ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

Definition and Rights of Indigenous Peoples: The Case of Ethiopia

BY

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A THESIS SUBMITED TO THE COLLEGE OF LAW AND GOVERNANCE STUDIES ADDIS ABABA UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS IN HUMAN RIGHTS LAW (LL.M)

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Declaration

I the undersigned declare that this thesis is my original work, has not been presented for the degree in other university and that all sources of materials used in this thesis have been duly acknowledged.

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Date: - June, 2016

This thesis has been submitted for examination with my approval as a University advisor.

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Date: - June, 2016

APPROVAL SHEET BY BOARD OF EXAMINERS

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Dedicated to

My beloved Son Maranata

Abstract

In the last three decades, indigenous peoples worldwide have been successful in bringing about legal changes in favor of their human rights and specific situation. However, there are still controversies regarding the definition of the subjects to whom these legal changes have been brought in favor of. Despite the non-recognition of indigenous peoples as defined under international law, in Ethiopian legislation, significant opportunities do exist for the protection of these peoples within existing legal frameworks in the country. Although, in order to ensure that the rights of indigenous peoples are properly enforced, having a clear idea of which groups are indigenous is increasingly important. A definition or guidelines for definition gives all parties a common understanding of the objects of the instrument and the application becomes safer and more predictable. This paper will reflect the need of flexibility and base the analysis of definition of indigenous peoples on the criteria used in the definitions as well as give impasses on specific rights given to indigenous peoples in Ethiopia. By developing a theoretical framework based on the criteria for definition, the similarities in the definitions and guidelines for definitions can be illustrated – without overlooking the separate context in which they operate. This will hopefully contribute to developing "indigenous peoples" as a concept in international human rights law, and disclose some of the misunderstandings and political objectives in discussions on definition in the different instruments. A case study used on the indigenous people in Ethiopia, which was useful to illustrate the findings in each chapter.

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Chapter one: General Framework of the Research

1.1 Background of the study

Indigenous peoples are renowned for their rich cultures, traditional knowledge systems and unique ways of life. In many countries, however, they are dispossessed of their ancestral lands and territories, as well as deprived of their natural resources upon which they depend for their survival. This can result in the denial of their very right to life. Many indigenous peoples continue to suffer discrimination, extreme poverty and exclusion from political and economic power. Their belief systems, cultures, languages and ways of life are threatened, even to the point of extinction.

There are approximately 370 million indigenous peoples in some 90 countries throughout all regions of the world.[1] while they constitute 5 per cent of the worldôs population, they make up 15 per cent of the worldôs disadvantaged. Of the 7,000 languages in the world today, it is estimated that more than 4,000 are spoken by indigenous peoples. Language specialists predict that up to 90 per cent of the worldôs languages are likely to become extinct or threatened by the end of the century.[2]

Indigenous peoples form an integral part of the fabric of many States and the circumstances of indigenous peoples may vary largely from region to region and from country to country. In some States indigenous peoples constitute more than 50 per cent of the population, while in others they may constitute a smaller percentage. In some States the very survival of indigenous peoples is threatened, while in others they are recognized and are able to maintain their distinct identities, spiritual traditions, cultures, and relationships with their lands, territories and resources. Many indigenous peoples have suffered historical injustices as a result of colonization and dispossession of their lands, territories and resources, as pointed out in the UN Declaration, which seeks to address this situation. Some indigenous peoples have been forcefully assimilated or coerced into national mainstream societies, often to their own detriment.

[1] Judith G. Bartlett *et al*, *Identifying Indigenous Peoples for Health Research in A Global Context: A Review of Perspectives and Challenges*, International Journal of Circumpolar Health, vol. 66, No.4, (2007), p.288

[2] Edmund Jan Osmanczyk (ed): *Inter-American Charter of Social Guaranties, at Art. 39 (1948),* reprinted in Encyclopedia of the United Nations and International Relations, (1990), pp.432-433

Across many States, indigenous peoples contribute to the rich diversity of cultures and languages. Of some 7000 languages currently spoken in the world, approximately 4000 languages are spoken by indigenous peoples. In many States, these languages are lost or are on the verge of extinction. In 2011 the Secretary-General of the United Nations stated that ñone indigenous language dies every two weeks, indigenous cultures are threatened with extinction.ò[5] The loss of language often results in a loss of intangible cultural heritage such as traditions, practices and customs. Many States value and take pride in their identity as nations through their cultural distinctiveness, which is often based on language and culture. The recognition of the contribution of indigenous peoples to the unique character and cultural diversity of States may be achieved through the effective implementation of the UN Declaration.

Indigenous peoples are increasingly demanding greater recognition of their rights. Though there were some scattered efforts,[3] a relatively modern indigenous rights movement gained momentum in the 1960s and 1970s. The UN Working Group on the rights of indigenous peoples (the UNWGIP), which was constituted in 1982, prepared a draft declaration earlier; it was on September 13, 2007, that the UN General Assembly (UNGA) adopted the UN Declaration. The adoption came after more than a year of delays in the UNGA, and represented the culmination of more than 20 years of work. Four States - the United States, Canada, Australia and New Zealand - voted against the adoption.[4] Eventually, the Co-sponsoring States for adoption of the Declaration and the African Group of States negotiated and agreed on a final proposal, contemplating nine amendments to the original draft Declaration as adopted by the Human Rights Council.[5] Since then, a discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.[6]

However, to get a clearer idea of which groups are indigenous is increasingly important, as the indigenous peoples are increasingly the objects of treaties and are given preferential treatment by various organizations. A definition or guidelines for definition gives all parties a common understanding of the objects of the instrument. The application of the instruments becomes safer

[3] Ibid

[4] Megan Davis, *The United Nations Declaration on the Rights of Indigenous Peoples*, Indigenous Law Centre, Vol. 11, No.3, (2007), P.55

[5] *See* UN Doc. A/61/L.67 and UN Doc. A/61/L.67/Add. 1 of respectively 12 September 2007 and 13 September 2007.

[6] Siegfried Wiessner : *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis,* Harvard Human Rts. J, 1999, p. 57

and more predictable. The indigenous peoples become aware of their preferential status and states as well as organizations are forced to recognize their status.

1.2 Statement of the Problem

Ethiopia is endowed with natural resources and largely unutilized fertile land which could be used for large scale development throughout the country. Unfortunately, the land and other natural resources are not fully utilized, in particular through effective and large scale level of modern technology. This means it is one of the critical national interests of the country to utilize land and other resources for enhancing the level of development of the country at large. On the other hand, the Ethiopian society is comprised of larger and smaller ethnic communities living largely in the countryside which the projects took place. These communities depend on land and easily accessible resources for their livelihood and are not willing to give up their natural resource for any other reasons than their survival.

Meanwhile, it is clear from the current assessment of different literatures and policies; there is a growing international consensus on the need for indigenous peoples to participate in the formulation and implementation of development projects that may affect them. However, despite the non-recognition of indigenous peoples as defined under international law, in Ethiopian legislation, significant opportunities do exist for the protection of these peoples within existing legal frameworks in the country. These Constitutional, statutory provisions, and international instruments ratified by Ethiopia are of particular importance to indigenous peoples. The Constitution, for instance, requires consultation of communities over development activities affecting them.

Although, in order to ensure that the rights of indigenous peoples are properly enforced during any activities including developmental activities which mentioned above, having a clear idea of which groups are indigenous is increasingly important. A definition or guidelines for definition gives all parties a common understanding of the objects of the instrument which gives rights. The application of the instruments becomes safer and more predictable. The indigenous peoples become aware of their preferential status and states as well as organizations and government are forced to recognize their status. However, at present time in international level especially in Ethiopia, rights recognized for indigenous peoples are not familiar for the indigenous peoples

themselves and even if those rights are available, it is not clear who are the beneficiaries for the specific rights reserved for indigenous peoples.

In order to avoid such complication, it may be useful to clarify the scope of rights of such people vis-à-vis the extent to which peoples are the beneficiaries of those rights. A prior understanding as to the position of the law, the government and the communities on these issues can encourage the peoples to practice their rights.

This research is intended to contribute towards elaborating the extent to which the rights of such communities and to study definitions of indigenous peoples with the political and historical processes that shaped them in light of the criteria used to define indigenous peoples.

1.3 Objective of the study

1.3.1 General objective

The general objective of this study is exploring whether or not there is adequate protection under International and domestic laws in favour of indigenous peoples and to study definitions of indigenous peoples with the political and historical processes that shaped them in light of the criteria used to define indigenous peoples.

1.3.2 Specific objective

The research specifically aims at exploring international human rights instruments applicable in Ethiopia and Ethiopian legislations having relevance to attain the above stated general objective of the research and also it reflect the need for flexibility of definitions and guidelines for definition of indigenous peoples and base the analysis of definition on the criteria used in the definitions.

1.3.3 Significance of the study

This research will have academic and practical relevance. In academic terms, it will be a contribution to the on-going debate on the contentious rights and definition of indigenous peoples almost everywhere in the world. Secondly, as far as its practical significance is concerned, such an independent analysis on the rights and definition of indigenous peoples will help to create a more conducive environment for the policy makers as well as for the peoples themselves.

1.3.4 Research Questions

- How and to what extent the Ethiopian law has been defining so far indigenous peoples in the country?
- What are the criteriaõs to distinguish indigenous peoples from non-indigenous peoples?
- What rights do they have and how are they to be understood in the legal perspective?
- Does their right extend to include a privilege to be consulted over policies, programs, and projects affecting their rights and interests?
- What protection do they have under the Ethiopian legal system?
- Taking in to consideration the currently intensified developmental activities, how can we possibly accommodate the issue of the protection of the rights of indigenous peoples?

1.4 Scope and Limitation of the study

This research aims to explore and provide a vivid picture of who indigenous peoples are and the rights internationally recognized for those peoples and comments on how indigenous peoples should be defined as well as indicate the observed loopholes on the recognized rights. Regarding protecting their rights, due emphasis is to be given to any impact of developmental activities on their right to culture, right to land and natural resources, and right to prior informed consent.

To this end, the paper makes a critical look at the existing modest attempts that have been undertaken at global and regional levels. Concerning the Ethiopian situation, the research primarily addresses these relevant international human rights instruments which are applicable in Ethiopia and Ethiopian domestic laws. Finally, as we do not have a universally agreed definition of who indigenous peoples are, this research will attempt to provide criterion for definition of indigenous peoples. However, because of time and resources, the research is limited on providing other case studies than Mursi.

1.5 Methodology

The present study employs qualitative on desk research approach. The data were collected from the secondary sources like relevant literature, databases and internet sources and it has been critically evaluated. However, for the purpose of tasting the theoretical framework on chapter three, primary data collected using interviews under chapter five.

Chapter Two: Indigenous people Rights under International Law

2.1 Meaning and Definition of Indigenous Peoples

As of this date, there is still no accepted universal definition of indigenous people. This is due to the inability of states to reach an agreement over what such a definition should entail, but it is also due to the indigenous representatives as they feel that a universally accepted definition could be more an inconvenience towards them then that it will truly benefit them. Since no indigenous community is the same they reason out that an accepted definition might exclude some indigenous communities since they would not fulfill the prescribed criteria.[7] However, another reason is that the indigenous representatives fear that if a strict definition is adopted, this may mean that governments with indigenous communities living within their borders might use such a strict definition as a reason for not recognizing the indigenous communities living within their borders. Therefore a strict definition is not valued, but a preference is given to setting key characteristics or criteria to help identify indigenous people.[8]

The most cited and most used description of indigenous people is by Jose Martinez Cobo, which reads as follow:

> *Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies considers themselves distinct from other sectors of the societies now prevailing in those territories or part 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.*[9]

[7] A.K. Meijknecht, ó*Towards International Personality: the Position of Minorities and Indigenous Peoples in International Law'*, Antwerpen: Intersentia 2001, p. 73.

[8] Report of the African Commissionôs Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoplesô Rights at its 28th ordinary session (2005), p. 87.

[9] UNCHR (Sub-Commission), ó Report of the Special Rapporteur on the Problem of Discrimination against Indigenous Populationsô (1986) UN Doc E/CN.4/Sub.2/1986/7/Add. 1-4.

As can be seen, indigenous people differ from ñregularò minorities, since to be seen as an indigenous community there must be ña historical continuity with pre-invasion and pre-colonial societiesò and they are ñdistinct from other sectors of societyò and must have a link with ñtheir ancestral landò, which are all characteristics that do not apply to other national minorities.[10] The distinctiveness of indigenous people lies in their special way of life, which is connected with the ancestral lands they live on, and they want to preserve these traditional lands. Another criteria that is often used, is that of self-identification which means that an indigenous community must see themselves as an indigenous community. This is for example included in Convention 169 from the International Labour Organisation (ILO)[11] and it was also used in the report of the African Commissionôs Working Group.[12]

2.2 Rights of Indigenous Peoples

2.2.1 Rights of Indigenous Peoples under International law

Since indigenous people were and still are marginalized and discriminated against in society, the international community has been trying to adopt documents that aim at strengthening the position of indigenous people. As individuals, indigenous people are entitled to the same basic rights as other individuals on the basis of equality, universality and non-discrimination, but the texts that the international community is trying to adopt are intended to protect and recognize the rights indigenous people have as a community, thus meaning collective rights so as to protect their distinct way of living.[13]

A. UN Declaration on the Rights of Indigenous People (UNDRIP)

Various international human rights instruments have now recognized indigenous peoplesô rights, the most important one so far is the declaration adopted by the UN rights of indigenous people.[14]

The UN Declaration on the Rights of Indigenous People (UNDRIP) has been long in the making. The drafting began on 1985 with the Working Group on Indigenous Populations under the Commission of Human Rights and this was completed in 1993. Two years later the Commission of Human Rights reviewed this draft and passed it to the General Assembly and on 13 September

[10] Ibid
[11] Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull 59 (adopted 27 June 1989, entered into force 5 September 1991) art 1 (2).
[12] Report of the African Commissionôs Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoplesô Rights at its 28th ordinary session (2005), p. 93.
[13] UNDG ó Guidelines on Indigenous Peoplesô Issuesô (adopted 22 January 2008), p. 6.
[14] Declaration on the Rights of Indigenous People (13 September 2007 UNGA Res 61/295) UN Doc A/RES/61/295.

2007 the Declaration was adopted by 144 states voting in favor, 4 votes against and 11 abstentions.[15] UNDRIP is an important document, even though it is a declaration and therefore not legally binding on states and hence does not impose any legal obligations on states, it does ñconstitute a minimum standard that is necessary for the survival, dignity and well-being of indigenous peoples of the worldò.[16] Besides it is a document that is not only drafted by the UN, it collaborated with indigenous peoples, states and non-governmental organizations (NGOs). A few key articles in UNDRIP that are of the utmost importance for indigenous peoples, is first of all the right to ñmaintain and strengthen their distinct political, legal, economic, social and cultural institutionsò as stated in Article 5. Another important article is Article 10, which states that indigenous people ñshall not be forcibly removed from their lands or territoriesò and that ñno relocation shall take place without free, prior and informed consent (é) and (é) agreement on just and fair compensation and where possible, with the option of returnò. A final important article is Article 26 that gives indigenous people the ñrights to the lands, territories and resources which they have traditionally owned, occupied or otherwise acquiredò and that ñstates shall give legal recognition to these lands, territories and resourcesò. Other articles emphasize the right of indigenous people to have their own culture, religion, language, history[17] but also the right to development[18] and the right to self-determination[19]. As said before, the UNDRIP is non-binding, but it does contain a development for customary law, since the Declaration concerns ñthe content of the rights of indigenous peoples, as they have been progressively affirmed in domestic legislation, in international instruments, and in the practice of international human rights bodiesò.[20]

B. ILO Convention of 169

A second important document for indigenous people rights is ILO Convention 169. A first attempt was already made earlier with Convention 10724, but due to its limitations and approach that indigenous people will gradually integrate with the majority of a state it was relinquished in

[15] UNDESA ôResource Kit on Indigenous Peoplesô Issuesô (27 August 2008) p. 24-26.
[16] Supra note 14 art. 43.
[17] Ibid art. 11, 12, 13, 14, 25.
[18] Ibid art. 23.
[19] Ibid art. 3.
[20] R. Stavenhagen, Statement on the Adoption of Declaration on the Rights of Indigenous Peoples Historic Moment for Human Rights, UN Expert Says, UN Press Release (14 September 2007).

favor of Convention 169.[21] Convention 169 also has some important Articles for indigenous people. The first is Article 14, which states that states have to recognize ñthe rights of ownership and possession of the peoples concerned over the lands which they traditionally occupyò. This includes the right to the national resources in that land.[22] In addition to these rights it Convention 196 too has the right of free, prior and informed consent in Article 16.

Another important instrument is the International Covenant on Civil and Political rights (ICCPR)[23] and in particular Article 27 that reads:

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

This Article states that it applies only to minorities, but it is also used by many indigenous communities that have successfully filled a complaint by the Human Rights Committee (HRC) for the infringement of their rights. However, the question is how far Article 27 ICCPR reaches in the protection of culture. The HRC has extensive case law on this issue, which in general gives the indigenous people the right to their traditional lands and territories and sees the way in which they maintain their livelihood as part of that culture.[24]

2.2.2 The Position of International Law vis-à-vis the Rights of Indigenous Peoples

Though the issue of indigenous peoples seems to have received greater attention following World War II[25], a number of writers describe a long tradition of recognition of the status and rights of indigenous peoples within international law[26]. Sanders, for instance, traces this long

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[21] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi- Tribal Populations in Independent Countries (ILO No. 107) (adopted 26 June 1957, entered into force 2 June 1959) art. 2 and further.

[22] Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull 59 (adopted 27 June 1989, entered into force 5 September 1991) art 15.

[23] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[24] See for example: *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990) UN Doc CCPR/C/38/D/167/1984.

[25] Asbjørn Eide, *Review: Human Rights of Indigenous Peoples*, The American Journal of International Law, Vol. 95, No. 1 (Jan., 2001), pp. 260-264

[26] GC Marks, *Indigenous Peoples and International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, Australian Yearbook of International Law, 2 (1992), p.2. Lindley noted that international law had a long history of recognizing, in theory at least, the territorial rights of indigenous peoples: *…extending over some three and half centuries, there had been a persistent preponderance of juristic opinion in favor of the preposition*

tradition of recognition of indigenous rights in international law back to the early sixteenth century contact between the Spaniards and the Indians.[27] According to these writers, the contemporary emergence of indigenous rights is not so much the progressive development of new law, but rather the restoration of rights previously existing and recognized.[28] Thus, Doubleday, discussing Inuit hunting rights, argues that the relationship between historical authority and the progressive development of international law can provide the necessary bases and elements to develop indigenous rights fully at law: [29]

> *Early publicists provide authority and theoretical roots. Existing international agreements provide materials for revision and inclusion. Processes like that of the Working Group on Indigenous Populations and the ILO 107 revision provide opportunities.*

However, to what extent early international law recognized and respected indigenous rights is highly controversial as there is a disagreement among scholars as to the evolution of international law. For instance, Leary argues that international law stretches back beyond the peace of Westphalia of 1648, often taken as its starting point, to times when organized states were not the predominant or sole actors in international life.[30] She goes on claiming that ña longer view of international law shows that there was an evolution before Westphalia away from the state-centered concept.ò[31] Thus, it is understandable from this quote that the recognition of indigenous peoples has been either weakened or extinguished in positive international law having its source entirely in the consensual acts of sovereign states. It can thus be seen that methodological issues at the basis of international law are transported into the discussion of indigenous rights, and in particular the use of historical sources.[32]

Be that as it may, in recent years the issue of indigenous peoples has been featuring prominently within international law. Modern international lawôs concern for indigenous peoples has been

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that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. (Ibid)

[27] Ibid, p.4

[28] Supra note 26

[29] Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, Denver Journal of International Law and Policy, vol.373, No.2, (1983), p.384

[30] Patrick Macklem, *Indigenous Recognition in International Law*: Theoretical Observations, Michigan Journal of International Law, vol.30, (2008), p.182

[31] Ibid

[32] Ibid

started by the International Labor Organization (ILO) in the early1920s, and culminated in the adoption of ILO Convention 107 of 1957.[33]For a very long time; this was the only international instrument that provided for the rights of indigenous peoples. However, in time, ILO Convention 107 came under fire, as it was regarded as assimilationist and incompatible with modern international law, which tended to emphasize respect for cultural integrity.[34]

Accordingly, ILO Convention 107 was revised by ILO Convention 169 in 1989, hailed as the ñmost concrete manifestation at the international level of the growing responsiveness to indigenous peoplesô demandsò.[35]The new Convention represented a major paradigm shift on the subject because, unlike its predecessor, it ñadopted an attitude of respect for cultures and ways of life of these peoplesò.[36] Meanwhile, the United Nations (UN) had also been involved on the issue of indigenous peoples, and eventually produced Declaration on the rights of indigenous peoples.

2.2.3 Regional Human Rights System

2.2.3.1 American Convention on Human Rights (ACHR)

A significant case is that of the Awas Tingni community against Nicaragua.[37] In this case the state allowed logging concessions without the consent of the Awas Tingni people and they claimed that it was unconstitutional to not give them land rights and hence they saw this as a violation of Article 21 ACHR. On the other hand the state claimed that local remedies had not been exhausted and that, if there were no preliminary objections according to the Court, the Awas Tingni did not have an ancestral link with their territory as they moved around. The Court ruled that the Awas Tingni has:

> *Communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. There rights "exist even without State actions which specify them". Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single conformation throughout the centuries. The overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation.*

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[33] Luis Rodriguez Pinero, *Indigenous Peoples, Post Colonialism, and International Law; The ILO Regime (1919-1989)*, (2005), p.115

[34] Lee Swepston , *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No 169 of 1989',* Oklahoma City University Law Review, vol.15, (1990), p.677

[35] S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, Arizona Journal of International and Comparative Law , vol.8, (1991), p.5

[36] Swepston, p.683

[37] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, reparations and costs, Inter- American Court of Human Rights Series C No. 79 (31 August 2001).

And the logging concessions granted by the State were a breach of Article 21 as it ñendangered the economic interests, survival, and cultural integrity of the Community and its memberò.[38]

A second important case is that of the Saramaka people versus Suriname.[39] The Saramaka people, who are part of the Maroons tribe, claimed that the mining concessions given by the Surinamese government on territory belonging to the Saramaka were in violation of their right to property as there was no full and effective participation with the tribe. However, the constitution of Suriname states that all natural resources belong to the state. The first answer the Court had to answer was whether the Saramaka people are indeed a tribe, which was answered in the affirmative.[40] Then the Court went on to examine if there was a violation of Article 21. In the light of the Surinamese constitution the Court holds that the right to property can me restricted when these restrictions are:

> *a) Previously established by law, b) necessary, c) proportional and d) with the aim of achieving a legitimate aim (...) and whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and its members.*[41]

And in the end the Court found that Suriname had violated the right to property as they failed to fulfill these criteria[42] and the Saramaka should as well receive a reasonable part of the benefits made by the government by developing new projects on their traditional land.[43] In another case the principle of compensation was further recognized, by saying that when damage has been done there is the duty to provide the victims with appropriate compensation.[44] The African Commission who in its cases often draws inspiration from its American counterpart has followed this line of reasoning.[45]

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[38] Ibid para. 140.
[39] *Case of the Saramaka people v. Suriname*, Preliminary objections, merits, reparations and costs, Inter- American Court of Human Rights Series C No. 172 (28 November 2007).
[40] Ibid paras. 76-86.
[41] Ibid paras 127-128.
[42] Ibid paras 154-156.
[43] Ibid para. 149.
[44] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, reparations and costs, Inter- American Court of Human Rights Series C No. 127 (17 June 2005) paras 179-180.
[45] See for example: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276-2003, African Commission on Human and Peoplesô Rights.

2.2.3.2 European Convention on Human Rights (ECHR)

The European Convention on Human Rights and Fundamental Freedoms (ECHR) entered into force in 1953, inaugurating the first regional human rights system. The ECHR has been revised several times through a series of protocols. In 1998, the European Court of Human Rights became the first permanent human rights court in the world. All of the member States of the Council of Europe are parties to the Convention, with the exception of Armenia and Azerbaijan, which are expected to ratify the Convention in the near future. The right of individual petition is inherent in the Convention system, and all of the Court's judgments are legally binding on States Parties.

The ECHR contains no indigenous peopleôs rights provision akin to Article 27 of the International Covenant on Civil and Political Rights. Therefore, there is no direct way for members of minority groups to claim indigenous peopleôs rights before the European Court of Human Rights. Nevertheless, a number of rights guaranteed by the ECHR are relevant to minorities. The European Court of Human Rights also has expertise on indigenous peopleôs rights based on the application of the ECHR, which has been applied with respect to the 43 member States throughout the Council of Europe.

At present, the only specific reference to minorities is to be found in Article 14 of the ECHR:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national indigenous people's , property, birth or other status."*

Although ñnational indigenous peoplesò is undefined, it is contrary to the ECHR to treat ñany person, non-governmental organization or group of individualsò in a discriminatory fashion with respect to one of the listed grounds without reasonable and objective justification. Article 14 is not a free-standing right to non-discrimination, and it may be raised only in connection with the alleged violation of another Convention right.

Discrimination is not limited only to those cases in which a person or group is treated worse than another similar group. It may also be discrimination to treat different groups alike: to treat indigenous peoples and a majority alike may amount to discrimination against the indigenous peoples. Moreover, the European Court of Human Rights has held that if a State takes positive measures to enhance the status of indigenous people (for example, with respect to their

participation in the democratic process), the majority cannot claim discrimination based on such measures. In general, ña balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant positionò. (It is possible that future decisions might examine the practical effect and impact of a law, rather than only whether it appears non-discriminatory on its face, but there is no solid body of law on this point as yet.)

A great number of cases under the ECHR have dealt with linguistic rights, but there is no right to use a particular language in contacts with government authorities. In the context of judicial proceedings, however, everyone has the right to be informed promptly, in a language he/she understands, of the reasons for arrest (Article 5.2) and the nature of any criminal charges (Article 6.3.a). There is also a right to a free interpreter if a defendant cannot speak or understand the language used in court (Article 6.3.e). The use of indigenous peopleôs language in private or among members of indigenous group is, however, protected by the right to freedom of expression guaranteed under Article 10. Thus, minorities have a right to publish their own newspapers or use other media, without interference by the State or others. The State must allow the indigenous group free expression; even if this calls into question the political structure of the State.

ñThe limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position that the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.ò

Another means of protecting the indigenous peopleôs identity is through education of children (Article 2, Protocol 1) belonging to the group. However, there is no right to mother tongue education under the ECHR, unless it previously existed and the State then tries to withdraw it. Refusing to approve schoolbooks written in the indigenous people kin-State might be a breach of the right to freedom of expression. Even when the books might give the kin-Stateôs view of history and culture, the government must ñshow that the undisputed censorship or blocking of the books was done in accordance with law and pursued a legitimate aim, such as the prevention

of disorder. It would then be for the respondent government to show that the censorship measures were necessary in a democratic societyò.

The individual right to freedom of religion (Article 9) includes the right to manifest that religion, which allows an indigenous peopleôs the necessary degree of control over community religious matters. The Court has held that the State must not interfere in the internal affairs of the church: ñfreedom of thought, conscience and religion is one of the foundations of a ódemocratic societyô within the meaning of the Convention. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on itò. The State may limit manifestation of indigenous peopleôs religion only for reasonable and objective reasons. Furthermore: ñwhere the organization of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believerôs right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection, which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individualôs freedom of religion would become vulnerableò.

Indigenous groups need to be able to participate effectively in cultural, religious, social, economic and public life (Article 11 and Protocol 1, Article 3). Formal or de facto exclusion from participation in the political processes of the State is contrary to the democratic principles that the Council of Europe espouses. It is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is organized, provided that they do not undermine democracy or human rights. According to the Court, ñ indigenous group is in principle entitled to claim the right to respect for the particular life-style it may lead as being 'private life', 'family life' or 'home'ò under Article 8 of the Convention. Several cases involving the Roma and the indigenous peoples of northern Europe have sought to raise such a claim, although no such application has yet succeeded.

2.2.3.3 The African Charter on Human and Peoples' Rights (ACHPR)

Within the framework of the African human rights system, the African Charter on Human and Peoplesô rights[46], and its implementing organ, i.e. the African Commission on Human and Peoplesô Rights (the óACHPRô), come at the forefront. While there is no express reference to indigenous peoples in the African Charter, its embodiment of group or peoplesô rights could be read as addressing their rights.[47]Moreover, Bojosi and Wachira argue that the ACHPRôs jurisprudence on ópeoplesô rightsô has undoubtedly paved the way for the protection of indigenous peoples.[48]

Initially, the ACHPR tended to reject the issue, as it did not find the term óindigenous peoplesô applicable to African conditions. The main argument was that all Africans are indigenous to Africa and that no particular group can claim indigenous status.[49] However, the ACHPR came to sensitize the issue of indigenous peoples following the intensive lobbying process which is actually traceable to 1999, when the International Work Group for Indigenous Affairs (IWGIA) held a conference on the situation of indigenous peoples in Africa in co-operation with a local NGO, named Pastoralists Indigenous NGO Forum in Tanzania.[50]The conference ñrecommended that the [ACHPR] should be encouraged to address the human rights situation of indigenous peoples in Africa, which it had so far never done beforeò.[51]

A continued lobbying from individuals, groups and communities identified as indigenous peoples for recognition and protection from the ACHPR,[52] led the latter to adopt a resolution establishing the African Working Group in Africa to study the issue of indigenous peoples on the continent,[53] on the basis of article 45(1) of the African Charter.

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[46] African Charter on Human and Peoplesô Rights, June 27, 1981, Organization of African Unity, art. 20, 21 I.L.M. 59 (1981) (entered into force Oct. 21,1986)

[47] Solomon A. Dersso, *Peoples' Rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?,* African Human Rights Law Journal, Vol. 6 (2006), p.15

[48] Kealeboga N Bojosi and George Mukundi Wachira, *Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights*, African Human Rights Law Journal, Vol. 6 (2006), p.383

[49] IWGIA Indigenous world (2001-2002), p. 453

[50] Ibid

[51] Ibid

[52] The report of African working group.

[53] ACHPR /Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Peoplesô Communities in Africa (2000), adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000. Downloaded from http://www.achpr.org/english/resolutions/resolution70_en.html (accessed on 15 July 2010)

The African Working Group is composed of members who are appointed by the ACHPR in their personal capacities as experts. The mandate of the African Working Group is as follows:[54]

1. to examine the concept of indigenous people and communities in Africa;
2. to study the implications of the African Charter on the human rights and well-being of indigenous communities; and
3. To consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.

The first meeting of the African Working Group was convened on 12 October 2001 in Gambia.[55] At this pioneering meeting, the African Working Group took upon itself the task of developing a conceptual framework paper as a point of departure. This paper would form the basis of a report that was to be submitted to the ACHPR, encapsulating the findings of the African Working Group in the discharge of its mandate.[56]It was agreed that this paper would, in the main, briefly discuss the characteristics of indigenous peoples in Africa and highlight their specific human rights problems.[57]This would shed light on the types of groups being discussed.

A draft of the conceptual framework paper was discussed at a roundtable meeting which was attended by members of the African Working Group and four invited experts.[58] The roundtable meeting generally endorsed the approach adopted by the African Working Group and this paved the way for the drafting of the report to be submitted to the ACHPR.[59]The African Commissionôs Working Group, after extensive consultations with human rights experts and indigenous peoplesô organizations, prepared a report which was submitted to and adopted by the ACHPR in 2003.[60]

As mentioned above, the second mandate of the African Working Group was to study the implications of the African Charter and the wellbeing of indigenous populations/communities with regard to specific articles. The African Working Group, therefore, analyzed these provisions and the jurisprudence of the ACHPR with regard to the concept of ópeoplesô. Based on these analyses, the African Working Group concludes that the African Charter protects the rights of

[54] Ibid, paras 1-5
[55] IWGIA Indigenous world (2001-2002), p. 453
[56] Ibid
[57] Ibid, 455
[58] Ibid
[59] Ibid, p.456
[60] Report of the African Working Group.

groups identifying themselves as indigenous peoples and that the concept of peoples in the African Charter may be interpreted to include groups within independent states.[61]

A. Key Provisions

The Charter contains two primary categories of rights and freedoms in Part I, Chapter I, as well as some general provisions applicable to both categories. The first category is individual rights, which apply to each human being as an individual. The individual rights guaranteed by the Charter are found in Articles 3-18. The second category is peoplesô rights or collective rights, which apply to peoples as a collectivity. These rights are found in Articles 19-24. The general provisions of Chapter I which apply to all rights are found in Articles 1, 2 and 26.

Part I, Chapter II of the Charter discusses ódutiesô that individuals owe to each other and to society in general. These provisions are expressions of the importance that Africans place on harmonious relations within the family and in the broader society. It is important to note that these duties do not affect the rights and freedoms contained in Chapter I of the Charter, that is, the State cannot rely upon an alleged failure of a person to live up to a duty in Chapter II as a defense to the Stateôs violation of a right or freedom in Chapter I.

Within both the individual and collective rights categories under Part I, Chapter I of the Charter are different types of rights that are often differentiated as either civil and political rights or economic, social and cultural rights. These are not airtight categories and there is crossover between some of them, but generally speaking civil and political rights are those rights which relate to life, liberty, personal security, judicial processes and participation in the affairs of oneôs country and community. Economic, social and cultural rights relate to basic human needs such as food, housing, work, health care, education and the expression and preservation of culture. Both types of rights are important for indigenous peoples. Typically poor and marginalized, such peoples often have less access to socio-economic support and development than other members of society, for instance access to education (both in terms of attendance within the regular school system and suitability of that system to their particular needs), access to health care and services (including proper conditions for good health such as food, water and housing), and access to fair and equitable conditions of work. Without having these basic needs met, indigenous peoples can give little attention to civil and political matters such as voting, obtaining identity cards, or participating in national decision-making bodies. On the other hand, without being politically

[61] Ibid, pp.110-111

empowered on an equal footing with other members of society through obtaining the necessary national documentation (which is often required for movement within the country and for accessing government services), voting in local and national elections, and participating in the national legislature and other governing bodies, the socio-economic issues facing indigenous peoples will not get the attention they deserve as the voices of these communities will not be heard. Further, these communities will not be able to participate in decisions which affect them, such as land and resource use planning, social policy development and the elaboration of poverty reduction strategies.

Unlike the United Nations system which treats civil and political rights differently from economic, social and cultural rights by placing them in different treaties with different degrees and methods of enforcement, in Africa all of these rights are guaranteed in the same instrument (the Charter) and placed on the same footing. Thus, whereas the UN system is still struggling over whether economic, social and cultural rights can be made ójusticiableô (i.e. capable of being the subject of a legal complaint), in Africa it is believed that

> *... economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.*[62]

Examples of individual civil and political rights contained within Articles 3ï 18 of the Charter are the rights to:

- equality before the law and equal protection of the law (Article 3)
- life, liberty and freedom from torture, cruel, inhuman and degrading treatment, slavery and other forms of exploitation (Article 5)
- a fair trial (Article 7)
- freedom of conscience and religion (Article 8)
- freedom of assembly and association with others (Arts. 10 and 11)
- freedom of movement and residence (Article 12)
- participate in government (Article 13)
- non-discrimination against women (Article 18(3))

[62] African Commission on Human and Peoplesô Rights, Communication 155/96, 15th Annual Activity Report (2001-02), para. 68.

Thus, in a situation where an indigenous person does not have the same access to legal processes in her country as other members of society or does not enjoy equal protection of the police, for instance, there is a violation of the right to equality before the law and equal protection of the law. Where an indigenous person is held in a position of slavery by another person and the State does not take appropriate measures to prevent and protect against such slavery, there is a violation of his right to freedom from slavery. Where indigenous persons do not have the same rights and access as others to vote or participate in local and national government and decision-making bodies, there is a violation of the right to participate in government.

Another key right for indigenous peoples, particularly in respect of their struggle for recognition and protection of their rights to their traditional lands and territories, is the right to property. Article 14 of the Charter provides:

> *The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

As we will see later, this right ï read in conjunction with several of the collective rights provisions of the Charter ï provides the legal foundation for any analysis of human rights violations relating to indigenous lands and territories.

Indigenous peoples in Africa are often subject to inequitable conditions of work including unfair pay for their labour. The State has a duty to protect against such treatment whether by private or public employers, in accordance with Article 15. Similarly, where indigenous peoples are not given the same access to health services or to education as other communities, taking into account their specific needs, it can be considered as a violation of Articles 16 and 17(1).

B. The concept of 'Peoples' in the charter

There is no definition of ópeoplesô in the Charter, nor indeed in any other international instrument that uses the term. While some have argued that ópeoplesô rightsô refers only to the rights held by all the people of a given State, the monitoring body for the Charter ï the African Commission on Human and Peoplesô Rightsï has clearly interpreted this term to mean the rights of different peoples within the State. For instance, the Commission has acknowledged that distinct groups within a State can be recognized as peoples, thus possessing a right of self-

determination.[63] The Commission also interpreted Article 19 of the Charter (relating to the equality of all peoples) as meaning that discrimination in Mauritania against black Mauritanians was a prohibited domination by one group over another. It went on to say that Article 23(1), which provides that all peoples have the right to national and international peace and security, could be used to protect the villages of black Mauritanians against attack.[64] In another context, it referred to the rights of "all the Peoples of Rwanda."[65]

The Commission has also recognized the existence of "indigenous peoples" in Africa. In the ground-breaking report of the Commission's Working Group on Indigenous Populations/Communities, which was adopted by the Commission in 2003, the concept of indigenous peoples is explored in great detail.

The peoples' rights or collective rights in Articles 19-24 of the Charter include:

- the right to equality and to be free from domination by other peoples (Article 19)
- the right to exist and to self-determination (Article 20)
- the right to freely dispose of natural wealth (Article 21)
- the right to economic, social and cultural development (Article 22)
- the right to a satisfactory environment favorable to their development (Article 24)

The African Commission has stated that peoples' rights as contained in the Charter may not be exercised in violation of the principle of territorial integrity of existing, independent States. What this means is that the right to self-determination may not be used to justify secession from independent States and must be exercised within existing State boundaries.[66]

In the context of indigenous peoples, it can be argued that the collective rights in Part I, Chapter I of the Charter as well as the right to property in Article 14 ï taken separately and as a whole ï signal an obligation on States parties to respect and protect their right to the ownership, control, use and enjoyment of their ancestral lands, territories and resources. Indeed, the African Commission has noted that ñthe protection of rights to land and natural resources is fundamental

[63] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, Fifteenth Activity Report, 2001-02, ACHPR/RPT.15.

[64] *Collectif des Venues et Ayants-droits, Association Mauritanienne des Droits de l'homme v Mauritanie,* Thirteenth Activity Report, 1999-2000, ACHPR/RTP/13th, Annex V.

[65] Resolution on the Situation in Rwanda*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993-94*, ACHPR/APT/7th, Annex XII, at para. 2.

[66] This is essentially the position taken by the UN Working Group on Indigenous Populations when it drafted the UN Declaration on the Rights of Indigenous Peoples.

for the survival of indigenous communities in Africa and such protection relates both (sic) to Articles 20, 21, 22 and 24 of the African Charter.ò This is consistent with the decisions and commentary of a variety of UN human rights bodies on indigenous rights to their ancestral lands.

Despite some early concerns that the collective rights in the Charter might not be justiciable (capable of being the subject of a legal complaint), the Commission has been willing to consider complaints regarding alleged violations of peoplesô rights.[67] This again is consistent with the Charterôs unique construction which places all rights on an equal footing with each other.

While the Charterôs provisions on collective rights, as they relate to indigenous peoples, have yet to be substantively developed by the Commission, there have been some helpful decisions, particularly coming out of a recent case involving the Ogoni people of Nigeria and the Endorois case of Kenya.

[67] E.g. *Katangese Peoples' Congress v. Zaire*, Communication 75/92, *Eighth Annual Activity Report 1994-95,* ACHPR/RPT/8th, Annex VI.

Chapter Three: Criteria for Definition

Much is written on indigenous peoples and their human rights, but often without a clear picture of the concept ñindigenous peoplesò. There are for instance many that does not realize that defining indigenous peoples by criterion of traditional lands linked to overseas conquest will arguably exclude groups that we many look upon as indigenous peoples in Europe, Asia and Africa. To better comprehend the definitions of indigenous people, it is important to have a clear concept of the criteria used in the definitions.

There is not one correct answer to the question of which criteria to apply when analysing the instruments. The criteria on the basis of which the indigenous peoples are defined have changed over time and vary today in the different definitions. Due to the limits of this paper it is impossible for me to include all the different suggestions of criteria one may use to define indigenous peoples. I will begin this chapter by examining the racial criterion, which represents the essence of early criteria of defining indigenous peoples. Following the treatment of this criterion, I will give reasons for choosing the four criteria used in this theoretical framework, which I subsequently discuss in detail. The analysis will show that the guideline for definition proposed by Alfonso Martinez does not fit the theoretical framework well, as it contains a modern version of a racial criterion.

3.1 Racial criterion for defining indigenous peoples

The protection of indigenous peoples was from the very beginning aimed at the natives in the countries the Europeans conquered. The indigenous peoples were defined on the background of their *race*. Race became in many instances the sole criteria used to define indigenous peoples. The status as indigenous was given to later generations through inheritance of this presumed ñraceò. This opinion that indigenous peoples should be defined by biological factors was common up to the 1970s. To distinguish the people into different *racial groups,* they often measured how many percentages of blood the proposed indigenous person had which originated from the ethnic group that was presumed to be indigenous due to differing physical characteristics from the white colonizers.

This criterion was even used in the U.N. One of the first attempts of naming criteria for defining indigenous peoples by the UN was one by Mr. Herman Santa Cruz, in the ñUN report on Racial Discriminationò from 1971.[68] Cruz comes up with criteria one can use in such circumstances to determine whether or not a person is indigenous. These criteria could be ñthe colour of the skin, language, customs, tribal conditions and living standards.ò[69] The criterion of ñcolour of the skinò is clearly a *racial criterion*.

The term ñraceò is used to describe people with a specific combination of physical characteristics of genetic origin. It is a concept applied to a world without clear-cut categories of peoples. The categories are based on certain characteristics, but these are not independent or invariable. It is difficult to divide human beings into groups. There will always be large variations within a group.

This view is supported by UNESCO, which convened the Conference of Experts in Moscow in 1964 to study the biological aspects of race. Among its proposals were the following ñall men living today belong to a single species, homo sapiens, and are derived from a common stock; pure races ï in the sense genetically homogenous populations ï do not exist in the human species; there is no national, religions, geographical, linguistic or cultural group which constitutes a race ipse facto.ò In 1967 The Conference of Experts had another meeting, this time in Paris, and elaborated on the subject. In the Statement on race and racial prejudice [70] expressed the view that ñhuman problems arising from so-called órace relations are social in origin rather than biological. A basic problem is racism ï namely, antisocial beliefs and acts which are based on the fallacy that discriminatory inter-group relations are justifiable on biological grounds.ò[71]

These arguments emphasise that the *biological factor* of race is something different that the *social myth* of race, which is how many scientists today use the word. A sociologist often refers to a race, but then most likely refers to a socially defined group ï not to biological differences. If a person writes about órace relationsô in America, she or he write about the different groups as defined by society based on the use of the terminology through history.

[68] UN pub. Sales No.: E.71.XIV.2. 1971.
[69] Ibid.
[70] UNESCO òStatement on race and racial prejudiceò UNESCO House, Paris, 1967. In Four Statements on the Race Question, p 50-55.
[71] Ibid

José R. Martinez Cobo wrote the monumental work ñStudy on the Problem of Discrimination against Indigenous Peoplesò[72], where he promotes the use of the word ñethnicityò and ñgroupò rather than ñraceò. The term ñrace-relationsò would translate into ñinter-ethnic relationsò. ñRacial prejudiceò would translate into ñgroup prejudiceò and so on. Cobo was one of the first that initiated a shift in focus away from mainly biological definitions of indigenous peoples. He wrote that culture, language and self-identification ï among other criteria also were important criteria in defining indigenous peoples.

Cobo still uses the criteria ñancestryò, instead of ñtraditional landsò, and calls it a *racial criterion*. He writes his study on national instruments that do refer to racial criteria, and thus uses the concept. I do not have to take these considerations, since international instruments do not refer to race explicitly. They do however use the concept of traditional land, which I use as one of the criterions of indigenousness.

To define indigenous peoples on basis of their ancestry is still common in many national definitions. The Norwegian government use biological factors to define the Sami. It is often difficult to decide who are indigenous peoples, and biological factors is a rather objective and easy way of distinguishing indigenous from non-indigenous. I think, however, it is important also to focus on the problematic implications of such an approach. One should be aware of the biases and problems involved in using racial criteria. What ought to be emphasized is not a so-called race, but other criteria as connection to traditional land.

Another problem with linking indigenousness to race is that the indigenous and other groups have mixed a lot since the times of colonization. Cruz acknowledges that it is a complex and difficult task to identify a group as indigenous[73]. Often, a lot of time has passed. The confrontation between indigenous peoples and invaders may have occurred centuries ago. Over time the distinction between the groups has been reduced. The different groupsô culture and language have influenced each other. The biological distinctions between the groups may have been, to a large extent, broken down through intermarriages. The result is a new group ï a hybrid between the invaders and the conquering population. This makes it even more difficult to define indigenous based on ancestry.

[72] E/CN.4/Sub.2/1986/7/Add.1
[73] UN publication Sales No.: E.71.XIV.2.

This treatment of the racial criterion illustrates the many problems involved in using the criterion. It involves ethical problems, in stigmatising a group because of itsô ethnicity; and practical problems, as it is difficult or impossible to separate different ñracesò. The racial criterion can be viewed as an alternative to a theoretical framework consisting of several criteria. It is difficult to combine the two, as a racial criterion potentially alone determines the indigenousness. It makes little sense in arguing whether an indigenous peopleôs culture is distinct or whether the group is non-dominant, if its indigenous status is already guaranteed due to the ñraceò of its members.

3.2 Traditional lands

Connection to traditional lands is by many laymen viewed upon as the only criteria for definition of indigenous peoples. Without being familiar with international human rights law it is easy to state something in the direction that indigenous peoples are those that ñalwaysò have lived in a given area. ñTraditional landsò is important for the identity of indigenous rights, separating it from minority rights. My contention is that connection to traditional land, even from immemorial times, is still not a sufficient requirement for status as indigenous peoples. Also important in the definition of indigenous peoples are other criteria as ñDistinctive cultural characteristicsò, ñNon-dominanceò and ñGroup consciousness and Self-determinationò. I will discuss this when treating the consequences of a strict and narrow interpretation of the criterion of traditional land below.

Connection to traditional lands means that the group lives in the same area over some time ï or have done so until recently. It is not enough for a group to have lived in an area a few years to qualify for indigenous status. At the same time most will not want the consequences of requiring connection to land since the first human beings. The land they live in is not necessarily their ñpropertyò, in our modern sense of the word. Many cultures do not use the term «property». Land rights may arise from land that is owned, occupied or used - alone as well as in cooperation with others.

One example of a definition emphasizing connection to land is the one promoted by Ms Akahi Nui from the Kingdom of the Hawaiôi nation.[74] She states that the Na Kanaka Maoli indigenous peoples are the original inhabitants of the island and their traditions and origins go indigenous peoples are the original inhabitants of the island and their traditions and origins go back to the life forces of nature itself. « *... the origins of the Na Kanaka Maoli people come from the earth,*

[74] UNPO MONITOR *Unrepresented Nations and Peoples Organization.* Day 2, Tuesday July 29, 1997 Working Group, Morning Session.

streams, springs, crops, oceans, currents, winds, volcanoes and various elements of nature...these people are part of nature and nature is part of them, and their languages has words for the love and the care of the land.

3.2.1 Consequences of applying the criterion

If one have an extreme interpretation of the criterion of traditional lands to the extreme, where only those who arrived at a place as the first homo-sapiens and still holds the area, almost no groups will be defined indigenous. The best candidates are probably the Maoris at New Zealand and the Aborigines in Australia.[75] A strict interpretation of the criterion of traditional lands raises a several problems. That a group successfully has held a territory for a very long time proves that there either has not been competition with other groups or that they have won the competition. One can call this a survival of the fittest - or maybe survival of those groups who live in places few others have had access to. A strict definition would result in international instruments protecting very few groups - a seemingly universal standard would in reality only apply to a few thousand peoples in the Oceania. It could in such a case be difficult to implement such an instrument on an international level, due to lack of relevance for most countries. The instrument would also obviously protect few people.

Giving definition to indigenous peoples as narrow as this, would exclude almost all groups that are generally looked upon as indigenous. The Indians in America would for instance not be viewed as indigenous peoples. They have moved around a lot, and there are strong indicia that there were other groups on the continent before them that have become extinct. Definition of indigenous peoples would with such a system become an academic exercise for archaeologists and would arguably have little to do with the needs of indigenous peoples in society today.

A definition requiring residence at an area for a fairly short time creates other problems. It is then difficult to distinguish indigenous rights from minority rights. Very many groups could be defined as indigenous peoples. When many get the rights, there is a fear that the level of protection is lowered.

The international instruments try to find a balance between requirements of connection to the land from the first homo-sapiens, to requirements similar to those of minority groups. This is solved in different ways. One way is to have a shorter time-requirement than connection to land

[75] According to Lee Swepston, ILO official, as stated in lecture on indigenous held in Geneva May 2001.

since the first human beings, often one talk about *time immemorial.* In reality archaeological findings of earlier human settlements on the land of prospective indigenous peoples is not necessarily enough to remove their indigenous status. Another way is to link the land rights up to colonialism. Special Rapporteur Alfonso Martinez only accepts as indigenous those who still live under a dominant group of descendants of overseas colonizers. The Martinez Cobo definition and the ILO 169, use more moderate definitions of colonization. In this scenario, traditional lands get a whole new meaning. The criterion of traditional lands now only requires that the indigenous peoples habituated the land when the colonizers came and conquered parts of the land. The definition of indigenous peoples is in such circumstances dependent on the definition of colonization. My interpretation is that Alfonso Martinez requires overseas colonization, while the definitions in ILO 169 and the Martinez-Cobo used in the Working Group on Indigenous Peoples accepts groups marginalized by adjacent groups as colonized.

3.3 Distinctive Cultural Characteristics

There are often discussions on what culture is. I will not go into disputes what is high, low or perhaps not culture, or discuss which activity is viewed as more important or esthetical than others, but instead use a broad definition of the term culture. I will instead include all human activities in my concept of culture. Martinez Cobo defines culture as such a broad definition of culture, and elaborates on its contents.[76] Cobo states that consideration must be given inter alia to the technological aspects, the economy and agriculture - as well as beliefs, habits, customs, rites and ancestral symbols, social and family organization, social and legal institutions, dress, religious and mythological concepts etc.[77] One important point to bear in mind is that the meaning of all these aspects is coloured by a conception of the world that is *peculiar to these communities* when compared to the ideas of other groups of people living alongside them.

Because of the page limit on this research paper, i will not go further into any of these criteria. There are of course controversies to who indigenous peoples are and who aliens in these categories. It is for instance not easy to define what indigenous clothing is. My purpose in referring to these descriptions of what culture consists of is not to define what is indigenous, but to describe how culture functions as a criterion for definition of indigenous peoples.

[76] E/CN.4/Sub.2/1986/7/Add.1
[77] Ibid

ñIndigenous cultureò is by many seen as synonymous with ñprimitive cultureò. This was especially the case in the past, when this was the dominant position. Today most agree that this is a biased position. Martinez Cobo states that: «It is not the case that everything that is óindigenousô is primitive, or that everything that is alien is ómodernô»[78] It is also impossible to speak of a ñpureò culture. Cultural borrowing is always present. It increases as contact between communities of different cultures increases, and increases even more when the groups in question cohabitate.

It should be remembered that the culture of many indigenous peoples is to a large extent linked to how they use and develop the land. Indigenous peoples are often hunters, gatherers, herders or farmers and are thus dependent on their traditional lands to maintain their way of life. This emphasise that the criteria used to define indigenous do not operate separately.

A definition that is has a clear emphasis on culture has been proposed by J. Burger (1990).[79] *«Indigenous people are strikingly diverse in their culture, religion, and social and economic organization. Yet today, as in the past, they are prey to stereotyping by the outside world. By some they are idealized as the embodiment of spiritual values; by others they are denigrated as an obstacle to economic progress. However, they are neither: they are people who cherish their own distinct cultures, are the victims of past and present-day colonialism, and are determined to survive. Some live according to their traditions; some receive welfare; others work in factories, offices or the professions. As well as their diversity, there are some shared values and experiences among indigenous cultures. Where they have maintained a close living relationship to the land, there exists a co-operative attitude of give and take, a respect for the Earth and the life it supports, and a perception that humanity is but one of many species.»*

3.3.1 Consequences of applying the criterion

To use culture as the main criteria for definition greatly widens the definition of indigenous peoples. An emphasis on the indigenous peoplesô distinct culture reduces the importance of connection to traditional lands. A common argument in support of emphasising culture as a criterion for definition states that indigenous cultures share the same challenges ï They are discriminated by the dominant sector and feel their culture pressured by globalisation, and thus need the same protection. One can argue that the common problems the indigenous face in all

[78] Ibid. Article 76.
[79] The Gaia Atlas of the first peoples (1990).

parts of the world is a better measure indicator of needing international protection than for how long they have held the territories or whether or not they have been colonized.

On the other hand, a focus on cultural characteristics can be inflationary. Many groups have a distinct culture, and can claim status as indigenous peoples. Indigenous rights could become difficult to distinguish from minority rights. One could possibly distinguish it from minority rights by emphasising certain cultural characteristics describing indigenous peoples ï such as a strong connection to land in their culture. There could also be an even longer time requirement for status as indigenous culture than for minority culture. It is not enough to have a distinct culture for a short time for a newcomer to a country to become indigenous. This might sound trivial, but white minority groups from Africa have claimed admission to the Working Group on Indigenous Populations as indigenous partly on basis of their distinct culture.

3.4 Non-Dominance

The indigenous peoples generally loose out in a number of areas. They often have lower income, worse health and less education than the rest of the society. These problems produce a significantly lower standard of living than that of other groups. Many of these problems have roots in discrimination of the indigenous peoples and violations of their rights.

What is meant is with majority and non-dominance needs to be closer defined. Indigenous peoples are a majority in numbers in countries like Guatemala and Bolivia, as well as some other countries depending on what definition of indigenous people one use. In these countries they are still non-dominant, even though they are more in numbers. These countries are not well functioning democracies, and there is no necessary connection between dominance in numbers and dominance in political power. In reality many minority groups discriminate against the majority. This is a well-known phenomenon in the international society, with the former apartheid regime in South Africa as the clearest example.

A non-dominant group must, at least, be politically non-dominant. The traditional assumption is that a politically dominant group cannot be discriminated against. The political dominant group can, however, be non-dominant in other sectors ï such as in the economic or cultural sector. In South Africa the majority group controls the government, while a minority controls most of the economy. To what extent the economical dominant group uses its power to control the other group will arguably be a factor in determining the economically non-dominant group status.

The former Chairperson of the Working Group on Indigenous peoples states that ñNon-dominant at presentò implies that some form of discrimination or marginalization exists, and justifies action by the international community.ò[80] Daes continues to say that it ñwould not follow that a group ceases to be óindigenousô if, as a result of measures taken for the full realization of its rights, it were no longer non-dominant.ò[81]

3.4.1 Consequences of applying the criterion

The question of the requirement of non-dominance raises the interesting question on the possibilities for a dominant group to have a status as an indigenous people. As we can see from international instruments, almost all of them explicitly or implicitly include a criterion of non-dominance.

Equality is a general principle in international law that goes through all the instruments, which states that groups ought to have equal opportunities and rights. This is arguably not consistent with giving a dominant group protection as indigenous peoples. It is easy to see how such a scenario might turn out to be a discriminatory scheme. Say, if the inhabitants of Iceland were granted status as indigenous peoples, they could then claim that they needed more resources to help preserve their language and culture. These funds would not be available to the rest of the society. The majority could force the minority to subsidize their culture and way of life. This is inherently different from a situation where a majority gives help to a minority because of their weak standing in society.

Even though a group is dominant in their own country, its culture can be threatened by external pressure. The Declaration on Race and Racial Prejudice states in Article I.2 stated that ñAll individuals and groups have the right to be different, to consider themselves as different and to be regarded as such.ò[82] One can argue that as the indigenous culture is an important part of the world cultural heritage, protecting it is important to all peoples and not in conflict with the principle of equal treatment.

There are several other elements that make this rejection of dominant groups difficult. One question is whether a group that first is defined as an indigenous people can possible looses this status. Another factor is that indigenous peoples can be dominant in different fields ï for instance

[80] E/CN.4/Sub.2/AC.4/1996/2, Article 26.
[81] Ibid.
[82] Declaration on Race and Racial Prejudice,1978. Adopted by UNESCO, Article 1, Part 2.

the economical, technological or academically. Even if the 25 of the ICCPR that gives rights to take part in government is followed, and the indigenous is in majority in a country, they can lag behind in other sectors.

At the same time the criterion of non-dominance is important in distinguishing indigenous peoples eligible for protection as indigenous peoples from other groups, like the majority of Norwegians, which fulfill the other criteria for indigenousnessï connection to traditional lands, distinctive cultural characteristics and self-identification and group consciousness. The Cobo-definition explicitly emphasizes the non-dominance. Alfonso Martinezô racial criterion depends on it, as it is the non-dominant racial group that is defined as indigenous. It can also be found implied in the ILO 169ôs definition and the World Bank Operational directive. It is possible that protection of indigenous peoples thus has to be combined with other instruments on cultureôs protection in general, to also secure dominant cultures.

3.5 Self-identification and Group-Consciousness

The use of ñSelf-Identification and Group Consciousnessò emphasises the fact that the individual consider himself or herself ñindigenousò that the group consider the individual and itself as indigenous and combinations of the two. The subjective opinion of the person, group or community is taken into consideration. Ideally this opinion is a true reflection of her, his or its position.

There has in recent years developed a stronger group consciousness among many indigenous peoples. In the past many were ashamed of identifying themselves as indigenous. The indigenous peoples were often viewed by the larger society as primitive and stupid. As a result many turned away from their heritage and embraced the majority culture. This process is changing in many parts of the world. In the last couple of decades indigenous and tribal peoples in seems to have gotten more respect and recognition. The indigenous peoples are in many places turning back to their roots. In several western countries indigenous languages experience a growth after decades of steady decline. The indigenous peoples are becoming proud of being indigenous, and are increasingly willing to identify themselves as indigenous peoples. This development is not universal, however, as the indigenous peoples are discriminated against in many places in the world.

The indigenous peoples get, with a criteria of self-identification and group consciousness, the possibility have a say in definitions of themselves. The World Council of Indigenous Peoples has

adopted five principles that must guide indigenous action. One of them reads as follows: ñ. ...the right to define what is an indigenous person be reserved for the indigenous people themselves. Under no circumstance should we let artificial definitions such as the Indian Act in Canada, the Queensland Aboriginal Act 1971 in Australia, etc. tell us who we are.ò[83]

3.5.1 Consequences of applying the criterion

One advantage of the criterion of self-identification and group conciseness is that those who truly consider themselves as indigenous peoples are ideally defined indigenous. However, they could give false information. A person or group could claim to be indigenous without really believing this is true. The reasons could be to gain materially or in other ways. It is perhaps far sighted to claim that the indigenous are frauds. Martinez Cobo states that it is generally not a problem to acquire an accurate picture of who is indigenous through self-identification.[84]

There are methodological problems involved. Misinterpretation, error and concealment frequently arise and distort the results. Martinez Cobo claims that the accuracy of census results when this criterion is applied consequently depends to a large extent on the sincerity of the person consulted and her or his personal conception of the criteria used.[85] It is a natural result of this that the information does not get strictly comparable and is only of relative usefulness for the purposes of an objective investigation. Some indigenous are ashamed of their background. This was an especially large problem earlier times. It is easy to see how this could influence the results of a test that relies on subjective criteria. The indigenous peoples could be inclined to state that they did not belong to an indigenous group, because the alternative was to belong to the general population with a higher socio-economic status. In a country like Mexico, being indigenous has traditionally in many places been synonymous by being poor. An indigenous person lost their indigenous status when she or he became wealthy. A subjective criterion can result in an inaccurate measure of who are indigenous peoples.

[83] E/CN.4/Sub.2/476/Add.5, p.32 and annex III, p 7.
[84] Ibid 212
[85] Ibid 213

Chapter Four: The Scope and Applicability of the Rights of Indigenous Peoples in Ethiopia

4.1 Introduction

The rights and interests of indigenous peoples are evolving through the dynamic process of international law making. For the last 30 years, the international community has recognized that special attention needs to be paid to the individual and collective rights of indigenous peoples. As a result, a number of international instruments address indigenous peoplesô rights or include provisions relevant to them. The main legally binding document entirely focused on the rights of indigenous peoples is ILO Convention No. 169 on Indigenous and Tribal Peoples. Another document is the UN Declaration, albeit not binding, which recognizes the rights of indigenous peoples on a wide range of issues and provides a universal framework for the international community and States.

The focus on these instruments will not be meaningful unless they are actually guaranteed in the domestic legal framework. This is because the domestic legal framework is the one with which indigenous peoples having close contact and can easily access in the event that their rights are violated. Thus, the chapter also assesses Constitutional provisions and other laws and policies that have implications for indigenous peoplesô rights.

4.2 The Constitutional Framework

The Federal Democratic Republic of Ethiopian Constitution has become operational in 1995. The Constitution officially recognizes the different ethnic groups residing within state boundaries. The Constitution underscores by opening with the words: ó[w]e, the Nations, Nationalities and Peoples of Ethiopia é ,ô and further stating that óall sovereign power resides in the Nations, Nationalities and Peoples of Ethiopiaô.[86] According to the Constitution, A óNation, Nationality or Peopleô for the purpose of the Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief

[86] The Federal Democratic Republic of Ethiopian Constitution Proclamation No 1/1995(ñthe Constitutionò), entered into force on 21 August, 1995, article 8(1)

in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.[87]

Unlike most countries, which emphasize the individual, Ethiopia chose to draft its Constitution using collective terms in addition to individual terms. Even though the Constitution does not distinguish between ónation, nationality or peopleô nor does it óexplicitly recognize national, ethnic, religious and linguistic minority or indigenous statusô,[88] there are several provisions relevant for indigenous peoples.

4.2.1 The Applicability of International Human Rights Law in Ethiopia

Ethiopia is a party to several international and regional human rights treaties. The FDRE Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land.[89] Accordingly, international human rights treaties ratified by the Parliament form the law of the country. No additional measure to be taken by the legislature is provided for in the Constitution. However, article 2(2) of the Federal Negarit Gazette Establishment Proclamation No. 3/1995 provides that all Laws of the Federal Government shall be published in the Federal Negarit Gazette, whereas art.2 (3) states that all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazette. However, under normal circumstances, international instruments ratified by the State are simply referred to and are not reproduced in the Negarit Gazette.[90] Reproduction in the Official Gazette of all international agreements ratified by Ethiopia is recommended for easier application.

Since it is the Parliament that ratifies them, the status of international agreements ranks at least as high as any legislation from the Parliament. However, the Constitution, which requires the use of international human rights instruments (namely the Universal Declaration of Human Rights, the two Covenants, and international instruments adopted by Ethiopia) in interpreting its human

[87] Ibid, article 39(5)

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

[89] The Constitution, article 9(1)

[90] Federal Democratic Republic of Ethiopia Combined report (initial and four periodic reports) to the African Commission on Human And Peoplesô rights: Implementation of the African charter On human and peoplesô rights, 2008, para.60

rights provisions,[91] affords those instruments a higher status than an ordinary legislation. This means that as far as human rights and fundamental freedoms are concerned, international instruments rank higher than ordinary legislation and are instruments of interpretation for the human rights provisions of the Constitution, the supreme law of the land.

In practice, international rules, irrespective of their consensual or customary base and irrespective of their subject matter, are applied beyond and above ordinary legislation.[92] As no additional detail is provided for in the Constitution, it can be argued that where there is an inconsistency between the provisions of the Constitution and international human rights standards, the former prevails.

4.2.2 The Rights and Interests of Indigenous Peoples Recognized by the International and Regional Instruments Applicable in Ethiopia

This section is dedicated to the exploration of these instruments which provide provisions for the protection of indigenous peoples, and which are applicable in Ethiopia. These include the two human rights covenants, the Convention on Biological Diversity, the International Convention on the Elimination of All Forms of Racial Discrimination, and the African Charter on Human and PeoplesôRights.

4.2.2.1 The Two Human Rights Covenants

Ethiopia has become party to the two human rights covenants without reservations after 27 years of their adoptions in 1993.

A. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) protects the rights and interests of indigenous peoples under the right to equality in article 26, the rights to family and privacy under article 17, rights to freedom of thought, conscience and religion in article 18, and the right to the protection of the family in article 23. These provisions have also been recognized in the FDRE Constitution under articles 25, 26, 27, 29 and 34. But the most important provision of the ICCPR for indigenous peoples is article 27 which provides: ñIn those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be

[91] The Constitution, article 13(2)
[92] Supra note 90, para.62

denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.ò

Although article 27 was not originally intended to apply to indigenous peoples because it is an individual, not a group, right, it has proved to be the most fruitful provision of the ICCPR in generating jurisprudence on the rights of indigenous peoples.[93] The UN Human Rights Committee has considered complaints under article 27 and has demonstrated a willingness to act in a supervisory role in relation to acts which infringe the rights of indigenous peoples. In Ivan Kitok vs Sweden[94], the Human Rights Committee considered a complaint by an indigenous person from Sweden relating to the right to carry out reindeer husbandry. The Committee found that, while the regulation of an economic activity is normally a matter for the state, there will be a violation of article 27 if the activity in issue is ñan essential element in the culture of an ethnic communityò.[95]Similarly, in Omniak v Canada[96], the Committee found a Canadian government lease over Indian land in violation of article 27, where the lease was to be used for commercial timber activities, on the grounds that this could destroy the traditional life of the Lubicon lake group.

Both these findings by the Committee provided a basis for the complaint in Lansman v Finland[97] that activities under a permit granted to a company to quarry and transport stone violated article 27 by interfering with the traditional reindeer husbandry of the Sami Tribe. The Committee found that, in fact, the quarrying was not significant and there had been no infringement of article 27. The Committee warned, however, that any future mining activities which might be approved on a large scale and significantly expanded by the company ómay constitute a violation of the authorsô rights under article 27ô.[98]

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[93] Elizabeth Evatt, Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rightsô in Sarah Pritchard (ed). Indigenous Peoples. the United Nations and Human Rights (1998) 114. She, for example, accepts that óthe rights protected by art 27 apply to indigenous people.ô

[94] Kitok vs Sweden, United Nations Human Rights Committee. Report of the Human Rights Committee. Communication No 197/1985. UN Doc CCPRJC/33/D/l97/1985 (1988).

[95] Ibid

[96] United Nations Human Rights Committee, *Report of the Human Rights Committee.* Communication No 167/1984. UN Doc A145140(1990) vol 2, I

[97] United Nations Human Rights Committee, *Report of the Human Rights Committee,* Communication No 511/1992. UN Doc CCPR) C15210/511/l992 (1993): (1996), *Australian Indigenous Law Reporter, p.* 154.

[98] Ibid

The willingness of the Committee to link the right of minorities to enjoy their ócultureô with indigenous land is illustrated by Love- lace v Canada.[99] The Committee found that a member of a Canadian indigenous minority, the Maliseet Indians, had been denied her rights of access to native culture and language when she was prevented from residing on a tribal reserve. The reason for this finding was that there were no members of that community living outside the reserve. In recognizing the relationship between the place where the community lived and the right to enjoy culture, the Committeeôs finding strengthens indigenous peoplesô claims to maintain cultural activities on the land, even where full native title cannot be made out. This is particularly important for Ethiopia where the ownership of the land is ñexclusively vested in the state and in the peoples of Ethiopia.ò[100]

In the recent decision of Hopu v France,[101] the Committee considered a claim that the construction of a hotel in Tahiti located on ancestral grounds, of which the traditional owners had been dispossessed in 1961, would destroy their traditional burial grounds and have a strong impact on their fishing activities. Adopting a wide view of ófamilyô and taking into account past cultural traditions, the Committee concluded that the construction would interfere with the rights to family and privacy, in violation of articles 17(1) and 23(1) of the ICCPR.[102] The majority accepted that visits to ancestral lands can play an important role in a personôs identity.[103] It found that the proposed construction would be an arbitrary interference in rights to privacy and family life and that France was bound to protect these rights. The Committeeôs views are particularly significant because, as France has made a reservation to article 27, no finding was possible on this ground. Rather, the Committee has indicated that interests in indigenous land can be developed through other individual rights under the ICCPR.[104]

The value of these findings by the Committee under the ICCPR for indigenous peoples lies in the recognition of the role that economic and resource activities play in the maintenance of the cultural rights protected by article 27 and in the possibility of protecting interests in indigenous land through rights such as privacy and family life. Thus, the ICCPR and the views of the

[99] United Nations Human Rights Committee, *Report of the Human Rights Committee*. Communication No 24/1977, UN Doc A136140 Annex 18 (1977); Human Rights Law Journal, vol. 2, (1981) *p.*158.
[100] The Constitution, article 40(3)
[101] United Nations Human Rights Committee, Report of the Human Rights Committee. Communication No 54911993. UN Doc CCPRJC.60/D/549/19931Rev.I (1997).
[102] Ibid
[103] Ibid
[104] Ibid

Committee are relevant to the recognition of the rights and interests of indigenous peoples in Ethiopia.

B. International Covenant on Economic, Social and Cultural rights

The International Covenant on Economic, Social and Cultural rights (ICESCR) is mainly concerned to protect interests such as the right to work, education, family life and social security. These provisions have a special significance for indigenous peoples of the globe as well as of the Ethiopia.

4.2.2.2 Biological Diversity Convention

The Convention on Biological Diversity (CBD)[105], which is almost approved universally, explicitly recognizes the contribution indigenous peoples can make to the conservation and management of biological diversity and may have an impact on their traditional hunting and fishing activities.

Article 8(j) provides that each contracting party shall, as far as possible and appropriate: Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge. (Emphasis added).

The word ôapprovalô has been interpreted to mean with their prior informed consent (FPIC) which has also found its way into regional standards on access and benefit sharing adopted by the African Union (AU).[106] Ethiopia, together with AU, has developed a model law for regulating access to biological resources and for enforcing the protection of the rights of the local communities to their traditional knowledge, technologies, innovations and practices and their biological resources in line with Article 8(j) of the CBD.[107] In this regard, Ethiopia has enacted

105 Opened for signature 5 June 1992, (19931 ATS No 32, 31 LLM 818 (entered into force 29 December 1993). Ethiopia ratified CBD in 1994.

106 Fergus MacKay, Indigenous Peoplesô Right to Free, Prior and Informed Consent and the World Bankôs Extractive Industries Review, Journal of the American University's Washington College of Law and the Center for International Environmental Law, Volume IV, Issue 2, (2004), p.21

107 The Federal Democratic Republic of Ethiopia Environmental Protection Authority, The 3rd National Report on the Implementation of The UNCCD/NAP in Ethiopia, (February, 2004), p.23

Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right in 2006 based on the African Model Law.[108]

The objective of the Proclamation is to ensure that the genetic resources of the country are conserved, developed, and sustainably utilized; the knowledge, innovations, practices, and technologies of local communities on the conservation and use of genetic resources are respected; and the benefits derived from the use of genetic resources, and community knowledge, innovations, practices and technologies are fairly and equitably shared by local communities. Article 10 of the CBD also calls on parties to: *(C) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced.*

These Provisions obliges state parties to respect the knowledge of indigenous peoples in the conservation of biological diversity, to encourage traditional cultural practices in the use of biological resources and to engage indigenous peoples in remedial actions.

4.2.2.3 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[109] is another key instrument that impacts on indigenous peoples. Racial discrimination is defined by article 1 as: *any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*.

Under article 2(1), state parties agree to condemn racial discrimination and to ǿengage in no act or practice of racial discrimination against persons [or] groups of personsô[110] This provision also requires states to pay particular attention to indirect discrimination, which occurs where

[108] Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right No. 482 /2006, preamble, para.4

[109] Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entered into force 4 January 1969, in accordance with Article 19.

[110] ICERD, article 2 (1) a.

government policies, laws and regulations unintentionally cause disproportionate and/or unjustifiable harm in the form of human rights violations against persons [or] group.[111]

A monitoring body of this Convention i.e. the Committee on the Elimination of All Forms of Racial Discrimination (CERD) has produced a number of General Recommendations to aid both states and peoples to interpret the ICERD. For example, the General Recommendation XXIII on the Rights of Indigenous Peoples recommends state parties: *Allow for sustainable economic and social development compatible with their [indigenous peoples ’] cultural characteristics … [ensuring] equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent … [recognizing and protecting] the rights of indigenous peoples to own, develop, control and use their communally owned lands and territories and resources traditionally owned or otherwise inhabited or used without their free and informed consent*.[112]

Article 2(2) of the ICERD allows states to take special measures in the ósocial, economic, cultural and other fieldsô to ensure that marginalized groups can enjoy their human rights fully and equally. Generally, the right not to be discriminated against on the basis of race, in a systematic way, has the legal status of jus cogens i.e. the prohibition of systematic discrimination has the legal status of a preemptory norm of international law from which no derogation is permitted.[113]

4.2.2.4 The African Charter on Human and Peoples’ Rights[114]

In contrast to other regional and international human rights instruments, the African Charter is unique in its approach to collective rights known as peoplesô rights. These include the right of all peoples to self-determination[115], the right of peoples to equality;[116] the right to existence;[117] the

[111] Ibid, article 2 (1) b and c
[112] General Recommendation XXIII, Concerning Indigenous Peoples, adopted at the Committee's 1235th meeting (1997) UN Doc. CERD/C/51/Misc.13/Rev.4.
[113] The American Law Institute, *Restatement of the Law (3rd): the Foreign Relations of the United States*, vol.2, 702, (1987)
[114] Ethiopia has acceded to the African charter in 1998
[115] The African Charter, article 20
[116] Ibid, article 19
[117] Ibid, article 20

right to development;[118] the right to national and international peace;[119] and the right to environment.[120]

In order for the groups that identify themselves as indigenous peoples to be entitled to them, they must qualify as ópeoplesô under the African Charter. However, the problem arises as to who or what counts as ñpeoplesò as the African Charter does not define it. Despite the conceptual void in the African charter, the ACHPR has been developing jurisprudence on ópeoplesô rightsô. A very important case in this respect is the Endorois case though other cases are also worth mentioning.

One of the cases is Katangese PeoplesôCongress v Zaire.[121] In this communication, the president of the Katangese PeoplesôCongress, requested the ACHPR to recognize, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter. In its decision on the case, the ACHPR has not hesitated to refer to the Katangese as people without holding it important to determine whether Katangese consist of one or more ethnic group.

> *In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.*[122]

The ACHPR then concluded that the case held no evidence of violations of any rights under the African Charter. Therefore, the request for independence had no merit under the African Charter. Another case in which a group of the population has invoked collective rights against the state is the Social and Economic Rights Action Centre and Another v Nigeria.[123] The case involved allegation of violation of peoplesô rights under the African Charter, namely the rights to

[118] Ibid, article 22
[119] Ibid, article 23
[120] Ibid, article 24
[121] ACHPR Communication 75/92 Congrès du Peuple Katangais v. Zaire Eighth Annual Activity Report 1994-1995 (the Katanga case)
[122] Ibid, para. 6
[123] The Ogoni case, Social and Economic Rights Action Centre & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

environment under Article 24 and the right to freely dispose of oneôs wealth and natural resources under Article 21. This case is particularly important, because it deals with a distinct community with a minority status, the Ogoni people. In its decision although the ACHPR employed the term people interchangeably with the Ogoni community and the Ogonis, seemingly to emphasize the distinctness of a group, with its own standing in the Nigerian Society. The ACHPR held that the State of Nigeria violated the rights of the Ogoni people, inter alia, to environment and to free disposal of oneôs wealth and natural resources the subjects of which are ópeoplesô. This presupposes the view of the ACHPR that the Ogonis are holders of peoplesô rights under the African Charter. The clear distinction that the ACHPR made between the group (the Ogoni people) and the state, Nigeria, affirms this point.

The very interesting case in which the ACHPR comes to affirm the collective rights enshrined under the Africa charter is the Endorois case.[124] The Communication alleges that Kenya has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from their ancestral land, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people. In its land marking ruling, the ACHPR found Kenya in violations of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. This decision is a major victory for indigenous peoples across Africa, including Ethiopia.

4.3 The UN Declaration on the Rights of Indigenous Peoples: What Implication for Ethiopia?

After a lengthy drafting process within the UN, the Human Rights Council in June 2006 approved UN Declaration. Of the thirteen African members of the Human Rights Council, only four (Cameroon, Mauritius, South Africa and Zambia) voted in favour of UN Declaration. African States expressed concern and contributed to the deferral of UN Declarationôs adoption by the UN General Assembly.[125] The AU adopted a unified position expressing concern

[124] The Endorois case, Communication 276/2003- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

[125] See e.g. the ódraft Aide Memoireô of the African Group on the Declaration, dated 9 November 2006, New York, in which the Group expressed concern about e.g. the absence of a definition; the inclusion of the right to self-determination; and called for a ódeferment on the adoption of this Declarationô (para 9.1).

regarding the UN Declaration,[126] and welcomed the deferral of the UN Declarationôs discussion by the UN. The AU mandated the African group at the UN to guard Africaôs interests and concerns about the ópolitical, economic, social and constitutional implicationsô of UN Declaration.[127] The African group released a memorandum setting out their concerns,[128] and proposed some further amendments to UN Declaration.[129] In March 2007, a group of African academics issued a reply countering the African groupôs Aide Memoire.[130] At its 41st session, in May 2007, the ACHPR responded with the adoption of an Advisory Opinion on the UN Declaration, in which it tried to óallay some of the concerns raised surrounding the human rights of indigenous populationsô and reiterated óits availability for any collaborative endeavor with African States in this regard with a view to the speedy adoption of the Declarationô.

Overcoming this initial resistance, and after some amendments to the initial text, the UN General Assembly on 7 September 2007 finally adopted UN Declaration. Among the fifteen African states, Ethiopia was one to have been registered an absent vote.[131] This shows Ethiopiaôs neglect for the existence of indigenous peoples in its territories. For instance, during the African Commissionôs 36th ordinary session, a state delegate of the Republic of Ethiopia in his contribution queried the authenticity of the statistics and identification of certain groups as being indigenous peoples in Ethiopia.[132] He averred that, to the best of his knowledge, there were no official statistics relied upon to make conclusions about groups who could be identified as indigenous in the country. The debate should not be who is indigenous and who is not. Rather what is important is articulating óthe concrete human rights concerns of these peoples whose problems resemble those of indigenous people all over the worldô.[133]

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[126] See African Union Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc Assembly/AU/Dec.141 (VIII) (30 January 2007).

[127] Ibid, para 3.

[128] Africa Group Draft Aide Memoire: United Nations Declaration on the Rights of Indigenous Peoples (9 November 2006).

[129] Africa Group Proposed Draft Text of the United Nations Declaration on the Rights of Indigenous Peoples (8 May 2007), available at http://www.ishr.ch/hrm/nymonitor/ new_york_updates/african_text_draft_8_may_2007.pdf

[130] African Group of Experts Response Note to óThe Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoplesô (21 March 2007). This note was signed by seventeen leading African experts on indigenous rights from a dozen different countries.

[131] Others include Chad, Côte dôIvoire, Equatorial Guinea, Eritrea, Gambia, Guinea-Bissau, Mauritius, Morocco, Rwanda, São Tomé e Principe, Seychelles, Somalia, Togo, and Uganda

[132] One of the authors participated in this session as a member of the Secretariat of the African Commission.(Bojosi and Wachira, p.400)

[133] The Report of the African Working Group, ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commissionôs Working Group on Indigenous Populations/ Communities (Resolution on

Chapter Five: Case Study; Definition of Mursi

5.1 Introduction

Given the emergence of new global and regional legal instruments to protect the rights of indigenous peoples, it is imperative that some consensus develops around global indigenous identity. As Kingsbury points out, a positivist approach to defining indigenous treats groups as ódistorted and rather static formal categoriesô.[134] However, even with a dynamic and fluid working definition of indigenous peoples, it is difficult to overcome some of the regional differences that groups face, especially in Africa, as host states deny the very relevance of indigenous identity. Such issues should be approached cautiously as attempts to confine indigenous peoples solely to regional contexts will disrupt an on-going global indigenous rights discourse over the passage of key human rights protections. For example, special rapporteur Miguel Alfonso Martinez in his comprehensive óstudy on treaties, Agreements and other Constructive Arrangements between states and indigenous populationsô attempts to point out that given the different colonial and treaty-making contexts in Africa versus other regions of the world, peoples in Africa should pursue their rights as óminorityô populations rather than óindigenousô.[135] Such erroneous distinctions lend further confusion to an already contentious debate and can be overcome somewhat with flexible and dynamic working definition that account for such historical and contemporary differences.

In Ethiopia the constitution under article 40(5) recognizes the existence of pastoralist groups and their specific rights to land. Quite progressively, the constitution also acknowledges that the country is composed of different peoples entitled to collective rights, including the right to self-determination. In addition, international human rights law, including the African Charter and the ICCPR, are incorporated in Ethiopian constitutional law. As a consequence, it is argued that the right of indigenous peoples transpires through the provisions of the constitution whose

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the Adoption of the Report). The report is entitled óReport of the African Commissionôs 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 at its 28th ordinary session held in Cotonou, Benin in October 2000, IWGIA & ACHPR, 87 (2005), p.85. downloaded from http://www.iwgia.org.sw163.asp (accessed on 15 July 2010) p.19

[134] Kingsbury,óIndigenous Peoplesô,P.414.

[135] United Nations commission on Human Rights, 22 June 1999, Study on Treaties, Agreements and other Constructive Arrangements between states and Indigenous populations: Final Report by Miguel Alfonso Martinez, Special Rapporteur, E/CN.4/Sub.2/1999/20. see pp.12-15

interpretation must be read in accordance with international human rights law and the African Charter which are binding on Ethiopia.

Characterization of peoples as indigenous, especially in Africa is extremely important in several aspects. As to mention some of the importance and to highlight the main consequences of my finding so as to indicate the practical content and implications of this studyôs findings;

A. Lack of legislation

The situation of indigenous peoples in Africa is extremely serious. The level of bad governance, corruption, impunity, violent conflict and poverty is in general very high on the African continent, and indigenous peoples are among the groups suffering the most. Only few African countries have so far recognized the existence of indigenous peoples. However, this situation is gradually improving and several central African countries now recognize the existence of indigenous peoples in their countries. Countries such as Kenya and Namibia are also gradually opening up. However, widespread lack of recognition persists in all other parts of Africa and the same is true in Ethiopia.

B. Lack of representation and participation in decision making

Indigenous peoples in Africa are often poorly represented in decision-making bodies at both local and national level and their participation in decision-making processes is very limited. The lack of representation and participation makes it very difficult for indigenous peoples to advocate their cause and determine their own future development. Most African states follow European-oriented modernization and development strategies that completely disregard indigenous traditional African sectors, the important contributions of such sectors to national economies and their need for supportive policies.

C. Discrimination

Indigenous peoples in Africa are discriminated against by mainstream populations and looked down upon as backward peoples. Many stereotypes prevail that describe them as ñbackwardò, ñuncivilizedò and ñprimitiveò and as an embarrassment to modern African states. Such negative stereotyping legitimizes discrimination and marginalization of indigenous peoples by institutions of governance and dominant groups.

D. Land Disposition

The main problem faced by indigenous peoples in Africa is land dispossession, which is 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; natural resource extraction etc. The land dispossession undermines indigenous peoplesô livelihood systems, leads to severe impoverishment and threatens the continued existence of indigenous peoples. Legal frameworks promoting and protecting indigenous peoplesô lands are very weak or non-existing, and policies are most often negatively biased against indigenous peoples and tend to undermine rather than support their livelihoods.

E. Victims of violent conflicts

Indigenous peoples in Africa are often victims of violent conflicts. In eastern and western Africa there are numerous violent conflicts between nomadic pastoralists and sedentary farmers as well as inter-community conflicts between pastoralists themselves. These conflicts are further exacerbated by effects of climate change and increased competition over natural resources, and they lead to massive suffering, impoverishment and displacements. In countries such as Niger and Burkina Faso the situation is extreme involving organized massacres of entire villages. Indigenous peoples are also victims of abuses committed by the military and armed militia groups.

F. Lack of Justice

Indigenous peoples in Africa have limited access to justice and violations against their rights are often committed with impunity. Cases of violations of indigenous peoplesô rights are rarely investigated by the police, perpetrators are often not brought to justice, judicial systems are too expensive for indigenous peoples and often ineffective and negatively biased against indigenous peoples, and indigenous peoples thus have very limited possibilities of redress. The failure of most court cases brought about by indigenous peoples in Africa is an indicator of this. (See for example the book by Albert Kwokwo Barume ñLand Rights of Indigenous in Africaò

Therefore, the object of this case study is the Mursi. The Mursi are a group of transhumant indigenous people who are pastoralists and cultivators, numbering about 7500 (according to the 2007 statistical report from Federal Democratic Republic of Ethiopia Populations Census Commission (FDRE 2008)) individuals, who live in the lower Omo valley- of south western Ethiopia.

This chapter will be used to illustrate the other chapters in this thesis. In Chapter III, I elaborated on the criteria behind defining indigenous peoples. I will here examine how these criteria relate to the Mursi people.

In the last sub-chapter to this chapter I will try to draw some conclusions on the case of Mursi, as well as an attempt to examine how the case study was related to the rest of the paper.

5.2 Methodology

Robert Yin writes that one should do simple or complex case studies or comparative analysis to get the best possible output from an analysis.[136] Independently of the purpose of the analysis ï whether it is to explain, describe or explore a phenomenon - it will be necessary to have a theoretical framework for the analysis. The theoretical framework is in this paper found in chapter III. According to Yin, analytical generalizations possible and is used as a pattern for comparing the case studyøs findings. Yin thus proposes that case studies can be used both to test and to develop theories. In this paper it is used to test the theory developed throughout this paper.

Yin classifies case studies into single and multiple case studies, and describes the variants.[137] This case study of the definition of the Mursi people is a single-case study. A single case study implies that the researcherøs focus is directed to one specific social phenomenon. The reason for the case study is either that the phenomenon is very rare or for other reasons little known, or that it is used to develop or test models. This case study is the latter types of a single-case study - it is used to develop or test models. Svein Andersen calls this type of case study ñimplicit comparativeò case studies, in his book on case studies and generalizations.[138] It is called "implicit comparative" due to its relation to theoretical models, and thus indirectly to other cases.

The number of units in the analysis influences the research methods. Yin separates between holistic case studies ï with one unit of analysis ï and embedded case studies ï with several units or sub-units.[139] In this thesis there will be a several criteria of which the Mursi are defined ï so this will be an embedded case study.

[136] Yin (1989)
[137] Ibid. Page 46-50.
[138] Andersen (1994). Page 369-370.
[139] Supra note 136, Page 49.

There are considerations to be taken in the collection and interpretation of data. The validity and reliability [140] of the data are influenced by the problems in the collection and interpretation of data. This measures to what extent the data collected is connected to the main question and whether the interpretation of the data is consistent with reality.

The strategy that would give the most *reliable* data would be to interview government official on their thoughts on criteria used to define the Mursi Peoples. By carrying out interviews with people among members of the house of peopleôs representatives, government representatives, Ministry of justices, Ministry of Federal Affairs and other decision-makers, I would have gotten a very reliable position on the Ethiopian governments stand on this issue. This process would have required a lot of time and resources, obviously outside the scope of this paper.

The *validity* of the data also needs to be discussed. I have tried to analyse the definition of the Mursi people. I have used four criteria. These four criteria are used because it is my suggestion that these will best explain the content of the definitions of the international instruments and here of the concept of the indigenous Mursi people. There are obviously other criteria I could have used. However, an analysis of all possible criteria for defining indigenous peoples would make the theoretical framework difficult to work with. If one were to attempt to investigate all relevant criteria, it would be a very time consuming study to conduct due to the complexity of the theoretical framework. It would also be impossible to know which criteria that is relevant. The criteria for defining have to be selected from a multitude of more or less relevant criteria.

There are thus problems with both the *reliability* and *validity* of the data. These problems have various sources, mainly the lack of resources and the trade-off between complexity and applicability.

5.3 Theoretical Framework

National instruments often include a racial criterion because they want a fairly easily applicable measure to define whom the indigenous are. International instruments sets common standards and do not, to the same degree, have to define each individual as indigenous - A possible exception to this rule being the Working Group of Indigenous Populations, which uses definition as a guide in deciding which representatives to admit to the group. I will discuss the four criteria

[140] For a discussion of the term ñvalidityò and ñreliabilityò, see e.g. Hellevik (1991, page 42-43) or Yin (1989, page 40-42).

in my theoretical framework, developed to fit international law ï and not go into national law in detail.

5.3.1 Traditional Lands

When the Mursi speak of the population movements that brought them into their present territory, and which have continued throughout this century, they describe themselves as ódooking for a cool placeô. This phrase is important for the light it sheds, not only on Mursi history but also on the role of history in shaping and legitimizing their response to present ecological conditions.

According to Mursi traditional history, they moved into their present territory from a range of hills, which they call Dirka, west of the Omo and south of the river Mui. Although it is impossible to say what promoted this move, it is easy to see why they should have settled on the east rather than on the west bank of the Omo. Between Dirka and the Omo there is a level grass plain, twenty to twenty-five kilometer wide and less than 500 meters in elevation, which becomes quickly waterlogged after rain but lacks even seasonal water courses. The Omo was, at that time, occupied by a group of hunters and cultivators, the Kwegu, who today form a small client population among both the Mursi and Bodi [141] and who are said to have first introduced the Mursi to cultivation. The Kwegu were in a subservient relationship with the Bodi, who occupied the present day Mursi grazing area east of the omo and who, in turn, had close links with communities of hill farmers who occupied higher ground in the Dara range and along the Omo-Elma watershed. These were ancestors of the Ari and/or the Dizi, who are now confined to the highlands east and west of the Omo respectively. The Mursi attacked the cattle herding Bodi, who retreated northwards, beyond the river Mara, but claim to have left the Kwegu in peace.

It is impossible to say with any certainty when the Mursi first moved to the Omo, but what little evidence there is suggests that they did so between 100 and 200 years ago. At Gowa, on the left (east) bank of the Omo, there was in 1970 a large tree which was said to have been used to tie up calves when the original crossing (using a ford which has since been washed away) was made. On high ground overlooking the river Elma, at Arichukgirong, there are what appear to be the fairly recent remains of house built by the farmers who abandoned the area on the arrival of the

[141] D.Turton, óA Problem of Domination at the Peripbery: The Kwegu and the Mursiô, in D. Donham and W.James (eds), The Imperial Marches of southern Ethiopia: Essaya in History and social Antropology (Cambridge: 1986): 148-172

Mursi.[142]And at the southern end of the Dara range, not only are thereclear remains of hill terracing, but there was also, in 1970, at least one dead coffee tree still standing. In any event, all that can be said with certainty, on the basis of oral testimony and external historical evidence, is that the Mursi were living on the east side of the Omo by the 1890s and it is from this point that one can begin to trace the history of their subsequent movements with some confidence.

In international law there is no requirement that the indigenous people have to be the first group to settle within the borders of a national state. The Mursi arrived first in the lower valley of river Omo and have held much of these areas of till today. There is precedence for allowing other indigenous peoples even in countries with a very old general population. Today, neighboring tribes like the Aari, the Banna, the Bodi, the Karo, the Kwegu, the Nyangatom and the Suri acknowledged that the Mursi living in their territories were an indigenous people. This established a precedent for the recognizing of a group as indigenous even where a majority population in the state as a whole was indigenous or very old.ò

5.3.2 Distinct cultural characteristics

The Mursi has a traditional culture very distinct from other neighboring tribes. They have their own religion, language, clothing, art, crafts, and different ways of life. The Mursi have a reputation for being one of the more aggressive African tribes and are famous for their stick fighting distinct culture ï the donga.

Their trademark ósaucerô lip plate (*dhebi a tugoin*) has become the chief visible distinguishing culture of the Mursi and made them a prime attraction for tourists. A girlôs lower lip is cut, by her mother or by another woman of her settlement, when she reaches the age of 15 or 16. The cut is held open by a wooden plug until the wound heals. It appears to be up to the individual girl to decide how far to stretch the lip, by inserting progressively larger plugs over a period of several months. Some, but by no means all, girls persevere until their lips can take plates of 12 centimeters or more in diameter. It is often claimed that the size of the lip plate is correlated with the size of a womanôs bride wealth. This is not borne out by the fact that the marriages of many girls have already been arranged, and the amount of bride wealth to be paid by their husbandsô families has already been decided, *before* their lips are cut.

[142] This are circular stone platforms, about 5 to 6 meters in diameter, on which, say the Mursi, the mud floors of the houses were laid. This was to keep out surface water as it ran down the hillside after heavy rain.

Like other forms of body decoration and alteration found the world over (like ear piercing, tattooing, and circumcision), the lip plate worn by Mursi women is best seen as an expression of social adulthood and reproductive potential. It is a kind of ôbridgeô between the individual and society ï between the biological óselfô and the social óselfô.

Religion and healing are very much interconnected for the Mursi. Knowledge of illness and of the divine emerges from people's experiences of the natural and social world. Priests provide the context for a healthy community and it is the priest as well as members of other lesser ritual families (e'wu) who are sought out to treat epidemics, drought, and crop pests. The Mursi also have a healing tradition based around the powers of women healers (ngerrêa, sg. ngerrê).

Like many agro-pastoralists in East Africa, the Mursi experience a force greater than themselves, which they call Tumwi. This is usually located in the Sky, although sometimes Tumwi manifests itself as a thing of the sky (ahi a tumwin), such as a rainbow or a bird. The principal religious and ritual office in the society is that of Kômoru, or Priest. This is an inherited office, unlike the more informal political role of the Jalaba. The Priest embodies in his person the well-being of the group as a whole and acts as a means of communication between the community and God (Tumwi), especially when it is threatened by such events as drought, crop pests and disease. His role is characterized by the performance of public rituals to bring rain, to protect men, cattle and crops from disease, to ward off threatened attacks from other tribes, to safeguard the fertility of the soil, of men and of the cattle. Ideally, in order to preserve this link between the people and God, the Priest should not leave Mursiland or even his local group (bhuran). One clan in particular, Komortê, is considered to be, par excellence, the priestly clan, but there are priestly families in two other clans, namely Garikuli and Bumai. The religion of the Mursi people is classified as Animism, although there is a Serving in Mission Station in the northeastern corner of Mursiland, which provides education, basic medical care and instruction in Christianity. The Mursi have their own language called Mursi, which is classified as one of the Surmic languages. Mursi is linguistically classified as a member of the Surmic group of languages within the east Sudanic subdivision of the Nilo-saharan Phylim. The Mursi have many distinctive cultural characteristics, which distinguish them from the dominant society.

5.3.3 Non-Dominance

The criteria of Non dominance as described in chapter III refers to Non-Dominance in the national states. The indigenous can be in majority in certain parts of the country and still

maintain indigenous status. The Mursi obviously do not control the Ethiopian government. Currently, only minorities with population of between 10,000 and 100,000 qualify for direct representation in Ethiopiaôs parliament, and the Mursi, Karo, Kwegu, and other small Omo tribes remain unrepresented in the countryôs democratic system. It is also an element of Non-Dominance that they have been discriminated against. As pointed to in the discussion of the concept in chapter III, there is an element of compensation in the special rights status that are given to peoples that has suffered from discrimination on the past. The Mursi has been discriminated against in the southern nation nationalities and peopleôs attempts to assimilate them.

5.3.4 Self-Identification and Group-Consciousness

It has not always been popular to be Mursi. The Mursi People has up through the years met a lot of racism. These attitudes are still a reality among some people. This discrimination resulted in many Mursiôs becoming embarrassed over their own culture. Many wanted to escape the culture and become a part on the majority. This is a typical element in many indigenous peoples' history.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). However, in general Mursi identify themselves as indigenous as group consciousness and according to ILO No. 169 article 1, 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.

Chapter Six: Conclusion and Recommendation

6.1 Conclusion

The objective of this thesis was to ñstudy definitions of indigenous peoples and the rights in which they are formed in light of the criteria used to define indigenous peoples.ò The aim was to develop ñindigenous peoplesò as a concept in international human rights law, and disclose some of the misunderstandings and political objectives in discussions on definition in the different instruments.

I developed a theoretical framework in chapter III, which was used in the analysis of the fifth chapter, in which I examined four criteria for definition of indigenous peoples ï traditional lands, distinctive cultural characteristics, non-dominance and self-identification and group consciousness. The first three definitions I examined - the definition written by Martinez Cobo and used by the Working Group on Indigenous Populations[143], the definition under ILO 169[144] and the World Banksô guidelines for definitions in Operational Directive 4.20[145] -fitted well into this framework. The criteria from the theoretical framework were found with varying emphasis in all the instruments, illustrating that there is a global abstract idea of indigenous peoples even though the specific contexts yield different definitions.

The guidelines for definitions proposed by Alfonso Martinez[146] did not fit equally well into the theoretical framework. Alfonso Martinez stated that only those who are descendants of people that once were marginalized by overseas colonizers should be eligible for protection by international instruments. He explicitly states that no indigenous groups in Africa and Asia should receive protection as indigenous peoples[147], as no descendants of colonizers control them. He defines indigenous peoples on the basis of what essentially is a racial criterion, where he traces the indigenous peoples descent from those holding traditional lands at the time of colonization.

I chose to abandon a racial criterion when I analyzed the theoretical framework under chapter III. Alfonso Martinez, a Special Rapporteur from the now Sub-Commission on the Promotion and

[143] E/CN.4/SUB.2/1986/7/ADD.4: Paragraph. 379-382
[144] International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent countries, 1989 (No. 169). Article 1.
[145] The World Bank Operational Manual Operational Directive 4.20 of September 1991. Articles 3-5.
[146] E/CN.4/Sub.2/1999/20. Articles 34-92.
[147] Ibid. Article 90.

Protection of Human Rights, included the racial criterion in his study[148] - but his view represents the minority in the human rights community. The racial criterion is difficult to combine with other criteria for definition, as the indigenous personôs status is determined by biological factors. It also involves, as I explained in chapter III, a lot of practical limitations and ethical problems. It should, however, be mentioned that it is possible that Alfonso Martinez would develop a definition consisting of a set of several criteria if given the task to define indigenous peoples within the regions he stated that there were indigenous eligible for protection.

The theoretical framework I decided on, consisting of the four criteria, was used to analyse four definitions and guidelines for definitions. This analysis illustrated how similar the first three definitions were, as they were based on much the same criteria. It also showed why the definition of Alfonso Martinez was different, as it used a racial criterion for definition.

Different criteria were in focus also within the first three definitions, as they were drafted in different contexts. There is, for instance, a varying emphasis on traditional lands and distinctive cultural characteristics. The inclusion of tribes, which takes focus away from the criterion of traditional lands, illustrates this. In the ILO 169 tribes and indigenous peoples are given the same protection by the treaty, the tribes needing no connection to traditional lands. In the Cobo-definition that is applied by the Working Group there is no mentioning of tribes, and connection to traditional lands is required.

These differences could be partially determined by the context the definitions are written in. Douglas Saunders argued that the omission of tribal peoples in the Working group on Indigenous Populations was largely a result of Asian countries influence, as they wanted no groups on their territories defined as indigenous peoples. The tripartite organ of the ILO included both indigenous peoples and tribal peoples as early as 1957 in the ILO 107, at a time when there was little participation from Asian and African states. The later ILO 169, which replaced ILO 107, continued to use the same dual definition. The ILOôs history and composition can have contributed to a focus on a criterion of distinctive cultural characteristics displayed in the inclusion of tribes.

There are a many political struggles on the definition of indigenous peoples. I focused on the disagreement I view as the most important, as it has drastic consequences ï the attempts to

[148] E/CN.4/Sub.2/1999/20

exclude Asian and African groups from protection as indigenous peoples. The moderate attempts emphasise that the criterion of traditional lands is difficult to apply in many areas in Africa and Asia, while others use a racial criterion for definition to exclude all Asian and African groups. The argument is that no group shall enjoy protection as indigenous peoples, as all groups in the territories have similar connections to the traditional lands. The indigenous peoples in these countries - as well as governments in New Zealand, Australia, Europe, the Americas, Asian and Africa ï often disagree. They emphasise that old traditional cultures liked to the use of land face the same problems all over the world, and should be protected by the universally applicable instruments. I explained these differences in a realist perspective.

I used the Mursi as a case study in an attempt to illustrate the impact of the theoretical framework, as well as how it related to the international instruments which protect the rights of indigenous people. The definition of the Mursi people is not yet well defined in both Ethiopian and International law.

Despite definitional impasse, the rights and interests of indigenous peoples are evolving through international law making processes. Through ILO Convention No.169 and UN Declaration, international human rights law provides important standards on the rights of indigenous peoples. On the basis of the present examination of key international instruments, it is possible to make some general observations about the rights of indigenous peoples. Among them, one relates to the extent to which states must formulate and implement policy in order to protect and promote the rights of indigenous peoples. The present evaluation reveals that there are some legal constraints on statesô freedom of action in this respect. For example, under ILO Convention No.169 and, in certain circumstances, ICCPR Article 27, the state must adopt some positive measures to protect the land and resources of indigenous peoples.

Ethiopia has become State parties to many international instruments that are of potential relevance to indigenous peoples, such as ICCPR, CERD, ICESCR, CBD and the African Charter. Increasingly, the bodies monitoring these treaties have made concern for indigenous peoples an express part of their mandates. For instance, the CERD Committee has received

communication from the Center for International Environmental Law regarding the violation of the rights of indigenous tribes in the Omo National Park.[149]

Despite the non-recognition of indigenous peoples as defined under international law, in Ethiopian legislation, significant opportunities do exist for the protection of these peoples within existing legal frameworks in the country. These Constitutional, statutory provisions, and international instruments ratified by Ethiopia, discussed above, are of particular importance to indigenous peoples.

I hope that this thesis has helped yield a better understanding of the implications and true nature of the arguments used in discussions on definitions and rights of indigenous peoples, which I see as necessary in order to develop the concept of indigenous peoples in international law. It is important to define who is indigenous before recognizing their rights, as they increasingly are given preferential treatment in international law. Greater agreement on which groups are indigenous ï without necessarily adopting a universal definition ï requires that one first agree on the criteria upon which the definitions of indigenous peoples are based.

6.2 Recommendation

The Ethiopian government should ratify ILO Convention No.169 and adopt a new law dealing with the rights of indigenous peoples recognizing their right. It should require definition and identification of existing indigenous peoples based on international and African standards and establishes independent monitoring institutions. In this regard, the term óindigenous peoplesô needs to be defined and understood outside the confines of aboriginality and based on the above theoretical framework. Such definition and identification will pave the way for the protection of indigenous peoples.

The Constitution should recognize the collective composition of indigenous peoples and their right as a group. The process of determining public interest, the role of affected communities in such processes and the extent to which their interests weigh should be settled. Measures should also be taken to encourage the participation of indigenous peoples in formal decision making organs. To ensure that the rights of indigenous peoples are properly enforced, standing rules should be relaxed to authorize public interest litigation in human rights matters.

[149] Center for International Environmental Law, report to the CERD Committee: Comments concerning the State Partyôs Report on the Federal Democratic Republic of Ethiopia (ñEthiopiaò), with specific reference to the indigenous tribes in the Omo National Park, Ethiopia, (February 7, 2007), p.2

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