

# New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa

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## Abstract

The adoption by some peoples in Africa of the indigenous rights concept has brought about new challenges regarding the application of the concept to these peoples. The indigenous rights concept was shaped by the colonial experiences of indigenous peoples in the Americas and Australasia. The international understanding of the concept pre-supposes the existence of a set of group rights belonging to peoples who are descendants of the earlier inhabitants of the territory on which a state is located, in contrast to other citizens of that state who are considered colonial settlers. The African Commission on Human and Peoples' Rights has attempted to overcome this challenge by evolving a description of indigenes for Africa. This article argues that, although the conceptual challenges that flow from the foreign origin of the concept have not been fully overcome, the African Commission's description has successfully located Africa within the global indigenous rights framework.

## Keywords

Indigenous rights, African indigenous peoples, collective rights Africa, human rights, peoples' rights Africa

## INTRODUCTION

Marginalized peoples in Africa have in recent decades increasingly adopted indigenous rights as a means to address their marginalization in their states. Indigenous rights evolved from the colonial and post-colonial experiences of indigenous people in the Americas and Australasia. The current distinguishing characteristics of indigenous peoples in international law focus on historical continuity with people who were on the territory of the state when the colonizers arrived. However, the law fails to clarify many situations, especially in Africa, where almost all peoples can claim this historical continuity.

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The African Commission on Human and Peoples' Rights (African Commission) established a working group to investigate claims to indigenous rights on the continent. The working group recognized the need for an indigenous concept in Africa, but considered that using historical continuity as a distinguishing characteristic would be problematic in Africa. It therefore formulated its own description of indigenes for Africa. The African Commission applied this description in *Centre for Minority Rights Development and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya (Endorois)*.<sup>1</sup> This article highlights the conceptual and legal challenges that have been encountered in introducing and implementing indigenous rights in Africa. It argues that, although the conceptual challenges that flow from the foreign origin of the indigenous concept have not been fully overcome, the African Commission's description is a major step towards locating Africa within the global indigenous rights framework. The article also argues that the legal and conceptual challenges of implementing indigenous rights in African states can be overcome.

## THE EVOLUTION OF THE INDIGENOUS RIGHTS CONCEPT

The origin of the indigenous concept has been traced to the European colonization of the Americas or New World (as it was then called).<sup>2</sup> This colonization, ushered in by the Spanish incursion into the Americas in the 16th century, inspired debate among European scholars as to the legitimacy of the Spanish power to govern the Indians and control their lands.<sup>3</sup> These debates were focused on "the nature, legitimacy and justifications of rights" that the Europeans could claim over the Indians and their lands.<sup>4</sup> The European colonisers developed international law principles to provide legal and moral justification for their forceful takeover of the lands of the American Indians.<sup>5</sup>

1 Comm 276/2003.

2 J Gilbert *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (2007, Martinus Nijhoff Publishers) at 4–5.

3 KN Bojosi and GM Wachira "Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights" (2006) 6 *African Human Rights Law Journal* 382 at 385; Gilbert, *id* at 8–9.

4 P Thornberry *Indigenous Peoples and Human Rights* (2002, Manchester University Press) at 64.

5 For instance, Vattel, a scholar in this era, argued *inter alia* that non-agrarian hunter-gatherer societies could not populate whole countries, their "unsettled habitation" in immense regions did not amount to legal possession and therefore it was lawful for Europeans to settle in the lands of Indians and colonise them. See JB Scott *The Classics of International Law: The Laws of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* by E De Vattel (transl CG Fenwick, 1916, Carnegie Institute of Washington) book 1 at 84, para 203, 85, para 209 and 37–38, para 81.

The application of international law to the colonization of the American Indians resulted in their progressive loss of status. At the initial stages of colonization, the European colonisers entered into treaties with the American Indians, suggesting recognition of the sovereignty of the people.<sup>6</sup> However, over time, the European colonisers abandoned these treaties, on the basis of the argument that these peoples did not legally exist in international law.<sup>7</sup> This reasoning occurred at a time when European colonization had expanded to regions like Australasia and inspired arguments that aboriginal and Indian lands were *terra nullius*.<sup>8</sup>

The ultimate outcome of European colonization of American Indian and other aboriginal lands was the introduction of European religion, commerce and civilization,<sup>9</sup> ultimately resulting in the establishment of modern societies fashioned after European culture in these lands. In many of these societies there was a system of dual and sometimes multiple cultures because some or all of the natives adhered to their own culture and religion.

At the decolonization of these territories, the colonial boundaries were maintained in conformity with the *uti possidetis* principle.<sup>10</sup> At the time of decolonization, the political rule of the European colonies in the Americas was handed to Creole or local elites of European extraction in the South American states<sup>11</sup> and the European settlers took over political control in the North American states. This Creole and European leadership adopted the position that the colonial boundaries had to be preserved.<sup>12</sup> Similarly, decolonization in Australia occurred without reference to the aboriginal people. Therefore, the Indians and aboriginal peoples who had been sovereign peoples in pre-colonial times became marginalized peoples with diminished

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6 Gilbert *Indigenous Peoples' Land Rights*, above at note 2 at 17–19.

7 Id at 21.

8 Originally, the term *terra nullius* was ascribed to territories that were not under any sovereignty, either because they had never been under the authority of any state or had been abandoned by a state that had sovereignty over them. However, in this era the concept was deployed for political purposes to describe territories with no form of “civilised” European model of government. See MF Lindley *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1929, Negro Universities Press) at 10; Gilbert, *ibid*.

9 Gilbert, *id* at 4–5.

10 According to Shawt, “the doctrine basically posits that new States will come to independence with the same boundaries they had when they were administrative units within the territories of a colonial power”: MN Shawt “The heritage of states: The principle of *uti possidetis juris* today” (1996) 67 *British Yearbook of International Law* 75 at 97. The impact of the doctrine was to convert the administrative boundaries that delimited the different colonies “into international frontiers in the full sense of the term”: *Case Concerning the Frontier Dispute (Burkina Faso / Mali)* International Court of Justice judgment of 22 December 1986, para 23.

11 M Reisman “Protecting indigenous rights in international adjudication” (1995) 89 *American Journal of International Law* 350 at 352. Gilbert *Indigenous Peoples' Land Rights*, above at note 2 at 36.

12 Gilbert, *ibid*.

status at the time of European colonization. At decolonization they remained marginalized peoples with diminished status under Creole or European settler governments.

In 1921, the International Labour Organization (ILO) commenced studies on indigenous workers in independent countries.<sup>13</sup> The studies that focused on the American Indians and aboriginal peoples ultimately led to the adoption of the ILO Convention 107 on 26 June 1957 (ILO 107).<sup>14</sup> ILO 107 entered into force on 2 June 1959.<sup>15</sup> This convention, which designated both the American Indians and the aboriginal peoples of Australasia as indigenous peoples, was the only international instrument that provided for the rights of indigenous peoples until the late 1980s. However, at the time ILO 107 was adopted, indigenous peoples were generally categorized as “backward” and “temporary societies”.<sup>16</sup> Their survival was considered to be dependent on their assimilation into their national societies.<sup>17</sup> ILO 107 gave governments responsibility for evolving protective and integrative measures for indigenous populations.<sup>18</sup> The 1960s witnessed a more effective agitation for the recognition of indigenous rights in the international arena, because indigenous peoples entered the debate with a new generation of men and women educated in the ways of the European colonizing states that had encroached upon them.<sup>19</sup> Through the means of non-governmental organizations (NGOs), these activists were better able to advocate for respect for their rights as distinct indigenous societies.

In this period, the United Nations (UN) took an interest in the concerns of indigenous peoples and commissioned a study on indigenous peoples in the 1970s.<sup>20</sup> As part of its mandate of organizing NGO conferences on racism and racial discrimination, the UN Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization also organized an international NGO conference on discrimination against indigenous populations in the Americas in 1977.<sup>21</sup> Following this conference, indigenous peoples started to appear before UN human right bodies in large numbers.<sup>22</sup> In 1981, another international indigenous NGO conference was held in Geneva,

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13 “Study of the problem of discrimination against indigenous populations” (final report (supplementary part) submitted by Special Rapporteur José R Martínez Cobo, May 1982), UN doc E/CN.4/Sub.2/1982/Add.1, para 34, available at: <[http://www.un.org/esa/socdev/unpfi/documents/MCS\\_ii\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/MCS_ii_en.pdf)> (last accessed 26 June 2017).

14 Id, para 64.

15 Id, para 65.

16 *ILO Convention on Indigenous and Tribal Peoples*, 1989, (No 169): *A Manual* (2003, ILO) at 4.

17 Ibid.

18 ILO 107, art 2(1).

19 J Anaya *Indigenous Peoples in International Law* (2004, Oxford University Press) at 56.

20 JR Martínez Cobo “Study of the problem of discrimination against indigenous populations”, UN doc E/CN.4/Sub.2/476/Add.5.

21 *Report of the International NGO Conference on Discrimination Against Indigenous Populations in the Americas 1977* (Sub-Committee in Racism, Racial Discrimination, Apartheid and Decolonization, 20–23 September 1997, Palais des Nations, Geneva) at 7.

22 Ibid.

with a focus on indigenous peoples and their land.<sup>23</sup> This conference established the indigenous agenda firmly in the UN.<sup>24</sup> The UN Economic and Social Council (ECOSOC) followed this conference by establishing a UN Working Group on Indigenous Populations (UNWGIP) in 1982.<sup>25</sup> This soon became the largest UN forum dealing with indigenous rights and attracted people from Asia and Africa, which had not previously been part of the indigenous rights movement.<sup>26</sup>

Around this time, ILO 107 came under severe criticism from indigenous peoples' NGOs regarding its assimilationist approach.<sup>27</sup> The ILO Convention 169 (ILO 169) was therefore adopted in 1989. ILO 169 is said to represent "a major paradigm shift" on indigenous rights because "it adopts an attitude of respect for the identity and culture of indigenous peoples".<sup>28</sup>

UNWGIP commenced drafting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in the late 1980s and finished the first draft in 1993.<sup>29</sup> After protracted debates, the draft declaration was adopted by the new UN Human Rights Council on 29 June 2006 and subsequently passed in September 2007.<sup>30</sup> Before the adoption of UNDRIP, the position of indigenous peoples in the UN was sealed by the establishment of a Permanent Forum on Indigenous Peoples in the UN in 2000<sup>31</sup> and the appointment of a UN Special Rapporteur on the situation of the human rights of indigenous people in 2001.<sup>32</sup>

## AFRICA AND THE INDIGENOUS CONCEPT

In 1989, Moringe Parkipuny, a member of the Tanzanian Maasai people, became the first African to address a UNWGIP session in Geneva.<sup>33</sup> Before

23 R Niezen *Origins of Indigenism: Human Rights and the Politics of Identity* (2002, University of California Press) at 45.

24 Ibid.

25 Established by res 1982/34.

26 Nietzsche *Origins of Indigenism*, above at note 23 at 46.

27 L Swepston "A new step in the international law on indigenous and tribal peoples: ILO Convention No 169 of 1989" (1990) 15 *Oklahoma City University Law Review* 677 at 682.

28 L Swepston "The ILO Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption" in C Cohen (ed) *Human Rights of Indigenous Peoples* (1998, Trans National Publishers) 23 at 23–24.

29 J Burger "Indigenous peoples and the United Nations" in Cohen (ed), id, 6.

30 143 states voted in favour of passing UNDRIP. Although no African state voted against passing the declaration, Nigeria, Burundi and Kenya abstained. See AK Barume "Responding to the concerns of African states" in C Charters and R Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009, IWGIA Publications) 170.

31 ECOSOC res 2002/28 "Permanent forum on indigenous peoples", available at: <<http://www.un.org/en/ecosoc/docs/2002/resolution%202002-28.pdf>> (last accessed 26 June 2017).

32 "Human rights and indigenous issues" Commission on Human Rights res E/CN.4/RES/2001/57, available at: <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2001.57.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.57.En?Opendocument)> (last accessed 26 June 2017).

33 M Parkipuny "The human rights situation of indigenous peoples of Africa" (1989) 4th *World Journal* 2.

he attended UNWGIP, Parkipuny founded the first Maasai NGO, framing the Maasai land struggles in eastern Africa within the context of the indigenous rights framework. Parkipuny's address to UNWGIP was a pioneering attempt to link the experience of the marginalization of peoples in Africa with that of the established indigenous peoples in the Americas and Australasia. Parkipuny asserted *inter alia* that, in post-colonial Africa, the uniform approach adopted by states and states' monopoly of national identity opened the door for prejudice against and violations of the rights of peoples with cultures and identities that were distinctly different from those of the mainstream national population.<sup>34</sup> This was a call to protect peoples with distinct cultures from nationalization policies in their states threatening those cultures with extinction. He identified the hunter gatherers and pastoralists as two categories of eastern African peoples that possessed distinct cultures.<sup>35</sup> He warned that prejudices against these peoples have "crystallised into blatant cultural intolerance, domination and the violation of the fundamental rights of these peoples".<sup>36</sup> In essence, Parkipuny's speech was a proposal for the application of the indigenous concept to Africa on the basis of the need to protect culturally distinct hunter gathering and pastoralist peoples from marginalization by agrarian peoples.

Parkipuny's lead was however followed by a people who were neither hunter gatherers nor pastoralists. In 1992, Ken Saro Wiwa, representing the Ogoni (an agrarian people in Nigeria), attended UNWGIP in Geneva and addressed them on the marginalization of the Ogoni by the Nigerian government.<sup>37</sup> His speech, in contrast to that of Parkipuny, was not premised on the protection of culturally distinct peoples, but on the fact that the destruction of the Ogoni lands deprived them of their collective rights to lands as a people. He asserted that, "[i]ncidental to and indeed compounding this ecological devastation is the political marginalization and complete oppression of the Ogoni and especially the denial of their rights, including land rights".<sup>38</sup> Wiwa's speech presented the notorious Ogoni environmental struggles within the indigenous rights context. One year after this address, in a subsequent speech in another forum, Wiwa expressed his belief that:

"Contrary to the belief that there are no indigenous people in black Africa, our research has shown that the fate of such groups as ... Ogoni in Nigeria [is], in essence, no different from those of the aborigines of Australia, the Maori of New Zealand and the Indians of North and South America. Their common

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34 *Id.*, para 6.

35 *Ibid.*

36 *Ibid.*

37 C Bob *The Marketing of Rebellion: Insurgents Media and International Activism* (2005, Cambridge University Press) at 81.

38 "An address to the United Nations Working Group on in [sic] Indigenous Populations, July 1992" at 2, available at: <<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyAccessToJustice/Ogoni.pdf>> (last accessed 26 June 2017).

history is of the usurpation of their land and resources, the destruction of their culture and the eventual domination of the people.”<sup>39</sup>

This statement argues for the application of indigenous rights to the Ogoni on the basis of the similarity of their experiences in their post-colonial state with those of the indigenous peoples of the Americas and Australasia.

Despite the contradictory positions in Parkipuny’s and Wiwa’s speeches, they inspired the international indigenous movement to take a closer look at the application of the indigenous concept in Africa. In 1993, the International Work Group on Indigenous Affairs (IWGIA)<sup>40</sup> dedicated one of its sessions to the specific “question of indigenous peoples in Africa”.<sup>41</sup> This conference was held in Denmark and attended by the representatives of several African peoples.

IWGIA subsequently co-sponsored the first indigenous conference on the African continent. This took place in Arusha, Tanzania in 1999 with participants from eastern, western and central Africa.<sup>42</sup> This conference culminated in the adoption of the Arusha resolutions urging African governments to provide special legal protection for indigenous peoples in Africa.<sup>43</sup> The UN Office of the High Commissioner for Human Rights also convened two other conferences involving “various indigenous peoples and minority groups”.<sup>44</sup>

## DESCRIPTIONS OF INDIGENOUS PEOPLES

Attempts at describing indigenous people have proved problematic because of the challenge of finding a description that fits universally.

### The International Labour Organization Convention 107

Article 1(1) of ILO 107 provides that the convention applies to:

“(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose

39 KS Wiwa “A deadly ecological war in which no blood is spilled but people die all the time” (speech on 4 January 1994, Bori, Nigeria, before a gathering of 300,000 Ogoni people) in A Tal *Speaking of Earth: Environmental Speeches that Moved the World* (2006, Rutgers University Press) 186 at 189.

40 An indigenous peoples’ NGO.

41 “Editor’s preface” in H Veber, E Waehle et al (eds) *Never drink from the Same Cup: Proceedings from the Conference on Indigenous Peoples in Africa* (1993, CDR / IWGIA) 5.

42 *The Indigenous World 2001–2002* (1999, IWGIA Publications) at 453.

43 *Arusha Resolution 54(2)* (1999, Indigenous Affairs – IWGIA Publications), para 21.3.

44 These conferences were held in Kidal, Mali and Gaborone, Botswana. “Reports of the seminars on multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples”: Arusha, Tanzania, UN doc E/CN.4/Sub.2/AC.5/2000/WP.3; Kidal, Mali, UN doc E/CN.4/Sub.2/AC.5/2001/3; Gaborone, Botswana, UN doc E/CN.4/Sub.2/AC.4/2002/4.

status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) 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 a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.”

This description essentially creates two distinct categories by distinguishing between tribal (or semi-tribal) peoples who are indigenous and tribal (or semi-tribal) peoples who are not indigenous. Tribal people who are indigenous include the indigenous peoples of the Americas and Australasia who are descendants of pre-colonial inhabitants of their states and for whom colonization resulted in migration and the establishment of hegemonic domination by the colonizers.<sup>45</sup> Tribal people who are not indigenous includes those in “African and Asian states where, generally speaking, colonization did not result in European settlement and the struggles of the more advanced elements of the local population produced independence”.<sup>46</sup>

UN Rapporteur Daes insists that ILO 107’s distinction between tribal indigenous people and tribal non-indigenous people is insignificant, because “[s]pecial rights attach equally to both groups. No advantage is gained by virtue of being ‘indigenous’ in the sense of having been a victim, historically of ‘conquest and colonization’, but this distinction is of no practical consequence, since the convention guarantees both categories of people exactly the same rights”.<sup>47</sup> According to Daes, “the source of rights is not ... a peoples’ history of being conquered, colonized or oppressed, but its history of being distinct as a society or nation”.<sup>48</sup> In other words, the fundamental factor for identifying the beneficiaries of the rights protected by ILO 107 is the issue of the marginalization of distinct vulnerable groups. This implies that the beneficiaries of the rights in ILO 107 could exist in states in which colonization did not result in settlement. International institutions adopt this philosophy and treat the terms “indigenous” and “tribal” as synonyms in the practical implementation of indigenous rights.<sup>49</sup>

45 BK Burman *“Indigenous” and “Tribal” Peoples and the UN International Agencies* (1995, Rajiv Gandhi Institute for Contemporary Studies) at 6.

46 P Thornberry *International Law and the Rights of Minorities* (1993, Clarendon Press) at 339; RL Barsh “Revision of ILO Convention No 107” (1987) 81/3 *The American Journal of International Law* (current developments) 756 at 757; Thornberry *Indigenous Peoples*, above at note 4 at 43.

47 E Daes “Standard setting activities: Evolution of standards concerning the right of indigenous peoples”, UN doc E/CN.4/Sub.2/AC.4/1996/2, para 22.

48 Ibid.

49 For example, a voluntary fund for indigenous peoples was established by UN General



In 1972, the UN joined the international discourse on indigenous rights by commissioning a study on indigenous people to be undertaken by UN Rapporteur Martínez Cobo.<sup>50</sup>

### Cobo's description of indigenous people

UN Rapporteur Martínez Cobo's study provided the most commonly utilized description of indigenous peoples.<sup>51</sup> He described indigenous people thus:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems."<sup>52</sup>

Cobo's description suggests various elements in the identification of indigenous peoples.

#### *Historical continuity with pre-invasion and pre-colonial societies*

This element describes indigenous peoples as those having historic continuity with people who occupied the territory of the state before the colonialists arrived. Cobo suggests that this historic continuity may consist of one or more of the following factors: "occupation of ancestral lands, common ancestry with the original occupants of the lands, distinctive cultural forms, language, and residence in certain regions and other relevant factors".<sup>53</sup> The factor of common ancestry with the original occupants of the lands has been the most emphasized by scholars and has been christened the

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Assembly res 40/131 of 1985 to facilitate the attendance of indigenous peoples at international indigenous fora. The fund has been used to assist people from Asian countries including Bangladesh and India, and African countries such as Tanzania. See DE Sanders "Indigenous peoples: Issues of definition" (1999) 8/1 *International Journal of Cultural Property* 4 at 7. In addition, the World Bank stated that "the terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups' and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purpose of this directive, 'indigenous peoples' is the term that will be used to refer to these groups": World Bank operational directive 4.20 (September 1991), para 3, available at: <[http://www.ifc.org/wps/wcm/connect/835cc50048855270ab94fb6a6515bb18/OD420\\_IndigenousPeoples.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/835cc50048855270ab94fb6a6515bb18/OD420_IndigenousPeoples.pdf?MOD=AJPERES)> (last accessed 25 July 2017).

50 Martínez Cobo "Study of the problem of discrimination", above at note 20.

51 The sub-commission called it "a reference work for definitive usefulness" and invited the working group to rely on it: UN Sub-Commission on Human Rights res 1985/22, para 4(a).

52 J Martínez Cobo "Study of the problem of discrimination against indigenous populations", UN doc E/CN.4/Sub.2/1986/7/Add.4, para 379.

53 Id, para 380.

“aboriginal” or “aboriginality” characteristic of the indigenous concept.<sup>54</sup> This factor of common ancestry with the original occupants of the land goes to the root of the indigenous concept, because the etymological meaning of the word “indigenous” is “originating in the region where found native”.<sup>55</sup> The descendants of the pre-colonial inhabitants are indigenous in comparison to the colonial settlers. Indigenous peoples are therefore also called “first nations” or “first peoples”.<sup>56</sup>

This historical continuity element is applicable in the Americas and Australasia where the American Indians and aborigines are traceable to those who lived on the land before the European colonizers arrived. In Africa, this historical continuity element is problematic because most peoples in Africa can establish historical continuity with pre-colonial occupants of the continent.<sup>57</sup> The opposition to the concept in Africa is grounded on the belief that most Africans are indigenous.<sup>58</sup> UN Rapporteur Daes notes that the conceptual objection to the inclusion of Africans in the indigenous concept rests on the grounds that the UN definition of the concept “which implies a distinction between persons originating in a state as opposed to settlers is inapplicable to most African states ruled by natives”.<sup>59</sup> This element inspires the conclusion that the concept does not apply in regions that did not experience settlement by European colonizers.

*They are culturally distinct from other sectors of society*

This element suggests that, in indigenous peoples’ states, there is a dichotomy between a central, usually European, culture adopted by the majority of the citizens of the state and a traditional culture (considered backward and inferior to the central culture by the majority of the citizens of the state) adhered to by indigenous peoples. The central culture is traceable to colonization and the traditional culture is traceable to the pre-colonial lifestyle of the indigenous peoples. Indigenous people consider themselves alien to the central culture.

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54 G Pentassuglia “Towards a jurisprudential articulation of indigenous land rights” (2011) 22/1 *European Journal of International Law* 156; E Daes and A Eide “Prevention of discrimination against and the protection of minorities”, UN doc E/CN.4/Sub.2/2000/10, para 45; Gilbert *Indigenous Peoples’ Land Rights*, above at note 2 at 4–7; A Xanthaki *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007, Cambridge University Press) at 11; Anaya *Indigenous Peoples*, above at note 19 at 50.

55 RK Barnhart *The Barnhart Concise Dictionary of Etymology* (2003, HarperCollins) at 57.

56 Thornberry *Indigenous Peoples*, above at note 4 at 48.

57 J Gilbert “Indigenous peoples’ human rights in Africa: The pragmatic revolution of the African Commission on Human and Peoples’ Rights” (2011) 60/1 *International & Comparative Law Quarterly* 245 at 250.

58 C Kidd and J Kenrick “The forest peoples of Africa: Land rights in context” in V Couillard, J Gilbert, C Kidd and J Kenrick (eds) *Land Rights and the Forest Peoples of Africa: Historical, Legal and Anthropological Perspectives* (2009, Forest Peoples Programme) 4; decision on the UN Declaration on the Rights of Indigenous Peoples: doc.assembly/AU/9 (VIII) add.6, para 7.

59 Daes “Standard setting activities”, above at note 47, para 64.

In African societies, there is no central culture in the sense suggested by Cobo. The dominant groups are African peoples who, as a result of being placed in an advantaged position by the circumstances of colonization, have collectively advanced their political and economic dominance in the state. Thornberry observed that the African experience of marginalization suggests human rights problems among indigenous peoples.<sup>60</sup>

*They form non-dominant sectors of society*

This element suggests that societies with indigenous peoples are bifurcated in terms of their citizenry into the dominant non-indigenous citizen and the non-dominant indigenous citizen. Cobo did not specify the sense in which they are non-dominant. Indigenous peoples all over the world suffer severe economic and political marginalization that is manifested in the seizing of their lands, distortion of their culture and the ascription of inferior status to them by the government of their states. African groups have emphasized their domination by dominant groups in their states as the basis for their claims to indigenous rights.

*Their ancestral territory and cultural identity are the basis of their existence as a people*

This element implies a connection between the culture, religion and economic survival of the indigenous people and their land or territory, such that removing them from their land would threaten their very survival. This element has also proved controversial in Africa. A percentage of the populations of almost all peoples in Africa are dependent on their land for survival.

### **ILO Convention 169**

ILO 169 was adopted in 1989. The drafters of ILO 169 applied the ILO 107 approach of using two distinct categories. ILO 169 provides in article 1(1) that the convention applies to:

“(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

ILO 169's distinction between “indigenous” and “tribal” has been explained:

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60 Thornberry *Indigenous Peoples*, above at note 4 at 48.

“The term ‘indigenous’, refers to those who, ... occupied a particular area before other populations or groups arrived. This is a description which is valid in the North and South America [sic] and in some parts of the Pacific. In most parts of the world however, there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived. In Africa, for instance, there is no evidence to indicate that the Maasai, the pygmies or the San (Bushmen) ... arrived in the region they now inhabit long before other African Populations ... The ILO therefore decided ... that it should refer to indigenous and tribal peoples. The intention was to cover a social situation, rather than to establish a priority based on whose ancestors had arrived in a particular area first.”<sup>61</sup>

This statement implies that the term “tribal” was introduced to extend the concept to peoples in Africa who are not distinguished by historical continuity from pre-colonial inhabitants.<sup>62</sup> The statement also implies that, as was the case with ILO 107, the crux of the indigenous concept is the social situation of having a distinct culture that is marginalized. The distinction between the terms indigenous and tribal is again qualified by the fact that both categories have the same rights<sup>63</sup> and the fact that international institutions treat both categories as synonyms.

Article 1(2) of ILO 169 introduced a crucial element: “self-identification as indigenous or tribal shall be a fundamental criterion for determining the group to which this convention shall apply”.

### The UN declarations on the rights of indigenous peoples

At the debates preceding the passing of UNDRIP at UNWGIP, state governments insisted on a precise definition, because “overly broad and subjective criteria for determining who is indigenous would lead to an exponential rise in the number of groups making claims for indigenous rights”.<sup>64</sup> Indigenous peoples argued on the other hand that the question of definition should be left to the world indigenous organizations<sup>65</sup> as “a strict definition would limit flexibility in the application of relevant instruments to

61 M Tomei and L Sweptston *Indigenous and Tribal Peoples: A Guide to ILO Convention No 169* (1996, ILO) at 5.

62 M Tong “The UN special rapporteur on human rights and fundamental freedom of indigenous peoples” (2002) 2 *Indigenous Affairs Journal* 36 at 38.

63 *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention Number 169* (2009, ILO) at 5, note 1.

64 RT Wick “Revisiting the emerging international norm on indigenous rights: Autonomy as an option” (2000) 25 *Yale Journal of International Law* 291 at 297.

65 “World indigenous organizations” are international organizations, such as the World Council of Indigenous People and the International Working Group on Indigenous People's Rights, that advance indigenous rights. “Standard-setting activities: Evolution of the standards concerning the rights of indigenous peoples, information received from indigenous organizations”, E/CN.4/Sub.2/AC.4/1996/2/Add.1, para 2.

indigenous circumstances”.<sup>66</sup> The ILO joined the debate by proposing that UNDRIP should adopt the terms “indigenous” and “tribal” to cater for Asian states such as India and Bangladesh where domestic law applies the term “tribe” to describe groups claiming indigenous identity and where the government rejects the idea that tribes are indigenous peoples.<sup>67</sup> UNWGIP decided that a global definition of indigenous peoples was not indispensable, as the adoption of UNDRIP was not conditioned on the articulation of a definition of indigenous peoples.<sup>68</sup> This was premised on the desire to provide a declaration on indigenous rights that was of universal application on the basis of the UNWGIP chairperson’s argument that any attempt to define indigenous peoples in UNDRIP would “result in a definition which lacked scientific and logical credibility which would in turn, undermine its credibility and usefulness”.<sup>69</sup> UNDRIP was passed without any definition of the indigenous concept.

## THE INDIGENOUS CONCEPT FOR AFRICA

The indigenous rights concept is particularly appealing to some marginalized peoples in Africa, because it adopts a holistic approach to the peoples’ problems. Indigenous rights protect indigenous peoples’ collective rights to a healthy environment,<sup>70</sup> and to own and control their lands and resources;<sup>71</sup> at the same time the concept also guarantees their right to self-determination and autonomy.<sup>72</sup> In the past, the problems faced by marginalized peoples in Africa have been over simplified as relating merely to environmental conservation or relocation from ancestral lands. In reality, the problems exceed this narrow conceptualization and embrace wider issues in the political realities of these peoples in their states. The Maasai land dispute in eastern Africa, for instance, transcends the mere relocation of the Maasai from their lands in the national interest by the colonial and post-colonial governments of Kenya and Tanzania. It embraces historical factors including the colonial re-positioning of peoples in the region, which overturned the pre-colonial political arrangement of Africa. This resulted in the pastoralist Maasai losing their

66 Ibid.

67 D Sanders “The legacy of Deskaheh: Indigenous peoples as international actors” in P Cohen (ed) *Human Rights of Indigenous Peoples* (1998, Trans National Publishers) 87.

68 *Human Rights of Indigenous People: Report of the Working Group on Indigenous Populations on its Fifteenth Session*, UN doc E/CN.4/Sub.2/1997/14, para.129; *Discrimination Against Indigenous People: Report of the Working Group of Indigenous Peoples on its Fourteenth Sessions*, UN doc E/CN.4/Sub.2/1996/21, paras 153–54.

69 Daes “Standard setting activities”, above at note 47, para 65.

70 ILO 169, art 7(4) and UNDRIP, art 29(1).

71 ILO 169, arts 13–15 and UNDRIP, art 26.

72 For instance ILO 169, arts 13–18 grant indigenous peoples autonomy in the use and control of their land in a manner that is not inconsistent with national laws. See RL Barsh “An advocate’s guide to the Convention on Indigenous and Tribal Peoples” (1990) 15 *Oklahoma City University Law Review* 209 at 215; UNDRIP, arts 3 and 4 provide for indigenous peoples’ right to self-determination and autonomy in their local affairs and the financing of their autonomous functions.

dominant pre-colonial position in the post-colonial states and now being vulnerable in the endemic competition for ethnic supremacy that characterizes African states.<sup>73</sup> Similarly, the Ogoni crisis transcends mere environmental rights or even human rights concerns. Watt aptly described the Ogoni crisis as representing “an almost archetypical modernist struggle over rights, and especially over state accountability and local representation”.<sup>74</sup> In other words, the Ogoni crisis involves political issues including inequalities in Nigerian fiscal structures, domination of the Ogoni by politically dominant peoples in Nigeria, exclusion of the Ogoni from the benefits of oil extraction in the region, dispossession from land, and the general perception among the Ogoni that they are colonized by the Nigerian state. Indigenous rights are therefore perceived by African peoples who have lost faith in their national judicial systems as providing an alternative means to protect their rights as a people, through international and regional organizations.

In Africa, colonization did not lead to foreign settlement.<sup>75</sup> The term “indigenous” was thus globally applied to all Africans. In colonial Africa, the term was used in treaties to describe all African people of the territories, in contrast to the colonizers.<sup>76</sup> In the era of decolonization, the term was used to describe the non-European majorities of European colonies in Africa.<sup>77</sup> The implication is that the decolonization of African states was viewed as the transfer of sovereignty from the European colonizers to the indigenous populations.<sup>78</sup> African state governments therefore perceive claims by some African peoples to their indigenous identity as a threat to national unity.<sup>79</sup>

The African Commission was initially reluctant to apply the term “indigenous” to any people in Africa, on the basis that most Africans are indigenous.<sup>80</sup> However, the issue of indigenous peoples was incorporated as an independent agenda item at the African Commission’s 28th ordinary session.<sup>81</sup> The

73 FM Ndahinda “Marginality, disempowerment and contended discourses on indigeness in Africa” (2011) 18 *International Journal on Minority and Group Rights* 486.

74 MJ Watts “Contested communities, malignant markets, and gilded governance: Justice resource extraction and conservation in the tropics” in C Zerner (ed) *People Plants and Justice: The Politics of Nature Conservation* (2000, Columbia University Press) 28.

75 South Africa, Zimbabwe and Liberia are exceptions.

76 This is demonstrated by para 2 of the preamble and art 6 of the General Act of the Conference at Berlin (26 February 1885) 3 *American Journal of International Law* 7 at 14, which refer to the African people in colonial territories as “indigenous populations”. Similarly art 22 of the League of Nations Covenant refers to the people inhabiting certain parts of south-western Africa as “indigenous populations”: Ndahinda “Marginality, disempowerment”, above at note 73 at 496–97.

77 B Kingsbury “Indigenous peoples in international law: A constructivist approach to the Asian controversy” (1998) *American Journal of International Law* 414 at 426.

78 Ibid. Ndahinda “Marginality, disempowerment”, above at note 73 at 497.

79 Pentassuglia “Towards a jurisprudential articulation”, above at note 54 at 184–85; Barume “Responding to the concerns”, above at note 30 at 171–72.

80 *The Indigenous World 2001–2002* (1999, IWGIA) at 453.

81 Ibid.

Resolution on the Rights of Indigenous Populations / Communities, which provided for the establishment of the African Commission's Working Group of Experts on Indigenous Populations / Communities (ACWG) was adopted at the same session. ACWG's mandate was to examine the concept of indigenous peoples in Africa and study the implications for their rights of the African Charter on Human and Peoples' Rights, with particular regard to making recommendations for their protection.<sup>82</sup> ACWG's report could be divided into background analysis of the indigenous concept in Africa and distinguishing characteristics of indigenes in Africa.

### Background analysis

The ACWG report noted that there are "African peoples who are facing particular human rights violations, and who are applying the term 'indigenous' in their efforts to address their situation".<sup>83</sup> ACWG justified its adoption of the term "indigenous" by noting that: "[t]hey are not accommodated by dominant development paradigms and in many cases they are even being victimized by mainstream development policies and thinking".<sup>84</sup> ACWG emphasizes that their marginalization related to their deprivation of their lands. It noted that these peoples are "dispossessed of their land and natural resources, which leads to impoverishment and threatens their cultures and survival as peoples".<sup>85</sup> ACWG described the indigenous peoples in Africa as falling under the category of hunter gatherers, pastoralists and farmers.

#### *Hunter gatherers*

ACWG's report describes the following peoples as falling into the category of hunter gatherers: the Pygmies of the Great Lake Region,<sup>86</sup> the San of South Africa, the Hadzabe of Tanzania and the Ogiek of Kenya.<sup>87</sup> The indigenous concept was intended to apply to peoples in the category of what anthropologist Schmidt describes as *Urkultur*, meaning of primeval or primitive culture.<sup>88</sup> Accordingly, anthropologists have traditionally categorized African hunter gatherer peoples such as the San and the Pygmies, along with the Australian aborigines and American Indians, as coming within the definition of

82 *Report of the African Commission's Working Group of Experts on Indigenous Populations / Communities* (2005, African Commission and IWGIA Publications) at 68–69, adopted in the 34th session of the African Commission in Banjul in 2003.

83 *Id* at 15–19.

84 *Id* at 14.

85 *Ibid*.

86 Eastern and central Africa.

87 *Report of the African Commission's Working Group*, above at note 82 at 15.

88 P Schweitzer "No escape from being theoretically important: Hunter-gatherers in German language debates of late nineteenth and early twentieth centuries" in AJ Barnard (ed) *Hunter-Gatherers in History, Archaeology and Anthropology* (2004, Berg Publishers) 69 at 72.

indigenous peoples.<sup>89</sup> These African hunter gathering peoples fit Cobo's "culturally distinct" element because there are perceivable cultural differences between the hunter gatherers and other African peoples, not just in terms of the hunter gathering mode of production but also in terms of lifestyle, marriage, religious rites etc. However, challenges remain for the African hunter gathering groups. The African hunter gatherer cultural distinction fades in multi-cultural African states where all peoples have unique cultures. While the culture of the San of South Africa is distinct from that of Europe, the San live in South Africa with other African peoples such as the Zulu and Xhosa whose cultures are equally distinct from European culture. African scholars attempt to overcome this limitation by arguing that hunter gatherers, like the pastoralists, are distinct by virtue of their mode of production in a continent dominated by agrarian peoples.<sup>90</sup> The weakness of this argument is that it provides no solution for situations in which agrarian peoples are marginalized.

### *Pastoralists*

ACWG's report identifies the following groups as pastoralists: the Pokot, the Barabaig, the Karamojong and the Maasai of eastern Africa; the Samburu, Turkana, Rendille, Orma and Borana of Kenya and Ethiopia; the isolated pastoralist communities in Sudan, Somalia and Ethiopia; and the Tuareg, Fulani and Mbororo of western and central Africa.<sup>91</sup> The Maasai stand out in this category. Colonial administrators used stereotypes of Maasai as culturally distinct or inferior, backward and primitive, to justify activities such as the formation of the Maasai Reserve in 1922.<sup>92</sup> At independence, African leaders advanced these policies by promoting the Maasai as "icons of primitive Africa in order to promote the lucrative tourist industry".<sup>93</sup> However, as demonstrated above, this category raises similar problems in terms of cultural distinctiveness in that these peoples are culturally distinct among other culturally distinct peoples.

### *Farmers*

ACWG describes the following groups as falling into this category: the Mbororo of western and central Africa, the Ogoni of Nigeria and the Berbers of northern Africa.<sup>94</sup>

89 RB Lee and R Dally *The Cambridge Encyclopedia of Hunters and Gatherers* (1999, Cambridge University Press) at 1; Schweitzer, id at 73.

90 Ndahinda "Marginality, disempowerment", above at note 73 at 486; FM Ndahinda *Indigenoussness in Africa: A Contested Legal Framework for Empowerment of Marginalized Communities* (2011, Asser Press) at 73.

91 *Report of the African Commission's Working Group*, above at note 82 at 17.

92 DL Hodgson *Once Intrepid Warriors: Gender, Ethnicity and the Cultural Politics of Maasai Development* (2001, Indiana University Press) at 50–59 and 126–34.

93 Id at 150.

94 *Report of the African Commission's Working Group*, above at note 82 at 18.



### Distinguishing characteristics of indigenoussness in Africa

ACWG began by noting that “clear-cut definitions” of the indigenous concept are “unworkable”.<sup>95</sup> ACWG expressed a preference for outlining the major characteristics of indigenoussness in Africa.<sup>96</sup> While acknowledging that all Africans were indigenous to Africa in the strict sense of the word,<sup>97</sup> ACWG emphasized that it was not using the term “indigenous” in its aboriginal sense but was applying it in the modern analytical form of the concept to describe the situation of tribes that suffer discrimination.<sup>98</sup> ACWG proceeded to explain that the term indigenous has:

“come to have connotations and meanings that are much wider than the question of ‘who came first’. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.”<sup>99</sup>

ACWG’s description excludes Cobo’s “historical continuity element” that emphasizes being a descendant of pre-colonial inhabitants on the land in favour of the element of marginalization. ACWG’s approach has been criticized. Bojosi argues that the assertion that the indigenous concept has connotations wider than the question of who came first is inaccurate, as leading commentators still see the term as bound to prior habitation, conquest and colonization.<sup>100</sup> He argues that the ILO 169’s distinction between the terms “indigenous” and “tribal” is proof that the term “indigenous” is inexorably tied to “aboriginality”.<sup>101</sup> The ACWG report acknowledged that ILO 169 applied the term “tribal” for Africa,<sup>102</sup> but offered no explanation for its preference for the term “indigenous”. Perhaps ACWG had concerns that the application of the term “tribal” to African peoples may exclude them from indigenous instruments (such as UNDRIP) that are not specifically described as protecting both “indigenous” and “tribal” peoples.

ACWG’s description was not the first to de-emphasize Cobo’s “historical continuity element”. ACWG’s description drew support from UN Rapporteur Daes’s summary of indigenous descriptors proposed by experts. She listed the following criteria: “[p]riority in time in the occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness; self-identification

95 Id at 87.

96 Ibid.

97 Ibid.

98 Id at 88.

99 Id at 87.

100 Bojosi and Wachira “Protecting indigenous peoples”, above at note 3 at 397.

101 Ibid.

102 *Report of the African Commission’s Working Group*, above at note 82 at 78.

and recognition by other groups as distinct; and an experience of subjugation, marginalization and discrimination".<sup>103</sup>

Daes's criteria adopted the more flexible expression "priority in time" in place of Cobo's "historic continuity element". This implies that, while indigenous peoples are not necessarily descendants of the original inhabitants in their territory, they have legitimate claims to that territory.

Similarly, the Inter-American Court of Human Rights (IACtHR) applied this approach when considering the case of the Maroon people, who were descended from African slaves forcefully taken to Suriname in the colonial era in the 17th century (and were thus not descendants of the pre-colonial inhabitants of Suriname). The court held that they qualified for indigenous rights because they were a tribal people who had a special relationship with their ancestral lands, practised communal ownership of their land and identified themselves as a distinct people.<sup>104</sup>

The World Bank also excluded "historical continuity" in its description of indigenous peoples in its operational directive 4.20, which described indigenous peoples as possessing a varying degree of the following characteristics: "a close attachment to ancestral territories and to the natural resources in these areas; self-identification and identification by others as members of a distinct cultural group; an indigenous language, often different from the national language; presence of customary social and political institutions; and primarily subsistence-oriented production".<sup>105</sup>

ACWG explained the reason for this approach as follows: "[i]f the concept of *indigenous* is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance".<sup>106</sup> ACWG's approach was motivated by the need for a concept that addresses the domination of vulnerable peoples in independent African states. The African Commission prioritized the protection of vulnerable peoples in Africa because of notorious cases of ethnic based human rights abuses on the African continent in the 1990s, such as the Tutsi genocide in Rwanda.<sup>107</sup>

The African Commission's approach to describing indigenousness is justified by Cobo's acknowledgement that the study that produced his definition did not include Africa.<sup>108</sup> Cobo recommended that certain population groups in Africa should be considered as indigenous<sup>109</sup> and that "a corresponding

103 *Id* at 93. Daes "Standard setting activities", above at note 47, para 69.

104 *Moiwana Village v Suriname* IACtHR (series C no 124) judgment of 15 June 2005, paras 132–35; *Saramaka People v Suriname* IACtHR (series C no 172) judgment of 28 November 2007, paras 79–84.

105 World Bank operational directive 4.20, above at note 49, para 5.

106 *Report of the African Commission's Working Group*, above at note 82 at 93 (emphasis original).

107 *Id* at 74.

108 Martínez Cobo "Study of the problem of discrimination", above at note 52, para 20.

109 *Ibid*.

study might be undertaken to cover African countries, perhaps with a slightly modified working definition".<sup>110</sup> Furthermore, Cobo did not intend his definition to be the sole basis for identifying indigenes. He described his definition as "tentative," "preliminary" and "provisional".<sup>111</sup>

A good description of indigenes in Africa must have specific elements that distinguish indigenous peoples from non-indigenous peoples. ACWG listed the descriptive elements of African indigenous peoples as follows:

"Their culture and way of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent [sic] extinction."<sup>112</sup> The weakness of this element is that, as noted above, there is no dominant culture in African societies. Therefore, this element does not distinguish between indigenous and non-indigenous peoples in Africa.

"The survival of their particular way of life depends on access to their traditional land and natural resources."<sup>113</sup> This element expresses the fact that indigenous peoples in Africa perpetuate their traditional subsistence mode of production, such as pastoralism or farming, and depend on their land for their economic, cultural and spiritual survival. In post-colonial Africa, many Africans have embraced modern careers and do not practise traditional life-styles. A large percentage of the populations of most African peoples still practise an historically traditional life-style that is dependent on their land. However, African indigenous peoples' dependence on their lands is highlighted by their marginalization, which deprives them of their lands.

"They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society."<sup>114</sup> This relates to the fact that these peoples are often stereotyped as "primitive" or "un-progressive". African peoples such as the Maasai, San and Pygmies are often discriminated against on the basis of societal stereotypes that label them as backward and inferior.<sup>115</sup>

"They often live in inaccessible regions, often geographically isolated".<sup>116</sup> Although this is true of some African peoples identifying as indigenous (such as the Maasai), many non-indigenous identifying peoples also live in inaccessible areas.

"They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority".<sup>117</sup> This is a distinguishing element because, even though there are many marginalized peoples in Africa, ACWG's choice of the terms "domination" and "exploitation" implies that

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110 Ibid.

111 Id, para 366.

112 *Report of the African Commission's Working Group*, above at note 82 at 89.

113 Ibid.

114 Ibid.

115 Hodgson *Once Intrepid Warriors*, above at note 92.

116 *Report of the African Commission's Working Group*, above at note 82 at 89.

117 Ibid.

the marginalization of these peoples primarily manifests in their dispossession from their lands and resources. This element describes the fact that lands on which these peoples have depended for their survival for centuries were taken by their states for natural resource exploitation and tourism.

“They identify themselves as distinct from other groups in the state.”<sup>118</sup> This subjective element is also a distinguishing factor for indigenous peoples by virtue of the fact that they proclaim themselves to be distinct groups within their various states.

This analysis demonstrates that the obstacles to finding a description of indigenes that meets Africa’s needs has not been fully overcome. However, the description of indigenes provided by ACWG has taken Africa a step closer to inclusion in the global indigenous concept by proffering the following criteria for distinguishing indigenous groups in Africa: “[t]heir way of life depends on their land and natural resources for survival”;<sup>119</sup> “[t]hey experience domination and exploitation (manifested in their dispossession from their lands) within the political and economic structures of their states”;<sup>120</sup> and “[t]hey identify themselves as distinct from other groups in their state”.<sup>121</sup>

These distinguishing features imply that the indigenous concept is potentially applicable in states such as Kenya where the indigenous concept is resisted (on the grounds of the inapplicability of the historical continuity element)<sup>122</sup> but in which there are marginalized groups.

## THE AFRICAN COMMISSION'S APPLICATION OF INDIGENOUS RIGHTS

The opportunity for the African Commission to implement indigenous rights came in 2009, when it was called in the *Endorois* case<sup>123</sup> to resolve the claims of the Endorois people of Kenya to, inter alia, the collective rights of property and to dispose of their wealth freely. The facts of this case are that the Endorois, a pastoralist society living in Kenya’s Rift Valley, were expelled from their lands by the Kenyan government in 1973 to make way for a games reserve.<sup>124</sup> In 2002 the government granted concessions for ruby mining on the land.<sup>125</sup> For the community, their eviction meant the loss of access to grazing lands as well as significant cultural and religious sites.<sup>126</sup> After exhausting all possible remedies at the national level, the community turned to the African Commission.<sup>127</sup>

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118 Id at 93.

119 Id at 89.

120 Ibid.

121 Id at 93.

122 Kenya refused to consent to UNDRIP on the basis of the debates on aboriginality. See Barume “Responding to the concerns”, above at note 30.

123 Above at note 1.

124 Id at 1, para 3.

125 Id at 3, para 14.

126 Id at 4, para 16.

127 The Kenyan High Court ruled that the community had effectively lost any legal claim to

The Endorois argued before the African Commission that they were a distinct people who qualified for protection of their indigenous rights on the basis of their cultural and religious dependence on their land for survival, their marginalization in terms of their dispossession from their lands and their self-identification as a people.<sup>128</sup> This argument by the Endorois was a call for the recognition of their indigeness on the basis of the three distinguishing elements of indigeness in Africa identified by ACWG: their way of life depends on their land and natural resources for survival; they experience domination and exploitation (manifested in their dispossession from their lands) within their state; and they identify themselves as distinct from other groups in their state.<sup>129</sup>

The Kenyan government argued that the Endorois were not a distinct people fitting the indigenous description because they were one of four sub-groups of the Kelenjin people, sharing the same language, names and other features with the other sub-ethnic groups.<sup>130</sup> However, the African Commission decided that the Endorois were indigenous on the grounds that they met the criteria provided in the ACWG report because: they were dispossessed of their land by the Kenyan government; they were culturally, religiously and economically dependent on their land as evidenced by the fact that their culture, religious ceremonies and traditional way of life were intimately intertwined with their ancestral land;<sup>131</sup> and they identified themselves as distinct.<sup>132</sup>

By holding that the Endorois, as a sub-group of the Kelenjin people, were indigenous, the African Commission was setting a precedent that sub-groups of peoples can claim indigeness independently of the other constituent parts of the group.<sup>133</sup>

The African Commission emphasized that “vital aspects of their religion and culture such as ancestor worship, traditional ceremonies were connected to their land”.<sup>134</sup> The commission noted further that self-identification was another important criterion for determining indigenous peoples,<sup>135</sup> but did

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the land as a result of the designation of the land as a game reserve in 1973 and that the court had no jurisdiction to adjudicate on the collective rights of a community: id at 3, paras 11 and 12.

128 Id at 13, paras 73–75.

129 See section above on “Distinguishing characteristics of indigeness in Africa”.

130 *Endorois*, above at note 1 at 32, paras 140–42.

131 Id at 37, para 156.

132 Id, para 157.

133 A precedent in this regard was also set by the IACtHR. In *Mayagna (Sumo) Awas Tingni Community v Nicaragua* the court held that the Awas Tigni were indigenous people, notwithstanding arguments by the government of Nicaragua that the Awas Tigni community was a group with 600 members that had splintered off from a “mother” indigenous community: IACtHR (series C) case no 79 (judgment of 31 August 2001), para 141.

134 *Endorois*, above at note 1 at 44, para 173.

135 Id at 37, para 157.

not specify how the Endorois fulfilled this requirement. Presumably, their affirmation of themselves as distinct sufficed in this case. The African Commission insisted that the application of indigenous rights to people who were not distinguished by aboriginality was not peculiar to Africa. It cited the IACtHR cases of *Moiwana Village v Suriname*<sup>136</sup> and *Saramaka People v Suriname*.<sup>137</sup> In these cases, the IACtHR applied its jurisprudence regarding indigenous rights to the Maroon people, “based on their special relationships to their ancestral lands, their communal ownership of land and their self-identification as distinct peoples”, thus moving “beyond the narrow / aboriginal / pre-Colombian understanding of indigenous peoples generally adopted in the Americas”.<sup>138</sup>

The implementation of the African Commission’s decision in the *Endorois* case raises various challenges. How can the indigenous and minority concepts be distinguished in Africa? Would the application of the indigenousness concept not result in the balkanization of African states? How can the indigenous claims be reconciled with the fact that many African peoples have embraced modernization? Would the African Commission’s decision on indigenous rights be implemented by African states?

### Indigenous rights versus minority rights in Africa

Two distinguishing elements of the indigenous and the minority concepts<sup>139</sup> can be discerned from the description of indigenous people by ILO 107, ILO 169 and Cobo. The first is the indigenous concept’s emphasis on the centrality of land to the indigenous identity. The attachment to a specific territory is the first defining factor of indigenousness.<sup>140</sup> Indigenous people perceive their relationship with their land as central to their identity, culture and survival.<sup>141</sup> Even though “minority groups may increasingly make claims to autonomy based on the existence of discrete concentrations of their populations in particular regions of States”,<sup>142</sup> minorities do not have “the long ancestral, traditional and spiritual attachment and connections to their lands and

136 IACtHR series C no 124 (2005); *Endorois*, id at 38, para 158.

137 IACtHR series C no 172 (2007); *Endorois*, id at 38–39 and 52, paras 158, 159–60 and 198.

138 *Endorois*, id at 38–39, paras 158–59.

139 Capotorti defined minorities as: “A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members (being nationals of the state) possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly, a sense of solidarity, directed towards preserving, their culture, traditions, religion or language.” See F Capotorti “Study on the rights of persons belonging to ethnic, religious and linguistic minorities”, UN doc E/CN.4/Sub.2/384/Rev.1, para 568.

140 Gilbert *Indigenous Peoples’ Land Rights*, above at note 2 at xv.

141 DM Johnston “Native rights as collective rights: A question of group self-preservation” (1989) 2 *Canadian Journal of Law and Jurisprudence* 19 at 32.

142 Daes and Eide “Prevention of discrimination”, above at note 54, para 45.

territories that are usually associated with self-identification as indigenous peoples".<sup>143</sup> The second is the historical continuity element.

In Africa, most peoples have long ancestral attachment to their lands and the African Commission rejects the historic continuity element. The African Commission noted in the *Endorois* case that being the first inhabitants or occupiers of a territory did not automatically convey a right to indigenity.<sup>144</sup> This implies that it is difficult to distinguish the indigenous and minority concepts in Africa. UN Rapporteur Daes expresses this dilemma in her observation that aboriginality appears to be the obvious characteristic distinguishing indigenous peoples from minorities; however this characteristic excludes indigenous peoples from Africa.<sup>145</sup> She explained further that attempts to replace the aboriginal characteristic with cultural distinctiveness and subordination in Africa have failed to distinguish the indigenous concept from the minority concept.<sup>146</sup> UN Rapporteur Martínez therefore argues that claims for indigenity in African states should be analysed in UN fora concerned with minority rights.<sup>147</sup>

Several factors make the minority concept unattractive to marginalized peoples in Africa. The first is the existence for many decades of dominant minority groups in African states including Angola, Mozambique, Namibia, Zimbabwe and South Africa.<sup>148</sup> Secondly, the task of identifying minorities in African states with many diverse peoples of diverse populations is very complex. For instance, in Kenya, the minority peoples are listed as Aweer, Abasuba, Kuria, Wlilwana, Nubi, Samburu, Taita, Luo, Kamba, Kalenjin, Kisii, Meru, Asians, Europeans, Arabs, Somalis, Ogiek, Maasai and Dahalo.<sup>149</sup> These peoples are defined as minorities in contrast to the Kikuyu and the Luhya, who constitute 20 per cent and 14 per cent of Kenya's entire population respectively.<sup>150</sup> The Kalenjin are included in the list of minorities despite the fact that they constitute 13 per cent of Kenya's population.<sup>151</sup> Similarly, the Luo and the Kamba are included as minorities even though they each constitute 10 per cent of Kenya's population.<sup>152</sup> The politically and economically dominant

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143 *Minority Rights: International Standards and Guidance for Implementation* (2010, UN Publications) at 4.

144 *Endorois*, above at note 1 at 36, para 154.

145 Daes and Eide "Prevention of discrimination", above at note 54, para 37.

146 *Ibid.*

147 MA Martínez "Human rights of indigenous peoples", UN doc E/CN.4/Sub.2/1999/20, para 90.

148 S Slimane *Recognizing Minorities in Africa* (2003, Minority Rights Group International) at 1.

149 "World directory of minorities and indigenous peoples: Kenya overview" (2012, Minority Rights Group International), available at: <<http://www.refworld.org/docid/4954ce2a30.html>> (last accessed 5 July 2017).

150 *The World Fact Book: Kenya* (2014, Central Intelligence Agency), available at: <<https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ke.html>> (last accessed 24 July 2017).

151 *Ibid.*

152 *Ibid.*

position of the Kikuyu and the Luhya would probably have influenced this categorization.

Although African peoples who have embraced the indigenous identity do not insist on their differences from minorities,<sup>153</sup> the importance of distinguishing the two concepts lies primarily in determining the rights each category can claim. The African Commission's jurisprudence on indigenous rights is in its nascent stages and African indigenous rights are an emerging framework. This article proposes that indigenous rights be distinguished as follows. First, indigenous peoples are peoples who meet the three distinguishing elements set by the African Commission, that their way of life depends on their land and natural resources for survival, etc.<sup>154</sup> Secondly, the marginalization of these peoples over time must have defied the solution proffered by the judicial systems of their states and they must have claimed the protection of indigenous rights in the African Commission. In other words, these peoples must (like the Endorois) have exhausted the local remedies in their states and tested their qualification for indigenous rights with the African Commission.

### **African indigenous claims and the balkanization of African states**

Rapporteur Martínez expressed concern that indigenous "claims by groups living within African states with artificially drawn state boundaries provide an additional ground for balkanisation of these states".<sup>155</sup> In other words, the indigenous concept may inspire claims to "statehood" by dissatisfied peoples in Africa. This argument arises because ACWG's report included pastoralists and farmers in the indigenous categorization. Their inclusion in the indigenous categorization is perceived as problematic because pastoralists and farmers constitute the bulk of Africa's population.<sup>156</sup> Recognition of these categories is perceived as capable of "opening a Pandora's Box of indigenous claims in African states struggling to unify the diverse peoples within their boundaries".<sup>157</sup> This concern is unfounded because the African Commission's description of indigenes is akin to the constructivist approach to describing indigenes proposed by Kingsbury. He proposed that the global indigenous concept is not fixed on sharply defined universal criteria. Instead it should embody a continuous process (which this article recommends should be administered by regional judicial bodies such as the African Commission) in which specific claims to indigenes are abstracted (interpreted and made the basis of regional jurisprudence) and then made specific (in terms of the decision in a particular dispute) for implementation in the state from

153 Indigenous groups in Africa often describe themselves as "indigenous minorities" and their organizations are often defined as indigenous minority organizations: Slimane *Recognizing Minorities*, above at note 148 at 3.

154 See section above on "Distinguishing characteristics of indigenes in Africa".

155 Martínez "Human rights", above at note 147, para 89.

156 Ndahinda "Marginality, disempowerment", above at note 73 at 486.

157 *Ibid.*



which the dispute originated.<sup>158</sup> Where a people in an African state claims indigenesness, the state has an obligation to test the group's claim by the three distinguishing elements set by the African Commission as to who is indigenous, that their way of life depends on their land etc.<sup>159</sup> If the state refuses to do so, or does so and holds that the group is not indigenous and the group wishes to test this, it is obliged to address the matter to the state's domestic courts. If the group is unsatisfied with the domestic court's decision, the matter can be brought to the African Commission. The African Commission ultimately decides whether or not the people are indigenous to avoid indiscriminate claims to indigenesness.

### **Indigenous rights claims and the issue of modernization.**

The inclusion of the Ogoni in the indigenous category has been criticized on the basis that the Ogoni are not culturally distinct, as members of the Ogoni participate in the Nigerian government and have embraced modern careers.<sup>160</sup> The inclusion of the Maasai in the indigenous category has been similarly criticized in that, in contrast to the hunter gatherers, pastoralist Maasai have been less excluded from national politics.<sup>161</sup> An argument in this regard was raised in the *Endorois* case. The government of Kenya argued that "the inclusion of the Endorois in 'modern society' has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct group that is very different from the Tugen sub-tribe or indeed the larger Kalenjin tribe".<sup>162</sup> The African Commission drew its response on this issue from the decisions in the *Saramaka* case.<sup>163</sup> The fact that some members of the Maroon people had opted out of the traditional way of life did not affect the distinctiveness of the group.<sup>164</sup> The IACtHR noted that: "[t]he fact that some individual members of the Saramaka people may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property".<sup>165</sup>

This statement was the basis for the African Commission's conclusion that "the Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community".<sup>166</sup> This decision accords with the fact that the indigenous concept does not preclude indigenous

158 Kingsbury "Indigenous peoples", above at note 77 at 415.

159 See section above on "Distinguishing characteristics of indigenesness in Africa".

160 Watts "Contested communities", above at note 74 at 29–30.

161 Ndahinda "Marginality, disempowerment", above at note 73 at 486.

162 *Endorois*, above at note 1 at 39, para 161.

163 Above at note 137, IACtHR judgment of 28 November 2007.

164 *Endorois*, above at note 1 at 40, para 162. See also *Saramaka*, id, para 164.

165 *Saramaka*, ibid.

166 *Endorois*, above at note 1 at 40, para 162.

peoples from participating in the national politics of their states. UNDRIP recognized the rights of indigenous peoples “to participate fully, if they so choose, in the political, economic, social and cultural life of their States”.<sup>167</sup>

### The issue of the implementation of the African Commission’s decision

There remains the issue of the implementation of the decision in the *Endorois* case. In the past some African Commission decisions have not been implemented by states.<sup>168</sup> Before 2010, the African Commission was a quasi-judicial body that only made recommendations, which were not binding decisions for states. In 2010, the African Commission enacted new rules of procedures.<sup>169</sup> These rules empower the African Commission to give a state that has not responded 180 days after its judgment, 90 days’ notice to report in writing the steps it intends to take regarding the decision.<sup>170</sup> The rules of procedure provide that, where the 90 days’ notice is given and it is discovered that the state is unwilling or has refused to comply, the African Commission may submit the communication to the African Court of Human Rights (African Court).<sup>171</sup> The rules also provide that non-complying states be referred to the Sub-Committee of Permanent Representatives and the Executive Council of the African Union.<sup>172</sup> This rule implies that implementing a decision of the African Commission is no longer at the discretion of states. The government of Kenya pledged shortly after the *Endorois* decision to implement the decision.<sup>173</sup> This pledge was often repeated by the government but no significant actions were taken to implement the decision.<sup>174</sup> Citing its obligation to follow up on its decision under rule 112 of its rules of procedure, in April 2013 the African Commission invited the government of Kenya to its headquarters in The Gambia and requested that the government of Kenya present a road map for implementing the *Endorois* decision case.<sup>175</sup> A Kenyan representative attended this meeting and promised to submit the road map

167 UNDRIP, art 5.

168 An example is the African Commission’s decision in *Social Economic Right Action Centre v Nigeria*, comm 155/96.

169 Rules of Procedure of the African Commission on Human and Peoples’ Rights 2010.

170 Id, rule 112(2), (3) and (4).

171 Id, rule 118(1).

172 Id, rule 112(8).

173 The pledge was made by Kenyan Minister of Land James Orengo. See E Ashamu “*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A landmark decision from the African Commission*” (2011) 55 *Journal of African Law* 300 at 311.

174 R Marlin “The Endorois decision: Four years on, the Endorois still await action by the government of Kenya” (September 2014) *Terra Nullius Journal*, available at: <<https://terra0nullius.wordpress.com/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/>> (last accessed 26 June 2017).

175 International Working Group on Indigenous Peoples *The Indigenous World: 2014* (2014, The International Work Group on Indigenous Affairs) at 579.

within 90 days.<sup>176</sup> This promise was never fulfilled.<sup>177</sup> In November 2013, the African Commission issued a resolution calling on the government of Kenya to take concrete steps to implement the decision, with the consequence of a referral of the communication to the African Court in the event of non-compliance.<sup>178</sup> Kenya still did not comply for ten months and the African Commission did not carry out its procedure of referring the matter to the African Court or African Union. In August 2014, an international NGO, Minority Rights Group, wrote a letter to the African Commission requesting that the African Commission refer Kenya's non-compliance to the African Union as provided in its Rules of Procedure.<sup>179</sup> The African Commission did not respond to this request. In September 2014, the Kenyan government yielded to pressure by setting up a legislative task force for the implementation of the *Endorois* decision.<sup>180</sup> This tentative step towards compliance is yet to yield any practical benefit for the Endorois people.<sup>181</sup> The African Commission has not applied its procedure of referring Kenya to the African Union or the African Court. Perhaps the African Commission is being cautious in this pioneering attempt to introduce indigenous rights in Africa. Nevertheless, the existence of the rules of procedure implies that indigenous rights in Africa are potentially enforceable.

## CONCLUSION

Marginalized peoples in Africa have insisted on their inclusion in the indigenous concept on the basis of the similarity of their experience of domination to that of indigenous peoples in the Americas and Australasia. The global descriptions of the indigenous concept emphasize the quality of historical continuity with the pre-colonial inhabitants of the land as the distinguishing characteristic of indigenes. This element is unworkable in Africa because most African peoples can demonstrate historical continuity. The African Commission insisted that the indigenous concept is needed in Africa to address the situation of marginalized peoples. The African Commission advocated a description of indigenes for Africa that excluded historical continuity. The African Commission's approach deviated from the approaches of

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176 S Maiga "Intersession report of the Working Group on Indigenous Population / Communities in Africa" (October 2012), paras 14 and 15, available at: <<http://www.achpr.org/sessions/52nd/intersession-activity-reports/indigenous-populations/>> (last accessed 7 July 2017).

177 International Working Group on Indigenous Peoples *The Indigenous World*, above at note 175, para 2.

178 See African Commission res 257, paras 6 and 12.

179 ECR-Net "Implementing the ACHPR's ruling on the Endorois case" (October 2014), available at: <<https://www.escri-net.org/node/365651>> (last accessed 26 June 2017).

180 *Gazette* no 6708 (September 2014) of Kenya at 1.

181 Marlin "The Endorois decision", above at note 174.

the indigenous rights specific instruments. ILO 169 adopts both “tribal” and “indigenous” to identify the beneficiaries of indigenous rights. “Indigenous” is applied to states in the Americas and Australasia where the historical continuity of indigenous peoples is not disputed. For African states, where historical continuity is not an exclusive quality of any people, “tribal” is adopted.<sup>182</sup> The African Commission applied the term “indigenous” instead of “tribal” to Africa. This is inconsequential as both terms convey entitlement to the same rights and are treated as synonyms. The African Commission advocated dependence on land for survival, marginalization in terms of dispossession from land and self-identification as the distinct criteria for African indigenesness. This article concludes that, although the challenges of fitting Africa into the global indigenous framework have not been completely overcome, the African Commission’s description has taken Africa a step closer to this goal.

The African Commission applied its description of indigenesness in the *Endorois* case. The implementation of the decision in this case raised challenges, such as the difficulty of distinguishing the indigenous and minority concepts, the fear that the concept may result in the balkanization of African states and the reluctance of African states to implement indigenous rights. The first two challenges can be overcome by treating indigenous claims on a case by case basis that requires people claiming indigenesness to test their claims in the African Commission after exhausting the remedies in their domestic legal system. States’ reluctance to implement indigenous rights can be addressed by the full application of the African Commission’s rules of procedure.

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182 ILO 107 similarly applied the terms “tribal indigenous” and “tribal non-indigenous”.