

**ACHIEVING SUSTAINABLE DEVELOPMENT AND INDIGENOUS RIGHTS IN AFRICA:
TENSIONS AND PROSPECTS**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF
PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTERS OF LAW (LLM HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

BY

VIRGINIA NJERI KAMAU

PREPARED UNDER THE SUPERVISION OF

ÁNGELO MATUSSE

AT THE FACULTY OF LAW, UNIVERSIDADE EDUARDO MONDLANE, MOÇAMBIQUE

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DECLARATION

I **VIRGINIA NJERI KAMAU** declare that the dissertation **Achieving Sustainable Development and Indigenous Rights in Africa: Tensions and Prospects** is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

Student: VIRGINIA NJERI KAMAU

Signature: _____

Date: _____

Supervisor: **ÁNGELO MATUSSE**

Signature: _____

Date: _____

DEDICATION

This dissertation is dedicated to my parents Mr. and Mrs. Peter Patrick Kamau Ngumba for the noble support you accorded to me in pursuit of my happiness; education and to my daughter Tamara Zawadi Mathias for making me realise the meaning of life; you are truly a God-given gift.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CKGR	Central Kalahari Game Reserve
CSO	Civil Society Organizations
DRD	Declaration on the Right to Development
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
IMF	International Monetary Fund
IPOs	Indigenous Peoples Organizations
MDGs	Millennium Development Goals
OD 4.20	Operational Directives 4.20 on Indigenous Peoples
OMS	Operational Manual Statement 2.34: Tribal People in Bank-Financed Projects
SOLCARSA	Sol del Caribe, S.A.
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
WB	The World Bank
WGIP	Working Group on Indigenous Populations

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CHAPTER 1: INTRODUCTION

1.1 Background to the research

Poverty stands out as the singular malaise that afflicts the African continent and indigenous peoples¹ have been identified as among the poorest.² The territories they occupy are in most cases marginalised and lack infrastructural development.³ The reasons for this disproportionate representation of indigenous peoples among the most poor are mainly structural. However, it is arguable that central to the impoverishment and vulnerability of indigenous groups is the reality that, through the continent, and indeed globally, they continue to suffer serious abuses of their human rights.⁴ In particular, they experience heavy pressure on the lands under their occupation from sustainable development demands. These include forest and wildlife conservation as well as extractive development demands such as logging, mining, infrastructural constructions, dams, and agribusiness.⁵ While many states have laws which recognize and protect human rights, to varying degrees, these laws are often violated. In some states national laws are inconsistent with obligations under international law. Some fundamental rights are also regarded as subordinate to the dictates of national interest.

Governments as custodians of national interest are better positioned to determine the direction that the management of public affairs should take.⁶ According to the European Court of Human Rights, the legislative arm of the state 'must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting such measures of control and as to the choice of detailed rules for the implementation of such measures'.⁷ Informed by this rationale, resulting legislation often require that the state is facilitated and not impeded either by individuals or

¹ While no universally accepted definition of indigenous peoples' exists, this research will employ a working understanding to the term on the basis of emerging regional and international standards, with particular reference to the African reality.

² 'Indigenous Peoples Among Earth's Poorest, World Bank Head Says' available on US State Department website; http://usinfo.state.gov/xarchives/display.html?p=washfileenglish&y=2004&m=September&x=2004_0924162601_AKIlLennoCcM0.355587, 24 September 2004 (accessed on 19 September 2007)

³ UNDP and Indigenous Peoples Policy: A Policy of Engagement (2001) par 18. Available on http://www.hreoc.gov.au/social_justice/conference/engaging_communities/unpan021101.pdf accessed on 18 October 2007.

⁴ Mackay, F (2001) *A Guide to Indigenous Peoples' Rights in the International Labour Organisation* p 3.

⁵ African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) p 20. See African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs (IWGIA), *Indigenous Peoples in Africa: The Forgotten Peoples?* The African Commission's Work on Indigenous Peoples in Africa (2006) p 17.

⁶ *The Secretary General of OTTU v the Presidential Parastatals Sector Reform Commission*, Civil Case No. 145 of 1995, High Court at Dar es Salaam, unreported. Cited with approval in Shivji I, *Lawyers in Neo-liberalism: Authorities professional supplicants or society's amateurish conscience?* (2006).

⁷ *Mellecker and others v Ireland* European Court of Human Rights (1989) Series A, No 169.

groups in its commitment to the advancement of national economic development goals, ostensibly for the benefit of all citizenry.

Unfortunately, mainstream economic development aspirations of the state often offend the dictates of sustainable development.⁸ They also often run counter to the quest of indigenous groups who are most times defined out of property, processes and policies by virtue of the normative and political governance frameworks that operate within a state. In the emerging scenario, property under their occupation or claim is expropriated without their full, prior and informed consent or consultation and often without compensation.⁹ Moreover, in most cases, the ensuing development programmes do not benefit but impoverish them.¹⁰ The lack of mechanisms for ensuring the protection and promotion of a peoples' based development, is arguably, at the heart of some of the most disturbing conflicts that continue to rage the continent over.¹¹

1.2 Problem statement

There is no single accepted international definition of indigenous peoples.¹² Instead, most instruments, literature and policies give characteristics or a list of criteria attributed to indigenous peoples.¹³ The lack of an internationally accepted definition renders it difficult to advance, protect and promote majority, if not all, of the indigenous

⁸ The Brundtland Report, World Commission on Environment and Development (WCED), *Our Common Future* New York: Oxford University Press, UN Doc. A/42/47 (1987) defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

⁹ Salomon, M and Sengupta, A (2003) 'The Right to Development: Obligations of the States and the Rights of Minorities and Indigenous People' *Issues Paper* by Minority Rights Group p 18.

¹⁰ N 9 above p 18.

¹¹ Niger delta conflicts, pastoralists' conflicts in the Sahelian region etc are trite examples.

¹² The United Nations has not officially give a definition however the ILO Convention 169 attempts to give a definition by stating that the 'Convention apply 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 regulation (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.' For more discussion on this see Magnarell, P.J 'Protecting Indigenous Peoples' 5 *Human Rights and Humanitarian Welfare* (2005) p 126.

¹³ Report of the African Commission Working Group n 5 above p 89. See P Thornberry, *Indigenous Peoples and Human Rights* (2002) Manchester University Press, Manchester p 55. See also The World Bank Operational Manual Statement on 'Tribal People' (OMS 2.34) and The World Bank Operational Policy 4:10 Indigenous Peoples, The World Bank Operational Policy 4.20 attempt to give a definition of indigenous peoples however it is noteworthy that this policy has hence been replaced by the OP 4.10 which instead gives a list of who indigenous people are and does away with the definition.

people's human rights¹⁴ as well as lead to misinterpretation of who can be considered indigenous.¹⁵ A single definition will ensure that the rights of indigenous peoples are adequately protected as well as avoid ersatz claimants but this should be approached cautiously to avoid exclusion of genuine groups.¹⁶

Although there are many international human rights treaties which cover human rights generally and therefore apply to indigenous peoples, it is worth noting that recognition and separate human rights provisions are imperative to address indigenous peoples emerging problems that they experience today. According to Kymlicka at present [indigenous] rights cannot be 'subsumed' under human rights and therefore the need to recognise indigenous rights separately.¹⁷

In addition indigenous peoples face evictions or they are forced to move from their ancestral land to pave way for development with no alternative settlement or adequate compensation. This is because in most countries collective (customary) land rights are considered 'common property' for the individuals and groups that occupy the lands however as a result states have considered these resources as 'common pool resources' and are thus taken from them and allocated to others.¹⁸

1.3 Research question and objectives

The key research question to be explored in this study is: can a state attain its national economic development objectives and at the same time advance the rights of indigenous groups?

This research aims at examining the tensions and prospects of the coexistence of both the rights of indigenous peoples in Africa and sustainable development with reference to selected case studies and approaches adopted by World Bank (WB) and United Nations Development Programme (UNDP). The broad objectives of the study are:

¹⁴ Porter, R 'Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples', 5 *Yale Human Rights and Development Law Journal* 123, 156 (2002) p 154.

¹⁵ The Working Group on Indigenous Populations is said to have been 'stirred' by the Boers and Rehoboth Basters when they claimed to be indigenous in 1990s. It is in this regard that M. Daes the chairperson of the Working Group indicated the pressing need for a definition. See *Note on Criteria which might be Applied when Considering the Concept of Indigenous People*, E/CN.4/Sub.2/AC.4/1995/3.

¹⁶ See remarks by Cree representative in Sjorselv, I 'Indigenous Peoples and the United Nations', *The Indigenous World* 1995-96 (1996) p 273.

¹⁷ Kymlicka, W (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p 4.

¹⁸ Colchester, M (ed) (2001) *A survey of Indigenous Land Tenure: A report for the Land Tenure Service of the Food and Agriculture Organisation* p 15, also The Report of the African Commission's Working Group n 5 above p 21.

- To examine the link between indigenous peoples' rights and sustainable development,
- To explore the manner in which the international legal framework and African human rights system responds to the problem of indigenous in development,
- To analyse key case studies of indigenous rights and development in Kenya, Botswana, and South Africa and explore emerging approaches by the WB and UNDP,
- To make proposals on mechanisms for mediating indigenous peoples' rights and national development aspirations.

1.4 Significance and limitations of the research

There exists a nexus between poverty, indigenous peoples' rights, and development. As earlier stated, whereas in most cases indigenous peoples are poor and the territories they occupy are marginalised and underdeveloped on the other hand these areas and territories when they are rich in resources they become susceptible to economic activities like mining, logging and oil extraction which may negatively or positively impact on the rights of indigenous peoples. In addition, land occupied or used by indigenous peoples particularly in Africa is collectively (customarily) owned and most legal structures do not recognise such ownership.¹⁹ As a result they are susceptible to dispossession of their land aggravating their poverty level and leading to infringement of their human rights. This study seeks to contribute to the literature of the rights of indigenous peoples and sustainable development with particular attention to Africa.²⁰

The study is limited in two ways: first there is no internationally accepted definition of indigenous peoples. However the author will formulate a working definition for the purpose of this research. Second this paper is also limited in terms of volumes and therefore only focuses on the main issues of indigenous peoples' rights and sustainable developments.

¹⁹ Unlike most African countries, South Africa one of the case studies recognises customary land ownership. See sec 1 of the Restitution of the Land Rights Act, Act 22 of 1994. Another country is Rwanda in art 7 (1) of the 2004 Rwanda Land Law No.08/2005/14/07 2005 reads 'This organic law protects equally the rights over land acquired from custom and the rights acquired from written law.'

²⁰ Only selected states in Africa will be dealt with. They include Kenya, South Africa and Botswana. The three countries were selected with due regard to availability of decided case law and data concerning indigenous peoples.

1.5 Methodology

The key methodological approach will be literature survey, interviews, internet and other electronic sources. The research will also make use of case studies to abstract key legal issues for the purpose of analyses and to also isolate best practices. In general, the author will adopt a critical approach to all the issues raised by both literature and other sources.

1.6 Literature review

Literature on state obligation to deliver the right to development has witnessed an increase in recent years. Except for Salomon and Sengupta,²¹ most authors, notably Alston²² and Tomasevski²³ are of the view that the right to development is still extremely unsettled in international law.

Moreover, few of these works have addressed themselves to the question of sustainable development and applied this concept to indigenous peoples in Africa. Authors such as Laurie Sargent²⁴ and David Baluarte²⁵ have sought to link indigenous rights to national development but mainly in Latin America, the context of which is significantly different from the African reality for two reasons. First, in Latin America, the concept of indigenous peoples is widely accepted and its beneficiaries quite recognisable unlike in Africa. Secondly, unlike in Africa, a number of Latin American states are parties to ILO Convention 169, and the provisions of this instrument touching on indigenous peoples have been enforced by among others, the Inter-American Commission on Human Rights (IACHR).²⁶

The seminal report of the African Commission's Working Group of Experts on Indigenous Communities/Issues while acknowledging denial of the right to development as one of the challenges of indigenous groups, elaborated the right to development under article 22 of the African Charter on Human and Peoples Rights

²¹ N 9 above.

²² Alston, P (1996) *The United Nations and Human Rights: A Critical Appraisal*.

²³ Tomasevski, K (1993) *Development Aid and Human Rights Revisited*.

²⁴ Sargent, L 'The Indigenous People of Bolivia's Amazon and ILO Convention 169: Real Rights or Rhetoric?' (1998) 29 *University of Miami International Law Review* p 453.

²⁵ Baluarte, D 'Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169' (2004) 4 *Sustainable Development Law and Policy Journal* p 9.

²⁶ In *Mary and Carrie Dann v United State* Case 11.140, Report N° 99/99, Annual Report of the IACHR 1999, p 286 in which the IACHR relied heavily on arts 13, 14 and 15 of the ILO Convention 169, despite the fact that United States was not a party to the Convention. It was decided that indigenous peoples in Western Shoshone had a right to exercise legal ownership over territories they traditionally occupied.

(ACHPR) as an individual right, hence limiting its conception.²⁷ The report does not dwell on the issue of sustainable development and indigenous peoples.

This study therefore seeks to complement the work already carried out and more importantly, mitigate the knowledge gap relating to the linkage between sustainable development, national economic development and indigenous rights in the African context.

1.7 Overview of the chapters

Chapter one lays the background to the research and the problem, enumerates the aims and objectives of study and outlines the methodology.

Chapter two examines the historical background of indigenous rights and sustainable development, the international and regional obligations of states and the possibility of balancing the two.

Chapter three analyses selected case studies on sustainable development and extractive development and looks at the emerging approaches applied by the World Bank and UNDP.

Chapter four will draw a conclusion and recommendations.

²⁷ N 5 above p 52.

CHAPTER 2: SUSTAINABLE DEVELOPMENT AND INDIGENOUS RIGHTS

2.1 Conceptual framework: Indigenous peoples and sustainable development

2.1.1 Indigenous peoples

The phrase 'indigenous' originates from the Latin word '*indigena*' comprised of two words, namely *indi*, meaning 'within' and *gen* or *genere* meaning 'root.'²⁸ In Africa the colonialists used the term indigenous to refer to persons found in the regions the colonialists were occupying whether these people had migrated or had been born in these territories.²⁹ The term indigenous has been associated with among others 'prior inhabitation', original or first inhabitants', 'association with particular place' and 'distinctive societies'.³⁰ It is notable that ILO was the first to use 'indigenous' in its legal norms in 1930s³¹ and has subsequently used this term in the ILO Convention 107 and Convention 169.

In the quest to define indigenous peoples, self-inclusion as a characteristic has been emphasized. In the Martínez Cobo report it was stated that:

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external reference.³²

The African Union has not escaped the contest on the identification of indigenous persons.³³ In its *Decision on the United Nations Declaration on the Rights of Indigenous Peoples*, the AU Assembly recognized that the term 'indigenous peoples' is inappropriate to Africa and stated that, 'the vast majority of the peoples of Africa are indigenous to the African Continent'.³⁴ This position was also reiterated by the African Commission's Working Group of Experts on Indigenous Populations/Communities in

²⁸ See Collins Schools Dictionary, 1993, Harper Collins Publishers, p 370 and Longman Dictionary of Contemporary English, 3rd Edition, 1995, Longman Dictionaries, p 724.

²⁹ Lindley, M.F (1926) *The Acquisition of Governments of Backwards Territory in International Law: Being a Treatise on the Law and Practices Relating to Colonial Expansion*, pp 32 and 34.

³⁰ Report of the African Working Group, n 5 above pp 37-39.

³¹ See the Recruiting of Indigenous Workers Convention 1936, The Penal Sanctions (Indigenous Workers) Convention 1939 and The Labour Inspectorates (Indigenous Workers) Recommendation 1939.

³² Cobo, M *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986 (1986). See also World Bank Operational Directive 4.20 which *inter alia* adopts the approach of self-identification for purposes of identifying the indigenous people.

³³ See African Union, Assembly, *Decision on the United Nations Declaration on the Rights of Indigenous Peoples (Assembly/AU/9 (VIII) Add.6 (December 2006)*, 8, AU Doc. Assembly/AU/Dec.141, (VIII) (January 2007).

³⁴ N 33 above.

which the application of the indigenous peoples in Africa was referred to as a 'misconception'.³⁵ Asia has also held the same position that indigenous is inappropriate for them.³⁶

From the above it follows that the definition of indigenous peoples remains controversial as there is no accepted definition. Further, it has been argued that a single definition of the indigenous peoples would not adequately cover their experience and survival diversity and it would lead to the exclusion of some groups.³⁷ However it is imperative to have one single definition for purposes of protecting and promoting indigenous peoples rights.

For purposes of this study indigenous peoples can be defined as a group of persons who identify themselves as indigenous, are native to the region in which they currently occupy by reason of birth or origin, they have a certain attachment to the ancestral territories or natural resources which they substantively depend as a means of livelihood and these lands and territories are inextricably linked to their culture and identities,³⁸ which are fully distinct from the greater society and this makes them vulnerable to being marginalised in development.

In this regard for people to identify themselves as indigenous the criteria to be used would include judgments from courts, land claims, resistance from land evictions, lobbying/campaign activities and statements issued at regional and international meetings. This definition is limited to indigenous peoples discussed in the case studies in chapter three and may receive criticism since it has been argued that in Africa there is no accurate data on the movement of people and therefore one cannot precisely identify the first group of people to settle.³⁹ The author maintains that this position is however not accurate since there exists documented history of peoples in Africa covering the last 3 million years.⁴⁰ Furthermore, indigenous peoples rarely use this criteria as a basis of their identity⁴¹ what is important is the history of being distinct as a society.⁴²

³⁵ Report of the African Working Group, n 5 above p 88. See the African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of the Indigenous Peoples* (2007) par 13.

³⁶ Thornberry, n 13 above p 38.

³⁷ Simpson, T 'Indigenous Heritage and Self-Determination' (1997) *IWGIA* No.86, p 22.

³⁸ These include cultural, political, legal and social identities or institutions.

³⁹ Tomei, M and Swepston, L (1996) *Indigenous and Tribal Peoples: A Guide to ILO Convention 169*, p 5.

⁴⁰ See General History of Africa by UNESCO International Scientific Committee for the Drafting of General History of Africa (1979) Vols I-VIII

⁴¹ Thornberry, n 13 above, p 39.

⁴² N 39 above p 5.

The term 'indigenous' is not synonymous with minorities who are also not defined internationally.⁴³ It is essential to distinguish the two since this research does not deal with minorities. Attempt to define minorities was proposed in 1985 by Jules Deschênes who defined them as:

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.⁴⁴

Although minorities have been identified as persons who are 'numerically inferior'⁴⁵ in states, contemporary constructions have sought to deviate from this simplistic understanding.⁴⁶ In this regard, characteristics such as economic and political marginalisation are attached to minorities.⁴⁷ Indigenous peoples on the other hand have distinct social, cultural and political traditions and organisations. However it is notable that in most cases indigenous peoples are frequently also minorities.⁴⁸ In Africa because of the colonial boundaries and 'arbitrary statehood',⁴⁹ some groups may be considered minorities in one country and majorities in another country this is not the case with indigenous peoples.

2.1.2 Sustainable development

Before embarking on sustainable development it is paramount to substantiate development. The preamble to the Declaration on the Right to Development (DRD) defines development as:

A comprehensive economic, social and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.

This definition is comprehensive with regard to indigenous peoples since it takes an inclusive and participatory approach and calls for them to benefit from the

⁴³ Thornberry, n 13 above, p 34.

⁴⁴ Proposal Concerning a Definition of the Term 'Minority', UN Doc. E/CN.4/Sub.2/1985/31. See Capotorti, F (1991) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, par 568.

⁴⁵ Capotorti, n 44 above.

⁴⁶ See the Minority Rights Group International website www.mrg.org.

⁴⁷ Although in most cases the minorities are politically marginalised this does not mean that when the minorities rise to power for example the Tutsi in Rwanda or the minorities in Ethiopia they cease being minorities.

⁴⁸ Report of the African Working Group, n 5 above, p 18.

⁴⁹ Murithi, T 'The African Union and the Prospects for Minority Protection in N Ghana and A Xanthaki (eds) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, (2005) p 299.

development projects. However as will be discussed in chapter three the dilemma has been in the practical implementation.

Development has evolved from a concept to a right⁵⁰ as recognised under the DRD. The question as to who is the right-holder and who is the duty-bearer to this right has raised controversy. According to the DRD 'all peoples and individual'⁵¹ are entitled to the right to development. The UNDP which came up with the concept of the Human Development Index insists that the right to development should not only be people focused but also gender focused.⁵² Salomon and Sengupta argue that the right to development is a collective and can be a group right in which individuals are ultimately the beneficiaries and that the state exercises the right on their behalf.⁵³ Thornberry on the other hand contends that the state bears the duty to ensure that the right is implemented.⁵⁴ It is imperative that the right to development with regard to indigenous peoples in Africa be both collective and individual. Further while the states should foresee that the right is implemented, they should also ensure that the process of development is inclusive and benefits all in the society.

This background leads us to sustainable development which has been defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'⁵⁵ This definition entails that for development projects to be classified as sustainable they have to take into consideration the needs of the existing and future. Development therefore has to achieve rising living standards without jeopardizing the potential of future generations to accomplish the same objectives. Critics have indicated that this definition and content are wide and 'brilliantly vague' as they permit application of sustainable development depending on the situation and conditions.⁵⁶ Therefore, when development projects are undertaken on indigenous peoples lands and territories lead to their displacement without an option for alternative land and they do not benefit this cannot be referred as sustainable development.

⁵⁰ Riddell, R *Minorities, Minority Rights and Development (2002)*, *Issues Paper* by Minority Rights Group International p 13.

⁵¹ N 18 above, p 6.

⁵² For more information on Human Development Index see www.undp.org

⁵³ N 9 above, p 7.

⁵⁴ N 13 above, p 254.

⁵⁵ The Brundtland Report n 8 above.

⁵⁶ Kaniaru, D 'The Concept of Sustainable Development: From Theory to Practice', *International Environmental Law-making and Diplomacy Review* (2004) p 29.

2.2 Sustainable development and indigenous rights

While on the one hand there is a link between human rights and development, on the other hand it is settled that all human rights, including civil and political rights and economic, social and cultural rights are equal, universal and inseparable and this means that certain human rights cannot be set aside for purposes of advancing the right to development.⁵⁷ Development takes place on land which is sometimes 'owned' or occupied by indigenous peoples; who are in most cases the poorest people in a country thus creating a nexus between sustainable development, poverty and human rights with particular emphasis on indigenous rights.⁵⁸

During the colonial occupation of Africa, land occupied by the indigenous peoples was considered 'legally unoccupied' and so the development of the doctrine of *terra nullius* that 'unoccupied land' was free to be owned by colonialists through 'legal means'.⁵⁹ However in the 20th Century international law distanced itself from this doctrine. In the *Western Sahara Case (Advisory Opinion)*⁶⁰ Judge Ammoun said that 'the concept of *res nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned'.⁶¹ In the *Eastern Greenland (Denmark v Norway)*⁶² where Norway claimed possession of Eastern Greenland on the basis that it was *terra nullius* the International Court of Justice (ICJ) held that this doctrine was no longer applicable. Despite the holding of these landmark cases the position today has not changed to a great extent. The African Working Group noted the indigenous peoples increasingly continued to lose their land that they occupy since in most cases such land is considered *terra nullius* and as explained earlier such land is considered 'common property' and thus susceptible to be distributed to others⁶³ and this has prevented them from exercising their rights with particular reference to the right to development.⁶⁴

Development depending on the context implies among others the eradication of poverty and the uplifting of people's livelihoods for the better.⁶⁵ However in Africa and

⁵⁷ See Riddell, n 50 above p 6.

⁵⁸ Akermark, S 'The World Bank and Indigenous Peoples' in N Ghana and A Xanthaki (eds) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, (2005) p 93.

⁵⁹ Plamer, A.D 'Evidence Not in a Form Familiar to Common Law Courts: Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*'; 38 *Alberta Law Review* (2001) p 1046.

⁶⁰ *Western Sahara case (Advisory Opinion)* 1975 ICJ Report p 86.

⁶¹ N 60 above p 87.

⁶² *Eastern Greenland case (The Legal Status of Eastern Greenland case)* 1933 P.C.I.J (ser. AIR) No 53

⁶³ N 13 above p 21.

⁶⁴ See the preamble to the UN Declaration on the Rights of the Indigenous People

⁶⁵ Riddell, R n 50 above p 11.

particularly with regard to indigenous peoples, development has not always improved the livelihood of indigenous peoples. This is seen when the indigenous peoples are dispossessed the land and resources that they occupy, the areas they live in lack infrastructure like roads, school and hospitals thus not benefiting from the development.

Sustainable development is an ancient concept that requires that any development undertaken takes into consideration the needs of the current generation without endangering the needs of the future generations to benefit from it.⁶⁶ Judge Weeramantry, in the *Gabcikovo-Nagymaros case*⁶⁷ stated that

‘Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.’

It therefore follows that for any development project to be considered sustainable, it should actively and meaningfully involve the individuals and they should benefit from it without compromising the ability of the future generation to benefit too. As regards indigenous peoples this definition calls for advancement of sustainable development and at the same time respect for and promotion of indigenous peoples rights. This will be considered in the next section.

2.3 Balancing the two rights

The right to development can be both an individual and a group right. It is an individual right when those who possess the right are individuals. It is a collective right when there are certain rights that concern the indigenous or minority peoples as a group.⁶⁸ On the other hand, land owned by indigenous peoples is held collectively or under customary law. Indigenous peoples have special attachment to their land which could be economic, social, spiritual or cultural.⁶⁹ It therefore follows that any policies, programmes or development activities to be implemented that affect the indigenous peoples should take into consideration their rights, the rights of the future generations and their attachment to land.

⁶⁶ See definition of sustainable development in the Brundtland report n 8 above.

⁶⁷ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports (1997) 7, Separate opinion, p 88.

⁶⁸ N 9 above p 12.

⁶⁹ See report of Cobo, M n 32 above and art 13 of the ILO Convention 169. See also the preamble and art 25 of DRIP.

It is arguable that the right to self-determination for indigenous peoples should permit them to decide and participate fully and equally on which development projects suit them. The importance of seeking consent from indigenous peoples was upheld in the case of *Awes Tingni Indigenous People of Mayagna v The State of Nicaragua*⁷⁰ in which the Inter-American Court of Human Rights (IACtHR) said that Nicaragua had violated the right to property, judicial protection and due process of the law since it had granted logging and road construction concessions to Sol del Caribe, S.A. (SOLCARSA) without taking steps to issue titles and demarcate the indigenous land and without consulting the Awes Tingni Community.⁷¹

Salomon and Sengupta argue that the rights of indigenous peoples and the right to development are interdependent and none of these should override the other.⁷² The indigenous peoples in this regard should be on the forefront and should play a key role in development. During the 2002 World Summit on Sustainable Development held in Johannesburg, South Africa the Summit reaffirmed the role of indigenous peoples in sustainable development and acknowledged their capability as 'stewards' of national and global natural resources and biodiversity.⁷³ Despite the existence of international instruments, practical implementation with respect to both rights has remained challenging since development projects rarely take the priorities of indigenous peoples into consideration and they seldom benefit from these projects as will be discussed later.

2.4 States obligation under international and regional systems

The Universal Declaration of Human Rights (UDHR)

Adopted in 1948 the document is non-binding, but most of the provisions are widely accepted as general principles of international law or binding customary law rules.⁷⁴ The preamble states that human rights are universal and inalienable to all human beings and it therefore follows that indigenous peoples are entitled to the rights stipulated in therein.

⁷⁰ *Awes (Sumo) Mayagna Tingni Community v Nicaragua*, IACtHR, Report No 27/98 (Nicaragua) par 164.

⁷¹ N 70 above par 142.

⁷² N 9 above p 22.

⁷³ See UN website http://www.un.org/jsummit/html/basic_info/basicinfo.html accessed on 22 October 2007.

⁷⁴ In the case of *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), (1980) *ICJ Rep.* 3, p 42, the ICJ recognised the binding nature of UDHR.

International Covenant on Civil and Political Rights (ICCPR)

This is a legally binding instrument, adopted in 1966 by the UN General Assembly and it entered into force in 1976. Whereas article 27 provides for minority rights,⁷⁵ the ICCPR does not explicitly mention indigenous rights. It is however worth noting that the Human Rights Committee in General Comment No. 23, which forms the foundation of human rights interpretation with regard to indigenous peoples, accentuated the relevance of this article to indigenous peoples.⁷⁶ Article 1 provides for the right of all peoples to self-determination and to freely dispose of their land and resources. Other articles applicable to indigenous peoples include articles 2 and 26 that provide for the equality of all citizens. Article 40 stipulates the state reporting and among issues states should report on is the status on main ethnic and demographic characteristics of the state and its population including indigenous peoples.⁷⁷ The First Optional Protocol to the ICCPR provides for individual communications which indigenous peoples can make use of if their rights under the convention are infringed. Articles 40 and 41 provide for the inter-state procedure but this has never been utilized.

International Covenant on Economic Social and Cultural Rights (ICESCR)

Unlike the ICCPR, the rights provided in the ICESCR are not immediate and instead they are to be realised progressively.⁷⁸ However, all rights provided for are applicable to indigenous peoples but distinctly they can utilise article 15 which provides for the right to culture. Nevertheless, it is notable that the Convention does not provide for collective rights and thus the article can only be pursued individually. The right to self-determination, a right also provided for in ICCPR, can be used to freely determine the indigenous peoples' political status, economic, social and cultural development. Although the ICESCR does not provide for individual complaints the draft Optional Protocol to the ICESCR proposes a system of individual communications.⁷⁹

Covenant on Elimination of All Forms of Racial Discrimination (CERD)

⁷⁵ It provides that ' In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

⁷⁶ Human Rights Committee, General Comment 23, art 27 (Fiftieth Session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. Hrgen1rev.1 at 38 (1994) pars 7 and 32.

⁷⁷ See Consolidated Guidelines for State Reports, CCPR/C/GU1/Rev.2.

⁷⁸ Art 2(1) of the ICESCR.

⁷⁹ Par 1 of the Draft Optional Protocol to the ICESCR available on [www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.1997.105.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.1997.105.En?Opendocument) accessed on 18 October 2007.

While this Convention does not define the term 'race' which is essential in pursuing indigenous rights the Committee on Elimination of Racial Discrimination (CERD Committee) in General Recommendation 8 attempts to identify membership of a particular group on the basis of 'self-identification of the individual concerned'⁸⁰ thus emulating the approach adopted by ILO Convention No. 169. In General Recommendation 23, the CERD Committee recognised that indigenous rights fall under the scope of the Convention.⁸¹ It also noted the discrimination experienced by indigenous peoples through the loss of their land to colonists, commercial companies and state enterprises.⁸² The Recommendation further calls on states parties to *inter alia* respect the rights history, culture, language and way of life of indigenous peoples, ensure that decisions concerning them are taken with their informed consent and to recognise collective ownership of land and natural resources by the indigenous peoples.⁸³

ILO Convention on Indigenous and Tribal Peoples (ILO Convention No. 169)

The Convention was adopted in 1989 to replace the ILO Convention 107.⁸⁴ The Convention contains a normative framework and responsibilities by states when undertaking development projects affecting indigenous peoples. Although this is the only instrument open for ratification that specifically provides for the rights of indigenous peoples none of the African states has ratified⁸⁵ this Convention in spite of lobbying. The Convention is important since its provisos are an inspiration and reflect trends towards protecting indigenous rights globally. Article 6 obliges states to fully consult indigenous peoples whenever administrative or legislative measures are being considered that will affect them. Indigenous peoples should participate fully in the consultations which should be carried out in good faith. In addition it stipulates the right of indigenous peoples to participate in the 'formulation, implementation and evaluation of plans for national or regional development that may affect them.' The articles when

⁸⁰ CERD Committee, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification, (Thirty-Eight Session, 1990), U.N. Doc. A/45/18 at 79 (1991), Reprinted in Compilation of General Comments and General Recommendation adopted by Human Rights Treaty Bodies, U.N. Doc. Hrighten1rev.6 at 200 (2003).

⁸¹ CERD Committee, General Recommendation 23, Rights of Indigenous Peoples, (fifty first Session, 1997) U.N. Doc A/52/18 Annex V at 122 (1997) par 1.

⁸² N 81 above par 3.

⁸³ N 81 above pars 4(a) and 5.

⁸⁴ Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Population in Independent Countries (1957).

⁸⁵ State parties include Norway, México, Colombia, Bolivia, Germany, Costa Rica, Paraguay, Kyrgyzstan, Peru, Honduras, Guatemala, Denmark, The Netherlands, Ecuador, Fiji, Argentina, Dominica, Brazil and Venezuela.

interpreted together make provision for 'prior informed consent'⁸⁶ of indigenous peoples with regard to any developmental activities. Land is considered to encompass the total environment of the area used or occupied by indigenous peoples and calls on governments to respect of collective aspects of the relationship between indigenous peoples and their lands or territories. Relocation from traditionally held land is only to take place under exceptional circumstances, with free and informed consent and according to the established legal framework. Relocation should be temporary and if not possible lands for compensation should be of quality and legal status equal to previously occupied ones.

Declaration on the Right to Development (DRD)

This is a non binding instrument that elucidates in detail the right to development. It is significant to indigenous peoples since it emphasizes the relationships between development, self-determination and human rights and the principle that the elimination of racism and all forms of colonialism and neo-colonialism is a precedent to the establishment of the right to development.⁸⁷

It recognizes the right to development as an 'inalienable human right' and further provides for the 'free and meaningful participation' of all of society in development as well as for the 'fair distribution of benefits' of development.⁸⁸ According to the Declaration the right to development is both collective and individual and should take place taking into account the need for full respect of human rights and freedoms.

The Declaration on the Rights of Indigenous Peoples (DRIP)

DRIP has been negotiated for over 20 years. It was ultimately historically adopted by the UN General Assembly on 13th September 2007 with an overwhelming majority.⁸⁹ While the negotiations for a draft were lengthy, it is a positive step as this could be the

⁸⁶ Balurte, D 'Balancing the Indigenous Rights and the State Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169' 4 *Sustainable Development Law & Policy* 9 (2004) p 10.

⁸⁷ Preamble to the DRD.

⁸⁸ Art 1 of the DRD.

⁸⁹ 143 votes in favour, 4 against (Canada, Australia, New Zealand, United States) and 11 abstentions.

'first step towards a new UN Convention.'⁹⁰ It is however worth noting that the DRIP while it is a UN General Assembly resolution it is not a legally binding instrument.⁹¹

Despite the fact that most of the provisions reiterate existing human rights norms or international law principles, the declaration provides for a greater protection to indigenous peoples than the existing international human rights instruments since some provisions provide for particular aspirations of indigenous groups. The Working Group on Indigenous Populations (WGIP) explains the importance of protecting certain marginalised groups:

The issue is that certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized 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 marginalized groups to call for protection of their rights in order to alleviate this particular form of discrimination.⁹²

This Declaration is a contribution to human rights standard setting by Commission on Human Rights and aims *inter alia* to strengthen the measures to promote and protect indigenous peoples' rights. The rights contained in the Declaration have been said to be crucial for the 'survival, dignity and well-being' of the indigenous peoples and in maintaining their spiritual and cultural relationship with the land and territories.⁹³ Article 10 provides that indigenous peoples shall not be forcibly moved from their land and territory and any relocation should involve free, prior and informed consent as well as adequate compensation.

The Declaration further provides for the rights to self-identification, self-determination, cultural protection. It not only recognises individual rights but also provides for collective rights.

The relationship between human rights and development and thus the importance of the Declaration was articulated by Mary Robinson former UN High Commissioner on Human Rights when she said that:

The United Nations draft declaration states the link between human rights and development, namely that the one is not possible without the other. Thus, economic improvements cannot be envisaged without the protection of land and resource rights. Rights over land need to include recognition of the spiritual relation

⁹⁰ Plant, R (1994) *Land Rights and Minorities*, *Minority Rights Group International* p 11.

⁹¹ Mackay, F The UN Draft Declaration on the Rights of Indigenous Peoples and the Position of the United Kingdom, *Forest Peoples Programme*, 16 (2003) available at http://www.forestpeoples.org/documents/law_hr/un_dft_decl_ips_rights_may03_eng.pdf accessed on 01 September 2007.

⁹² WGIP Report (2006) WGIP pp 11-12.

⁹³ Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007 available on http://www.docip.org/declaration_last/STAT_IPSCAUCUS_CHAIR_91307.pdf accessed on 22 October 2007.

indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by recognition of indigenous peoples' own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.⁹⁴

Convention on Biological Diversity (CBD)

Adopted in Rio de Janeiro in 1992, the CBD is another significant instrument with regard to protection on indigenous peoples' rights. It contains four main provisions that directly deal with the rights of the indigenous peoples. It obligates states to:

Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.⁹⁵

Article 10(c) 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.' The CBD further deals with the exchange of information including 'indigenous and traditional knowledge..... and in combination with technologies' and lastly it refers to the development and use of 'indigenous and traditional technologies'.

Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

The conference took place in Durban, South Africa in 2001. The Durban Programme of Action urges states to adopt or continue to apply constitutional, administrative, legislative, judicial and all necessary measures to promote, protect and ensure indigenous peoples' rights, guarantee their fundamental freedoms on the basis of equality, non-discrimination and full and free participation in all areas of society, particularly in matters affecting or concerning their interests.

African Charter on Human and Peoples' Rights

⁹⁴ 'Bridging The Gap Between Human Rights And Development: From Normative Principles to Operational Relevance', Lecture By Mary Robinson, available on <http://www.unhchr.ch/hurricane/hurricane.nsf/0/2D A59CD3FFC033DCC1256B1A0033F7C3?opendocument> accessed on 22 October 2007.

⁹⁵ Art 8(j) of the CBD.

The ACHPR was devised to address particular issues relevant to Africa taking into consideration the African cultural context.⁹⁶ The ACHPR is distinct from other international and regional human rights instruments⁹⁷ in that it recognises and protects the collective rights through the use of the word 'peoples' in the instrument. While most of the rights provided for in the ACHPR can be invoked by indigenous peoples those with particular reference to indigenous peoples and sustainable development include: article 20(1) which provides that the right to self-determination including the freedom of people to decide their political status and economic and social development as per policy they have freely chosen. In the *Katangese Peoples' Congress v Zaire*,⁹⁸ the African Commission in dismissing the claim to self-determination, recognised that it had an obligation to uphold the territorial integrity and sovereignty of Zaire. This case goes to demonstrate that while the right to self-determination, which can be utilised by the indigenous peoples, is provided for under the ACHPR, the African Commission is hesitant to make decisions granting self-determination to indigenous peoples for reasons of upholding territorial integrity.

The Charter provides for the right to people to freely dispose of their natural wealth, where they are dispossessed to recover and get full and adequate compensation and to benefit from the advantages derived therein. The interpretation of this provision leads to a conclusion that natural resources or land owned or occupied by indigenous peoples should not be taken away from them without free, prior and informed consent from them and full and adequate compensation and they should benefit from the development projects. Article 22 deals with the right of peoples to economic, cultural and social development; this right to development has been interpreted to include the right of individuals.⁹⁹ Indigenous peoples can also lodge complaints if they feel that their rights under article 55 of the ACHPR are violated.

While in this study it is not possible to exhaust the normative framework relevant to indigenous peoples and sustainable development, other relevant instruments include the Rio Declaration on Environment and Development, Agenda 21, United Nations Convention to Combat Desertification, Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and

⁹⁶ Thornberry, n 13 above p 262.

⁹⁷ Regional human rights system here includes the European System however the Inter-American Human Rights System stipulates in arts 1 and 2 of the American Convention mentions 'peoples' the proposed American Declaration on Rights of Indigenous Peoples provides for both individual and collective rights.

⁹⁸ *Katangese Peoples' Congress v Zaire*, (2000) AHRLR p 72.

⁹⁹ Resolution on the African Commission on Human and Peoples' Rights, 6th Annual Activity Report, ACHPR/RPT/6th, Annex III.

United Nations Framework Convention on Climate Change. Another one is the African Union's 2003 African Convention on the Conservation of Nature and Natural Resources which updated the 1968 Algiers Convention that has been argued to be 'the most comprehensive regional biodiversity convention'.¹⁰⁰

¹⁰⁰ N 56 above p 26.

CHAPTER 3: MEDIATING INDIGENOUS RIGHTS AND SUSTAINABLE DEVELOPMENT

3.1 Introduction

African states inherited colonial laws which have proved detrimental to customary/collective ownership of land for the indigenous peoples.¹⁰¹ Despite this shortcoming courts in African states have been hesitant to order governments to come up with a normative framework that 'create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores'.¹⁰² Some courts have however recognised that certain groups are indigenous¹⁰³ but few have been progressive enough to make orders for effective mechanism for collective land rights of indigenous peoples which are relevant to protection of indigenous rights when development is being carried out on land they occupy.

This part will look at four case studies from Africa the Endorois and Ogiek Communities from Kenya, the Basarwa of Botswana and the Richtersveld Community in South Africa. The case studies generally address environmental (conservation) and extractive developments and how they impact on indigenous peoples.

3.2 Sustainable development case studies

3.2.1 Ogiek case in Kenya

The Ogiek are found in the Mau Forest Complex (Mau Forest) in Kenya which they consider their ancestral.¹⁰⁴ Although the Ogiek are traditionally hunters and gatherers,¹⁰⁵ today the Ogiek also cultivate and keep animals as a result of interaction with other neighbouring communities but they predominantly remain honey collectors.¹⁰⁶ The Ogiek depend on the forest for their medicine and their diet consists

¹⁰¹ English Common Laws in countries like Kenya, Tanzania, Uganda, Malawi, Zambia which separates what is owned from the land itself, Roman Dutch Law practiced in South Africa, Namibia, Swaziland, Lesotho and Zimbabwe this does not give recognition to 'divided rights of ownership' and Civil laws in countries like Senegal, Burkina Faso, Mauritania, Ivory Coast, Mali, Madagascar and Niger which 'draws from the concept of the ultimate owner of land retained by the state'. See Colchester, M n 17 above p 53

¹⁰² See *Awasi (Sumo) Maygna Tingni Community v Nicaragua* n 70 above par 164.

¹⁰³ See for example *Roy Sesana, Keiwa Setlhobogwa and others v the Attorney General* MISC NO. 52 of 2002.

¹⁰⁴ 'The Ogiek', Survival International, www.survival-international.org/tribes/Ogiek

¹⁰⁵ See Barume, A, K Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya, in Castellino, J and Walsh, N *International Law and Indigenous Peoples*, (2005) , pp 365-392

¹⁰⁶ Fedders, A and Salvadori, C (1979) *Peoples, and Cultures of Kenya*, pp 14-15

mainly of honey, meat and wild game meat.¹⁰⁷ It is approximated that the Ogiek number about 20,000.¹⁰⁸ While the Ogiek did not traditionally have a centralized political system the clan (Oret), the most essential entity, was made up of local groups and was the 'land holding unit.'¹⁰⁹

A brief historical background of land ownership in Kenya particularly with reference to the Ogiek is necessary to understand their current situation with regard to sustainable development on land the Ogiek previously occupied.

The 1930 Land commission formed by the colonial government and headed by Mr Morris Carter to review the land situation in Kenya and come up with a land policy adversely affected the Ogiek with regard to ownership of their indigenous land. The commission recommended *inter alia* that the Ogiek be allocated land near communities with whom they had affinity, to facilitate their integration into those communities and that they should not be allocated any reserve.¹¹⁰

As a result, the Ogiek have faced forceful evictions from the forest which they consider their cultural land since the declaration and gazettelement of their land as a forest reserve.¹¹¹ However they still go back to the forest as they consider it their cultural land and their livelihood depends on the forest. The evictions are normally carried out without free, prior and informed consent of the community and further they are not adequately compensated for the loss of their land. This can be attributed to the fact that in Kenya the government does not recognise indigenous peoples land ownership but only recognises the collective occupation and use of land.¹¹²

The laws in Kenya have also adversely affected their cultural way of life and resulting to violation of their rights. First, the Government Lands Act¹¹³ designated most of Mau Forest as government or trust land vested in the local authority in whose territory a respective part of the forest was and therefore they were dispossessed their land since

¹⁰⁷ The Ogiek depend on herbal plants and trees found in the forest to treat diseases. See Odunga, D *Gripe of Ogiek now Forced into Modernity*, Daily Nation, 8 August 2007. www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=39newid=103984 accessed on 10 October 2007

¹⁰⁸ N 104 above.

¹⁰⁹ N 104 above.

¹¹⁰ Kamau, J Ogiek: History of the Forgotten Tribe quoting unpublished commentary by Guy Yeoman on the Ogiek stored at Kenya National Archives available on <http://www.ogiek.org/report/ogiek-ch1.htm> accessed on 01 September 2007.

¹¹¹ N 104 above.

¹¹² Sec 117 of the Kenyan Constitution land is vested in the county councils for the collective benefit of the people in that area.

¹¹³ Sec 2 cap 280 of the Laws of Kenya.

collective land rights are not recognised in Kenya. Then, the Forest Act¹¹⁴ prohibits entry into and use of forest products without express authorization by the government. This Act also declares the land occupied by the Ogiek, as protected area¹¹⁵ and thus they cannot access their medicine and food (honey and wild game meat). There is also the Wildlife (Conservation and Management) Act¹¹⁶ which prohibits hunting in all its forms thus criminalizing a traditional way of life and increased wildlife conservation areas.

In 1991 the Kenyan government issued certificates of allocation and allowed the Ogiek to settle in the degazetted Tinet, Ndoinet, Tieret and Mariosioni parts of Mau forest. However in 1999 the District Commissioner acting on behalf of the Government of Kenya issued a 14 days ultimatum and later issued an order to vacate the forest or face eviction as result the Ogiek instituted a suit *Kemai & 9 others v Attorney General & 3 others*.¹¹⁷ The applicants asked for declaration that the eviction contravened their rights to protection of law, not to be discriminated against and to reside in any part in Kenya,¹¹⁸ a declaration that the Ogiek's right to life had been contravened by the eviction and for compensation for loss of their land.¹¹⁹ The main reason advanced by the government for undertaking the eviction was forest conservation namely that the Mau Forest was a water catchment area. The government maintained that the certificates of allotment issued in 1991 did not amount to allotment but 'mere promise', that the Ogiek had changed their way of traditional life and were not solely dependent on the forest for survival as they kept livestock and practiced peasant farming and they constructed modern structures on the forest.¹²⁰

Although the government was evicting the Ogiek and restricting the use of the forest and forest products for reasons of forest conservation, at the same time it opened up the Mau Forest to private use including logging, tea planting and settlement schemes.¹²¹ Three giant logging companies which were allowed to log trees included

¹¹⁴ Sec 52 cap 7 of 2005 of the Laws of Kenya.

¹¹⁵ Sec 21 of the Act vests all public forests on the state. Sec 4(1) of the Forest Act Cap 385 of the Laws of Kenya empowers the Minister in charge to declare any unalienated government land to be forest area

¹¹⁶ Sec 23 cap 376 Laws of Kenya.

¹¹⁷ *Kemai & 9 others v Attorney General & 3 others*, Civil Case 238 of 1999, KLR (E&L) 1.

¹¹⁸ As per secs 71 and 82 of the Kenyan Constitution.

¹¹⁹ Pp 3-4 of n 117 above.

¹²⁰ See pp 8 and 9 n 117 above. It is instructive also to note that although the Forest Act restricts logging, rearing of livestock, collection of honey, erection of structures in the forest and hunting unless licensed by Director of Forestry sec 22 of the Act provides that members of forest community should not be prevented from using forest produce as per their custom in accordance with the Act.

¹²¹ See 'The Open Letter to the President' available on <http://www.ogiek.org/action/letter.htm> accessed on 03 October 2007. See also 'Kenya: Government Destroys the Ogiek's Forest', Survival International (29

Pan African Paper Mills, Raiply Timber and Timsales Limited. The reason advanced by the government for exempting the three from general government bans on logging was that Raiply and Timsales employs over 30,000 Kenyans.¹²²

The court in dismissing the applicant's plea for loss of livelihood caused by the eviction stated that the Ogiek like all other Kenyans should seek licences as provided for under section 8 of the Forest Act to the use of the forest. The court stated that:

To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc, is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it.....There is no reason why the Ogiek, should be the only favoured community to own and exploit at source the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans. No; they are not being deprived of their means of livelihood and a right to life.¹²³

The court in this case dwelt in depth on how important environmental conservation was for sustainable development but neglected the impact of evictions on the livelihood and culture of indigenous peoples in this case, the Ogiek. The court also failed to address the issues of ownership of land and compensation for loss of land claiming that this would lead to 'prodigious vexatious litigation, and, perhaps to interminable law suits.'¹²⁴

Despite reports indicating that large scale logging of trees has traumatic effects to the water sources¹²⁵ the court did not touch on this issue in which the applicant had complained as a ground for discrimination as logging companies were being allowed to use carry on large scale logging yet the Ogiek who had lived in the forest since time immemorial and whose activities arguably had a minimal effect were being evicted.¹²⁶

The judgment also failed to tackle the government's international human rights obligation and its role in ensuring both parties to sustainable development (environmental) benefit for example by ordering the government to put in place legal

November 2001) available on <http://www.survival-international.org/news/86> accessed on 04 October 2007.

¹²² 'History of Kenya', available on <http://www.ogiek.org/faq/index.htm> accessed on 10 October 2007.

¹²³ N 117 above p 14.

¹²⁴ N 117 above p 22.

¹²⁵ 'Nowhere to go: Forced Evictions in Mau Forest', Kenya, Amnesty International et al, May 2007 p 19. See also 'Forest Protection The Media Role' by Centre for Minority Rights Development (CEMIRIDE) available on www.cemiride.info/repository2/WebFiles/Ogiek_media.pdf accessed 13 September 2007 see also 'Nakuru Rivers Drying up Due to Deforestation' *Daily Nation* 13 March 2001 available on <http://www.nationaudio.com/News/DailyNation/13032001/News/NewsFeature.html> accessed on 02 October 2007.

¹²⁶ See n 117 p 14 above.

framework designating certain parts of the forest where the Ogiek can occupy while at the same time conserving the environment.

While forest conservation is commendable, the Ogiek in this case have continued to suffer¹²⁷ as a result of forest evictions advanced to give way to environmental conservation in the Mau forest. It is imperative that environmental conservation which falls under the umbrella of sustainable development is advanced and at the same time the rights of indigenous peoples' be respected and promoted. In this case the government of Kenya should have compensated the Ogiek and give them alternative land out of the forest while being allowed to continue hunting, collect honey and medicinal plants from the forest. The logging of trees by three giant logging companies should also have been terminated since it has adverse effects on the environment compared to the activities by Ogiek.¹²⁸

3.2.2 Endorois case in Kenya

The Endorois people number approximately 60,000 and they have lived in the areas bordering Lake Baringo in Nakuru, Baringo, Koibatek and Laikipia districts of the Rift Valley Province in Kenya.¹²⁹ They are indigenous peoples who identify themselves as a distinct community¹³⁰ with special and distinct cultural and religious attachment to Lake Baringo where they have lived since time immemorial and their ancestors are buried.¹³¹ The Endorois people are a pastoralist community who depend on livestock and have traditionally relied on beekeeping for honey.

Unlike the Ogiek the land occupied by the Endorois did not fall under forest laws in Kenya but was gazetted as a 'reserve' and thus administered by the county councils as 'trust land.'¹³² Lake Baringo, as it is known today,¹³³ therefore falls under 'trust land' administered jointly by Koibatek and Baringo county councils as trustees. In 1963 the government gazetted parts of Mochongoi forest as a government forest causing a large loss of grazing land for the Endorois Community. In 1974 the government

¹²⁷ Amnesty International report, n 125 above and Odunga, D n 107 above.

¹²⁸ See Daily Nation n 125 above.

¹²⁹ See CEMIRIDE 'The Justice and Equality Programme Intervention in Endorois Conflict available on <http://www.cemiride.info/NewsDetails.asp?ID=29> accessed on 10 October 2007.

¹³⁰ The Endorois are sometimes classified to as a sub-tribe of the Tugen tribe belonging to the bigger Kalenjin group.

¹³¹ The Endorois believe that the spirits of their ancestors live around Lake Baringo.

¹³² See sec 3 of Trust Land Act, Cap 285 of the Laws of Kenya.

¹³³ Lake Baringo was previously called Lake Hannington and was listed as part of Suk, Kamasi, Marakwet, Elgeyo and Njemps Native Reserve.

decided to convert the area around Lake Baringo into a game reserve.¹³⁴ The Kenyan Constitution provides that trust land is held by the county councils on behalf and in trust of the communities that continue to live and use that land.¹³⁵ It therefore follows that the actual ownership is vested on the city council while the Endorois community have a beneficial interest to the land. While section 18(6) of the Wildlife (Conservation and Management) Act¹³⁶ designated Lake Baringo and its surrounding environment as 'national reserve', it is important to note that the conversion did not change the legal position of the land as trust land since the land is still held in trust for the local communities by the Baringo and Koibatek councils.

Upon conversion of the land to a game reserve the community was not given compensation and even the 170 families out of 400 compensated the compensation was not adequate.¹³⁷ Further, they were forcefully evicted without the option of protecting the wildlife whilst keeping the community's ownership and occupation of their ancestral land. The government issued mining concessions for ruby (extractive development) on the land near Lake Baringo without prior, informed consent from the Endorois but the concessions were later revoked.

As a result, the Endorois community filed a case in the High Court of Kenya. In this case *William Arap Ngasia et al. v. Baringo Country Council*,¹³⁸ the issues raised by the applicants included *inter alia* lack of compensation, right to benefit from the resources collected from Lake Baringo and collective right to property. The defendants' core argument was that the disputed lands had been gazetted as game reserve and that according to sections 114 and 115 of the Constitution, trust lands are vested in county councils. Therefore the applicants had no right of ownership as a result of the gazettelement and they were not entitled to compensation.

In dismissing the suit with regard to the issue of adequate compensation awarded to the 170 families the court said:

¹³⁴ The concept of a game reserve is used in Kenya to conserve the natural resources; wildlife and the environment, it is also meant to be a source of resource to the communities living around the reserve and the reserves attract tourism bringing income to the council which in turn use it to develop the area.

¹³⁵ This section provides that: 'Each county council shall hold the trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interest or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.'

¹³⁶ N 116 above.

¹³⁷ The families were compensated in 1986 years after they were evicted from their land and moved to 'semi-arid land' which proved unsustainable to their pasture.

¹³⁸ *William Arap Ng' Asia & 29 others v. Baringo County Council, Koibatek County Council and the Attorney General*, High Court of Kenya at Nakuru, Civil suit No.522 of 1998.

The applicants have admitted in affidavits that when the disputed land was set apart for use as a game reserve, meetings were held and compensation paid...It was upon the applicants and other residents who were affected to make use of their right of Appeal and appeal against the award of compensation ... We note that none of the claimants appealed...It is now too late to complain. In any case there is no proper identity.¹³⁹

The court went on to say that:

The two Councils tried to show that they use some of their revenue for the benefit of the applicants and the people they represent. In our view they needed not show such proof.¹⁴⁰

It can be interpreted that according to the court the council had respected the procedure for compensation and the applicants should have appealed against this in due time which they did not. The court did not dwell on the issue of compensation according to Kenyan law and relevant international law.¹⁴¹ Although the court recognised the plaintiffs as customary residents of the land in dispute, it based its ruling on the management of trust lands as provided for by the Constitution.

Like in the Ogiek case the government of Kenya has also in this case failed to balance the rights of indigenous peoples with sustainable development; wildlife management . This is because there was no adequate compensation and the Endorois Community was forcefully evicted from their ancestral land without alternative land and failure to seek free, prior and informed consent. Further, while sustainable development requires that peoples benefit from the development activities being carried out, the Endorois have not benefited from Lake Baringo game reserve.¹⁴²

This case is currently pending at the African Commission on Human and Peoples' Rights and has already passed the admissibility stage.¹⁴³

3.2.3 Basarwa case in Botswana

The Basarwa people are found in Southern Africa and are also often called 'San' 'Nama', 'Khoe' (Khwe), or ' Bushmen'. Sometimes the term San is applied to refer to the Khoesan speaking group composed of the San and the Khoekhoe who were

¹³⁹ N 138 above p 6.

¹⁴⁰ N 138 above p 6.

¹⁴¹ Sec 75 of Kenyan Constitution and art 21(2) of ACHPR.

¹⁴² See n 129 above.

¹⁴³ *Centre for Minority Rights Development on behalf of the Endorois Community v The Government of Kenya* Communication 276/2003. See Reliefweb 'Kenyan Endorois Legal Success Takes Historic Land Rights Case to Final Stage' available on <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EVIU-6E9JBW?Open Document> accessed on 10 October 2007.

among the first people to inhabit Southern Africa dating 20,000 years ago.¹⁴⁴ The term San may also be applied to groups which traditionally lived on hunting and gathering in the Kalahari Desert region.¹⁴⁵ In Botswana the San are officially referred to as the 'Basarwa' which has a Setswana origin to mean 'people who did not rear cattle' and it is for this reason that the San consider it derogatory. This study will however use the term 'Basarwa', not in the derogatory form, but because it is the official name used in Botswana.

Although there are no official figures it is approximated that there are about 55,000 Basarwa people in Botswana.¹⁴⁶ With regard to the legal framework for the protection of indigenous peoples' rights in Botswana, the Botswana Constitution provides that all citizens have the right to own land,¹⁴⁷ the right of movement,¹⁴⁸ the right to the imposition of restriction on the entry into or residence within defined area in Botswana of persons who are not Bushmen'.¹⁴⁹ Despite these Constitutional provisions the Basarwa have continued to experience dispossession of their land without adequate or no compensation.¹⁵⁰ Since they practice hunting and gathering they are further viewed as landless exacerbating the land dispossession.

The Basarwa have continued to be negatively affected by the laws enacted in Botswana. The Tribal Grazing Land Policy (TGLP) of 1975 which encouraged the creation of land ranches led to the loss of land by the Basarwa. The 1991 National Agricultural Development Programme which introduced the 'Fencing Component' in the Western Sandveld of Central District led to the loss of land by the rural population majority of who are Basarwa. Further, in 1990s the government of Botswana introduced Community Based Natural Resource Management programme (CBNRM), where rural people were offered wildlife and natural resources to manage. However with time community management has been phased out bringing in other stakeholders.¹⁵¹ As a result the Basarwa have not benefited from these resources.

¹⁴⁴ The Basarwa (San) are found in Namibia, Zambia, Angola, South Africa, Zimbabwe and Botswana.

For an extensive discussion on the San see Barnard, (1992) *A Hunters and Gatherers of Southern Africa: A Comparative Ethnography of the Khoisan Peoples*.

¹⁴⁵ See Taylor, M: "Life, Land and Power: Contesting development in Northern Botswana" (2000). University of Edinburgh, Department of Anthropology, PhD Thesis.

¹⁴⁶ International Work Group for Indigenous Peoples, 'Indigenous Peoples in Botswana' available on <http://www.iwgia.org/sw9940.asp> (accessed on 10 October 2007).

¹⁴⁷ The Constitution of Botswana sec 8.

¹⁴⁸ Sec 14 n 147 above.

¹⁴⁹ Sec 14(3)(b) n 147 above.

¹⁵⁰ See sec 8(b)(i) of the n 147 above.

¹⁵¹ For further discussions on the CBRM see Mbaiwa (2005) M Taylor (2000).

One of the landmark cases concerning the Basarwa in Botswana is the case of *Roy Sesana and others v the Attorney General*.¹⁵² The applicants who were from the Basarwa community filed an application seeking *inter alia* the action by the government to terminate essential and basic services to the applicants in the Central Kalahari Game Reserve (CKGR) was unlawful and unconstitutional and they sought the services to be restored.¹⁵³ The services in this case included weekly provision of drinking water, maintenance of borehole, provision of rations for registered destitutes and orphans, provision of transport to school for applicant's children and the provision of mobile health care services. The applicants also sought an order for the restoration of land for those who had been forcibly removed from CKGR as a result of the termination of the basic and essential services.¹⁵⁴ To determine the actual situation on the ground the court conducted an inspection of the settlements occupied by the San people and it was observed that they lived in 'difficult terrain'¹⁵⁵ a situation common with most indigenous peoples.

With regard to termination of the services, the applicants argued that the government did not consult the people in the settlements or even negotiate with the Negotiating Team of its intention to terminate the services. The government on the other hand indicated that it had terminated essential services due to difficulties with sustainability. They argued that 'human residence caused a disturbance to the wildlife which was contradictory to the policy of...preservation of wildlife.' The government argued that the provision of services was not costs effective as it was spending 55, 0000 Botswana pula. On this issue the court observed that the applicants in this case had a 'legitimate expectation that the government would consult them before the decision to terminate the provision of services in their settlements in the CKGR was made'.¹⁵⁶ Judge Dow who dissented on certain issues in the main judgment pointed out that the Basarwa people were indigenous and the fact that Botswana was a signatory to CERD and was therefore obligated to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.¹⁵⁷

With regard to notice of intention to terminate services the court found that the government was not obliged to restore the services since it had given the applicants

¹⁵² *Roy Sesana v the Attorney General* n 103 above.

¹⁵³ N 103 above Pars 2(a) and (b).

¹⁵⁴ N 103 above par 2(c).

¹⁵⁵ N 103 above p 19.

¹⁵⁶ N 103 above p 52.

¹⁵⁷ CERD Committee, General Comment XXIII, U.N. Doc A/52/18, Annex V, at para. 4(d).

reasonable time 6 months notice before the termination. The government had argued that the negotiations with the Basarwa which had been held since 1986 had taken too long. It is worth noting however that Judge Dow in her dissenting judgment noted that this termination was a breach of the constitutional right to life therefore unlawful and unconstitutional.¹⁵⁸ Although it is imperative that negotiations be free from any pressure the main judgement did not take this into consideration particularly considering the position of the government as the provider of services and the Basarwa community as the recipients. Withdraw of essential services by the government can be interpreted to mean that the government was pressuring the applicants in this case to give consent. Judge Dow notes that the lack of the community to have an organised political system compromises their position to present an unadulterated consent she also stated that the government of Botswana was obligated to put in place mechanisms that 'promoted and facilitated genuine and pure consent.'¹⁵⁹

Judge Dow also noted that the 'applicants were deprived of possession of the land they lawfully occupied wrongfully and unlawfully and without their consent.'¹⁶⁰ In recognising the special relationship of indigenous peoples and the land they occupy as expressed in Martinez Cobo report¹⁶¹ she notes that the withdraw of essential services and failure to renew permits thus no hunting and food for the community was aimed at ensuring that life was totally impossible thus forcing them to relocate therefore finding the withdrawal of services and withdrawal of permits unlawful and unconstitutional.¹⁶² In this regard it was noted that the government was obliged to restore services for the applicants and for those who had moved from the game reserve and were not interested in going back to pay damages.

The court unanimously held that the applicants were in possession and lawfully occupied the land in dispute before they were forced to move because of withdrawal of services but that they were forcibly deprived this possession by the government without consent. The court should have proceeded to order the government to reinstate this possession to the applicants. The court should have done this taking into consideration the special relationship the livelihoods of indigenous peoples have with their lands and territories.

¹⁵⁸ N 103 above p 258.

¹⁵⁹ N 103 above pp 232-233.

¹⁶⁰ N 103 above par 18 p 227.

¹⁶¹ 'The Study of the Problem of Discrimination Against Indigenous Populations', Vol V No. E.86.XIV.3 (United Nations publication).

¹⁶² N 103 above pp 255 and 276.

While the government was trying to advance sustainable development; wildlife conservation, the act of withdrawing basics services and as a result forced the Basarwa to move from the CKGR leads to a conclusion that indigenous rights were not promoted and respected while aiming to achieve sustainable development. Further failure by the government to reinstate the essential services for the Basarwa does not conform to the concept of sustainable development where all parties should benefit.¹⁶³ Like in the Endorois case discussed above in this case too the government does not endeavour to balance indigenous rights while advancing sustainable development; wildlife conservation.

3.2.4 Richtersveld case in South Africa

The Richtersveld is a large area situated in the North Cape Province and since time immemorial it has been occupied by what is today called the Richtersveld Community. They claimed to have been disposed their land due to the discriminatory practices in South Africa prior to the end of the apartheid rule by a company named Alexkor Limited wholly owned by the government and which undertook mineral extraction. The South African Constitutional Court in the case of *Alexkor Limited and Another v The Richtersveld Community*¹⁶⁴ an appeal from the case filed by the Richtersveld Community against Alexkor Ltd at the Lands Claim Court for restitution of the land in dispute under the Restitution of Lands Act.¹⁶⁵ According to the Act person to be entitled to restitution of right in land if it was a community or part of community disposed land after 1913 as a result of past discriminatory laws or practices and claim not lodged later than 31st December 1998.¹⁶⁶ The subject matter in this suit was land located in the Richtersveld along the west coast from the Gariep (Orange) River in the north to just below Port Nolloth in the south.

One of the issues the Constitutional Court of South Africa had to grapple with was whether the right of ownership of the land had been extinguished by the Annexation

¹⁶³ Brundtland report n 8 above.

¹⁶⁴ *Richtersveld Community and Others v Alexkor Ltd and Another* (2003)12 BCLR 1301 (CC). This suit was appealed to the Supreme Court of Appeal *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) which granted relief to the Community.

¹⁶⁵ Act 22 of 1994.

¹⁶⁶ Sec 2(1) of the Restitution of Land Rights Act.

Proclamation of 1847. Another issue to be determined was whether the Community had a right to ownership of land after 19 June 1913.¹⁶⁷

The Constitutional Court in concurring with the decision by the Land Claims Court that the Community held a right of communal ownership for their land under indigenous law¹⁶⁸ after 1913 stated that the validity of the indigenous (customary) law must be determined with reference, not to common law, but to the Constitution under section 211(3) and courts must take into consideration the spirit and purpose of the Bill of Rights.¹⁶⁹ This right included the right to own minerals and resources in the land. The court was of the view that the 1847 Annexation Proclamation in which the British Crown acquired sovereignty over the land in question did not extinguish the rights held by the Richtersveld Community. The court further noted that the Richtersveld Community were disposed off their land under apartheid rule and ordered that the community was entitled to 'restitution of ownership of the land in question including mineral and resource'.¹⁷⁰

The decision in this case that the Richtersveld were entitled to restitution of their land held under customary law, is an indication that some courts in Africa have a progressive approach and thus try to balance both indigenous peoples rights and the right to development. It is necessary that courts and governments strike a balance when the right to development and indigenous peoples' rights conflict taking into consideration the impact of sustainable development on indigenous peoples rights.

3.3 Emerging approaches to resolving tension between indigenous rights and sustainable development:

The previously discussed case studies from Africa have shown that the indigenous peoples have tried to assert their rights whenever development activities carried out on their land have negatively affected them or infringed on their rights. Most of these developments in Africa are carried out by governments and funded by international financial institutions. This section will examine the approaches by the WB and the UNDP which fund development projects, programmes and policies undertaken on indigenous peoples' lands, resources and territories.

¹⁶⁷ This is the date that the Native Land Act 27 of 1913 which deprived black South Africans the right to own land came into operation.

¹⁶⁸ N 164 above par 62.

¹⁶⁹ N 164 above par 51.

¹⁷⁰ Par 109(1)(a) n 164 above.

3.3.1 The World Bank approach

The WB has been criticised for funding projects involving indigenous peoples particularly because the funds do not contribute to the improvement of lives and livelihood of the indigenous peoples making them reliant.¹⁷¹ Further, it has also been argued that the funds are channelled to ‘incompetent, corrupt and undemocratic’ governments¹⁷² and that developing countries are often in a weak position when negotiating with the WB and IMF.¹⁷³ Indigenous peoples have also raised concern that even the WB fails to hold on to its own policies.¹⁷⁴ Other problems included the benefits derived from the projects by the indigenous people, consultation on decision making.¹⁷⁵

Despite complaints over the severe impact and negative human rights encountered by the indigenous peoples over projects funded by the WB, the Bank was previously reluctant to address human rights issues. The Bank maintained the position that the Articles of Agreement of the WB prohibited it from interfering with the political affairs of its borrowers.¹⁷⁶ This previous held position could be a shift since under paragraph 1 of the OP 4.10 it requires that ‘free, prior, informed consultation’ is sought for all projects to be funded by the WB.¹⁷⁷

Although the WB was initially taking a ‘hands off approach’ with regard to political affairs of indigenous peoples, it has however indicated that the projects they fund on indigenous territories are intended to take a ‘sustainable approach to development which is socially, culturally, and environmentally sensitive’.¹⁷⁸

¹⁷¹ WB also grants funds to indigenous people and since 2003 the WB Grants Facility for Indigenous Peoples has been providing small funding for Indigenous People’s Organisations/Communities to advance what it calls cultural development programmes. The Bank has awarded 79 grants in 35 countries for a total amount of \$1.25 million. See www.worldbank.org.

¹⁷² N 58 above p 93.

¹⁷³ N 58 above pp 93-94.

¹⁷⁴ MacKay, F ‘The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?’ *Arizona Journal of International & Comparative Law* Vol 22, No. 1(2005) p 69.

¹⁷⁵ See R. Plant n 90 above p 11. see also World Bank Group, Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation Of Results, OED Report No. 25754, 10 April 2003, at http://www.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf accessed on 13 September 2007

¹⁷⁶ See Mackay, n 174 above p 69 and The World Bank, International Bank for Reconstruction and Development, Articles of Agreement, art IV sec 10.

¹⁷⁷ Since 1992 the WB has funded 261 projects involving indigenous people and 134 are currently underway. See the WB website www.worldbank.org.

¹⁷⁸ ‘Indigenous Peoples Among Earth’s Poorest, World Bank Head Says’ available on the US State Department <http://usinfo.state.gov/xarchives/display.html?p=washfileenglish&y=2004&m=September&x=200040924162601AKllenoCcM0.355587>, 24 September 2004 (accessed 19 September 2007).

This part will analyse the World Bank Operational Policy 4.10 on Indigenous Peoples (OP 4.10) which was approved by the World Bank's Board of Directors in May 2005. Prior to OP 4.10, there were other policies aimed at 'mitigating harm to indigenous peoples in WB financed-projects' which included: Operational Manual Statement 2.34: Tribal People in Bank-Financed Projects (OMS 2.34) which was criticised for being selectively applied.¹⁷⁹ OP 4.10 was replaced by Operational Directive 4.20 on Indigenous Peoples (OD 4.20) which provided informed participation and required projects to mitigate the impact on indigenous people, as well as ensure that they benefit.¹⁸⁰ The OP 4.10 and Bank Procedures 4.10 (BP 4.10) both replaced OD 4.20. 'The OP 4.10 and BP 4.10 apply to all projects for which a Project Concept Review takes place on or after July 1, 2005'.¹⁸¹

The negative impact and the lack of sustainability of projects undertaken under the previous policies led to the revision of these policies. With regard to revision of OD 4.20 the bank was of the view that;

People were sought of looked upon as objects or economic entities....We began finding that the development that we were promotinghad some very traumatic effects on these peoples. It introduced new diseases. The acculturation process which goes on when mainstream society comes up against these people was very unsavoury, was very traumatic. There clearly was a need for the Bank to get out in front of this and to adopt a policy....that said that the Bank was concerned about the future of these people and was going to do something about it.¹⁸²

While OD 4.20 defined indigenous peoples,¹⁸³ OP 4.10 in paragraph 4 does not provide a definition arguing that there is no international definition.¹⁸⁴ However, it adopts a definitional criteria giving more emphasis on land rights and states that for purposes of the policy the term 'indigenous peoples' is used to refer to 'a distinct, vulnerable, social and cultural group' possessing characteristics such as self-identification as indigenous peoples, collective attachment to land and territories, 'customary social, cultural, economic, social and political institutions' distinct from the larger society and an indigenous language often different from the national

¹⁷⁹ According to Akermark, S n 58 above p 98, it was applied to small groups in America and Central and South Africa and not to large groups in India, Southeast Asia or East and West Africa.

¹⁸⁰ OD 4.20 The World Bank Operational Manual, Operational Directive: Indigenous People, 1991 par 8

¹⁸¹ See World Bank Website <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> accessed 14 October 2007.

¹⁸² Wade, R 'Greening the Bank: The Struggle over the Environment, 1970-1995' in Kapur, D *et al* (eds.) *The World Bank: Its First Half Century*, Washington: Brookings Institution, 1997 Vol. II.

¹⁸³ See OD 4.20 n 180 above which defines "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" as 'social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process'.

¹⁸⁴ It recognises that that indigenous peoples may be referred to in different countries as 'indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'national minorities,' 'scheduled tribes' or 'tribal groups.'

language.¹⁸⁵ The policy further provides that it may be complicated deciding if a group is considered as 'indigenous peoples' and this may require 'a technical judgment' of a social scientist with 'expertise on the social and cultural groups in the project area.' The Bank in this regard may also consult indigenous peoples and the borrower. It may also follow the framework used by borrower for identification of indigenous peoples during project screening if this is consistent with the policy. In most cases borrowers are states and it therefore follows from this provision that the Bank may opt to use the national legal framework and policy used to identify indigenous peoples if they are consistent with the OP. The Bank is therefore not tied down to use self-identification as the only criteria or as a 'primary consideration.'¹⁸⁶ The use of national laws for example in Africa could be very challenging since the applicability of the term 'indigenous peoples' has not been fully embraced.¹⁸⁷

With regard to free, prior and informed consultation, the policy in paragraph 1 provides that projects to be financed by the Bank the borrower must engage in free, prior and informed consultation with the indigenous peoples. This means that the consultation should be sought at 'the earliest stage of the project', be free from any manipulation or coercion and there should be full information disclosure of the proposed project, this information should be both 'accessible' and comprehensible to the indigenous peoples.¹⁸⁸ It is worth noting that the Bank opts to use the word 'consultation' instead of 'consent' for example as contained in the ILO Convention 169, and DRIP.¹⁸⁹ Indigenous peoples have preferred that the Bank seeks free, prior and informed consent prior to undertaking any development projects on their land rather than consultation as contained in the policy arguing that consultation does not give them a right to say no to development projects¹⁹⁰.

The free, prior, informed consultation is also provided in paragraphs 6(c), 10 and 11 of the OP 4.10 but the policy does not make provision for how this consultation will be undertaken and which persons from the indigenous groups will be involved in consultation. It was relevant to make this provision considering that in most cases indigenous societies are not homogenous.¹⁹¹ The project only requires that the

¹⁸⁵ OP 4.10 pars 4(a)-(d).

¹⁸⁶ N 174 p 73.

¹⁸⁷ See the African Working Group report n 5 above p 88.

¹⁸⁸ N 174 above p 88.

¹⁸⁹ See arts 2, 6, 7, 15, 16(2) ILO Convention 169, arts 10, 11 (2), 19, 27 and 30, 32 of the DRIP

¹⁹⁰ Rivzi, H 'Indigenous People Want Power to Veto World Bank Plans' (2005) *Global Policy Forum* available on <http://www.globalpolicy.org/globaliz/cultural/2005/0531indigenous.htm>

¹⁹¹ See Goodland, R 'Free, Prior and Informed Consent and the World Bank Group', *Sustainable Development Law and Policy*, Volume IV, Issue 2, (2004) p 68.

consultation by the borrower is both the gender and intergenerational inclusive and take into consideration the interests of women, children and the youth. Further the concept of free, prior and informed consultation maybe difficult to apply in Africa particularly if the authorities do not recognise customary or collective land rights.

In identifying indigenous lands and territories the policy says that the indigenous peoples have to be physically present or have a collective attachment to the area¹⁹² and thus fails to recognise land and territories that indigenous peoples hold, use or occupy under customary law.¹⁹³ The policy further requires that in deciding whether to proceed with the project it is important that there is a 'broad community support' at each stage of the proposed project. There is no definition of what broad community support means in the policy.¹⁹⁴ As a result, this policy has been termed as 'broad, vague and ambiguous.'¹⁹⁵ Further it does not provide a definition for broad community support and the indigenous people are excluded in the determination of whether there exists a broad community support as only the borrower and the Bank are consulted¹⁹⁶ and the support is only a requirement for the social assessment and not necessary for the Indigenous Peoples Plan or an Indigenous Peoples Planning Framework (IPP/IPPF).

The policy has been further criticised in that it does not require that the borrower, in most cases who are government, adopt legal framework to recognise collective and customary ownership of indigenous land and territories.¹⁹⁷ While paragraphs 12 and 13 require the borrower to take into account both individual and collective rights, there is no provision on 'legal recognition' of the indigenous land.

With regard to involuntary relocation, the policy requires that the borrower to opt for other projects to avoid relocation,¹⁹⁸ and if not possible to prepare a resettlement plan in accordance with OP 4.12 Involuntary Resettlement. While the DRIP¹⁹⁹ and ILO

¹⁹² Collective attachment 'means that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied by the group concerned, including areas which hold special significance for it, such as sacred sites' see Policy 4.10 n 13 above.

¹⁹³ Par 16 of the policy only calls on the borrower to take into consideration customary rights of indigenous people when carrying out the social assessment and in preparing IPP/IPPF but this is not included in the determination of indigenous rights to land, territories and resources.

¹⁹⁴ Mackay, F n 174 above p 82.

¹⁹⁵ N 190 above.

¹⁹⁶ See OP 4.10 par 11.

¹⁹⁷ Mackay, F n 174 above p 92 see also Akermark, S n 58 above p 107.

¹⁹⁸ OP 4.10 par 20.

¹⁹⁹ Arts 28 and 16 of DRIP.

Convention 169²⁰⁰ require that when relocation is undertaken the indigenous peoples are granted compensation the WB policy fails to provide for adequate and just compensation.

Paragraph 21 requires that involuntary restriction of access to protected areas and parks should be avoided where feasible. The policy in this case avoids applying 'broad community support' and has been criticised for the use of the word 'involuntary'²⁰¹

It is imperative to point out that the WB has also adopted the Social Development Strategy in which it aims to hold the WB accountable so that others would watch what the bank does and report back to it. Despite this strategy OP 4.10 fails to involve an independent verification mechanism for consultation and negotiation process with the indigenous peoples thus weakening it.

In conclusion, it seems that while the OP 4.10 is meant to be an improvement of previous policies by the WB the true test remains in its implementation and to what extent borrowers embrace and put into effect the policy.

3.3.2 The United Nations Development Programme approach

The UNDP obtains its mandate to engage with indigenous people from the United Nations Charter which states that 'We the peoples ... reaffirm faith in fundamental human rights, in the dignity and worth of the human person... (and) promote social progress and better standards of life in larger freedom.'²⁰²

UNDP's engagement with indigenous peoples is also guided by the 2001 policy guidance note entitled: UNDP and Indigenous Peoples: A Policy of Engagement (herein after called the UNDP and Indigenous Peoples Policy) which aims to provide 'UNDP staff with a framework to guide their work with indigenous peoples'²⁰³ It also emphasizes the normative human rights framework and recognizes indigenous peoples' vital role in, and contribution to, development.²⁰⁴ In May 2000, UNDP established a Civil Society Organizations Advisory Committee to the Administrator to

²⁰⁰ Arts 15(2) and 16(5) of ILO Convention 169.

²⁰¹ Mackay, F n 174 above p 96.

²⁰² See the Preamble of the United Nations Charter.

²⁰³ UNDP and Indigenous Peoples Policy: A Policy of Engagement (2001) pars 2, 6 and 9. Available on http://www.hreoc.gov.au/social_justice/conference/engaging_communities/unpan021101.pdf accessed on 18 October 2007.

²⁰⁴ N 3 above par 18.

provide strategic advice to senior management on key policy directions including issues on indigenous peoples. There is also the UNDP and Civil Society Organizations: A Toolkit for Strengthening Partnerships launched in 2006 and guides country offices in developing partnerships and programmes with civil society organizations (CSO) including indigenous peoples' organization. In addition the UNDP releases the Human Development Report which examines the development challenges experienced by indigenous peoples at the country level.

This part will analyse the UNDP and Indigenous Peoples Policy with regard to sustainable development and indigenous peoples' rights. The policy identifies the following areas for UNDP support; participation, self-determination, conflict prevention and conflict-building, environment and sustainable development and globalization. It also seeks a human rights approach with regard to governance and development.

The main objectives for UNDP's engagement with the indigenous peoples are:

To foster an enabling environment that: promotes indigenous peoples' participation in all decision-making levels; ensures the co-existence of their economic, cultural, and socio-political systems with others; and develops the capacity of Governments to build more inclusive policies and programmes; and to integrate indigenous peoples' perspectives and concepts of development into UNDP work.²⁰⁵

The policy recognises that indigenous peoples are among the most poor, 'most marginalised in societies and they are deprived most basic rights to development'.²⁰⁶ The policy further provides for the engagement of indigenous peoples and their organisations in enhancement of democratic governance, prevention of conflict, poverty alleviation, and in sustainable environmental management.

While this policy provides for UNDPs engagement with indigenous peoples, it however leaves it to the UNDP country offices to determine who to engage with²⁰⁷ at the same time it stipulates that UNDP strives to shun from the 'top-down' approach with programmes dealing with indigenous peoples. There is no doubt that this lack of a conventional application to engagement may result to numerous approaches by different country offices and thus there is a need to streamline the policy with regard to the UNDP's engagement with indigenous peoples.

²⁰⁵ Par 25 n 203 above.

²⁰⁶ Par 2 n 203 above.

²⁰⁷ Par 47 n 203 above.

The policy does not define indigenous peoples but lists criteria to be used to identify indigenous peoples to include self-identification, distinct social, economic and political institutions, their attachment to land and territories they occupy, and their aspiration to remain distinct. According to the policy 'there does not exist any single accepted definition of indigenous peoples that captures their diversity as peoples'. It however notes that self-identification is regarded as an essential criterion to determine if a group is indigenous or tribal.²⁰⁸

The UNDP recognise that the indigenous peoples seek to participate and be represented at all decision-making stages principally those that 'may affect their human, developmental and environmental rights'.²⁰⁹ In this regard, the policy recognises the UNDP's strength in facilitating dialogue between the government, indigenous peoples and their societies and civil society organisations. However, UNDP country offices are left to decide what measures to adopt and the policy wording does not seem to obligate them to establish the Civil Society Organisation (CSO) committees.

UNDP seeks to play a lead role in capacity building, sensitization and staff training of its staff, civil society and government on indigenous rights and development. UNDP is also to assist in 'developing the relational capacity and negotiating skills of indigenous peoples to build networks and engage at various policy-making levels'.²¹⁰ However, the policy is weak as it does not involve the indigenous peoples in the process of capacity building and sensitization.

The policy adopts an inclusive approach since it calls for 'gender and generational balance' for representatives in the local and regional IPOs particularly the role of women considering their position in society as they experience 'triple discrimination' (poor, female and indigenous).²¹¹

The policy provides that UNDP supports the right to self-determination as provided for in ICCPR, ICESCR and the recently adopted Declaration of Indigenous Peoples Rights to freely 'determine their political status and freely pursue their economic, social and cultural development.' This right is however not to be misconstrued as promoting territorial disintegration and interfering with state sovereignty. There is no provision

²⁰⁸ See Cobo, M n 32 above.

²⁰⁹ Par 16(1) n 203 above.

²¹⁰ See par 45 of n 203 above.

²¹¹ Pars 60-61 of n 203 above.

from the policy on how the UNDP will help promote self-determination among the indigenous peoples. For example the policy does not provide whether UNDP will engage the government or the civil society in assisting the indigenous peoples pursue this right.

The policy further supports the balancing of indigenous peoples' rights with the environmental and sustainable development based on a balance between people, spirit, land and nature. While the policy recognises the special relationship between indigenous peoples to their land and resources and the impact of lack of recognition of customary land rights it refrains from addressing the issue. For example it should have made a provision for engaging with the governments to persuade them to recognise collective and customary land rights. However it may be interpreted that since the UNDP seeks to build capacity for the government, civil society and indigenous peoples and their organisations so that the government domesticates international laws of concern to indigenous peoples²¹² then it may utilise this opportunity to channel issues such as collective and customary land rights in accordance with international legal framework.

UNDP will also play a role in examining the impact of globalisation on the livelihoods of indigenous peoples especially with regard to 'food security, security of tenure, gender equity, intellectual and cultural property rights, and indigenous knowledge'. This policy supports globalisation that is fully inclusive, equal and equitable and where human rights and freedoms are respected. It recognises that the current global intellectual legal framework is not favourable to indigenous peoples. On the contrary it takes a 'hand-off approach' as it does not call for a review of the relevant international laws while it calls on the government to domesticate the CBD.²¹³

Like the World Bank, UNDP also does fund Indigenous Peoples Organizations (IPOs) in small grants programmes²¹⁴ which focus on poverty eradication, environmental conservation, dry land development, conflict prevention and resolution, and cultural revitalization²¹⁵ it seeks to involve the indigenous people in decision making process and poverty reduction strategies and processes by empowering them and their

²¹² Par 43 of n 203 above.

²¹³ N 203 above pars 33 and 34.

²¹⁴ According to par 20 of the UNDP policy UNDP/Global Environment Facility Small Grants Programme has supported over 300 projects involving indigenous peoples.

²¹⁵ N 203 above par 17.

organizations to 'network and influence policy'.²¹⁶ These grants have been criticized for being non-philanthropic and making the indigenous peoples more dependent on them.²¹⁷ Instead it is recommended that the UNDP focus on capacity building to enable the communities be self reliant.

3.4 Conclusion

The two policies while attempting to solve problems faced by the indigenous peoples and seeking to involve them they have some shortcomings. Although OP 4.10 was aimed at solving the inadequacies in previous policy it omits to define indigenous peoples and further does not provide for consultation at all stages of development projects.

Reading through the UNDP and Indigenous Peoples Policy, one gets the impression that the policy is preoccupied with solving the indigenous peoples' problems as understood by the UNDP but not as understood by the indigenous peoples themselves. In regard to UNDP involvement with indigenous peoples, Professor Hansungule, remarks that, 'my interactions with pygmies (Batwa) in Burundi, DRC, Rwanda and Uganda left me with the impression that the most pressing problems for the pygmies at least are (a) denial of political participation (b) lack of education and (c) deprivation of land.'²¹⁸ However, a manifestation of this preoccupation is expressed in the policy which is more focused on poverty eradication than solving any of the above issues.

²¹⁶ N 203 above par 36.

²¹⁷ Akermark, S n 58 above p 94.

²¹⁸ Interview with Professor Michelo Hansungule, Professor of Law, Faculty of Law, University of Pretoria on 13 July 2007 (notes on file with author).

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

While the normative framework recognises that development should take place in view of respect and promotion of human rights, the practice however has been different since there is always a tendency to extricate the two.²¹⁹ International financial institutions have however adopted policies and programmes that adopt a human rights approach with regard to development especially being undertaken on indigenous lands and territories. Some courts on the other hand have increasingly recognised the rights of indigenous peoples with regard to the land they occupy.²²⁰

Despite the burgeoning jurisprudence on indigenous peoples and the adoption of rich policies and approaches by international financial institutions indigenous peoples continue to remain marginalised and their rights are often violated.

As demonstrated by the case studies states have exacerbated the indigenous rights violations for example when they evict or forcefully remove indigenous peoples from the lands and territories they occupy without free, prior and informed consent and without compensation. When the evictions are done for extractive or environmental development purposes and where there is no free, prior and informed consent from the indigenous peoples or they are not adequately compensated it is arguable that the evictions and removals do not conform to sustainable development as defined by the Brundtland report.

This study has shown that there are some shortcomings and loopholes in the policies on indigenous peoples adopted by financial institutions and the policies do not address the indigenous peoples' most pressing problems but are instead preoccupied with the 'problems' as understood by the financial institutions.²²¹

Legal inadequacies particularly in African countries and the lack of an internationally accepted definition of indigenous peoples have contributed to the violation of indigenous peoples rights and more so when development projects take place on their land and territories. It is therefore essential that these shortfalls are tackled in an

²¹⁹ Riddell, R n 50 above p 11.

²²⁰ See n 103 above.

²²¹ See chapter 3 above.

attempt to bridge the two gaps. The next section will give recommendations to some of the deficiencies highlighted with regard to sustainable development and indigenous rights.

4.2 Recommendations

It is necessary that there is an internationally accepted definition of indigenous peoples particularly in Africa since there are specific human rights issues pertaining to certain groups of peoples who are marginalized, repressed and discriminated and thus imperative that these groups (indigenous peoples) are defined for their rights to be protected. The definition should however take into consideration the situation in Africa where states host several ethnic groups. It is thus vital that 'the term 'indigenous' is not misused as a 'chauvinistic term with the aim of achieving rights and positions over and above other ethnic groups or members of the national community, nor as a term by which to nurture tribalism or ethnic strife and violence.'²²²

While the adoption of the DRIP is a commendable step with concern to indigenous rights, it is recommended that a comprehensive convention on the rights of indigenous peoples is adopted. African states could in this regard come up with a regional convention specific to indigenous peoples in Africa. In this case party states will have international or regional obligations under the convention to protect and promote the rights of the indigenous peoples in their countries.

It is imperative that African states respect collective land rights to or customary/communal ownership of indigenous lands. These lands should therefore not be considered as public property which can be distributed to all without free, prior, informed consent from indigenous peoples and adequate compensation. In this regard it is essential that African states accede to the ILO Convention 169 and make efforts to domesticate it since it requires state parties to recognise customary ownership of land.²²³

Although, the protection of natural resources is consistent with the concept of sustainable development, governments should approach this with respect and promotion of human rights. Lack of compensation and failure to provide alternative land to settle or accommodation is not consistent with human rights as it violates rights

²²² *Indigenous Peoples in Africa: The Forgotten Peoples* n 5 above p 22.

²²³ Art 14 ILO Convention 169

including rights to housing, food, health, education for the children, and property. It is crucial that in carrying out such relocations and evictions governments come up with clear guidelines on evictions including compensation or alternative resettlement taking into consideration their international human rights obligation.

The policies by WB and UNDP should be more specific on how the projects they fund empower and build capacities for indigenous peoples. Further they should ensure that there is no gap existing between the rhetoric and the reality with regard to the projects they fund. These can be done by ensuring that borrowers assess the development policies taking into consideration indigenous peoples rights. A post evaluation on the projects they sponsor and the impact of these projects on indigenous peoples will also be vital in this regard. It is for this reason that it is recommended that the WB emphasize on the continuous assessment of development projects with particular reference to the impact on indigenous people both short term and long term.

Balancing sustainable development and indigenous rights entails *inter alia* that indigenous peoples have the capacity to influence policy processes and decision-making regarding sustainable development and human rights. It is therefore imperative that they are actively involved at all stages of the development process and that their free, prior and informed consent as opposed to consultation is sought.

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