

LLD THESIS PROPOSAL

**PROTECTING INDIGENOUS PEOPLES' RIGHTS TO
LAND AND RESOURCES: A CASE STUDY OF
KENYA AND SOUTH AFRICA**

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1 Background to the study

There is no consensus on the definition of indigenous peoples.¹ A definition by Martinez Cobo, the first United Nations Special Rapporteur on the issue of discrimination against indigenous peoples states that:

Indigenous peoples, communities, people and nations are those which have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories; consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²

Cobos definition focuses on historic continuity with pre-invasion and pre-colonialism in the traditional sense of European colonisation. This definition seems to exclude indigenous peoples in Africa and Asia since all their inhabitants have a historical continuity with pre-invasion and pre-colonial societies.³

¹ For some definitions of 'indigenous peoples,' see for example the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986, UN Doc. E/CN.4 Sub.2 1986/7/Add. 1-4 (José Martín Cobo, Special Rapporteur, hereinafter Cobos definition). See also World Bank Group, Operations Policy and Country Services, vol. 2, Operational Directive 420, articulating indigenous groups in relation to their possessing 'a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development processes. See also S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed, Oxford University press, 2004, 3, defining indigenous peoples as 'living descendants of pre-invasion inhabitants of lands now dominated by others. They are culturally distinct groups that find themselves engulfed by other settler societies born of forces of empire and conquest'; see a critique of the definitions by Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 1999, *12 Harv. Hum. Rts. J.* 5, 110-115 with regard to their tendency to exclude some otherwise applicable categories or to include those who do not squarely fall within the indigenous framework. For example, Anaya's definition does not account for situations where indigenous peoples constitute a majority (as in Fiji, Bolivia, Mexico) or where a whole population is indigenous, as in Iceland, Tonga and Papua New-Guinea. See also Chidi Oguamanam, Indigenous Peoples and International Law: The Making of a Regime, 30 *Queen's L.J.* 348, *Queen's Law Journal*, Fall, 2004. See also Joy Asiema & Francis Situma, Indigenous Peoples and the Environment: The Case of the Pastoral Maasai of Kenya, 5 *Colo. J. Int'l Env. L. & Pol'y* (1994).

² Cobos definition, as above note 1.

³ Lucia Fresa, A new interpretation of the term 'indigenous people': what are the legal consequences of being recognised as 'minorities' instead of as 'indigenous people' for the indigenous people of the world? *Anno Academico* 199-2000, 5. sourced from <www.studiperlapace.it/documentazione/fresa.html> accessed on 10 August 2005

Most indigenous groups in Africa though not under foreign domination are still oppressed by equally 'original' inhabitants of neighbouring lands that have now become the dominant groups of their society.⁴

This may explain why many states in Africa do not recognise the existence of indigenous people within their territories with some taking the view that the concept of indigenous people is not applicable in Africa.⁵ For instance during the 36th Ordinary Session of the African Commission on Human and Peoples' Rights in Dakar, Senegal, in December 2004, the State Delegates from the Republic of Rwanda insisted that the concept of indigenous peoples does not exist in Rwanda and the Batwa people⁶ could not be regarded as such.⁷

While there is no clear cut definition of indigenous peoples, it is necessary to set out criteria that would be applicable in Africa.⁸ This is particularly important in this

⁴ Chidi Oguamanam, as above, note 1.

⁵ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session in Cotonou Benin, 12.

⁶ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, as above note 5, 15. The Batwa people are regarded as indigenous peoples in the Great Lakes region which comprises Rwanda, Burundi, Uganda and Democratic Republic of Congo.

⁷ See the Draft Report of the 36th Ordinary Session of the African Commission on Human and Peoples' Rights.

⁸ Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs Erika-Irene Daes on the Concept of "Indigenous People," U.N. ESCOR, Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, 1996, 5 (Hereinafter Daes Concept Paper) Daes stated that it is her considered opinion that the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the World; Rudolfo Stavenhagen, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples concurs that there is no internationally agreed upon definition of indigenous peoples. He states that 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

research since the classical definitions seem to focus on aboriginality⁹ which may not reflect the situation of such groups in the continent.¹⁰

Erika Daes avers that the ideal type of an 'indigenous people' is a group that is aboriginal to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory.¹¹ This seems to suggest that the ideal 'indigenous peoples' are the 'first peoples' of a certain territory. However, the term 'indigenous peoples' has acquired a much wider meaning than a question of 'first peoples'.¹² The term 'indigenous' broadly refers to the living descendants of pre-invasion inhabitants of lands now dominated by others.¹³ The groups are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.¹⁴

In Africa, almost all communities can claim aboriginality to Africa. Most communities on the continent experienced varied migratory patterns before and after European colonialism for reasons ranging from forceful eviction, economic to natural calamities such as drought. The African Commission's Working Group of Experts on Indigenous Populations/Communities, acknowledges that indeed all Africans can claim to be indigenous to Africa in the sense that they were in their

protection of the human rights of indigenous peoples, cited in *Human Rights and Indigenous Issues* 2003, para 92.

⁹ See Cobo's definition, as above note 1.

¹⁰ Asbjorn Eide & Erika Irene Daes, Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples, *E/CN.4/Sub.2/2000/10*, para 37.

¹¹ Asbjorn Eide & Erika Irene Daes as above note 10, para 48.

¹² Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 87.

¹³ James Anaya, *Indigenous Peoples in International Law*, New York: Oxford University Press, 1996, 3.

¹⁴ James Anaya, as above.

current territories before European colonialism and were subjected to subordination.¹⁵

The term 'indigenous', is today used by particular marginalised groups in a modern analytical form of the concept (which does not focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from.¹⁶ These are groups who have, due to past and ongoing processes, become marginalised in their own countries and they need recognition and protection of their basic human rights.¹⁷ Their culture and way of life has been subject to discrimination and contempt and whose very existence is under threat of extinction. The groups feel that they have been left on the margins of development and are perceived negatively by dominating development paradigms.¹⁸ The communities are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁹

The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities summarises the characteristics of groups identifying themselves as indigenous peoples in Africa as follows:

Their cultures and ways of life differ considerably from the dominant society and 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 discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, 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.²⁰

¹⁵ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, as above, 88.

¹⁶ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5 as above, 88.

¹⁷ As above, 86.

¹⁸ As above, 87.

¹⁹ Cobos definition, as above note 1.

²⁰ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 90.

These characteristics indicate that certain groups of people in Africa even after colonialism continue to suffer discrimination. Erika Daes offers a set of factors she considers relevant in the understanding of the term indigenous:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) 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;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as distinct collectively; and
- (d) An experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.²¹

The priority in time factor as the sole criteria for identifying indigenous peoples would be problematic in Africa since migratory patterns all over the continent indicate that communities have changed their territories over time. However, certain communities have inhabited certain territories for considerable long periods before, during and after colonialism and as such have formed strong and often spiritual bonds with their lands.

The voluntary practice and perpetuation of their culture to generations is a key factor in identifying indigenous peoples. Unlike most mainstream communities, indigenous peoples seek to retain and transmit to future generations their distinct cultural, social and economic practices. The majority of these groups are hunter gatherers or former hunter gatherers and pastoralists.²²

In Africa as in the international level the identification criteria that is gaining universal acceptance is self identification and recognition on contemporary situations of these people.²³ This is the identification by the people themselves of their distinct cultural identity. The principle of self-identification has been adopted by the International Labour Organization Convention 169 Concerning Indigenous

²¹ Daes Concept Paper, as above note 8, para 69, 22.

²² Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 89.

²³ As above, 93. See also Art 1.2 ILO Convention 169, as below note 24.

and Tribal Peoples in Independent Countries²⁴ and by the United Nations Working Group on Indigenous Peoples to identify indigenous peoples.

The principle of self identification focuses on indigenous peoples' 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. It is also linked to their experience of subjugation, marginalization, dispossession, exclusion or discrimination because of their cultures, ways of life or modes of production which is different from that of the national hegemonic and dominant model.²⁵

Some groups identified as indigenous in Africa are for example hunter gatherer communities such as the Batwa/Pygmy people of the Great Lakes region,²⁶ the San of Southern Africa,²⁷ the Hadzabe of Tanzania²⁸ and the Ogiek of Kenya.²⁹

²⁴ The ILO Convention 169, art 1.1 defines 'indigenous' peoples as: peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. Art 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. The 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 art 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 art 1.2. See *ILO Manual on Convention 169 of 1989*, 8.

²⁵ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, as above note 5, 93.

²⁶ As above, 15. The Batwa/pygmies people live in the equatorial forests of Central Africa and the Great Lakes region. They have different names and language according to the forests they live but trace a common ancestry and are called the Batwa in Rwanda, Burundi Uganda and the eastern region of the Democratic Republic of Congo (DRC). They are referred to as the *Bambutu* 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 *Babendjele* in the North-West Congo basin and *Baka* and *Bagyeli* in Cameroon.

²⁷ As above, 16. The San in Southern Africa are located in Botswana, Namibia, Zimbabwe, Zambia and Angola. They number approximately 107000 people.

²⁸ As above, 15. The hadzabe number approximately 1200 to 1500 people and inhabit an area of Northern Tanzania commonly referred to as the Lake Eyasi basin. They pursue a semi nomadic hunting and gathering lifestyle but have recently taken up small scale agriculture and trading with neighbours.

Examples of pastoralist communities regarded as indigenous are the Maasai of Kenya and Tanzania,³⁰ the Mbororo who are spread over Cameroon and other West African countries,³¹ the Himba of Namibia³² and the Tuareg/Berbers of West and North Africa.³³ The groups highlighted here are only a few examples of communities who identify themselves as indigenous. It is neither comprehensive nor exhaustive but gives a general idea of some of the groups in Africa who would fit within the indigenous rights regime.

This research will explore the question of indigenous peoples' rights to land and resources and the conflict with national interests. The scope of the study is limited to an examination of the protection of indigenous peoples' rights to land and resources in Kenya and South Africa. The study discusses the conflict between collective land ownership as sought by indigenous peoples and individual land tenure systems as enshrined in the legislations of the two countries. It also looks at the impact of development projects in the territories inhabited by indigenous communities on their rights to land and access to resources. An analysis of some select domestic court cases in the countries under study is made for comparative purposes.

The study examines international, regional and some selected country standards and jurisprudence. This forms the basis of a comparative analysis with the countries under study. The analysis identifies best practices, deficiencies and

²⁹ As above. The Ogiek mainly live on the Mau Escarpment in the Rift Valley Province of Kenya and they number approximately 15000 to 20000 people.

³⁰ As above, 17. The Maasai are found in Southern Kenya (Kajiado, Narok, Transmara, Laikipia and parts of Baringo districts) and stretch to Northern Tanzania (Monduli, Simanjiro, Kiteto and Ngorongo of Arusha region).

³¹ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 18. The Mbororo are also referred to as Fulanis and can be found in Niger, Cameroon, Burkina Faso, Nigeria, Senegal, Mali, Benin, Chad and Central African Republic. Some are nomadic pastoralists while other practice mixed farming. The Mbororos are further divided into three main groups; the Jafun, The Woodabe and the Aku.

³² As above, 18. The Himba are a nomadic pastoral people who live in relative isolation in the Kunene region of Namibia.

³³ As above, 18. The Tuareg also commonly referred to as Berbers are mainly found on Southern Algeria, northern Mali and Niger, a few in Libya, Burkina-Faso and Mauritania.

postulates possible options in the protection of indigenous peoples' rights to land and resources in Kenya and South Africa whilst balancing national interests of a state. This could also be applicable to other countries in similar circumstances in Africa on the protection of indigenous peoples' rights to land and resources.

2 Problem statement

The right to land and resources is crucial to indigenous peoples' struggle for existence and is intimately related to their right to culture and identity.³⁴ The ILO Convention 169 makes it clear that governments, in applying the provisions of Part II of the Convention,³⁵ must respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspect of this relationship.³⁶ 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 as envisaged in the African Charter on Human and Peoples' Rights.³⁷

Of the common traits that indigenous peoples share, probably the most notable are the retention of a strong sense of their distinct culture and a strong identification with their ancestral lands.³⁸ They conceive of their land as a substance endowed with sacred meanings, which defines their existence and identity and to which they are inextricably attached. The social relations of indigenous peoples are often tribal, involving collective or communal management of natural resources, thick

³⁴ Indigenous Peoples of Southern Africa, *IWGIA*, 2004, 11.

³⁵ Part II of the ILO Convention 169 deals with Land (art13-19).

³⁶ The ILO Convention No.169 as above note 24, art 13.1.

³⁷ African Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), entered into force Oct. 21, 1986(hereinafter African Charter),art 20, 21, 22 and 24 of the African Charter; Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 21;

³⁸ Joy K. Asiema & Francis D.P. Situma, as above note 1, 150. See also Study on Indigenous People and their Relationship to Land, by Erika Irene Daes, UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999, para.18.

networks of bonds among individuals, and group decision making, often by consensus among elders.³⁹

This is in consonance with the provisions of the Draft Declaration on Indigenous Populations whose preamble recognizes territorial rights as one of the inherent rights of indigenous peoples, deriving from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.⁴⁰ The Declaration provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used.⁴¹ They have the right to own, develop, control and use their lands and territories.⁴² They also have the right to the restitution of the lands, territories and resources which have been confiscated, occupied, used or damaged without their consent or at least they have the right to just and fair compensation.⁴³

The close attachment to land and the collective nature of their claim to land and resources form the core content of this research. The research draws a distinction between indigenous peoples' claims for collective rights to land and resources⁴⁴ and individual land tenure systems as advanced by the laws of both countries. The individual land tenure systems have also affected indigenous peoples' way of life and are seen to mainly benefit mainstream communities to the detriment of

³⁹ See Julian Burger, (Ed), *Indigenous Peoples, a Global Quest for Justice, a Report for the Independent Commission on International Humanitarian Issues*, 1987 quoted in Joy K. Asiema & Francis D.P. Situma, as above note 1, 150.

⁴⁰ For the text of the Draft Declaration see, Report of the Working Group on Indigenous Populations on its Eleventh Session. *U.N. Doc. E/CN.4/Sub.2/1993/29* at pp 50-60. The Draft was approved by the Sub Commission in 1997 and presently is under consideration of the Commission of Human Rights. The Draft is expected to be submitted to ECOSOC and thereafter submitted for proclamation by the UN General Assembly.

⁴¹ Draft Declaration, as above note 40, art 25.

⁴² Draft Declaration as above, art 26.

⁴³ Draft Declaration as above, art 27.

⁴⁴ B.R. Howard, Human Rights and Indigenous People: On the Relevance of International Law for Indigenous Liberation', 35 *German Yearbook of International Law* 1992, 143.

indigenous peoples.⁴⁵ The study also looks at some of the conservation and large scale infrastructure projects in the name of national development in the two countries that affect indigenous peoples' rights and access to land and resources.⁴⁶ These projects have led to territorial dispossession of indigenous peoples and affected their way of life. The research looks at the impact of these projects to indigenous peoples in view of national development projects and state interests.

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

⁴⁵ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as note 5, 24. For example in Kenya in the 1970s the World Bank sponsored a land titling project whose intention was to increase agricultural productivity through the introduction of individual titles. However the effect was decreased productivity, serious insecurity of tenure, landlessness and economic vulnerability. These policies continue in Kenya with many disastrous effects for the pastoralists, especially the Maasai, who have ended up losing their land that is crucial to their livelihood and many today find themselves completely impoverished. There are also examples of treaties signed between the British and the Maasai in 1904 and 1911 which are currently subject to international judicial action that evicted the Maasai from their best land to make room for colonial settlers which have never been settled. Indeed at the Lancaster House Conference in the 1960s, the Maasai refused to sign the constitutional arrangements on account of disagreements over their land question; See also Joy K. Asiema & Francis D.P. Situma, as above note 1, 149; On the San in South Africa, see Suzman, James, *Regional Assessment of the Status of the San in Southern Africa*, Legal Assistance Centre (LAC) April 2001, 34.

⁴⁶ These could be for example conservation projects, establishment of national parks and reserves, mining and construction projects. In Kenya for example the establishment of the National Parks such as the Manyara, Serengeti, Maasai Mara, Amboseli has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival without compensation supposedly in the national interest; The ancestral land of the Ogiek in Kenya in the Mau forest has also been declared a protected forest area. However the same forest has been encroached by logging companies and outsiders for other purposes to the extent the Ogiek have lodged High Court applications over the matter, see *The Indigenous World 2002/2003, IWGIA*, Copenhagen, 2003. There is therefore need to weigh and strike a balance between the need to earn foreign revenue through tourism and conservation and the rights and interest of communities affected by such projects.

of their resource bases and food insecurity. This situation has been promoted by the assumption that the land occupied by the pastoralists and hunter-gatherers belongs to no one in particular or to the State. 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 land ownership.⁴⁷ 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 which is their main source of livelihood.⁴⁸

In the countries under study, settled agriculture, mining, and modern development schemes are seen as the way to development and certain types of indigenous African systems, such as nomadic pastoralists, hunting and gathering, are looked upon negatively and their future survival and development is put in jeopardy.⁴⁹ The sustainability and development potentials of these cultural systems are ignored and they are perceived as being primitive, uneconomic and environmentally destructive and as being incompatible with modernisation. By taking this approach, many African States overlook a considerable economic resource. It is increasingly being recognised in development discourses that respect for cultural diversity is an important aspect of poverty alleviation. This is for instance reflected in the UNDP's Human Development Report 2004 'Cultural Liberty in Today's Diverse World'

⁴⁷ See generally Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above note 5, 29

⁴⁸ Xanthaki A, Collective Rights of Indigenous Peoples, *Amicus Curiae* Institute of Advanced Legal Studies 2000, 25.

⁴⁹ See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as note 5, 29. 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 pastoralists bias dominating rural development policies encourages the spread of farming at the expense of pastoralism often leading to conflicts over scarce resources.

which analyses why respect for cultural diversity is an important precondition to reach the Millennium Development Goals.⁵⁰

Poverty alleviation is not sustainable where the economic activities of indigenous peoples are not supported by the State on the basis that it does not add value to the mainstream economy. These are people who have supported their lifestyles in line with their cultural aspiration and choose to keep it that way. The evictions from their lands or denial of access to the natural resources upon which their survival as peoples depend is a sure way of increasing poverty. The dispossessions are usually within legislations and government policies caused by a number of factors such as dominating development paradigms favouring settled agriculture over other modes of production; establishment of national parks and conservation areas and large scale commercial enterprises such as mining, logging, commercial plantations, oil exploration, dam construction amongst others. 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 research looks into legitimization of the dispossessions of indigenous peoples' rights to land and resources and evaluates possible means to protect their rights nationally and regionally. The research will discuss in detail certain indigenous groups in reference to their rights to land and resources such as the Maasai and the Ogiek communities in Kenya.⁵¹ In April 2005 for instance, the Maasai in Kenya were embroiled in inter ethnic conflicts with one of the mainstream communities; the Kikuyu over scarce water resources and have also lodged various land claims

⁵⁰ United Nations Development Programme (UNDP) Human Development Report 2004 sourced at <<http://www.hdr.undp.org/report/global/2004>> accessed on 26 January 2005.

⁵¹ See further on the Maasai, Joy K. Asiema & Francis D.P. Situma as above note 1. These are the two main groups considered indigenous communities in Kenya. For purposes of this research these two communities will be at the centre of the discussions without prejudice to the fact that there could be a number of other indigenous communities in Kenya.

and suits in courts.⁵² The Ogiek Community in Kenya are facing extinction and have been evicted from their forest lands.⁵³ The Ogiek are 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 20,000.⁵⁴

In South Africa the Khoi-Khoi⁵⁵ and Khoi San⁵⁶ are the main groups the research will consider. The San describe themselves in terms of their dialect groups such as the Xu, Khwe, Nama, Naro, and Qgoon.⁵⁷ In South Africa they are mainly found in the Western Cape. While indigenous peoples in both countries suffer similar problems in terms of discrimination with regard to their land and resources rights, the recent decision upheld by the Constitutional Court of South Africa in the Richtersveld case⁵⁸ in which the Khomani San and the Richtersveld Nama were able to get their land claims recognised will be discussed and lessons learnt shared.⁵⁹

⁵² Sourced from <www.water.org/crisis/headlines.htm - 199k> accessed on 20 October 2005

⁵³ Towett J. Kimaiyo, *Ogiek Land Cases and Historical Injustices* 1902-2004.

⁵⁴ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities as above, note 5.

⁵⁵ Tlou and Campbell, *History of Botswana*, Macmillan, Botswana, 1984, 21. They are also referred to as the Khoe Khoe cited in the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, 59.

⁵⁶ There is no regionally acceptable collective term to describe the San. They have also been referred to as the Basarwa, Bushmen, San, Ovakurcha. See Tlou and Campbell as above. According to Tlou and Campbell "San" means those who gather wild fruits. This name was apparently given to the San by the Khoe Khoe. They have also been called Bushmen meaning people who live in the bush or unoccupied territory.

⁵⁷ Tlou and Cambell, as above note 55.

⁵⁸ *Alexkor Ltd and Another v Richtersveld Community and Others*, CCT19/03 sourced from <<http://www.constitutionalcourt.org.za/Archimages/758.PDF>> accessed on 10 October 2005.

⁵⁹ Yvette Trahan, *The Richtersveld Community & Others V. Alexkor Ltd*. Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System, 12 *Tul. J. Int'l & Comp. L.* 565. The present Richtersveld population descends from the Nama people, who are thought to be a subgroup of the Khoi people. These people were a "discrete ethnic group" who "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle." The primary rule of these people was that the land of their territory belonged to their community as a whole.

3 Research questions

This research will seek to address the following main questions:

- Is the concept of indigenous peoples applicable in Africa?
- Who are indigenous peoples in the countries under study?
- Is collective land ownership the solution to indigenous peoples' land and resource claims?
- How should the conflict between Indigenous peoples' rights to land and resource rights and national interests be addressed?
- Is the legal protection in place and protection in practice adequate?
- How can national and regional human rights protection mechanisms effectively protect these rights?

4 Aims and objectives of the study

The general objectives of the study are to:

- outline the criteria for identification of indigenous peoples in the regions under study;
- analyse the international protection mechanisms of indigenous peoples' right to land and resources.
- analyse the extent of protection of indigenous peoples' rights to land and resources in the countries under study;
- seek to address the conflict between indigenous peoples' rights to land and resources and national interests.
- make a conclusion and discuss possible options for the protection of indigenous peoples' rights to land and resources in the two countries under study that would also be applicable to most of the other countries in Africa generally.

5 Research methodology

This research will primarily be by way of literature review available on the indigenous people's rights in Kenya and South Africa. It will also look at treaties, conventions, statutes, constitutions, government policies and case law. The research will do a comparative analysis of available literature and jurisprudence on the international, regional and national human rights protection mechanisms in Kenya and South Africa.

Where possible, participate in the meetings of the African Commission on Human and Peoples Rights Working Group on Indigenous Populations and such other conferences, discussions, workshops and seminars on indigenous peoples' rights to gather further information and views on the subject. The research will also seek views of indigenous persons, government officials and other stakeholders on the subject.

6 Literature review

There are several studies on Indigenous Peoples in Africa but none is specific on protecting land and resource rights in Kenya and South Africa. The available related literature generally deals with case studies on indigenous populations on the continent.⁶⁰ The International Work Group for Indigenous Affairs has also done a number of publications on indigenous peoples rights on the region for example a recent publication titled *Indigenous Peoples' Rights in Southern Africa*⁶¹. The book analyses the civil and political rights situation of the Indigenous populations in Southern Africa. This research on the other hand is specific and concentrates on indigenous peoples' rights to land and resources in Kenya and South Africa and

⁶⁰ See for example 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*, IWGIA 2000; Xanthaki as above note 58; Hitchcock, Robert *Kalahari Communities: Bushmen and the Politics of the Environment in Southern Africa* IWGIA Document 79, 1996; Suzman, as above note 45.

⁶¹ *Indigenous Peoples in Southern Africa*, IWGIA, Copenhagen 2004.

explores the mechanisms available for the protection of these rights domestically and regionally.

The Forest Peoples Programme⁶² has also documented the impact of ten conservation projects on the lives and futures of indigenous peoples in seven African countries. The book documents the experiences of the indigenous peoples on the conservation projects and adopts a factual rather than a legal analysis of the protection of indigenous peoples' rights to land and resources. This study on the other hand adopts a factual and legal analysis of the available national protection mechanisms and compares it with international jurisprudence and regional protection mechanism. The research analyses national laws, constitutions, the African Charter and the jurisprudence of the African Commission in addressing the indigenous peoples' rights to land and resources. This study is therefore unique in addressing the indigenous peoples' rights to land and resources from the perspective of existing national human rights protection mechanisms as compared to other regional and international jurisprudence.

This research also adopts a different approach from the treatment of the question of indigenous peoples' rights by most of the available literature on the subject which is mainly based on the European, American, and Australian definitions of indigenous peoples as first peoples.⁶³ The research will certainly benefit from the views expressed by number of journal articles and literature on the subject which are highlighted on the proposed bibliography.

7 Limitations of the study

The main limitation envisaged in this study is the lack of recognition and acceptance by a number of governments in the regions under study that there exist indigenous peoples in their countries. The scope of this research is also only limited to the protection of land and resource rights. While acknowledging that

⁶² Forest Peoples Programme, *From Principles to Practice, Indigenous Peoples and Protected Areas in Africa*, 2003.

⁶³ See definitions as above note 1.

indigenous peoples suffer many forms of human rights violations this study intends to only deal with the protection of land and resource rights in Kenya and South Africa.

Resources may also limit the scope of the research since it is mainly based on library and archival research and views exchanged with experts and stakeholders on the subject. A possible field study would entail a sizable amount of financial resources which may not be available.

8 Chapters overview

This research will be divided into seven chapters. Chapter one is an introduction and will set out the content of the research and identify the problem (Protecting land and resource rights of indigenous people and the conflict with national interests). The chapter will outline criteria for identifying indigenous peoples in Africa, specifically in Kenya and South Africa. It also explores the reasons as to why the concept of minorities' rights may not be sufficient to address the rights of indigenous persons.

Chapter two will discuss the international standards for the protection of indigenous peoples' rights. This will be by analyzing international instruments, relevant standard setting institutions and emanating jurisprudence. It looks at the work of the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Affairs as well as the UN Special Rapporteur on Indigenous Peoples' Rights.

Chapter three will discuss the regional standards and jurisprudence such as from the African Commission on Human and Peoples' Rights, the Inter American Human Rights System, the European Human Rights system with a view to making a comparative study that could inform the country study comparative analysis.

Chapter four will discuss relevant jurisprudence of selected domestic courts that have sought to protect indigenous peoples' rights. This will be useful in making a comparative analysis in chapter seven that will inform best practices and protection regimes of indigenous peoples' rights to land and resources.

Chapter five will discuss in detail indigenous peoples' land and resource rights in Kenya and South Africa. This will be an analysis of the extent statutes, case law and policies protect indigenous peoples' rights to land and resources.

Chapter six will make a comparative analysis of two countries protection standards with the international, regional and other domestic standards. The Chapter will also discuss indigenous peoples' collective rights to land and resources and the conflict with national interests and development. The chapter will seek to identify best practices, deficiencies and postulate possible options in the protection of land and resource rights in Kenya and South Africa that could also be used by other countries in Africa.

Finally chapter seven will draw conclusions.

CHAPTER ONE: INTRODUCTION

- 1.1 Introduction
- 1.2 Minorities or indigenous peoples
- 1.3 Criteria for identifying indigenous peoples in Africa
- 1.4 Individual versus collective rights
- 1.5 Indigenous peoples land and resource rights and the conflict with national interests
- 1.6 Chapters overview

CHAPTER TWO: INTERNATIONAL PROTECTION STANDARDS FOR THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS

2.1 Introduction

2.2 Historical developments

2.3 Towards international standards

2.4 Sources of the international standards

2.5 Binding instruments

2.5.1 The International Covenant on Civil and Political Rights (ICCPR)

2.5.2 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

2.5.3 International Labour Organization (ILO) Convention 107

2.5.4 International Labour Organization (ILO) Convention 169

2.6 Non binding instruments and standard setting institutions

2.6.1 The Working Group on Indigenous Populations

2.6.2 The UN Draft Declaration on the Rights of Indigenous Peoples

2.6.3 The Permanent Forum on Indigenous Issues

2.6.4 The UN Special Rapporteur on Indigenous Peoples' Rights

2.7 The International standards on protection of indigenous peoples' rights to land and resources

2.7.1 The right to collective control, ownership, use and enjoyment of indigenous peoples' lands and resources

2.7.2 Consultation and participation in the use, management and conservation of their resources

2.7 Chapter conclusion

CHAPTER THREE: REGIONAL PROTECTION STANDARDS FOR THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS

- 3.1 Introduction
- 3.2 The African human rights system
 - 3.2.1 The African Commission on Human and Peoples' Rights
 - 3.2.1.1 State reporting
 - 3.2.1.2 Individual communications
 - 3.2.1.3 The African Commission's Working Group of Experts on Indigenous Populations/Communities
- 3.3 The Inter-American human rights system
 - 3.3.1 The Inter-American Commission on Human Rights
 - 3.3.2 Jurisprudence of the Inter-American Court on Human Rights
- 3.4 The European human rights system
 - 3.4.1 Jurisprudence of the European Human Rights Court
- 3.5 Chapter conclusion

CHAPTER FOUR: COMPARATIVE DOMESTIC JURISPRUDENCE ON INDIGENOUS PEOPLES' RIGHTS TO LAND AND RESOURCES

- 4.1 Introduction
- 4.2 Canada
- 4.3 Australia
- 4.4 New Zealand
- 4.5 Chapter conclusion

CHAPTER FIVE: INDIGENOUS PEOPLES' RIGHTS TO LAND AND RESOURCES IN KENYA AND SOUTH AFRICA

- 5.1 Introduction

5.2 Identifying indigenous peoples in Kenya and South Africa

5.3 Land and resource rights of indigenous peoples

5.3.1 The pastoralists

5.3.2 The hunter gatherers

5.4 Individual versus collective land tenure systems

5.4.1 Legislative framework

5.4.2 Judicial protection

5.4.3 Policy and institutional framework

CHAPTER SIX: COMPARATIVE ANALYSIS

7.1 Introduction

7.2 Towards better protection standards

7.2.1 Collective right to land and resources

7.2.2 Balancing between indigenous peoples' land rights and national interests

CHAPTER SEVEN: CONCLUSION

George Mukundi: LLD Thesis Reading List

Main Subject: International Human Rights Law

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