main tribes' as chiefs. The direct effect of this Act is that non-Tswana tribes, including the Basarwa, are regarded as not having chiefs similar to their Tswana counterparts.

Similarly, inequalities between different ethnic groups in Kenya can be traced back to colonial policies and laws and post-colonial practices that simply entrenched colonial discrimination, such as the Special Districts (Administration) Ordinance 1934; the Stock Theft and Produce Ordinance 1933; and Section 19 of the Independence Order in Council of 1963, which gave the Governor General sweeping powers to pass any provisions to ensure effective governance, and which in respect of the North Eastern region included declamations of state of emergency which resulted in mass killings and the displacement of indigenous peoples.

Today, most post-colonial African Constitutions embrace the principle of non-discrimination. Although none of the Constitutions explicitly prohibits discrimination against members of indigenous peoples, they almost all include 'race' and 'ethnicity' (or ethnic 'status' or 'origin') among grounds for non-discrimination. Most of these lists of grounds are not specifically declared to be open-ended, giving rise to the question whether each of these lists of grounds is exhaustive or whether it allows for a more inclusive interpretation. The Egyptian Constitutional Court, for example, ruled that the prohibited grounds of discrimination listed in Article 40 of the Constitution were not exhaustive.¹⁰⁶ Article 40 of the Constitution prohibits discrimination between citizens in regard to the rights that they enjoy on grounds such as birth, social status or class, party political tendencies, and racial or tribal affiliation. The Court ruled that there were other equally serious forms of discrimination not explicitly referred to in the provision. Such an approach would allow for a ground such as indigenous status to be 'read into' the ambit of constitutional protection.

Three of the most recent Constitutions, those of Burundi, Congo and the DRC, have taken steps towards the inclusion of indigenous groups by emphasising minority protection and the value of tolerance. In its Preamble, the 2005 Constitution of Burundi declares that minority political parties and the protection of ethnic and cultural minorities are integral to good governance. The Constitution further requires that all Burundians live in harmony and tolerance with each other.¹⁰⁷ Every Burundian further has the

105. Chapter 41:01 of the Laws of Botswana.

106. Constitutional Case No. 17, judicial year 14, session of 14 January 1995, ruling published in the Official Gazette No. 6 of 1995 on 9 February 1995).

107. Art 14 of the 2005 Constitution of Burundi.

duty to promote tolerance in his or her relations with others.¹⁰⁸ The 2002 Congolese Constitution criminalises incitement to ethnic hatred, and also places a duty on individuals to promote mutual tolerance.¹⁰⁹ The 2006 DRC Constitution goes one step further by including membership of a ‘cultural or linguistic minority’ as a basis for non-discrimination alongside ‘race’ and ‘ethnicity’.¹¹⁰ In addition, the State has the duty to promote the harmonious coexistence of all ethnic groups in the country and to protect all ‘vulnerable and minority groups’.¹¹¹

Some countries have also adopted legislative measures outlawing racial and ethnic discrimination and hatred. One such measure is the prohibition of political parties and the organisation of political organisation on the basis of race or ethnicity (in Rwanda and Niger). The Constitution of Rwanda not only outlaws the formation of political parties identifying themselves with one particular ‘race, ethnic group, tribe, clan, region or religion’, but also prescribes that political parties have to adhere to the principle of national unity in all its activities.¹¹² While the constitutional principles of the ‘eradication of ethnic divisions’ and the ‘promotion of national unity’ are clearly and justifiably informed by the 1994 genocide, the risk lurks large that they may become constitutional imperatives of such overriding importance that even legitimate minority voices are stifled and interests trumped – in particular those of the Batwa. In its Overview Report, the APRM mission to Rwanda found that the government’s approach is ‘based on a policy of assimilation’ and that there ‘appears to be a desire to obliterate distinctive identities and to integrate all into some mainstream socio-economic fabric of the country’.¹¹³ Under the 1999 Niger Constitution, ‘ethnic, regional or religious’ parties are prohibited, and all propaganda of a ‘regionalist, racial or ethnic’ character and all manifestations of ‘racial, ethnic, political or religious discrimination’ are made punishable by law.¹¹⁴ A similar prohibition is provided under the Penal Code of Mali.¹¹⁵ These provisions may have a similar stifling effect on the articulation of indigenous peoples’ interests.

Discrimination along vertical and horizontal lines

Discrimination along vertical lines results from State-sponsored discriminatory policies, as is illustrated by numerous examples in this overview. Horizontal discrimination, which is often more pervasive but less immediately visible, does not emanate from State laws, policies or institutions but is discrimination perpetrated by individuals or by one group against another. In a related expression of concern, the CERD Committee has in respect of Ethiopia expressed growing concerns over widespread ethnic strife that has been caused by racial discrimination and ‘political tensions and violations of basic economic, social and cultural rights, and exacerbated by competition over natural resources, provision of food, access to clean water and agricultural land’.¹¹⁶

‘Horizontal’ discrimination against indigenous peoples in many other countries manifests in various forms. In many places, for instance, such

108. Art 67 of the 2005 Constitution of Burundi.

109. Arts 11 and 44 of the 2002 Congolese Constitution.

110. Arts 11, 12 and 13 of the 2006 DRC Constitution.


111. Art 51 of the 2006 DRC Constitution.

112. Art 54 of the Constitution of Rwanda.

113. Rwanda’s APRM Review Report, para 153.

114. Arts 8(3) and 9(3) of the Constitution of Niger.

115. Article 55 of law No 61-99 AN-RM of 3 August 1961 on the Penal Code.



indigenous peoples as the Batwa in Uganda are ostracised by their neighbours; they are shunned as sexual partners by other ethnic groups; and they are considered underdeveloped, backward and in some respects sub-human. A similar fate often befalls members of other 'Pygmy' groups, in countries such as Cameroon and the CAR. In its worst form, this attitude manifests itself in practices akin to slavery and forced labour of 'Pygmies' by dominant Bantu groups.¹¹⁷ The majority populations in countries such as Burkina Faso, Cameroon and Chad regard the Mbororo as 'uncivilised'. Especially Mbororo girls are scorned and ridiculed, causing many of them not to attend school.

In these instances it is the government's duty to *protect* the rights of these indigenous peoples that are at stake. An example of a State giving effect to this duty is found in the Constitution of Chad, which outlaws all customs that extol inequality *between citizens*. While it may be true that slavery and forced labour have been abolished, the relevant States are doing very little to ensure that these laws are effectively implemented, especially in the domestic sphere.

To enhance equality and non-discrimination, particularly at the horizontal level, the Ugandan government introduced the Equal Opportunities Commission.¹¹⁸ However, indigenous peoples are not represented in the Commission, and it does not make any provisions that expressly address the special needs of indigenous peoples. In terms of the composition of the Commission, only youth, women and persons with disabilities are represented.¹¹⁹ In South Africa, the equality courts established under the Promotion of Equality and Prevention of Unfair Discrimination Act have also addressed the issue of horizontal discrimination without regard to indigenous peoples.

States may employ the criminal law in an effort to eradicate manifestations of discrimination (such as hate speech) between individuals. In Botswana, for example, Section 92(1) of the Penal Code makes it a criminal offence to utter or publish words showing hatred, ridicule or contempt for any persons on the basis of, among other things, race, tribe, or place of origin.¹²⁰ Section 94(1) criminalises discrimination and discrimination for those purposes means treating another person less favourably or in manner different to that which one would treat any other person on the basis of race, colour, nationality or creed. Unfortunately the penalty for these offences is an inadequate P 500.00 (little under \$ US 100). Even if these provisions are not often used to affirm the rights of indigenous peoples in Botswana, they add normative weight to the notion that their dignity should be respected by other people, and create a potential avenue for redress. In Niger, all propaganda of a 'regionalist' character, or based on ethnicity or race, and all discrimination on these grounds, has been criminalised (under Article 8 of the Constitution).

Direct and indirect discrimination

116. Committee on the Elimination of Racial Discrimination, UN Doc CERD/C/ETH/CO/15, para 12, 20 June 2007.

117. See Sections 8 and 9 below for a more detailed discussion.

118. Constitution of Uganda Art 32(3) and (4). Which is mandated to eliminate discrimination and inequalities against individuals and groups.

119. Sec 5(1).

120. Chapter 08:01 of the Laws of Botswana.

Direct discrimination occurs when differential treatment is explicitly legalised, for example with reference to indigenous peoples generally, or with reference to a specific indigenous group. Despite legal protection, the reality is that indigenous peoples suffer from deeply-entrenched and often concealed (or 'indirect') discrimination. This is most telling in the disproportionate level of poverty and social exclusion in which most indigenous peoples find themselves. Sometimes the impression is that of overall government neglect.

In some instances the application of seemingly neutral laws may have a disproportionate effect, for example, on indigenous children. In Botswana, for example, the use of corporal punishment is particularly resented by Basarwa parents and learners as an alien imposition at odds with their culture. The practice on the ground in Algeria prevents Amazigh parents from giving traditional or 'cultural' names to their children. National educational policy forces the minority children to learn and recite verses of the Koran even without understanding, since they are not Muslims.

In Algeria, the consequence of some government policies is to disadvantage the cultural growth of non-Islam and non-Arab cultures. In the sense that this discrimination was not targeted explicitly against the Amazigh, it could be characterised as indirect discrimination. In Burkina Faso, legislation on stray animals causes the loss of many of the Mbororo's cattle which are central to their survival. With regard to the nomadic Fulani, it has been noted that the nomadic Fulanis are among the most neglected groups in Nigeria. Iro observed that government policies are geared towards developing livestock capital to the detriment of the nomads.¹²¹ For example, more money is spent on vaccinating the cattle than on immunising the children of the nomadic Fulanis. Nomadic Fulanis also experience discrimination at the hands of host communities who feel that the Fulanis are encroaching on their territories. Part of government response to the plight of the nomadic Fulani is a federally funded Nomadic Education Programme that targets them. In Mali, a 1962 law on marriage, adopted to stop 'some archaic practices that should be banished from society',¹²² restricted engagement ceremonies to one day and the expenses related to their organisation to a maximum of 20,000 CFA (40\$).¹²³ This law was considered by indigenous groups, especially the Tuareg, as arbitrary and an unacceptable infringement to secular beliefs about the value of marriage and engagement ceremonies.


Sudanese law contains provisions that adversely affect the cultural rights and practices of indigenous peoples, even though these laws are couched in neutral terms, and do not target indigenous peoples specifically. The provisions of the Criminal Act of 1991 that are especially relevant in this regard include

- prohibition of drinking (Article 78);
- 'dealing in' alcohol (Article 79);
- prohibition of indecent and immoral acts (Article 152); and
- prohibition of prostitution and adultery (Articles 145-146).

121. See I Iro, 'Nomadic Education and Education for Nomadic Fulani', online: <<http://www.gamji.com/fulani7.htm>> (accessed 6 August 2007).

122. P Boilley (1999) *Les Touaregs Kel Adagh. Dépendances et révoltes: du Soudan français au Mali contemporain*, p 311.

123. *Loi No 63-19 AN-RM of 25 January 1963 amending Articles 10, 24 et 43 of Loi No 62-17 ANRM du 3 février 1962 on the Marriage Code of Mali.*



The brewing, drinking and selling of alcohol are often a part of the culture and social life of non-Muslim displaced persons from Southern Sudan, including indigenous peoples, but not of Northerners who are predominately Muslim. Hence, the law most frequently affects displaced non-Muslim Southerners. Similarly, as indigenous marriages are not always recognised by the authorities because they do not follow the procedures prescribed by law and instead adhere to customary practices, couples may be charged with adultery and indecent behaviour or the women with prostitution although they are in reality joined in a family bond as wife and husband.

Indirect discrimination may also be the result of neglect or inaction on the part of government. There is currently no legislation in Egypt (and many other countries) which effectively addresses and implements measures to fulfil the rights of indigenous (and other marginalised) peoples as implied in Egypt's Constitution. As a result, indigenous (and other marginalised) groups suffer discrimination and prejudice emanating from existing laws and policies of the State that fail to consider the special circumstances of such groups.

The concept of 'special measures'

'Special measures' or affirmative action policies are recognised as useful mechanisms through which States can redress past and existing injustices and inequalities, particularly in respect of indigenous peoples. Where accurate statistics are available, they often reveal the outcome of discrimination against, neglect of and unconcern for the indigenous populations within States. In Mali, for example, available statistics show a distinct contrast between the population-wide literacy average of 23 per cent, and the average of 14 per cent for the three regions of the country where indigenous peoples find themselves. The same discrepancy exists with respect to the rate of school attendance (with a national average of 47 per cent, compared to a regional average of 31 per cent).

In Article 23(2) the Constitution of Namibia recognises the need for special measures ('affirmative action') as a result of past injustices and human rights violations suffered under apartheid:

Nothing contained in Article 10 (equality provision) hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally, disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving balanced structuring of the public service, the police force, the defence force, and the prison services.

By making specific reference to social, economic and educational disadvantage, this provision clearly opens the door to indigenous peoples in Namibia to benefit from its application. However, in practice this has not yet been the case.

The Ethiopian Constitution, under Article 89(4), makes a duty, for the government at all levels, to provide special assistance to groups least advantaged in socio-economic development. Under the Botswana Constitution, the government is permitted to accord privileges or advantage to members of any of the groups named in the equality clause (Section 15) if, having regard to the special circumstances of the members of the particular

group, the treatment 'is justifiable in a democratic society'.¹²⁴ This exception effectively allows for special measures that may facilitate the redressing of past and continuing imbalances to bring marginalised communities such as indigenous peoples to a level where they can exist on an equal footing with other communities. Unfortunately, this provision has not been fully utilised by the government. Some indigenous peoples benefit from a government development policy called the Remote Area Dwellers Programme (RADP), which was previously called the Bushman Development Programme. The programme seeks to bring basic facilities such as schools and health care to people living in remote areas – by necessary implication, also indigenous peoples.¹²⁵ However, this programme has been rendered largely ineffective due to the government's policy of non-racialism, which results in indigenous peoples competing with, and losing to, other ethnic groups in remote areas.

To ensure fairness, equity and even representation, the Nigerian Constitution provides for the use of 'federal character' principle in the appointment of public officers in order to promote national unity and to foster a sense of belonging among the citizens.¹²⁶ This operates as a form of affirmative action. The federal character principles extend equally to governments at state and local levels.¹²⁷ Consequently, there is a quota system for employment in the civil service, placement in government owned educational institutions,¹²⁸ recruitment into the police, military and other armed forces. However, indigenous peoples such as the Ogonis and Ijaws, are de facto excluded, particularly from positions in government-controlled oil companies operating in their ancestral homelands.¹²⁹

In countries where 'affirmative action' exists, its benefits have often not been fully extended to cover indigenous peoples – or indeed, measures have been ad hoc, and not representative of any broader policy for to address discrimination against these peoples. The South African Constitution provides that, due to past inequalities, affirmative action is acceptable.¹³⁰ Such measures are directed at 'black South Africans', women and disabled people. Indigenous people are not targeted in law or in practice. The Constitution of Uganda also makes provision for affirmative action in favour of women, children and disabled people, but also for groups marginalised on the basis of 'any other reason created by history, tradition or custom'.¹³¹ The obligation to undertake affirmative action for the benefit of marginalised groups is also constitutionally extended to the local government councils. The Constitution requires that the law adopted by Parliament to regulate local councils provides for affirmative action for all marginalised groups referred to in Article 32.¹³² However, other than women, youth and disabled

124. Sec 4(e).

125. M Bolaane and S Saugestad 'Mother-Tongue: Old Debates and New Initiatives in San Education' *Indigenous Affairs, IWGIA*, 1/06, 48.

126. Chapter II section 14(3) of the Nigerian Constitution.

127. Sec 14(4) of the Nigerian Constitution.


128. The Federal Ministry of education quota system for admission applies to both secondary schools and federal tertiary institutions. See C Nwagw, 'The Environment of Crisis in the Nigerian Education System' (1997) 33 *Comparative Education* 92.

129. A Onduku, 'Towards a culture of peace in the Niger Delta' Sourced from <http://www.waado.org/NigerDelta/Essay/ResourceControl/Onduku.html> (accessed 21 July 2007).

130. Sec 9(2) of the South African Constitution.

131. Art 32(1) 'Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purposes of redressing the imbalances which exist against them'.

132. Art 180(2)(c).



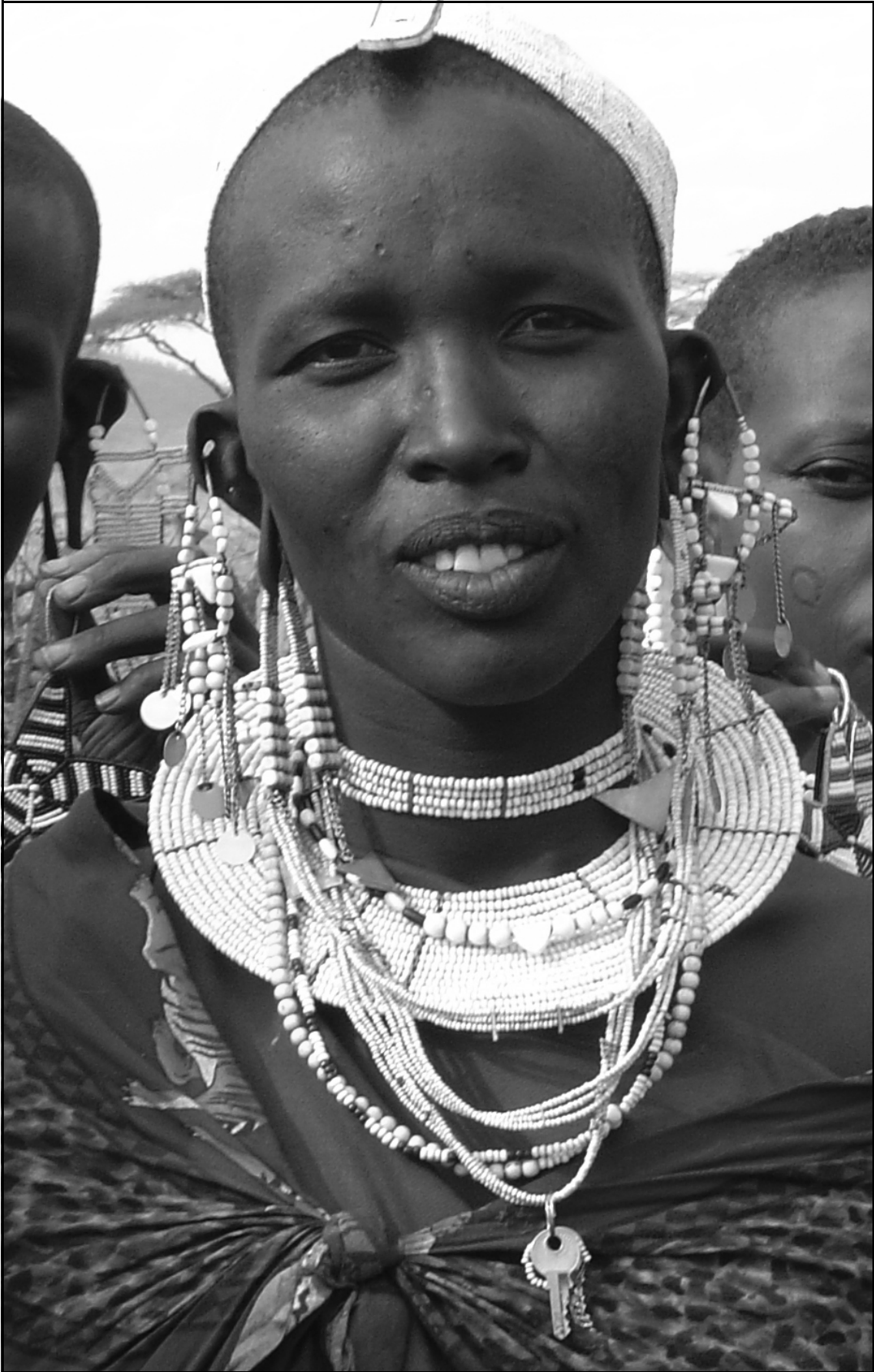
persons, the local government laws do not make any provision for the benefit of indigenous peoples. Neither does the law establish structures to ensure that indigenous peoples participate effectively in decision-making processes.

2.4 Conclusion

Although their Constitutions comprise the principle of non-discrimination, the legal systems of most African States fail to effectively curb discrimination against indigenous peoples. While it is important and encouraging that some States (such as Burundi, Congo and the DRC) have given constitutional priority to the value of tolerance for minorities, outlawing public mobilisation on the grounds of ethnicity or race (as in the case of Rwanda) may stifle the articulation of indigenous peoples' claims. To curb discrimination by individuals and groups against indigenous individuals or peoples, some States (such as Botswana) has criminalized hate speech on the basis of ethnicity, race or origin. No State has adopted anti-discrimination legislation to give effect to its obligation to *protect* the rights of indigenous peoples.

The discrimination by States often takes the form of neglect, and is most visible in the position of relative deprivation as far as access to land, health and education is concerned. In the absence of reliable statistics, discriminatory patterns tend to remain hidden. However, the required statistics and data are lacking in all States, thus making the identification of the extent of the problem very difficult.

Despite the profoundly negative effect of deeply-engrained and longstanding discrimination against indigenous peoples, few states have taken special measures to redress this dire situation. In the cases where measures have been undertaken, they have been largely ad hoc, not targeted at indigenous peoples, and not accompanied by measures to ensure the capacity building of previously disadvantaged groups including indigenous peoples.





3 Self-management, consultation and participation

3.1 Introduction

Self-management, consultation and participation are among the most fundamental rights of indigenous peoples. The right to free, prior and informed consent is enshrined in UNDRIP, and the right of indigenous peoples to participation and to be consulted is enshrined in ILO Convention No. 169. Both concepts are similar in content. The spirit of consultation and participation constitutes the cornerstone of Convention No. 169. Article 6 of the Convention provides that indigenous peoples should be consulted through *appropriate procedures* and *through their representative institutions*. It also provides that consultation should be undertaken in *good faith*, in a *form appropriate to the circumstances*, with the *objective of achieving agreement or consent* to the proposed measures. Another important component of the concept of consultation is that of *adequate representation* – those consulted should be genuinely representative of indigenous peoples. Furthermore, the right of indigenous peoples to be consulted should be considered in the light of their right to decide their own priorities for development, as enshrined in Article 7(1) of Convention No. 169.¹³³ In order to facilitate this participation, the Convention also requires the establishment of means for the development of indigenous and tribal peoples' own institutions and initiatives.

The rights to consultation, participation and self-management, could also be considered components of the right to self-determination. ILO Convention No. 169 does not deal with self-determination, but this right is confirmed by UNDRIP, which defines the right to self-determination to include the right to autonomy or self-determination in matters relating to indigenous peoples' internal and local affairs.¹³⁴ In addition to these instruments, the African Charter on Human and Peoples' Rights guarantees the right of all peoples to existence and to self-determination, which includes the right to freely determine their political status and pursue their economic and social development.¹³⁵ In addition, the Charter provides that all peoples shall freely dispose of their wealth and natural resources.¹³⁶ In its Legal Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, the African Commission clearly places the right of indigenous peoples to self-determination within the context of the territorial integrity of States, stating the following:

... 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 levels, 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

133. Report of the Tripartite Committee established to examine the Representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the *Confederación Ecuatoriana de Organizaciones Sindicales Libres* (CEOSL) para 44.

134. Art 4.

135. Art 20.

136. Art 21.

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.¹³⁷

Crucial elements of indigenous peoples' rights to consultation and participation include the right to vote, and associated political rights, the right to be consulted in the broad range of legislative and administrative measures that affect them, including legal reform, and the drafting and implementation of development policies, programmes and projects. Also included are a range of other rights, including in respect of natural resources and land use. Both ILO Convention No. 169¹³⁸ and UNDRIP¹³⁹ address these issues. Indigenous peoples also place emphasis on the right to self-management and the right to participate in the government of the broader society. Self-management contributes to the revitalisation of African traditions, and can be seen in the light of Articles 21 and 22 of the African Charter, which deal with the rights of peoples or communities to dispose freely of their natural resources, and of the right of communities to economic, social and cultural development. Some aspects of self-management of natural resources are dealt with in this chapter, as well as in the Chapter on lands, territories and resources.

Several international human rights instruments provide for the right to political participation, albeit in varying forms. Article 13 of the African Charter guarantees the right of citizens to participate in the management of public affairs, and to have access to public functions, among other things. Article 25 of ICCPR states that every citizen has the right and the opportunity, without discrimination, to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held and to have access, on general terms of equality, to public service in his country.

3.2 State structure and central administration

A number of African constitutions, laws, and state structures examined within the context of this study make provisions for participatory governance, and some even go as far as to address the question of self-determination. State structures vary from decentralised, or even federal States, to those where decision-making is highly centralised. However, very few legal frameworks or governance structures, if any, have institutionalised indigenous peoples' participation in a systematic manner, despite the fact that such frameworks and structures could provide entry points for such a systematisation.

A unique aspect of the Ethiopian Constitution is the right to self-determination.¹⁴⁰ Article 39 provides that 'every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination'. Furthermore, the Constitution gives every group the right 'to a full measure of self-government that includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in State and Federal governments.'¹⁴¹ Although these provisions seem to provide each ethnic group with equal rights to self-government and self-


137. *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, Banjul, 2007, para. 27.

138. Arts 6 and 15, among others.

139. Arts 19, and 10, respectively.

140. Ethiopian Constitution, Art 39(1).





management, the States within Ethiopia are generally governed by powerful ethnic groups so that smaller groups, including indigenous peoples, do not have significant influence.¹⁴²

The concept of self-determination of peoples is also reflected in the Constitution of Burundi, which states that:

Every people has the right to existence. Every people has the inalienable right to self-determination without any prescription. It freely determines its political status and assures its economic and social development according to the means it has freely chosen.¹⁴³

The South African Constitution addresses the right to self-determination within the framework of the territorial integrity of the State. The State has made provision for communities to govern themselves through its principle of co-operative government.¹⁴⁴ Therefore, in theory, indigenous communities should be able to influence and play an active role in local spheres of government. However, given that they are often minorities with little economic power, they continue to be marginalised.

It is a fundamental principle of the Constitution of Eritrea to guarantee its citizens participation in the political, economic, social and cultural life of the country.¹⁴⁵ The Constitution further requires appropriate institutions to encourage and develop people's initiative and participation in their communities.¹⁴⁶ However, it is not clear how indigenous peoples actually benefit from these provisions. As the provisions of the Constitution remain unimplemented, they have not been used in any fora at the national level, including the judiciary.

Nigeria operates a federal system of government. This is a constitutional mechanism for equitable representation and participation by Nigerians including indigenous and ethnic minorities in their governance.¹⁴⁷ To promote the participation of indigenous people in policies affecting them, the government has introduced initiatives such as the Consolidated Council of Socio-Economic Development of Constitutional State of the Niger Delta, which includes government representatives and community members, aimed at uplifting the oil producing communities.¹⁴⁸

In opposition to this, Kenya is a unitary State with a central government in accordance with its Constitution. Attempts to provide for devolved (federal) government in the constitutional review process caused a lot of controversy. In the final document presented during the National

141. Ethiopian Constitution, Art 39(3).

142. Kjetil Tronvoll, Minority Rights Group International, *Ethiopia: A New Start?* 19 (2000).

143. *'Tout peuple a droit à l'existence. Tout peuple a un droit imprescriptible et inaliénable à l'autodétermination. Il détermine librement son statut politique et assure son développement économique et social selon la voie qu'il a librement choisie.'*

144. SA Constitution, Secs 40-41.

145. Art 7(1).

146. Art 7(3).

147. Sec 14(4) of the Nigerian Constitution.

148. The composition of this council has been criticised due the perceived failure of the government to appoint credible civil society representatives as committee members. See International Crisis Group 'Nigeria's Faltering Federal Experience' (2006) | *African Report*.

Referendum, this was one of the most contentious issues.¹⁴⁹ The central government is accorded extensive powers in the administration of the country. The President (head of the executive) appoints all the Provincial Commissioners who are civil servants and have limited say on how provincial affairs are managed. While there are no express provisions in the Kenyan Constitution on indigenous peoples' participation and consultation in decision-making, the Constitution guarantees political participation through provisions in the Bill of Rights such as the right to assembly, association and expression as well as the conduct of regular elections.

Article 55 of the Egyptian Constitution provides for the right of every citizen to form societies subject to the law. These provisions seem to provide the general legal framework that allows indigenous peoples in Egypt the right to organise themselves to compete for political power, particularly at the local level. This, however, does not seem to be the case. The only other way by which indigenous peoples may have their say in the running of public office in their locality is by running for election either in their individual capacity or as a member of other political parties. The problem here is that indigenous peoples are generally the least mobilised. They live at the periphery of the political process with little or no political influence.


3.3 Composition of national decision-making bodies

Within the framework of the various State structures described above, it is important to analyse the participation of indigenous peoples in national-level decision-making bodies. As can be seen below, some States have made attempts to put in place special bodies to represent indigenous issues, or affirmative action measures to address the lack of indigenous participation in national level bodies such as Parliament. However, such measures vary in scope, and challenges remain in their implementation. In addition, as can be seen from the examples below, many of the measures put in place are ad-hoc, and are not necessarily linked to more general policies or systematic measures for indigenous peoples at the national level.

In Uganda, the composition of the Parliament includes persons representing special interest. Women, children, and persons with disabilities are the main beneficiaries of such affirmative action. Ethnicity is, for instance, not a ground for special representation. Constituencies are not drawn on the basis of ethnicity, but it is common that members of Parliament from a specific region are members of the ethnic group that dominates that area.¹⁵⁰ There is not one single Mutwa in Parliament. This is because the Batwa are discriminated against in the districts they reside in; and are also largely uneducated and do not have the requisite academic qualifications to contest for a place in Parliament. In the Republic of Congo, as in a number of other countries, where the indigenous 'Pygmies' reside, there are no indigenous representatives in national decision making bodies including Parliament; nor are there any in local administrative bodies. Furthermore, no measures have

149. See Wako Draft Constitution presented during the National Referendum in November 2005 (it was the present government's supported draft as opposed to the Bomas Draft which provided for devolved government and endorsed by delegates during the National Constitutional Conference). The Wako Draft was eventually opposed by the majority of Kenya and to date a new Constitution is yet to be adopted and the country is still functioning on Independence Constitution of 1963 with numerous amendments that has given immense powers to the executive and the Central government.

150. See List of members of Parliament at: [www.parliament.go.ug/index/php?option=com_wrapper&Itemid=37](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=37) (accessed on 30 January 2008).



yet been taken to assure their representation. Again, in Gabon, the Senate is chosen on the basis of the representativity of various local communities. However, there are no quotas for specific groups, and until now, the Senate has no indigenous representation. Illiteracy levels of indigenous peoples in Gabon are a significant challenge for access to decision-making fora.

In Burundi, the situation is different, and specific measures have been put in place for the representation of Batwa in Parliament. Article 16 of the Constitution of Burundi stipulates that the government of Burundi shall be composed in a manner which represents all Burundians, and that all shall have equal opportunities to participate in government. Furthermore, it stipulates that the actions and decisions of the government should have the largest possible measure of public support. In accordance with the Constitutional provisions, three Batwa representatives have been elected to the National Assembly¹⁵¹ and the Senate.¹⁵² These representatives include the President of a national NGO working in favour of the rights of indigenous peoples – UNIPROBA.¹⁵³ However, at lower levels of governance, the lack of participation of indigenous peoples is still a major challenge. With the exception of the limited influence that the Batwa are able to exercise in Burundi, through their representation in the Senate and the National Assembly, in reality, the Batwa have little or no control over their own development. There are no laws or policies to ensure their representation in other sectors of national life.¹⁵⁴

Similarly, in Rwanda measures have been taken to ensure participation of disadvantaged groups. Article 45 of the Constitution of Rwanda provides that all citizens have the right to participate in the management of public affairs – directly or through their freely-chosen representatives. However, the Batwa are conspicuously absent from almost all political parties, and prevented from occupying posts within those parties due to the general prejudice they face. Article 82 of the Rwandan Constitution deals with the membership of the Senate. Aside from guaranteeing a 30% representation of women, it contains a provision for 8 members of the Senate from ‘historically disfavoured communities’ to be appointed to the Senate by the President of the Republic. This has ensured the inclusion of one Batwa member of the Senate.

Specific measures have also been taken in South Africa with regard to consultation of indigenous peoples at the national level. The non-statutory but government-funded National Khoi-San Council (NKSC) was established in 1999, consisting of 21 members. Among other things, it has been mandated to ‘review the contents of the Government’s Status Quo Report on the role of traditional leaders in local government, providing advice on indigenous issues’.¹⁵⁵ The consultations are occurring within the context of the Department of Provincial and Local Government’.¹⁵⁶ Although indigenous peoples have expressed ‘dissatisfaction over the slow pace of the process and that it has been placed under general negotiations relating to the status of traditional authorities,’ the process affords indigenous peoples with a forum to engage directly with the State on issues that affect them.¹⁵⁷

151. Art 164.

152. Art 180.

153. IGWIA (2007) *The Indigenous World* 500.

154. Report of the African Commission’s Working Group visit to Burundi, 32.

155. *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual* (2003) 20.

156. R Chennells and A Du Toit ‘The rights of indigenous peoples in South Africa’ in RK Hitchcock and D Vinding (eds) *Indigenous peoples’ rights in Southern Africa*, IWGIA (2004) 103.

157. As above, 103.

In the 1999 general elections in Namibia, the first San Member of Parliament was elected to the National Assembly on the ruling party's ticket.¹⁵⁸ However, the San Member of Parliament is from the Nyae Nyae community, which consists only of one San community (the Ju/'hoansi) and although this is doubtless a positive step, the election does not represent any specific measure taken by the Government to ensure adequate indigenous participation in national-level decision making bodies.

An interesting development in Mali has been the creation of the '*Espace d'Interpellation Démocratique (EID)*'. This is an annual forum that allows for civil society, including human rights and other organisations, to question the authorities in public on matters concerning them, in particular on human rights questions.¹⁵⁹ The EID was set up by Decree 159/P-RM in 1996, and could provide a useful forum for discussing indigenous issues at the national level, although it has thus far not addressed issues pertaining to minorities or indigenous peoples. The National Pact of 1992 was an important step towards the recognition of the specificity of the regions inhabited by the Tuareg in Mali and foresees a specific status for these regions. This could be examined further, however, in terms of implementation, and as a step towards further recognition of indigenous peoples in Mali. Other institutions that aim to include various interest groups in the management of national affairs are the Economic, Social and Cultural Council, and the High Council of Local Collectives (*Haut Conseil des collectivités locales*). Tuareg members are represented on the *Haut Conseil des collectivités locales*. In fact, it is presently presided over by a member of the Tuareg community, Oumarou Haidara. Membership of the Economic, Social and Cultural Council is regulated by Article 110 of the Constitution. Such membership consists of members from trade unions, various professionals elected by their organisations, and groups of various social origin. Thus, given the lack of official recognition of indigenous peoples as a specific category, there are no members of the Council that are there in their capacity as indigenous peoples. However, the President, as well as other members of the Council, is Tuareg. The High Council of Local Collectives aims to ensure the participation of the different populations living within the various local collectives in Mali, and has a mandate to make proposals to the government in areas concerning the environment, and the quality of life of citizens within the collectives.¹⁶⁰ This could provide a useful forum for indigenous peoples to express their concerns.

In Ethiopia, the second parliament has established a Standing Pastoralist Affairs Committee composed of mainly representatives from pastoralist communities in the Parliament. This Committee is in charge of promoting and safeguarding interests of the pastoralist communities in decisions, policies and laws passed by the parliament. Yet, much needs to be done in practical terms, particularly representation of the small minority group of communities.

158. C Daniels 'Indigenous rights in Namibia' in RK Hitchcock Robert & D Vinding, (eds) *Indigenous peoples' rights in southern Africa* IWIGA (2004) 48- 49.

159. Committee on the Elimination of Racial Discrimination, UN Doc CERD/C/407/Add.2, 10 June 2002, 21 (Examination of Mali's state report).

160. Art 99 of the Constitution.



3.4 Local administration

An important channel for indigenous peoples to be consulted and participate in decision-making is through local administration. A number of States examined are highly centralised, leaving little space for any influence from the local level on national level policies and programmes. As regards those States that are decentralised to various degrees, the extent to which indigenous peoples are able to participate effectively in local processes varies considerably.

Decentralised States include Uganda, where the local government system is regulated by Chapter Eleven of the Constitution and the Local Government Act.¹⁶¹ This Act deals with government units organised from village, parish, county, sub-county and district levels.¹⁶² Apart from the district councils which enjoy only executive and legislative powers, the other levels also enjoy judicial powers.¹⁶³ However, the only special interest groups represented are youth, women and persons with disabilities. The structures of the parish and village administrative units are such that the dominant ethnic group is guaranteed representation. The Batwa do not dominate many villages and thus have a very limited participation.¹⁶⁴

In Mali, decentralisation has been directed at increased autonomy for territorial collectives, and has been supported by a number of donors. However, the process faces a number of challenges, including the transfer of ownership of local and regional development to the local authorities, and ensuring consistency between the sectoral strategies at the national level and the choices and priorities of the local and regional authorities.¹⁶⁵ Furthermore, it does not necessarily respond to the self-management needs of indigenous peoples. The delimitation of the territorial collectives and the emphasis on village structures with specific geographical locations have disadvantaged nomadic pastoralists in the area of participation in local governance, as well as property rights and access to land.¹⁶⁶

Formally, Rwanda is decentralised with administrative entities with legal personality and relative autonomy.¹⁶⁷ Legislation addressing the powers of district authorities could be of use to indigenous peoples, although it has not thus far been used to this end. For example, Law No. 08/2006 on the organisation and functioning of the District provides that District authorities should support the initiatives of the local population, and take into account their aspirations in the planning of development activities.¹⁶⁸ However, despite potentially useful legal provisions, the discrimination and stereotyping that indigenous peoples face effectively prevent measures from being taken in their favour at the local level, although there are some exceptions. Solutions to their problems are conceived in urban centres, often based on the perception that their ways of life are a 'barrier to development'.

161. Chap 243, Laws of Uganda 2000.

162. See Secs 10 – 48 of the Local Government Act.

163. See The Local Council Courts Act, 2006.

164. Parliamentary Committee, 2007, 11.

165. Government of Mali (2006) *Mali: Poverty Reduction Strategy Paper*, 44.

166. MAA Hamana 'La charte pastorale malienne: Entre droits coutumiers et décentralisation' (June 2006) *Regards Croisés, Revue trimestrielle*, 17, 29.

167. Art 3 of the Constitution.

168. Art 6.

Egypt's decision-making is largely centralised, although the Constitution envisages the establishment of local administration under Articles 161 to 163 – including governorates, cities and villages. Egypt now has twenty-six governorates (*muhafazat*). These were further subdivided into districts (*Marakaz*) and villages (*qura*) or towns. Where the boundary of administrative units generally coincides with the territories inhabited by indigenous peoples, there is high probability that members of indigenous peoples would be able to exercise some degree of control on local government. However, there is very little chance for this to happen – not only due to the disparity between administrative boundaries and the territories of indigenous peoples – but also due to the high level of centralisation that characterises the system.

A number of Central African States follow a similar structure in terms of central, district and local administration, and the challenges for indigenous peoples to access local decision-making are also similar. One particular challenge is the non-recognition of indigenous villages in their own right. As explained in further chapters concerning land rights, for example, indigenous 'Pygmy' villages are most often only recognised in their capacity as 'campements' or camps that are attached to Bantu or other neighbouring communities' villages. Where indigenous villages do exist, they are very rarely headed by an indigenous village chief. In Gabon, for example, laws concerning the status of local chiefs¹⁶⁹ do not contain any specific provisions concerning indigenous peoples. Representation at provincial level, under the Chief of the canton, is followed by a chief of a group of villages, under which are the village chiefs. In Gabon there are a number of villages exclusively occupied by indigenous peoples. However, only very rarely are these villages headed by an indigenous village chief. In general, the 'Pygmy' villages are only considered insofar as they form part of a larger Bantu village. There is only one instance of note (in la Lopé) where the Chief of a group of villages is a 'Pygmy'.¹⁷⁰ Also, in CAR there are efforts underway for the recognition of the first indigenous villages. In 2006, for example, the first indigenous villages were recognised in Ngouma, Bakota1 and Bakota2, in the La Lobaye Prefecture. These villages are led by Aka leaders.


Articles 174 and 175 of the Constitution of the Republic of Congo stipulate that local collectives consist of a Department and the Commune. These are administered by elected councils, in particular in the areas of their competence, and their resources. Law No. 3-2003 on decentralisation places the village as the lowest administrative entity.¹⁷¹ Decree No. 2003-20 stipulates that a village is created by an *arrêté du préfet*, who designates the Village Chief, as well as their functions.¹⁷² Indigenous peoples in Congo automatically form part of neighbouring villages, which effectively prevents them from exercising any decision-making power at that level. To date, no indigenous village in Congo has official village status, and the situation is similar in other countries in Central Africa, although some NGOs are working towards their recognition, notably in Cameroon. Having access to village status could be a way in which many indigenous communities

169. L'arrêté n°0058/ML-SG-DPRH du 20 mars 1996 et l'arrêté n°0031/ML du 21 juillet 1998 portant statut des chefs de quartier.

170. République Gabonaise, Ministère de l'Economie Forestière, des Eaux, de la Pêche, de l'Environnement chargé de la Protection de la Nature, Plan de Développement de Peuple Autochtones du Programme Sectoriel Forêts Environnement, Rapport Final préparé par Dr. Kai Schmidt-Soltau, juillet 2005, 21.

171. Arts 30 to 34 de la Loi du 17 janvier 2003.

172. Art 126 of the décret No. 2003-20 du 6 février 2003.



throughout Central Africa could better exercise their rights to self-management, consultation and participation.

In addition, the concept of having a community chief is alien to the cultures of most indigenous 'Pygmy' groups which, for the most part, do not have any discernible hierarchical structure. In Congo, for example,

Traditionnellement, les sociétés égalitaristes des peuples autochtones ne sont pas structurées autour de chefs et de représentants puissants. Les relations se basent sur le principe d'égalité. Il n'existe pas d'organigramme précis. Cependant, ils reconnaissent une autorité morale que l'on consulte souvent lors des situations conflictuelles. Cette autorité est le patriarche de la famille, ayant une connaissance infuse des pratiques coutumières et rituelles; ou encore une personne choisie pour sa sagesse et son âge avancé.¹⁷³

3.5 Traditional leadership and customary law

Customary leaders are recognised in a number of African countries. Their mandates and powers vary, but in many countries, their recognition could be an effective entry point for more effective consultation and participation of indigenous peoples, although a number of challenges remain in addressing this question. At the other end of the spectrum, some countries do not recognise traditional leadership in their legal frameworks, and national legislation makes no provisions for the recognition of customary law, and its coexistence with written law.

Traditional leadership is not formally recognised in the legal frameworks of Kenya and Nigeria among other countries. The 1999 Constitution of Nigeria does not appear to recognise traditional leadership. Local government councils are charged with the responsibilities of exercising authority on traditional associations and in the common interests of the community.¹⁷⁴ The constitutional position, however, conflicts with actual practice in the sense that in all the States of the Nigerian federation, there are laws that recognise traditional rulers and their roles in their various communities. Traditional rulers are assigned different roles in governance of local communities and are incorporated in local government administration albeit in usually minimal roles.¹⁷⁵ Unofficially, however, traditional rulers and institutions wield considerable influence in the governance of Nigeria.

On the other hand, as mentioned above, a number of legal frameworks do recognise the existence of customary law, and the institution of traditional leaders – although this is to varying degrees and with differing implications and challenges for indigenous peoples. The Ugandan

173. As above, 44: 'Traditionally, the egalitarian societies of indigenous peoples are not structured around traditional leaders and powerful representatives. These relationships are based on the principle of equality. Detailed organigrammes do not exist. However, they recognise a moral authority that is often consulted during situations of conflict. This authority figure is the family patriarch, who has in-depth knowledge of customary practices and rituals, or may also be a person chosen on the grounds of his wisdom and advanced age.'

174. Sec 7 of the Nigerian Constitution.

175. O Agbese 'Chiefs, Constitutions and Policies in Nigeria' (2004) 6 *West African Review*. Traditional rulers in the Niger Delta, acting under the aegis of the Association of Traditional Rulers of Oil Mineral Producing Communities of Nigeria (ATROMPCON) – it includes traditional rulers from Ijaw and Ogoni communities – collaborate with government in ensuring lasting peace and development in the region. See A Ogbu, *Niger Delta receives N3.07 Trillion in 8 years*. Sourced from <http://www.legaloil.com/NewsItem.asp?DocumentIDX=1174818064&Category=news> (accessed 10 July 2007).

Constitution, for example, provides for the institution of traditional or cultural leaders, which may exist in any area of Uganda in accordance with the cultures, customs and traditions or wishes and aspirations of the people to whom this institution applies.¹⁷⁶ The provisions, however, are generally only successful for those groups with substantial numbers and some potential political influence. Communities such as the Batwa which do not necessarily have defined traditional leadership structures have found it difficult to access this provision, and have therefore not benefited from this institutional arrangement.

The situation is similar in other countries with 'Pygmy' populations. The Constitution of DRC, for example, recognises the institution of 'customary authority', and foresees the adoption of a law to regulate this. However, no law has yet been adopted to this end.¹⁷⁷ Also, indigenous peoples are not organised in a manner that is consistent with the institution of a central authority.¹⁷⁸ The Association of Customary Chiefs does not have any indigenous membership due to the fact that indigenous peoples' societies are not organised in a hierarchical manner and they do not recognise a central authority. Therefore, some rethinking of the concept of leadership for such communities may be required in order for national laws to respond to the need for them to be included in decision-making, whilst at the same time recognising that their decision-making processes may be different to those of other populations.

In Cameroon, some efforts have been made by NGOs to promote and have recognised traditional chiefdoms for indigenous peoples. These are regulated by decree No. 77/245. The modalities for the organisation and management of these chiefdoms are regulated by the customary law of the concerned communities, and local authorities have demonstrated a favourable attitude towards their creation, which offers a legal framework for self-management.

Constitutional provisions for traditional leadership that functions according to customs and traditions include Chapter 12 of the South African Constitution.¹⁷⁹ The Traditional Leadership and Governance Framework Act¹⁸⁰ provides for the recognition of traditional communities whose customs recognise traditional leadership and observe customary law.¹⁸¹ This provision theoretically excludes the majority of the San and Khoe communities who do not exhibit established structures recognising traditional leadership.¹⁸² Although the State is still in the process of recognising these structures, indigenous peoples are making efforts to ensure they are recognised within the traditional leadership framework envisaged by the Act.¹⁸³ The National House of Traditional Leaders, provided for in Chapter 12 of the Constitution, functions as an advisory body at the national level, and similar Provincial Houses of Traditional Leaders. However, these

176. Art 246(1).

177. Sec 3 de la Constitution de février 2006.

178. Nkoy Elela (2005) *Situation des autochtones pygmées (Batwa) en République Démocratique du Congo: enjeux des droits humains* 42.


179. SA Constitution, Secs 211-212.

180. Act 41 of 2003.

181. As above, Sec 2.

182. N Crawhall (1999) 19; see also Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa, paras 49-54.

183. As above.



Houses do not include the Khoi-San communities.¹⁸⁴ While a number of traditional communities and councils have been recognised in various provinces in South Africa, none has been recognised to cater for indigenous peoples such as the Khoi and the San.¹⁸⁵ The challenge is compounded by the lack of specific hierarchies within their cultures.

Article 66(1) of the Namibian Constitution also recognises customary law and traditional authorities as part of its legal system. The Traditional Authorities Act No. 25 of 2000 provides for the establishment of traditional authorities consisting of chiefs or heads of traditional communities and traditional councillors.¹⁸⁶ These are responsible for implementing customary law and settling disputes. To be recognised, they must submit an application to the State,¹⁸⁷ and thus the authority to confer recognition or withhold it from traditional leaders is vested in government. However, only two San 'chiefs' of those that have been elected by their people have been recognized by the government. The CERD Committee, among others, has questioned the lack of clear criteria for the recognition of traditional leaders, and the fact that no institution exists to assess applications for recognition independently of government.¹⁸⁸ However, some NGOs see the Traditional Authorities Act as an opportunity for indigenous peoples to participate more effectively in decision-making, with some challenges, including the required training in administrative and leadership skills that the full implementation of the Act for indigenous peoples would imply.¹⁸⁹

In Botswana there are also laws which provide for traditional or customary institutions that could facilitate the participation of indigenous peoples. The Constitution of Botswana provides for the House of Chiefs which is part of the National Assembly. Under Section 88 of the Constitution, the National Assembly must consult the House of Chiefs before passing any bill with respect to tribal organisation or tribal property, the organisation, administration and powers of customary courts and customary law. However, there are some basic challenges for indigenous peoples with respect to the House of Chiefs. It has a stratified membership in terms of which permanent membership is reserved to chiefs of Tswana tribes.¹⁹⁰ To date, only one indigenous representative has been appointed to the House of Chiefs. CERD has observed that the current situation reproduces the discriminatory position relating to the partition of ethnic groups in the House of Chiefs.¹⁹¹

As a result, the Working Group of Indigenous Minorities in Southern Africa (WIMSA) and the San in Southern Africa set up the concept of San

184. Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, para 51.

185. As above.

186. Sec 2(1).

187. Secs 4 - 6 of the Act.

188. CERD, Concluding Observations: Namibia, August 2008, UN Doc CERD/C/NAM/CO/12 para 16.

189. R Kappleca & WIMSA 'Civil Rights In Legislation and Practice: A Case Study from Tsunkwe District West, Namibia' in RK Hitchcock and D Vinding (eds) *Indigenous Peoples' Rights in Southern Africa* (2004) 91.

190. The composition of the House of Chiefs was challenged in the *Kamanakao* case on the basis that it was discriminatory and in violation of Secs 3 and 15 of the Constitution of Botswana. The High Court agreed but held that since the discriminatory composition of the House of Chiefs was enshrined in the Constitution, the High Court could not declare it unconstitutional.

191. Botswana CERD Report 2006 para 10.

Councils.¹⁹² National San Councils many not be traditional indigenous peoples' institutions but they are pragmatic responses to deal with social realities of the societies and times in which they exist.¹⁹³ In South Africa, the South African San Council engaged in negotiations to be part of the House of Chiefs in South Africa, which could serve as a model for similar situations in Southern Africa.¹⁹⁴

3.6 Participation in elections

Participation in elections is a crucial aspect to be examined under the theme of participation. The right to vote is a fundamental individual right, and also has consequences for the collective rights of indigenous peoples. All national legal frameworks address the right to vote, and the establishment of political parties, as well as the issue of electoral candidacy. The issue of non-discrimination in this area is also a key element of national legal frameworks. However, as will be seen below, for indigenous peoples, there are many challenges associated with the exercise of their rights in this area.

Law No. 06/006 of DRC concerns the organisation of presidential, legislative, provincial, urban, municipal and local elections. However, it has been demonstrated that the conditions and formalities of inscription to electoral registers are a great challenge for the majority of indigenous peoples, who in consequence participate in very low numbers in elections. In order to register to vote, individuals require a national identity card, passport or a certificate of nationality. Similarly, the Constitution of CAR addresses civil and political rights, and the right of men and women aged eighteen or above, to vote. Article 28 of the Electoral Law elaborates on the formalities that should be fulfilled in order to register to vote. These include that individuals should be in possession of a national identity card, a birth certificate, and other documents such as a driving licence etc. In the absence of such documentation, a witness statement is required. An NGO report from 2006 indicates that the Aka do not even enjoy the most basic rights as regards participation and consultation, citizenship and political representation. They frequently lack identity documents, and consequently do not have the right to vote, leading to almost complete exclusion from public life.¹⁹⁵ In both countries, many if not most indigenous people do not have access to such documents. In addition, registration centres are often located in administrative centres, which are often very far from indigenous peoples' villages. Furthermore, their poor literacy levels constitute a great barrier to their formal participation in elections.

The situation is similar in Congo, where the Electoral Law guarantees the right of all Congolese to participate in elections or to stand for office,¹⁹⁶ and yet the requirements for enrolment in the electoral register under Article 10 of Law No. 04/028, which are similar to the ones cited above regarding CAR


192. As above.

193. In South Africa, for example, the South African San Council (SASC) was established in 2001. Its main priorities set in 2004 were to establishing locally based offices, providing training to SASC members, securing access rights to heritage sites for San, building links with museums and parks, identifying other San groups in southern Africa and negotiating entrance to the House of Chiefs in South Africa; as above.

194. As above.

195. A Giolitto (2006) *Etude des cas de discrimination, abus et violations des droits de l'homme envers les pygmées Aka de la Lobaye République Centrafricaine, Etude faite pour COOPI, Caritas et OCDH*, Bangui 17.

196. Art 4 de la Loi n 06/006 portant organisation des élections présidentielle, législatives, provinciales, urbaines, municipales et locales.



and DRC make it extremely difficult for indigenous peoples to either register to vote, or to put forward their candidacy for election.

La non jouissance du droit de citoyenneté des peuples autochtones au même titre que le reste de la population est un véritable obstacle à leur participation à la vie nationale. Car, en dépit de la gratuité de l'acte de naissance, plusieurs enfants 'pygmées' ne jouissent pas de ce document, notamment à cause de l'inaccessibilité de leurs parents aux bureaux de l'état civil, l'adaptabilité des procédures mises en place au mode de vie, l'éloignement de ces communautés. De plus des frais sont exigés aux 'pygmées' qui veulent acquérir un document d'état civil.¹⁹⁷

As well, a good indication of these challenges is the fact that there is not one single indigenous person represented among the 500 deputies and 108 senators at the national level in Congo. Similarly, in Gabon where Law No. 24/96 on political parties introduces the principle of non-discrimination and guarantees the right of all Gabonese citizens to join the political party of his or her choice, and Law No. 7/96 on elections guarantees the right to enjoy civil and political rights as electorate as political candidate, the realisation of the basic right to participate in elections remains a significant challenge for indigenous peoples. The electoral law of Gabon does not take into account the various challenges faced by indigenous peoples. As a consequence there are not even, as in other countries such as Burundi, quotas in place for indigenous peoples' representation in any political organs.

Under the 1971 Constitution of Egypt, some aspects of the right to participation are enshrined. Law No. 73 of 1956 stipulates that on reaching the age of 18 years, every Egyptian has an obligation to exercise his political rights in person by expressing his opinion in the public referendums that are held in accordance with the Constitution. From the perspective of indigenous peoples, one notes that the law does not provide for representation of marginalised groups such as Nubians, Berbers or Bedouins in elected bodies. Given the limited political mobilisation within these communities, the absence of such provisions means that they would be kept in a disadvantaged position.

The Constitution of Botswana guarantees every individual citizen who has attained the age of 18 the right to vote, without any distinction on the basis of race or ethnic origin.¹⁹⁸ The Electoral Act deals with the conduct of elections for National Assembly and local councils. Among the challenges associated with the electoral laws is the requirement to speak English in order to stand for election. Basarwa are the least educated ethnic group in Botswana which means in practice very few of them would meet this

197. 'The lack of enjoyment of the right to citizenship of indigenous peoples on the same basis as the remainder of the population is a crucial obstacle to their full participation in the national polity. Because, in spite of the gratuity of the birth certificate, many 'Pygmie' children do not have this document, mainly due to the inability of their parents to access governmental offices, the lack of adaptation of procedures to their way of life, and the geographic isolation of these communities. In addition, fees are charged when 'Pygmies' want to acquire documents pertaining to their civil status.' *Rainforest Foundation et OCDH, 2006*, www.rainforestfoundationuk.org/files/droits_autochtones_final.pdf (accessed 30 November 2008).

198. Sec 67(b) as amended by Constitution (amendment) Act No. 18 of 1997; Similarly, every citizen has the right to stand for elections to the National Assembly provided he/she is 'able to speak, and, unless incapacitated by blindness or other physical cause, to read English well enough to take an active part in the proceedings of the Assembly). Sec 61 of the Constitution.

requirement.¹⁹⁹ Since independence, there has never been a member of the Basarwa ethnic group in the National Assembly. One potential entry point for indigenous peoples is Section 58(2)(b) of the Constitution, which provides for four specially elected members of the National Assembly nominated by the President and elected by the National Assembly.²⁰⁰ However, in practice this provision has not been utilised to encourage the nomination of marginalised groups.

The South African Constitution establishes the Independent Electoral Commission,²⁰¹ whose mandate and functions are elaborated by the Electoral Commission Act of 1996.²⁰² The Commission oversees the free and fair participation of every registered voter in the election, either to vote or to stand for election. The UN Special Rapporteur on Indigenous Peoples has called on South Africa's political parties to 'take a stand in favour of constitutional recognition of indigenous peoples', which in essence implies their active participation in the political parties' affairs that would translate to nomination in elective posts and the formulation of policies.²⁰³

The Kenyan electoral system is based on universal suffrage and, depending on where certain communities are situated the majority will often win the elections.²⁰⁴ In the absence of express provisions and special measures of representation, indigenous peoples and minorities continue to be marginalised in elective politics. Section 42 of the Constitution establishes the Kenya Electoral Commission, the body charged with the supervision and conduct of elections every five years. Kenya is divided into 210 constituencies with boundaries determined by the Electoral Commission. However, indigenous peoples' views and needs are not always represented through this process, as was highlighted in the *Il Chamus* case.²⁰⁵ The Il Chamus community sought a declaration by the Constitutional Court that the statistical chance of an Il Chamus candidate being elected as a member of Parliament in the Baringo Central Constituency²⁰⁶ is so minimal as to effectively deny them any chance of being represented in the National House of Assembly. The Court held that minorities such as the IL Chamus have the right to participate and influence the formulation and implementation of public policy, and to be represented by people from the same social cultural and economic context as themselves. This decision marked a positive turn in the Kenyan judiciary for the recognition of indigenous rights.

3.7 Participation in land and natural resource management and decision-making

At the local level, regulations dealing with land and resource management are of direct relevance to the issue of self-management for indigenous communities. There are many provisions, in particular on the management of

199. I Mazonde 'Equality and ethnicity: How equal are San in Botswana' in RK Hitchcock and D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) IWGIA Document 110, 140.

200. Botswana CERD 2006 Report para 221.

201. SA Constitution Secs 190-191.


202. Act 51 of 1996.

203. Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa Report, para 103.

204. See the Local Government Act (Cap 265) of the Laws of Kenya.

205. *Rangal Lemeiguran & Others v Attorney-General & Others (Il Chamus case)*.

206. See above. Baringo District has three ethnic communities: the Pokot, the IL Chamus and the Tugen. It has three constituencies. The Il Chamus, it was claimed, have no proper representation through any of these constituencies.



forest resources, that could provide indigenous peoples with limited entry points for their self-management, as well as their consultation in decision-making concerning lands and resources. However, as can be seen below, such entry points are limited, and often do not take into account the specificities of indigenous peoples' lives. Nevertheless, it is clear from some of the examples provided that a number of legal provisions could be a basis for more adequate consultation and self-management, or a first step towards a more systematic addressing of indigenous peoples' role in land and resource management.

The Forest Code of CAR (Law No. 90-003) contains certain provisions that in theory should enable indigenous communities to exercise some degree of self-management as regards use rights. Articles 15 and 16, for example, deal with individual and collective use rights, meaning that collectives are able to use forest resources in accordance with their custom. Article 53 of the Forest Code defines collective forests as those areas which are classified by decree, and are reforested and preserved by the collective in question. Collectives, according to this law, are regions, prefectures, sub-prefectures, and communes. Therefore, given the fact that no Aka commune exists, and that their villages generally only constitute part of adjacent villages of other communities, there is no possibility for these peoples to manage their own portion of forest directly. As discussed above, the recognition of indigenous villages in their own right is an important means of ensuring resource rights for indigenous peoples in Central Africa.

The Forest Law of DRC also contains a number of provisions that could pave the way for the consultation and participation of indigenous peoples. Article 84 provides that any contract for a forestry concession should be preceded by a public inquiry. In practice such an inquiry consists of announcements and field visits. Indigenous peoples rarely take part in such meetings and, if they do, they generally do not participate actively due to the discrimination they face from neighbouring communities. Therefore, despite the existence of legal provisions that could in theory allow for their participation, in practice, the situation is very different.

The situation is similar in Congo, where Law No. 16-2000 (the Forest Code) contains provisions on the participatory management of forests. Articles 24 and 25 of the Code stipulate that local communities should be consulted prior to any designation of permanent domain forest. In practice, the process of 'consultation' consists of the posting of information in the offices of the holding of public meetings in villages neighbouring the concerned forest areas. Again, the levels of illiteracy and other barriers also pose significant challenges. In addition, the fact that rarely have contact with public administration also means that the information posted in its offices rarely, if ever, serves the purpose of informing indigenous peoples adequately about proposed measures. Similarly, in Cameroon, under the 1995 decree on the 1994 Forestry, Wildlife and Fisheries Law (Decree No. 95/591),²⁰⁷ the posting of notices concerning the classification of forests and protected areas is the preferred form of information dissemination. The Campo Ma'an, Benoue, Boumbek Nki, the Dja and Lobeke Ntaional Parks, are cases in point. The creation of this Reserve resulted in an increase in food insecurity in neighbouring settlements, including in indigenous peoples' settlements. Following participatory mapping exercises conducted by the CED, and

207. Art 18(3) provides that notices concerning the classification of forest should be widely publicised through local government offices, town halls and administrative services in charge of forests in the region where the classification takes place.

discussions with the World Bank, however, some access rights have recently been recognised for the Bagyeli community.²⁰⁸

Articles 63 and 64 of the Organic Law No. 04/2005 on the modalities for the protection, safeguarding and promotion of the environment in Rwanda define a specific role for concerned populations in environmental management. The populations concerned have the right to free access to information, to express their opinions on environmental issues, to be represented in decision-making bodies dealing with environmental issues, as well as to training. This could constitute an important entry point for indigenous peoples to participate in policy and programming action on environmental issues – particularly pertinent as they have an in-depth knowledge of the environment and of how to preserve it – built up over many generations.

In addition to provisions concerning participation in the management of forest resources, there are also a number of entry points for forms of participation in the management of other resources. For the Mbororo in CAR, the creation of territorial entities appears to be an entry point for some degree of self-management. This concerns Laws Nos. 64/32 and 64/33 on the creation and organisation of these collectives, as well as Law No. 64/32 on the creation of rural communities in pastoral zones, the designation of mayors and the management of municipal councils, in addition to Law No. 65/61 on the regulation of animal breeding, permits the creation of stock farming communes. Since the 1960s, seven communes have been created with autonomous municipal councils. Despite the fact they were created to sedentarise the Mbororo, the fact that these communities have their own autonomous, elected councils could be an entry point for reinforcing their participation in the day-to-day management of their own affairs. Pastoralists have also put in place a National Federation of pastoralists, which has a certain level of power in decisions concerning pastoralism. In a similar vein, the government of Ethiopia has adopted a new strategy on pastoral development, which has increased the level of cooperation between the pastoralists and regional governments.²⁰⁹ Following the federal government's lead, the Oromiya, Afar and Southern Peoples' regional governments have formed pastoral commissions.²¹⁰

According to the Forest Code of Cameroon, the Minister of Forests, Wild Life and Fisheries may, in the public interest and in consultation with the affected populations, suspend the exercise of rights of usage for a limited or fixed period, when necessity requires (Art 8(2)). Despite the consultation requirement, the government officials provided for under the law are the sole arbiters to determine the need to suspend the right of usage. Due to their vulnerability, the 'Pygmy' communities are the primary victims of measures of this nature. With the establishment of the Campo National Park, a severe and sudden restriction on the right to usage of this community, which led to a deterioration in their living conditions, has been introduced.


In Burkina Faso, Law No. 034-2002/an on pastoralism deals with the exploitation of natural resources. Within this context, the State and territorial collectives are mandated with the identification, protection and

208. The Centre for Environment and Development has initiated participative training in cartography among 'Pygmy' communities. This yielded the map of the Baka's customary land, which was important during negotiations.

209. Working Group Report, 33.

210. Working Group Report, 50.





conservation of areas where pastoralism take place. Pastoralist organisations, in consultation with customary authorities, should address issues of the identification, conservation and management of areas used for pastoralism, water points, etc.

In Botswana, the government has introduced programmes and policies that grant a limited right to limited economic self-management. The Community-Based National Resource Management (CBNRM) Programme started in 1993.²¹¹ It permits eligible communities management rights over a tract of land which exceeds 100,000 ha.²¹² It is generally recognised that the communities likely to be eligible are Basarwa and statistics indicate that villages that opted for CBNRM are predominantly Basarwa.²¹³ The programme does not pass ownership rights to the community but simply confers on the community the right to manage and benefit from the land resources within a specific tract of land.²¹⁴ However, among the challenges associated with this programme is that the CBNRM does not utilise indigenous peoples' own traditional political and social institutions. Thus, for example, they have to create and register recognised legal institutions akin to trusts.²¹⁵ Secondly, the lack of educated members from these communities means that they are unable to appreciate the intricate legal requirements in order to make use of the CBNRM.

Nigeria operates a federal system of government and, as such, the control and management of natural resources are the responsibility of the federal government. In 2000, the Niger Delta Development Commission (NDDC) was established with the aim of achieving greater efficiency and effectiveness in the 'use of the sums received from the allocation of the federation account for tackling ecological problems which arise from the exploration of oil minerals in the Niger Delta area and for connected purposes'.²¹⁶ The Niger Delta Regional Development Master Plan is intended to address poverty and environmental degradation and afford indigenous peoples the opportunity of participating fully in decision-making processes.²¹⁷ However, the level of participation, despite the existence of this Plan, is minimal. Recently, the Nigerian federal government established a Federal Ministry for the Niger Delta. The ministry is headed by a Niger Delta bureaucrat. It is aimed at a

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211. See generally JW Arntzen 'An Economic View of Wildlife Management Areas in Botswana' CBRM Support Programme.
 212. M Taylor 'The Past and Future of San Land Rights in Botswana' in Hitchcock, R.K. and Vinding, D (eds) (2004) *Indigenous Peoples' Rights in Southern Africa* 152.
 213. M Taylor 'CBNRM and Pastoral Development in Botswana: Implications for Land Rights' Paper for presentation at Workshop on Environment, Identity and Community Based Natural Resource Management: Experiences of the San in Southern Africa, Friday 1st December 2006 Oxford University African Studies Centre and African Environments Programme 9.
 214. Taylor (n 212 above) 162.
 215. T Gujadhur "'It's good to feel like we own land": The People's View of Community Land Rights Under CBNRM in Botswana' CBNRM Support Programme Occasional Paper No. 3, 3.
 216. The Federal government and the NDDC require over N400BN to execute the master plan. See <http://www.projectniddc.com/> (accessed 24 March 2007). Although the establishment of these agencies and the constitutional reassignment of at least 13% of centrally collected oil and gas revenue to oil producing states has been hailed as a commendable move on the part of the Nigerian government, there is still a strong national consensus that the Nigerian government needs to do more. See T Suberu, *Reconstructing the architecture of federalism in Nigeria: The option of non-constitutional renewal*, Accessed from www.dartmouth.edu/jcarey/suberu.pdf (accessed 30 October 2006).
 217. On 27 March 2007, the Nigerian president unveiled the NDDC masterplan, see <http://www.thenationonline.com/dynamicpage.asp?id=14678> (accessed 28 March 2007).

better coordination and tackling of the problems peculiar to the Niger Delta under federal budgetary provisions.

3.8 Consultation and participation in development policies and programmes

A major concern for indigenous peoples is that development projects that affect them are often formulated without the input of the target groups and as such tend not factor in indigenous peoples' cultural specificity.²¹⁸ The lack of consultation with indigenous peoples has often resulted in the adoption of development policies and programmes that are unsuited to their real needs. According to research by the ILO, among others, indigenous peoples often have very different perceptions of poverty and wealth, as well as priorities for poverty reduction, than other sections of the national population.²¹⁹ Nevertheless, increasingly governments in some of the countries examined during this research are realising the need to address indigenous issues specifically in their poverty reduction, and overall development strategies.

In the context of the National Participatory Development Plan in Cameroon, some efforts have been made to address the needs of indigenous peoples, but specific programmes developed to this end remain inappropriate and not adapted to the needs of indigenous peoples. As a consequence their positive effects have been negligible. During the elaboration of the first National Poverty Reduction Strategy Paper (PRSP), indigenous peoples were not consulted despite the participatory methodology adopted by the Government within this context.²²⁰ And despite the existence of the Indigenous Peoples Development Plan within the framework of the PRSP, the PRSP does not take into account the priorities and needs of indigenous peoples in its overall strategy, or in the associated sector strategies and medium-term expenditure framework. Within the framework of the PRSP revision process, which was ongoing in 2007 and 2008, the government conducted consultations with various sections of Cameroonian society, including the Mbororo and the 'Pygmy' populations. However, it remains to be seen whether the revised document and the modalities for its implementation will adequately consider and address the rights of indigenous peoples.

Efforts have been also made by the Kenyan government to enhance community participation and consultation in development agendas. It is, for example, envisaged through the Constituency Development Fund Act and the Local Authority Transfer Fund Act of 1999 'which promote pro-poor identification and implementation of development projects at the local level',²²¹ that local communities would be involved in determining priority action programmes. However, there is a lack of adequate measures and actions for effective decentralisation and capacity to manage these resources for the benefit of the communities that are targeted.²²²

218. S Saugestad 'Developing Basarwa Research and Research for Basarwa Development' (1994) 10 *Anthropology Today* 20-22.


219. B Tcoumba, *Peuples Indigènes et Tribaux et Stratégies de Réduction de la Pauvreté au Cameroun* (2005, ILO).

220. B Tchoumba, *Peuples Indigènes et Tribaux et Stratégies de Réduction de la Pauvreté au Cameroun* (2005, ILO).

221. Kenyan APRM Report 57.

222. Kenyan APRM Report 75.





The Congolese PRSP places particular emphasis on participation as an essential element of good governance. This document also foresees a process for participation in three stages, the first being raising awareness of the process through campaigns and consultations, including with vulnerable groups, the second involving participatory consultations at the central level and community consultations in eleven departments, and the third including participatory consultations to integrate sector perspectives in the draft I-PRSP.²²³ However, one of the objectives it fixes in relation to indigenous peoples is the 'Setting up of an integration assistance fund for the pygmies'.²²⁴ To date, this has not been done, and it is clear that the integrationist objective expressed here is at odds with the draft law on the rights of indigenous peoples in Congo, which expressly takes as its starting point the priorities of indigenous peoples themselves and the protection of their cultures.

When looking at issues of consultation and participation, it is important to take into account the societal structure and notions of representation of indigenous peoples. 'Pygmy' society, for example, is known for its comparative lack of hierarchy and lack of designated spokespersons. A representative of the *société d'exploitation forestière en République du Congo* (CIB) explained, for example, in the context of the creation of a community radio programme, that

Their society is egalitarian, as a result one cannot only speak to the village chief but should rather speak to the community. It is very difficult to overcome all these obstacles and breach the gap created by illiteracy among this population. We therefore consulted experts with in-depth knowledge of 'Pygmy' communities who recommended that we set up a radio station. We answered, 'Let us give it a try'.²²⁵

In fact, many PRSP documents (including that of CAR, and a number of others examined during this research) place specific emphasis on consultation with local communities. However, very few actually foresee any specific mechanisms for consultations with indigenous peoples, and for those processes that do foresee such consultation, such as the current process to redraft the Cameroonian PRSP document, the consultations held are not sufficiently participatory or adapted to indigenous peoples' own methods of decision making to ensure an outcome that reflects their own needs.

For example, the Strategic Framework for Poverty Reduction of Burkina Faso enounces certain development priorities that could constitute the ideal framework for the expression by indigenous peoples of their own priorities. The elaboration of this document was preceded by the participation of a number of concerned groups. However, the use of methodologies that indigenous peoples were not familiar with, as well as the use of French as a working language during the consultations that many indigenous peoples do not understand sufficiently, affected significantly the extent to which

223. As above para 23.

224. As above, para 216.

225. *'Leur société est égalitaire, par conséquent on ne peut pas seulement parler au chef du village, mais il faut parler à tout le monde. Il est très difficile de surmonter tous ces obstacles et de combler le fossé créé par l'analphabétisme de ces populations. Nous avons donc consulté des experts qui connaissent très bien les communautés pygmées et nous ont recommandé de monter une station radio. Nous avons répondu, d'accord, essayons cela.'* Statement of M Poynton for CIB/Congo, see World Bank Website http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/EXTEA_PREGTOPSOCDEV/0,,contentMDK:20539995~isCURL:Y~menuPK:502986~pagePK:34004173~piPK:34003707~theSitePK:502940,00.html (accessed 30 November 2008).

indigenous peoples have been able to contribute to the elaboration of this document. In addition, given that a number of indigenous peoples inhabit very isolated areas, the information disseminated in the various meetings did not reach these isolated populations.

On the other hand some PRSP frameworks do not foresee any indigenous participation in the process, or respond to their priorities. This is the case, for example, with the Ugandan PRSP document. In Algeria, there are no formal mechanisms for consulting with indigenous peoples as such. Particularly in the development of large infrastructure projects such as the Taksebt Dam in Kabylie, the lack of consultation with local indigenous peoples has resulted in water being diverted from the local area to the city of Alger, thus depriving local populations of formerly accessible resources. In other cases, whereas national poverty reduction and development strategies may not give specific attention to indigenous issues, the need to address indigenous peoples' specific needs may be addressed within another context. Although Namibia's overall poverty reduction strategies do not take indigenous peoples into account,²²⁶ following visits by the Deputy Prime Minister to San communities across Namibia, the San Development Programme was introduced.²²⁷ The visits were aimed at consultations with the San people on their needs and their perceptions of the pressing challenges facing them. The Programme was framed pursuant to the revelations of the consultations regarding the plight of the San people. However, the Plan maintains a comparatively integrationist approach to the development of the San people, which raises questions concerning the appropriateness of the consultations held with them.

3.9 Conclusion


A number of legal frameworks in the African region provide for the participation and consultation of the population in general or specific populations, including marginalised groups. Very few of these legal frameworks actually make specific provision for indigenous peoples, but a number can be used as entry points to advance the participation of indigenous peoples in decision-making. However, the mechanisms for the implementation of these legal frameworks or for any associated consultation or participation are generally weak, and do not take into account the specific considerations that need to be made when consulting with indigenous peoples. At the other end of the spectrum, a number of legal frameworks make no provision whatsoever for the needs of marginalised and other specific groups within the national society.

Where they do exist, laws containing provisions for specific groups, or affirmative action clauses, often only relate to specific instances, not to a broader policy of inclusion for indigenous peoples. Furthermore, efforts to include and consult with indigenous peoples are often at best *ad hoc*. In the worst cases, no mechanisms exist at all, and where the law provides for equal access to certain services and equal rights in specific areas, it is often the case that no further action is taken to address the difficulties that indigenous peoples have in exercising those rights. Regulations on participation in elections are a case in point. Whereas most national legislation does provide

226. 'Namibia Millennium Development Goals, 2004' Government of Namibia (August, 2004) available at [www.undg.org/documents/5307-Namibia MDG Report 2004.pdf](http://www.undg.org/documents/5307-Namibia%20MDG%20Report%202004.pdf) (accessed 31 July 2007).

227. See San Development Programme Report 2007/2008.





for the right of all citizens to vote, it generally does not take into account that the conditions that individuals must fulfil in order to be able to vote are extremely difficult to fulfil for indigenous peoples. This includes the lack of basic citizenship documents. In some cases, the demarcation of electoral boundaries may benefit more powerful ethnic groups, serving to decrease the possibility for indigenous peoples exercising influence through voting.

As regards participation in national decision-making bodies, related affirmative action measures, with the exception of Burundi, make provisions for specific interest groups but do not include indigenous peoples. Where positive examples of affirmative action for indigenous peoples do exist, as in the case of Burundi, they are not linked to a broader policy of ensuring indigenous participation in governance, but only to the specific instances of the national Assembly and Senate. Some positive examples of efforts to create national bodies to debate and advise on indigenous issues, such as those initiated in Southern Africa, can be found, and could prove to be starting points for a broader consideration of their needs in policy and law.

In the area of self-management, some legal frameworks allow for participation, for example in the management of natural resources. The issue of natural resource-management is linked to governance. In the forest areas in Central Africa, for example, even though laws do provide for resource use and management for local communities, the fact that indigenous villages are not recognised as 'local communities' in their own right, and only as attachments to neighbouring villages, means that indigenous peoples have added difficulties in claiming their rights to land and natural resources in their own right. It also means that indigenous peoples' own participation in decision making and local administration is limited, not only because their communities are not recognised, and thus 'represented' by chiefs of neighbouring communities.

Linked to this issue is the recognition of customary law and traditional authorities at the national and local levels. Many African countries' legislation recognises customary law and traditional chiefs or authorities. This is a vital entry point for the participation of indigenous peoples and their representatives in decision-making. However, the challenge lies in those areas where indigenous peoples may not have a discernible decision-making structure or hierarchy within their societies. This is the case with the San and the 'Pygmy' peoples. Other conditions, such as the use of specific languages, also often serve to preclude effective indigenous participation. Additional challenges for governance and participation in decision-making lie in the fact that the legal recognition of traditional authorities excludes the traditional authorities of those groups who are not attached to a specific territory. As seen above, measures taken, for example, to include nomadic pastoralists, in decision making, have often been conditioned on their sedentarisation, rather than accommodating this in the structures of decision-making. Legislation on customary or traditional authorities needs to take such differences into account if it is to be of significant benefit for indigenous peoples.

Increasingly, governments in some of the countries examined during this research are realising the need to address indigenous issues specifically in their poverty reduction, and overall development strategies. This is a significant advance in a region where indigenous issues have rarely been on the agenda in the past. But again, the mechanisms for such participation are

weak, and often inappropriate for the adequate inclusion of indigenous peoples in the design, implementation and monitoring of such strategies.



4 Access to justice

4.1 Introduction

Access to justice requires, in the first place, that lawyers are available to assist people who need them. It further requires that courts are not too remote and inaccessible to be used, and that the language of the law is be understandable to the people who need to rely on the law. Access to justice further includes the meaningful opportunity to acquire the required information about the workings of the judicial system. It requires a functioning legal system, allowing for just processes, which includes, among others, the timely resolution of disputes, affordability, transparency, fairness, effectiveness, and efficiency.

4.2 International standards

Article 17(2) of ICCPR provides that ‘everyone has the right to the protection of the law’. In Article 7, the African Charter guarantees important aspects related to access to justice:

1. Every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
- (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) The right to defence, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.

Unlike the African Charter, ILO Convention No. 169 deals exclusively with indigenous peoples’ rights, including a number of aspects of access to justice. For example, Article 2 imposes on States the obligation to ensure that indigenous peoples ‘benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population’, including by implication the right of access to justice. Moreover, Article 12 obliges governments to safeguard indigenous peoples ‘against the abuse of their rights’ and to ensure they are ‘able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights’. Furthermore, it states that ‘measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means’.

Under Article 13(2) of UNDRIP, States shall take effective measures to ensure that indigenous peoples can ‘understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means’. Article 34 of the Declaration enables indigenous peoples to maintain their juridical systems. Article 40 recognises their right of ‘access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements

of their individual and collective rights', while requiring that 'such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights'. The UN Declaration thus extends the pre-existing legal regime: Not only do indigenous peoples have the right to access justice, but States must also make sure that their disputes are solved in respect of their juridical customs.

4.3 Major national trends

Following this brief summary of the relevant legal instruments, the examination turns to the main obstacles that indigenous peoples have to overcome in practice, and how these are dealt with by African States.

Geographic remoteness

The first hindrance indigenous peoples have to face when trying to access justice is practical in nature. Indigenous peoples tend to live in remote rural areas, far removed from the most important cities and thus from formal courts. It would for example take most persons belonging to 'Pygmy' groups, who live in remote forest areas in countries such as Gabon and the DRC, many days of walking to reach the closest police station or tribunal. In Congo, because of the absence of courts in most of the areas where the concentration of indigenous peoples is the highest, justice is administered by the police rather than the judiciary. This state of affairs increases the arbitrariness to which indigenous peoples are exposed.

In Eritrea, each region of the country counts several 'Regional courts' people can go to. South Africa has also found a solution to the geographic accessibility problem by launching mobile ('circuit') courts in rural and isolated communities, especially in the Northern Cape where the San mainly lives. These courts deal with both criminal and civil matters.

Cost of legal proceedings

The cost of proceedings is another factor that inhibits access to justice. In Gabon, for instance, opening a case will cost more or less 20 USD, to which one will have to add a least a 100 USD to pay for a lawyer, while the yearly income of indigenous people in the country has been estimated at 60 USD. The high costs of legal representation in the formal courts of all surveyed countries cause access to justice to remain the preserve of the rich, the educated and those with political power. The poor, of whom indigenous peoples are part, cannot afford expensive legal fees.

Legislation of most countries, including CAR, Congo, DRC and Gabon, establishes a right to free legal assistance based on the gravity of the sentence faced by an indigent person. Obstacles that put this form of legal assistance beyond the reach of particularly indigenous peoples are:

- Indigenous peoples rarely speak the language in which the law is written very well (mostly English, French and Arabic). They are disproportionately analphabetic, and may therefore often not properly understand their rights.
- They do not know how to access these programmes.



- They live in remote areas where such assistance is as a matter of practice not available.
- They may fail to prove their indigence according to formalities prescribed by the authorities, or may struggle to overcome other bureaucratic hurdles. Indigenous peoples' almost uniform lack of birth certificates and national identity cards is a serious impediment to the realisation of their access to legal assistance.
- In many countries, legal aid is only available to persons facing the most serious charges. The Botswana, Kenyan and Ugandan legal aid schemes, for example, are only available to persons charged with offences for which the death sentence or life imprisonment may be imposed.
- Payment for legal aid work may be very low, thus causing reluctance amongst lawyers to engage in such cases, as is the case in Botswana.

The CERD Committee in 2006 expressed its concern about difficulties experienced by poor people, 'many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, due in particular to high fees, the absence of legal aid in most cases, as well as difficulties in accessing adequate interpretation services'.²²⁸ The Committee recommended that the State provide adequate legal aid and interpretation services, especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice.

In order to cater for persons who cannot afford legal services, South Africa has established a national legal aid scheme. Unlike the case in criminal matters, there are no specific constitutional duties imposed upon the State to provide the services of a legal practitioner to litigants in civil matters. In Cameroon, legal aid exists and allows free access to justice, yet, in order to start a case, each party must pay a given amount of money. This requirement appears therefore as a huge obstacle to indigenous peoples' access to justice, and to indigents, more generally. Moreover, in order to access justice in Cameroon, one must have a national ID card, something indigenous peoples often are without.

Generally dysfunctional legal system

The access to justice of indigenous peoples is framed by the general dysfunctionality of legal systems and factors such as judges' lack of experience or competence, and their lack of independence. In many African countries, judges lack adequate legal knowledge or training – especially in rural areas. This factor, combined with the lack of judicial infrastructure and logistics, tends to render it very hard for marginalised and poor people to access justice. In Uganda, for example, judges from time to time use inadequate or outdated legislation. In Ethiopia, while there are both national and international anti-discrimination provisions that may be invoked directly before the courts, they are not published in the official Gazette. Only a few lawyers or judges are therefore knowledgeable about these legal avenues. The DRC's Strategic Poverty Reduction Paper (SPRP) diagnoses the country's judicial system as inefficient, and characterised by mass violations of the principle of equality before the law, bad administration of human

228. UN Doc CERD/C/BWA/CO/16, 4 April 2006.

resources, and the absence of any awareness campaign on the judicial system, all of which affect vulnerable populations negatively.²²⁹

Corruption and partiality represent further hurdles to the populations' access to justice. In Kenya, for instance, corruption and the biased application of the law, resulting from the lack of independence of the judges from the Executive, have been identified as impediments to the effective enforcement of law and order, with serious negative consequences for indigenous peoples' claims.²³⁰ In Eritrea, the judiciary is weak. Although considered efficient and independent as far as disputes between or among individuals are concerned, the public has no confidence in matters where the government is a party. Practicing lawyers in the country do not challenge government actions before the judiciary. The African Commission has also denounced the lack of independence of judges in Sudan. In Uganda, the judicial system is characterised by a high level of interference by the executive and threats to judicial independence. Corruption is a major issue. In Burundi, local authorities often side with farmers in their efforts to expropriate indigenous peoples (Batwa). Their lack of official status also represents an efficient means of pressure from other populations. In Congo, due to the lack of access to judicial structures, indigenous peoples are confronted with corruption on the part of the police.

Problems related to competence and impartiality may ironically become a greater issue when legislation provides special mechanisms or jurisdictions to settle the disputes between indigenous peoples and villagers. In Burkina Faso, many conflicts occur between farmers and breeders as their activities use the same natural resources. Before bringing the matter before a court, administrative clerks try to help the parties find an amicable agreement. However, breeders argue that these clerks, coming from families of farmers, are not impartial. In Botswana, indigenous peoples live in villages where they are subject to the criminal jurisdiction of customary courts over offences like theft, assault and other misdemeanours. The problem there is that chiefs who preside over these courts have no legal training and attorneys have no right of audience before these courts.

The reality of impunity accorded to those responsible for violating indigenous peoples' rights undermines the legitimacy of the legal system in the eyes of indigenous groups. In Niger, in particular, violence towards indigenous peoples has been so serious and widespread that some of these violations may qualify as crimes against humanity or as crimes of genocide. Mass killings have occurred on several occasions and up to today most of these crimes remain unpunished. Most of them have been shrewdly qualified so that their authors would get away with minor convictions, favouring repetition.

229. DRC, 'Document de stratégie de croissance et de réduction de la pauvreté', July 2006, paras 93 - 95.

230. See eg Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: International Covenant on Civil And Political Rights: Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/KEN (HRC, Kenya 2005), para 20; see also APRM Report 68; see also See Concluding observation of the Committee on Economic, Social and Cultural Rights on Kenya's Initial Report on ECOSOC rights at the 41st session Geneva, 3-21 November 2008, UN Doc E/C.12/KEN/CO/1, para 10.



Lack of knowledge of the law and the language of the law

Another factor inhibiting indigenous peoples' access to justice is a lack of comprehension and knowledge of the law, often due to the language and complexity of the law. The first component of the issue is closely linked to the question of indigenous peoples' access to education. The language used in courts is always the official language of the country, mostly Arabic, English or French. Most indigenous peoples do not speak these official languages. Their inability to understand the language used in the courts jeopardises greatly their access to a fair justice and can even inhibit their will to approach a court. In Gabon, decisions are rendered in French and judges have no obligation to use the language spoken by the person brought to court. Yet, the Gabonese law provides everyone with the right to an interpreter if one does not understand French. However, to be able to claim that right, one must be aware of its existence. When indigenous peoples do not understand the language in which laws are written, they are not aware of their rights and how to have them recognised. The Algerian system goes even further than the Gabonese. In Algeria, complaints, evidences, pleadings and rulings can only be done in Arabic. The law does not make provision for the right to ask for an interpreter, as all Algerians are supposed to speak Arabic. Amazigh that can not speak it can therefore not easily access justice. Cameroon has adopted a very similar position. An ILO study of 1999 on South Africa noted that 'most representatives of the State, and courts in particular, ignore the constitutional guarantee in Article 35 of the Constitution of South Africa that requires accused persons to be informed in language they understand'.

Many African countries have tried to solve the problem by implementing translation mechanisms as part of their broader legal aid plan. In Chad, Cameroon, Namibia and Uganda, for instance, the law specifies that interpreters will be appointed when one or all the parties do not understand or speak the court's language. In Botswana, free interpretation is provided if needed in all criminal cases. However, in civil proceedings, the parties may be required to bear some or all of the cost for interpretation when the language understood by the parties or witnesses is not ordinarily spoken within the area of jurisdiction of the court. In Congo, the appointment of interpreters is mandatory when needed in criminal cases when the accused does not speak or understand French. Article 19 of the Ethiopian Constitution provides that a person arrested must be informed promptly, in a language he or she understands, of the reasons for his or her arrest and of any charges against him or her. The Constitution further guarantees the assistance of an interpreter at State expense if the accused cannot understand the language of the court proceedings. In the DRC, authorities have the obligation to use a language the accused understands at his arrest. The Penal Procedures Code therefore provides all accused with a free translation service. The report on DRC does not indicate whether these obligations bind the State in civil proceedings.

Customary law²³¹

Most indigenous peoples still practice their customs (customary laws) and know them well. The issue of the different States' recognition of indigenous peoples' customary methods of solving disputes is of great importance for

231. For a further discussion of customary law, please refer to Chs 3 (self-management, consultation and participation), and 7 (land and natural resources).

the effectiveness of these persons' access to justice. In Rwanda, a method of dispute resolution based on traditional understandings and processes, namely the *gacaca* courts, was resurrected and legislated to deal with the multitude of cases arising from the 1994 genocide. In some countries, indigenous peoples living far way from urban centres or regional capitals have their own traditional judicial system ruled by their own customs. Decisions are taken by 'neighbourhood chiefs', mainly in conjugal, neighbourhood, land and inheritance disputes.


In some instances, customary law systems enjoy no or very limited recognition and protection under the law. In Egypt, for example, the customary law and traditional institutions of the Bedouins, Amazigh (Berber) and Nubians are only protected in so far as they may be based on Islamic law. Even if other African States recognise customs as a source of law, these laws often play a very limited role. In Kenya, for example, customary laws and traditions are constrained by the 'repugnancy clause', inherited from colonial times, requiring consistency between customary law, all written laws and the Constitution. This state of affairs has prompted the UN Special Rapporteur on Indigenous Peoples to declare that 'with the exception of Kadhis (Islamic Courts) there is only a limited recognition of traditional or customary justice system in Kenya'.²³² Under Congolese law, the land law system guarantees customary law only in so far as it is not incompatible with registered title deeds.

In many States, numerous customary law systems exist side by side. The official recognition of one customary law system – that of the dominant groups, in particular Muslim or Bantu customary law systems – poses a serious hindrance to the application of the customs of indigenous peoples. In Algeria, for example, the dominance of Muslim law results in the Amazigh's customary law and traditional judicial institutions being totally ignored. The *Tajmaat*, the assembly vested with judicial power in the Amazigh culture, is not recognised. The Amazigh are therefore not tried according to their own law, but according to Muslim legal principles and customs, and by Muslim courts. In Sudan, too, Islam has a disproportionate effect on the laws and Islam-based Shari'a law is still applied to non-Muslim indigenous peoples. In the States where they live, such as Congo and Gabon, the indigenous traditional judicial systems of the 'Pygmies' are not recognised. Most village chiefs are not indigenous and indigenous peoples 'campements' are only recognised insofar as they form part of Bantu villages, and not as existing of their own accord. This means that indigenous peoples are subject to the legal systems of their Bantu neighbours. Their disputes are therefore solved according to the Bantu customary law – not indigenous peoples' customs. In Botswana, in practice, the customary law recognised is that of the Tswana tribes, since the indigenous peoples were, and are still regarded as mere components of the Tswana tribes or tribal communities. Furthermore, customary law, which is unwritten, is administered by chiefs and sub-chiefs, the majority of whom are from Tswana tribes. In this regard the customary laws of the indigenous peoples are not recognised in practice.

Even when indigenous custom is recognised, it may be problematic to prove its specific content. In Cameroon, for example, customary law is officially recognised as a source of law. However, in practice, presiding officers hardly ever make reference to indigenous peoples' customs due to the absence of assessors with authoritative knowledge of these customs, and

232. Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 64.





the lack of interpreters familiar with the languages of the Baka, Bakola and Bagyeli. In Uganda, Local Council Courts have been created to provide for some form of popular justice. They not only have criminal jurisdiction, but also have powers to try civil causes and matters governed by customary law. The customary law that is practiced by indigenous peoples is therefore applicable in these courts. However, there is no available information about the extent of representation of indigenous peoples in these courts. Moreover, indigenous peoples are minorities in almost all the areas and thus do not dominate the communities in which they live. They may therefore not have the numbers needed to dominate the courts; as a result, their causes and laws may be ignored. This has forced most people to abandon their customary law and seek to protect their rights using written law, which has denied the legal system of the benefits of customary law. In Ethiopia, customary law and justice system has constitutional recognition, but only to the extent the disputing parties consent to it. The customary system is still dominant among most of the indigenous communities of the country.

Some questions may be raised about the identity and quality of the personnel used in these courts. In Chad, customary law is recognised and applied by national courts. Courts include a civil and customary chamber. When ruling on civil matters, judges appoint two assessors representing the parties' customs, even when indigenous customs are involved. Moreover, traditional institutions are preserved by the Constitution, and many Chadians use them. These institutions solve disputes according to the customary law of the parties. The DRC recognises both customary law and courts. However, there are currently no indigenous judges to adjudicate on these matters, as most Congolese consider people from these communities as 'second class citizens' and thus not fit to fulfil such an important task.

Alternative institutions to enhance access to justice

Aware of the lacunae of their judicial systems, notably their complexity and the length of the procedures, some States have created ombudsmen to facilitate populations' access to justice in case of a breach of their human rights. In Namibia, the functions of the Ombudsman include the investigation of 'complaints concerning alleged or apparent instances of violation of fundamental human rights'. Ombudsmen are established to promote the concept of human rights amongst the public; to monitor human rights violations; and to take measures to remedy violations. The problem is that they rarely benefit from the necessary means to fulfil their mandate. Moreover, the Namibian example shows that, since his appointment, the Ombudsman has received very few complaints, may in part to victims' lack of information about their rights and of the accessibility of legal remedies. In Burundi the ombudsman service set by the Constitution in 2005 is still not running as the organic law needed has not yet been adopted.

4.4 Conclusion

Access to justice requires that lawyers are available to assist people who need them, that the courts are not too remote and inaccessible to be used and that the language of the law is understandable to the people who need to rely on the law. While the legal regime of all surveyed countries guarantees access to justice to all, the lived reality of indigenous peoples paints a very different picture. In most countries under study, the inaccessibility of justice does not only affect indigenous populations. Although the access to justice of

most people living African States is very limited, the problems besetting the population as a whole are exacerbated in respect of indigenous peoples. Courts and other judicial fora are often geographically inaccessible, because they live in remote rural areas, or engage in nomadic life-styles. Due to the disproportionate levels of poverty and illiteracy among them, indigenous peoples are less likely to be able to pay for legal services, or be aware of their rights and the possibilities of legal aid, if it exists. Recognition of Bantu customary law as the single form of recognised 'traditional' legal framework has further eroded access to justice of indigenous peoples. With a few exceptions, such as mobile court for some indigenous communities in South Africa, States have not taken measures to address this situation. While a number of countries have managed to tackle the general problem of inaccessibility in a way that may also benefit indigenous peoples, few have taken any action specifically directed at indigenous peoples.





5 Culture and language

5.1 Introduction

The protection of their distinct culture and language is a central element of indigenous peoples' survival. For these groups, language and culture are often interdependent and indivisible. Likewise, common beliefs and religion are often a significant attribute of culture, which can only be fully expressed and explained in the indigenous language of that community. To deny one of these aspects to a community will inevitably threaten the identity of that community. Moreover, as indigenous groups usually represent small minorities in their national populations, the denial of a right to language, culture or belief can also be manifested in the failure to actively protect and promote those rights. No other attributes of minority groups are as vulnerable to the 'tyranny of the majority' as culture and language. Apart from language, some important aspects of culture are its creative and scientific attributes. Respect for indigenous cultures will often depend on respect for their physical worlds, including the land on which they live and the natural resources on which their livelihood may depend.

Both international law and many national constitutional documents recognise these problems and guarantee the right to culture, belief and in some cases use of language as fundamental rights. Some of these guarantees have even been reinforced by legislative and policy documents, as well as institutional structures.

5.2 International law

There are a number of provisions in international law that aim at protecting the language and cultural rights of indigenous peoples.

The UN Declaration on the Rights of Indigenous Peoples contains numerous provisions of importance to the culture and language of indigenous peoples, underscoring the centrality of culture to the claims of indigenous groups. Article 8 provides that indigenous peoples have the right 'not to be subjected to forced assimilation or destruction of their culture'. Indigenous peoples have the right to practise and revitalise their cultural traditions and customs, which includes the right to maintain cultural sites.²³³ States must provide restitution and other means to redress the taking of indigenous peoples' cultural, intellectual, religious and spiritual property,²³⁴ and to the repatriation of ceremonial objects and human remains.²³⁵ According to Article 13, indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. In order to address stigmatisation and intolerance, States must take effective measures to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.²³⁶ The role of the media is important in the survival of culture. Indigenous peoples accordingly have the right to establish their own

233. Art 11(1) and 12(1).

234. Art 11.

235. Art 12(2).

236. Art 15(2).

media. In addition, States must take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States should also encourage privately-owned media to adequately reflect indigenous cultural diversity.²³⁷

CERD requires of States to eliminate racial discrimination in the enjoyment of the 'right to equal participation in cultural activities'.²³⁸ In 2006, the CERD Committee expressed its concern that Botswana's objective to build a nation based on the principle of equality for all has been implemented in a way detrimental to the protection of ethnic and cultural diversity, and urged the State to respect and protect the existence and cultural identity of all ethnic groups within its territory. The Committee also invited the State party to review its policy regarding indigenous peoples and, to that end, to take into consideration the way in which the groups concerned perceive and define themselves.

More directly, the legally-binding ICCPR guarantees as follows in Article 27: '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.' The Human Rights Committee noted the close link, particularly in respect of indigenous communities, between the right to enjoy one's own culture and the preservation of a way of life dependent on land and natural resources.²³⁹ Its sister covenant, the ICESCR, protects traditional communities from cultural exploitation for the tourist industry, as well as protecting their intellectual property rights to their cultural and scientific advancements.²⁴⁰ On the global level it is equally important to note the guarantees agreed to in the United Nations Declaration on Cultural Diversity (2001), the Hague Convention of 1954 (on the protection of cultural property during conflict) and its second protocol, as well as of course the provisions of ILO Convention No. 169. Of particular note in that Convention is the importance of a proactive approach on the part of the government to actively protect the rights of indigenous peoples.

Article 22 of the African Charter is an important measure in that it emphasises the importance of having regard for equality, freedom and identity in carrying out economic and development policies. It also places an obligation on States to promote and protect traditional morals and values.²⁴¹ The report of the African Commission's Working Group on Indigenous People points out that failure to recognise indigenous, cultural and language rights in order to protect the unity of the State underestimates the value of recognising cultural and language rights as cultural resources, which can be used for the benefit to everyone in society.²⁴²

Equally of note is the AU Cultural Charter for Africa, and in particular the expression of understanding of the importance of cultural identity to indigenous communities of Africa in the preamble, as well as the importance of cultural diversity and its interplay with national identity in Part II of the

237. Art 16.

238. Art 5(e)(vi) of CERD.


239. General Comment No. 23. (1993).

240. Art 15(1)(c) of ICESCR.

241. Art 17(3) of the African Charter.

242. Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 28-29.





Charter. The aims, objectives and principles of this Charter include 'the rehabilitation, restoration, preservation and promotion of the Africa cultural heritage'. This is in addition to 'the assertion of the dignity of the African and the popular foundations of his culture'.²⁴³ The Charter commits parties to the adoption of a cultural policy designed as a codification of social practices and concerted activities that satisfy cultural needs.²⁴⁴ One of the priorities set by the Cultural Charter is the development of national languages; this is in addition to the development of research and the establishment of permanent research centres in the field of culture.²⁴⁵

5.3 National trends

Although almost every African State has a different ethnic composition and dissimilar political and economic situations which produce diverging policies on the protection of language and culture rights, there are certain trends which can be traced which give a general appreciation on the status of these rights on the African continent.

Culture as way of life

Culture is a very broad term. It refers to a way of life which includes the type of work and survival strategies of a group. Since the survival of indigenous peoples is closely tied to their natural environment, their culture is often mostly threatened by inroads into their territories, caused by developmental projects, logging and the proclamation of nature conservations or natural parks.

A development project in Namibia, aimed at building a hydro-electric dam below the Epupa Falls, threatened the ancestral graves of the Ovahimba with flooding, and would have impacted on other aspects of their culture. The loss of their resources would have impacted negatively on them, denying them the right to maintain the livelihood of their choice and to retain and develop their culture and cultural identity according to their own wishes. So far, the mobilisation of the community, combined with local and international pressure, stopped the process from going ahead. A major concern has been the lack of participation of indigenous communities in this project affecting their culture. This issue was the subject matter in the case of *Kapica v Government of Namibia*, illustrating how the judicial process may be used to benefit the cause of indigenous peoples.

The establishment of natural parks often leads to the displacement of indigenous groups and affect their culture adversely. A 2007 Gabonese law (Law 32007 of 11 September 2007) requires that all institutions involved in park management respect the imperative to protect the natural and cultural heritage.

243. Art 1.

244. Art 6(a).

245. Art 6.

Obviously, a constitutional guarantee protecting cultural rights is a good starting point. An example of this is Section 31(1) of the South African Constitution:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

However, such constitutional guarantees often come with a limitation clause, such as section 31(2) of the South African Constitution:

The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.


Still, evidence of indigenous peoples' social exclusion and discrimination remain a cause for concern in South Africa despite the legal framework.²⁴⁶

Some constitutions, such as that of the DRC, explicitly lists 'cultural and linguistic minority' as a ground on which discrimination is prohibited.²⁴⁷ In Ethiopia, Article 39 of the Constitution guarantees the cultural rights of each 'nation, nationalities and peoples', in addition to the obligation of the State to preserve the cultural and historical heritage of the people.

Many national constitutions contain a clause which allows for the co-existence of customary law alongside national law, such as section 115(2) of the Kenyan Constitution, which allows for the statutory recognition of customary law dominion over matters such as adoption, marriage, divorce, burial and the devolution of property on death. However, the authority and validity of customary law are seriously eroded through the 'repugnancy clause', according to which customary law is made subservient to all written law. The Nigerian case of *Oyewumi v Ogunesan* highlights that the constitutional recognition of customary law is crucial to the survival of indigenous cultures and languages in Africa. Customary law is connected to traditional rites, and to the administration of land, an essential aspect of indigenous culture.

246. See generally Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa; CERD Concluding Observations 2006, para 19; see also Channels R and du Toit *A Ibid*, 101, citing an ILO report that documents a campaign of assimilation of Nama and San children who were beaten for acknowledging their identity or use of their language.

247. Art 13 of DRC Constitution.



Customary and traditional law are part of the legal system of Namibia. The Community Courts Act 10 of 2003, which makes provision for the official recognition of established community courts, where traditional authority is recognised in terms of the Traditional Authorities Act 25 of 2000, was enacted to incorporate the administration of customary law into the judicial system. Towards the end of the 1990s, the Nama communities, a sub-group of the Khoisan people, started a process of revising customary law through workshops organised to evaluate the law. At a meeting of Traditional Leaders in 2001, one of the resolutions was that all traditional communities (including indigenous peoples) were to draft their own constitutions and to write up their customary law. Many communities complied with this resolution by starting a process of assessing their laws and writing them down. However, it was noted that people were not aware of the relevant legislation such as the Traditional Authorities Act 25 of 2000 and the Community Courts Act 10 of 2003 because the law had been passed without consultation and participation of the targeted group.

In some countries there have been a number of important legal enactments to supplement or reinforce constitutional guarantees. An interesting example is Law 06.002 of the CAR, concerning the CAR Cultural Charter, which emphasises the importance of protecting the national cultural heritage and specifically includes a reference to 'cultural minorities'. Likewise, a 2003 CAR law (*arrêté ministériel*) prohibits the exploitation and expropriation of oral and other cultural traditions of cultural minorities for commercial purposes. Another interesting series of laws can be found in the DRC in the form of Forestry and Mining Codes, which emphasise that all actions in those domains must be done with strict adherence to the protection and conservation of cultural property. The Forestry Code aims to protect the customary usage of the indigenous forests, including respect for sacred sites.

As far as policy instruments are concerned, some good practices may be identified. Gabon's 2005 Plan for the Development of Indigenous Peoples (*Plan de Développement des peuples autochtones*), developed as part of its Sectoral Programme on the Forest Environment, is a prime example. The principal aim of this Plan, explicitly stated, is to ensure the preservation of and respect for the 'Pygmy' culture (*'la culture des populations pygmées au Gabon'*). The 'Framework for a Long Term Vision for Botswana' (Vision 2016), for example, recognises diversity of culture and engages the government in promoting minority cultures. To this day, however, the predominance of English and Tswana over all other languages can only be described as cultural hegemony. In some instances, as with the Ugandan National Cultural Policy, adopted in 2006, government policy remains silent about indigenous cultures. However, it is also correct to state that the government's expressed concern for culture has created a vehicle that could possibly include the concerns of indigenous peoples.

The preservation of cultural artefacts usually does not extend beyond the inclusion of a few indigenous cultural objects in the national museum.

Cultural expression, such as 'Pygmy' dances, is often promoted best outside the ambit of the State. Examples are the Pan-African Music Festival,

organised in Brazzaville (July 2007), where cultural expressions were shared, and the regular cultural festivals of Amazigh peoples.

Religion

Religious practices also play an important role in the cultural life of indigenous communities. These practices may roughly be described as 'animist' in nature, emphasising the link between humans and their natural environment, and between one generation and another. A common feature of most constitutions is their protection of freedom of conscience, including freedom of religion. The right to freely associate is also regularly guaranteed. However, over the years indigenous belief systems have been and are being placed under severe strain by the advent of Islam and Christianity. Indigenous religious ritual practices have become demonised as contrary to Christianity, or have been replaced by the Islamic world-view. Some indigenous groups, such as the Fulani in Nigeria, have largely been converted to Islam; and, perhaps ironically, are viewed as threatening the religion of other groups in Central Nigeria.


Language

With regards to language rights, the most common trend is the identification of an official language of government, as well as the recognition of several national languages. However, it is clear that the official and national languages identified by constitutions almost never include indigenous minority languages, which can have a serious effect on the survival of those languages since all government business, communications and often education will be conducted in those languages identified by the constitution. Of note is the Constitution of Eritrea, which unlike most others does not identify an official language, but instead guarantees the equality of all Eritrean languages in Article 4(3). Nevertheless, in practice, Arabic and Tigriyna (with an indication that the latter is more dominant), are the language of official ceremonies, national gatherings and government declarations to the exclusion of other minority (including 'indigenous') languages.

The language of the Amazigh, Tamazight, is under threat in North Africa. In the three countries under study, Algeria, Egypt and Morocco, the institution of the Arabic language as an integral part of an Islamic culture has led to the systematic suppression and diminution of non-Arabic languages, in particular Tamazight. The suppression of Tamazight also has a political dimension, in that its resurgence is viewed as a threat to the national cultural (and political) hegemony.

In Algeria, Tamazight has become a casualty of the process, starting with independence in 1962, of replacing the French language and culture with an Arabic-Islamic culture. Arabic became and still is the only official language in Algeria. In fact, Law 91-05 of 1991 stipulates that public institutions may only use Arabic as language of communication; and prescribes that all official documents including court records must be in Arabic. Some gains have been made in the last decade or so. In 1996, when a new Constitution was adopted, the founding values of the Algerian State were extended beyond 'Arabité' and 'Islam' to also include 'Amazighité'. In 2002, the Algerian Parliament approved an amendment to the Constitution by according the status of 'national language' to Tamazight. Both these important





developments came about only as the result of the extreme forms of pressure that the Amazigh community exerted on the State.

In 1995, students boycotted schools, and in 2001, violent protests erupted in Kabylie following the killing by the police of a youth. Security forces responded disproportionately, killing and wounding many in what came to be known as the 'events of Kabylie'. After these events, the Amazigh movement grew in strength, culminating in a march of some 2 million Amazigh in Algiers. However, Amazigh leaders contend that the legal changes do not go far enough. The inclusion of 'Amazighité' is merely in the Preamble of the Constitution, and has no further significance; and Tamazight is described as being 'également' (also) a national language, underlining the dominance of Arabic as both official and national language. Tamazight still suffers from a lack of exposure and State support. It is only used for occasional TV programmes; and because it is a voluntary language at schools, viewed as of limited use in society, the number of schools teaching this language is dwindling. These problems are exacerbated by a reduction in the number of teaching posts funded by the government.

Tamazight has suffered and is suffering a similar fate in Egypt and Morocco. In Egypt, Arabic is the only official language. The indigenous languages of the Nubians and Berber (Tamazight) enjoy no official status and are not recognised for any public purpose. In respect of the situation in Egypt, the CERD Committee observed that 'no legislation or planned measure aimed to prevent or eliminate discrimination or protect the language or culture of all those groups, for example by guaranteeing mother-tongue or bilingual education.'²⁴⁸ In Morocco, too, Arabic is the only official and national language. King Mohammed VI's public declaration in 2001, accepting 'Amazighité' as part of the cultural make-up of the country, was the first acknowledgement of the reality that linguistic (and cultural) diversity exists.

The Tifinagh alphabet, used by some members of the Amazigh, is of particular importance to the Tuareg, to whom this script serves as a strong feature of their identity. Although it is developed and taught in some Maghreb countries, such as Morocco, Tifinagh is still largely ignored in Mali and Niger, where it is used at most in folkloric festivals or for decoration.

In Sudan, the 2005 Constitution demonstrates greater appreciation for cultural and linguistic diversity than its predecessors. Although Arabic and English enjoy privilege of place as 'the widely spoken national language' and 'official working language', respectively, 'ethnic and cultural' communities are constitutionally entitled to use their languages, and 'all indigenous languages of the Sudan are national languages', and must be protected and promoted.²⁴⁹

248. CERD, Summary record of the first part (public) of the 1484th meeting: Egypt. UN Doc CERD/C/SR.1484 17/09/2002 para 9.

249. It would seem that the 'indigenous' here refers to languages other than Arabic and English, and not only to the languages of indigenous peoples as the term is used in this study.

A number of State institutions have been established to promote Tamazight. In response to civil protest and the boycotting of elections by the Amazigh, especially those living in Kabylie, the Algerian government created two institutions dedicated to the promotion of the Amazigh culture. The first to be created was the *Haut Commissariat à l'Amazighité* (the Amazigh High Commissioner). Another institution, the *Centre national pédagogique et linguistique pour l'enseignement de tamazight* (CNPLET), was 'launched' officially in 2005, but has as yet not been made operational. In 2001, the Moroccan King announced the establishment of the Royal Institute for Amazigh Culture (IRCAM). Its membership is dominated by Amazigh activists or supporters. The aims of IRCAM include the promotion of artistic creation of the Amazigh culture, and the preparation of teaching materials in Tamazight.

The position of the indigenous languages of the various 'Pygmy' groups is even worse. These languages compete for recognition not only with the colonial language of national unity (French), but also with other national languages spoken by the more dominant Bantu groups. There is no country in the Central African region that recognises any indigenous language as a national or official language. According to available official statistics, a minuscule percentage of the populations speak an indigenous language. The situation is exacerbated by the extent to which indigenous peoples have internalised the generally prevailing perception that their language is inferior, backward and of little practical use in the modern economy. In the CAR, for example, most of the Aka and Mbororo speak Sango, one of the Bantu languages recognised as official language. These indigenous languages are not used for any public purpose such as in education or in the judicial system.

With the exception of South Africa, the position in Southern Africa is not much different. A case in point is that of Botswana, where Sestwana and English are the only recognised national and official languages; they also serve as the only official medium of instruction in government schools in Botswana. In South Africa, the right to use one's language is constitutionally protected.²⁵⁰ The South African Constitution exceptionally mentions indigenous languages by name, and requires that the State promote the Khoi, Nama and San languages.²⁵¹ The enactment of legislation²⁵² has also been utilised in South Africa to protect and promote indigenous languages through the establishment of specific institutions.


Media

The media plays an important role in the promotion of cultural and language rights. The Egyptian Broadcasting Authority, for instance, has a mandate to carry out activities in support of the cultures of non-dominant groups, including indigenous peoples. The same takes place in Nigeria and a handful of other States. However, the general trend in Africa is for public and private media companies to broadcast (or print) information and cultural emissions in the dominant languages, leaving minority cultures outside the sphere of the modern means of mass communication. At most, some programmes in

250. Sec 6(2) Constitution of South Africa.

251. Sec 6(5).

252. Language Act of 1995, Sec 5(b)ii.



dominant languages may be devoted to issues related to indigenous peoples, or there may on occasion be programmes in an indigenous language. One such example is the single State-owned television channel in Algeria, which has a daily 20 minute slot in Tamazight. However, these programmes are characterised by a one-dimensional and folkloristic portrayal of the culture.

Institutions

Some national laws have gone even further to establish specific national institutions aimed at the protection of cultural and linguistic rights. Common institutions include museums and cultural centres, both within the indigenous communities and in metropolitan centres. Some States seek to protect cultural and linguistic rights with more formal government structures, such as the Ministry of Gender, Sports, Culture and Social Services in Kenya. Nevertheless, using an institution with such wide competencies often results in the exploitation, rather than protection of indigenous culture, as many indigenous communities in Kenya have been subject to an aggressive marketing campaign for Kenyan tourism while receiving very little profit from that lucrative enterprise. More specific institutions dealing with the arts (such as the National Arts Council in South Africa) or languages (Pan South African Language Board) are better suited to address the specific needs of indigenous communities. An even better example is the Commission for the Promotion of and Protection of the Rights of Cultural, Religious and Linguistic Communities in South Africa, which eventually was brought to life in 2002.

Civil society may contribute to highlight the issue of media exposure, as exemplified in the Namibian *Handbook on San Intellectual Property Rights*, developed by WIMSA, which addresses such issues as the use of images of the San and obliges media and research to respect and consult them.

5.4 Conclusion

The protection of their distinct culture and language is a central element of indigenous peoples' survival. To deny one of these aspects to a community will inevitably threaten the identity of that community. All examined countries either explicitly or implicitly value national unity over cultural diversity, despite their national and international obligations. Such overarching policies lead to gradual cultural and linguistic homogeneity and the disappearance of minority traditions, knowledge and culture. Not only is this devastating to national heritage and cultural diversity, it also leads to the destruction of indigenous groups themselves, as cultural and linguistic divergences are predominant features of their unique identities. There is further a tendency to view expressions of indigenous culture as of a mere folkloric or ceremonial nature, often geared towards the tourist market.

Across Africa, the hegemonic position as official language of the colonially-inherited languages English and French, and Arabic, threaten all African languages, and has caused numerous indigenous languages to become or be threatened with extinction. The non-implementation of laws, policies and constitutional guarantees is also common to most States. The overall trend in Africa is bleak, as in practice, most governments simply do not do enough to implement the measures aimed at protecting and promoting indigenous languages and cultures, leading to the disappearance of the indigenous communities themselves.

However, there are also some positive developments, such as the constitutional protection of the right to culture (in South Africa); the legislative protection of cultural heritage as part of nature conservation and management (in the DRC and Gabon), the reference in the Gabonese government's policy to protect 'Pygmy' culture, and the protection of customary law through legislation allowing for community involvement in the assessment and writing up of these laws (in Namibia). As the Namibian case of *Kapica v Government of Namibia* illustrates, the judicial process may be used to protect the culture of indigenous peoples. Although not effectively functioning (yet), a number of institutions such as the *Haut Commissariat á l'Amazighité* (the Amazigh High Commissioner) and the Royal Institute for Amazigh Culture (IRCAM) and the South African Commission for the Promotion of and Protection of the Rights of Cultural, Religious and Linguistic Communities, have also been established.





6 Education

6.1 Introduction: Importance of education to indigenous peoples

The relevance of education for individual and societal development cannot be overemphasised. Education is essential for the self-development of indigenous people and to empower them to fight domination and the consequences of such domination. The fact cannot be denied that education is vital to the survival of indigenous groups. Hence the right to education for indigenous people is as important with respect to basic and early child education as it is to adult formal or informal and even technical education. To this end, access to primary education for children and especially the girl child, access to higher education including secondary, technical and tertiary education as well as literacy programmes for adults are important components of the right of indigenous groups to education.

Regarding the right of indigenous people to education, studies continue to show lower enrolment rates for indigenous children (especially the girl child) and a higher rate of school drop-outs among indigenous children. These are usually attributed to factors such as a lack of schools within vicinities of indigenous communities, prohibitive costs of education by the standards of indigenous people, a lack of or inadequate specialised infrastructure and teaching staff, discrimination and exclusion of indigenous interests in curricula. In general, there is an inadequacy within national schooling systems in terms of addressing the specific needs, ways of life and cultures of indigenous peoples. They are also some of the reasons that call for special measures for the protection of the rights of indigenous people to education. Recognition of this fact is even evident in certain international human rights instruments. While not all such instruments are binding on the States evaluated in the study, relevant provisions in such instruments would be highlighted as standards for the assessment of national measures in this area.

6.2 International standards

The standards for the protection of the right to education in favour of indigenous people can be found in binding and non-binding international human rights instruments. Such instruments go beyond the general guarantee of the right to education to reflect the right of indigenous people to special measures needed for the protection of their right to education. The CRC, for example, contains very important statements for the protection of the right to education of indigenous children. In addition to the recognition of a general and equal right of children to compulsory and free primary education contained in Article 29, the CRC records the right of minority or indigenous children to enjoy specific education on their culture, religion and language in community with other members of the indigenous group.²⁵³ In terms of CRC General Comment No. 11, States should ensure special measures to ensure that indigenous children enjoy their right to education on an equal footing with non-indigenous children. It further requires that States 'allocate targeted financial, material and human resources in order to implement policies and programmes which specifically seek to improve the access to education for indigenous children'. As established by Article 27 of the ILO Convention No. 169, education programmes and services should be

253. Arts 28 and 30 of CRC.

developed and implemented in co-operation with the peoples concerned to address their specific needs. Furthermore, governments should recognise the right of indigenous peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples.²⁵⁴

States should also ensure that school facilities are easily accessible where indigenous children live, and the school cycle should take into account and seek to adjust to cultural practices, agricultural seasons and ceremonial periods.

Article 30 of the Convention establishes the right of the indigenous child to use his or her own language. In order to implement this right, education in the child's own language is essential. Article 28 of ILO Convention No. 169 affirms that indigenous children must be taught to read and write in their own language besides being accorded the opportunity to attain fluency in the official languages of the country.²⁵⁵ Teachers of indigenous children should to the extent possible be recruited from within indigenous communities and given adequate support and training.

ILO Convention No. 169 addresses the question of the right of indigenous people to education by requiring that States make an effort to guarantee that indigenous people enjoy the general right to education at all levels on an equal footing with other members of the national community.²⁵⁶

The UN Declaration on the Rights of Indigenous Peoples recognises the right of indigenous peoples, especially indigenous children, to pursue all forms of education at all levels without discrimination.²⁵⁷ Recognising that governments may not always have the resources to provide the form of education needed by indigenous groups, the Declaration further affirms the right of indigenous peoples to establish and control their own educational systems and institutions for the purpose of providing specialised education addressing their specific needs, including teaching and learning in indigenous languages. States are thus required to partner with indigenous groups to ensure that as much as possible, indigenous peoples have access to education in their culture and in their language, even outside the specific indigenous community.²⁵⁸ In the implementation of Article 14 relating to the right to education under UNDRIP, there is a requirement that particular attention be paid to the special needs of various sectors of indigenous groups.²⁵⁹ Article 15(1) further directs that the dignity and diversity of the cultures, traditions, histories and aspirations of indigenous peoples be appropriately reflected in education and public information.

The provisions in these instruments represent global standards for the protection of the right to education of indigenous people. It should be noted that cumulatively, these provisions require the guarantee of equal access to general education at the national level, the involvement of indigenous groups in decisions affecting special measures in their favour and support for indigenous groups to establish institutions for the preservation of indigenous cultures, religions and languages in accordance with laid-down rules.

254. ILO Convention No. 169, Art 27.

255. ILO Convention No. 169, Art 28.


256. ILO Convention No. 169, Art 26.

257. Art 14(2) of the UN Declaration on the Rights of Indigenous Peoples (2007).

258. Art 14(1)(2) of UNDRIP (2007).

259. Art 22 of UNDRIP (2007).





At the regional level, certain instruments of the African human rights system also set standards for the protection of indigenous people's rights to education. The general right to education in the African human rights system is contained in Article 17 of the African Charter. While stating the right to education of all individuals, Article 17 also recognises the right of individuals to take part in the cultural lives of their own communities. This operates in favour of indigenous people as it protects their right to be educated in their specific culture. Beyond this general right, the African Charter on the Rights and Welfare of the Child (African Children's Charter) contains a statement on the right of children to enjoy equal access to free and compulsory basic education.²⁶⁰ The African Children's Charter also requires States to take measures to address drop-out rates and special measures in favour of disadvantaged children.²⁶¹ These latter aspects cover the situation of indigenous children in their enjoyment of the right to education. In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) imposes obligations on State parties to take measures to eliminate discrimination against women in relation to access to education and to address the poor enrolment and retention of girls in schools.²⁶² Again, the peculiar circumstances of indigenous women, especially the girl child, are covered by these provisions. It is against these standards that national measures for the protection of indigenous people's right to education need to be examined.

6.3 National trends

Sufficiency of formal legal guarantees

As already observed, the right to education is sufficiently guaranteed in various international human rights instruments. At the national level, however, the right to education is not uniformly guaranteed. While some States guarantee the right to education in their constitutions, others only provide for the right through statutory instruments. Constitutional and statutory guarantees of the right to education are usually general in nature and protect the rights of all citizens to have access to basic education. The minimum guarantee is often in the form of free and compulsory basic education.²⁶³ However, where constitutions give room for affirmative action in favour of previously-disadvantaged groups, space is created for legislative

260. Art 11 of the African Children's Charter.

261. Art 11(3)(d)(e) of the African Children's Charter.

262. Art 12 of the African Women's Protocol.

263. The study on Ethiopia suggests that education at any level is neither free nor compulsory in Ethiopia. South Africa also does not seem to have constitutional provision for free primary education.

and administrative action to advance special measures for indigenous people.²⁶⁴

The right to education is an ever-present feature of national Constitutions, but it is extremely rare to find a right to education which explicitly provides for the right to be educated in one's minority language or to be taught a curriculum tailored to the demands of one's cultural traditions. One rare example of this is Section 32 of the South African Constitution, which guarantees 'every person ... the right to instruction in the language of his or her choice where reasonably practical'. On a practical level, the Schmidtsdrift San Combined School project in the Northern Cape province of South Africa, which introduced alternative education programmes to ease learning for indigenous children, is an example of best practice even though it is a limited project. The introduction of the South African Integrated National Primary School Nutrition Programme and Curriculum 2005 aimed at correcting disparities in access to education is also an important affirmative action programme.

CAR adopted a National Plan for Education for All (*Plan National d'Action de l'Education Pour Tous* (PNA-EPT)) to increase the level of access to education of 'minority groups ('Pygmy', Mbororo, and handicapped children, and children living in mining areas, etc) between ages five and fifteen years old from 10 to 80 per cent.²⁶⁵


Inadequate attention to peculiar educational needs of indigenous children

The need for special measures which promote indigenous peoples right to education arises because the general provisions on the right to education fail to adequately cover indigenous needs. A survey of the States examined in this study demonstrates the inadequacy of these general guarantees of the right to education. Hence, there are issues of consistently low literacy rates among indigenous groups, poor school enrolment, high school drop-out rates and inadequate measures for addressing the real needs of indigenous peoples. These are manifestations of deeper problems of marginalisation, prejudice and poverty. Indigenous families may not be in a position to pay even limited school fees or to bear ancillary costs for items such as stationary or clothes. In January 2006, the Botswana government introduced school fees.²⁶⁶ Given that indigenous peoples are at the bottom of the economic strata there is a real likelihood that the already high illiteracy levels among the San will rise even further.

264. For the States that provide constitutional guarantees, some recognise the right as an enforceable right under constitutional bill of rights whereas others merely state a right to education as a non-justiciable directive principle of state policy. The consequence is that in those states where the right to education appears as a justiciable constitutional right, there is greater for judicial review of legislative and administrative actions for implementation even though statutory provisions also create room for judicial enforcement. Yet, even in the face of such justiciable constitutional guarantees, there are indications of a lack of political will to fulfil the right to education.

265. *Gouvernement de la République Centrafricaine, Plan National d'Action de l'Education Pour Tous* (PNA-EPT, portal.unesco.org/education/en/file_download.php/08809d2e13a118ddc8df9f6113081c3bPNA-EPT-RCA.doc – (accessed 30 November 2008).

266. Botswana CRC 2004 Report para 275.



As well, the educational systems of the surveyed States do not take into account that the majority of the indigenous peoples are pastoralists and hunter gatherers, and members of nomadic or semi-nomadic groups. By not accounting for the complexities arising from these peculiarities, governments restrict the possibility of their continued schooling. The failure to adjust the educational system to these peculiarities makes it impossible for these groups to combine their ways of survival with the requirements for an appropriate education. Some of the claims and aspects referred to when dealing specifically with the right to education can be mentioned here: the necessity of pre-school education, bilingual training and the compatibility of class schedules with the community rhythms determined by seasonal imperatives.

School curricula neither include material sensitising the broader community to indigenous peoples' issues, nor do they include aspects of indigenous peoples' cultures and knowledge systems. The Botswana education curriculum is a case in point, as it is geared towards the assimilation of non-Tswana children.

In Chad, education is the shared responsibility of the State and local authorities. At present, however, not all the local institutions provided for under the Constitution and other decentralisation laws have been put in place. The concept of 'community schools' was born from a perception of incapacity of the State to deliver in all educational needs. These schools are run by the community, with support from the State. Although not particular to indigenous peoples, community schools are important vehicles that could potentially affect them positively. In these schools, the specificities of particular communities are taken into account, for example, by complementing the official curriculum with aspects of interest to that community. The Chad government also adopted the Law Establishing an Agency for the Promotion of Community Initiatives in Education (*Agence pour la promotion des initiatives communautaires en education (APIDEC)*) to regulate subventions to parents' associations, enabling them to appoint community teachers. Chad has also established nomadic schools, with the support of UNICEF and GTZ. These nomadic communities are in charge of the schools, with the support of the State. The aim of the schools is stated to be the 'education and other aspects of well-being of nomadic children'. As for the content of education, a 2006 law includes the promotion of tolerance and respect for other cultures as an objective of the educational system.

Working together with such civil society organisations such as Save the Children-Norway, the Ugandan government introduced the Alternative Basic Education for Karamoja (ABEK) programme. ABEK is designed to offer a curriculum and methods that are conducive for a nomadic lifestyle. It also ensures the participation of the community in the education of their children. The facilitators are drawn from members of the community, mainly from the elders. The curriculum focuses on areas of study that are directly relevant to the Karamajong way of life such as crop production, livestock, health and peace and security.

The Ethiopian Alternative Education Programme targeted at pastoral communities in the country is a positive practice that encourages school enrolment for otherwise disadvantaged groups. Ethiopia also has a National Education Sector Development Plan established in 1997, and then revised in 2005 for the purpose of increasing the access, quality and equity in education for girls and children from rural areas. Indigenous children in rural areas and indigenous girl children stand to benefit from this programme. However, the practical implementation has started only very recently and only in very few places the programme has become operational at pilot-project level.

Indigenous languages neglected

Indigenous children have mostly found it difficult to follow classes taught in languages other than their mother-tongue, causing them to suffer prejudice from teachers and co-learners. In Botswana, there is record of State insistence on the use of English and Setswana as the only language of instruction at the primary school level. Although there is policy revision recommending the use of mother-tongue in areas where such a language is dominant, it still creates difficulty for indigenous children if first schooling is done in another language. The Egyptian State practice of forbidding writing in languages other than Arabic is also a barrier to indigenous children's education. Another example of inappropriate practice is the Algerian closure in 2006 of 42 private schools for their failure to comply with Arabic-orientated school curricula. These practices are negative to the extent that they create mental and language barriers for indigenous peoples interested in seeking access to education. While the CERD Committee acknowledged advances that allow for the teaching of the Tamazight language at schools and universities,²⁶⁷ the CESCR Committee recommends that the State party set up literacy programmes in the Tamazight language and invited the State party to provide free schooling in Tamazight at all levels.²⁶⁸


In the Ngorongoro area of Tanzania, there is a discrepancy between the permission granted for the building of luxury resorts in ecologically-sensitive areas, and the refusal to allow the construction of schools in the same area.

Although French and Arabic are the languages of instruction in the schools of Chad, 'national languages' may also be used.

267. UN Doc CERD/C/304/Add.33, dated 18 September 1997, para 8.

268. CESCR Committee UN Doc E/C.12/MAR/CO/3, 4 September 2006, para 58.





In line with the Namibian government's policy to provide mother-tongue education for grades one to three, the Nyae Nyae Village School Project (VSP), which is an integration of traditional, culturally-appropriate mother-tongue education with formal education, has made a difference in indigenous people's lives. The project was established through collaboration by local NGOs and the former Namibia Ministry of Education and Culture in the early 1990s in response to Ju'hoansi children's lack of participation in the government schools of East Tsumkwe District. Further, the Gquaina Primary School encourages cultural diversity and employs teachers who speak the Ju'hoansi language and provides mother-tongue education to Ju'hoansi students in Grade 1.

Lack of attention to basic adult literacy among indigenous peoples

Basic literacy is necessary in order to understand the current world and to better communicate with the external world and achieve a better life harmonising the different realities in which they are immersed. Adult literacy among indigenous peoples is uniformly very low. Despite this pronounced need, there is little evidence of government programmes directed towards improving literacy among indigenous adults.

Dearth of special measures

Some States do not have specific projects aimed at special measures ('affirmative action'). However, the prohibition of discrimination in education has positive consequences for indigenous education. In this category, it is possible to identify the legal framework in Niger which recognises the right of all groups to use their own languages, encourages respect for every language and prohibits policies and actions based on regional, ethnic, religious or other sectional grounds. In other cases, such as that of the Congo, the State encourages or at least allows intergovernmental and non-governmental actors to intervene to promote affirmative action. In this area, some States like Chad even partner with non-State actors to provide affirmative action programmes.

The Nigerian Nomadic Education Programme, established by military decree in 1989, may qualify as an example of a State taking 'special measures' in favour of indigenous children's right to education. The National Commission for Nomadic Education was established by Decree 41 of 1989, with the mandate of formulating policies for nomadic education in Nigeria and the successful implementation of the Nomadic Education Programme (NEP). These include the use of collapsible classrooms and radio and television programmes for the benefit of the nomadic population of Nigeria. However, the progress of this programme is curtailed by lack of infrastructure, unqualified teachers and poor pay packages.

6.4 Conclusion

Despite constitutional and international law invocations to the contrary, education for indigenous children in actual practice is neither free nor compulsory. The review of State constitutional, legislative and administrative

practices demonstrates that, in the majority of States constitutional guarantees of the right to education do not go beyond general guarantees of access to basic and primary education. One consequence of this reality is that adult literacy levels have remained rather low. Even in the area of basic primary education, general constitutional and statutory guarantees have been inadequate to speak to the specific needs and challenges of indigenous people. Thus, it is in those States where special measures are present that indigenous peoples have had a greater opportunity to enjoy the right to education. This reverses the gains that the guarantee of basic education should have brought. It is also evident that in the absence of adequate State resources, States can partner with non-State actors to promote indigenous people's right to education. It is therefore essential that States develop the political will to act in favour of indigenous peoples.

In the light of the conclusion reached from the review of State laws, policies and practices, it has to be recommended that States be encouraged to adopt laws and policies with clear goals to promote indigenous people's right to education. It has to be recommended as well that States initiate projects to promote the use of indigenous languages as tools of instruction at the basic primary education level, alongside the use of official languages.

On the short term, States should not only ensure that the right to compulsory free primary education is enshrined in their Constitutions and legislation, but also that this right is made a reality for all children, including indigenous children. To the extent that the specific needs of these children require special measures, these should be put in place and resourced. As much as indigenous children should benefit on an equal level with other children from the right to education, their education should be directed at maintaining and cultivating their languages, cultures and ways of life.





7 Lands, natural resources and environment

7.1 Introduction: International standards

For many indigenous peoples, land is much more than an economic commodity.²⁶⁹ It not only provides them with the means of economic survival but it also forms a basis for their cultural identity and their spiritual and social well-being. As their survival as a people is closely linked to their ancestral land, the dispossession of the land they occupy or the destruction of its natural environment through ‘development’ activities such as mining, logging and the construction of dams, or through the creation of national parks and protected areas on their lands, has a highly detrimental effect on their existence. In many African countries, colonial laws introduced new concepts of land ownership, most of which were unknown to indigenous peoples, as well as to the vast majority of Africans. Some of these laws introduced concepts of individual ownership, and overrode customary laws. Concepts of individual ownership was applied also in many areas where customary law was to some extent maintained. Following independence, indigenous peoples continue to face many challenges with respect to their rights to lands and natural resources. International and regional legal instruments provide a broad framework for the protection of indigenous peoples’ rights to land and their rights to natural resources pertaining to their lands.

Article 26(1) of UNDRIP provides that indigenous peoples have the right to the lands, territories and resources they have traditionally owned, occupied or otherwise used. Furthermore, it provides for the right of indigenous peoples to control, develop or use these lands, and requires States to give legal recognition to such lands, territories and resources with due respect for the customs, traditions and land tenure systems of indigenous peoples.²⁷⁰ Article 27 requires States to establish procedures by which indigenous peoples’ customs and land tenure systems can be recognised, with the participation of indigenous peoples. Article 28 addresses the issue of compensation for lands of which indigenous peoples have been dispossessed. The combined importance of Articles 26, 27 and 28 lies not only in the recognition of their rights to land, territories and natural resources but also in the protection and *recognition of indigenous peoples’ traditions, customs and land use systems*.

ILO Convention No. 169 recognises indigenous peoples’ rights to *ownership and possession of the lands they occupy or otherwise use*,²⁷¹ and various other articles require States to respect the customs, customary law and institutions of indigenous peoples²⁷² and foresee measures for, *inter alia*,

269. See Report by JR Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: *Study on the Problem of Discrimination Against Indigenous Populations*. UN Doc E/CN.4/Sub.2/1986/7/Add.1, paras 196 and 197.

270. Art 26(2) calls on states to recognise and protect these lands, territories and resources with due respect to their customs, traditions and land tenure systems. Arts 27 and 28 are geared towards providing mechanisms for adjudicating land claims and for restitution of lands. Art 28 gives indigenous peoples the right to redress by means including restitution and compensation in cases where indigenous peoples’ lands, territories and resources have been taken, used or confiscated without their free, prior and informed consent.

271. Art 14.

promoting the social and economic rights of indigenous peoples with full respect for their customs and traditions.²⁷³ This is important because the land rights recognised in post-colonial countries often do not give recognition to indigenous peoples' traditions, customs and concepts of ownership.

Article 13 of ILO Convention No. 169 recognises the *collective aspects* of the relationship of indigenous peoples to their lands. The concept of land encompasses the land which a community or people use and care for as a whole. It also includes land which is used and possessed individually. Land can also be shared among different communities or even different peoples. This is especially the case with grazing lands, hunting and gathering areas and forests. The situation of nomadic people and shifting cultivators must be taken into account, in accordance with Article 14 of the Convention. Similarly, UNDRIP recognises the collective rights of indigenous peoples in its Preamble, as well as in Article 1.

The combined effect of Articles 14 (right to property) and 21 (peoples' rights to freely dispose of their wealth and natural resources) of ACHPR is to guarantee all forms of property, including land, and to provide for means by which it may be recovered and compensation provided in the event the right is encroached upon. Whilst Article 14 does not specifically refer to the right to property as a collective right, the articles of ACHPR impose an obligation on the State to guarantee collective proprietary rights. Further, Article 21 protects collective rights to natural resources. Additionally, Article 22 of ACHPR provides for peoples' right to development, which often has been linked to indigenous peoples' land rights in international and national discourse.

CERD's General Recommendation No. 23 on Indigenous Peoples requests States to provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics, as well as to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.²⁷⁴ Furthermore, at the international level, UNDRIP recognises and reaffirms that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.²⁷⁵ Moreover, in its articles on the land rights of indigenous peoples, UNDRIP uses the terminology of 'peoples', indicating clearly that in accordance with this, indigenous peoples have the collective right to land. General Comment No. 23 of the Human Rights Committee establishes a clear link between territories and natural resources and the right to enjoy one's culture.

Article 15(1) of ILO Convention No. 169 is intended to safeguard the rights of indigenous peoples to natural resources pertaining to their lands, including the right of these peoples to participate in the use, management and conservation of these resources. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments must establish or maintain procedures


272. Art 8.

273. Art 2(2)(b).

274. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*: 18/08/97, paras 4(c) and 5, respectively.

275. Preamble and Art 7.





through which they *consult* these peoples, 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 pertaining to their lands. The peoples concerned must, wherever possible, *participate in the benefits* of such activities, and must receive fair *compensation* for any damage which they may sustain as a result of such activities.

7.2 Ownership, possession, use rights, and land tenure issues

General framework

The advent of colonialism in Africa often meant large-scale dispossession of lands of indigenous peoples, as well as the introduction of new regimes regarding land ownership and use which influence even present-day policies and legislation. In a number of African countries, the land regime introduced in colonial times has remained in place or greatly influenced the post-independence land regime. This has posed a number of problems post-independence. In many cases, what were fundamentally collective customary laws and land regimes were replaced with a primarily-individualist concept of land ownership or possession, or indeed, lands previously considered as belonging to indigenous peoples under their customary law, became State (public or private)-protected or privately-owned land, often with a loss of access rights for the communities who previously occupied or used the land.

An element that was introduced to the land rights regime in a number of countries during and after colonialism is that of *trust lands*. This is particularly the case in countries that were former British colonies, where, post-independence, the State replaced the Crown as the trustee. In a number of national legislative frameworks, where trust lands form part of the land rights regime, those lands held in trust often cover areas that are inhabited by indigenous peoples, meaning that the possibility of indigenous peoples acquiring ownership over their lands is negligible. Land held in trust is inherently unstable, and open to arbitrary changes in status, and dispossession.

For example, in Botswana, general colonial policy was to encourage individual land ownership and the commercialisation of land.²⁷⁶ Traditional and communal uses of land were regarded as wasteful and antithetical to economic development.²⁷⁷ The new system divided land into three types, namely, tribal land, crown land (State land after independence) and freehold land. Tribal land belonged to the whole tribe and was held in trust by the chiefs. At independence, Land Boards replaced chiefs with respect to tribal land, which is held in trust for the tribes and administered and allocated by Land Boards²⁷⁸ for residential, arable, grazing or business purposes.²⁷⁹ Land Boards are, notionally, independent bodies. However, there are numerous reports from indigenous peoples that their applications for land allocation are

276. I Schapera (1943) *Native Land Tenure in Bechuanaland Protectorate*.

277. JC Smuts (1930) *Africa and Some World Problems* 82.

278. Tribal Land Act and State Land Act.

279. Tribal Land Act and State Land Act, for example Sec 23 of the Tribal Land Act.

not accepted, or that the application processes are much slower than those of the Tswana tribe of the territory.²⁸⁰

In Kenya, since colonial times laws have served to dispossess indigenous peoples of their traditional lands. The Crown Lands Ordinance of 1915²⁸¹ and subsequent colonial land laws and policies were aimed at further disinheritance and marginalisation of Africans.²⁸² Eventually, through the RJM Swynnerton Plan of 1955, the colonial authorities decided to individualise land tenure. This policy that was adopted and retained by the independent State of Kenya.²⁸³ The current Kenya Constitution deals with land as property and as Trust Lands. Land as property is protected by Section 75 of the Constitution. Chapter 9 of the Kenyan Constitution relates to trust lands. The chapter makes provision for trust lands managed by County Councils, whose administration of trust land is regulated by the Trust Lands Act.²⁸⁴ However, entrusting the management and control of such lands to local authorities in many instances has been a recipe for appropriation of community lands by individuals and corporations. The Registered Land Act sanctified individual land tenure in Kenya and does not apply to communal land.²⁸⁵ Thus, pastoralist and other indigenous collective lands are not covered by this form of protection.

On a positive note, the government has put together a draft National Land Policy, published in December 2005,²⁸⁶ which seeks to address some of the critical issues of land rights in Kenya, such as access to land, land use, tenure, planning, redressing historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. The Policy is important for indigenous peoples in that it recognises the rights and forms of land tenure of pastoral communities and other marginalised groups.²⁸⁷ However, the Policy has been faulted for not going far enough in addressing the question of collective land rights.²⁸⁸ According to a 2007 IWGIA report, 'while some sections of the draft (National Land Policy) are sensitive towards issues relating to land and resources (issues touching directly on the livelihoods of indigenous peoples), it falls short of recognising collective rights. In 2008, the United Nations Committee on Economic Social and Cultural Rights has noted with concern that 'disparities in the enjoyment of economic, social and cultural rights, including access to land, have led to

280. The Botswana Centre for Human Rights 'Land Rights' <http://www.ditshwanelo.org.be/land_rights> (accessed 30 November 2008).

281. 1915 Crown Lands Ordinance, section 5; See Ghai YP and Mac Auslan JPWB, *Public Law and Political Change in Kenya* (1970) 28.

282. See eg the Native Lands Trust Ordinance 1930, Native Lands Trust (Amendment) Ordinance 1934; Crown Lands (Amendment) Ordinance 1938; native Lands Trust Ordinance 1938; Kenya (Natives Areas) Order in Council 1939 and Kenya (Highlands) Order in Council.

283. HWO Ogendo *Tenants of the Crown, Evolution of the Agrarian Law and Institutions in Kenya*, Acts 1991 70.


284. Trust Lands Act (Cap 288) Laws of Kenya.

285. SC Wanjala 'Land ownership and use in Kenya: past present and future' in SC Wanjala (ed) *Essays on land law, the reform debate in Kenya* Faculty of Law, University of Nairobi (2000) 34; See also SC Wanjala 'Problems of land registration and titling in Kenya' in SC Wanjala (ed) *Essays on land law* 97.

286. Kenya Draft National Land Policy 2005.

287. As above.

288. See IWGIA (2007) *The Indigenous World* 470.



inter-ethnic tensions and post-election violence during which at least 1,500 persons were killed early in 2008'.²⁸⁹ The Committee recommends that, among other things, Kenya establish land inspectorates to monitor discriminatory allocation of land, and implement the recommendations of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land'.²⁹⁰

The Ethiopian Constitution has recognized the rights of 'nations and nationalities' including indigenous peoples to their, although land ownership is controversial. Article 43(5) of the Constitution provides that pastoralists have the right not to be displaced from their land. Several pieces of land administration legislation have been enacted since 1997. Although some provisions of these legislations talk about collective land rights of communities (particularly that of the pastoralists), they all failed to come up with a clear and enforceable instruments for collective land rights of traditional communities.

Following the French colonisation of Algeria in 1830, the expropriation of land from indigenous peoples took place on a large scale. Following independence in 1962, the State appropriated this land, but did not reinstate it to its original owners. Furthermore, in Amazigh tradition, there is no concept of individually-owned property, and many Amazigh have lost their lands due to the fact that the absence of formal title to those lands has given way for State appropriation of their lands.

In South Africa, the question of land ownership has been high on the agenda in a bid to facilitate redress of past wrongs perpetuated by the apartheid regime. Apart from the Constitution making provision for land reform,²⁹¹ a number of laws were enacted as well, including the Communal Property Association Act 28 of 1996,²⁹² to recognise indigenous land tenure as well as address dispossessions. This Act has been instrumental in according indigenous peoples the right to own and utilise their land collectively (see discussion of collective rights to land, below).

Article 237 of the Constitution of Uganda provides that land belongs to its citizens.²⁹³ It prescribes four types of land rights systems that obtain in Uganda: (a) customary; (b) freehold; (c) mailo; and (d) leasehold.²⁹⁴ The Land Act²⁹⁵ defines the rights and duties of members of a community using common land.²⁹⁶ They have the right to make 'reasonable use' of the land jointly with others, to gather wood fuel and building materials, and harvest the resources on the land, and to exclude non-members of the community from using the land. The only problem, however, has been that in cases of a takeover of communal land by an individual or by the State, there is no

289. See Concluding observation of the Committee on Economic, Social and Cultural Rights on Kenya's Initial Report on ECOSOC rights at the 41st session Geneva, 3-21 November 2008, UN Doc E/C.12/KEN/CO/1 para 12.

290. See Concluding observation of the Committee on Economic, Social and Cultural Rights on Kenya's Initial Report on ECOSOC rights at the 41st session Geneva, 3-21 November 2008, UN Doc E/C.12/KEN/CO/1 para 12.

291. SA Constitution Sec 25(4) - 25(9).

292. The Act enables communities to form juristic persons, to be known as Communal Property Association in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.

293. Art 237(1).

294. Art 237(3).

295. Chap 277, Laws of Uganda 2000.

296. Sec 26.

means of proving ownership of the land since the legal mechanism for issuing certificates of customary ownership has largely not been implemented.²⁹⁷ There is also a bias against the customary tenure system, as it is considered to hinder economic development.²⁹⁸

Another common feature of post-colonial land regimes is that they vest *all or large areas of land in the State*. In many cases the areas vested in the State are lands that indigenous peoples use or occupy. Article 40 of the Constitution of Ethiopia, for example, vests all land in the State.

The Constitution of the Republic of Congo contains certain provisions that could be of use to indigenous peoples as regards their ancestral lands, natural resources, and environmental matters. Article 17 guarantees the right to property, and also provides for compensation measures in cases of expropriation in the public interest. Article 36 of the Constitution of Burundi guarantees the right to property. The Land Law of Burundi,²⁹⁹ identifies two categories of land: State land (including forests and lands considered as vacant), and non-State land (including individually-titled lands).³⁰⁰ With its emphasis on *visible occupation of land*, this legislation does not take into account the situation of the Batwa.³⁰¹ Despite these provisions, a number of Batwa in Burundi have succeeded in acquiring land thanks to the efforts of Batwa Parliamentarians and some local authorities.³⁰² Burundi is also taking positive measures to address the land issue at a national level.

297. Sec 4 of the Land Act.

298. The Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992) as quoted by Mugambwa (2007) 53. See also SB Tindifa *Land rights and peace-building in Gulu District, Northern Uganda: Towards a holistic approach* Human Rights and Peace Centre Working Paper No. 7 (May 2007) 11.


299. *Loi 1/1008 du 1^{er} septembre 1986*.

300. IWGIA *The indigenous world* (2007) 502.

301. *Rapport de la Visited u Groupe de travail*, 30.

302. IWGIA *The indigenous world* (2007) 502.





The Government of Burundi has put in place a 'Commission Terres et Autres Biens' further to a law adopted by the National Assembly in 2006. The Commission's mandate is to:

- Examine land disputes;
- Identify and recuperate State lands that have been attributed irregularly;
- Examine all issues referred to the Commission by victims with a view to recovering their inheritance;
- Provide technical and material assistance to victims to enable them to enjoy their rights to property; and
- Look into questions of attributing land and compensation to victims.

This Commission is meant to address questions arising from the loss of lands during the civil war, but could also provide a channel through which indigenous peoples' land claims could be examined. The law that establishes the Commission stipulates that one of the 23-member Commission should be a Mutwa. Thus, in 2006, a member of an indigenous peoples' organisation (*Unissons-nous pour la Promotion des Batwa*) was selected as a member. Although it is too early to say whether this will result in improving the land rights situation of indigenous peoples in Burundi, it is a step in the right direction, and one of the few instances in the African region where indigenous representatives are included in bodies with a mandate to address issues of such importance to indigenous peoples.

According to Article 100 of the Constitution of Namibia, all non-privately-owned land and natural resources vest in the State, again demonstrating the priority given to individual ownership over collective rights. State ownership covers communal land as well, which is probably of greatest importance to indigenous peoples. Section 17(1) of the Communal Land Reform Act reads:

Subject to the provision of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment and or engage in non agricultural business activities.

It is clear from this provision that there is a restriction on indigenous peoples' possibilities to own land, particularly communal land, and even to control the lands they occupy or otherwise use in accordance with international standards. In addition to the constitutional provisions, the Communal Land Reform Act No. 5 of 2002 of Namibia is intended to 'provide for the allocation of land rights in communal areas, establish communal land boards and prescribe the powers of Chiefs and Traditional Authorities and boards with regards to communal land'. This Act seeks to regulate the land tenure relationship between the State and those occupying communal land owned by the State. It recognises the existence and role of communal area conservancies. Of the six broader Namibian San communities only two, namely, the !Kung and Ju/'hoansi of the Tsumkwe District, at present have any say in matters regarding their ancestral land. The conservancies established on their lands and managed by them have given

them access to wildlife and other natural resources. In accordance with this rule, individuals and communities can only enjoy forms of concessionary rights to land.³⁰³ The Land Law does, however, recognise customary rights to land, which are covered later in this Chapter. Again, similarly to some of the other national legal frameworks analysed in this report, lands established as 'vacant' are transferred back to the State, which can put them to another use.

The situation is similar in Gabon, where the Constitution recognises both an individual and collective right to property. This is an important constitutional provision providing scope for the protection of the land rights of indigenous peoples, particularly because of the mention of collective rights. However, in terms of land rights, the Land Law of 1963 declares the State as the sole owner of lands. Since the colonial era, indigenous peoples have lost almost all of their lands to the State, or to large foreign concessions. Nevertheless, customary use and possession are recognised, and this recognition provides indigenous peoples with the possibility to register their lands under customary law. However, another challenge is the condition that, in order to be registered, lands must be visibly occupied or used. Ordinances Nos. 25/PR and 1/76/PR allow for the appropriation by the State of lands that are not visibly used or occupied. Thus, many indigenous peoples may become prey to the expropriation of their land by the State or by large landowners.

Rwanda's Constitution provides for the right to individual and collective property ownership as well.³⁰⁴ These provisions are supplemented by Organic Law No. 08/2005 on the land regime in Rwanda. This confirms the rights of moral or physical persons to land, as well as customary rights to land.³⁰⁵ Articles 54 and 56 of the same law protect the owners of land against eviction, except in the case of eviction in the public interest. However, as indigenous peoples do not have formal property rights, these provisions are not implemented in the areas they inhabit, and indigenous people frequently suffer from expulsion from their traditional lands. It is estimated that approximately 40 per cent of the Batwa have been forced to relocate from their traditional territories.³⁰⁶ Despite provisions on customary rights to land, provisions concerning forest resources do not follow suit.

7.3 Indigenous peoples' forms of land use and national legislation

Pastoralism


Many indigenous peoples of Africa practice pastoralism, which involves the use of large areas of land, and seasonal migration for the purpose of grazing livestock. Such a form of land use represents a challenge in many cases, particularly where conflicting claims to some of the areas used by particular pastoral communities are made. Often, through the lack of recognition of

303. Art 57 of the Land Law.

304. Arts 20 to 30.

305. Arts 5 and 6.

306. See for example the case of the Batwa expelled from the land constituting the Virungu National Park, the mountain Park famous for the its mountain's gorillas in the North; the Batwa expelled from the old Gishwati forest during the 1990-1994 war; and the case of Batwa who use to live in the present-day Nyungwe forest in the South West of the country.



collective land rights, or of the traditional occupations of indigenous peoples, the practice of such an occupation is a complex and significant challenge for indigenous peoples. Approaches to pastoralism in different African countries vary from active hostility, to ambivalence, to recognition and legislation for pastoralism and associated land rights.

Although pastoral rights to free grazing and cultivation of land are enshrined in the Ethiopian Constitution, as is the right not to be displaced from their own lands,³⁰⁷ tension exists due to farmers who encroach on pastoralist land.³⁰⁸ Like many other indigenous peoples, the pastoralists have been forcibly removed from their ancestral land in order to make way for commercial farms, State farms, wildlife reserves and game parks.³⁰⁹ Although it is estimated that 1.9 million hectares of pastoral grazing land have been taken for agriculture and 466 000 hectares for national parks,³¹⁰ the right to be compensated 'commensurate to the value of the property' has not been implemented.³¹¹ Consequently, these communities are deprived of their communal lands³¹² and lack of action has resulted in the degradation of the natural resource base which pastoralism protects.³¹³

The Tanzanian government has displayed a routinely negative attitude towards pastoralists and indigenous peoples.³¹⁴ Its Land Policy of 1995, for example, prohibits 'nomadism'. The Wildlife Conservation Act of 1974,³¹⁵ which provides for the creation of Game Reserves, Game Controlled Areas and Partial Game Reserves, is the main legislation governing conservation of wildlife in Tanzania. This law has been used to declare indigenous pastoralists' village lands as Game Controlled Areas and Game Reserves, for example the Game Controlled Areas are Loliondo and Longido in northern Tanzania. In November 2008, Tanzania issued a new Wildlife Conservation Bill for public hearing to repeal and replace the 1974 Law. The 2008 Bill provides that the President may, after consultation with relevant local government authorities, and by order in the gazette, declare any part of Tanzania a game reserve; without exempting those people previously living in those areas from obtaining permits.³¹⁶ The Bill also has a specific provision that prohibits the grazing of livestock in the game reserve without a permit, which would overturn the position under the Wildlife Conservation Act of 1974 which does not require people born, or whose places of ordinary residence are in, the game controlled areas to have permits in order to live (and graze livestock) in a game controlled area.

In Eritrea, there is a legal framework for the protection of pastoralists' lands, which is unusual in the African context, but there are challenges as regards to the law's understanding of pastoralism, and as regards the protection of nomadic peoples' rights. As elsewhere, the Constitution of Eritrea vests ownership of all land and all natural resources below and above the surface of its territory in the State. Within its legal framework, usufruct rights are the strongest that pastoral indigenous peoples can hope to have over their lands. Land Proclamation No 58/1994 confirms that all land is

307. Ethiopian Constitution, Art 40(5).

308. Kjetil Tronvoll, *Minority Rights Group International Ethiopia: A New Start?* 27 (2000).

309. IWGIA (2006) *The indigenous world* 434.

310. Pastoralist Forum Ethiopia, *Strategic Plan 2004-2008*, 2.2, May 2004.

311. Ethiopian Constitution, Art 40(8).

312. IWGIA (2006) *The indigenous world* 434.

313. As above.

314. IWGIA, *Indigenous Peoples Yearbook 2008*, 'Tanzania'.

315. Cap 282, R.E 2002.

316. Sec 14(1) and 17(2) and (3) of the Wildlife Conservation Bill, 2008.

owned by the State (Article 3(1)). The government may allow the lease of usufruct or similar rights over land and it may provide preconditions and criteria pertaining to the use and management of the land (Article 3(3) and (4)). However, it is provided for in the law that every Eritrean citizen³¹⁷ has a usufruct right over land (Article 4(1)). One important usufruct right is the right to obtain *tiesa* land (land for housing) in one's home village (Article 6(3)). Another is the right to obtain land for housing or farming or both activities in existing villages, or villages or other places to be established henceforth (Article 4(20)).

The government is also empowered to classify land for housing and *farming activities*.³¹⁸ The Land Proclamation defines 'farming activities' as including farming and pastoralism (Article 2(6)). However, there are severe limitations as regards to the understanding of pastoralism. Usufruct rights to land for farming (including pastoral activities) in village areas of Eritrea are granted only to Eritrean citizens who are permanent residents of Eritrean villages and whose livelihoods depend on land, and to Eritrean citizens who are granted government permission to settle in villages and live by using the land (Article 6(2)). The effect is that nomadic pastoralists are not entitled to rights to land unless they permanently settle in villages. Once settled, they cannot perpetuate nomadic or semi-nomadic pastoralism.³¹⁹ In this way, the Land Proclamation effectively forces pastoralists to shift to sedentary farming.

In Burkina Faso, some concrete efforts have been made towards addressing pastoralism. Law No. 034-2002/an on pastoralism deals with the exploitation of natural resources. Within this context, the State and territorial collectives are mandated with the identification, protection and conservation of areas where pastoralism take place. Collective rights to the land in question are recognised for members of a specific lineage or tribe. It is also recognised by law that pastoralists should exploit natural resources within the framework of the law, in particular that relating to the environment. Pastoralist organisations, in consultation with customary authorities, are required to address issues of the identification, conservation and management of areas used for pastoralism, water points, etc. In Mali, the adoption of a Charter aimed at regulating pastoralism and access to water and pasture in 2001 was, in part, an attempt to address the tensions between agriculturalists and pastoralists.³²⁰ However, the Charter leaves unaddressed the question of the appropriation of pastoral lands by others, and only addresses access rights in this regard.


For the Mbororo in CAR, the creation of territorial entities appears to be an entry point for some degree of recognition of pastoralism through Laws Nos. 64/32 and 64/33 on the creation and organisation of these collectives, as well as Law No. 64/32 on the creation of rural communities in pastoral zones, the designation of mayors and the management of municipal councils. Law No. 65/61 on the regulation of animal breeding permits the creation of stock farming communes. Such communes were created in the 1960s, with

317. Any person who has attained the age of majority or a person who is deemed as emancipated pursuant to Arts 329-334 of the Transitional Civil Code of Eritrea, is entitled to the right to land (Art 7 of the Land Proclamation).

318. Emphasis added.

319. For detailed analysis of this ramification see generally JR Wilson 'Eritrean land reform: The forgotten masses' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 498 and SF Joireman, 'The minefield of land reform: Comments on the Eritrean land proclamation' (1996) 95 *African Affairs* 273, 275.

320. See *Loi No 01-004 du 27 février 2001 portant charte pastorale du Mali*.



the aim of sedentarising pastoralists. Since then, seven communes have been created, with autonomous municipal councils.

In Niger, the Code Rural (of 1993, as amended in 1998) provides for measures to ensure that access to water is guaranteed to all as an inalienable right, through State ('public') ownership and the creation of 'couloirs de passage', which are of particular use to nomads.

Hunter-gatherers

As regards hunters and gatherers, the fact that indigenous peoples' occupation of forests has rarely been recognised in customary or statutory law explains the fact that they rarely, if ever, have land titles.³²¹ In Central Africa, an additional issue concerning the right to practise hunting and gathering is that indigenous peoples' settlements are usually attached to the villages of more dominant ethnic groups, and are only recognised in their capacity as part of those villages, meaning that any land rights attached to local communities generally do not pertain to indigenous peoples.

In Gabon, current discussions surrounding the Sector Programme on forest and Environment and the Indigenous Peoples Development Plan (IPDP) could serve as an initial step to begin looking into rectifying the injustices that indigenous peoples have suffered as regards their land rights. Within the framework provided by Operational Policy 4.10 of the World Bank, the IPDP recommends, among other things: ensuring legal recognition (identity cards) for the Babongo, Bakoya, Baka, Barimba, Bagama, Bakouyi and Akoa; addressing the legal and equality matters surrounding the question of indigenous peoples 'campements'; the establishment of community forests (minimum one square kilometre per person) for the communities mentioned above; legally recognising and protecting the areas of land used by indigenous peoples, including in national parks and protected areas; and drafting a national policy on indigenous peoples.³²²

Under the Tribal Land Act in Botswana, land can only be granted for residential, arable, grazing or business purposes. Other traditionally recognised land uses like hunting and the collection of wild foods became the responsibility of the central government, meaning that *traditional land use systems of country's indigenous peoples are not recognised*. Moreover, land can only be granted to an individual who qualifies as a tribesman. As tribal membership was often contested, some Basarwa were excluded from making applications for land on the basis that they were not tribesmen.³²³ In 1993, the Tribal Land Act was amended to provide for the allocation of land to be based on the basis of citizenship and not tribal affinity.³²⁴ However, although the official stance is that no tribe owns any territory, evidence on the ground points to the recognition of tribal ownership of, or at least an association with, land. For example, Land Boards that manage the land in question in trust are named after the tribes of the territories for which they are responsible. All these bear the names of the principal Tswana Tribes.

321. Jackson *Twa Women, Twa Rights in the Great Lakes of Africa* 8.

322. République Gabonaise, Ministère de l'Economie Forestière, des Eaux, de la Pêche, de L'Environnement chargé de la Protection de la Nature, *Plan de Développement de Peuple Autochtones du Programme Sectoriel Forêts Environnement, Rapport Final préparé par Dr Kai Schmidt-Soltau, juillet 2005* 5.

323. Wily, EA (1979) *Official Policy Towards San (Bushmen) Hunter-Gatherers in Modern Botswana: 1966-1978* Gaborone: National Institute of Development and Cultural Research 33.

324. Sec 10(1) of the Tribal Land (Amendment) Act of 1993.

Indigenous peoples, therefore, have no recognised territory outside of the Tswana tribes that they are assumed to be part of.³²⁵



325. I Mazonde 'Equality and ethnicity: How equal are San in Botswana' in RK Hitchcock and D Vinding (eds) *Indigenous Peoples' Rights in Southern Africa* (2004) IWGIA Document 110, 138.

Example: The Kamanakao case, Central Kalahari Game Reserve, Botswana

The Kamanakao case represents a landmark decision that highlights the important issue of *free and informed consent in relation to relocation*. The government had entered into negotiations for a period of over fifteen years before finally deciding to relocate the applicants. Thus, it initially appeared that the applicants had been consulted and therefore had freely consented to their relocation. However, the Court found that there was *no free and informed consent because the government failed to take into account the specific socio-economic circumstances of the applicants*. This included the fact that the applicants were generally a very poor, marginalised community with very little education and who spoke and understood Setswana to varying degrees. They were also of a culture that was markedly different from the Tswana culture. Thus, the form of meetings used for Tswana groups might not necessarily be so for non-Tswana groups.

In 1986 the government of Botswana adopted a policy according to which the Basarwa residing in the Central Kalahari Game Reserve (CKGR) would be relocated to settlements outside of the reserve. The government's stated reasons for this were: the need to bring these communities closer to 'developments'; and that their presence was a 'threat to the wildlife populations within the reserve'. The decision to go ahead with the relocations was made in 2002. The government took measures to enforce its decision to relocate, which, it was insisted, had been consensual. Some residents of the CKGR sought an order from the High Court declaring the government's decision to relocate them unlawful. The answer to this question depended, according to the High Court, on whether or not Basarwa were in lawful possession of the CKGR when they were removed in 2002. On the one hand, the argument was that the CKGR belonged to the State, and therefore at best, the rights of the Basarwa in this respect would have been those of *possession* and not ownership. On the other hand, the applicants claimed that they had *native title* to the CKGR.

The Court held that for a colonial power to acquire ownership of land there has to be a specific *act of acquisition* which is distinct from the act of colonisation. It also held that at the time of proclamation of independence, the Basarwa had native title to the CKGR and that native rights could only be distinguished by a specific act of alienation to a third party. In addition, the Court held that native title could not have been extinguished by a declaration of land rights by colonial powers, except where use of the land in question (for example, if the land had been alienated to third parties, or used for residential purposes) was inconsistent with the existence of native rights. Therefore, Court held that:

- The native title of the Basarwa to the CKGR was not affected because the British colonial government allowed them to reside and hunt in the CKGR *without interference*.
- The Creation of the CKGR did not extinguish native title because Section 3 of the Fauna Conservation Act provided for the hunting rights for those who primarily depended on hunting.

As a result, it was held that the Basarwa were in lawful *possession* of the CKGR in 2002. The Court then reached the conclusion that the Basarwa were unlawfully deprived of this possession for a number of reasons including the destruction of the applicants' huts, termination of provision of services like water and hunting licences and separation of families. All these factors were evidence that the applicants *did not give proper consent to their relocation*.

7.4 Collective and individual rights and customary law

The protection of the collective right to land and natural resources is particularly important because access to land and natural resources has a direct bearing on the very identity and existence of people. Furthermore, land and natural resources are often linked to the culture and traditional way of life of peoples, and collective land rights are one of the core rights claims of many indigenous peoples.

Article 29 of the Constitution of Rwanda recognises private, individual and collective property rights. In the Republic of Congo, the 2004 land law recognises the individual and collective character of customary property rights.³²⁶ In Chad, collective property is also recognised, on the condition that the collective has legal status. The Law on public assets of July 1967³²⁷ states that lands that are 'productively used' in a collective manner will be the subject of special provisions including registration of lands in the name of the collective when that collective has legal status, or in the name of the State, which will grant the collective the enjoyment of rights to that land free of charge.

As stated earlier in this chapter, according to Article 29 of the 1971 Constitution of Egypt three kinds of ownership are recognised: public ownership, co-operative ownership and private ownership. As regards collective rights, the Constitution envisages the establishment of co-operative societies who collectively enjoy co-operative ownership which is guaranteed by virtue of Article 31 of the Constitution. Although co-operative ownership may be taken as a form of collective ownership, it is not a customary system of ownership. Where a group is not organised into co-operative societies and its occupation and use of land are not registered as private ownership, its land would legally be regarded as publicly-owned land. Where indigenous people are forced into co-operatives, they may be constrained to adopt a mode of production that undermines their traditional system and way of life. After their resettlement away from Nubian valley, for example, members of the Nubian community were organised into a co-operative society and as a result began to cultivate sugarcane – a crop that had not been part of their traditional culture.³²⁸

In Kenya, the draft National Land Policy has been faulted for not going far enough to address the question of collective land rights.³²⁹ According to a 2007 IWGIA report, 'while some sections of the draft (National Land Policy) are sensitive towards issues relating to land and resources (issues touching directly on the livelihoods of indigenous peoples), it falls short of recognising collective rights.

In South Africa, the Communal Property Association Act 28 of 1996³³⁰ has the potential to protect indigenous peoples' land rights since it is


326. Art 31 of Law No. 10-2004 of 26 March 2004 on General Principles Applicable to the Public Domain and Land Regimes.

327. Art 20 of Law No. 24 of 22 July 1967.

328. Library of Congress country study [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+eg0069\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+eg0069)) (accessed on 2 December 2006).

329. See IWGIA (2007) *The indigenous world* 470.

330. The Act enables communities to form legal entities, to be known as Communal Property Association in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.



designed to address historical injustices related to land use and tenure. The Communal Property Association Act has been instrumental in according indigenous peoples the right to own and utilise their land collectively, especially after the restitution of their traditional land as discussed below. However, the conditions envisaged by the Act which demand the election of officials to represent the community sometimes clash with existing traditional leadership structures of the indigenous communities, creating tension and delaying the management and execution of decisions.

Customary law exists side-by-side in many of the countries examined, and in a number of cases, national legislation recognises its existence side-by-side with written law. Some national laws, as will be seen below, provide possible entry points for indigenous peoples to claim their customary rights to land, although a number of challenges still remain.

In almost all countries in the Central African region, the customary laws of the Bantu population are different to those of the 'Pygmy' peoples, as the latter's traditional territories comprise large areas of land or territories upon which they practice hunting, gathering, fishing and other activities. These lands are considered the common property of the community as a whole. This concept is similar for the Mbororo of Central and Western Africa, who consider grazing areas as belonging to the community as a whole. It is almost unthinkable for one individual or family within these communities to claim one area of the common lands for exclusive use. In other areas of Africa, the picture is similar, and indigenous concepts of land use and customary rights, as well as traditional governance and decision-making structures differ – often considerably – from the mainstream population.

Article 237 of the Constitution of Uganda provides that land belongs to its citizens.³³¹ The Constitution prescribes four types of land tenure systems, including customary tenure.³³² The Land Act,³³³ which is the principal law making provision for the tenure, ownership, use and management of land, defines the various land tenure systems prescribed for in the Constitution, including customary tenure. Section 3(1) of the Land Act defines the customary system as a form of ownership. Upon an initial reading of this provision, however, it is clear that customary rights in this instance are applicable to individuals and families, which does not necessarily correspond to indigenous peoples' own customary understanding of collective land rights, which goes beyond individuals and families to comprise the community as a whole. The Land Act also defines the rights and duties of those using common land.³³⁴ They have the right to make reasonable use of the land jointly with others, to gather wood fuel and building materials, and harvest the resources on the land, and to exclude non-members of the community from using the land. One problem, however, has been that in cases of a takeover of communal land by an individual or by the State, there is no means of proving ownership of the land since the legal mechanism for issuing certificates of customary ownership has largely not been implemented.³³⁵ There is also a bias against the customary tenure system as it is considered to hinder economic development.

331. Art 237(1).

332. Art 237(3).

333. Chap 277, Laws of Uganda 2000.

334. Sec 26.

335. Sec 4 of the Land Act.

Various provisions in the Land Act make it easy to translate customary tenure into freehold.³³⁶ This attitude is also widespread in Africa and demonstrates very well the eminence that many African legal systems give to individual tenures over communal customary tenures.³³⁷

It is common for provisions related to customary land rights to ignore the customs of indigenous peoples. Customary rights are often based on an understanding of customary forms of land use that is essentially sedentary in nature, which excludes nomadic, pastoralist and hunter-gatherer communities, which comprises most of the indigenous peoples in the region, even in Africa as a whole. For example, the constant migration of the Fulani makes them 'strangers' in terms of the customary land tenure system in Nigeria.³³⁸ The customary land tenure system holds that land is held whether it is under cultivation or lying fallow.³³⁹ As a result of this system, lands are loaned to nomadic Fulanis for grazing and water purposes and they revert to the customary owners after the passage of the nomads.³⁴⁰

Courts of law have issued conflicting decisions when adjudicating land matters in reference to customary rights to land. The courts have on certain occasions held that registration extinguishes customary rights to land and then vests rights in land in the registered proprietor absolute.³⁴¹ On the other hand, they have also held that the registration of title was never meant to disinherit people who would otherwise be entitled to their land.³⁴² Such conflicting rulings from the same courts beg the question as to the extent of the complexity of the land laws in the country which disinherit and affect peoples' rights to their lands. Some of the cases that have come before Kenyan courts seeking to espouse indigenous peoples' land rights without success include the *Ogiek case*³⁴³ discussed earlier, and the *Endorois Case*,³⁴⁴ currently before the African Commission on Human and Peoples' Rights.³⁴⁵

336. Sec 9.

337. See Sec 115(2) of the Kenyan Constitution.

338. C Ezeomah, *Land tenure constraints associated with some recent experiments to bring formal education to nomadic Fulani in Nigeria*. Sourced from <http://www.odi.org.uk/pdn/papers/20d.pdf> (accessed 15 June 2007).

339. As above.

340. As above.

341. *Obiero v Opiyo* (1972) EA 227; and *Esiroyo v Esiroyo* (1972) EA 388.

342. *Wanjala* *Ibid*; See *Muguthu v Muguthu* HC Civil case No 377 of 1968 (unreported).

343. *Francis Kemai and Others v the AG and others* HCC 238/1999.

344. High Court Misc. Civil Case No. 183 of 2002. In the case the Community argued before the High Court in Nakuru that, by creating a game reserve, on their communal land without consulting them and subsequently evicting them and barring them from accessing the lands, the Baringo county council was a breach of their fundamental rights and freedoms as well as the constitutional provisions on trust land. The High Court of Kenya in Nakuru ruled against the Community.

345. Communication 276/2003, *CEMIRIDE (on behalf of the Endoris) v Kenya*.



Recognition of indigenous customary law – the Richtersveld case

The 'Richtersveld is a large area of land situated in the north-western corner of the Northern Cape Province of South Africa and for centuries has been inhabited by what is now known as the Richtersveld Community'. The 'Richtersveld community had been in occupation of the land prior to its annexation to the British Crown in December 1847. Even after the annexation, the Richtersveld community continued to occupy the land until the 1920s when diamonds were discovered. After the initiation of mining operations in the 1920s, the Richtersveld community was progressively denied access to its lands until by 1994, the government had granted ownership of the subject land to a mining company. Spurred by the provisions of the Restitution Act, the Richtersveld community in December 1998 lodged claim to their land rights and associated valuable mineral rights to a large diamond-rich area of land in the Barren Northern Cape.

Following an unsuccessful claim made at the Land Claims Court, the community made a successful direct application to the Supreme Court of Appeal, which held that '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 exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones)'. The Court found that the dispossessions were racially-discriminatory '*because they were based on the implicit premise that because of the Richtersveld community's race and presumed lack of civilization, its rights to the land had been lost with annexation*'.

The company that had been granted ownership of the subject land appealed to the highest court in South Africa – the Constitutional Court – which upheld the right of the Richtersveld community to restitution of the rights to the exclusive beneficial use and occupation of the land including its minerals and precious stones. The Constitutional Court went further finding that the Richtersveld community held *ownership* of the land under indigenous law, as well as affirming the independent status of customary law under the South African Constitution:

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. Its validity must now be determined by reference not to common law, but to the Constitution . . . [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system . . . [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

Although it was only a number of years later when agreements on compensation to the community and on profit sharing on minerals mined in the area were reached, the Richtersveld case illustrates that a progressive judiciary is a vital vehicle to realizing indigenous peoples' rights. Indeed, while express provisions in the Constitution and legislation in South Africa provide a clear route for restitution of lands through the courts, the community also explored alternative grounds of action. This concept of *aboriginal title* provides an alternative course of action that could be used where a claim may fail to qualify under provisions for restitution, or where such provisions are lacking altogether.

Collective rights and customary law in the Democratic Republic of Congo, and the invisibility of indigenous peoples' land use methods

Article 34 of the Constitution of the DRC protects the right to both individual and collective property:


La propriété privée est sacrée. L'Etat garantit le droit à la propriété individuelle ou collective, acquis conformément à la loi ou à la coutume. Private property is inviolable. The State guarantees individual or collective property rights, acquired according to the law or custom.

Congolese law is dualist in nature as regards property rights. Written law exists side-by-side with customary law. For indigenous peoples in the DRC, ways of using and managing lands are essentially collective in nature, thus, the concept of collective property could be of great potential use. In addition, the Constitution also clearly recognises the role of customary law in the area of property rights. In theory, these provisions could be of use for indigenous peoples.

The Land Law (*Loi n° 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés, telle que modifiée et complétée par la Loi n° 80-008 du 18 juillet 1980*) also recognises customary land rights:

Les terres occupées par les communautés locales sont celles que ces communautés habitent, cultivent ou exploitent d'une manière quelconque – individuelle ou collective – conformément aux coutumes et usages locaux. Les droits de jouissance régulièrement acquis sur ces terres seront réglés par une Ordonnance du Président de la République. (The land occupied by the communities are those which these communities inhabit, cultivate or exploit – in whatever way, individually or collectively – according to custom or local usage. The right to habitual enjoyment over these lands will be regulated by an Ordonance of the President of the Republic.)

The Ordonance of the President of the Republic, as foreseen in the law, has not yet been issued. Therefore, in terms of customary law, property and land matters are treated in accordance with the respective rules of each community which differ considerably. In some areas, rights to land are proved through the visible use and occupation of an area of land. This is termed 'customary possession' – land that has been lived on or used for as long as one can remember. This notion is similar to the idea of 'time immemorial' in international law. In others, a customary chief distributes the land among the members of their community. For indigenous peoples, collective lands include lands for hunting and gathering, in addition to various spiritual and cultural sites. These lands belong to the community as a whole. Their nomadic lifestyle leaves little visible trace of occupation or use of land. Consequently, indigenous peoples' lands overlap with those of other communities. According to written law, the registration of rural land should be preceded by an inquiry to ensure that the land in question is not already occupied customarily. In theory, this is a useful mechanism for the protection of the customary land rights of indigenous peoples. However, the customary land use of indigenous peoples has thus far never been taken into account in such an inquiry, which generally consists of the mounting of posters and signs in public, as well as field visits for visible signs of occupation and use of the land in question. As indigenous peoples' lands often appear unoccupied to outsiders, this has been the cause of the loss of large areas of indigenous peoples' lands – either through transformation into protected areas, or through concession to other individuals or communities.



A further challenge to the exercise of indigenous peoples' customary rights to lands in Africa is the use of the concept of lands in 'productive use'. Whereas in many countries, customary rights to lands appear to be a reality, for the most part the precondition is that those lands must be 'productive'. The concept of productivity used here often conflicts with indigenous peoples' land use methods and patterns, particularly in the case of nomadic or semi-nomadic peoples. In Chad, for example, customary rights to land are recognised by virtue of Law No. 24 of 22 July 1967. Article 15 of this law effectively states that rights to lands not productively used may be revoked by the State, and replaced with either compensation or other forms of rights.

In the DRC, the recent creation of a protected area (the *Réserve de Faune de Lomako-Yokokala*) followed an inquiry into the 'vacant land' signed not by local communities, but by local administrative agents. The Ministerial Order³⁴⁶ establishing the protected area makes no mention of any consultation with potentially-affected communities. Once declared vacant, indigenous peoples' lands have been put up for other uses with no compensation.³⁴⁷

The conditions that have to be fulfilled in order to register land are virtually impossible for indigenous peoples in Cameroon as they cannot obtain a registration order if their lands are not 'productively used'.³⁴⁸ For the Baka and Bagyèli of Cameroon, this means that they have little chance of being eligible for the registration of land rights, given their nomadic way of life. Even if Order No. 74/1³⁴⁹ opens up the possibility of a group to constitute itself as a legal entity, it remains extremely difficult for indigenous peoples to fulfil the conditions to be in a position to apply for registration. Thus neither the process, which is long and requires a lot of technical information to be submitted, nor the rights accorded by this piece of legislation respond adequately to the needs of indigenous peoples.

Similarly, whereas written law divides national lands into public State and non-public lands in Burundi, some forms of customary use and possession are tolerated. The emphasis, however, is on *visible occupation* of lands, and the productive use of those lands that are proposed for registration. In a similar vein, the Land Law of the DRC recognises occupation and use rights, in conformity with local customs and usages, of local communities who live on, cultivate or exploit – individually or collectively – a specific area of land.³⁵⁰ However, the law also states that those lands that can be considered as vacant should revert to the State.

Article 7 of the Organic Law on the land regime in Rwanda³⁵¹ provides for the recognition of customary ownership of land of those who have inherited it from their parents, received it from the competent authority, or by other recognised means, including exchange and sale.

346. No. 024/CAB/MIN/ECN-EF/2006 of 26 June 2006.

347. R Busane (2006) *Gestion des aires protégées et conflictualité. Recherche sur l'impact de la domanialité publique sur les activités socioéconomiques des terroirs villageois du Sud Kivu*, UCB 10.

348. Art 11(3) of Decree No. 2005/481 (16 December 2005), modifying certain provisions of Decree No. 75/165 (27 April) 1976 outlining the conditions for obtaining land title effectively prohibits registration of title on lands that are free from occupation or exploitation.

349. Art 15.

350. Arts 388 and 389 of the Land Law.

351. *Loi organique no. 08/2005 du 14/07/2005 portant régime foncier*.

Customary law continues to play an important role in terms of land rights in the Central African Republic. This regime is largely based on the principle that those who first clear a land area for cultivation have rights to that area.³⁵² Written law prevails whenever there is a conflict of customary rules. Customary possession, however, does carry weight when it comes to legal resolution of conflicts. The principles of use and occupation since time immemorial can result in legally-recognised possession rights. This principle has benefited many citizens, but due to discrimination and prejudice against indigenous peoples, very few of them have benefited.

The Law on General Principles Applicable to the Public Domain and Land Regimes³⁵³ of the Republic of Congo does contain several innovations that could be favourable to the promotion of the rights of indigenous peoples:

The first is the recognition of *pre-existing customary rights* (*le régime foncier garantit la reconnaissance des droits coutumiers préexistants non contraires ou incompatibles avec des titres dûment délivrés et enregistrés*).³⁵⁴

The second is the recognition of the *collective and individual nature of customary land rights* (*Ce régime fixe les modalités de constatation et d'établissement des droits fonciers coutumiers, qu'ils relèvent d'appropriation individuelle ou collective*).³⁵⁵

The third is the *delivery of titles* to lands recognised as customarily owned/occupied.³⁵⁶ It is also important to note here that, unlike other laws in African countries that speak to the 'productive' use of lands, this one does not.

Fourth, the law also speaks of land titles delivered to persons acting on behalf of their communities.³⁵⁷ However, this may also represent a challenge in that in particular the indigenous 'Pygmy' peoples do not necessarily have a social structure where such a person would be identifiable to entrust a land title on behalf of the community.

7.5 Natural resources

As can be seen above, there are many cases in which the State Constitution provides that the State alone owns mineral and other resources and State ownership of sub-surface resources in particular, is the case with all of the cases examined in this study. The International legal framework for the protection of the rights of indigenous peoples recognises this situation while also allowing indigenous and tribal peoples to have a say in how these resources are exploited. The first principle is that of consultation. This consultation should take place even before exploration for resources on indigenous peoples' lands, which in itself can be damaging. In many cases, as can be seen in the examples throughout this chapter, the State also owns all

352. NEPAD et FAO, *République Centrafricaine: Programme national d'investissement à moyen terme* (PNIMT), TCP/CAF/2905 (I), (NEPAD Ref. 05/43 F), December 2005.


353. *Loi No. 10-2004 du 26 mars 2004 fixant les principes généraux applicables aux régimes domaniaux et fonciers*.

354. Art 31 of the Law on General Principles Applicable to the Public Domain and Land Regimes: 'the land tenure regime recognises the pre-existing traditional right that is not contrary to title deed duly delivered and registered.'

355. As above: 'This regime establishes the modalities for the recognition and the delivery of customary land rights, whether they are they pertain to individual or collective ownership'.

356. As above, Art 23.

357. As above, Art 34.



land within national boundaries, or owns specific areas of land – many of which are in areas inhabited by indigenous peoples. All this has several implications for indigenous peoples, particularly where the question of sub-surface resources is concerned. Nevertheless, there are, as demonstrated below, entry points for indigenous peoples to access, use and manage the natural resources pertaining to their lands, and participate in the benefits of exploitation in other cases.

General legal framework

As regards overall legal frameworks, the Constitution of Chad reaffirms the exclusive ownership of natural resources by the State. Article 57 of the Constitution states that:

*L'Etat exerce sa souveraineté entière et permanente sur toutes les richesses et les ressources naturelles nationales pour le bien-être de toutes la communauté nationale. Toutefois, il peut concéder l'exploration et l'exploitation de ces ressources naturelles à l'initiative privée.*³⁵⁸

This is supplemented by Article 3 of the Mining Code,³⁵⁹ which provides that:

Les gîtes naturels de substances minières contenues dans le sous-sol ou existant en surface sont, sur le territoire de la République du Tchad, la propriété de l'État et, sous réserve du Code minier, ne peuvent être susceptibles d'aucune forme d'appropriation privée.

Botswana's Mines and Minerals Act³⁶⁰ also provides in Section 3 that all rights to minerals vest in the State. The 1969 Petroleum (Drilling and Productions Regulations) Act of Nigeria provides for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and vest ownership of, and all onshore and offshore revenue from resources derivable there from in the Federal Government and for all other matter incidental thereto. The Ogoni, Ijaw and affected minority and indigenous groups claim that this Act alienates them from their oil wealth, a claim that has resulted in part to a 13 per cent oil revenue-allocation scheme. In *Social and Economic Rights Action Center (SERAC) and Economic Rights Action Center for Economic and Social Rights (CESR) v Nigeria*, the African Commission held that the Nigerian government has violated the right of the Ogoni people to dispose of their wealth and natural resources.³⁶¹

In some cases, ownership of resources goes further, in that the national legal framework may also provide that the State maintains ownership of other natural resources. For example, the Constitution of the Democratic Republic of Congo provides that:

358. 'The State exercises its complete and permanent sovereignty over all its national wealth and natural resources for the well-being of the national community as a whole. However, the State may allow exploration or exploitation of its natural resources to private actors.'

359. 'The natural deposits of minerals resources in the subsoil or on the surface, on the territory of the Republic of Chad, are the property of the State and, unless otherwise provided for in the Mineral Code, are not open to any form of private ownership'. (*Loi n°011/PR/1995 du 20 juin 1995*).

360. Act No 17 of July 1999.

361. See Communication 155/96, see also J Nwobike 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and Economic Rights Action Center for Economic and Social Rights (CESR) v Nigeria*' (2005) 2 *African Journal of Legal Studies* 129-146.

*L'Etat exerce une souveraineté permanente notamment sur le sol, le sous-sol, les eaux et les forêts, sur les espaces aérien, fluvial, lacustre et maritime congolais ainsi que sur la mer territoriale congolaise et sur le plateau continental.*³⁶²

Article 23(2) of the Constitution of Eritrea states that all land and natural resources below and above the surface of the territory of Eritrea belong to the State and that the interests citizens have in land will be determined by law. Article 8(3) states that the State is responsible for managing all land, water, air and natural resources and for ensuring their management in a balanced and sustainable manner; and for creating the right conditions to secure the participation of the people in safeguarding the environment. In accordance with these provisions, the government may designate any area or mineral as reserved for, or excluded from particular mining operations, particularly when it regards sites of historical, cultural or religious interest.³⁶³ Unless the Licensing Authority decides otherwise, no license can be issued for any area which is within 100 meters of a site of archaeological, cultural or religious importance (Article 13(1)).

The current Constitution of Kenya makes little if any reference to natural resources. However, in accordance with the law, natural resources which include all minerals, wildlife, water bodies, national forests vest in the State.³⁶⁴ Various pieces of legislation regulate access to, control and utilisation of natural resources in Kenya.³⁶⁵ Natural resources currently in the territories of indigenous peoples include national parks, game reserves, and mining resources. Indigenous peoples demand to be consulted and involved in the management of the resources and in sharing the benefits derived. Apart from the Maasai Mara 'where 19 per cent of the revenue collected is said to be invested in favour of the Maasai community', most of the indigenous peoples claim that they are not involved and the State does not share proceeds of the resources within their territories.³⁶⁶ According to a report of the UN Special Rapporteur on Indigenous Peoples on the impact of large-scale projects on indigenous peoples' rights, Kenya's indigenous peoples have complained that 'the creation of national parks or game reserves has forced people off their land'.³⁶⁷ The report cites the example of the Borana who have 'testified that four reserves created in Isiolo had been annexed affecting important grazing and watering points previously used by pastoralists'.³⁶⁸ In Algeria, many natural resources can be found in the traditional territories of the Amazigh people. However, they very rarely benefit from these resources. For example, a number of dams have been

362. Art 9 of the DRC Constitution: 'The State exercises permanent sovereignty over the soil, the subsoil, the water, the forests, over Congolese airspace, its rivers, lakes and maritime space, as well as the Congolese territorial sea and continental shelf.'

363. Proclamation to Promote the Development of Mineral Resources, Proclamation No. 68/1995, Art 6.


364. See Sec 115(1) of the Constitution of Kenya.

365. Such legislation include the Wildlife (Conservation and Management) Act (cap 376), Petroleum (Exploration & Production) Act (Cap 308), Environmental Management and Coordination Act 8 of 1999, Forest Act 7 of 2005, Water Act 8 of 2005, Kerio Valley Development Authority Act (Cap 441), Lake Basin Development Authority Act (Cap 442), Tana and Athi Rivers Development Authority Act (Cap 443), Agricultural Development Corporation Act (Cap 444), Ewaso Ng'iro South River Basin Development Authority Act (Cap 447), Ewaso Ng'iro North River Basin Development Authority Act (Cap 448) and the Coast Development Authority Act (Cap 449).

366. See report of the UN Special Rapporteur on Indigenous Peoples in Kenya, paras 48-54.

367. See Report of the UN Special Rapporteur on Indigenous Peoples on the impact of large scale projects, para 23.

368. As above.



constructed in Amazigh-inhabited areas, in order to service urban areas. Thus, local populations receive little or no benefit from this resource.

Article 35 of the Constitution of Burundi addresses the rational exploitation of natural resources, the preservation of the environment and the conservation of resources for generations to come. According to a statement of the Minister responsible for conservation, lands in areas destined to become natural reserves are to be claimed by the State and the occupants to be relocated elsewhere.³⁶⁹ It does not appear that indigenous peoples' interests have been taken into account in any way in this regard. Law No. 04/2005 on the modalities for protection, preservation and promotion of the environment in Rwanda places a responsibility on local communities in the area of environmental protection.³⁷⁰ The obligation to undertake environmental impact studies is enshrined in this law,³⁷¹ but it makes no reference to any consultation procedure or to the participation of local communities during such a process.

In countries where there is already little legal recognition of indigenous peoples' rights to own or use land, there is a negative impact on the possibility of indigenous peoples to access and use natural resources on the lands they occupy or otherwise use. In the CAR, Ordinance No. 84.045 on the protection of wild fauna and the regulation of hunting states that natural resources found on land owned by the State belong to the State. Hunting is subject to obtaining a hunting permit, with the exception of those who claim a customary right. In the latter case, the holders of customary rights face a number of restrictions in terms of the kind of game they may hunt and the weapons they are permitted to use.³⁷²

Forest resources

As regards forest resources, the Forest Code of the CAR³⁷³ distinguishes collective and individual forests from State forests. State forests include fauna reserves and other forms of protected forest. Chapter II of the Code states clearly that communities have only customary use rights to their lands for subsistence needs – to natural resources, but not to sub-surface resources:

*Les populations locales continuent d'exercer leurs droits coutumiers d'usage gratuitement en se conformant aux dispositions de la présente loi, de la réglementation en vigueur et des règles coutumières. L'exercice des droits coutumiers d'usage est strictement limité à la satisfaction des besoins personnels, individuels ou collectifs des usagers.*³⁷⁴

Furthermore, the customary rights conferred by the Code only confer certain forms of use rights, namely: collection of dead wood, gathering of fruits or medicinal plants, exploitation of wood for the purposes of house construction or making certain objects.³⁷⁵

369. Groupe de travail d'experts de la Commission africaine sur les populations/communautés autochtones, *Rapport de la Visite de recherche et d'information en République du Burundi* : 27 mars – 9 avril 2005 (2007) 24.

370. Art 64.

371. Art 67.

372. Arts 34, 37 et 38 of *Ordonnance n°84.045 du 27 Juillet 1987 portant protection de la faune sauvage et réglementant l'exercice de la chasse en République Centrafricaine*.

373. Law No. 90/003, 9 June 1990.

374. Art 15 of the *Code forestier*: 'The local populations continue to exercise their customary right of free usage while conforming to the provisions of the present law, with the current and with customary rules. The exercise of the right of customary usage is strictly limited to the satisfaction of the personal, individual or collective needs of the users.'

In addition, Article 12 of the Forest Code also prevents local communities from residing on lands that have been transformed into national parks. Furthermore, the Code prevents any activities other than those aimed at conservation, are permitted in those areas.

In the national parks and the recreational forests, no one is allowed to settle permanently and no activity may be undertaken other than those necessary for the management, the conservation, or for the restoration of the natural wealth, which is the aim of the establishment of these parks. (*Dans les parcs nationaux et les forêts récréatives, nul n'est admis à résider de façon permanente et aucune activité autre que celles nécessaires à l'aménagement, à la conservation ou à la restauration des richesses naturelles, objet de la création, ne peut être entreprise.*)

A decision of the Council of Ministers in Rwanda³⁷⁶ defines the limits of the National Park of Akagera, further to the reinstallation and the land needs of various repatriated populations. A draft law is underway which will define the newly-reduced boundaries of the Park.³⁷⁷ However, no action has been taken to ensure the inclusion of the Batwa in any of the considerations surrounding the Park, despite their dependence on the resources therein and their occupation of the area since time immemorial.

The Forest Code of CAR only defines collective forests as those that have been classified by way of a decree on behalf of a collective, or have been reforested or conserved by the collective in question. Individual forests are those that are planted by individuals on land pertaining to them by virtue of the applicable legislation. According to this understanding, collectives are regions, prefectures, sub-prefectures and communes. Villages are not considered collectives to this end, which effectively excludes the possibility of any indigenous community claiming or managing a collective forest. However, the situation is quite different in other countries in the sub-region such as Cameroon and DRC. Here, even if indigenous peoples do not have rights stretching as far as those enshrined in international law of relevance to indigenous peoples as regards natural resources, there are *community forestry mechanisms* in place that enable them to have limited access and rights to certain resources.

In DRC, the community forestry mechanism is also foreseen as a means for local communities to access resources in forest areas. Article 22 of the Forest Code states:

A local community may, at its request, by way of a forest concession obtain a part or the whole of the forest that is regularly [in their] possession by virtue of custom. (*Une communauté locale peut, à sa demande, obtenir à titre de concession forestière une partie ou la totalité des forêts protégées parmi les forêts régulièrement possédées en vertu de la coutume.*)

The community forestry mechanism provides access to resources that could be of great use to indigenous peoples, and may eventually serve as a basis for the consolidation of their land rights. However, there are very few community forests in Central Africa, for example, that have been allocated to an indigenous community, and a number of countries with large areas of forest have not yet put in place such mechanisms. Numerous challenges remain for indigenous peoples to be able to benefit from this opportunity,

375. Arts 20 et 21 of the Code forestier.

376. 29 July 1997.

377. Rwanda, Ministère des terres, de la Réinstallation et de l'environnement, *Stratégie nationale et plan d'action pour la conservation de la biodiversité au Rwanda*, Kigali, avril 2003, 28-30.



including the manner in which these forests are managed, and prevention measures to avoid the appropriation of such areas by elites, are questions that remain unresolved.

Section 5 of the Forestry Law of Gabon deals with community forestry, which it defines as an area of the rural forest domain allocated to a village community with a view to it undertaking activities for the sustainable management of natural resources on the basis of a simplified management plan.³⁷⁸ A request for the creation of a community forest must consist of documents concerning the community request, including a map of the area in question.³⁷⁹ These requirements may exclude indigenous peoples given their low levels of literacy and the differences in the concepts of community representation between indigenous peoples and others, as well as various forms of discrimination.

378. Art 156 of the *Code forestier*.

379. Art 162 of the Forest Law.

Community forestry in Cameroon

Legal provisions in Cameroon on community forestry are an example of the way in which legislation often does not take into account the specific situation of indigenous peoples, and in some cases, displays a discriminatory attitude towards their ways of life, making it difficult, if not impossible, for them to benefit from that legislation. Since the passing of the Forestry Law in 1994, village communities resident on land considered as part of the national domain in Cameroon have the right to acquire community forests. A community forest is a piece of the forest of the national domain, free from any form of concession for exploitation, with a maximum area of 5000 hectares upon which the State retains ownership of, but can grant management rights to a village community for a renewable period of 25 years. The Agreement between the beneficiary community and the State is accompanied by a simple management plan according to which all activities in the community forest will be undertaken.


All forest products from the community forest are the sole property of the community (Articles 37(3) and 67(2)). Exploitation of those products can be done directly or through a form of sub-contracting (Article 54). Despite these provisions, the conceptual, legislative and practical framework for community forestry is problematic for indigenous peoples for the following reasons:

- One of the preconditions for the acquisition of a community forest is the designation of a legal representative institution of the community. In addition, the request for a community forest is complex and has a number of technical requirements, including a map of the area and a management plan. The 'Pygmy' communities do not generally have sufficient education to be able to fulfil these conditions.
- Community forest cannot be acquired unless the community making the request has preexisting customary land rights. In general, 'Pygmy' communities living along roads do not have any customary rights to land, as it is the Bantu communities who are in possession of these rights. In the Permanent Forest Reserve, where the 'Pygmies' would be most likely to claim customary rights, the law does not authorise community forests. Thus, the 'Pygmies' are largely excluded from the beneficiaries of such rights.
- The maximum possible size of a community forest is 5000 hectares. This is inadequate for 'Pygmy' communities who often use larger areas for their subsistence activities and are nomadic or semi-nomadic.

Communities are entitled, under this legislation, to collect some forest products without authorisation, although such products must be for personal and not commercial use. For indigenous peoples in particular, given that the main income they generate is from the sale of forest products such as firewood, game, Njansang (*Ricinodendron heudelotii*), honey, bamboo and medicinal plants, the prohibition on the sale of such products poses significant problems.

Within the context of the Conservation of Natural Resources Project of the CAR, which has contributed to the establishment of the Special Dense





Forest Reserve of Dzanga Sangha, some attempts have been made to associate local and indigenous communities. For example, Decree 93/13 which created the Sangba pilot zone makes reference to local populations in Article 3:

The Pilot Zone of Sangba has as its goal to identify, to test and to promote diverse methods of rational utilisation of renewable natural resources in order to guarantee, from the perspective of sustainable development, concrete advantages to the benefit of the populations following the preservation activities put in place in the Northern region. (*La Zone Pilote de Sangba a pour but d'identifier, de tester et de promouvoir les modes divers d'utilisation rationnelle des ressources naturelles renouvelables afin de garantir, dans une optique de développement durable, les retombées concrètes au bénéfice des populations à la suite des actions de préservation mises en place dans la région Nord.*)

Article 4 of this Decree states the following:

The proposed activities will be conducted in collaboration with the riverine populations in order to secure their agreement about and participation in development activities in that region. (*Les activités proposées seront menées en étroite collaboration avec les populations riveraines afin d'obtenir leur adhésion et leur participation aux actions de développement de ladite région.*)

Relatively rare in the African context, one of the specific objectives of the Special Reserve of Dzanga Sangha is to address the needs of local populations in terms of a rational and sustainable use of natural resources. The Development Committee of Bayanga was created with a view to the representation of the interests of local populations in the general organisation of the Reserve. However, '... as in the case of the zones cynégétiques villageoises, the comité de développement of the Bayanga remains a creation of the administration of the reserve, which organises it and keeps it operational'.³⁸⁰

380. '... comme dans le cas des zones cynégétiques villageoises, le comité de développement de Bayanga reste une création de l'administration de la réserve qui l'organise et le fait fonctionner' (GTZ, *Étude ressources naturelles* 24).

The CIB (*Congolaise Industrielle des Bois*) is one of the world's largest logging companies and that it has big logging concessions in the Republic of Congo and that several of their concessions have received FSC (Forest Stewardship Council) certification for sustainable logging thereby committing the CIB to respect the rights of indigenous peoples. A new initiative undertaken by the CIB includes addressing issues of occupation and use of land by the Mbendjellé indigenous people, within the context of forest conservation plans. Although this practice remains far from a legal guarantee of land rights of this group of indigenous people, sacred sites, as well as other culturally important territories have been identified within the context of the CIB's programme, and can be spared from industrial exploitation. In accordance with the UFA Conservation plan at Kabo, 296 000 hectares are reserved for the exclusive use of indigenous Mbendjellé people and their sacred sites. This is an almost unique practice within the sub-region, and could lead to stronger legal recognition of their rights to lands and resources.

In Cameroon, as in other countries, indigenous communities are extremely dependent on natural resources for their survival. The 1993 Forest Policy foresees a larger involvement of local communities in forest management. The Forest Law of 1994 contains provisions concerning the manner of the association of local communities to this end, as well as concerning community forestry and hunting, and the duty on industrial forest exploitation.

However, it has been observed on numerous occasions that the provisions put in place to protect local communities' rights to management of certain resources are not operational, particularly in the case of the 'Pygmies', as they do not take into account their cultural specificities, and are effectively ignored at all stages of the process. The definition of the size of the area available for exploitation does not take into account their hunting grounds, or their seasonal migration zones. The only criteria that are applied to the definition of land area are based on economic, and not social or cultural considerations.


In the Democratic Republic of Congo, the Forest Code³⁸¹ provides for customary use rights, albeit limited rights, to natural resources:

*les droits d'usage forestier des populations vivant à l'intérieur ou à proximité du domaine forestier sont ceux résultants de coutumes et traditions locales pour autant que ceux-ci ne soient pas contraires aux lois et à l'ordre public.*³⁸²

This could constitute an opportunity for indigenous peoples, were indigenous peoples not also faced with the challenge of having their own villages recognised in their own right. In general, they are considered only as a part of existing Bantu villages, and the idea of a village does not fit with the lifestyles of indigenous peoples. Thus, they are not able to benefit fully from the provisions of the Forest Code.

381. Law No. 011/2002 of 29 August 2002.

382. Art 36 of the *Code forestier*: 'the rights to use of the forest of the populations living inside or in the proximity of the forests are the result of local customs and traditions in so far as these are not contrary to the laws or the public order.'



The Forest Code distinguishes classified forests, protected forests and permanent productive forests. Protected forests are all those which are not assigned for a particular purpose, and are not classified forests. It is within these areas that the most extensive use rights are in place for local communities (including indigenous communities). The distinction between these two types of forest is important for indigenous peoples, in terms of assuring that their traditional lands are not transformed into classified forests and their use rights severely restricted. Permanent production forests are part protected forests that are conceded following a public inquiry, and rendered exploitable. The majority of such areas constitute concessions, with use rights in accordance with certain limitations. Pursuant to Article 84 of the Forest Code a contract for a forest concession should be preceded by a public inquiry. However, the public inquiries associated with this process do not sufficiently take into account the use and occupation of lands by indigenous peoples, or indeed the question of payment of compensation when concessions are granted on their lands.

The right to benefit in revenues from forest exploitation is another issue that is linked to the right to use forest resources. The Forest Code does not address the specific situation of indigenous peoples, but does provide for some rights of local communities in this regard:

the construction and the management of the routes, the provision of food, equipping hospitals and social installations, the facilities for transportation of persons and goods (*la construction, l'aménagement des routes, la réfection, équipement des installations hospitalières et sociales; les facilités en matière de transport des personnes et des biens.*)

Another matter of concern for indigenous peoples is the manner in which forest revenues and taxes are distributed. In accordance with the Forest Code, 40 per cent of such revenues are granted to decentralised administrative entities, and 60 per cent to the public treasury. Of the 40 per cent intended for decentralised administrative entities, 30 per cent goes to the province, and 15 per cent to the local administration in the area the exploitation is taking place. As there is no official indigenous peoples' territory, and indigenous peoples are not represented at communal level, it is unlikely that indigenous peoples will benefit from these provisions, or that such provisions can achieve their stated goal of poverty reduction in forest areas, unless attention is paid to the poorest communities.³⁸³

In the Republic of Congo, the 2004 Land Law does not recognise customary possession rights, but use rights only, which are governed by Article 41. As with the legal provisions on use rights in a number of other countries, the right to commercialise the products of the exercise of these use rights, is severely limited to personal use rights, and commercialisation is prohibited, as it is by Article 37 of the Forest Code of DRC.

In legal terms, there are several aspects of use rights as foreseen by the Forest Code that are unclear. Firstly, the Code does not clearly define who is entitled to such rights. The Code speaks of local populations, without specifying exactly what this means, which could be of great concern to communities such as indigenous peoples in Congo that are extremely dependent on forest resources. Secondly, use rights are very limited and apply only to certain forest products that are determined by public

383. AK Barume 2003, *Le nouveau code forestier congolais et les droits des communautés des forêts*, Rainforest Foundation www.rainforestfoundationuk.org/files/DRC%20Code%20and%20communities.pdf (accessed 30 November 2008).

authorities, that cannot be commercialised, and doing so constitutes an offence according to Article 143. Thirdly, the Code does not foresee the participation of local communities in any of the benefits of forest exploitation.³⁸⁴ Nor are any measures foreseen to guarantee access to the employment generated by forest exploitation. Logging companies do undertake socio-economic interventions for the benefit of local populations, but there is no obligation to aim any of these specifically at indigenous peoples, the result of which is that indigenous peoples are largely ignored at the expense of measures put in place for Bantu villages, which they form part of.

Law No. 48/83 on the conservation and exploitation of wild fauna regulates hunting activities. This framework places restrictions on the kinds of animals that may be hunted, despite the fact that there may be cultural reasons for doing so. This framework also ignores the existing methodologies and skills that indigenous peoples have practiced for centuries for the conservation of their environment. The 1993 Act that created the Nouabalé-Ndoki National Park even states that all use rights within that area are cancelled, including the clearing of land, cutting of '*bois vivants*', collection of dead wood, and traditional hunting.³⁸⁵

The Forestry Law of Gabon provides that all national forest domain constitutes the exclusive property of the State.³⁸⁶ Such forests are divided into two categories: (1) Permanent forest – consisting of those forests reserved for exploitation, or conservation, by the State; and (2) rural forest – consisting of forests that can be used for various reasons, including community forests. The Law, therefore, only recognises use rights and does not recognise any property rights of local communities to their ancestral forests. Use rights are determined by various regulations³⁸⁷ and Article 252 of the Law, for example, provides for use rights to cover wood for construction, firewood, non-timber forest products, latex, hunting and fishing for traditional purposes (*artisanal*), and other specified forest products. Thus, again, use rights are limited, as is the scope of their application. For example, use rights in rural forest areas are free, but extremely restricted in permanent forests.³⁸⁸ In addition, their exercise may be restricted by ministerial decision, which reveals the legal insecurity that users of forest products face.

In Gabon, as in other countries in Central Africa, the traditional lands of indigenous peoples are forest lands. Gabon has expressed the intention to diversify its economy through increasing revenues from forestry.³⁸⁹ Within this context, Gabon has adopted an Indigenous Peoples Development Plan, which, among other things, expresses the intent to demarcate indigenous peoples' lands, and provide compensation to them for lost lands, in addition to ensuring their participation in forest management.

384. Art 92 of the Code.

385. *Rainforest Foundation et OCDH, 2006*, p. 6 see : www.rainforestfoundationuk.org/files/droits_autochtones_final.pdf (accessed 30 November 2008).

386. Art 13 of the *Code forestier gabonais* - Law No. 0016/01.

387. Art 14 of the *Code forestier gabonais*.

388. Art 253 of the Forest Law.

389. To carry on these reforms and coordinate partners' interventions, Gabonese authorities decided to establish a Sectoral Forest, Fishing and Environment Programme (SFFE). This programme is an important element of the national strategy of poverty reduction. The SFFE is expected to increase the sustainable contribution of sectors such as forestry, fishing, nature conservation and the environment to the Gabonese economy.



Mining

National constitutions usually provide that that sub-surface resources pertain to the State. One of the challenges for indigenous peoples, and for any legal framework for the protection of their rights, is to ensure their adequate consultation prior to the consideration of any exploitation of such resources, and their participation in the benefits of such exploitation.

The Mining Code of the DRC provides for direct benefit from the revenues from the exploitation of certain substances for the State, the province, and the territory concerned by the exploitation. Again, however, this rarely implies that indigenous peoples will gain any benefit from this, as again, indigenous peoples are not represented at the communal level. However, this law does contain provisions that could be considered as entry points for indigenous peoples, as a number of their ancestral lands contain mineral resources, such as is the case in the Kahuzi Biega National Park.

Article 63 of the Mining Code of CAR³⁹⁰ addresses the principle of rights conferred by anteriority, including for local communities. It also addresses the need for consultation of local authorities and communities concerning anterior rights before issuing mining permits.

In Chad, there are no legal provisions that foresee consultation with local populations that are likely to be affected by mining operations, or indeed by the exploitation of natural resources in general. Only the Law on the management of petrol revenues foresees an allocation of 5 per cent of the profits to territorial collectives in the region of production.³⁹¹ It is also worth noting that the populations of the oil-producing regions of the country are not represented in the body that is responsible for the monitoring of petrol revenues.³⁹²

7.6 Conclusion

Colonial law created new forms of land regimes and laws that were often alien to Africans. In particular, the institution of individual land rights, as well as the vesting of lands customarily owned by indigenous peoples in the State, or the devalorisation of communal land rights, had a profound effect on the rights of indigenous peoples. Such new land regimes also ranked agriculture, and individual land tenure, over collective, nomadic land use, including pastoralism and hunting-gathering. Many of these values and land regimes were adopted, with some modifications, at independence. Further, with the introduction of conservation measures for protected areas and environments, the role of indigenous peoples in conserving and managing such lands was undervalued. Some of the main issues and challenges for the rights of indigenous peoples, associated with land regimes in African countries, are:

- The pre-eminence of individual land rights over collective rights.
- Attitudes to indigenous forms of land use – in particular nomadic pastoralism and hunting and gathering, whether nomadic or semi-nomadic – are generally that such forms of land use are

390. Ordinance No. 04/001.

391. Art 8 de la Loi n°001/PR/99 du 11 janvier 1999 (modifiée par la Loi n°016/PR/2000 du 1er août 2000).

392. Le Collège de Contrôle et de Surveillance des Revenus Pétroliers (CCSRP). Art 16 de la Loi n°001/PR/99 du 11 janvier 1999 (modifiée par la Loi n°016/PR/2000 du 1er août 2000).

unproductive and thus invalid as claims to land rights, leading to efforts to sedentarise pastoralists and individualise their lands. However, the situation is less severe for a minority of pastoralists, in some cases, where as can be seen above, the economic value of pastoral activities is recognised and pastoralists have some influence in decision-making affecting their lands.

- Governance is a key issue that is directly linked to the rights of indigenous peoples to their lands. As can be seen from the above discussion, in many cases, the local entities to which indigenous peoples' lands are entrusted, or those entities (villages or traditional authorities) who have specific rights to lands, most often do not include indigenous peoples or their traditional authorities. In a number of countries, indigenous peoples' own villages are not even recognised in their own right, but only as 'attachments' to other villages, thus placing severe restrictions on their ability to own, possess and use land.


Many African countries recognise *customary rights* as a form of rights to land. This is an important entry point for indigenous peoples. Customary law often exists side-by-side with written law, and often, national legislation takes into account customary rules as regards land rights. In addition, in a limited number of cases, customary rules existing side-by-side with national law and recognised in legislation allow for both collective and individual rights to land, although in most cases, such rights are not full ownership rights, and only consist of either possession or use rights. This is particularly the case for countries in the Central African region.

A number of the countries analysed in the context of this study also have either constitutional or other legal provisions that recognise some *collective rights* to property and lands. In many of these cases, a direct link is made to customary law, where there is a pluralist system that recognises both written and customary law. However, due to the fact that indigenous peoples' methods of land use are often considered outdated, for example with a national emphasis on the promotion of agriculture, as opposed to recognising activities such as pastoralism and hunting and gathering, and there may be little evidence of active occupation of a given area, the assumption may be made that indigenous peoples' lands are not used 'productively'. This could be considered to constitute a form of discrimination against indigenous peoples' forms of land use and traditional occupation. Furthermore, there is rarely an established legal right for collective ownership of land. Where arrangements for collective land rights do exist, they tend to be weaker forms of rights.

For indigenous peoples in particular, who rarely possess land titles – as individuals or as communities – customary law could be an avenue through which some of their land rights could be addressed. Indeed, there are legal frameworks and provisions in a large number of countries that could be directly beneficial to indigenous peoples. However, these potential benefits are often lessened by factors such as the following:

- In most national contexts, where customary occupation or use of land confers rights to individuals or communities, those rights are rarely, if ever, in the form of ownership rights, and are at best use or possession rights which means that the communities or individuals in question remain in a precarious position as regards land security.



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- In many instances, the condition that land either has to be visibly occupied, or used ‘productively’ in order for a claim based on customary use or occupation to be made possible, puts indigenous peoples at a clear disadvantage, as a large proportion of these peoples are nomadic or semi-nomadic, leaving few visible traces of land use, there is an obvious need to address the inadequacies of national legislation and rules regarding recognition of customarily occupied and used lands to ensure that indigenous peoples’ methods of land use are duly recognised.

Thus, the legal and practical challenges of securing collective land rights for indigenous peoples can be summed up as follows:

- The requirement that indigenous communities should have legal status before being able to claim collective rights to lands prevents many indigenous communities from being able to enjoy the rights provided in national law. If indigenous peoples cannot form legal entities, this means that it is impossible for them to have collective rights to land. In some instances the only manner in which indigenous communities can register as legal entities is to form cooperatives or other such associations, which do not reflect their institutions or traditional structures as a community.
- In many circumstances, the possibility to claim collective land rights is dependent on indigenous peoples being able to show a ‘productive’ use of land. The concept of productivity is based on the idea of sedentary agriculture, and fails to take into account the land use methods of indigenous peoples, as well as their important role in the protection of the resources on the lands which they occupy or otherwise use.
- In most cases, the kinds of rights available to collectives are not full ownership rights. They are either rights where the land is entrusted to an association, legal guardian, or community representative. This may be in conflict with traditional management and decision-making structures in indigenous communities.

As regards natural resources, most Constitutions vest these in the State, and use rights are the main form of rights that indigenous communities can exercise. In forest areas, in particular in protected areas, use rights are also, often severely, restricted, as are rights to hunt. Based on the recognition in some States of customary occupation and use of lands and resources, however, in many cases, such customary occupation is difficult to prove.

However, as has been demonstrated, positive entry points can be found whereby indigenous peoples can use existing customary claims as a basis for more formalised land and resource rights. Some examples are:

- Arrangements in some countries for the recognition of pastoralism. For example, in Burkina Faso and CAR, the legislation for territorial collectives or stipulations in the law that pastoralist organisations should be consulted on land use, can be entry points for the further protection of their lands. The draft National Land Policy in Kenya also recognises some tenure rights for pastoralists, as does the draft Pastoral Code in Niger, which civil society – including pastoralist organizations – have been active in help elaborating.
- Community forestry mechanisms in Cameroon, CAR, DRC and Gabon, for example, have been instrumental in allowing the use of

natural resources by indigenous peoples. These could be of great use to indigenous peoples, and may eventually serve as a basis for the consolidation of their land rights.

- A number of benefit sharing arrangements also exist, in particular in forest areas, that could serve as examples to be followed in other countries. These include the CIB's benefit sharing arrangements with local communities in Congo.



8 Socio-economic rights

8.1 Introduction

Indigenous peoples constitute one of several groups across the African continent that have been, and continue to be, subjected to gross socio-economic human rights violations. Some of them have been evicted from lands they regard as their traditional homes and with which they have a special connection. Over the last few recent years, international law and actors have been responsive to the plight and concerns of indigenous peoples worldwide, in particular those from Africa. This responsiveness has echoed in the adoption of a specific body of law aimed at the promotion and protection of the rights of indigenous peoples. Of those rights, socio-economic rights can be identified as critical to the survival and well-being of African indigenous peoples.

8.2 International law

A number of international law provisions, both globally and regionally, can be identified as guaranteeing the socio-economic rights of indigenous peoples.

The ICESCR provides for the right to self-determination.³⁹³ Even though the rights provided in the ICESCR are to be realised progressively, it sets out specific obligations on States under the monitoring eye of the CESCR. The ICESCR framework is further strengthened by CRC³⁹⁴ and CEDAW,³⁹⁵ which provide for special socio-economic rights of children and women, including those from African indigenous communities.

Furthermore, CERD contains an important provision that can be considered central to the protection of the socio-economic rights of indigenous peoples.³⁹⁶ Article 5(e) of CERD calls upon States to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour to equality before the law, notably in the enjoyment of economic, social and cultural rights. Even though CERD does not define the term 'race', which is essential in pursuing indigenous socio-economic rights, the CERD Committee in General Recommendation No. 8 attempts to identify membership of a particular group on the basis of 'self-identification by the individual concerned' as belonging to a particular group. In General Recommendation No. 23, the CERD Committee underlined the link between the socio-economic situation in which indigenous peoples find themselves and the deprivation of their lands and territories by the State enterprise and commercial companies. It further requires of States to provide indigenous peoples 'with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics'.³⁹⁷

Of particular importance is ILO Convention No. 169, which sets out a normative framework and responsibilities of States when undertaking

393. Art 1 of ICESCR.

394. See Arts 23, 24, 25, 26, 27 and 28.

395. See Arts 11, 12, 13, 14, 15 and 16.

396. Art 5(e).

397. CERD Committee, General Recommendation 23, Rights of Indigenous Peoples, (fifty first Session, 1997) UN Doc A/52/18 Annex V at 122 (1997) para 4(c).

development projects affecting indigenous peoples. States are called upon to adopt specific measures to ensure that the rights to social security, health and education of indigenous peoples are realised. It further recognises that indigenous peoples should, as far as possible, be allowed to exercise control over their own economic, social and cultural development.³⁹⁸ Although none of the African States has so far ratified this Convention, the fact remains that this instrument constitutes an inspiration and reflects trends towards protecting indigenous rights globally and in Africa. Arguably, the fact that these aspirations and trends are today universally shared has been evidenced by the adoption of UNDRIP.³⁹⁹ Another ILO Convention of relevance in this area is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which addresses discrimination in employment and occupation including the traditional occupations of indigenous peoples, and may also cover their access to education as well as land issues related to the exercise of traditional occupations. The Forced Labour Convention, 1930 (No. 29) is also of direct relevance.

Designed to tackle particular issues relevant to Africa and taking into account the African cultural context, the African Charter recognises and protects the collective rights through the use of the word 'peoples' within which indigenous peoples fall. Thus, most socio-economic rights provided for in the African Charter can be invoked by indigenous peoples, in particular those with particular reference to indigenous peoples and sustainable development.⁴⁰⁰ In addition to the right to self-determination,⁴⁰¹ which the African Commission has interpreted restrictively,⁴⁰² the African Charter enshrines from Articles 14 to 25 an arsenal of socio-economic rights, which are of great relevance to indigenous peoples, individually and as a people. These include the right of people to freely dispose of their natural wealth, where they are dispossessed to recover and get full and adequate compensation, and to benefit from the advantages derived therein. Of particular significance is Article 22, which guarantees the right of peoples to economic, cultural and social development along with the rights to property (Article 14), which may equally include intellectual traditional property, the right to work equitable and satisfactory conditions (Article 15), the right to the best attainable state of physical and mental health (Article 16) interpreted as encompassing the rights to food, housing and safe environment, and the right to free education and cultural life (Article 17).

The African Charter is supplemented and reinforced by the provisions of the Protocol to the African Charter on the Rights of Women in Africa,⁴⁰³ and the African Charter on the Rights and Welfare of the Child,⁴⁰⁴ which take specifically into consideration the socio-economic needs and concerns respectively of African women and children, including those from indigenous communities.

398. Art 7(1) of ILO Convention No. 169.

399. Adopted by the UN General Assembly on 13 September 2007.


400. See Arts 21, 22, 23 & 24.

401. See Art 20.

402. Communication No. 75/92 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

403. See Arts 12 (Education), 13 (Economic and social welfare), 14 (Health and reproductive rights), 15 (Food security), 16 (Adequate housing), 17 (Adequate cultural environment), 18 (Healthy and sustainable environment) and 19 (Sustainable development).

404. See Arts 11 (Education), 12 (Leisure, recreational and cultural activities), 13 (Special assistance to handicapped children) & 14 (Health and health services).



This wealthy corpus of socio-economic rights, in particular those of indigenous peoples, are primarily meant to be implemented on the domestic level *inter alia* through constitutional, legislative and administrative measures. However, these international standards have not necessarily been implemented with uniformity in all African countries. This resulted in discrepancies in the enjoyment by African indigenous peoples of the socio-economic rights globally and regionally guaranteed. Nevertheless, there could remain some similarities that can allow identifying the main trends across Africa.

8.3 National trends

While implementing international standards on indigenous peoples' socio-economic rights through constitutional, legislative and administrative measures, every African country tends to respond to its own political, social, economic and cultural context. Given that those contexts differ from one country to another, the level of implementation of international standards may also differ from one country to another. However, it is possible to identify certain trends in the protection of indigenous peoples' socio-economic rights in Africa.

Lacking the basic necessities of life

In most African countries, indigenous peoples are regarded as less developed and less advanced than other social and cultural groups in society, and economically unproductive. These perceptions subject them to discrimination, domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. In practice, indigenous peoples form part of the poorest and socio-economically most deprived segments of the societies in which they live. Indigenous peoples are almost uniformly poorer than members of other ethnic groups in the States of the region. Nomadic groups such as the Tuareg lack hospitals and veterinary services for their camels, on which they rely for their survival, and are excluded from developmental programmes. All aspects of indigenous peoples' development are hampered by this situation of extreme deprivation and exclusion. However, it should be noted that many African countries increasingly acknowledge that their respective indigenous peoples constitute 'marginalised' and socio-economically 'vulnerable' groups requiring special attention and protection, although their specific approaches to this question differ greatly.

The recognition of the economic vulnerability accompanied by special protection measures is observed in Cameroon and Namibia (mobile medical clinics), in Nigeria (Community Sensitisation Empowerment), in Namibia (San Development Programme) and in Egypt (the adoption of the Social Security Law No. 30 of 1977 establishing limited financial support to needy families including mainly indigenous communities). In Ethiopia, the 2005 PASDEP has clearly recognized that both 'human development indicators and poverty among [pastoralists] group are uniformly worse than elsewhere in the country, and they have proven difficult to reach with traditional services'.

Further, while the above special measures are designed to offer special protection to indigenous peoples because of their economic status, access to socio-economic rights is further almost uniformly protected under the principle of non-discrimination. At least at the legal and policy level, it is

widely guaranteed that the State should not discriminate against any group of citizens, chiefly indigenous peoples, in providing access to public health, clean water, housing, food and social security. The non-discrimination principle also protects one's free choice to engage in economic activity and to pursue a particular livelihood, guaranteeing thus State's non-interference with the lifestyle of indigenous peoples.

A very visible effect of indigenous peoples' socio-economic deprivation is thirst and malnutrition. Some of the affected countries have drafted Poverty Reduction Strategy Papers (PRSPs), in which measures for poverty-eradication related to malnutrition are proposed. Although indigenous peoples make up part of the 'poor' and the 'indigent' mentioned in most of these PRSPs, they are only occasionally explicitly mentioned as a constituent part of the poorest echelons of society.

The PRSP of Burundi mentions the Batwa by name, identifying them as living in a situation social and cultural deprivation and exclusion. The PRSP was prepared in consultation with representatives of the poorest in the society, including the Batwa.


The principle of the justiciability of socio-economic rights allows these rights to be invoked directly in courts. Although this principle has not been recognised in most States, it may favour the enforcement of the socio-economic rights of indigenous peoples. The Constitution of South Africa, supported by groundbreaking jurisprudence,⁴⁰⁵ is explicit concerning the justiciability of socio-economic rights, and the Constitution of the DRC echoes the African Charter's approach of not classifying human rights into the two traditional generations. This position provides the possibility of successful judicial enforcement of the socio-economic rights of indigenous peoples. This would arguably apply to other civil law countries where the provisions of the African Charter can be directly enforced in domestic courts through the mechanism of direct application. Even in those countries where socio-economic rights are explicitly set under the section on non-enforceable fundamental objectives and directive principles of State policy, there have been interesting positive developments towards judicial enforcement of socio-economic rights based on the State's international commitments.

Housing

In traditional indigenous societies, housing and shelter was not an issue of concern. As indigenous people lost their traditional land, and their access to natural resources became more restricted, problems of insufficient housing started arising. At the principle level, only the Constitutions of Namibia (Article 95), Burkina Faso (Article 18), South Africa (Article 26) and Ethiopia (Article 90(1)) explicitly provide for the right to adequate housing for all citizens. The South African Constitution (Section 27) seems to encompass all aspects guaranteeing indigenous peoples' right to adequate housing in that it guarantees not only access to housing but also protection from unlawful eviction. However, no policy measures have been adopted in South Africa to give full effect to the abovementioned constitutional provision.

405. See, *inter alia*, *Government of the Republic of South Africa v Grootboom & Others* (1) SA 46 (CC); *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC); *Treatment Action Campaign v Minister of Health and Others* 2002 4 BCLR 356 (T).





There are some examples of programmes that deal with the housing problems of indigenous peoples, especially when they become displaced and no longer live in traditional settlements. The government of Namibia has made housing one of its development priorities to bring about development through the Build Together Housing Programme, dealing *inter alia* with rapid urbanisation and migration into urban areas by creating reception areas (Incremental Development Areas). The merits of this programme lie in the government's effort to tackle the need for housing of the most vulnerable of the country. Similarly, the Rural Areas Dwellers Programme (RADP) set up in Botswana to assist all citizens living in remote areas, including indigenous people, with the establishment of organised settlements, the provision of basic education and the allocation of land.⁴⁰⁶ These two examples, which can be followed by other African countries, demonstrate clearly the government's political will to promote indigenous people's access to the socio-economic right to adequate housing. However, such programmes are not appropriate for nomadic peoples and forest dwellers. Their housing needs pose different sets of problems.

Health care

In so far as can be reliably established, the health indicators of all indigenous populations are inferior to those of other members of society. These indicators include maternal mortality rates; infant mortality rates and vaccination rates. Because they live in rural areas, indigenous peoples do not generally have access to safe drinking water. Traditional reliance on water sources has been compromised by development projects, including logging and deforestation, the effects of climate change, as exemplified in the desertification of the Sahel. This state of affairs further exposes indigenous peoples, in particular children, to disease.

A limited number of States guarantee the rights associated with health. Article 95(a) and (e) of the Constitution of Namibia obliges the State to enact legislation to ensure the health needs of the people and to provide access for every citizen to public facilities including health facilities. In the same vein, Section 27 of the South African Constitution provides that everyone has the right to have access to health care services, including reproductive health care. This provision is echoed in Article 26 of the Constitution of Burkina Faso; and as part of the Directive Principles of State Policy in the Nigerian Constitution. In Kenya, as in many other countries, the legal protection of health is based on a number of laws including the Public Health Act (Cap 242), Mental Health Act (Cap 248) and the Malaria Prevention Act (Cap 246).

As far as the actual implementation of those legal provisions are concerned, very few African States have adopted a medical policy aimed at affording regular medical attention to their indigenous peoples.

In sub-Saharan Africa, including areas where indigenous peoples live, the issue of health is closely linked to that of HIV. Due to a number of risk factors, indigenous peoples may be at a greater risk of infection. Indigenous women are often victims of unwanted sexual attention, sexual assault and rape. Their disproportionate levels of poverty may cause them to engage in

406. L Tshireletso 'Participatory Research: A Development World Research Paradigm for Change' in S Saugestad (ed) *Indigenous Peoples in Modern Nation-States Occasional Papers Series A No. 90*. 141-147.

sex work. A recent study has further shown that the spread of HIV among indigenous communities is fuelled by logging in the forests of the Central African Equatorial region.⁴⁰⁷ Despite these indications of elevated risk, there is very little disaggregated data about HIV prevalence rates among these groups in any of the States under examination. Although States all have national HIV and AIDS programmes and strategic plans, the particular position of indigenous peoples is mostly neglected.

Mobile health clinics are found in Namibia, Cameroon and Kenya. Indigenous peoples are further empowered with the necessary knowledge on how to better deal with devastating diseases such as HIV/AIDS, tuberculosis and malaria. Sensitisation includes preventative action, such as those initiated by the Ugandan Government to tackle the HIV/AIDS problem amongst the Batwa. The Government of Botswana have applied the same approach by using radio broadcasting.

Failure to protect workers' rights, forced labour

With their traditional modes of production increasingly coming under threat due to natural disasters and the pressures of modernising economies, more and more indigenous peoples are entering into non-traditional forms of employment. This is particularly true of the Batwa and other 'Pygmies' in the Central African region. 'Pygmy' workers almost exclusively work in the informal sector of the economy, without the security of a contract, and are frequently paid less than other workers and often expected to work longer hours. A relationship of personal debt ('bondage'), often spanning generations, in some cases lead to situations of forced labour or servitude. This is particularly the case in respect of the youth and men and women who work on the plantations of their Bantu neighbours. Of particular concern is the situation in the Congo, Cameroon, the DRC and Gabon, where Bantu populations are known to exploit indigenous peoples' economic vulnerability. Indigenous children are disproportionately exposed to hazardous conditions of work.

The main trend concerning workers' rights is the unanimous proscription of forced labour and hazardous child labour. As a result these and other countries have strictly outlawed forced labour and hazardous child labour. In a number of countries, this proscription is enshrined constitutionally. For example: Article 25 of the Ugandan, Section 13 of the South African and Article 26 of the Congolese Constitution provides that no person shall be required to perform forced labour.


In other States, legislation dealing with the issue has been adopted. Article 2(3) of the Cameroonian Labour Code prohibits forced labour '*de façon absolue*' (completely or absolutely). The Congolese Labour Code of 1975 also criminalises forced labour,⁴⁰⁸ as does the Gabonese Labour Code.⁴⁰⁹ Article 3 of the DRC Labour Code domesticates international law by abolishing the worst forms of child labour.

407. C Laurent, A Bourgeois, M Mpoudi, C Butel, M Peeters, E Mpoudi-Ngolé *et al* 'Commercial logging and the HIV epidemic, rural Equatorial Africa' *Emerg Infect Dis* (2004) Nov Available from <http://www.cdc.gov/ncidod/EID/vol10no11/04-0180.htm> (accessed 30 November 2008).

408. Art 4, read with Art 257.

409. Art 4 of the 1994 Labour Code.





However, these constitutional and legislative provisions are not effectively enforced in all these States. Neither international law nor domestic law has been utilised as a means to redress this pervasive social ill. One reason for this recurring problem is the negation of the existence of the problem, often informed by a dearth of reliable information. Furthermore, and in particular for the 'Pygmies' the issue of forced labour is linked directly to discrimination and marginalisation by other groups, leading to a situation in which those subjected to this practice are virtually powerless to address it. Another reason relates to the insufficient access to justice, a topic which is elsewhere discussed more fully.

Intellectual property rights

Over the past years, African indigenous peoples have suffered from 'an intellectual hijacking' of their traditional knowledge due to intellectual property theft organised by individuals and private companies involved in the media, manufacturing, pharmaceutical and other industries.

In response, a number of governmental efforts have responded to this phenomenon by enacting legislation or disseminating information or else by setting up special agencies to promote and protect the intellectual rights of the indigenous. This has been the case in the Central African Republic where Act No. 06/002, Act on the Cultural Charter of the Central African Republic, poses the principle of '*interdiction d'exploitation et/ou d'exportation des traditions orales des minorités culturelles de Centrafrique à des fins commerciales*' (the prohibition of the exploitation for commercial purposes of the oral traditions of cultural minorities of the CAR). By banning the exploitation or exportation of oral traditions of cultural minorities of the CAR, this State endeavours to protect traditional knowledge. Other promising developments include the following: Apart from providing for the right to health in the Bill of Rights, the Wako Draft Kenyan Constitution recognises indigenous knowledge and intellectual property rights and seeks to support and promote them.⁴¹⁰ A Traditional Medicine Action Plan (2004) has also been adopted aimed at recognising and protecting traditional healers and medicines. Likewise, the Gabonese government have set up a national institute tasked with promoting traditional therapeutic practices and medicine.

A close proximity to and dependence on natural resources facilitated the development by indigenous peoples of traditional medicines. The San of South Africa have for generations used the *Hoordia gordonii* plant to suppress hunger. Through the assistance of the Working Group on Indigenous Minorities in Southern Africa (WIMSA), a non-governmental organisation, the San were able to demand and share profits on a patent of the plant by the Council for Scientific and Industrial Research. The South African San Institute (SASI) was also able to negotiate a share of profits of San rock art heritage in KwaZulu-Natal. During his mission in South Africa the UN Special Rapporteur on Indigenous Peoples called upon the State to protect through law the intellectual property rights of indigenous communities, such as the case of 'commercial exploitation of *Hoodia gordonii* plant used by the San, conservation of various rock art and sacred sites that have a special meaning

410. Wako Draft Constitution, Sec 26(2).

for indigenous communities and preservation of traditional medical practices'.⁴¹¹ The South African Traditional Health Practitioners Act was adopted recently to regulate traditional medicine.

8.4 Conclusion

The socio-economic position of indigenous peoples is often very dire. There is a great need for specific concerns related to their position to be explicitly acknowledged and acted upon as an integral part of development plans and strategies. Of particular concern is the vulnerability of indigenous peoples to HIV infection; and the practices akin to forced labour and personal bondage involving the 'Pygmy' in Central Africa.

In attempting to implement their international obligations, several African countries have ended up adopting a number of measures, ranging from constitutional, legislative to administrative, with a view to upholding particularly the socio-economic rights of indigenous peoples. These rights include the right to food, the right to health, the right to social security, the right to housing, the right to education, the right to land, and the right to property including intellectual property. In an example of a positive legal development, the CAR enacted legislation to prohibit the exploitation for commercial purposes of the oral traditions of cultural minorities of that country. Despite some progress over the last decade, indigenous peoples around Africa continue to live in hardship and danger due to a lack of political will to adopt the necessary legal framework for the promotion and protection of the socio-economic rights of indigenous peoples. The inclusion of concern about the Batwa in the Burundian Poverty Reduction Strategy Paper is a good example of what needs to be built upon.

411. Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 101.



9 Gender equality

9.1 Introduction

Gender equality relates specifically to equality of treatment under the law and equality of opportunity. Gender equality is constructed through both society's formal laws and statutes and through unwritten norms and perceptions of what the role of women in society should be. The question of gender is of significance to indigenous people and to indigenous women in particular because in addition to the issues of discrimination and marginalisation that women are generally subjected to, indigenous women are further disadvantaged by socio-cultural and traditional practices and State policies and laws that directly or indirectly discriminate against them as a people and as women.

9.2 International law

Gender equality, non-discrimination and the promotion of women's rights are closely related. Most international instruments contain general provisions prohibiting discrimination on the grounds of sex. Article 3 of the ICCPR for example protects the rights of men and women to enjoy all civil and political rights as set forth in the ICCPR. Article 26 of the same instrument emphasises the equal protection of the law, which is also highlighted by Article 3 of the African Charter. Article 18 of the African Charter further requires States to 'ensure the elimination of every discrimination against women and also ensure the protection of the right of the women and the child as stipulated in international declarations and conventions'. In its Article 10(2), the ICESCR provides more specifically for the protection of mothers for a reasonable period before and after childbirth.

CEDAW guarantees women's rights in general terms and does not mention indigenous women. In its General Comment No. 24, the CEDAW Committee highlighted that different societal factors may determine the status of differently situated women's health rights. For this reason, special attention should be given to specific groups of women, including indigenous women. CEDAW prohibits harmful cultural practices, domestic violence and violence against women.

Article 3 of the ILO Convention No. 169 forbids discrimination on the ground of sex. ILO Convention No. 100 establishes the obligation of States to ensure that women workers receive equal pay for work of equal value. As far as appointments and working conditions are concerned, ILO Convention No. 111 obliges States to eliminate discrimination on a number of grounds, including 'sex'. It also accepts the principle that measures aimed at 'affirmative action' may be adopted to address the needs of groups requiring 'special protection or assistance'.

The African Women's Protocol is the legal framework for women in Africa to use in the exercise of their rights. It is complementary to the African Charter. Like CEDAW, it makes no specific reference to indigenous women. However, most of the rights therein articulated potentially have a direct impact on indigenous women.⁴¹²

412. See, for example, Arts 2, 5 and 17 that can specifically be attributed to indigenous women.

The UN Declaration on the Rights of Indigenous Peoples establishes that all the rights and freedoms in the Declaration are equally guaranteed to male and female indigenous individuals.⁴¹³ In the two most relevant provisions, women are placed in one category with children and other 'vulnerable' groups. States are required to pay particular attention to the 'rights and special needs of indigenous elders, women, youth, children and persons with disabilities'.⁴¹⁴ One issue of overriding concern, violence against women (and children) is specifically highlighted: 'States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.'⁴¹⁵

9.3 National trends

Overall picture of general discrimination and double detriment

Even where women's rights have been formally guaranteed, the reality in each of the countries under study is that women still suffer from many forms of discrimination and marginalisation. As primary care-givers, especially in rural areas, women bear the brunt of poverty, lack of social services and diseases such as HIV and AIDS. Formal protection is often trumped by tradition and custom. Indigenous women suffer from double detriment and discrimination: first, they suffer the discrimination that all women are exposed to, and second, they are subjected to the negative attitudes and practices in respect of all indigenous peoples.

Addressing the need to ensure greater gender equality, most Constitutions of States included in the research protect the rights to equality and non-discrimination as an integral component of gender equality. Discrimination on the basis of sex is generally prohibited in most constitutions. In some instances, 'gender' or other relevant grounds such as 'marital status' are also included. The Constitutions of Egypt, Kenya, Namibia and Uganda prohibit discrimination on the grounds of sex, but do not mention gender. The Nigerian and South African Constitutions prohibit discrimination on the basis of gender and sex, but the South African Constitution goes a step further in addressing and prohibiting discrimination on gender related issues such as pregnancy and marital status.⁴¹⁶

In order to effectively address the situation of indigenous women, the law should acknowledge that their subjugation is extreme and requires the adoption of 'special measures'. However, the likelihood of such measures is very small seeing that the majority of States do not even have generic programmes for the advancement of women. There are a few exceptions. The Constitution of Ethiopia has a clause dedicated to promoting equality for women and which acknowledges the history of gender discrimination.⁴¹⁷ The Namibian Constitution provides for special measures in recognition of the special discrimination that women have suffered⁴¹⁸ and to this extent calls for legislation to be enacted.⁴¹⁹ It follows that it calls for legislation to be enacted which will prevent any further unfair discrimination against

413. Art 44 of UNDRIP.

414. Art 21(2).

415. Art 22(2).


416. As above.

417. Art 35 1-7.

418. Art 23(3).

419. Art 95(1).





women.⁴²⁰ The Ugandan Constitution promotes equality for women generally and in recognition of historical imbalances provides for the right to affirmative action, much like South Africa, Namibia and Ethiopia.⁴²¹

Early and forced marriage

Gender inequality is often embedded within the context of marriage and family relations. Indigenous women suffer from many forms of exploitation and degradation in the context of family law, and, particularly, in marriage. This situation is caused by traditional cultures, which have long been characterised by the harmful practices of early and forced marriages. Among the Maasai of Tanzania, for example, women are often forced into planned (arranged) marriages, often when they are much younger than 18, and often with men much older than themselves.

Most Constitutions protect individuals from discrimination on the basis of 'sex', but only occasionally on grounds of marital status. South Africa's Constitution presents an example of prohibition of discrimination on the basis of marital status. However, in terms of African customary law, women generally do not always enjoy equal status with men due to patriarchy especially in the context of customary marriages. This has been addressed by the Recognition of Customary Marriages Act 120 of 1998 which provides for the recognition of customary marriages. Section 3 of the Act provides for the consent of prospective spouses, aged above 18 years, before a valid customary marriage can be concluded. This is important for indigenous peoples since they rely mainly on customs and traditions, and as such the Act gives indigenous spouses the legal backing of their unions. The law thus ensures that marriages even among indigenous persons are through mutual consent, and outlaws early marriages. Section 6, which provides for the equal status and capacity of spouses who concluded a customary marriage, is an important provision that guarantees gender equality among indigenous spouses. This includes a wife's capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have under customary law.

The Family Code of Ethiopia (Proclamation 213/2000) has a direct impact on the rights and protection of married women. Although the government has amended provisions to ensure equality between the sexes, it remains Federal Law which is not compulsory at the regional level. In most rural areas, mainly among the pastoralists, the traditional and religious system governing family affairs is still dominant and the new family laws have little effect on them.

Indigenous women living in countries with Shari'ah-based family codes often experience conflicts between their way of life, which is often more egalitarian. In Algeria, for example, the *Code de la Famille* (Family Code) allows for polygamy, for the minority status of women, and for a prohibition to marry non-Muslims. All these aspects work against Amazigh culture. In some instances, the dominant Code may also soften Shari'ah law. The Family Code of Morocco, adopted in 2004, for example introduces gender equality as a fundamental principle. Under Sudan's Constitution, both men and women have the right to marry with their free and full consent.⁴²²

420. Sec 9(4).

421. Art 33.


422. Art 15(1) of the Constitution of Sudan.

Property rights and succession

Because indigenous women’s survival often depends on their access to land, their exclusion from access to land has a very harsh effect on them. According to Batwa tradition, property passes to fathers or sons. At the death of a Batwa women’s husband, the widow consequently has no claim to property including land.

Namibia’s Marriage Equality Act provides for marriage in community of property. The Act, together with the Deeds Registry Amendments Act, prevented the sale of commercial land by one spouse without the other’s consent. Moreover, the Land Reform Act No. 5 of 2002 grants women equal rights when applying for rights to communal land. Though the law does not address indigenous women per se, all women including indigenous women are brought under the umbrella of the law. The law prohibits discriminatory practices against women married under civil law, but women who married under customary law continue to face legal and cultural discrimination. Traditional practices that permit family members to confiscate the property of deceased men from their widows and children still exist.





It has been alleged that the Botswana government fails to adopt a culturally-sensitive approach to gender equality which, it is claimed, is demonstrated through its policies towards indigenous peoples. For example, although resettlement of the Basarwa had a negative impact on both men and women, it tended to affect women more profoundly. Amongst Basarwa families, women tended to own small livestock purchased from revenues generated by their trade in handicrafts. However, when the government paid compensation to families for relocation from the CKGR, it tended to give livestock to men because in line with Tswana culture livestock belonged to men. Similarly, when allocating plots of land after the Basarwa's relocation, the Land Boards were reluctant to give certificates to women because in Tswana culture men held the right to land. This was done in disregard of traditional Basarwa culture in which men and women were theoretically equal. In similar vein, Eritrea's Proclamation No. 58/1994 gives every citizen a right to land use without discrimination, though the proclamation's narrow focus on land rights of sedentary communities may leave some indigenous women without recourse.

Concluding his mission to Kenya, the UN Special Rapporteur on Indigenous Peoples called upon the State to review existing discriminatory laws and regulations affecting the property rights of indigenous women particularly those of widows and divorced women.⁴²³

Uganda's Land Act makes provisions intended to enhance the socio-economic welfare of women, especially married women. The Act prohibits the disposition of land on which a person resides with his or her spouse and from which they derive sustenance without the prior written consent of the spouse.⁴²⁴ Any transaction undertaken without such consent is rendered void by the Act.⁴²⁵ It should be noted, though, that the effective operation of this provision has been hampered by the women's powerlessness within the family.⁴²⁶ As is the case with many Ugandan ethnic groups, land inheritance among the Batwa is from father to son.⁴²⁷ In Ethiopia, the 2005 Rural Land Proclamation as well as the land laws issued by some States within Ethiopia have provisions guaranteeing women's right to possess land and give equal rights as their husbands over their land. These provisions of the land laws have been enforced in some parts of the country, but pastoralist women have yet to exercise such right.

Violence against women, including rape

Sexual violence, including rape, of indigenous women by Bantu men has been recorded in many of the States where 'Pygmy' women live. Many factors, such as the limited access to justice and the passive acceptance of these circumstances, contribute to the lack of prosecution of these crimes. In

423. Report of the UN Special Rapporteur on Indigenous Peoples in Kenya, para 119.

424. Sec 39(1)(a).

425. Sec 39(4).

426. See M Nabacwa *Working in gender and development in the Ugandan context*. Paper delivered to students of Gender and Development Policy, University of Wales Swansea, 4 December 2002, revised 1 April 2004, 4.

427. D Jackson (2003) *Twa women, Twa rights in the Great Lakes region of Africa* Minority Rights Group 7.

situations of conflict, exemplified by the situation in the Eastern DRC, indigenous women have been particularly vulnerable. Their vulnerability is exacerbated by beliefs that sexual relations with 'Pygmy' women, who are imbued with mythical qualities, may cure illness, including HIV.

The DRC Constitution prioritises the issue of sexual violence by stating that 'public authorities' must ensure its elimination. This provision is supplemented by legislative enactments in the Criminal Procedure Code and a Law integrating the rules of international humanitarian law pertaining to sexual violence. The 1998 Congolese Law related to the definition and punishment of genocide, war crimes and crimes against humanity defines and renders punishable as 'crime against humanity' both 'rape' and 'sexual slavery'.

A number of countries have adopted Domestic Violence Acts. The South African Domestic Violence Act 116 of 1998 provides that any person may apply to a court for a protection order. If the court is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed an act of domestic violence and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must issue an interim protection order against the respondent. Although this law obviously does not single out indigenous women, it remains a potential vehicle through which they may assert their rights. As with other legal remedies, its effectiveness will depend on its availability in practice and the reality of access to justice. South Africa further established Equality Courts under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. These courts are expected to provide and enhance access to victims of discrimination on any grounds including gender. However, incidences of violence against women in South Africa, particularly from disadvantaged and poor ethnic groups are still rampant.⁴²⁸ Indeed the CERD has called upon South Africa to adopt effective measures 'to address those phenomena of double discrimination, in particular regarding women and children from the most disadvantaged and poor ethnic groups'.⁴²⁹

Namibia also enacted domestic violence legislation. However, violence against women remains a serious concern. In 2008, CERD expressed concern about the high incidence of rape of San women by members of other communities, which seems to be caused by negative stereotypes, recommending the launch of investigations into the allegations, and an increase in efforts to combat prejudices.⁴³⁰

Other countries do not go that far, leaving it to the general criminal law to deal with allegations of sexual or domestic violence. The Egyptian Penal Code (Law No. 58 of 1937) lays down various provisions that penalise sexual violence against women.

Many countries, including Botswana, Kenya and Nigeria, do not have a Domestic Violence Act. The government of Eritrea has not developed any policies or legislation prohibiting violence against women.

428. See CERD Concluding Observations (2006), para 16.

429. As above.

430. CERD Concluding Observations: Namibia, August 2008, UN Doc CERD/C/NAM/CO/12.



Harmful cultural practices

Female Genital Mutilation (FGM) remains an obstacle to women's human rights. This concern extends to women in indigenous communities. According to a research on the position in Nigeria, for example, only the Fulani do not practise FGM, the Ijaw – depending on the local community – practise some form of FGM. FGM is also extensively practiced among numerous pastoralist groups in East Africa, the Horn of Africa and among various pastoralist groups in Western Africa. In Nigeria, there are no federal laws banning FGM. Some States, such as Eritrea, have in recent times banned the practice, but monitoring its implementation is a challenge.

Other cultural practices also impair the dignity of indigenous women. In Congo, for example, a particularly demeaning practice is that of the 'hiring' of an indigenous woman by a Bantu man, for the purpose of giving birth to a child, after which she is returned to her community.

Indigenous women's rights are threatened by the practice of polygamy and women are at risk of HIV/AIDS because they have no say over their own or their husband's sexuality. In Ethiopia, polygamy in rural areas, where most indigenous women live, is still widely sanctioned by regional States. In Nigeria, polygamy is prevalent in indigenous and local communities; women are often abandoned by their polygamous husbands and left with sole responsibility of looking after the children. Polygamy is criminalised for those who first marry under the Western style colonial marriage statute, but there is no record of any successful prosecution. In an example of a targeted legal measure, the Constitution of Sudan imposes a positive duty on the State to 'combat harmful customs and traditions which undermine the dignity and status of women'.⁴³¹

Right to participation in political and decision-making processes

As a general rule, African women have been consigned to the private sphere, and play a relatively unimportant role in the public sphere, including party politics. Although this situation is rapidly changing, it still is largely true for indigenous women. Although women's representatives in the Moroccan Parliament increased from 0,6% in 1997 to 10,8% in 2007, there is no indication that the representation of indigenous women improved.

Customary law may be a contributing factor. Indigenous peoples' customary law is different to other customary law, and is divided between those forms that do view women as inferior in certain areas of life, but not in others, forms where women are dominant in certain areas, and forms where society is not hierarchical. Sometimes indigenous women are subjected to the customary law of dominant Bantu groups, as in the case of Basarwa women in Botswana. Indigenous women then occupy positions inferior to men, and do not have the same rights as men to speak at *kgotla* meetings, as dictated by those systems. However, there is a tendency towards an acceptance of greater equality for women.

In South Africa one other key issue affecting gender equality for indigenous women is that of the role and participation of indigenous women in development. At present most indigenous women are not represented in designing and participating in negotiations and strategies to uplift the

431. Art 32(3) of the Constitution of Sudan.

communities' welfare. However, over time some of these communities have appreciated the important contribution and role of women in development. For example, the Riemvasmaak Namas have made efforts to ensure that women are at the forefront of advocacy training and negotiations with the Government. Women of the †Khomani community form their own working groups during planning sessions to ensure that their gender specific contributions are taken into account.⁴³² Although these measures have not been applied consistently, it is anticipated that they could inspire more systematic programmes in the future.

In countries where 'special measures' have been adopted to ensure the equal representation of women in the political life of the nation, such as Rwanda and Uganda, indigenous women have not been specifically targeted. Uganda's Constitution requires that every district in Uganda be represented by one woman as a special representative of women.⁴³³ This provision has greatly increased the number of women in Parliament: The number has been increasing as more districts have been demarcated, which now stand at over 70. At the local level, the Local Government Act makes provision for one-third of the seats of each district council and lower councils to be reserved for women.⁴³⁴ However, among the Karamajong, women are still excluded from decision-making. Their main responsibilities are viewed as cultivation and childbearing.⁴³⁵

One of the State Policies in the Namibian Constitution is the enactment of legislation to ensure equality of opportunities for women to enable them to fully participate in all spheres of Namibian society. The Namibian National Gender Policy of 1997 advocates equality between men and women in all spheres of public life. The achievement of this objective requires concerted efforts to overcome the historical imbalances that existed between men and women mainly arising from customary laws and practices. At the national level great strides have been made as evidenced by the number of women ministers including the Deputy Prime Minister, women parliamentarians, permanent secretaries and many other senior public figures. The appointment of a Himba woman as Deputy Minister set an important precedent for the political empowerment of indigenous women. Under the San Development Programme, various developmental projects for San women have been initiated. Needle Work Projects have been initiated in Omaheke and Oshikoto regions with the assistance from the Ministry of Gender, Equality and Child Welfare. Preparations for a bread making project in Tsumkwe are almost complete. In addition the office of the Deputy Prime Minister and the Ministry of Gender, Equality and Child Welfare is busy preparing for the launch of the Namibia San Women Association. San women committees have already been constituted in the seven regions of the country housing San communities, namely; Oshana, Otjozondjupa, Omusate, Oshikoto, Kavango, Caprivi and Omaheke regions. A San women conference on development at which the various challenges facing San women will be discussed is planned and will be spearheaded by the Ministry of Gender, Equality and Child Welfare.

432. N Crawhall (1999) *Indigenous Peoples of South Africa: Current Trends*, Project to Promote ILO Policy on Indigenous and Tribal Peoples / South African San Institute, International Labour Office, Geneva 33.

433. Art 78(1)(b).

434. See Local Government Act, Secs 10(e) and 23(1)(e).

435. Uganda Wildlife Authority (2004) *Environmental Impact Statement of Land use change of Pian-Upe Wildlife Reserve*. Report by Ema Consults (August 2004) available at <http://www.nemaug.org/UPLOADS/eian/>, Chapter 7.



Health and reproductive rights

As far as can be established, the maternal mortality rate among indigenous women is very high in all countries in the region. Rural women, of which indigenous women such as the 'Pygmy' form part, often have only limited access to health care services, including services related to their reproductive health. This is all the more pronounced in respect of women living in isolated desert areas, such as some Amazigh women. Indigenous women living a nomadic life style are often excluded from the benefits of accessible health care.

Article 12 of CEDAW commits State parties to 'take all appropriate measures to eliminate discrimination against women, access to health care services, including those related to family planning'. However, though the proportion of women receiving assistance from skilled birth attendants has increased in recent years, there are still large regional disparities. Indigenous peoples are located in rural areas where there are generally fewer critical care units for birthing complications, fewer traditional or trained birth attendants and large distances to travel to receive healthcare. Consequently the assumption is that maternal mortality is higher in indigenous communities.

The Egyptian Ministry of Health and Population has many programmes that aim at providing health services to mothers and children and organising family and maternal health in order to ensure health care for women, ensure health security for mothers and their children, and reduce maternal mortality. These include the programme for monitoring maternal mortality, program of ante-natal care for pregnant women, program of care for mothers during childbirth and family planning and maternal health programs.⁴³⁶ The extent to which indigenous women form a part, benefit depends on availability of the centres that provide these services in rural areas. Moreover, as these programs are normally designed for women in the mainstream society, it is very doubtful if such centres are available particularly for Berber women who live in isolated lands of the western desert and for Bedouin women, who by virtue of their nomadic way of life do not have a sedentary life.

In Nigeria, there is a high prevalence of Vesicovaginal Fistula (VVF) among the Fulani indigenous group due to the fact that girls are given in marriage at a very young age. The government has made efforts in addressing this by enacting Child Rights Act of 2003 aimed at prohibiting girl-child marriage and child betrothal.⁴³⁷

Labour and employment

The issue of forced labour is dealt with elsewhere. In the context of gender equality, it could be pointed out that the displacement of 'traditional egalitarian social systems' among the 'Pygmy' by a new social structure, modelled more closely on patriarchal Bantu examples, have resulted in a change of gender roles. The responsibility for children's wellbeing and household food provisioning is now falling increasingly on Batwa women,

436. See further ACHPR Report, I 19-122.

437. http://www.un.int/nigeria/docs/GA_Docs/s_m-c_10_12_05.htm (accessed 24 January 2007).

whereas in traditional forest based communities these roles had been more equitably shared between men and women.⁴³⁸ In spite of this, discrepancies in the level of earnings between men and women are apparent in the Batwa communities. Generally, women earn 50 percent less than men;⁴³⁹ this hampers their capacity to effectively provide for their families. Additionally, it creates a discrepancy in the levels of socio-economic wellbeing between men and women. This problem is, among other factors, caused by the structural differences that exist between men and women resulting from gender wage differentials.⁴⁴⁰

The domestic legal frameworks of most countries have neglected to deal with these issues.

Inequalities in education

Illiteracy levels among indigenous girls, such as the San, Batwa, other 'Pygmy' groups, the Mbororo and Amazigh, are higher than those of boys in these communities. Drop-out levels are also higher, even at primary school level, because indigenous girls are prone to more forms of abuses than their male counterparts. The long absences from home during school terms and the hostel situation make San girls vulnerable to assaults and teenage pregnancies, resulting in higher drop-out rates for San girls.⁴⁴¹

Some deep-seated views even within indigenous communities themselves may inhibit the education of indigenous girls. According to the UN Special Rapporteur on Indigenous Peoples, among Kenya's Maasai community, indigenous girls occupy a transitional position between their parents' family and that of their husbands. In a context dominated by patriarchy, the need to educate girls is not considered to be very important, since many families feel that there is no point in making an economic investment in a woman's education if the fruits of the investment are to be enjoyed by her husband's family.

Despite efforts to eliminate disparities, inequalities persist. Namibia domesticated Goal 3 of the Millennium Development Goals Promoting Gender Equality and Empowerment of Women through the elimination of gender disparity in education. However, there are fundamental regional disparities among boys and girls when analysing literacy and enrolment rates in regions with indigenous peoples.

9.4 Conclusion

Despite general legal provisions on gender equality in most States, women still experience systematic inequality across a wide front. Indigenous women often experience double discrimination, first for being indigenous, and secondly for being female. Due to the particular socio-economic and cultural

438. D Jackson 'The health situation of women and children in Central African Pygmy peoples' 1/06 *Indigenous Affairs* 38 40 – 41.

439. F Banda and C Chinkin 'Gender, Minorities and Indigenous Peoples' (2004) *Minority Rights Group International* 24.

440. See P Kagundu and O Pavlova 'Gender wage differentials in Uganda: Evidence from the Uganda National Household Survey' Andrew Young School of Policy Studies, Working paper 07-26.

441. M Bolaane and S Saugstad 'Mother-Tongue: Old Debates and New Initiatives in San Education' IWGIA 1/06 46 59.





context in which they find themselves, indigenous women suffer even greater disadvantage in areas such as forced and early marriage, domestic violence, rape, harmful cultural practices including FGM, as well as exclusion from education and political decision-making. As a consequence, their levels of education are inferior to those indigenous men. Indigenous women are also more exposed to the risk of HIV transmission. They are further excluded from enjoying property rights and the right to succession.

States have taken very few measures to address the specific vulnerabilities of indigenous women. Generic provisions pertaining to the rights of women, such as constitutional protection against discrimination on the basis of sex, domestic violence legislation, and special measures, have not taken into account the peculiar needs of indigenous women, and have not been used to address their concerns.





10 Indigenous children

10.1 Introduction: The importance and special needs of indigenous children

As the very survival of most indigenous peoples increasingly comes under threat, it follows that the rights of children, who will determine the future, need to be secured. As indigenous peoples are increasingly being marginalised, their children are more likely to be enticed away from their indigenous ways of life. As a consequence of inadequate legal protection, the likelihood increases of indigenous children being forced to abandon their culture to find employment or pursue schooling under the allure of modernism, or, more accurately, hegemonic citizenship.

10.2 International law

Article 22 of UNDRIP obliges States to pay particular attention to the special needs and rights of certain groups including indigenous children and young people. States are further required to cooperate with indigenous peoples to develop strategies for the protection of indigenous children against violence and discrimination. Some time prior to the adoption of UNDRIP, in 2002, the UN General Assembly had encouraged States to provide special support and ensure equal access to services for indigenous children.⁴⁴² The provisions above constitute the non-binding standards for the protection of indigenous children.

Although not specific to indigenous children, certain provisions in the international bill of rights oblige State parties to guarantee special protection of the rights of children generally. Article 10(3) of the ICESCR specifically requires States to take special measures for the protection of children and young people without discrimination. The article also requires the protection of children and young people from economic and social exploitation, and harmful employment. Article 24 of the ICPPR also guarantees the right of children against all forms of discrimination and protects their rights to birth registration, a name and a nationality.

Other general provisions for the protection of children can be found in ILO Convention No. 138, which prohibits the employment of children below 15 years of age for certain work.⁴⁴³ ILO Convention No. 182 also encourages the prohibition and elimination of child labour, especially in its worst forms.⁴⁴⁴ The CRC also contains important provisions for the protection of the rights of children generally. However, the more particular and specific provisions for the protection of the rights of indigenous children can be found in certain provisions of the CRC and in ILO Convention No. 169.

In Articles 17(d), 29(1)(c)(d) and 30, the CRC expressly identify indigenous children as right holders. These provisions jointly recognise the right of indigenous children to enjoy the use of their language in the mass media and the right to learn and practice culture and religion in community

442. Para 20 of *A World Fit For Children* (Document of the UNGA special session on children).

443. Art 2 of the ILO Convention No. 138. Art 3 of the Convention sets the age of employment for dangerous work at 18 years.

444. Arts 1 and 3 of ILO Convention No. 182.

with other members of their group. Although the CRC Committee has in its concluding observations increasingly highlighted concerns pertaining to indigenous children, its practice remains inconsistent. In some instances such as the CAR report, the Committee did not mention indigenous children in its concluding observations. In the recently adopted General Comment No. 11 on 'Indigenous children and their rights under the Convention', the CRC Committee provides States with comprehensive guidance on how to implement their obligations under the CRC with respect to indigenous children. In the process, it often reinforces the provisions or approach of ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. Spelling out the application of each of the provisions of the CRC to indigenous children, it for example notes that indigenous children, to a greater extent than non-indigenous children, remain without birth registration; States must therefore ensure that all indigenous children, in particular, are registered immediately after birth and that they acquire a nationality as part of a free and accessible process.⁴⁴⁵

On their part, Articles 28 and 29 of the ILO Convention No. 169 also address the rights of indigenous children to be educated in their language, culture and region. These provisions are fortified by all provisions in human rights instruments prohibiting discrimination on the basis of ethnicity and circumstance of birth.

At the regional level, the general provisions in Article 18 of the African Charter and all the provisions of the African Charter on the Rights and Welfare of the Child combine to guarantee protection for children at a general level. However, no specific mention is made of indigenous children. In fact, the very notion of 'peoples', which is one of the distinguishing features of the African Charter, is absent from the African Children's Charter. The Preamble of the African Children's Charter recognises the necessity of special safeguards and care of children. It sets out the right to education towards the promotion and development of child's personality, talents and mental and physical abilities to their fullest potential (Article 11), their right to rest and leisure (Article 12), and to enjoy the best attainable state of physical, mental and spiritual health (Article 14). They shall be protected from all forms of economic exploitation (both in formal and informal sectors, Article 15), entitling them to the enjoyment of parental care and protection (Article 19): parents have the primary responsibility of the upbringing and development of the child. Article 31 of the Charter also imposes responsibilities of the child towards his family and society, subject to his or her age and ability (and under certain limitations). All those rights and prerogatives shall be interpreted under the principle of the best interest of the child: the welfare of the child is the guiding principle. Under the African Children's Charter, a child means every human being below the age of 18 years (Article 2). It specifically provides for the protection of the child against harmful traditional practices detrimental to the health of the child, and outlaws child marriages. This Charter has been ratified by 43 African countries.

445. Paras 41 and 42.



10.3 National trends

Particular vulnerabilities exposed

Indigenous children suffer from the same disadvantages and experience similar human rights violations as the families and communities of which they form part, such as social exclusion, inadequate access to health care and education, poverty and social stigmatisation. Items discussed elsewhere in this report, such as non-discrimination or education, are obviously also of relevance to children. Still, indigenous children are exposed to particular vulnerabilities, some of which are highlighted here:

Their births are very frequently not registered, a fact that places them at potential disadvantage when they encounter the State bureaucracy.

They are exposed to forced labour. One of the major concerns revealed in the country reports is the issue of child labour (specially its worst forms, such as slavery, forced labour, prostitution and serfdom), which threatens the child's physical, mental and moral well-being. This generally unpaid workmanship is closely connected with poverty and lack of education. The precarious and unstable situation under which indigenous children are living, oblige them to enter into those activities of economic and sexual exploitation.

Indigenous children are at risk of becoming involved as child soldiers or as victims of armed conflict. This is particularly the case in Central Africa, where the 'Pygmy' groups live in or close to the contested areas that are rich in mineral wealth. Children may easily be compelled or influenced to become conscripts in one of the armies, and girls could be forced or lured into sexual relations with soldiers.

Cultural practices may impact negatively on their life prospects. Examples are prearranged, early and forced marriages; and female genital mutilation (FGM).

General Comment No. 11 (2009) stipulates that States should work together with indigenous communities to ensure the eradication of harmful cultural practices such as early marriages and female genital mutilation. The Committee strongly urged States parties to develop and implement awareness-raising campaigns, education programmes and legislation aimed at changing attitudes and address gender roles and stereotypes that contribute to harmful practices.⁴⁴⁶ In Eritrea, Proclamation No. 158/2007 abolished FGM, a practice which also affects many indigenous girls. In Ethiopia, measures were adopted to protect the girl child by criminalising FGM in the revised Penal Code and raise of the minimum age of consent for marriage. However, the legislation has not been strictly enforced and has not been accompanied by sufficient involvement of communities.

Girls are particularly vulnerable, especially to sexual violence and abuse. Indigenous children are considered by some conventions as disadvantaged and vulnerable children, category which includes among others; orphans, disable, abandoned and street children. They suffer from acute discrimination, a situation which is being aggravated due to the cultural and

446. Para 22.

social stress under which their communities live. The discrimination that indigenous children endure as part of an indigenous group is exacerbated with regard to girl children. They suffer from a triple discrimination, based on being indigenous, being female, and also being children. Some aspects related with the discrimination they suffer can be illustrated with reference to health and nutrition and the lack of adequate medical attention and assistance (lack of vaccination and high mortality rates), as well as in relation to housing facilities, lack of food and drinking water. As a result of this situation, the girl child is exposed to various risks apart from those already mentioned. These risks include violence, human trafficking, abductions, and harmful traditional and cultural practices (namely: female genital mutilation, early child marriages, forced marriages). All those circumstances undermine their self-esteem, causing a feeling of being marginalised, hampering their integration into the dominant culture as well as their possibilities of expanding their opportunities and of attaining a better life.

Many of these factors combine to leave indigenous children ill prepared for school, and hinder their school attendance. As a result, the literacy level and school attendance rates are very low among children from these communities.

Silence of the laws

Notwithstanding this obvious need to address these concerns, the Constitutions, laws and policy frameworks do not mention indigenous children as a particularly vulnerable group.

In recent years, an increasing number of Constitutions contain provisions specifically guaranteeing the rights of children. In keeping with the general approach of these Constitutions, none of these Constitutions make any mention of indigenous children.


Some of the 'generic' children's rights in **constitutional frameworks** that may obviously be relevant to indigenous children but do not refer to them explicitly include the following: Article 24 of the Constitution of Burkina Faso provides for equal protection of children. The Constitution of Burundi, in Article 44 guarantees the health, well-being and security of the child. Article 36 of the Ethiopian Constitution protects the rights of the child that have been enshrined in the CRC, including the right to life, name and nationality; and protection from exploitation and abuse.⁴⁴⁷ Article 95(b) of the Namibian Constitution requires the State to ensure that 'children are not abused and that citizens are not forced by economic necessity to enter vocation unsuited to their age and strength'. The Constitutions of the DRC, South Africa and Uganda contains a comprehensive list of children's rights.

More and more State are also adopting **child-specific legislation**. Nowhere in these texts are indigenous children mentioned. General Comment No. 11 of the CRC Committee stipulates that States need to adopt appropriate legislation in accordance with the CRC so as to 'effectively implement the rights of the Convention for indigenous children'.⁴⁴⁸ A significant number of African States, especially in Southern and Eastern Africa, have adopted child-specific legislation. However, because indigenous

447. Committee on the Rights of the Child, Ethiopia, UN Doc CRC/C/129/Add.8, paras 21, 31, 28 October 2005.

448. Para 80.





people (and their indigenous children) are not recognised as such, the protection of indigenous children's rights remains very limited, ad hoc and incidental to the protection of children's rights in general. No particular efforts have been made either in the formulation or application of these laws to address the peculiar concerns of indigenous children. The following are examples of children's legislation, which hold unrealised potential for indigenous children:

Kenya has enacted legislation that addresses children's rights and the prohibition of discrimination against children such as the Children Act 8 of 2001, which domesticates the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Children's Act in Section 5 stipulates that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. Namibia adopted the Children's Act (No 33 of 1960). However, because the State does not recognise indigenous people per se, the protection of indigenous children's rights remains ad hoc and incidental to the protection of children's rights in general. A 2002 law of the DRC abolished the worst forms of child labour.

Even the Congolese draft Law on the Promotion and Protection of the Rights of Indigenous Populations, which deals with many aspects of indigenous peoples' rights, does not make explicit mention of children.

Many of these laws devote considerable attention to vulnerable children or children 'in difficult situations', in particular street children, handicapped children, orphans, children in conflict with the law. Indigenous children are not made part of this list, perhaps as a result of the non-recognition of indigenous peoples as entities in most of these States. In any event, even if these laws are applied in respect of indigenous children, this will not be very clear in the absence of any data disaggregated per age and ethnic origin, including indigenous group.

Increasingly, **State institutions** dedicated to the rights of children are also being instituted. The same pattern repeats itself here: there is no room for indigenous children's issues in the scope of concern of these bodies. For example: In 1990, Cameroon established a National Commission for the Protection of Morally Endangered, Delinquent and Abandoned Childhood (*Commission Nationale pour la protection de l'enfance en danger moral, délinquante et abandonnée*). The tendency towards the establishment of child parliaments (for example in Bukina Faso and the CAR) has not seen the inclusion of indigenous children into these fora, nor has specific provision been made for their inclusion. Kenya has established an institutional framework for the protection of children rights that include the National Council for Children, the Department of Children's Services, located in the Vice President's Office, local authorities and children's courts.⁴⁴⁹

Even when **States report under UN human rights treaties**, in particular the CRC, they mostly do not devote any attention to the plight of indigenous children. When the CAR submitted its periodic report under CRC, it did not mention at all the specific issues faced by indigenous children. It should be added that the CRC Committee, in its examination and

449. African Peer Review Mechanism, Country Review Report of the Republic of Kenya, May 2006, *African Socialism and its Application to Planning in Kenya*, Sessional Paper No 10, Government Printer, 1966, 108.

concluding observations in 1999 also did not refer to this issue. As has been shown elsewhere, there is now much more awareness of the importance of this issue among CRC Committee members. The adoption of General Comment No. 11 will also no doubt reinforce this trend.

No special measures for indigenous children

It therefore follows that the likelihood is very remote of any State taking 'positive' or 'special' measures to address the deep-seated disadvantaged position of indigenous children.

To some extent, international law provides for specific recognition of indigenous children's rights. In spite of this formal and express recognition, most of the constitutions of the countries object of study do not provide for specific clauses addressing indigenous children's problems or rights, and do not even reflect the protection guaranteed by the Conventions mentioned above, to which the majority of these countries are party. While general protection for children is ensured in most of the countries, it is not recognised that indigenous children have peculiar and specific problems which need to be addressed.

Some promising policies and programmes


In the domain of policy and programming, the situation of indigenous children is at least sometimes addressed more explicitly than in Constitutions, legislation and institutional frameworks. This may suggest a tendency towards an increase in awareness at the level of 'soft' (non-binding) law.

Since the visit of the African Commission's Working Group on Indigenous Populations/Communities to Namibia (in July/August 2005), the Namibian government has put in place the San Development Programme. Spearheaded by the Deputy Prime Minister, and approved by Cabinet on 29 November 2005, its aim is to ensure the full integration of the San people in the mainstream socio-economic strata. While several programmes have been initiated for the San people, President Pohamba also directed the Deputy Prime Minister to ensure the resettlement of the nomadic Ovatie and Ovatjimba communities of the Kunene region. Under the programme for Education for San Learners (scholarships) the Office of the Deputy Prime Minister has launched the 'Back to School and Stay at School for San Children' Campaign. Financial support has been provided for San children from primary school up tertiary education.

The Ugandan Ministry of Gender, Labour and Social Development adopted a policy to address the needs of orphans and other vulnerable children.⁴⁵⁰ The mission of this policy is to fulfil the rights of orphans and vulnerable children and ensure that responsibilities towards these children are met. To realise its mission, the NSPPI identifies a set of 13 principles that guide the plan. Though not intended for indigenous children, this policy could be stretched to accommodate such children. One of the only government programmes that specifically includes indigenous children is the special

450. See Ministry of Gender, Labour and Social Development National Strategic Programme Plan of Intervention for Orphans and other Vulnerable Children, Fiscal Year 2005/6 – 2009/10.





education programme, ABEK, for children in Karamoja. However, the same has not been done for other indigenous children such as the Batwa.

However, for the most part policies – even poverty reduction strategic papers – do not give any prominence to the position of indigenous children. Another example is the technical support structure on child labour, Towards the Elimination of the worst forms of Child Labour (TECL), run in a number of Southern African countries, in association with the ILO. The definition of ‘vulnerable children’ in its draft Action Programme on the Elimination of Child Labour (APEC) does not recognise indigenous children as falling within this category.

10.4 Conclusion

From the aspects explained above, we can identify a failure in the adoption of specific measures protecting indigenous children’s rights. A general failure to appreciate children’s defencelessness and the dangers of child labour, as well as lack of political will to fight against the situation of vulnerability affecting children, explains this lack of protection. Domestication of the provisions stated in international and regional instruments has to be achieved in order to have coherent policies in relation to indigenous children, and in order to implement effective measures of protection, aimed to achieve their healthy development in all respects; in freedom, dignity and humanity. Despite this need, the law in most countries under review is particularly silent on indigenous children’s issues. The reason for this omission may lie in the perception that laws dealing with children already address a special category of vulnerability within the general population. All children are open to exploitation and in need of special legal protection. Often, the needs of indigenous children may overlap with those of other vulnerable children. However, there seems to be little understanding for the extent of violations that indigenous children, in particular, are exposed to. Despite the possibility that indigenous children may benefit from general legal provisions, there is very little evidence that they actually do. In fact, there are clear indications that the inverse is true. Indigenous children constitute a particularly vulnerable sub-group, due in great measure to the fact that they are living in rural areas or in conditions of migration under which social services do not reach them sufficiently or are inexistent.

The following recommendations may be offered:

The government should ensure that disaggregated data on children is collected so as to identify existing gaps and barriers to their enjoyment of human rights, and aiming to develop legislation, policies and programmes in order to address those obstacles. In response to the Gabonese government’s failure, in its 2001 report under the CRC, to recognise that indigenous children deserve special attention, the CRC Committee highlighted the precarious position of Pygmy children in the country.⁴⁵¹ The Committee recommended that the government undertake a study to identify the needs of these children and to elaborate an action plan for their social inclusion in consultation with the leaders of the Pygmy community. It further emphasised the need to enable these children to be registered at birth and to access social services.

- Active participation of children and adolescents as well as of local communities in the protection of children and the enforcement of their rights. For that purpose, it is necessary to ensure

451. UN Doc CRC/C/15/Add.171, paras 69 and 70.

mechanisms which will enable and facilitate community participation, as well as empowerment aiming the achievement of an active role in the design of their future.

- Special measures have to be adopted for indigenous children, following the example of what is being done for other vulnerable groups, as is the case of the special measures adopted for children living with disabilities adopted in the Ugandan Children's Act.
- Some of the few mechanisms that may implicitly improve the situation of indigenous children view the problem in mere economic terms, addressing it just by measures which would improve their economic situation. The root causes of their situation, namely discrimination and vulnerability, necessitate the adoption of specific legislation that protects and promotes indigenous children's rights.

Given their high percentage of the total population, most States have recognised youth as an important human resource and of paramount importance for the development of the State. States should acknowledge that the protection and promotion of indigenous children's rights are equally pivotal to the future of indigenous peoples within their territories.





II Indigenous peoples in border areas and trans-boundary situations

II.1 Introduction: Transhumant and nomadic indigenous peoples

Indigenous peoples are often dispersed across national borders. The presence in various countries of members of the same group, and their movement across borders puts into stark relief the artificiality of the colonially constructed borders. As a consequence, groups that are sociologically similar end up being ascribed different legal nationalities. However, the lived reality of these peoples is often markedly different, as their lives remain unaffected by the official ('paper') borders and remain determined by familial and ethnic ties spanning many centuries.

To the extent that borders constitute barriers to inhibit or prevent social and cultural interaction, they undermine the cohesion of the group, and thus affect the ability of the group to preserve their common identity. For example, Amazigh families living on different sides of the Algerian-Moroccan border have since the closure of the border in 1994 been separated and restricted in their movement and trade relations.

Particularly those groups who live transhumant and nomadic life styles often migrate over borders as part of their survival. The dividing line between transhumant groups, who migrate seasonally and return to an area, and nomads, who wander perpetually, has increasingly become blurred. As they do so in the remote areas of the Sahara desert, or in the densely forested areas on Central Africa, their movements are often unnoticed and uncontrolled. This is true for Tuaregs of North Africa, who are present in and move between Burkina Faso, Mali, Niger and Mauritania in West Africa; and between Algeria and Libya in the North. The Mbororo (part of the Peul) are transhumant stock breeders, and often migrate seasonally between Cameroon, CAR, Chad, Burkina Faso, Mali and Niger. 'Pygmy' groups are found in Burundi, Cameroon, CAR, Congo, DRC, Gabon, Rwanda and Uganda. The interconnectedness of 'Pygmy' groups in the area between Gabon and Congo; and of the Aka in the regions between the CAR, Congo and the DRC provides particular examples of close ties across borders. The same applies to the Maasai who live in both and move between Kenya and Tanzania.

There is also the peculiar case of the Kunama, who live on both sides of the border between Ethiopia and Eritrea. It should be recalled that Eritrea became independent from Ethiopia only in 1993. Finding themselves in the epicenter of the 1998 war between the two countries, the Kunama had no particular loyalty to either of the warring parties. Perceived as disloyal by the Eritrean government, the Kunama has been viewed with suspicion. After the war, many of them left Eritrea to evade compulsory military conscription. Temporarily settled on Ethiopian soil, these displaced people suffer numerous problems, including the burning of their shelters, water shortages and inadequate sanitation. With resettlement not a viable option, these people are caught in a legal lacuna. However, it has also been observed that as the Kunama are agitated by an armed military front from Ethiopia, this has contributed to their harsh treatment in Eritrea.

A similar situation has beset the Basongora pastoralists, who moved from their territories in Uganda to find water and pastures for their animals in the Virunga National Park located in the DRC, and in Tanzania. After being evicted and forced to return to Uganda, they faced the legal dilemma of not fitting into either the definition of refugee (as they see themselves as Ugandan) nor that of internally displaced persons (as they crossed the national boundaries).

11.2 International law

International law shows limited awareness of this precarious situation or predicament of indigenous peoples whose living patterns defy the logic of formal boundaries. ILO Convention No. 169, for example, requires governments to take appropriate measures, also by way of international agreements, to facilitate contact and co-operation between indigenous peoples across borders.⁴⁵² These measures should be directed at activities in the economic, social, cultural, spiritual, environmental and other fields.

In its Preamble, and throughout its text, UNDRIP does not link the protection of indigenous peoples to, or render them dependent on, nationality or citizenship. Rather, the connection between indigenous peoples and their land, territories, and resources is prioritised. Article 36 of the UNDRIP is the most expansive in dealing with indigenous peoples in border areas, in that it provides that indigenous peoples, in particular those divided by international borders, 'have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders'. States are required, in consultation and cooperation with indigenous peoples, to take 'effective measures to facilitate the exercise and ensure the implementation of this right'.

At the African regional level, the African Charter in Article 12 provides for the right to leave any country and the right to return to one's own country. However, this right may be subjected to restrictions related to national security, law and order, public health and morality.


Because the issue of trans-boundary movement of indigenous peoples plays itself out at the sub-regional level, between States that are mostly also members of a common sub-regional economic community of other arrangement, it could be expected that solutions should be explored in these fora. Some examples of tentative steps have been observed.

The Treaty of the Economic and Monetary Union of Central Africa (*Communauté Economique et Monétaire de l'Afrique Centrale* (CEMAC)), comprising Cameroon, CAR, Chad and Equatorial Guinea, provides for the free movement of persons and goods between member States. A sub-commission has been established to trace annually the movement and routes of transhumant peoples.

Not only States, but also civil society has organised and mobilised sub-regionally to address this issue. Sometimes these efforts have been combined. Under the auspices of CEFDHAC, a Central African regional structure, which brings numerous States in the region together with a pygme representative from each of the countries, the *Réseau des Populations*

452. Art 32.





Autochtones et Locales pour la Gestion Durable des Eco-systèmes Forestiers d'Afrique Centrale (REPALEAC) was brought into being as a regional NGO for indigenous peoples.

A related positive development in 2007, initiated by a national government, was the organisation by the Congolese government of the first international forum of indigenous peoples of Central Africa (*Forum International des Peuples Autochtones de l'Afrique Centrale*, FIDAC). The aim of the event was to ensure the involvement of indigenous populations in sustainable development of forests and ecosystems in the region. Other States in the region attended, as well as international organisations such as UNICEF, WWF and the World Bank.

11.3 National trends

Most countries accord, in their Constitutions, all citizens the right to leave and return to the country. In one way or another, mostly with reference to existing national laws, this right is usually qualified. The most obvious qualification to the free exercise of this right is the requirement to possess and travel with a passport, as stipulated in nationality or citizenship legislation. Exceptionally, the same right is accorded to everyone within the territory of the State.

Indigenous peoples live on the margins of the formal administrative apparatus. Their movement mostly takes place outside the parameters of the law. Few leave and re-enter at border ports, and not many carry passports. Formally, they are required to comply with regular border formalities. None of the States through which the Tuareg migrate has a law or allow for special measures to enable their free movement.

The Burkina Faso Forestry Code (*Code Forestier*) provides a pertinent example of an acceptance of the reality of trans-boundary movement of nomadic pastoralist groups, such as the Peul (*Fulbé*).⁴⁵³ On condition of reciprocity, foreign herds are allowed to cross the country's borders in the context of transhumance. Such movement or crossing is conditional on the following: (1) the herders must observe the laws relating to animal sanitation and should be in possession of official documents related to sanitation; (2) they should hold the administratively required certification of transhumance. In addition, the herd should be accompanied and guarded by a sufficient number of adult guardians.

In the domain of policy, the CAR Ministry of Agriculture and Livestock (*Elevage*) from time to time fixes '*couloirs de la transhumance*' and communicates these to cattle herders and breeders (*éleveurs*).

Often, the most pertinent problem of these groups is more related to freedom of free movement within their own States, for example when they find themselves inside a proclaimed area such as national parks.

11.4 Conclusion

The situation of indigenous peoples migrating across and living on both sides of official borders has not been sufficiently addressed. More flexibility should

453. See arts 36-42 of the *Loi no. 006/97/ADP, du 31 janvier 1997 portant Code Forestier*.

be introduces into legal regimes to take account of this reality. The specific needs of these groups should be assessed and the consequences of their migratory patterns and shared realities should be brought into the ambit of the law.



C Conclusions and recommendations

This part sets out some overall conclusions and general recommendations pertaining to the study as a whole. Specific conclusions and recommendations on the eleven themes are dealt with in the report, above, at the end of each thematic section.

Conclusions

Presence of indigenous peoples is a reality

Adopting the understanding that indigenous peoples are those communities who suffered a very high degree of marginalisation, who self-identify as 'indigenous' often based on historical claims of settlement, and who depend on their close relationship with land and resources for survival, it is an undeniable reality that indigenous peoples exist in many African States. These groups cover a diversity of ethnicities, life-styles, cultures and languages.

Although there are many country-specific differences in the treatment and legal protection of these indigenous peoples, the overriding picture is one of government neglect and negation of the plight of these peoples. Indigenous peoples have been marginalised from mainstream society in economic, social and political terms. They are ostracised and discriminated against on the basis of their ethnicity and way of life.

Nevertheless, despite the non recognition of indigenous peoples as defined under international law, in African legislation, significant opportunities do exist for the protection of these peoples within existing legal frameworks in a number of African countries (although in some the legal framework still remains very weak). This has been demonstrated throughout this report, and pertains to special measures in a number of areas for disadvantaged or marginalised groups or other specific groupings within society, to provisions on traditional leadership and customary law and local governance, to land and resource management provisions and development policies, as well as to a number of other areas. However, major challenge lies in the lack of adequate measures for implementation of such provisions for the benefit of indigenous peoples, lack of capacity to address indigenous issues in an adequate and consultative/participatory manner, as well as in general attitudes towards indigenous peoples, among other things.

International law

Through ILO Convention No. 169 and UNDRIP, international human rights law provides important standards on the rights of indigenous peoples. African States have become State parties to many other international instruments that are of potential relevance to indigenous peoples, such as CERD, CEDAW and the CRC, and ILO Conventions Nos. 107 and 111. Increasingly, the bodies monitoring these treaties have made concern for indigenous peoples an express part of their mandates. In particular,

increasingly concluding observations adopted after the examination of State reports make pertinent recommendations related to indigenous peoples to African States.

At the regional level, the African Charter's inclusion of 'peoples' rights' serves as a basis for the inclusion of indigenous peoples within its protective scope. After some initial resistance and hesitance, the African Commission established a Working Group to deal with the issue. By adopting a report of its Working Group, the Commission has accepted that indigenous peoples exist in many African States, and that they are entitled to the protection under the Charter.

However, due to the lack of domestication and follow-up, the domestic effect of international law has remained limited.


Domestic law

As far as domestic protection is concerned, there are numerous legal provisions that can provide entry points for a more adequate protection of the rights of indigenous peoples. However, broadly, with a few notable exceptions, such as elements in the Constitutions of Burundi and South Africa and the draft legislation in the Congo, States have not formally accepted the legal existence of indigenous peoples. The specific reasons for this reluctance to acknowledge the existence of indigenous peoples vary from State to State, but almost uniformly relate to the goal of not undermining nation-building and of maintaining national unity in multi-ethnic societies characterised by competition for limited resources. In the process the richness of cultural diversity is negated and suppressed. Underlying these policies is a philosophy of the supremacy of the dominant group, which is often the result of pre-colonial tribal organisation and patterns, according to which the cultures, traditions and histories of particular ethnic groups were given preference. An important result of this denial is that governments' records, for example the national census, do not reflect the different ethnic groups and languages, including indigenous peoples, existing in the country.

While it is correct that the laws and policies of a number of States make reference to the situation and rights of 'vulnerable' and 'marginalised' communities or groups, the particular concerns of indigenous peoples may be easily overlooked if care is not taken to address their specificities within this context, rather than address them as a component of a broader grouping with different needs and challenges. Still, all States have a number of legislative provisions, policies and programmes that could be exploited to protect and promote the rights of indigenous peoples. This has not been done sufficiently, partly due to obstacles inhibiting the ability of indigenous peoples to access justice, and partly because government officials and other important role players have not been sensitised to the plight of indigenous peoples.

Similarly, the mandates and practices of State institutions, such as national human rights institutions, the office of the ombudsman and 'mediateur', have not been adjusted to include the representations and concerns of indigenous peoples. These and other institutions have the potential to take on board indigenous peoples' issues as the National Human Rights Commission of Kenya has done. A few institutions have been established to address specific aspects of indigenous peoples' situation.





Indigenous peoples are often discriminated against by the State, especially in the exercise of their culture and in resource allocation. Perhaps more often the source of discrimination is not the State, as such, but other individuals and groups. Members of indigenous communities often suffer discrimination resulting from social stigma and negative attitudes. States still have the duty to take measures to protect their rights. Where special measures are taken to combat discrimination, these are often aimed at specific groups within the national population, but rarely indigenous peoples. In addition, many of these measures are *ad hoc* and do not entail broader policy measures. However, they could represent entry points through which to better protect the rights of indigenous peoples, or explore ways in which existing measures can be improved and systematised.

A number of legal frameworks in the African region provide for the participation and consultation of the population in general or specific populations, including marginalised groups. However, few, if any, make specific provisions for indigenous peoples. Nevertheless, a number could be used as entry points for advancing the participation of indigenous peoples in decision-making. Still, the mechanisms for the implementation of these legal frameworks or for any associated consultation or participation are generally weak, and do not take into account the specific considerations that need to be taken into account when consulting with indigenous peoples. At the other end of the spectrum, a number of legal frameworks make no provision whatsoever for the needs of marginalised and other specific groups within the national society. Where they do exist, laws containing provisions for specific groups, or special measures (affirmative action clauses), often only relate only to specific instances, not to a broader policy of inclusion for indigenous peoples.

In terms of access to justice, although access to justice of most people living in African States is very limited, the problems besetting the population as a whole are exacerbated in respect of indigenous peoples. Courts and other judicial fora are often geographically inaccessible, because they live in remote rural areas, or engage in nomadic life-styles. Due to the disproportionate levels of poverty and illiteracy among them, indigenous peoples are less likely to be able to pay for legal services, or be aware of their rights and the possibilities of legal aid, if it exists. Recognition of Bantu customary law as the single form of recognised 'traditional' legal framework has further eroded access to justice of indigenous peoples. With a few exceptions, such as mobile courts for some indigenous communities in South Africa, States have not taken measures to address this situation.

States have paid little attention to the importance that indigenous peoples attach to the preservation of culture as an important element of their identity. This state of affairs is one of the consequences of the prevailing nation-building imperative and the denial of indigenous peoples' existence. Similarly, indigenous languages are not accorded official recognition and therefore are not used in the government media and schools. Also, indigenous peoples' groups are not accorded the same treatment in representative bodies which negatively impacts on their ability to participate in the decision-making processes that affect them. As a result, some indigenous languages have all but disappeared, and others such as Tamazight and Khoi are under severe pressure.

A number of States have taken some measures to combat this, often in the form of establishing new institutions. Examples are the South African

Commission for the Promotion of and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Amazigh High Commissioner in Algeria, and the Royal Institute for Amazigh Culture (IRCAM) in Morocco. As these institutions are still in their infancy, it remains to be seen how the potential problems of adequate indigenous representation and resource-allocation will be addressed.

The levels of school attendance and literacy rates among indigenous peoples are disproportionately low. Although the right to education is guaranteed in almost all African States, indigenous children still have difficulties accessing their right to education, in particular to education that is appropriate to their needs and cultures. The Ugandan government's Alternative Basic Education for Karamoja (ABEK) programme, which is designed to offer a curriculum and methods that are conducive to their nomadic lifestyle, provides an example of a measure that takes an indigenous community's needs into account.

A close relationship and dependence on land and natural resources not only form an important component of indigenous peoples' identity, but also relate to their very survival. A major cause of the neglect and violation of a variety of their rights emanates from the loss of their ancestral land due to conservation programmes, the promotion of tourism, logging, as well as deforestation and desertification resulting from climate change. Factors such as the lack of consultation, of compensation and the failure to provide alternative land have compounded the effect of land loss. The institution of individual land rights, as well as the vesting of lands customarily owned by indigenous peoples in the State, or the devalorisation of communal land rights, has had a profound effect on the rights of indigenous peoples. Such new land regimes also ranked agriculture, and individual land tenure, over collective, nomadic land use, including pastoralism and hunting-gathering. Further, with the introduction of conservation measures for protected areas and environments, the role of indigenous peoples in conserving and managing such lands has been undervalued. Governance is also a key issue that is directly linked to the rights of indigenous peoples to their lands.

Many African countries recognise *customary rights* as a form of right to land. This could be an important entry point for indigenous peoples. In addition, in a limited number of cases, customary rules, existing side-by-side with national law and recognised in legislation, allow for both collective and individual rights to land. However, in most cases, such rights are not full ownership rights, and only consist of either possession or use rights.

The denial of socio-economic rights is at the core of indigenous peoples' marginalisation. Although reliable indicators are not always available, a picture emerges of relative deprivation in respect of the right to education, access to health care, property and employment.

It is also noticeable that some groups within indigenous peoples, such as women and children, are even worse off. Indigenous women and girls suffer multiple disadvantages. This is mainly due to the fact that the general legal position enforces inequality between men and women, often perpetuating cultural and religious conceptions. Whereas the government has taken measures to ensure gender equality and the protection of the rights of children, virtually nothing has been done to address the ethnic dimension of gender discrimination and the abuse of children's rights.





Indigenous peoples are often dispersed across national borders. Borders constitute barriers that inhibit or prevent their social and cultural interaction, and undermine the cohesion of the group. Particularly those groups who live transhumant and nomadic life styles, such as the Tuareg and Mbororo, often migrate over borders as part of their survival. Affected States have in their legal systems not addressed the situation of indigenous peoples' migration across official borders.

While the emphasis in this study is on the obligations of States, it should be stressed that non-State actors also have an important role to play in exploiting the existing legal regime to benefit indigenous peoples, and to align law, policy and practice with the specific needs of indigenous peoples. An example of a NGO that has made such contributions is WIMSA in Namibia. Indigenous communities themselves have demonstrated the value of organisation and the public articulation of their concerns. In some instances, major gains have followed periods or incidents of civil disobedience and protest by members of indigenous groups.





Recommendations

A number of clear lessons and broad lines of action can be proposed, based on the conclusions of this analysis of legislation concerning indigenous peoples in Africa. As has been demonstrated, the treatment of indigenous peoples and indigenous issues varies greatly across the region – and ranges from severe neglect and discrimination, to the institution of efforts in a number of areas to begin addressing specific issues affecting indigenous peoples. There are entry points within existing national legislation and policies, and challenges in their implementation, as well as broad needs to examine and address the rights of indigenous peoples in a more systematic manner. The proposals below are based on these broad considerations, and are intended as recommendations for possible constructive steps that may be taken by States, indigenous peoples, international organisations and the media and civil society to form a basis for such a systematisation, and to construct an adequate knowledge platform, and a legal, policy and institutional basis for the more adequate addressing of the rights of indigenous peoples in Africa.

To African States:

National inquiries

National commissions of inquiry, or other similar bodies, composed of national and international experts would constitute an ideal way of scoping and documenting the broad picture regarding the situation of indigenous peoples at the national level, and consequently, collecting the requisite information to form the basis for a road map of action. Such bodies could investigate and report on the position of indigenous peoples in the country. Their inquiries would ideally be directed towards establishing whether indigenous peoples, as understood by the African Commission and other instruments and bodies, exist in the country (if there is any doubt about this issue), what problems are facing these communities (if they exist), what *de jure* and *de facto* legal protection they enjoy, and what legal reforms are required to improve their situation.

In order for such a process of inquiry and subsequent action to be sustainable, the political commitment of states is essential. Some states have shown leadership in the African region in being among the first to address indigenous issues in draft legislation or specific programmes – these include Namibia, and Congo.

Data and statistics

Data collection measures would be key in assisting governments to identify the specific needs of indigenous peoples (and other ethnic groups) in the country, which would in turn assist in adopting measures to ensure substantive equality among them. Data should be obtained about all aspects of their lives, including their level of education, health indicators, access to socio-economic services such as health care and drinking water, and their access to justice. As far as possible, this data should be disaggregated by age and gender, and be generated in consultation with indigenous peoples, to ensure it adequately reflects their own priorities and perceptions. Existing international and regional processes for data generation should be adapted,

and the indicators about the position of indigenous peoples should be developed in order to address the need for relevant data and statistics.

Recognition

If indigenous peoples are present in a country, States must ensure their political and legal identification, using the international and regional criteria. In this regard, the term 'indigenous peoples' needs to be understood outside the confines of aboriginality. Such recognition and identification will pave the way for the protection of indigenous peoples. This will entail the recognition of their cultural heritage, including language and customary laws, and the need to accord them special protection. States should establish appropriate mechanisms to ensure that indigenous peoples obtain birth certificates, citizenship documents, identity cards and other relevant official documents that will allow them to fully exercise their rights.

Domestic law and policy

States should consider the adoption of a law dealing comprehensively with the rights of indigenous peoples, as is being done in the Congo. Existing law, in the absence of a comprehensive law targeting indigenous peoples in the country, should be exploited to the full granting protection to indigenous peoples' rights. All national human rights programmes and plans should address the issue of indigenous peoples' rights.

Special measures

States should ensure that indigenous peoples are identified as specific groups for the implementation of special measures in relevant areas of social, economic, cultural, civil or political life. Such special measures would address the situation of marginalisation and discrimination faced by indigenous peoples due to their specificities, and be devised and implemented in consultation with indigenous peoples to ensure their compatibility with indigenous peoples' aspirations. Special attention should be paid to address the particular needs and vulnerabilities of indigenous women and children. Some lessons can be learned from existing special measures implemented in a number of African countries, which can be built on to develop a broader policy.

Institutions

National institutions, such as national human rights institutions, are well placed to address the situation of indigenous peoples as they are already institutionalised within state structures or functioning independent institutions. In order to facilitate this, a revision of the mandates of such institutions to include indigenous issues would be key. Indigenous peoples should be included as members of these institutions.

The establishment of State institutions mandated with the protection of the rights of indigenous peoples, where these institutions do not exist, would ensure a more systematic and coherent approach to indigenous issues. States should consider the establishment of a State institution mandated to ensure the protection of the rights of indigenous communities. Indigenous peoples should be included as members of these institutions.





Consultation and participation

In all matters affecting them, such as legislative and administrative measures, the development or conservation policies, programmes and projects, and in other areas that may affect indigenous peoples, including health and education, consultation is key to ensuring that any legislative, policy or programme measures undertaken respond to the actual needs of indigenous peoples as stated by them. Such consultation should be done through the existence of a specific institution, as recommended above, or through building systematic consultation mechanisms into specific thematic programmes and policies. Experience from throughout the world has demonstrated that consultation mechanisms are most effective when designed in consultation with indigenous peoples, and built into the administrative structure of the State, at all levels of governance. Indigenous peoples should be allowed to participate fully in decision-making in elective institutions and governance structures at all levels. States should adapt their electoral processes to cater for the specificity of indigenous peoples, in particular nomadic peoples, so as to ensure their effective political participation.

International law

The ratification of ILO Convention No. 169, which defines the obligations of States towards indigenous peoples, would enable African States to tap into international expertise and processes on the implementation of the rights of indigenous peoples. As the ratification of this Convention would imply a regular supervision of its implementation by a body of independent experts, it would enable States and indigenous peoples to engage in a dialogue concerning the most effective manner to give effect to the provisions of this Convention. Domestication would give the Convention legal effect within each State. The UNDRIP also provides an important guide for the protection of the rights of indigenous peoples.

States should include information and discussion on indigenous peoples in all its reports to UN and AU human rights treaty bodies. They should further give effect to and follow up the recommendations contained in the concluding observations issued after the examination of their State reports to these bodies.

To the UN, AU and other international organisations:

UN and AU human rights treaty bodies have proven effective in a number of instances in their examination of the concerns of indigenous peoples. A systematisation of such examinations of indigenous peoples' situation within the context of the examination of States' reports would enable such bodies to enter into an ongoing dialogue with States and follow-up on previous discussions to monitor states' progress in the implementation of the rights enshrined in their establishing treaty for indigenous peoples. In particular, the reflection of this in any concluding observations should be disseminated as broadly as possible. The African Commission should revise its Guidelines for State Reporting to explicitly cover issues related to the protection of the rights of indigenous peoples.

When appropriate, the special mechanisms of the African Commission, such as the Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa, and Working Group on Economic, Social and Cultural Rights in Africa, should take into account the special needs and concerns of indigenous peoples as an integral part of their mandates.

The potential of the Universal Periodic Review and African Peer Review Mechanism to address the concerns of indigenous peoples should be explored fully.

UN and other multi-lateral and bi-lateral agencies with programmes at the country level would be of value in assisting African governments in implementing the recommendations outlined above. Through the guidance provided by the UN system in the form of international standards and guidelines, such agencies should integrate a concern for indigenous peoples into their broader programmes and ensure their staff are trained and aware of indigenous peoples' issues. These agencies should also devise mechanisms for adequate and systematic consultation with indigenous peoples in respect of their own activities that may affect them, and are also in a good position to assist Government efforts by facilitating consultation processes.

The African Commission, through its Working Group on Indigenous Populations/ Communities, the ILO and other UN agencies should provide technical assistance and undertake capacity-building and awareness-raising activities to government officials, judicial officers and parliamentarians, and civil society on indigenous issues in Africa.

To civil society:

The inclusion of a concern for indigenous peoples in the teaching and research of academic institutions would ensure greater capacity building on the issue in the African region.

Civil society groups, including indigenous peoples' organisations, should advocate for the effective consultation of indigenous peoples in all matters affecting them, and for the inclusion of the concerns of indigenous peoples in laws, policies and programmes. They should ensure that their programmes on indigenous issues are defined and implemented in full consultation with indigenous peoples, and ensure that programmes that are not specifically aimed at indigenous peoples take into account the specific concerns of indigenous peoples, and engage or partner directly with indigenous peoples on specific thematic areas of relevance. Where possible, civil society organisations should engage in capacity building for their staff on indigenous issues.

To the media:

The media has an important role to informing the general population about the concept of indigenous peoples, their particular needs and rights, and the urgency of addressing their concerns. The media could also contribute greatly to diminishing negative stereotypes about indigenous peoples through the provision of accurate information, as well as collaboration with indigenous peoples' organisations to provide an indigenous perspective on the themes addressed.



Annexure A: A list of country studies

- Algeria:** B Lounes *Protection constitutionnelle, législative et administrative des peuples autochtones en Algérie*
- Botswana:** K Bojosi (with comments by Alice Mogwe incorporated), *Botswana: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Burundi:** Albert Kwokwo Barume, *Protection constitutionnelle, législative et administrative des peuples autochtones au Burundi*
- Burkina Faso:** S Aboubacrine & A Hamady Sow, *Protection constitutionnelle, législative et administrative des peuples autochtones au Burkina Faso*
- Cameroon:** Samuel Nguiffo, Nadine Mballa & P Bigombe Logo, *Protection constitutionnelle, législative et administrative des peuples autochtones au Cameroun*
- Central African Republic (CAR):** Albert Kwokwo Barume, *Protection constitutionnelle, législative et administrative des peuples autochtones en République Centrafricaine*
- Chad:** F N Ngarhodjim, *Protection constitutionnelle, législative et administrative des peuples autochtones au Tchad*
- Congo:** Albert Kwokwo Barume, *Protection constitutionnelle, législative et administrative des peuples autochtones en République du Congo*
- Democratic Republic of Congo (DRC):** Albert Kwokwo Barume, *Protection constitutionnelle, législative et administrative des peuples autochtones en République Démocratique du Congo*
- Egypt:** S Dersso, *Egypt: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Eritrea:** S Mebrahtu (with comments by Zerisenay Habtezion incorporated) *Eritrea: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Ethiopia:** Mohammud Abdulahi (with comments by Melakou Tegegn incorporated), *Ethiopia: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Gabon:** Albert Kwokwo Barume, *Protection constitutionnelle, législative et administrative des peuples autochtones au Gabon*
- Kenya:** G Wachira Mukundi, *Kenya: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Mali:** P Eba & S Aboubacrine, *Protection constitutionnelle, législative et administrative des peuples autochtones au Mali*
- Morocco:** Mohammed Amrhar (with Divinia Gomez and Anne Schuit incorporated), *Morocco: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Namibia:** Andrew Chigovera (with comments by Clement Daniel incorporated), *Namibia: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Niger:** Oumarou Narey & Gandou Zakara, *Protection constitutionnelle, législative et administrative des peuples autochtones au Niger*
- Nigeria:** B Fagbayibo (with comments by Chidi Oguamanam incorporated), *Nigeria: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Rwanda:** Z Kalimba *Protection constitutionnelle, législative et administrative des peuples autochtones en République du Rwanda*
- Tanzania:** W Olenasha & R Kapindu, *Tanzania: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- South Africa:** G Wachira Mukundi, *South Africa: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Sudan:** C Doebbler, *Sudan: Constitutional, legislative and administrative provisions concerning indigenous peoples*
- Uganda:** C Mbazzira, *Uganda: Constitutional, legislative and administrative provisions concerning indigenous peoples*