

**REPORT OF THE AFRICAN COMMISSION'S  
WORKING GROUP ON INDIGENOUS  
POPULATIONS/COMMUNITIES**

**SUBMITTED IN ACCORDANCE WITH THE**

**“Resolution on the Rights of Indigenous  
Populations/Communities in Africa”**

**ADOPTED BY  
THE AFRICAN COMMISSION ON HUMAN  
AND PEOPLES' RIGHTS  
AT ITS 28<sup>th</sup> ORDINARY SESSION**

## 1. INTRODUCTION

Mr Chairman:

It gives me great pleasure to present to you and members of the Commission, the final report of the Working Group on Indigenous Populations in Africa. I present this report on behalf of the Working Group that has been hard at work since this Commission passed the resolution establishing the Working Group at its 30<sup>th</sup> Ordinary Session held in Cotonou, Benin in October 2000. On behalf of the Working group, I wish to thank you for the trust you placed in us and for the assistance we received from the Secretariat of the Commission especially Ms Fiona Adolu, the Legal Officer attached to the Working Group.

The invaluable support of the International Working group on Indigenous Affairs (IWGIA) must not be lost sight of. Not only have we had the expertise and services of Ms Marianne Jensen but that IWGIA has spared no effort in ensuring that resources were available to ensure the completion of this task. The Commission owes IWGIA, especially Mr Jens Dahl, the Executive Director a debt of gratitude.

Our work would never have been completed without the enthusiastic support of many experts and African activists on indigenous issues who rallied around fired by the imagination that for the first time Africa could have an instrument to address a matter whose existence is often denied but which remains a festering sore in the African body politic. Among these have been drafters and other discussants who helped us to understand the experiences of indigenous people in Africa.

The “Resolution on the Rights of Indigenous Populations/Communities in Africa” passed by the 28<sup>th</sup> Ordinary Session provides for the establishment of a Working Group with the following mandate:

- Examine the concept of indigenous people and communities in Africa
- Study the implications of the African Charter on Human Rights and well being of indigenous communities
- Consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities
- Submit a report to the African Commission

At the 29<sup>th</sup> Ordinary Session the Working group was then constituted as follows:

1. Commissioner N Barney Pitso (convenor)
2. Commissioner Kamel Rezag-Bara
3. Commissioner Andrew Chigovera
4. Ms Marianne Jensen (independent expert)
5. Dr Naomi Kipuri (indigenous expert)
6. Mr Mohammed Khattali (indigenous expert)
7. Mr Zephyrin Kalimba (indigenous expert)

For various reasons, Commissioner Rezag-Bara was not able to take any further part in the affairs of the Working Group.

The Working Group developed a funding document, and agreed a work plan. Meetings were held with the Danish authorities in Durban, during the World Conference against Racism and in Pretoria. Initial hopes of funding the work of the Working Group were, however, never realized. The Working Group thus had to rely entirely on the generosity of IWGIA to fulfil its mandate.

The Working Group encouraged the participation of indigenous groups in the sessions of the Commission. It held briefing meetings in Tripoli, Cotonou and Pretoria, participated at the WCAR, held a Roundtable meeting in Pretoria and a consultative workshop in Nairobi, 31 January – 2 February 2003. The main drafters of the report were Marianne Jensen and Maureen Tong.

The Resolution on the Rights of Indigenous “Populations/Communities” in Africa reflects the ambiguity felt within the Commission about this initiative. It also reflects a divergence of conceptual thought between French and English-speaking members. The expression “indigenous” had long been problematic within the Commission and the report attempts to deal with the matter. “Populations/communities” reveals a residual consideration of indigenous people as “minorities” or as a cohesive population in its own right. The resolution avoided direct reference to “peoples” due to the divergence of views within the Commission itself about the value and meaning of this expression within the African charter.

The Working Group prepared a Conceptual paper which later formed the basis of the final report. The paper first addresses the thorny issue of definitions of indigenous people in Africa. The report recognizes that this is a sensitive issue in Africa and acknowledges that the situation in Africa, except for a few exceptions involving communities that migrated from other Continents or settlers from Europe, Africans can claim to be aboriginal people of the Continent and nowhere else. Within a common heritage of aboriginality, however, African people have for centuries been migrating from various parts of the Continent and that there have been wars of conquest which shaped the character of nationalities. As if that was not enough, communities have over the years, mixed, intermingled and inter-married. The 19<sup>th</sup> century phenomenon of nation-states has further complicated the cohesion of African nations and communities. With the adoption of former colonial boundaries at independence, arbitrary lines of demarcation have divided indigenous communities. The Working Group then resolved to settle for a socio-psychological description of indigenous people, setting out broad criteria and affirming, as in the United Nations system, the principle of self-definition and recognition of self-identity of peoples.

In presenting the situation of indigenous people in Africa, the Working Group than identifies themes within the Charter whereby to present the situation of indigenous people. This section is a situation, status quo report. It is intended to be informative and affirming. It analyses critically current practices, the cultural system, political practices and economic/development paradigms that indigenous people find oppressive. There is a

dialectical relationship between the indigenous people and the nation they are part of. At one level they belong and embrace the political and constitutional system and they owe allegiance to the country concerned. At another level, they are a distinct people, with their own traditions and cultures and political systems which often transcend national boundaries. They then embrace a parallel allegiance. The report calls for a recognition of the unique character of indigenous people and develop policies and practices in consultation with the people concerned and with due regard to the identity of the people concerned.

The report then analyses the jurisprudence of the African Commission in its interpretation of the African Charter especially the group rights provisions of articles 19-24. The conclusion is that for various reasons this is the least developed section of the Charter. It appears that the Commission itself is ambiguous about what the intended meaning of the sections is. The Report makes a bold assertion that the concept of 'peoples' can be elaborated to embrace indigenous people in Africa. It believes that the foundations laid in the decisions like the *Katangese*, *Mauritania* and *Nigeria* lay the basis for the application of 'peoples' to indigenous people. Drawing from contemporary developments in international law, a tentative investigation of self-determination is explored. The conclusion is that there is a rich potential for the growth of the African Commission jurisprudence in this area.

Finally the Report draws conclusions and makes recommendations. Coming as it does during the Decade of Indigenous People in Africa adopted by the OAU in 2002, we believe that this report will place the African Commission at the centre of African debates, policy formation and human rights practice on indigenous people in Africa.

The Working Group wishes to table the draft report at this session. Recognising that the report has not been made available in advance and translations are not available, the Working Group requests that a general debate on the report may be allowed but that at the next session, the Commission, with a view to their adoption, consider the report and its recommendations. We recommend that the Working Group retains its mandate until the final report is adopted at the 34<sup>th</sup> Ordinary Session of the Commission.

In presenting this report, Mr Chairman, allow me to thank my colleagues in the Working Group for making this monumental task a pleasant one.

**N Barney Pitso**  
**COMMISSIONER**  
**CONVENOR: Working Group on Indigenous Populations/Communities**

**Niamey, Niger, 14 May 2003**

## **2. THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES IN AFRICA**

The focus of this chapter is the particular forms of human rights violations experienced by those groups identifying as indigenous. The term “indigenous peoples” often leads to debates and we shall go into a deeper discussion in chapter 4 on criteria for identifying indigenous peoples. However, before doing that we find it important to outline the concrete human rights issues at stake, which we shall do in this chapter. This leads to chapter 3 where we make an analysis of the African Charter and its jurisprudence on the concept of “peoples”.

This chapter discusses the status and situation of indigenous peoples, the historical circumstances that brought about their situations and the human rights issues they are struggling with in their respective countries and regions. It also raises the kind of questions and approaches that have been taken by the various countries to try to address the plight of indigenous peoples. Lastly, it looks at the African Charter to seek justification for addressing the Human Rights issues within the African Commission for Human and Peoples’ Rights.

Although the African continent as such is struggling with massive human rights problems, it is a reality that some marginalized and vulnerable groups are suffering even more. They are not accommodated by dominating development paradigms and in many cases they are even being victimized by mainstream development policies and thinking. Where "development" has been attempted, it has been misguided and destructive.

Terms such as "underdeveloped", "backward", "primitive", and worse are regularly applied to some people and not others in different countries. Along with the negative stereotyping and discrimination comes dispossession of these peoples’ land and natural resources, which leads to impoverishment and threatens their cultures and survival as peoples. Lack of infrastructure, poor access to health services and appropriate education systems, exclusion from true participation in their own development and denial of their cultural and language rights further adds to their marginalisation and impoverishment.

Indigenous peoples suffer from particular human rights violations – to the extent that some groups are on the verge of extinction. While the degree of experience may differ from country to country, the situation is a cause for serious concern and it calls for intervention. Examples of some of the most serious human rights problems are outlined below.

The African peoples who are facing particular human rights violations, and who are applying the term “indigenous” in their efforts to address their situation, cut across various economic systems and embrace hunter-gatherers, pastoralists as well as some small-scale farmers. Similarly, they also practice different cultures, social institutions and observe different religious systems. The examples provided in this report are by no means conclusive, but are meant to provide tangible content to what would otherwise be pure theory. Those identifying as indigenous peoples in Africa have different names, are tied to very differing

geographical locations and find themselves with specific realities that have to be evoked for a comprehensive appreciation of their situation and issues.

The peoples who have identified with the worldwide indigenous peoples movement in their struggle for recognition of fundamental human rights are mainly different groups of hunter-gatherers and pastoralists.

### **Some examples of hunter-gatherers**

Among hunter-gatherer communities, the ones that are best known are the Pygmies of the Great Lakes Region, the San of Southern Africa, the Hadzabe of Tanzania and the Ogiek of Kenya.

The *Hadzabe* (Hadza, sing.) number approximately 1200 to 1500 people and inhabit an area of Northern Tanzania commonly referred to as the Lake Eyasi Basin, an area that covers 1500sq km. They pursue a semi-nomadic hunting-gathering lifestyle but in recent years some Hadzabe have taken up small-scale agriculture and trading with neighbors.

Like the Hadzabe, the *Ogiek* (or Okiek) are also hunter-gatherers living under very difficult circumstances. They live on the Eastern side of the Mau Escarpment in the Rift Valley Province of Kenya and they number approximately 15,000 to 20,000.

The highly marginalized *Batwa/Pygmy* people live in the equatorial forests of Central Africa and the Great Lakes Region and they have different names that correspond to the specific regions of the forest in which they live. Hence they are called *Batwa* in Rwanda, Burundi, Uganda and the Eastern boundary of the Democratic Republic of Congo (DRC). They are called *Bambuti* in the Ituri Forest in DRC and *Baka* in the Labaye Forest of the Central African Republic (CAR) and in the Minvoul Forest of Gabon. They call themselves *Yaka* and *Babendjelle* in the North-West Congo basin and *Baka* and *Bagyeli* in Cameroon. Although the Batwa/Pygmies speak different languages, depending on the geographic location of their area, all the Batwa Pygmies of Central Africa recognise their common ancestors as being the first hunter/gatherer inhabitants of the tropical forests.

No known official census has given an exact figure for the number of *Batwa* in Rwanda. However, they are estimated at around 28,000 people, making up around 0,2% of the total population.

The *Batwa* people in Burundi number around 30-40,000 people, that is, between 0.45 and 0.6% of the population. They live in no particular areas of Burundi but are dispersed throughout all of the country's provinces.

Around 2000 *Batwa* live in Uganda, former inhabitants of the Bwindi, Mgahinga and Echua forests. Another group who call themselves '*Basua*' number around 1000-2000 people and live in the West of Uganda.

Four Pygmy groups can be found in the vast territory of the Democratic Republic of Congo (DRC): the *Bambutu*, *Bacwa* and *Batwa* in the West and the *Batwa* in the East, in total numbering around 270.000 people.

In Cameroon, there are three main Pygmy groups: The *Bagyeli/Bakola* in the South-West of the country numbering around 3,500-4,000 people; The *Baka* in the South and South-East of the country numbering around 25,000-30,000 people; The *Medzan* in the North-West numbering around 250 – 300 people.

In the Central African Republic (CAR) the *BaAka* people (also known as *Bayaka*, *Biaka*) live in the Southern part of the country and their numbers are estimated between 8.000 and 20.000. Some 3.000 *Bofi* Pygmies live between Bélemboké and Manassao in a mixed savannah-forest area.

In Congo-Brazzaville the Pygmy peoples of the North-Western Congo basin refer to themselves collectively as the *Yaka* – forest people. The Yaka comprise around 20.000 people.

The *San* of Southern Africa is another group of hunter-gatherers or former hunter-gatherers who are suffering from marginalization and particular human rights problems. It is estimated that there are approximately 107.071 San in Southern Africa with the majority located in Botswana (49.475 - 3% of the national population) and Namibia (38.275 - 1.8% of the national population). The San population in South Africa is approximately 4.700 (0.02% of the national population), in Zimbabwe 1.275 (0.02% of the national population), in Angola 9.750 (0.01% of the national population) and in Zambia 1.600 (0.01% of the national population).<sup>1</sup>

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<sup>1</sup> Suzman, James. *Regional Assessment of the Status of the San in Southern Africa* . Legal Assistance Centre (LAC) April 2001.

In South Africa the Khoekhoe (Khoe)<sup>2</sup> and the San<sup>3</sup> are often collectively referred to as the Khoesan. This term was developed by linguists and anthropologists as there is no collective 'indigenous' label for them, and there is no collective term for self-description.<sup>4</sup> In Southern Africa, the San describe themselves in terms of specific language or dialect groups, e.g. Xu, Khwe, Nama, Naro, Qgoon, etc. However, with the continued use of imposed terminology in Southern Africa, the collective terms are beginning to be used by the San themselves, to describe one another, as they discover the positive aspects of networking and mutual support.

### Some examples of pastoralists and agro-pastoralists

Examples of pastoralists who are suffering from particular human rights violations are the *Pokot* of Kenya and Uganda, the *Barabaig* of Tanzania, the *Maasai* of Kenya and Tanzania, the *Samburu*, *Turkana*, *Rendille*, *Orma*, *Borana* of Kenya and Ethiopia, the *Karamojong* of Uganda, the numerous isolated pastoralist communities in Sudan, Somalia and Ethiopia, to name but a few. West and Central Africa also has pastoralists such as the *Touareg* and *Fulani* of Mali, Bukina-Faso, Niger and the *Mbororo* who are spread over Cameroon and other West African countries.

The *Pokot* people live in North Western Kenya and South Eastern Uganda. Although they share the same language with the mainstream Kalenjin, their respective histories have been different owing to their politico-economic situations.

The *Barabaig* are found in Hanang District of Northern Tanzania whose headquarters is Katesh. Many have been displaced and since no plans were made for resettlement, the Barabaig were forced to move southwards.

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<sup>2</sup> Many textbooks refer to the Khoekhoe as Khoikhoi. Tlou and Campbell explain [See Tlou and Campbell, *History of Botswana*, Macmillan Botswana (1984) 21] that the name 'Khoe' means 'man' while 'Khoekhoe' means 'men of men' or the real people. The people of Botswana, the Batswana, call the Khoekhoe 'Bakgothu'. Tlou and Campbell's spelling is adopted for purposes of this paper. See Tlou and Campbell, *History of Botswana*, Macmillan Botswana (1984) 21. For a contrary view see Hromnik, 'It's Not Hottentot or Khoikhoi, The Name is Quena', *Weekend Argus* (Newspaper), 18 June 1988. Also Elphick, 'The Meaning, Origin and Use of the terms Khoikhoi, San and Khoisan', *CABO*, volume II no.2, June 1974.

<sup>3</sup> There is no collective regionally acceptable word to describe these particular peoples. They are described variously as San, Basarwa, Bushmen, Ovakurcha, etc. The San too have no collective term to describe themselves, utilizing instead terms of description in accordance with the individual language groups. This has greatly contributed to others 'naming' them. According to Tlou and Campbell, 'San' or 'Sana' means 'those who gather wild fruit' this name was apparently given to the San by the Khoekhoe. The people of Botswana call the San 'Basarwa'. The Dutch 'colonisers' at the Cape, South Africa, called them 'Hottentots' as a description of how they spoke, 'like stutters'. They have also been called the 'Bushmen', meaning people who live in the bush, or unoccupied territory. See, Suzman, *The Regional Assessment 3. The Regional San Report* was undertaken after a resolution was passed at the 22<sup>nd</sup> Session of the Africa-Caribbean-Pacific-European Union (ACP-EU) Joint Assembly held in Windhoek in March 1996. The resolution called for 'a comprehensive study of the San people in light of international conventions. The study was funded by the European Union. See also Tlou and Campbell, *History of Botswana*, 21.

<sup>4</sup> The name is said to combine labels for the main language groups within the Khoesan class, namely Khoe: (Nama/Khoekhoegowab/'Hottentot' languages) and San (San/'Bushman' languages). See Suzman, *Regional San Report*, 3.



The *Maasai* are found in Southern Kenya and stretch to Northern Tanzania. In Tanzania they are essentially found in 4 districts of Arusha region: Monduli, Simanjiro, Kiteto and Ngorongoro. The Baraguyu (Ilparakuyio) who are a sub-section of the Maasai were originally in Handeni, but are also scattered in 9 other districts outside the region. In Kenya, the Maasai are found in Kajiado, Narok, Transmara, Laikipia and parts of Baringo district. They are also cousins to the *Samburu* (since they speak the same language) who in turn reside in Samburu, Marsabit and Isiolo districts.

The pastoral population in Ethiopia is made up of 29 different groups and is estimated to be 12% of the country's population, roughly five million, and live in the harshest environment namely in arid and semi-arid climatic zones. The majority include *Somalis*, *Afars*, *Borena* and *Kereyu (Oromo)*, *Nuer*, and other smaller Omotic groups in the South. Some of the pastoral communities such as the Somali, Afar, Borena and Nuer found themselves in different countries whose borders were artificially demarcated by European colonization.

The *Himba* people of Namibia are a nomadic pastoral people who live in relative isolation in the Kunene Region. They are politically marginalized and have recently been affected by major regional development plans in the area.

There are also many pastoralists and agro-pastoralist groups in North and Western Africa. The *Tuareg* are found in West and North Africa. The Tuareg are formed of tribes divided into several groups, such as: Kel Adagh, Kel Ahaggar, Kel Ajar, Kel Tadamakkat, Tagaraygarayt and Oulliminden. They speak their own language, Tamashaq, with its own unique alphabet, Tifinagh.

The Tuareg are part of the indigenous Amazigh peoples (generally known as 'Berbers') of North Africa. They are mainly living in Southern Algeria, Northern Mali and Niger, with smaller pockets in Libya, Burkina Faso and Mauritania. Their precise numbers are not known and published figures range from 300,000 to 3 million. The Southern Tuareg of Niger and Mali probably number around one million and 675,000 respectively<sup>5</sup> The Northern Tuareg, who inhabit the regions of Ahaggar and Tassili-n-Ajjer in Algeria number some 25,000<sup>6</sup>.

The *Mbororo* are part of a large group of what the British called the Fulanis or Peul in French and are found in Central and West Africa such as Niger, Burkina Faso, Nigeria, Senegal, Mali, Benin Cameroon, Chad and Central African Republic. Some of them are nomadic pastoralists or "Cattle Fulani" while others practice mixed farming. The Mbororo are further subdivided into three main groups. The Jafun, the Woodabe and the Aku.

The *Ogoni* people are found in South-Eastern Nigeria, an area referred to as Ogoniland located in the North East plain terraces of the Niger River delta in Rivers State. The Ogoni inhabited this area for nearly 1,000 years before the British came to Nigeria in 1861. The Ogoni people are mostly farmers and fishermen.

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<sup>5</sup> Based on national data.

<sup>6</sup> There are a few thousand Tuareg in Libya in the regions of Ghat, Ghadames and the Murzug.

The *Berbers* of North Africa are still mainly settled farmers, with significant minorities of nomads and city dwellers. Berbers are the indigenous inhabitants of the whole of North Africa and the Sahel. The term Berber is derived from the Greek, but is not used by the people who identify themselves rather as *Imazighen*, which translates as “free human beings” and has become a major indicator of Berber self-awareness.

Since independence, there has been no census along ethnic and cultural lines in Morocco and Algeria. It is therefore impossible to come up with precise population figures, but estimates are that the Berbers number around 12 million people in Morocco (45 % of the population), and around 7 million people in Algeria (about 25 % of the population) and about 5 % of the population of Tunisia. Today, the Berbers of Algeria and Morocco are concentrated in six main groups: the Rif, Berraber, Shluh, and Soussi, in Morocco, and the Kabyles and Shawiya, in Algeria. These main groups are subdivided into numerous tribes that live in the Atlas highland and along the Mediterranean coast

The Berbers are concentrated mainly in the Rif and the Atlas mountains (and also in the Sous plain) of Morocco, and in the Kabyle and Aures mountains (and also in the region of M'zab) of Algeria. Small communities are still found on Djerba Island and in a few mainland villages in Tunisia, in the Jebel Nafusah mountain and the Ghudamis and Ghat oases of Libya<sup>7</sup>, and in the Siwa oasis in Egypt.<sup>8</sup>

The groups briefly mentioned above as examples of peoples using the term indigenous peoples are by no means a comprehensive or exhausting account. They are just mentioned as examples to give a general idea about some of the affected peoples in question. Below we shall give examples of the concrete human rights concerns of these peoples - whose problems resemble those of indigenous peoples in other parts of the world – and relate these to the African Charter on Human and Peoples' Rights.

## **2.1 Human rights issues of concern to indigenous peoples in Africa**

The human rights situation in Africa is diverse, complex and it varies from country to country and from one community to another. Whereas some states and communities have improved their human rights situation, others have not. Instead they have systematically reversed gains made earlier and they have made the lives of some segments of their own populations unbearable. Concrete examples are given below to describe and explain indigenous peoples' situations.

Most of the areas occupied by pastoralists, hunter-gatherers and other peoples who have identified with the indigenous peoples' movement are under-developed with poor, if any, infrastructure. Generally too, they have often been evicted from their land or been denied

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<sup>7</sup> Four groups of *Berbers*, including Zenaga and Tuareg, total population of 150.000, living in Jebel Nafusah, and Ghat and Ghudamis oasis and roaming the Sahara.

<sup>8</sup> An estimated 6 000 Egyptians of Berber origin live in the Western desert of Egypt near the border with Libya, one of the most arid areas of the world, apart from a little rain on the coastal strip. They were ethnically related to the Berber people of North Africa. Their native language, Siwah, is a Berber dialect.

access to the natural resources upon which their survival as peoples depend for the benefit of others. Indigenous peoples are also dominated by the thinking of mainstream populations and looked down upon as backward peoples.

Dispossession of land and natural resources is a major human rights problem for indigenous peoples. They have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation. Establishment of protected areas and national parks have impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and in many cases even displaced them. Large-scale extraction of natural resources such as logging, mining, dam construction, oil drilling and pipeline construction have had very negative impacts on the livelihoods of indigenous pastoralist and hunter-gatherer communities in Africa. So has the widespread expansion of areas under crop production. They have all resulted in loss of access to fundamental natural resources that are critical for the survival of both pastoral and hunter-gatherer communities such as grazing areas, permanent water sources and forest products This is a serious violation of the African Charter (*Article 21,1 and 21,2*) which states clearly that every peoples have the right to natural resources, wealth and property.

Contrary to the provisions of the African Charter that all peoples have the right to existence (*Article 20,1*), some of the hunter-gatherer communities, are threatened with extinction. The Hadzabe population is now estimated to be less than 1,500. The existence of the Batwa is equally threatened.

The dispossession of land and natural resources threatens both the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities and this violates *Article 22,1* of the African Charter which says that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

## **2.2 Rights to land and productive resources**

Land and other natural resources are critical for the survival of any subsistence community. The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates to both *Articles 20, 21, 22 and 24* of the African Charter.

Indigenous pastoral and hunter-gatherer communities in Africa have traditionally occupied areas well endowed with natural resources. Such territories were adequate in size and ecological parameters mediated and supported sources of their livelihood that formed the heritage of such communities.

Indigenous knowledge systems have evolved over many years, and natural resources have been utilised and managed in sustainable ways. However, over the years, key productive resources have been systematically alienated, leading to the shrinkage of their resource bases.

Such a reduction of the resource bases for indigenous peoples has constrained their coping strategies and food insecurity have become a recurrent feature. Livestock holdings have been reduced for the pastoral communities, and for hunter-gatherers game resources, wild berries, roots and honey have increasingly become inadequate.

Indigenous pastoralist and hunter-gatherer communities in Africa have been losing their land incrementally over the years. In many parts of Africa this situation has been promoted by the assumption that the land occupied by the pastoralists and hunter-gatherers is *terra nullius*. The term *terra nullius* has traditionally been taken to mean 'land belonging to no one'.

The assumption that the land of pastoralists and hunter-gatherers is empty or not used productively has stimulated land alienation at all levels. The targeted pastoralist and hunter-gatherer communities have only to a very limited extent legal titles to their land as their customary laws and regulations are not recognized or respected and as national legislation in many cases do not provide for collective titling of land. Collective tenure is fundamental for most indigenous pastoralist and hunter-gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.

Examples of land alienation of indigenous communities are manifold and we can only provide a few examples. However, they all illustrate a very serious human rights concern of the communities in question that should be addressed by the African Commission.

#### ***Establishment of national parks and conservation areas***

Establishment of national parks and conservation areas has led to severe dispossession of pastoralist and hunter-gatherer communities. Some examples are:

In 1998 the Batwa of the *Nyungwe Forest* in Rwanda were driven out in order to establish a military zone and a national park. The Batwa of the *Parc des Volcans* have also been driven out by conservation projects desiring to make a sanctuary for the mountain gorillas. This dispossession has led to impoverishment and a host of social and cultural problems.

In Uganda, the Batwa were driven out of their ancestral land in the forests of *Bwindi*, *Mgbinga* and *Echuya* by the English colonial administration in 1930 in order to create conservation zones. The establishment of the *Bwindi* and *Mgbinga National Parks* for gorillas in 1991 (355 km<sup>2</sup>) enabled the authorities to evict the Batwa definitively from the forest. Some were compensated, others not. The farmers who had destroyed the forest were excessively compensated. Now, the Batwa have little land, and their forest-based economy has been destroyed. In 1995, 82% of the Batwa were landless. The rest have land equivalent to 0.04 ha per family<sup>9</sup>.

During the 1960–1970 period, 580 Batwa families (3.000 – 6.000 people) were evicted from the *Kabuzi-Biega Forest* in the Democratic Republic of Congo in order to create a 6,000 km<sup>2</sup>

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<sup>9</sup> Jackson, Dorothy "Indigenous Peoples in Central Africa. A desk review for the International Labour Office", March 2001.

gorilla reserve<sup>10</sup>. Land should have been given in compensation to the Batwa, but this did not happen. Now the Batwa are forbidden to hunt in the park, and forbidden to collect park products. They have no food resources or medicinal plants, and the forest is no longer their place of worship. The Batwa have been culturally and psychologically shattered by the loss of their forests. The local authorities do not allow the Batwa to return to the forest of Kahuzi-Biega, as they claim they pose a high risk to the ecosystem. However, this is only a pretext, as traditionally the Batwa have never hunted gorillas, nor do they destroy the forest by cutting down trees. In contrast, groups of farmers have caused great damage to the forest by destroying large sections in order to create agricultural plots and pasture.

The Batwa who were driven out of the Kahuzi – Biega forests are now extremely poor, even destitute. Most have no property, and it is very difficult for them to obtain their basic needs. To survive, some have learned from other non-Batwa how to make charcoal from wood to sell and this gives them around \$10 every fortnight. Others who have plots of land try to cultivate them as best they can with potato and vegetables but, given that they are not used to farming, and that the rains have been extremely irregular in recent times, their situation remains one of extreme poverty. The Batwa in the North of the Kahuzi-Biega Park have settled on plots of land but these land, officially unoccupied, may be allocated to someone else by the local authorities. The Batwa have no legal protection once neighbours from other ethnic groups decide to take their land or drive them out of their villages.

Protected areas also pose a threat to the land rights of the Pygmies in Cameroon. The second largest protected area is called the *Dja Reserve* (5,260km<sup>2</sup>) and some Baka encampments can be found there (around 4,000 people). Local community rights have been abolished by the reserve. An evaluation undertaken in 1994 concluded that local community participation in planning and decision-making with regard to protected areas was superficial<sup>11</sup>.

In the Central African Republic (CAR) the *Nzanga-Ndoki National Park* (1,222 km<sup>2</sup>) and the special buffer reserve in the dense forest of Dzanga-Sangha (3,159 km<sup>2</sup>) were created in December 1980. The protected area is situated in the South-West of the CAR, on land that were traditionally occupied by the Baka. The main aim is to protect the biodiversity of the CAR and yet the demarcation of this zone was declared without consulting the local population. The Park has reduced the area used by the Baka for hunting and gathering and, in addition, the Baka have had to suffer an increase in Bilo hunters and fisher people. A WWF project, in association with the CAR government, is in the process of creating a new protected zone that will enable the local people to undertake their own activities. However, the Bakas' land rights are not mentioned in the project.

In Botswana, around 1.500 San people have been evicted from the *Central Kalahari Game Reserve* during the last 10 years. The case, which is now pending in court, bears witness to the refusal of the government of Botswana to recognize that the inhabitants of the area have

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<sup>10</sup> Barume, Albert Kwokwo "Heading Towards Extinction? Indigenous Rights in Africa: The case of the Twa of the kahuzi-Biega National Park, Democratic Republic of Congo", The Forest Peoples Programme and IWGIA 2000.

<sup>11</sup> Jackson, Dorothy *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*, march 2001.

ancestral rights to the territory. Instead, they have been ‘encouraged’ to leave, through the State’s cessation of the delivery of basic and essential services to those who refuse to move to two settlements outside the Reserve.<sup>12</sup> The move is being ‘encouraged’ in order for the State to provide ‘development’ in the forms of schools, clinics, etc. Alternative forms of development which could be based upon or utilize the indigenous knowledge systems of the San, within the Reserve, appear to be unknown or unacceptable to the government of Botswana.

The landless situation in which the San find themselves in Namibia, is directly linked to the colonial policies of the apartheid government of South Africa, which apportioned the country into freehold ‘white’ commercial farms, ‘tribal’ communal land and wildlife conservation areas.<sup>13</sup> A consequence was that less than 1% of the San people were able to retain limited rights to the territories that they had traditionally occupied. The rest of their land had been allocated to other ethnic groups or become game reserves or national parks.<sup>14</sup>

The *Maasai* in Kenya and Tanzania have been and are still experiencing dislocations similar to those experienced by other pastoralists and hunter-gatherers in the region. Evictions of Maasai from their ancestral territories at both sides of the common border started during the colonial era and are continuing to the present. The famous fake treaties signed between the British and the Maasai in 1904 and 1911 to evict the Maasai from their best land to make room for colonial settlers has never been settled. This is because, at independence, with the departure of the British, the land were taken by the more numerous and dominant community at the expense of the Maasai. Consequently, the Maasai were pushed to the periphery and remained marginalized. At the Lancaster House conference in the 1960’s, they refused to sign the constitutional arrangements on account of the disagreements on the land question. The matter remains unsettled.

In Tanzania, a similar treaty was concocted to remove the Maasai from *Serengeti*, without their consent. As late as in 1988 they were again evicted from the *Mkomazi Game Reserve* by the government.

In Kenya and Tanzania establishment of National Parks has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival. This has affected many pastoralists not at least the Maasai. The creation of all the National Parks: *Manyara, Tarangire, Ngordoto, Serengeti, Mkomazi* in the case of Tanzania and *Amboseli, Maasai Mara* and others in the case of Kenya, has led to the eviction of indigenous Maasai from their ancestral land without compensation, supposedly in the national interest.

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<sup>12</sup> This policy decision was executed on 31 January 2002. Essential services which were stopped, include the delivery of water, food rations, and medical care.

<sup>13</sup> Hitchcock, Robert *Kalabari Communities: Bushmen and the Politics of the Environment in Southern Africa* IWGIA Document 79, 1996.

<sup>14</sup> Suzman, James op cit., 34.

The government of Tanzania has in 1999 enacted two land laws that restructure the system of land ownership. The new acts improve access to land for individuals, and guarantee equality in land ownership. Customary ownership of land is recognised subject to the superior title of the state, and in so far as it is not repugnant to the fundamental principle of land policy as enumerated in the Statutes. However, the status of the pastoralists remains uncertain and precarious. Whilst there are provisions recognising collective tenure which would be favorable to recognition of ownership of pasture land, it is still unclear how pre-existing possession of land may be transformed into a new title and how subservient interests may be owned (eg. water rights, tree tenure, sacred places, etc). Thus, the serious problems of the pastoralists still go to a large extent unattended. A serious case is the forced displacement of the Maasai pastoralists from the *Mkomazi Game Reserve*, which has had severe consequences in terms of forced uprooting and impoverishment.

Upon the displacement of the Maasai from Mkomazi, the pastoralists launched their case in court<sup>15</sup>. The High Court noted that the plaintiffs were seriously injured and harassed during the process of displacement. The court recommended that the state should seek alternative land for them, but so far this has not been done. The court also upheld the state's contention that statutes enacted by the state could extinguish customary rights. This point is manifestly unconstitutional as property rights are protected by the constitution and may only be compulsorily acquired through due process provisions of statute guaranteeing full, prompt and fair compensation. The Court of Appeal reversed the decision of the high court and completely dispossessed the Maasai of their land rights in Mkomazi. The pastoralist residents of Mkomazi numbering over 20.000 people are today landless and have exhausted all municipal remedies.

The case of *Ngorongoro Conservation Area Authority (NCAA)* in Tanzania has a special status since some of the people now living in Ngorongoro had been evicted from Serengeti when it was declared a National Park in 1959. Even then the interests of wildlife are still supreme since the overriding consideration has been the protection of habitat, flora and fauna and not how to accommodate pastoralists. Consequently, the benefits accruing from tourism go to meet priorities other than those of pastoralists.

The ancestral land of the Ogiek in Kenya in the *Mau Forest* has been declared a protected forest area leaving about 5.000 Ogiek homeless. While some Ogiek have taken up agriculture and some are livestock keepers, a large number of those who depend upon foraging and hunting have been left without any means of livelihood by the eviction. Some of the gazetted area is claimed to be protected for the customary territorial and foraging rights of the Ogiek, yet the Ogiek are kept away from the area. At the same time, no effort has gone into protecting the area against possible encroachment and logging. Instead, the government has allocated some of the forest to outsiders to be used for other purposes. The Ogiek took the

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<sup>15</sup> One was the case of Faru Kamunyu and 16 others versus the Minister of Tourism, Natural Resources and Environment and 3 others – which is civil case number 33 of 1994, and the other was the Koperu Kenya Kamunyu and 44 others versus the Minister of Tourism, Natural Resources and Environment and 3 others – which is civil case number 33 of 1995. These two cases were combined into one.

matter to court and the High Court declared an injunction on any further land allocations until the dispute had been resolved<sup>16</sup>.

Eviction of Ethiopian pastoralists from their ancestral land is a huge problem that has besieged pastoral communities for a long time. Large tracts of pastoral land have been turned into wildlife reserves and game parks such as for instance the *Awash National Park*<sup>17</sup>.

***Mining, logging, plantations, oil exploration and dam constructions***

Large-scale infrastructure projects and company concessions – taking place in the name of national economic development – have displaced and impoverished many indigenous communities. In most cases the affected marginalized indigenous communities are neither consulted nor compensated.

All over the Great Lakes Region big company concessions are having severe consequences for the lives and survival of the Pygmies/Batwa people.

The Batwa/Bambutu from the DRC suffer from serious problems in relation to their land. The multinational mining, exploitation and infrastructure companies have planned their strategies for activity in the DRC with a view to exploiting the natural resources of the Congo as soon as conditions permit. This will inevitably lead to the destruction of the forest and wipe out the Pygmies' way of life. The Batwa/Bambutu have been driven out of their forests, with neither financial compensation nor compensation in terms of other cultivable land. A large number of Batwa/Bambutu thus find themselves landless and live as tenants on the land of others, who can evict them at any time.

In the Central African Republic (CAR), the consequences of company concessions are less severe than in other countries of the Great Lakes Region. However, in the North-Western part of the country, in the regions of Sangha and Lobaye, company concessions seriously affect the lives of the Baka. Over 3.2 million hectares, or 86% of the region's forests, have been allocated to companies. The companies have attracted large numbers of workers to work on the plantations, in the diamond mines and in hunting activities, and the forest has become overpopulated. Competition for resources has created conflict between the Baka and the Bilo, and there are several instances of mistreatment<sup>18</sup>.

In Congo-Brazzaville the alienation of Babendjelle land has been seriously aggravated by the allocation of state land as *Unités forestières d'Aménagement* (Forest Management Units - UFA) to logging companies and conservation organisations. The North of Congo-Brazzaville is covered with 17.3 million ha of forest, of which 8.9 million are judged to be exploitable. In 1996, 5.3 million ha were allocated to logging companies and donors interested in developing the forest sector. In these companies' contracts, it is noted that the aim of the projects is to create an island of stability, to provide the population with certain facilities, to create salaried employment and to have a considerable influence in local business. In spite of these positive

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<sup>16</sup> *The Indigenous World 2001-2002*, IWGIA, Copenhagen 2002

<sup>17</sup> *The Indigenous World 2002/2003*, IWGIA, Copenhagen 2003

<sup>18</sup> Jackson, Dorothy, *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001



intentions, the overall impact of these companies on the local populations is clearly negative. Traditional tenure and use rights, and the resource management system of the local populations, have been wiped out. As elsewhere in Central Africa, deforestation and the creation of roads have encouraged trade in wild meat and large-scale hunting. This has had a devastating effect on subsistence hunters such as the Baka and Babendjelle.<sup>19</sup> In Cameroon logging companies have a severe effect on the Bagyeli and Baka economy. Tractors and machines kill animals, destroy trees and cause damage to plants. The Bagyeli and Baka watch this destruction of their forest helplessly. Some are employed but only on a temporary basis. Road construction is undertaken in order to facilitate the construction companies' access to the forest, and this facilitates the entry of infectious diseases. The traditional life of the Pygmies is under severe threat from the arrival of the cash economy into the forest.

Another threat to the land rights and livelihood of the Pygmies in Cameroon is the planned construction of the Chad-Cameroon oil pipeline funded by the World Bank. The pipeline will take oil from Chad to the Cameroon coast of Kribi, crossing Bagyeli land in Bipindi and Lolodorf. In order to assess the damage caused to local communities by the project, two local NGOs assessed 11 villages within a range of 10 km of the pipeline. The survey revealed that 55% of those interviewed knew nothing of the project, and only 20% had superficial knowledge of it. Only 8% were clearly aware of the risks and advantages of the project. The study concludes that, during the planning and preparation, consultations with the local communities, particularly the Bagyeli, were culturally inappropriate and inadequate and that they had not been informed of the implications of the project for their future<sup>20</sup>. The World Bank's "Indigenous Peoples' Policy", for projects affecting indigenous people, was not observed. The lack of effective representation of the Baka and the Bagyeli severely disadvantages them when claiming compensation for their damaged resources. The Pygmies are doubly disadvantaged: not only are their forests destroyed but the money due to them is paid to the villagers and not to the Pygmies. This reinforces the economic and political division between the Bantu and the Pygmies. Alongside this, the Pygmies' share of the preliminary compensation that was paid when the pipeline was established was collected by the Bantu and the land that previously belonged to Pygmies have become Bantu property.

Oil exploration has likewise seriously affected the livelihoods of indigenous communities. An example is the Ogoni people of Nigeria who have been denied rights to the rich oil resources found on their land and they have found themselves extremely vulnerable. Shortly after the

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<sup>19</sup> The *Industrielle du Bois* company (CIB) operating near Quesso, covers all or part of 8 or 9 traditional Land belonging to the Pygmies/Bantu. The influx of professional hunters has destroyed the Pygmies' traditional hunting areas. The companies use tractors to transport wild meat out of the forests. Forest guards carrying automatic guns are put in place by the companies in order to stop commercial hunting on their concessions. The companies never have any dealings with Pygmy communities, only with village communities. The result is that the Pygmies never receive compensation for what has been taken. They are also less capable of benefiting from schools and dispensaries built by the companies in Bantu villages, through lack of money and discrimination against Pygmies living near these establishments. (*"Indigenous Peoples in Central Africa" A desk review for the International Labour Office*. March 2001).

<sup>20</sup> Forest Peoples Programme & Bank Information Centre 2000. Report on a Workshop on "Indigenous Peoples, Forests and the World Bank: Policies and Practice", Washington D.C., 9-10 May 2000.

oil company, Shell, started their drilling operation in 1958, the Ogoni observed that agricultural production and fishing catches started to decline. A series of complaints were made to Shell and to government authorities but nothing was done. Over the years, as Shell increased its operations so were increases in oil spillage thus the environment pollution problems for the Ogoni intensified up to the present. Protests from the Ogoni people has over the years led to massive human rights abuses in the area. The execution of the Ogoni leader Ken Saro Wiwa and other Ogoni people is also a case in point.

Large scale infrastructure projects like dam constructions also seriously threaten the livelihoods of indigenous communities. The planned construction of a hydroelectric dam at the Epupa waterfall in the Kunene River in Namibia is potentially having severe consequences for the existence and way of life of the Himba pastoralists. The plan dates back to 1969 when the Portuguese colonial government in Angola and the apartheid government of South Africa agreed to dam the Kunene River to provide hydro-electric power to Southern Angola and Northern Namibia, then called South West Africa. After independence the SWAPO Government took over the plan to construct the dam<sup>21</sup>

Consultations with the Himba people concerning the construction of the dam have been very limited and there has been little political will to listen to their protests and to enter into a dialogue with the Himba on their perceptions of development, the consequences of the dam construction on their way of life and the kind of future they would like to see for themselves. The government of Namibia has temporarily halted the plans after the leaders of the Himba mobilised international support to stop the construction. Should the plans be implemented, about 1.000 Himba will be permanently displaced and as many as 5.000 will lose access to grazing areas which they currently depend to sustain their livelihoods.<sup>22</sup>

***Biased development policies and expansion of areas for agricultural production***

Many African governments have tended to apply development paradigms focusing on assimilationist approaches designed to turn indigenous peoples into sedentized crop cultivating farmers on the assumption that the ways of life of indigenous peoples have to change because it is “primitive”, “backward” “unproductive” and degrading to the environment. Such assimilation processes take many forms and are generally based on prejudice, lack of informed knowledge and power interests of the elites and not on genuine consultations with the peoples in question. The focus on crop production in rural development policies and the increasing expansion of areas under crop production is threatening the livelihoods of indigenous pastoralist and hunter-gatherer communities.

The Batwa in Rwanda, Burundi and Uganda have been driven out of their ancestral forest areas. They have been dispossessed of nearly all their land and they do not have any guaranteed rights over the last remaining land. Thus, the Batwa in Rwanda, Burundi and Uganda suffer from a serious lack of land, which is a root cause for the severe poverty, marginalization and discrimination, which they are experiencing.

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<sup>21</sup> Sveijer, Terese “The Himba People’s Fights against the Planned Construction of a Dam”, In: *Indigenous Affairs* no 3/4 1997, IWGIA, Copenhagen

<sup>22</sup> Suzman, *Minorities in Post Independence Namibia*, 2002 MRG, 20

In Rwanda, it was estimated by a survey made in 1997 that 98.5% of the Batwa included in that survey were landless.<sup>23</sup> The Batwa continue to be deprived of the access to land that other social groups enjoy. They live as tenants on land belonging to other private individuals, religious congregations or public institutions. The majority of Batwa in Burundi are also landless.

The economic situation of the Batwa in the DRC, Cameroon, CAR and Congo-Brazzaville differs from that of the Batwa in Rwanda and Burundi insofar as those in the DRC, Cameroon, CAR and Congo-Brazzaville have to a large extent been able to retain their forest way of life. However expansion of crop production also increasingly pose a threat to their survival.

In Kenya and Tanzania several major agricultural development programmes have been implemented in pastoralist areas, but they have either failed, or resulted in negative, and even disastrous implications. Some cases include the 1970's World Bank sponsored land titling project in Kenya whose intention was to increase agricultural productivity through the introduction of individuation of tenure. However the resultant effect was decreased productivity, serious insecurity of tenure, landlessness and economic vulnerability.

Policies of individuation of tenure is continuing in Kenya and this has in many cases had disastrous effects for the pastoralists, especially the Maasai who have ended up losing the land that is crucial for sustaining their livelihood and many now find themselves completely impoverished.

In the whole Eastern African region, the need to increase exports has led to intensification of agricultural production and unplanned cultivation of semi-arid areas, leading to uncontrolled clearing of forests. Areas set aside for dry-season grazing by pastoralists have been cleared and cultivated. The underlying anti pastoralist bias dominating rural development policies encourages the spread of farming at the expense of pastoralism, often resulting in conflicts over resources. Also, the tendency to re-settle farmers in the land of the pastoralists has not helped to ease the tension, instead, the latter have increasingly felt discriminated against and are articulating their grievances from a rights perspective.

The *Pokot* people in Kenya and Uganda have largely suffered both under the colonial administration and in the post-independent Kenya and Uganda. Like other indigenous peoples, land alienation is the most contentious issue among the Pokot. In Kenya, land alienation started during the colonial period when in 1926 the British administration forcibly evicted the Pokot from their ancestral seasonal grazing land in order to make room for the settlement of white farmers in the present-day Trans-Nzoia District of Kenya. Following independence the government nationalized some of the land in the creation of state farms, and a large portion of land was also used by the post-colonial government to settle farming communities. In Uganda, some land was also set aside for wildlife management in the

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<sup>23</sup> The survey was made by the organization APB and it showed that only 44 families out of 2.892 involved in the census owned Land, implying that 98,5 had none. Batwa with Land could only be found in 4 prefectures: Kigali Rural, Gitarama, Byumba and Umutara (*Indigenous Peoples in Central Africa. A desk review for the International Labour Office.* March 2001.)

creation of *Nasolot Game Reserve*, which resulted in the restriction of livestock movement during the dry season. These land losses have led to serious economic threats to the livelihoods of the Pokot.

In Tanzania, the rights of the *Barabaig* pastoralists have been seriously violated by a big commercial agricultural development programme implemented by the Canadian National Agricultural and Food Corporation (NAFCO). NAFCO, a government parastatal organization establishing large, mechanized wheat farms, was granted lease by the Tanzanian government to cultivate wheat in land occupied by the Barabaig pastoralists. Without regard to the people, the company, with the assistance of Tanzanian government officials, evicted people and destroyed their graveyards. The Barabaig lost over 10% of their land composed of the most important grazing areas. Huge numbers of Barabaig were displaced and since no plans were made for resettlement, the Barabaig were forced to move southwards until they arrived at Kilombero district. At Kilombero, the residents did not want them in their area, had no services, were over taxed and had no political representation at the village, ward or district administrations. Clearly they were not desired there and were expected to go back to their own areas. One angry and frustrated member of the community was reported to have told a team of investigators that:

*“We are Tanzanian citizens but no one wants us in this country, where can we go as everywhere we go we have to move on?”* (Brehony, et al. 2001:13).

Subsequent movement of large numbers of outsiders into the area further displaced the Barabaig who are now scattered all over Tanzania. After a long struggle, some villagers sued the company for the violations of their rights. The Barabaig villagers lost the appeal and when NAFCO was embarrassed and abandoned the project, the land never reverted to the Barabaig, but it is still held by the government. There has been talk that the land will be sold to willing buyers. Many Barabaig continue to be pushed onwards by shortages of land in neighboring districts and countries (including Malawi) in search of pasture and water resources for the maintenance of their herds. To the pastoralists then, the results of the operation were loss of land and other productive resources, human rights abuses and impoverishment.

Another example of land alienation due to expansion of crop production and the inherent development thinking biased against the forms of production of pastoralists and hunter-gatherers is the Hadzabe people in Tanzania. In the thinking of the majority of Tanzanian communities, farming is perceived and presented as the ideal form of subsistence and the way of life of the Hadzabe is perceived as not representing mainstream practices. In this ideological scenario, hunter-gatherers are characterized as outside the norm and accordingly pressure is exerted upon them to conform to the majority lifestyle.

A number of development initiatives were undertaken for the Hadzabe, but most of them failed owing to their being incompatible with the lifestyle of the Hadzabe. Nevertheless, they helped to justify the employment of violent and forceful methods of administration by government officials mandated to "develop" them. In subsequent decades, and despite various donor driven initiatives and decades of failed "development" programmes, no

lessons seem to have been learnt. Every attempt at settling the Hadzabe has resulted in more of their land being alienated to other communities and other uses.<sup>24</sup>[

Since the Hadzabe leave few visible features in the environment, compared to cultivation, it makes their land to be perceived by farmers as open or unused. Notwithstanding the fact that the land is largely unsuitable for agriculture due to low rainfall and poor soil conditions, the combined pressures of increased population, land degradation in adjacent areas and the government's single-minded policy of agricultural development regardless of social, economic and ecological conditions, more non-Hadzabe people are being pushed into Hadzabe territory which further dispossess the Hadzabe. As there is no clear protection of minority interests under the law, the ancestral land of the Hadzabe are fast shrinking and this threatens the survival of the Hadzabe as a people. Additionally, the pressure to make them conform to mainstream thinking violates the right of the Hadzabe to be themselves and to self determine their own future and development. At present, Mono wa Mongo is the only area of their ancestral territory to which the Hadzabe have any measure of quasi-legal protection although this is not guaranteed in an absolute legal sense<sup>25</sup>

In Ethiopia pastoralists have suffered from negative stereotyping for a long time. This has given way to two forms of inequality. The first is that it is used to rationalize the confiscation of pastoral land and eviction of pastoralists from their ancestral land. Private and absentee landlords as well as 'modern' commercial farm 'developers' have taken over pastoral land in a number of places. The second form is that it has informed the macro-economic policy very negatively in the sense that it has contributed to the prevailing notion that 'development' in pastoral land have to start with the settlement or sedentarization of pastoralists. As such, pastoral communities have been completely marginalized from official macro-economic policies of the various governments in Ethiopia.

Eviction of pastoralists from their ancestral land is a huge problem that has besieged pastoral communities in Ethiopia for a long time. Pastoral land is passed on to commercial farmers as 'developers' and this causes conflict between the community and the government. The case of the commercial farms along the Awash River are typical examples of this systematic eviction of pastoralists from their own land. Other areas such as the Kereyu and Borana in the Oromiya regions and other places in the South can also be mentioned as cases. Land eviction - on top of the sheer neglect of pastoral development policies and strategies - has greatly exacerbated the poverty of pastoralists and it has deprived the development of alternative or additional means of livelihood systems. However, there now seems to be positive developments as the Federal Government of Ethiopia has adopted a new strategy on pastoral development. This has given way to cooperation between pastoralist networks and regional governments where pastoralists preponderate.

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<sup>24</sup> Madsen, Andrew: "*The Hadzabe of Tanzania. Land and Human Rights for a Hunter-Gatherer Community*", IWGIA 2000.

<sup>25</sup> Madsen, Andrew: "*The Hadzabe of Tanzania. Land and Human Rights for a Hunter-Gatherer Community*", IWGIA 2000.

The alienation of the land of indigenous communities – that started during colonialism - has continued after independence throughout Africa. Ancestral land rights to territories in which pastoralist and hunter-gatherer communities have lived for generations, presents a demand for innovative conceptual thinking. This is closely linked to the question of which dominant development model is utilized by the government in power. Is the model of development accepting of multi-culturalism? Can there be recognition of alternative land use patterns, which do not conform to the traditionally accepted land use patterns of the dominant and can that provide a basis for the recognition of territorial land rights?

### ***Positive examples***

Amidst the distressing picture of land alienation, dispossession and impoverishment of indigenous communities, South Africa provides an encouraging example of an attempt to safeguard the land rights of indigenous communities. In South Africa, Section 25(7) of the 1996 Constitution, the Constitution of the Republic of South Africa Act 108 of 1996, provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.<sup>26</sup> The Restitution of land Rights Act 22 of 1994 (Restitution Act) was passed within seven months of the establishment of the new democratic government in 1994. The Restitution Act established the Commission on Restitution of land Rights (land Claims Commission)<sup>27</sup> that has the responsibility to investigate and process all land claims lodged by 31 December 1998.<sup>28</sup> Khoesan communities that have benefited from the land restitution programme include the Riemvasmaak Community, the Mier Community, the Kleinfonteinjie Community in Schmidtsdrift as well as the ꞤKhomani San Community of the Southern Kalahari. Speaking at the ceremony to symbolically hand over the successfully claimed land to the ꞤKhomani San of the Southern Kalahari, then Deputy President Mbeki said:

*“What we are doing here .....is an example to many people around the world. We are fulfilling our pact with the United Nations during this decade on Indigenous People”<sup>29</sup>*

## **2.3 Discrimination**

*Article 5* of the African Charter says that every individual shall have the right to the respect of the dignity inherent in a human being and *Article 19* says that all peoples shall be equal and enjoy the same respect.

The rampant discrimination towards indigenous peoples is a violation of the African Charter, and we shall give a few examples of the discrimination that takes place.

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<sup>26</sup> Section 25(7) of the Constitution provides:

‘a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.’

<sup>27</sup> Section 4 of the Restitution of Land Rights Act 22 of 1994, as amended.

<sup>28</sup> Section 6 of the Restitution Act.

<sup>29</sup> Quoted in IWGIA, *Indigenous World 1999-2000*, 373 and IPACC, *Annual Review November 1998 – October 1999*, 2. Article 27 of the Draft Declaration on Indigenous People provides for the right of indigenous peoples to the restitution of the land that they traditionally occupied.

Throughout Central Africa the Batwa/Pygmies are victims of discrimination. They can neither eat nor drink with their neighbors, they are forbidden to enter their houses and are not permitted to have sexual partners other than from their own ethnic group. The Batwa/Pygmy communities live on the outskirts of other people's settlements. This exclusion is less within towns, although serious prejudice does still persist against the Batwa/Pygmies, particularly in terms of derisory comments<sup>30</sup>.

In Rwanda and Burundi the Batwa suffer from marginalization, discrimination and extreme poverty, and they are neglected in all areas of development. Prejudice means they are considered undeveloped, intellectually backward, hideous, unsavoury characters or sub-human. The Batwa are allowed to share nothing with the Hutus or Tutsis, neither food nor drink. Even sitting down with a Batwa would be considered an insult or a dishonour to the friends and family of any Hutu or Tutsi who agrees to do so. If an individual non-Batwa should sympathise with the Batwa and become their friend, his peers will treat him as ridiculous or mentally disturbed.

Forming a numerical and political minority, and being a dispersed population with the lowest level of social status, the Batwa have been unable to overcome their difficulties in order to defend their rights and resist arbitrary violence. They are treated as inferior, and are hence the victims of scorn and exploitation. The Batwa are brutalised and the victims of erroneous judgements passed by the legal system against them in order to appropriate their land, the victims of racist and discriminatory attitudes on the part of the rest of the population.

Some government circles and local authorities have no objection to working with Batwa communities and their representatives. Generally, the attitude of the rest of the population is that they would prefer the Batwa to settle down, abandon their traditional way of life and imitate their own way of earning a living. The Batwa, for their part, would prefer positive encouragement in order to affirm their rights before people try to convince them they are equal to the rest of society. Most Batwa are so marginalized and impoverished that they cannot envisage any change in their situation and integration programmes are insufficient to eliminate this situation.

In February 1999, a National Commission for Unity and Reconciliation (URC) was established in Rwanda to implement three programmes of action: civic education, conflict resolution, and promotion of grassroots initiatives and reconciliation. In April 2000, the URC recognised that the Batwa formed the murky side of Rwandan society, that they had been systematically forgotten as if they did not exist and, consequently, that they needed particular attention. The URC recommended positive discrimination in favour of the Batwa in terms of education and health services.

Like in Rwanda, Burundi and Uganda, discrimination against the Pygmies is prevalent in the DRC, Cameroon, the CAR and Congo-Brazzaville. The authorities and the majority

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<sup>30</sup> Jackson, Dorothy *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001

population do neither understand nor respect their culture but do generally perceive the Pygmies to be at a lower developmental level. To the extent that any action is taken, the purpose is rather to assimilate the Pygmies into the dominant culture and not to promote multiculturalism, which respects the diversity and rights of all different groups.

In the DRC, some of the Batwa and the Bambuti suffer less discrimination than their counterparts in Rwanda and Burundi. Those who have preserved their customs and forest-based way of life have managed to escape a possible situation of exploitation. The Batwa who have been driven out of their forests have become the poorest of the poor, marginalized from society and suffering the same discrimination as the Batwa in Rwanda and Burundi. They are considered immoral, dirty, deceitful and uncivilised and Batwa children are considered to be good for nothing.

Like in the DRC, the Bagyeli and the Baka in Cameroon are in many cases treated like children and they are often described not as people but as creatures. As for all the Pygmies in the Great Lakes Region, the forest-based way of living is the basis for the extreme discrimination and contempt, which they Pygmies are suffering from. The forest-based way of life is considered non-human. Official circles consider the Pygmies to be people who are still at an early stage of cultural development. They consider that the permanent settlement of the Pygmies is inevitable and irreversible, if they are to become true partners in the national economy.

In the CAR, the Bilo consider the Baka mode of production to be primitive and their mobile way of life and flexibility suspect. The government encourages the Baka to settle and adopt farming techniques. Hunting and gathering are considered to be primitive and not in line with attempts to create a unified nation.

In Congo-Brazzaville the Babendjelle and Baka social systems are not known to outsiders. Whenever there are logging activities, government activities or medical programmes that need to reach a wide audience, the promoters target first the Bilo of the villages to which the Babendjelle are linked and not the Babendjelle directly, which means that all action in favour of the Pygmies is easily intercepted by the Bilo. The Babendjelle are considered to be the property of the Bilo and, for this reason, they do not wish them to be represented at local or regional level. The Bilo treat the Babendjelle as their slaves, considering them sub-human, dirty, lazy, greedy, stupid, infantile and uninterested in development. Among the Babongo, who have long been settled in Sibiti District, 63% declare that their relations with the Bantu are bad, characterised by social inequality or exploitation. This discrimination is reinforced by official attitudes, which tend to perceive the hunter/gatherer way of life as being primitive and shameful for national heritage. And yet their knowledge of plants for healing and magic and their dancing and singing skills are all a part of national heritage<sup>31</sup>.

All though the scope of discrimination differs from country to country with that of the Batwa being among the most severe, many other indigenous hunter-gatherer or former hunter-gatherer communities are also facing discrimination. The Hadzabe people in

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<sup>31</sup> Jackson, Dorothy *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001



Tanzania are looked down upon and discriminated against and the San people in Southern Africa are likewise suffering from negative stereotyping.

There are also many examples of discrimination against pastoralist communities. One example is the pastoralists of Ethiopia who are considered as uncultured, uncivilized and barbaric. In fact the word *zelan* in Ethiopia's official language Amharic - literally meaning uncultured and unruly - has been used to describe pastoralists. The pastoral culture and way of life has been looked down upon for such a long time that such hegemonic perceptions have almost appeared the 'norm'.<sup>32</sup>

Negative stereotyping of pastoralists is also common in Tanzania and Kenya. Cultural differences between farmers and pastoralists are quite obvious as they are manifested in dress and lifestyle. Farmers who are the majority tend to feel uncomfortable that pastoralists present themselves as different from the mainstream society. The differences are manifested in two ways: first, pastoralists have not been persuaded to discard their indigenous forms of dress in favour of the quasi-Western styles that the mainstream society has adopted. A feeling is held that pastoralists have made no attempt to adapt to the way of life of the majority. Secondly, farming, being the economic activity that the majority of the population are involved in, it is perceived as the norm. But since pastoralists keep livestock, their persistence as pastoralists is seen as a form of resistance against mainstream practices. The differences in clothing simply accentuate this point since it provides a visible reminder of the undesired difference.

Because of these differences, farmers perceive pastoralists as exhibiting arrogance and an air of self-importance. Livestock is further associated with wealth, hence part of the arrogance is deemed to arise from ownership of livestock. The reaction of farmers, who are the national majority, is extreme impatience with pastoralists. The feeling of intolerance to differences is much more pronounced in Tanzania than in Kenya, perhaps because of the efforts and enthusiasm that Tanzania has expended in building a national culture and language.

It is observed that part of what is perceived, as arrogance is simply resistance on the part of pastoralists, particularly the Maasai and Barabaig against influence and domination by the majority of the population. The Barabaig particularly were considered as 'underdeveloped' and as "offering nothing to the district." Overall, herders are perceived as 'outsiders' pursuing a way of life that is considered 'underdeveloped' (Brehony, 2001:9).

## **2.4 Denial of justice**

The right to justice is enshrined in several of the articles of the African Charter such as *Articles 3, 4, 5, 6 and 7*. However, denial of justice towards indigenous communities and individuals is evident in many instances. Cases of Batwa illustrate the point.

The Batwa of Uganda suffer from exploitation and injustice from their non-Batwa neighbours. The 1996 Wily report stated that Batwa were arbitrarily arrested, beaten and

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<sup>32</sup> *The Indigenous World 2002/2003*, IWGIA Copenhagen 2003

mistreated for failing to pay taxes to such an extent that seven died in 1990 and, up until 1995, the case had not been tried. Their non-Batwa neighbors take areas of land from them by intimidation. In 1999/2000, a group of Batwa were unjustly imprisoned for having property in the town. The authority that put them in prison declared that the Batwa had no right to property. In 1995, the Governor of Kisoro district recognised the legality of the Batwa complaint because the constitution states that the land belongs to all the Ugandan people.

In 2000, three villagers accused of having murdered a Batwa who was collecting wood were sentenced and imprisoned. Unusually for those condemned of murder, the defendants were conditionally released and still mistreat the Batwa to this day, to the extent that the Batwa have gone elsewhere<sup>33</sup>.

In the DRC the Batwa are frequently subject to arbitrary arrests, physical attacks against their houses and property, beatings from forest wardens, the payment of heavy taxes and expropriation of their land. Many have been killed or tortured by armed groups in the conflict in the DRC. In 1995, a Mutwa was accused of having killed Maheshe, the gorilla in the Kabuzi-Biega Park. The accused and his three detained colleagues pleaded their innocence but that did not prevent them from being imprisoned for 11 months in inhuman conditions in a local prison before being tried. They were beaten, suffered a lack of food, and were traumatised. Until a lawyer from the local human rights association intervened on their behalf, the four Batwa were incapable of preparing their defence. One of the four died, probably due to bad treatment received during prison detention. This example illustrates how vulnerable the Batwa are in the face of the power of political interests. The four Batwa were arrested and imprisoned but the person actually suspected of being guilty, a businessman who probably paid others to kill Maheshe for a trophy, has never been questioned about the affair<sup>34</sup>.

The Tuareg people have suffered from the violation of their right to existence in Niger and Mali where they were killed by the army and militia. Although the problem has been solved by the signing of peace accords between the two countries and the Tuareg, the problem of impunity still persists and the situation of peace is fragile.

The principle of the sanctity of borders is used by all the nation states to deny the nomads the right to associate with their kin who find themselves in different nation states. One example is that of people who live in Kidal in Mali, which is 1500 kilometre from the capital city of Bamako. The nearest city for the residents of Kidal is the town of Tinzawaren in Algeria. But because of the sanctity of borders, nomads who have no identity cards or travel documents suffer harassment when they cross borders to acquire the basic necessities. They are often searched, beaten, imprisoned and bribes are often solicited from them, and failure to pay leads to the loss of resources purchased. This has been going on for a long time and

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<sup>33</sup> Jackson, Dorothy *Indigenous Peoples in Central Africa – A desk review for the International Labour Office*, March 2001

<sup>34</sup> Jackson, Dorothy, *Indigenous Peoples in Central Africa – A desk review for the International Labour Office*, March 2001

has become the order of the day for all indigenous African peoples who find themselves in different political divides of the African states. Their rights are continuously violated yet they are not aware of the circumstances leading to their being in different political boundaries.

Because of the denial of liberty of association, the nomads of West Africa have had to use cultural associations just to be able to meet and associate with their kin in many countries. This a violation of *Article 6(1)* which states as follows:

*“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”.*

Collective punishment is an experience that is commonly imposed on indigenous peoples which again violates the same article 6 (2) of the African Charter which states:

*“No one may be condemned for an act or omission which did not constitute a legally punishable offense at the time it was committed. No penalty may be inflicted for an offense for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender”.*

## **2.5 Examples of violation of cultural rights**

Violation of cultural rights is also a particular form of human rights violation suffered by indigenous peoples. Violation of cultural rights is contrary to the African Charter that states that every peoples have a right to culture and identity (*Article 22*).

It is also contrary to *Article 2* which states that: *“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status”.*

Indigenous peoples experience cultural marginalisation, which has taken different forms and which is caused by a combination of factors. Loss of key productive resources has impacted negatively on indigenous peoples’ cultures, denying them the right to maintain the livelihood of their own choices and to retain and develop their cultures and cultural identity according to their own wishes.

The failure of many African states to recognize cultural and language rights, hence an admission of cultural diversity, is based on the fear that it is bound to ‘open a can of worms’. This is because it is believed it could lead to separatist demands, within a continent where tribalism and ethnicity risk threatening the continued existence of the unitary state. However, this is to underestimate the value of recognizing cultural and language rights as cultural resources, which can be used for the benefit of all.

Examples of violation of cultural and language rights are manifold and we shall provide a few.

In Eastern Africa the massive land dispossession has had negative consequences for the cultures of many pastoralists such as the Maasai. Different religious rituals are no longer observed because of loss of livestock and game resources, which are necessary for the performance of such rituals. This has deprived indigenous peoples their valuable spiritual practices.

Alienation of land has in some parts of Africa led to alienation of sacred sites for the indigenous peoples. Endoinyio Oolmoruak in Tanzania where every generation of the Maasai community from both Kenya and Tanzania visited and performed an important spiritual rite is a good example.

Vulnerability has also forced indigenous peoples in Africa to sell their valued art objects for pittance, resulting in the removal of indigenous art from the communities to trade centres (curio shops, museums and other tourist centres). Some of this art is used to decorate tourist hotels to which indigenous peoples are denied access.

The promotion of national languages and dominant cultures has been accompanied by a systematic suppression of indigenous languages and cultures, such that in urban settings it is becoming common for indigenous children whose parents work in towns not to speak their own languages.

The San in Southern Africa comprise distinct language groups.<sup>35</sup> Respect for their rights to maintain their own culture is closely interlinked with rights to remain in their traditional territories such as for instance the Central Kalahari Game Reserve in Botswana. However, the Botswana government is convinced that the continued presence of the San/Basarwa in the Central Kalahari Game Reserve will merely serve the interests of the foreign tourists and 'objectify' its citizens. The Negotiating Team<sup>36</sup> has attempted to explain that the rich cultural heritage of the San/Basarwa in terms of indigenous knowledge systems concerning wildlife and natural resources, could in fact be an asset in the country's environmental and tourism sectors. Not only would continued occupation provide the Basarwa with access to their territory, it would also provide the state with a people who would utilize the environment in a sustainable manner. This because it would be in their interests to ensure that there was minimum negative exploitation of their heritage. There would clearly also be the possibility of income-generating activities (to help to address the question of unemployment and poverty); increase in self-esteem and responsibility (which proceeds from 'working your own land'), and participation in the planning, implementation and monitoring these activities in conjunction with the State (Basarwa participation in their own development).

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<sup>35</sup> For example, in Botswana there are at least three (3) distinct language groups, which comprise various dialects. There are approximately seventeen (17) San groups across the country. In Namibia, there are at least five (5) language groups, which comprise dialects. It is important to note that over thirty-five (35) Khoesan languages are used in Southern Africa 'plus several isolated varieties in East Africa'. N. Crawhall, op cit. 7.

<sup>36</sup> This was established in 1997/1998 to negotiate a land claim with the Government of Botswana. The Team comprises representatives of the residents of the CKGR; FPK, Kuru Development Trust, WIMSA (Working Group on Indigenous Minorities in Southern Africa), Botswana Council of Churches and DITSHWANELO – The Botswana Centre for Human Rights. The first three NGOs are Basarwa-based and have voting rights on the Negotiating Team.

In North Africa, despite the commitment of the Berbers to the cause of national unity and their active involvement in the fight for de-colonisation, both the Algerian and the Moroccan regimes have systematically pursued de-Berberisation and Arabisation policies as well as the discriminatory exclusion of Berbers from equal access to government services and political power, and from the enjoyment of economic and cultural rights.

Arabic is the official language of all Maghreb states and also the language of religion and culture. In the name of national unity, the Tamazight language is discriminated against by the “Arabisation” policies of both the Algerian and Moroccan authorities.

Today, Berbers from Algeria and Morocco vigorously oppose Arabisation and demand recognition of their identity as Imazighen, of their language, Tamazight, of its script, Tifinagh and respect for the Berber culture. Although - unlike Morocco's - the Algerian constitution recognises in its preamble the existence of the Amazigh people, its Article 3 designates Arabic as the official national language.

Berbers in Morocco perceive their identity to be threatened by discrimination, marginalization and exclusion from access to education and media in the country. A limited tolerance shown by the Moroccan regime to Berber cultural expressions in recent years has resulted in the creation of numerous associations throughout the country, and the Berber movement’s struggle against Arabisation is now spawning a revival that the authorities are finding hard to ignore.

In Morocco, a serious issue of concern to the Berbers has been the prohibition of giving their children Amazigh names, which threatened the very identity of Amazigh people. The Amazigh movement protested heavily against this, and positive changes have now occurred. Thus, the registry system has now been changed to allow for the registration of Amazigh names. However, in many regions the registry offices are still following the departmental note of the former Minister of Interior, and refuse to register Amazigh names, which are considered as the harbinger of the rise of the Amazigh movement in North Africa<sup>37</sup>.

The government of Morocco continues to suppress the Tamazight language as a symbol of Berber identity and cultural rights. It is still not officially recognised, not taught at all from grammar school to university, and not given equal status with Arabic. It is not allowed in public administration and the Moroccan laws forbid the use of Tamazight in courts, so Imazighen, especially those who do not speak Arabic, are effectively second-class citizens<sup>38</sup>.

Imazighen are not allowed to give Amazigh names to their offices and companies nor to write in Tifinagh. Although the publication of some newspapers in the Berber language is allowed, editors are often subjected to interrogation by state officials. Such repression demonstrates the vulnerability of the Berber culture and its advocates. Due in part to Amnesty International’s involvement, the Berber issue in Morocco has acquired recognition as a topic of concern within the international human rights community. Amazigh activists

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<sup>37</sup> *The Indigenous World 2002/2003*. IWGIA, Copenhagen 2003.

<sup>38</sup> Slimane, Samia *Desk Review on North Africa* (unpublished ILO paper)

have been harassed, interrogated and put under surveillance, when they have been legally and peacefully exercising their civil liberties.<sup>39</sup>

The cultural and linguistic rights of the Amazigh in Algeria tend not to be respected in the face of the government's continuing programme of Arabisation. Algerian independence established arabo-islamism at the expense of an "Algerian Algeria"<sup>40</sup>, which excluded berbero-nationalist activists who were accused of "berberism"<sup>41</sup>. From 1980 to 1988, an estimated 300 activists for Amazighity were imprisoned for "berberism"<sup>42</sup>.

Immediately after independence in 1962, the first President of Algeria presented Arabisation as a return to the just order of things. The process advanced in stages, first within the educational system, then within the justice system and later encompassing the whole of public officialdom. In September 1999, President Bouteflika reiterated that the Amazigh language would never become an official language. A comprehensive law institutionalising the general use of the Arabic language in all spheres of broader public life came into force in Algeria on 5 July 1998. It orders the use of Arabic in enterprises and public departments, except in dealings with the outside world, which will be directed by the requirements of International transactions. All in all, its articles stipulate that all written correspondence of administrations, enterprises, associations, and political parties be in Arabic.

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<sup>39</sup> A Professor was imprisoned for the entire year of 1982 because he published an article about racism against Tamazight in Morocco. In March 1994, the Ilmas Cultural Association was prevented from holding a conference on Berber language and writing. Similarly, in April 1994, the Moroccan Association for Research and Cultural Exchange was refused permission to organise a special day for Berber theatre in the city of Rabat.

Four members from the New Association for Culture and Popular Arts, in Agadir, were arrested in 1994 and imprisoned for 3 months because they published a calendar in the Berber language, participated in the workday march and proclaimed Amazigh rights, using the Amazigh alphabet, Tifinagh, in the slogans they were exhibiting. On 3 May 1994, seven secondary school teachers were arrested because they participated in a peaceful Labour Day demonstration organised by the Democratic Confederation of Workers. Even though the demonstrations had been authorised by the appropriate officials, and the slogans were familiar to the government, the Berbers were charged with inciting actions threatening law and order and internal state security

<sup>40</sup> During the 1940s, nationalist debates among the Algerian immigrant community in Paris centred around two opposing formulations for the future country: Algérie arabe (Arab Algeria) and Algérie algérienne (Algerian Algeria). The first saw in the nascent Muslim Arab nationalist movement of Egypt and Lebanon the potential for a true competitor to European colonialism, and sought to ally the revolutionary uprising to its ideological formulations and economic support. The second focused more particularly on the specificities of the Algerian populace, as pluri-religious (Christians, Jews, as well as both Shi'a and Sunni Muslims) and pluri-ethnic (with a variety of Berber-speaking populations). This last group became referred to as the 'Berber crisis', and in 1949 its members were expelled from Messali's pre-FLN party, the Movement for the Triumph of Democratic Freedoms (MTLD). In subsequent years, other Kabyle leaders would be systematically marginalized or assassinated for too openly demonstrating regional attachments. Successive Algerian regimes have pursued a policy that has had only one objective: the de-Berberisation of the country. The 1964 National Charter declared Islam to be the national religion and Arabic to be the national language.

<sup>41</sup> On this topic, read Ali Guenoun, *Chronologie du mouvement berbère*, Ed. Casbah, Alger, 1999. Regarding the current situation, read Salem Chaker, *Berberes aujourd'hui*, Ed. L'Harmattan, Paris, 1998.

<sup>42</sup> Slimane, Samia *Desk Review on North Africa* (unpublished ILO paper).

Arabic must be used during political rallies and during meetings by political parties. This has been condemned by numerous political parties and led to a protest march by thousands of Berbers, to demand official recognition of their Tamazight language. The United Nations Human Rights Committee called on the law to be reviewed so as to remove the negative consequences that it produces<sup>43</sup>.

The Berbers of Algeria have fought hard for the recognition of their cultural rights. A High Commission on Amazighity was set up in Algeria in 1995, however, it is deprived of adequate resources and seems not to be taken seriously by the authorities

### ***Positive examples***

Positive developments have recently taken place in Morocco. On July 31, 2001 King Mohammed VI declared in his Address from the Throne that he recognized the Amazigh cultural identity. After 45 years of independence, this was the first declaration of the multi-dimensional aspect of Moroccan identity and of the fact that the Amazigh dimension is one of its facets, alongside the Arabic, Islamic, African and Andalusian dimensions. In October 2001, the King declared the creation of the Royal Institute for the Amazigh Culture. The first meeting of the administrative council of this Institute was held by the end of July 2002. This administrative council is composed of 32 members, seven of whom are government representatives (ministries and universities) and the rest are activists belonging to the Amazigh Movement or individuals supporting this movement. For the first time this paved the way for dialogue at a higher level.

Positive developments have also taken place in South Africa. The President of South Africa, Mr Thabo Mbeki, made the following statement at the opening of Parliament on 25 June 1999:

*“The promotion and protection of the cultural, linguistic and religious rights of all our people must occupy a central place in the work of the Government. It should not happen that anyone of us should feel a sense of alienation. Whatever the sickness of our society, none should be driven to levels of despair which drive them to a peripheral existence at the fringes of the mainstream. Nor should we allow that those who were denied their identity, including the Khoi and the San, continue to exist in the shadows, a passing historic relic and an object of an obscene tourist curiosity. We consider the work of restoring the pride and identity of all our people of vital importance to the task of advancing the human dignity of all our citizens and ensuring the success of our efforts towards national reconciliation and nation building.”*<sup>44</sup>

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<sup>43</sup> This legislation first appeared in 1991, but was postponed after the parliament’s vote when 500.000 Berber people took to the streets in protest. It was modified and completed in 1996 by an order of the then un-elected National Transitional Council.

<sup>44</sup> Quoted in the Statement by the South African delegation to the United Nations Working Group on Indigenous Populations, Geneva, 27 July 1999, South African Permanent Mission to the UN in Geneva and reprinted in Maureen Tong *Lest We Forget: The Restitution Digest on Administrative Decisions* Commission on Restitution of Land Rights 2002.

There has been much work done to develop cultural and language rights of the San in South Africa. Section 6(2) of the South African Constitution<sup>45</sup> obliges the state to take practical and positive measures to elevate the status and advance the use of indigenous languages. Section 6(5) of the Constitution promotes the protection of Khoi, Nama and San languages.<sup>46</sup> The Language Act of 1995 established the Pan South African Language Board (PanSALB), whose purpose and function include the development and use of African languages, including the Khoi and San languages as well as sign language.<sup>47</sup> The Khoisan Language Board has been established as a substructure of the PanSALB.<sup>48</sup> The PanSALB has launched an awareness campaign in Khoisan communities, has orthographicated the !Khomani language and is in the process of finalising the compilation of a Nama/Afrikaans dictionary.<sup>49</sup> The South African Broadcasting Corporation (SABC) has granted a radio licence to X-K, a station dedicated to the Khoisan languages.

The Commission for the Protection of Rights of Cultural, Religions and Linguistic Communities has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious, and linguistic communities.<sup>50</sup> The Nama, San and Griqua people have set up a number of organisations that are included in the provisions of section 185 of the South African Constitution.<sup>51</sup>

## 2.6 Denial of the right to political recognition, representation and participation

Political empowerment and recognition is important in order to ensure that indigenous peoples participate in and are represented in political processes. Indigenous peoples may be represented in the legislative assemblies and other political structures of their respective states, but their representation is in many cases either minimal or ineffective, hence the issues that concern them are not adequately addressed. This is caused by many structural factors including lack of own educated professionals. This is indirectly a violation of *article 13(1)* of the African Charter that guarantees all citizens the right to participation in government of their own country.

Historically, indigenous peoples have been used by the more powerful in the society. For example, in Botswana the San were the serfs of the ruling class. Due to their traditional collective system of traditional elders, as opposed to an individual leader, it has proved

<sup>45</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>46</sup> Section 6(5) provides: A Pan South African Language Board established by national legislation must-

- (a) promote and create conditions for the development of:
  - (i) all official languages;
  - (ii) the Khoi, San and Nama languages;
  - (iii) .....

<sup>47</sup> Section 5(b)(ii) of the *Language Act of 1995*.

<sup>48</sup> South African San Institute (SASI), *Language Rights for Marginalised Constituencies in South Africa: A User's Handbook*, Results of a Language Rights Workshop, © SASI 2000, 21.

<sup>49</sup> South African Permanent Mission in Geneva, statement by the South African Delegation to the 18<sup>th</sup> Session of the United Nations Working Group on Indigenous Populations, 24- 28 July 2000.

<sup>50</sup> Section 185(2) of the Constitution of South Africa.

<sup>51</sup> ILO, *Indigenous Peoples of South Africa: Current Trends*, Project for the Rights of Indigenous and Tribal Peoples, © 1999 ILO 7 – 11.



difficult for the San to engage with the Bantu-speakers notion of a traditional leader who speaks and acts on behalf of others. Their political representation is weak, they do not have political representation in Parliament and they are not among the main 8 tribes represented in the House of Chiefs, which is an advisory body to the government on customary law and practices

In Namibia the Council of Traditional Leaders Act of 1997 outlines the role of traditional leaders in state governance. The government has the power to dispute the legitimacy of any traditional community. This has proved problematic for some communities, like the San to have their traditional community and their traditional authorities recognised by the government. After receiving more than 40 applications, the Government of Namibia announced in March 1998 that 31 traditional leaders and communities were to be recognised. Six traditional authorities from the San community had applied and not one of them had been listed. Two San communities were recognised after a complaint.<sup>52</sup>

Like the Hadzabe in Tanzania, the Ogiek in Kenya do not have political representation in parliament, hence their issues are not brought up for deliberation and their rights are not defended. Also because of the low educational levels, following lack of infrastructure and social services, including school, Ogiek do not occupy important positions of power such as within the civil service.

The Batwa/pygmies in the Great Lakes Region are very weakly represented in decision making bodies. This prevents them from participating in discussions and decision making processes which have far reaching consequences for their own future.

For instance in Cameroon the Bagyeli chiefs do not have the same powers as the Bantu chiefs; they rarely participate in village meetings and play no role in decision-making and consultation. Their main role is to report to their Bantu colleagues on the prevailing situation in the encampments. The Bantu chiefs occasionally visit the encampments. The Pygmies are rarely allowed to speak at village meetings and are not included in the local Bantu organisations or in their churches. The Bantu from the village represent the Pygmies and their interests, but this representation is problematic. For instance the Bantu are the ones who negotiate with the logging companies and with the people who want to mine the resources or who have projects, not the Pygmies.

### ***Positive examples***

There are some positive examples of political recognition and participation, which could be of inspiration. This is for instance the case in Mali where a National Pact has been signed with the Tuareg in Mali in 1992, through Algerian mediation. Seen in the light of the previous massive suppression of the human rights of the Tuareg, the National Pact is a positive development that gives the Tuareg areas decentralised powers and allows for Tuareg participation and representation. Likewise the solemn signature of the Pact in the presence of foreign delegations does give the Tuareg recognition. The pact provides for 1) A

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<sup>52</sup> Suzman, *Minority Rights in Independent Namibia*, 2002 MRG 21.

permanent end to hostilities; 2) Recognition of national unity and solidarity through the creation of two funds; 3) Special status to the North of Mali.

For the moment, only some of the provisions in this pact have been applied:

- Decentralisation is effective throughout the country;
- Democracy is real, along with freedom of expression;
- There is real integration of the Tuareg in the Army and the civil service.

## 2.7 Constitutional and legislative recognition

Very few African countries recognise the existence of indigenous peoples in their countries. Even fewer do so in their national constitutions or legislation. Lack of legislative and constitutional recognition of their existence is thus a major concern of indigenous peoples.

Examples include the Tuareg in Mali who – despite the positive developments with the National Pact - encounter problems linked to lack of legislation in relation to the application of that which is stated in legal texts and to lack of recognition as a people entitled to particular collective rights. The most crucial problem is the threat of absorption of the Tuareg into the Bambara majority. In fact population flows from the South to the region of the North are causing considerable changes in the population composition, making the Tuareg minorities in their own country.

Another example of lack of recognition as a people is the San of Botswana. The Constitution of Botswana does not recognise the San as one of the tribes/communities that make up the Botswana people. It makes reference to the eight main tribes of Botswana, which do not include the San.

### *Promising developments*

South Africa is one of the few countries that has moved forward on the issue. In South Africa, the Khoe and San are generally acknowledged as the aboriginal and indigenous people who occupied the land long before the Bantu-speaking did so.<sup>53</sup> There is, however, yet to be a South African norm as to the meaning of ‘indigenous peoples’ and who qualifies for such status in South Africa. The South African Human Rights Commission was commissioned by the Government of South Africa to research the concept of indigenous people, its applicability to South Africa and guide the Government on how to deal with the issue. The research was completed in 2000 but has not yet been publicised.

The Department of Provincial and Local Government took over a ‘project’ initiated by the previous Department of Constitutional Development on researching governance structures of the Khoesan community with a view to interacting with such structures on matters of

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<sup>53</sup> Hitchcock at 8 and Suzman, *An Introduction to the Regional Assessment of the Status of the San in Southern Africa*, © 2001 LAC at 3 and 34. The President of **Namibia**, Mr Sam Nujoma, acknowledges the San as the ‘original inhabitants’ of **Namibia**. See Appendix A Speech by the **Namibian** President Sam Nujoma at the Regional Conference on Development Programmes for Africa’s San/Basarwa Populations, Windhoek 16-18 June 1992 as reprinted in Suzman *An Assessment of the Status of the San in Namibia*, © 2001 LAC, 155.

provincial and local government. Some aspects of the research have been completed but the research reports have not been publicised.

The South African Human Rights Commission has been granted 'affiliate' status with the African Commission on Human and Peoples' Rights. The author of the research by the South African Human Rights Commission, Mr Tseliso Thikeyane, now participates in the activities of the African Commission on Human and Peoples' Rights. It is hoped that this development will in some way contribute to the Government of South Africa publicising the research report as well as that conducted by the Department of Provincial and Local Government. The Department of Arts, Culture and Technology (DACST) are interacting with the Khoesan community and the South African San Institute (SASI) on issues related to renaming of places back to indigenous names. There are also government initiated projects aimed at alleviating the effects of poverty as experienced by the Khoesan community.

The Constitution of South Africa makes reference to religious, cultural and linguistic communities. The San are recognised as a 'community' deserving of protection both in terms of constitutional rights and government policy. Section 185 of the South African Constitution establishes the Commission for the Protection of Rights of Cultural, Religious and Linguistic Communities.<sup>54</sup> The term 'indigenous' is used in the Constitution in the context of language rights. Section 6(2) refers to the need to protect and promote indigenous languages, making specific mention of the Khoe, San and Nama languages.

Section 9(3) of the South African Constitution expressly prohibits 'unfair discrimination'. It allows for 'fair discrimination', otherwise known as affirmative action, in favour of groups that historically suffered from discrimination on the basis of, *inter alia*, race, gender, sex, religion, belief, culture, language, ethnic and social origin. This allows the Government to undertake affirmative action policies in favour of the Khoesan, for example in the area of employment in national conservation parks as trackers and other jobs that involve the use of specialised skills that the Khoesan possess.<sup>55</sup>

Positive developments also seem to take place in Rwanda. Batwa organisations have recently met with the Constitution Commission to press for their rights in the new constitution, calling for increased representation of Batwa at all administrative levels in the country, inclusion of Batwa in land distribution, recognition of Batwa as a disadvantaged group needing particular attention, and support for Batwa education. The draft constitution has allocated 2 senate places, to be nominated by the President, for representatives of people

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<sup>54</sup> Section 185 of the South African Constitution states the functions of the Commission as:

(1) the primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-

- (a) to promote respect for the rights of cultural, religious, and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

<sup>55</sup> Proposed by the ILO *Indigenous Peoples of South Africa: Current Trends*, 26.

‘disadvantaged by the historical process’. Batwa could therefore be eligible for these seats. A referendum on the new Constitution will be held in mid-2003, followed by parliamentary and presidential elections to replace the current transitional government<sup>56</sup>.

A constitutional review process is presently taking place in Kenya – although it has been temporarily halted due to elections and shift of government. Organizations representing pastoralists and hunter-gatherers in Kenya have participated very actively in this constitutional review process to ensure that their views were heard. Many memoranda were prepared and presented by indigenous communities and organizations highlighting the grievances that were common to all of them. Top of the list were the injustices relating to land and resources, which they had hoped the new constitution would address and offer safeguards. The final draft constitution is yet to be finalized through a National Constitutional Conference that is taking place in May, 2003. The recommendations are to be agreed upon by all stakeholders. It is hoped that the final revised constitution of Kenya will recognize and address the fundamental needs and rights of pastoralists and hunter-gatherers in Kenya and thus place itself in a leading position on the matter in Africa<sup>57</sup>.

Promising developments have also taken place in Ethiopia. A major incident happening in 2002 in favor of pastoralists was the establishment of the Pastoral Standing Commission within the Ethiopian Federal Parliament. Led by a prominent head of a pastoral NGO, this commission is expected to contribute a lot to advance the cause of pastoralists at the level of policy formulation and legislation. With the Federal Government’s changed policy on pastoralism, some regional governments have gone ahead and have formed pastoral commissions in their respective regions. The Oromiya, Afar and Southern Peoples regional governments have all formed pastoral commissions that will specifically work toward pastoral development. Thus the years since 2001 have marked a shift in policy of the Federal Government of Ethiopia, which has recognized the pastoral communities and pastoral development. To that extent, the verbal allegiance to devotion to pastoral development is given prominence. However, the major problem, which is a problem of perception, still prevails. The government has not yet recognized pastoralism as a viable traditional way of life in the same way as it recognizes farming. This is fundamental to pastoral development as pastoral development requires recognition of the right to development of pastoralists as universally recognized such as in Agenda 21. Nevertheless, the new policy adopted by the government has at least opened up the door for cooperation with NGOs<sup>58</sup>.

## 2.8 Marginalization from social services

The infrastructure in most areas occupied by indigenous peoples is either lacking or is inadequate. Social services such as schools and health facilities are few and far apart, while the roads and other physical infrastructure is equally poor. This has had a negative impact on

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<sup>56</sup> *The Indigenous World 2002/2003*. IWGIA, Copenhagen 2003

<sup>57</sup> *The Indigenous World 2002/2003*. IWGIA, Copenhagen 2003

<sup>58</sup> *The Indigenous World 2002/2003*. IWGIA, Copenhagen 2003

the staffing levels and quality of services offered. As a result, illiteracy levels and mortality rates in such areas are higher than national averages.

The lack of own professionals in the fields of education, human and animal health, judicial system and public administration deprive indigenous peoples representation in important spheres of decision at various levels. This constitutes a violation of fundamental human rights as spelled out by the African Charter on Human and People's Rights: such as.

- *The right of equal access to public service of one's country (article 13 (2))*
- *The right to education (article 17(1))*
- *The right to medical care and attention (article 16(2)).*

In terms of social services, few indigenous peoples have adequate access to schooling. Often school attendance is less than 50% below the national level and literacy levels are also usually very low. The reasons for these low figures could be attributed to a range of factors including unavailability of schools to the unsuitability of the mainstream school curriculum for the needs of the indigenous peoples.

Because of low educational levels, indigenous peoples also find themselves with low per capital incomes; low and decreasing life expectancy owing to poor nutritional standards and basic health care status. To these have, in recent years, been added alcohol abuse, high levels of domestic violence, crime and depression.

Examples of social marginalization of indigenous peoples are manifold and we can just mention a few:

## **2.9 The right to health and medical attention**

*Article 16* of the African Charter emphasizes that states parties shall take the necessary measures to protect the health of their people. However, the health situation of indigenous peoples is often very precarious and receive very limited attention from the responsible health authorities. This has to be seen in connection with the general marginalization that indigenous peoples suffer from economically and politically. On top of this indigenous peoples often live in remote areas where they are easily forgotten. As indigenous peoples receive little political attention and prioritization and as they to a large extent suffer from impoverishment and low literacy rates, their health situation is in many cases extremely critical and this is a violation of *Article 16* of the African Charter.

An example is the San of Southern Africa whose health situation is closely linked with marginalisation and poverty. Some of the major health problems experienced by the San/Basarwa in Botswana include alcoholism, tuberculosis, and HIV/AIDS. Alcoholism is both a symptom of marginalisation and despondency, as well as a cause of poor health. Many people drink alcohol to deal with hunger. Alcohol-related trauma injuries are often presented at the clinics. Domestic violence is also a recurring crime, often linked to alcohol. Tuberculosis (TB) is reported to be higher amongst the San/Basarwa communities than in

others. Poverty plays a crucial role in facilitating the spread of TB, e.g. poor sanitation, poor diet, etc. Poverty is also linked to HIV/AIDS.<sup>59</sup>

The San in Namibia are also affected greatly by poverty and its concomitant effects on health. The major health concerns include tuberculosis, malaria, HIV/AIDS, gastrointestinal problems, teenage pregnancies, pneumonia and alcohol abuse. There are mobile health facilities for the San, as there are in Botswana.

Most of the !Xu, Khwe and Khomani San in South Africa are living in extreme poverty. The !Xu and Khwe lived in close proximity for the past ten years, after their relocation to South Africa at the end of the liberation struggle in Namibia in the early 1990s. The effects of involvement in the Namibian war and related experiences of violence have been manifested in alcoholism, domestic violence and rape. They have had access to healthcare provided by the South African Defence Force (prior to the establishment of the South African National Defence Force).

Alcohol abuse is a major health concern amongst the San in Angola. Healthcare services are not developed. There have been complaints by !Xu in Mulunga that they have not seen a mobile health team from the hospital in Chide for the past twenty-five years!<sup>60</sup>

The Batwa in Rwanda, Burundi and Uganda are severely discriminated in terms of healthcare due to poverty and marginalization. The Batwa have very limited access to primary health care and they do not obtain any medical care, neither for themselves nor for their children. Malnutrition rates and health statistics are generally poor in the Great Lakes region and in such circumstances, the Batwa – with neither land nor other resources with which to feed themselves - are among the first to suffer.

The Batwa experience high rates of infant mortality. The authorities recognise that infant mortality levels amongst the Batwa are extremely high and out of all proportion to their number. The Batwa suffer serious difficulties in the area of diet and nutrition and Batwa children suffer from chronic malnutrition. The Batwa do not have access to clean drinking water because they live in remote areas. Due to lack of money to buy medicines and the discrimination they face, the Batwa do not go to health centers and they are left to hope that the illness will cure itself or they practice self-medication. Many Batwa – especially children under 5 - die from Malaria as they cannot afford treatment. The Batwa have a very low level of child vaccination and they are exposed to the most dangerous diseases (tetanus, whooping cough, measles, polio). Expecting mothers do not go to health centres, they do not receive the necessary vaccinations and they generally give birth at home under non-hygienic conditions. Many Batwa mothers and children thus die during child delivery.

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<sup>59</sup> "...poverty is an important factor in the transmission of HIV ... as it informs many of the undesirable choices taken by poor people, including behaviour that increases the risk of HIV transmission". UNDP 2000:4 in L. Cassidy et al. Op cit., 15.

<sup>60</sup> Brenziner, M. *Angola and Zambia* in S. Robins et al., op cit., 65.

In Burundi vulnerable sectors have the right to free health care. However, only those who hold special health cards can obtain free health treatment, and the Batwa, either not informed or misinformed by health workers, do not hold these cards. Malaria is one of the most dangerous diseases ravaging the Burundi population, particularly women and children under the age of 5. The Batwa die because they have no money with which to purchase medicines.

The situation of the Batwa in the DRC is similar to that of the Batwa in Rwanda, Burundi and Uganda - they live in extreme poverty. Most live in straw huts, suffering from malnutrition, a lack of hygiene, respiratory infections and malaria, with no access to education or primary health care. Infant mortality is extremely high. Children growing up in such conditions remain forever impoverished. The Batwa believe that if they still lived in their forests, their lives would be better because they would be able to collect medicinal plants and practise their customs.

The same picture repeats itself for other countries in the Great Lakes Region. For instance in Congo where, in comparison with other village inhabitants, the Babendjelle from the North Congo forest suffer more from yaws, jiggers, leprosy and conjunctivitis. The mortality rate from measles is five times higher amongst the Babendjelle than the Bantu. Under-5 mortality is 27% among the Babendjelle compared with 18% among Bantu children. The Babendjelle are nicknamed out of prejudice (*la viande qui parle* - the animal that can speak) and so do not receive the same treatment as others. This leads the health staff to discriminate against sick Babendjelle. For example, their consultation takes place after all Bantu have been dealt with, and they are refused appropriate treatment. The public health system employs Bantu individuals to distribute medicines for leprosy to the Babendjelle. Often, the Babendjelle do not receive the medicines or they receive them only if they work for the person who is supposed to give them the medicines. The provisions put in place by the health services and company clinics are thus not able to improve the Pygmies' health situation<sup>61</sup>.

Many of the pastoralists in Eastern Africa and the Horn of Africa have very limited access to health facilities and their health situation is thus precarious. This is for instance the case with the Turkana and other pastoralist groups living in the poor and remote areas in Northern Kenya.

In North Africa the Berber people live overwhelmingly in rural areas, and rural areas have the worst socio-economic situation in North Africa. Current development cooperation policy involves numerous activities, which should potentially benefit indigenous peoples. Yet, if one examines project reports on Morocco and Algeria, there is no reference to Berber speakers at all.

In Morocco there is a huge disparity in all areas between urban and rural populations. In 1991, rural areas received only 27% of public health spending, and almost 40% of the rural population must travel more than 10 km to access a medical facility.

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<sup>61</sup> Jackson, *Dorothy Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001.

In Algeria, the population living under the poverty line was estimated to be 6,7 million in 1999 (23% of the total population). Patterns of disparity largely mirror those in Morocco. Health care infrastructure and personnel show considerable urban-rural disparities. Health structures remain hardly accessible to rural people, since 42% of basic facilities, 75,5% of maternity wards and 74,3% hospitals are situated more than 5 km from rural populations. Health indicators appear to have deteriorated recently, with infant mortality ratios stagnating, and infectious diseases having increased<sup>62</sup>.

## 2.10 The right to education

The African Charter states in its article 17 (1) that every individual shall have the right to education. It further states in article 17 (3) that “*The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State*”.

Literacy rates are poor for most indigenous peoples and often school attendance is less than 50% below the national level. Since most of them live at the periphery of their respective countries, it is often very difficult if not impossible for children to walk to schools. Their nomadic life style is often blamed for this, rather than inability by governments in Africa to adjust to the varying needs of different communities within their borders.

The significance of access to education is self-evident and this right has to be ensured. However, the aspects of ‘education for what’, ‘education for whom’ and ‘which education?’ are questions which need to be answered. The role of cultural and language rights is integral to the question of education. Is it to be education for assimilationist purposes? It is important that it is recognized that education is not value-free. It is known that an education system, which assumes aspects of dominant cultural perceptions towards indigenous peoples, tends to be alien and non-accepting of them. This tends to lead to a high drop-out rate due to discrimination by teachers and other students<sup>63</sup>; absenteeism when the children join their parents for gathering, herding or other activities; intensification of poverty and reliance on government hand-outs due to non-employment, etc.

In Botswana, the languages of the San/Basarwa people have not been integrated into the education system.<sup>64</sup> The effect of this is that San/Basarwa children are taught in a language (Setswana), which is alien to them. The children are moved to schools with hostels in which the children stay. Due to the sparse manner in which the areas where the Basarwa live are

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<sup>62</sup> Slimane, Samia *Desk Review on North Africa* (unpublished ILO paper)

<sup>63</sup> In Botswana, in 1999, 120 primary school children walked several kilometers to remove themselves from the harsh treatment meted out to them by a matron in the hostel. Tragically, one of the children, an eight (8) year old, died due to exhaustion. Her body was devoured by wild animals. (Botswana Daily News 1 March 1999). The use of officially sanctioned corporal punishment, traditionally unknown in Sesarwa culture, has also contributed to children leaving school.

<sup>64</sup> Integration of Sesarwa languages requires careful planning to ensure that the various language groups find representation and are appropriate, where used. For example, children from three (3) different language groups attend the same school in Ngamiland. The language groups are Bugakhwe, Xanikhwe, Tsexakhwe, Juchoan and Tcgaxein. The first two groups can understand each other, as can the last two groups; but mutual understanding of all the languages does not exist. Lin Cassidy, in L. Cassidy et al. Op cit., 13.



populated, the Government has opted for 'fixed location schools' to which children are transported at the beginning of every school term.<sup>65</sup> Thus the hostel system has been blamed for making the San/Basarwa children into 'the children of the government'.<sup>66</sup> Though the Botswana government provides basic schooling for these San children it is done in a way which is not sensitive to their culture and way of living and not in the spirit of article 17 (3).

In Angola, Zambia and Zimbabwe, with the San comprising smaller minorities than in Botswana and Namibia, concerns in education tend to be related to facilitating access to the San to enter the school system. Poverty is a cross-cutting issue, which prevents children attending school. There is often an inability to pay school fees, purchase school uniform, etc. due to the household focus being on the acquisition of food. In Angola, formal education has not been available to some of the communities since 1975.

In Rwanda, Burundi and Uganda prevalent prejudice considers the Batwa to be mentally retarded, and the great majority do not go to school. Even those who start do not finish, merely because of the contempt and discrimination of their teachers and classmates. The reason for this contempt and discrimination is that the Batwa children are badly dressed, badly fed, and unsure of other children because of the isolation in which they live. The contempt of some of the teachers is for instance reflected in the fact that when a Batwa child makes an error, the teacher will claim that the child is good for nothing, backward or mentally retarded. Due to their poverty, the Batwa parents cannot afford to buy the required school materials such as uniforms, books, pens, etc. The consequence of all this is that the great majority of Batwa children do not go to school.<sup>67</sup>

The rate of primary school attendance among the Batwa in the DRC is 11% as opposed to 72% nationally. Illiteracy in the DRC is somewhere between 20% and 53% but for the Batwa it is 94%. Education levels amongst the Bagyeli and the Baka in Cameroon in the CAR and the Baka and the Baka Babendjelle and Babongo in Congo-Brazzaville are equally very low. One example out of many is that in 1988, 9 Baka children were enrolled at primary school in the Dzanga-Sangha reserve in the CAR. Most left because they were so badly treated by the other pupils, they had a long journey with nothing to eat and had to return to the forest with their parents<sup>68</sup>.

### *Positive examples*

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<sup>65</sup> The conditions under which the children live in the Remote Area Development (RAD) hostels are generally appalling. At times, there is no adult presence during the nights, other than the night watchman. In 1998, DITSHWANELO recommended that Basarwa couples be employed as house parents for the Basarwa children who had been moved many kilometers from home to attend school. DITSHWANELO Fact Finding Mission report, 1998 op cit.

<sup>66</sup> DITSHWANELO Fact Finding Mission Report 1998, op cit.

<sup>67</sup> In Burundi there are for instance only 2 Batwa students at the University of Burundi and 6 pupils in secondary education.

<sup>68</sup> Jackson, Dorothy Indigenous Peoples in Central Africa

In Namibia, the poor education of the San is partially a result of the legacy of the apartheid education system. However, there has been a 'marked improvement in the educational status of Namibian San since independence',<sup>69</sup> due to work by the NGOs and the Ministry of Basic Education, Sport and Culture (MBESC). Namibia provides a useful example of how appropriate education models can be developed as well as the clear benefits of such model.

### **2.11 Denial of the right to existence and to their own development**

*Articles 20 and 22* of the African Charter emphasizes that all peoples shall have the right to existence and to the social, economic and cultural development of their own choice and in conformity with their own identity. Such fundamental collective rights are to a large extent denied to indigenous peoples. The above analysis of the land dispossession of indigenous peoples, discrimination, denial of cultural rights etc. clearly bears witness to this fact. The different types of human rights violations experienced by indigenous peoples all boil down to this fundamental issue: many marginalized indigenous peoples in Africa are denied the right to exist as peoples and to determine their own development

### **2.12 What has been done locally**

Networking between civil society organizations provides an important beginning for political empowerment. Indigenous peoples in Africa are increasingly trying to organize in order to advocate for their rights and enter into dialogue with their governments.

The Southern African region has made great strides in this over the past decade. The establishment of a regional non-governmental organization, WIMSA (The Working Group on Indigenous Minorities in Southern Africa) in 1996, has led to the breaking of the isolation within which San groups existed within their own countries. The first regional San populations conferences held in 1992 and 1993 (in Namibia and Botswana respectively) proved to be significant events, where both governments and ordinary citizens learnt about the existence of the San peoples in parts of their countries where they had never imagined! A regional approach has meant that there are opportunities for experiences to be shared within Southern Africa. As this paper demonstrates, there are several challenges faced by the San, which are common to the region.

Political representation, employment of the San peoples in government, true participation of the San peoples in the consultation, planning, implementation and monitoring of development programmes and projects would contribute towards affording them the opportunity to participate in development.

The success of the Khomani San in their land restitution claim in relation to the Kalahari Gemsbok National Park in South Africa has provided an important example of what can be done, where a government creates an enabling environment. Sustainable development based upon a broad rights-based approach, allows for a broad understanding of development, which encompasses the fundamental need to respect the rights of all. These include

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<sup>69</sup> Suzman, James op cit., 125.

recognition of the right for various cultures to co-exist within an environment of mutual respect.

The Batwa/Pygmies are beginning to be involved in a process that will enable them to represent themselves effectively at local, national and international levels. The Batwa participate actively in the international movement in support of the rights of indigenous peoples. In March 2002 the largest Twa organisation, CAURWA (*Communauté des Autochtones Rwandais*) was legally recognised as an indigenous organisation working to promote Batwa rights. This signals an important shift in attitude by the Rwandan government, which previously has opposed reference to indigenous peoples and to specific ethnic groups in an attempt to overcome ethnic tensions that led to the 1994 genocide.

In Rwanda the Twa have increased official and public awareness of Twa issues by stepping up their national and international advocacy work through meetings with government ministries, the Unity and Reconciliation Commission, funders, embassies, NGOs and civil society networks. CAURWA organised meetings between Twa representatives, conservation bodies and local authorities to discuss the rights of Twa people who have been evicted from the Volcanos National Park, Gishwati Forest and the Nyungwe Forest and conservation agencies are beginning to listen to the Twa voice and respond to development needs of evicted communities, but implementation of the modern conservation guidelines that recognise indigenous rights and promote co-management is lagging far behind.

In Eastern Africa pastoralists and hunter-gatherers have established their own advocacy NGOs in order to promote their fundamental human rights such as land rights, right to education and health. These organizations have recently been very active in the consultations concerning constitutional reform in Kenya.

In Ethiopia a national network of pastoralist organizations has been formed (its application is still under process) called the Pastoralist Forum Ethiopia (PFE) which is active in regional as well as continental networking representing the pastoral communities of Ethiopia including organizing annual conferences on pastoral development issues. The 2001 national conference was so successful that the government - that introduced a new macro-economic policy in the autumn of the same year - gave pastoral development a high priority and by 2002, the Federal Government of Ethiopia had adopted a new policy on pastoral development. This has given way to cooperation between the PFE and regional governments where pastoralists preponderate.

The Berbers in North Africa such as Morocco have also created organizations to advocate respect for their human rights such as cultural and linguistic rights and this has led to recent positive developments in Morocco.

Despite the emerging self-organization and some positive developments there is, however, still a very long way to go.

## **2.13 International human rights instruments**

To date, most African governments have shown little interest in recognising indigenous rights within the context of the United Nations human rights instruments. And yet, as citizens of the countries in which they live, and as citizens of the world according to the international declarations on rights, their right to be represented and recognized, to possess land and other goods, to have access to justice, to education, health services, employment and other benefits must in no way be dependent upon them adopting the mode of production, clothes, outlook, food, housing, in a word lifestyle that is considered the « norm ». The indigenous peoples of Africa have witnessed the destruction of forests and evictions from their territories without them being provided any alternatives for their survival. And yet, given that they have ratified international instruments relating to human rights, African states should be committed to treating their citizens equally and maintaining their rights and freedoms. A way should be sought in which each individual, with his or her rights and responsibilities, has an active role to play. Such a society must be based on respect for human rights and fundamental freedoms and on genuine dedication to multiculturalism.

## **2.14 Conclusion**

Indigenous peoples in Africa suffer from a range of human rights violations. While the degree of experience may differ from country to country, the situation is a cause for serious concern and it calls for intervention. Until the governments of Africa take responsibility for striving to ensure that all their citizens have access to appropriate development, the indigenous peoples of Africa will continue to be at the bottom rung in African countries.

Indigenous peoples represent a unique cultural and social reality – faced by particular human rights violations - that mainstream society refuses to accept. Denial of the existence of indigenous peoples in Africa has tended to be the official position of African Governments, who argue that “all Africans are indigenous”, thereby suggesting that there is no legitimate ground for what they maintain is preferential treatment of a sector of their societies. Governments have tended to deal with the question of indigenous peoples, through assimilation policies, e.g. Government of Botswana uses the `need to integrate Basarwa into the mainstream of development, so that they are like other Botswana and not objects of tourists’ approach. The underlying attitude towards the indigenous peoples question is manifested in the development model utilized. The effect of a model, which measures success in terms of assimilation and mainstream development, has tended to leave the indigenous peoples of Africa in poverty. This clearly violates many articles of the African Charter including Articles 20 (1) as stated above.

Member States of the African Union are bound by the Articles in the African Charter to recognise the rights, duties and freedoms enshrined in the Charter and have vowed to undertake legislative or other measures to give effect to them. The situation of indigenous peoples described above does not demonstrate that African governments do indeed respect their own Charter. Some intervention is required to correct this situation.

### 3. AN ANALYSIS OF THE AFRICAN CHARTER AND ITS JURISPRUDENCE ON THE CONCEPT OF 'PEOPLES'

In order to analyse the relevant provisions of the African Charter on Human and Peoples' Rights and jurisprudence from the African Commission on Human and Peoples' Rights with regard to the concept of 'peoples', it is necessary to first examine the mandate of the Working Group, to ensure that all relevant provisions of the African Charter have been addressed.

#### 3.1 The Mandate of the Working Group on Indigenous People/ Communities in Africa

The Resolution on the Rights of Indigenous People/Communities in Africa adopted by the African Commission at its 28<sup>th</sup> Ordinary Session at Cotonou, Benin, 23 October to 6 November 2000, reads:<sup>70</sup>

The African Commission on Human and Peoples' Rights meeting at its 28<sup>th</sup> Ordinary Session in Cotonou Benin from 23<sup>rd</sup> October to 6<sup>th</sup> November 2000.

*Recalling* that at its 26<sup>th</sup> Ordinary Session held in Kigali Rwanda it constituted a committee made up of three Commissioners to consider the issue of indigenous people in Africa and advice accordingly.

*Having reconsidered* the issue and its implications,

#### **Resolved to:**

1. Establish a working group of experts on the rights of indigenous people or communities in Africa;
2. Set up a working group made of two members of the African Commission, one of whom should be designated as convener and two African experts in the field of human rights and indigenous issues;
3. Assign the following mandate to the working group:
  - Examine the concept of indigenous people and communities in Africa
  - Study the implications of the African Charter on Human and Peoples' Rights and the well being of indigenous communities especially with regard to:
    - The right to equality (Article 2 and 3)
    - The right to dignity (Article 5)
    - Protection against domination (Article 19)
    - Self-determination Article (20) and

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<sup>70</sup> Fourteenth Annual Activity Report (2000- 2001) of the African Commission to the Assembly of Heads of State and Government of the OAU, 37<sup>th</sup> Ordinary Session/Fifth Ordinary Session of the AEC, 9-11 July 2001, Lusaka, Zambia, AHG/229 (XXXVIII).

- The promotion of cultural development and identity (Article 22)
  - Consider appropriate recommendations for the monitoring and protection if the rights of indigenous communities
4. Have a funding proposal prepared with a view to raising donor funds to meet the costs of the work of the working group;
  5. Have a progress report submitted at the 30<sup>th</sup> Ordinary Session of the Commission<sup>71</sup>

The Organisation of African Unity (OAU), the forerunner to the African Union (AU), was founded in 1963 - a time when many African states were attaining independence from colonial rule. The OAU accepted existing colonial boundaries (the principle of *uti possidetis*)<sup>72</sup> and adopted the principle of non-violability of colonial boundaries.<sup>73</sup> Article II of the OAU Charter set out the five purposes for which the OAU was formed as:

- (a) To promote unity and solidarity of the African states;
- (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
- (c) To defend their sovereignty, their territorial integrity and independence;
- (d) To eradicate all forms of colonialism; and
- (e) To promote international cooperation, having due regard to the Charter of the UN and the Universal Declaration of Human Rights.

Article III of the OAU Charter outlined the principles that were to govern the relations of the member states (of the OAU) *inter se* and with the rest of the world. They were:

- (i) Sovereign equality of all member states;
- (ii) Non-interference in the internal affairs of states;
- (iii) Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence;
- (iv) Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;
- (v) Unreserved condemnation in all its forms of political assassination as well as subversive activities on the part of neighbouring states;
- (vi) Absolute dedication to the total emancipation of the African territories which are still dependent; and
- (vii) Affirmation of a policy of non-alignment with regard to all blocks.

It could be argued, therefore, that the principle of self-determination of 'peoples' in the African Charter on Human and Peoples' Rights (the African Charter) was closely associated

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<sup>71</sup> Ibid.

<sup>72</sup> Berman, Howard, R. 'The Development of International Recognition of the Rights of Indigenous Peoples' in *Never Drink from the Same Cup* IWGIA Document no. 74, (1993) Centre for Development Research (CDR) and International Working Group for Indigenous Affairs (IWGIA) 313.

<sup>73</sup> Chanda, 'the Organisation of African Unity: An Appraisal' in *Zambia Law Journal 1989-92*, 5.

with colonisation and the need for national liberation from foreign domination.<sup>74</sup> The introductory statement by the Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights,<sup>75</sup> held in Dakar, Senegal, 28 November to 8 December 1979, indicates that one of the characteristics of the African Charter was emphasis to be laid on the rules relating to the objectives of the OAU as stated in Article 2 of the OAU Charter. Particularly, the document states that African states have the duty of solidarity and co-operation on state sovereignty and the struggle against foreign domination.<sup>76</sup> It is, however, important to note that no international law regime is static but should continuously be interpreted in the line with changing realities.

Article 2 of the Constitutive Act of the African Union establishes the African Union (AU) to replace the OAU. While there has been an additional 14 objectives to the five 'original' objectives of the OAU, the Constitutive Act of the AU has left out of the objective of eradicating all forms of colonialism. The reasons for this seem obvious, Africa has moved beyond the need to eradicate colonialism.<sup>77</sup>

### 3.2 The African Charter on Human and Peoples' Rights

The OAU adopted the African Charter in 1981. The Charter came into force on 21 October 1986.<sup>78</sup> The African Charter does not place a hierarchy on rights that it protects. By developing different instruments to protect the different types of rights, the United Nations system has led to the perception of 'generation of rights'.<sup>79</sup> So-called first generation rights, namely the Civil and Political Rights, are protected in the International Covenant on Civil and Political Rights (ICCPR) of 1976 and the so-called second generation rights are protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1976.<sup>80</sup> The so-called third generation rights, which are essentially collective rights, are

<sup>74</sup> Article 20(2) and 20(3) of the African Charter on Human and Peoples' Rights directly relate the concept of self-determination to colonisation.

<sup>75</sup> OAU Doc CAB/LEG/67/3/Rev.1. It states that the document was drafted "in implementation of Decision 115 (XVI) Rev.1 by which the Assembly of Heads of State and Government requested the Secretary-General of the Organisation of African Unity at its Sixteenth Ordinary Session held in Monrovia (Liberia) from 17 to 20 July 1979 to organise as soon as possible in an African capital, a restricted meeting of experts to prepare a preliminary draft of an 'African Charter on Human and Peoples' Rights providing, *inter alia*, for the establishment of bodies to protect human and peoples' rights".

<sup>76</sup> Article 20 of the African Charter states that:

1. 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 that they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the States parties to the Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

<sup>77</sup> Baimu, Evarist The African Union: Hope for Better Protection of Human Rights in Africa? *African Human Right Law Journal* 2001 Centre for Human Rights and Juta Law, 299, 306.

<sup>78</sup> The OAU Assembly of the Heads of State and Government on adopted the African Charter in Nairobi on 27 June 1981 and came into force on 21 October 1986.

<sup>79</sup> Garling, Marguerite and Odinkalu, Chidi Anselm *Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights* 2001 INTERIGHTS 19.

<sup>80</sup> *Ibid.*

contained in Article 27 of the ICCPR,<sup>81</sup> the Declaration on Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities (1992), ILO Conventions 107 of 1957 and 169 of 1989 as well as the Draft Declaration on Rights of Indigenous People currently being debated by the UN Working Group on Indigenous Populations.<sup>82</sup> The African Charter, however, protects all rights in the same document without placing any such hierarchy.

Article 3(h) of the Constitutive Act of the AU states that the protection of human and peoples' rights, in accordance with the African Charter and other human rights instruments, is one of the objectives of the AU. This implies that the AU wishes to retain the African Charter as the primary document that sets the framework for human rights protection in Africa.<sup>83</sup> While the Constitutive Act makes reference to the African Charter, it is silent on the African Commission on Human and Peoples' Rights. Further, the Assembly of the Heads of Government and States is yet to adopt a resolution on the status of the African Commission as one of the organs of the AU<sup>84</sup>. The Optional Protocol on the Establishment of the African Court on Human Rights has not received sufficient ratifications and the establishment of the African Court has not been clarified in the Constitutive Act of the AU. It is not clear what the jurisdiction of the African Court of Justice, provided for in Article 18 of the Constitutive Act, would be with regard to enforcement of human rights obligations.<sup>85</sup>

### 3.3 Protection of Collective Rights

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<sup>81</sup> Article 27 of the ICCPR states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language

<sup>82</sup> Xanthaki A, 'Collective rights of indigenous peoples' *Amicus Curiae* 25 (2000) Institute of Advanced Legal Studies, 7 – 11.

<sup>83</sup> Baimu, 311.

<sup>84</sup> At the Summit of the OAU held in Lusaka, Zambia in July 2001, the Assembly of Heads of State and Government resolved to invite the African Commission on Human and Peoples' Rights to make a submission as to the manner in which the African Commission can be integrated into the structures and systems of the African Union. Even though this matter was raised repeatedly at successive sessions of the Commission since then, the Commission has to date not presented the submission requested.

<sup>85</sup> Baimu, 313.



Unlike the human rights instruments developed by the United Nations<sup>86</sup> and other regional systems<sup>87</sup> like the European system,<sup>88</sup> which are primarily concerned with rights of individuals, the African Charter expressly recognises and protects collective rights. It uses the term ‘peoples’ in its provisions, including the Preamble. The very name of the instrument is the African Charter on Human and Peoples’ Rights. This indicates that right from the beginning the instrument was meant to protect collective rights. The meeting of experts for the Draft African Charter sheds some light on what the thinking was about the term ‘peoples’ at the time of the drafting of the African Charter. The governing principle guiding the preliminary draft was that the African Charter must reflect the African conception of human rights, reflecting the African philosophy of law<sup>89</sup> and meeting the needs of Africa. The principle of peoples’ equality was asserted. It is ‘opposed to every attempt by one people

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<sup>86</sup> The exception being Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognise the rights of ‘peoples’. It states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its subsistence.
3. The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Other instruments UN that protect collective rights include Article 27 of the ICCPR, Articles 1 and 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, which enumerates the acts of genocide aimed at destroying national, ethnic, racial or religious group. The Convention on the Elimination of All Forms of Racial Discrimination as well as the UNESCO Declaration on Race and Racial Prejudice protect group rights. For a discussion on cultural rights, which by definition are collective rights as they are exercised by groups, see Xanthaki A, ‘Collective rights of indigenous peoples’ 25 (2000) *Amicus Curiae* Institute of Advanced Legal Studies, 7 – 11.

<sup>87</sup> The Inter-American system of human rights, made up of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights, protects rights enumerated in the American Convention on Human Rights. Articles 1 and 2 of the American Convention oblige states-parties to ‘respect rights and freedoms in the Convention and to ensure their free and full exercise to all *persons* subject to their jurisdiction’ (own emphasis). The Proposed American Declaration on Rights of Indigenous Peoples contains both individual and collective rights, directly and exclusively applicable to indigenous peoples. See MacKay, Fergus, *A Guide to Indigenous Peoples’ Rights in the Inter-American Human Rights System* IWGIA 2002. The most notable decision of the Inter-American Court is the *The Mayagna (Sumo) Indigenous Community of Awas Tigni v The Republic of Nicaragua* decided on 31 August 2001 that held that the Government of Nicaragua had violated the human rights of the Awas Tigny Community by granting foreign companies to licences to log the tropical forests where the community resides without proper consultation. See [http://www.indianlaw.org/body\\_iachr\\_decision.html](http://www.indianlaw.org/body_iachr_decision.html) and <http://www.cedha.org.ar>.

<sup>88</sup> The European system of human rights, notably the European Convention on Human Rights, recognises individual and not collective rights. Member States of the European Union, notably Norway, recognise rights of the Saami People, an indigenous people. Norway even has the Saami Parliament, which takes an active part in the supervision of ILO Convention on Indigenous and Tribal Peoples, No. 169 of 1989, which Norway ratified in 1990. See *ILO Convention on Indigenous and Tribal Peoples, 1989 [No. 169]: A Manual*, 2000, International Labour Office, 80.

<sup>89</sup> N 6. The document states ‘the conception of an individual who is utterly free and utterly irresponsible and opposed to society is not consonant with African philosophy’.

to dominate another no matter the importance attached to people'.<sup>90</sup> Article 3(h) Constitutive Act of the African Union states one of the objectives of the AU is being the promotion and protection of human and 'peoples' rights, an indication that the African human rights system will continue protecting collective rights.

### 3.4 Jurisprudence from the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (the African Commission) was established in terms of Article 30 of the African Charter.<sup>91</sup> Despite its mandate to interpret all provision of the Charter as per the provisions of Article 45(3) of the African Charter,<sup>92</sup> the African Commission initially shied away from interpreting the concept of 'peoples'.<sup>93</sup> The African Charter itself does not define the concept. Initially the African Commission did not feel at ease to develop rights where there was little concrete international jurisprudence. The ICCPR and ICESCR do not define 'peoples'.<sup>94</sup> It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding Article 17 make reference to "every individual". Article 18 serves as a break by referring to the family. Articles 19-24 make specific reference to "all peoples".

Given such specificity, it is surprising that the Charter fails to define "peoples" unless it was trusted that its meaning could be discerned from prevailing international instruments and norms. Two conclusions can be drawn from this. One, that the Charter seeks to make provision for group or collective rights, that is, that set of rights that can conceivably be enjoyed only in a collective manner like the right to self-determination or independence or sovereignty. Two, that in the light of the prevailing political circumstances at the time, the Charter gave legal justification to the anti-colonial struggles then raging in parts of the Continent. Given that the principle of *uti possidetis*, the sanctity of pre-independence boundaries of African member states of the OAU was given legal sanction by the OAU Charter, there could hardly be any other means of understanding this provision.

#### Article 17 of the African Charter

The African Commission has recently taken decisions that involve the protection of rights of a specific sector of the population against the state, for example the case against the

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<sup>90</sup> Ibid.

<sup>91</sup> Article 30 provides:

'An African Commission on Human and Peoples' Rights, herein after called the 'the Commission' shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa'.

<sup>92</sup> Article 45(3) provides that the mandate of the African Commission is:

'Interpret all provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU'.

<sup>93</sup> Vide more fully Murray: *The African Commission on Human and peoples' Rights and International Law*; Oxford-Portland Oregon: Hart Publishing, 2000; 103-104 and the conclusion in N Barney Pityana: "The Challenge of Culture for Human Rights in Africa" in Evans and Murray (Eds): *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000*; 233-234.

<sup>94</sup> Murray, Rachel 'The African Charter on Human and Peoples' Rights 1987 – 2000: An Overview of its Progress and Problems', *African Human Rights Law Journal* (2001) 1 Centre for Human Rights, Juta Law, 2.

government of Mauritania on allegations of discrimination against its black population. It interpreted Article 17 of the African Charter<sup>95</sup> to argue that:

‘Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.’<sup>96</sup>

#### **Article 19 of the African Charter**

The African Commission interpreted Article 19 of the African Charter<sup>97</sup> to mean that the discrimination against black Mauritians was a domination of one group over another, while Article 23(1)<sup>98</sup> could be used to protect the villages of black Mauritians against attack.<sup>99</sup>

#### **Article 20 of the African Charter: The right to self-determination**

The African Commission was open to ‘adjudicating’ on the concept of ‘peoples’ when it heard Communication 75/92 *Katangese Peoples’ Congress v Zaïre* that was brought by Mr. Gerard Moke, President of the Katangese Peoples’ Congress an individual who purported to represent the Katangese people.<sup>100</sup> The Communication was brought in terms of Article 20(1) of the African Charter for an assertion of the Katangese people’s right to self-determination.<sup>101</sup> Although the Commission did not decide in favour of the Katangese people, its acceptance of the case was an indication that the Commission was willing to consider cases of alleged violations of human rights of ‘people/s’. The communication presented an opportunity for the Commission to elaborate on self-determination and raise the possibility at least that in certain circumstances a matter based on the principle of self-determination can be considered by the Commission. Indeed, since *the Katangese* decision, the Commission has deliberated upon Nigeria cases involving the social and economic rights of the Ogoni people and the black citizens of Mauritania. That, in spite of the fact that in many utterances, some members of the Commission have expressed unease about the concept of the ‘right of peoples’.

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<sup>95</sup> Article 17 of the African Charter provides:

‘(2) Every individual may freely take part in the cultural life of his community

(3) The promotion and protection of morals and traditional values recognised by the community shall be duty of the State’

<sup>96</sup> *Collectif des Veues et Ayants-droits, Association Mauritanienne des Droits de l’homme v Mauritanis*, discussed in the *Thirteenth Activity Report of the African Commission 1999-2000*, ACHPR/RTP/13<sup>th</sup>, Annex V, paragraph 137.

<sup>97</sup> Article 19 provides:

‘All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another’

<sup>98</sup> Article 23(1) provides:

‘All peoples have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States’

<sup>99</sup> Note 21.

<sup>100</sup> *Compilation of Decisions on Communications of the African Commission on Human and Peoples’ Rights, Extracted from the Commission’s Activity Reports 1994-1999*, Third Printing, 2000 Institute for Human Rights and Development.

<sup>101</sup> *Ibid.*

Another matter that concerned the application of Article 20 of the Charter was the *Resolution on the Western Sahara*<sup>102</sup> where the Commission noted that the said Article as well as other resolutions of the UN Security Council called for the organisation of a referendum by the Saharawi people on self-determination.

The genocide in Rwanda in 1994 has brought into sharp focus the concerns about the domination of one people by another (Article 19) and the systematic manner in which one group may design the “elimination” of another’s “right to existence”. The right to self-determination elaborates provisions already available in the common article 1 of the 1966 Covenants (ICCPR and ICESR) and in the ILO Convention on Indigenous and Tribal Peoples 169 of 1989. Although considered contentious, the provision on self-determination in the Draft Declaration on the Rights of Indigenous People currently being considered by the United Nations, bears stark resemblance to the provisions in Article 20 of the African Charter.

However elaborate the provisions of Article 20, the right to self-determination as entrenched within the provisions of the OAU Charter as well as the African Charter, cannot be understood to sanction secessionist sentiments.<sup>103</sup>

Self-determination of peoples must therefore be exercised within the inviolable national boundaries of the state with due regard to the sovereignty of the nation-state. Of course, this poses some difficulties for indigenous populations inasmuch as the boundaries of nation-states intersect indigenous communities and divide national loyalties. The recognition of parallel allegiances between the state as a political entity and indigenous nationhood that transcends national boundaries would go a long way towards affirming the parallel allegiances indigenous communities of necessity must embrace.

The Commission has tended to link violations of the right of a people in Article 20(1) with the violation of the right of an individual in Article 13(1)<sup>104</sup> of the Charter. It found that a military coup in Nigeria violated both articles and called

‘upon the Nigerian military government to respect the right to free participation in government and the right to self-determination and hand over the government to duly elected representatives of the people without unnecessary delay’.<sup>105</sup>

<sup>102</sup> *Thirteenth Activity Report of the African Commission 1999-2000*, ACHPR/RTP/13<sup>th</sup>, Annex V.

<sup>103</sup> “[E]xcept perhaps in the narrowly defined circumstances in the *Katangese* decision where it appears that the state as such no longer coheres and which complies with the principles of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory...” quoted in Murray:2000;108. It appears that there is some acceptance of secession as Eritrea and Ethiopia recognized each other as sovereign independent states although Somaliland is still battling for international recognition after seceding from Somalia which is widely understood to have effectively collapsed as a viable state.

<sup>104</sup> Article 13(1) states:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

<sup>105</sup> Resolution on Nigeria, Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights, ACHPR/RP/8<sup>th</sup>, Annex VII, quoted by Murray, unpublished.

The Commission has also decided that a ‘accession to power by military regimes through coup d’etat constitutes an intolerable infraction of the democratic principles of the rule of law .....declares that the military coup d’etat in Comoros is a grave and unacceptable violation of the rights of the Comorian people to freely choose their government’.<sup>106</sup>

In the matter of *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference for East Africa v Sudan*<sup>107</sup> the African Commission decided that Shari’a law should not be applied to non-Muslims.<sup>108</sup>

### **Articles 21 and 22 of the African Charter**

Article 21 deals with the right of peoples to freely dispose of their wealth and natural resources<sup>109</sup> while Article 22 deals with the right of peoples to economic, social and cultural development.<sup>110</sup> In the Guidelines for National Periodic Reports to the Commission stated that these rights:

‘Consist in ensuring that the material wealth of the countries are not exploited by aliens to no or little benefit to the African countries. Establishment of machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country’<sup>111</sup>

The guidelines seem to be based on an assumption that the threat to Africa’s development comes from foreign companies hence the need to prevent them from exploiting African countries. It seems therefore that a right of a people is equated with that of the state itself.<sup>112</sup>

Although Article 22 of the African Charter refers to the right of ‘peoples’ to economic, social and cultural development, the *Resolution on the African Commission on Human and Peoples’ Rights*

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<sup>106</sup> *Resolution on the Situation in the Comoros*. Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights, ACHPR/RP/12<sup>th</sup>, Annex VII, quoted by Murray, supra.

<sup>107</sup> *Thirteenth Activity Report of the African Commission 1999-2000*, ACHPR/RTP/13<sup>th</sup>, Annex V.

<sup>108</sup> Ibid.

<sup>109</sup> The full text of Article 21 states:

1. 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.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice on the obligations of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

<sup>110</sup> The full text of Article 22 states:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

<sup>111</sup> Second Activity Report, Annex XII, para II.6.

<sup>112</sup> Ibid.

in its Sixth Annual Activity Report interpreted the right to development to include the rights of individuals.<sup>113</sup> The Commission stated that it:

‘reaffirms that the right to development as including the rights of individuals is an inalienable Human Right by virtue of which every human person is entitled to participate in, contribute to and enjoy the economic, social, cultural and political development of the society’<sup>114</sup>

### **Article 23 of the African Charter**

The Commission has stated that the states should report on

‘information on any statutory and administrative measures designed to restrain refugees allowed into the country under Article 12 from engaging in subversive activities against their country of origin or any other state party to this Charter being organised or launched from their territories’<sup>115</sup>

### **Article 24 of the African Charter**

The Commission seem to assume that the threat to Africa comes from outside the continent, hence the need to legislate and take other measures to ‘prevent international dumping of toxic wastes and other wastes from industrialised countries’<sup>116</sup>

### **Articles 2, 3 and 5 of the African Charter: the Right to Equality**

Articles 2<sup>117</sup> and 3<sup>118</sup> of the African Charter give ‘every individual’ the right to equality and equal protection of the law. These rights are available to every one, including individual members of communities or people identifying themselves as indigenous. Chapter 2 of this document makes reference to the fact that indigenous people are usually discriminated against and do not enjoy equal protection of the law in relation to members of the dominant groups. By not protecting individual members of indigenous communities against discrimination, the member states of the African Union violate Articles 2 and 3 of the African Charter. Another important Article relevant to indigenous people is Article 5 of the African Charter<sup>119</sup> that gives every individual the right to human dignity. Member states of

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<sup>113</sup> ACHPR/RPT/6<sup>th</sup>, Annex III.

<sup>114</sup> Murray, *supra*.

<sup>115</sup> N 42, para III.10.

<sup>116</sup> *Ibid*, Paras III.1.1.

<sup>117</sup> Article 2 of the African Charter states:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

<sup>118</sup> Article 3 of the African Charter states

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

<sup>119</sup> Article 5 of the African Charter states

the African Union have an obligation to protect individual members of indigenous people against inhuman and degrading treatment. Chapter 2 above has made reference to numerous examples of situations whereby indigenous people are treated as less than human and are denied the right to dignity as equal members of the mainstream populations of their states.

### **Article 60 of the African Charter: Recourse to International Law**

The African Charter gives the African Commission, when dealing with issues brought before it, the mandate to have recourse to international law principles on Human and Peoples' Rights.

Article 60 states:

The Commission shall draw inspiration from international law on Human and Peoples' Rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

When dealing with Communications brought by people who identify themselves as indigenous or when considering National Periodic Reports, the African Commission should have recourse to, and be 'inspired' by the various international human rights instruments. Although only a handful of African states have ratified ILO Convention 107 of 1957 and none have ratified ILO Conventions 169 of 1989, both these Conventions are part of international law. An important matter to be considered is that ILO Convention 169 of 1989 recognises the principle of self-identification as an important criterion.<sup>120</sup> It could be argued that irrespective of the fact that many African states do not recognise the existence of indigenous people within their territories and some take the view that the concept of indigenous people is applicable in Africa, Article 1.2 of ILO Convention 169 of 1989 grants rights and protection to people identifying themselves as indigenous in Africa.<sup>121</sup>

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Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

<sup>120</sup> Article 1.2 states 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'

ILO Convention 169 therefore adopts both objective and subjective criteria. The objective criterion determines whether a specific indigenous or tribal group meets the requirements of Article 1.1, while the subjective criterion is concerned with whether the person identifies themselves as belonging to an indigenous or tribal group or people, or the group considers itself to be indigenous or tribal under the Convention as stated in Article 1.2. See *ILO Manual on Convention 169 of 1989*, 8

<sup>121</sup> Tong, Maureen, The UN Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Affairs* 2/2002 IWGIA

Further, the ICCPR and the ICESR are also part of international law and a number of African states have ratified these Conventions as well as other United Nations conventions that protect rights of indigenous people. There is therefore an obligation on African states to honour right granted to indigenous people under common Article 1 of the ICCPR and the ICESR as well as Article 27 of the ICCPR.

### 3.5 National Periodic Reports to the African Commission

Article 62 of the African Charter requires member states to submit reports every 2 years on the measures they have taken to implement the provisions of the Charter.<sup>122</sup> The African Commission set out the General Guidelines Regarding the Form and Contents of Reports to be Submitted by State Members regarding the Meaning, Scope and Weight of the Rights of Peoples' Recognised by Articles 17(2), 19 to 20 of the Charter.<sup>123</sup>

The guidelines require states to take specific measures aimed at the promotion of cultural identity. States are required to take measures and programmes aimed at 'promoting awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the populations'.<sup>124</sup>

During state reporting at its 29<sup>th</sup> Ordinary Session, the African Commission for the first time questioned states what measures have they taken to address the human rights situation of indigenous people in their countries.

The African Commission has not received and decided on Communications from people identifying themselves as indigenous. For its part, the Commission is encouraging indigenous peoples to, among other strategies, apply for observer status in the African Commission, bring communications before it for consideration as well as lobby the members of the Commission who come from areas where there are indigenous peoples.<sup>125</sup>

### 3.6 Conclusion

The Working Group on the Rights of Indigenous People or Communities in Africa takes the view that the provisions of the African Charter that have been dealt with in this Chapter offer protection to indigenous people in Africa. The rights to equality and human dignity in Articles 2, 3 and 5 are available to all individuals, including individual members of indigenous communities. It is significant that Article 2 states that the rights guaranteed in the African

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<sup>122</sup> Article 62 of the African Charter provides:

'Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'

<sup>123</sup> Second Activity Report, Annex XII, para III.6.

<sup>124</sup> *African Commission 1990*: 417-8.

<sup>125</sup> Pityana, Barney The African Commission on Human and Peoples' Rights and the Issue of Indigenous Peoples, *Indigenous Affairs April May June 1999* © 1999 IWGIA, 49.



Charter are applicable to every individual without distinction of any kind, including national or *social* origin. (own emphasis).

The Working Group also takes the view that as the African Charter recognises collective rights, formulated as rights of 'peoples', these rights should be available to sections of populations within nations states, including indigenous people and communities. As illustrated under the heading of 'Jurisprudence from the African Commission on Human and Peoples' Rights', the Commission has started to interpret the term 'peoples' in a manner that should allow indigenous people to also claim protection under Articles 19 – 24. of the African Charter. By recognising rights of a section of a population to claim protection when their rights are being violated, either by the state or by others, the African Commission has opened the way for indigenous people to claim similar protection. This is very encouraging and it is to be hoped that this development will continue, making the African Charter and the African Commission major avenues for the promotion and protection of the human rights of indigenous people.

The protection of the human rights of vulnerable groups such as indigenous peoples is a major concern in the report of the UN World Conference against Racism as expressed in the following paragraph:

*"We emphasize that, in order for indigenous peoples freely to express their own identity and exercise their rights, they should be free from all forms of discrimination, which necessarily entails respect for their human rights and fundamental freedoms. Efforts are now being made to secure universal recognition for those rights in the negotiations on the draft declaration on the rights of indigenous peoples, including the following: to call themselves by their own names, to participate freely and on an equal footing in their country's political, economic, social and cultural development, to maintain their own forms of organization, lifestyles, cultures and traditions; to maintain and use their own language; to maintain their own economic structures in the areas where they live,- to take part in the development of their educational systems and programmes; to manage their lands and natural resources, including hunting and fishing,- and to have access to justice on the basis of equality"* (Declaration paragraph 42)

This Working Group welcomes the positive assessment of the Report of the World Conference against Racism, which the African Commission made during its 30th session. We fully agree that the report can be an important source of inspiration for the African Commission to look more into possibilities of addressing modern forms of discrimination within African states such as discrimination and human rights abuses against indigenous peoples, minorities and other vulnerable groups.

The United Nations Special Rapporteur on Right of Indigenous People has taken up issues concerning indigenous people in Africa in both his first and second annual report to the Commission on Human Rights. This despite the fact the controversy of whether the concept is applicable in Africa nor the denial by many African states that there are indigenous people within their territories. Indigenous people and a handful of African states participate in the United Nations fora on indigenous rights. This is encouraging.

#### **4. POSSIBLE CRITERIA FOR IDENTIFYING INDIGENOUS PEOPLES**

The analysis in chapter 2 of the critical human rights situation of certain groups in Africa demonstrates that certain groups are victims of particular forms of human rights abuses. The main human rights issues at stake for those groups have to a large extent a collective nature such as the right to existence, to land, to culture and identity etc – rights which are protected by the articles in the African Charter on Human and Peoples' Rights such as articles 19, 20, 21 and 22.

As demonstrated in the above analysis these groups have due to past and ongoing processes become marginalized in their own countries and they need recognition and protection of their basic human rights. In order to achieve such recognition and protection many of these groups have started to organize themselves at local and national level and they are also reaching out to other groups around the world who are facing similar forms of marginalization and human rights violations. The kind of human rights protection they urgently need is reflected in the international law regime on the rights of indigenous peoples and many of the groups concerned are now taking part in the international movement for the rights of indigenous peoples. The linking up to this movement and the application of the term Indigenous Peoples is a way for those groups – whose very existence and way of life is under threat - to try to address the situation and overcome the human rights violations. It is by no means an attempt to question the identity of other groups or to deny any Africans the right to identify as indigenous to Africa or to their country. In a strict sense all Africans are indeed indigenous to Africa. We also recognize the concern of those who feel that the term “indigenous peoples” has negative connotations in Africa as it has been used in derogatory ways during European colonialism and also been misused in chauvinistic ways by some post-colonial African governments. However, notwithstanding these possible negative connotations of the word itself, it has today become a much wider internationally recognized term by which to understand and analyse certain forms of inequalities and suppression such as the ones suffered by many pastoralists and hunter-gather groups and others in Africa today and by which to address their human rights sufferings. “Indigenous peoples” has come to have connotations and meanings that are much wider than the question of “who came first”. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left in the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject of discrimination and contempt and whose very existence is under threat of extinction.

It is in this understanding that we shall proceed to elaborate more on present day understandings of the global term Indigenous Peoples.

We shall aim at *identifying* those peoples and those issues that within the international human rights agenda fall under the global terms of *indigenous peoples* and *indigenous issues*. Like all other peoples and issues of today's world these have to be approached in their own rights by recognising their local and regional characteristics as part of a larger conceptual framework

This report does not aim at giving a clear-cut definition of *indigenous peoples*, as there is no global consensus about a single final definition. The global indigenous rights movement and the UN system oppose recurrent attempts to have a single strict definition. Other peoples of the world are not required to define themselves in similar ways, and the danger of a strict definition is that many governments may use a strict definition as an excuse for not recognizing indigenous peoples within their territories. For relevant comparison it should be noted that the category *minority* is not defined in the UN declaration on minority rights.

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 the indigenous peoples and communities in Africa are. This is the major internationally recognized approach, advocated by the United Nations bodies dealing with the human rights of indigenous peoples such as the UN Working Group on Indigenous Populations. We shall present this in more detail in this paper.

We know that many people are critical towards the issue of protection of indigenous peoples' rights in Africa. We definitely recognize the concerns, but we also think that many misunderstandings are involved.

One of the misunderstandings is that protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights. As demonstrated in the analysis in the previous chapter, the issue is that certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. A form of discrimination, which other groups within the state do not suffer from. The call of these marginalized groups to protection of their rights is a legitimate call to alleviate this particular form of discrimination.

A closely related misconception is that the term *indigenous* is not applicable in Africa as "all Africans are indigenous". There is no question that all Africans are indigenous to Africa in the sense that they were there before the European colonialists arrived and that they have been subject to sub-ordination during colonialism. We do thus in no way question the identity of other groups. When some particular marginalized groups use the term *indigenous* to describe their situation, they use the modern analytical form of the concept (which do not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination, which they suffer from. They do not use the term in order to deny all other Africans their legitimate claim to belong to Africa and identify as such. They use the present day wide understanding of the term because it is a term by which they can very adequately analyse the particularities of their sufferings and by which they can seek protection in international human rights law and moral standards.

Another misunderstanding is that talking about *indigenous rights* will lead to tribalism and ethnic conflicts. We believe that this is turning the arguments upside down. There exist a rich variety of ethnic groups within basically all African states and multiculturalism is a living reality. Giving recognition to all groups, respecting their differences and allowing them all to flourish in a truly democratic spirit does not lead to conflict, it prevents conflict. What rather creates conflict is that certain dominant groups force through a sort of “unity” which only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives. Or put in another way: conflicts do not arise because people demand their rights but because their rights are violated. The elaboration of modalities to protect the human rights of particularly discriminated groups should not be seen as tribalism and disruption of the unity of African states. On the contrary it should be welcomed as an interesting and much needed opportunity on the African human right arena to discuss ways of developing African multicultural democracies based on the respect and contribution of all ethnic groups. Democracies where the breeding ground for ethnic violence and conflict will most likely be diminished.

#### 4.1 Characteristics of indigenous peoples in Africa

As described in the previous chapter, those groups of peoples or communities throughout Africa who are identifying themselves as indigenous peoples or communities and who are linking up with the global indigenous rights movement are first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists.

To summarize briefly the overall characteristics of the groups identifying themselves as indigenous peoples are that their cultures and ways of life differ considerably from the dominant society and that their cultures are under threat in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalization, both politically and socially. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalization violate their human rights as peoples/communities, threaten the continuation of their cultures and ways of life and prevent them from being able to genuinely participate in deciding on their own future and forms of development.

These are groups of people who could lead a good life - based on their own visions of a good life - and who could contribute considerably to the development of the states within which they live - if they were given the same opportunities as other more dominant groups. Opportunities, which can only come about through the recognition of their particular situation and needs, and through the granting of fundamental collective rights. These groups are not problematic categories in themselves. They are produced as problematic categories

by certain political and structural factors. Factors which must be looked at critically in order to allow these presently marginalized groups to live in a dignified way and to fully realise their potential to make positive contributions to the larger society.

Very important human rights issues are at stake. It has to do with discrimination and marginalization of some of the most vulnerable groups within African states whose situation has continued to be very critical even after de-colonisation. It is thus matters, which should be an important concern of the African Commission on Human and Peoples' Rights.

It is important that the critical human rights situation of these groups/communities is addressed and for this purpose it is necessary to have a concept by which to highlight and analyse their situation and by which to link up with protection in international law. Over the past 10 to 20 years, an increasing number of affected groups/communities in Africa have come to identify themselves as *indigenous peoples*. The discrimination, domination and marginalization experienced by indigenous peoples throughout the world matches the experiences of the groups identifying themselves as indigenous in Africa. During the past 10 years (which is also the UN decade for indigenous peoples) African indigenous people have thus increasingly participated in the global indigenous rights movement. They are by now attending the Working Group on Indigenous Populations under the Sub-Commission on the Promotion and Protection of Human Rights (formerly the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities) in large numbers, they are represented in the newly established Permanent Forum for Indigenous Issues, they participate in the discussion of the UN Draft Declaration on the Rights of Indigenous Peoples, they took active part in the preparations for and the deliberations of the World Conference Against Racism in Durban and the World Conference on Sustainable Development (WSSD) in Johannesburg etc.

The groups concerned have thus found an international platform from which to analyse their situation, voice their concerns and seek recognition and protection of their rights in their national contexts.

#### **4.2 Existing approaches to the term “indigenous peoples”**

As stated in the recently published report by Rudolfo Stavenhagen, UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People:

*There is no internationally agreed upon definition of indigenous peoples. Different states adopt different definitions in terms of their particular contexts and circumstances. The term indigenous is frequently used interchangeably with other terms, such as “aboriginal”, “native”, “original”, “first nations” or else “tribal” or other similar concepts. In some states local terms might be commonly used that are not easily translatable. In still other countries, no formal designation exists even though there might be general agreement that such populations do in fact inhabit certain areas of the country. And in still other countries, the existence of indigenous groups is denied altogether and therefore their definition becomes even more problematic, yet the absence of an international definition should not prevent constructive action in the promotion and protection of the human rights of indigenous peoples. (Human Rights and Indigenous Issues Para 92)*

The major identifications of *indigenous peoples*, which have emerged at the international level, have primarily been developed around the United Nations Working Group on Indigenous Populations (established by the UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982) and by the International Labour Organization (ILO) in its Convention 169 “*Convention Concerning Indigenous and Tribal Peoples in Independent Countries*” of 1989. International monetary institutions such as the World Bank have also worked on identifications.

The discussions on definitions of indigenous peoples have developed considerably during the past 50 years. The initial approaches considered indigenous peoples to be the aboriginal peoples of a given land who have become marginalized after having been invaded by colonial powers or invaders who settled there and are now politically dominant over the earlier occupants.

These early attempts of a definition – including the definition of José Martínez Cobo - have been criticised on the grounds that aboriginality is not the only determining factor, and that not enough importance is placed on self-identification and on contemporary situations. Limiting the definition of indigenous peoples to those local peoples still subject to the political domination of the descendants of colonial settlers as in the Americas and in Australia makes it very difficult to meaningfully use the concept in Africa.

Domination and colonialization has not exclusively been practiced by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states, which the contemporary African indigenous movement seeks to address. The indigenous movement in Africa has grown as a response to the policies adopted by independent post-colonial African states. As argued by Mohamed Salih, post-colonial African states have in many respects continued the suppression, dispossession and discrimination, which was initiated by the colonial regimes: “*Most post-independent African states were no less cruel towards their indigenous populations than the colonialists*” (Salih 1993: p. 271). The favouring of settled agriculture over hunting, gathering and nomadic cattle herding has been instrumental in both marginalizing and stigmatising some peoples and inspiring them to identify themselves as indigenous groups. So too has the establishment of national parks and other projects that led to forced relocation of the inhabitants. The cultural domination of the new states by certain groups served to stigmatise others. The overall result was that some people became “left overs” as they did not to the same extent as the dominating groups enjoy the advantages which resulted from independence.

It is often being argued that all Africans are indigenous to Africa. Definitely all Africans are indigenous as compared to the European colonialists who left all of black Africa in a subordinate position that was in many respects similar to the situation of indigenous peoples elsewhere. However, if the concept of *indigenous* is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.

We should put much less emphasis on the early definitions focussing on aboriginality, as indeed it is difficult and not very constructive (except from certain very clear cut cases like the San of Southern Africa and the pygmies of central Africa) to debate this in the African context. The focus should be on the more recent approaches focussing on *self-definition* as indigenous and distinctly different from other groups within a state; on a *special attachment to and use of their traditional land* whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of *subjugation, marginalization, dispossession, exclusion or discrimination* because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model. We recognize that the immediate connotation of the term often has to do with aboriginality. However, we find that the modern analytical understanding of the term – and indeed the understanding relevant and constructive for Africa – with its focus on the above-mentioned criteria of marginalization, cultural difference and self-identification should be adopted by the African Commission.

This modern analytical understanding is being advocated by Erica-Irene Daes, the chairperson of the United Nations Working Group on Indigenous Populations that was established by the UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982. She uses 4 criteria, which can be used in the identification of indigenous peoples:

1. The occupation and use of a specific territory;
2. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
3. Self-identification, as well as recognition by other groups, as a distinct collectivity;
4. An experience of subjugation, marginalisation, dispossession, exclusion or discrimination

These 4 elements are guiding principles to characterize indigenous peoples, however, not all of 4 elements need to be present at the same time in a given situation.

The approach based on guiding principles has also been adopted by the 1989 ILO Convention 169 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*. The Convention 169 emphasises the principle of self-identification, stating in article 1(2) “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this concept of this Convention apply”. The Convention applies to:

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

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonialization 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.

The World Bank has adopted an inclusive approach, stating in its Operational Manual, March 2001:

*The term “indigenous peoples”, “indigenous ethnic minorities”, “tribal groups”, and “scheduled tribes” describe social groups with a social and cultural identity that is distinct from the dominant groups in society and that makes them vulnerable to being disadvantaged in the development process. Many such groups have a social and economic status that limits their capacity to defend their interests in and rights to land and other productive resources, or that restricts their ability to participate in and benefit from development.*

The World Bank refers to all of the above groups as “indigenous peoples”. It notes that there are varying national legal contexts and socio-cultural criteria for identifying indigenous peoples and that no single definition can capture their identity. However the World Bank does list characteristics, which may identify indigenous peoples in particular geographical areas such as:

1. Close attachment to ancestral territories and the natural resources in those areas;
2. Presence of customary social and political institutions;
3. Economic systems primarily orientated to subsistence production;
4. An indigenous language, often different from the dominant language;
5. Self-identification and identification by others as members of a distinct cultural group.

We find the characteristics outlined above useful for the work of this Working Group and for the further deliberations of the African Commission.

### **4.3 Indigenous peoples and minorities**

In debates and discussions on the issue of indigenous peoples in Africa, some people argue that “minorities” is a more appropriate term to describe the groups of people we are talking about. It is our position that it is important to accept the use of the term indigenous peoples all over the world including in Africa as the concept indigenous peoples in its modern forms more adequately encapsulates the real situation of the groups and communities concerned. However, there obviously can be overlaps between the two.

In 1999, Asbjørn Eide and Erika Irene Daes were tasked by the UN Sub-Commission on the Promotion and Protection of Human Rights to prepare a working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples. The conclusions of both of these two renowned experts are that the usefulness of a sharp and clear-cut distinction between minorities and indigenous peoples is debatable. No definition or list of characteristics can eliminate overlaps between the



concepts of minority and indigenous peoples, and cases will continue to arise that defy any simple attempt at classification.

Daes suggests that the most constructive approach would be a so called “purposive approach” where the important question is: which category is most consistent with the goals and aspirations of the group in question, and what are the legal consequences for the group being assigned to one or the other category.

It is thus important to apply a flexible approach that is based on concrete analysis of the human rights issues at stake.

Having said this, however, it is very important to note that both Daes and Eide point out that the nature of the types of rights ascribed to indigenous peoples and minorities respectively in international law differs considerably and that this has major implications.

Asbjørn Eide describes four major sets of rights within international human rights law, which relate to indigenous peoples or minorities.

1. The general human rights to which everyone is entitled, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966. They are all individual rights.
2. The additional specific rights to persons belonging to national or ethnic, religious or linguistic minorities, found in article 27 of the International Covenant on Civil and Political Rights, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (“Minority Declaration”), and in several regional instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States have some duties to minorities as collectivities, however.
3. The special rights of indigenous peoples and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and – if and when adopted – in the Draft Declaration on the Rights of Indigenous Peoples (“Draft Indigenous Declaration”) adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now before the Commission on Human Rights. They are mostly rights of groups (“peoples”) and therefore collective rights.
4. The rights of peoples as provided for in common article 1 to the two International Covenants of 1966. These are solely collective rights. (Eide p. 1)

The general human rights are purely individual rights and can be demanded by everyone.

The major and crucial difference between minority rights and indigenous rights is that minority rights are formulated as individual rights whereas indigenous rights are collective rights. The specific rights of persons belonging to national or ethnic, religious or linguistic

minorities include the right to enjoy their own culture, to practice their own religion, to use their own language, to establish their own associations, to participate in national affairs etc. These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group<sup>126</sup>.

The indigenous rights are clearly collective rights, even though they also recognize the foundation of individual human rights. Some of the most central elements in the indigenous rights regime are the collective rights to land, territory and natural resources. The Minority Declaration contains no such rights whereas land and natural resource rights are core elements in the ILO Convention 169 (arts 13-19) and in the draft indigenous declaration (arts 25-30). Collective rights to land and natural resources is one of the most crucial demands of indigenous peoples – globally as well as in Africa – as they are so closely related to the capability of those groups to survive as peoples and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop on their own terms their mode of production and way of life and to exercise their own culture.

The types of human rights protection, which groups such as the San, Pygmies, Ogiek, Maasai, Barabaig, Tuareg, Berber etc. are seeking are of course individual human rights protections just like all other individuals in the world. However, it goes beyond this. These groups seek recognition as peoples and protection of their cultures and particular ways of living. A major issue for these groups is the protection of collective rights and access to their traditional land and the natural resources upon which the upholding of their way of life depends. As the protection of their collective rights, including land rights, is at the core of the matter, many of these groups feel that the indigenous human rights regime is a more relevant platform than the minority rights arena.

#### **4.4 International fora involving indigenous peoples in Africa**

The United Nations and the world community recognize that indigenous peoples live all over the world including Africa and their plight is being addressed in an increasing number of international fora. African indigenous peoples are participating actively in these fora as they have gradually become part of the international indigenous rights movement:

- The *International Decade of the World's Indigenous Peoples* has been in effect since 1993, which express the growing interest of the international community in the fate of indigenous peoples, and reflect the fact that the indigenous question has become a key issue on the international agenda.
- The *Working Group on Indigenous Populations (WGIP)*, which was established in 1982 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities is now being attended by more than 1000 indigenous representatives every year and an increasing number are African indigenous representatives. They have here a forum a to

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<sup>126</sup> It should, however, be mentioned that though minority rights are cast as individual rights exercised collectively, there are ongoing debates about groups rights of minorities.

inform governments and the international community as such about their situation, and they are being recognized by indigenous representatives from other parts of the world as being indigenous peoples. Unfortunately very few African governments attend the sessions of the WGIP, which limits the possibilities of creating a dialogue.

- A *Permanent Forum on Indigenous Issues* has been established within the United Nations in 2000 and it had its first meeting in May 2002. This is a high level body placed directly under the Economic and Social Council (ECOSOC). The Permanent Forum formally integrates indigenous peoples and their representatives into the structure of the United Nations. The Permanent Forum consists of 16 members, 8 of which have been nominated by governments and 8 of which are indigenous representatives who have been nominated by the President of the Council following consultations with indigenous peoples. African indigenous peoples also have their own representative in the Permanent Forum. This clearly indicates that the United Nations and the world community recognize the existence of indigenous peoples in Africa.
- A *Special UN Rapporteur for Indigenous Peoples* has been nominated by the Commission on Human Rights in 2001 to serve for a three-year period. The mandate of the Special Rapporteur is to: a) Gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples themselves and their communities and organizations, on violence of their human rights and fundamental freedoms; b) Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous peoples; c) Work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights. The first report of the Special Rapporteur was released in December 2001 and it contains numerous references to the situation of indigenous peoples in Africa. The report of the Special Rapporteur also takes positive note of the Resolution on Indigenous People/Communities in Africa adopted by the African Commission on Human and Peoples' Rights and of the establishment of the Working Group on Indigenous People/Communities in Africa established by the African Commission.
- The Working Group on Indigenous Populations has prepared a draft *UN Declaration on the Rights of Indigenous Peoples* with the active participation over the years by numerous indigenous organizations from around the world, including Africa. It is presently under review by the Human Rights Commission – with the active participation of indigenous representatives - and it is undoubtedly the most important human rights document for indigenous peoples.
- The United Nations has a fund *the Voluntary Fund* for support to indigenous peoples and an African representative sits in this fund along with indigenous representatives from all other regions of the world.

- *The ILO* has elaborated a policy on support to indigenous peoples with particular focus on indigenous peoples in Africa and Asia. The ILO indigenous office opened in 2001 a regional Africa office in Tanzania with the specific purpose to support indigenous peoples in Africa. Though the ILO Convention 169 has only been ratified by a limited number of countries, it is having a significant impact on the processes and programmes in the realm of development. The influence of Convention 169 on development policies also reflects the intersection between the rights of indigenous peoples and the right to development. Despite certain shortcomings, Convention 169 is significant in that it is currently the only binding international instrument, still open for ratification, dedicated specifically to the rights of indigenous peoples.
- *The World Bank* is presently having consultations in all regions of the world with indigenous peoples on their policy on support to indigenous peoples and the new operational manual, and they are conducting a number of consultative meetings with indigenous peoples in the various regions of Africa.

The UN Working Group on Minorities and the UN Working Group on Indigenous Populations have held 3 seminars on multiculturalism in Africa. The first one was held in Arusha, Tanzania in May 2000, the second one in Kidal, Mali in January 2001 and the third one in Botswana in February 2002. The seminars dealt with minority and indigenous peoples' issues in Africa.

In the Arusha seminar the participants presented a range of issues and problems, which they were facing as indigenous peoples and minorities. These related to problems in having access to land, discrimination, political marginalization, lack of access to education, suppression of culture and identities etc. In the conclusions of the Arusha seminar it was stated:

*“The concepts of indigenous peoples and minorities were discussed. It was felt that the terms were useful in Africa, in particular since they were based on the principle of self-identification. The terms were acknowledged to be complex and misunderstood in the region, often being seen as threatening the integrity of states. It was suggested that indigenous peoples and minorities could be understood to be peoples with specific identities, histories and cultures. Such peoples could be characterized as non-dominant, vulnerable and disadvantaged. In differentiating between indigenous peoples and minorities it was suggested that indigenous peoples had an attachment to a particular land or territory an/or had a way of life (e.g. pastoralists, hunter/gatherers, nomadic or other) which was threatened by current state policy and affected by the shrinking of their traditional resource base.”* (p. 10)

The Arusha seminar called on the African Commission on Human and Peoples' Rights to take into consideration the concerns of indigenous peoples and minorities.

In the Kidal seminar, the participants welcomed the participation of the representatives of the African Commission on Human and Peoples' Rights and the establishment of the Working Group on Indigenous People/Communities in Africa by the African Commission. The participants encouraged the Office of the United Nations High Commissioner for Human Rights to strengthen its ties with the African Commission on Human and Peoples

Rights on questions relating to indigenous peoples and minorities. The meeting also called upon African governments to participate actively in international and regional meetings on indigenous peoples and minorities, including the UN Working Group on Minorities, the UN Working Group on Indigenous Populations, the working group on the draft declaration on the rights of indigenous peoples and the Permanent Forum on Indigenous Issues.

#### **4.5 The importance of the recognition of indigenous peoples in Africa**

The African Commission on Human and Peoples' Rights being a major human rights institution for the whole of Africa can hardly ignore neither the voices of some of the most marginalized sections of the African people nor of the United Nations and the world community. We recognize the concerns over the use of the term *indigenous peoples* in the African context, and there might be a number of issues specific to Africa that need to be discussed in order to reach fruitful common understandings. But it is our position that the overall present day international framework relating to indigenous peoples should be accepted as the point of departure. The principle of self-identification as expressed in the ILO Convention 169 and by the Working Group on Indigenous Populations is a key principle, which should also be guiding in the further deliberations of the African Commission.

As has been argued, it is indeed a fact that Africa is characterized by *multiculturalism*. Almost all African states host a rich variety of different ethnic groups, some of which are dominant and some of which are in subordinate positions. All of these groups are indigenous to Africa. However, some are in a structurally subordinate position to the dominating groups and the state leading to marginalisation and discrimination. It is this situation, which the *indigenous* concept in its modern analytical form, and the international legal framework attached to it, addresses. It addresses the root causes of the subordination – such as for instance the dominant perceptions of development and land use – and is thus a fundamentally different approach than for instance mainstream welfare and poverty alleviation programmes. Several poverty alleviation programmes have been carried out among indigenous peoples. However, whereas these address immediate problems concerning water supply, health facilities etc. they do not remove the structural root causes of the overall subordination and dispossession of these groups.

We find that it is important for a major human rights body like the African Commission on Human and Peoples' Rights to draw attention to the fact that in the present-day de-colonised and multicultural African states there is a serious human rights issue concerning specific marginalized peoples who are being suppressed and discriminated against and whose cultures are under threat. Whatever the specific term to analyse and describe their situation will be, it is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.

It is of course important that the term indigenous peoples is not being misused as a chauvinistic term with the aim of achieving rights and positions over and above other ethnic groups or members of the national community nor as a term by which to nourish tribalism

or ethnic strife and violence. Needless to say, this is absolutely not the spirit of the term. The very spirit of the term is to be an instrument of true democratisation whereby the most marginalised groups/peoples within a state can get recognition and a voice. It is a term through which those groups - among the variety of ethnic groups within a state - who identify themselves as indigenous and who experience particular forms of systematic discrimination, subordination and marginalisation because of their particular cultures and ways of life and mode of production can analyse and call attention to their situation. It is a term through which they can voice the human rights abuses, which they suffer from - not only as individuals but also as groups or peoples. If genuinely understood in this way, it is a term through which the concerned groups can seek to get in dialogue with the governments of their countries over protection of fundamental individual and collective human rights, and over recognition as peoples who have a right to choose their own future destiny.

The debate on the protection of the rights of indigenous peoples can give very constructive input to discussions within African human rights institutions on how to develop modalities of truly democratic multicultural African states where the voices and perceptions of all groups are respected. If allowed to flourish and develop on their own terms, indigenous peoples and communities in Africa have important contributions to make to the overall economic, political, social and cultural development of the states within which they live. They should be seen as an asset, and if the political will exists, it would be very feasible to develop policies that give space and opportunities to all groups within a state.

The concrete elaboration of positive policies, which respect the collective human rights of indigenous groups could very well give new inspiration to ongoing debates on prevention of conflicts on the African continent. As put forward by Ms Samia Slimane during the workshop on multiculturalism held in Mali, the rich ethnic variety within African states should be an asset, but has instead been the source of tensions and conflicts. She stressed that the OAU has failed to integrate an ethnic dimension in its conflict prevention approach despite this being a crucial element in the relationship between human rights and social and political stability in Africa. She pointed out that the African constitutional discourse is in essence unitary because states fear ethnic divisions. However, she emphasized that states can easily adopt legal practices that take into account the variety of identities present on the continent. (Kidal report p.4). Respect for different cultures, identities and modes of production and an inclusive in-cooperation of the rich variety of perspectives and needs of all groups in national policies will go a long way in preventing conflicts. It is important not to hide away from discussing ethnic issues. All over the world history has repeatedly shown that the silencing of ethnic identity does not lead to peace and true unity – only the genuine respect for diversity can lead to this.

#### 4.6 References

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## 5. Conclusion

Mandated by the “*Resolution on the Rights of Indigenous People/Communities in Africa*” this report has attempted to:

1. Analyse the human rights situation of indigenous peoples and communities in Africa
2. Analyse the African Charter on Human and Peoples’ Rights and its jurisprudence on the concept of “peoples”
3. Examine the concept of indigenous peoples and communities in Africa

The overall conclusion is that indigenous peoples and communities in Africa suffer from a number of particular human rights violations that are often of a collective nature; that the African Charter is an important instrument for the promotion and protection of the rights of indigenous peoples and communities; and that the preceding jurisprudence of the African Commission opens a way for indigenous peoples and communities to seek protection of their human rights. The report further concludes that although contested, the term “indigenous peoples” is valuable also in an African context as it offers the victims of particular human rights abuses an important avenue forward to improve their situation.

We shall elaborate a bit more on this overall conclusion:

### **The human rights situation of indigenous peoples in Africa**

The indigenous peoples of Africa display remarkable commonalities. Unlike other indigenous peoples outside Africa, where the aboriginal type of indigeneity is the characteristic feature, Africa's indigenous peoples have their own specific features that reflect from the specific feature of the African state and its role. They have specific attachment to their land and territory; they have specific cultures and mode of production that are distinct from the groups that dominate political, economic and social power. As predominantly traditional systems, they have their own forms of governance, laws that go in the name of customary laws, modes of productions and culture, all deriving from an all-inclusive indigenous knowledge system.

The African peoples who are facing particular human rights violations, and who are applying the term "indigenous" in their efforts to address their situation, cut across various economic systems and embrace hunter-gatherers, pastoralists as well as some small-scale farmers. Similarly, they also practice different cultures, social institutions and observe different religious systems. However, a common feature of indigenous peoples and communities is the type of human rights violations, which they experience.

Indigenous peoples and communities experience a range of human rights violations that ultimately boil down to a threat towards their right to existence and to the social, economic and cultural development of their own choice. *Articles 20 and 22* of the African Charter emphasize that all peoples shall have the right to existence and to the social, economic and cultural development of their own choice and in conformity with their own identity. Such fundamental collective rights are to a large extent denied to indigenous peoples. The analysis in this report of the land dispossession of indigenous peoples, widespread discrimination, denial of cultural rights, exclusion from political representation, lack of constitutional and legal recognition and protection etc. clearly bears witness to this fact.

The report analyses violations of the human rights of indigenous peoples with respect to:

- Violation of right to land and productive resources
- Discrimination
- Violation of the right to justice
- Violation of cultural rights
- Denial of the right to political recognition, representation and participation.
- Denial of rights to constitutional and legislative recognition and protection.
- Violation of rights to health and education.

Though the human rights situation in Africa is diverse, complex and varies from country to country, the human rights situation of indigenous peoples and communities show remarkable commonalities.

A major and critical commonality is that many pastoralists, hunter-gatherers and other groups who have identified with the indigenous peoples' movement have often been evicted from their land or been denied access to the natural resources upon which their survival as peoples depend. This dispossession is caused by a number of factors such as dominating



development paradigms favouring settled agriculture over other modes of production such as pastoralism and subsistence hunting/gathering; establishment of national parks and conservation areas and large scale commercial enterprises such as mining, logging, commercial plantations, oil exploration, dam construction etc. The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to undermining of the knowledge systems through which indigenous peoples have sustained life through centuries and it has led to negation of their livelihood systems and deprivations of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is a serious violation of the African Charter (*Article 20, 21 and 22*) which states clearly that every peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development. The land of indigenous peoples is gradually shrinking and this makes them vulnerable and unable to cope with environmental uncertainty and threatens their future existence.

Indigenous peoples and communities are to a large extent discriminated against by mainstream populations and looked down upon as backward peoples. Many stereotypes prevail that describe them as “backward”, “uncivilized”, “primitive” and “uncultured” and as an embarrassment to modern African states. Such negative stereotyping legitimises official discrimination, marginalisation, subjugation, exclusion and dispossession of indigenous peoples by institutions of governance and dominant groups. The at times extreme discrimination is a cause of profound suffering among indigenous communities and it is a violation of *Article 5* of the African Charter saying that every individual shall have the right to the respect of the dignity inherent in a human being and *Article 19* saying that all peoples shall be equal and enjoy the same respect.

Many indigenous individuals and communities are denied the right to justice, which is enshrined in several of the articles of the African Charter such as *Articles 3, 4, 5, 6 and 7*. The report gives evidence of different case both concerning communities and individuals.

Violation of cultural rights is also a particular form of human rights violation suffered by indigenous peoples. Violation of cultural rights is contrary to the African Charter that states that every peoples have a right to culture and identity (*Article 22*). Violation of cultural rights take different forms and is caused by a combination of factors. For instance loss of key productive resources is impacting negatively on indigenous peoples’ cultures, denying them the right to maintain their livelihood of their own choices and to retain and develop their cultures and cultural identity according to their own wishes.

The failure of many African states to recognize cultural and language rights, hence an admission of cultural diversity, seems to be based on the fear that it is bound to ‘open a can of worms’. This is because it is believed it could lead to separatist demands, within a continent where tribalism and ethnicity risk threatening the continued existence of the unitary state. However, this is to underestimate the value of recognizing cultural and language rights as cultural resources, which can be used for the benefit of all.

Another feature of indigenous peoples and communities is that their representation in the legislative assemblies and other political structures of their respective states tend to be very

weak hence the issues that concern them are not adequately addressed. This is indirectly a violation of *article 13(1)* of the African Charter that guarantees all citizens the right to participation in government of their own country.

Very few African countries recognise the existence of indigenous peoples in their countries. Even fewer do so in their national constitutions or legislation. Lack of legislative and constitutional recognition of their existence is thus a major concern of indigenous peoples.

Most of the areas still occupied by indigenous peoples and communities are under-developed with poor, if any, infrastructure. Social services such as schools and health facilities are few and far apart, while the roads and other physical infrastructure is equally poor. This has had a negative impact on the staffing levels and quality of services offered. As a result, illiteracy levels and mortality rates in such areas are higher than national averages. This constitutes a violation of the African Charter such as:

- *The right of equal access to public service of one's country (article 13 (2))*
- *The right to education (article 17(1))*
- *The right to medical care and attention (article 16(2)).*

Few indigenous peoples have adequate access to schooling. Often school attendance is less than 50% below the national level and literacy levels are also usually very low. The reasons for these low figures could be attributed to a range of factors including unavailability of schools to the unsuitability of the mainstream school curriculum for the needs of the indigenous peoples.

The health situation of indigenous peoples is often very precarious and receive very limited attention from the responsible health authorities. This has to be seen in connection with the general marginalisation that indigenous peoples suffer from economically and politically. On top of this indigenous peoples often live in remote areas where they are easily forgotten. As indigenous peoples receive little political attention and prioritisation and as they to a large extent suffer from impoverishment and low literacy rates, their health situation is in many cases extremely critical. To these have, in recent years, been added alcohol abuse, high levels of domestic violence, crime and depression.

The total picture of the human rights situation of indigenous peoples and communities is a serious cause of concern, and effective protection and promotion of their human rights is urgently required.

This report notes that some positive developments have been taking place on matters such as cultural rights, constitutional recognition and more favourable development policies and in a few cases even on land rights issues. Countries such as among others South Africa, Algeria, Morocco, Rwanda, Mali and Ethiopia could be mentioned. In the midst of a very critical scenario, this is encouraging and a cause for optimism.

It is to be hoped that the African Commission on Human and Peoples' Rights will be part of promoting such positive and much needed improvements in the human rights situation of indigenous peoples.

### **The African Charter and its jurisprudence relating to “peoples”**

The analysis in this report of the African Charter and its jurisprudence relating to “peoples” conclude that both the individual and collective rights provided for in the Charter should be applicable to the promotion and protection of the human rights of indigenous peoples. The relevant articles include: article 2, 3, 5, 17, 19, 20, 21, 22 and 60.

The most challenging issue might be the collective rights of peoples implying a discussion on the understanding of the term “peoples”. As noted in the report, the understanding of “peoples” might initially have been closely associated with colonisation and the need for national liberation from foreign domination. However, as reflected in the Constitutive Act of the African Union, where the objective of eradicating all forms of colonialism has been left out, Africa has moved beyond the need to eradicate colonialism. The African Charter therefore needs to be understood and interpreted in the light of present realities where there is a great need of promotion and protection of the human rights of vulnerable groups and peoples within national states.

No international human rights regime should be static and neither is the African Charter. This is reflected by jurisprudence on peoples' rights such as in the case against the government of Mauritania. Another case in point is the Communication 75/92 *Katangese Peoples' Congress v Zaire*. The Communication was brought in terms of Article 20(1) of the African Charter for an assertion of the Katangese people's right to self-determination. Although the Commission did not decide in favour of the Katangese people, its acceptance of the case was an indication that the Commission was willing to consider cases of alleged violations of human rights of 'people/s'. The communication presented an opportunity for the Commission to elaborate on self-determination and raise the possibility at least that in certain circumstances a matter based on the principle of self-determination can be considered by the Commission. Indeed, since *the Katangese* decision, the Commission has deliberated upon Nigeria cases involving the social and economic rights of the Ogoni people and the black citizens of Mauritania.

The African Charter gives the African Commission, when dealing with issues brought before it, the mandate to have recourse to international law principles on Human and Peoples' Rights.

Article 60 states:

The Commission shall draw inspiration from international law on Human and Peoples' Rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights as well as from the provisions of various instruments

adopted within the Specilised Agencies of the United Nations of which the parties to the present Charter are members.

When dealing with Communications brought by people who identify themselves as indigenous or when considering National Periodic Reports, the African Commission should have recourse to, and be ‘inspired’ by the various international human rights instruments. Although only a handful of African states have ratified ILO Convention 107 of 1957 and none have ratified ILO Conventions 169 of 1989, both these Conventions are part of international law and should be considered by the African Commission. An important matter to be considered is that ILO Convention 169 of 1989 recognises the principle of self-identification as an important criterion. It could be argued that irrespective of the fact that many African states do not recognise the existence of indigenous people within their territories and some take the view that the concept of indigenous people is not applicable in Africa, Article 1.2 of ILO Convention 169 of 1989 grants rights and protection to people identifying themselves as indigenous in Africa.<sup>127</sup>

Further, the ICCPR and the ICESR are also part of international law and a number of African states have ratified these Conventions as well as other United Nations conventions that protect rights of indigenous people. There is therefore an obligation on African states to honour rights granted to indigenous people under common Article 1 of the ICCPR and the ICESR as well as Article 27 of the ICCPR.

The Working Group on the Rights of Indigenous People/Communities in Africa takes the view that many of the provisions of the African Charter offer protection to indigenous peoples in Africa. The rights to equality and human dignity in Articles 2, 3 and 5 are available to all individuals, including individual members of indigenous communities. It is significant that Article 2 states that the rights guaranteed in the African Charter are applicable to every individual without distinction of any kind, including national or social origin.

The Working Group also takes the view that as the African Charter recognises collective rights, formulated as rights of ‘peoples’, these rights should be available to sections of populations within nations states, including indigenous peoples and communities and the Commission has indeed started to interpret the term ‘peoples’ in a manner that should allow indigenous people to also claim protection under Articles 19 – 24 of the African Charter. By recognising rights of a section of a population to claim protection when their rights are being violated, either by the state or by others, the African Commission has opened the way for indigenous peoples to claim similar protection. This is very encouraging and it is to be hoped that this development will continue, making the African Charter and the African Commission major avenues for the promotion and protection of the human rights of indigenous peoples in Africa.

A promising process concerning recognition of the importance of protecting and promoting the human right of indigenous peoples has started in the African Commission. The very

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<sup>127</sup> Tong, Maureen, The UN Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Affairs* 2/2002 IWGIA

establishment of the Working on the Rights of Indigenous People/Communities in Africa bears witness to this. During state reporting at its 29<sup>th</sup> Ordinary Session, the African Commission for the first time questioned states what measures have they taken to address the human rights situation of indigenous people in their countries, and indigenous representatives have since the 29<sup>th</sup> Ordinary Session started participating in the sessions of the Commission and voicing their concerns.

This is an important process for strengthening the human rights protection of particular vulnerable and marginalized groups within contemporary African states.

### **The concept of indigenous peoples**

The Working Group recognizes the concerns over the use of the term *indigenous peoples* in the African context. However, we sincerely hope that the concerns will not block necessary and much needed constructive action. It is our position that the overall present day international framework relating to indigenous peoples should be accepted as the point of departure. The principle of self-identification as expressed in the ILO Convention 169 and by the Working Group on Indigenous Populations is a key principle, which should also be guiding in the further deliberations of the African Commission.

As has been argued, it is indeed a fact that Africa is characterized by *multiculturalism*. Almost all African states host a rich variety of different ethnic groups, some of which are dominant and some of which are in subordinate positions. All of these groups are indigenous to Africa. However, some are in a structurally subordinate position to the dominating groups and the state leading to marginalisation and discrimination. It is this situation, which the *indigenous* concept in its modern analytical form, and the international legal framework attached to it, addresses. It addresses the root causes of the subordination and it emphasizes the human rights dimension for addressing the issues.

We find that it is important for a major human rights body like the African Commission on Human and Peoples' Rights to draw attention to the fact that in the present-day de-colonised and multicultural African states there is a serious human rights issue concerning specific marginalized peoples who are being suppressed and discriminated against and whose cultures are under threat. It is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.

It is of course important that the term indigenous peoples is not being misused as a chauvinistic term with the aim of achieving rights and positions over and above other ethnic groups or members of the national community nor as a term by which to nourish tribalism or ethnic strife and violence. Needless to say, this is absolutely not the spirit of the term. The very spirit of the term is to be an instrument of true democratisation whereby the most marginalised groups/peoples within a state can get recognition and a voice. It is a term through which those groups - among the variety of ethnic groups within a state - who identify themselves as indigenous and who experience particular forms of systematic discrimination, subordination and marginalisation can seek to improve their human rights

situation. It is a term through which they can voice the human rights abuses, which they suffer from - not only as individuals but also as groups or peoples.

## **RECOMMENDATIONS**

1. That the African Commission on Human and Peoples' Rights should establish a focal point on indigenous issues within the Commission. The focal point could be in the form of a special rapporteur once the Commission finalises its review of the special rapporteur mechanism;
2. That the African Commission on Human and Peoples' Rights should establish a forum which brings together indigenous participants, experts and other human rights activists to meet regularly in the context of the sessions of the Commission to consider developments in the field of the rights of indigenous populations/communities in Africa, give expression to the voices of indigenous people and formulate advisory opinions for consideration by the Commission. Rule 29 allows for the establishment of a sub-commission;
3. That the African Commission on Human and Peoples' Rights, in partnership with IWGIA, should publish the final report of the Working Group in French and English for wide distribution among African governments and policy makers in international development;
4. That the work on elaborating the concept of 'peoples' in the light of the collective rights of indigenous populations, should continue;
5. That as the Commission reviews its Rules of Procedure, that specific inquiries on indigenous populations in Africa be inserted for the purposes of a.62 reports, the work of all special rapporteurs and in the mission reports of members of the Commission;
6. That the African Commission on Human and Peoples' Rights should remain seized on the matter of "The Rights of Indigenous Populations in Africa" which should remain an Agenda item at all Ordinary Sessions of the Commission;
7. That until such time as a final decision is taken as to paragraphs 1 and 2 above, the Working Group should continue to serve as the focal point for deliberations on this matter.