

Chapter 2

International Law and Land Rights in Africa: The shift from states' territorial possessions to indigenous peoples' ownership rights

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1 Introduction

Land rights have been recognised as a central human rights issue for indigenous peoples,¹ emerging both internationally and regionally. At the international level, the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 marked a resolute step from the international community in affirming indigenous peoples' human rights, and puts a great emphasis on land rights. The African states under the guidance of the AU played an important role in shaping this declaration.² This reflects the developments regarding indigenous peoples' human rights that have been taking place at the regional level, particularly the African Commission on Human and Peoples' Rights (ACHPR), which established a Working Group on Indigenous Populations/Communities in 2001 with the mandate to examine the situation of indigenous peoples on the continent.³

A central issue of contention concerned the definition of indigenous peoples, with several States proposing that in Africa all inhabitants are indigenous,⁴ and viewing the legal emergence of such a category of rights-holders as potentially a cause of "tension among ethnic groups and instability between sovereign States."⁵

¹ See: "Indigenous people and their relationship to land", Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur. UN Doc. E/CN.4/Sub.2/2001/21; Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2007).

² For an analysis, see A Barume 'Responding to the Concerns of the African States', in C Charters & R Stavenhagen (eds) *Making The Declaration Work: The United Nations Declaration on The Rights Of Indigenous Peoples* (2009); W Genugten 'Protection of Indigenous Peoples on the African Continent' (2010) 104 (1) *American Journal of International Law* 29.

³ N Kealeboga & GM Wachira 'Protecting Indigenous Peoples in Africa' (2006) 6 *African Human Rights Law Journal* 382.

⁴ H Weber et al (eds) "Never drink from the same cup: Proceedings of the conference on Indigenous Peoples in Africa" (1993); A Bernard & J Kenrick (eds) *Africa's Indigenous Peoples: Peoples: 'first peoples' or 'marginalised minorities'?* (2001).

⁵ African Group, "Aide-memoire of the African Group on the United Nations Declaration on the Rights of Indigenous Peoples" (2006).

Adopting a pragmatic approach, the ACHPR has highlighted that “in Africa, the term indigenous populations does not mean ‘first inhabitants’ in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.”⁶ The Commission has emphasised that there is no universally agreed definition of the term indigenous peoples, and that the most constructive approach is to refer to common characteristics which allow for the identification of indigenous peoples in Africa. The Commission explains that a first major characteristic is self-identification, which implies that a people initially identify itself as indigenous. A second major characteristic is indigenous peoples’ “special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples.”⁷ Finally, the Commission adds that indigenous peoples are often communities which face “a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.”⁸

As the work of the ACHPR highlights, access and security over land rights are the principal issues for indigenous peoples. With the establishment of protected areas and the ever increasing exploitation of natural resources, indigenous peoples have experienced large scale displacements and often been evicted without compensation or alternative land. Most of them hold no formal legal title to land under national tenure laws, which means that they have technically become squatters on their own lands or on other people’s lands, and suffer permanent risk of eviction. In some cases, indigenous peoples are allowed to remain on land owned by non-indigenous communities in exchange for agricultural work; others are allowed to stay on land owned by charitable organisations. Land rights will determine whether indigenous peoples have the right to remain on their lands, or at least get compensation for their expulsion, and are not only crucial to their cultural survival as peoples but also for their livelihoods and economic development. By becoming landless most indigenous communities have been pushed into further economic and spatial marginalisation, living in extremely vulnerable conditions. Loss of access to their traditional territories is often synonymous with marginalisation, homelessness, increased mortality, food insecurity, and social disarticulation arising from the forced change of lifestyle. Securing access and ownership of land therefore remains a critical concern for many indigenous communities.

International law, and more particularly international human rights law, has for some time been seen as a positive tool to support indigenous peoples’ rights; when it comes to land rights, however, such positivity is new. September 2007 marked the start of a new era for indigenous peoples, with the adoption of the UNDRIP. Despite this recent development, international law has historically played a negative role regarding indigenous peoples’ rights, and more especially their rights to land. An important tool in the hands of the colonial powers, international law has been a central vehicle in the dispossession of indigenous peoples. Most of the rules

⁶ ACHPR “Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples”, 41st Ordinary Session, Accra, Ghana, May 2007.

⁷ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (2005) 93

⁸ Report of the African Commission’s Working Group (n 7 above).

regarding title to territory under international law were aimed at justifying the dispossession of indigenous peoples of their lands. While various legal systems applied, during colonisation, to land rights for indigenous peoples – depending on which state was the coloniser – international law played the role of common denominator, ensuring that all powers adhered to the same legal doctrine. The rules governing title to territory under international law became the basis of the ‘rules of the game’ between the colonial powers, and as such had a direct impact on indigenous peoples’ land rights. Because of this legacy, international law still plays a huge part in the contemporary situations faced by indigenous communities throughout the continent today, a legacy now being challenged by international human rights law.

The first part of this chapter retraces in history the manner in which territory was acquired by the State according to international law with a view to analysing the consequences of this acquisition for indigenous peoples. It examines to what extent international legal rules designed by colonial powers directly and indirectly affected indigenous peoples’ land rights. It is argued that international law played an important role in such colonial operation, serving as a basis to establish the rule of territorial rights. In contrast, the second section highlights that contemporary international human rights law has supported the recognition of indigenous peoples’ rights over their traditional territories. By undertaking such a historical approach to land rights, the chapter analyses to what extent contemporary international human rights standards support the recognition of the land rights of indigenous communities. The emergence of a specific body of law regarding indigenous peoples’ rights is becoming important for Africa. The rights to land, and also the emerging international legal standards on free, prior and informed consent, could potentially play a key role in the future relationship between States, investors, and indigenous peoples. By focusing on both the history of international law and contemporary human rights law standards, this chapter examines the sometimes contradictory rules, on the one hand rules governing territorial possession by states, and on the other hand human rights law arguing for the recognition of indigenous peoples’ land rights.

2 International Law, Colonisation and Land Rights

Ironically, the universalisation of international law was principally a consequence of the imperial expansion that took place in past centuries, as the development of international law was primarily guided by the establishment of rules governing title to territory over newly colonised countries. For the African continent, these rules were crucial in defining land titles both for the colonial powers and for the so-called ‘native’ populations. In what is now referred to as the ‘scramble for Africa’⁹, colonial powers needed rules to divide the continent between themselves, and to justify the colonial enterprise of taking lands from the ‘natives’. Most of the rules regarding title to territory under international law were based on these two premises.

2.1 International Law and the ‘Civilising’ Mission

⁹ TF Pakenham *The Scramble for Africa* (1991).

The colonial enterprise, especially during the new imperialist period (1880-1914), justified itself under a banner of 'Commerce, Christianity and Civilisation'. While ultimately the primary goal of colonisation was undoubtedly trade expansion, the notion of 'Civilisation' provided the colonial powers with a moral vindication, the equation being: 'Commerce plus Christianity equals Civilisation'. Especially in Africa a 'civilizing mission' was proposed as the main justification for the colonial enterprise. Illustrations of such a 'civilizing mission' can be found in the Berlin Conference (1884-85), which played a huge role in the development of the international 'rules' regarding the colonisation of Africa. The Berlin Conference represented one of the first gatherings of the main colonial powers and the first formal recognition of their different 'spheres of influences'. Concomitant to the prevailing '*mission civilisatrice*' governing that period the Final Act refers to colonial states' mission to bring the 'blessings of civilisation' to the African continent. The development of international law throughout that period contains many references to 'civilizing mission' ('*mission civilisatrice*'), providing colonial powers with rules justifying territorial dispossession of indigenous peoples in Africa.¹⁰

A legal consequence of this 'civilising mission' was the doctrine of trusteeship, and the 'humanitarian' call to help the 'natives' (or 'primitives') to join the 'enlightenment' and stop their 'barbaric' traditions. As a result colonial powers (or 'civilised' powers) had to act in a spirit of trusteeship towards the non-civilised native populations. The trusteeship doctrine is summarised in a 1919 decision from the Privy Council which stated that: "some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with institutions or the legal ideas of civilized society."¹¹ Behind this veil of 'civilising mission' European powers took control of the lands in the hands of indigenous communities, not for their own interest but for the benefit of indigenous people themselves. This international doctrine of a trusteeship mission was translated into colonial laws, as most (if not all) colonial powers put in place a system of land control for the 'most uncivilised'. In central Africa such a doctrine can be found in legislation up to the 1950's. For example, a 1952 decree in the Congo stated that, to be able to register a right to land, native peoples had to prove their degree of education and civilisation.¹² In practical terms the trusteeship doctrine resulted in the establishment of reserved lands or reservations for indigenous communities, conferring a right of usage for native communities with a restriction on their ability to alienate such lands (as the aim was to 'protect' them). Even today reserved lands for indigenous peoples are based upon hypocritical humanitarian grounds (to allow indigenous peoples to enable to maintain a reasonable standard of existence), and on the absolute control of the government over such right (the government holds the ultimate title to the land).

The colonialist distinction between 'civilised' and 'uncivilised' societies had another consequence for land rights for indigenous peoples through the notion of 'pre-existing rights'. Under colonial rules, when a colonial power took control of a territory there was an obligation to recognise 'pre-existing rights', including land

¹⁰ M Koskenniemi, *The Gentle Civilizer of Nations* (2002)

¹¹ Privy Council, *In Re Southern Rhodesia* (1919) AC 211, 233 - 234.

¹² Décret du 17 mai 1952 sur l'immatriculation des indigènes. tout indigène ayant justifié par sa formation et sa manière de vivre d'un état de civilisation impliquant l'aptitude de jouir des droits et à remplir les devoirs prescrits par la législation écrite pouvait passer du régime de la coutume au régime du droit écrit.

rights, in that territory. The Final Act of the Berlin Conference stipulated that colonial states had to exercise their authority in such a way as to protect existing rights within the territory (Article 35 of the Final Act). In theory such recognition of 'pre-existing rights' could have some important consequences for indigenous peoples, as if their rights were 'pre-existing' the colonial legal regime they could 'survive' it. However, in the words of Westlake, a prominent nineteenth century publicist: not "all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognised territorial sovereignty they are comprised..."¹³ This statement accurately highlights how the recognition of pre-existing land rights was in the absolute control of the colonial power. Lindley, in his seminal work on the acquisition of territory, also highlighted the distinction made by the colonial states between the recognition of 'civilised' and 'un-civilised' pre-existing rights, with states rejecting the notion of 'uncivilised' pre-existing rights to land (such as customary indigenous peoples' laws).¹⁴ Some contemporary land claims at the national level (especially under the common law) have started to examine what pre-existing rights 'survived' the colonial rules.¹⁵ Some courts have stated to examine to what extent indigenous peoples 'pre-existing' laws could have survived colonisation, and what their impact could be in contemporary land claims, notably in the Richtersveld decision of the Supreme Court of South Africa.¹⁶

One consequence of the colonial era's classification of societies on a scale of 'civilisation' is the view of nomadic societies. Under the tenets of international law, nomadic peoples were traditionally considered to be at the bottom of the scale. By being nomadic they had no right to the land, as one of the rules of territorial occupation under international law is the principle of effective use of the land. Only agricultural societies were deemed to use lands effectively, and nomadic peoples were considered as only wandering across territories and therefore having no rights to occupation. The assumption was that nomadic peoples' territories were not used productively and therefore should be regarded as empty and opens to colonisation. Nomadic peoples' territories were regarded as *terra nullius*, lands belonging to no-one. This assumption was partially challenged only in 1975 when the ICJ in its advisory opinion on the Western Sahara recognised that nomadic peoples could also exercise some form of social and political organisation, but fell short of recognising the capacity of nomadic peoples to exercise territorial sovereignty.¹⁷ As highlighted by Reisman, "the Court formally acknowledged the existence of a theory of international land tenure based on a non-European conception of title as generative of 'legal ties' But such 'legal ties' were not enough to defeat title deriving from European colonial claim."¹⁸ The view that only societies with a permanent settled population can exercise territorial control remained. This historical bias against nomadic communities still has some impact in contemporary land claims, as most nomadic communities throughout the continent have only very limited access to

¹³ J Westlake *Chapters on the Principles of International Law* (1894) 138

¹⁴ MF Lindley *The Acquisition and Government of Backward Territory* (1969).

¹⁵ J Gilbert, 'Historical Indigenous Peoples' Land Claims' 2007) 56 (3) *International and Comparative Law Quarterly* 538 – 611.

¹⁶ *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA).

¹⁷ ICJ, Western Sahara, Advisory Opinion, ICJ Reports 1975

¹⁸ M Resiman, 'Protecting Indigenous Rights in International Adjudication' (1995) 89(2) *American Journal of International Law* 354 - 355.

legal titles to their lands, and the dominant assumption is still that they do not 'effectively' occupy their lands.

2.2 The Principle of 'Effective Occupation'

In contrast to other instances of colonisation, where European colonial powers just decided that the colonised territories were empty and therefore open to colonisation (Australia, Americas), in the case of Africa (at least following the Berlin Conference) colonial powers had to establish formal legal ties with the local populations to establish their authorities. Article 35 of the Final Act stated:

The signatory powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights (*droit acquis*) and, as the case may be, freedom of trade and of transit under the conditions agreed upon.¹⁹

While the Final Act remained vague regarding the implementation of the principle of effective occupation, it had several long-lasting consequences for the development of the international rules regarding title to territory in Africa.

One of the first consequences was that colonial powers renewed their use of chartered companies as agent of the state. As in most situations the effective control of huge territories was deemed too expensive for the administrative systems of the colonial states, and so states granted rights to private companies (often referred to as chartered companies), not only trading rights but also rights regarding the administration of the colonised territories, including territorial rights. Thus chartered companies became important actors regarding land rights for the local communities, sometimes over huge areas of lands. For example, the UK placed the area corresponding to what is today Uganda under the charter of the IBEAC in 1888, and ruled it as a protectorate from 1894. At some stage chartered companies were responsible for securing control over 75 per cent of British territory in sub-Saharan Africa.²⁰ Similar processes were followed by the French, German, Portuguese and Dutch administrations, so that private trading companies could act as the colonial power with rights over land and natural resources.²¹ Chartered companies also had the power to enter into treaty relationship with communities, such treaties often having territorial consequences. While treaties with indigenous populations have always been part of the colonial enterprise, following the Berlin Conference colonial powers (mainly through their chartered companies) entered into a period of intense treaty making with African leaders and communities. In the end of the nineteenth century, Africa (and especially West and Central Africa) witnessed a 'race' between the main colonial powers in trying to sign as many treaties as possible with local chiefs, to ensure the transfer of the lands.²² While the forms of these treaties vary across the continent, usually they involved a notion of peaceful relationship and provided for the cession of land ownership from the African communities.²³ These

¹⁹ Note that such obligation of effective occupation was repeated in the 1919 Convention of Saint Germain in its article 10.

²⁰ JE Flint, 'Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa' in S Forster et al (eds), *Bismarck, Europe, and Africa* 69-83

²¹ On the power of such companies, see decision from the Privy Council in Southern Rhodesia (n 11 above).

²² An account of such race for treaty making is available in Lindley (n 14 above) 34-36.

²³ For detailed analysis of these treaties and the role of international law, see J Castellino & S Allen *Title to Territory in International Law* (2003).

treaties were then used by the colonial powers as proof to ensure the transfer of sovereignty in their favour.

3.3 Contemporary African and international human rights law

In contrast with the rationales behind colonial law-making processes, human rights developments since the 1948 Universal Declaration of Human Rights have created legal norms that operate according to a different paradigm. While traditionally international law is concerned with the rights of states to claim title to territory, human rights law focuses on the rights of the peoples living in those states. Hence international human rights law starts from a different perspective on land rights: it requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognised and respected. It connects those land rights to a variety of other rights, including the general prohibition against racial discrimination, the right to property, the right to cultural integrity and the right to self-determination.

This section explains some relevant human rights standards pertaining to indigenous peoples' right to land, including provisions from the AU's instruments, the UN system and the ILO. Those sets of standards are applicable to African countries, and the African Charter on Human and Peoples' Rights can be interpreted by reference to other international human rights instruments and decisions.²⁴ The analysis of those standards reveals an important gap between the human rights situation of indigenous peoples and the human rights protection provided by legal standards. Their implementation remains challenging, but they form the core guiding principles to which states have committed themselves as members of intergovernmental bodies, through their ratification and participation in the adoption of these instruments.

3.3.1 The right to land

In the African Charter on Human and Peoples' Rights of 1986, the right to property is guaranteed, but can be 'encroached upon in the interest of the public need or in the General interest of the community and in accordance with the provisions of appropriate laws'.²⁵ This restriction could at first glance be taken to provide justification for evictions and displacements of indigenous peoples, but the right to property should be interpreted alongside other provisions of the charter, and the work of the Working Group on Indigenous Peoples/Communities.

The Working Group on Indigenous Peoples/Communities is a special mechanism of the ACHPR, the human rights organ of the regional inter-governmental African Union. It was established in 2001, and part of its role is to research the human rights situation of indigenous peoples in Africa and to formulate recommendations to prevent and provide remedy for violations of indigenous peoples' human rights. In an extensive report adopted in 2003, the working group explained that:

²⁴ Article 60 of the African Charter.

²⁵ Article 14 of the African Charter.

The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates... to Articles 20, 21, 22 and 24 of the African Charter²⁶

These Articles provide the rights of all peoples to: existence and self determination; freely dispose of their wealth and resources and, in case of dispossession, the right to recover their property and be compensated; development and equal enjoyment of the common heritage; and a general satisfactory environment favourable to their development. They amount to a solid legal protection of indigenous peoples' land rights in Africa.

The report of the working group further emphasises that a major problem leading to the loss of indigenous peoples' land in Africa is that customary collective tenure was neither recognised nor secured. Instead, land occupied by pastoralists and hunter-gatherers was defined as *terra nullius*. Also collective land titles are not granted by most national laws, and yet: 'Collective tenure is fundamental to most indigenous pastoralist and hunter gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure'.²⁷

The ACPHR, by endorsing the report of the working group, has acknowledged that the land rights of indigenous peoples have been violated:

The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is a serious violation of the African Charter (Article 20, 21 and 22), which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.²⁸

In 2009, the ACHPR issued a decision on the first formal complaint received about indigenous peoples' land rights, submitted by the Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community against the government of Kenya.²⁹ A nature reserve was established by the Kenyan government in the 1970s in the Lake Bogoria region on lands inhabited since time immemorial by the indigenous Endorois pastoralist communities. When the reserve was created the Endorois were evicted and relocated without compensation, and in vain sought redress in Kenya's national courts. They continued to face contestation from the state when they brought their case before the ACHPR. The ACHPR's decision constitutes an extensive and clear piece of jurisprudence, which is unequivocal on the definition of indigenous peoples and the necessity to recognise their ownership rights over their ancestral lands.

The ACHPR built on definitions provided by the UN, the ILO and its Working Group on Indigenous Populations/Communities to clarify the contested terms, and noted that:

²⁶ Report of the African Commission's Working Group (n 7 above) 21.

²⁷ Report of the African Commission's Working Group (n 7 above) 22.

²⁸ Report of the African Commission's Working Group (n 7 above) 108.

²⁹ Complaint No. 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya. Decision adopted by the ACHPR in May 2009 and endorsed by the AU Assembly of Heads of State in February 2010.

there is a common thread that runs through all the various criteria that attempt to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture.³⁰

The ACHPR found that Articles 1, 8,14,17,21 and 22 of the African Charter had been violated, referring respectively to: the duty of States to recognise the rights enshrined in the Charter; the right to practice religion; the right to property; the right to culture; the right of peoples to the free disposal of their natural resources; and the right of peoples to development. It recommended that the State of Kenya:

- (a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- (e) Grant registration to the Endorois Welfare Committee.
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- (g) Report on the implementation of these recommendations within three months from the date of notification.

This ground-breaking decision has become the most important precedent in international human rights law with regard to indigenous peoples land rights in Africa.

These rights are also affirmed by the UNDRIP of 2007, which states that indigenous peoples have the ‘right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.’³¹ This also comprises ‘the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.’³² Furthermore, the UNDRIP affirms that states’ duty to guarantee the right to land must be realised in respect of tradition and land tenure systems of indigenous peoples. The vast majority of UN member states voted in favour of its adoption, and no African country voted against it.³³

African indigenous peoples’ right to land also stems from fundamental binding international treaties. The International Covenant on Civil and Political Rights (ICCPR) of 1966 protects the right of ethnic, religious and linguistic minorities to enjoy in community their own culture, practices, religion and language.³⁴ The Covenant also affirms the right of all peoples to self-determination

³⁰ (n 29 above) para 154

³¹ Article 26 (1) of UNDRIP.

³² Article 26 (2) of UNDRIP.

³³ The African Group submitted an ‘Aide mémoire’ to the United Nations session in November 2006 in New York. Namibia and Botswana led this group, which raised several concerns concerning the adoption of the Declaration. These concerns were responded to by expert NGOs and the African Commission’ Working Group on Indigenous Peoples/Communities. The Declaration was adopted without any African vote against in 2007. See the Advisory Opinion of the African Commission on Human and Peoples Rights Concerning the United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 40th Ordinary session of ACHPR, May 2007, Accra, Ghana.

³⁴ Article 27 of ICCPR.

and freely to dispose of their natural wealth, and fifty AU member states ratified it. The UN Human Rights Committee, the body monitoring the implementation of the ICCPR, linked the right to land to cultural rights guaranteed in the Covenant, and advised that measures be taken to reconstitute to indigenous peoples their native lands.³⁵

The ILO has adopted two Conventions pertaining to indigenous peoples' rights: Convention 107 (ILO 107) of 1957 and Convention 169 (ILO 169) of 1989.³⁶ Their content is, however, only partially applicable in Africa, as African states have not yet broadly ratified these instruments.³⁷ Yet the two Conventions are part of the ILO's standards on indigenous land rights and represent the views of a major intergovernmental organisation.

While ILO 107 has been superseded and replaced by ILO 169, it remains in force for those countries which ratified it but have not ratified ILO 169. ILO 107 states that 'The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized'. The Committee of Experts stated that the fact that a people has some form of relationship with land currently occupied, even if only for a short time, was sufficient to form an interest and, therefore, rights to that land and the attendant resources.³⁸

ILO 169 contains a number of provisions on the territorial rights of indigenous peoples. It requires that governments recognise and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories, and especially the collective aspects of this relationship.³⁹ It further affirms that states shall recognise indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy, and take the necessary measures to identify these lands and to guarantee effective protection of indigenous peoples' rights of ownership and possession.⁴⁰ Finally, it states that indigenous peoples may be relocated only as an exceptional measure and only with their free and informed consent, and stipulates the measures to be taken in the event of relocation.⁴¹

3.3.2 A matter of equality and non-discrimination

When indigenous peoples claim their land rights, they claim the rights to equality and non-discrimination. Discrimination was both a catalyst in and a consequence of their loss of ancestral lands. Human rights standards pertaining to discrimination issues are thus fundamental to indigenous land rights. At the international level, the

³⁵ Concluding observations by the Committee on the Elimination of Racial Discrimination, Australia, 24 March 2000, CERD/C/56/Misc. 42/rev. 3.

³⁶ ILO 169 came into force in 1991.

³⁷ ILO 107 is ratified by only a few and ILO 169 by none. Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia have ratified ILO 107. However, both the Central African Republic and Cameroon have actively started a process of negotiation towards the potential adoption of ILO 169. See ILO Programme to Promote ILO Convention No. 169.

³⁸ International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (4A)*, (1988) 287.

³⁹ Article 13 (1) of ILO 169.

⁴⁰ Article 14 of ILO 169.

⁴¹ Article 16 (2) of ILO 169.

rights to equality and non-discrimination are guaranteed in numerous international instruments, including the UDHR,⁴² the ICCPR⁴³ and the Convention on the Elimination of all Forms of Racial Discrimination.

The United Nations Committee on the Elimination of Racial Discrimination, the body responsible for monitoring of the CEFRD of 1969 affirms that it:

calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴⁴

At the regional level, rights to non-discrimination and equality are guaranteed by the African Charter, and equality of all peoples is explicitly protected.⁴⁵ The Working Group on Indigenous Populations/Communities of the African Commission explains how different indigenous groups in central Africa suffer from being looked down upon by other members of the society, how in many places they are dehumanised and described as creatures, and how the rest of the population would prefer them to 'settle down and abandon their way of life and imitate their own way of living and earning'. The working group declares that: 'the rampant discrimination towards indigenous peoples is a violation of the African Charter'.⁴⁶

While it is clear to the ACHPR that groups of hunter-gatherers from the African forests, such as the Batwa, Baka and Bagyeli, are indigenous peoples as understood in international law,⁴⁷ the Commission also acknowledges that 'very few African countries recognise the existence of indigenous peoples in their countries' and 'even fewer recognise them in their national constitutions or legislation'.⁴⁸ In many African countries, the use of the term indigenous peoples – and by extension the implementation of international standards pertaining to indigenous peoples – has revealed a challenge because of its colonial meaning relating to natives or first inhabitants. It was argued by some African states that the meaning of 'indigenous' in their constitution is not the same as the one under international law.⁴⁹ Some African states have also declared that implementing the rights of indigenous peoples under international law will generate conflicts as it risks being seen as preferential treatment. Rwanda, for example, explained to the AHCPR during the examination of its state report in November 2007, that, because of the genocide of 1994, the government could not integrate the concept of indigenous peoples, and claimed that every Rwandan was equal, there were no indigenous peoples in Rwanda, and

⁴² Article 7 of UDHR.

⁴³ Article 26 of ICCPR.

⁴⁴ General Recommendation XXIII of 1997.

⁴⁵ UN CEFRD, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted at the 1235th meeting, 18 August 1997, UN Doc. CERD/C/51/Misc. 13/Rev. 4, paragraph 5; and article 2 and 3 of ACHPR.

⁴⁶ Article 19 ACHPR; ACHPR Report (n 7 above) 35 – 36.

⁴⁷ ACHPR Report (n 7 above) 95 – 97.

⁴⁸ ACHPR Report (n 7 above) 107. For a definition of indigenous peoples see 86 – 104.

⁴⁹ See for example the constitution of Cameroon and of Uganda

therefore the legal concept of indigenous peoples and its different protections did not apply to the country.⁵⁰

However, as stated by the ACHPR, reactions such as that of the Rwandan government reveal a misunderstanding of the status of indigenous peoples. According to the Commission:

One of the misconceptions regarding indigenous peoples is that to advocate for the protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights. As explained above, the issue is that certain marginalised groups are discriminated [against] in particular ways because of their particular culture, mode of production and marginalised position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalised groups to call for protection of their rights in order to alleviate this particular form of discrimination.⁵¹

The Commission further explains a related misconception: ‘talking about indigenous right will lead to tribalism and ethnic conflicts’, and responds that human rights promote multiculturalism and diversity, while the conception of unity and assimilation that causes conflicts.⁵² African countries should not, therefore, fear that accepting the concept of indigenous peoples will cause conflicts in the country and divide their peoples.

3.3.3 Conservation practices and customary use of land and natural resources

Relevant norms on indigenous land rights can also be found in instruments pertaining to environmental conservation. The Convention on Biological Diversity (CBD) of 1992 was ratified by many African states, and its preamble recognises

the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.⁵³

The respect and preservation of traditional knowledge relevant for the conservation and sustainable use of biological diversity is also promoted and protected.⁵⁴ The CBD further provides that states should ‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.’⁵⁵ This includes indigenous agriculture, agro-forestry, hunting, fishing, gathering, use of medicinal plants, and other subsistence activities. This article, by implication, should also be read to include protection for the land base, ecosystem and environment in which

⁵⁰ There are no official transcripts of the oral response delivered in public session during the ACHPR meeting in Brazzaville, Republic of Congo, in November 2007. However, unofficial notes taken by the International Working Group for Indigenous Affairs can be found at <http://www.gitpa.org/Peuple%20GITPA%20500/GITPA%20500-6.htm>

⁵¹ ACHPR *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006) 11–12.

⁵² ACHPR Report (N.7 above) 88.

⁵³ The CBD entered into force in 1993.

⁵⁴ Article 8 (j) of CBD.

⁵⁵ Article 10 (c) CBD.

those resources are found, as acknowledged in the *Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity* of 2004.⁵⁶

In addition, in 2000, states party to the CBD adopted guidelines for the conduct of cultural, environmental and social impact assessments to help develop a collaborative framework within which governments, indigenous and local communities, decision makers and managers of developments can act. It also gives advice on the incorporation of cultural, environmental – including biodiversity-related – and social considerations of indigenous and local communities into new or existing impact-assessment procedures.⁵⁷

The *African Convention on Conservation of Nature and Natural Resources*, in its revised version adopted in 2003,⁵⁸ provides that states should take measures ‘to ensure that traditional rights and intellectual property rights of local communities including farmers’ rights are respected’.⁵⁹ The Convention further recognises that access to indigenous knowledge requires prior and informed consent from communities.⁶⁰ This Convention revises the 1968 version, which did not integrate specific provisions for peoples’ rights and was solely oriented towards the protection of soil, flora, fauna and other natural resources. The revised Convention is not yet in force, as only eight states have so far ratified it since its adoption.⁶¹ The Convention has potential for indigenous land rights if its provisions are interpreted in conjunction with other relevant international and regional standards, first and foremost, the African Charter on Human and Peoples’ Rights and the work of the African Commission’s working group on indigenous populations/communities.

Another useful guideline in the context of conservation and land rights is the *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, developed in 2000 by the OAU, and designed to provide guidelines for access and benefit-sharing regimes with respect to biodiversity.⁶² In 2004, more than half of African countries had taken steps to adopt legislation based on the model law.⁶³ The model legislation promotes and supports traditional and indigenous technologies for the conservation and sustainable use of biological resources, guides states into recognising local and indigenous communities’ collective rights to their biological

⁵⁶ Adopted by the VIIth Conference of Parties to the CBD, especially in Principles 1 and 2. Principle 2 provides that ‘sustainability is generally enhanced if Governments recognize and respect the “rights” or “stewardship” authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities...’. The first principle of the ‘Ecosystem Approach’, adopted by the COP in Decision V/6 and considered to be one of the main tools for the implementation of the Convention, states that ‘Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognized.’

⁵⁷ Secretariat of the CBD *Akwé: Kon Guidelines* (2004).

⁵⁸ *African Convention on the Conservation of Nature and Natural Resources* (2003).

⁵⁹ Article XVII (1) of *African Convention* (n 58 above).

⁶⁰ Article XVII (2) of *African Convention* (n 58 above).

⁶¹ According to Article XXXVIII fifteen ratifications are required for its entry into force.

⁶² OAU (2000), available at <http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>.

⁶³ N Zerbe ‘Biodiversity, ownership and indigenous knowledge’ (2005) *54 Ecological Economics* 493 – 506.

resources, and includes an obligation to obtain prior and informed consent of indigenous and local communities to access resources.⁶⁴

3.4 Participation and consent

The principle of free, prior and informed consent (FPIC) is possibly the most dramatic example of the paradigm shift since the international colonial era to the modern conception of international human rights law. In contemporary international law, indigenous peoples' have the right to participate in decision-making and to give or withhold their consent to activities affecting their traditional lands, territories and resources. International human rights law places clear and substantial obligations on states in connection with resource exploitation on indigenous lands and territories. Several decisions of intergovernmental human rights bodies have established the rights of indigenous peoples to free prior and informed consent, founded upon an understanding of the full range of issues.⁶⁵

The UNDRIP (2007) explicitly stipulates the right to FPIC.⁶⁶ The CBD requires that the traditional knowledge of indigenous and local communities may be used only with their 'approval'.⁶⁷ The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC.⁶⁸ The African Commission also used this principle in the case of the Ogoni people of Nigeria considering the impact of oil exploration on them through an analysis of both the economic and social rights and the collective rights in the Charter.⁶⁹ The Government of Nigeria was part of a consortium involved in oil production in Ogoniland, part of the oil-rich Niger delta region. Local Ogoni communities were not involved in the decisions affecting development of their region, and production activities were carried out without regard for their health or environment. A number of oil spills contaminated the water and soil, causing short- and long-term health consequences for the Ogoni people, due in part to the lack of proper safety measures. When the Ogoni people protested, state military forces carried out violent and often lethal attacks against them. The Commission found a violation of the right of peoples to a general satisfactory environment,⁷⁰ linking it with a violation of the individual's right to health.⁷¹ Moreover, the Commission found a violation of the right of peoples

⁶⁴ OAU (n 62 above) article 18.

⁶⁵ See, inter alia, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples* (1997); UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (2001)* 49–54, paragraph 18; Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children: Recommendations* (2003) para 4; Organisation of American States, *Report on the Situation of Human Rights in Ecuador* (1997) 89; *Report No. 96/03, Maya Indigenous Communities and their Members Case 12.053* (2003) para 149.

⁶⁶ Articles 10, 11 (2), 19, 28 and 32 of UNDRIP (2007).

⁶⁷ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8 (j) and Related Provisions of the CBD (2001) 11.

⁶⁸ See, inter alia, IACHR Report No. 27/98 (Nicaragua), para 142; *Report No. 96/03, Maya Indigenous Communities and their Members Case 12.053* (2003) para 141.

⁶⁹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria*, Communication 155/96 (2001 – 2002).

⁷⁰ Article 24 of African Charter.

⁷¹ Article 16 of African Charter.

freely to dispose of their wealth and natural resources,⁷² since the government failed to involve Ogoni communities in the decision-making regarding oil exploration.⁷³ In the Endorois case, the ACHPR also expressed the view that, in any development or investment project, the state had a duty to seek the free prior and informed consent of indigenous communities, which had not been respected by the Government of Kenya.⁷⁴

3.5 The right to reparation

According to international legal principles and standards, indigenous peoples have a right to reparation for the human rights violations they have experienced, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁵ Reparation is intended to relieve the suffering of and afford justice to victims 'by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations'.⁷⁶ One basic aspect of the right to reparation is the availability of effective remedies.⁷⁷

Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his landmark UN study on reparations that:

Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.⁷⁸

The Inter-American Court on Human Rights has consistently held that 'Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*), which includes the restoration of the prior situation ...' and compensation or other forms of indemnification for material and immaterial damages.⁷⁹ The same principle has been applied by UN bodies responsible for oversight of state compliance with universal human rights and instruments, the ICJ, and the European Court on Human Rights, pursuant to Article 50 of the ECHR.

The general principle of restitution in human rights law also applies to indigenous peoples. There is a difference in its application to indigenous peoples,

⁷² Article 21 African Charter.

⁷³ The SERAC case (n 69 above) para 58.

⁷⁴ The Case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International (n 29 above), para 290-291.

⁷⁵ For a detailed treatment of remedies in human rights law, see D Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 1999.

⁷⁶ T Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (1993) 56.

⁷⁷ In human rights law, the availability of effective remedies is a right in and of itself that complements other recognised rights. See, *inter alia*, UDHR, Article 8; ICCPR, Article 2 (3); CERD, Article 13; ECHR, Article 13; American Convention on Human Rights, Articles 1, 8 and 25; ACHPR, Article 7.

⁷⁸ Boven (n 76 above) 57.

⁷⁹ n 76 above 13

however, because indigenous people hold property rights individually and collectively. As van Boven stated, a

coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.⁸⁰

He adds that:

Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, and in case of relocation of indigenous peoples. The draft declaration on the rights of indigenous peoples [Article 27] recognizes the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost.⁸¹

Article 28 of the UNDRIP states that:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In 1997 the UN Committee on the Elimination of Racial Discrimination also addressed this issue, and its General Recommendation XXIII called upon States parties:

to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁸²

In the case of indigenous peoples in Africa evicted for environmentally protected areas, some might want to argue that restitution of ancestral lands is impossible. This hypothesis has, however, been defeated in the ACHPR Endorois decision, that the

⁸⁰ n 76 above 8 para 14.

⁸¹ Boven (n 76 above) 9.

⁸² UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples* (1997) para 5.

indigenous community rights of ownership of an area gazetted as a Game Reserve be recognised and that they should be granted unrestricted access to the said area.⁸³

Finally, ILO Convention 169 requires that indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy shall be recognised.⁸⁴ The term 'traditionally occupy' does not require a continued and present occupation, but rather, according to the ILO, 'there should be some connection to the present'.⁸⁵ Consequently, under ILO 169 – and ILO 107, which uses the same language – indigenous peoples have the right to restitution and recognition of their rights to lands 'traditionally occupied' that they have been expelled from or that they have lost title to or possession of in the recent past, including those incorporated into protected areas without their consent. In the case of relocation, both consensual and non-consensual, ILO 169⁸⁶ also contains specified remedies: the right to return to traditional lands once the reason for relocation no longer pertains; allocation of lands of equal quality and legal status, unless the people(s) concerned express a preference for compensation; full compensation for any loss or injury resulting from relocation.

4 Conclusion

As highlighted, international law has played a mixed role regarding land rights in Africa. During the colonial era international law was an important factor in initiating the dispossession of indigenous peoples. The emergence of human rights law as a branch of international law marks an important change of approach. Indigenous peoples' rights to land and natural resources are strongly affirmed and guaranteed by numerous inter-related human rights decisions and instruments, which emerged from both regional and international human rights mechanisms in recent years. The wide ratification by African states of international and regional instruments pertaining to indigenous peoples' rights demonstrates a strong commitment toward the protection and promotion of indigenous land rights. However, the realisation of these rights through the implementation of the relevant decisions and instruments remains challenging. While international and regional bodies have created solid instruments and taken pioneering decisions, few of the principles expounded have been implemented in practice. Concrete measures are needed to translate the standards into reality, including those of the African Charter on Human and Peoples Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Elimination of All Forms of Discrimination and the Convention on Biological Diversity. States can show greater commitment by ratifying other recent international and regional treaties engaging the rights of indigenous peoples, such as the revised African Convention on the Conservation of Nature and Natural Resources and ILO Convention 169. The principles and rights emerging from international law should be seen as minimum standards of protection for the rights of indigenous peoples, which no state legislation should fail to integrate.

⁸³ The Case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International (n 29 above),

⁸⁴ Article 14 of ILO 169.

⁸⁵ International Labour Office, *ILO Convention on Indigenous and Tribal Peoples 1989: A Manual* (2000) 18.

⁸⁶ ILO 169, Article 16 (3–5).

The recognition of the existence of indigenous peoples in Africa is crucial to the realisation of the human rights guaranteed in international and regional instruments. Confusion around the concept of indigenous peoples has been recognised in documents of the Working Group on Indigenous Peoples/Communities, and few African countries recognise the existence of indigenous peoples on their territories.⁸⁷ Recognition must be the starting point, and then indigenous peoples should be given the opportunity to reacquire their ancestral land and acquire legal property rights on these lands. International law is unequivocal: it provides for reallocation of ancestral land to indigenous peoples and, when this is impossible, the allocation of alternative lands. The ongoing reforms on land rights undertaken at the national level are opportunities for government to take affirmative measures to tackle the specific problems that indigenous peoples face. In some cases, reintegration on the ancestral lands is possible and compatible with environmental conservation objectives. In other cases, alternative land can be provided, in accordance with international standards. Additionally, urgent measures to fight extreme poverty and marginalisation can be taken while reforms are being implemented.

Contemporary human rights law is also clear about participatory requirements in relation to decisions affecting indigenous peoples' right to land, which must be validated through their free, prior and informed consent. Displacements and eviction of indigenous peoples have happened without them being consulted and involved in the decision. Still landless, indigenous peoples continue to be marginalised from decisions concerning land. Viable and fair solutions will only emerge from consultations with indigenous communities and their involvement in decision-making processes.

⁸⁷ The report of the working group: *Advisory Opinion of the ACHPR Concerning the UNDRIP*, adopted at the 40th Ordinary session of ACHPR, in May 2007, Accra, Ghana.