

**UNIVERSITY OF PRETORIA**  
**FACULTY OF LAW**

**LLM: SOCIO-ECONOMIC RIGHTS: PRACTICE AND THEORIES**

**ENVIRONMENTAL CONSERVATION AND THE RIGHT TO NATURAL  
RESOURCES OF INDIGENOUS PEOPLE**

Dissertation submitted in partial fulfillment of the  
requirements of master's degree in law (LLM)

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## DECLARATION

I, **RUTABAGISHA Rosine** declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other works have been used, references have been provided. It is in this regard that i declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of master's degree in law (LLM)

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Signature.....

## **DEDICATION**

This dissertation is dedicated to my adorable husband. I also dedicate this dissertation to my late father and mother, my sister, my brothers and other members of my family.

## ACKNOWLEDGEMENTS

I am eternally grateful to God the Almighty father for His indescribable love and comfort in my life. Jesus you are the sense of my life, I offer you my soul. I am grateful to all who have contributed directly or indirectly to the successful completion of this LLM Program. I am greatly indebted to the University of Pretoria for affording me the opportunity to pursue further studies.

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## LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR: African Charter on Human and Peoples Rights

Art: Article

CAURWA : *Communauté des Autochtones du Rwanda*

CCB I : Civil Code Book I

COPORWA: Community of Potters in Rwanda

CRC: Convention on the Rights of the Child Discrimination

DRIP: Declaration on the Rights of Indigenous Peoples

DRTD: Declaration on the Right to Development

ECOSOC: United Nations Economic and Social Council

FAO: Food and Agricultural Organization

FPIC: Free, Prior and Informed Consent

GA: General Assembly [UN]

HIV/AIDS : Human Immuno-virus/Acquired Immuno-deficiency Syndrome

IACHR: Inter-american Court of Human Rights

ICERD : International Convention on the Elimination of All Forms of Racial

ICESCR: International Covenant on Economic, Social and Cultural Rights

ILO : International Labor Organization

IPRA: Indigenous Peoples Rights Act

MINALOC : Ministry of Local Government

NGO : Non- Governmental Organization

O.G : Official Gazette

UDHR : Universal Declaration of Human Rights

UN : United Nations

UNDP: United Nations Development Program

UNESCO: United Nations Educational, Scientific and Cultural Organization

UNPO : Unrepresented Nations and Peoples Organization

UR : University of Rwanda

USA : United States of America

Vol : Volume

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## CHAP.I: INTRODUCTION

Over the past three decades there has been a dramatic upsurge in international, regional, and local efforts to promote human rights for the cultures of the world that define themselves as indigenous. Variously called aboriginals, native peoples, tribal peoples, Fourth world peoples, or “first nations,” these populations have suffered acts of physical and cultural genocide, human rights’ abuses, discrimination, impoverishment and inequalities in access to land, capital, and employment for centuries.<sup>1</sup>

The above mentioned abuses are not only suffered by those called or calling themselves indigenous peoples but the latter suffer them with more acuity due to their peculiarities. The notion of who is indigenous is far from getting unanimity of researchers. That’s why controversies surrounding the way different tribes occupied for example Rwanda will not hinder us from exposing specific problems faced by former *Batwa* community nowadays called “*abatwa*” due to the historical background of terms *Twa*, *Hutu* and *Tutsi*.<sup>2</sup> It should be noted that the appellation *abatwa* itself implicitly considers *Batwa* community as the first land occupier.

The refusal of the government of Rwanda to recognize *Batwa* as indigenous peoples and the refusal to make reference to ethnic groups have led to the adoption of numerous appellations and representations: they changed from *batwa* to “*abatwa*” and “*Abahejweinyuma n’amateka*” or “historically marginalized people” and their representation has evolved from CAURWA (*Communauté des Autochtones du Rwanda*) to COPORWA (Community of Potters of Rwanda).<sup>3</sup>

Again this appellation is not fully accepted by stakeholders as, according to COPORWA leaders, because all *Batwa* are not potters (especially those from Northern Province of Rwanda); yet all

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<sup>1</sup> D.P FORSYTHE & C.P McMahan, *Human Rights and Diversity*, Lincoln, University of Nebraska Press, 2003 p. 205.

<sup>2</sup> The use of those terms is prohibited since the adoption in 2001 of the law no 47/2001 of 18/12/2001 instituting punishment for offenses of discrimination and sectarianism. See also the Constitution of the Republic of Rwanda of 2003, art.33(2) (*O.G* no special of 4 June 2003).

<sup>3</sup>Report of the African Commission Working Group on Indigenous Populations/Communities (hereinafter Working Group on Indigenous), Mission to the Republic of Rwanda 1-5 December 2008.p.31.

potters are not *Batwa* like the *Bayovu* for example<sup>4</sup>. Worth to mention is that the term *Abatwa* is still used as it can be seen in both the reports compiled by the Rwandan National Human Rights Commission and the Social Affairs Commission of the Rwandan Senate.<sup>5</sup>

I decided to research on these indigenous populations called because they have been plagued by the sense of inferiority imposed upon them by the dominant neighbours, have rarely if not never seriously participated in decision affecting their lives and have generally gained very little from the economic development of the state.<sup>6</sup>

Beginning with the *Batwa*, Since 1970<sup>8</sup>, this population nowadays known as *Abasangwabutaka* has been dispossessed of their land most of the time without proper compensation, the beneficiaries profiting from their ignorance<sup>7</sup>. It should be mentioned right here that this community mainly relied on making pots but were also hunter-gatherers.

Recently with the promulgation of the Land law and the Law on environment, they have no access to marshlands where they were getting clay for pottery and the access to forest is forbidden since the creation of National Parks and no compensation was paid.<sup>8</sup> However, even if the *abatwa s'* conditions are precarious, there are legal frameworks protecting them though as it will be later evoked, Rwanda has not ratified some of the international binding legal instruments related to rights of indigenous populations.

## **I.1. Problem statement**

Land and other natural resources are critical for the survival of any subsistence community. The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates to Articles 20, 21, 22, and 24 to the African Charter.

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<sup>4</sup>Interview with COPORWA leaders on July 7<sup>th</sup>, 2013The term *Abayovu* means potters from communities other than *Batwa*.

<sup>5</sup>National Human Rights Commission “*Raporo kumibereho y’Abatwa n’uburenganzira bwabo bw’ibanze*”,(hereinafter Rwanda Human Rights Report 2006), Kigali, 2006, and the Social Affairs Commission of the Senate“ *Raporo kumibereho yabamwe mu banyarwanda amateka agaragazak obasigaye inyuma*”, (hereinafter Rwanda Senate Report 2007),Kigali, 2007,p.17.

<sup>6</sup>Working group on indigenous, *supra* note 2, p.19.

<sup>7</sup> According to COPORWA, hectares of land were exchanged against one or two sheep.

<sup>8</sup>Working Group on Indigenous ,*supra* note 2, p.41.

Indigenous pastoral and hunter-gatherer communities in Africa have traditionally occupied areas well-endowed with natural resources. Such territories were adequate in size and ecological parameters mediated and supported the sources of their livelihood that formed the heritage of such communities.

Indigenous knowledge systems have evolved over many years, and natural resources have been utilized and managed in sustainable ways. However, over the years, key productive resources have been systematically alienated, leading to the shrinkage of their resource bases. Such a reduction in the resource bases for indigenous peoples has constrained their coping strategies and food insecurity has become a recurrent feature. Livestock holdings have been reduced from the pastoral communities and for hunter-gatherers game resources, wild berries, roots and honey have become increasingly inadequate.

Indigenous pastoralist and hunter-gatherers communities in Africa have been losing their land incrementally over the years. In many parts of Africa, this situation has been promoted by the assumption that the land occupied by the pastoralists and hunter-gatherers is *terra nullius* taken as land belonging to no-one.

The assumption that the land of pastoralists and hunter-gatherers is empty or not used productively has stimulated land alienation at all levels. The targeted pastoralist and hunter-gatherers communities have only, to a very limited extent, legal titles to their land as their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land.

The establishment of national parks and conservation areas has led to severe dispossession of pastoralists and hunter-gatherers communities. For instance, in 1998 the Batwa of the Nyungwe Forest in Rwanda were driven out in order to establish a military zone and a national Park. The Batwa of the Parc des Volcanos have also been driven out by conservation projects desiring to make as sanctuary for the mountain gorilla. This dispossession has led to impoverishment and a host of social and cultural problems. In Uganda, the *Batwa* were driven out of their ancestral land in the forests of Bwindi, Mghinga and Ecchuya by the English colonial administration in 1930 in order to create conservation zone. Many other examples can be found.

The needs of conserving environment have in many countries led to chase indigenous peoples in their historical living areas and deprived them their sources of food. This paper tends to reconcile the conservation of environment and the right to natural resources of indigenous peoples, a right enshrined and provided for in African Charter of Human and People's Rights. The main obstacle faced by indigenous peoples is the lack of clear legal framework for the protection of their rights and their voices alone are not heard.<sup>9</sup> In the name of national interests, most of resources traditionally used by for example the *abatwa* of Rwanda are no longer at their disposition and this has seriously contributed to their miserable way of living compared to other Rwandans.<sup>10</sup>

Considering these *abatwa* as any other Rwandan without discrimination has led to the adoption of good but inappropriate measures meant to address the problems because they are taken without consulting them and find out their views.<sup>11</sup> It even happened to have instances whereby these peoples were not aware of the favours accorded to them by the administration!<sup>12</sup> The government of Rwanda like other several countries has ratified most of the international human rights instruments but hasn't yet ratified conventions/treaties directly protecting indigenous populations/communities.<sup>13</sup>

## **I.2.Methodology**

This work is mainly a desk research through library research with special focus on the relevant statutes, books, journals, case law and reports from the media and different human rights organizations. The methodology will also include the use of the Internet. However, interviews with COPORWA (an umbrella organization for *abatwa* in Rwanda) leaders as representative of the study group will be resorted to.

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<sup>9</sup> K.A. Adem, *The Power of Indigenous Peoples to Veto Development Activities: The Right to Free, Prior and Informed Consent(FPIC) with specific reference to Ethiopia*, LLM Dissertation, University of Mauritius, p.11 (Unpublished).

<sup>10</sup> Rwanda Senate Report 2007, *supra* note 6, pp 4-9.

<sup>11</sup> Working Group on indigenous, *supra* note 3, p.46.

<sup>12</sup> *Ibidem* .

<sup>13</sup> *Idem*, pp 17-18.

### **I.3. Research questions**

This work has to answer a number of questions

- What is “environmental conservation?”
- Who are indigenous peoples and what are their rights?
- What are legal protections of rights to natural resource of indigenous peoples? In other world, what is the scope of rights to natural resource of indigenous peoples?
- Is there any legal link between environmental conservation and the right to natural resources of indigenous people

All these questions will be answered referring to legal framework available.

### **I.4. Hypothesis**

This study has a kind of anticipated answer which should be confirmed at the end of the research or not. By the time we start our research, our hypothesis is that if properly interpreted and applied, environmental conservation should not conflict with the right to natural resources of indigenous people but rather the two complement each other.

### **I.5. Literature review**

A literature review is a text written by someone to consider the critical points of current knowledge including substantive findings, as well as theoretical and methodological contributions to a particular topic. Literature reviews are secondary sources, and as such, do not report any new or original experimental work. Also, a literature review can be interpreted as a review of an abstract accomplishment.

In terms of indigenous peoples rights is concerned. As of now, there is no single definition universally accepted of indigenous peoples. The cause of this may be found in the fact that individual indigenous peoples’ communities’ present tremendous diversity in their cultures, histories but also today’s ways of existence.<sup>14</sup>

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<sup>14</sup>F. KAYITARE, *Indigenous Peoples’ Rights to Political and Economic Self-determination: A Case Study of Abasangwabutaka*, LL.B Dissertation, NUR, Butare, 2003, p5.(Unpublished).

The term “indigenous” has no accepted definition and its existence is an accident of history.<sup>15</sup>

Klein, Ernest, 1996 defines them as these groups as particularly vulnerable to exploitation, marginalization and oppression by nation states that may still be formed from the colonizing populations, or by politically dominant ethnic groups.

In the some view, Robert K. Hitchcock<sup>16</sup>, 2004 affirms that there is no single, universally accepted definition of the term "indigenous peoples"; however, the four most often invoked elements are:

- A priority in time
- the voluntary perpetuation of cultural distinctiveness
- An experience of subjugation, marginalization and dispossession and self-identification.

The definitions of indigenesness have changed over time to reflect the changing perceptions of the people within the framework of conceptualization Indigenesness, for example in Africa: From the advent of the colonial rule until decolonization, the concept was used to refer to all non-European natives on territories conquered and colonized by European powers. Under the early years of the post-colonial era, indigenesness was popularized as a concept referring to non-Europeans in countries where peoples mainly descending from European settlers remained dominant. The indigenous rights movement was internationalized to cover other (marginalized) groups, in Africa, Asia, Europe and the Pacific<sup>17</sup>.

In terms of rights of indigenous people is concerned, the UN Declaration was adopted on rights of indigenous people in 2007.

Under the said declaration, there is a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education,

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<sup>15</sup>R BARSH “*Indigenous Peoples: An Emerging Object of International Law*”, in American Journal of International Law, 1986, p.416.

<sup>16</sup>Robert K. Hitchcock, Diana Vinding, *Indigenous Peoples' Rights in Southern Africa*, IWGIA, 2004, p.8 based on *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of indigenous people*. UN-Dokument E/CN.4/Sub.2/AC.4/1996/2.

<sup>17</sup>S .VON LEWINSKI, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, Kluwer Law International, 2004, pp.130-131

health, employment, language, and others<sup>18</sup>. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development<sup>19</sup>. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples. Their ways of life have and Cosmo visions have contributed to the protection of the natural environment on which they depend on.

## **I.6.Limitation of the topic**

As there is a variety of indigenous peoples, this work cannot in whole study them at once. Thus it is delimited to the right to indigenous people in relation to environmental conservation. To be precise, this study bases to these communities from Great Lakes Region and Rwanda shall be taken as a case study for this research work. The author experienced some difficulties in gaining access to recent and interesting cases on the issue. In addition, it was difficult to get a general picture of indigenous people neglecting their rights to natural source in most society because a number of conflicts between social classes happen mostly behind closed doors and are not recorded anywhere since they are resolved within local authority. The other difficulty is that most of indigenous people don't know their rights. For that reason they don't claim their right before the courts or other administrative avenues. They accept their inferiority and neglect.

## **I.7.Chapter outline**

The study will consist of four chapters:

The present dissertation is divided into chapters and sections: The introductory and first chapter mainly sets down the objectives of the study; the research questions, the methodology and literature review. The second chapter deals with theoretical framework on environmental conservation and rights of indigenous peoples. Under this chapter, the key concept of environmental conservation and rights of indigenous people are discussed. The third chapter deals with the link between human rights and environmental conservation. The fourth concerns the challenges related to

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<sup>18</sup>K. ROBERT HITCHCOCK, Diana Vinding, *Indigenous Peoples' Rights in Southern Africa*, IWGIA, 2004, p.8 based on *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of indigenous people*. UN-Dokument E/CN.4/Sub.2/AC.4/1996/2

<sup>19</sup>S, DOUGLAS "*Indigenous peoples: Issues of definition*". *International Journal of Cultural Property*:1999.P.8

environmental conservation and indigenous rights to natural resources and possible mechanisms aimed at solving these challenges.

## **I.8. Conclusion**

In conclusion, during this present research, the author introduces by presentation of background of the topic. At the second, the statement of the problem, research questions, methodology, literature review, limitation of the study and outline of the chapters are the mains concerns of this introductory chapter.



## **CHAP.II: THEORETICAL FRAMEWORK ON ENVIRONMENTAL CONSERVATION AND RIGHTS OF INDIGENOUS PEOPLES**

### **II.1. Introduction**

As it was mentioned above, the notion of who are indigenous peoples is still subjected to debate. The term indigenous is a result of important movements of population spearheaded by colonial conquest, mass murder, dispossession, and displacement, especially in Australasia and the Americas. The international convention guarantees different rights including the rights to natural resources. The discussion under present chapter gives an overview on environmental conservation, indigenous people and their rights as rights holder. The definitions of key terms that help to understand the discussion are given under the present chapter.

### **II.2. Definition of key terms**

Under this section, the author defines the indigenous people and human rights.

#### **II.2.1. Indigenous people**

The survey on definition of indigenous people is still subjected to debate. The term indigenous is a result of important movements of population spearheaded by colonial conquest, mass murder, dispossession, and displacement, especially in Australasia and the Americas<sup>20</sup>.

According to the United Nations Special Rapporteur to sub-commission on prevention of discrimination and protection of minorities, indigenous communities, peoples and nations are:

“Those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”<sup>21</sup>.

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<sup>20</sup>F. VILJOEN, *International Human Rights Law in Africa*, New York, Oxford University Press, 2007, p. 277.

<sup>21</sup>University of Minnesota Human rights Center, *Study Guide: The Rights of Indigenous Peoples*, available at <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>, accessed on 14.05.2013.

The International Labour Organisation added another aspect of on this definition, which it refers as “Self-identification”<sup>22</sup>; i.e. the term will apply to those who identify themselves as indigenous. The controversies surrounding the definition of the term indigenous has led to the adoption of different attitude *vis-à-vis* the existence of indigenous peoples especially in Africa. African countries have adopted mainly two positions<sup>23</sup>:

1. They claim that there are no indigenous peoples whatsoever<sup>24</sup>;
  2. They state that the entire group in the country is indigenous. It should be noted that the *abatwa* who constitute our case study belong to a large group of *Batwa* (pygmies) disseminated through 7 countries of East and Central Africa and are estimated to be around 200,000 in the region<sup>25</sup>.
- It is clear that, the above mentioned definitions show that as of now, there is no universally accepted definition of indigenous peoples, mainly because of the diversity between countries and regions, differences in history and cultures.

However, self-identification as indigenous and marginality have been the central elements. Noteworthy is that these controversies surrounding the term indigenous peoples shall in no case constitute impediments to the realization and enjoyment of human fundamental rights. Some of those fundamental human rights will be discussed in the next paragraphs.

### **II.2.2.Human rights**

Human right refers to the concept of human beings as having universal rights, or status, regardless of legal jurisdiction or other localizing factors, such as ethnicity and nationality. As is evident in the United Nations Universal Declaration of Human Rights, human rights, at least in the post-war period, are conceptualized as based on inherent human dignity, retaining their universal and inalienable character.

The existence, validity and the content of human rights continue to be the subject to debate in philosophy and political science. Legally, human rights are defined in international law and

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<sup>22</sup>ILO Convention 169 art 1(2)

<sup>23</sup>D.P Forsythe & C.P McMahon, *Human Rights and Diversity*, Lincoln, University of Nebraska Press, 2003 p. 205.

<sup>24</sup>This is the current position of Rwanda as the notion of sequences of occupying Rwanda territory is, as of now, contested contrary to what was taught that *Batwa* came first followed by *Bahutu* and *Batutsi* respectively. There is nothing scientifically acceptable proving that theory of occupation.

<sup>25</sup>.D P Forsythe & P C McMahon, *supra* note 1, p.211

covenants, and further, in the domestic laws of many states. However, for many people the doctrine of human rights goes beyond law and forms a fundamental moral basis for regulating the contemporary geopolitical order. For them, they are democratic ideals<sup>26</sup>.

Human Right can be defined as any basic right or freedom to which all human beings are entitled and in whose exercise a government may not interfere including rights to life and liberty as well as freedom of thought and expression and equality before the law<sup>27</sup>.

However, Universal Declaration on Human Rights provides in its article 1 that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood”<sup>28</sup> and Article 2 states the basic principles of equality and non-discrimination where it provides that “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national, or social, origin, property, birth or other status”<sup>29</sup>.

Thus, human rights entail both rights and obligations .So far, States assumes obligations and duties under international law to respect and to fulfil human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and group against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights<sup>30</sup>.

## **II.2. Notions on indigenous people and their rights**

The rights of indigenous peoples were closely linked to minority rights, but later on, many commentators alongside with indigenous peoples themselves, and the regional as well as international bodies recognized the indigenous peoples as a distinct group with distinct problems<sup>31</sup>. The views on indigenous peoples and those on minorities are different: they share

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<sup>26</sup> *Human Rights Definition* available on <http://www.youthtrafficking.net/tc/.../Human%20Rights%20Definition.pdf> accessed on 25, August, 2013.

<sup>27</sup> *Human Rights Definition*, available on <http://www.thefreedictionary.com/human+right>, accessed on 25/09/2011

<sup>28</sup> Art1 of UDHR.

<sup>29</sup> *Idem*, Art.2.

<sup>30</sup> MUSONERA Innocent, *Human Rights, National University of Rwanda*, class note, LLBIV, p. 21.

<sup>31</sup> R Smith, *Texts and Materials on International Human Rights*, 2<sup>nd</sup> ed., New York, Routledge, 2010, p.546.

mainly preoccupations about culture, education, language, identity but texts on indigenous peoples' rights are replete with land rights<sup>32</sup>. The discussed rights are human fundamental rights as they are, in my understanding, at the basis of one's development i.e. one can't pretend to be developed unless he/she enjoys those rights.

### II.2.1. Right to food

The right to food is a human right. It protects the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition<sup>33</sup>. This right is laid down in several international human rights instruments, but most importantly in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This article recognizes two dimensions of this right<sup>34</sup>:

- a. An element of adequate standard of living (art.11 (1));
- b. A fundamental right to freedom from hunger (art.11 (2)).

States have particular obligations concerning the right to food of indigenous peoples. These include respecting indigenous peoples' traditional way of living, strengthening traditional food system and protecting subsistence activities such as hunting, fishing and gathering<sup>35</sup>. The right to food imposes to government an obligation to respect, protect and fulfil<sup>36</sup>.

Obligation to respect: government should refrain from taking any actions that would negatively affect people's existing right to food;

- Obligation to protect: requires government to ensure that third parties do not take any actions that negatively affect indigenous rights to food;

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<sup>32</sup>F. Viljoen, *supra* notes 29, p. 277.

<sup>33</sup>J ZIEGLER, *Right to Food*, p.1 available at <http://www.righttofood.org/new/html/wharighttofood.html> accessed on 23 August, 2013.

<sup>34</sup>L. KNUTH, *The Right to Adequate Food and Indigenous Peoples: How Can the Right to Food Benefit Indigenous Peoples*, Rome, 2009, p.14 available at <http://www.fao.org/righttofood/publi09/indpeoples.pdf> accessed on 30 June 2013

<sup>35</sup>FAO and the Secretariat of the Permanent Forum for Indigenous peoples, *The Right to Food and Indigenous Peoples*, Rome, 2008, p.2 available at [http://www.fao.org/righttofood/wfd/pdf2007/focus\\_indigenous\\_eng.pdf](http://www.fao.org/righttofood/wfd/pdf2007/focus_indigenous_eng.pdf) accessed on 22 August, 2013.

<sup>36</sup>UN, *Note of the UN Secretary General to the G.A.*, New York, September 2005, p.7 available at <http://www.righttofood.org/new/PDF/A6035.pdf>, accessed on 21 August, 2013.

- Obligation to fulfill: requires government to take steps to address the marginalization, hunger and poverty of indigenous communities, respecting indigenous peoples own priorities to ensure their integrity and cultural survival.

The human rights are closely connected and one will never have full rights if he/she is properly fed but lacks shelter. Hence the right to housing is also important and the government should do whatever it can to make sure citizens have adequate houses.

### **II.2.2.Right to housing**

The right to housing is a universal human right internationally recognized in more than one hundred national constitutions<sup>37</sup>. This right to adequate housing is vital for human survival and life with dignity. In the absence of this right, many other human rights will be compromised mainly the right to family life and privacy, the right to freedom, the right to health, right to development, etc<sup>38</sup>.

There are minimal elements which should be guaranteed before talking of adequate housing<sup>39</sup>:

- Legal security of tenure;
- Availability of services, materials and infrastructure;
- Affordability;
- Habitability;
- Accessibility for disadvantaged groups;
- Location (far from polluted site but near health care, schools, etc). Again, the right to housing is meaningless if one is deprived of the right to education, which is at the cornerstone of any development.

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<sup>37</sup>C.GALAY & M.Özden, *The Right to Housing: A fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions*, p.2 available at <http://www.cetim.ch/en/documents/bro7-log-A4-an.pdf> accessed on 30 August, 2013.

<sup>38</sup>C.SIDOTI, *Housing as a Human Right*, Sydney, 1996 available at <http://www.righttohousing.org/en/about/direito/-a-moradia/> accessed on 03 August 2013.

<sup>39</sup>C.Galay& M Özden, *supra* note 48, p.4.

### II.2.3.Right to education

The right to education is recognized as a human right and is understood to establish an entitlement to education. According to the International Covenant on Economic, Social and Cultural Rights the right to education includes the right to free, compulsory primary education for all<sup>40</sup>, an obligation to develop secondary education accessible to all in particular by the progressive introduction of free secondary education<sup>41</sup>, as well as an obligation to develop equitable access to higher education in particular by the progressive introduction of free higher education<sup>42</sup>.

The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. In addition to these accesses to education provisions the right to education encompasses also the obligation to rule out discrimination at all levels of the educational system, to set minimum standards and to improve quality<sup>43</sup>.

The accessibility of education is so often presented as the means to achieve right to education that in the end we tend to combine the two. The question is far more complex than that, despite the fact that some persons have tendency to simplify issues in order to hide some other intentions<sup>44</sup>.” It is clear that right to education differs with mere accessibility to education as one having access to education may fail to enjoy that right due to other factors like health or economy.

The right to education is enshrined in many international legal instruments and some are legally binding while others are not. The most important - binding ones-are the international Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC)<sup>45</sup>.

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<sup>40</sup> Article 13.2(a), International Covenant on Economic, Social and Cultural Right, adopted on.....(Hereinafter ‘ICESCR’).

<sup>41</sup>Article 13.2(b) ICESCR.

<sup>42</sup>Article 13.2(c), ICESCR.

<sup>43</sup> *A Human Rights-Based Approach To Education For All*. UNESCO and UNICEF, 2007, p.7 available on <http://unesdoc.unesco.org/images/0015/001548/154861E.pdf> accessed on 03 August 2013

<sup>44</sup>C.HENAY, *Conditions Favourable to the Realization of Right to Education: Issues and Implications for Aboriginal Peoples*, 2001, p.129 available at <http://www.cifedhop.org/fr/publications/thematique/thematique9/Henay.pdf> accessed on 23 August , 2013

<sup>45</sup>ICESCR art 13(1) and CRC art28 (1).

At national level, this right is also provided for in the Rwandan constitution<sup>46</sup>. The main attributes of the right to education are<sup>47</sup>:

- Universal access to primary education free and compulsory for all;
- Accessibility to second education in its different forms;
- Capacity- based access to higher education;
- Opportunities for continuing education and literacy program and lifelong learning;
- Minimum international standards of quality education and of the teaching profession.

Human rights in general enclose many kinds of rights and in those rights also the education is among them that's why in the Universal declaration of human rights and multiple legal documents do recognize the right to education internationally regionally and nationally as it is provided in CEDEW that states parties to this convention shall take all appropriate measures to eliminate discrimination against women in order to ensure for them equal rights with men in the field of education and in particular to ensure on a basis of equality of men and women<sup>48</sup> and the UDHR also provided it in his articles that Everyone has the right to education<sup>49</sup> the mere existence of those rules ensure the observance of them and the effective mechanisms to enforce them.

Even though education is of paramount importance in enhancing human rights, it will never achieve this goal when those being educated enjoy an unhealthy life and have no proper health care at their disposition. The right to health care will follow in the next sub-section.

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<sup>46</sup>The Constitution of the Republic of Rwanda of June 2003 as amended to date, Art 40 (O.G no special of 4 June 2003).

<sup>47</sup>UNESCO, *Inclusive Dimensions of the Right to Education: Normative Bases*, available at <http://unesdoc.unesco.org/images/0017/001776/177649e.pdf> accessed on 23 August 2013.

<sup>48</sup>Article 10 of CEDAW.

<sup>49</sup> Article 26 of UDHR adopted at 10 December 1948 (Hereinafter 'UDHR')

## II.2.4. Right to health care

The right to health care is provided for in almost all the international legal instruments, inter alia, the Universal Declaration of Human Rights, (UDHR), ICESCR, International Convention on the Elimination of Racial Discrimination (ICERD), etc.

The scope of the right to healthcare is difficult to define: with the variety of tests and treatments, it is difficult to determine where this right ends<sup>50</sup>. However, irrespective of the difficulties, an effective health care is essential to preserve life and health through diagnosis and treatment, early intervention to minimize the impact of illness and injury; identifying and managing risks to health and through supporting the capacity of individuals to take responsibility for their own health<sup>51</sup>.

The rights to food, education, healthcare and housing have been dealt with in this work not by simple hazard. It was rather motivated by the great importance they bear in as far as human development is concerned. Therefore, it would sound unfair to analyze indigenous rights to development without looking at those specific and important human rights.

The above chapter has laid down foundation for a better understanding of the most important terms encountered in this dissertation. Again we tried to show some components of the right to development. The next chapter will deal mainly with who are indigenous peoples with special reference to a group called *abatwa* found in Rwanda and we will put emphasis on the human rights related problems faced by this very community.

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<sup>50</sup>M. Moore, *A Right to Health Care*, Cato Institute, available at [http://www.cato.org/pub\\_display.php?pub\\_id=844](http://www.cato.org/pub_display.php?pub_id=844) accessed on 12, August, 2013.

<sup>51</sup>Dwyer & al, *National Strategies for Improving Indigenous Health and Health Care*, commonwealth of Australia 2004, p.12 available at [http://www.health.gov.au/internet/main/publishing.nsf/content/EC09AB903EAD9CA3CA25722BOO83428F/\\$file/vol1\\_national.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/EC09AB903EAD9CA3CA25722BOO83428F/$file/vol1_national.pdf) accessed on August 23, 2013.



### II.3. Current Position of Government on recognition of *Batwa* as Indigenous to Rwanda

In the aftermath of the 1994 Rwandan genocide, the Government of Rwanda has sought national unity and reconciliation by implementing policies and laws aimed at entirely eliminating distinctions among ethnic groups. Thereby, the Government of Rwanda refuses to recognize the existence of minority and indigenous groups in Rwanda. The *Batwa* live not only in Rwanda, but also in Burundi, Uganda, and the Democratic Republic of Congo and are generally considered an indigenous people in the region.

The Government report<sup>7</sup> mentions the *Batwa* in relation to a description of the origins of the Rwandan people, merely to state that all Rwandans are the same, and ‘myths’ of different ethnic origins among the Hutus, Tutsis, and *Batwa* ‘were discounted’. It states that no distinct ethnic groups exist in Rwanda, because no ethnic difference has ever existed. Thereby, the Government argues that Rwanda is home to only one shared ethnicity resulting from a common ancestry: ‘the ethnic group of *Banyarwanda*’. While the Government has criminalized mention of ethnic distinctions<sup>52</sup> and does not consider the *Batwa* as a distinct indigenous people, the Government includes two mentions of ‘historically marginalized groups’.

Although the Rwandan government gives no definition of who this group includes or what their situation is, in Rwanda it is widely understood that ‘historically marginalized groups’ refers to the *Batwa*. The current Constitution of Rwanda (2003) does place emphasis on the rights of “marginalized and excluded groups “as stated in Article 9. However, the government refused to recognize the *Batwa* as a group that is marginalized and discriminated against, and this has led to them being ignored in government programs to provide social welfare and development services such as primary healthcare, shelter and clean water.

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<sup>52</sup>Law No 47/2001 of December 2001 instituting punishment for offences of discrimination and sectarianism provides for penalties to be imposed on people for divisionism or sectarianism, meaning “the use of any speech, written statement, or action that divides people, that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination

### II.3.1. Meaning and origin of *batwa*

The *Batwa* are an indigenous ‘hunter-gatherer’ people, traditionally inhabiting the forests of the Great Lakes Region of Africa, who have been evicted from their forest homes over many decades beginning in pre-colonial times<sup>53</sup>. The *Batwa* can claim to be the original inhabitants of Rwanda, being related to other ‘Pygmy’ peoples of Central Africa. Although no official figures exist and it is difficult to estimate the numbers of the *Batwa*, estimates place the population in Rwanda at 33,000, or about 1% of the country’s population. The *Batwa* are dispersed throughout the country in small groups, and none are believed to maintain a traditional existence as forest-dwellers<sup>54</sup>. Most *Batwa* work as potters, though others earn a living as day laborers or porters. Almost none own land or cattle.

### II.3.2. Origin of *Batwa*

The *Batwa* Pygmies are believed to be the original inhabitants of the equatorial forests of the Great Lakes region of Central Africa<sup>55</sup>. In the nineteenth century, incoming agriculturalists and pastoralists started the process of deforestation, clearing forests for cultivation. The *batwa* were integrated into society at the lowest level, although they were also important in the courts of the pre-colonial kings and chiefs, as performers, spies, hunters and warriors. The *batwa* were the only inhabitants of the study area until at least the mid-16<sup>th</sup> century. The *batwa* were mostly forest hunter-gatherers, though some may also have lived in savannah forest or Forest Lake environments<sup>56</sup>. At that time the study area would have been the northern frontier territory of the pre-colonial Rwandan state.

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<sup>53</sup>Lewis, Jerome. “The *Batwa* Pygmies of the Great Lakes Region,” *Minority Rights Group International*: June 2000, p25.

<sup>54</sup>Report of the African Commission’s Working Group on Indigenous Populations/Communities: Mission to the Republic of Rwanda, Note 4, p31.

<sup>55</sup> Wähle, E., ‘*The Twa of Rwanda: survival and defence of human rights*’, in K. Biesbrouck, S. Elders and G. Rossel (eds), *Central African Hunter-Gatherers in a Multidisciplinary Perspective: Challenging Elusiveness*, CNWS, Universiteit Leiden, 1999, p. 265–78.

<sup>56</sup> J. WOODBURN, ‘*Egalitarian societies*’, *Man, the Journal of the Royal Anthropological Institute*, vol. 17, no. 3, 1982, p431–51.

The batwa are the oldest recorded inhabitants of the Great Lakes Region in Central Africa. While many people in this area have histories of migration the batwa emphasize they have no origins elsewhere, but are indigenous to this region. Today they are found in the territories of Rwanda, Burundi, Uganda and the eastern part of the Democratic Republic of Congo<sup>57</sup>.

### II.3.3. NGOs activities/ Local /International based in Rwanda

The main purpose of this section is to provide insight into the defence of human rights in Rwanda from a non-governmental organization (NGO) perspective. This perspective is based on the experience of (NGO) which has been actively working with communities in Rwanda for over, and which has more recently become involved in advocacy for securing the recognition and protection of indigenous in *rwanda*<sup>58</sup>. Finally, this section will attempt to place NGO work within the broader context of recent developments in Rwanda. Thoughts on the opportunities and remaining obstacles from a practitioner's perspective will also be shared.

#### II.3.3.1. (CAURWA) Communauté des Autochtones Rwandais

Created by the government is the alternating names of NGOs that support the *Batwa*. For instance the prominent NGO known as the Association of the Promotion of *Batwa* (APB) eventually joined the more broadly named Community of Indigenous Peoples of Rwanda (CAURWA)<sup>59</sup>. However, the presence of the adjective "indigenous" in the name of the organization led to threats by the government to revoke their license and CAURWA had to change its name to the Organization of Rwandan Potters (COPORWA). On 12 July 2011, the Rwandan government once again reaffirmed the position that recognition of the *Batwa* goes against the constitution, threatening to revoke all NGO assistance unless the *Batwa* campaign for recognition is terminated<sup>60</sup>.

Consequently, cultural heritage and diversity lack protection in Rwanda. It has long been documented that the cultural histories, habits and practices of the *Batwa* differ from those of other Rwandans. Yet the

<sup>57</sup> African Commission's Working Group On Indigenous Populations/Communities, 2010 Report Of The African Commission's Working Group On Indigenous Populations/Communities: Mission To The Republic Of Rwanda 1 –5 December 2008. Banjul, Gambia. p.29

<sup>58</sup> Minority Rights Group International (2000). *The Batwa Pygmies of the Great Lakes Region*. London, UK, p. 21.

<sup>59</sup> Republic of Rwanda, Ministry of Justice (2009). "The 9th & 10th Periodic report Of The Republic Of Rwanda Under The African Charter On Human And Peoples' Rights". p. 14.

<sup>60</sup> Minority Rights Group International (2000). *The Batwa Pygmies of the Great Lakes Region*. London, UK. p. 26.

Government fails to recognize and respect the distinct nature of the *Batwa* and the diversity of Rwanda to which it contributes. It is becoming harder for the *Batwa* to keep their own culture and not to be assimilated. For instance, some younger *Batwa* could not even remember if there had ever been such a thing as a *Batwa* language. The older *Batwa* however confirmed that there had been a distinct language which was modified by the *Rukiga* language<sup>61</sup>.

### **II.3.3.2. (AIMPO) African Indigenous and Minority Peoples Organization**

AIMPO is non-governmental organizations; its main tasks are to increase recognition and respect for the rights of the *Batwa*, to enhance participation and representation in the decision-making process and to promote appropriate social development through intercommunity cooperation (leading to effective participation in the economy on the *Batwa*'s own terms. They are however other NGOs working on issues related to rights of indigenous people like (UNIPROBA) Un missions-nous pour la Promotion *Batwa*<sup>62</sup>.

### **II.4. Main human rights concerns of indigenous peoples**

Indigenous peoples' rights are laid down in the United Nations Declaration on the Rights of Indigenous Peoples<sup>63</sup>. It's noteworthy to mention that the International Labor Organization (ILO) was one of the first international bodies to address indigenous peoples rights mainly concerning recruitment of indigenous peoples (ILO convention 50), protection and progressive integration of indigenous and other tribal populations into their respective communities (ILO 107), the ILO 169 aimed at revising the ILO 107 for a better protection of indigenous peoples rights<sup>64</sup>.

Indigenous peoples enjoy all the rights any other populations enjoy. However due to the fact that they have been, *de jure* or *de facto*, neglected and do not enjoy some development programs, special rights have been introduced to help them fill the gap between them and other populations. Some of the specific rights recognized to the indigenous peoples especially at the international level are: the right to economic and political self-determination, right to ancestral lands, right to

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<sup>61</sup>GEF Evaluation Office. *Case Study: Impacts of Creation and Implementation of National Parks and of Support to Batwa on their Livelihoods, Well-Being and Use of Forest Products*, September, 2007, p.23

<sup>62</sup>S. Slimane, *Recognizing Minorities in Africa* (Minority Rights Group International, 2003), available at <http://www.minorityrights.org>, accessed on December, 24. 2013.

<sup>63</sup> This Declaration was adopted by the General Assembly Resolution 61/295 on September 13, 2007.

<sup>64</sup>R Smith, *Texts and Materials on International Human Rights*, 2nd ed., New York, Routledge, 2010, p.546.

preserve their cultural identity, right to development, right to a clean environment, right to non-discrimination, *etc*<sup>65</sup>.

It should be noted that no African country has ratified the ILO 169 and surprisingly only four of the thirteen African countries members of the Human Rights Commission have voted in favor of the UN Declaration on the Rights of Indigenous Peoples<sup>66</sup>.

This is a clear indication that from the very beginning, African States were reluctant to sign whatever is in relation with indigenous peoples hence refuting any special recognition of their rights as indigenous peoples. This resistance of African states was motivated on the one hand by the problem of determining who the “first peoples” are and on the other hand by the fear that recognizing indigenous rights to self-determination will lead to explosion of the already fragile states<sup>67</sup>.

Being part of Africa and taking into consideration the genocide perpetrated against *Tutsi* in 1994, the government of Rwanda has proscribed any reference to ethnicity and the theory of *Batwa* s first peoples is nowadays completely rejected<sup>68</sup>.

However, bearing in mind that the definition of indigenous peoples is controversial but also that the sequence of occupying the land is superseded by the notion of self-identification as indigenous peoples supported by the factors such as marginalization threatening extinction<sup>65</sup>; I shall look at the situation of a current community known as *Abasangwabutaka*, formerly called *Batwa*, considering them as an indigenous community.

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<sup>65</sup> M. MOORE, *A Right to Health Care*, Cato Institute, available at [http://www.cato.org/pub\\_display.php?pub\\_id=844](http://www.cato.org/pub_display.php?pub_id=844) accessed on August, 1, 2012.

<sup>66</sup> F.VILJOEN, *International Human Rights Law in Africa*, New York, Oxford University Press, 2007, p. 277.

<sup>67</sup> *Ibid.*

<sup>68</sup> It should noted that any reference to the terms *Hutu*, *Twa* and *Tutsi* may result in an offence of divisionism as it is stipulated in the Law no 47/2001 of 18/12/2001 on prevention, suppression and punishment of the crime of discrimination and sectarianism, art.3( O.G no 4 of 15 February 2002).

## **II.4. Conclusion**

To conclude, the right of indigenous people are recognized under different instruments of human rights. Those are for example; Universal Declaration of Human Rights, (UDHR), ICESCR, International Convention on the Elimination of Racial Discrimination (ICERD).The rights contained in these instruments like, Right to Food, Right to Housing, Right to Education and Right to Health Care are common to all people. Main human rights concerns of indigenous peoples are drowning in United Nations Declaration on the Rights of Indigenous Peoples including the rights to natural resources. In order to understand the main meaning of this topic, the link between human rights and environmental conservation are discussed in the following chapter.

## **CHAP.III. THE LINK BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL CONSERVATION**

### **III.1. Introduction**

The study of link between human rights and environmental conservation is debatable topic under international human rights. For that reason the main concern under this chapter is the link between human rights and environmental conservation. The rights of indigenous people to natural resource and their duties to conserve and protect the environment are discussed. It is kind of seeing what relationship between human rights and environment conservation is. But for better comprehensive the following subsection discusses on the definitions of environment and environmental conservation.

#### **III.1.1. Environment**

Environment literally means surrounding and everything that affect an organism during its lifetime is collectively known as its environment<sup>69</sup>.

In other words “Environment is sum total of water, air and land interrelationships among themselves and also with the human being, other living organisms and property”. It includes all the physical and biological surrounding and their interactions. Environmental studies provide an approach towards understanding the environment of our planet and the impact of human life upon the environment. Thus environment is actually global in nature, it is a multidisciplinary subject including physics, geology, geography, history, economics, physiology, biotechnology, remote sensing, geophysics, soil science and hydrology etc.

#### **III.1.2.Environmental conservation**

Conservation is defined as judicious use to avoid wastage of materials and degradation of environment. Conservation of environment involves the conservation of the natural resources. The non-renewable resources have to be conserved as they cannot be replenished. The reserves of the resources such as fossil fuels are limited and man is heavily dependent on these resources

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<sup>69</sup>K. DAVID Walker *Environment Dictionary*. London, UK: [Routledge](#). 1998.p.251

for his day to day needs. The renewable resources too have to be judiciously used<sup>70</sup>. Though they are replenished, they are subjected to a lot of pollution that renders them useless.

For example: water is plenty on earth. However, most of it is in the ocean and cannot be used as such by man. Man can only use the fresh water of the rivers that are being polluted by man. The polluted waters cannot meet man's requirements effectively and satisfactorily<sup>71</sup>. Thus, conservation of the environment includes the conservation of all the natural resources. The governments of different countries must contribute by making strict legislations to counter the activities that are not environment friendly and lead to unsustainable development<sup>72</sup>.

### **III.1.3.The Convention on Biological Diversity**

The Convention on Biological Diversity (CBD) is an international treaty and, as such, a legally binding instrument that promotes international cooperation to manage, conserve and foster the sustainable use of the world's biological resources. It is one of a number of such instruments located under the UN and Environmental Programme (UNEP). The three primary objectives of the Convention are to conserve biological diversity, promote the sustainable use of its components, and promote the fair and equitable sharing of the benefits that accrue from the use of genetic resources<sup>73</sup>. The Convention, which came into force on 29 December 1993, focuses on protecting the world's ecosystems. Parties to the Convention conduct programs to conserve and ensure the sustainable use of biological diversity associated with inland waters, marine and coastal areas, forests, dry-land ecosystems, and agricultural lands that are vital to human well-being and the global environment. The Convention also promotes the protection of traditional knowledge, which plays an important role in conserving the world's biological resources.

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<sup>70</sup>G. MILLER, Tyler *Environmental science*. California: Wadsworth. 1995.p.31

<sup>71</sup>Conservation of environment available at <http://www.tutorvista.com/content/biology/biology-ii/environment-and-environmental-problems/protection-environment.php> accessed on 24 August 2013.

<sup>72</sup> Conservation of environment available at <http://www.flipsnack.com/AF5BDBBA9F7/f7c9qjpt> accessed on August 21.2013

<sup>73</sup>International Labour Organization Indigenous& Tribal Peoples' Rights in Practice: A guide to ILO Convention No. 169. Geneva: International Labour Organization. 2009.p.51



### III.2. Human rights and conservation

Human well-being and environmental protection are interconnected and essential goals of the global community, as reflected in the Universal Declaration on Human Rights<sup>1</sup>, in Principle 1 of the Stockholm Declaration<sup>2</sup>, and, more recently, in the Millennium Development Goals, and the 2007 passing of the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>74</sup>.

Throughout the world, land and natural resources provide indigenous people with their primary sources of food, their freshwater, their traditional medicines, and the materials for their needs (houses, cooking utensils, canoes, hunting weapons, and cultural artifacts, etc.), and are tightly interwoven with their cultural identity and livelihoods. Indigenous peoples have always protected their lands and the rich resources they hold; managing their resources through customary laws and traditional practices. Some of the best protected biodiversity-rich areas are those in the lands and territories of indigenous peoples.<sup>75</sup>

Indigenous peoples have been using UNDRIP as a mechanism to leverage their rights and secure their participation in local, national and international processes that directly or indirectly affect their communities. Securing their basic human rights, their rights to their lands, and their access to the natural resources they depend upon is increasingly affected, however, by the shocks and stresses induced by such as climate change, violent conflicts and natural disasters, as well as the developmental trends of, for example, population growth and agricultural expansion, and megaprojects such as the construction of large dams and highways<sup>76</sup>.

Many indigenous peoples have suffered discrimination within their national context in terms of their culture, language, and religious beliefs, and their rights to use and occupy lands where they have lived for hundreds of years or even millennia.

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<sup>74</sup>American Diabetes Association *Economic costs of diabetes in the U.S.* in 2002. *Diabetes Care* 26 (3): 917–932.

<sup>75</sup>J. ANAYA, Indigenous Peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issues of what rights Indigenous Peoples have in lands and resources. *Arizona Journal of International and Comparative Law*, 22, 1, 2005.p. 7-17.

<sup>76</sup>Colchester, M. & Ferrari, M.F. *Making FPIC Work: Challenges and Prospects for Indigenous Peoples*. Moreton-in-Marsh: Forest Peoples Program 2007,p.71

### **III.2.1.The United Nations’ human rights bodies and environmental conservation**

Concerns related to land rights and rights related to the environment can be addressed through the various bodies of the United Nations that deal with human rights, including both charter and treaty bodies. The United Nations and Environmental Program (UNEP) is the UN’s focal point for environmental action and coordination among governments, UN agencies and NGOs. UNEP promotes and coordinates the sharing of environmental information and implements projects that support its agenda for sustainable development, i.e., projects that promote economic, social and environmental development.

### **III.2.2.Indigenous peoples’ rights and the environmental conservation**

The United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, in June 1992, was an important development for indigenous peoples and their rights related to the environment. The Conference, or Earth Summit as it is called, recognized that indigenous peoples and their communities have a critical role to play in managing and developing the environment<sup>77</sup>. The importance of indigenous peoples’ traditional knowledge and practices was acknowledged, and the international community committed itself to promoting, strengthening and protecting the rights, knowledge and practices of indigenous peoples and their communities

The adoption of the Convention on Biological Diversity recognizes the close dependence of many indigenous communities on biological resources and the desirability of sharing the benefits that come from using traditional knowledge, innovations and practices to conserve biological diversity, including species diversity<sup>78</sup>.

Diversity of species is important to the natural functioning of ecosystems, and the survival of species is an indicator of the health of the environment. Indigenous peoples have already lost, or risk losing, ancestral lands and sacred sites, many of which contain the world’s richest biodiversity. Governments that have adopted the Convention on Biological Diversity are obliged

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<sup>77</sup>J.MARTINEZ-ALIER ,*On the relations between political ecology and ecological economics. In The Environmentalism of the Poor*, Cheltenham& Northampton: Edward Elgar Publishing Limited.2002.p.100.

<sup>78</sup>*Ibid*

to introduce domestic legislation, or amend their constitutions, to ensure the participation of indigenous peoples in the conservation and sustainable use of their environment.

The right of indigenous peoples to participate in the use, management and conservation of natural resources is also recognized in the International Labor Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries, and the UN draft Declaration on the Rights of Indigenous Peoples. The draft Declaration provides for the right of indigenous peoples to own traditional lands and manage their environment and its resources<sup>79</sup>.

Since 1992, interest in the rights of indigenous peoples and the environment has continued to grow. Indigenous and non-indigenous peoples are increasingly aware that traditional lands and natural resources are essential to the economic and cultural survival of indigenous peoples. Some countries, such as Canada, Australia, Finland, Brazil and the Philippines, have adopted legal measures that acknowledge indigenous land rights or have established legal procedures for indigenous participation in land-related issues.

A growing number of governments have amended their national Constitutions to recognize the ancestral rights of indigenous peoples to occupy own and manage their traditional lands and territories. Many countries have established Environment Ministries and developed national Environment Policy Statements and Strategies. Even though some governments now consult with indigenous peoples on land rights and the environment, many States still have not introduced laws or policies that provide for indigenous land claims or promote participation of indigenous peoples<sup>80</sup>.

### **III.2.3. The convention and indigenous peoples**

The Convention contains a number of provisions of particular importance to indigenous peoples. These provisions are contained in Articles 8(j), 10(c), 17.2 and 18.4. Of these, Article 8(j) is regarded as the core provision. It calls upon Contracting Parties to respect, preserve and maintain

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<sup>79</sup>G. SCHULTING, ILO Convention 169: Can It Help?. *AbyaYala News: The Journal of the South and Meso American Indian Rights Center*, 10, 4, Consulted in November, 2009 at <http://saiic.nativeweb.org/ayn/schulting.html>, accessed on July 2013

<sup>80</sup>United Nations Human Rights Committee (1994). General Comment No. 23: The rights of minorities (Art. 27): 08/04/94 (CCPR/C/21/Rev.1/Add.5, General Comment No. 23). New York: United Nations.

knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biodiversity, subject to national legislation<sup>81</sup>. The Convention contains a number of provisions of particular importance to indigenous peoples<sup>82</sup>.

The Convention encourages Parties to promote the wider application of such knowledge, innovations and practices with the approval and involvement of the indigenous peoples concerned. Article 8(j) also requires that benefits arising from the application of traditional knowledge, innovations and practices should be shared equitably with the indigenous communities concerned.

The Convention does not use the term “indigenous peoples”, but refers to them in terms of “indigenous and local communities embodying traditional lifestyles”. This phrase is interpreted to include the estimated 1.5 to 2 billion people around the world who have not adopted industrialized practices to exploit agricultural, forest, animal and fisheries resources.

The Article 10, which deals with the sustainable use of components of biological diversity, requires that each Contracting Party protect and encourage the use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements.<sup>83</sup> This Article has important implications for cultural survival, since particular species form the spiritual and economic focus of many indigenous cultures<sup>84</sup>. The continued customary use of such species is therefore essential to the existence of such cultures.

At its fifth meeting in Nairobi, Kenya, in May 2000, the COP recognized that maintaining knowledge, innovations and practices of indigenous and local communities is dependent on maintaining cultural identities and the material base that sustains them. The COP invited Parties and governments to take measures to promote the conservation and maintenance of such identities (Decision V/16, para. 16). Article 17, concerning exchange of information relevant to

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<sup>81</sup>*Ibid*

<sup>82</sup>United Nations Declaration on the Rights of Indigenous Peoples. New York: United Nations. 2007,p.132.

<sup>83</sup>K. De FEYTER, *Localizing Human Rights*, Antwerp: Institute of Development Policy and Management & University of Antwerp.2006, p.32.

<sup>84</sup>M. COLCHESTER, *Indigenous Rights and the Collective Conscious*, Anthropology Today, 18, 1, February, 2002, p.3.

the conservation and sustainable use of biological diversity, requires that such information include indigenous and traditional knowledge, and, when feasible, repatriation of information.

This has important consequences for those indigenous communities seeking to retrieve valuable information collected decades, if not centuries, ago by museums and research institutions about their traditional knowledge and practices concerning their use of plants and animals.

Such information can be used to fill gaps in current knowledge, or even help revive certain traditional practices related to particular species.

Article 18 seeks cooperation for the development and use of technologies, including indigenous and traditional technologies. The COP recognizes that traditional knowledge should be given the same respect as any other form of knowledge in the implementation of the Convention, and therefore should be considered to be as useful and necessary as other forms of knowledge, including scientific knowledge.

### **III.3. Human rights framework for natural resource**

Human rights framework for natural resource entails three essential elements; first it explains what the rights to natural resource are. Second the basis of rights to natural resources and interpretation of rights to natural resources.

#### **III.3.1. Right to natural resources**

Before dealing with rights to natural resource, it is important to note that natural resources occur naturally within environments that exist relatively undisturbed by humanity, in a natural form. A natural resource is often characterized by amounts of biodiversity and geodiversity existent in various ecosystems<sup>85</sup>. Natural resources are derived from the environment. Some of them are essential for our survival while most are used for satisfying our wants. Natural resources may be further classified in different ways.

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<sup>85</sup> Natural resource available at <http://www.sbs.utexas.edu/resource/onlinetext/definitions/resources.htm> accessed August 29, 2013.

Natural resources are made by Nature and the energy to make them comes from geochemical, geophysical and solar energy<sup>86</sup>. For example humans cannot make petroleum, which once was living plants that have been processed for millions of years before humans existed, slowly becoming petroleum. Petroleum is a natural resource that we consider to be "non-renewable" because it takes too long to make by the time scale that we can experience. But we can change where petroleum is located, and we can process it into components parts.

As far as rights to natural resource is concerned, the Article 25 of the International Covenant on Economic, Social and Cultural Rights<sup>87</sup> and Article 47 of the International Covenant on Civil and Political Rights each states that "Nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources<sup>88</sup>." On the face of the Covenants, at least two anomalies are immediately apparent.' First, the article in questions don appears in each Covenant immediately following the provisions setting forth measures of implementation, and is preceded immediately by a provision 6 which eliminates any possibility of the measures of implementation in the Covenants being read as derogating from the powers of the United Nations and its specialized agencies with respect to human rights<sup>89</sup>.

Thus, it appears in each case that a provision apparently dealing with a purely substantive question-"the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources "is classified with measures of implementation. Article 1, paragraph 2 of each of the covenants provides that: All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. From these provisions above, it is clear that right to natural resource is a legal right.

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<sup>86</sup>G.HOLREN, let's "back" into the answer with some questions. What is the value of natural resources? Can we buy them? Why are natural resources important to us? Available at <http://www.humanrights.gov.au/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources> accessed on August 29, 2013.

<sup>87</sup>Art.25 of the International Covenant on Economic, Social and Cultural Rights

<sup>88</sup>Art. 47 of the International Covenant on Civil and Political Rights

<sup>89</sup> University of Minnesota Human rights Center, *Study Guide: The Rights of Indigenous Peoples*, available at <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html> accessed on 14.08.2013.

### III.3.2. Right to Ancestral Lands

The issue of land rights is of paramount importance for indigenous peoples. In fact this can be easily understood when one bears in mind that this notion often refers to those peoples who are supposed to have occupied a given land before the arrival of dominant groups; hence the attachment to the land is supposed to be the only source of survival.<sup>90</sup> As we mentioned above, indigenous peoples present great diversities depending upon their background. Where these peoples are undoubtedly recognized as the first occupiers of the land, some special land rights have been formulated through special legal instruments.<sup>91</sup> The indigenous peoples regard the land rights as the essence for their struggle for survival: land rights are more than the name suggests but they are about resources, religious practices, and fundamental senses of community belonging.<sup>92</sup>

It should be noted that land rights are core claims globally but particularly in Africa. The centrality of land for indigenous peoples is based on the fact that they rely on traditional lands and natural resources for the livelihood, economic sustenance as well religious and cultural life; this right over land flows from their articulated ideas of common stewardship overland and a deeply felt spiritual and emotional link with the earth and its fruits.<sup>93</sup> This link of indigenous peoples to their land was highly emphasized by the Inter-American Court of Human Rights IACHR.

The IACHR has emphatically explained that “indigenous population is structured on the basis of its profound relationship with the land”, that “land for indigenous peoples, is a condition of individual security and liaison with the group” and that “the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining

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<sup>90</sup> F. KAYITARE, *supra* note 14, p.34

<sup>91</sup> As an illustration, in October 1997, the Australian President signed into law, RA 8371 the Indigenous Peoples Rights Act [IPRA]: this Act lays down the legal framework for addressing indigenous peoples poverty by protecting their ancestral lands, cultural integrity, etc.

<sup>92</sup> A. HEGARTY & S.LEONARD, *Human Rights: an Agenda for the 21<sup>st</sup> Century*, London, Cavendish Publishing Ltd, 1999, p. 21.

<sup>93</sup> G. MUKUNDI WACHIRA, *supra* note 8, pp 23-24.

the community's integrity".<sup>94</sup> In as far as *abatwa* are concerned, they also do have right to the land even if their situation may not be comparable to the one of indigenous of the Americas.

### III.3.3. Interpreting rights to land

In order to avoid any ambiguities in implementing indigenous rights, people should understand it in a progressive way. This is to say, one should not think that when they say that any development should take into consideration the indigenous culture, even the one highly contributing to their impoverishment will be considered. Article 26(1) of the Declaration on the Rights of Indigenous Peoples stipulates that "indigenous peoples have right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".

The problem here is whether one can hide him/herself behind this provision to take pygmies back to *Nyungwe* forest or to Volcano national parks in order to enforce the rights they might have over there? Before answering to this, one should ask him/herself if this will be beneficial for indigenous peoples. As the answer is no for the last question, it's also not for the first.

In interpreting this provision, it's essential to know how they were removed from the forests and see if they were given alternative lands for their survival. If not, it will be the obligation of the state to look for the land and give it to the concerned peoples but taking them back to forests will be prejudicial for their lives and will rather be a serious violation of their right to development.

Another point to note as far as the interpretation of rights is concerned; it's the diversity of indigenous peoples which should be taken into consideration when interpreting indigenous rights. As an illustration, when we talk that any education should consider language and culture of indigenous peoples, this should be sounding for example in Australia or Canada and not in Rwanda.

In Canada for example, indigenous are culturally different from other population and teaching indigenous peoples in another's group language would amount to assimilation jargon;<sup>95</sup>

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<sup>94</sup> Indigenous and Tribal Peoples Rights over their Ancestral Lands and Natural Resources, available at <http://www.cidh/countryrep/Indigenous-Lands09/TOC.htm>, accessed on September 9, 2013,

<sup>95</sup> C. HENAY, *supra* note 51, p.7



So far, this work has been dealing with different rights indigenous peoples should enjoy, be it specific rights recognized to them, be it all other rights enjoyed by all human beings. Unfortunately, despite the DRTD and the DRIP, much of their rights are not realized and various violations of their rights occur either deliberately or not. In the next section, enforcement and application of indigenous peoples' rights will be dealt with

### **III.3.4. Indigenous people and rights to natural resource**

The indigenous rights belong to those who, being indigenous peoples, are defined by being the original settlers of a land that has been invaded and colonized by outsiders<sup>96</sup>. Exactly who is a part of the indigenous peoples is disputed, but can broadly be understood in relation to colonialism. When we speak of indigenous peoples we speak of those pre-colonial societies that face a specific threat from this phenomenon of occupation, and the relation that these societies have with the colonial powers<sup>97</sup>. The exact definition of who are the indigenous people, and the consequent state of rights holders, varies. It is considered both to be bad to be too inclusive as it is to be non-inclusive.

Indigenous Peoples rights are those rights that exist in recognition of the specific condition of the indigenous peoples<sup>98</sup>. This includes not only the most basic human rights of physical survival and integrity, but also the preservation of their land, language, religion, and other elements of cultural heritage that are a part of their existence as a people.<sup>99</sup> This can be used as an expression for advocacy of social organizations or form a part of the national law in establishing the relation between a government and the right of self-determination among the indigenous people living within its borders, or in international law as a protection against violation by actions of governments or groups of private interests<sup>100</sup>.

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<sup>96</sup>S. ANAYA, *James Indigenous Peoples in International Law*, Oxford University Press. 2004, p.371.

<sup>97</sup>L. LINDHOLT, *Human Rights in Development Yearbook 2003: Human Rights and Local/living Law*. Martinus Nijhoff, Publishers, 2005, p.48.

<sup>98</sup>G. ANDREW, *Indigenous Rights and Development: Self-Determination in an Amazonian Community*. Berghahn Books, 2003, p.23.

<sup>99</sup>K. PAUL, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, Cambridge University Press, 2003, p.45.

<sup>100</sup>R. KUPPE, *Law & Anthropology: "Indigenous Peoples, Constitutional States And Treaties Of Other Constructive Arrangements Between Indigenous Peoples And States"*. Brill Academic Publishers. 2005. P.37.

### **III.4. Conclusion**

In conclusion, there is a link between human rights and environmental conservation. The discussion above shows that individuals including indigenous people have not an obligation to conserve and protect the environment but also the rights to live in safety environment. The indigenous people have duties to conserve the environment. In term of indigenous rights and rights to natural resources, it is observed on rights to land. This is mainly because rights to natural resource occur naturally within environments that exist relatively undisturbed by humanity, in a natural form. For further comprehensive of this topic the challenges related to environmental conservation and indigenous rights to natural resources are discussed in the following chapter. And then, the author suggests the possible mechanisms aimed at solving the problem posed by the topic.

## **CHAP. IV: CHALLENGES RELATED TO ENVIRONMENTAL CONSERVATION AND INDIGENOUS RIGHTS TO NATURAL RESOURCES AND POSSIBLE MECHANISMS AIMED AT SOLVING THESE CHALLENGES**

### **IV.1.Introduction**

The environmental conservation and indigenous rights to natural resource is a difficulty to be implemented. There are challenges that hind the indigenous people to enjoy their rights. Not only for that, but also ignorance of indigenous people to recognize their rights. Thus, the following chapter elaborates these challenges and proposes the possible mechanism that can solve the problem.

#### **IV.1.1.Challenges related to defining indigenous rights**

It should be noted that, because of their lifestyle, indigenous peoples are vulnerable to being marginalized in developmental circles. This is mainly linked to their culture and identities<sup>101</sup> which are fully distinct from the greater society.

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<sup>102</sup>. 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<sup>103</sup>. Furthermore, indigenous peoples rarely use this criteria as a basis of their identity what is important is the history of being distinct as a society<sup>104</sup>.

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<sup>101</sup>These include cultural, political, legal and social identities or institutions

<sup>102</sup>M.TOMEI, and L. SWEPSTON, *Indigenous and Tribal Peoples: A Guide to ILO Convention* 169, 1996, p 5.

<sup>103</sup>General History of Africa by UNESCO International Scientific Committee for the Drafting of General History of Africa (1979) Vols I-VIII

<sup>104</sup>M.TOMEI, and L, *supra* notes 91.

#### IV.1.1.1 Neglecting rights of indigenous people

Indigenous peoples are arguably among the most disadvantaged and vulnerable groups of people in the world today. The international community now recognizes that special measures are required to protect the rights of the world's indigenous peoples.” International law recognizes the rights of indigenous peoples to self-determination, to be treated without discrimination, and not to be deprived of their means of subsistence.

These rights are embodied in the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other international agreements that are negotiated and agreed upon by most of the world's governments<sup>105</sup>. Convention No. 169 of the International Labor Organization (ILO), ratified by 20 countries in 1989, explains the unique, collective connection that indigenous peoples have with their land and resources, and asserts their fundamental rights under international law, in particular their rights to territory and to continued survival, wellbeing and development as distinct peoples and cultures. Signatories are obliged to implement the treaty in domestic law, and it is enforceable through international courts and UN treaty bodies.

Unfortunately most of government policies and agencies on environmental conservation are taken without consultation of indigenous. Where these peoples are undoubtedly recognized as the first occupiers of the land, some special land rights have been formulated through special legal instruments<sup>106</sup>. The indigenous peoples regard the land rights as the essence for their struggle for survival: land rights are more than the name suggests but they are about resources, religious practices, and fundamental senses of community belonging<sup>107</sup>. It should be noted that land rights are core claims globally but particularly in Africa.

The centrality of land for indigenous peoples is based on the fact that they rely on traditional lands and natural resources for the livelihood, economic sustenance as well religious and cultural

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<sup>105</sup>Including the Universal Declaration of Human Rights, the UN Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and American Declaration of the Rights and Duties of Man

<sup>106</sup>As an illustration, in October 1997, the Australian President signed into law, RA 8371 the Indigenous Peoples Rights Act IPRA: this Act lays down the legal framework for addressing indigenous peoples poverty by protecting their ancestral lands, cultural integrity, etc

<sup>107</sup>A. HEGARTY & S. Leonard, *Human Rights: an Agenda for the 21st Century*, London, Cavendish Publishing Ltd, 1999, p. 210.

life; this right over land flows from their articulated ideas of common stewardship overland and a deeply felt spiritual and emotional link with the earth and its fruits<sup>108</sup>.

This link of indigenous peoples to their land was highly emphasized by the Inter-American Court of Human Rights [IACHR]. The IACHR has emphatically explained that “indigenous population is structured on the basis of its profound relationship with the land”, that “land for indigenous peoples, is a condition of individual security and liaison with the group” and that “the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity”

For example the *abatwa* in Rwanda suffer a serious lack of land. This group used to live in forests where they lived of hunting and gathering. With the creation of national parks, they were evicted from those forests and it’s said that no proper compensation was paid. Noteworthy is that only 0.1 % of the *abatwa* community owns land. This number is very low compared to the national average of 80 %<sup>109</sup>. This is the violation of rights of indigenous people.

Recently with the promulgation of the Land law and the Law on environment, they have no access to marshlands where they were getting clay for pottery and the access to forest is forbidden since the creation of National Parks and no compensation was paid<sup>110</sup>.

The other example is in its 2007 report on the state of human rights in Bolivia, the IACHR assessed the situation of the indigenous peoples and communities affected by the development of natural resource exploration and exploitation projects in their ancestral territories, from their design throughout their implementation; The granting of concessions had taken place without conducting prior consultation procedures with the interested peoples and communities; some of these projects had caused serious environmental contamination, with noxious effects upon the continuity of basic subsistence activities and on the health of the members of the indigenous communities that were located in the territories where they were being carried out; and there

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<sup>108</sup> *Ibid.*

<sup>109</sup> see Alternative Report submitted to the UN committee on the Elimination of Racial Discrimination (hereinafter Alternative Report UNPO) at the 78th session during consideration of the 13th-17th Periodic Reports of the Republic of Rwanda, by Unrepresented Peoples and Nations Organization, January 2011, p.19 available at [http://www.ohchr.org/english/cerd/docs/ngos/UNPO\\_RWANDA78.pdf](http://www.ohchr.org/english/cerd/docs/ngos/UNPO_RWANDA78.pdf) accessed on 6 September 2013.

<sup>110</sup> The Constitution of the Republic of Rwanda of 2003, art 33(2) (O.G no special of 4 June 2003).

were no judicial mechanisms which could enable indigenous peoples to contest the effects to which they were exposed<sup>111</sup>.

#### **IV.1.1.2 Project planning without consent of indigenous people**

Policy decisions on natural resource development made in ‘the national interest’ cannot be based on the interests of the majority alone, particularly if such policies would cause serious violations of the human rights of minorities and indigenous peoples. The framework of what constitutes a serious violation in such cases is determined primarily by the rights to self-determination, nondiscrimination, cultural life, means of subsistence, and to land, territories and natural resources<sup>112</sup>.

The specific standards elaborated for indigenous peoples and minorities respectively related to natural resource development do differ, with those for indigenous peoples being more extensive and specific. This gap presents a serious problem for indigenous groups affected by harmful natural resource development, who have fewer mechanisms and remedies available to them.

Some of this gap can and has been filled by progressive interpretations of existing standards, including non-legally binding standards such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM). The right to self-determination is an important starting point for both groups, not least because it is linked to freedoms regarding the use of natural wealth and resources.

The key to exercising self-determination over natural resource development is the right to ‘free, prior and informed consent’ in its various forms<sup>113</sup>. However, as we observed above in case of *abatwa* in Rwanda, indigenous people are not consulted. The international standards on minority rights recognize that persons belonging to minorities have ‘the right to participate effectively in

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<sup>111</sup>Inter-American Commission on Human Rights (2009), “Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.” <http://www.cidh.org/countryrep/Indigenous-Lands09/TOC.htm> see also: Due process Law Foundation (2010), “The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru.” <http://www.dplf.org/uploads/1302034794.pdf>. Accessed on September 10 2013.

<sup>112</sup>Colchester, Marcus “*Free, Prior and Informed Consent Making FPIC work for forests and peoples.*” 2010,p.231

<sup>113</sup>P.FORSYTHE, *Human Rights and Diversity*, Lincoln, University of Nebraska Press, 2003 p.205.

decision on the national and, where appropriate, regional level concerning the indigenous to which they belong or the regions in which they live.

#### IV.1.1.3.Consultation indigenous

The other challenge of indigenous right to natural resources is planning project over their natural land without consulting them<sup>114</sup>. Hence most State project are planned and implemented on indigenous environment without consent of indigenous because consultation is their right. For example is the violation of the right to consultation, which is constitutionally established, is systematic in Mexico, as is the right to participation in public affairs<sup>115</sup>.Government imposes infrastructure projects without taking into account opinion of affected communities.

Thus, the governmental has strategically to illegally impose infrastructural megaprojects in indigenous and rural areas, as well as in nature reserves. This problem has been aggravating social and agrarian conflicts in various regions of the country; this in turn has increased the vulnerability of indigenous communities that, not having been informed or consulted are seriously threatened with the dispossession of their lands, environmental degradation and forced displacement<sup>116</sup>.

Priscila Rodríguez, a lawyer with the Mexican Center for Environmental Law, or CEMDA, explains that among the factors that prevent the indigenous communities from fully securing the right to consultation is the failure to apply Article 2 of the Mexican Constitution, which requires authorities to carry out consultation processes when it comes to planning and implementing legislation<sup>117</sup>, development programs, and infrastructural construction projects that impact the communities' territories and natural resources.

In March 2010, a debate began in the House of Representatives over a bill called the Consultation with Indigenous Peoples and Communities to regulate that article; from December

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<sup>114</sup>D. Michael, *Remi"Indigenous Organizations and Development: The Case of Ara, Mexico"* In Indigenous Organizations and Development (IT Studies in Indigenous Knowledge and Development, 1996, p.123.

<sup>115</sup>*Ibid.*

<sup>116</sup>W. BOLANLE "*Community Development Associations and Self-Reliance: The Case of Isalu Community Development Union, Mexico.*"In Indigenous Organizations and Development. p. Blunt and D. M. Warren, eds. London: Intermediate Technology Publications, 1996, p.137.

<sup>117</sup>D. Michael, *supra* note 94

to May, a consultation process was conducted with indigenous peoples and communities in several states across the country to discuss the project<sup>118</sup>. The result was not encouraging.

While this initiative, promoted by the center-right envisages the obligation of federal and state governments, as well as the legislature, to ensure the right to prior consultation with the indigenous communities on issues relating mainly to the establishment of legislative measures, the care and enjoyment of natural resources in their territories, and the implementation of operating rules and regulations in social programs at all three levels of government, it also maintains that neither public budget allocation nor the appointment of leaders in charge of the specialized agencies that deal with indigenous peoples, except the delegates of the National Commission for the Development of Indigenous Peoples, or CDI, may be the subject of consultation<sup>119</sup>.

Finally, among the challenges to the implementation of these rights is firstly that the communities know their rights, secondly that they not only use direct measures (mobilization, protests) but also use mechanisms like *amparo*, a form of constitutional protection, habeas corpus, and constitutional procedures to protect their rights. But there also is a need for change in the mindsets of judges, prosecutors, and public servants that they may be conscious that they must enforce and respect indigenous rights.

#### **IV.2.Possible mechanisms aimed at solving indigenous rights and environmental conservation**

As it has revealed in sections above, the rights of indigenous people is challenged by different factors, for that reason, the present research suggested the mechanism aimed at solving that problem. However the lists of suggested mechanism are not exhaustive, meaning that there are other strategies that can be proposed by other researcher.

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<sup>118</sup>*Ibid.*

<sup>119</sup>W. JEANETTE. "Ecological Risk Assessment and Management: Their Failure to Value Indigenous Traditional Ecological Knowledge and Protect Tribal Homelands." *American Indian Culture and Research Journal* 22(2): 1998, p.151.



### IV.2.1. Planification and consultation

Planning and consultation are mechanism that can resolve the problem of indigenous right to natural resource and environmental conservation. This is mainly simply because, the findings above shows that the project plan that affect the living of indigenous are taken without consent of the indigenous while it is legal rights. This subsection describes in more detail the role of planning and consultation in protecting the rights of indigenous to natural resource.

#### IV.2.1.1 Planning

In order to guarantee the rights of indigenous people, the inclusion in project planning and management committees is needed, e.g. by the use of quotas<sup>120</sup>. However, it should be recognized that quotas may give indigenous focused access to decision making, but is no guarantee towards achieving genuine participation in decision making this is because the indigenous peoples<sup>121</sup>.

The land is at the individual level, a strong symbol of cultural identity and community level, a factor of social reproduction. Indeed, it is the earth that man derives natural resources, treatment, food and clothing they need to survive<sup>122</sup>.

Negative environmental changes can be caused by projects that are beneficial in other ways. Mining and forestry can dramatically alter the landscape and productivity of traditional natural resources<sup>123</sup>. Shifting from traditional agriculture which encourages diversity, to intensive agriculture which sacrifices diversity to productivity, can have a negative impact on indigenous

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<sup>120</sup>Rural Advancement Foundation International, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation*. New York: United Nations Development Programme, 1994, p.432.

<sup>121</sup>D. RAJASEKARAN and, M. Warren, "Indigenous Natural-Resource Management Systems for Sustainable Agricultural Development: A Global Perspective." *Journal of International Development*3 (4):1991.p.402.

<sup>122</sup>B. RAJASEKARAN, "Economics of Irrigated Rice Production in Mali." A Study Report, Sahelian Agriculture Division, Washington, D.C.: The World Bank. 1990, p.27.

<sup>123</sup>RAJASEKARAN et al."Indigenous Natural Resource Management Systems for Sustainable Agricultural Development - A Global Perspective." *Journal of International Development* N0 387-402.1991, p.157.

peoples and their lands. Construction of major infrastructure, such as transportation, or increased urbanization can significantly reduce traditional resources<sup>124</sup>.

These projects have many beneficial results, but it is important that they consider the potentially harmful impacts, especially on indigenous peoples<sup>125</sup>. When indigenous peoples are involved, negative environmental impacts can be very serious, simply because people living in traditional life styles rely heavily on a healthy environment, an environment that is well-understood within the traditions of the indigenous population. Inclusion of the traditional knowledge highlights environmental understanding.

Best practices in development projects include the creation of a plan for sustainability that lasts long after the end of the project's operational life<sup>126</sup>. Factors should include sustainable cycles for economic, social, cultural, community and individual health. It is not enough for the local community to depend on local volunteers to help with the many tasks involved in an environmental assessment or planning a development project.

Hence the best practice is for proponents to include indigenous peoples and their communities in the key decisions right from the beginning<sup>127</sup>. Encourage proponents to maintain open-door policies so that the community can participate in the pre-planning as well as later stages of the project<sup>128</sup>. To maintain this open door, the community should also be prepared to invite the proponent to discussions as well<sup>129</sup>. This does not mean that either the community or the proponent will invite the other to all meetings<sup>130</sup>. It only means that the basic decisions should be discussed openly between the parties.

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<sup>124</sup>D. SEIBEL, Hans and Andreas Massing *Traditional Organizations and Economic Development: Studies of Indigenous Co-operatives in Liberia*. New York: Praeger 1974, p.168.

<sup>125</sup>J. SMITH Biodiversity and agriculture: implications for conservation and development, World Bank Technical Paper 1996, p.321,

<sup>126</sup>C. FHUTCHINSON, *Using Indigenous Knowledge, Remote Sensing and GIS for Sustainable Development in Indigenous Knowledge Monitor* Vol. 2, (1) April 1994

<sup>127</sup>Lori Ann. "Legitimizing Local Knowledge: From Displacement to Empowerment for Third World People." *Agriculture and Human Values* 6:13-24, 1989, p.145.

<sup>128</sup>D. M. WARREN, "Linking Scientific and Indigenous Agricultural Systems." *In The Transformation of International Agricultural Research and Development* J. L. Compton, ed. Boulder, CO: Westview 1984, p.125

<sup>129</sup>*Ibid.*

<sup>130</sup>*Ibid.*

#### **IV.2.1.2.Consultation with indigenous peoples**

The lack of consultation often results in the refusal by the indigenous community to implement proposed policies/solutions judged inadequate. The refusal doesn't mean necessarily that the proposed solution is in disfavor of the beneficiaries<sup>131</sup>. It would be a problem of mentality and understanding. So, at least mobilization and sensitization will be required so that these indigenous feel that they are really cared about; otherwise any activity will be rejected regardless of the anticipated good results. However, for this participation to be fully effective there is a *sine qua non* condition: one should have a level of education enabling him/her to discern and understand what is being proposed as a policy or solution.

Each people have its way of making decisions, and for a consultation to be suitable it needs to respect those ways. It is the right of the indigenous people and the state's obligation to conduct prior consultation on any legislative or administrative measure. This means that wherever there is going to be natural resource activity the state must have the consent of a community before giving the mining concession. In order for the state to observe the right to consultation, there is a need to look at the responsibilities of each agency, each branch of government. The Executive branch must implement the right to consultation; every time the Legislature is going to take action it has to consult the indigenous peoples, but in turn must develop the right to consultation, to participation, to consent, etc. So, a juridical culture of consultation and participation must be created.

For example, the Judiciary in Peru now is interested in developing a law for the right of coordination between indigenous jurisdictions and general jurisdiction; the Judiciary and the state must implement a process of consultation and participation of indigenous peoples for the development of this legislative initiative. That is the duty of all state actors. So while there is no law on consultation, the Executive is nevertheless required to implement consultation when it is going to take an administrative measure that will affect an indigenous community.

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<sup>131</sup>B. Esther. *Women's role in Economic Development*, London Earthscan Publications LDT, 1989, p.156.

#### IV.2.2. Free, prior and informed consent

The ILO, the UN Declaration and national and international courts all affirm that indigenous peoples are the legitimate owners of their lands, territories and natural resources regardless of whether they possess a title that is issued and registered by the state in question. They recognize indigenous peoples' rights to self-determination and to manage, distribute, and effectively control their territory, in accordance with their customary laws and traditional collective land tenure system<sup>132</sup>.

The UN Declaration and international law and jurisprudence have established that, in order to respect and uphold these rights, activities affecting indigenous peoples' land and resources must only proceed with their free, prior and informed consent.<sup>29</sup> The principles of FPIC have been increasingly recognized by development agencies such as the World Bank, the IFC and the International Fund for Agricultural Development, and by industry bodies, such as the Round Table for Sustainable Palm Oil (RSPO) and to some extent the International Council on Mining and Metals (ICMM)<sup>133</sup>. Free, prior and informed consent (FPIC) is consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.

Free means that indigenous people are free from coercion or manipulation to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws<sup>134</sup>. Prior means that indigenous people understand and are involved in a decision making process and have the opportunity to give or withhold their consent during the early planning stages (for example, before auctioning exploration concessions) before a project becomes an economic or political inevitability, and this participation and consent process continues through the design and implementation phases of the project<sup>135</sup>. Informed means that indigenous people have the legal and technical expertise and access to information in forms and

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<sup>132</sup>J. SOHN, *Development Without Consent: The Business Case for Community Consent*. Available at <http://www.wri.org/iffe> accessed on September 10, 2013.

<sup>133</sup>HERBERTSON, et al. *Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects*. Washington DC: World Resources Institute 2009, p.134.

<sup>134</sup>M. COLCHESTER *Free, Prior and Informed Consent. Making FPIC work for forests and peoples*. Moreton-on-Marsh: Forest Peoples Programme., 2010, p.134.

<sup>135</sup>J. DANDLE, *PUEBLOS Indígenas de la Amazonía Peruana y Desarrollo Sostenible*. Lima: International Labor Organization, 1998, p.124

languages that allows them to understand the implications of any decision on their lives and their future, and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so<sup>136</sup>. If affected peoples choose to withhold their consent or not enter into negotiations with a company or government, then a project cannot go ahead without violating their basic rights to decide what happens on their land and control their own future.

In this way, free, prior and informed consent goes far beyond the notion of “consultation” which merely requires companies to simply survey a community<sup>137</sup>. FPIC requires respect for the decisions and priorities of indigenous peoples and enables a new era of development decision-making in which indigenous peoples decide how their lands and resources will be used and what form development will take<sup>138</sup>.

It is primarily the responsibility of government to ensure that policy decisions, development plans and extractive resource or infrastructure development projects have the free, prior and informed consent of indigenous peoples before concessions are granted to multi-national corporations<sup>139</sup>. However, many governments have discriminatory laws and fail to uphold the rights of indigenous peoples. In addition, the FPIC process does not end with the granting of the concession, but continues through each phase and major decision of a project.

### **IV.2.3. Level of education**

The level of education is a cornerstone for any human development. The education is important as it was emphasized by the ILO Convention of 169: “The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own community and in the national community shall be the aim of education for

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<sup>136</sup>WOLFF-KEDDIE, Jackie. "Aboriginal Agenda or Agency Agenda? Community-Development Planning Projects in Australia." *In Indigenous Organizations and Development*. P. Blunt and D. M. Warren, eds. London: Intermediate Technology Publications. (IT Series in Indigenous Knowledge and Development) 1996.

<sup>137</sup>*Ibid.*

<sup>138</sup>*Ibid.*

<sup>139</sup>K.A Adem, *The Power of Indigenous Peoples to Veto Development Activities: The Right to Free, Prior and Informed Consent (FPIC) with specific reference to Ethiopia*, LLM Dissertation, University of Mauritius, p.11 (Unpublished).

these peoples”<sup>140</sup>. In all researches carried out on indigenous people, it was clearly spelt out that ignorance and low level of education has played and still plays a big role in the impoverishment of this community<sup>141</sup>. Education is of a paramount importance not only to indigenous peoples but also to any other community/individual.

The level of education is a key factor in development and human rights. It was clearly mentioned in the CAURWA report on living conditions of its beneficiaries that, some of *abatwa* fails to go to health centres while they have a health insurance scheme, simply because they think medicines are bad for their health and sleep at home till they recover all die. This is one of the much drawbacks of ignorance<sup>142</sup>.

#### IV.2.4. Participation of Indigenous Peoples Development Plan

Participation of Indigenous Peoples Development Plan is the response for protection of indigenous rights to natural resources and conservation of environment. A plan in which the State presents its efforts for the development of the indigenous communities affected by the natural resource must include at least indigenous person. Effective participation is one of the core elements of the right to development<sup>143</sup>. Participation is nothing but enabling people to realize their right to participate in decision-making processes affecting their lives.

To achieve this, the concerned peoples should be given enough and clear information about these processes. “States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights<sup>144</sup>”. This effective participation may directly be linked to another indigenous right to free, prior and informed consent. By this, “indigenous peoples have the inherent and inalienable right to free, prior and informed consent to freely determine what is best for them and for their future generations, in accordance with their

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<sup>140</sup> ILO Convention No 169, art.29 available at <http://www.ilo.org/indigenous/Conventions/no169/lang--fr/index.htm> accessed on 3 September 9, 2013.

<sup>141</sup> See the recommendations of the Reports of the National Human Rights Senate (Rwanda) Social Affairs (2007) but also the CAURWA report and the Working Group on Indigenous Peoples report, 2006, p.221.

<sup>142</sup> B. HAWA, *Indigenous Women Biodiversity and traditional Knowledge: the case of the Boscuda. Nomadic News* (8) p, 2004, p.13-14.

<sup>143</sup> X *Human Rights, Environment and Economic Development: Existing and Emerging Standards in International Law and Global Societies*, p.2 available at <http://www.ciel.org/Publications/0|paper3.html>, accessed on September 9, 2013.

<sup>144</sup> DRTD, art.8(2)

own culture and world views<sup>145</sup>. Indigenous peoples are supposed to know their problems better than anyone else and consequently know better their needs. Before attempting any solution to their problems, any government or NGO needs to consult them and see whether the proposed solution is adequate.

#### **IV.2.5.Reducing conflict related to natural resources**

Reducing conflict related to natural resource is other solution on the rights to natural resource and conservation of environment .The international institutions or stakeholders (can) have a significant role in the conflict of natural resources versus indigenous communities and specifically the recognition of indigenous rights to participate in the decision-making process. Our central question here is which international responsibilities and mechanisms for conflict resolution there are. We will focus on two relevant international instances: the Inter-American Commission for Human Rights and the Canadian state.

##### **IV.2.5.1. Identifying natural resources**

Simultaneously with the recognition of indigenous rights and importance for natural resource management, there has been a growing international recognition of indigenous peoples' rights and of the positive inter-linkage of indigenous knowledge, traditional practices, and nature conservation leading to an increased interest in indigenous community-based *in situ* conservation and natural resource management<sup>146</sup>.

Two main approaches to indigenous peoples' role and rights as natural resource managers of their traditional territories can be identified; the first is a 'rights-based approach'<sup>147</sup>, while the second is performance-based approach as they are explained under this subsection.

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<sup>145</sup> X, *Indigenous Peoples and the Right to Free, Prior and Informed Consent*, p.2 available at [http://www.manitobachiefs.com/policy/research/documents/FPIC\\_ENG-110908WEB.pdf](http://www.manitobachiefs.com/policy/research/documents/FPIC_ENG-110908WEB.pdf) accessed on September 9, 2013.

<sup>146</sup> A.BRYSK, "Identities across borders: The politics of global civil society" Chapter 5 In *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America*. Stanford, California: Stanford University Press, 2002,p.213.

<sup>147</sup> K. CARINO, *Putting Together a Picture of Asian Indigenous Women*. 2004,p.134.  
 URL [http://www.tebtebba.org/tebtebba\\_files/gender/aisit.htm](http://www.tebtebba.org/tebtebba_files/gender/aisit.htm), accessed on September,9, 2013

#### IV.2.5.2. Rights-based approach

The rights-based approach claims, that indigenous peoples have an unquestionable right to their ancestral territory and self-determination and that the Western world holds a historical responsibility to support these rights while the second approach could be labeled a ‘performance-based approach’<sup>148</sup>.

#### IV.2.6. Performance-based approach

Performance-based approach argues that indigenous peoples should be granted access to and control over their traditional territories and the natural resources therein so far as they act in a sustainable way towards endangered environments. The rights-based approach has led to strategies to protect indigenous peoples from outside intrusion as well as efforts to empower them in gaining control over their own social, cultural and economic development, recognizing their role as historical agents, and their right to self-defined development<sup>149</sup>.

Where the rights-based approach takes its departure in a humanistic tradition and most often has been advocated by anthropologists and human rights lawyers<sup>150</sup>, the performance-based approach stems from a global concern with the preservation of biological diversity and a growing recognition of the strategic importance of indigenous peoples for environmental conservation. It has, broadly speaking, produced two ways<sup>8</sup> of looking at indigenous peoples as either potential destroyers or ‘natural’ guardians of the environment<sup>151</sup>. The view of indigenous peoples as guardians of the environment has opened up for an alliance between indigenous peoples and environmentalists that, especially over the last decade, has been taken up by indigenous peoples. By emphasizing the link between indigenous peoples’ animist spirituality and their close relationship with the environment, indigenous peoples and their advocates have succeeded in

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<sup>148</sup>CEIMM, *First Indigenous Women Summit of the Americas. Background Paper on Gender from the Indigenous Women’s Perspective*, Center of Studies and Information of the Multiethnic Woman (CEIMM) of the University of the Autonomous Regions of the Caribbean Nicaraguan Coast, Uraccan, 2002, p.20.

<sup>149</sup>HITCHCOCK et al., Notes, that for the San of Botswana, who have only recently begun to address the gender differentiated effects of modern development, the gender equality of traditional San society has long made it seem unnecessary to both men and women to develop a political gender strategy.2004.

<sup>150</sup>A. BRYSK talks about ‘*conservationists environmentalists*’, ‘*indigenous environmentalists*’ and ‘*conditional indigenizes*’,2000,p.51

<sup>151</sup>*Ibid.*



creating a popular image of indigenous peoples as relatively isolated groups living in harmony with nature<sup>152</sup>.

This image has been backed up by extensive research showing the sustainability of indigenous natural resource use and of view<sup>153</sup>. Consequently many natural resource management and conservation projects aim at being community-based and participatory, as it is assumed that the involvement of local populations in planning, implementation and monitoring secures a higher degree of local ownerships to projects, and that the inclusion of indigenous or local environmental knowledge ensures greater environmental, social, and cultural sustainability<sup>154</sup>. Indigenous peoples' intimate and detailed knowledge of their environment. An important finding of such research has been that the high levels of biodiversity found in indigenous territories are not of a pristine nature, but rather a result of indigenous peoples' active natural resource management<sup>155</sup>. Involving indigenous peoples in the conservation and management of natural resources is thus increasingly considered an advantage from both a human rights and an environmentalist point<sup>156</sup>.

#### **IV.2.7. Participation of indigenous people in policy planning**

Although we are focusing on the right to consultation, this is not the only relevant right, because Convention 169 also discusses the right to participation not only when there is a measure at hand, but throughout the policy cycle. Article 7 of the Convention says that the communities have the right to participate in the formulation, application, and evaluation of national and regional development plans and programs that may directly affect them.

That means that when it comes time to make petroleum policy, mining policy, hydroelectric policy, or of communications, of where highways will pass through, the communities have the

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<sup>152</sup>Hitchcock et al. (2004) notes, that for the San of Botswana, who have only recently begun to address the gender differentiated effects of modern development, the gender equality of traditional San society has long made it seem unnecessary to both men and women to develop a political gender strategy.

<sup>153</sup>E. Alan R, *Integrating Indigenous Knowledge in Project Planning and Implementation*. Quebec: Canadian International Development Agency, 2000. URL [http://www.acdicida.gc.ca/INET/IMAGES.NSF/vLUIImages/ea/\\$file/IndiKnow-NP-e.pdf](http://www.acdicida.gc.ca/INET/IMAGES.NSF/vLUIImages/ea/$file/IndiKnow-NP-e.pdf), accessed on September at 8, 203.

<sup>154</sup>Emery, Furze et al. the Indigenous Women's Biodiversity Network was c2000; 1996 available at

<sup>155</sup>DESCOLA et.al. For nuanced accounts of modern day indigenous natural resource management and how it is shaped by the wider political economy and unequal power relations, 2004.

<sup>156</sup>AIPP. *Indigenous Knowledge & Biodiversity in Asia: Proceedings of the Asian Regional Conference on Indigenous Knowledge and Biodiversity*. Kuala Lumpur. Asia Indigenous Peoples Pact (AIPP) Foundation, 2004, p.172.

right to participate from the formulation stage (where the oil blocks will be, what the zoning will be, where farming will be done, where the livestock will be raised)<sup>157</sup>. They also participate when the development plan is applied, and when it is evaluated. So it is a more comprehensive right than the right to consultation, because this right is for plans, development programs, and development policy, and if the communities participate in every stage of formulation, application and evaluation, then it makes sense that they could then be consulted specifically about a concrete measure. The communities participate in petroleum policy, but it is all of the communities and in a general way, but when it comes time to dig a well, a block, in a specific place, that's where the communities that will be specifically affected will participate; therefore the consultation is for that specific measure, but the participation is for the entire policy.

Throughout the state's administrative apparatus wherever there will be decisions made about policies that affect them, there should be an indigenous presence or mechanisms to check with them, when a plan for bilingual education, for example, is going to be adopted<sup>158</sup>. The same goes for elective institutions; in Congress the indigenous communities should be represented. In some countries they have established this with an indigenous quota, for example. Colombia, Venezuela, and Bolivia all have an indigenous quota that is achieved directly, rather than through political parties. They are elected from indigenous organizations or indigenous authorities and have to speak their indigenous language.<sup>159</sup>.

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<sup>157</sup>D. M. Warren, "*Indigenous Knowledge Systems for Sustainable Agriculture in Africa.*" Keynote Address, International Conference on Sustainable Agriculture in Africa. Columbus, Ohio: The Ohio State University, Center for African Studies, 1990, p.148.

<sup>158</sup>D. M. WARREN, "*Indigenous knowledge, Biodiversity Conservation and Development.*" Keynote Address at International Conference on Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles. Nairobi, Kenya August 30 - September 3, 1992.

<sup>159</sup>W.JEANETTE. "*Ecological Risk Assessment and Management: Their Failure to Value Indigenous Traditional Ecological Knowledge and Protect Tribal Homelands.*" *American Indian Culture and Research Journal* 22 (2):151, 1998, p.231.

### **IV.3. Conclusion**

To conclude, the implementation of indigenous rights to natural resource and environmental conservation is faced with several challenges. The causes of this challenge are neglecting rights of indigenous people, project planning without consulting them and enforcement of project over their land without their free consent. Participation of indigenous people in policy planning, Performance-based approach Rights-based approach, Identifying natural resources, conflict related to natural resources raising their level of education, the free, prior and informed consent and consultations of indigenous are possible solutions that can help to resolve these challenges.

## **CHAP. V: CONCLUSION AND RECOMMENDATIONS**

The present work shows an increasing interest in linking the issues of indigenous peoples related to natural resource rights of indigenous people and environmental management. The research, especially in the fields of ethno-botany, ecology, and development and indigenous studies, focuses on indigenous role as enhancers and conservers of plant biodiversity and indigenous studies have provided insight into the effects of modernization and natural resource degradation on indigenous relations.

It is, however, a fact that most research on the environment, natural resource management, and indigenous peoples produced. It often does not make explicit which part of indigenous natural resource management is undertaken by men and women respectively, or the extent to which indigenous environmental knowledge is differentiated by gender.

Controversial is also the definition of indigenous peoples. At the very beginning, peoples tended to refer mainly to colonial situation involving colonizers and natives of the colonized lands. Later on, some other factors like self-identification as indigenous peoples and living in precarious conditions compared to compatriots have been adopted. Concerning this right to indigenous peoples, most African countries have been reluctant to adopt it fearing that the right to self-determination included in it would lead to the secession and hence the instability of the already weak states.

The confluence of indigenous peoples' rights, environmental issue being advocated from different, highly politicized, and traditionally opposed camps, is a challenging endeavor. The present work suggests that one way to start is to deconstruct some of the prevailing stereotypes of indigenous with the natural environment and aim for a more nuanced view of indigenous peoples involvement in natural resource management - taking as a point of departure the recognition of indigenous as historical actors and the respect for indigenous collective rights to self-determination, territory and self-defined development. As the above review has shown, researchers, policy-makers and planners are increasingly embarking on such endeavor but much work still lies ahead.

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. Policy makers should consult leaders of indigenous and any other NGO working hand in hand with this marginalized group in order to harmonise activities and facilitate the implementation of the same policy.

It is imperative that 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 states accede to the ILO Convention 169 and make efforts to domesticate it since it requires state parties to recognize customary ownership of land. Although, the protection of natural resources is consistent with the concept of environmental conservation, 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 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.

Furthermore, NGOs should ensure that there is no gulf existing between the rhetoric and the reality with regard to the projects they fund. These can be done by ensuring that environmental conservation 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. Balancing environmental conservation 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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