

**School of Graduate Studies, Faculty of Law,  
Addis Ababa University**

**Topic: The Emerging International Law on  
Indigenous Peoples' Rights: A Look at the Ethiopian  
Perspective**

**By: Bahar Abdi**

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**Addis Ababa**

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**By: Bahar Abdi**

**Advisor: Mohammed Habib (Assistant Professor)**

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**Addis Ababa University**  
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**Faculty of law**

**Signed Approval Sheet by Board of Examiners**  
**The Emerging International Law on Indigenous Peoples' Rights: A Look at the Ethiopian Perspective**

**By: Bahar Abdi**

**Approved by Board of Examiners**

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**Advisor**

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**Internal Examiner**

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**External Examiner**

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**Signature**

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**Signature**

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**Signature**

## **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 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. It is clear from the current assessment of the thesis that 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. 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. The Constitution, for instance, requires consultation of communities over development activities affecting them. However, the level of legal and policy protection is obviously inferior compared to international and regional standards. The Ethiopian government should ratify ILO Convention No.169 and adopt a new law dealing with the rights of indigenous peoples explicitly recognizing their collective right to land. It should require identification of existing indigenous peoples based on international and African standards and establish independent monitoring institutions. In this regard, the term 'indigenous peoples' needs to be understood outside the confines of aboriginality. Such recognition and identification will pave the way for the protection of indigenous peoples. The Constitution should recognize the collective composition of indigenous peoples and their consultation 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.*



## **Plagiarism Declaration**

I, BAHAR ABDI, do hereby declare that the thesis ‘The Emerging International Law on Indigenous Peoples’ Rights: A Look at the Ethiopian Perspective’ is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

**To my beloved Mom**

## **Acknowledgement**

First, praised be to the almighty Allah who has done all these to me and giving me the patience to go through this thesis.

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## Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
African Working Group	African Working Group of Experts on Indigenous Populations/Communities
African Charter	African Charter on Human and Peoples' Rights
AU	African Union
CEMIRIDE	Centre for Minority Rights Development
CBD	Convention on Biological Diversity
CERD	The Committee on the Elimination of Racial Discrimination
EIA	Environmental Impact Assessment
IACHR	Inter-American Commission of Human Rights
IACrHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ILO Convention No. 107	ILO Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries No.107
ILO Convention No.169	ILO Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries No.169
IWGIA	International Work Group for Indigenous Affairs
MRG	Minority Rights Group International
NGO	Non-Governmental Organization
OAS	Organization of American States
The Committee	UN Human Rights Committee
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNGA	United Nations General Assembly
UNWGIP	United Nations Working Group on Indigenous Populations
UN Declaration	United Nations Declaration on the Rights of Indigenous Peoples

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# Chapter One: General Framework of the Research

## 1.1 Back ground of the Study

The concept of indigenous people is an emerging area of modern international law. It is estimated that there are more than 370 million indigenous people spread across 70 countries worldwide.<sup>1</sup> Practicing their respective unique traditions, they retain social, cultural, economic and political characteristics which are distinct and different from those of the larger societies in which they live. The protections granted to such groups under international human right instruments, do not usually take into consideration the fact that the situation of indigenous peoples varies from other groups as well as from country to country and region to region as the UN Declaration on the Rights of Indigenous Peoples (hereinafter, the UN Declaration) did.

Though there were some scattered efforts,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Since then, a discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.<sup>5</sup>

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<sup>1</sup> 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

<sup>2</sup> 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

<sup>3</sup> Megan Davis, *The United Nations Declaration on the Rights of Indigenous Peoples*, Indigenous Law Centre, Vol. 11, No.3, (2007), P.55

<sup>4</sup> 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

<sup>5</sup> Siegfried Wiessner : *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, Harvard Human Rts. J, 1999, p. 57

It has also been stated that there are now some specific issues or suggested as they will become areas of interest for indigenous people in this decade. These includes, *inter alia*, the right to exploit natural resources located on the traditional lands of indigenous peoples; preservation of cultural traditions and languages which is a high priority for many indigenous peoples who are usually a minority in the settler society; to be asked for their prior informed consent against activities affecting them, and compensation for the previous use or exploitation of land and property by the settler which is contentious too.<sup>6</sup>

In addition, the impact of large-scale Development projects on the human rights and fundamental freedoms of indigenous peoples, and their communities vis-à-vis the notion of sovereign right of a state to exploit its natural resource and ‘public/national interest’ doctrine has been critical concerns. The introduction of the right to ‘Free, Prior and Informed consent’ of indigenous peoples is said to decipher such exposition of indigenous peoples while opening a conceptual debate. It is against these back ground that the research will try to cover the overall legal and theoretical discourses attached to these issues besides giving a general sketch of the recognition of indigenous peoples under international law.

## **1.2 Statement of the Problem**

Developing countries need capital and knowledge transfer in the relation with developed world. Moreover, there is always need to utilize domestic resources for wider national development projects. 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. These communities depend on land and easily accessible resources for their livelihood. In the event where the government tends to utilize large scale lands, in any part of the country, there is a tendency to be extra-ordinarily concerned about the future status of people previously utilizing the same landed property subject to the applicable laws of

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<sup>6</sup> Ruth Thompson (ed.), *The Rights of Indigenous Peoples in International Law*: Workshop report, University of Saskatchewan Native Law Centre, (1986), p.13

the country including the prohibition to sell land. So far, the government has been paying compensation for individuals who have to forfeit their existing right to use the land. But, under the customary practices of several ethnic groups such as the pastoral peoples of the lowland communities also retain some form of collective right to use land for farming or animal husbandry. Meanwhile, such communities assume or perceive themselves as indigenous peoples of the locality where they live. In other words, whenever there is a demand by the government to use a portion of the land of such localities, the people of the area respond as legitimate user of the land and possessors of the right, at least not to allow anyone to “take away” without their agreement. In particular, a proposed project is perceived to eventually lead to eviction of some portion of these communities, the relationship with the government or investors engaged with the development project vis-à-vis the “indigenous communities” may be more complicated.

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 the government may go in utilizing the land for major development projects. A prior understanding as to the position of the law on this issue can encourage the communities, the government and the investors to go into major projects in such localities with no or little problem. In particular, foreign investors seem to be interested in having a very clear picture about the legal protection they could resort to, in a country like Ethiopia, under international law.

This research is intended to contribute towards elaborating the extent to which the rights of such communities and the public interest which the government may like to promote. The focus on international law will have direct effect on the attitude of the major development partner of the country that can invest large amount of capital in this country.

### **1.3 Objectives of the Study**

#### **❖ General Objective**

The general objective of this study is exploring whether or not there is adequate protection under international law in favour of indigenous peoples affected by major development projects.

## ❖ Specific Objective

The study also 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.

### **1.4 Significance of the Study**

This research will have academic and practical relevance. In academic terms, it will be a contribution to the ongoing debate on the contentious rights of indigenous peoples almost everywhere in the world. Secondly, as far as its practical significance is concerned, such an independent analysis on the rights of indigenous communities will help to create a more conducive social environment for major development projects to be implemented without any significant obstacle. In other words, it may help towards elaborating the scope of rights of people, under the applicable rules of international law vis-à-vis major development projects. Moreover, in addition to whatever rights are recognized under the domestic laws of Ethiopia, such exploratory research on international human rights law will expand the dimensions of the same right and ensure more adequate protection. After all, the rights of such people have been debated so far, largely with reference to cultural and linguistic rights. The focus of this research which is right to retain title over land ownership, within the localities where the indigenous communities live, will extend the ongoing discourse to previously neglected dimension.

### **1.5 Research Questions**

- How and to what extent the international law has been protecting so far indigenous peoples in countries like Ethiopia?
- What are the emerging international policies and laws for the protection of indigenous peoples?
- What rights do they have and how are they to be understood in the broader international law 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 with our land tenure system/state-public ownership as well as the resulting right of the government to use land for major developmental projects in the interest of the public?

### **1.6 Scope and Limitation of the Study**

This research aims to explore and provide a vivid picture of the rights internationally recognized for indigenous peoples and comments on the observed loopholes. Due emphasis is to be given to the impact of development projects 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 legal instruments which are applicable in Ethiopia and Ethiopian domestic laws. Finally, as we do not have a universally agreed understanding of who indigenous peoples are, this research does not attempt to provide a definition of indigenous peoples, but a working definition is adopted.

### **1.7 Methodology**

This research is exploratory covering:

- a) Any rules of international custom recognizing the rights of indigenous communities in general, and land ownership right in particular
- b) Any provisions international instruments recognizing these general and particular rights
- c) Any provisions of international human rights instruments regarding development projects vis-à-vis the land and other natural resources, in particular these general and particular rights
- d) Any provisions of international human rights law applicable in Ethiopia
- e) The process by which international instruments are applicable in Ethiopia
- f) Any domestic laws recognizing these general and particular rights

## **1.8 Chapter Outline**

This work has five chapters. Chapter one is an introduction to the study. Chapter two reviews existing literatures on the rights of indigenous peoples including definitional issue. Chapter three explores international instruments on those rights of indigenous peoples having connection with development projects. Chapter four discusses international instruments which are applicable in Ethiopia and the Ethiopian legal system on the rights of indigenous peoples. Conclusion and recommendations form chapter five.

## **Chapter Two: The Rights of Indigenous Peoples under International Law: A Review of Existing Literature**

### **2.1 Introduction**

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. The international community has not adopted a definition of indigenous peoples. In fact, the position of most international bodies charged with examining or addressing the rights of indigenous peoples is that a strict definition of indigenous peoples is neither necessary nor desirable.<sup>7</sup> In addition to the definitional issue, this chapter seeks to explore the position of international law on the rights of indigenous peoples as well as the status of indigenous peoples under the African human rights system. Though the recognition of the rights of indigenous rights is continually evolving, the scope of these rights is still uncertain.

### **2.2 The Meaning and Definition of Indigenous Peoples**

In this section, we will try to explore different definitions forwarded by scholars and international organizations.

#### ***2.2.1 Definitions Proposed by Scholars***

For a better understanding of the meaning and definition of indigenous peoples, let us compare the term with some interrelated concepts before appreciating those definitions forwarded by scholars. The term “indigenous” can be juxtaposed against communities referred to as “local” or “traditional.” Local or traditional communities may or may not be indigenous, but often, like indigenous communities, they have a connection with particular lands.<sup>8</sup> Their use of those lands and their lifestyles are integrally tied to their cultural traditions, which distinguish them from the dominant societies within their states.<sup>9</sup> The terms “local” and “traditional,” like “indigenous,”

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<sup>7</sup> See, for instance, the Report of the African Working Group, *infra* note 41, p.41

<sup>8</sup> Jeremy Firestone, Jonathan Lilley, and Isabel Torres De Noronha, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, American University International Law Review, vol.20, No.219 (2004-2005), p.226

<sup>9</sup> Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, McGill Law Journal, vol.44, No.953, (1999), p.957. He argues that “local” communities that

are not defined in international law despite the increasing frequency with which they are employed. Examples of their use in international law include the Convention to Combat Desertification,<sup>10</sup> the Proposed American Declaration on the Rights of Indigenous Peoples,<sup>11</sup> and perhaps most prominently, the Convention on Biological Diversity.<sup>12</sup> A typical example in Ethiopia is the Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right.<sup>13</sup>

Benedict Kingsbury suggests “local” communities as a focal point rather than favoring “indigenous” or “tribal” concepts. He contends that the concept of tribal is difficult to define and its “implicit emphasis on social structure does not mesh well with the dynamic societies, cultures, and political forms of many of the groups in the internationally active indigenous peoples’ movement.”<sup>14</sup>

Returning to the core issue i.e. the meaning of “indigenous”, an early attempt was made by Jose Martinez Cobo to define the parameters of this term in his seminal Study of the Problem of Discrimination Against Indigenous Populations. Martinez Cobo defines indigenous peoples as:

*Indigenous communities, Peoples and nations are those which having historical continuity with pre-colonial societies that developed on their*

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live “traditional lifestyles” share, to an extent, characteristics with indigenous peoples that include lengthy territorial occupation and cultural and economic traditions that are tied to occupation and customary use of lands).

<sup>10</sup> See United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc.A/47/49, vol. 1, 137, article 16(g) (1994) (using the terms “local and traditional knowledge”).

<sup>11</sup> See Proposed American Declaration On The Rights Of Indigenous Peoples, Inter-Am. C.H.R., 1333<sup>rd</sup> sess., OEA/Ser.L/V/II.H.95, art. 1(1) (1997) (noting that “this Declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations”), available at <http://www.cidh.org/Indigenous.htm> (visited on July 19, 2010)

<sup>12</sup> See Convention on Biological Diversity, infra note 157 (recognizing the “close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources”).

<sup>13</sup> Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right No. 482 /2006 ( throughout the proclamation, the term ‘local communities’ are used)

<sup>14</sup> Benedict Kingsbury, “*Indigenous Peoples*” in *International Law: A Constructivist Approach to the Asian Controversy*, American Journal of International Law, vol.92, No.414, (1998), p.450 (noting that a broad alternative to focusing on “indigenous peoples” is a consideration of local communities).

*territories , consider themselves distinct from other sections of societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve , develop and transmit to future generations their ancestral territories and their ethnic identity , as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.*<sup>15</sup>

According to this definition, to be regarded as indigenous peoples , there must be historical continuity between peoples under consideration and societies that existed before invasion of external forces. Regarding the question of historical continuity, he continues by saying that:

*Historical continuity envelops the notion that the indigenous existence is a current, ongoing and persistent distinction comprised of one or more of the following factors:*

- a) full or partial occupation of ancestral lands;*
- b) common ancestry among the original occupants of these lands;*
- c) general culture or way of life in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
- d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
- e) residence in certain parts of the country, or in certain regions of the world;*
- f) other relevant factors.*<sup>16</sup>

According to this definition , in principle , even only one of the factors listed here is enough to be recognized as indigenous people but this factor has to be considered in relation to historical continuity with pre-invasion and pre-colonial societies.<sup>17</sup>

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<sup>15</sup> Jose Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub2/1986/7, (1986-87),

<sup>16</sup> Id, paras.379-80

<sup>17</sup> Lorenzo Nesti, *Indigenous Peoples' Right to Land*,(1999), p.9

The definition suggested by Martenz Cobo also answers the question “who is indigenous person?” Accordingly, it defines indigenous person as one who belongs to these indigenous populations through self-identification as indigenous and recognized and accepted by these population as one of their members.<sup>18</sup> The definition insists that such requirement of recognition from the group preserve for this communities sovereign right and power to decide who belongs to them.<sup>19</sup> This type of self-identification was not recognized in the ILO Conventions.<sup>20</sup>

The risk with this type of self-identification is that if indigenous peoples are given power to disregard individuals who claim to be member it goes against internationally recognized individual’s right. For instance, Article 27 of International Covenant on Civil and Political Rights (ICCPR), states that “persons belonging to ethnic, religious ,or linguistic minorities shall not be denied the right to enjoy their culture ,language...” Here ,it must be noted that minorities may include , indigenous peoples, ethnic groups and national minority, which justify application of this provision to indigenous peoples.

How shall we reconcile, article 27 of ICCPR and the assertion of Martinez Cobo which reserve sovereign right for indigenous peoples to determine their member.

A case which is related to issue at hand was brought before the UN Human Right Committee (hereinafter, the Committee) on December 1985 by Ivan Kitok against the Swedish government (*Ivan Kitok v Sweden*)<sup>21</sup>. In this communication the plaintiff has been the member of Sami-minority ethnic group , where he left the area before three years and pursuing his own profession. But latter ,he came back and required membership alleging that he has inherited civil right to reindeer breeding from his forefathers as well as right to land. However, the

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<sup>18</sup> Cobo, supra note 15

<sup>19</sup> U.N. Dep’t of econ. And soc.affairs, division for social policy and development, workshop on data collection and disaggregation on indigenous peoples, , the concept of indigenous peoples, (Jan 19-21, 2004), p.6, (UN Doc. PFII/2004/WS.1/3)

<sup>20</sup> ILO Convention No.107, art(1)(b) and art1(2)(b) and art1(2) of ILO Convention NO.169

<sup>21</sup> United Nations Human Rights Committee. Report of the Human Rights Committee. Communication No 197/1985. UN Doc CCPRJC/33/D/197/1985 (1988).

members disregarded him. After futile attempt of redress at local tribunal, he filed suit before the UN Human right committee based on Article 27 of ICCPR against Swedish government. The Committee decided that there is no violation of Article 27 of ICCPR. The reasoning was that the objective criteria of determining membership to a group may be challenged if it is shown that there is reasonable and objective justification necessary for the continued viability and welfare of minority as a whole. In other words, restriction upon individual who sought membership to the aforementioned group is possible when there is objective justification which secures the continued existence of the minority as a whole.

To recap, self-identification as mentioned in Article 1(2) of ILO convention NO.169 and Martinez Cobo's definition should be construed to refer to situation where members of groups may exclude any person claiming membership so long as there is justifiable circumstances as mentioned above.

Similarly, Erica Irene Daes who conducted a comprehensive review of the literature and the practice of international institutions that inform the meaning of the term "indigenous", identified self identification as one of the four factors relevant to determining whether a people is indigenous:

- (a) Priority in time, with respect to the occupation and use of a specific territory;*
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;*
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and*
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>22</sup>*

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<sup>22</sup> Erica-Irene Daes, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, U.N. ESCOR, Sub-Commission On Prevention Of Discrimination And Protection Of Minorities, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, (1996), p.60 (this definition is also adopted by the UN Working Group on Indigenous Populations)

The weight and relevance assigned to any one factor depends on the relationship between colonizers and indigenous peoples as well as that among indigenous peoples.<sup>23</sup> Indeed, while members of the developing world tend to be more familiar with the settler/immigrant model adopted in colonies such as Australia and the United States (which has resulted in a particular configuration to the relationship between indigenous peoples and a given settler society), in much of Africa and Asia, colonists left indigenous social structures relatively intact.<sup>24</sup> The former communities, unlike the latter, also tended to define their relationship vis-à-vis the colonists in treaties.<sup>25</sup> Perhaps most importantly, unlike the more familiar settler societies in the “west,” in Africa and Asia, ethnic groups that govern states tend to be no less native to their states than those who have been identified as tribal or indigenous.<sup>26</sup> Daes suggests, however, that any conceptual difficulty incorporating native peoples of Asia into the concept of indigenous peoples “disappears” if we consider that the term encompasses groups that are “native to their own specific ancestral territories within the borders of the existing State, rather than persons that are native generally to the region in which the State is located.”<sup>27</sup> Indeed, to the extent such ethnic peoples are isolated and otherwise exist at the margins of society, it also may well be appropriate to consider such peoples as covered by the concept of “indigenous” peoples.<sup>28</sup>

Professor Siegfried Wiessner provides a final formulation. Wiessner contends that indigenous communities are “best conceived” as:

*[P]eoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or*

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<sup>23</sup> Id, p.70

<sup>24</sup> Rodolfo Stavenhagen, “*The Indigenous Problematique*” in IFDA **DOSSIER** (Nyon), 3-14, 10 (1985), *quoted in* Cobo, *supra* note 15, p.106

<sup>25</sup> Id, p.128

<sup>26</sup> Cobo, *supra* note 15, p.64

<sup>27</sup> Ibid

<sup>28</sup> Ibid

*present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.*<sup>29</sup>

Wiessner prefers the phrase “traditionally regarded” to the phrase “priority in time” that Daes uses, because as a factual matter, it may turn out that a specific group of indigenous peoples who are regarded as indigenous does not have priority.<sup>30</sup> In addition, Wiessner emphasizes the strong bond that indigenous peoples have with ancestral lands, while acknowledging that indigenous peoples may not presently reside on such lands.<sup>31</sup>

### **2.2.2 Definitions by International and Regional Organizations**

Attempts have been made to define indigenous peoples by different organs like the International Labour Organization (ILO), the UN Working Group on Indigenous Peoples (the UNWGIP), and the African Commission on Human and Peoples’ Rights (ACHPR) to mention few.

#### **2.2.2.1 The ILO Definitions**

The ILO Conventions Nos. 107 and 169 are the only general, binding interstate treaties concerning Indigenous Peoples. In 1953, the ILO reviewed various definitions and criteria used by national governments and social scientists and concluded that there was no single universally accepted definition of indigenous peoples.<sup>32</sup> The review was important in that it casted light on difficulties encountered in formulating a definition of indigenous peoples which followed with publication of a book entitled;”Indigenous Peoples: Living and working Condition of Aboriginal Populations in Independent countries .”This book provided provisional description of indigenous peoples living in independent countries. It mentions that indigenous peoples are descendants of original inhabitants of population living in a given country at the time of conquest by ancestors of non-indigenous groups . To show these peoples’ distinct culture, the book proceeds ;-

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<sup>29</sup> Wiessner, supra note 5, p.115

<sup>30</sup> Id, pp.114-115

<sup>31</sup> Ibid

<sup>32</sup> Jk Das, *Human Rights and Indigenous Peoples*, (2000), p.20

*Indigenous peoples tend to live more in conformity with the social, economic and cultural institutions which existed before colonization than with culture of the nation to which they belong.*<sup>33</sup>

This description has been the base for definition contained in ILO convention NO. 107 of 1957. Article 1(1) of this Convention defines indigenous peoples as:-

*members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited, the country, or geographical region to which the country belongs, at the time of conquest and which irrespective of their legal status, live more in conformity with the social, economic and cultural institution of that time than with institutions of the state to which they belong.*

Thus, the ILO Convention No.107 made the first attempt in defining indigenous populations. As we understand from the reading of this article, the Convention adopted objective criteria of distinct culture and descent from original inhabitants as means of identifying indigenous peoples.<sup>34</sup>

Now the ILO convention NO.107 of 1957 is revised by ILO Convention NO.169. Nevertheless, no substantial change is made in defining indigenous peoples, albeit there are added elements. Article 1(1) puts the criteria of descent from original inhabitants and also indigenous peoples are regarded as those parts of society who retain their own social, cultural and political institutions.

The departure between the two Conventions is that indigenous peoples need not be special category of tribal peoples, which is the case in the ILO convention NO 107. Secondly and notably, variance is revealed as we go through Art.1(2) of convention NO.169 of 1989. This provision provides that self identification as indigenous people shall be taken as criteria to

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<sup>33</sup> Ibid

<sup>34</sup> Luis Rodriguez Pinero, *Indigenous Peoples, Post Colonialism, and International Law; The ILO Regime (1919-1989)*, (2005), p.146

determine the identity of these groups of peoples. Accordingly, if a group of people considered itself as indigenous, they shall be regarded as such. However, both definitions failed to emphasize vulnerability of indigenous people.

Generally, in the two Conventions, indigenous peoples are defined as a group of people who settled in an area before another dominating group and they solely or at least partly rely on their own social, cultural, economic and political institutions and are those who identified themselves as indigenous.

#### **2.2.2.2 The United Nations Working Group on Indigenous Populations**

The UN Working Group on Indigenous Populations, which is established as a result of study commissioned in 1970s,<sup>35</sup> proposed four criteria, which may be used to identify indigenous peoples rather than defining indigenous peoples. These include:

- Priority in time, with respect to the occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>36</sup>

#### **2.2.2.3 The African Commission on Human and Peoples' Rights Approach**

Within the African context, the issue of who indigenous peoples are becomes controversial as there is a strong contention that 'all Africans are indigenous to the continent'. It is up on such assumptions that the ACHPR adopted the modern analytical form of the concept which is concerned with the plight of these groups of peoples instead of focusing on "who came first".<sup>37</sup>

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<sup>35</sup> Jk Das, supra note 32, p.22

<sup>36</sup> Working paper on the concept of "indigenous people" of the Working Group on Indigenous Populations (E/CN.4/Sub.2/AC.4/1996/2).

<sup>37</sup>, ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/ Communities (Resolution on the Adoption of the Report). The report is entitled

The ACHPR being cognizant of undesirability of giving definition for indigenous peoples, it opts for outlining the major characteristics (like the UNWGIP) that can help identify who the indigenous peoples and communities in Africa are. The ACHPR thus characterizes the groups of peoples who consider themselves as indigenous peoples as those:

- a) Who have distinct and different cultures and ways of life from the dominant society,
- b) Whose cultures are under threat, and ways of life is dependent on access and rights to land and natural resources thereon,
- c) Who suffer from discrimination as they are regarded as less developed and less advanced than other dominant society,
- d) Who live in remote areas, and
- e) Who are subject to domination and exploitation by the dominant sectors of the society which prevents them from genuinely participating in decisions affecting their future and development.<sup>38</sup>

In the communications the ACHPR has considered regarding a specific sector or group of the population which has invoked collective rights against the state, it is only in the very recently decided case that the ACHPR has come to determine who indigenous peoples in Africa are.

The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG), on behalf of the Endorois Community against the government of Kenya.<sup>39</sup>In this case, the ACHPR has got the opportunity to elaborate on the concept of ‘peoples’, and to determine whether the Endorois are a distinct community who is to be regarded indigenous peoples. The ACHPR notes that the concepts of ‘peoples’ and ‘indigenous peoples / communities’ are contested terms. As far as the concept of ‘peoples’ is concerned, the ACHPR describes its dilemma of defining the concept in its Report of the

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‘Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission 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)

<sup>38</sup> Id, p.89

<sup>39</sup> Communication 276/2003- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya. The ruling was made on February 4, 2010.

Working Group of Experts on Indigenous Populations/Communities ( hereinafter, the African Working Group), in the following terms:

*Despite its mandate to interpret all provisions of the African Charter as per Article 45(3), the African Commission initially shied away from interpreting the concept of ‘peoples’. The African Charter itself does not define the concept.<sup>40</sup>*

However, the ACHPR in this Endorois case comes to elaborate on the concept noting that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as ‘peoples’, viz:

*[A] common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights... and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.<sup>41</sup>*

Being cognizant of the absence of a single universal definition for indigenous peoples, the ACHPR explored definitions rendered by different organs<sup>42</sup> and concluded that “indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognize the linkages between people, their land, and culture.”<sup>43</sup> In this regard, the ACHPR notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/communities include pastoralist communities such as the Endorois.

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<sup>40</sup> Report of the African Working Group, supra note 37, p.72

<sup>41</sup> The Endorois case, Supra note 39, para. 151

<sup>42</sup> The African commission considered definitions forwarded by Working Group of Experts on Indigenous Populations/Communities, the UN Working Group on Indigenous Populations and Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (Article 1(1)(b))

<sup>43</sup> The Endorois case, supra note 39, para. 154

Thus, based on the evaluations of evidences and statements of the complainants and the respondent state, Kenya, the ACHPR is of the view that:

*[T]he Endorois are an indigenous community and that they fulfill the criterion of “distinctiveness”. The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a ‘people’, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands.<sup>44</sup>*

### **2.3 Working Definition of Indigenous Peoples for This Thesis**

As seen above, both the terms ‘indigenous’ and ‘peoples’ are contentious. As such, it is difficult to formulate a universally viable definition that is not grossly under- or over-inclusive.<sup>45</sup> The term ‘indigenous peoples’ is today applied by certain groups to seek rights and protection that accrue from international standards protecting similarly situated peoples. It is therefore more important to outline the major characteristics that can help identify indigenous peoples (particularly, in Africa) rather than engage in semantics of who is indigenous.

Indigenous peoples, for our purpose, are any group of peoples who identify themselves as such and whose culture and way of life, social institutions, and mode of production differ considerably from, and are threatened by, the dominant society, and who depend on access and rights to their traditional land and natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other dominant societies which often prevent them from genuinely participating in decisions affecting their future and development.<sup>46</sup>

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<sup>44</sup> Id, para. 162

<sup>45</sup> Kingsbury, supra note 14, p.414

<sup>46</sup> Based on characteristics identified by the WGIP and the ACHPR Working Group of Experts on Indigenous Populations/Communities

## 2.4 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<sup>47</sup>, a number of writers describe a long tradition of recognition of the status and rights of indigenous peoples within international law<sup>48</sup>. Sanders, for instance, traces this long tradition of recognition of indigenous rights in international law back to the early sixteenth century contact between the Spaniards and the Indians.<sup>49</sup> 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.<sup>50</sup> 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:<sup>51</sup>

*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.<sup>52</sup> She goes on claiming that “a longer view of international law shows that there was an evolution before Westphalia away from

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<sup>47</sup> Asbjørn Eide, *Review: Human Rights of Indigenous Peoples*, *The American Journal of International Law*, Vol. 95, No. 1 (Jan., 2001), pp. 260-264

<sup>48</sup> 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 proposition 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)*

<sup>49</sup> *Id.*, p.4

<sup>50</sup> *Ibid*

<sup>51</sup> 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

<sup>52</sup> Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, *Michigan Journal of International Law*, vol.30, (2008), p.182

the state-centered concept.”<sup>53</sup> 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.<sup>54</sup>

Be that as it may, in recent years the issue of indigenous peoples has been featuring prominently within international law. Modern international law’s concern for indigenous peoples has been started by the International Labor Organization (ILO) in the early 1920s, and culminated in the adoption of ILO Convention 107 of 1957.<sup>55</sup> 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.<sup>56</sup>

Accordingly, ILO Convention 107 was revised by ILO Convention 169 in 1989, hailed as the “most concrete manifestation at the international level of the growing responsiveness to indigenous peoples’ demands”.<sup>57</sup> The new Convention represented a major paradigm shift on the subject because, unlike its predecessor, it “adopted an attitude of respect for cultures and ways of life of these peoples”.<sup>58</sup> 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.

## **2.5 The African Human Rights System**

Within the framework of the African human rights system, the African Charter on Human and Peoples’ rights<sup>59</sup>, and its implementing organ, i.e. the African Commission on Human and

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<sup>53</sup> Ibid

<sup>54</sup> Marks, supra note 48, p.7

<sup>55</sup> Pinero, supra note 34, p.115

<sup>56</sup> 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

<sup>57</sup> S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, Arizona Journal of International and Comparative Law, vol.8, (1991), p.5

<sup>58</sup> Swepston, supra note 56, p.683

<sup>59</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, Organization of African Unity, art. 20, 21 I.L.M. 59 (1981) (entered into force Oct. 21, 1986), (hereinafter, the African Charter)

Peoples' Rights (the 'ACHPR'), come at the forefront. While there is no express reference to indigenous peoples in the African Charter, its embodiment of group or peoples' rights could be read as addressing their rights.<sup>60</sup> Moreover, Bojosi and Wachira argue that the ACHPR's jurisprudence on 'peoples' rights' has undoubtedly paved the way for the protection of indigenous peoples.<sup>61</sup>

Initially, the ACHPR tended to reject the issue, as it did not find the term 'indigenous peoples' applicable to African conditions. The main argument was that all Africans are indigenous to Africa and that no particular group can claim indigenous status.<sup>62</sup> 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.<sup>63</sup> The conference "recommended that the [ACHPR] should be encouraged to address the human rights situation of indigenous peoples in Africa, which it had so far never done before".<sup>64</sup>

A continued lobbying from individuals, groups and communities identified as indigenous peoples for recognition and protection from the ACHPR,<sup>65</sup> led the latter to adopt a resolution establishing the African Working Group in Africa to study the issue of indigenous peoples on the continent,<sup>66</sup> on the basis of article 45(1) of the African Charter.

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:<sup>67</sup>

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<sup>60</sup> 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

<sup>61</sup> 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

<sup>62</sup> IWGIA Indigenous world (2001-2002), p. 453

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> The report of African working group, supra note 37

<sup>66</sup> ACHPR /Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Peoples' 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](http://www.achpr.org/english/resolutions/resolution70_en.html) (accessed on 15 July 2010)

<sup>67</sup> Id, paras 1-5

- (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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> The African Commission's Working Group, after extensive consultations with human rights experts and indigenous peoples' organizations, prepared a report which was submitted to and adopted by the ACHPR in 2003.<sup>73</sup>

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 'peoples'. Based on these analyses, the African Working Group concludes that the African Charter protects the rights of

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<sup>68</sup> IWGIA, *Supra* note 62

<sup>69</sup> *Ibid*

<sup>70</sup> *Id.*, 455

<sup>71</sup> *Ibid*

<sup>72</sup> *Id.*, p.456

<sup>73</sup> Report of the African Working Group, *supra* note 37

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.<sup>74</sup>

## **2.6 Existing Uncertainties on the Position of International Law on the Rights of Indigenous Peoples**

Some evidence suggests that the rights of indigenous peoples may be given greater consideration in the formulation and implementation of development programs that affect them. The World Bank, for example, is undertaking a major review of its policy on indigenous peoples.<sup>75</sup> Other international organizations, such as the European Union<sup>76</sup>, the Asian Development Bank<sup>77</sup>, and African Development Bank<sup>78</sup> have adopted policies on indigenous peoples and development programs. The UN has also undertaken a range of activities in this area, including publishing a report in January 2003 on the impact of large-scale development projects on the rights and interests of indigenous peoples.<sup>79</sup> This trend could result in a more systematic integration of the rights of indigenous peoples into development programs.<sup>80</sup> Indigenous peoples tend to be among the poorest and most marginalized from the development perspective. Behara notes:

*It may be asserted that although people other than those who are indigenous have also been ousted in the name of development in the 'national interest', the acuteness of the gloom that is suffered is disproportionately high among indigenous peoples.<sup>81</sup>*

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<sup>74</sup> Id, pp.110-111

<sup>75</sup> The World Bank Operational Manual, Operational Policies, Indigenous Peoples (OP 4.10), (10 May 2005)

<sup>76</sup> European Union Council resolution, Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States, EU Doc. No. 13461/98 (30 Nov. 1998)

<sup>77</sup> Asian Development Bank, Policy on Indigenous Peoples (1998), available at [www.adb.org/Documents/Policies/Indigenous\\_Peoples/IPPP.pdf](http://www.adb.org/Documents/Policies/Indigenous_Peoples/IPPP.pdf).

<sup>78</sup> African Development Bank Group Involuntary Resettlement Policy (November 2003).

<sup>79</sup> Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen, Submitted in Accordance with Commission Resolution 2001/57, U.N.ESCOR, Comm'n on Hum. Rts., 59th Sess., Agenda Item 15, U.N. Doc. E/CN.4/2003/90 (2003).

<sup>80</sup> Helen Quane, *The Rights of Indigenous Peoples and the Development Process*, Human Rights Quarterly, Vol. 27, No.2, (2005), pp.652-682

<sup>81</sup> DK Behara, 'So-called development' and its impact on the rights of indigenous peoples in India, in CP Cohen (ed) *Human rights of indigenous peoples* (1998) p.121, cited in Chakma, supra note 9, p.30

Though it is vital to integrate the rights of indigenous peoples into development programs, the process could encounter several problems which stem from the uncertainty surrounding the scope of indigenous rights under international law, and the collective nature of some of these rights.<sup>82</sup> These uncertainties are further complicated by principles like ‘national interest’. Most States, for instance, reserve their right to expropriate or undertake development activities on alleged public interest grounds despite their impact on some people, including indigenous peoples. Thus, the thesis examines the scope of these rights under international law and explores some of their potential implications for the development process.

## **2.6 Conclusion**

In summary, most of the definitions, discussed above, link indigenous peoples with a pre-colonial or pre-invasion society in addition to other factors. However, sticking the concept of indigenous peoples with pre-invasion and colonization is somehow superfluous in African context for two reasons. First, all Africans are admittedly considered indigenous and suffered subordination by colonizers. Secondly, not all African countries had been colonized (e.g. Ethiopia) to associate indigeneity with pre-invasion and colonization. Thus, it is appropriate to deal with the concept of indigenous peoples in terms of their plight in addition to the self identification criteria. Moreover, whatever the specific term used to analyze and describe their situation, it is highly important to recognize the issue and to do something urgently to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.

Despite definitional debate, international recognition of indigenous peoples is continually evolving. This is evident from the growing interest by the international community to recognize indigenous peoples. However, it is hardly possible to say all the rights claimed by indigenous peoples are recognized under international law.

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<sup>82</sup> Ibid

## Chapter Three: The Rights and Interests of Indigenous Peoples under International Human Rights Instruments

### 3.1 Introduction

Most international human rights instruments protect the rights of the individual. Indigenous peoples need the recognition of specific collective rights for their survival as human groups. These rights, *inter alia*, include indigenous peoples' rights to their lands and resources, to maintain their cultures, and to be asked for their free, prior and informed consent in decisions that may affect them. Such rights are considered the minimum standards for the protection of their survival as distinct peoples and are intended to address the challenges most indigenous peoples face around the world. This chapter examines the scope of the above rights under international law and considers some of their potential implications for the development process.

### 3.2 Cultural Rights

The notion of respect for cultural particularism has been a feature of treaties among European powers since the Peace of Westphalia in 1648.<sup>83</sup> The Anti-Genocide Convention, the first U.N. sponsored human rights treaty, upholds that all cultural groupings have, at a minimum, a right to exist.<sup>84</sup> Respect for cultures beyond those of European derivation is promoted further by article 27 of the ICCPR. Article 27 affirms in universalist terms the right of persons belonging to “ethnic, linguistic or religious minorities . . . to enjoy their own culture, to profess and practice their own religion [and] to use their own language.”

The cultural integrity norm, particularly as embodied in article 27, has been the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS).

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<sup>83</sup> Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, (2000), p.93

<sup>84</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277,280 (entered into force Jan. 12, 1951) (defining, at article II, genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. . .”).

Several cases alleging breaches of Article 27 as a result of the impact of development on the cultural identity of the group have been considered by the Human Rights Committee under the First Optional Protocol to the ICCPR. For instance, in *Lansman et al v Finland No. 2*<sup>85</sup>, the Committee has established the following principles in relation to Article 27:

- *The Committee will consider whether the State has weighed up the interests of the Indigenous persons with the benefits of the proposed economic activity. Large scale activities, particularly those involving the exploitation of natural resources, could constitute a violation of Article 27.*
- *In assessing activities in the light of Article 27, State parties must take into account the cumulative impact of past and current activities on the minority group in question. Whereas 'different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of (a group) to enjoy their own culture.'*
- *The Committee will consider whether the State has undertaken measures to ensure the 'effective participation' of members of minority communities in decisions that affect them.*<sup>86</sup>

The Committee makes it clear that Indigenous people have a unique and profound relationship to their land which extends beyond economic interests to cultural and spiritual identity. Consequently the impact of developments on Indigenous people's land is also an impact on this deeper relationship.

The Inter-American Court of Human Rights (IACrHR) has recognized this relationship in the case of *Awas Tingi*<sup>87</sup>. The Court found that the right of everyone to use and enjoy their property extended to Indigenous communal ownership of land 'through an evolutionary interpretation of international instruments for the protection of human rights'.<sup>88</sup> The IACrHR continued:

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<sup>85</sup> *Lansman et al v Finland No. 2*, (25 November 1996) CCPR/C/58/D/671/1995

<sup>86</sup> *id.*, paras 10.5 and 10.7

<sup>87</sup> *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, [www.umn.edu/humanrts/iachr/AwasTingnicase.html](http://www.umn.edu/humanrts/iachr/AwasTingnicase.html) accessed 18 June 2010

<sup>88</sup> *Id.*, para 149

*[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*<sup>89</sup>

Surprisingly enough, the IACHR regards the cultural integrity of indigenous peoples as binding upon states irrespective of any specific treaty obligation. In its 1985 decision concerning the Yanomami of Brazil,<sup>90</sup> the IACHR invoked article 27 in favor of the Indians even though Brazil is not a party to the ICCPR. Citing the article, the IACHR held that

*[I]nternational law in its present state... recognizes the right of ethnic groups to special protection on the use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.*<sup>91</sup>

In this vein, the IACHR stressed that “the [OAS] has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of [indigenous] groups....”<sup>92</sup> The IACHR viewed a series of incursions into Yanomami ancestral lands as a threat not only to Yanomami’s physical well-being but also to their culture and traditions.<sup>93</sup> Among the recommendations made by the IACHR to protect the cultural heritage of the Yanomami was that the government proceed to secure the boundaries of a reserve for the group.<sup>94</sup>

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<sup>89</sup> Ibid

<sup>90</sup> Res. No. 12)85. Case No. 7615 Inter-Am. C.H.R. 24(1985) in Annual Report of the Inter-American Commission on Human Rights 1984-85. OEA/Ser.L/V/IL66, Doc. 10 Rev. I (1985).

<sup>91</sup> Id, para.7.

<sup>92</sup> Id, para. 9.

<sup>93</sup> Id, para. 2.

<sup>94</sup> Id, para. 3b.

Government practice in the UNWGIP and in the negotiation and adoption of the text of ILO Convention No. 169 renders the norm of cultural integrity a status of customary law.<sup>95</sup> Ambassador Espaiia-Smith of Bolivia, the chair of the ILO Conference Committee that drafted Convention No. 169, summarized the normative consensus reflected in the text

*The proposed Convention takes as its basic premise respect for the specific characteristics of the differences among indigenous and tribal peoples and the cultural, social and economic spheres. It consecrates respect for the integrity of the values, practices and institutions of these peoples in the general framework of guarantees enabling them to maintain their own different identities and ensuring self-identification, totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and lifestyles as long as this is freely and voluntarily chosen.*<sup>96</sup>

The same cultural integrity theme is at the core of the UN Declaration. Among the preambular paragraphs for which the Working Group Chair reported widespread support is the following:

*Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, **cultures and traditions**, and to promote their development in accordance with their aspirations and needs[.]*<sup>97</sup> (Emphasis added)

Moreover, the UN Declaration confers extensive rights on indigenous peoples to enable them to maintain and develop their own culture. For example, it recognizes indigenous peoples' right to be free from cultural genocide,<sup>98</sup> and to maintain and preserve their distinct identities<sup>99</sup>. The Declaration also through articles 11-13 codify rights pertaining to culture, spirituality and

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<sup>95</sup> S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, Arizona journal of international and comparative law, vol.21, No.1, (2004), p.29

<sup>96</sup> Anaya, *Indigenous Rights Norms in Contemporary International Law*, supra note 57, p.20

<sup>97</sup> Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, supra note 95, p.30

<sup>98</sup> ILO Convention No.169, article 7

<sup>99</sup> Id, article 8

linguistic identity, including the right to practice and revitalize cultural traditions and customs as well as the right to maintain, protect and develop past, present and future manifestations of Indigenous culture.

### 3.3 Land and Natural Resources Rights

Land and natural resources rights are collective rights which do not apply beyond the context of indigenous peoples.<sup>100</sup> These rights are either a result of i) a recognition of the distinct cultural, material and spiritual relationship indigenous peoples have with their lands, or ii) a distinct set of rights to property.<sup>101</sup> As far as property right is concerned, it has been affirmed as an international human right. The Universal Declaration of Human Rights (UDHR) states, “Everyone has the right to own property alone as well as in association with others,” and that “[n]o one shall be arbitrarily deprived of his property.”<sup>102</sup> Similar prescriptions are repeated in the American Convention on Human Rights<sup>103</sup>, the American Declaration on the Rights and Duties of Man,<sup>104</sup> the European Convention on Human Rights,<sup>105</sup> and the African Charter<sup>106</sup>.

More specifically, land and natural resources rights of indigenous peoples are recognized in the ILO Convention no.169 and the UN Declaration. The land rights provisions of Convention No. 169 are framed by article 13(1), which states:

*In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable,*

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<sup>100</sup> Henry Minde, Asbjørn Eide and Mattias Åhrén, *The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The work and process beyond the final adoption*, Journal of Indigenous Peoples Rights No. 4/2007, p.127

<sup>101</sup> Ibid

<sup>102</sup> See UDHR, article 17.

<sup>103</sup> See American Convention on Human Rights, Nov. 22, 1969, G.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), article 21.

<sup>104</sup> See American Declaration on the Rights and Duties of Man, adopted by the 9th International Conference of American States (Mar. 30-May 2, 1948), O.A.S. Res. 30, O.A.S. Doc. OENSer.UV/I.4, rev. (1965), article XXIII.

<sup>105</sup> See Protocol (No. I) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ.T.S. No. 9, at art. 1 (1952) (entered into force May 18, 1954).

<sup>106</sup> See the African Charter, supra note 59, article 21.

*which they occupy or otherwise use, and in particular the collective aspects of this relationship.*

The concept of indigenous territories embraced by the Convention is deemed to cover “the total environment of the areas which the peoples concerned occupy or otherwise use.”<sup>107</sup> Indigenous land and resource or territorial rights are of a collective character,<sup>108</sup> and they include a combination of possession, use, and management rights. In its article 14(1), Convention No. 169 affirms:

*The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.*

Further, article 15 requires that states safeguard indigenous peoples’ rights to the natural resources throughout their territories, including their right “to participate in the use, management and conservation” of the resources. The Convention falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources.<sup>109</sup> Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners.<sup>110</sup> In any case, the Convention asserts that indigenous peoples are to have a say in any resource exploration or extraction on their lands and to benefit from those activities.<sup>111</sup> In applying the Convention, relevant ILO institutions have emphasized that, when natural resource development activities may affect indigenous communities, a process of consultation with the communities, is required, at a minimum, before the development begins.<sup>112</sup> Prior consultation

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<sup>107</sup> ILO Convention No. 169, article 13(2).

<sup>108</sup> Anaya, *International Human Rights and Indigenous Peoples*: supra note 95, p.37

<sup>109</sup> Id, p.39

<sup>110</sup> Ibid

<sup>111</sup> See ILO Convention No. 169, article 15(1).

<sup>112</sup> Id. article 15(2).

and appropriate mitigation measures are required in respect to any natural resource extraction from indigenous ancestral or traditional lands, regardless of formal ownership of the lands or the exclusivity of indigenous occupation, when the extraction may in some way affect the lives of the indigenous people.<sup>113</sup> The Convention adds that indigenous peoples “shall not be removed from the lands which they occupy” unless under prescribed conditions and where necessary as an “exceptional measure”.<sup>114</sup> This would enable the state to retain some control over these lands and resources and allow it to utilize them in the national interest. When the grounds for relocation no longer exist, they “shall have the right to return to their traditional lands” and when return is not possible “these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them.”<sup>115</sup> The Convention also provides for recognition of indigenous land tenure systems,<sup>116</sup> which typically are based on long-standing custom.

The UN Declaration also acknowledges the land and natural resources rights. Article 26(2) of the Declaration states that “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of ... traditional occupation or use...” Article 28(1) stipulates that “Indigenous peoples have the right to ... restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally ... occupied or used, and which have been ... taken ... without their free, prior and informed consent”. When matching Articles 26 and 28 with the corresponding provisions in the only other binding international instrument specifically addressing indigenous peoples’ rights, ILO Convention No. 169, one notes that the Declaration goes beyond the ILO Convention. Under the UN Declaration, Indigenous peoples, for instance, will be able to use those provisions to veto development projects affecting their land and resources.

The ownership right is fairly ambiguously expressed in the ILO Convention 169, for which reason indigenous peoples have had difficulties using the ILO Convention 169 to claim ownership rights to land. But even more noteworthy is the right to restitution, which is

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<sup>113</sup> Anaya, *International Human Rights and Indigenous Peoples*: supra note 95, p.39

<sup>114</sup> ILO Convention No. 169, article 16.

<sup>115</sup> Id, article 16(3).

<sup>116</sup> Id, article 17(1).

essentially absent in the ILO Convention 169. The Declaration's clear confirmation that land, territories and resources taken shall be returned is significant.

It is important to note that the land and natural resources provisions are not innovations, even if they do stretch beyond the ILO Convention No. 169. Rather, they confirm recent trends within international law. Since the adoption of the ILO Convention in 1989, developments within international law have increasingly confirmed that indigenous peoples have the right to own the territories they have traditionally used as well as a right to restitution of territories lost. These developments within international law are attributable to the jurisprudence of the U.N. Human Rights Committee<sup>117</sup> and the IACHR regarding the implications of the cultural integrity norm. It also coincides with the interpretations of the general human right to property that has been promoted by the IACHR and adopted by the IACrHR.

For instance, in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>118</sup> the IACrHR accepted the IACHR's conclusion that Nicaragua had violated the property rights of the indigenous Mayangna community of Awas Tingni by granting a foreign company a concession to log within the community's traditional lands and by failing otherwise to provide adequate recognition and protection of the community's traditional land tenure. The IACrHR held that the concept of property articulated in the American Convention on Human Rights<sup>119</sup> includes the communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state.

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<sup>117</sup> See e.g. *Kitok v. Sweden*, supra note 21, *Lansman et al v Finland No. 1* (24 March 1994) CCPR/C/49/D/511/1992., *Lansman et al v Finland No. 2*, supra note 85 and *Awas Tingni Community v Nicaragua*, supra note 87

<sup>118</sup> *Awas Tingni Community v Nicaragua*, supra note 87

<sup>119</sup> . By virtue of article 21 of the American Convention on Human Rights, supra note 87, "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society . . . . No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." The Court declared, "Article 21 of the American Convention recognises the right to private property . . . . 'Property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value." *Awas Tingni case*, supra note 87, paras 143-44.

In this *Awas Tingni* case, the IACHR had maintained that, given the gradual emergence of an international consensus on the rights of indigenous peoples to their traditional lands, such rights are now a matter of customary international law.<sup>120</sup> Similarly, Anaya notes that “certain minimum standards concerning indigenous land rights, rooted in accepted precepts of cultural integrity, property, non discrimination... have made their way not just into conventional law but also into general or customary international law.”<sup>121</sup>

### **3.4 Right to Free, prior and informed consent (FPIC)**

Collective rights to traditional lands and resources are fundamental to indigenous peoples’ economic and social development, as well as to their very survival as distinct cultural communities. It is thus understandable that encroachments like development projects upon indigenous peoples’ traditional lands and natural resources threaten their very survival without their informed consent.

The right to free, prior informed consent is acknowledged in several international human rights instruments. The ILO Convention No. 169 refers to the principle of free and informed consent in the context of relocation of indigenous peoples from their land in its article 16. Article 7 recognize indigenous peoples’ “right to decide their own priorities for the process of development” and “to exercise control, to the extent possible, over their own economic, social and cultural development.” In articles 2, 6 and 15, the Convention requires that States fully consult with indigenous peoples and ensure their informed participation in the context of development, national institutions and programmes, and lands and resources. As a general principle, article 6 requires that consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.

The UN Declaration on the rights of indigenous peoples explicitly recognizes the principle of free, prior and informed consent in its articles 10, 11, 19, 28, 29 and 32. Specifically addressing the issue of development projects is article 32(2) which reads:

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<sup>120</sup> Final Written Arguments of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni Against the Republic of Nicaragua, *Arizona journal of international and comparative law*, vol.19, No.1, (2002), paras 62-66

<sup>121</sup> Anaya, *International Human Rights and Indigenous Peoples*, supra note 95, p.47

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

Several UN committees have made reference to the principle of free, prior and informed consent in their jurisprudence. In its General Recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination (hereinafter, the CERD) calls upon States to “ensure that members of indigenous peoples have 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”<sup>122</sup>.

On a number of occasions, the Committee on Economic, Social and Cultural Rights has highlighted the need to obtain indigenous peoples’ consent in relation to resource exploitation. In 2004, for instance, the Committee stated that it was “deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities.”<sup>123</sup> A few years earlier, it observed “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.”<sup>124</sup> It subsequently recommended that the State party ensure the participation of indigenous peoples in decisions affecting their lives and particularly urged it “to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169.”<sup>125</sup>

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<sup>122</sup>General Recommendation XXIII Concerning Indigenous Peoples, adopted at the Committee's 1235th meeting (1997) UN Doc. CERD/C/51/Misc.13/Rev.4., para. 4 (d)

<sup>123</sup> Report of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.100, para. 12

<sup>124</sup> Report of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.74, para. 12

<sup>125</sup> Id, para.33

The Inter-American human rights system has also dealt with the issue of consultation and consent in its jurisprudence. For instance, The IACrHR requires that States obtain the consent of Indigenous people before granting approval to companies seeking access to and exploitation of Indigenous land. In the *Awasi Tingni* decision the IACrHR held:

*The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the [American Convention on Human Rights], by granting a concession to company SOLCARSA to carry out road construction work and logging exploitation of the Awasi Tingni lands, without the consent of the Awasi Tingni Community.*<sup>126</sup>

A similar conclusion was reached by the ACHPR in the 2002 *Ogoni* case.<sup>127</sup> The ACHPR noted that “in all their dealing with the Oil Consortiums, the Government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland” and held that Nigeria had violated the right of the Ogoni people to freely dispose of its natural wealth and resources by issuing oil concessions on Ogoni lands.<sup>128</sup>

### **3.5 Conclusion**

In summary, states and indigenous peoples agree on the need to recognize the special relationship indigenous peoples have with their land. They also agree on the need to recognize the rights of indigenous peoples over their land and resources. Where indigenous peoples and states differ is on the extent of that recognition. Indigenous peoples want fairly unqualified, international recognition for their rights to their land and resources. States are reluctant to grant this recognition as they want to retain some flexibility in the implementation of these provisions.<sup>129</sup>

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<sup>126</sup> The *Awasi Tingni* case, supra note 87, para.142

<sup>127</sup> *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>128</sup> *Id.*, para. 58

<sup>129</sup> Quane, supra note 80, p.27

To whatever extent the ownership rights over land and resources is recognized, indigenous peoples will have to be involved in any development projects affecting their lands and resources. This should ensure that indigenous peoples are not marginalized from these projects to the same extent as they have been in the past.

There also seems to be a growing consensus that where development projects affect indigenous peoples, they should be able to participate in the formulation of these projects. In ILO Convention 169, this is recognized as a legal right and can be used to challenge development projects that fail to respect this right. This can be contrasted with the UN Declaration, which recognizes that indigenous peoples have a right not only to be consulted about development projects that may affect them but also to veto these projects when they affect their land and resources. The UN Declaration is still significant in highlighting the growing international consensus that indigenous peoples should participate in development projects that may affect them and should no longer be marginalized from the development process. Even though the Declaration does not impose any legal obligations on decision-makers in this area, it can be used to render them politically accountable for any failure to ensure the participation of indigenous peoples in relevant development projects.

## **Chapter Four: The Scope and Applicability of the Rights and Interests 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 peoples' 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. Even though our focus will be on international standard-setting instruments which provide provisions for the protection of indigenous peoples, and which are applicable in Ethiopia, the implication of the UN Declaration in Ethiopia is also considered. 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 have 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 peoples' 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: '[w]e, the Nations, Nationalities and Peoples of Ethiopia ...,' and further stating that 'all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia'.<sup>130</sup> According to the Constitution,

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<sup>130</sup> The Federal Democratic Republic of Ethiopian Constitution Proclamation No 1/1995( "the Constitution"), entered into force on 21 August, 1995, article 8(1)

*A 'Nation, Nationality or People' for the purpose of the Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.*<sup>131</sup>

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 'nation, nationality or people' nor does it 'explicitly recognize national, ethnic, religious and linguistic minority or *indigenous status*',<sup>132</sup> 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.<sup>133</sup> 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

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<sup>131</sup> Id, article 39(5)

<sup>132</sup> United Nations Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' Report of the independent expert on minority issues, Gay McDougall, Mission to Ethiopia, UN Doc A/HRC/4/9/ Add.3, 28 February 2007, para. 7

<sup>133</sup> The Constitution, article 9(1)

reproduced in the Negarit Gazette.<sup>134</sup> 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 rights provisions,<sup>135</sup> 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.<sup>136</sup> 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 Peoples' Rights.

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<sup>134</sup> Federal Democratic Republic of Ethiopia Combined report (initial and four periodic reports) to the African Commission on Human And Peoples' rights: Implementation of the African charter On human and peoples' rights, 2008, para.60

<sup>135</sup> The Constitution, article 13(2)

<sup>136</sup> The combined report, supra note 134, para.62

#### 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:

*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.*

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.<sup>137</sup> As has already been seen in the previous chapter, 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*<sup>138</sup>, 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 “an essential element in the

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<sup>137</sup> Elizabeth Evatt, *Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rights* in Sarah Pritchard (ed). *Indigenous Peoples. the United Nations and Human Rights* (1998) 114. She, for example, accepts that ‘the rights protected by art 27 apply to indigenous people.’

<sup>138</sup> *Kitok vs Sweden*, *Supra* note 21

culture of an ethnic community”.<sup>139</sup> Similarly, in *Omniak v Canada*<sup>140</sup>, 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*<sup>141</sup> 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 ‘may constitute a violation of the authors’ rights under article 27’.<sup>142</sup>

The willingness of the Committee to link the right of minorities to enjoy their ‘culture’ with indigenous land is illustrated by *Love-lace v Canada*.<sup>143</sup> 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 Committee’s finding strengthens indigenous peoples’ 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 “exclusively vested in the state and in the peoples of Ethiopia.”<sup>144</sup>

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<sup>139</sup> Ibid

<sup>140</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee*. Communication No 167/1984. UN Doc A145140(1990) vol 2, I

<sup>141</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No 511/1992. UN Doc CCPR) C15210/511/1992 (1993): (1996) I *Australian Indigenous Law Reporter*, p. 154.

<sup>142</sup> Ibid

<sup>143</sup> 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.

<sup>144</sup> The Constitution, article 40(3)

In the recent decision of *Hopu v France*,<sup>145</sup> 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 ‘family’ 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*.<sup>146</sup> The majority accepted that visits to ancestral lands can play an important role in a person’s identity.<sup>147</sup> 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 Committee’s 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*.<sup>148</sup>

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 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.

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<sup>145</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee*. Communication No 5491/1993. UN Doc CCPRJC.60/D/549/19931Rev.I (1997).

<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Ibid

#### 4.2.2.2 Biological Diversity Convention

The Convention on Biological Diversity (CBD)<sup>149</sup>, 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:

*[R]espect, 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 ‘approval’ 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).<sup>150</sup> 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.<sup>151</sup> In this regard, Ethiopia has enacted Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right in 2006 based on the African Model Law.<sup>152</sup>

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<sup>149</sup> Opened for signature 5 June 1992, (19931 ATS No 32, 31 LLM 818 (entered into force 29 December 1993). Ethiopia ratified CBD in 1994

<sup>150</sup> Fergus MacKay, *Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s 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

<sup>151</sup> 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

<sup>152</sup> Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right No. 482 /2006, preamble, para.4

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) [P]rotect 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)<sup>153</sup> is another key instrument that impacts on indigenous peoples. Racial discrimination is defined by article 1 as:

*[a]ny 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.*

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<sup>153</sup> 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.

Under article 2(1), state parties agree to condemn racial discrimination and to ‘engage in no act or practice of racial discrimination against persons [or] groups of persons’.<sup>154</sup> This provision also requires states to pay particular attention to indirect discrimination, which occurs where government policies, laws and regulations unintentionally cause disproportionate and/or unjustifiable harm in the form of human rights violations against persons [or] group.<sup>155</sup>

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:

*[A]llow 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.*<sup>156</sup>

Article 2(2) of the ICERD allows states to take special measures in the ‘social, economic, cultural and other fields’ 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.<sup>157</sup>

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<sup>154</sup> ICERD, article 2 (1) a

<sup>155</sup> Id, article 2 (1) b and c

<sup>156</sup> General Recommendation XXIII, supra note 122

<sup>157</sup> The American Law Institute, *Restatement of the Law (3<sup>rd</sup>): the Foreign Relations of the United States*, vol.2, 702, (1987)

#### 4.2.2.4 The African Charter on Human and Peoples' Rights<sup>158</sup>

In contrast to other regional and international human rights instruments, the African Charter is unique in its approach to collective rights known as peoples' rights. These include the right of all peoples to self-determination<sup>159</sup>, the right of peoples to equality;<sup>160</sup> the right to existence;<sup>161</sup> the right to development;<sup>162</sup> the right to national and international peace;<sup>163</sup> and the right to environment.<sup>164</sup>

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

One of the case is *Katangese Peoples' Congress v Zaire*<sup>165</sup>. In this communication, the president of the Katangese Peoples' Congress, 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*

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<sup>158</sup> Ethiopia has acceded to the African charter in 1998

<sup>159</sup> The African Charter, article 20

<sup>160</sup> Id, article 19

<sup>161</sup> Id, article 20

<sup>162</sup> Id, article 22

<sup>163</sup> Id, article 23

<sup>164</sup> Id, article 24

<sup>165</sup> ACHPR Communication 75/92 Congrès du Peuple Katangais v. Zaire Eighth Annual Activity Report 1994-1995 (the Katanga case)

*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.*<sup>166</sup>

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*<sup>167</sup>. This case involved allegation of violation of peoples' rights under the African Charter, namely the rights to environment under Article 24 and the right to freely dispose of one's 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 one's wealth and natural resources the subjects of which are 'peoples'. This presupposes the view of the ACHPR that the Ogonis are holders of peoples' 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*<sup>168</sup>. 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,

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<sup>166</sup> Id, para. 6

<sup>167</sup> The Ogoni case, supra note 127

<sup>168</sup> The Endorois case, supra note 39

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 Declaration's adoption by the UN General Assembly.<sup>169</sup> The AU adopted a unified position expressing concern regarding the UN Declaration,<sup>170</sup> and welcomed the deferral of the UN Declaration's discussion by the UN. The AU mandated the African group at the UN to guard Africa's interests and concerns about the 'political, economic, social and constitutional implications' of UN Declaration.<sup>171</sup> The African group released a memorandum setting out their concerns,<sup>172</sup> and proposed some further amendments to UN Declaration.<sup>173</sup> In March 2007, a group of African academics issued a reply countering the African group's *Aide Memoire*.<sup>174</sup> 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 'allay some of the concerns raised surrounding the human rights of indigenous populations' and reiterated 'its availability for any collaborative endeavour with African States in this regard with a view to the speedy adoption of the Declaration'.

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<sup>169</sup> See e.g. the 'Draft Aide Memoire' 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 'deferment on the adoption of this Declaration' (para 9.1).

<sup>170</sup> See African Union Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc Assembly/AU/Dec.141 (VIII) (30 January 2007).

<sup>171</sup> AU Doc Assembly/AU/Dec.141(VIII), para 3.

<sup>172</sup> Africa Group Draft Aide Memoire: United Nations Declaration on the Rights of Indigenous Peoples (9 November 2006).

<sup>173</sup> 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](http://www.ishr.ch/hrm/nymonitor/new_york_updates/african_text_draft_8_may_2007.pdf)

<sup>174</sup> African Group of Experts Response Note to 'The Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples' (21 March 2007). This note was signed by seventeen leading African experts on indigenous rights from a dozen different countries.

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.<sup>175</sup> This shows Ethiopia's neglect for the existence of indigenous peoples in its territories. For instance, during the African Commission's 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.<sup>176</sup> 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. As I have already pointed out in chapter two that the debate should not be who is indigenous and who is not. Rather what is important is articulating 'the concrete human rights concerns of these peoples whose problems resemble those of indigenous people all over the world'.<sup>177</sup> With this assumption, let's see the implication of some provisions of the UN Declaration for Ethiopia vis-à-vis development projects.

Indigenous peoples' relationship to their traditional lands and territories is recognized in the Declaration and given specific protection in Articles 25 to 32. At the outset, Article 25 ensures that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

The basic rights stemming from this are enlisted in Article 26:

- 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
- 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or*

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<sup>175</sup> Others include Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Gambia, Guinea-Bissau, Mauritius, Morocco, Rwanda, São Tomé e Príncipe, Seychelles, Somalia, Togo, and Uganda

<sup>176</sup> One of the authors participated in this session as a member of the Secretariat of the African Commission.(Bojosi and Wachira, supra note 61, p.400)

<sup>177</sup> The Report of the African Working Group, supra note 37, p.19

*other traditional occupation or use, as well as those which they have otherwise acquired.*

3. *States shall give legal recognition to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*

With regard to aboriginal peoples' rights to natural resources, the most significant provision is Article 32 which determines:

1. *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
2. *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
3. *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

The term natural resources is wide and can include such things as air, coastal seas, coastal ice, timber, minerals, oil, gas, as well as genetic resources and all other materials pertaining to indigenous lands and territories.<sup>178</sup> The Preamble of the Declaration further emphasizes that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”.<sup>179</sup>

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<sup>178</sup> Erica-Irene Daes, “*Indigenous Peoples' Rights to Land and Natural Resources*”, in: Nazila Ghanea & Alexandra Xanthaki, eds., *Minorities, Peoples and Self-Determination*, 2005, p.88

<sup>179</sup> UN Declaration, Preamble, para. 10.

Another important provisions concerning lands and territories is included in Article 10, which ensures that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Articles 18 and 19 more generally state that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions” and that “States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

As a declaration by the General Assembly, the Declaration on the Rights of Indigenous Peoples has no binding force such as a treaty. However, it is also not simply a statement, but to the contrary, some of past General Assembly declarations have gained significant status in international law.<sup>180</sup> Simply the name of a “Declaration” gives the document a certain solemnity.<sup>181</sup> Other General Assembly Declarations in the field of Human Rights have, in spite of their non-binding status, risen to extraordinary significance. As a prominent example, the Universal Declaration on Human Rights is frequently cited as an authoritative document with regard to human rights standards.<sup>182</sup> Such a declaration can furthermore be regarded as an element of state practice, and thus, among others, can lead to the development of new customary international law.<sup>183</sup>

In the view of UN Special Rapporteur on the Situation of Human Rights and Fundamental

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<sup>180</sup>Lassa Oppenheim, *International Law – A Treatise*, vol. 1, 9th ed., ed. by Sir Robert Jennings and Sir Arthur Watts (Harlow, Essex: Longman 1992), p. 424

<sup>181</sup>James S. Anaya & Siegfried Wiessner, “*The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment*” (2007) online: JURIST, University of Pittsburgh School of Law, 3 October 2007, available at: <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

<sup>182</sup>Ibid

<sup>183</sup>Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press 2008), p. 1212

Freedoms of Indigenous People, James S. Anaya, the UN Declaration on the Rights of Indigenous Peoples constitutes “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law (...)”<sup>184</sup> Various scholars have joined him in this understanding, stating, as Bartolomé Clavero did:

*The Draft Declaration of Indigenous Rights is but a new step in the development of the international human rights regime that builds on the Universal Declaration on Human Rights. It is presented in declarative terms exactly because the instrument does not create these rights out of thin air, but instead confirms their prior existence and gives them practical meaning.*<sup>185</sup>

Thus, the UN Declaration will have a bearing on Ethiopia despite its absence during the voting stage. This is because there are communities whose problems resemble those of indigenous people all over the world.

#### **4.4 The Rights of Indigenous Peoples That Have Legal Protection against Violations by Development Projects in Ethiopia**

This section examines the extent to which provisions have been made for the rights of indigenous peoples. In the event provision is not made for the rights of indigenous peoples, then it will explore ways in which the legal framework can be brought in line with international law. The legal framework includes instruments that may not be directly geared towards indigenous peoples but nevertheless impacts on the rights of indigenous peoples. Examples of such instruments are, *inter alia*, land statutes, forest legislation, water statutes and environmental statutes. In this respect, one way of limiting the scope of the legal framework to be examined, is by focusing on the core issues or core claims made by indigenous peoples. The following are identified as some of the core claims often made by indigenous peoples: non-discrimination,

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<sup>184</sup> UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc. A/HRC/9/9 of 11 August 2008 at para. 85.

<sup>185</sup> Bartolomé Clavero, “*The Indigenous Rights of Participation and International Development Policies*” (2005) 22 Arizona Journal of International and Comparative Law 41, p.43

right to development, environmental rights, cultural rights and land rights. In this regard, the paper could limit itself to examining the extent to which the domestic legislation makes provision for these rights or claims.

#### **4.4.1 Non-discrimination**

The principle of non-discrimination and equality enables indigenous peoples to derive the same benefit from development projects on their land as that derived by the rest of the population.<sup>186</sup> As noted above, General Recommendation XXIII of the CERD provides guidelines to a non-discriminatory development, including the provision by State parties of conditions “allowing for sustainable economic and social development compatible with their cultural characteristics”<sup>187</sup>, and requiring restitution for the deprivation of Indigenous land providing for “the right to just, fair and prompt compensation [which] should as far as possible take the form of lands and territories”.<sup>188</sup>

This principle is enshrined under article 25 of the FDRE Constitution which states “[a]ll persons are equal before the law and are entitled without discrimination to equal protection of the law.” In this light, the Constitution stipulates that “the law shall guarantee to all persons equal and effective protection without discrimination on grounds of, [*inter alia*], race, social origin and ‘other status’.” Hence, such equality protection extends to indigenous peoples.

#### **4.4.2 Right to Development**

The right to improved living standards and to sustainable development is affirmed under article 43(1) of the Constitution. The Constitution further entitles nationals to take part in the national development process, and also to be consulted in policies and projects affecting their communities.<sup>189</sup> However, this provision of the Constitution seems to have lacked guarantee for

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<sup>186</sup> CERD Recommendation XIII, supra note 122

<sup>187</sup> Id, para.4(c)

<sup>188</sup> Id, para.5

<sup>189</sup> The Constitution, article 43(2)

indigenous peoples as it is stipulated as an individual right ignoring the communal life style of indigenous peoples and their collective rights and interests.

Being cognizant of the collective nature of the rights and interests of indigenous peoples, the CERD provides guidelines regarding the participation of indigenous peoples in development. Accordingly, indigenous peoples have “equal rights in respect of effective participation in public life and that no decision directly relating to their rights and interests are taken without their informed consent.”<sup>190</sup>

#### **4.4.3 Environmental Rights**

The Constitution stipulates under article 92 that the design and implementation of development programs and projects in the country should not damage or destroy the environment<sup>191</sup>; and recognizes the right of the people to be consulted and express their views on the planning and implementation of environmental policies and projects that affect them<sup>192</sup>. In addition, the Constitution recognizes the right of citizens to live in a clean environment,<sup>193</sup> and, where they are displaced or their livelihood has been adversely affected by the development projects undertaken by the government, the rights to get commensurate monetary or alternative compensation, including relocation with adequate state assistance.<sup>194</sup> These provisions provide a perfect constitutional basis for indigenous peoples to have a say on development projects affecting them, and also require the government to conduct environmental impact assessment before major development projects are implemented.

Based on these provisions, Ethiopia has introduced a comprehensive environmental policy in 1997. This policy was issued to provide overall guidance in the conservation and sustainable utilization of the country’s environmental resources in general. The overall objective of the environmental policy is to promote the sustainable social and economic development of the

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<sup>190</sup> CERD Recommendation XIII, supra note 122, para.4(d)

<sup>191</sup> The Constitution, article 92(2)

<sup>192</sup> Id, article 92(3)

<sup>193</sup> Id, article 40(1)

<sup>194</sup> Id, article 40(2)

country through, *inter alia*, sustainable management and utilization of the natural resources of the country.<sup>195</sup> Among the specific objectives the environmental policy seeks to achieve are ensuring the conservation, development and sustainable use of essential ecological processes and life support systems, biological diversity and renewable natural resources; and the empowerment and participation of the people in environmental management.<sup>196</sup>

Based on this environmental policy, proclamations have been enacted to achieve these policy objectives. One of these proclamations is the Environmental Impact Assessment Proclamation (EIA)<sup>197</sup>. The Proclamation requires an EIA process for any planned development project or public policy which is likely to have a negative impact on the environment. With regard to development projects, the Proclamation stipulates that no person shall commence implementation of a proposed project identified by directive as requiring EIA without first passing through environmental impact assessment process and obtaining authorization from the competent environmental agency.<sup>198</sup> In line with this, project proponents must undertake EIA and submit the report to the concerned environmental body, and, when implementing the project, fulfill the terms and conditions of the EIA authorization given to them.<sup>199</sup> Moreover, the Proclamation allows for the imposition of a fine between fifty-thousand and one hundred thousand birr on any project owner who commences implementation of a project without obtaining authorization from environmental agencies or who makes false presentation in the environmental impact assessment study report.<sup>200</sup>

Furthermore, the Proclamation obliges licensing institutions, prior to issuing investment permits or operation license to projects, to ensure that the relevant environmental bodies have authorized the implementation of the projects.<sup>201</sup> In addition, it requires such licensing institutions to suspend or cancel the permit or license they have issued for projects where the concerned environmental body suspends or cancels the authorization given for implementation of the

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<sup>195</sup> Environmental Policy of Ethiopia, 1997,p.3

<sup>196</sup> Id, pp.3-4

<sup>197</sup> Environmental Impact Assessment Proclamation NO. 299 of 2002

<sup>198</sup> Id, article 3(1)

<sup>199</sup> Id, article 7

<sup>200</sup> Id, article 18

<sup>201</sup> Id, article 3

project.<sup>202</sup> These provisions are important to ensure that project owners comply with the EIA requirement.

The Proclamation also provides for public participation in the environmental impact assessment process. It requires environmental bodies to ensure that the comments made by the public (in particular the comments by the communities likely to be affected by the implementation of a project) are incorporated into the EIA study report as well as into its evaluation.<sup>203</sup> To this end, it requires environmental bodies to make any EIA study report accessible to the public and to solicit comments thereon.<sup>204</sup> Under this provision, indigenous peoples, likely to be affected by development projects, have the opportunities to express their specific needs.

Among the specific objectives of the environmental policy of Ethiopia, one is the conservation and management of natural resources. In line with this objective, the country has promulgated Development, Conservation and Utilization of Wildlife proclamation<sup>205</sup>. Wildlife Proclamation seeks to enable the active participation of local communities living around wildlife conservation areas.<sup>206</sup> This may include indigenous peoples residing in or around protected areas for wildlife conservation. The only instance where the proclamation mentions the term indigenous is in defining one of the protected areas, ‘wildlife reserve’- an area designated to conserve wildlife where indigenous local communities are allowed to live together with and conserve wildlife.<sup>207</sup> However, the Amharic version seems to connote the literal meaning of indigenous which is ‘nebar’.

In relation to maximizing the economic benefit from the wildlife resources of the country, the Proclamation encourages investment in wildlife-based tourism, to be conducted in such a way that shall not endanger the ecological integrity of protected areas.<sup>208</sup> In addition, it requires that

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<sup>202</sup> Id, article 12

<sup>203</sup> Id, article 15(2)

<sup>204</sup> Id, article 15(1)

<sup>205</sup> Development, Conservation and Utilization of Wildlife Proclamation No 541/2007

<sup>206</sup> Id, preamble, para.3

<sup>207</sup> Id, article 2(10)

<sup>208</sup> Id, article 11

any economic activity to be undertaken in wildlife conservation areas shall be carried out in accordance with the Proclamation, and its corresponding regulations and directives.<sup>209</sup>

While the Proclamation's assertion that wildlife based tourism should not endanger the ecological integrity of the protected areas is a positive measure, the Proclamation fails to subject the granting of permits for development of wildlife tourism infrastructures such as hotels, camp or other facilities in protected areas to the EIA process. Hence, this would have an impact on the life of indigenous communities residing in these reserve areas, unless the regulations and directives envisaged to be issued under the Wildlife Proclamation address this issue. Otherwise, there will be a legislative gap in integrating EIA with wildlife-based tourism development.

#### **4.4.4 Cultural Rights**

The right of indigenous peoples to enjoy their own culture is important in a development context, especially in terms of its potential impact on the exploitation of land and other natural resources. The right is recognized under article 39 of the Constitution which guarantees the cultural rights of each 'nation, nationalities and peoples'<sup>210</sup>, in addition to the obligation of the State to preserve the cultural and historical heritage of the people<sup>211</sup>.

The UN Human Rights Committee in its General Comment on Article 27 interpreted the right to culture as the right to pursue a way of life associated with territory and the use of its resources, which "may" include such traditional activities as fishing and hunting and the right to live in reserves.<sup>212</sup> In light of such interpretation, it is worth mentioning Fisheries Development and Utilization Proclamation<sup>213</sup> and the Wildlife Proclamation.

Fishery Proclamation seeks to ensure the sustainable use of fishery resources in the country. To this end, the proclamation stipulates that federal or regional organs should ensure that development programs and projects will not have a negative impact on the fishery resources of a

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<sup>209</sup> Id, article 10

<sup>210</sup> The Constitution, article 39(2)

<sup>211</sup> Id, article 41(9)

<sup>212</sup> General Comment No 23, on Article 27 of the ICCPR, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para.7

<sup>213</sup> Fisheries Development and Utilization Proclamation NO. 315/2003.

basin.<sup>214</sup> In addition, it states that any subsidiary fishery laws and regulations to be developed under the proclamation should incorporate EIA. Furthermore, it states that permits for the establishment and operation of an aquaculture for commercial purposes shall not be issued unless there is sufficient land and water resources and unless it has been ascertained by the competent authorities that the intended aquaculture will not cause negative impact on the surrounding environment and natural resources.<sup>215</sup>

As has already been mentioned above, the only instance by which indigenous communities are mentioned in the wildlife Proclamation is in defining one of the protected areas.<sup>216</sup> However, the Proclamation does not define, or prescribe characteristics to identify, who indigenous local communities are. Nor can we find a definition anywhere else. This is a major hurdle as it leaves the discretion to whoever is managing wildlife reserves.<sup>217</sup>

Another national legislation which is relevant to the cultural rights of indigenous peoples is the Genetic Resources and Community Knowledge proclamation. Even though the Proclamation makes no mention of indigenous peoples, but local communities, it is also applicable for indigenous peoples as it can be understood from the definition of local communities.<sup>218</sup> As access to genetic resources and community knowledge has an impact on indigenous peoples' cultural heritages, the proclamation requires their prior informed consent.<sup>219</sup> Article 13 of the Proclamation also provides the situation by which the institute can deny access to indigenous peoples' genetic resources where such access has adverse effects on their cultural values.

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<sup>214</sup> Id, article 8

<sup>215</sup> Id, article 6

<sup>216</sup> The wildlife proclamation, supra note 189, article 2(10)

<sup>217</sup> This confusion has created problems in relation to the Omo National Park and the indigenous tribes in the area, for instance. In its report to the CERD Committee regarding the Omo National Park, the Center for International Environmental Law has invoked the violation of, *inter alia*, article 39(2) of the FDRE Constitution.( Center for International Environmental Law, report to the CERD Committee: Comments concerning the State Party's Report on the Federal Democratic Republic of Ethiopia ("Ethiopia"), with specific reference to the indigenous tribes in the Omo National Park, Ethiopia, (February 7, 2007), p.2).

<sup>218</sup> See infra note 248

<sup>219</sup> Genetic resources and community knowledge, supra note 152, article 7(1) b, c and d

Moreover, the contents of access agreement must respect their cultural practices, traditional values and customs.<sup>220</sup>

#### 4.4.5 Rights of Access to and Use of Land and Natural Resources

The Constitution prescribes under article 40(3) that the right to ownership of land and natural resources therein are exclusively vested in the State and the peoples of Ethiopia.

However, pastoral rights to free grazing and cultivation of land and their right not to be displaced from their own lands have been guaranteed under article 40(5) of the Constitution. This is an important pledge for indigenous peoples as the all indigenous peoples identified in Ethiopia by the African Working Group are pastoralists which include the Somalis, Afars, Borena, Kereyu (Oromo) & Nuer.<sup>221</sup> Although the authenticity of the process of identification has been challenged as ill-informed and unsystematic, the list represents a blurred catalogue of indigenous peoples in Africa.<sup>222</sup>

However, it is arguable whether or not article 40(5) of the Constitution grants the pastoralists an absolute right not to be displaced from their lands. This is because article 8(2) of the Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation<sup>223</sup> puts the possibility by which pastoralists grazing lands could temporarily be expropriated. This provision provides “[a] rural landholder or *holders of common land* whose landholding has been provisionally expropriated shall... be paid until repossession of the land....”<sup>224</sup> (Italics added). The phrase ‘holders of common land’ may be interpreted to include pastoralists as the latter most often use lands commonly.

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<sup>220</sup> Id, article 16(17)

<sup>221</sup> Report of the ACHPR working group of experts on indigenous populations/communities, supra note 37, p.16.

<sup>222</sup> Bojosi & Wachira, supra note 61, p.400

<sup>223</sup> Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No 455/2005

<sup>224</sup> Id, article 8(1)

The Expropriation Proclamation enunciates State's entitlement to expropriate landholdings for public purposes subject only to advance compensation. The Proclamation defines public purpose as:

*[T]he use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.*<sup>225</sup>

One may find this definition too general to list down the kinds of activities that constitute public purpose.<sup>226</sup> The basic standard that may serve to identify the types of activities which lie on public purpose is the 'direct or indirect benefit' that it gives to society.

The Proclamation does not, however, define the process of and role of affected communities in determining public interest. Strikingly, the decision on what constitutes public interest is incontestably left to the discretion of implementation agencies. It is not even subject to appeal in courts or superior authorities.<sup>227</sup> Hence, potential victims may not demonstrate that public interest can be served better through different mechanisms, or even to challenge the involvement of public interest in a particular situation. It also does not determine the extent to which the interest of local communities weighs vis-à-vis 'national interest'. In this regard, the UN Human Rights Committee has stated that the rights set out in Article 27 can be restricted, if the restriction has a reasonable and objective justification and is compatible with the other provisions in the Covenant.<sup>228</sup> Thus, it is suggested that the development activities which are conducted for public purpose should have reasonable and objective justification.

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<sup>225</sup> Id, article 2(5)

<sup>226</sup> The previous repealed Federal Expropriation Proclamation, (Proc. No. 401/2004) seems clearer. The Proclamation, under Article 2(2) listed the kinds of works that are considered as beneficial to the public as power generating plants, highways, airports, dams, railways, fuel depots, water and sewerage facilities, telephone and electrical works and other related activities were listed as public purpose activities.

<sup>227</sup> It is only dissatisfaction in relation to the amount of compensation that is subject to appeal to superior administrative bodies or courts of law (article 11).

<sup>228</sup> Report of the Human Rights Committee: Communication No. 197/1985, adopted 27 Jul.1988, U.N. GAOR, 43rd Sess., Annex VII, at 221, U.N. Doc. A/43/40 (1988)

Another proclamation which has relevance to indigenous peoples' right to access to natural resources is Forest Development, Conservation and Utilization Proclamation<sup>229</sup>. This Proclamation from the outset acknowledges the benefits of participation and benefit sharing with communities living in or adjacent forest areas for the sustainable utilization of forest resources.<sup>230</sup> It further requires the participation of local communities in the designation and demarcation of protected and productive forests.<sup>231</sup> Moreover, whenever such designation necessitates eviction of communities, priority is accorded to the protection of communities' interests.<sup>232</sup> The Proclamation, however, does not determine the criteria for determining community interest, who decides and how.

Participation should further persist beyond forest designation and demarcation during development, conservation and utilization plans.<sup>233</sup> It also demands facilitating the continuity of habitation of local communities previously residing in forests whenever feasible without obstructing its development; if not possible, the inhabitants should be resettled in areas suitable for living.<sup>234</sup> Furthermore, considering their realities, local communities may reap grasses, collect fallen woods, utilize herbs, harvest forest products, grass and fruit as well as keep beehives in State forests consistent with management plans upon permission from appropriate bodies.<sup>235</sup>

Despite the commitment of the legislation towards participation, it does not provide special protection to indigenous peoples who have particular economic and psychological relationship with their forests. Moreover, it does not require community participation/consultation/consent regarding large-scale farming, mining operations, construction of roads, irrigation, dam construction and other similar investment activities that impact on forests - it only requires government approval.<sup>236</sup> It is also a crime to cut trees or remove, process or in any way use forest

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<sup>229</sup> Forest Development, Conservation and Utilization Proclamation No 542/2007

<sup>230</sup> Id, preamble, para.2

<sup>231</sup> Id, articles 2(7),(8) and 8(2)

<sup>232</sup> Id, article 8(3)

<sup>233</sup> Id, article 9(3)

<sup>234</sup> Id, article 9(8)

<sup>235</sup> Id, articles 10(3) and (4)

<sup>236</sup> Id, article 14(5)

products.<sup>237</sup> This allows no exceptions even to indigenous peoples whose lives might be totally dependent on it and who might have been doing same for centuries. Temporary/permanent settlement, grazing domestic animals or hunting are all outlawed without a written permission from the Ministry of Agriculture and Rural Development.<sup>238</sup>

In short, indigenous peoples are mingled with all other local communities and treated exactly alike, which is inconsistent with the differential treatment they should be accorded considering their special relationship with forests.

#### **4.4.6 Right to Consultation vis-à-vis Right to Prior Informed Consent**

Threats to indigenous peoples' rights and well-being are particularly acute in relation to resource development projects. These projects and operations have had and continue to have a devastating impact on indigenous peoples, undermining their ability to sustain themselves physically and culturally.<sup>239</sup> Hence, it is very important to secure the consent of, or at least to have consultation with indigenous local communities in decisions affecting them.

Here, it is necessary to appreciate the distinction between 'consent' and 'consultation'. While the former is essentially a substantive right, the latter is predominantly procedural. Consultation is principally included in ILO Convention No.169<sup>240</sup> while the consent is entrenched in the UN Declaration<sup>241</sup>.

Consultation only requires States to avoid settled outcomes, and the willingness to negotiate geared towards obtaining consent, not just to explain and convince. It is weak as it only implies

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<sup>237</sup> Id, article 20(1)

<sup>238</sup> Id, article 14(3)

<sup>239</sup> Robert Goodland, *Free, Prior And Informed Consent And The World Bank Group*, Sustainable Development Law & Policy, No. IV, Issue 2, (2004), p.1

<sup>240</sup> ILO Convention No.169, articles 6 &16

<sup>241</sup> UN Declaration, 10, 11, 19, 28, 30, and 32

“an exchange of views devoid of any decision making role”.<sup>242</sup> Even the agenda is set by the State; hence, only defective procedures undermine this guarantee.<sup>243</sup>

The right to prior informed consent, however, limits the State’s role to providing the necessary information for indigenous peoples to make appropriate decisions. The final say as well as the determination of the process lie in the discretion of indigenous peoples.<sup>244</sup>

When we turn to Ethiopia, consultation has got constitutional basis in addition to its incorporation in EIA Proclamation, while the right of local communities to prior informed consent is only recognized in Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right.

The right to consultation is enshrined under articles 43(2) and 92(3) of the Constitution. Article 43(2) states that “[n]ationals have the right to...be consulted with respect to policies and projects affecting their community.” However, as discussed above, this provision is couched in a way to provide guarantee for individuals as opposed to group rights. It does not thus create an opportunity for indigenous communities to be consulted as a group. The other provision which enunciates the right to consultation is article 92(3) which reads:

*People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly.*

Apart from constitutional framework, the right to consultation is asserted in the EIA Proclamation. The Proclamation requires the project conductor to carry out EIA in consultation with the communities likely to be affected by the project.<sup>245</sup> In this regard, the Environmental

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<sup>242</sup> Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Population 23rd Session ‘Standard Setting Legal Commentary on the concept of FPIC’ Expanded working paper submitted by Mrs Antoanella-Iulia Motoc and the Tebtebba Foundation, E/CN.4/Sub.2/AC.4/2005/2 (21 June 2005), p.5

<sup>243</sup> S Bass et al ‘*Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities*’ (2003) Environmental Law Institute, [http://www.elistore.org/reports\\_detail.asp?ID=10965&topic=Mining](http://www.elistore.org/reports_detail.asp?ID=10965&topic=Mining) (accessed 20 August, 2010)

<sup>244</sup> Alex Page, *Indigenous Peoples’ Free Prior and Informed Consent in the Inter-American Human Rights System*, p.19, in Melanie Nakagawa and Kirk Herbertson, *Exploring Environmental Law & Policy Issues Around the Globe*, sustainable development law & policy, Volume IV, Issue 2, (2004)

<sup>245</sup> EIA Proclamation, supra note 181, article 6(1)

Protection Authority makes sure whether or not the communities likely to be affected have been consulted and their views incorporated.<sup>246</sup>

Similarly, the right of the communities to prior informed consent has found its way in Genetic Resources and Community Knowledge Proclamation. Among the objectives of the Proclamation, one is intended to participate local communities in the decision making processes regarding the use of genetic resources and community knowledge.<sup>247</sup> To this end, the Proclamation requires the prior informed consent of the concerned local communities, particularly concerning access to community knowledge. The Proclamation defines ‘local communities’ and ‘prior informed consent’ as follows:

- *‘[L]ocal communities’ means a human population living in a distinct geographical area in Ethiopia as a custodian of a given genetic resource or creator of a given community knowledge.*<sup>248</sup>
- *‘[P]rior informed consent’ means the consent given by the Institute and the concerned local community based on an access application containing a complete and accurate access information to a person seeking access to a specified genetic resource or community knowledge.*<sup>249</sup>

This Proclamation definitely applies to indigenous peoples as it could be understood from the definition of local communities. The Proclamation entitles local communities to give prior informed consent for access to their community knowledge<sup>250</sup> as the latter is owned by them<sup>251</sup>. When the local communities are of the belief that the intended access is detrimental to their cultural or natural heritages, they have the right to refuse such access.<sup>252</sup> Additionally, the right of local communities to revoke the already granted consent is reserved when they came to know that such consent is likely to be detrimental to their socio-economic life or their natural or

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<sup>246</sup> Id, article 6(3)

<sup>247</sup> Genetic resources and community knowledge Proclamation, supra note 152, preamble, para.7

<sup>248</sup> Id, article 2(9)

<sup>249</sup> Id, article 2(11)

<sup>250</sup> Id, articles 7(1)a and 12(2)

<sup>251</sup> Id, article 5(2) provides “[t]he ownership of community knowledge shall be vested in the concerned local community while “[t]he ownership of genetic resources shall be vested in the state and the Ethiopian people.(article 5(1)

<sup>252</sup> Id, article 7(1) b

cultural heritages.<sup>253</sup> Even more, they have the right to demand the restriction or withdrawal of the prior informed consent given by the Institute of Biodiversity Conservation for access to their genetic resources where they found out that is likely to be detrimental to their socio-economic life or their natural or cultural heritages.<sup>254</sup>

This legislation is a pioneer in recognizing the right to prior informed consent of local communities, at least in the context of access to genetic resources and community knowledge. As this right is very necessary for indigenous peoples given their specific characteristics, recognition of this right is also necessary as a precondition for conducting other development projects in their territories apart from access to genetic resources and community knowledge.

#### **4.5 Conclusion**

In conclusion, the Constitution is novel in requiring consultation of communities over development activities affecting them. The laws considered even diminish this constitutional guarantee, at times establishing a mere participation right. The Constitution should recognize the collective composition of indigenous peoples and their consultation as a group. Furthermore, none of the statutes guarantees the right to institute court action to challenge potential violations of the right to consultation or participation. Finally, even though there is no comprehensive legislation or policy specifically addressing the rights and concerns of indigenous peoples, indigenous peoples can claim their rights under those Conventions ratified by Ethiopia.

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<sup>253</sup> Id, article 7(1) c

<sup>254</sup> Id, article 7(1) d

## **Chapter Five: Conclusion and Recommendations**

### **5.1 Conclusion**

The emergence of a new body of international law specifically concerned with indigenous peoples is a milestone in their centuries' long conquest for survival. However, the question, of who indigenous peoples are, still remains elusive. Of course, it is "neither necessary nor desirable"<sup>255</sup> to have a single universal definition for indigenous peoples, given the varied context in which they live around the world. Meanwhile, attempts have been made by scholars and international organizations to define indigenous peoples. Based on the definition the thesis has adopted which is the understanding that indigenous peoples are those communities who suffered a very high degree of marginalization, who self-identify as 'indigenous', and who depend on their close relationship with land and resources for survival, it can be held that indigenous peoples exist in Ethiopia.

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 impact of the rights of indigenous peoples on the development process. The first relates to the extent to which states must formulate and implement development policy in order to protect and promote the rights of indigenous peoples. The present evaluation reveals that there are some legal constraints on states' 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.

The second observation relates to the extent to which states must refrain from adopting development policies that have a negative impact on the rights of indigenous peoples. There are considerably more legal constraints on the states' freedom of action in this area. Depending on the circumstances of the particular case, the rights of indigenous peoples may be used to block

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<sup>255</sup> Report of the African Working Group, supra note 37, p.41

certain development policies such as logging or mineral extraction on lands associated with a traditional way of life. Ultimately, the outcome seems to depend on the rights in question, the extent to which the development policy interferes with those rights, and whether the state can provide objective and reasonable justification for the policy.

A third observation relates to the manner in which states formulate and implement development policy. It is clear from the current assessment that 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. The content of such participation has evolved over the years and is still in the process of developing into a secured norm of international law. International organs, first and foremost the IACHR and the IACrHR, have interpreted existing human rights norms to include a duty to obtain the free, prior and informed consent of indigenous peoples. In its leading decision in the case of *Awas Tingni v. Nicaragua*, the IACHR and the IACrHR first established that consent of the indigenous inhabitants is necessary before granting a logging permission on their territory. They also recognized communal property of aboriginal peoples as protected property under the relevant human rights norms. In the decision on *Maya Indigenous Communities of Toledo v. Belize*, the IACHR extended this principle to the extraction of oil and other resources. Other international bodies, such as the CERD Committee has followed the same trend, investigating cases where states failed to obtain prior consent of an affected aboriginal community and calling upon the states to observe those rights. Also, international institutions have recently included in their policies the requirement to obtain consent before engaging in or supporting any projects on indigenous lands.

The UN Declaration has been drafted in the spirit of this newly evolved consent in the international community. It regulates that indigenous peoples have the right to own, use, develop and control their lands, territories and resources, and that states shall consult with them in order to obtain their free and informed consent prior to the approval of any project in connection with the utilization or exploitation of natural resources. This provision is in line with the newly developed international law. With the overwhelming affirmation of the UN Declaration, the UN General Assembly has recognized this right and taken a further step to reinforce it. Thus, the UN

Declaration can be used to render states politically accountable for any failure to ensure the participation of indigenous peoples in development projects that affect them.

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.<sup>256</sup>

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. The Constitution, for instance, requires consultation of communities over development activities affecting them. However, the level of legal and policy protection is obviously inferior compared to international and regional standards.

## **5.2 Recommendations**

Development projects are vital for the economic development of a country. However, the importance of such projects becomes problematic if they have negative impact on the rights of indigenous peoples. Hence, to avoid or mitigate negative impacts of development projects on the rights of indigenous peoples,

- The ratification of ILO Convention No. 169, which defines the obligations of States towards indigenous peoples, would enable African States to tap into international expertise and processes on the implementation of the rights of indigenous peoples. As the ratification of this Convention would imply a regular supervision of its implementation by a body of independent experts, it would

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<sup>256</sup> Center for International Environmental Law, report to the CERD Committee: Comments concerning the State Party's Report on the Federal Democratic Republic of Ethiopia ("Ethiopia"), with specific reference to the indigenous tribes in the Omo National Park, Ethiopia, (February 7, 2007), p.2

enable States and indigenous peoples to engage in a dialogue concerning the most effective manner to give effect to the provisions of this Convention. Domestication would give the Convention legal effect within each State. The UN Declaration also provides an important guide for the protection of the rights of indigenous peoples.

- In all matters affecting them, such as legislative and administrative measures, the development or conservation policies, programmes and projects, consultation is key to ensuring that any legislative, policy or programme measures undertaken respond to the actual needs of indigenous peoples as stated by them.
- Governments should halt the destruction of vulnerable ecosystems, and decide that vast development projects benefiting the people in the cities are not the only way to safeguard the country. But also they should go some way towards addressing the marginalization of indigenous peoples from the development process and ensure that they receive an equitable share of the benefits of development. In this respect, indigenous peoples should also continue to organize for their own protection, assuming for themselves the power to decide what course best ensures their future development.
- International aid agencies will have to reflect on whether they can continue to loan or give money without conditions, ensuring that the social costs of development activities are calculated along with the economic benefits.
- States should ensure the participation of indigenous peoples in formal administrative and legislative structures. This would help indigenous peoples to have a say in the formulation and implementation of development policies that may affect them.
- Though the African Charter is helpful in indigenous peoples' protection endeavor, having an independent binding legal framework concerning indigenous peoples is recommendable.

- The Ethiopian government should ratify ILO Convention No.169 and adopt a new law dealing with the rights of indigenous peoples explicitly recognizing their collective right to land. It should require identification of existing indigenous peoples based on international and African standards and establish independent monitoring institutions. In this regard, the term ‘indigenous peoples’ needs to be understood outside the confines of aboriginality. Such recognition and identification will pave the way for the protection of indigenous peoples. The Constitution should recognize the collective composition of indigenous peoples and their consultation 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.

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