PART II
CONCEPTUALISING INDIGENOUS LAND RIGHTS IN AN AFRICAN CONTEXT

CHAPTER I
THE TERM "INDIGENOUS" — AN EVOLVING CONCEPT

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

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

To reach its current understanding in international law, the meaning of the term "indigenous" seems to have evolved through several distinct phases. The first meaning of the concept, referred to hereafter as "the colonial meaning", can be considered as an alteration of the term's etymological understanding for colonial purposes. The second meaning of the term "indigenous" can be seen as having emerged in the aftermath of the creation of the United Nations and the decolonization process, and was confirmed by the adoption of ILO (International Labour Organization) Convention No. 107. Finally, it seems that the current understanding of the term "indigenous" is the result of the process starting with the Marffiez Cobo study launched in 1972 that lead up to the adoption of ILO Convention No. 169 in 1989, as well as of subsequent efforts to develop the concept by—among others—the U.N. Working Group on Indigenous Populations (WGIP), established in 1982, the World Bank (OD 4.20 in 1991 and OP 4.10 in 2004) and the African Commission on Human and Peoples' Rights (2003).

The colonial meaning of the concept "indigenous"

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

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

Universal and lasting peace can be established only if it is based upon social justice ... and privation to large numbers of people [can] produce unrest so great that the peace and harmony of the world are imperilled ...
The issue of "indigenous" was one of the first to be dealt with by the ILO, although it was not until 1936 that it adopted Convention No. 50 on the Recruitment of Indigenous Workers, its first native-related instrument. By "indigenous", this convention meant as stated in Article 2(b): "workers belonging to or assimilated to the indigenous populations of the dependent territories of Members of the Organization and workers belonging to or assimilated to the dependent indigenous populations of the home territories of Members of the Organization." This Convention and its travaux préparatoires seemed to give a double meaning to the term "indigenous". On the one hand, in an understanding closer to the etymology of the term, ILO Convention No. 50 meant by "indigenous", those peoples who were natives, "born in non-independent territories" or, in other words, "indigenous by origin". Delegates and government representatives mandated to draft this Convention thus made it clear that the convention was "dealing with the subject of native labour", and that if ratified, it would apply in particular to the African colonies, but also to other colonized territories. British delegates to these drafting sessions also said that ILO Convention No. 50 was expected to deal with populations of all the territories under its Colonial and Dominions Offices, such as Switzerland.

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

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

ILO Convention No. 107

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

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9 In 1921, the ILO conducted a study on indigenous workers and, in 1926, it established the Committee of Experts on Indigenous Workers.
10 ILO Convention No. 50 Concerning the Regulation of Certain Special Systems of Recruiting Workers—also called C50 Recruiting of Indigenous Workers Convention. For full text, see http://www.ilo.org/ILOEn/english/conventions/105.htm
11 Convention No. 50 was drafted by the Committee of Experts on Indigenous Workers set up by the International Labour Conference, the governing body of the ILO, during its 31st session in 1926. The Committee was given the mandate of framing standards of protection of this specific category of workers. ILO Convention No. 50 appears to be the first indigenous-related text drafted by the Committee set up 10 years earlier. See International Labour Organization, International Labour Conventions and Recommendations 1919-1951, vol. I. (Geneva: International Labour Office, 1956), pp. 277.
12 Travaux préparatoires (French for "preparatory works") are the official record of a negotiation.
14 Ibid.
17 International Labour Conference, "Information and Reports on the Application of Conventions and Recommendations", Report III (1), 59th session (Geneva: International Labour Office, 1956a), p. 247: the United Kingdom ratified ILO Convention No. 50 on 22 May 1939 with reserve that it was not applicable to Aden, Bermuda, Cyprus, Falkland Island, Gibraltar, Malaya, St. Helena and Zanzibar. Japan's ratification occurred on 8 September 1938 and it was said to be applicable to all the Pacific Islands that Japan had under its power from the League of the Nations' mandate. New Zealand's ratification occurred on 8 July 1947 and Belgium on 26 July 1948.
18 The exact wording and meaning of the term "indigenous" were later referred to in ILO Convention No. 64 of 1939 on "regulation of written contracts of employment...". ILO Convention No. 65 on "penal sanctions for breaches of contracts of employment...", and ILO Convention No. 104 of 1955 abolishing the penal sanctions for breach of contract of employment. See http://www.ilo.org/ilex/
19 ILO Recommendation No. 70 in its opening statement remarks that "the economic advancement and social progress of the peoples of dependent territories have become increasingly a matter of close and urgent concern to the States responsible for their administration". See in International Labour Organization, International Labour Conventions and Recommendations 1919-1951, vol. II. (Geneva: International Labour Office, 1956), p. 402. Article 1 of the recommendation stated that "...all policies designed to apply to dependent territories shall be primarily directed to the well-being and development of the peoples of such territories and to the promotion of the desire on their part for social progress".
20 For text of ILO Convention No. 82 (and others), see ILOLEX Web site at http://www.ilo.org/ilex/
territories. The United Nations Charter had also just been adopted (1945), stating among others, "the principle of equal rights and self-determination of peoples".

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

None of the above mentioned documents contained anything on the meaning of the term "indigenous". The drafters of ILO Convention 107, however, could not avoid having to deal with the definition problem, since it built on previous work done by the Committee of Experts on Indigenous Labour and its report on the "living and working conditions of indigenous populations in independent territories". At its session of June 1956, the International Labour Conference set up a Committee on Indigenous Populations, with a mandate to analyse this report and to recommend a draft text on indigenous populations' rights. At the following session of the International Labour Conference, the Committee presented a draft text bearing the title: "Convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations". This Draft defined the term "indigenous" as:

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

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

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

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

1. descendants of people who inhabited the country at the time of conquest or colonization, who lead a tribal or semi-tribal existence more in conformity with the living and working conditions of the indigenous population of the country...


3. The Committee on Indigenous Populations was set up on 7 June 1956 by the International Labour Conference. It was composed of 45 members, amongst them 30 Government members, 5 Employers' members, and 10 Workers' members. The Committee founded its work on studies on the conditions of indigenous populations in independent territories undertaken by the Committee of Experts on Indigenous Labour during its sessions of March 1951 and May 1954. It also received a great deal of materials and needed information from the responses of Governments to the questionnaire proposed by the Committee of Experts. See also in International Labour Conference, "Living and Working Conditions" (1955), p. 3.


A modern understanding of the term “indigenous”

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

With regard to the meaning of the term “indigenous”, the drafting Committee of the new Convention suggested the following changes to ILO Convention 107:58 Paragraph 1(a) of Article 1 of ILO Convention No. 107 was to be kept unchanged, apart from inserting the term “cultural” between the words “social” and “economic”.59 In paragraph 2 to Article I, the Committee proposed that the words “members of tribal or semi-tribal populations” be deleted and replaced by either “peoples” or “populations”. Finally, the Committee recommended the deletion of the entire paragraph 2 of Article 1 and its replacement by a statement on the principle of “self-identification”.

The formulation of Article 1 of the new Convention (ILO No. 169) went through without major amendments.60 However, the use of the term “peoples” in the definition of those to whom the Convention was meant to apply raised a major controversy, which was resolved by the adoption of a third paragraph to Article 1, stating that:

The use of the term “peoples” ... shall not be construed as having any implications as regards the rights which may attach to the term under international law.61

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

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

59 Article 1(1)(a) of ILO Convention No. 107 speaks about, “members of tribal or semi-tribal populations in independent countries, whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations ...”
60 Amendments proposed by various delegates were minor, like the proposition by Norway to insert the terms “establishment of present States boundaries” before the word “colonization” in paragraph 1(b) of Article 1. This amendment was not adopted.
61 Article 1(3) of ILO Convention No. 169.
people in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.

However, it was emphasized in paragraph 2 that:

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

As one can see, the above Article 1, on the one hand, lists factors that could be considered elements regarding the scope of the term "indigenous" and, on the other hand, it emphasizes the principle of self-identification. Is this a contradiction? The Japanese Government delegates to the drafting sessions of ILO Convention No. 169 considered that there was an apparent contradiction between the two first paragraphs of Article 1 and argued that "the scope of the Convention [was] being ambiguous with the introduction of the notion of self-identification as a fundamental criterion." 40

One should not read a contradiction in the combination of self-identification and the list of indigenous peoples' characteristics. An adviser to the Danish Government and, at the time, Rapporteur of the Drafting Committee, gave a hint of what the rationale might be behind this article. He made it clear that the drafters addressed the issue of which individuals are "indigenous" with an inclusive and comprehensive understanding. More specifically, he said that the Convention was meant to be a "significant expression of ... concern for peoples who ... suffered discrimination, injustice, dispossession and shameful treatment." 41

This means that, contrary to the opinion that "ILO Convention No. 169 [has] succeeded in delimiting [its] scope of application", in terms of the persons it applies to (native personae), 42 it can be argued that what the drafters had in mind whilst outlining the provisions of paragraphs (a) and (b) of Article 1 was not to make a strict definition of the term "indigenous", but to offer guidance, to facilitate a better understanding of communities which could identify themselves as indigenous.

Andrew Gray, a well-known anthropologist and for many years Director of the International Work Group for Indigenous Affairs (IWGIA), shares the view that the drafting Committee of ILO No. 169 did not define the term "indigenous". He makes indeed a useful distinction between "defining [indigenous] ... and establishing procedures to exercise the right of self-determination". In other words, he does not understand the "guiding factors" as indirect definitions of indigenous, but as elements that help to comprehend which groups enjoy "the right of self-identification" protected by ILO Convention No. 169. Indeed, he argues that guiding factors must "be operational in order to serve international objectives and in particular to allow an understanding of the many different cultures; second, ... [it must] be functional to allow participation of the indigenous peoples; third, ... [it must] be flexible in order to be able to respond to new situations in the dynamic process of recognizing indigenous people's rights". 43

Similarly, the opinion within the U.N. Working Group on Indigenous Populations is that a definition of the term "indigenous" would undermine the credibility of all the efforts made under the United Nations. It is feared that "the diversity of the world's indigenous communities is such that no single definition is likely to capture the breadth of their experience and their existence, but many in fact exclude particular groups in its efforts to establish a defined category of indigenous peoples". 44 Indigenous communities themselves have also categorically rejected any attempt made by governments to define "indigenous peoples", stating that such matters "should be determined by the world's indigenous peoples themselves". 45

This broad understanding of the term "indigenous", based upon guiding criteria combined with the principle of self-identification, is widely argued by numerous other international bodies. The World Bank, as discussed further in this book, underlines criteria such as attachment to ancestral territories or natural resources, being a culturally distinct community and the principle of self-identification. 46

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

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

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

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

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

The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities also enshrines the principle of self-identification and lists a number of characteristics. It states indeed that, “a strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us identify who indigenous peoples and communities in Africa are.”

The Report also shows that the culture and ways of life of African indigenous peoples differ from those of dominant communities and that their survival depends strongly on access to ancestral lands.

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

Several scholars have elaborated on this issue, James Anaya, for example, gives most emphasis to the issue of attachment to “ancestral lands in which [indigenous] live, or would like to live”. Patrick Thornberry speaks of an association with “a particular place, not an amorphous space”. In the same vein, Andrew Gray builds upon the fact that some continents can still experience “inter-generations domination”, “relocations”, “transmigration” and similar movements of peoples, to argue for a “pragmatic definition” that can be applied to all tribal, aboriginal and other groups, which consider their territorial base to be under external threat. He refers, for instance, to the case of more than three million non-native people relocated onto indigenous lands in West Papua by the Indonesian Government.

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

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

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54 Ibid., p. 89.
CHAPTER II
RELEVANCE AND APPLICABILITY OF THE CONCEPT "INDIGENOUS" IN CENTRAL, EASTERN, AND SOUTHERN AFRICA

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

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

It is often asserted that "far too little is known of the indigenous groups in Africa" or that "in Africa ... it is very difficult to see across communities which retain all their pristine tribal characters". Others have even said that all Africans are indigenous to the continent. Overall opinions on indigenous peoples in Africa are diverse and on occasions contradictory, revealing that "Africa poses thorny problems of definition, because most Africans consider themselves to be indigenous peoples who have achieved decolonization and self-determination." The

60 Article 1.2 of ILO Convention No. 169 reads: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."
61 For more on opinions on as to whether or not a definition of the terms indigenous is imperative, see Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy", 27 American Journal of International Law (1993), p. 415ff.
63 Wiesner, "Rights and Status of Indigenous Peoples" (1990), p. 89.

South African judge Gildenhuys, in his ruling in the Richtersveld case, asked himself the question "whether the doctrine of indigenous title forms part of [South African law]" and answered that, to his "knowledge, the notion of aboriginal title had never been recognised in any reported court decision." The definition of the term indigenous by the Martinez Cobo Report to the U.N. Sub-Commission on the Prevention of Discrimination of Minorities (1986) has been criticized for, among other things, "potentially leaving out indigenous peoples in Africa, Asia, and other places that are oppressed by equally 'original' inhabitants of neighbouring lands that have now become the dominant groups of their society." Alfonso Martinez in his study on Treaties criticizes the Cobo Report for "[lump[ing] to lump together situations that ... should be differentiated because of their intrinsic dissimilarities". According to him, "these dissimilarities hinge on a number of historical factors that call for a clear distinction to be made between the phenomenon of the territorial expansion by indigenous nations into adjacent areas and that of organized colonization, by European powers, of peoples inhabiting, since time immemorial, territories on other continents". He goes on to say that "many representatives of what is described as state-oppressed groups/minorities/people in African and Asian countries have brought their case before the Working Group on Indigenous Populations for lack of other venues to submit their grievances" but in his view "post-colonial Africa and Asia autochthonous groups/minorities/ethnic groups/people ... cannot ... claim for themselves, unilaterally and exclusively, the 'indigenous' status in the United Nations context" but "should be analysed in other fora of the United Nations than those that are currently concerned with the problems of indigenous peoples, in particular in the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities." Martinez concludes that "the term 'indigenous'—exclusive by definition—is particularly inappropriate in the context of the Afro-Asian problematics and within the framework of United Nations activities in this field."

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

66 Richtersveld and Others v. Alexis Farm Ltd. And Another, 2001 (3) SA 1293 (LCC), p. 46.
• Self-identification
• Non-dominant status within a wider society;
• History of particular subjugation, marginalisation, dispossession, exclusion, or discrimination;
• Land rights prior to colonization or occupation by other African groups; and
• A land-based culture and willingness to preserve it.

Self-identification

The principle of "self-identification", as articulated in Article 1.2 of ILO Convention No. 169 and Article 3 of the U.N. Declaration on the Rights of Indigenous Peoples, recognizes to any community or peoples the freedom to define itself/themselves as "indigenous". In Central, Eastern and Southern Africa, numerous communities self-identify as indigenous peoples.69 These include in Central Africa, the "Pygmies" of the African tropical forests and the Mbororo. In Eastern Africa, there are the Hadzabe, Akie, Ogiek, Yaaku, Sengwer, Massai, Samburu, Turkana, Barabaig, Pokot, Orma, Rendille, Karamojong, and numerous others. In Southern Africa there are the San, the Nama and the Himba. Representatives of these communities are active through various platforms such as the Indigenous Peoples of Africa Co-ordinating Committee (IPACC),70 and at several regional/or international meetings on indigenous issues in Africa and world wide.71 The following few illustrative examples show how these communities or peoples exercise this freedom.

The Central African indigenous hunter-gatherers, known generically as the "Pygmies" and estimated to be as many as 350,000, self-identify as indigenous peoples. In a letter addressed to the President of their country, the Batwa "Pygmies" of Rwanda not only state their aboriginal title over a number of forests, but also call upon their Government to address their claim to lands on the basis of ILO Convention No. 169 and other international instruments, which provide for the rights of indigenous peoples.72 Because of claiming indigenous status, the Batwa of Rwanda have experienced difficulties in their relationship with the Government, which considers the concept "indigenous" as a threat to national unity.

Not only Batwa representatives from Rwanda and Burundi, but also Mbuti, Bageni, and Baka representatives from the Democratic Republic of Congo and Cameroon have been regular attendants at the sessions of the former U.N. Working Group on Indigenous Populations, the U.N. Permanent Forum on Indigenous Issues, and the African Commission on Human and Peoples’ Rights as well as at several other international gatherings. At the 16th session (1998) of the U.N. Working Group on Indigenous Populations, for example, members of the Batwa community from Rwanda and the Democratic Republic of Congo together stated that their communities consider themselves as the first nations of their respective countries,73 an assertion that is widely accepted.74 The consistent work of these groups at the United Nations level has made it possible that, in one of the final reports of the fifty-seventh session of the U.N. Commission of Human Rights, it was recommended that:

The Governments of Burundi, the Democratic Republic of the Congo, Rwanda, and Uganda should recognize the Batwa as indigenous peoples and demonstrate their commitment to respecting that people’s rights by fulfilling the obligations they had entered into under the African Charter on Human and Peoples’ Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. They should also ratify and implement ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and support the adoption of the Draft Declaration on the Rights of Indigenous Peoples.75

The Mbororo is another community that identifies itself as indigenous. They are predominantly pastoralists and live in several African countries, notably Cameroon, Nigeria, Chad, and the Central African Republic. In all these countries, they ground their indigenous status on a particular way of life (nomadic or semi-nomadic pastoralism) threatened by other communities’ dominant way of life.76

70 "Pygmy" is a generic term for a large number of indigenous groups living mostly in Central Africa. As some of these groups find the term derogatory and prefer to use their own names, it is now common to write "Pygmy" with inverted commas.
71 The IPACC was created in 1997 by a number of African indigenous peoples. This network of indigenous organizations includes among its members organizations representing the San of Southern Africa, the Batwa of Central Africa, the Massai, the Barabaig and the Ogiek of Bother Africa, and the Tuareg and the Ogoni from West Africa. See Web site at http://www.ipacc.org.za/represent.html
72 In September 2001, for example, representatives from Massai, Batwa, Ogiek, and several other communities that consider themselves indigenous took part in a conference on Indigenous and Protected Areas in Africa, held in Rwanda. Each one of these communities related in its presentation its indigenousness as the basis for its land claims.
73 The letter was written by a member of the Batwa community of Rwanda and head of a platform of Batwa. See Web site of Héritiers de la justice: http://www.beritiers.org/ceasevoletpres.html
74 See Web site of Héritiers de la Justice: http://www.beritiers.org/kapupugenera.html
numerous national, regional, and international fora, this community has claimed to suffer particular discriminations related to its wish to maintain its way of life.

In Eastern Africa, the Maasai (estimated to number up to 500,000) self-identify as indigenous peoples to lands stretching over Kenya and Tanzania. They could be considered as amongst the most active Eastern African communities with regard to claiming indigenous status and all this involves, including rights over resources. As early as 1912, the Maasai of Kenya were already in court to proclaim and protect their indigenous lands against the colonial Government. Despite ruling against the Maasai plaintiffs, the court recognized that they were sovereign over their lands.77

The Maasai have also used regional and international stages to proclaim their indigenousness. At the 1999 “Conference on Indigenous Peoples from Eastern, Central, and Southern Africa”, held in Arusha (Tanzania), a representative of the “Maa Development Association”—a Kenyan Maasai development organization—stated: “The Maasai comprise some of the indigenous peoples of East Africa”.91 On the same occasion, a representative of the Maasai community of the Kiteto District in the Arusha area of Tanzania declared: “We are the people of South Maasai Steppes, we live on semi-arid land. We value our livestock and natural vegetation with relative resources ... we struggle to protect our land, which is home to all the habitats we know in our ecosystem”.93 Similarly, at a conference held in Kigali/Rwanda on Indigenous Peoples in Conservation Areas, representatives of Maasai communities living in the Ngorongoro area of Tanzania showed how their communities considered themselves as indigenous to the Serengeti.94 Maasai representatives have also been regular attendants of numerous relevant gatherings, including the annual sessions of the former United Na-

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77 In Kenya, the Maasai live in the areas of Narok and Kajiado in the southern part and Nakuru and Laikipia in the central part of the country, whereas the Maasai of Tanzania are found in the areas of Ngorongoro, Simanjiro, Kiteto, and Oldebean in Engai. The Maasai communities in Kenya and Tanzania are estimated to have some 155,000 and 230,000 members respectively. See Web site of Maasai-Infoline: http://maasai-infoline.org/TheMaasaipeople.html
80 This conference was organized by PINGOs Forum—a Tanzanian umbrella organization for pastoralists and hunter-gatherers—and IWGA.
86 Ibid.
87 The Ogiek submission is available online at http://www.ogiek.org/report/ogiek-april.htm. The Land Review Commission, known as the Njonjo Land Commission, was set up by the Kenyan Government in 2000 to assess, amongst other things, land claims by various communities. The Commission was named after its Chairperson, Charles Njongo, member of the Kenyan Parliament.
an increasing number of African countries tend not to require a formal definition as a precondition for addressing human rights violations facing such communities.

**Non-dominant sector of society**

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

Are all these factors relevant in the case of Africa?

**Numerical non-dominance**

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

In Central Africa, the "Pygmies" of the African tropical forests, which stretch over Cameroon, Central African Republic, Gabon, Equatorial Guinea, the Republic of Congo, the Democratic Republic of Congo, Rwanda, Burundi, and Uganda, are estimated to total 350,000, whereas altogether these countries have a population exceeding 114.5 million people. In Rwanda, the Batwa make up about 0.4 per cent of the whole population, the two other ethnic groups (the Tutsi and the Hutu) making up the remainder of the national population estimated at approximately 7.3 million.

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


94 The full text of this statement by the Himba community to the Government of Namibia can be accessed on the Web site of the International Rivers Network, http://www.ren.org/programs/safries/heba960103.html


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


In Kenya, which has a population of over 29 million, the 2001 Population Reference Bureau's figures indicate that the Kikuyu make up 22 per cent of the population, the Luhyas 14 per cent, the Luo 13 per cent, the Kalenjin 12 per cent, the Kisii 6 per cent, and the Meru 6 per cent, "other Africans" 15 per cent, and the non-African (Asian Europeans and Arabs) 1 per cent. As one can see, neither the Maasai (estimated to be 155,000) nor the Ogiek (estimated to be 20,000) are mentioned, possibly because of their significantly small numbers. Both the Maasai and the Ogiek are surely included in what the report calls "other Africans".

In Tanzania, with a population of over 36 million, the Hadzabe are estimated to be not more than 1,500 people and the Maasai some 330,000, whereas the Chagga ethnic group alone reaches the figure of about 1 million people.

In Southern Africa, the San are estimated around 107,000 with approximately 50,000 San in Botswana, 40,000 in Namibia, 4,500 in South Africa, 1,300 in Zimbabwe, 9,700 in Angola and 1,600 in Zambia. In all these countries, the San are numerically small communities. In the case of Namibia, for instance, they only represent 3 per cent of the national population, estimated at 1.7 million people. The Himba of Namibia are believed to number some 15,000.

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

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

Two factors could be considered as the main differences between “minorities” and “indigenous”. First, minorities’ rights are generally framed in individual terms, whereas those of the indigenous are, or should be, worded in collective terms. Minorities’ rights are indeed individual rights that can be enjoyed or exercised as a group. Secondly, and perhaps more importantly, unlike minorities, the “indigenous” are characterised particularly by their strong cultural bond to their lands, without which they would not exist as a cultural entity and their lives would be in great danger. John Borrows calls this tie a “landed citizenship”, which he defines as “loyalties, allegiance, and affection related to the land ... the water, wind, sun, and stars are part of this federation ... [Indigenous] teachings and stories form the constitution of this relationship, and direct and nourish the obligations this citizenship requires”. Furthermore, minorities, either linguistic, ethnic or religious, are often identified with regard to a given state in which they are numerically small. Indigenous communities tend not to identify themselves with a given state but with a given and discernable land within a state or region. Indigenous peoples claim their rights on the basis of social factors that existed long before the “state” as an institution. In other cases, indigenous peoples identify themselves with a whole region comprising different states. This is, for instance, the case of the “Pygmies” in Central Africa. In Eastern Africa, many Maasai continue to resist the Kenyan and Tanzanian Governments’ efforts to try and integrate them, by holding two identity cards, because members of this community identify themselves more with their lands, which stretch over the two countries, than with the two states.

Baker (Toronto: University of Toronto Press, 1994), p. 106; Dave Ingram, Group Rights (Kansas University Press of Kansas, 2000), p. 107. This last author distinguishes, for example, a gathering of individuals with “societal culture” from those without. With regard to the former, he refers to indigenous communities, whereas for groupings of individuals without a “societal culture” he refers to such groups as immigrants, refugees, guest workers, and former colonizers.


Article 14 of ILO Convention No. 169 on land rights speaks of “the rights of ownership and possession of the peoples concerned”.

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

In Africa, the non-dominant characteristic of indigenous peoples has also something to do with their ways of life as hunter-gatherers and pastoralists, which increasingly are threatened by the dominant ways of life based on agriculture, industrial farming and modern development. As Hugh Brody writes, "... then came a revolution that transformed almost the entire surface of the earth: agriculture...[so] any landscapes that is not farmed is wild and therefore of little economic use". 110

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

Governments and the international donor community give instead priority treatments to agriculture and industrial farming, as well as to mining, the building of hydroelectric dams, the creation of national parks, and many other activities that are leading to the reduction of forests, bushes and grazing lands. Often, this results in tensions, and sometimes even open conflicts, between sedentary agriculturalists and nomadic communities. 111

Pressures on grazing and forested lands also has to do with population growth and land scarcity. An increase of agricultural production depends largely on both the size of the cultivated land and the number of people working on it. As the number of cultivators continues to grow, the problem of land shortage arises. This often leads to a dispersal of community members in search of new areas suitable for cultivation. Pastoralists and hunter-gatherers, on the other hand, tend not to increase to the same extent in number. Pastoralists do not require much land.

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


History of severe discrimination

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

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

Indigenous peoples tend to resist these measures and policies designed by their States to "civilise" them, and this struggle for their land-based cultural survival, their "societal cultures", often clashes with the interests of the States in which they live. In Andrew Gray's words, "indigenousness is an assertion by people directed against the power of outsiders", 114 including the power of the States. Most Kenyan and Tanzanian indigenous peoples, as well as several other indigenous peoples living in Central, Eastern, and Southern Africa consider their respective Governments to be outside powers established on their lands.
The Ogiek indigenous peoples are in court against the Kenyan Government’s policy, which aims first at de-gazetting the Mau Forest and then at dividing it into individually held land plots, a scheme that land-hungry communities, such as the Kipsigis, welcome. In Kenya, too, the Maasai community is resisting government policies of land individualization. The Hadzabe and the Barabaig in northern Tanzania have sometimes resisted compulsory schooling of their children as well as the efforts made by their Governments to transform them into agriculturalists, considered to be the only rational way of life or “legitimate occupancy” of land. Actions taken by indigenous peoples in resistance to being “civilized” or assimilated range from open conflicts, legal challenges, lobbying at the international level against their States’ policies, voluntarily ignoring the expropriation measures taken by the State by continuing to “clandestinely” use the contentious lands, burning down the resources on lands taken away from them by governments, etc.

In 2005, legal status was denied a Rwandan indigenous NGO, Communauté des Autochtones du Rwanda (CAURWA), on the grounds that their use of the term “autochthone” (indigenous) and their claim of cultural identity as Batwa indigenous peoples amounted to a breach of the Rwandan Constitution, which prohibits any act that may divide the Rwandan society along ethnic lines. The indigenous community-based NGO argued unsuccessfully that the term “Batwa” symbolized their cultural identity, which they wanted to maintain. In order to survive as an NGO with a legal status, CAURWA had eventually no other option than changing its name to Communauté des Potiers du Rwanda (Rwanda’s Potter Community - COPORWA).

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

On numerous occasions, African officials have argued that indigenous peoples tend to auto-exclude themselves from modern life, national programs and policies. The “Pygmies” of Central African forests, the Mbororo, the Hadzabe, the San and numerous other communities are thus often accused of sidestepping them.

115 Medweni, *The Hadzabe of Tanzania* (2000), p. 20, writes: “The objective of the Government became the transformation of these communities into what officials viewed as the more rational mode of life of sedentarized agriculture ...”


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

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

As shown by international and a number of African jurisprudences, indigenous land rights are not proven by written modern land titles, but by testimonies and accounts of immemorial occupation and use. In order to prove indigenous peoples’ land rights, it is often necessary to bring in not only the beneficiaries but also researchers, historians, anthropologists to testify, and to use archives and similar sources of historical information. This is because, in most African cases, indigenous peoples’ land rights existed long before the current modern system of land ownership and written history.

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

In many parts of Africa, people’s movements have been less well documented than in other regions, to the extent that it is difficult to know who lived where and when. A further problem arises where the process of some communities being culturally overpowered by others is still taking place. Some have thus argued for the term “prior” in addition to “original”. In the Australian Mabo case, for instance, the term “prior” was chosen rather than “original”, because, although the Meriam people had been occupying the Torres Strait Islands for generations before the first European contact, Justice Brennan, at the same time, also acknowledged that the original inhabitants of the islands were not the Meriam people, but probably Melanesian people who had come from Papua New Guinea. Andrew Gray similarly points out that the Chukma of the Chittagong Hill Tracts are not the original inhabitants of these lands, on which they settled after the Arakanese and Tripurans. A recent study on Cameroon by the author of this book shows that Mbhororo, living in that country, arrived from elsewhere too, but still claim indigenous status. Nor are the Maasai the original occupants of their lands. Survival International reckons they arrived in the region known today as Maasailand (southern Kenya and northern Tanzania) around the fifteenth century. Basil Davidson, on the other hand, believes that the Masai reached Kenya long after 1545, establishing themselves along the Mount Ngorongoro near what is now Tanzania’s border to Kenya. The Himba are in the same way recorded to have originated from the Great Rift Valley in Central Africa around the fourteenth century A.D. Not being the “original inhabitants”, however, does not make the Masai or the Himba less indigenous than the “Pygmies”, the Hadzabe or the San, who are widely recognized as the first peoples of the African tropical forest, the forest around Lake Eyasi in northern Tanzania and the Kalahari, respectively.

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

Land-based culture

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

Conclusion

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

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

In the process of adoption of the United Nations Declaration on the Rights of Indigenous Peoples, however, most of the African States—also designated as the “African Group”—objected to the principle of self-identification by saying that “the absence of a definition of indigenous peoples in the text creates legal prob-
problems for the implementation. It is therefore important that the Declaration’s jurisdic-
tional clause defining the rights holders should be included in the text”.

The African Commission on Human and Peoples’ Rights appealed the worries of
African political leaders by underlining the principle of self-identification en-
shrined by ILO Convention No. 169, and stressing that “a strict definition of
indigenous peoples is neither necessary nor desirable. It is much more relevant and
constructive to try to outline the major characteristics, which can help us to iden-
tify who the indigenous peoples and communities in Africa are.”

Unlike the situation on other continents where indigenous means first inhab-
itants as opposed to the colonizers and their descendants, in Africa the concept of
“indigenous peoples” refers to communities who have been long forgotten or
overlooked for the sake of post-colonial development programmes and projects
relating to, among other things, nature conservation, exploitation of natural
resources, public infrastructure and industrial agriculture. These communities have
seen their ways of life being considered as backward, ridiculed and des-
tined to disappear. In each African country where they live, these communities,
whose way of life is negatively looked upon, are easily identifiable by the rest of
their fellow citizens and Governments. These peoples or communities are largely
hunter-gatherers and nomadic pastoralists whose methods of occupation and
use of the land have not been legally recognized and protected. In many African
countries, hunting, gathering and nomadism were not and are still not consid-
ered as being “civilized” and development-oriented ways of using the land. This
is not only because agriculture has become the main way of life, but also because
lands used by hunter-gatherers and other nomadic communities in most cases look
as if they are not occupied or are no-man’s land (nos nullius). In the Americas,
Australia, and New Zealand, the concept of indigenous referred to peoples hav-
ing been conquered, colonized, displaced, and even exterminated by the new-
comers. In contrast, the colonization process in Africa appears to have been
somewhat less malignant. Nevertheless, here, too, people were subjected and
displaced first by the colonial powers and later by post-independence main-
stream societies. It is in response to these historical injustices suffered by a number
of African communities that the African indigenous movement should be seen.
The call to justice and equal enjoyment of all rights and freedoms by these com-

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

munities goes via the human rights international framework called “indigenous
movement”. This is indeed the human rights meaning of the term “indigenous
in Africa, which therefore should be differentiated from its general meaning by
which each African can legitimately call himself or herself indigenous to the con-
tinent.

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

It is therefore arguable that not all Africans are indigenous peoples, because,
as understood in current international law, someone is indigenous in relation to a
given, well-identified area of land. This implies that an African community
cannot be indigenous to the entire continent, nor even to an entire country, but
instead to a precise land that can be demarcated and seen as culturally important.

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

It should also be noted that most African indigenous peoples tend to use inter-
changeably the terms “communities” and “peoples”. The African regional hu-
man rights system seems also to prefer the terminology “communities”, rather
than “peoples”. It is argued that, whereas societies, organizations, clubs, and
similar groupings are established by deliberate and voluntary actions of their
members, communities are groups based upon unifying and spontaneous fac-
tors essentially beyond the control of members of the group”, Communities are
presented as entities that exist as cultural units, and cannot be regarded as a
mere aggregate of individuals. They are featured by a sense of belonging togeth-
er, willingness to preserve “solidarity between them and sharing a common her-
itage and common destiny”.

The use of the term “communities” together with indigenous seems indeed
more appropriate in Africa. Firstly, this concept implies the idea of culture, living
together, sharing common values, and being willing to preserve a certain way of

133 Nathan Lerner, Group Rights and Discrimination in International Law (Oxford: Martinus Nijhoff
134 Olivier Mendesbain and Upendra Baxi (eds), The Rights of Subordinated Peoples (Delhi: Oxford
life, all of which are characteristics that appear closer to African indigenous peoples’ claims. Secondly, the term “communities” is less politically charged than “peoples”. It can be considered as appropriate for building up trust between indigenous communities and their States, since most African indigenous communities do not claim statehood, but autonomy, self-governance, and control over their lands and resources. Thirdly, the term “communities” is unlikely to include any aggregate of individuals like the concepts “minorities” and “groups”. There is also an emerging interchangeable use of the terms “communities” and “peoples” in various indigenous-related international human rights discourse, particularly on lands seen as the cornerstone of indigenous peoples’ existence.

CHAPTER III
THE LANDS OF INDIGENOUS PEOPLES:
IMPORTANCE AND JUSTIFICATION

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

Land as the Incarnation of culture

In international human rights law doctrine, culture is sometimes understood as being a “cluster of social, and economic activities, which gives a community its sense of identity”.137 The United Nations Human Rights Committee in a General Comment (1994) writes:

3.2. ... To enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities ... 7. ... Culture manifests itself in many forms, including a particular way of life associated with the use of land resources especially in the case of indigenous peoples. That right may include such traditional activities as fishing and hunting ...138

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

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

Indigenous peoples have indeed “a distinctive and profound spiritual and material relationship with their lands.” They “view their relationship with the land as central to their collective identity and well-being. People and land and culture are indissolubly linked...[lands express] the rights of...communities to self-preservation...The foundational right accorded to collective entities capable of bearing rights would be meaningless without a right to the continued possession and enjoyment of their land.”

Lands are simply “the raison d’être of [indigenous peoples’] culture.” That alien activities on indigenous peoples’ lands undoubtedly can threaten the “way of life and culture” of such peoples, has also been emphasized by the Human Rights Committee.

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[140] This was also stated in the Delgamuukw v. British Columbia [1997] S.C.R. 1010 (Canada), which emphasized the special bond between indigenous peoples and their lands. For text of case, see http://www.canlii.org/en/ca/nec/doc/1997/1997canlii1012/1997canlii1012.html
[144] Ibid.

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“There is ample evidence of the “special connection between indigenous and the lands” For example, during the proceedings of the Mabo case in Australia, several elders of the Meriam people were brought to testify on their community’s immemorial occupation and cultural uses of Mer (Murray) Island. Similarly, in all the legal cases of the Barabaig against NAFCO (National Agricultural and Food Corporation) in Tanzania, numerous Barabaig elders were brought from their villages to testify why their lands were and continued to be culturally important for their survival as a community (see Part II of this volume). One of the lawyers, who acted for the plaintiffs, underlined the irreparable cultural value that these Tanzanian indigenous people accorded to their lost lands. With regard to sacred graves, various testimonies were recorded by Barabaig elders providing information that individuals who played important roles within this community were not buried in the same way as other community members. Their graves often took more than two years to build, as they required very special skills and a lot of materials because of their size and their cultural value. The areas where these graves were located, were generally used by the Barabaig for seasonal gatherings. All these graves were bulldozed by NAFCO, against whom the Barabaig community later went to court.

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

Women [...] give birth to their children in the forest just outside camp. The forest inhabits the Mbendjele as much as they inhabit the forest. The forest is idealized as the perfect place for people to be. Every day Mbendjele conversations are obsessed with the forest, with different tricks and techniques for finding wild foods, about stories of past hunting, fishing or gathering trips, or of great feasts and forest spirit performances (massaana) that occurred, or will occur in the near future. The forest links people to the past. Different areas in the forest are talked about in terms of the remembered ancestors that spent time there and the events that
occurred. When Mbenjilele die, they believe they go to another forest
derm Komba (God) has a camp. They will remain in Komba’s forest
camp until they are told to take another path and are born into this
world again.149

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

For the Himba, a grave is not just the location of the physical remains of
a deceased person—it is a focal point for defining identity, social relation-
ship and relationship with the land, as well as being a centre for im-
portant religious rituals. ... Graveyards are usually located near a water-
course ... [which makes these areas] heavily loaded with emotions, as the
points where communities congregate, the starting point of annual cattle
migrations.150

As put by Andrew Corbett, “the key point is not the physical fact of the graves
themselves, but the connection between the graves, the family’s history and the
community’s system of land tenure and decision-making”.151

Similarly, an elder of the South African Xhosa people, who was interviewed
during the process of reclaiming their ancestral lands from the South African
Government, stated: “Without the Kalahari ... we are nothing. In the Kalahari,
we know where we belong, we know what to do with the land, we know who we are”.152
This is very much corroborated by what the author of this book saw and
heard during his visit to San communities in the Kalahari, in November 2002.

However, the strong tie between indigenous communities’ livelihood and
culture with their lands should not be confused with the relation that we might
all have, as members of the human race, to some resources, such as the ozone
layer, marine life, international waters and similar resources. In her famous pub-
lication, Governing the Commons: the Evolution of Institutions for Collective Action,
Elinor Ostrom uses the concept of “common property resources” (CPR), which is
defined as resources used by many individuals in common and difficult to own.153

Although this understanding of CPR could include the “collective lands of indige-
 nous communities”, one can see that the perception of the CPR, as resources
“used by many individuals in common”, gives the impression of insisting on
“use” as the principal and main tie between the CPR and people.

This understanding of CPR seems not to underline the fact that, for indige-
 nous communities, land is not just for use, but also and more importantly, land
sustains their whole livelihood and culture. Furthermore, the indigenous com-
 munities also have a distinctive and profound spiritual and material relation-
ship with their lands.154 For indigenous peoples “their relationship with the
land is central to their collective identity and well-being. ... People and land
and culture are indissolubly linked ... [lands express] the rights of ... communi-
ties to self-preservation. ... The foundational right accorded to collective enti-
ties capable of bearing rights would be meaningless without a right to the con-
tinued possession and enjoyment of their land.”155

Right to lands and right to life

Indigenous peoples’ right to lands is so important that many have linked it
with some aspects of the right to life. Many examples from Africa seem to cor-
robate this view. In the late 1960s, when the Batwa of eastern Democratic
Republic of Congo were being expelled from their homelands—later to become
the Kahuzi-Biega National Park—they numbered up to 6,000. In less than fifty
years, these figures have approximately halved, due to the non-adaptation of
these Batwa to any other type of lifestyle outside their forests.156

Before the beginning of their expulsion from the Mau forests in the early
1910s, the Ogiek of Kenya were also said to number far more than their current
number, which is estimated to be up to 20,000 countrywide and 5,883 in the
East Mau.157 Forced to face a new way of life outside their natural environment,
the life expectancy of the Ogiek has dropped drastically, as underlined by an
Ogiek representative.158

community. Furthermore, damage to some of the CPR affects all communities, regardless of their
way of life. We are all, as human beings, affected in the same way by the reduction of the ozone
layer, deforestation, pollution and destruction of similar resources.

149 Jerome Lewis, “Forest People or Village People: Whose Voice will be Heard?” in Africa’s Indige-
 nous Peoples: First Peoples’ or Marginalized Minorities?, edited by Alan Barnard and Justin Ker-
151 Ibid.
152 Chenunis, The Xhosa Xhosa of South Africa (2003), p. 278.
153 Elinor Ostrom, Governing the Commons: the Evolution of Institutions for Collective Action, Series
155 Ibid., p. 1.
158 Ibid., p. 16.
159 The Ogiek of Kenya were also said to number far more than their current number, which is esti-
 mated to be up to 20,000 countrywide and 5,883 in the East Mau.157 Forced to face a new way of life outside their natural environment,
the life expectancy of the Ogiek has dropped drastically, as underlined by an
Ogiek representative.158
Kenyan pastoralists such as the Maasai “feel especially attached to the land because they depend on its resources for the survival of the herds and people, and without it, they cannot survive especially since they do not also have the skill necessary for survival outside the pastoral sector.” Lotte Hughes (2006) gives a detailed account of the forced eviction of the Maasai from their ancestral lands and how it affected them.  

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

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

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

part in this training organized by the Ogiek Welfare Council, a local NGO created by the Ogiek, and the Forest Peoples Programme (FPP), a British NGO working with indigenous peoples worldwide. The author of this volume contributed to this training as a facilitator.

163 The Etosha Game Reserve was established in 1907 but the Hal/hoi San were first evicted in 1954.
164 The Khoisan San live in South Africa, in the southern area of the Kalahari. They were resettled when part of their lands was turned into the Kalahari Gemsbok National Park in 1931. This Park has since 1999 formed Africa’s first transfrontier park with the Gemsbok National Park in Botswana under the name of the Kgalagadi Transfrontier Park.

number 100,000 people and can be found in six of the countries of Southern Africa.  

Whereas several experts165 and UNESCO documents166 therefore have used the terms “ethnocide” and “cultural genocide” in relation to the forced removals of indigenous peoples from their lands, there are no international instruments which recognize that forced expulsions may amount to violations of the right to life. Attempts to include the concept “ethnocide” into the scope of the crime of genocide during the travaux préparatoires of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide were unsuccessful.167 Neither do comments by the Human Rights Committee on the right to life refer to the expulsion of indigenous peoples from their culture-based lands.

The United Nations Human Rights Committee strongly—albeit implicitly—hinted in the Lubicon Lake Band case v. Canada at a relationship between indigenous peoples’ right to lands and the right to life of members of these communities. Considering the seriousness of the allegations made by the author of the communication, Chief Bernard Omiyayk, “that the Lubicon Lake Band was on the verge of extinction, [the Human Rights Committee recommended Canada, under rule 86 of procedures ‘to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band’,”168 The Committee seems to have recognized that there is a connection between indigenous peoples’ collective right to exist as a cultural entity and the right to life of their members.169

The Inter-American Commission on Human Rights has also adopted a broad understanding of the right to life in its decision on a number of communications, including the case of the Yanomami indigenous peoples, whose lands were affected by

a highway project promoted by the Brazilian Government. In response to allegations of violating Article 1 of the American Declaration of the Rights and Duties of Man regarding the right to life, the Commission ruled, amongst other things, that "invasion was carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others". In a similar communication before the Inter-American Commission on Human Rights, members of the Miskito indigenous people alleged that the Government of Nicaragua violated, amongst other things, their right to life and the right of their community to exist as a distinct cultural entity, by expropriating their lands.

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

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

More recently (May 2002), the African Commission on Human and People's Rights ruled that, regarding the destruction of Ogoniland by the Shell Petroleum Development Company, "the Federal Republic of Nigeria [violated amongst others] the right to life of Ogoni as articulated by article 4 ... of the African Charter on Human and People's Rights", by allowing Shell to carry out a number of actions.

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174 This case was filed in November 1995, following death sentences carried out on nine leaders of the Movement for the Survival of the Ogoni People (MOSOP), a movement that fights for the rights of Ogoni communities in Nigeria. In June 2003, Shell agreed to pay US$15.5 million in an out-of-court settlement of a legal action in which it was accused of having collaborated in the execution of the writer Ken Saro-Wiwa and eight other leaders of the Ogoni tribe.
rights to religious freedom and to culture, as well as a denial of their pastoral way of life. 199

So if the right to land of indigenous peoples is so closely and directly linked to the right to life of indigenous individuals, it is therefore arguable that this right to land could be considered as non derogatory, meaning it cannot be suspended even in a situation of a state of emergency, when a State can strike a fair and just "relationship between a particular objective and the administrative or legislative means used to achieve that objective." 200

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

**Ancestral lands and indigenous languages**

For indigenous peoples, as shown by the above few examples, lands are "intimately related to its holders' identity, of which it is an essential component," 201
The usage of indigenous languages is an important part of this identity. As noted by Kymlicka,

Modernisation involves the diffusion throughout a society ... of a common culture, including standardised language, embodied in common economic, political, and educational institutions, one of the most important determinants of whether a culture survives is whether its language continues to be used. 202

In most parts of the world, indigenous languages are endangered. This is especially the case of those languages that have no script (the case of 80 per cent of all languages in Africa). This is, among other reasons, the consequence of national language policies. In post-independence Tanzania, the main political objective was to create a nation with "a system of generalised identification ..., a unified education system and a unifying language." 203
This was also the case in Botswana, where Setswana is the only local official language.

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199 See ACHPR Communication 276/2003 (2009) and chapter V, this volume.
The Maasai and their land cases

The following two cases—later consolidated into one—involves the indigenous Maasai people of Mkomazi in Tanzania. The Maasai are pastoralists with a semi-nomadic lifestyle and they are estimated to number some 50,000 people in Tanzania.

Mkomazi is located in the northern part of Tanzania. Most of it was gazetted as a Game Reserve in 1951. This Game Reserve is known for its diverse fauna and a controversial 17.5 km long solar-powered electric fence prevents local communities from entering and using it clandestinely. The creation of this game reserve was expected not to affect the land rights of the Maasai communities. The Wildlife Conservation Act of 1974,\(^{417}\) which repealed and replaced the Fauna Conservation Ordinance that created Mkomazi Game Reserve, indeed exempts a “person whose place of ordinary residence is within the reserve” from the general rule relating to the requirement for permits.\(^{418}\)

In 1986, Government officials ordered a forcible removal of all Maasai out of the Game Reserve, (by now upgraded into a National Park), so as to provide more security to wildlife. An estimated 4,000 to 10,000 community members—who consider the reserve their ancestral lands to which they are entitled—were evicted without due compensation or any provisions for relocation.\(^{419}\)

After attempts to get the Tanzanian Government to change its mind had failed, a number of Maasai decided to lodge two cases challenging the eviction. By then, six years had elapsed since the eviction happened.

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418 Section 7(a) of Act No. 12 of 1974.

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Lekengere Faru Paruntu Kamunya and 16 Others v. the Minister for Tourism, Natural Resources and Environment and 3 Others. HC – Moshi, CV#33/1994

And

Kopera Keliya Kamunya and 44 Others v. the Minister for Tourism, Natural Resources and Environment and 3 Others. HC – Moshi, CV#33/1995

Background facts and claimants’ arguments

In court, the Maasai argued, among other things, breach of their customary land rights, destruction of their properties, killing of their livestock, and negative impact on their way of life. As detailed by Ringo Tenga, the plaintiffs claimed that:

1. Their constitutional right to live and enjoy their respective lives has been infringed;
2. They have, without due process been denied their basic right to reside in their traditional and ancestral lands;
3. Unlawful eviction constitutes a serious infringement of the claimants’ customary land rights of natives of Tanganyika as recognised by land laws of Tanzania as well as the constitutional right to property;
4. They now find themselves in drought conditions, with their dwindling livestock lacking grazing and water and surrounded by settled villages;
5. No plans to relocate the claimants have been made;
6. Shortage of grazing for their livestock has attracted exorbitant fines of up to Tshs 400,000 for livestock straying into the Mkomazi Game Reserve (MGR);
7. They have suffered frequent beating and general harassment by employees of MGR;
8. They have lost cattle, goats, sheep and donkeys estimated at 10 billion shillings due to diseases and starvation;
9. They have lost access to customary holy places and sacred shrines;
10. Loss of grazing lands has led to vicious deprivation of the plaintiffs' employment, livelihood and ultimately, their right to life;
11. Evictions without compensation and alternative grazing land have reduced the Maasai pastoralists into squatters surrounded by hostile agricultural communities;
12. The claimants’ pastoral activities have been criminalized.
The plaintiffs' lawyers submitted that the Land Ordinance of 1923 only required proof of occupation and use of land to establish a customary title to land. The Maasai plaintiffs established that they had been in MGR for generations, using the vast plains of Aliitai Lamwasiini as the community's common property for grazing and community life. Further, the authorities had listed or registered them and allowed them to keep their pre-existing rights as required by the Fauna Conservation Ordinance and the Wildlife Conservation Act of 1974.

The lawyers argued also that according to principles protecting the constitutional right to property, a land owned by a community can only be acquired by the Government in accordance with the Land Acquisition Act of 1967, whose procedures require establishing a public purpose that justifies the acquisition. This is followed by a consultative process where, upon agreement, the rights-holders are compensated and/or given alternative land. In case of disagreement, the parties have recourse in the courts. These procedures were not followed in this particular case, and therefore all actions taken should be declared null, void, and unconstitutional.40

Defendants' core legal points

The defendants, represented by the Attorney General, argued that the disputed lands were lawfully gazetted as a protected area since 1951, that the residents were given notice with enough time to leave the Game Reserve and that the Government had no other choice than the use of force after the plaintiffs had refused to leave the area voluntarily. The Attorney General argued also that alternative lands were provided to the plaintiffs in Handeni, Kipeto, and Ruviu. He contended furthermore that the plaintiffs were mere licensees residing on the disputed lands and had no longer the right to remain in the Game Reserve after the Government had revoked their licenses. The Attorney General argued also that the plaintiffs should have lodged a Constitutional Petition rather than a suit, given that they claim a violation of Constitutional rights. Finally, the defendants' representative argued that the plaintiffs' claim for compensation should be thrown out because of being overdue or not presented within the three years required by the Tanzanian Statute of Limitations of 1971, given that the eviction occurred in 1988 and the case was filed in 1994.41


Ruling and reasoning of the court

The High Court made several points:

1. Regarding the issue of representation, the High Court ruled against the idea that a number of Maasai could represent others in court: "The judgment shall not canvass the pastoral Maasai community en masse for the reason that this is not a representative suit". Accordingly, the High Court dealt only with 38 plaintiffs out of 53, who appeared in court.

2. Regarding the claim of customary rights by the plaintiffs, the High Court ruled that "the plaintiffs held customary land rights at Umba Game Reserve, a portion of the Mkomazi Game Reserve". The court also ruled that the eviction of the Maasai plaintiffs from Umba Game Reserve was unlawful because it did not comply with procedures specified by the Land Acquisition Act of 1967. But the judge went on arguing that since the eviction occurred in 1988 and the case was filed more than five years later, the case had been overtaken by events and therefore a return of the plaintiffs' traditional lands was no longer possible: "the unlawful eviction took place in May 1988, over more than five years ago. In that regards the suit has been overtaken by events".

3. The High Court ruled also in favour of a violation of the plaintiffs' right to property protected under Article 24 of the Constitution and awarded each of them a compensation of Tshs 300,000, (more or less US$450). The judge found that game scouts and militiamen effecting the eviction assaulted pastoralists, harassed their families, mothers with newly born babies had to be carried and dumped into the bush in the rush of the eviction, cattle, donkeys and calves strayed into the wilderness where they were lost or devoured by beasts; huts, huts, kraals, cattle, domestic articles, food stuffs, veterinary medicines, cash and ornaments got lost or razed down by the fires the game scouts started. Families were dislocated and broken up. In short the plaintiffs were seriously inconvenienced, put through a great crisis and thrown out of the reserve without assistance for resettlement in terms of alternative land.

4. Finally the High Court ruled that alternative lands should be provided to the plaintiffs "so that the pastoral plaintiffs can resettle on a self-help basis."

The plaintiffs were not happy with the decision of the High Court, against which they appealed immediately. In 1998, the Court of Appeal made the following decisions in its ruling:

1. It agreed with the High Court on the issue of representation and ruled that the case concerned only the plaintiffs that had testified;
2. The Court of Appeal overturned the High Court's decision that the plaintiffs enjoyed customary right in the disputed land:

We now come to substantive points, and we begin by considering whether the Maasai community of which the appellants are members, had an ancestral customary land title over the whole of the Mkomazi Game Reserve. We have carefully considered the in disputable surrounding circumstances which gave rise to this case, and it is apparent that the Maasai community or tribe in question was not the first tribe to arrive in the geographical area which is the subject of this case. It is apparent that the Maasai were new arrivals in the area, preceded by other tribes, such as the Pare, Shambas and even the Kamba. It would seem that the Maasai, as a nomadic tribe, began to reach the area in the second half of the 1940s and their presence was still scanty at the time the Mkomazi Game Reserve was established in 1951. That explains why they were not involved in the consultations which preceded the creation of the Game Reserve. That being the position; we are bound to hold that the Maasai Community in question did not have ancestral customary land title over the whole of the Mkomazi Game Reserve. We are aware that the learned trial judge found that such title existed in a portion of the Game Reserve, that is, Umba Game Reserve. The Respondents have not cross-appealed against the finding, but since that finding of the learned trial judge is inconsistent with our overall finding, we have to invoke our revisio nal jurisdiction provided under Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 so as to set aside such finding which is inconsistent with ours. We do so accordingly, and find that no such title existed in the Umba Game Reserve. 423


423 Ibid., p. 11-14.


Concluding observations and results/impact of the court cases

1. Sengondo R. Mvungi makes an interesting critical reading and analysis of this decision by the Court of Appeal, 423 underlining a number of wrong assumptions upon which the Court of Appeal seemed to ground its reasoning. Firstly, the court assumed that the plaintiffs were not the first inhabitants of the disputed land and therefore could not claim customary rights over it. This court’s reasoning was not correct because “the first people may have abandoned the land, or just disappeared. The groups that follow and subsequently establish long usage would not be held ransom to the fact that there existed some people in the areas some time in the past. What is required is proof of long use over time that is not contradicted by a superior title.” 424 It is not necessary to be first to claim indigenous rights over a land. This has been widely proven including in the Australian Mabo case, where the claimant indigenous peoples were recognized as having arrived from elsewhere. Furthermore, it is almost impossible to tell which community lived where first in Africa. The Court of Appeal seemed even to distance itself from the Tanzanian legislation. This was indeed a justice badly rendered that could have prompted further national or international legal challenges.

2. The time that had lapsed between the dispossession and the filing of the case appears as an excuse by the first judge to deny justice to the plaintiffs. In numerous cases, indigenous peoples were expelled from their lands for tens or hundreds of years before taking legal actions. One could mention for example the restitution of tens of thousands of hectares to the South African Khomani San on the basis of the Land Restitution Act. Had the High Court of Tanzania aimed at redressing historical injustices, it would have not only declared the eviction unlawful but also ordered a return of the plaintiffs to their ancestral lands in addition to compensation. This makes it imperative for communities’ lawyers acting in this kind of cases to make as much as possible reference to any existing relevant international jurisprudence in an attempt to try and move judges away from traditional ways of thinking, ‘taking the case to higher courts or international bodies such as the African Commission on Human and Peoples’ Rights could have been further options, which seem to never have been considered by the plaintiffs.

3. This case demonstrates also that indigenous communities should file land-related lawsuits as soon as they are dispossessed or evicted from their lands in order not to give judges cheap excuses.
4. The importance of properly filling a representative suit must be underlined once more as something to deal with carefully in similar cases.

Legal and policy landscape in Tanzania relating to indigenous peoples’ land rights

During colonial times

In 1919, following the end of the First World War, German East Africa came under the control of the League of Nations. The territory was later divided into three mandated countries, of which two were given to Belgium (Rwanda and Burundi) and one—under the name of Tanganyika Territory—to Britain.425 In 1946, after the collapse of the League of Nations and World War II, Tanganyika became a British Trust Territory, since, according to the UN Charter, all territories formerly under the League of Nations’ mandate were to be covered by the trusteeship regime.426

As a territory under mandate, Tanganyika, as the country was called until 1961, was not like other colonies. The League of Nations set a string of rules, including the protection of the rights of local populations.427 This was later reinforced by the Charter of the United Nations, which also made it clear that under the Trusteeship system, the wishes, values and customs of the inhabitants of a trust territory must be given priority.428

It emerges, however, that during the period up to World War II large areas of land were taken away from traditional communities. Between 1923 and 1926, an average of 24,000 acres per year, or approximately a total of 120,000 acres of land, were alienated on behalf of foreigners.429 In its 1926 Report, the Permanent Mandates Commission of the League of Nations set up to oversee the British administration of Tanganyika heavily criticized the provisions of the 1923 Land Ordinance, which stated that “the whole of the lands of Tanganyika, whether occupied or unoccupied on the date of the commencement of this Ordinance, are hereby declared to be public lands”.430 The Commission’s central issue was whether, by stripping the communities of their pre-colonial full ownership of their lands,431 the Ordinance was in breach of the terms of the Mandate regarding the need to “respect the rights and safeguard the interests of the local population”.432

Following up on this report, the colonial Government passed another more pro-indigenous communities law in 1928,433 which provided for the deemed right of occupancy deriving out of customary use and occupation of land and said to be “as protective and good as a written document or right of occupancy under the Land Ordinance”.434 Thus, indigenous peoples maintained some sort of control over their homelands. James Woodburn confirms that, “the British administrators who replaced the Germans during the First World War were content to leave the Hadzabe area, occupied by a hunter-gatherer community of northern Tanzania, much as it was”.435 Indeed, several scholars believe that most of the “customary land laws of Tanzania [remained] untouched” by the colonial system.436

One strong indication of the survival of the notion of collective holding of land by local communities during this era of colonial-type land laws was the recognition by the colonial ruler of a number of customary mechanisms such as the semi-feudal Nyarubanjra tenure system. The beneficiaries of this mechanism were usually traditional chiefs favorable to colonial rule, whose duties and rights were later regulated by the Bukoba Chiefs Act in 1930, amended later in 1938 as the “Nyarubanjra Rules” under the Native Authority Ordinance.437

In an attempt to keep within the margins of the international mandate, the colonial master of Tanganyika furthermore opted for a colonial system that would avoid hostile reactions from traditional communities.


426 Article 77 of the United Nations Charter. The Charter’s chapter XII deals with the Trusteeship system.

427 Article 6 of the Mandate Agreement between the League of Nations and Britain (1922) relating to the administration of Tanganyika.

428 Article 76 of the U.N. Charter: “The Trusteeship system shall … promote the political, economic, social … advancement of the inhabitants of the trust territories”.


430 Section 5 of the 1923 Land Ordinance, CAP 113.

431 The 1926 Report by the Permanent Mandates Commission of the League of the Nations showed some doubts about the Land Ordinance in the following terms: A “Land Ordinance was drafted in 1923 and has since been enacted … doubt had arisen whether native occupiers of communal land, to whom no certificate of occupancy had been issued, would be regarded as occupiers under the principal ordinance and be entitled to protection against arbitrary disturbances which that Ordinance gives”. See also in Finbow, Essays (1992), p. 62. Many scholars have indeed shown that land was collectively owned amongst most pre-colonial Tanzanian indigenous peoples. As opposed to individuals, communities were the entities that had rights which were not subject to tenancy. See, e.g., Sally Falk Moore, Social Facts and Fabulations: “Customary Land in the Kilimanjaro 1880-1920” (Cambridge, UK: Cambridge University Press, 1980), p. 62; Tangha, Pastoral Land Rights (1992), p. 16; Eugenie Coitram, “Customary Land Law in Kenya, Uganda and Tanzania”, in UNESCO, Le droit de la terre en Afrique, (Paris: G.P. Maisonneuve et Larose, 1972), pp. 91-103.

432 Article 6 of the British League of Nations Mandate over Tanganyika.

433 Ordinance No. 7 of 1928.


consist of incorporating the communities, and some of their ways of life, within the overall program of the Government.438 This could explain why in some cases, when the colonial Government needed to resettle a number of communities in new areas, it resorted to “agreements”, as was the case in 1958 regarding a Masai community of the Western Serengeti.439 However, by the end of the 1950s, 40 per cent of Tanzania’s arable lands were owned by foreign farmers.440 A number of communities, nevertheless, had kept their lands, which they continued to use and occupy collectively according to their customs and traditions.

The Ujamaa era

After independence in 1967, Tanzania introduced Ujamaa in an attempt to Africanise its land laws through a policy that considered the agricultural sector “as capable of generating growth from the countryside’s own resources, while at the same time benefiting the majority of the people.”441 This policy was called by the Swahili words of Ujamaa Vijiji, meaning “socialism within villages” (also known as “villageization”). It consisted of “translocating” people in groups to what was called “Ujamaa villages”, where individuals, sometimes of different cultural backgrounds, lineages and clans, were expected to work on communal farms with which they had no cultural tie or bond. By 1977, 90 per cent or more of the Tanzanians lived in some 7,300 villages.442 This African adaptation of socialism was constructed around the principle that Tanzania was to regain its economic independence by providing for itself. The principle of “self-reliance” (kujilewania) in Swahili) was always attached to the term Ujamaa, as stated in the 1967 Arusha Declaration.443

439 The Agreement between the Masai and the colonial authority stated as follows: “We, the Laigwanak leaders of the Nyangombe and Lellenda division of the Masai district, agree on behalf of all the Masai living in these areas to rescind our claim to all those parts of the Serengeti plains lying within theNorthern and Lake provinces which lie to the west of the line shown up by the District Commissioner, on the 15th and 16th March and the 20th of April 1928. We understand that, as a result of this renunciation, we shall not be entitled herewith in the years to come to cross this line which will become the boundary of the new Serengeti National Park and which will be demarcated. We also understand that we shall not be entitled to reside in or use in future the land lying to the west of this line, which we have habitually used in the past. We agree to move ourselves, our possessions, our cattle and all other animals out of this land by the end of the next short rain season after the 31st December 1928. Witnessed by us at Nyangombe this 21st day of April 1928.” See Shiku and Kapuno, Masai Rights (1988), p. 74.
443 The Arusha Declaration was made public by the Tanzanian president, Mr. Nyerere, in 1967. It consisted in nationalising private enterprises, business and farmlands with the intent of boosting

This policy, which attempted to transform all Tanzanian communities into farmers by designing and imposing the way lands should be used and occupied,444 emerged as a radical political change in Tanzania.445 The policy was also intended to be a reaction to the then surviving colonial economic system, accused of plundering national resources for the sake of individual interests.446 Numerous private companies, which had existed since colonial time, continued to hold large parts of the most fertile lands in Tanzania. The policy was crafted on the idea that land together with people, good policies and good leadership were “the four prerequisites of development”447. Accordingly, private land ownership was prohibited and the “State retained the sole right to allocate land for cultivation and housing through allotment”.448 “The State was supposed to bring social services, industries, and infrastructure to the people who, in return, were expected to accept a high degree of economic control”.449 In one way or another, people were moved into Ujamaa villages, where they were deemed to work on communal lands.

The Ujamaa policy could be regarded as having had two major effects on communities’ land rights based on customary tenure. On the one hand, it implicitly abolished the communal aspect of the “deemed right of occupancy” on agricultural lands. On the other hand, it could be argued that it somehow preserved the customary right of communities found within conservation areas and on other reserved lands. There had never been a law explicitly abolishing the “deemed right of occupancy”. Indeed, the Ujamaa decision merely focusses for the destruction of the institutional framework or the sociological pillars on which the customary land tenure was based so that everything would fall apart, once the foundation had been destroyed. Secondly, the legislator designed a strategy that consisted of uprooting local communities from lands with which they had cultural ties.

Towards a new agricultural policy

By 1980, the Tanzanian economy was assessed as not performing.450 At the same time, Tanzania was also hit by the international economic turmoil caused by the
1970s oil crisis. This combination of factors made Tanzania succumb to pressure from international financial institutions, and thus abandon its socialist system. Instead, the country embarked on the capitalist track. With the agricultural sector as a central pillar, efficient land management and a reinforced private sector were expected to play a key role in the ultimate goal of good food supplies and sufficient foreign exchange.

Accordingly, in 1983, the Tanzanian Government adopted a National Agricultural Policy, aimed at increasing rural productivity. This Policy proposed the establishment of individually owned plots of land within the Ujamaa villages. For a village as a whole, the Policy proposed a “right of occupancy” that would not last more than 99 years. The State would, however, continue to be the sole absolute owner of all Tanzanian lands and the District Councils, as organised by the Local Government Act of 1982, were given the role of management and allocation of lands in most rural areas.

The new policy did little, if anything at all, to restore to communities their lands, which in addition to being a major source of income were also the symbol of their cultural existence. On the contrary, following the suggestions made by the World Bank and the donor community in support of land titling, the policy “encouraged the development of a class of big farmers” at the expense of the poor peasant masses.

The trend of ignoring customary claims to lands went on until 1987, when the Prime Minister issued an Extinction of Customary Land Rights Order, … which extinguished customary land rights in Arumeru, Bubali, Hanang, and Mbulu Districts. In July 1989, the Prime Minister issued another order … which covered areas in Hanang District, which Barabaig pastoralists of Hanang were claiming in court.

The Shivi Report

However, the continuing burning desire for, and claims of communities to, their customary land rights—demands which had to be reconciled with the need for Tanzanian economic growth—prompted, among other things, the establishment of what is known as the Presidential Commission of Inquiry into Land Matters.

In late 1992, this Commission submitted its report, commonly referred to by the name of its author as “the Shivi Report”. This Report underlined the “dichotomy … between the peasant/pastoral sector governed by customary land tenure under the deemed right of occupancy and the plantation/urban sector governed by statutory … system under the granted right of occupancy.”

Giving particular attention to the pre-existing collective holding of lands by communities, the Shivi Report concluded that the 1980s Tanzanian understanding of customary land tenure was similar to the one in pre-colonial times, when traditional authorities held effective powers over lands. Furthermore, the Shivi Report criticised the Government’s introduction of the “process of original adjudication and issuance of titles”, which it argued “became, to some extent, a process of dispossessing original rights-holders while improving the land holding of others”.

Accordingly, the Shivi Report proposed that there should be two types of lands on the one hand, “national lands” that would be administered by a National Lands Commission, and on the other hand, “village lands” that would be managed by village assemblies composed of all the adult village members. In relation to village lands, the Shivi Report recommended also a formalisation of customary titles through a process of local adjudication by the elders, which could result in the issuance of customary titles. The councils of elders would compile a village lands register. Land transactions between village members would be allowed, but land dealings between members of a village with outsiders would not be possible without the consent of the elders.

The mechanisms of “village land” management, as recommended by the Shivi Report, were not the exact match of the pre-colonial mechanisms for collective land holdings. However, they could be regarded as the closest-possible alternative to the pre-colonial customary land tenure in Tanzania, where “rights in lands [were never] vested in any individual but in … groups such as a tribe or the political authorities or the clan or family groups, and … although an individual could have the right of use of the land, the ultimate reversion [was] in the community”.

Despite the important remarks made by the Shivi Report in support of customary land rights of communities, the National Environment Management Council, which is the architect of the 1995 Tanzania National Conservation
Strategy for Sustainable Development (NCSSD), re-focused the debate on laying the ground for a market-oriented resources management:

The existing land legislation, land bill and institutional set-up for land tenure are inadequate to deal with dynamic changes such as the changeover to a market-oriented economy, privatisation, increased urbanisation, population increase, etc. They fail to provide incentives for more efficient use of resources, including investments for land improvements and development.463

Furthermore, in addition to the political willingness to make agricultural lands the power-engine of the new free market economic orientation in Tanzania, a new conservation policy was adopted aiming at increasing the contribution of this sector to the country’s economy from 2 to 5 per cent of GDP by 2017.464 The tourist industry was also identified as an important sector for Tanzania.465 In order to achieve this, the new conservation policy was designed to incite the private sector “to invest in the wildlife industry, in order to take]... advantage of the prevailing political stability and sound investment policies”.466

As already mentioned in chapter IV, these efforts paid off quickly. In the 1990s, the figures were beyond projections: “Between July 1990 and August 1993, the number of investment projects approved in the country was 80 in tourism, 58 in agriculture, and 41 in natural resources”.467 In 1994, tourism contributed up to 7.5 per cent of GDP and provided up to 25 per cent of total foreign exchange earnings.468 The Tanzanian National Park Authority (TANAPA) was making an annual amount of about US$1.3 million on entry fees and concessions in the Serengeti alone.469

This new shift towards an increased role of conservation and wildlife protection was to impact on the land rights of traditional communities because wildlife in Tanzania as well as in Kenya depends significantly on grazing lands outside the boundaries of protected areas, where the communities’ cattle herds and the wildlife compete for the same resources.470

that conservation areas at the time covered about 26 per cent of Tanzania’s land area, the collaboration between this Council and any land-related work was regarded as essential. See in Report of the Presidential Commission (1994), p. 273.


It is on this socio-economic and legal background that the new Tanzanian land laws were drafted.

Tanzanian twin Land Acts and traditional communities’ right to lands

The need for a reformed agricultural sector compatible with the principles of the free-market economy and the increasingly undeniable role that the conservation sector was playing in the Tanzanian economy were the two driving forces behind the crafting of the twin Land Acts, namely the Land Act and the Village Land Act, both adopted in 1999.471 These two Acts cover three types of lands: “general land”, “reserved land” and “village land”. The general land is understood as “all public land, which is not reserved or village land”, including unoccupied and unused village land;472 and “the reserved land” as those set apart for national parks, game reserves, forest reserves, marine parks and public recreation parks. Both the general and reserved lands are regulated by the Land Act, whereas “village lands” are regulated by the Village Land Act.

“Right of occupancy” and claims of traditional communities living on agricultural land, as regulated by the Village Land Act

Like its principal predecessor, namely the 1923 Land Ordinance, the new Tanzanian Land Act of 1999 declares that all lands shall continue to be “public land vested in the President as trustee for and on behalf of all citizens of Tanzania”.473 Accordingly, communities, individual, as well as any other right holder can only enjoy and exercise the right of occupancy and use of lands.474 According to the Village Land Act, the holders of the “right of occupancy” are the villagers. The Act defines the term “village” as an entity registered as such under the Local Government (District Authority) Act 1982,475 the Land Tenure (Village settlement) Act 1965, and “any law or administrative procedure in force

471 During their drafting process, these two Acts were merged into one single Act and referred to as the Land Bill. At the end, they were presented before Parliament as two separate, but related Acts, the Tanzanian Land Act (Act No. 4 of 1999) and Village Land Act (No. 5 of 1999), that both were passed on May 21, 1999. See also Tenga, “Legislating” (1998a), p. 6.

472 Village Land Act 1999, Section 2.


474 Village Land Act 1999, Section 2. A village’s “right of occupancy” of land is defined as “a title to the use and occupation of land and includes the title of a Tanzania citizen of African descent or a community of Tanzania citizens of African descent using or occupying land in accordance with customary law”.

475 Local Government (District Authorities) Act 1982, Section 22.
at the time before [the Village Land Act 1999] comes into operation". The Act defines also the term "villager" as "any person ordinarily resident in a village or who is recognised as such by the village council of the village concerned". The Act goes further by stating that any aggregate of individuals can apply for a village status, provided that its members "have been in peaceful, open and uninterupted occupation of, or have similarly used for pastoral purposes, village land for not less than twelve years". A "village", (wojiki in Swahili), could also result from "settlement and resettlement of people in villages commenced or carried out during and at the time between the first day of January 1970 and the thirty-first day of December 1977 or in connection with the purpose of implementing the policy of villagisation".

Most of the estimated 9,000 "villages" in Tanzania279 are relics of the Ujamaa policy. By legitimising the artificial groupings created during the Ujamaa period, the Village Land Act clearly shows that it does not comprehend the term villagers as members of communities with cultural ties to a given land, or people sharing common values that they wish to protect and preserve through a collective ownership and control of their customary lands. In other words, the Village Land Act does not consider "villagers" as amounting to communities understood as "groups based upon unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of members of the group". Instead, "villages" are understood by the Act as mere groupings established by deliberate and voluntary actions of their members.

This may have serious implications for indigenous peoples. The village of Mongo Wa Mono, for example, which was allegedly established in recognition of the right of its original inhabitants, the Hadzabe, has 1,700 members, including only approximately 500 Hadzabe.280 Village land is established by a "certificate of village land".281 According to the Village Land Act 1999, village land, such as that of Mongo WaMono, should be under the management of a Village Council, a body elected by all the members of the village. This electoral mechanism means that the original inhabitants of the village of Mongo WaMono, the Hadzabe, have no control over their lands because of being a numerical minority and therefore without a chance of winning the electoral majority of the Village Council. Moreover, the Government can transform a village land into a general public land, without consulting the concerned villagers. In other circumstances, a village council can be stripped of its management role of village land.282 Despite the weaknesses of this mechanism, it is still an option that is being pursued by pastoralist organizations active in titling village lands in several districts in northern Tanzania as a way of trying to safeguard pastoral lands on a collective basis. More indicative is the fact that the Village Land Act recognizes the possibility for a villager to apply for an individual title on village lands.283 The immediate consequence of this alternative is that a villager, who has secured an individual title on an area of a village land, may then at will dispose of this land and sell it to outsiders.

In conclusion, it appears that the broad understanding of the concept "villager", the mechanism of election of members of Village Councils, and the possibility of individual titling on village lands, all put together, indicate that the "right of occupancy" and "certificate of village land" do bring in risks of land individualization.284 This is also the opinion of Shivji, who argues that "individualisation has never meant individual ownership in freehold. It really means the defining of inheritable, negotiable, and transferable land rights exclusively owned by a defined legal entity, be it an individual or a group of individuals".285 In a technical analysis of the practical implications of the Acts, Gelr Sundet concludes that:

"Reserved land" and the right of communities living within conservation areas regulated by the Land Act

Section 14 of the aforementioned Village Land Act of 1999 stipulates that the rights of people, whose ordinary place of residence is within conservation areas,
should continue to enjoy their rights in accordance with previous legislation, such as the 1974 Wildlife and Conservation Act, which provides for a special right to enter and reside within conservation areas for the benefit of communities whose place of ordinary residence is within these areas. There is also the Game Park Law (Miscellaneous Amendments) Act No. 14 of 1975 that, for example, states that the Authority in charge of management of a game park:

[...] shall ... safeguard and promote the interest of Maasai citizens of the United Republic engaged in cattle ranching and dairy industry within the Conservation Area.

It appears indeed that the Village Land Act allows for the right of people who ordinarily live or reside within conservation areas to be automatically transformed into "customary right of occupancy". The Land Act 1999 provides furthermore for the leasing of a granted right of occupancy to any person. These provisions could for example provide a legal basis for allowing the Maasai to lease or lease or land within the NCA (Ngorongoro Conservation Area) to tourist operators should they so desire, as is happening in villages outside the NCA. This could also enable the Maasai to use the land rights conferred upon them through customary rights of occupancy to leverage tourism benefits in the absence of village land titles.

However, the land rights recognized to communities and villages seems limited in weight and far from constituting land ownership rights. For instance, the president of the Republic of Tanzania could, at will, grant a right of occupancy on reserved lands to anybody, including a foreigner, provided that such a beneficiary has an investment certificate from the Investment Promotion Centre. Furthermore, the Ngorongoro Conservation Area Authority (NCJA) has statutory power to regulate land and its uses within the NCA, which reduces the ability of the Maasai to enjoy the land rights they hold. Indeed, it seems unlikely that the Maasai residing in the NCA will ever obtain full land ownership (land titles) within the NCA given the powers of the Government over these lands.

In 2007, the Government of Tanzania presented a Draft Grazinglands Management and Utilisation Bill, which provides for the creation of Village Grazingland Development Areas (VGDAs) and Village Grazingland Development Committee (VGDCC). As Ringo Tenga writes, the Draft "Bill [yet to be adopted as law] does not directly refer to pastoralists' participation in the VGDA." And he adds "Pastoral communities are not directly recognised in the Bill as having customary titles, written or unwritten, over grazing land."

Noticeably, the current Tanzanian Land Law does not offer a better protection to communities living in conservation areas than pre-existing standards, despite being passed after the conclusion of the 1994 Presidential Commission of Inquiry into Land Matters, which stated that, "there is a need for the resolution of conflict of interests in the conservation areas sector. Ultimately, the survival of all the conservation areas will depend on the contiguous communities". The Commission went on adding that "the sooner the interests reconcile, and the contiguous villages internalize the values of conservation, the more assured will be the future of [conservation areas]". These recommendations called for redress so that cases such as the electric fencing of the Mkomazi Game Reserve by the George Adamson Wildlife Conservation Trust and the evictions of ordinary residents of these areas would no longer occur.

It thus appears that in relation to the protection of collective rights to communal lands, the Tanzanian Land Acts could be seen as in line with a free market-oriented system of land management. In this perspective, Ringo Tenga argues that, according to current Tanzanian land laws,

[Land], which may be fully allocated and managed by the Village Council, appears to be land that is not traditionally owned. The customary institutions do not appear to have been significantly affected by the reforms. Actually the VLA (Village Land Act) reserves space for customary land law in the regulation of land tenure. In doing so a potential conflict or grey area exists in terms of land management—is it the responsibility of the Village authorities or of traditional land allocation authorities?

Second, common lands, which in many cases include grazing land, appear to be "no man's land" and, as such, subject to the exclusive management of Village authorities by virtue of the VLA. For pastoralists, this

489 Section 71(4) of the Wildlife (Conservation and Management) Act No. 12 of 1994 states that "No person other than a person whose place of ordinary residence is within the reserve shall be allowed to enter in such area without an authorisation. Similar provisions are found in the 1951 Fauna Conservation Ordinance (Section 6 of CAP. 302 Supp. 64) and the Forest Ordinance of 1959 (Section 9 (3) of CAP. 309 Supp. 65).

490 The Game Parks Law (Miscellaneous Amendments) Act No. 14 of 1975 includes the Ngorongoro Conservation Area Ordinance.

491 Ibid., Section 5A.


495 The electrified fence is now reported to be 41 km long and capable of harming animals as well as human beings. See Tenga, "Legislating" (1998b), p. 7.

496 See for instance the already mentioned Letangere Faru Famiro Kiamono and 16 Others v Minister for Tourism, Natural Resources and Environment and 5 others, HC-M-014-1994. In this case, the applicants claimed that they had been forcibly evicted from their homesteads in violation of several domestic laws including the Wildlife Conservation Act 1974. See, for more details, Tenga, "Legislating" (1998b).
raises a critical concern in that without pro-active response to this ambiguity the VLA virtually dispossesses the pastoralists from their grazing lands.497

In recent years, the Government of Tanzania has taken a number of initiatives related to the Land Act. These initiatives include, among others, the Land Bank Scheme that identifies land suitable for investment and is supported by the Investment Act of 1997, which allows non-citizens to own land for the purpose of investment; the Land Amendment Act of 2004, which creates a legislative framework that allows the sale of "bare" lands and promotes the use of land as collateral; and the "Programme to formalize the Assets of the Poor of Tanzania and strengthen the Rule of Law" (also known as MKURABITA), which promotes land registration.498 Many of these initiatives have, with the words of William Ole Nashta, turned land into "a pure commodity, devoid of its cultural and spiritual values".499 They have also paved the way for many of the private investments that have led to the eviction of pastoralists from areas in for example Mbeya, Iringa and Morogoro Regions, and have threatened the land rights of the Hadzabe of Yaeda Chini and Mongo wa Mono.500 A number of pastoralist organizations have also expressed fear that pastures may be looked at as "bare" or "idle" land and then be identified for investment purposes.500 The Strategic Plan for the Implementation of the Land Laws, SPLL (2005), whose aim is to make the land laws operational, also clearly reflects that commitment of the Government is to modernize the agricultural sector in Tanzania and, in that relation, make land an important commercial asset. The Plan has two essential strategies— to sedentarize pastoralists and

498 See, for example, Celeste Nyamwase Mucheru, Bringing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa, IDS Working Paper 272 (Brighton, UK Institute of Development Studies, IDS, University of Sussex, 2006). As pointed out by Chris Maima Peter in “Human Rights of Indigenous Minorities in Tanzania and the Courts of Law”, International Journal on Minority and Group Rights 14 (2007), p. 476, “There is now intense pressure on the Government from both domestic and international financial institutions such as the IBRD and the International Monetary Fund to commoditise land itself and make it available as collateral for loans from commercial banks.”
501 In this particular case, the Tanzanian Government had granted a hunting concession to a private company, the UAE Safari Limited. The Hadzabe community had not been consulted and, by all accounts, did not consent to this grant. The case was taken up by Tanzania’s Legal and Human Right Center (LHRC) and other local human rights organizations and due to their pressure, the UAE Safari Limited eventually decided from its project. See LHRC’s “Tanzania Human Rights Report 2007”, p. 61, and “Tanzania Human Rights Report 2008”, p. 75, accessible at http://www.humanrights.or.tz

change their production system into a ranching system, and to introduce a system of minimum acreages for farmers through a resettlement scheme.500 The rights of hunters and gatherers are not mentioned at all by the Plan.500

Other land-related policy processes have also an important bearing on indigenous peoples’ land rights. A case in point is the revised Draft of the Wildlife Conservation Act No. 9 of 2008. This draft introduces several restrictions in terms of access to grazing areas for pastoralists as well as to other restrictions on various types of uses. It also includes provisions of heavy punishment in cases of non-compliance with the conditions set up by the Act.501 The Act will thus affect not only pastoralists but also hunter-gatherers and poor farming communities who depend on access to such areas for their livelihood.502

The situation for pastoralists and indigenous peoples in general in Tanzania has thus worsened over the past 5-10 years. Policies and legislation have continued to undermine their land rights, and areas, on which these people use to sustain their livelihood, have been further reduced since 2006.503 Most disturbing are the recent evictions of pastoralists and their livestock from Ihefu in Usangu Plains, Mbarali District in 2006 and 2008, and the evictions from Kilosa district in Morogoro Region504 and Lolondo district in Ngorongoro District505 in 2009, just to mention a few that have reached the headlines in the press. That some of these incidents are in fact part of an official policy towards pastoralists, and not just isolated cases, cannot be dismissed seen in the light of the Strategic Plan for the Implementation of the Land Laws, among others.

Conclusion

It has been shown in this chapter that, in general terms, the Tanzanian judiciary has not provided the protection it should to indigenous peoples’ land rights.

503 United Republic of Tanzania, Strategic Plan (2005), pp. 9 and 14.
510 See IWGIA Alert, August 2009, accessible at http://www.iwgia.org/swa183.asp51630073
2. The Supreme Court of Appeal (SCA) took a rather different reasoning approach by going beyond national laws to find references in contemporary international jurisprudence. Citing cases such as *Mabo v. The State of Queensland* and *Delganuwau v. British Columbia*, the court argued that "a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people.**303** The court noted further the importance of witnesses’ accounts and presentations by multi-disciplinary researchers:

Evidence was given by three anthropologists and an archeologist for the appellant concerning the history of the appealed communities, the land they and their forebears occupied and their traditional laws, customs and practices forming part of their distinctive aboriginal culture".304

3. The Constitutional Court of South Africa made in fact a landmark decision that will, for a long time to come, have a major impact on the legal protection of indigenous peoples’ right to lands.305 By itself, this judgment contains most of what one could advise a lawyer on an indigenous community to take as legal arguments.

4. In its first lines of argument, the Constitutional Court states for the primacy of indigenous law over written common law and indicates that the validity of the former should not be dependant of its compliance with the latter.306 Once this was done, the rest of the argument followed logically. The "Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system", the court argued. The court underlined further major particularities of indigenous law, including its dynamism and its links with culture, stressing that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses, if necessary.307

5. The Constitutional Court did not distinguish lands rights from mineral rights, like several African legislations and judges have done. According to the court, “under the indigenous law of the Richtersveld Community, communal ownership of the land included communal ownership of the minerals and precious stones”.308 This is an extremely important statement that could have a major positive impact on indigenous peoples’ right to lands throughout Africa.

6. The court meets also one of this book’s points, namely that change in sovereignty does not per se extinguish pre-existing property rights. As stated by the Constitutional Court, [The SCA found that the majority of colonial decisions favoured an approach that a mere change in sovereignty is not meant to disturb the rights of private owners ... The SCA adopted the view that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation. [The Constitutional Court] endorses that conclusion.309

7. Finally, the Constitutional Court, like the Supreme Court of Appeal, did refer widely to relevant foreign cases, which helped to bring into its reasoning a number of contemporary principles, such as the notion of “aboriginal title”. This case could indeed be considered as the first one on the African continent to uphold explicitly the notion of “aboriginal title”, which can no longer be considered as alien to Africa. What impact this ruling will have on other African judges is what remains to be seen.

The San of Botswana and the Central Kalahari Game Reserve case

The San (formerly known as Bushmen) are indigenous to Southern Africa and live in several countries in the region. The African Commission on Human and Peoples’ Rights estimates their number at approximately 107,000 people with a majority of about 50 per cent living in Botswana.308 San in Botswana are commonly called Basarwa or Remote Area Dwellers.309

The central Kalahari Desert is known to be part of the ancestral lands of the San of Botswana. In 1961, the British colonial regime set up the Central Kalahari Game Reserve (CKGR) “with the aim of not only nature conservation but also of protecting the rights of the 5,000 or so people (mostly San) living within its 52,347 sq. km who wanted to maintain hunting and gathering as part of their lifestyle”.310 This is one of Africa’s most remote, unspoiled wilderness areas, well known for its lions and a variety of wildlife. It is also known to have diamond deposits.

In 1997, the Government of Botswana started moving the San out of the CKGR to new settlements such as New Xade and Kaudane. But until 2002, some few
hundred San continued to live inside the Reserve, seen as their ancestral residential place and recognized as such by section 14(3)c of the 1966 Constitution of Botswana, which stated that restriction may be imposed "on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen." 

Sesana and Others v. The Attorney General (52/2002) [2006] BWHC 1 (13 December 2006). Also known as the Central Kalahari Game Reserve (CKGR) case

Background facts and claimants' arguments

On 31 January 2002, the Botswana Government ceased the basic and essential services that it used to provide to the CKGR residents (San and Bakgalagadi) still living inside the CKGR. These services were: (i) the provision of drinking water on a weekly basis; (ii) the maintenance of the supply of borehole water; (iii) the provision of rations for registered destitutes; (iv) the provision of rations for registered orphans; (v) the provision of transport for the residents' children to and from boarding school; (vi) the provision of healthcare through mobile clinics and ambulance services.

This decision was taken by the Government despite previous and ongoing negotiations between the Government's Department of Wildlife and National Parks (DWNP) and the San regarding sustainable and fair management of the resources in the area on the basis of their continued residence in the CKGR.

In February 2002, 243 San and Bakgalagadi applicants brought a court case before the High Court, claiming that:

1. The termination by the Government with effect from 31 January 2002 of the following basic and essential services to the Applicants in Central Kalahari Game Reserve (CKGR) is unlawful and unconstitutional [follows a list of the services, see above];
2. The Government is obliged to

a. Restore ... the basic and essential services that it terminated with effect from 31 January 2002;
b. Continue to provide to the Applicants the basic and essential services that it had been providing to them immediately prior to the termination of the provision of these services; and
c. Restore land to the possession of these Applicants, whom the Government forcibly removed from the Central Kalahari Game Reserve (CKGR) after the termination of the provision to them of the basic and essential services referred to above, and who have been unlawfully deprived of their possession of the land which they lawfully occupied in their settlements in the CKGR.

At first, the application was dismissed on technical grounds. This decision was appealed and, in July 2002, the Court of Appeal took the view that the parties should first formulate and agree on the issues to be dealt with. In early 2003, the Court of Appeal observed that there were material disputes of fact and that such disputes could only be resolved by the hearing of oral evidence. The Court of Appeal made a Consent Order, which essentially turned the relief sought by the Applicants into questions for consideration and answering by the High Court.

Defendants' core legal points

The defendant or respondent (the Government of Botswana) maintained that it had been justified in terminating the services as they were too expensive to maintain on a long term basis; that they never were meant to be permanent; and that the residents of the settlements in the CKGR had repeatedly been consulted before the services were terminated. The respondent also denied that the applicants were forcibly or wrongly deprived of the land they occupied in the CKGR on the grounds that the CKGR is state land and the settlements were situated on state lands. Consequently, argued the defendants, the applicants had neither ownership nor right of tenancy to the CKGR. To the question of whether the applicants lawfully occupied the land in their settlements in the CKGR before the 2002 relocations, the Government argued that the occupation by the applicants of the land in the settlements in the CKGR was unlawful because the CKGR is owned by the Government. Finally, the respondents also maintained that human residence within the reserve posed disturbance to the wildlife there and was contradictory to the policy of total preservation of wildlife.

541 This subsection (3)c was deleted from Section 14 by the Constitutional (Amendment) Act of 2003 which also amended the sections 76, 78 and 79 of the Constitution in order to render the Constitution "tribally neutral." 542 These Bakgalagadi belong to another ethnic group but have been living in the CKGR for several generations and their lifestyle is today very similar to that of the San.

543 There was only one borehole with potable water in the CKGR. The San were not allowed to make their own boreholes but had to share the water delivered by the Department of Wildlife and National Parks in large tanks. In 2002, the authorities destroyed the tanks and sealed off the borehole with cement.

544 Transport was provided at the beginning of the school term and at the end, respectively.

545 Sesana and Others v. the Attorney General (52/2002) [2006] BWHC 1, per Dibotelo, para. 1. Roy Sesana has, over many years, been the chairperson of the San organisation, First People of the Kalahari (FPK).

546 Ibid., at para. 5.
Ruling and reasoning of the court

The trial commenced in July 2004. Prior to the first hearings, the judges had conducted an inspection in loco of the new settlements of Kuadwane and New Xade outside the CKGR, and of the settlements of Guagrama, Kikao, Mohomelo, Metsiamang, Molapo and Old Xade inside the CKGR. The final judgment was given on 13 December 2005, after 130 days of trial spread over a period of just over two years.

The questions for consideration and answering by the High Court were the following:

1. Whether the termination with effect from 31 January 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and unconstitutional.
2. Whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve;
3. Whether subsequent to 31 January 2002 the Appellants were:
   a. In possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve;
   b. Deprived of such possession by the Government forcibly or wrongly and without their consent;
4. Whether the Government’s refusal to:
   a. Issue special game licences to the Appellants;
   b. Allow the Appellants to enter into the Central Kalahari Game Reserve unless they are issued with a permit is unlawful and unconstitutional.

The case was presided over by a panel of three judges—Chief Justice Maruping Dibetelo, Justice Unity Dow and Justice M. P. Phumaphi. In a non-unanimous judgment, the court ruled that:

1. The termination in 2002 by the Government of the provision of basic and essential services to the Applicants in the CKGR was neither unlawful nor unconstitutional. (Dow J dissenting).
2. The Government is not obliged to restore the provision of such services to the Applicants in the CKGR. (Dow J dissenting).
3. Prior to 31 January 2002, the Applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR. (Unanimous decision).
4. The Applicants were deprived of such possession by the Government forcibly or wrongly and without their consent. (Dibetelo J dissenting).

5. The Government’s refusal to issue special game licenses to the Applicants is unlawful. (Unanimous decision).
6. The Government’s refusal to issue special game licences to the Applicants is unconstitutional. (Dibetelo dissenting).
7. The Government’s refusal to allow the Applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional. (Dibetelo dissenting).547

As mentioned by Justice Dow, it was a judgment one to three and each Justice therefore delivered in open court a full stand-alone judgment in order to substantiate their positions.

Chief Justice Maruping Dibetelo’s line of reasoning was “traditional” and based on Botswana jurisprudence; he concluded in favour of the respondents in five (5) out of seven (7) rulings. The two other judges—Justice Dow and Justice Phumaphi—on the other hand, took a more “modest” stance.

This was especially the case of Justice Unity Dow whose approach differed significantly from that of her two colleagues. She began thus by stating that she held the position “that while each of the various questions could very well be answered as stand-alone questions, there is significant inter-play and inter-connectedness between the questions, making such an approach too narrow and too simplistic.” She said, for instance, that,

While the termination of services may, by itself, not raise constitutional questions, the consequence of such termination may well do. If, for example, it is found that the termination of services had the consequence of forcing the Applicants out of the Reserve, then the termination would necessarily raise such constitutional questions, as for example, the right to movement. And in view of the acceptance by the parties that the services were basic and essential, their termination, if that is found to have been unlawful, will necessarily raise the constitutional question of whether the right to life has been abridged”.548

For Dow, the question of relocation was therefore the core issue and the first to be dealt with. Having once ruled the relocation to be unlawful and unconstitutional, the logical consequence was that the other actions taken by the Botswana Government were unlawful and unconstitutional. Accordingly, her ruling was in favour of the applicants on all seven questions.

Justice Dow also found “that the fact the Applicants belong to a class of peoples that have now come to be recognised as ‘indigenous peoples’ is of relevance” and referred to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which Botswana has ratified, and to its Committee’s Recommendation XXIII on

547 Ibid., per Dibetelo, at para. 55.
548 Ibid., per Dow, at para. H.1. b.
indigenous peoples' equal rights. She also pointed out that "the current wisdom, which should inform all policy and direction in dealing with indigenous peoples, is the recognition of their special relationship to their land," and referred to Martinez Cobo's statement regarding indigenous peoples' special relationship to their land.

As for Justice Phumaphi, his overall approach was similar to that of Chief Justice Dibotelo, with whom he sided on the two issues related to service delivery. On the other issues, however—including issue 4 on whether the applicants were deprived of their land by the Government forcibly or wrongly and without their consent—he ruled in favour of the applicants, and just like Justice Dow, used the term "indigenous" when referring to the San. He also based his arguments on international jurisprudence, making substantial quotes from the Australian Mabo case to sustain his view that the San had had "native titles" that had been extinguished neither by the Proclamation on Crown Lands (1910) nor by the creation of the Game Reserve, nor by the 1966 Constitution of Botswana.

On the question of whether the applicants were consulted before the termination of basic services by the Government, both Chief Justice Dibotelo and Justice Phumaphi found that the legal concept of "legitimate expectation" (of continued service delivery) was not applicable and that witness evidence showed that the applicants had been duly consulted. For these same reasons, both Justices ruled "that the Government is not obliged to restore the provision of services". Justice Dow, who gave a dissenting ruling, held that since "the termination of basic and essential services was intended to force relocation" her assessment of that relocation being "forced, wrongful and without consent applies to this issue as well." Regarding whether the termination was constitutional or not, she concluded that "the right to life is a constitutional right and the termination of essential services was in essence, a breach of that right", since it endangered life.

To the question of whether the applicants were in legal possession of the disputed land before the settlements of 2002, the response was affirmative and unanimous. The same was the case with the answer to the question, "whether the Applicants lawfully occupied the land in their settlements in the CKGR before the 2002 relocations". Chief Justice Dibotelo answered:

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549 CERD (Committee on the Elimination of All Forms of Racial Discrimination), General Comment XXII, U.N. Doc A/50/18, Annex V, at para. 4 (c). The General Comment requires of States Parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".

550 ibid., per Phumaphi, at para. 29.

551 ibid., per Phumaphi, at para. 25.

552 ibid., per Dibotelo, at paras 28-29 and 31-33; per Phumaphi, at paras 41-42 and 48-49.

553 ibid., per Dow, at paras H.12 and H.13.

554 ibid., per Dow, at para. H.12.A.

555 ibid., per Dibotelo, at para. 38.

556 ibid., per Dibotelo, at para. 40.

557 ibid., per Phumaphi, at para. 69-82.

558 ibid., per Dibotelo, at para. 45.
tended that the Applicants were forcibly or wrongly deprived of possession of the land they occupied in their settlements in the CKGR by the Government.”

Both Justice Dow and Justice Phumaphi based their affirmative ruling on whether relocation had been wrong and without the consent of the relocates on a critical review of the circumstances and processes of the 2002 relocation and on the evidence given by witnesses to the applicants. Justice Dow saw a crucial factor in the fact that the Government had been ambiguous and unclear in its policy prior to January 2002, thereby adding to the confusion among the CKGR residents as to the Government’s intentions. She also held that the respondent had failed to take into consideration how relocation might disrupt the culture of the applicants and threatened their very survival as a people. Once the respondent executed its decision,

[It failed to appreciate the importance of the fact that the Applicants lived in families, compounds and small settlements ... [were] linked together by blood, marriage, mutual-cooperation and general inter-dependence. And true consent by any one to relocate could hardly be obtained unless the family, the compound and in some instances the whole settlement was taken as a unit.]

Justice Dow also considered that the respondent should also have taken into consideration the relative powerlessness of the applicants and provided culturally appropriate consultations:

The average non-politicised Applicant, illiterate, dependent upon Government services, without political representation at the high political level, was hardly in a position to give genuine consent. It was the Respondent’s obligation to put in place mechanisms that promoted and facilitated true and genuine consent by individuals, families and communities.

In relation to hunting rights, Chief Justice Dibotelo and his two colleagues agreed that the refusal to issue special game licenses was unlawful: the Director (of the DWNP) had acted outside the powers granted to him by law and the applicants had not had an opportunity to be heard before his decision. However, the Chief Justice did not find that the Government’s refusal to issue such licenses was unconstitutional, nor did he find the refusal to allow the Applicants to enter the CKGR unless they have been issued with a permit unlawful and unconstitutional since he considered that “the receipt of compensation in the form of money as well as new plots in the settlements outside the CKGR was in replacement of the rights of the

559 Ibid., per Dibotelo, at para. 47.
561 Ibid., per Dibotelo, at para. 51.

Applicants to occupy and possess land in the settlements inside the Reserve”. Dow’s standpoint, on the other hand, was that

[Any rights that were lost as a result of the relocation] were lost wrongfully and unlawfully. Any attempt to regulate the enjoyment of those rights by permits, when such permits were not, prior to the 2002 relocations, a feature of the enjoyment of such rights, is an unlawful curtailment of the right of movement of the Applicants. It is unlawful and unconstitutional.

Concluding observations and results/impact of the court case

1. This case reveals the importance of constitutional recognition or protection of indigenous peoples’ rights. The fact that the Botswana Constitution of 1966 provided for a special treatment on behalf of the San emerged as critical to the case. This is also believed to be the reason for the amendment of the Constitution in 2005 and the repeal of its section 14 (3)c.

2. A similarity this case has with others in this volume is the use of delayed tactics. In this instance, it took almost four years before a decision was reached. The court resorted several times, at times because money had run out for the San, but also because technicalities were invoked, expert witnesses gave lengthy and technical evidence that was “by and large, a waste of time”, or because the witnesses of the applicants were “cross-examined” at exaggerated length by the respondent’s representative.

3. This is a case where international campaigning actions were combined with legal action and the former seemed to accelerate the latter. International and national NGOs such as Survival International and the Botswana Centre for Human Rights, Ditshwanele undertook a number of campaigning activities on this case while the court hearings were being held.

4. Conducting an inspection in loco proved also highly recommendable since it brought the judges closer to the realities and conditions of life of the concerned indigenous people, both in the CKGR settlements from where people had been relocated and in the new settlements outside the CKGR where they now live.

5. The use of a large number of witnesses for the applicants, who were themselves victims of relocation, seemed also to help and is recommendable. The four hundred pages judgment reveals the extent to which witnesses’ accounts were used by the three judges.

562 Ibid., per Dibotelo, at para. 22.
564 Ibid., per Dow, at para. R.2.
6. This case is also a good illustration of a successful collective representative suit, which is the ideal option when the capacities are there and the concerned indigenous community is fully aware of the implications. The Government of Botswana, however, has subsequently taken the position that only the listed applicants have the right to return to the CKGR, thus disregarding the rights of former CKGR residents in general.

7. It is interesting to note that the applicants made clear that “their legal claim is not to ownership, but to a right to use and occupy the land they have long occupied, unless and until that right is taken from them by constitutionally permissible means”. It is difficult to understand why the San decided not to claim ownership. Was it because such right could have been difficult to prove? Or was it because the right of use and occupation is broad enough to accommodate their livelihood? The judgment and the case’s proceedings do not provide us with a clear answer to these questions, which could inspire strategic legal choices by other indigenous communities.

8. The fact that a State is declared sole owner of all lands should not prevent indigenous communities from initiating legal actions for protection of their right to use and occupational of what they believe are their ancestral lands. This case reveals that a court can declare a State sole owner of a land and at the same time rule in favor of the right to use and occupation by an indigenous community. This case demonstrates also that being owner of a land does not automatically give a State the right to expel at will indigenous communities from it.

9. The San’s lawyers referred widely to international law and jurisprudence such as the Australian Mabo case, and this seemed to pay off.

10. Like the South African Constitutional Court judge did, Judge Phumaphi relied on the principle that pre-existing rights were not extinguished following the change in sovereignty. He contended that the immemorial occupation of the disputed land by the San, as confirmed by many historical accounts, amounted to ownership under customary law. Quoting substantially the ruling in the Mabo case, he concluded that “the Bushmen are indigenous to the CKGR which means that they were in the CKGR prior to it becoming Crown Land” and that:

   The reasoning of the Australian Court is quite persuasive, but this Court would not readily endorse any action taken by the State to extinguish the “native rights” of citizens, unless it is done in accordance with the Constitution of the Republic of Botswana. I have earlier said the evidence indicates that the Bushmen were in the area now known as the CKGR prior to 1910, when the Chenic Crown land which included the CKGR was proclaimed. It therefore follows that they must have claimed “native rights” to land, which has since become the CKGR, as they keep referring to it in their evidence as “their land”.

566 Ibid., par 69.

11. This case reveals the positive input that each judge’s separate legal opinion supporting or dissenting from the majority decision can have. Lawyers of indigenous communities could consider persuading judges to express dissenting opinions depending on the circumstances.

12. This case also highlights the problem of the implementation of judgments. The High Court made its decision on 13 December 2006, but three years later not much has been done in terms of implementing the court’s ruling. San continue nevertheless to move back into the CKGR although they risk being stopped and harassed by guards from the Department of Wildlife and National Parks.

Conclusion

Both the Richtersveld and the CKGR cases seem to indicate a new trend that consists of a pro-active judiciary with a better understanding of the internationally developed standards of protection of indigenous peoples’ rights. An African court making a bold reference to landmark international rulings such as the Mabo case of Australia is something of a milestone as far as indigenous rights are concerned in Africa. One could hope that this new development grows in strength, and inspires judges, lawyers, and indigenous communities in other parts of Africa.
APPENDICES

1. ADVISORY OPINION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by the African Commission on Human and Peoples’ Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana.

Introduction

1. At its 1st Session held on the 29th June 2006 in Geneva, the United Nations Human Rights Council (UNHRC) adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). This Declaration is the result of a process of negotiation, which began in March 1995, under the auspices of the former United Nations Commission on Human Rights (UNCHR), during which an inter-session working group prepared the draft.

2. During its consideration by the 3rd Committee of the United Nations General Assembly (UNGA) in New York, the adoption of this resolution was brought before a certain number of countries as well as the group of African States which expressed a number of concerns which had been submitted to the State Parties in the form of an aide-memoire of the African Group dated 9th November 2006.

3. Having been seized of the issue, the Assembly of Heads of State and Government (AUHG) of the African Union (AU), meeting in Addis Ababa in January 2007, took a decision aimed at requesting the deferment of the consideration by the UNGA of the adoption of the said Declaration with a view to opening negotiations for making amendments, in order to take into consideration the fundamental preoccupations of the African countries, namely:

   a. The definition of indigenous peoples;
   b. The issue of self-determination;
   c. The issue of land ownership and the exploitation of resources;
   d. The establishment of distinct political and economic institutions;
   e. The issue of national and territorial integrity.

4. Seized of this matter during its 41st Ordinary Session (Accra, Ghana, 16 – 30 May 2007), the African Commission on Human and Peoples’ Rights (ACHPR), deliberated on the issue and on the recommendation of its Working Group on Indigenous Populations/Communities (WGIP), passed a Resolution which underlined the fact that the concept of indigenous populations in the African Continent had been the subject of extensive study and debate resulting in a report adopted by the ACHPR in November 2003 at its 34th Ordinary Session. [Report of the African Commission’s Working Group of Experts on Indigenous Populations /Communities, adopted at the 34th Ordinary Session in November 2003, which fact was included in the 17th Annual Activity Report of the African Commission issued by the African Commission, noted and authorized for publication by the 4th Ordinary Session of the ACHPR of the AU held in January 2005 in Abuja, Nigeria (Assembly/AU/Dec.56 (IV)).]

5. Following its adoption of the said report, the ACHPR in its jurisprudence has interpreted and shed some light on matters similar to the concerns voiced by the AUHG of the AU on the draft UN Declaration and to that end, decided to ask, at its 41st Ordinary Session held in Accra, Ghana, its WGIP to draft an Advisory Opinion on the various concerns expressed by the African States on the UN Declaration for submission to and discussion by key AU organs concerned with the matter before and during the AU Summit scheduled to take place in Accra, Ghana, from 1st to 3rd July 2007.

6. The ACHPR has interpreted the protection of the rights of Indigenous Populations within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties, in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples’ Rights (the African Charter) and the UN Charter.
7. Within this context, the present Advisory Opinion is being submitted on the basis of the relevant provisions of Article 45(3)(a) of the African Charter which gives mandate to the African Commission on Human and Peoples' Rights as follows:

Collect documentation, carry out studies and research on African problems in the field of Human and Peoples' Rights ... and, if need be, submit opinions or make recommendations to the Governments.

8. In providing this Advisory Opinion, the African Commission on Human and Peoples' Rights also relies on its well established jurisprudence in interpreting the provisions of the African Charter, which is one of its mandates under Article 45(3) of the African Charter:

Interpret all the provisions of the present Charter at the request of a State Party, an Institution of the OAU or an African Organization recognized by the OAU.

I. On the lack of a definition of indigenous populations

9. The lack of a definition of the notion of indigenous populations in the draft UN Declaration is considered as likely to create major juridical problems for the implementation of the Declaration. The aide-memoire of the African Group of November 2006 even indicates that this “would be not only legally incorrect but could also create tension among ethnic groups and instability between sovereign States”.

10. From the studies carried out on this issue and the decisions it has made on the matter, the African Commission on Human and Peoples' Rights is of the view that, a definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.

11. Thus, the major characteristics, which allow the identification of Africa's Indigenous Communities is the favored approach adopted, and it is the same approach at the international level. [See the Report of the African Commission on Human and Peoples' Rights' WGIP, adopted by the African Commission on Human and Peoples' Rights].

12. The concept in effect embodies the following constitutive elements or characteristics, among others [See page 93 of the Report of the African Commission on Human and Peoples' Rights' WGIP, adopted by the African Commission on Human and Peoples' Rights):

a. Self-identification;

b. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;

c. A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

13. Moreover, in Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the African Commission on Human and Peoples' Rights considers that any African can legitimately consider him/herself as indigenous to the Continent.

II. On the question of self-determination and territorial integrity

14. In its preamble, the UN Declaration on the Rights of Indigenous Peoples states “the fundamental importance of the right of all persons to self-determination and considers that no provision of the present Declaration can be invoked to deny a people, whatever they may be, of their right to self-determination exercised in conformity with international law.”

15. Article 3 of the Declaration specifies that Indigenous Peoples "freely determine their political status and freely pursue their economic, social and cultural development." Article 4 states that "In the exercise of their right to self-determination, the indigenous peoples have the right to autonomy or self-government in everything that concerns their internal and local affairs as well as ways and means to finance their autonomous activities."

16. In reaction to these provisions, the aide-memoire of the African Group of November 2006 re-affirms: "To implicitly recognize the rights of indigenous peoples to self-determination in paragraph 13 of the preamble and in Articles 3 and 4 of the Declaration may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation to a
specific section of the national population, thus threatening the political unity and territorial integrity of any country”.

17. The ACHPR advises that articles 3 and 4 of the Declaration should be read together with Article 46 of the Declaration, which guarantees the inviolability of the integrity of Nation states. Article 46 of the Declaration specifies “that nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN”.

18. In the opinion of the ACHPR, Articles 3 and 4 of the Declaration can be exercised only in the context of Article 46 of the Declaration which is in conformity with the African Commission’s jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity.

19. In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized.

20. In this context, Article 20(1) of the African Charter is drafted in similar terms: “all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.

21. It is true that the decision of the AU Summit of January 2007 on the subject re-affirms in its preamble the reference to the UNGA Resolution 1514(XVIII) of 14 December 1960, which recognizes the rights to self-determination, and the independence of the populations and territories under colonial domination or under foreign occupation.

22. The fact remains however that the notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.

23. In its jurisprudence on the rights of peoples to self-determination, the ACHPR, seized of Communications/Complaints claiming for the enjoyment of this right within State Parties, has constantly emphasized that these populations could exercise their right to self-determination in accordance with all the forms and variations which are compatible with the territorial integrity of State Parties. [See Communication 75/92 of 1995 – the Katangese People Congress vs. Zaire, reported in the 8th Annual Activity Report of the ACHPR].

24. In this respect, the report of the ACHPR’s WGIP states that, “the collective rights known as the peoples’ rights should be applicable to certain categories of the populations within Nation States, including the indigenous populations but that ... the right to self-determination as it is outlined in the provisions of the OAU Charter and in the African Charter should not be understood as a sanctioning of secessionist sentiments. The self-determination of the populations should therefore be exercised within the national inviolable borders of a State, by taking due account of the sovereignty of the Nation State” (Experts’ Report of the ACHPR, p. 83/88).

25. Several States in Africa and elsewhere share this meaning of the right to self-determination taken either from its perspective of identity for the preservation of the cultural heritage of these populations, or from its socio-economic perspective for the enjoyment of their economic and social rights within the context of the specificities of their way of life.

26. However, if it is taken from the political perspective, the right of Indigenous Populations to self-determination refers mainly to the management of their “internal and local affairs” and to their participation as citizens in national affairs on an equal footing with their fellow citizens without it leading to a total territorial break up which would happen should there be violation of the territorial integrity of the State Parties. Therefore this mode of attaining the right to self-determination should not at all be confused with that which issued from the Resolution 1514(XVIII) of the 14th December 1960 which is applicable to the populations and territories under colonial dominance or foreign occupation and to which the UN Declaration, which is the objective of this Advisory opinion, does not refer to at all.

27. In consequence, the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompass-
ing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties.

28. From another angle, the question is also raised in terms of determining the exact meaning and scope of Article 9 of the UN Declaration, which stipulates:

"Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in conformity with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."

29. On this point, the document representing the side-memoire of the African Group of November 2006 states that there is: "a real danger that the tribal communities may interpret this clause as meaning that they can choose to belong to a country whilst they live in the territory of another".

30. The ACHPR observes that trans-national identification of indigenous communities is an African reality for several of the socio-ethnic groups living on our Continent and which co-habits in perfect harmony with the principle of territorial integrity and national unity. Furthermore, it would be erroneous to think that certain trans-border cultural activities anchored in the ways of life and the ancestral productions of these communities can imperil the national unity and integrity of the African countries.

31. In this regard, trans-border identification of indigenous communities or nations has not resulted in any challenge to the question of citizenship or nationality being governed by the internal laws of each country.

III. On the right of indigenous peoples to land, territories and resources

32. The UN Declaration states in its preamble that: "the control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions and to promote their development according to their aspirations and needs."

33. In the comment relating to the provision contained in the draft side-memoire of November 2006 by the African Group, it is stated that the said provision "is impracticable within the context of the countries concerned. In accordance with the constitutional provisions of these countries, the control of land and natural resources is the obligation of the State."

34. On this issue, Article 21(1) of the African Charter states that: "all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."

35. Similar provisions are contained in many other instruments adopted by the AU such as the African Convention on the Conservation of Nature and Natural Resources whose major objective is: "to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour" (preamble) and which is intended "to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge," which is similar to the provisions of Article 10, 11(2), 28(1) and 32 of the UN Declaration.

36. With regard to Article 37 of the UN Declaration on the rights of indigenous peoples, it states: "The indigenous populations have a right to the effect that treaties, agreements and other constructive arrangements signed by the States or their successors be recognized, honored, respected and applied by the States". In its side-memoire the African Group states having "serious reservations" on the possible repercussions of this article.

37. On this point, the UN report on treaties and agreements signed between the States and indigenous peoples shows that apart from the case of the Maasai in East Africa where the agreement with the British Colonial administration went through a judicial procedure, there is nowhere on the African continent where other indigenous communities have signed a historic agreement or treaty with a State. Moreover, these agreements have never resulted in the emergence of entities that have the characteristics of international sovereignty.

38. Consequently, it seems that this concern is predicated on fears relating to the reality of other continents, e.g., North America, where countries rec-
recognize its validity and implement agreements signed with indigenous communities and people living on their territories.

IV. On the right of indigenous peoples to establish separate political and economic institutions

39. This concern was expressed by referring to Article 5 of the UN Declaration on the rights of indigenous peoples which states that: "indigenous peoples have the right to maintain and consolidate their separate political, legal, economic, social and cultural institutions, by maintaining the right, if that is their choice, to fully participate in the political, economic and cultural life of the State".

40. In its comments on the issue, the aide-memoire of the African Group of November 2006 is of the view that this article “contradicts the constitutions of a number of African countries which, if adopted, would create constitutional problems for the African Countries”.

41. In this context, it is pertinent to reiterate the provision of Article 46 of the UN Declaration which guarantees the inviolability and integrity of Member States: "that nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN."

42. Moreover, Articles 5 and 19 of the Declaration appears to merely restate the right to culture and development and the duty of the state to take into account cultural rights while fulfilling its obligations to guarantee the right to development similar to the provisions of Article 22(1) and (2) of the African Charter.

43. It is appropriate in this regard to recall the definition given to the notion of culture by the Southern African Development Community (SADC) which means “…The totality of a people’s way of life, the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or a social group, and include not only arts and letters, but also modes of life, the fundamental rights of the human being, value system, traditions and beliefs”, as well as the pertinent provisions of the African Cultural Charter that make reference to it as “a balancing factor within the nation and source of enrichment among the different communities.”

Conclusion

44. On the basis of this Advisory Opinion, the ACHPR recommends that African States should promote an African common position that will inform the United Nations Declaration on the rights of indigenous peoples with this African perspective so as to consolidate the overall consensus achieved by the international community on the issue.

45. It hopes that its contribution hereof could help allay some of the concerns raised surrounding the human rights of indigenous populations and wishes to reiterate its availability for any collaborative endeavor with African States in this regard with a view to the speedy adoption of the Declaration.