

**EQUALITY IN TREATMENT:  
TOWARDS A QUEST FOR THE RIGHT TO PARTICIPATION FOR THE BATWA IN  
UGANDA**

**BY**

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**SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE**

**DOCTOR OF LAWS (LLD)**

**FACULTY OF LAW, UNIVERSITY OF PRETORIA**

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**2015**

## Declaration

I declare that this thesis for the degree: Doctor of Laws at the University of Pretoria is my own original work and has not been submitted to any other institution for any academic award. All primary and secondary sources used have been duly acknowledged by complete references.

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Patricia Achan - Okiria

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Date

## Dedication

I dedicate this thesis to my children Josephine Akia, Joel Okiria, Timothy Okia and Joshua Opio.

## Acknowledgments

In the course of the last four years of writing this thesis, I have received a lot of support from several individuals. I am highly indebted to my supervisor, Prof. Michelo Hansungule, whose guidance and support had been exceptional. His critical comments not only improved this thesis but also enabled me to think broadly and objectively. I would like to thank Assoc. Prof. Christopher Mbazira, Dr. Kaban Kabanyukye and Dr. Donald Rukare for the academic inspiration, advice and encouragement which enabled me to bring this work to accomplishment.

I conceived the idea for this thesis while I was attending a specialized human rights training on monitoring Economic, Social and Cultural rights at the Graduate Institute of International and Development Studies in Geneva, Switzerland, in May, 2009. During a moot session on the rights of indigenous people, I was selected to represent a state that did not recognize indigenous people's rights. Mr. Fergus Mackay was counsel for the indigenous people. I got inspired by his arguments in support of the indigenous people's rights. Upon return from Geneva, I visited Kisoro in Western Uganda and met the Batwa for the first time and understood their plight. It is on that basis that I wrote this thesis so that I would ignite debate and possibly cause change in policy in as far as issues relating to the Batwa are concerned. I would like to thank Mr. Mackay for inspiring me and providing the materials and guidance especially during the development of the proposal.

The successful completion of the LLD degree would not have been possible without my family support. I therefore thank my parents, David and Winifred Aliobe, for their encouragement during the course of the study.

I would like to thank the entire Centre for Human Rights at the University of Pretoria for the support which enabled me to complete this LLD programme.

Finally, special thanks go to the love of my life, John Vincent Okiria, for his editorial guidance, emotional and family support and for adding meaning to the life we share, may God richly bless you.

## Summary

This thesis examines the extent to which Uganda's domestic legal framework promotes the right to participation of the Batwa, which is one of the indigenous tribes in the country. This is against the background that of all Uganda's diverse ethnic groups, the Batwa has been the most historically disadvantaged in the country. The main argument in this thesis is that all groups of people, regardless of their origin and status have a right to participate in making decisions that affect them in all public forums. The Batwa's right to participation can be accommodated within the mainstream legal framework including the 1995 Constitution of Uganda. However, compared to other ethnic groups in the country, the Batwa have remained victims to various forms of discrimination. This discrimination is mainly evident in some of the policies, practices and programmes relating to rights such as self-determination and land rights. There is also lack of special protection measures and respect towards the Batwa's socio-economic rights like the right to health, housing and education. Although the Constitution of the Republic of Uganda 1995 recognizes the Batwa as one of the ethnic groups in the country, they are not recognized as an indigenous and minority group.

The central thrust of the thesis is to generate debate on the enhancement of Batwa's participation and enjoyment of their civil, political, economic, social and cultural rights by laying emphasis on non-discrimination and equality in participation. The right to participation both in public and private life by the Batwa has been a subject of debate and discussion among several professionals working with indigenous groups in Africa. The Constitution of Uganda 1995 (as amended) and the Local Government Act (Cap. 243) 1997 (as amended) recognize the right to participation by all persons in the affairs of government. However, there has been a challenge of implementation of the laws and policies which promote fair participation of the indigenous people considering the low levels of awareness regarding the right to participate among the Batwa.

Although there are several ethnic minorities in Uganda, this study specifically focuses on the Batwa because the group has for over centuries been treated inhumanly by the dominant societies. In fact, the African Commission on Human and Peoples' Rights

identifies them as one of the most marginalised due to their culture and way of life. The case study of the Batwa aims at highlighting the challenges in enforcement of legal measures in protecting the rights of ethnic minorities in the country.

The choice of Batwa as a case study is justified by their level of marginalisation and impoverishment and not because of their numbers marginalisation. Regarding their right to participation, the Batwa's ability to take part is undermined since they are excluded in policy planning and formulation. Unlike Europe where ethnic minority rights issues have prompted political action, legislation and regional treaties, this has not been the case in Africa. This is attributed to the lack of awareness on minority issues and inadequate comprehensive legal regime to protect the rights of the ethnic minorities in the continent.

Participation as a right is very important because better decision making arises from public involvement in the process of development. Likewise, the problems of the Batwa cannot be solved and sustainable development achieved without their involvement in decision making. Public discourse and civic participation are thus important components to achieving the goals of sustainable development. These can be applied by involvement of the Batwa in decision making processes. Public participation in decision making is very vital because it gives chance to the Batwa to express their views on key government policies and laws which have a bearing on their rights in their particular communities. This in turn would enable government to pass policies and enact laws that are relevant to Batwa communities and take into account their needs.

The thesis also analyzes some legal resources that have been used to protect ethnic minority groups' right to participation in two comparative jurisdictions in Africa: Rwanda and Burundi. This will help identify the best practices that Uganda could adopt from the other jurisdictions in as far as the protection of the right to participation for the ethnic minorities such as the Batwa is concerned.

The scope of this thesis is limited to the examination of the current legal framework in Uganda and the extent it promotes the right to participation for ethnic minority groups in general and the Batwa in particular. In order to try and provide remedies to the situation,

the thesis utilizes the global and regional instruments and mechanisms together with the domestic instruments such as the Constitution in making a case for the Batwa participation. On the basis of international legal regimes and comparable jurisprudence from other jurisdictions, this thesis will try to make a case for comprehensive reforms in the country's policies and laws in respect to the right to participation.



## List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
CCPR	International Covenant on Civil and Political Rights
CERD	Committee on the Elimination of all Forms of Racial Discrimination
CERD	International Convention on the Elimination on All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
EAC	East African Community
EALA	East African Legislative Assembly
EOC	Equal Opportunities Commission
EOCA	Equal Opportunities Commission Act
ESIP	Education Strategic Investment Plan
FRODEBU	Front for Democracy in Burundi
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Committee
ILO	International Labour Organisation
LC	Local Council
NGO	Non-Governmental Organisation
PEAP	Uganda's Poverty Eradication Action Plan
RC	Resistance Council
REPA	Rights Equality and Protected Areas Programme
RPF	Rwanda Patriotic Front
SDIP	Social Development Sector Strategic Investment Plan
STD	Sexually Transmitted Disease

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIPROBA	Unissons-nous pour la Promotion de Batwa (Union for the Promotion of the Batwa)
UNPO	Unrepresented Nations and Peoples Organisation
UOBD	United Organisation for the Batwa Development
UPE	Universal Primary Education
USA	United States of America
WGIP	Working Group on Indigenous Populations
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation

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## CHAPTER ONE

### A QUEST FOR THE RIGHT TO PARTICIPATE FOR THE BATWA IN UGANDA: AN INTRODUCTION.

#### 1.1 Introduction

The Batwa populations within the great lakes region in Africa are estimated to be about 70,000 to 80,000 people.<sup>1</sup> In Uganda, they number about 6,000 people<sup>2</sup> and they are known as one of the indigenous peoples in the country.<sup>3</sup> Traditionally, they are known to mainly live forests and the mountainous Kabale, Bundibugyo, Rukungiri, Kisoro and Kanungu districts of the south-western part of the country. However, the exact number of the Batwa in terms of population in Uganda is very difficult to establish since they are not often included in the official national population census conducted in the country. The Batwa people are a very unique and distinct people in the great lakes region and they are part of a social group different from the mainstream society where they belong.<sup>4</sup>

The Batwa have remained vulnerable because of their close attachment to their traditions and reluctance to cope with the modern concept of development introduced by colonialism.<sup>5</sup> They have remained the ‘most vulnerable of the vulnerable’ due to continued economic and political marginalisation.<sup>6</sup> The Batwa have virtually no representation in the political offices and structures in the country. In fact, only two

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<sup>1</sup> K Kabananyuke and L Wily, *Report on a study of the Abayanda Pygmies of south-western Uganda for Mgahinga and Bwindi Impenetrable Forest Conservation Trust*, Makerere University [unpublished report], 1996, at 25.

<sup>2</sup> Uganda Bureau of Statistics (UBOS), *Population and Housing Census*, 2002.

<sup>3</sup> The Third Schedule of the Constitution of the Republic of Uganda 1995 (as amended).

<sup>4</sup> A Kairn Klieman *Beyond primordialist myths: The Batwa (“Pygmy”) role in Central African history*, University of Houston (Unpublished paper).

<sup>5</sup> I Brownlie, *Treaties and indigenous peoples* (F.M. Brookfield ed., 1992) Oxford: Clarendon Press. Chicago at 56.

<sup>6</sup> Independent Commission on International Humanitarian Issues on Indigenous Peoples: A global quest for justice (1987) 16-17.



Batwa were on a Local Council (LC) in the whole of western Uganda, and even then at the lowest level (LC 1).<sup>7</sup>

While the rights claimed by the Batwa are not any different from those sought by other indigenous and marginalised groups in Uganda, as an indigenous group, they are exposed to dire poverty levels to the extent that they have remained the 'most vulnerable of the vulnerable' due to continued economic and political marginalisation.<sup>8</sup> Unlike other indigenous peoples which have representation in Parliament, government institutions, institutions of higher learning, local governments and local councils, the Batwa are not represented anywhere in the government arena. Additionally, formal equality which calls for equal treatment of everybody is not favourable to the Batwa who have been subject to generations of discriminative treatment.

## **1.2 Justification of the study**

The right to participation both in public and private life by the Batwa people has been a subject of debate and discussion among several professionals working with indigenous groups in Africa. Uganda recognizes the right to participation by all persons in its 1995 Constitution (as amended) and the Local Government Act, 1997 (as amended) (Cap. 243). Several efforts by the civil society organisations and government to promote fair participation by the indigenous peoples have been initiated. The challenge has been the lack of implementation of the laws and policies which promote fair participation of the indigenous peoples.

The Ugandan government, by virtue of its ratification and acceptance of international human rights standards, has taken on the obligation to treat its citizens equally and to uphold their rights and freedoms. The country's National Culture Policy of 1996 bears

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<sup>7</sup> K Kabanankye and L Wily (1996). Report on a study of the Abayanda Pygmies of south west Uganda for Mgahinga and Bwindi<sup>8</sup> African Peer Review Mechanism (APRM), Country Review Report Number 7 on the Republic of Uganda, January 2009.

<sup>8</sup> African Peer Review Mechanism (APRM), Country Review Report Number 7 on the Republic of Uganda, January 2009.

an objective to develop and promote indigenous knowledge as a key factor in social and economic development and cultural transformation. However, this cannot be practical when the Batwa are not fully involved in the promotion of the indigenous knowledge. The Bill of rights (Chapter Four) in the Ugandan Constitution provides for the protection of the rights of the minorities, implying that the minorities have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of the national plans and programmes.<sup>9</sup>

The focus on participation in this thesis therefore arises from the recognition that participation is a priority for good governance and democracy to flourish.

The focus on the Batwa is justified by their marginalisation especially during planning and implementation processes. The focus on participation arises from the fact that as indigenous peoples, their plight has for some time been examined by the United Nations Working Group on Indigenous Peoples and the United Nations Permanent Forum on Indigenous Issues.

Both these forums have pointed out as a main concern the right of indigenous peoples to own and control their own land and resources which they possess through traditional ownership or use. The forums have encouraged member states to involve indigenous peoples in decision-making processes. It is thus found appropriate that this thesis focuses on the participation of the Batwa in civil, political, economic, social and cultural arenas as a matter of great importance for the indigenous peoples at the international and local level.

This research is thus justified by the need to contribute new knowledge on how the international and domestic laws can protect and promote the rights of the marginalised indigenous communities.

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<sup>9</sup> The 1995 Constitution of the Republic of Uganda.

### 1.3 The statement of the problem

The Batwa constitute one of the ethnic minorities in Uganda,<sup>10</sup> not only in terms of numerical numbers, but also in terms of resource access, utilization and political participation. They are a victim of the colonial legacy that sidelined or excluded them from the mainstream development programmes and activities in the country. In addition, the exclusion has further been perpetuated by the dominant ethnic groups neighboring them such as the Bakiga and Bafumbira that have continuously belittled the problems of the Batwa, which has ultimately limited attention that is given to their meaningful political participation. In fact, the African Commission on Human and Peoples' Rights identifies them as one of the most marginalised due to their culture and way of life.<sup>11</sup>

Unlike in Europe where minority matters have caused action in respect to initiation of legislation and regional treaties, in the Great Lakes Region where the Batwa live, there has been inadequate action taken to initiate legislation and regional treaties to address the problem of marginalisation of ethnic minorities in Africa. This is because of the lack of awareness on minority issues and inadequate comprehensive legal regime to protect the rights of the ethnic minorities. As a result, the Batwa remain marginalised and violations of their rights have become one of the causes of conflict rather than a unifier in Africa.

There has also been a lack of implementation of the legal measures relating to the promotion of the rights of indigenous peoples in Uganda. Whereas Uganda has ratified international treaties such as the International Covenant on Civil and Political Rights that enjoin the State to institute measures to promote the rights of indigenous groups, relevant practical measures have not been adopted. Concern is particularly raised vis-à-vis the lacunas in the instituted policies in education, health and other sectors that are

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<sup>10</sup> Uganda Bureau of Statistics, Statistical abstracts for the years 2002 and 2006.

<sup>11</sup> Report of the African Commission's Working Group on Indigenous Populations/Communities, adopted on the 47<sup>th</sup> ordinary session 12<sup>th</sup> – 26<sup>th</sup> May 2010.

not specifically geared towards the improvement of the lives of indigenous peoples, and in his case, the Batwa.

The 1995 Constitution of Uganda lists the Batwa as one of the indigenous groups in the country.<sup>12</sup> However, the absence of a definition for the term ‘indigenous peoples’ in the same document, has negatively impacted on the promotion of the rights of the Batwa as the indigenous group. They are treated as homogenous with their other counterparts without due regard to the challenges that they are confronted with. Treating all groups at the same footing has consequences for the weak and marginalised groups in coping up with programmes that are instituted by the state. This has been the case with the Batwa where their neighbouring communities have tended to exploit all the available opportunities, thus pushing them to the periphery of all development programmes. Even during consultations, the Batwa are sidelined by their neighbours who dominate the proceedings. According to Mwakikagile, the Batwa are excluded from the decision-making processes because of their low levels of education, which makes them fail to keep up with the proposed government policies that affect them, even when they are aware of such upcoming policies.<sup>13</sup> Other institutions and people who have acted as their voices have misrepresented them resulting into prejudices and stereotyping.

The Batwa have continuously experienced a wide range of human rights violations which include discrimination in the enjoyment of their rights such as the right to adequate housing and education as pointed out by Woodburn.<sup>14</sup> This situation is manifested by the widespread poverty, unemployment, illiteracy, substandard housing among others. Discrimination against the Batwa people is still rife as noted by the African Commission in its concluding observations in the 3<sup>rd</sup> periodic report of 2009 on

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<sup>12</sup> Third Schedule of The Constitution of Uganda 1995 (as amended).

<sup>13</sup> G Mwakikagile *Ethnicity and national identity in Uganda: The land and its people, customs* (2009) New Africa Press, California: USA, at 187.

<sup>14</sup> For analyses on discrimination against hunter-gatherers and former hunter-gatherers in sub-Saharan Africa, see J Woodburn, ‘*Indigenous discrimination: The ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa*’, *Journal of Ethnic and Racial Studies*, vol. 20, no. 2, 1997, at 345–61.

the Republic of Uganda. The African Commission expressed concern about the levels of marginalisation against the Batwa and urged the government of Uganda to tackle the problem. They are often targeted as scapegoats for the ills in society which has resulted into attacks against them and their property.<sup>15</sup> The Batwa have also been discriminated in regard to access to social services. For example, personnel at government clinics and hospitals are reluctant to treat Batwa patients.<sup>16</sup> Teachers and fellow students ridicule Batwa school children, which forces them to drop out of school.<sup>17</sup>

#### **1.4 The aims and objectives of the study**

The thesis will make reference to the Batwa indigenous peoples in Rwanda, Burundi and Uganda in order to provide examples in more practical terms of what happens at the national and community level in implementation of the right to participation. The three studies are very significant because they encourage an examination of participation rights beyond the theoretical context. The objectives of the study include the general and specific objectives as indicated below;

##### **1.4.1 General objective**

The general objective of this research is to examine the extent to which Uganda's legal framework promotes the Batwa's right to participation.

##### **1.4.2 Specific objectives**

- To analyze how the current legal and policy framework in Uganda enhances the right to participation for the Batwa; there will be a review of the laws and policies pertaining to indigenous groups and how they can effectively promote the rights of the Batwa.

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<sup>15</sup> K Barume and D Jackson, *Heading towards extinction? The expulsion of the Twa from the Kahuzi-Biega National Park, Democratic Republic of Congo: A study of indigenous rights in Africa*. Copenhagen: World Rainforest Movement and Forest Peoples' Programme (2000).

<sup>16</sup> A Barratt and A Afadameh-Adeyemi, '*Indigenous Peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21*', 2011 11 (2) *African Human Rights Law Journal*, at 568.

<sup>17</sup> *Ibid*, n 15.

- To examine how international law in the absence of effective local remedies can be resorted to in order to protect the right to equality in participation for the Batwa; and
- To discuss how the relevant jurisprudence from comparable jurisdictions can promote the right to participation in decision making for vulnerable groups like the Batwa.

## 1.5 Scope of the study

The scope of this thesis is limited to the examination of the current legal framework in Uganda and the extent it promotes the right to participation for the Batwa. For purposes of this thesis, we shall adopt a classical definition of a minority as ‘a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from the rest of the population.’<sup>18</sup> Suffice to note that recognition of an ethnic minority group as such by the State is not a precondition for a group to be classified as a minority. There are things to note about this working definition. The first is that minorities are often numerically smaller than the rest of the population. Secondly, their socio-economic characteristics show trends of marginalisation. Thirdly, the characteristics they possess such as unequal access to social services, failure to manage their own affairs, unfair treatment by the majority or powerful, reveal that they need special protection and participation.

On the basis of international legal regimes and comparable jurisprudence from other jurisdictions, this thesis will make a case for comprehensive reform in respect to the right to participation. The thesis will make reference to the Batwa indigenous peoples in Rwanda and Burundi in order to provide examples in more practical terms of what happens at the national and community level in implementation of the right to participation. The two studies are very significant because they encourage an examination of participation rights beyond the theoretical context.

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<sup>18</sup> F Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (New York: United Nations, 1979), at 7.

## 1.6 Research Questions

In the quest to address the above aims and objectives, this study will be guided by the following questions:

- To what extent does the current legal and policy framework in Uganda enhance the right to participation for indigenous groups?
- How can international law protect the right to equality in participation for indigenous groups?
- What are the legal and policy frameworks in Uganda that guarantee the right to participation for indigenous groups?
- How does the relevant jurisprudence from comparable jurisdictions promote the right to participation in decision-making for indigenous groups such as Batwa?

## 1.7. Research methodology

This thesis will be a qualitative desk study involving an analysis of the extent to which human rights law promotes the right to equality in participation for vulnerable indigenous groups. The research described in this document is predominantly based on qualitative research. It was not found proper to use quantitative methods for a study that covers three jurisdictions and involving a wide range of issues and potential interviews. The interview and questionnaire method of data collection has some challenges and limitations in respect to the nature of the study. As discussed in the background, the right to participation in civil, political, economic, social and cultural rights covers a wide scope and it was not practical to conduct interviews. However, observation was employed to explore the life experiences, perceptions and attitudes of the Batwa group. This study primarily based its arguments on a review of literature on indigenous people's rights in general and will give particular attention to the right to participation for the Batwa. The thesis analyzes the relevant legal framework in Uganda and applicable regional and international provisions in respect to the right to participation. The thesis also examines the comparable human rights standards and jurisprudence that promotes the right to participation for the Batwa. This study employed a qualitative research methodology, because of its appropriateness to provide a complete and detailed description of the research topic since it is more exploratory in nature.

## 1.8. Organisation of Chapters

The thesis consists of six Chapters.

- Chapter one consists of an introduction and general overview of the study as it sets out the content and structure with the focus and the methodology to be adopted in the research.
- Chapter two discusses the context of the study. It examines the importance and relationship of the right to participation and the civil, political, social, economic and cultural rights. The chapter also discusses the rationale of participation as a right for the Batwa in decision-making processes and concludes by analyzing some theories of human rights and participation, and examining the different human rights systems.
- Chapter three examines the right to participation for the politically marginalised Batwa. It also discusses the different types of public participation and analyses the challenges facing the Batwa in realization of this right.
- Chapter four unpacks the Economic, Social and Cultural rights in respect to participation. It discusses some examples of the socio economic rights of the Batwa and how they can enjoy these rights.
- Chapter five sets the context for the tripartite study on the participation of Batwa in Burundi, Rwanda and Uganda. The situation in Rwanda and Burundi is reviewed in order to identify possible legal reforms to protect the Batwa's right to participation.
- Chapter six make recommendations for revamping the right to participation for the Batwa. The chapter also discusses the possibility for a model law for indigenous peoples in Africa and a general conclusion of the study on the right to participation by the Batwa.



## CHAPTER TWO

### CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW ON INDIGENOUS PEOPLES AND THE RIGHT TO PARTICIPATION

#### 2.0 Introduction

The right to participation for indigenous peoples has placed more attention on political participation than participation in economic, social and cultural rights. However, the subject on Batwa participation in economic, social and cultural rights and their inclusion as indigenous peoples is gaining prominence. Its prominence is justified by the discrimination and often exclusion of the indigenous peoples to access of basic services. Currently, there are no established standards on the participation of indigenous peoples in economic, social and cultural rights which shows that these are related to access to fundamental socio-economic rights and equality in treatment.

This chapter lays the theoretical foundation by including a definition for the concept 'indigenous', and gives a clear meaning of participation as a right and explores how the indigenous peoples have articulated their demands within international law. It analyses the major developments in respect to the concept of indigenous people's rights and particularly makes reference to the norms, best practices and principles of international human rights law which govern individuals and groups which include collective interests of indigenous peoples. In particular, the normative content of indigenous rights will focus on the indigenous people's right to participation and how the right to participation is at the core of the human rights system. The chapter also discusses special measures that may be appropriate and necessary in giving proper effect to the right to participation for the Batwa.

## 2.1. Equality Defined

Theoretically, equality refers to act of treating similar cases in a similar manner alike and different case differently. Formal equality refers to the right to treat like cases alike, whereas a substantive equality involves the unlike treatment due to their unlikeness.

The principle of equality often refers to the formal component.<sup>1</sup> This tendency has been illustrated within the EC equality law.<sup>2</sup> It is significant to describe the inclination from the economic perspective,<sup>3</sup> as the legal system of the Community focusing on economic goal of the creation and expansion of the market by the market forces of demand and supply.<sup>4</sup>

This description encourages liberalism<sup>5</sup> whereas the capitalist encourages the organisation principle for contractual arrangement within the market forces. People are treated as factors of production in comparison with other factors of production. This argument places emphasis that even the Batwa can be employed as other citizens and make free choices. It is therefore considered that the position of the Batwa in respect to equality would depend highly on their merit. Inequality of capabilities, efficiency and ultimately bargaining power among the Batwa communities in Uganda justifies inequality of treatment which has hampered their participation in programmes.

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<sup>1</sup> K. Wenholt, “*Formal and substantive equal treatment: The limitations and the potential of the legal concept of equality*”, in Loenen, Rodriguez, *Nondiscrimination law: Comparative perspectives*, Kluwer, 1999, pages 54-55 and U. O’HARE, “*Enhancing European equality rights: A new regional framework*”, (2001) 8 *MJ*, page 144.

<sup>2</sup> That such a tendency does indeed exist in EC anti – discrimination law is commonly accepted in literature. In this regard, see, for example, C. Barnard, “*Article 13: Through the looking glass of Union Citizenship*”, in D. O’ Keffee, P. Twomey (eds), *Legal issues of the Amsterdam Treaty*, Hart publishing, Oxford – Portland Oregon, 1999, pages 385 - 387.

<sup>3</sup> C. Mc CRUDDEN, “*The new concept of equality*”, paper presented at the Conference “Fight against Discrimination: The Race and Framework Employment Directives”, June 2003, Academy of European Law, pages 12 – 13.

<sup>4</sup> H. Fenwick, T. K. Hervey, “*Sex equality in the single market: New directions for the European Court of Justice*”, (1995) 32 *CMLR*, p. 443 – 444.

<sup>5</sup> G. MORE, “*The principle of equal treatment: From market unifier to fundamental right?*”, in P. CRAIG, G. De BURCA, *The evolution of EU law*, Oxford University Press, 1999, page 522.

Formal equality identifies better with this context, because it does not focus on other factors apart from the personal attributes of individuals that affect their impact in the market.

Since active treatment is seen as derogation from the principle of equality, it has to be construed narrowly<sup>6</sup>. This concept is not, therefore, gravely disruptive of market forces<sup>7</sup>. This is not to say that formal equality has no impact on the market at all. On the contrary, if fully established, it induces the market forces not to act in an arbitrary and inefficient fashion. In so far as it disallows the individual biases of employers to feed into the market, formal equality may admittedly promote genuine competition based on individual merit.

Formal equality should not mean that all people regardless of their situation be treated the same way. It is clear that the existing differences between the people may explain the necessity for difference in their treatment. This, when applied would support unequal treatment among unequal subjects of law. It is these differences that call for special attention to the Batwa Community since formal equality wrongly rationalises that all people are of equal value despite their differences.<sup>8</sup> According to the interpretation of equality through formal equality lenses, all the Batwa as human beings are entitled to and should be afforded equal concern and respect as stipulated by article 1 of the Universal Declaration of Human Rights (1948): “All human beings are born free and equal in dignity and rights...”

The realization of the right to substantive equality (equality in fact) as the necessary counterpart of formal equality (equality in law) is important in eliminating human rights violations and disguised discrimination against ethnic minorities. Violations of the rights to participation and non-discrimination intensify conflict while the observance and implementation of the same serves to reduce conflict. This is common because Uganda

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<sup>6</sup> K. Wentholt, *n 1*, page 55.

<sup>7</sup> H. Fenwick and T. K. Hervey, *n 4*, pages 443 - 450.

<sup>8</sup> L.Waddington, A. Hendricks, “*The expanding concept of employment discrimination in Europe: From direct and indirect discrimination to reasonable accommodation discrimination*”, (2002) 18/3 *IJCLLIR*, page 403 at 406.

as a state is closely identified with the dominant or majority ethnic groups that are superior to the Batwa. The right to equality should therefore act as a necessary balance to this tendency which limits some people's possibilities for the perpetuation of ethnic dominance by placing the individual at the Centre of decision making.<sup>9</sup>

## **2.2 Linking the Right to Participation with Equality**

The term "Participate" and "Take part" have the same meaning and are used interchangeably. Participation therefore touches three components which include; participate in, access to and contribution towards decision making processes in the community. Equality in participation therefore refers to the extent to which citizens have equal voice in decision making.

Equal activity is therefore significant for equal consideration because participation is the means by which the people inform the state of their needs and request for action. The right to participation therefore provides the mechanism by which the Batwa can communicate information to the government for action. This would give them the ability to express their views, interests and concerns to the leadership.

Equality in participation is heavily dependent on the aspect of participation rather than equality component. For example community development is dependent on the level of participation. Participation can also be viewed as a political process in which all citizens have equal rights to take part in decision making processes. This right has evolved as part of the fundamental rights that guarantee political participation and has been expanded to include participation in social and economic decision making.

The inclusion of social and economic participation came up after it was realized that people could not attain their economic and social rights when they do not participate in decision making processes. The economic and social rights therefore make it possible for the citizens to attain their civil and political rights through participation

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<sup>9</sup> W Duncan (2002), *Minority rights in education: Lessons for the European Union from Estonia, Latvia, Romania and the former Yugoslavia Republic of Macedonia*. Printed by Elanders Novum AB.

The right to participation can therefore be used as a right to enable citizens to claim other rights.<sup>10</sup> Participation is described by Gaventa and Vanderama as a human agency which provides the approach for the public influence and control in governance.<sup>11</sup> It could be argued therefore, that once the Batwa can attain equality in participation, then there will be recognition of better decision making which will flow from their involvement in decision making and development processes. The comparison of other rights with the right to participation is justified by the crosscutting nature of the latter. Thus, if the Batwa are given the opportunity to enjoy this right, the other rights will also be enjoyed. Participation therefore, would enable the Batwa to demand for the other rights and can be used as an avenue to advocate for the promotion and protection of both the Civil and Political rights and the Economic Social and Cultural rights.

### 2.3 Indigenous peoples defined

The concept of indigenous peoples relies on several criteria for identification and characterization since it does not have a universal and unambiguous definition. The definition of 'indigenous' has therefore remained a great debate amongst several academic authors.<sup>12</sup> This debate was generated by Kuper by emphasizing that 'indigenous' is a term that is essentialist with claims for specific rights which are not

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<sup>10</sup> IDS Policy Briefing Issue, The rise of rights: Rights based approach to international development, (17<sup>th</sup> May, 2003) 2.

<sup>11</sup> J Gaventa and C Valderama, *Participation, citizenship and local governance*, Background paper for workshop on 'Strengthening participation in Local Governance, Mimeo (Institute of Development Studies, Brighton 21-24 June 1998) 5.

<sup>12</sup> M.R Dove, *'Indigenous People and environmental politics'*, *Annual Review of Anthropology*, (2006) vol. 35, no. 1, at 191-208; J Kenrick, *'Discussion: The concept of indigeneity'*, *Social Anthropology*, (2006) vol. 14, no. 1, at 17-32; J Kenrick & J Lewis, *'Indigenous Peoples' rights and the politics of the term 'indigenous'*, (2004) Volume 20 No 2 *Anthropology Today*, at 4-9; A Kuper, *'Discussion: The concept of indigeneity'*, (2004) Volume 14 No 1 *Social Anthropology*, at 17-32; D Rosengren, *'On 'indigenous' identities: Reflections on a debatee'*, (2002) Volume 18 No 2 *Anthropology Today*, at 25; S Saugestad, *'Contested images: 'First peoples' or 'marginalised minorities in Africa?'*, In A Barnard & J Kenrick (eds.) *Africa's Indigenous People: 'First peoples' or 'marginalised minorities in Africa?'* (2001) Edinburgh, Centre of African Studies, University of Edinburgh; J Suzman, *'Indigenous wrongs and human rights: National Policy International Resolutions and the Status of the San in Southern Africa'*, in J Kenrick & A Barnard (eds.) *Africa's indigenous minorities: First peoples or marginalised minorities.* (2001) Edinburgh, Centre of African Studies, University of Edinburgh; R Sylvain, *Class, culture, and recognition: San farm workers and indigenous identities*, In J S Solway (ed.) *The politics of egalitarianism: Theory and practice.* New York ; Oxford, Berghahn Books.

different to those made by the 'extreme right wing parties of Europe'.<sup>13</sup> Kuper relies mainly on essentialist definition yet there is much importance in the evaluation of indigenous peoples' rights and their based practices.<sup>14</sup> The indigenous rights activists should conduct a self-assessment and evaluation for the different practices that are positive especially in Africa where the views of indigenusness build tension in the field of politics.

'Indigenusness' has also been challenged by several scholars<sup>15</sup> and some accept that it differs in contexts while others are restrictive in nature. According to Kuper's arguments, indigenous peoples are seeking 'privileged rights' over others and base this claim for privileged rights on a 'blood and soil' ideology of descent that echoes Nazi or apartheid ideologies.<sup>16</sup> He however fails to discuss how the different indigenous peoples understand their own position in a wider context of relationships and how they understand the term 'indigenous' to reflect their own identity. In his arguments, he equates the term 'indigenous' to 'primitive, tribal, hunting or nomadic' and claims that indigenous peoples are primitive societies.<sup>17</sup>

However, Bowen is of a different view that in defining indigenous status, the first stage is to claim that certain rights adhere to a group that was first to settle in a particular territory. The priority of residence therefore justifies the claims about indigenous peoples which are distinct from those made about the minorities or about people subject to discrimination and oppression.<sup>18</sup> This is different from the position of the African Commission for Human and Peoples' Rights which stated:

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<sup>13</sup> A Kuper, 'Return of the Native', *The New Humanist*, September 2003.

<sup>14</sup> n 13 above.

<sup>15</sup> J R Bowen, 'Should we have a universal concept of 'Indigenous' People's Rights?: Ethnicity and essentialism in the twenty first century', (2000) Volume 16 No 4 *Anthropology Today*, at 12-16; R Niezen, *The origins of indigenism: Human rights and the politics of identity* (2003), Berkeley, London: University of California Press.

<sup>16</sup> Kuper, 'The return of the native', (2003) Volume 44, No 3 *Current Anthropology*, at 390.

<sup>17</sup> *Ibid*, n 13 at 389.

<sup>18</sup> *Ibid*, n 15 at 13.

Indigenous Peoples' has come to have connotations and meanings that are much wider than the question of 'who came first'. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.<sup>19</sup>

The African Commission has made observations that certain marginalised groups are facing discrimination in different ways because of their culture, mode of production and marginalised position within the state.<sup>20</sup> The idea on whether to accept equal rights based on an acceptance of legitimacy of economic and social ways of life of the indigenous peoples as Kenrick describes, is an aspect that requires more analysis and further research.<sup>21</sup> The identity of the indigenous peoples therefore represents a special relationship which has been disposed while the indigenous rights describe an approach for resisting dispossession.<sup>22</sup> In Africa, Indigenous Peoples have their own specific traditional practices that reflect who they are. With respect to the Batwa, they have specific attachment to their specific ways of life which are distinct from the rest of the dominant groups; they prefer to be called the Batwa. This thesis moves towards the definition of the Indigenous Peoples by the African Commission because of its significance to the African context. The Commission therefore defines Indigenous Peoples as those whose culture and way of life is subject to discrimination and contempt and whose existence is under threat. The Batwa fit into this definition as they are marginalised and discriminated against because of who they are. In order to understand the relationship between Indigenous Peoples Rights and the discrimination they are facing, it is important to address the historical context of human rights theories.

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<sup>19</sup> ACHPR & International Work Group on Indigenous Affairs (IWGIA), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Banjul, The Gambia, Copenhagen, Denmark, 2005.

<sup>20</sup> Ibid, n 19 at 88.

<sup>21</sup> J Kenrick & J Lewis, *'Indigenous Peoples' rights and the politics of the term 'Indigenous'*, (2004) Volume 20 No 2 *Anthropology Today*, at 9.

<sup>22</sup> J Kenrick & J Lewis, *'Discussion: On the return of the native'*, (2004) Volume 45 No 2 *Current Anthropology*, at 263.

## 2.4 Historical context of human rights

In order to address the niche of this thesis, it is significant to discuss the naturalist theory, which perceives human rights as deriving from the idea of natural rights,<sup>23</sup> in respect to the indigenous rights movement. According to the naturalists, human rights are conceived as objects that acquire their characteristics from natural rights with the foundations in European political ideas and legal views in the modern period.<sup>24</sup> Human rights are defined as entitlements that accrue to every individual human being by virtue of his/her humanity. This position has been subject to different interpretations with two major common positions. The first is that human rights are separate from positive rights because the former are enacted by law and are recognized by society.<sup>25</sup> The second position reaffirms the fact that human rights belong to human beings by virtue of their humanity. This implies that all human beings are entitled to human rights claims.<sup>26</sup>

The naturalist theory therefore looks at international human rights as rights that all human beings have because of 'their humanity'.<sup>27</sup> According to Beitz, human rights are entitlements to all people irrespective of their origin, and the current legal or social institutions.<sup>28</sup> Beitz's position on exploring the definition of human rights widens the Rawlsian view in which the scope and reason of the right is found outside the concept of the right.<sup>29</sup> Rights are interpreted as an invitation to global critique in the public context models which are demonstrated as acceptable norms with no deviations.<sup>30</sup>

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<sup>23</sup> RC Beitz, *The idea of human rights* (2009), Oxford: Oxford University Press, at 49.

<sup>24</sup> Romuald R. Haule, *Some reflections on the foundation of human rights – Are human rights an alternative to moral values?*, Max Planck Yearbook of United Nations Law, Volume 10, 2006, p. 367-395.

<sup>25</sup> *Ibid.*

<sup>26</sup> Preamble to the UDHR.

<sup>27</sup> *Ibid.*, n 24 at 256.

<sup>28</sup> Charles Beitz, *The idea of human rights*, Oxford University Press, 2009.

<sup>29</sup> J Rawls, *The law of peoples* (1999), Cambridge, Mass.: Harvard University Press, at 79–81 (interpreting human rights as a special category of rights based on the need for a system of cooperation in a well-ordered society).

<sup>30</sup> *Ibid.*, n 26 at 116.



Arising from the inherent challenges in the naturalist school of thought by the human rights advocates, the idea of human rights being general is conceived by Hart who states that general rights are not regarded as necessary considerations in order to require their own protection.<sup>31</sup> In order to demonstrate this position, Hart claims that some human rights like social and economic rights cannot be enforced as general rights because of their special nature that calls for special protection.<sup>32</sup>

In order to appreciate the naturalist theory, the marginalisation of indigenous peoples and their exclusion from international law as a subject has its origins in the positivist theory. Right from the 19<sup>th</sup> century, some international jurists and scholars like William E Hall,<sup>33</sup> John West Lake,<sup>34</sup> Thomas Lawrence,<sup>35</sup> James Lorimer<sup>36</sup> and M F Lindley<sup>37</sup> supported the international law system as grounded on the positivist theory.

Positivism focuses on the notion of the sovereign state as the highest in authority within international law while in the natural perspective the sovereign states are governed by the principles of natural law.<sup>38</sup> The rules that govern relationships within the sovereign states are usually agreed upon by the parties.<sup>39</sup> The positivist international law

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<sup>31</sup> Ibid, n 26 at 70-72.

<sup>32</sup> Ibid, n 26 at 49-59.

<sup>33</sup> W E Hall, *A treatise on international law* (1924) 8<sup>th</sup> ed Oxford: Clarendon Press Page Number.

<sup>34</sup> J Westlake, *Chapters on the principles of international law* (1894) Cambridge: Cambridge University Press.

<sup>35</sup> T Lawrence, *The principles of international law* (1895) Boston: D.C. Heath.

<sup>36</sup> J Lorimer, *The Institutes of the Law of Nations: A Treatise of the jural relations of separate political communities* (1883) (Edinburgh: Blackwood & Sons.

<sup>37</sup> M F Lindley, *The acquisition and government of backward territory in international law* (1926) London: Longmans, Green & Co.

<sup>38</sup> Positivism is an illustration of the framework articulated by early jurists like Francisco de Vitoria who tried to bring the difference between 'natural law' and 'human law', the former was described as a set of transcendental principles which were identified by the use of reason, the latter expressed through political authorities.

<sup>39</sup> C H Alexandrowicz, *Doctrinal aspects of the Universality of the Law of Nations* (1961) British Yearbook of International Law at 506.

discriminated between uncivilized and civilized states and was mainly applicable to the latter.

The doctrine of civilization as was advanced by Westlake to ascertain whether people would be part and parcel of the international system of states excludes the positivist position.<sup>40</sup> Culture as an idea therefore became very significant for the doctrine of sovereignty which was put together with a set of cultural practices to the exclusion of others and results into struggles to fight exclusion and discrimination.

Another interesting concept of human rights in Africa is brought up by Mawa who is of the view that human rights in Africa involve struggles against domination, exploitation, oppression and abuse.<sup>41</sup> Mawa explains that his position is demonstrated in the preamble of the African Charter on Human and Peoples' rights where the duty of everyone is affirmed as; 'to achieve the total liberation of Africa, the people of which are still struggling for their dignity and genuine independence'.<sup>42</sup>

Another critical argument is brought out by Burke<sup>43</sup> and Bentham<sup>44</sup> who take the position that human rights are not inalienable but crop from government's actions. On the other hand, John Locke is of the opinion that civil and political rights like life, liberty and property fall under the natural rights which are fundamental to human beings.<sup>45</sup>

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<sup>40</sup> Ibid, n 28.

<sup>41</sup> M Mawa, 'Human rights and development in Uganda: Reflections on the Constitutional provisions on the right to development' in AT Dalfovo, JK Kigongo, J Kiseka, G Tusabe, E Wamala, R Munyonyo, A B Rukooko, ABT Byaruhanga- Akiiki, M Mawa (eds) *Ethics, human rights and development in Africa: Uganda philosophical studies III* (2002), Washington, DC: The Council for Research in Values and Philosophy, at 2.

<sup>42</sup> Ibid, n 37 at 1.

<sup>43</sup> E Burke, *Reflections on the revolution in France* (1970), Harmondsworth, UK: Penguin, at 114.

<sup>44</sup> J Bentham, 'Critique of the doctrine of inalienable, natural rights' (1843), at 2. Available at [www.ditext.com/bentham.html](http://www.ditext.com/bentham.html) (accessed on the 2nd April 2012).

<sup>45</sup> J Locke, 17<sup>th</sup> century English, philosopher who discussed the natural rights through his works and specifically identified them as 'life, liberty, and the estate(property)'.

It should be noted that the positivist perception of international law in the 19<sup>th</sup> century undermined the indigenous peoples as subjects in the international legal arena which left them with no status and rights. This exclusion of the indigenous peoples from international law is rooted in the Eurocentric ideas of the law of nations.<sup>46</sup> The indigenous peoples were therefore excluded and discriminated against because they were not recognized within the set up 'family of nations'.<sup>47</sup> This was because the basis of the Law of Nations was in the common consent of the civilized states and therefore statehood on its own would not imply membership to the family.

The League of Nations in the early 20<sup>th</sup> century marked an important development in the indigenous peoples lives as the first forum internationally in which the indigenous peoples made attempts to raise their voices especially on their existence and to claim their rights.<sup>48</sup> However, they did not succeed in their efforts since there were no provisions specifically on minority rights within the Covenant of the League of Nations.<sup>49</sup>

This issue was deferred until the mid-20<sup>th</sup> Century when the indigenous peoples reorganized themselves and begun to advocate for their rights by virtue of their existence within the international legal system. With the birth of the United Nations System and growth of international human rights law marked an improvement in the relationship between the indigenous peoples in international law. This is the basis for advocating for the rights of the marginalised indigenous groups like the Batwa in Uganda.

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<sup>46</sup> Ibid, n 39 at 47.

<sup>47</sup> L Oppenheim, *International law: A treatise* (first published 1905; London and New York: Longmans, 3rd ed., 1920).

<sup>48</sup> Les Malezer, 'Permanent forum on indigenous issues: Welcome to the family of the UN' In Joshua Castellino and Niamh Walsh (eds) *International law and Indigenous Peoples* (Leiden, The Netherlands: Martinus Nijhoff, 2005) 67, 73.

<sup>49</sup> Warwick A McKean, *Equality and discrimination under international law* (1983) (Oxford: Clarendon Press; New York: Oxford University Press).

## 2.5 The Batwa as a minority or indigenous group

States do have minority groups within their national territories and such groups are normally distinguished by their own ethnic, linguistic or religious identity that differs from that of the majority population.<sup>50</sup> The identification and recognition of the Batwa communities is an important step towards their legal protection. Harmonious relations among and between the minorities and majorities, as well as respect for each other's identity are a great asset to society.

The United Nations<sup>51</sup> has appealed for special rights to be afforded to groups of indigenous peoples that are especially vulnerable to marginalisation. Such special rights are included in the UN Conventions and Declarations such as the International Convention on the Elimination of Racial Discrimination,<sup>52</sup> which prohibits any form of discrimination on grounds of ethnicity, race, colour, sex and other related factors. These instruments operate both regionally and internationally. It is therefore very important to advocate for the meeting of the aspirations of the minorities and ensuring their rights promote the dignity and equality of all individuals which in turn fosters participatory development and reduces unnecessary tensions among states.<sup>53</sup>

The International Labour Organisation<sup>54</sup> was the first international body to take action on indigenous issues. The ILO has since its creation defended the socio-economic rights of groups whose cultural practices and tradition make them different and apart

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<sup>50</sup> Fact Sheet No.18 (Rev.1), Minority Rights Adopted by General Assembly resolution 47/135 of 18 December 1992, available at <http://www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf>. (accessed on 5th March 2012).

<sup>51</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>52</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969.

<sup>53</sup> Pamphlet No. 2 of the UN Guide for Minorities, The protection of the rights of minorities and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). UN Working Group on Minorities.

<sup>54</sup> The ILO was formed in 1919 to promote rights at work, encourage decent employment opportunities, and enhance social protection.

from other national communities. The ILO Convention 169<sup>55</sup> specifically protects the rights of people whose way of life and existence were threatened by dominating cultures. The Convention underlines the significance of self-identification for all indigenous peoples such as the Batwa groups.

There is no clear definition of indigenous peoples under international law due to the position that it is not relevant for purposes of protecting human rights.<sup>56</sup> According to this thesis, there are different groups of indigenous peoples in the Republic of Uganda and determining who is indigenous for purposes of international law is difficult because the country uses the term differently from that adopted by the international community.

According to the ILO Convention, people are considered “indigenous” because they are the descendants of those who lived in the area before colonization, or because they have maintained their own social, economic, cultural and political institutions since colonization and establishment of new states.<sup>57</sup> Both criteria apply to the Batwa people in the Central African Republic.<sup>58</sup> Minorities as conceptualized under international human rights law do not extend to every conceivable classification of minority say, left-handed people, albinos. Rather, the concern with minorities is typically related to racial, ethnic, religious and linguistic groups; what Thornberry<sup>59</sup> refers to as “cohesive groups”, the characteristics of which endure, and who regard themselves or are regarded by others as different to the mainstream of society.<sup>60</sup>

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<sup>55</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

<sup>56</sup> Indigenous and Tribal People’s rights over their ancestral and natural resources, Inter American Commission on Human Rights, III (A) (25). <http://cidh.org/countryrep/Indigenous-Lands09/Chap.III-IV.htm> (accessed on 9th April, 2012); see also KN Bojosi & GM Wachira, ‘Protecting indigenous people in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights 2006, 6 (2) *African Human Rights Law Journal* 384-391.

<sup>57</sup> ILO Convention No 169.

<sup>58</sup> P Thornberry, *International law and the rights of minorities* Oxford: Oxford University Press (1991), at 6.

<sup>59</sup> Ibid.

<sup>60</sup> Constitutional Rights Project (1999), *Text for human rights teaching in schools* ( A.O Obilande, ed).

The African Independent Inc, 2003 explains that much as the Charter of the United Nations and the Universal Declaration of Human Rights were grounded in the protection of individual human rights and freedoms and the principles of non-discrimination and equality, special provisions for the rights of minorities remained necessary. It was soon very apparent, that further measures were needed to better protect and promote persons belonging to minorities. To this end, special rights for minorities were elaborated and measures adopted to supplement the principles of non-discrimination in international human rights instruments. These special rights of minorities are outlined in a separate document; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>61</sup>

There is no universally accepted definition of “minorities”; the word is generally interpreted differently in separate societies.<sup>62</sup> The minority groups activists prefer to describe them as a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics that are unique compared to the majority of the population.<sup>63</sup> The challenge to arriving at an acceptable definition lies in a variety of situations in which minorities exist. The UN has failed to agree on a more precise definition of what constitutes a minority beyond that is implied in the title of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.<sup>64</sup>

The UN Human Rights Committee<sup>65</sup> has stated that defining a minority under the International Covenant on Civil and Political Rights should not be at the discretion of a

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<sup>61</sup> African Independent Inc. (2003), ‘Minorities under Siege-Pygmyes today in Africa, Indigenous people and minorities: A global and historic assault.’ <http://www.africanindependent.com> (accessed on 6<sup>th</sup> July, 2010).

<sup>62</sup> IRIN (2006), ‘In-depth: Minorities under siege-pygmyes Today in Africa, Global: Indigenous People and Minorities: A global and historic assault’, available at [www.irinnews.org/in.../minorities-under-siege-pygmyes-today-in-africa](http://www.irinnews.org/in.../minorities-under-siege-pygmyes-today-in-africa) (accessed on 7<sup>th</sup> March 2012).

<sup>63</sup> Parliamentary Forum of Small Arms and Light Weapons, meeting in Berlin, Germany on February 15, 2009, available at [www.parliamentaryforum.org/sites/default/files/parlf](http://www.parliamentaryforum.org/sites/default/files/parlf) (accessed on 17<sup>th</sup> April 2012).

<sup>64</sup> n 49 above.

<sup>65</sup> This is a human rights treaty body that monitors the implementation of the International Convention on Civil and Political Rights among States Parties.

government, but is an objective definition. Despite the lack of a universally acceptable definition, it is important to note that any disempowered group, regardless of its numerical size, could be considered a minority.<sup>66</sup> It is also important to note that special rights are not privileges, but they are merely granted to make it possible for minorities to preserve their identity, characteristics and traditions.<sup>67</sup> Special rights are however important in achieving equality in participation for the Batwa and non-discrimination.

Martín Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities of 1986, indigenous communities are defined as those with historical continuity with pre-invasion and pre-colonial developments on their land and also consider themselves as different from other members of the society.<sup>68</sup> Since the Batwa form the non-dominant part of society, they need to preserve and develop their traditional lifestyle and ethnic identity.

The Report further observed that the concept of historical continuity for the minorities is elaborated as the continued practice of the usage of the ancestral lands, cultural practice and specific manifestations of religion, dress code, means of livelihood and usage of language as a habitual means of communication. The term 'minority' has got several definitions. Chaliand is of the view that only "groups who see themselves as different, ethnically, religiously or linguistically, and are concerned to preserve their special features should be described as minorities".<sup>69</sup> The status on minorities according to Chaliand would be meaningless if they were dominant minorities. These refer to the minorities that though, they do not have a major demographic weight, nevertheless wield huge economic and political power.

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<sup>66</sup> K Kabanankye & D Kwagala, 'Culture, minorities and linguistic rights in Uganda: The case of the Batwa and the Ik', HURIPEC Working Paper No. 11, June, 2007.

<sup>67</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135 adopted on 18 December 1992 in New York.

<sup>68</sup> M Cobo, Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities of 1986, at 2.

<sup>69</sup> G Chaliand (ed.) *Minority peoples in the age of nation states*, (1989) London: Pluto Press, at 89.

Despite several studies by experts from the UN Sub Commission for the existence of discrimination and protection of minorities, and lengthy debates in many forms in which minority protection has been addressed, no definition of the term minority has proved universally acceptable. According to the UN Commission on Human Rights (now Human Rights Council)<sup>70</sup> however, despite the lack of a universally acceptable definition, it is important to note that any disempowered group regardless of its numerical size, can be considered a minority.<sup>71</sup> In this regard, the UN fails to give a definition of minorities and simply generalizes it as any disempowered group.

The UN Sub Commission on the Prevention of Discrimination and Protection of Minorities in 1950 made the following suggestions;<sup>72</sup>

- The term minority includes only those dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- Such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and
- Such minorities must be loyal to the state of which they are nationals.<sup>73</sup>

This definition is however lacking since minorities can be understood basing on objective and subjective criteria. The objective criterion includes the characteristics of the group such as ethnicity, language or religion. While the subjective criteria includes the wish of the individual members to collectively see themselves as unique and different from other groups in society who have a sense of belonging to the group and

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<sup>70</sup> The UN Commission on Human Rights was a subsidiary body of the UN Economic and Social Council (ECOSOC) whose mandate was to examine, monitor and publicly report on human rights situations in specific countries or territories as well as on major phenomena of human rights violations worldwide. It was replaced by the Human Rights Council in 2006.

<sup>71</sup> G Wairama Baker *Uganda; The marginalization of minorities*, (2001) Minority Rights Group International: UK, at 8.

<sup>72</sup> J P Humphrey, 'The United Nations Sub- Commission on the prevention of discrimination and protection of minorities' (1968) Volume 62 *American Journal of International Law*, at 869.

<sup>73</sup> UNDOC.EC/CN.4/Sub.2/1985/31/Corr.1 para 181, at 30.



wish to preserve the group's distinctive characteristics. In this case, they should be a discriminated and marginalised group.

The Minority Rights Group International points out the clarity on the fact that there can be one group with a numerical majority and another with a much smaller number requires minority rights protection. They explain that the existence of minority rights is necessary for the protection of the non-dominant people within society as they find themselves in a vulnerable position.<sup>74</sup> However, Minority Rights Group International also does miss the point when it fails to categorically specify the different states in which the above situation can be cited. Nonetheless, this gives a clear understanding of minorities drawing attention to a specific group's access to services and participation in public affairs other than group numbers.

According to Kuper, 'indigenous' is a term that is essentialist with claims for specific rights which are not different to those made by the 'extreme right wing parties of Europe'.<sup>75</sup> Kuper further advances that indigenous peoples are seeking 'privileged rights' over others and base this claim for privileged rights on a 'blood and soil' ideology of descent that echoes Nazi or apartheid ideologies.<sup>76</sup> He, however, fails to discuss how the different indigenous peoples understand their own position in a wider context of relationships and how they understand the term 'indigenous' to reflect their own identity. He also relies mainly on essentialist definition yet there is much importance in the evaluation of indigenous peoples' rights and their based practices.<sup>77</sup>

Natan Lerner, in a book 'Group Rights and Discrimination in International Law', provides some special measures that should be adopted for protection of specific groups

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<sup>74</sup> Minority Rights Group International *Who are the minorities?* (2008) London.

<sup>75</sup> A Kuper, 'Return of the native', *The New Humanist*, September 2003.

<sup>76</sup> A Kuper, *The return of the native. Current Anthropology* 44(3): 389- 402, at 390.

<sup>77</sup> A Barnard, 'Comment: Indigenous Peoples: A response to Justin Kenrick and Jerome Lewis', *Anthropology Today*, 2004 vol. 20, no. 5, at. 19.

including indigenous peoples.<sup>78</sup> He attempts to summarize and analyze the provisions incorporated into international law for dealing with discrimination of indigenous peoples but does not specifically discuss the right to participation for the indigenous communities.

Frans Viljoen, in an article 'Legal protection of Indigenous people's rights in Africa', is of the view that the source of protection for indigenous peoples falls within the constitutional and legal provisions that guarantee rights for everyone.<sup>79</sup> This protection for the Batwa can be address through the international, Regional and domestic legal framework as illustrated by next subtopics.

## **2.6 International legal framework relating to the protection of indigenous people's right to participation**

The minority groups in the different States are normally distinguished by their ethnic, linguistic or religious identity different from that of the majority population.<sup>80</sup> Participation as a right to minority groups is very important because better decision-making arises from public involvement in the process of development of policies and programmes. Several international and regional human rights instruments urge state parties to promote the right of minorities to participation. The concept of participation is enshrined in different human rights instruments. The United Nations<sup>81</sup> has appealed for special rights to be afforded to groups of indigenous peoples that are especially vulnerable to marginalisation. Such special rights are included in the UN Conventions and Declarations which prohibits any form of discrimination on grounds of ethnicity, race, colour, sex and other related factors.

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<sup>78</sup> Natan Lerner, *Group Rights and Discrimination in International Law*, (1991) Martinus Nijhoff Publishers (Dordrecht/Boston/London).

<sup>79</sup> F Viljoen, 'Legal protection of Indigenous People's rights in Africa' page number in S Dersso (ed), *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) Pretoria: Pretoria University Law Press.

<sup>80</sup> Fact Sheet No.18 (Rev.1), Minority Rights Adopted by General Assembly resolution 47/135 of 18 December 1992, available at [www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf) (accessed on 5th March 2012).

<sup>81</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

There is no universally accepted definition of “minorities”; the word is generally interpreted differently in separate societies.<sup>82</sup> The minority groups activists prefer to describe them as a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics that are unique compared to the majority of the population.<sup>83</sup> The challenge to arriving at an acceptable definition lies in a variety of situations in which minorities exist. The UN has failed to agree on a more precise definition of what constitutes a minority beyond that is implied in the title of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.<sup>84</sup> The UN Human Rights Committee<sup>85</sup> has stated that defining a minority under the International Covenant on Civil and Political Rights should not be at the discretion of a government, but is an objective definition. Despite the lack of a universally acceptable definition, it is important to note that any disempowered group, regardless of its numerical size, could be considered a minority.<sup>86</sup> It is also important to note that special rights are not privileges, but they are merely granted to make it possible for minorities to preserve their identity, characteristics and traditions.<sup>87</sup>

Martinéz Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities of 1986, defined indigenous peoples as

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<sup>82</sup> IRIN (2006), ‘In-depth: Minorities under siege- pygmies today in Africa, Global: Indigenous People and Minorities: A global and historic assault’, available at [www.irinnews.org/in.../minorities-under-siege-pygmies-today-in-africa](http://www.irinnews.org/in.../minorities-under-siege-pygmies-today-in-africa) (accessed on 7th March 2012).

<sup>83</sup> Parliamentary Forum of Small Arms and Light Weapons, meeting in Berlin, Germany on February 15, 2009, available at [www.parliamentaryforum.org/sites/default/files/parlf](http://www.parliamentaryforum.org/sites/default/files/parlf) (accessed on 17th April 2012).

<sup>84</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135 adopted on 18 December 1992 in New York.

<sup>85</sup> This is a human rights treaty body that monitors the implementation of the International Convention on Civil and Political Rights among States Parties.

<sup>86</sup> K Kabanankye & D Kwagala, ‘*Culture, minorities and linguistic rights in Uganda: The case of the Batwa and the Ik*’, HURIPAC Working Paper No. 11, June, 2007.

<sup>87</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59; 28 ILM 1382 (1989).

those with historical continuity with pre-invasion and pre-colonial developments on their land and also consider themselves as different from other members of the society.<sup>88</sup>

The Report further observed that the concept of historical continuity for the minorities is elaborated as the continued practice of the usage of the ancestral lands, cultural practice and specific manifestations of religion, dress code, means of livelihood and usage of language as a habitual means of communication.

Chaliand is of the view that only “groups who see themselves as different, ethnically, religiously or linguistically, and are concerned to preserve their special features should be described as minorities”.<sup>89</sup> The status on minorities according to Chaliand would be meaningless if they were dominant minorities. These refer to the minorities that though, they do not have a major demographic weight, nevertheless wield huge economic and political power.

Within international law which stands as an inspiration towards the recognition of the rights to participation by indigenous peoples, the International Covenant on Civil and Political Rights<sup>90</sup> and International Covenant on Economic, Social and Cultural Rights<sup>91</sup> are very significant because they both recognize the principle of equal rights and non-discrimination as stipulated in article 1 of the two covenants:

All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

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<sup>88</sup> M Cobo, Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities of 1986, at 2.

<sup>89</sup> G Chaliand (ed.) *Minority peoples in the age of nation states*, (1989) London: Pluto Press, at 89.

<sup>90</sup> International Covenant on Civil and Political Rights (CCPR), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

<sup>91</sup> International Covenant on Economic, Social and Cultural Rights (CESCR), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

The issue of indigenous people's rights to resources have been tackled by several inter-governmental bodies as stipulated within the human rights instruments as provided for in article 1 of the CCPR that;

The right to self-determination requires needs all peoples to be able to freely dispose of their natural wealth and resources and that they should not be deprived of their means of subsistence.<sup>92</sup>

The rights of persons belonging to minorities are formulated as rights of individuals to preserve and develop their own identity which is separate in the integration process.<sup>93</sup> Minority rights can also be asserted by persons belonging to indigenous peoples because the jurisprudence developed by the UN Human Rights Committee following article 27 of the CCPR indicates that minority rights are also applicable to indigenous peoples.<sup>94</sup> The CCPR further confers a general right to participation which places more attention on political processes which include conducting elections and accessing public offices by the indigenous peoples.<sup>95</sup> The CCPR in article 27 stipulates that:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right to community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.<sup>96</sup>

In General Comment No. 23 on Article 27 (Rights of minorities), the Human Rights Committee stated that:

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<sup>92</sup> Ibid, n 81 article 1(2).

<sup>93</sup> A Eide & E I Daes, Working paper on the relationship and distinction between the rights of persons belonging to Minorities and those of Indigenous Peoples, UN Document E/CN.4/Sub.2/2000/10, 19 July 2000, paragraph 23.

<sup>94</sup> Human Rights Committee, General Comment 23, Article 27 on the CCPR (Fiftieth session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).

<sup>95</sup> Ibid, n 87 article 25.

<sup>96</sup> Ibid, n 87 article 27. The UN Convention on the Rights of the Child contains parallel language specifically for children and extended so far as to expressly include persons of indigenous origin (article 30).

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples....The enjoyment of these rights may require positive legal means of protection and measures to ensure the *effective participation* (author's emphasis) of members of minority communities in decisions which affect them.<sup>97</sup>

The mention of effective participation by this General Comment is very vital for indigenous peoples especially in their aspiration to have a voice in the decision-making processes from their community level to the national level.

Participation through free and fair elections encourages fair competition among the political parties and the independent candidates. With regard to the importance of political parties during elections, the European Court of Human Rights in *Socialist Party and others v Turkey* stated that forming political parties which seek for elections into office for their candidates plays a vital role in promoting pluralism and the proper functioning of democracy.<sup>98</sup> The Batwa' concerns can therefore be addressed under the international law provisions which have already been domesticated in Uganda especially on their right to participate in both Civil and Political rights and the socio-economic rights.

### **2.6.1 The International Covenant of Economic, Social and Cultural Rights**

The CESCR, under article 15, recognizes the right of everyone to participation in cultural life, and guarantees the enjoyment of the benefits of scientific progress, and to benefit from the protection of the moral and material rights to any scientific discovery or artistic work they have created. The right of everyone to take part in cultural life is also intrinsically linked to other rights such as the right to education, through which individuals and communities pass on their values, religion, customs, language and other

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<sup>97</sup> Grazia Borrini - Feyerabend, Ashis Kothari and Gonzalo Oviedo, *Indigenous and local communities and protected areas: Towards equity and enhanced conservation*, Best Practice Protected Area Guidelines Series (2004) No 11, IUCN and Cardiff University, Gland, Switzerland, at 13.

<sup>98</sup> *Socialist Party and others v Turkey*, case No 20/1997/804/1007, paragraph 41.

cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values. This right is also interdependent on other rights enshrined in the same Covenant, such as the right of all peoples to self-determination (article 1) and the right to an adequate standard of living (article 11). The terms “to participate” and “to take part” have the same meaning and are used interchangeably. The right touches on three main components: (a) participation in, (b) access to, and (c) contribution to cultural life.<sup>99</sup> These provisions are reflected in the Constitution of Uganda and the Batwa can invoke them to advocate for their rights to equal enjoyment of economic, social and cultural rights with other Ugandan citizens without discrimination.

### ***2.6.2 International Convention on the Elimination on All Forms of Racial Discrimination***<sup>100</sup>

According to the provisions on discrimination in the CERD, Meron stresses that, state parties are required to recognize, respect and guarantee the right to own property in association with others without discrimination and include the right to property as declaratory of customary international law.<sup>101</sup> The CERD Committee also made provisions to the effect that discrimination should be discouraged and it emphasized that state parties should recognize and protect the rights of indigenous peoples to participate in the ownership, development, control and use of communal lands and not to use resources without their free and informed consent.<sup>102</sup> Article 2 of CERD stipulates that state parties should condemn and take measures to eliminate all forms of racial

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<sup>99</sup> Committee on Economic, Social and Cultural Rights, General comment No. 21: The right of everyone to take part in cultural life (article 15, paragraph 1 (a), of the International Covenant on Economic, Social and Cultural Rights, Forty-third session, 2–20 November 2009, E/C.12/GC/21.

<sup>100</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan.4, 1969.

<sup>101</sup> T. Meron, *Human rights and humanitarian norms as customary law* (1989) Oxford: Clarendon Press at 21.

<sup>102</sup> General Recommendations XXIII (51) concerning Indigenous Persons, Adopted at the Committee's 1235<sup>th</sup> Meeting, on the 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.

discrimination which if adopted and implemented fully, there would be no discrimination and marginalisation of indigenous peoples in the world.<sup>103</sup>

In addition, the right to self-determination within CERD lays emphasis on the economic, social and cultural rights as an important aspect. In the General Recommendation xxi (48), the CERD Committee explains in paragraph 10 that:

Governments should be sensitive towards the rights of persons belonging to ethnic groups (including indigenous peoples), particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens.<sup>104</sup>

The CERD plays a vital role in monitoring compliance by state parties. The CERD Committee in 1987 made a General Recommendation xxiii (51) which provides an interpretation of the Covenant in respect to indigenous peoples and states in paragraphs 3-5 that;

The Committee is conscious of the fact that in many regions of the world indigenous peoples have been and are still being discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and state enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.<sup>105</sup>

In paragraph 4, the Committee calls upon state parties to;

- (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the states' cultural identity and to promote its preservation

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<sup>103</sup> Ibid, n. 100 article 2.

<sup>104</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 125 (1996), at 1.

<sup>105</sup> Ibid, paragraph 3.



- (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity
- (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics
- (d) ensure that members of indigenous peoples have equal rights in respect to effective participation in public life, and that no decisions
- (e) directly relating to their rights and interests are taken without their informed consent.
- (f) ensure that indigenous communities can exercise their right to practice and revitalize their cultural traditions and customs, to preserve and to practice their language.<sup>106</sup>

Paragraph 4 above specifically urges state parties to recognize and protect the rights of indigenous peoples to possess, develop, control and utilize their communally owned lands and in situations where they have been deprived of their property in land without their free and informed consent, the states should ensure that they return or compensate the indigenous peoples promptly in the form of land.<sup>107</sup>

The right to effective participation as recognized in public life and in decision-making by the indigenous peoples in this recommendation is a very important development in international law that had resulted into the recognition and promotion of the rights of indigenous peoples to participate in the management of their own resources especially in Australia.<sup>108</sup> Similarly, the Batwa indigenous peoples can have their rights to effective

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<sup>106</sup> Ibid, paragraph 4.

<sup>107</sup> G Netheim, G D Meyer, and D Craig, *'Indigenous peoples and governance structures: A comparative analysis of land and resource management rights'* (2002), Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, at 12-13.

<sup>108</sup> Australia has ratified the International Convention on the Elimination of Racial Discrimination (ICERD) and implemented most of its obligations in national law through the Racial Discrimination Act 1975. Further, it is on this basis that the High Court in *Western Australia v Commonwealth* (1995) 183 CLR 373

participation addressed in respect to decision making and consultation by Government agencies when planning to implement policies for the citizens in the country.

### **2.6.3 United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP)**

The UN Declaration on Indigenous Peoples' (UNDRIP)<sup>109</sup> is an important step in the protection and promotion of the rights of indigenous peoples. The UNDRIP has put in place universally accepted standards for the protection of the rights of indigenous people.<sup>110</sup> The Declaration outlaws discrimination against indigenous peoples and encourages their participation in all matters that concern them. The Declaration therefore discusses both collective and individual rights and ensures cooperation between states and indigenous peoples. The UNDRIP is a very important step towards recognition of the right of indigenous peoples to participation in the management of their own resources. The Declaration was passed by the UN Human Rights Council on the 29<sup>th</sup> June 2006.<sup>111</sup> This Declaration recognizes the right of indigenous peoples to participate in and maintain their distinct political, economic and cultural practices and legal systems thus, their right to fully participate in making their choices especially in the political, economic, social and cultural life of the state.<sup>112</sup>

The UNDRIP makes special provisions in respect to participation by the indigenous peoples. For example, article 19 provides that the indigenous people have the right to

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declared invalid the Land (Titles and Traditional Usage) Act 1993 which had abolished native title and substituted defensible statutory rights of traditional application and use.

<sup>109</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted on the 13 September 2007 by the United Nations General Assembly through Resolution A/RES/61/295, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf> (accessed on 3<sup>rd</sup> June 2013).

<sup>110</sup> The Declaration, for example provides for the right to self-determination article 3); the right to consent (article 10); the right to maintain, develop, protect culture and traditions (article 11) and the right to property (land) (article 26). Indigenous persons have a right to lands, resources and territories which they have owned, occupied and used.

<sup>111</sup> On the 23<sup>rd</sup> June 2006, the Human Rights Council adopted the UN Declaration on the Rights of Indigenous peoples as proposed by the Chairperson-Rapporteur of the working group of the Commission on Human Rights and it was recommended to the General Assembly for approval.

<sup>112</sup> Ibid 100, article 4.

make their choice at the level of decision-making in matters which affect their rights, lives and destinies through their own chosen representatives within their own procedures as well as maintaining and developing their own indigenous institutions. This is further supported by article 20 which provides that states are required to obtain the free and informed consent of indigenous peoples before adopting or implementing any legislative or administrative measures that is most likely to affect the indigenous peoples. This Declaration is very comprehensive in addressing indigenous people's issues and contains several provisions relating to participation of indigenous peoples in managing their own affairs. The right to participation for the Batwa fits within the UNDRIP and if government of Uganda domesticated the provisions of UNDRIP they would adequately address issues of indigenous peoples within the country in respect to their participation in Civil and Political Rights and Economic, Social and Cultural Rights.

#### **2.6.4 The International Labour Organisation (ILO) Convention 169**

The ILO Convention 169<sup>113</sup> which was adopted in 1989 is the most significant Convention at the international level on indigenous peoples' rights.<sup>114</sup> The International Labour Organisation<sup>115</sup> was the first international body to take action on indigenous issues. The ILO has since its creation defended the socio-economic rights of groups whose cultural practices and tradition make them different and apart from other national communities. The Convention 169 specifically protects the rights of people whose way of life and existence were threatened by dominating cultures. The Convention promotes respect for the cultures and traditional ways of life of the indigenous peoples.<sup>116</sup>

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<sup>113</sup> Ibid, n. 55.

<sup>114</sup> BJ Kealeboga and GW Mkundi '*Protecting Indigenous Peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights* (2006) 6 (2) African Human Rights Law Journal 384. See also, SJ Anaya, *Indigenous Peoples in International* (2nd edn. New York: Oxford University Press, 2004)

<sup>115</sup> The ILO was formed in 1919 to promote rights at work, encourage decent employment opportunities, and enhance social protection.

<sup>116</sup> L Swepston '*The indigenous and tribal peoples in post-colonial development discourse in Africa*' (2002) 20 Wisconsin International Law Journal at 298. In respect to indigenous peoples, the ILO Convention 169 provides for measures to safeguard property, cultures, labour and environment of indigenous peoples (article 4), and respect for cultural and religious values of indigenous peoples (art 5).

Although there is no clear definition of indigenous peoples under international law,<sup>117</sup> according to the ILO Convention, people are considered “indigenous” because they are the descendants of those who lived in the area before colonization, or because they have maintained their own social, economic, cultural and political institutions since colonization and establishment of new states.<sup>118</sup>

With respect to political participation and self-government, article 2 of the Convention stipulates that:

- (a)
  1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity:
  2. Such action shall include measures for:
    - (b) Promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.<sup>119</sup>

The Convention also encourages states to often consult with the indigenous peoples before taking decisions which affect them and thus provides that:

- (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.
- (b) Establish means for the full development of these peoples own institutions and initiatives and in appropriate cases provide the resources necessary for this purpose.

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<sup>117</sup> Indigenous and Tribal People’s rights over their ancestral and natural resources, Inter American Commission on Human Rights, III (A) (25). <http://cidh.org/countryrep/Indigenous-Lands09/Chap.III-IV.htm>; see also KN Bojosi and GM Wachira, ‘*Protecting Indigenous People in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights* 2006, 6 (2) African Human Rights Law Journal 384-391.

<sup>118</sup> Ibid, n 55.

<sup>119</sup> Ibid, n 55, article 2.

(c) Consult the peoples concerned in good faith and in a form appropriate for the circumstances, with the objective of achieving agreement or consensus or consent to the proposed measures.<sup>120</sup>

The Convention encourages the indigenous peoples to participate in deciding their own priorities in respect to developments that affect their lives, beliefs, institutions and spiritual wellbeing and to exercise full control over their own economic, social and cultural development.<sup>121</sup> Additionally, indigenous peoples shall take part in the process of formulation, implementation and evaluation of plans and programmes aimed at the national and regional development which concern them as indigenous peoples.

The Convention also urges states to improve the general life and work conditions of the indigenous peoples including encouraging their participation in the enjoyment of their right to health and education.<sup>122</sup> The Convention enjoins states to take steps and encourage cooperation with the indigenous peoples in order to protect their resources and territories.<sup>123</sup>

With regard to the right to participation, ILO Convention 169 urges states to apply the domestic laws and regulations to the indigenous peoples and give due regard to their own customs and customary legislations.<sup>124</sup> If all states adopted these provisions within their domestic legislation, then the rights of the indigenous peoples would be promoted and protected especially in Africa and Uganda where the Batwa are marginalised.

## **2.7 Regional level**

### ***2.7.1 Protection of indigenous peoples under the Inter-American System***

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<sup>120</sup> Ibid, article 6.

<sup>121</sup> Ibid, article 7.

<sup>122</sup> Ibid, article 7(2).

<sup>123</sup> Ibid, article 7(4).

<sup>124</sup> Ibid, article 8(1).

Within the Inter-American system, the indigenous peoples enjoy their rights as set out within the special measures established for their protection. These special measures include protection of the rights of indigenous peoples through the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>125</sup>

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights emphasize the importance of the rights of indigenous peoples to own property and traditional lands even without formal state recognition.<sup>126</sup> Within customary law, the indigenous peoples are entitled to obtain registration of their rights to own land.<sup>127</sup> The state was advised in the case of *Awás Tingini*<sup>128</sup> to adopt legislative, administrative and other measures for the creation of an appropriate mechanism for titling of indigenous peoples' property according to the provisions of customary law, usage and values within the indigenous peoples communities.<sup>129</sup>

In order to promote and protect the rights of indigenous peoples and their freedoms, the American system has clarified that these rights should be enjoyed and exercised by the indigenous peoples collectively in a manner that can be guaranteed to the community as a unit.<sup>130</sup>

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<sup>125</sup> Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc 26. (1984), 76-78, 81; Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), 103-4; Third Report on the Situation of Human Rights in the Republic of Guatemala OEA/Ser.1/V/II.67, doc.9 (1986), 114.

<sup>126</sup> *The Awás Tingni v. Nicaragua*, Case 11.577, Annual Report of the IACHR.OEA/Ser.L/V/II.02, Doc.6 rev., (Vol.II), April 16, 199, 1067, paragraph 108.

<sup>127</sup> *Ibid*, n. 125.

<sup>128</sup> *Ibid*, n. 126.

<sup>129</sup> *Mary and Carrie Dann v. United States* (2001) para 128, citing IACHR, The Human Rights Situation of Indigenous Peoples in the Americas 2000, OEA/Ser.L/V/II/108, Doc. 62 (October 20, 2000) 125. See n 48 above, article 13.

<sup>130</sup> M D W Jeffreys, 'The Batwa: Who are they?', Africa, 1953, vol. 23, no. 1, at 45.

It has been acknowledged that the indigenous peoples within the Inter-American system have a special relationship with their lands and the use of their resources have been considered as an integral part of the physical and cultural practice of the indigenous communities in the realization of their rights.<sup>131</sup>

In the case of *Mayagna Community of Awas Tingni v. Nicaragua*,<sup>132</sup> the Inter-American Court decided that;

For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generation.<sup>133</sup>

This decision is significant to this study in the context of participation because it touches on the core of participation by indigenous peoples. The government had decided to grant logging concessions to private interests in the Mayagna territory without consulting the people. The Batwa can also organize and take similar steps to mitigate their right to participation especially in government programmes that affect them.

### **2.7.2 Protection under the African Charter on Human and Peoples' Rights**

The African Commission through the Working Group on Indigenous Populations conducted a special study on the implications of the African Charter and wellbeing of indigenous peoples' communities in respect to their marginalisation and discrimination

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<sup>131</sup> Report on the Situation of Human Rights in Ecuador, n 50 above. It was observed by the Commission that the continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of indigenous peoples and that control over the land refers to both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group.

<sup>132</sup> The Commission on the 4<sup>th</sup> June 1998 submitted to the Inter-American Court an application in the case of the *Mayagna (Sumo) Community of Awas Tingni v Nicaragua* Case 11.577, Annual Report of the IACHR.OEA/Ser.L/V/II.02, Doc.6 rev., (Vol.II), April 16, 199, 1067, where it requested the Court to decide that Nicaragua violated articles 1, 2, 21, and 25 of the Convention. The communal lands of the Mayagna (Sumo) Community of Awas Tingni had not been demarcated by the government of Nicaragua and the state had not taken effective measures to ensure the property rights of the Awas Tingni Community in respect of their ancestral lands and natural resources.

<sup>133</sup> Ibid, n 126, paragraph 149.

affecting their participation as elaborated by Jeffreys.<sup>134</sup> The Working Group took into consideration the jurisprudence of the African Commission with respect to indigenous people's concept and description.

The African Charter therefore protects the rights of indigenous peoples and encourages the group to identify themselves as indigenous peoples. Article 2 of the African Charter provides for the enjoyment of the rights and freedoms recognized and guaranteed in the treaty without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Furthermore, by virtue of its name, the African Charter on Human and *Peoples'* Rights, and the use of the term 'peoples' in its preamble and provisions, the African Charter expressly recognises and protects collective rights.<sup>135</sup> This recognition of indigenous rights as collective had the aim of having a clear distinction between traditional rights from the rights that should be enjoyed in a collective manner.<sup>136</sup>

However, the African Commission has not provided a clear interpretation of the concept of 'peoples' although in some communications involving groups of indigenous populations the Commission has made reference to collective rights against the state.<sup>137</sup> Further, in the communication involving the *Katangese Peoples' Congress v Zaire*,<sup>138</sup> in which it was alleged that the right to self-determination by the Katangese people was violated under article 20(1) of the African Charter, the Commission dismissed the application for lack of proper proof of denial to participate in government which later

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<sup>134</sup> Ibid, n 130, at 45.

<sup>135</sup> ACHPR and International Work Group for Indigenous Affairs (IWGIA), *Indigenous Peoples in Africa: The forgotten peoples* (2006), Copenhagen, Denmark, at 20.

<sup>136</sup> ACHPR/Res 65 (XXVIII) 03, Resolution on the Adoption of the Report of ACWG on Indigenous Communities/Populations Rights of indigenous in Africa (2000), adopted by the African Commission, 73.

<sup>137</sup> Ibid, n 135 at 384.

<sup>138</sup> *Katangese Peoples' Congress v. Zaire* (2000) ACHRLR 72 (ACHPR 1995).



paved way for the indigenous peoples to make similar claims for protection of their right to self-determination. The Commission interpreted article 20(1) of the African Charter in *Jawara v The Gambia*<sup>139</sup> that the Charter provides for a right which should be enjoyed by the entire population. The Commission also condemned the exploitation of oil reserves by the military government in Ogoniland without the participation of the indigenous peoples in the case of *Social and Economic Rights Action Centre and Another v Nigeria*.<sup>140</sup> This was interpreted as a violation of article 21 of the African Charter and the Commission stated that:

The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoni land but, also the community as a whole. They affected the life of the Ogoni as a whole.<sup>141</sup>

The African commission further in the *Endrois* case made a landmark decision when it pronounced that no effective participation or reasonable benefit had enjoyed by the *Endrois* community, which therefore amounted to a denial of their right to participation in making decisions on matters that affected them.<sup>142</sup> Further, the Botswana High Court in *Sesana v Botswana* in 2006 ruled that the evictions and displacement of the San indigenous peoples in 2002 from their ancestral land in Central Kalahari Game Reserve (CKGR) was unconstitutional and therefore the San did not have to obtain permits in order to access the CKGR.<sup>143</sup>

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<sup>139</sup> 2000 AHRLR 107 (ACHPR 2000). In this communication, the African Commission in its decision stated that, the military coup d'etat was a violation of art 20(1) of the African Charter.

<sup>140</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Decided at the 30th ordinary session, Oct 2001, 15th Annual Activity Report.

<sup>141</sup> Report of the African Commission's Working Group on Indigenous Populations/Communities, adopted on the 47<sup>th</sup> ordinary session 12<sup>th</sup> – 26<sup>th</sup> May 2010.

<sup>142</sup> *Endorois Welfare Council v Kenya* 276 / 2003 by Centre for Minority Rights Development (Kenya) and Minority Rights Group International.

<sup>143</sup> *Sesana v Botswana* (2006) South African Legal Information Institute (2006).

Additionally, in the South African case of *Alexkor Ltd v Richtersveld Community*, the Constitutional Court argued that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.<sup>144</sup> These cases provide persuasive authority that even the Batwa communities can use to promote their rights to participation in decision making for their enjoyment of socio economic rights since it was established that it was unlawful to terminate basic services for an indigenous community. These cases point to the importance of involving indigenous communities like the Batwa in decisions that affect them. Their participation is relevant in making decisions that would not be a hindrance to their survival and well-being.

## 2.8 Domestic level

### 2.8.1 *The 1995 Constitution (as amended)*

There are provisions for the protection of individuals and group rights in the 1995 constitution with established mechanisms and procedures to enhance their protection. While these are not sufficient to guarantee effective participation by the Batwa, they are very important for enabling free and effective participation. The Constitution of Uganda is a product of participation and wide consultations.<sup>145</sup>

Uganda's Constitution was enacted in a participatory manner coupled with countrywide consultations of the citizens. A special commission was established in 1989 to gather proposals from all Ugandans during the constitution making process. The commission collected views from the citizens through talk shows, debates, public hearings, seminars and workshops. These consultations involved interest groups, academic institutions, community based institutions and professional associations.<sup>146</sup> The civil society's

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<sup>144</sup> *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003).

<sup>145</sup> N Baraaza, 'Legal and policy framework for citizen participation in East Africa: A comparative analysis.' Paper prepared for the LOGO-Link write-shop at the institute of Development Studies, Brighton, July 29-August 9. 2002.

<sup>146</sup> J Ihonvbere, 'Towards a new constitutionalism in Africa'. CDD Occasional Paper Series No.4. Centre for Democracy and Development: 2000, London.

contribution was very important to the constitutional making exercise.<sup>147</sup> The process involved minority groups and organisations representing persons with disabilities. All the views were documented into the draft Constitution which was debated and enacted as the 1995 constitution. The preamble to the 1995 Constitution recognizes the sovereignty of the people and not the state by mentioning that the Constitution is enacted with the people 'having fully participated in the Constitution-making process'.<sup>148</sup> However, much as the Constitution is a reflection of democracy and people's participation, there is no information in respect to the Batwa's contribution to the constitutional making exercise. Further, the 1995 Constitution in the directive principles of state policy does make special provisions for the protection of groups, individuals and collective rights and puts in place some mechanisms for their enforcement or protection;

The state shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of people to equal opportunities in development.<sup>149</sup>

The Directive principles also bring out commitment on part of the state towards the protection and the promotion of the social and cultural wellbeing of the people. They place a duty on the state to ensure that the citizens enjoy rights and opportunities through access of education, health services, clean and safe water, work, decent shelter and adequate clothing.<sup>150</sup>

Secondly, the 1995 Constitution contains a comprehensive bill of rights, covering civic and political rights, economic, social and cultural rights, and collective rights. The civil and political rights contained the constitution include equality before the law;<sup>151</sup> freedom from discrimination on the 'ground of sex, race, colour, ethnic origin, tribe, birth, creed or

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<sup>147</sup> J Oloka-Onyango, 'On the barricades: Civil society and the role of human rights and women's organisations in the formulation of the Bill of Rights of Uganda's 1995 Constitution'. Centre for Basic Research Working Paper No.60. CBR Publications: 2000, Kampala.

<sup>148</sup> The 1995 Constitution of Uganda, Preamble.

<sup>149</sup> Ibid, Directive Principle ix.

<sup>150</sup> Ibid, Directive Principle xiv.

<sup>151</sup> Ibid, article 21 (1).

religion, or social or economic standing, political opinion or disability’;<sup>152</sup> right to participation;<sup>153</sup> and the right to access information.<sup>154</sup> Economic and social rights include the ‘right to development’,<sup>155</sup> and the ‘fundamental rights ... to social justice and economic development,<sup>156</sup> including rights to ‘education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits’.<sup>157</sup>

The Constitution also captures the essence that it is not just individual rights that are constitutionally protected, but group rights as well.<sup>158</sup> The Constitution particularly guarantees the right to own property either individually, or in association with others.<sup>159</sup> The Batwa can therefore claim their rights collectively basing on the constitutional foundation for collective ownership of property which is for the advancement of the rights of ethnic minorities and communities.

Additionally, the Constitution has special provisions relevant to the situation of the Batwa which places special responsibility on the state ‘to take affirmative action in favour of groups marginalised on the basis of gender, age disability or any other reason created by history, tradition or custom for purposes of redressing imbalances that exist against them.’<sup>160</sup> Accordingly, parliament is mandated to enact relevant laws including one for the establishment of an Equal Opportunities Commission (EOC) for the purpose of operationalization that provision.

Furthermore, the minorities’ right to participate in development processes and decision making on issues that affect their welfare is also guaranteed in the Constitution of

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<sup>152</sup> Ibid, article 21 (2).

<sup>153</sup> Ibid, article 38 (1).

<sup>154</sup> Ibid, article 41 (1).

<sup>155</sup> Ibid, Directive Principle ix.

<sup>156</sup> Ibid, Directive Principle xiv.

<sup>157</sup> Ibid, Directive Principle xiv(b).

<sup>158</sup> Ibid, article 20 (2).

<sup>159</sup> Ibid, article 26(1).

<sup>160</sup> Ibid, article 32.

Uganda.<sup>161</sup> The right to participate in the enjoyment of cultural rights consistent with human rights norms through maintaining and promoting any culture, cultural institution, language, tradition, creed or religion in association with others.<sup>162</sup> The Batwa therefore simply need empowerment and enforcement of affirmative action to enable them demand for their right to participation which is guaranteed in the Constitution.

Affirmative action for all marginalised groups is provided for in the Constitution which encourages the Local Government to enact laws for affirmative action for all marginalised groups referred to in Article 32.<sup>163</sup> Furthermore, representation of marginalised groups at all local levels<sup>164</sup> would encourage participation by the Batwa in leadership roles at the local levels. The Local Government Act provides for representation of marginalised groups at all local government levels. Specifically, representation for two youth councilors one male and one female, two councilors with disability one male and one female, and two women councilors.<sup>165</sup>

This method of representation is meant to enhance the right to participation and include the marginalised groups in the leadership at local levels. However, the Batwa are not involved and have got no affirmative action seats at the local levels. It must be noted that the Batwa are a vulnerable group and they find it difficult to participate in open discussions about projects with the project managers who are their neighbors and enemies at that. Secondly, in an environment where they feel disempowered, they often choose not to discuss issues which might worsen their situation. As a result, the Batwa are forced to assimilate in order to be accepted and if they do not, they are blamed for their own inadequacies. Ribot in his book notes that;

‘Communities in project areas who choose not to accept the conditions of ‘participation’ and those simply not chosen for projects, have no legal control

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<sup>161</sup> Ibid, article 36.

<sup>162</sup> Ibid, article 37.

<sup>163</sup> Ibid, article 180 (2) (c).

<sup>164</sup> The Local Government’s Act Cap 243 Laws of Uganda 2000.

<sup>165</sup> Ibid, section 10.

over the disposition or forest resources... These local governments and village communities simply do not have the right to say 'no'... This is hardly participatory forestry.<sup>166</sup>

This shows that the Batwa are rarely given an opportunity to engage in development projects because of the discrimination and segregation from the wider society and their right to participation is curtailed. The Batwa are also left out because the projects are structured in such a way that they neglect the specific needs and wishes of the Batwa. Even in situations where some opportunity is given to their participation and representation to the development partners, such opportunities are usually taken up by the more dominant neighbours, the Bakiga.

### **2.8.2 Equal Opportunities Commission Act, 2007**

The Equal Opportunities Act<sup>167</sup> provides for the elimination of discrimination and for affirmative action in favour of the marginalised groups. Under this law, a special commission is established to enforce the constitutional mandate of eliminating discrimination and inequality facing individuals, groups of persons and to take affirmative action in favour of the marginalised.

The fate of the Bawa vis-à-vis their human rights in Uganda has remained unclear. The question is whether Uganda has any indigenous peoples; or whether all ethnic groups in Uganda are indigenous so that the whole country benefits from special rights accorded to them; or whether all groups constitute indigenous peoples thus requiring no need for indigenous protection. The above is assumed on the grounds that much as there has been affirmative action for different disadvantaged groups, nothing has been done with specific reference to the Batwa that should be protected as an indigenous group. This is more especially regarding legal protection and government policies.

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<sup>166</sup> J.C Ribot, 'Participation without representation: Chiefs, councils and forestry Laws in the West African Sahel', *Cultural Survival Quarterly*, 1996, vol. 20, no. 3.

<sup>167</sup> The Equal Opportunities Commission Act No. 2 of 2007.

The 1995 Constitution of Uganda does not expressly provide protection for indigenous peoples. However, article 32 enjoins the state to take affirmative action in favour of groups that have been historically disadvantaged and discriminated against. It further mandates Parliament to enact appropriate laws, including laws for the establishment of an Equal Opportunities Commission (EOC), for the purpose of giving full effect to Article 32. In this vein, the Equal Opportunities Commission<sup>168</sup> was established in 2008. It is mandated to eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed or religion, health status, social or economic standing, political opinion or disability, and take affirmative action in favor of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them, and to provide for other related matters.<sup>169</sup>

The Commission is also charged with the function of monitoring, evaluating and ensuring that the policies, laws, plans, programs, activities, practices, traditions, cultures, usages and customs of organs of state at all levels, statutory bodies and agencies, public bodies and authorities, private businesses and enterprises, non-governmental organisations, and social and cultural communities are compliant with equal opportunities and affirmative action in favour of groups marginalised on the basis of sex, race, colour, ethnic origin, tribe, creed, religion, social or economic standing, political opinion, disability, gender, age or any other reason created by history, tradition or custom.<sup>170</sup> It is also worth noting that the Commission has powers of Court in the discharge of its functions.<sup>171</sup>

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<sup>168</sup> Ibid, section 2.

<sup>169</sup> Ibid, preamble.

<sup>170</sup> Ibid, section 14.

<sup>171</sup> Ibid, section 15.

Relatedly, the State also established the Uganda Human Rights Commission (UHRC)<sup>172</sup> with the mandate of promoting and protecting the rights of all people. Among one of UHRC's functions is to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right, monitor the Government's compliance with international treaty obligations on human rights; and to recommend to Parliament effective measures to promote human rights.<sup>173</sup> Therefore, the UHRC is also in position to engage the government on the violations of the rights of the Batwa and to also recommend to the legislature measures on how such violations can be redressed.

### **2.8.3 The Land Act of 1998 (as amended)**

The provisions relating to land ownership in the 1995 Constitution are operationalized by the Land Act which specifically provides for the management of customary land.<sup>174</sup> The Act provides for the protection of land owned by the Batwa communities and establishes a land fund to resettle persons rendered landless by government action.<sup>175</sup> However, it should be noted that the Batwa have not benefited from this fund even after government gazetted Bwindi and Mgahinga forests in 1991 which resulted into their evictions.<sup>176</sup> The Batwa were not consulted prior to this action by the government contrary to the constitutional provision which places a duty on government to protect the land rights of its citizens. The evictions exposed the Batwa to untold suffering and economic, social and cultural breakdown as evidenced through the shortage of food, shelter and clothing.<sup>177</sup>

The Land Act also seeks to guarantee individual and collective rights in land as recognized under the Constitution. The provisions for the establishment of communal

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<sup>172</sup> This body was established by the Uganda Human Rights Commission Act, 1997.

<sup>173</sup> Constitution of Uganda, *ibid*, article 52.

<sup>174</sup> The Land Act of 1998, section 4(e).

<sup>175</sup> *Ibid*, n. 174, section 42.

<sup>176</sup> C Mbazira, Uganda: constitutional, legislative, and administrative provisions concerning Indigenous Peoples, Country Report of the Research Project by the ILO and the ACHPR on constitutional and legislative protection of the rights of Indigenous Peoples: Uganda, 2009, at 9.

<sup>177</sup> *Ibid*, n. 174, section 1.2.1.



land associations that encourage the recognition of customary land tenure can provide good ground for the recognition of the land and resource rights of the Batwa communities.

The Land Act further consists of the provision for the compulsory acquisition of land for public purposes and stipulates that the land owner must be compensated.<sup>178</sup> The occupant of land is therefore supposed to be compensated for the value of their property on the land. However, the Batwa ancestral rights to their land which were alienated through the creation of Bwindi and Mugahinga National Parks cannot be determined by customary law but calls for restitution and compensation within the current constitutional provisions and international obligations to protect and promote the rights of marginalised communities. However, the Batwa marginalised group in Uganda has not yet pursued legal remedies provided by the Land Act to claim these rights.

It should be noted that there was no consultation and participation by the Batwa in the decision-making processes in respect to the establishment of the national parks and their evictions from their traditional ancestral lands. Furthermore, the non-Batwa who were affected during the evictions got compensated, while the Batwa were not.<sup>179</sup>

#### ***2.8.4 The Land Acquisition Act, 2000***

This law stipulates that any acquisition of land by government must have notice given to the land owners prior to compensation.<sup>180</sup> The law also provides that compulsory acquisitions should be conducted in accordance with the law.<sup>181</sup>

This Act provides for the procedures and method of compulsory acquisition of land for public purposes whether for temporary or permanent use. The law places responsibility on the Minister responsible for land to authorize any person to enter upon the land and survey the land, dig or bore the subsoil or any other thing necessary for ascertaining

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<sup>178</sup> Section 30, Land Act, Cap 227 (1998).

<sup>179</sup> Ibid, n. 174.

<sup>180</sup> Land Acquisition Act of 2000, sections 3(3), 5 and 6.

<sup>181</sup> Ibid, n. 180, section 8.

whether the land is suitable for a public purpose. According to the law, the Government is duty bound to pay compensation to any person who suffers damage as a result of any action and any dispute in respect to compensation for land acquired by government is supposed to be referred to the Attorney General or court for decision.<sup>182</sup> However, the Land Acquisition Act ends at payment of compensation and it is not therefore a legal requirement to purchase alternative land for the affected people by the government.

The Batwa therefore cannot base any claim for resettlement under this law simply because there is no requirement or provision in the law that people need to be moved or that alternative land be made available or bought. However, for the case of the Batwa, this law was not enforced when government effected their evictions from their ancestral lands. To date, their entitlement to compensation from the government of Uganda has not been addressed.

### ***2.8.5 The Uganda National Land Policy, 2011***

The policy provides that land is a natural gift for the citizens to enjoy in association with others.<sup>183</sup> It also seeks to address the historical injustices to protect land rights of groups and communities marginalised by history on the basis of their ethnicity<sup>184</sup> and takes note of the fact that the land rights of vulnerable groups have been inadequately protected and not well enforced.<sup>185</sup> The policy expounds on compulsory acquisition and specifically addresses the fact that government has failed to ensure adequate compensation for lands appropriated at the local level.<sup>186</sup> With specific reference to the Batwa, the most relevant provision is in chapter three which provides that;

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<sup>182</sup> Article 26(2) of the Constitution, 1995 (as amended).

<sup>183</sup> The Uganda National Land Policy, 2013, Chapter 1, section 1.5 (5) (i).

<sup>184</sup> Ibid, Chapter 1, section 1.4 (4) (iv).

<sup>185</sup> Ibid, Executive summary, at 2.

<sup>186</sup> Ibid, Chapter 2, section 2.3 (10).

Government shall in its use and management of natural resources, recognize and protect the rights to ancestral lands of ethnic minority groups.<sup>187</sup>

In order to have this policy enforceable, it was proposed that special statutory regulations be developed to have the land tenure rights of minorities recognized<sup>188</sup> and to protect them against arbitrary evictions.<sup>189</sup> The policy also has provisions for land swapping, compensation and resettlement for the ethnic minorities who have faced evictions from their lands for purposes of conservation in the past.<sup>190</sup> However, the policy remains as paper work since it has not yet been implemented. This is a very important document containing very impressive and progressive provisions which would ensure proper enjoyment of rights by the Batwa.

It should be noted that the Batwa as the main stakeholders were not consulted and therefore did not participate in the whole process of developing this policy. The Batwa leadership is not aware about the provisions of this policy, hence leaving it as a mere wish list than a substantive statement of land rights that are guaranteed and enforceable in practice. Consultation and public participation of the Batwa is very vital to initiate their compensation by the government. This would help to ensure that all the Batwa are well informed and adequately involved in the government programmes right from the planning phase up to the implementation stage. The negative stereotypes experienced by the Batwa have left them in a helpless situation and unable to recognize their problems and solutions to the problems.<sup>191</sup> Several people who have learnt about the Batwa's situation would like to advocate for their rights at the local level and are hopeful that this is one way to achieve results for these marginalised Batwa community.

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<sup>187</sup> Ibid, Chapter 3, section 3.8 (59).

<sup>188</sup> Ibid, Chapter 3, section 3.8 (59) (i) (a).

<sup>189</sup> Ibid, Chapter 3, section 3.8 (59) (i) (b).

<sup>190</sup> Ibid, Chapter 3, section 3.8 (59) (ii).

<sup>191</sup> M Blaser, '*Life projects: Indigenous Peoples' agency and development*' 2004. In M Blaser, H.A Feit & G Mcrae, (eds.) *In the Way of Development: Indigenous Peoples, Life Projects and Globalization*. London, Zed.

Participation by the Batwa is an appropriate solution and would offer opportunity for negotiations as a method of social transformation which would result into Batwa empowerment. From the national perspective, the Batwa's participation would not easily be realized as they would remain marginalised and discriminated from the entire processes and denied the chance to be involved in making decisions on issues that affect them.

## 2.9 Discrimination

Discrimination simply refers to the systematic denial of certain peoples' or groups' full human rights because of who they are or what they believe.<sup>192</sup> The UN Human Rights Committee has defined discrimination as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>193</sup>

The Sub-commission on the Prevention of Discrimination and Protection of Human Rights, a body that was created by the United Nations specifically to deal with questions of Discrimination did not attempt to agree upon a legal definition of the term early in its first session but merely indicated the considerations which should be taken into account in framing the proposed Universal Declaration of Human Rights. The term “Prevention of discrimination” was described as the prevention of any action which denies individuals or groups of people the equality of treatment which they may wish.<sup>194</sup> The Sub-commission, however, held that differential treatment of such groups or of individuals was justified when it was exercised in the interests of their contentment and the welfare of the community as a whole. Equality and non-discrimination are positive

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<sup>192</sup> Amnesty International, “Discrimination”, retrieved from <http://www.amnesty.org/en/discrimination> (Accessed 22 September 2014).

<sup>193</sup> CCPR General Comment No. 18: Non-discrimination, Adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, para. 7.

<sup>194</sup> UN Doc. E/CN. 4/52, 6 December 1947, section V.

and negative statements of the same principle and the former means the absence of the latter and upholding the non-crimination between groups will result into equality.

The term discrimination is defined in both the CERD and CEDAW. Article 1 of the CERD defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Also article 1 of CEDAW defines the term discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although these definitions are tailored to particular groups and grounds, what is clearly portrayed is that discrimination refers to any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms. Under international law, discrimination has three distinct elements. There must be: unfavourable treatment; based on a prohibited ground; lacking reasonable and objective justification.<sup>195</sup>

The Batwa in Uganda experience several forms of discrimination which is the main reason for their exposure to poor education facilities, poor healthcare and lack of employment. According to the Constitution of the Republic of Uganda (1995), article 20 (2) stipulates that; “all persons shall not be discriminated against on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion or social or economic standing,

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<sup>195</sup> Ibid, n 46.

political opinion or disability”. Article 36 further provides for the guarantee of protection to minority groups to participate in decision making processes and consideration of their interests in making national plans and programmes. The Batwa are discriminated by both the government actors and their fellow community members from other indigenous groups.

The different kinds of discrimination are discussed elaborately by Woodburn as negative stereotypes, segregation and denial of rights.<sup>196</sup> These have resulted in the Batwa feeling isolated and thus shunning involvement or participation in the community activities. It is this stigma which has also made them miss out on accessing health and education services.

Whereas the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities<sup>197</sup> prohibits the practice of discrimination, article 2(3) of the same also guarantees the right of minorities to participate effectively in decisions on that concern them.

The Batwa continue to insist that they are different from the other indigenous peoples and it is the reason they are referred to as backward and primitive as discussed in chapter one of this thesis. From the political, social and economic perspective, severe marginalisation has affected the Batwa to the extent that the social dysfunctions have resulted into loss of income. Although the regions occupied by the Batwa have the lowest standards of living in Uganda, the Batwa have been described as the worst of the ‘needy among the needy’ in the country. Therefore, among all the tribes in Uganda, the Batwa remain the most marginalised.

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<sup>196</sup>J Woodburn, *Indigenous Discrimination: The ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa*, *Ethnic and Racial Studies*, 1997 vol. 20, no. 2, p. 353.

<sup>197</sup> UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 20 December 1993, A/RES/48/138, available at: <http://www.refworld.org/docid/3b00f302c.html> [accessed 2 November 2015].

### 2.9.1 Discrimination in access to education

The right to education is guaranteed to all in several international human rights instruments,<sup>198</sup> all of which Uganda is a party. In Uganda, the right to education is guaranteed in article 30 of the 1995 Constitution. Article 34 further enjoins the state and parents to offer basic education to a child. In order to ensure that all children attain education and to address the high levels of illiteracy, the government of Uganda introduced free Universal Primary Education (UPE) in 1997. Under the arrangement, the government pays the school fees and provides a grant towards materials with respect to children's education. In 1992, an Education White Paper was proposed that provided that children be taught in their first language for the first four years of their education. This proposal was entrenched in the 1995 Constitution under article 37 that provided a right for every person to belong, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. However, the UPE programme has failed to benefit many marginalised Batwa children because of poverty and prejudice from other students and teachers which has forced them to abandon school.<sup>199</sup> The Batwa children perform poorly in class and very few successfully finish school due to discrimination.<sup>200</sup> Although the government of Uganda efforts in reducing illiteracy and improving access to education for all is commendable, interrogating other factors that impede the Batwa children from enrolling in school and ensuring completion is important in putting in place conditions favourable to such a group of children.

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<sup>198</sup> Article 17(1) of the Banjul Charter; Article 28 of United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, GA Res 44/25 (1989/1990), available at: <http://www.refworld.org/docid/3ae6b38f0.html>; Article 13 of the CESCR; Article 13 of the ACRWC; General Comment No.13: Right to Education. E/C.12/1999/10 8 December 1999.

<sup>199</sup> Supplemental Report on the First Periodic Report of Uganda on the Convention on the Rights of the Child, CRC/C/65/Add.3 (State Party report)

<sup>200</sup> Ewelina Kawezynska, Batwa: The Most Marginalize People in Uganda? (2014), retrieved from [http://www.equaltimes.org/batwa-the-most-marginalised-people#.VDHB17Era\\_I](http://www.equaltimes.org/batwa-the-most-marginalised-people#.VDHB17Era_I) (Accessed 22 September 2014).

### 2.9.2 Discrimination in employment

The Batwa have also suffered from discrimination in the field of employment. The right to work is a fundamental right, recognized in several International legal instruments<sup>201</sup> and it is guaranteed to everyone regardless of his or her race, sex, or status. The Batwa has been one group that has not achieved much in terms of education of those who belong to the group. They are mostly hunter-gatherers and for over decades have had their lives dependent on forests. They thus cannot compete for employment in the formal sector because of their low levels of education.<sup>202</sup> The problem of lack of employment for the Batwa is further exacerbated by their isolation from the rest of Ugandan society due to their poverty and the mutual distrust that exists between them and Uganda's other ethnic groups, as well as their lack of access to information and low self-confidence in being able to take advantage of opportunities open to them.<sup>203</sup>

### 2.9.3 Discrimination in access to healthcare

Uganda being signatory to international instruments that promote the right to health such as the CESC<sup>204</sup>, is required to take measures to ensure the realization of the right to its citizens. Although the 1995 Constitution does not explicitly provide for the right in the document, there are provisions that have a bearing on the right to health. Objective XIV under the National Objectives and Directives of State Policy directs the state to promote social well-being through access to health services, clean and safe water. Objective XX further enjoins the State institute measures to ensure the provision of medical services to the population.

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<sup>201</sup> Article 15 of the Banjul Charter; Article 6 of the CESC; Article 23(1) of the UDHR.

<sup>202</sup> n 194 above.

<sup>203</sup> Batwa women in Uganda : Disproportionate human rights violations, Alternative Report to the Combined 4th to 7th periodic reports of Uganda (CEDAW/C/UGA/7) submitted by United Organisation for Batwa Development in Uganda and Forest Peoples Programme to the United Nations' Committee on the Elimination of Discrimination Against Women.

<sup>204</sup> Article 12 of the CESC; UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the covenant) 11<sup>th</sup> August, 2000, E/C. 12/2000/4.



The health concerns of the Batwa have a direct linkage to their displacement from the forest, social discrimination and extreme poverty. Traditionally, the Batwa depended on forest products for medicines and food products for the community. As a result of their eviction, they have lost access to many traditional forest products that contributed to their health. They also have difficulty accessing health services provided by the Ugandan government. For example, access to health services is affected by the issue of distance between the health centres providing the services and their places of abode. Access to healthcare is also curtailed by the discrimination from hospital staff and other patients in addition to poverty since they have to part with money.<sup>205</sup>

## 2.10 Conclusion

States have a duty to recognize the indigenous peoples' rights and ensure their participation and consultation in making policies and programs that affect them. Their recognition ought to include the indigenous peoples preferred names and should reflect international human rights standards. The international standards can be realised first by domestication of international legal instruments which guarantee indigenous and peoples' rights generally. This is in tandem with Uganda's duty to meet its treaty obligations in good faith.<sup>206</sup> Just in case there are some limitations, such limitations should accrue from the states' interest only when the indigenous peoples have participated in negotiations and consultations for a fair amount of compensation.<sup>207</sup> Having established that the right to participation is a core and significant claim by the

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<sup>205</sup> Uganda: Batwa – Sexual violence and lack of healthcare spreads HIV/AIDS, retrieved from <http://www.minorityvoices.org/news.php/fr/1502/uganda-batwa-sexual-violence-and-lack-of-health-care-spreads-hivaids#sthash.aX6Bjt0K.dpuf>.

<sup>206</sup> Article 26, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 3 November 2015].

<sup>207</sup> E I Daes, 'Indigenous Peoples and their relationship to land' Final working paper by the Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, p. 89.

indigenous peoples, the next chapter examines the existing civil and political rights within which the Batwa indigenous peoples can be included in the enjoyment as citizens of Uganda.

## CHAPTER THREE

### UNPACKING THE RIGHT TO PARTICIPATION FOR THE POLITICALLY MARGINALISED BATWA INDIGENOUS MINORITIES IN UGANDA

#### 3.1 Introduction

This chapter examines the extent to which Uganda's domestic legal framework fails to adequately promote the right to participation for the Batwa. This is against the background that of all Uganda's diverse ethnic groups, Batwa has been the most historically disadvantaged since time immemorial. The central thrust of the section of this thesis is to generate ideas on the enhancement of Batwa's participation and enjoyment of their civil and political rights.

The justification for the choice of Batwa as a case study is based on their level of marginalisation and impoverishment. Although the 1995 Constitution of Uganda recognizes the Batwa as one of the ethnic groups in the country, they are not recognized as indigenous and minority group and their ability to take part in political affairs are undermined.

#### 3.2 The right to public participation

Democratic strength is not merely a function of electoral process. A true Democracy must additionally feature transparent and participatory decision making and a government that is in constant dialogue with its citizens to shape and direct its fundamental policies. It is pluralistic decision making that is at the heart of democracy, and there must exist a public space within which citizens learn from and debate each other, and where the government is informed about the public will.<sup>1</sup>

Participation as a right is very important because better decision making arises from public involvement in the process of development.<sup>2</sup> Likewise, the problems of the Batwa

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<sup>1</sup> Presentation by Ramon Daubon to opening Plenary, Montevideo Conference on public participation in sustainable decision making (August 1996).

<sup>2</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public

cannot be solved and sustainable development achieved without their involvement in decision making. Public discourse and civic participation is therefore an important component to achieve the goals of sustainable development.<sup>3</sup> Public participation in decision making is very vital because it gives them a chance to express their views on key government policies and laws concerning their rights in their particular communities.<sup>4</sup> This in turn would enable government to pass policies and enact laws that are relevant to the Batwa communities and take into account their needs.

The concept of participation is enshrined in different human rights instruments. For example, the right to participate in public affairs is protected under the Universal Declaration of Human Rights (UDHR)<sup>5</sup> and the International Covenant on Civil and Political Rights (CCPR).<sup>6</sup> This provision is also emphasized by the General Comment 25 of the United Nations Human Rights Committee that;

...the conduct of public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers...<sup>7</sup>

The right to participation by the Batwa is not just limited to political participation; it needs to be integrated into every part of society. They must participate in all societal issues that affect them directly or indirectly. The overall aim of this thesis is to ensure that even the Batwa participate in all issues concerning them like other citizens do. Every effort

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Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <http://www.refworld.org/docid/453883fc22.html> [accessed 5 November 2015]

<sup>3</sup> T.A Sinclair, *The politics* (Penguin, Harmondsworth, 1981 pp.197-198) Contemporary writers have championed the importance of public participation. See generally, Benhabib, *Models of Public space: Hannah Arendt, the Liberal Tradition, and Jurgen Habermas* in C. Caloun (ed) *Herbermas and the public sphere* (MIT Press, Cambridge, 1992, at 73-98)

<sup>4</sup> *Ibid*, n. 2.

<sup>5</sup> Article 21, UDHR.

<sup>6</sup> Article 25, CCPR.

<sup>7</sup> Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

must therefore be taken to ensure that they have access and opportunities to participate in affairs of government.

Minority groups seek to be recognized as such by their governments and wish to secure their rights to identity, to speak their own language, to profess and practice their own religion, to enjoy culture and to establish and maintain their own associations. They are also desirous of participating in public and political life and in designing and implementing policies and projects that affect them.<sup>8</sup>

Several arguments for the protection of the Batwa relate to the right to participation. Like any other person, they are entitled to all other rights and freedoms where participation is an important right. As an indigenous group, they have the right to participate in policy formulation, implementation and representation. When they are left out, it amounts to a direct violation of Article 13 (1) of the African Charter on Human and Peoples' Rights (hereinafter African Charter), which guarantees all citizens the right to participate in the government of their own country.

For the promotion of Democracy, it is important to involve the Batwa just like any other citizen; to have a voice of their own and communicate their decisions. For example, in Botswana there was a petition by the Bayeyi to government for recognition of their right to participation with the Swana in the House of Chiefs.<sup>9</sup> There are also demands for participation by other indigenous groups in Africa. A conference of indigenous peoples from Eastern, Central and Southern Africa held in Arusha, Tanzania from 18<sup>th</sup>-22<sup>nd</sup> January, 1999 agreed that participation in local, national or international bodies is interlinked to the full enjoyment of all other rights stipulated in the human rights instruments.<sup>10</sup>

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<sup>8</sup> Pamphlet No. 11 of the UN Guide for Minorities, The protection of the rights of minorities and United Nations Educational, Scientific and Cultural Organisation (UNESCO). UN Working Group on Minorities.

<sup>9</sup> *Kamanakao and Another v Attorney General of Botswana* MISCA 377/99 and CM Fombad, *The constitutional protection against discrimination in Botswana* (2004) 53.

<sup>10</sup> IWGIA Report 'The 37<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights' Banjul, The Gambia, 27 April – 11 May 2005.

The idea of special mechanisms and procedure for participation by the Batwa minority is not to promote unfair advantage but to bring them to the same level with their majority counterparts. The special mechanisms can contribute to their involvement in the national, political and social activities in their communities and this would ultimately enable them obtain a position in the system and participate in the formulation and implementation of policies.

However, the Batwa have remained isolated from the main national processes because they do not see any responsibilities for their engagement and they believe that they cannot influence any decisions<sup>11</sup> Institutions and people who have acted as their voices have misrepresented them which have resulted into prejudices and stereotyping. Participation also results into the development of special talents and skills of the Batwa for the good of the nation. The states which encourage participation and integration of indigenous peoples tend not only to remain stable but also more prosperous.<sup>12</sup>

The concept of universality of human rights is promoted when the Batwa as an indigenous group enjoy their right to participation together with other groups. This is simply because it also helps to put old policies into new ideas by pointing out their gaps and loopholes, hence the need for new policies and mechanisms to promote participation by the Batwa people.

Participation also promotes open discussions and cultural dialogues and discourages conflicts which are often a result of lack of information and ignorance. This would help the Batwa identify their concerns and forge ways on how to address them. The Batwa would therefore be willing to welcome the opportunity to participate in public affairs with a view of enhancing democracy and democratic processes.

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<sup>11</sup> G Mwakikagile (2009), *Ethnicity and national identity in Uganda: The land and its people, customs* Book Publishing, California: USA, at 187.

<sup>12</sup> Yash Ghai, *The importance of public participation rights: 'Public participation and Minorities'* MRG 2003, at 5.

The key concerns of the Batwa can easily be identified through their involvement in public affairs, which creates a greater sense of ownership and responsibility especially in the programmes that they will develop for themselves as a group.

### 3.3 The right to political participation

Political participation is very relevant for indigenous peoples because it enables them to build their capacity and self-esteem as people who can take part in leadership.<sup>13</sup> The right to political participation is guaranteed in international, regional and national human rights instruments.<sup>14</sup> The provisions in these instruments encourage multiparty elections and democracy in political participation as a right.<sup>15</sup> The right to political participation has also been affirmed by the international and regional quasi-judicial institutions.<sup>16</sup> Furthermore, political participation can be regarded as a very important avenue for the promotion of democracy simply because it enables people to feel empowered through their engagement.<sup>17</sup> For example, when the South African government interacts closely with its citizens in the process of service delivery, it finds itself in a better position than the local provinces in effective response to the local challenges and in so doing it promotes local participation.<sup>18</sup>

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<sup>13</sup> A Reynolds, 'Electoral systems and the protection and participation of minorities' (2006) 6, available at <http://www.monorityrights.org/admin/download/pdf/MRG> (Accessed on 10<sup>th</sup> July 2012).

<sup>14</sup> These include the International Covenant on Civil and Political Rights (article 25), Convention on the Elimination of Discrimination against Women (article 7), Convention on the Elimination of Racial discrimination (article 5), International Covenant on Economic, Social and Cultural Rights (article 15).

<sup>15</sup> G H Fox 'Right to political participation in international law' (1992) 17 Yale Journal of International Law at 539; and S Wheatley 'Minority rights and political accommodation in the "NEW" Europe' (1997) 22 *European Law Review* at 63 – 81.

<sup>16</sup> *Constitutional Rights Project and Another vs. Nigeria* (2000) AHRLR 191 (ACHPR 1998).

<sup>17</sup> G Van der Waldt 'Fostering local democracy' Page Number in G. van der Waldt (ed). *Municipal management: Serving the people* (2007) Cape Town: Juta, at.28.

<sup>18</sup> R.G. Cameron and A.B. Stone *Serving the public: A guide for practitioners and students* (1995) Pretoria: Van Schaik, at100.

Political participation is guaranteed in international human rights law and has widespread recognition especially in state practice. This promotion of this right among the Batwa of Uganda calls for more advocacy and agitation since they are not involved in the political affairs of the country.<sup>19</sup>

Article 25 of the CCPR guarantees the right to take part in the conduct of public affairs, either directly or through chosen representatives and to be elected in genuine periodic elections. This provision makes an individual a beneficiary. Wheatley argues that democracy can be achieved when the individual participates in public affairs.<sup>20</sup> It is important to ensure a proper flow of the argument in a non-fragmented way. Article 13 (1) of the African Charter provides that 'even citizens shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

The Human Rights Committee, in General Comment No. 25 on article 25 (Participation in Public Affairs and the Right to Vote) of the CCPR<sup>21</sup> has stated that this right stands at the core of democratic government based on the consent of the people,<sup>22</sup> relating to individual rights to 'participate in those processes which constitute the conduct of public affairs,'<sup>23</sup> preferably legally regulated<sup>24</sup> and also confined to the citizens as voters and participants at the same time.

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<sup>19</sup> Uganda Human Rights Commission (2009). *Protection and promotion of rights of ethnic minority groups in Uganda: The case of the Benet of Kapchorwa, the Batwa of Bundibudyo and Kuku of Yumbe districts* (2009) Uganda Human Rights Commission, Kampala: Uganda.

<sup>20</sup> S Wheatley 'Non discrimination and equality in the right to political participation for minorities' (2000) 3 Journal on Ethno Politics and Minority Issues in Europe 1.

<sup>21</sup> CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7. Also see, KJ Partsch, 'Freedom of conscience and expression, political freedoms', in Louis Henkin ed, *The international Bill of Rights: The Covenant on Civil and Political Rights* New York: Columbia University Press, (1981) at 238- 245.

<sup>22</sup> CCPR General Comment No. 25 above, paragraph 1.

<sup>23</sup> Ibid, paragraph 2.

<sup>24</sup> Ibid, paragraph 5.



The construction of article 25 is around elections and taking part in public affairs. These rights are qualified by some reasonable restrictions and must be applied in a manner which is non-discriminatory.<sup>25</sup> However, processes for participation that are a creation of the state normally regulate elections by determining the individuals and group access to political party activities and public institutions. In respect to political participation by indigenous peoples, article 21(3) of the Universal Declaration of Human Rights provides for popular will to be expressed through ‘periodic and general elections based on universal adult suffrage held by secret ballot or free voting procedures.’<sup>26</sup> This analysis distinguishes between genuine elections and feigned ones.

The right to participate in political decision making by indigenous peoples either directly or indirectly through elected political representatives is very vital in the democratization processes. Public participation stands out to be the most active relationship between government and the citizens since they are directly engaged in decision-making processes.<sup>27</sup> Taking part in public affairs as a sign of political participation is very crucial in the promotion of the right to participation. Public affairs relate to the exercise of political power and also extend to legislative, executive and administrative powers. It comprehensively touches all aspects of public administration, policy formulation and implementation at national, regional and international spheres.<sup>28</sup>

In Uganda, the participation of minority groups is not expressly provided for in the 1995 Constitution. Article 36 guarantees minorities the right to participate in decision-making processes, and enjoins the State to take their views and interests into account in the making of national plans and programmes. Furthermore, Objective X of the National Objectives and Directives of State Policy under the same constitution also enjoins the

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<sup>25</sup> Article 2 of the ICCPR lists the prohibited grounds of discrimination to include; race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>26</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>27</sup> C Pollitt, *The essential public manager*, Berkshire: Open University Press (2007).

<sup>28</sup> *Ibid*, n. 21, paragraph 5.

State to take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.

Although interest groups such as women, youth, persons with disabilities, the army, and the workers have representation in the legislature, minorities lack such opportunity. For the case of the Batwa, considering their numerical strength, it is difficult for anyone from such a group to ascend to any elective position since the determinant factor is that of numbers. Therefore, if there were opportunities within the Electoral structures that may enhance underrepresented groups and accessibility to political processes; this would guarantee their effective participation and enhance their contribution to the national development processes. Proportional representation would therefore guarantee minority seats or other affirmative measures would promote the facilitation and inclusion of a wider range of views into the decision-making process.

Even still, the Batwa have no representation in the Cabinet portfolios of the country. Objective II (iv) on Democratic Principles provides that the composition of Government shall be broadly representative of the national character and social diversity of the country. However, out of the 31 Cabinet Ministers, none is a Mutwa.<sup>29</sup> And yet, all decisions and policies are generated and developed at that level. Therefore, the lack of representation of the Batwa at that level does not bring the issues affecting them to the fore in regard to generating debate on them. The fact that the Batwa do not participate as a marginalised people within Uganda, but in their individual capacity makes them remain too weak to influence decision-making processes.<sup>30</sup>

The right to political participation is a constitutional requirement to all citizens either directly or through a freely chosen representative to access public offices, property and services.<sup>31</sup> When it comes to choosing leadership, indigenous peoples can be involved

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<sup>29</sup> Full list: Uganda Cabinet 2015, available at <http://news.ugo.co.ug/full-list-uganda-cabinet-2015/>.

<sup>30</sup> African Commission IP/C (2005), at 109.

<sup>31</sup> African Charter, article 13

in political dispensation and exercise their influence on issues which affect them and therefore hold their leaders accountable.

Participation is one of the key pillars in democratic governance. The key role of citizens in a democracy is participation. Citizens have a duty to be informed about public issues, to monitor the conduct of their leaders and representatives, and to express their own opinions. As provided for by the African Commission<sup>32</sup> in *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*,<sup>33</sup> the right to participate freely in government entails, among other things, the right to vote for the representative of one's choice. A very important provision of this right is that the results of the free expression of the will of the voters are respected and promoted, otherwise, the right to vote freely would remain meaningless. The African Commission has handled communications on the right to political participation and also discovered that even annulment of elections amounts to a violation of the right. It was stated that:

To participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless.<sup>34</sup>

Further, in the *Dawda* communication, the African commission observed that banning political participation of government members after a coup is a violation of their rights to choose government leadership.<sup>35</sup>

### **3.4 Participation as a right to self-determination**

Self-determination denotes the legal right for all peoples to determine their own economic, social and cultural development. The right of indigenous peoples to self-

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<sup>32</sup> This is a body that oversees the implementation of the African Charter on Human and Peoples' Rights within the States Parties. It also has Quasi-judicial function.

<sup>33</sup> Communication 102/93, 12th Annual Report 1998/1999.

<sup>34</sup> *Zamani Lakwot and 6 Others v. Nigeria, Communication 87/93.*

<sup>35</sup> *Sir Dawda K. Jawara v. The Gambia, Communications 147/95 and 149/96.*

determination should be respected.<sup>36</sup> The right to self-determination in international law is viewed with two lenses.<sup>37</sup> First, is internal self-determination through involvement in social, political and economic affairs in the country and generally exercising the right to participation.<sup>38</sup> Second is the external self-determination through secession.<sup>39</sup> This occurs mainly where a people have been discriminated against and denied a right of participation within their country.<sup>40</sup> As recourse, they seek to exercise their right to self-determination out of the country, through secession.<sup>41</sup>

This right to self-determination asserts the necessity of allowing indigenous peoples as the Batwa to exercise their right to internal self-determination through participating in economic, social and political decision making, especially where the decisions affect them. This can be done through ensuring mechanisms of substantive equality for Batwa's benefit. Refusal of such may in the long run call for attempts of external self-

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<sup>36</sup> Concluding Observations of the HRC: Mexico. UN Doc.CCPR/C/79/Add.109 (1999), paragraph 19; Norway. UN Doc.CCPR/C/79/Add.122 (1999), paragraphs 10 & 17; and Australia. 28/07/2000. CCPR/CO/69/AUS paragraphs 8; Article 1(1), International Covenant on Civil and Political Rights (1966); article 1(1), International Covenant on Economic, Social and Cultural Rights (1966); Programme of Action for the Full Implementation of the Declaration on Granting of Independence to Colonial Countries and Peoples, A/RES/2621 (12 October 1970); Declaration on Friendly Relations A/RES/2625 (24 October 1970); *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports 1975, p 12 at pages 31-33; *Case concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, page 90; *The Namibia Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ICJ Reports 1971, p 16; *Legal consequences of the construction of the Wall in the occupied Palestinian territory (Wall opinion) (Advisory Opinion) 2004 ICJ 136*; *Aaland Islands case (1920)* League of Nations Official Journal Spec Supp 3, at page 3; *Kayano v. Hokkaid v Expropriation Committee*, I.L.M. 394 (Mark A. Levin trans., 1999); *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No.167/1984, Human Rights Committee, U.N. Doc. A45/40 (1990); Pellet A, (1992), *The opinions of the Badinter Arbitration Committee: A second breath for the self-determination of peoples*, volume 3, European Journal of International Law, at page 178.

<sup>37</sup> Committee on Racial Discrimination, General Recommendation 21, The Right to Self-Determination, UN Doc. A/51/18.

<sup>38</sup> Ibid; Pellet A, *The opinions of the Badinter Arbitration Committee: A second breath for the self-determination of peoples*, 3 EJIL 178 (1992).

<sup>39</sup> Ibid; Cassese, *Self-determination of Peoples*, Cambridge 1995, page 120; Daniel Thurer, *Self-determination in international law*, R. Bernhardt, 2000, 4 Encyclopedia of Public International Law 364, 367.

<sup>40</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

<sup>41</sup> Ibid.

determination like other peoples have attempted to.<sup>42</sup> Further, article 27 of the International Covenant on Civil and Political Rights carries a provision on the general norms of international law on the right to cultural integrity.<sup>43</sup>

It has been argued that the doctrine of self-determination was not considered a legal right until after the Second World War.<sup>44</sup> The concept became more pronounced in the aftermath of the Second World War and it formed one of the major purposes under the UN Charter.<sup>45</sup>

The principle of self-determination, according to Higgins, appears to be the rights of the peoples of one state to be protected from interference by other governments or states.<sup>46</sup>

The entire population of the UN member states is therefore signified by the term 'peoples' in the UN Charter. The UN established the right to self-determination as a right of people's under colonial and alien administration. The right does not apply to people already organized in the form of a state which are not under colonial rule and alien domination since resolution 1514 (xv) and other UN instruments condemn any attempt aimed at partial or total disruption of the national unity and territorial integrity of a country.<sup>47</sup>

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) concluded a debate as to whether the right to self-determination applies to

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<sup>42</sup> *Katangese People's Congress v Zaire*, Communication No. 75/92 (2000) AHRLR 72; Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

<sup>43</sup> SJ Anaya, *Indigenous Rights Norms in Contemporary International Law*, (1991) 8 (1) *Arizona Journal of International and Comparative Law* at 15.

<sup>44</sup> J Oloka-Onyango, *Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium*, *American University International Law Review*, vol. 15, No.1 (1999), at 59

<sup>45</sup> Article 2, UN Charter.

<sup>46</sup> R Higgins 'Self-determination and secession', In J Dahlitz (ed) *Secession and International Law: Conflict Avoidance, Regional Appraisals* (The Hague: T.M.C. Asser Press, 2003), at 23.

<sup>47</sup> HG Espiell, *The right to self-determination: Implementation of United Nations Resolutions* (1980).

Indigenous peoples. Article 3 of UNDRIP<sup>48</sup> is based on article 1 of both the CCPR<sup>49</sup> and CESC<sup>50</sup> and provides that indigenous people have a right to self-determination and by virtue of that right, they can freely participate in the determination of their own political status, and also freely pursue their economic, social and cultural development. Clarification is made in the UNDRIP that the right to self-determination by indigenous people should not be interpreted to encourage any activity which would impair the territorial or political unity of sovereign and independent states.<sup>51</sup>

The UNDRIP further in article 4 provides for the internal aspects of the right to self-determination that, 'indigenous peoples, in exercising their right to self-determination have a right to autonomy and self-government in matters relating to their internal affairs.' However, the indigenous peoples in exercising their right to autonomy should not limit their rights to fully participate in the mainstream political life of the state.<sup>52</sup> Further, article 4 of the UNDRIP also recognizes that indigenous peoples have the right to build and empower their district political, legal and economic institutions while maintaining their right to participation in the political, social and cultural life of the state.

The UNDRIP therefore plays a vital role especially on states obligations towards indigenous peoples as was decided in the Supreme Court of Belize, in a case concerning the land rights of the indigenous peoples'.<sup>53</sup> The Supreme Court concluded that unlike the resolutions of the UN Security Council, the resolutions of the UN General Assembly are not ordinarily binding on member states and member states are not

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<sup>48</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 2 October 2007, A/RES/61/295.

<sup>49</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

<sup>50</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

<sup>51</sup> Ibid, n. 48, article 46 (1).

<sup>52</sup> Ibid, article 5.

<sup>53</sup> *Aurelio Cal and the Maya Village of Santa Cruz v Attorney general of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim No. 171 and 172.

expected to disregard them when they contain the principles of general international law.<sup>54</sup> It was further decided that the obligations of Belize are mainly concerned with respecting and protecting the rights enshrined in the UNDRIP.<sup>55</sup>

This decision provides clarity and specificity in respect to the significance and impact of the Declaration in national enforcement. The Declaration contains a reaffirmation and application of existing human rights standards to historical, cultural, economic and social experiences of indigenous peoples. Interpreted in conjunction with other international instruments, the Declaration gives a more authoritative framework for proper and better protection and enforcement of the indigenous people's rights.

The United Nations Human Rights Committee (HRC) has accepted that indigenous peoples do enjoy the right to self-determination. In its past commentaries on Canada's compliance with its obligations under the International Covenant on Civil and Political Rights and the rights of Canada's Aboriginal Peoples, the HRC noted:

...[T]he Committee emphasizes that the right of self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP [Royal Commission on Aboriginal Peoples] recommendations on land and resources. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.<sup>56</sup>

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<sup>54</sup> The Supreme Court of Belize (2007), Consolidated Claims: Claim No. 171 of 2007, and Claim No. 172 of 2007, paragraph 131.

<sup>55</sup> Ibid.

<sup>56</sup> UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Canada*, 7 April 1999, CCPR/C/79/Add.105, cited in Kambel, Ellen-Rose and F MacKay, 'The Rights of Indigenous Peoples and Maroons in Suriname'. Forest Peoples Programme and International Work Group on Indigenous Affairs, Copenhagen, 1999.

Originally, the European nations were not against the idea of giving recognition to the indigenous peoples rights to hold territories, own land, practice their customs and maintain their own governments.<sup>57</sup> Sovereign powers and indigenous peoples entered into binding agreements to maintain the right to self-determination by the latter.<sup>58</sup>

The right to self-determination is enshrined in the UN Charter and makes specific reference to the development of 'friendly relations among nations'.<sup>59</sup> Similarly, article 55 of the Charter also requires the UN to promote the highest standards of living, solutions to health and cultural problems, and universal respect for human rights in order to create conditions necessary for the peaceful and friendly relations among nations based on equal rights and self-determination of peoples. The subject of the right to participation for indigenous peoples and the corresponding rights such as the right to self-determination is likely to remain a major subject of debate at the United Nations.<sup>60</sup> For purposes of this thesis, it is important to recognize that one of the key reasons why the indigenous peoples recognize themselves as such is because they want to assert their right to participation through self-determination and to be involved in decision-making processes through their representatives.

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<sup>57</sup> J Francis, *The Ambiguous Iroquois Empire: the Covenant Chain Confederation of Indian Tribes With English Colonies* (1984) WW Norton: New York.

<sup>58</sup> O Claudia, *The treaty of Waitangi*, (1987) Allen & Unwin Port Nicholson Press, New Zealand. Also see, P F Paul *'American Indian Treaties'*. *The history of a political anomaly* (1994) University of California Press, Berkley; Alfonso Martinez, Miguel, Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Draft report by the Special Rapporteur to the 1998 session of the United Nations Working Group on Indigenous Populations, Geneva.

<sup>59</sup> Article 1(2) of the UN Charter stipulates as one of the purposes of the UN 'to develop friendly relations among nations based on the principle of equal rights and self-determination of peoples'.

<sup>60</sup> Previously, the Human Rights Committee as it then was avoided making a judgment on whether indigenous peoples have the right to self-determination. Following the case of *Chief Omanayak and Another v Canada*, CCPR/C/38/D/167/1984, UN Human Rights Committee (HRC), 26 March 1990, where the Committee upheld the complaint on the grounds of violations of other rights, thus leaving the Lubicon Crees right to self-determination unaddressed. The Committee similarly declined to consider whether the ethnic Germans of Italian Tyrol constitute a peoples in the case of *AB v Italy*, Comm. 565/1993, U.N. Doc. A/49/40, Vol. II, at 360 (HRC 1994), cited in S Pritchard, *The International Covenant on Civil and Political Rights and Indigenous peoples*. In: S Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (1998) Zed Books Ltd, London: 184-203



In Uganda, the involvement of the Batwa in the democratization process in the country has not realized benefits as other groups have. The politics of the country relies on number and since the Batwa are few in number compared to their counterparts, it is hardly possible for any of their members to get a slot for any leadership position. Even in the communities where they live, they are subdued by their majority counterparts, which make it hard for them to voice out their interests through the political leadership. Even though contesting for elective positions is an opportunity that is open to all citizens, there are certain conditions that curtail the Batwa pro actively participating in the exercise. First, some elective positions demand certain levels of academic qualification, which the Batwa lack. For example, for one to contest for the post of a Member of Parliament, he or she is required to have attained an Advanced Certificate of Education or its equivalent.<sup>61</sup> And, for one to contest for a Local Council post (I, II, and III), one is required to have attained an Ordinary Level Certificate or its equivalent.<sup>62</sup> In addition, a fee, depending on the position one is contesting, is charged on any person. With the high levels of illiteracy and the abject poverty that the Batwa experience, it is practically impossible for the group to have any of their own carry their voice and to also contest for an election.

Furthermore, unlike other groups such as the Baganda, Basoga, Banyoro and Batooro that have had their traditional institutions and leaders recognized by the government of Uganda, for the Batwa this has not been the case. Although the existence of the traditional institution of the Batwa has not been disputed, government has been reluctant to grant them the much desired recognition. Having a traditional leader will ensure that the voices of the Batwa are carried by their traditional head to the key government functionaries and their situation brought to the attention of the responsible bodies. The traditional institutions that have been recognized by the government enjoy social, political, economic and cultural benefits through programmes implemented by

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<sup>61</sup> Section 5 of the Parliamentary Elections Act, 2001.

<sup>62</sup> Section 139 of the Local Governments Act of 1997; Ongole Michael v Electoral Commission and Ebukalin Sam, Election Petition No. 0008 OF 2006.

the government. If the Batwa were also given such recognition, this would benefit them as the programmes and activities geared towards them would address their situation.

### **3.5 The right to participate in decision-making**

It is an international human rights norm that indigenous peoples are able to effectively participate in decision-making processes on matters that affect them. This applies to both decisions within the framework of domestic legal processes and the international sphere. Taking part in decision making is the most important aspect of the right to participation. Participation can also be done through representation and consultations before decisions are made. This makes the process of participation key to implementation of legislative and administrative policies and decisions.

According to international human rights standards, there is a difference between the indigenous people's right to participate in decision-making through their independent decisions concerning internal affairs and the right to make external decisions that directly affect them. The UNDRIP makes general provisions for the indigenous peoples to build and maintain their own decision making institutions alongside their right to participation in external decision-making processes which affects them.<sup>63</sup>

Article 18 of the UNDRIP provides that 'indigenous peoples have a right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures and also maintain and develop their own indigenous decision-making institutions'.<sup>64</sup> The UNDRIP contains several provisions about the indigenous peoples and their right to participate in decision-making processes.

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<sup>63</sup> United Nations Declaration on the Rights of Indigenous Peoples, Adopted 2 October 2007 at the 107th plenary meeting Issued in GAOR, 61st sess., Suppl. no. 49, *General Assembly Res. A/RES/61/295*, arts 5 and 15.

<sup>64</sup> *Ibid*, article 18.

The right to participation further demands that adequate and appropriate consultation mechanisms are put in place in order to ensure the indigenous peoples get involved in owning, controlling and management of their property. In this regard, the CERD Committee therefore recommended that state parties:

Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and no decisions directly relating to their rights and interests are taken without their informed consent.<sup>65</sup>

The right to participate in decision-making processes by the Batwa is therefore a very important principle under the international human rights standards. It is a state's obligation to seek, prior and informed consent from the indigenous communities before making decisions that affect them. The decentralization system of governance in Uganda has made the country a success story. The Batwa are beginning to have a bit of contact with the local government officials although they still lack the significant representation in order to voice their concerns effectively. The Batwa have continuously relied on their customary laws and traditional decision-making practices alongside the national laws and assistance from local government institutions.

In light of their differences and unique way of life, the Government of Uganda can adopt special measures with the aim of protecting the rights of the Batwa as special and vulnerable people. This includes involving them in the national consultation programmes. Such special measures cannot amount to discrimination against other dominant tribes because according to international law, unequal treatment towards persons in unequal situations does not amount to impermissible discrimination.<sup>66</sup> Special measures are therefore necessary to ensure that the Batwa take part in

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<sup>65</sup> General Recommendation 23: Rights of Indigenous Peoples, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997).

<sup>66</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 103.

decision making process at the same level as other dominant community members in Uganda.

### 3.6 Consultation and Consent

The formation of mechanisms for the consultations of indigenous peoples on issues which concern them is a very vital provision in ILO Convention No. 169<sup>67</sup>, and yet very difficult to achieve by several states.<sup>68</sup> The Convention encourages indigenous peoples to participate in decision-making processes. It can therefore be argued that articles 6 and 7 of the Convention on consultation and participation are very vital provisions in as far as ensuring the participation of indigenous peoples is concerned. Consultation under the Convention is seen as an important means of promoting dialogue in order to reconcile divergent views and solve conflicts.

Further, since the right to consultation is interrelated with participation, it enables the indigenous peoples to make their own independent decisions when choosing priorities for their development processes. Consultation and participation can be demonstrated as a relationship between the indigenous peoples and the state. Consultation of the Batwa can therefore be an obligation of the state which arises in relation to the application of the Convention since it is required that indigenous peoples participate freely at all levels in the formulation and implementation of programmes that directly affect them. The process of consultations with the Batwa is therefore an important way of promoting effective participation for the indigenous peoples in decision-making.

Article 6 (2) provides further that consultations should be carried out in good faith and in a form appropriate to the circumstances with the objective of achieving agreement or consent to the plan. Additionally, the article requires that there should be a good faith

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<sup>67</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, Adopted 27 Jun 1989, *entered into force* September 5, 1991.

<sup>68</sup> Committee of Experts, General observation on Convention No.169, 79<sup>th</sup> session, 2008, published 2009.

process of consultations with the objective of achieving consent to the proposed steps. This argument is strengthened further by the CCPR's<sup>69</sup> provision to the effect that states are obliged to consult indigenous peoples in situations where measures may affect their culture, language or religion.<sup>70</sup>

The Ugandan Constitution under article 32 further calls for affirmative action in favour of marginalised groups. It obliges government to support affirmative action on behalf of groups such as the Batwa who have been historically disadvantaged on grounds as a result of the creation by history, tradition or custom.<sup>71</sup>

A framework for operations by the CERD Committee has been provided by the International Convention on the Elimination of All Forms of Racial Discrimination to the effect that the relation between the elimination of racial discrimination and recognition of indigenous rights has been emphasized.<sup>72</sup> The ILO Convention No 169 similarly urges states to consult indigenous peoples with the aim of ascertaining whether their interests have been taken into consideration when making decisions on matters that affect them.<sup>73</sup>

In response to international developments, there is need to increase consultations involving issues affecting the Batwa linked to both government and non-government institutions. This approach would open opportunities for the Batwa leadership through their cultural associations to participate in consultations as the representatives of the

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<sup>69</sup> GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

<sup>70</sup> Ibid, n. 63, article 27.

<sup>71</sup> BG Wairama "Uganda: The marginalization of minorities." Minority Rights Group International, (2001) available at <http://www.minorityrights.org> (accessed on the 6<sup>th</sup> August 2012).

<sup>72</sup> GA Res 2106(XX), 660 UNTS, 195, adopted on 21st December 1965, entered into force on 4th January 1969 [hereinafter ICERD].

<sup>73</sup> UN Declaration on Indigenous Peoples, article 30 (providing for the right of indigenous peoples 'to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources').

Batwa peoples. When discussing issues of consultation and participation, it is important to consider structural setups among the Batwa communities.

The 1995 Uganda Constitution (amended) enjoins the state to initiate steps and involve the people in the formulation and implementation of development plans and programmes which affect them.<sup>74</sup> Article 36 also guarantees minorities the right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes. However, the Batwa as a group has been excluded from these processes where key decisions are taken. For example, in terms of representation at the national level, the Batwa have no representation both in the legislative assembly and at the Cabinet level, where key national plans and policies are made. Therefore, although the Batwa might have important developmental views to make, they lack a voice to carry their opinions to inform the national planning process and policy formulation.

### **3.7 Representation in cabinet**

The Batwa should be represented in cabinet either through elections or by co-option like in the case of Burundi. The Constitution of Burundi promotes ethnic balance by providing for the co-option of legislators after elections.<sup>75</sup> The Constitution of Burundi also provides for representation by reserving three seats for the Twa in the National Assembly.<sup>76</sup> This provision advocates for affirmative action and promotes legitimate representation of the Twa within the composition of the senate.<sup>77</sup>

The Burundi Constitution refers to ethnic groups and provides for a quota when dealing with the composition of cabinet, the legislature and the army. Article 130 stipulates that the minister of defense and the minister of the national police shall be from different

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<sup>74</sup> National Objectives and Directives of State Policy, Objective X.

<sup>75</sup> *Constitution de Burundi (consolidated 2005)* [Burundi], 18 March 2005, article 164.

<sup>76</sup> *ibid*, article 99.

<sup>77</sup> *ibid*, article 180.

ethnic groups. This promotes participation in cabinet since one of the vice presidents is from a different ethnic group. If the Batwa in Uganda were given such an opportunity, then the government would go a long way in encouraging their participation in managing the affairs of the state.

### **3.8 Conclusion**

This chapter speaks to the fact that at all levels among the indigenous peoples, democracy empowers people to participate actively in the realization of their needs. The right to participation is therefore very relevant among the Batwa in building democracy. It has also been established that the success of democracy depends on the effectiveness of citizen participation. The key element of participation is democracy and the key element of democracy is participation.

Participation in civil and political affairs of governance provides a wide range of advantages to the Batwa indigenous peoples. It enables them to build a spirit of patriotism especially when they are given chance to take part in civic affairs through their contribution in the decision-making processes. Public participation and engagement therefore remains very crucial in the promotion of democracy and good governance among the Batwa indigenous peoples.

This chapter has highlighted the significance of empowering the indigenous peoples to actively and meaningfully participate in the making of decisions on issues that affect them and their wellbeing as citizens. It has emerged that in Uganda, public participation of all the citizens including the Batwa is very important in building democracy. Citizen participation and engagement requires constant consultation with the Batwa and response from their political representatives as well as direct access by their communities to information concerning them. However, relying on civil and political rights alone for discussing the right to participation by the Batwa is not sufficient enough

since human rights are interrelated and interdependent.<sup>78</sup> It is therefore important to discuss the right to participation from the socio economic rights perspective which is the subject in the next chapter.

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<sup>78</sup> Guide to Human Rights Impact Assessment and Management, available at [www.guidetohriam.org/human-rights-an-umbrella-term-1](http://www.guidetohriam.org/human-rights-an-umbrella-term-1) (accessed on 21st August 2012).



## CHAPTER FOUR

### THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS PERSPECTIVE OF PARTICIPATION FOR THE BATWA

#### **4.1 Introduction**

Whereas the Batwa face various human rights violations, the focus of this chapter is on their participation with respect to economic, social and cultural rights which are core rights. Several laws, policies and practices in the majority of states in Africa disregard indigenous peoples and have often remained in conflict with the rights that accrue to the group.<sup>1</sup> This situation is often revealed by little or lack of consultation and participation of the Batwa on issues that affect them in respect to their economic, social and cultural rights. The chapter examines the core rights and the problems associated with the Batwa's participation in making and implementing decisions in respect to the economic, social and cultural rights. The chapter also makes proposals on how best the problems can be addressed with reference to international standards and best practices in other jurisdictions.

#### **4.2 Economic, social and cultural rights for the Batwa**

It is important to discuss aspects of marginalisation experienced by the Batwa in order to appreciate the reasons for their failure to enjoy economic, social and cultural rights. This in turn has resulted in their lack of access to healthcare, unemployment and poor access to education facilities. As indicated above, the Batwa are excluded from the processes of planning and programming for services not only in the local arena but also at the national level due to the attitudes and negative stereotypes against them. The types of discrimination often faced by the African hunter gatherers such as the Batwa

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<sup>1</sup> I Brownlie, *Treaties and Indigenous Peoples* (F.M. Brookfield ed., 1992) 56.

are in form of negative stereotypes, denial of rights and segregation.<sup>2</sup> Among the ordinary people, the inhabitants of forests are perceived as alien and uncivilized, which perception has also been attributed to the Batwa hunter gatherers.<sup>3</sup> Therefore, the high level of marginalisation experienced by the Batwa exposes them to control of their neighbours who have subjected them to bonded labour arrangements as stated by a local inhabitant that;

These people are mine: they live on my farm and you cannot come and talk to them without my knowledge. You need not to worry about them, I am looking after them.<sup>4</sup>

This statement re-echoes the experience of marginalisation by the Batwa and their relationship with their neighbors which has been a subject of debate among academics.<sup>5</sup> Further, there exists a concept that the Batwa in Uganda are existing on temporary basis and would get phased out with the effect of modernization.<sup>6</sup> This implies that the Batwa as an indigenous group remains in an extremely vulnerable position and are likely to get extinct due to the high levels of marginalisation and discrimination that they face.

The Batwa also experience severe discrimination at the national sphere which has been attributed to their way of life. Suggestions proposed by the Ugandan government officials that the Batwa situation can be improved when they develop their skills like

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<sup>2</sup> J. Woodburn, ' *Indigenous discrimination: The ideological basis for local discrimination against hunter-gatherer minorities sub-Saharan Africa* ', (1997) Volume 20 No 2 *Ethnic and Racial Studies* at 345-361.

<sup>3</sup> J Francis, ' *The ambiguous Iroquois Empire: The covenant chain confederation of Indian tribes with English colonies* ' (1984) WW Norton: New York.

<sup>4</sup> K Kabananyuke and L Wily, *Report on a study of the Abayanda Pygmies of South-Western Uganda for Mgahinga and Bwindi Impenetrable Forest Conservation Trust*, Makerere University [unpublished report], 1996, at 25.

<sup>5</sup> R.R Grinker, ' *Images of denigration: Structuring inequality between foragers and farmers in the Ituri Forest, Zaire* ', (1990) Volume 17 No 1 *American Ethnologist*, at 111-130; R.R Grinker, 'Houses in the rainforest: Ethnicity and inequality among farmers and foragers in Central Africa', (1994), Berkley, Calif London, University of California Press; J. Kenrick and J. Lewis, 'Discrimination against the forest people (pygmies) of Central Africa.' (2001); A. Kohler and J. Lewis, 'The Kalahari debate in the rain forest: A complementary from Central Africa' (2001); C. Draft , *Turnbull way forward servants: The two worlds of African pygmies*, (1966) Eyre and Spottiswoode: London.

<sup>6</sup> BG Wairama, *Uganda: The marginalization of minorities*, (2001), Minority Rights Group International, London.

other 'normal' Ugandans<sup>7</sup> imply that they are not living a normal life. This level of marginalisation has been increasing due to the forest conservation activities in western Uganda. The Batwa people are entirely dependent on forests. However, the Uganda Wildlife Authority (UWA) has labeled their activities in the forest lands illegal.<sup>8</sup> By insisting on depending on the forests for survival, the Batwa have also been misunderstood by the UWA as a group that disrespects the rules that have been enacted to protect such areas. They have often been arrested within the game reserves and made to pay fines.<sup>9</sup> However, the local community has taken advantage of this situation and begun exploiting the Batwa. As noted above, it was against the intention of the UWA that they decided to exclude the local institutions from settling disputes involving the Batwa as it would result into more illegal activities.<sup>10</sup>

From the International law perspective and comparative legal jurisdictions, the Batwa as a group of indigenous peoples could base their claim for the protection of their rights<sup>11</sup> on the International human rights law standards set under the ILO Convention for the protection of the rights of Indigenous Peoples<sup>12</sup> and the contribution by the UN Working Group on Indigenous Populations<sup>13</sup> which emanated into the United Nations Declaration on the rights of Indigenous Peoples.<sup>14</sup>

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<sup>7</sup> C Kidd, *Development discourse and the Batwa of South West Uganda: Representing the 'other': Presenting the 'Self'*. (PhD thesis, 2008) at 121.

<sup>8</sup> R Mwebaza, *The right to participation in environmental decision making: A comparative study of legal regimes for the participation of indigenous people in the conservation and management of protected areas in Uganda*, (Phd thesis, 2006), at 38.

<sup>9</sup> R Higgins 'Self-determination and secession' in J Dahlitz (ed) *Secession and international law* (2003) at 23.

<sup>10</sup> A. Namara, 'From paternalism to real partnership with local communities? Experience from Bwindi Impenetrable National Park (Uganda) (2006) vol XXXI, No. 2 *Africa Development*, at 39-68.

<sup>11</sup> J Anaya, *Indigenous Peoples in international law* (2 edn, Oxford University Press 2004), at 16-26; and JS Anaya & RA Williams Jr 'The Protection of Indigenous Peoples rights system' (2001) 14, *Harvard Human Rights Journal* at 33.

<sup>12</sup> Convention concerning Indigenous and Tribal Peoples in Independent countries (ILO 169), 72 ILO Official Bulletin 59, Entered into force on 5<sup>th</sup> September 1991.

<sup>13</sup> Resolution 1982/34 of 7<sup>th</sup> May 1982 by the Economic, Social and Cultural Council which authorized the Sub Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations with a mandate to review developments relating to promotion and protection of human rights and fundamental freedoms of indigenous people, giving special attention to developments of standards concerning the rights of indigenous people.

<sup>14</sup> *Ibid*, n 3.

Another avenue that the indigenous peoples have used for developing standards within Africa is the African Commission on Human and People's Rights Working Group of Experts on Indigenous Populations or Communities in Africa.<sup>15</sup> While the right to participation in economic, social and cultural life claimed by the Batwa indigenous peoples are not necessarily different from those sought by other marginalised groups, it is important to take into consideration the fact that the Batwa people are generally de facto and de jure excluded from utilizing the available avenues due to several circumstances. These include the high levels of poverty among these peoples to the extent of them being regarded as the 'poorest of the poor' because of the levels of political and economic marginalisation.<sup>16</sup>

### **4.3 The right to culture**

Uganda is a culturally diverse country with 65 constitutionally recognized indigenous groups,<sup>17</sup> each claiming a unique identity, as manifested through their distinct languages and dialects, oral traditions, creative arts and their indigenous knowledge and skills. The Constitution of Uganda (amended in 2005), under Objective XXIV enjoins the State to ensure the social and cultural well-being of the people, and to promote and preserve the cultural values and practices that enhance the dignity of Ugandans; encourage the development, preservation and enrichment of Ugandan languages. Article 37 further guarantees every person the right to culture to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. The government of Uganda developed the first National Culture Policy in 2006 is to conserve, protect and promote Uganda's tangible and intangible heritage. The policy's principles underlies unity in diversity, respect for

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<sup>15</sup> BN Pityana, Introduction to the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the resolution on the rights of indigenous populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> ordinary session held in Cotonou, Benin, October 2000.

<sup>16</sup> Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A global quest for justice* (1987) 16 – 17.

<sup>17</sup> Constitution of the Uganda 1995 (amended), Schedule 3.

one another's culture, and ensuring social participation for all citizens, in the enjoyment and promotion of cultural heritage in the country.

The establishment of Bwindi and Mgahinga National Parks for gorillas in 1991 enabled the authorities to evict the Batwa definitively from their traditional forest lands. This decision was made without consultation or participation by the Batwa in the decision-making processes associated with the establishment of the national parks and their consequent eviction.<sup>18</sup> Additionally, although non-Batwa people who lost their lands were compensated, the Batwa have not been compensated for their expulsion and the loss of their territory.<sup>19</sup>

The Batwa deeply value Bwindi and Mgahinga forests as their cultural heritage and attach great cultural importance to resources found in the two forest resources including caves, hot springs, rivers, hills, plants and animals.<sup>20</sup> The forests are a source of physical, emotional and spiritual well-being to the Batwa. Therefore, the creation of Bwindi and Mgahinga National Parks and the subsequent eviction of the Batwa from the two forests amounted to a violation of their cultural rights, which are important in ensuring their wellbeing.

Attempts by the Batwa to access their traditional and historical lands have been futile as they have been labeled trespassers. The cultural rights of the Batwa community have also been violated by the serious damage caused by the national park authorities to their traditional and cultural way of life.<sup>21</sup>

The government of Uganda has made some interventions in respect to the promotion of culture through participation by the indigenous peoples. However, it has not taken the

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<sup>18</sup> J Anaya, Cases Examined by the Special Rapporteur June 2009- July 2010.

<sup>19</sup> Ibid, n 4.

<sup>20</sup> Fauna & Flora International (2013). *Batwa cultural values in Bwindi Impenetrable and Mgahinga Gorilla National Parks, Uganda; A report of a cultural assessment*. Fauna & Flora International: Cambridge, p.11.

<sup>21</sup> Ibid.

initiative to recognize cultures, languages and customs of the Batwa that are particularly facing threats of extinction and requires special intervention.

Although the 1995 Constitution of the Republic of Uganda provides for the cultural leadership institution in the country according to the existing cultural practices and traditions of the people,<sup>22</sup> the Batwa indigenous peoples have not been able to benefit from it. This is simply because they do not have defined traditional leadership structures.<sup>23</sup>

The right to participation in cultural leadership for the Batwa is very important in order for the national laws to be enforced in their favour with the requirement for their inclusion in decision-making processes. Although Uganda has made interventions that promote culture, it has not made mention or taken action to protect cultures and customs of the Batwa indigenous peoples which are threatened and would require special government intervention.

#### **4.4 Participation in education**

At the domestic level, the 1995 Constitution of the Republic of Uganda guarantees a right to education for all persons.<sup>24</sup> The educational objectives provide that the state shall promote free and compulsory basic education and take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.<sup>25</sup> The Constitution further provides that a child is entitled to basic education which shall be a responsibility of the state and the parents of the child.<sup>26</sup> The state therefore has a constitutional mandate to eliminate discrimination and to take affirmative

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<sup>22</sup> Ibid, n 17, article 246(1).

<sup>23</sup> Overview Report of the Research Project by the International Labour Organisation and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African countries. 2009, page 48.

<sup>24</sup> Ibid, n 17, article 30.

<sup>25</sup> Ibid, National Objectives and Directive Principles of State Policy, Objective xviii.

<sup>26</sup> Ibid, article 34(2).

action in favor of marginalised people like the Batwa<sup>27</sup> as provided in the Equal Opportunities Commissions Act.<sup>28</sup> The Batwa's right to education has not been realized.. According to Lewis, in the research conducted by the United Organisation for Batwa Development in Uganda (UOBDU) in 1999 showed that there were only five Batwa children in secondary school in the districts of Kabale, Kanungu and Kisoro where 70% of the Batwa people reside in Uganda.<sup>29</sup>

An Education Strategic Investment Plan (ESIP) with positive strategies for promoting equality in access to education was adopted in Uganda applying to all education levels. Under the plan, the Universal Primary Education (UPE) programme was put in place where government provides all school fees and scholastic materials for the beneficiaries. However, much as this programme is in place, the Batwa children have not benefited from it due to the high levels of marginalisation and discrimination in the provision of the services. The learning environment does not demonstrate the willingness to promote peace, tolerance, equality and friendship among all the people from the ethnic, religious, national and persons of indigenous origin as recommended by the UN Committee on the Rights of the Child.<sup>30</sup>

Despite their appreciation of education and improvement of their living standards, the Batwa have not embraced and taken advantage of the education programme.<sup>31</sup> The Batwa children have often complained about lack of uniforms, scholastic materials, and harassment from fellow students, the problem of housing and the need for facilitation for basic wants which include food, clothing and shelter.<sup>32</sup>

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<sup>27</sup> UNESCO World Data on Education 2010/11, at 2-3.

<sup>28</sup> Equal Opportunities Commission Act, 2007.

<sup>29</sup> Lewis J, *The Batwa Pygmies of the Great Lakes Region*, (2000) MRG, London UK.

<sup>30</sup> General Comment No. 1: The aims of education.:17/04/200, CRC/GC/2001/01, paragraph19.

<sup>31</sup> Supplement Report on the First Periodic Report of Uganda on the Convention on the Rights of the Child, CRC/C/65/Add.3 (State Party report) 17, submitted by United Organisation for Batwa Development in Uganda (UOBDU) and Forest Peoples Programme (FPP), 31 May 2005, at 3.

<sup>32</sup> Ibid, n 11, at 8, 33.

The Batwa have continued to experience difficulties due to extreme poverty and marginalisation in making attempts to access the right to education. According to Uganda's Equal Opportunities Policy, although UPE had provided opportunities for child education, the marginalised groups still face challenges especially with respect to enjoyment of the right to education.<sup>33</sup>

The right to education for the Batwa remains a big challenge in Uganda because the Batwa children do not enjoy this right on the same footing as other Ugandan children. They are forced to abandon school even when free primary education is in place because of poverty and prejudices from other pupils and teachers.<sup>34</sup> Much as access to education has been made possible, the retention rate is low because of some hidden costs like books, uniforms, sanitary facilities and other materials which deny the Batwa indigenous peoples the opportunity to stay in school.

The 1995 Constitution of the Republic of Uganda provides as a matter of principle that education is a fundamental right and government has to take steps towards the fulfillment of this right. However, its obligations towards the Batwa in respect to this right seem to prove the opposite. The need for education is crucial especially for the Batwa indigenous peoples and its limited access has been hampered by discrimination, physical exclusion and inadequate resources among others.<sup>35</sup>

The right to education involves functional education institutions that are available, sufficient and accessible to all without discrimination and adoptable to the society's needs.<sup>36</sup> Although the government of Uganda has tried to take positive steps to improve the education status of indigenous peoples, the efforts should not only be restricted to

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<sup>33</sup> Government of Uganda, 2<sup>nd</sup> Draft National Equal Opportunities Policy, Ugandan Ministry of Gender, Labour and Social Development, p.5.

<sup>34</sup> *ibid.*

<sup>35</sup> Minority Rights Group International, *Minorities and Indigenous People: Justice and peaceful development* (2006) London, UK.

<sup>36</sup> F Jjuko and C Kabonesa 'Universal Primary Education (UPE) in contemporary Uganda: Right or privilege?' (2007) Human Rights Peace Centre, Working Paper 8.



indigenous peoples' children but also extended to the adults. Reports have indicated that no single Mutwa can read and write proficiently.<sup>37</sup>

A 2003 report by the Ministry of Finance on the achievements of the Poverty Eradication Action Plan (PEAP) underscored the need for positive discrimination on behalf of particularly marginalized groups.<sup>38</sup> To this effect, government of Uganda made deliberate efforts to provide special education programs for the hard-to reach areas. For example, the case of Karamoja, a special program of known as Alternative Basic Education for Karamoja (ABEK) was put in place to deliver education to nomadic pastoral children. The programme was made to suit their conditions and demands. However, similar efforts have not been made with respect to the Batwa. It is therefore important that such programmes be initiated and should suit the conditions of the Batwa since this is key in ensuring that they embrace the programme and it also assures high retention and completion rates.

Uganda is a state party to a number of international human rights instruments that guarantee the right to education. Article 13 of the International Covenant on Economic Social and Cultural Rights (CESCR) recognizes the right to compulsory primary education for everyone including the introduction of free education at both secondary and higher levels of education. The general availability of secondary education including technical and vocational education is provided for in the covenant.<sup>39</sup>

The African Charter<sup>40</sup> stipulates that every individual shall have the right to education and may freely take part in the cultural life of his community.<sup>41</sup> The Charter also imposes a duty on state parties to educate and promote respect of the rights and

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<sup>37</sup> Ibid, n 33..

<sup>38</sup> Report by the Ministry of Finance on the Achievements of the Poverty Eradication Action Plan (PEAP) 2003.

<sup>39</sup> CESCR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), art 13(2).

<sup>40</sup> African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

<sup>41</sup> Ibid, article 17.

freedoms in the Charter including the obligation to ensure that the freedoms and corresponding duties are understood.<sup>42</sup>

The ILO Convention 169 addresses the right of indigenous peoples to participation in education by requiring that states make an effort to guarantee that Indigenous peoples enjoy the right to education at all levels on equal footing with members of the national community.<sup>43</sup>

#### **4.5 Participation in land rights**

Land remains a very important resource to the Batwa indigenous people.<sup>44</sup> It was observed by the UN Special Rapporteur on the Rights of Indigenous Peoples that indigenous people have for a very long time maintained a special relationship with land for their survival and livelihood.<sup>45</sup> The African Commission declared that the protection of the right to land and natural resources is very important for the survival of indigenous peoples in Africa.<sup>46</sup> Its denial has also been used as a tool to marginalize the Batwa indigenous peoples.

However, most Batwa are landless and depend on the land of other farmers while others depend on government and church land.<sup>47</sup> This implies that the majority of the Batwa depend on the community who discriminate against them. The few Batwa who own land are facing exploitation by the Bakiga and Bafumbira community neighbors. They have been intimidated and discriminated by the neighbors who even make comments such as; “who will fear a Mutwa?”<sup>48</sup>

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<sup>42</sup> Ibid, article 25.

<sup>43</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), 72 ILO Official Bulletin 59, Entered into force on 5<sup>th</sup> September 1991, art 26.

<sup>44</sup> Ibid n 33, (2006), at 13.

<sup>45</sup> Alternative Report to the Second Periodic Report of Uganda to the African Commission on Human and Peoples’ Rights submitted by Forest Peoples’ Programme on the 13<sup>th</sup> May 2009, at 14.

<sup>46</sup> Indigenous Peoples’ in Africa: The Forgotten Peoples? The African Commission work on Indigenous People in Africa. African Commission on Human and Peoples’ Rights, (2006).

<sup>47</sup> n 4 above, at 116.

<sup>48</sup> Ibid, at 121.

In order to make the Batwa self-reliant and free from the bonded labour, some organisations have tried to purchase land for them. However, this activity was also brought to a halt due to lack of funds. Much as there is a need for Batwa's land ownership, there is no land legally handed to the Batwa communities as all donated land has remained under the title to the NGOs and churches. The land has to be titled in the names of the Batwa in order to enable them enjoy the security being provided by the churches and NGOs.

In 2004, the United Organisation for the Batwa Development (UOBD) established that despite the positive efforts for the Batwa to own land, out of 623 families, only 351 are living on their own land,<sup>49</sup> leaving several landless. Another study established that Batwa around Bwindi Impenetrable Forest occupied approximately 1.18 fields while those around Mgahinga did not have any fields.<sup>50</sup> The landless Batwa are owned by their landlords since they have no access to other income-generating activities. This experience places them in a marginalised situation and more vulnerable to exploitation and abuse of their neighbors.

Land, according to the 1995 Constitution of Uganda, belongs to its citizens and the state has a duty under the Constitution and the National Environment Statute of 1995 and the Land Act of 1998 to offer protection of all customary interest in the land.<sup>51</sup> The Constitution further provides for compensation where government has appropriated land and property of its citizens.<sup>52</sup> However, the Batwa have been excluded by the government from their ancestral homelands without any kind of compensation and even the alternative provisions for their settlement.

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<sup>49</sup> United Organisation for the Batwa Development (UOBD) 2004.

<sup>50</sup> A J Plumpre, A Kayitare, H Rainer, M Gray, I Munanura, N Barakabuye, S Asuma, M Sivha and A Namara, 'The socio-economic status of people living near protected areas in the central Albertine Rift, Bronx, Wild Life Conservation Society, (2004) , at 45.

<sup>51</sup> Ibid, n. 17, article 237; the National Environment Statute of 1995 (Statute No. 4); and the Land Act, No. 16 of 1998, section 3(1).

<sup>52</sup> Ibid, n. 17, article 26 (2) (b) (i).

This obligation for government arises from the Universal Declaration of Human Rights<sup>53</sup> which provides for the rights of individuals or groups to own property which should not be taken away arbitrarily.<sup>54</sup> Additionally, the United Nations Declaration on the Rights of Indigenous Peoples<sup>55</sup> contains a provision to the effect that indigenous peoples have a right to their ancestral lands and to own, use and develop the land which they have traditionally occupied.<sup>56</sup>

Historically, the Batwa believe that their forest land is a gift from God—the Creator and they continue to depend on the forest for their livelihood and identity.<sup>57</sup> This belief had empowered and enabled them to continuously claim ownership over the forests for gathering fruits and hunting activities.<sup>58</sup>

Originally, the British Colonial government established conservation zones through laws which affected the Batwa inhabited areas in the south western part of Uganda.<sup>59</sup> The laws that were enacted by the British Colonial government resulted into the gazetting of Bwindi and Mgahinga forests with the intention of giving protection to the gorillas and hence the eviction of the Batwa from the forests.

The NGOs and local governments have tried to resettle some Batwa communities. For example, the Bwindi Mgahinga Conservation Trust recently secured 173 acres of land in Bikuto cell in Butogota town council to resettle about 20 families of the Batwa

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<sup>53</sup> Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

<sup>54</sup> *Ibid*, article 17.

<sup>55</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted by G.A, res, 61/295, at 18, U.N GAOR, 107<sup>th</sup> Plen, mtg., 13<sup>th</sup> Sep. 2007.

<sup>56</sup> *Ibid*, article 26.

<sup>57</sup> A Barratt and A Afadameh-Adeyemi, 'Indigenous Peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21', *African Human Rights Law Journal*, at 568.

<sup>58</sup> *Ibid*.

<sup>59</sup> J. Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples A/HRC/15/37/Add.1, 30<sup>th</sup> September 2010, paragraph 392.

community.<sup>60</sup> However, majority of them have remained landless and potters on the privately owned land near the parks.<sup>61</sup> The management of the National Parks has also denied the Batwa access to the forest land which used to be under their use and control and they are not even participating in their management.<sup>62</sup>

The most important policy statement for the Batwa in respect to their right to land provides that government shall in its use and management of natural resources recognize and protect the right to ancestral lands of ethnic minority groups.<sup>63</sup> In order to have this policy easily enforced and implemented, it was proposed by the government that statutory regulations should be prepared to recognize the land tenure rights of minorities to ancestral lands, protection from arbitrary evictions and payment of compensation for conservation purposes in the past.<sup>64</sup> Although the policy remains as good as a sign and intention of the country to implement its obligations within the international and domestic legal provisions, its implementation remains a big challenge since it only provides for a single authority to plan and administer its proposals.

#### **4.6 Participation in economic projects**

The Batwa experience discrimination and are not involved in the process of planning for development projects and they are not treated as part of the community. This has hampered them because it unmask the differences between them and other tribes in the community.<sup>65</sup> The Batwa are therefore left out of most development projects when it comes to their participation. It requires legitimizing the project by gaining the sanction of the formal approval of key people in the community which in turn gives feedback in the project appraisal method in order to make the process successful.<sup>66</sup>

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<sup>60</sup> Robert Muhereza, 20 displaced Batwa get home, *Daily Monitor*, April 19, 2014.

<sup>61</sup> *Ibid*, n 4, at 85.

<sup>62</sup> *Ibid*, n. 4.

<sup>63</sup> The Uganda National Land Policy, 2011, Chapter 3, section 3.8(59).

<sup>64</sup> *Ibid*, Chapter 3, section 3.8(59)(i) (ii).

<sup>65</sup> K Gardener and D Lewis, *Development and the post modern challenge*, (1996) Pluto Press, at 112.

<sup>66</sup> *Ibid*.

When the Batwa are not included in projects, the level of discrimination they face has severe consequences to the extent that even their money can be forcibly taken away by the tour guides,<sup>67</sup> because they have no control of their own tourist resources in the community and occupy a vulnerable and silenced position.

As a marginalised group, the Batwa still find it hard to participate in open debates about projects which concern them. It has been noted that their ability to speak politically even in the most simple way is related to the concept of having the right to speak.<sup>68</sup> Furthermore, because they find themselves in a position where they feel disempowered, they prefer not to discuss issues that may cause controversy and affect their little income. A researcher points out that; “To give is to show ones superiority, to show that one is something more higher and to accept without returning or repaying more is to face subordination, to become dependent and submissive”.<sup>69</sup>

Participation in the enjoyment of socio-economic rights is very important for the livelihood and wellbeing of the Batwa indigenous peoples. Socio economic rights are guaranteed in several international and domestic legal provisions. The provisions within CERD<sup>70</sup> are vital in the protection of socio-economic rights of indigenous peoples such as the Batwa.<sup>71</sup> These provisions encourage states to prohibit and eliminate discrimination without distinction to race, colour, and equality before the law and in participation in respect to economic, social and cultural rights.

However, the areas the Batwa occupy are underdeveloped with poor infrastructure and the social services such as schools and health facilities are few and far from their

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<sup>67</sup> A tourist witnessed money being taken away from a Batwa by the tour guide in the Buhoma Village Walk (BVW) as indicated by an article written by D. Schuvman, ‘A people betrayed’, African Graphic (2003) Vol. 11, No. 10, at 73-77.

<sup>68</sup> P. Bourdieu, *Distinction: A social critique of the judgment of taste* (1984), London: Routledge and K. Paul, at 411.

<sup>69</sup> M. Mauss, *The gift: The form and reason for exchange in archaic societies* (1970), London: Routledge, at 72.

<sup>70</sup> Adopted 21 December 1965, entered into force 4 January 1969, UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).

<sup>71</sup> CERD, article 5(e).

settlements. This situation has also hampered the quality of services offered by these facilities. The health situation of the Batwa is therefore very poor and receives very limited attention from government health authorities which is also a sign of marginalisation they continue to experience in the country. This situation violates the provisions of the African Charter on the right to equal access to the public services of one's country,<sup>72</sup> the right to education<sup>73</sup> and the right to medical care and attention.<sup>74</sup>

Objective XIV of the 1995 Constitution of Uganda under the section of general social and economic objectives enjoins the State to ensure that all Ugandans enjoy rights and opportunities to among others, education, health services, clean and safe water, food security. However, the Batwa's level of access to socio economic rights such as their right to clean water, healthcare, food and housing is not clear in Uganda due to their socio economic issues and problems are dealt with concurrently with other groups. The Batwa specifically face several socio-economic issues that include inadequate food, clean water and healthcare facilities. This is due to the extreme poverty levels which have left several groups below the radar and living an existence that greatly contrasts with the majority poor.<sup>75</sup>

Generally, the Batwa do not participate in health programmes and projects, and one study has found that their infant mortality rates were higher than that of the general population.<sup>76</sup> The women suffer from more health related effects compared to the men due to their child reproductive roles and upbringing in the community. The Batwa women face risks from local beliefs among other members of the society to the effect that a non-Mutwa who has sex with a Mutwa woman can get healed of ailments such as

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<sup>72</sup> Banjul Charter, article 13 (2).

<sup>73</sup> Ibid, article 17(1).

<sup>74</sup> Ibid, article 16 (2).

<sup>75</sup> J Oloka – Onyango, *The problematique of economic, social and cultural rights in globalised Uganda*, Human Rights and Peace Centre, Working paper 3 (March 2007) at 4.

<sup>76</sup> Ibid, n 4, at 72-74.

back-ache, and is protected against HIV/AIDS; this belief exposes the Batwa women to the risk of contracting HIV and other STDs.<sup>77</sup>

The Batwa also continue to face challenges in respect to their access to decent housing and have lived under difficult conditions since their eviction from Bwindi and Mgahinga. The Ugandan Constitution of 1995 does not guarantee socio economic rights as justiciable since they do not appear in the main body of the Bill of Rights. The only rights provided for in the Constitution include the right to education, clean and healthy environment, the right to work and the right to join and form trade unions and to collective bargaining.<sup>78</sup> Most of the socio economic rights are lamped in the National Objectives and Directive Principles of State Policy which provides for the protection of marginalised groups together with the right to development, medical services, clean and healthy environment, food and adequate nutrition.

The National Objectives and Directive Principles can be enforced through the constitutional provisions which stipulates that; “Uganda shall be governed based on the principles of national interest and common good enshrined in the national objectives and directive principles of state policy”.<sup>79</sup> The Constitution therefore imposes a duty on government to observe the national objectives and it has taken some positive steps towards eradication of poverty and improvement of socio-economic welfare of citizens. However, the Batwa are unrepresented in all sectors of government and have continued to suffer marginalisation.

With respect to housing, the needs of the Batwa were taken into consideration by the Equal Opportunities Committee of the Ugandan Parliament which made proposals to the effect that government should construct decent shelter for the Batwa since they are living under pathetic conditions.<sup>80</sup> The report further recommended that Batwa should

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<sup>77</sup> H Mwesigye “Pygmies' in the 1990s, changes in forestland tenure, social impacts and potential health hazards, including HIV infection” 2006.

<sup>78</sup> Ibid, n, 17.

<sup>79</sup> Ibid, article 8.

<sup>80</sup> Equal Opportunities Committee Report, 2007.



be provided with socio economic services such as access to clean water, household items and access to employment within the national parks. The government of Uganda ratified the major ILO Convention III on Labour rights,<sup>81</sup> which ensures that states encourage policies which promote and practice equality at work by elimination of discrimination.<sup>82</sup>

The 1995 Constitution promotes the standards provided in ILO Convention III by prohibiting forced labour with some exceptions.<sup>83</sup> The main challenge to this provision is that only the people who are formally employed benefit from it. The Batwa cannot benefit because of their levels of marginalisation and illiteracy rates. The ILO Convention 169 also encourages government to adopt special measures for the protection of indigenous peoples in respect to their recruitment and employment conditions.<sup>84</sup> However, Uganda has not yet adopted any special measures for the special protection of the Batwa in the labor market.

Despite some efforts, the government of Uganda developed some of the most progressive policies related to land and poverty alleviation in the region. However, implementation is still ineffective and the Batwa feel left behind in Uganda's development process. There is hardly any Batwa participation in the process of formulation and development of strategies, policies and projects in general and there is no institutional mechanism to promote and support Batwa participation. For example, they did not even participate in the development and formulation of Uganda's Poverty Eradication Action Plan (PEAP), and there are no legal provisions and remedies within the domestic legislations which give effect to the internationally guaranteed rights of indigenous peoples to meaningfully participate in development policies, programmes and initiatives that directly impact on them.<sup>85</sup>

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<sup>81</sup> ILO Convention III, adopted on the 25<sup>th</sup> June 1958.

<sup>82</sup> Ibid.

<sup>83</sup> Constitution of Uganda, article 25.

<sup>84</sup> Report of the African Commission's Working Group on Indigenous Populations/Communities, adopted on the 47<sup>th</sup> ordinary session 12<sup>th</sup> – 26<sup>th</sup> May 2010.

<sup>85</sup> Ibid, n. 33.

According to the provisions of the ILO Convention No. 169, it is stipulated that indigenous peoples have the right to decide their own priorities for the process of development and they shall participate in the development, enforcement and evaluation of plans and programmes for national and regional development which may affect them directly”.<sup>86</sup> The Batwa’s right to participate in development programmes is frequently undermined due to exclusion and marginalisation, and special efforts are often necessary to ensure that they participate.

The provision in ILO Convention No. 169 is further supported in Uganda’s Constitution where it is stipulated that minorities have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes.<sup>87</sup> For purposes of enforcing article 32 of the Constitution, the government of Uganda established the Equal Opportunity Commission (EOC) with the mandate of ensuring all citizens enjoy equal access to participation and enjoyment of benefits that accrue from development programmes and services within the country.<sup>88</sup> The Social Development Sector Strategic Investment Plan (SDIP) of Uganda was conducted during which it was observed that several indigenous groups are experiencing marginalisation and exclusion from the benefits of development in the country. It is therefore necessary for the government to take positive steps towards the creation of an enabling environment for social protection and social transformation especially in the Batwa communities in order to promote the vision for a better standard of living, equity and social cohesion amongst all Ugandans.

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<sup>86</sup> n 43 above, article 7.1.

<sup>87</sup> Constitution of Uganda (1995), article 36.

<sup>88</sup> Ibid, article 32 states: “Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them”.

## 4.7 Conclusion

This chapter has examined the core rights and the problems associated with the Batwa's participation in making and implementing decisions in respect to the economic, social and cultural rights. The chapter has discussed the different aspects of marginalisation and discrimination being experienced by the Batwa which has affected their participation in economic, social and cultural life. The next chapter discusses the legal framework on the rights of indigenous peoples in the tripartite jurisdictions of Rwanda, Burundi and Uganda and makes proposals on how best the Batwa problems can be addressed in Uganda with reference to best practice from the legal mechanisms in the two countries.

## CHAPTER FIVE

### BATWA PARTICIPATION IN A TRIPARTITE COMPARISON OF BURUNDI, RWANDA AND UGANDA

#### 5.0 Introduction

The comparative study of Burundi and Rwanda throws light on the policies and strategies put in place to promote the right to participation for the Batwa. The steps taken by the two countries provide best practices that can be adopted to address the problems of the Batwa in respect to their participation rights and involvement in political processes within Uganda.

The right to participation in governance is influenced by the historical experience and background of Burundi and Rwanda. The population in both countries is made up of Tutsis, Twas and Hutus and their history has been characterised by frequent conflicts between the Tutsis and Hutus. This chapter discusses the right to participation in governance by different ethnic groups in Rwanda and Burundi by explaining their relationships before and after colonization.

It provides a comprehensive analysis of the practical application of the right to participation by focusing on the Batwa participation in the three countries of Rwanda, Burundi and Uganda. Several examples of participation of Batwa in the tripartite study will discuss the implementation of participation in decision-making processes in Burundi, Rwanda and Uganda. Significant issues related to policy, legal, institutional and implementation approaches in respect to the participation of the Batwa in decision-making.

This chapter will therefore provide a comprehensive study on the inclusion of Batwa in decision making process right from the EAC so as to promote their participation in governance.

When the Belgians colonized the two countries in 1923, they governed their territory through indirect rule on the Tutsi dominated aristocratic hierarchy.<sup>1</sup> During this time, the Tutsi were the majority involved in the governance of the country. However, it was also possible for a Tutsi to become a Hutu and vice versa. For example, a Hutu could become a Tutsi only if he had acquired a big number of cattle, and a Tutsi could also become a Hutu if he became impoverished.<sup>2</sup>

## 5.1 The case of Burundi

In 1972 Burundi experienced a serious Hutu-led rebellion characterized by civil unrest within the country. This also triggered the formation of the Front for Democracy in Burundi (FRODEBU) which resulted into the emergence of ethnic consciousness in the country. This resulted into a violent military coup which was orchestrated by Tutsi activists. This coup resulted into loss of lives by several Hutus and Tutsi people.<sup>3</sup> The history of ethnic conflicts is taken into account by the constitutions of Rwanda and Burundi and the right to participation in governance comes in as an attempt by the governments to prevent future conflict and genocide in the two countries.

The 2005 Burundian Constitution recognizes the political and social marginalisation of the Batwa and therefore provides for reservation of seats in Parliament for the Batwa for purposes of promoting equality in participation.<sup>4</sup> The Constitution promotes participation by making emphasis on the ethnic aspect since they entered the Pretoria Protocol on

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<sup>1</sup> M Z Bookman, *The demographic struggle for power; The political economy of demographic engineering in the modern world* (1997) London: Frank Cass, at 227.

<sup>2</sup> W P Shiley, *Power and Choice: An introduction to political science* (1999) McGraw-Hill, at 365.

<sup>3</sup> C Ake, *The feasibility of democracy in Africa* (2000) Dakar: Codesria Books, at 93.

<sup>4</sup> The 2005 Burundian Constitution, article 180.

power sharing<sup>5</sup> which was later made part of the Burundi Constitution. The objectives of the protocol was to streamline participation of parties in governance and allocate positions in government at the provincial and local levels to encourage participation. The Protocol on power sharing was reached after the political parties made the decision in coalitions referred to as G10 and G7.<sup>6</sup> In Burundi, the Batwa too constitute an extreme by marginalised ethnic group as shown through their representation the political parties.<sup>7</sup>

The Arusha peace Accord of 2000 also emphasized the need for Batwa involvement in national events<sup>8</sup> by laying emphasis on the promotion of political participation by all tribes in Burundi. The right to participation of Batwa in Burundi emerged as a serious point of concern right from the Arusha Peace Accord, where the Burundians all agreed that Batwa had been more marginalised within government institutions compared to other tribes. Issues which involve them like the right to education, good security, healthcare and access to land needed much more attention than their participation.<sup>9</sup>

Batwa participation in the idea of the EAC should be based on the fact that often tribes do not experience exclusion in different countries by some allocating seats for representation in parliament to the minorities while some government policies that includes in public institutions. The Constitution of Burundi does have a provision which recognizes the protection and inclusion of the Batwa in the system of governance.<sup>10</sup>

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<sup>5</sup> The Burundi power sharing agreement was signed on 6 August 2004 in Pretoria. The Burundi Constitution was influenced by this agreement because article 4 of the agreement specifically provides that the Constitution should incorporate the principles of power sharing based on the inclusion and protection of minority groups either political or ethnic as recognized in the agreement.

<sup>6</sup> G10 was made up of UPRONA, PARENA and other dominated Tutsi parties while the G7 was made of FRODEBU with allied Hutu dominated parties and Hutu armed groups.

<sup>7</sup> S Vandeginste "Constitution Theory and power sharing in Burundi," (2006) Institute of politics and Development Management of the University of Antwerp, in CAHIER, at 23.

<sup>8</sup> Article 2 and 14, Arusha Peace Agreement and Reconciliation in Burundi signed on 28<sup>th</sup> August, 2000.

<sup>9</sup> Amani Jean Pierre, 'Historical Development in Burundian land law and impacts on Batwa land ownership, Forest people programme', (2009) London: England, Available at [www.forestpeoples.org/documents/africa/land](http://www.forestpeoples.org/documents/africa/land); Senate of Burundi (<http://www.senat.bi>), August 2008, Report of information on the situation of the Batwa, LEG III/RAP no.7 Bufumbira, at 4-5.

<sup>10</sup> Ibid, n. 4, article 180.

There are some provisions which guarantees the “Batwa their right to political participation in national election activities within the electoral code of 2009.”<sup>11</sup>

### 5.1.1 The Burundi Constitution of 2005

The Burundian Constitution in its preamble does not recognize protection and inclusion of ethnic, cultural, religious and minority groups in governance system.<sup>12</sup> The Burundian Constitution advocates for equality and social justice and prohibits discrimination. Bahutu and Batutsi are the most prominent tribes that play a dominant role in political participation in Burundi. The Batwa appear to be less interested in politics and are not effectively represented in public institutions and political party seats.

The Burundi Constitution caters for the protection of minority groups through their involvement in political parties.<sup>13</sup> The President appoints two Vice Presidents from different political parties and ethnic groups as provided for in the Constitution.<sup>14</sup> To promote participation, the appointment takes into consideration political and ethnic origin by providing for one of the Vice Presidents to be from an ethnic group different from that of the President. The Vice Presidents also have different roles and responsibilities as provided in the Constitution. The first Vice President coordinates both administrative and political affairs, while the second is responsible for economic and social affairs of the state.<sup>15</sup>

The Burundian Constitution in article 171(4) stipulates that:

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<sup>11</sup> Burundi Electoral Code of 18<sup>th</sup> September, 2009.

<sup>12</sup> Law No. 1/10 of March 18, 2005 carrying enactment of the Constitution of the Republic of Burundi.

<sup>13</sup> Ibid, n. 4, Preamble.

<sup>14</sup> Ibid, article 124.

<sup>15</sup> Ibid, article 122.

the senate is competent to lead some investigations in public administration and if the case arises, to make some recommendations to ensure that no region or group is excluded from the benefit of the public services.

The Senate tried to handle the living conditions of the Batwa in 2008 in order to promote equal and fair treatment within Burundi.<sup>16</sup> There are other constitutional provisions which refer to non-discrimination which are relevant to the Batwa in Burundi. These include provisions such as; article 13 which stipulate that:

All Burundians are equal in merit and in dignity. All citizens enjoy the same rights and have the right to equal protection of the law. No Burundian will be excluded from the social, economic or political life of the nation because of their race, language, religion, self or ethnic origin.

Article 27 stipulates that “All citizens are equal before the law which must assures them equal protection.” These constitutional provisions ensure that the nationals are not subject to discrimination on any of the grounds including in participation. Article 62 stipulates that; All people have the right to mutual respect without any consideration.

Article 180 further provides;

“The Senate is composed of:

1. Two delegates from every province elected by an electoral college composed of members of townships counsel advisers of the providence considered, coming from different elected ethnic communities by district votes.
2. Three people from the Twa ethnic group; and
3. The former heads of state. A minimum of 30% women is guaranteed”.

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<sup>16</sup> Senate of Burundi (<http://www.senate.bi>) Report of information on the situation of the Batwa” LEG III/RAP no. 7 Bujumbura, August 7, 2008, at 1.



The right to political participation of the Batwa in Parliament is guaranteed in articles 164 and 180. These are progressive provisions for the Batwa, which if maintained would promote their participation in Burundi. Further, the Working Group of the African Commission on Human Rights and People's (ACHP) also commended the government of Burundi as "one of the rare countries in Africa where causes of Batwa indigenous community emerges with hope".<sup>17</sup> It is important to note that; only one woman out of the three Batwa members is represented in the national assembly. This is a practical aspect where even the Batwa women are encouraged to participate in politics as representatives within the national assembly.

The right to equality is one of those rights protected by law under the South African jurisprudence. The country's Constitution guarantees the right to equality and prohibits public and private discrimination.<sup>18</sup> It also enjoins the state to enact legislation to prohibit discrimination. In order to give effect to this constitutional provision, the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (also referred to as the Equality Act)<sup>19</sup> was enacted to promote equality and prevent unfair discrimination. The Act prohibits unfair discrimination by the government, private organisations, and individuals and also forbids hate speech<sup>20</sup> and harassment.<sup>21</sup> The Act specifically lists race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth as "prohibited grounds" for discrimination.<sup>22</sup> The Act further bestows upon both public and private entities the duty to promote equality whether in the public or private spheres.<sup>23</sup> The Act also establishes High Court divisions and designated Magistrates Courts also known as "Equality Courts" to hear complaints of discrimination, hate speech and

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<sup>17</sup> Report of the working group of the African Commission on the populations/indigenous communities visit of research and information in Republic of Burundi, Banjul Gambia, 2007, at.11.

<sup>18</sup> Constitution of South Africa, section 9.

<sup>19</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000).

<sup>20</sup> *Ibid*, section 10.

<sup>21</sup> *Ibid*, section 11.

<sup>22</sup> *Ibid*, sections 7-9.

<sup>23</sup> *Ibid*, sections 26 and 27 respectively.

harassment.<sup>24</sup> The putting in place of an Act and institution to ensure the legal enforcement of the law is welcome move that is worthy emulating in the Ugandan jurisprudence. This would ensure the protection of the Batwa against against form of discrimination and also ensure the promotion of policies that address their situation both in their social and economic welfare.

### **5.1.2 Electoral Code, 2009**

The right to political participation of the Batwa is captured within the Electoral Code of Burundi. The Code provides for three members of the Twa ethnic group co-opted by the independent National Electoral Commission and coming from different regions.<sup>25</sup> The Code also provides the procedure of election in the group on the basis of lists presented by their most representative organisations recognized by the authorities of the tutelage, while taking into account the gender dimension and the geographical distribution.<sup>26</sup>

This code also promotes the recognition of Batwa's right to choose their representatives in the National Assembly and promotes good governance and democracy in the sense that Batwa institutions in Burundi choose their representatives.<sup>27</sup> Their participation as Batwa in Burundi therefore gives authenticity to the public policies relating to their participation as Batwa.

The right to participation by the Batwa is also taken care of within the Township and Village local representation levels during elections to the positions of advisers and administrators within the villages. It is further stipulated in article 181 that:

“The township is managed by the local council and the local administrator”.

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<sup>24</sup> Ibid, section 16.

<sup>25</sup> Burundi Electoral Code, article 141.

<sup>26</sup> Ibid, article 108.

<sup>27</sup> Ibid, article 180.

The same provision emphasizes that the town councils should consist of ethnic diversity in the electorate which is a good sign of Batwa participation in the Burundi local council leadership. Such provisions have often encouraged the Batwa in Burundi to participate in politics by belonging to political parties which are represented by the elected members in townships. However, some Batwa representatives have often argued that they are not representatives of the interests on the political parties but for the Batwa interests.

### 5.1.3 Best practice towards Batwa participation

In Burundi, the Batwa genuinely demand for their rights to participate in governance because of their historical attachment within the country. This is illustrated within the Burundi Constitution and has remained the spirit behind the Arusha Peace Accord to advocate for the participation of Batwa in several government institutions and to have the right presented.<sup>28</sup> In addition to the Batwa in Parliament, they are progressively moving towards full participation in government institutions.

The Batwa already hold key positions in some departments of government such as the State General Inspection as the Governors and Senior Advisors in Kirundo province. However, the Batwa participation is still limited especially in decision making in public affairs because of their low levels of education.<sup>29</sup> They are more concerned about their immediate rights like the right to food, shelter, clothing and land.

With regard to their right to associate, the ministry in charge of home affairs has given UNIPROBA the mandate to defend all Batwa interests in Burundi. <sup>30</sup> UNIPROBA has been a very influential institution especially in promoting the rights of the Batwa in

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<sup>28</sup> Damame Dominique *"History and desire of history"* (1994) South Pole, No.1, at.68.

<sup>29</sup> V Bambanze and J P Amani, Ethnic and racial minorities and movement towards political inclusion in East Africa: The case of the Batwa in Burundi, In *towards a rights-sensitive East African Community: The case of ethnic and racial Minorities* (H Majamba, ed.), at 142.

<sup>30</sup> Act No. 530/870 of June 2003.

Burundi. They have organized workshops and conferences for the Batwa. The international day of indigenous peoples has also been marked and celebrated by the Batwa every year on 9<sup>th</sup> August with the support of the United Nations Integrated office and the country's Ministry of Human Rights.<sup>31</sup> This has been used as a tool for advocacy for Batwa rights in Burundi.<sup>32</sup>

The EAC treaty recognizes human rights principles and guarantees the promotion and protection of minority rights within the EAC. The Batwa therefore can be integrated into the EAC through their representation in the government institutions like the East African Legislative Assembly (EALA) with close linkage to the EAC. Burundi is a member of the EAC and in May 2008, it elected its representative to the EALA.

Article 7(g) and (d) of the EAC treaty encourages involvement of people and multi-level participation of a wide range of stakeholders in the integration process. The article defined subsidiary as a principle that lays much emphasis on the participation of several people in the economic integration process.<sup>33</sup> The treaty also focuses on human rights and hence the Batwa can therefore have the chance to express their interest within the EAC in order to enjoy their right to participation alongside other human rights. The Batwa therefore constitute a people within Burundi and the EAC and are entitled to protection and treatment like any other Burundian. They also have a right to enjoy political and economic participation with other groups within the country.

The Government of Burundi also signed and ratified the African Charter on Human and Peoples' Rights.<sup>34</sup> The African Commission has acknowledged that different groups

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<sup>31</sup> Shao, I. F. 2004. '*The gender and civil society dimension in the Burundi peace negotiations*', in G P Mpangala and B U Mwansasu (eds.), *Beyond conflict in Burundi*, Chapter X. Dar es Salaam: The Mwalimu Nyerere Foundation.

<sup>32</sup> Ibid.

<sup>33</sup> Treaty for the creation of the east African community (as modified in the date of 14<sup>th</sup> December 2006 and 20 August, 2007) page 4.

<sup>34</sup> Burundi ratified the ACHPR of 1981 by decree no.1/29 of 28 July 1989.

within a state can be recognized as peoples.<sup>35</sup> Therefore, the Batwa can claim for “peoples’ rights” as interpreted by the Commission to mean rights belonging to different people within the same country.

The Batwa rights to participation are therefore guaranteed in the interpretation of “the rights of the people” as linked by the African commission. All States should therefore recognize the fact that minorities have a right to be treated without discrimination especially with respect to their participation in public life which is applicable to the Batwa in Burundi.

#### **5.1.4 Citizenship and participation**

The notion of citizenship is very critical to contemporary political settings including Burundi where citizens have chosen to identify themselves as Burundians apart from the Batwa who consider themselves different because of the level of marginalisation they experience and lifestyle. The Batwa have chosen to identify themselves as so while other citizens are Burundians. It is therefore very important to integrate the Batwa in Government institutions in Burundi so that they can begin to identify themselves as Burundians.

The Batwa rights stretch beyond political participation to include; the right to participate in decision-making within the state, the right to associate with other ethnic groups, the right to access information, the right to ground and form associations to promote their own activities. Citizenship is therefore very important for the improvement of political processes and shows the existence of a united tribal group and community.

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<sup>35</sup> *The Social Economic Rights Action Centre and the centre of Economic and Social Rights v Nigeria*, Communication 155/96, Fifteenth Activity Report, 2001-2002, ACHPR/RPT. 15.

### **5.1.5 Recommendations**

From the study of Burundi, it is revealed that there are several ways through which the Batwa are participating such as representation in public institutions through nominations, elections and co-option within their own constituencies. The study has taken note of the best practices with regard to Batwa involvement in public life within the country. The right to participation in government is a very important step towards the involvement of Batwa in politics.

It is therefore recommended that there is need for further advocacy and discussions to encourage government to promote and protect the Batwa by facilitating their involvement in politics. There is need to support programmes that improve on their political and economic status through awareness programs to enable them participate in decision-making processes and to exercise their voting rights.

### **5.2 The Case of Rwanda**

The Batwa in Rwanda who are also known as the Twa<sup>36</sup> are one of the inhabitants of the present Twa population in the country. They claim that they have no origin elsewhere other than Rwanda because they have been inhabitants whose history cannot be pegged to migrations. Their population is estimated to be approximately within 33,000 and 35,000 people, making up 0.4% of the population in Rwanda.<sup>37</sup> The Batwa have settled in small communities spread out in the country. Their population is decreasing due to the extreme poverty levels and discrimination.

The Batwa are a disadvantaged and vulnerable people within Rwanda who are agitating for to equal recognition and treatment like other country's citizens. Similar to the case of Burundi, the Batwa in Rwanda do not feel like they are Rwandese citizens as indicated

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<sup>36</sup> Ministry Rights Group International, World Directory of Minorities and Indigenous peoples – Rwanda: Twa, 2008.

<sup>37</sup> <http://www.achpr.org/> (accessed 23 September 2014).

in a report submitted by the Commission of Social Affairs which revealed that the Batwa “do not feel that they are Rwandans like other citizens” “those are citizens and we are the Batwa”.<sup>38</sup>

The Batwa still face the challenge of being left out in major decision-making processes within the country. They have also been displaced from their ancestral land and given meager compensation compared to other citizens.<sup>39</sup> The Batwa also do form a very small percentage of the electorate and when they try to advocate for their rights to participation, they are likely to garner few votes.

They need special measures towards improving their standard of living and community participation in order to make them feel and identify themselves as Rwandese citizens. The African Peer Review Mechanism (APRM)’s review of Rwanda reveals that the denial of Batwa status because they are disadvantaged compared to other tribal groups has impacted negatively on their participation as a group.<sup>40</sup> Although the government of Rwanda has registered great achievements especially in the practice of democracy, however it has met some challenges in the promotion of effective participation and representation for the marginalised Batwa within the country.

This section attempts to explore some considerations for policy that promotes equal treatment for all citizens without discrimination. The section will identify some aspects of discrimination which have impacted on the Batwa’s participation and effective representation in Rwanda’s ‘new democracy’.<sup>41</sup> Despite the attempts to ban discussions on ethnicity from the public, the Batwa have continued to experience discrimination in Rwanda.

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<sup>38</sup> Commission in charge of Social Affairs, Human Rights and Social Issues, Report on the living conditions of some Rwandans Disadvantaged throughout History, (July 2007) p.7.

<sup>39</sup> Like those who left the country during the genocide whose land and housing compensation was given as a matter of urgency.

<sup>40</sup> APRM Country Review Report: Republic of Rwanda, June 2006.

<sup>41</sup> Reference is made to the period after the first post genocide parliamentary and presidential elections in 2003.

### **5.2.1 The Rwanda Constitution**

The right to participation in government is guaranteed by the Rwanda Constitution<sup>42</sup> which provides for direct participation and through free elected representatives without discrimination. Although there is no specific constitutional protection for the Batwa in Rwanda, however, they are represented in cells and village management levels because of their low level of education. The Government of Rwanda does not have a policy on affirmative action which would progressively help to promote Batwa participation in public affairs in the country.

The Constitution of Rwanda indirectly provides for the right to participation by making reference to power sharing but this is for Rwandans and not just for the marginalised groups.<sup>43</sup> Emphasis is made on the fact that Rwanda is a state governed by the rule of law, human rights, democracy, equitable power sharing, tolerance and solving problems through dialogue.<sup>44</sup> The Constitution has also promoted participation by providing that the President of the Republic and the Speaker of the Chamber of Deputies shall be from different political parties.<sup>45</sup> Cabinet members are also selected from political parties proportional to the number of seats in the chamber of deputies.<sup>46</sup> With respect to the composition of cabinet, it is possible to have a member who does not necessarily belong to any political party and therefore this could be an entry point for the Batwa to participate in leadership activities in the country.

The concept of participation under the Rwanda Constitution dwells more on the coalition government approach. The Constitution allows the President to declare war by informing the parliament without necessarily consulting with his cabinet.<sup>47</sup> This provision therefore would highly discourage participation of other members when he declares war

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<sup>42</sup> Constitution of the Republic of Rwanda 2003 (amended).

<sup>43</sup> *Ibid*, article 116.

<sup>44</sup> *Ibid*, Preamble.

<sup>45</sup> *Ibid*, article 58.

<sup>46</sup> *Ibid*, article 116.

<sup>47</sup> *Ibid*, article 136.



without any consensus. Without consensus, the President's decision would be in conflict with the doctrine of decision-making through consensus between representatives of political parties in cabinet as stipulated by the Constitution.

The whole idea of the coalition government is of more advantage since the policies adopted by consensus are likely to be supported by more political party representatives because they were involved in negotiations and debate.<sup>48</sup> Contrary to this, in the multiparty system, policies that are announced during elections are usually changed and transformed. They would therefore differ from the ones announced during elections time.<sup>49</sup> The idea of consensus results into policies that are noticeably as a result of the compromise rather than for their efficacy in most cases.<sup>50</sup>

### **5.2.2 Batwa marginalisation in Rwanda**

The revolution of 1959 in Rwanda marked the beginning of the persecution of the Tutsi which caused them to flee to exile in the neighboring countries like Burundi, Tanzania, Democratic Republic of Congo, Uganda and Kenya.<sup>51</sup> Those who remained in Rwanda faced persecution and discrimination since the government was not willing to repatriate those in exile. This was the spirit behind the establishment of the Rwanda Patriotic Front (RPF) as a guerilla movement which commenced its operations in Uganda in 1990. The Arusha Peace Accord of 1993 was later signed between the government of Rwanda and RPF to promote participation and governance by the RPF and government of Rwanda. After the death of Juvenal Habyarimana, the then President of Rwanda in 1994, some Hutu activists began the genocide and over 800,000 Tutsis lost their lives together with a few Hutus.<sup>52</sup>

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<sup>48</sup> A H Chayes & A Chayes 'Mobilizing international and regional organisations for managing ethnic conflict', In D Wippman (ed) (1999) *International law and ethnic conflict* at 183.

<sup>49</sup> A Majeed (ed) *Coalition politics and power sharing* (2000) New Delhi: Manak Publications, at 17.

<sup>50</sup> D Wippman (ed) 'Constraints on internal power sharing', (1999) *International Law and Ethnic Conflict* at 219.

<sup>51</sup> G Prunier *The Rwanda crisis: History of a genocide 1959-1994* (1997) London: C.Hurst & Co ltd, at 53.

<sup>52</sup> A Thomson *An introduction to African politics* (2000) Psychology Press, 2000, at 59.

Not much has been documented on the Batwa in Rwanda.<sup>53</sup> This explains why even their population is estimated at 30,000 people out of 9 million Rwandans. A Batwa rights activist describes the group as “the forgotten people of Rwanda” because they have lived in the rain forests before the coming of the Hutu and Tutsi, hence their claim for having been forgotten by all those who came later to use their forests homes.<sup>54</sup> However, the Twa have been referred to as ‘first peoples’, ‘autochthones’ or ‘indigenous’, all meaning that they came from the original inhabitants of the country.

The reason for different treatment and marginalisation of the Batwa has been attributed to the fact that they practiced what was considered as an ‘abnormal’ way of life instead of the ‘normal way’ that involves agriculture and subsistence farming.<sup>55</sup>

The Batwa have lived as hunter gatherers within the forests and have also served in some positions of responsibility like helpers to the king.<sup>56</sup> Some Batwa have also been participating as followers of the king, royal guards and executioners.<sup>57</sup> However, today the stigma still exists and the Twa are considered by the non-Twa as ‘filthy and uneducated’.<sup>58</sup> The marginalisation of the Batwa does not only affect them as

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<sup>53</sup> Little academic research has been done on the Twa with a few exceptions by Susan Thompson ‘Ethnic Twa and Rwandan National Unity and Reconciliation Policy,’ (2009) Volume 21 *Peace Review*, at 1-8; see also Kairn Klieman (2003) ‘The pygmies were our compass’: Bantu and Batwa in the History of West Central Africa, Early Times to c.1900 CE. Portsmouth, New Hemisphere: Heinemann, 2003; also see Gaudens P. Mpangala ‘Movement Towards Inclusion of Ethnic and Racial, minorities in Burundi, Rwanda and Zanzibar’, In n 29 above.

<sup>54</sup> Speech by the head of Batwa rights organisation (What is the title of the Speech?), Charles Uwiragiye, quoted in “Minorities under Siege: Pygmies today in Africa” IRIN In Depth Report (April 2006) at 11.

<sup>55</sup> Jan Vansina ‘Antecedents to modern Rwanda: The Nyiginya Kingdom.’ (2004 ) Oxford: James Curry. at 36.

<sup>56</sup> Prunier, Gerald *The Rwanda crisis: History of genocide* (2002) Hurst and Company: London, at 5.

<sup>57</sup> Report of information on the situation of the Batwa” LEG III/RAP no. 7 Bujumbura, August 7, 2008, at 1, retrieved from <http://www.senate.bi> (Accessed 20 June 2014).

<sup>58</sup> S Thompson ‘Ethnic Twa and Rwandan National Unity and Reconciliation Policy’ (2009) Volume 21 *Peace Review* at 3.

indigenous peoples in Rwanda, but similar experiences have been noted in countries like DRC, Burundi and Uganda as well.<sup>59</sup>

The government of Rwanda has tried to introduce some measures to prevent discriminatory practices, although some of the programs have not benefited the Batwa. The government created some specialized institutions to enhance equality and combat discrimination in the country. They have tried to help the Batwa to overcome their disadvantages by providing some positive discrimination in terms of access to benefits from public services.<sup>60</sup> However, most of the government programmes target all citizens and not specifically the Batwa because it is believed that no population or group of people should claim inborn rights which other citizens cannot have.<sup>61</sup>

The Rwanda Constitution provides for the rights of the marginalised and excluded groups<sup>62</sup> although the government has failed to recognize the Batwa as a group facing marginalisation and discrimination. In so doing, the Batwa have been excluded from government programs that provide for welfare and primary healthcare services. The Batwa are also not participating in decision-making processes and they have failed to benefit several development programs in Rwanda.<sup>63</sup> Other Rwandese citizens have also continued to undermine the Batwa and referred to them as lazy, dirty and backward hence causing their social exclusion from participating in community activities. This level of marginalisation and discrimination is evidenced through taboos in respect to sharing meals with the Batwa.<sup>64</sup>

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<sup>59</sup> J Lewis, *The Batwa Pygmies of the Great Lakes Region* Minority Rights Group International: London (2000).

<sup>60</sup> MINALOC National Social Protection Strategy (draft) 2010, page 36.

<sup>61</sup> African Commission on Human and Peoples' Rights, Eight Periodical Report of Rwanda (March 2005).

<sup>62</sup> n 42 above, article 9.

<sup>63</sup> n 38 above, at 26.

<sup>64</sup> African Commission Working Group on Indigenous Populations/ Communities: Mission to the Republic of Rwanda 1-5 December, 2008. Banjul, Gambia, at. 31.

### **5.2.3 Political participation**

Participation of the Batwa in the political affairs in Rwanda is very minimal due to their levels of illiteracy and even those who are literate and want to contest council or cell elections are teased by Hutus and Tutsis on the grounds of ethnicity and reminded to remember their 'place' in society.<sup>65</sup> The UNPO's report of 1994 observed that:

Active participation in Rwanda political life is inconceivable for many Batwa, who are already excessively proud when their ten year old son drops out of school only after the third grade".<sup>66</sup>

Effective political participation for the Batwa is hampered by their lack of information and low population. Political marginalisation and discrimination is still evidenced in Rwanda and this has severely hampered the Batwa from exercising their right to active participation as political candidates reported that:

When a Mutwa ventures to stand for an election, he or she is mocked, abused, harassed and called all sorts of names to discourage the voters from lining behind him or her.<sup>67</sup>

The Rwanda Constitution has provisions for the political welfare of the vulnerable groups through special measures.<sup>68</sup> The Constitution provides for the Chamber of Deputies to be represented by 80 members, where 24 seats are assigned to women, 2 seats for representatives of the youths, 1 seat for a person with disability. None of the seats is preserved for a representative of the Batwa. The Constitution further provides that the senate shall include 8 members appointed by the president to ensure fair representation of the marginalised communities.<sup>69</sup> However, the level of representation

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<sup>65</sup> UNPO Mission Report, Investigating the situation of the Batwa People of Rwanda. The Hague, The Netherlands (1994), at 35.

<sup>66</sup> Ibid.

<sup>67</sup> Commission in charge of Social Affairs, Human Rights and Social Issues, Report on the living conditions of some Rwandans Disadvantaged throughout history, (July 2007), at 7.

<sup>68</sup> Ibid, n 42, article 76.

<sup>69</sup> Ibid, article 82.

is not clear; one may imply that the 8 reserved seats are for marginalised communities including the Batwa.

The Constitution of Rwanda promotes the right to participation in a multiparty system by recognising it<sup>70</sup> and through the creation of political parties. However, the same Constitution prohibits operations of political parties based on ethnicity.<sup>71</sup> The official recognition of political parties in Rwanda encourages participation in the discussion of national policies through the consultative forum which also serves to mediate in the cases of conflict between the parties.<sup>72</sup> The forum reflects an important aspect of participation by stating that decisions are taken by consensus and functions deliberated upon democratically. Furthermore, the Constitution grants the political parties the authority to participate in the forum as long as they are officially recognized.

There are progressive provisions within the Constitution which promote the rights of minorities and had encouraged the establishment of associations for the enhancement of Batwa welfare. These constitutional provisions were later compromised making it difficult for the Batwa to participate in political leadership.

#### **5.2.4 National policies**

In order to achieve national unity, the government of Rwanda has tried to promote democracy by institutionalizing and managing the right to participation through the different government policies. It is therefore important to understand some of the policies which address the rights of the marginalised groups like the Batwa.

Right from the Rwanda genocide, the Rwanda Patriotic Front (RPF), as the ruling party, made some attempts to create an image of the Tutsi ethnic group as the 'good' people

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<sup>70</sup> Ibid, article 52.

<sup>71</sup> Ibid, article 54.

<sup>72</sup> Ibid, article 56.

and the Hutu as the ‘bad’ people in order to underpin their rule in the country.<sup>73</sup> It is for this reason therefore that the government has tried to ban ethnicity by replacing it with a single Rwandan national identity as the only acceptable identity for a citizen of Rwanda.

This has remained a challenge to the entire policy of national unity and demonstrates government effort to promote peace in Rwanda by describing Hutu, Tutsi and Twa as the tribes that enjoyed harmonious living before the colonizers came to Rwanda.<sup>74</sup> A tight political sphere has been maintained by the government and harsh penalties have been imposed on the people who challenge its policies. They are referred to as opponents to the national unity and security in the country.<sup>75</sup>

The Constitution makes provisions for some acceptable political activity through participating in the campaigns at the local levels and outlawing discrimination on grounds of ethnicity.<sup>76</sup> Other legislations that have hampered the participation of the Batwa and the activities of the civil societies include the law on discrimination and sectarianism.<sup>77</sup> The law describes discrimination as:

Something that occurs when the author makes any speech, written statement or action based on ethnicity, religion or country of origin, color of the skin, physical features, sex, language, religion or ideas with the aim of depriving one or a group of persons their human rights. The crime of sectarianism occurs when the author makes use of any speech, written statement or action that causes an uprising that may degenerate into strife among people”.<sup>78</sup>

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<sup>73</sup> Pottier, Johann, ‘Reimagining Rwanda: Conflict, survival and disinformation in the late twentieth century’ (2002) Cambridge University Press.

<sup>74</sup> Republic of Rwanda, Office of the President, Unity of Rwandans: Before the colonial period; Under Colonial Rule; Under the first Republic (Kigali, August 1999).

<sup>75</sup> Policy on National Unity and Reconciliation 2007.

<sup>76</sup> Ibid, n 42, article 52.

<sup>77</sup> Law number 47/2001 of 18/12/2001 Chapter 2, Article 3 which institutes punishment for offences of discrimination and sectarianism.

<sup>78</sup> The Law No. 47/2001 of 18/12/2001 instituting punishment for offences of discrimination and sectarianism (O.G. n° 4 of 15/02/2002).

This provision by itself has affected advocacy efforts and discouraged political discussions around ethnicity and justice for the groups like Batwa who are disadvantaged and marginalised because they cannot lobby for support of their rights as an ethnic group within Rwanda.

### **5.2.5 African Peer Review Mechanism (APRM) of 2005**

During the APRM of Rwanda in 2005, the New Partnership for Africa's Development (NEPAD) team took note of challenges encountered in respect to political participation and governance in the country.<sup>79</sup> The challenges included lack of political space for political parties, press freedom and government attitude towards the Batwa indigenous peoples. In its response over the marginalisation of the Batwa people, the government discussed features of Rwanda's democracy and the need to promote peace and harmony.<sup>80</sup> Discussions around political identity have specifically made it difficult for the Batwa to organize politically and advocate for their right to participation in Rwanda.

The APRM Report extensively discussed government's policy towards the Batwa under objective 9 of category 1: To promote and protect the rights of vulnerable groups, including internally displaced persons and refugees.

The Report established that the policy of assimilation was taken into consideration with the view of integrating the Batwa into the mainstream socio-economic activities of the country.<sup>81</sup> This response by the government was made because of the domestic laws that prevent discrimination by prohibiting citizens from identifying themselves by ethnicity. The policy has been a disadvantage to the Batwa although government has continued to defend and promote it to the detriment of the Batwa indigenous peoples.<sup>82</sup> After acceding to the peer review mechanism, the government decided to discourage all

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<sup>79</sup> Ibid, n 40.

<sup>80</sup> E Jordan, '*Grist for the Sceptics mill: Rwanda and the African Peer Review Mechanism*' (2007) Volume 25 No 3 Journal of Contemporary African Studies at.338.

<sup>81</sup> Ibid, n. 40, at 51.

<sup>82</sup> L Mathews, '*The people who don't exist*' (2006) Volume 30 No 2 Cultural survival Quarterly , available at <http://www.cs.org/publications/CSQ/csq-article.cfm> (accessed on 30th January, 2013).

NGOs which advocated for the rights of indigenous peoples from supporting indigenous peoples cause, arguing that such support created divisions. For example, it demanded that the Rwandese Community of Indigenous Peoples Organisation (CAURWA) changes its name as it was alleged that they promoted division between Rwandans by identifying Batwa specifically. The NGO name was then changed to Community of Potters in Rwanda (COPORWA) since the Ministry of Justice had threatened to stop NGOs from supporting Batwa targeted programmes.

The issue of CAURWA's support to the Batwa and the government's policy against ethnic differences was a great challenge during the peer review of Rwanda. The change of name to COPORWA remained silent on ethnic identity and indigenosity but highlighted Batwa's cultural activities as a compromise to allow Batwa programmes to continue in the country.<sup>83</sup>

### **5.3 The case of Uganda**

#### **5.3.1 Decentralisation policy as a basis for participation**

Participation as a right for the Batwa in Uganda is also well articulated within the general context of the government's policy on decentralization. This policy was enacted in 1993 to give effect to the Local Governments (Resistance Councils) Statute specifically dealing with powers of the local councils. The rationale for the policy was to encourage people's participation through local democratic control especially in decision-making and mobilization of support towards the development processes, which is vital to the local needs.<sup>84</sup> The 1995 Constitution of the Republic of Uganda adopted the provisions of the 1993 Local Government Statute and also established the doctrine of devolution of functions and powers to the elected council members following the principle of universal adult suffrage.

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<sup>83</sup> 'Threat: Government to stop funding for Batwa over name change' Focus (Kigali) March 2006, at 2.

<sup>84</sup> Nyangabyaki Bazaara, *Decentralization, politics and environmental management in Uganda*. WRI Working Paper Series, Institutions and Governance Programme (2003), at 3.



This doctrine was further legislated and passed within the Local Government Act in 1997 with the rationale of amending, consolidating and streamlining the existing law on local government in the Constitution to enforce and give effect to decentralization at all local governments to ensure good governance and democracy in participation and control of decision making by the people and to provide for the election of Local Councils.<sup>85</sup>

The Local Government Act contains the following specific objectives that encourage local participation by the people:

- (a) to give full effect to the decentralization of functions, powers, responsibilities and services at all local government
- (b) to ensure democratic participation in and control of decision making by the people concerned
- (c) to establish a democratic gender sensitive administrative set up in local governments
- (d) to establish sources of revenue and financial accountability and
- (e) to provide for election of local councils.<sup>86</sup>

This provision within the decentralization policy and Local Government Act relates to public participation in decision making and therefore applies to all citizens including the Batwa indigenous peoples. It is therefore important to make an analysis of the right to participation by the Batwa within this context. In order to appreciate the need for participation in decision making by the Batwa within the decentralized framework, the structure and nature of decentralization in Uganda demonstrates the practical aspects of its applicability.

The implementation of the decentralization policy in Uganda begun from the local councils (LCs), which previously were known as the Resistance Councils (RCs) in the

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<sup>85</sup> Local Government Act, Chapter 2.

<sup>86</sup> Ibid.

1993 statute. The RCs were used as small village administrative units which were established during the 1981 - 1986 war which ushered President Yoweri Kaguta Museveni into power. At the district level, there are five major levels of the local council beginning from the village council to the district council.<sup>87</sup> At the village level, there are parish, sub-county and county councils whereas the urban areas have the city council equivalent to the district council. The municipalities are composed of the municipal councils and the municipal division council while the towns have the town councils.<sup>88</sup>

It is significant to note that within the system of decentralization in Uganda, not all council levels fall within the local government bracket since the local governments are those institutions which possess both the legislative and executive roles while in the rural setting, it is the sub-county and district councils. The other levels of county, parish and village councils simply play administrative roles.

### **5.3.2 *Batwa participation in the management of Bwindi Impenetrable Game Park***

Bwindi Impenetrable Game Park is located in the South Western part of Uganda at the edge of the Western Rift Valley and the park stands out as a world heritage.<sup>89</sup> The Batwa are believed to be the first inhabitants of this park area until around the sixteenth century.<sup>90</sup> They depend on the forests as hunter gathers and they have also lived within the forest lake regions.<sup>91</sup> The Bwindi area has therefore been occupied by the Batwa for a very long time as one elder quoted in Lewis indicated:

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<sup>87</sup> Nyangabyaki Bazaara, 'Actors, powers and environmental accountability in Uganda's decentralisation (A paper presented at a conference on Decentralisation and the Environment, Bellagio, Italy, 18-22 February, 2002), at 4.

<sup>88</sup> Ibid.

<sup>89</sup> Bwindi Impenetrable Game Park was declared a world Heritage site in 1994.

<sup>90</sup> Quoted in n 87 above. It is important to note that the Batwa that inhabit part of South Western Uganda are part of a group of Batwa that are also found in the DRC, Rwanda and Burundi.

<sup>91</sup> The forest based Batwa that are found in the Bwindi Impenetrable Park area of South western Uganda refer to themselves as Impunyu. They practice the semi-nomadic lifestyle which involves moving from place to place but often spend elongated periods in favored campsites both in and outside the forest. They also hunt a variety of small and medium sized animals and collect several tubes, leaf and fruit stock, honey and fungi depending on the season.

Since the beginning, we have lived in the forest. Like my father and grandfathers, I have lived from hunting and collecting on this mountain. Then the Bahutu came. They cut the forest to cultivate the land. They carried on cutting and planting until they had encircled our forest with their fields. Today, they come right up to our huts. Instead of the forest, we are now surrounded by Irish potatoes.<sup>92</sup>

The other communities occupying the Bwindi area include the Tutsi, Hutu and the Bakiga who migrated from outside the region but the Batwa have made emphasis that they have no origins elsewhere and no history of migration, which makes them purely indigenous peoples of the area. However, although they are indigenous peoples, they have been displaced from their own land and lack security of tenure.<sup>93</sup> This mainly occurred during the process of gazettement the Bwindi Impenetrable Game Park when they were displaced as it is lamented by one Mutwa in Namara et al:

"A long time ago we used to get all the resources we wanted from the forest with no one stopping us. We would cultivate on the forest fringes, hunt and trap animals in the forest, make beehives and lay them there, cut large trees to convert them into timber and mine gold. All that is no more".<sup>94</sup>

The Batwa community living in the Bwindi area was neither included nor were its interests put into consideration during the decision-making process which resulted into the gazettement of Bwindi by the colonial government. To date, the Batwa have completely been left out in the management of the Park. This process is significant as it clearly demonstrates the manner in which government policies are formulated to disregard community interests especially in the gazettement of the Bwindi Impenetrable Game Park in 1991. Later, the World Bank requested the government of Uganda to conduct an assessment of the impact of the project on the indigenous peoples in Bwindi

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<sup>92</sup> Ibid, n 87, at 8.

<sup>93</sup> Ibid, at 5-6.

<sup>94</sup> Quoted in A Namara, et al, *People and Bwindi Forest Reserve, A historical account as given by local community members*, (2000) Institute of Tropical Forest Reservation, Kampala, Uganda, Mimeo.

Impenetrable Park area. The World Bank regulations encourage prior and meaningful consultations with informed participation as one of its funding requirements.<sup>95</sup> The assessment which was carried out five years after their evictions was able to point out the Batwa as one of the groups affected by the gazetting of the park and several recommendations were made to the effect that they should be given rights to access certain resources in the park, rites of passage, capacity building, education, health assistance and economic assistance be offered to the Batwa among others.

However, it is worth noting that these recommendations were not implemented to provide for the Batwa who had been victims of the exercise much as the wildlife statute has a provision to allow the Batwa to use and even settle in the park.<sup>96</sup>

Since then, the Batwa find themselves in a difficult situation between the farmers and the government conservation policies which brought their practice of forest gathering and hunting lifestyle to an end. They have been reduced to casual labourers and potters in order to support their families.<sup>97</sup>

This study on the process of gazetting Bwindi and the Batwa participation is important because it brings out the suffering and injustice upon the indigenous peoples with no consideration for their concerns in the entire process. The Batwa needs were not taken into consideration in the decision-making process and they were not even given an opportunity to participate in the process and yet the Bwindi area had been their source of livelihood.

Since then, the Batwa have found themselves in a precarious position as losers of the process and entirely dependent on the local councils in Bwindi without their

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<sup>95</sup> The World Bank used its Operational Manual Statement 2.34 (February 1982) on the need to consult Tribal People in Bank Oriented Projects and Operational Directive 4.20 requiring the consultation of indigenous people (Operation Manual September 1992).

<sup>96</sup> Uganda Wild Life Statute No.4 of 1996, sections 23-26.

<sup>97</sup> Ibid, n 94, at 20-21.

representation. In addition, several Batwa have remained illiterate with an inferiority complex arising from the prolonged marginalisation and stigmatization. As an environment officer in Bwindi explained, the Batwa are represented at the local councils by proxy through other people who are not Batwa but understand their issues.<sup>98</sup>

#### ***5.3.4 Challenges faced by the Batwa in the gazetting of Bwindi Impenetrable***

The Batwa indigenous peoples were exposed to several challenges during the process of gazetting Bwindi Impenetrable Game Park and there are several lessons that can be drawn on their participation as indigenous peoples in the entire process. The lessons provide a unique illustration of the unfairness and suffering that the Batwa experience and the need to provide solutions to address the situation they are facing in order to attain a good level of participation.

The impact of marginalisation and stereotyping of the Batwa is a significant lesson from the gazetting of Bwindi as it demonstrates lack of opportunity offered to them for participation in decision-making in respect to the management of the resources. Government begun the process of without including the Batwa and most of the planning was carried out at the centre. The Batwa therefore did not have any knowledge of the process and only learnt about it when Bwindi had already been gazetted and they were being evicted from the area.

The experience of the Batwa is very significant since it acts as a reflection of what many indigenous peoples go through in decision-making. They are often taken by surprise to discover that they have been disposed of their property without any semblance of consultations in the process. This leaves lack of consultation as a key issue of concern to the indigenous peoples.

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<sup>98</sup> Ibid.

As previously discussed, the colonial government did not include the Batwa in the decision-making process because of prejudice against the group. They basically relied on their understanding of the Batwa from the negative stereotype that was created by the Western publishers and media depicting the Batwa as apes and sub humans.<sup>99</sup> It did not therefore occur to them that these people were worth consulting. These prejudices against the Batwa are a hindrance to their involvement in the decision-making processes. They are generally considered uncivilized and lack intelligence and some government officials view them as poachers of the mountain gorillas.

This stereotyping and its impact on the Batwa in respect to their participation demonstrate that the Batwa need to be integrated into the wider society in order to wipe out the prejudices and stereotypes. This integration into the society would discourage their isolation and involve them in decision-making processes.

Apart from the negative stereotypes against the Batwa, the government of Uganda has not shown any commitment and apathy towards establishment of mechanisms that encourage meaningful and effective participation by the group in decision-making. The concept of good governance and democracy requires government to establish guidelines for participation in decision making. However, taking the example of the National Environment Management Policy which was adopted 15 years ago, the national guidelines for the public to participate have never been developed.

The entire gazetting process for Bwindi has demonstrated how the government of Uganda makes policies without the involvement of the community which results into serious consequences especially to their livelihood and untold suffering. The Bwindi case marked the gradual taking of the Batwa's ancestral land through government policy which led to the gazetting of Bwindi as a protected area which resulted into the displacement of the Batwa indigenous peoples.

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<sup>99</sup> Ibid, at 20-21.

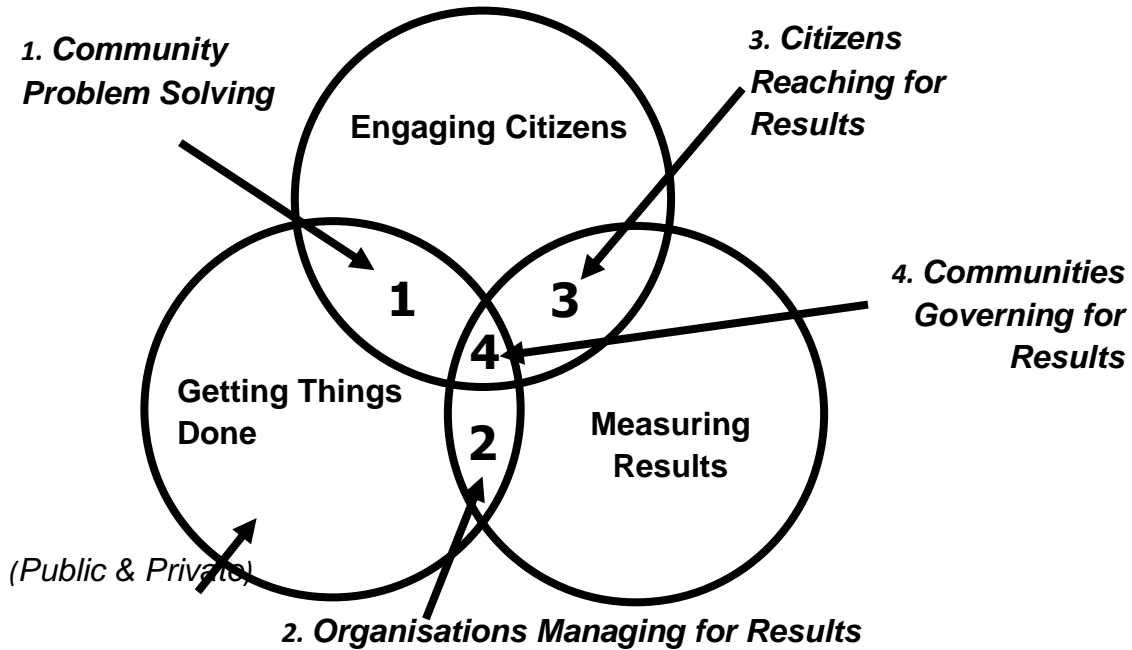
However, much as the Batwa have experienced marginalisation and life threatening situations, some of them have been empowered and have been involved with the international indigenous rights activists who have joined effort in their struggle. This move is very significant in their advocacy for participation since it will enable them to represent themselves right from the local level to the national and international levels. They have become very active in the international indigenous rights movement and have been part of the campaign to demand for respect and acquire recognition. The governments of Uganda and other African states have not been willing to recognize the indigenous rights within the UN system which illustrates a useful lesson since the right to participation by the indigenous peoples in decision making has remained unnoticed until the African leadership makes it a priority and acknowledges them. The right to participation by the indigenous peoples in decision making remains very vital since it touches the centre of their survival as a people.

The challenge faced by the Batwa shows the lack of capacity by the indigenous peoples and its impact on their capacity to meaningfully participate in decision making. This is because the Batwa are mostly illiterate and hence they cannot participate effectively in decision-making processes. Additionally, they are not able to articulate their issues together as a group and therefore require more empowerment to enhance their capacity at all levels.

### 5.4 Effective Batwa participation model

Figure 1. Effective Community Governance Model

*Align 2 or 3 “Core Community Skills” to Get Any of 4 “Advanced Governance Practices”*



Source: Epstein et al. Results That Matter.<sup>100</sup>

According to this model, when applied to the Batwa, the involvement of government and practices occur at the overlaps of the circles. At number 1, the solving of the problems of the Batwa community would only be experienced at the overlap when engaging Ugandan citizens and getting things done. This is simply because the citizens play a vital role in having things done through advocacy for proper policy making and

<sup>100</sup> P D Epstein, P M Coates and L D Wray, *Results that matter: Improving communities by engaging citizens, measuring performance, and getting things done* (2006) San Francisco: Jossey-Bass.



implementation; otherwise, there may be no results and performance feedback into the community decision making.<sup>101</sup>

At number 2, organisations manage results that appear to get things done and measure results cycle. When applied to the Batwa, they as citizens can be engaged as stakeholders. They therefore need collaboration as a strong tool for improving organisation. According to Espain, this practice can be very effective for achieving measurable results although the results achieved do not necessarily reflect the citizens because they are not involved in framing issues and setting their own priorities.<sup>102</sup>

At number 3 where citizens are reaching for results, the citizens are given the opportunity to decide on the results that get measured since the measures are not directly connected to organisations, their involvement and engagement occurs more at advocacy level than collaboration.<sup>103</sup>

At number 4 where the Communities are governing for results at the intersection of the three cycles creates the desired results by aligning citizens engaging in the identification of what gets measured and participating in measuring the results through collaboration with the organisations implementing the policies.<sup>104</sup>

This model for effective participation if applied to the Batwa situation would encourage collaboration with the government especially in policy formulation since they will have made their contribution as citizens regarding their own programmes and hence their participation will be improved.

## **5.5 Conclusion**

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<sup>101</sup> Ibid, at 7.

<sup>102</sup> Ibid, at p. 8.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid, at 9.

Several lessons can be learnt from the tripartite jurisdictions of Burundi, Rwanda and Uganda. Some experiences of the Batwa are similar while others are different. The study also reveals that the Batwa people are the most marginalised indigenous peoples in the region especially with respect to their participation. The government therefore should initiate mechanisms of involving them right from the lowest levels into government socio economic programs like education, health, water and sanitation. With this approach, they will feel encouraged, valued and cared for by the state. They should also be consulted in making decisions and encouraged to participate in the political processes in the country.

Unlike Burundi, Rwanda and Uganda has some state and non-state institutions like the Global Rights and United Organisation for Batwa Development that have tried to encourage Batwa participation and promote the rights of the minorities. The history of conflict and genocide arising from the tribal differences has made it difficult for the government to recognize ethnic groups and minorities. Nevertheless, the government of Rwanda has tried to promote the rights of Batwa through the provision of socio-economic rights like education, health and shelter although there is need to develop policies which promote their participation in decision-making processes and political representation.

## CHAPTER SIX

### REVAMPING THE RIGHT TO PARTICIPATION FOR THE BATWA: RECOMMENDATIONS AND CONCLUSION

#### 6.0 Introduction

The current theme on participation for the Batwa is very important because their lack of participation both in political and economic affairs of state is a recipe for conflict in a democracy. In light of the importance of the right to participation for indigenous peoples, this thesis has presented an in-depth understanding of the content of indigenous participation in civil and political rights, and economic, social and cultural rights in order to disentangle the challenges relating to participation. This thesis has established that participation is a continuous process whose vitality is determined by the institutions, process and the Batwa culture. The techniques and means used for safeguarding the Batwa and their right to participation have centered on both institutional reforms and justiciable indigenous rights to economic and political rights. While the constitutional institutions recognize diversity in terms of indigenous peoples composition in Uganda, the informal and formal modes of participation by the Batwa can be used. The thesis proposes a normative framework specific to indigenous rights and a methodological approach to legislation and policies aimed at fulfilling the Batwa's right to participation.

Uganda is a country very rich in ethnic and cultural diversity where the citizens are proud of their ethnic rights and identify themselves with their respective indigenous groups as manifested through the different languages they speak. However, ethnic diversity still remains a source of problems especially to the Batwa as it has hampered their right to participation. They have been victims of ethnic discrimination and marginalisation both in the economic and political affairs of the state, as government has handled situations that face some indigenous peoples.

For example, in regard to the right to political participation, when it comes to accessing high political offices, the government has not adopted policy and legislation aimed at promoting benefits and rights to specific ethnic groups in order to ensure that their problems are appreciated. The major problem of non-involvement of the Batwa as discussed in this thesis is that Uganda has not taken deliberate steps to recognize and identify indigenous or tribal peoples. The thesis has demonstrated in chapter two that the term 'indigenous' has connotations and refers to all people who have lived in Uganda since its borders were drawn.

The fact that the Batwa are not recognized by their identity as indigenous peoples is the main cause of their neglect and denial of participation in the economic affairs of the state. They are marginalised and discriminated against on the basis of their ethnicity and way of life to the extent that they have lost the traditional forest land which was gazetted for conservation and promotion of tourism without their consent and prior consultation.

Uganda has comprehensive legal framework policies and programmes which can be enforced to promote the rights of the Batwa. The Constitution has provisions that promote affirmative action and prohibit discrimination and other laws. However, government has not fully handled the Batwa concerns of participation as they have remained marginalised. The thesis has constructed two areas relevant to indigenous rights to participation both with international law and domestic legislation and tried to explore for solutions beyond the legal domain since even government policies impact greatly on the lives of the Batwa indigenous peoples living in Uganda.

Chapter two provided the essential background needed to understand the status and rights of the indigenous peoples within international law necessary to construct the framework for the study. The framework gives a background to the essence of the Batwa's right to participation as it has been developed within the indigenous rights system. This system is built on the basic understanding of the right to participation

individually and collectively simply because participation is a prerequisite for the fulfillment of other rights and is perceived as the process through which other rights are realised. The right to participation therefore is the foundation to the fundamental policies and legal framework.

Accordingly, this thesis makes emphasis that the involvement of the Batwa in making decisions that affect them would improve their lives and wellbeing both in the political and social arena. This line of argument was constructed by benchmarking Rwanda and Burundi's legal framework for the Batwa's participation. This application resulted into useful insights that the Ugandan policy makers can take into consideration to further the Batwa's quest for participation. In particular, the study lays emphasis on the inclusion of Batwa's collective and individual ideas within policy processes. This involvement would enhance their freedom to choose and value their own choices as citizens of Uganda.

The thesis strongly advocates against the practice of discrimination and marginalisation of the Batwa and urges the government of Uganda and policy makers to initiate actions for the acknowledgment and inclusion of Batwa within the policy making processes. The study recommends the following actions in order to encourage participation among the Batwa.

### **6.1 Promoting equality and nondiscrimination of Batwa**

Discrimination practices against the Batwa have to be taken into consideration right from planning up to implementation of programmes. Economic development projects and services should not be focused only in the urban centers but should spread even to the rural population.

In order to promote participation for the marginalised Batwa, the government of Uganda should put in place proper legal enforcement mechanisms to encourage social inclusion for all citizens and move towards the realization of substantial equality. This would require Uganda to make positive action measures compulsory in order to guarantee the Batwa inclusion.

The Rights Based approach should be embraced in the Batwa programmes within the human rights standards aimed at the promotion and protection of human rights. This thesis has discussed the lights of marginalisation among the Batwa and the legal framework can be used to address their situation regardless of their weakness. As established under international law, equal enjoyment of the human rights is encouraged and discrimination is prohibited in the enjoyment of rights.<sup>1</sup> However, the grounds for prohibiting discrimination usually differs in the different human rights instruments although the causes and the non-discrimination rule extends to every sphere of human rights equally.

It is therefore the responsibility of government to ensure that Batwa enjoy all human rights without discrimination. Although it has been established that equal rights and non-discrimination provisions in the human rights instruments are normally slow in enforcement, there is a need for affirmative action to promote these rights.

## 6.2 Affirmative action

This is also referred to as special measures and preferential treatment or reverse discrimination. It is based on the arrangement whereby the law sanctions differences in treatment which does not necessarily depart from the principle of formal equality. This would protect and promote the Batwa's rights to participation as a group being discriminated against and experiencing marginalisation. Preferential treatment is meant to be a temporary approach which should cease once the intended aim is achieved and should not at any one time deteriorate into discrimination.<sup>2</sup>

The essence of affirmative action is to enable minorities achieve equal enjoyment which distinguishes them from the majority population.<sup>3</sup> For the Batwa, these special

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<sup>1</sup> Article 2 of the Banjul Charter, Article 26 of the CCPR.

<sup>2</sup> G Alfredsson, 'Group rights, preferential treatment and the rule of law.' (Paper presented at Research Centre for International Law, Cambridge University. 1995), at. 8.

<sup>3</sup> Lisa Mathews, 'The people who don't exist' (2006) *Cultural survival Quarterly* 30(2), available at <http://www.cs.org/publications/CSQ/csq-article.cfm> (accessed on 30th January, 2013), at 6; This was also

measures coupled with preferential treatment do not amount to privileges but are imbedded in the principle of equal enjoyment and non-discrimination. This is because the Batwa cannot be made equal to other indigenous groups unless they are afforded conditions equivalent to the rest of the population; otherwise the disadvantages and discrimination will persist in respect of the dominance by other indigenous groups in national life.

This thesis advocates for affirmative action in favour of the Batwa using their native culture, running their own schools, benefiting from access to socio-economic services provided by and for the group. It also urges for the participation of the Batwa in the political and economic affairs of the state so as to improve their situations to match with the rest of indigenous groups in the country. These measures are provided for in several human rights instruments and legislations, what is important is government's policy in the enforcement of the various provisions.

The policy of the government of Uganda on this has been negative in that the Batwa who were living in Bundibugyo forest do not have their right to continued existence in that protected area because it has been marked as a forest resource and have no access to education or health facilities.<sup>4</sup>

The CCPR, as discussed in this thesis, has special rights provisions for minorities to exist in a community with others and to enjoy their culture, profess and practice their religion and use their language.<sup>5</sup> This special attention recommended is a language therefore not in any way meant to place the Batwa in any special position but to act as a means of enhancing and uplifting their status.

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reiterated by Steven Musota in the Ugandan case of *Legal Action for People with Disabilities v Attorney General and Anor*, Miscellaneous Cause No.146 of 2011.

<sup>4</sup> K Kabanankye, 'A statement of concern on the Plight of the Batwa Peoples' Makerere University, 1995 (Unpublished).

<sup>5</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) art 1.

The government of Uganda has made some positive attempts to relocate the Batwa from the forest into neighboring areas where they can engage in commercial activities with other people and have access to education and healthcare facilities. However the government needs to do much more to protect the Batwa as even the assimilation into the community has exposed them to risks of contracting HIV.<sup>6</sup> These special rights, practices and policies seek to offer the minorities the right to exist as a group in addition to the individual rights and the right to participate in traditional and political activities.<sup>7</sup>

### 6.3 Pluralist Techniques

Separate institutions are provided for different ethnic groups in plural societies although all groups share common institutions like the courts of law, parliament and the executive institutions. The spirit behind having separate institutions including separate representation and participation in the legislature by the Batwa is to recognize and protect their special and peculiar interests and afford them full participation. Together with the pluralist techniques which include participation in government power sharing, fair electoral laws and special composition of the legislature, participation by the Batwa in government can be achieved through consultation with them and collection of their views about policies to be passed by government.

During the constitutional making process in Uganda, several groups were consulted although the Batwa were not included.<sup>8</sup> The spirit behind consultations is to ensure that the interests of the Batwa are catered for when making policies. For more effective representation of the Batwa, the legislature and local bodies should act as a stepping stone for them to air their views and be considered in making policies at both the local and national levels.

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<sup>6</sup> Nyangabyaki Bazaara, 'Decentralization, politics and environmental management in Uganda'. WRI Working Paper Series, Institutions and Governance Programme (2003), at 3.

<sup>7</sup> G Alfredsson, 'Human rights, fundamental freedoms and rights of minorities, essential components of democracy.' (Discussion paper presented at the United Nations Centre for Human Rights, Geneva 1991), at 4.

<sup>8</sup> There is no draft report on the views of the Batwa.



Another method of increasing participation in government by the Batwa can be through power sharing. For example when selecting the cabinet, members of commissions and public positions, the issue of ethnic composition should put into consideration. This is elaborated in chapter 5 on the Best Practice in Burundi Constitution. The 1995 Constitution of Uganda, under its NODSP, also provides an objective for ensuring the inclusion of groups of people in government. Objective II, clause (iv) states that the composition of Government shall be broadly representative of the national character and social diversity of the country. However, none of the Batwa holds a key position in government, constitutional, or statutory bodies. Participation and representation in public life is very important to create links of loyalty to the state and the society of which the Batwa form a part. It is therefore important to ensure that the interest of minorities are taken into consideration and inspected as far as possible in a tolerant and inclusive environment.<sup>9</sup>

The Local Government system in Uganda provides for division of powers, functions and duties to the local government units<sup>10</sup> in order to ensure people's participation in democratic control and decision making. This can be of help in respect to devolution of powers to the local communities but only to a small extent because most of the policies at the local levels are not initiated by the Batwa. They are from the Central Government and the local leaders only assist with the policy implementation.

#### **6.4 Anti-Discrimination Legislation**

The core of Uganda's anti-discrimination legal provision is the 1995 Constitution which provides legal ground for the country to pass laws that combat discrimination on several grounds. In 2009, the Equal Opportunities Act was passed to establish the Equal Opportunities Commission specifically to deal with equality matters in the country.

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<sup>9</sup> Fernand de Varennes, 'Towards effective political participation and representation of minorities.' (Working Paper) Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fourth Session (May 1998), at 9.

<sup>10</sup> Constitution of Uganda, 1995 (amended), art 176 (2) (a).

The new anti-discrimination law has been an important development especially for the Batwa because it introduces uniform and comprehensive negative discrimination by ensuring that citizens are not treated differently on any grounds. Although the law does not target the Batwa in particular, the provisions are very important in discouraging direct and indirect discrimination and marginalisation experienced by the Batwa.

The government has made great efforts at establishing systems to discourage discriminatory tendencies among the indigenous peoples. However, the implementation and enforcement of these mechanisms has particularly been weak. In order to handle this challenge, the government should consider the adoption and implementation of good enforcement practices similar to those in Rwanda and Burundi as discussed in chapter 5 of this thesis. These best practices can be studied and considered for adoption in order to encourage Batwa participation.

## **6.5 Positive Action**

Positive action is another step towards realizing Batwa integration in all spheres of social life in Uganda. This call for positive obligations on the part of the government is to ensure that substantial equality is in place for the marginalised Batwa. This is mainly because it is government to be held responsible for eradicating obstacles hampering the Batwa from having access to fundamental rights and participation in major activities in their communities. For example, the government can use financial means to remove all the barriers to participation by supporting and facilitating the Batwa to access education, employment, housing, healthcare and other public services.

Government's action against discrimination, especially indirect discrimination calls for negative obligations to restrain from discrimination actions and the provision of remedies to individuals who have been victims of discrimination. It also calls for the proactive approach towards discriminatory systems through broader social reforms and positive action.

The government of Uganda should take into consideration the Batwa needs when developing legislations and policies especially in respect to education, healthcare, employment and housing in order to address the situation of the Batwa. Chapter four of this thesis has analyzed the existing legislations, policies and practices some of which have a negative impact on the Batwa and discriminate against them indirectly. It is therefore important for government to monitor the situation of the Batwa and assess the impact the current laws and policies have on them. The government should also adopt preferential treatment towards the Batwa in order to correct the inequalities and provide same opportunities and chances with other members of the community. Positive action for the Batwa would help to discourage marginalisation, poverty, low education, unemployment and overcome the gap between the Batwa and other indigenous peoples in the country.

## **6.6 Development of a national policy for Marginalised groups**

There is need for the government to initiate a special national policy for the marginalised groups such as the Batwa which will provide more solid background upon which the Batwa rights to participation can be based. This would create a basis for more concerted and directed efforts on the government in fulfilling its human rights obligations with respect to the Batwa Indigenous peoples. Arising from this, this would cause the enactment of a special law following the best practice from Burundi and Rwanda which would ensure a firm basis upon which the Batwa right to participation would be secured. More attention needs to be accorded to the establishment of a national council for the Batwa as well as their representation in parliament in order to address the issue of effective participation for the group.

## **6.7 Strengthening of the Equal Opportunities Commission to prioritize issues of marginalised groups**

Both the Government and the actors from NGOs need to employ new ideas and innovative thinking and target the operational EOC to ensure that the issue of

marginalisation and discrimination against the Batwa is placed on the Commission's agenda and plan of action.

### **6.8 Ring fencing of political positions for marginalised groups**

There is need for ring fencing particular positions for parliamentary representation for the Batwa alongside the legislative process which will contribute greatly to ensure that the right to participation for the Batwa is given full respect and attention. Considering that representation in political positions in the country is about numbers, it is impossible for any Mutwa to be elected in political leadership position. Therefore, there is need to reserve special seats in the country's legislative body to advance the interests of the marginalised groups.

### **6.9 Availability of data about the Batwa**

Most of the approaches on positive action are related to availability of data about the Batwa. This information would make it possible for the decision makers to appreciate the extent to which the Batwa have been marginalised and discriminated against in order to decide on the different measures to overcome it. The impact of discrimination on the Batwa reveals the fact that even government has not been keen to fight such attitudes towards its own citizens. For example, if no Mutwa is represented in positions of leadership right from the village level, this could mean that the leadership requirements indirectly discriminate against the Batwa. The availability of data relating to the Batwa could prove the otherwise hidden discrimination tendencies and ignite positive action with special focus on the group. As has been highlighted in this thesis, there is absence of data about the numbers of the Batwa in the Uganda since they are not catered for in the country censuses.

Furthermore, the presence of information related to the Batwa is very important for purposes of exercising the right not to be subjected to discrimination. For example, among the Roma ethnic people, information or data about a group forms the basis for a legal claim and could facilitate the attacks against 'disparate discrimination'.<sup>11</sup>

## 6.10 Observe International Human Rights Standards

The positive action in favour of the Batwa as discussed above are closely linked to the international human rights standards enshrined in several human rights instruments some of which Uganda is a state party. For example, the doctrine of equality imposes special obligations on the states to take affirmative action in order to get rid of the conditions which encourage discrimination as provided for in the CCPR.<sup>12</sup>

The CERD also stipulates that;

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development of certain racial groups or individuals belonging to them, for the purpose of guaranteeing the full and equal enjoyment of human rights.<sup>13</sup>

The international standards can be realised first by domestication of international legal instruments which guarantee indigenous and peoples' rights generally. This is in tandem with Uganda's duty to meet its treaty obligations in good faith.<sup>14</sup> The government of Uganda should take positive steps and ratify the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries and enact legislation to domesticate the provisions of the Convention. This would be important in reducing or eradicating the level of marginalisation and discrimination suffered by the Batwa in the

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<sup>11</sup>O De Schutter, 'Three models of equality and European anti-discrimination law', *Northern Ireland Legal Quarterly*, Vol. 57, No. 1, (2006) at 9–13.

<sup>12</sup> n 4 above, article 2.

<sup>13</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), art 2 (2).

<sup>14</sup> Article 26, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 3 November 2015].

country which has hampered their enjoyment of their rights as is the case with the ordinary population.

## **6.11 Conclusion**

The analysis in this thesis enables us to make several concluding observations about the Batwa and their right to participation in Uganda. While there are several international and regional human rights instruments, as well as domestic laws which support participation by all people in both the social and political arena of their states, a lot remains to be done especially with respect to the enforcement of the right to participation which has been comprehensively discussed during this study. However, some of the issues and causes underlying the disadvantages of the Batwa remain ill-defined. Consequently, the proposed solutions lack comprehensive grounding in the current conditions that the Batwa are experiencing.

The Batwa peoples in Uganda as illustrated by this thesis points as a reflection of their experiences of marginalisation and mistreatment of indigenous peoples in Africa. When a particular indigenous group of people get to a point where they are considered inferior by those in control of economic power and policies, then their situation needs to be addressed urgently and their problems solved. Indigenous peoples world over are turned into slaves on their own ancestral lands by the dominant population. Government has developed uniform legislations and policies which seemingly create equality and yet in reality, equality is lacking due to the patterns of discrimination, marginalisation and subordination. For the case of the Batwa, even their right to consent is denied. There is thus need to redefine the term “independence” because for the Batwa independence has not yet been attained.

In conclusion, it can be argued that the originality of this thesis is its synthesis of two bodies of knowledge which have never been brought together before in scholarly literature. It is argued that the inclusion of the Batwa will help to advance the fulfillment of their right to participation in Uganda. In advocating for participation by all citizens as

a basis for good governance and democracy, Kofi Annan, the former United Nations Secretary General stated that;

Good governance demands the consent and participation of the governed and the full participation and lasting involvement of all citizens in the future of their nation. The will of the people must be the basis of governmental authority. That is the foundation of democracy. That is the foundation of good governance Good governance will give every citizen, young or old, man or woman, a real and lasting stake in the future of his or her society.<sup>15</sup>

## **6.12 Model law for Indigenous Peoples in Africa**

### **6.12.1 Introduction**

This thesis proposes a model law for Indigenous Peoples in Africa, where it encourages state parties to adopt legislative measures to address the problem of discrimination among the Indigenous Peoples on the continent. This is because under the African system, there is no specific instrument for Indigenous Peoples yet the UNDRIP addresses the rights of Indigenous peoples at a global level. The UNDRIP requires support from the regional, sub regional and national level in order to ensure effective promotion and participation of Indigenous peoples in governance.

Whereas the legal framework in Uganda can be used to promote the Batwa people's rights to participation, it is very necessary to improve the law in order to benefit the marginalised communities like the Batwa. This thesis makes a case for legal development to address the continuous injustice against Indigenous Peoples in Africa especially the Batwa. However, as shown in Burundi and Rwanda's case studies, these legal developments and improvements depend on political environment.

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<sup>15</sup> Kofi Annan, inaugural address at the opening of the International Conference on Governance for Sustainable Growth and Equity (United Nations, New York 28 -30 July 1997).

Currently, there are only two countries in Africa with a domestic law for protecting the rights of indigenous peoples. These are the Central African Republic and the Democratic Republic of Congo. The proposal for a law to address the rights of indigenous people will provide protection against discrimination in Africa. The law draws from UNDRIP and enshrines most of the provisions in UNDRIP.

The proposed law identifies the aspects in which the indigenous peoples require special protection and also adopts a comprehensive definition of the term ‘indigenous peoples’ as was adopted by the African Commission on Human and Peoples’ Rights. The law is intended to address the concept of effective consultation and participation and make provision on how the consultation should be made following articles 18,19 and 23 as provided in the UNDRIP.

### **6.12.2 Justification for enforcement of the Model Law**

Enforcement of Indigenous people’s rights in Africa is hampered by inefficiency in applying the available mechanisms. Under international law, priority should be given to the creation of mechanisms to address these gaps within the proposed model legislation in addition to the available mechanism under the UN Human Rights system. It is also inevitable to include the possibility of exploiting the African Union’s mechanism of conflict resolution, preferably with full indigenous participation.

In order to explain how the proposed model law for Indigenous Peoples in Africa will be fully enforced by the state parties, it is significant to explain the concept ‘enforcement’. This is simply because the human rights enforcement regime has not been fully operationalized in Africa but merely encourages the promotion and protection of human rights with necessary cooperation among the state parties.<sup>16</sup> Enforcement is defined to mean the composition of all the measures required and proper to induce respect for

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<sup>16</sup> C.A Odinkalu, ‘Proposals for review of the Rules of Procedure of the African Commission on Human & Peoples’ Rights’,(1992) 21 Human Rights Quarterly, No.2, 543.



human rights.<sup>17</sup> Enforcement therefore includes obtaining compliance with the required standards by all the necessary means. In order to attain compliance with international law, a state will depend on its legislations, the court system and other agencies,<sup>18</sup> however, within other international obligations, the international system provides for influence to ensure that the state complies.

It is necessary to note that unlike the UN Charter, the OAU did not provide for the enforcement of its provisions but rather placed emphasis on the promotion of cooperation among the members and peaceful settlement of conflicts. This omission encouraged reluctance among the state parties to challenge each other for the violations of human rights. However, this position was improved in the AU Act which gives the Union powers to intervene in respect of grave human rights violations. This provision is critical in terms of cooperation among the AU and the African Commission on Human and Peoples Rights as provided for within Article 58 of the African Charter.

This provision speaks to the experiences of Indigenous peoples in Africa who are exposed to gross human rights violations and whose rights to participation are completely denied. This provision points towards the departure from OAU's reluctance to enforce the Charter and encourages the use of a mechanism that can work to protect the rights of Indigenous Peoples in Africa.

The AU incorporates within the Constitutive Act some provisions on the enforcement of human rights norms and hence departs from the OAU' previous status. Within the Constitutive Act, Articles which include 9(1) and 23(2) on the powers and functions of the Assembly to receive, consider and take decisions on reports and recommendations

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<sup>17</sup> Rudolf Bernhardt, General Report, in Bernhardt & Jolowicz (eds.), *International Enforcement of Human Rights*, 5 (1985).

<sup>18</sup> Steiner & Alston, 'International human rights in context: Law, politics & morals', 350. States observe international law from developed habit and from commitment to order generally. However, this general practice of compliance is not as effective for human rights law especially in Africa.

from the organs of the Union<sup>19</sup> and to monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States.<sup>20</sup>

Article 23(2), provides for the imposition of sanctions, states that any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

The implementation of these provisions can be comprehensive to address enforcement of human rights, the promotion and protection of which is one of the main objectives of the AU. The powers of the Assembly of the AU to receive, consider and take decisions on reports and recommendations from the organs of the Union can be interpreted to include reports and recommendations of the African Commission,<sup>21</sup> Committee of experts on Indigenous Peoples, and the Human Rights Court<sup>22</sup> submitted to the Union. This would ensure that the AU intervenes to promote compliance where the bodies have failed by applying pressure by way of sanctions to ensure that the state parties take action as required.<sup>23</sup>

This section has provided for the framework for enforcement of human rights norms which can be used to advocate for the rights of Indigenous Peoples within the AU structure. However the AU human rights mechanism has to be activated through the work of the Commission and other human rights institutions. This thesis proposes that mandates of the different organs of the AU be made broad to covers human rights monitoring and enforcement in order to address the concerns of the Indigenous Peoples like the Batwa. This proposed enforcement of the rights of Indigenous People's

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<sup>19</sup> AU Act , article 9(1)(b).

<sup>20</sup> AU Act article9 (1)(e).

<sup>21</sup> Articles 52-54 & 58-59, African Charter.

<sup>22</sup> Article 28, Protocol to the African Charter on the establishment of a Court

<sup>23</sup> Article 23(2), Constitutive Act

framework will be similar to the dual structure under the United Nations' (UN) mechanism of the Charter and the Treaty-Based Systems.

The UN relies on the two systems for enforcement of human rights and the Charter – based system was created and mandated by the UN Charter to include the General Assembly, the Economic and Social Council and the Commission on Human Rights. Some have been created by the UN bodies which includes as the Sub-Commission on the Promotion and Protection of Human Rights, and the Commission on the Status of Women.

Under the treaty –based system, bodies which include the Human Rights Committee established under the CCPR, and others that were created by six other human rights treaties originating in UN mechanism and that are intended to monitor compliance by states with their obligations under those treaties. These includes; the Committee on the Rights of the Child, the Committee Against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of all forms of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, and the Committee on Migrant Workers.

Established best practice from the UN's experience, the two systems for enforcement can be applied to the African human rights enforcement based on the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights. This requires collaboration and partnership among the National Human Rights Institutions in Africa and the relevant organs of the African Union. Due to the nature of their work, the Assembly of the Union, the Pan African Parliament and the Specialized Technical Committees are the institutions that can enforce the proposed legislation for indigenous peoples in Africa.

The Assembly of the Union plays a significant role in receiving and considering reports of the activities of the African Commission.<sup>24</sup> The Assembly works for the promotion and protection of human and peoples' rights as indicated in the AU Act and would have failed in its responsibilities if it does not consider reports from the African Commission.<sup>25</sup> When the decisions of the Assembly are not respected on matters relating to the promotion and protection of human rights, it would amount to a breach of the objectives of the African Union and should warrant sanctions by the Assembly as provided for within Article 23(2). The rights of Indigenous peoples in Africa can be addressed through these mechanisms for enforcement as these provisions encourage human rights enforcement in Africa.

### **6.12.3 Model Law on the rights and protection of Indigenous Peoples in Africa**

#### ***PREAMBLE***

The African member States of the African Union,

Guided by the purposes and principles of the African Charter on Human and Peoples' Rights, and the spirit of fulfillment of the obligations assumed by States in the Charter,

Affirming that all indigenous peoples in Africa are equal to all other peoples,<sup>26</sup> while recognising the right of all peoples to be different, to consider themselves different, and to be respected,

Noting that the Universal Declaration of Human Rights emphasizes the principle of inadmissibility of discrimination and proclaims that all human beings are born free and

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<sup>24</sup> K. Quashigah, 'The African Charter on Human & Peoples' Rights: Towards a more effective reporting mechanism', (2002) 2 African Human Rights Law Journal, 287.

<sup>25</sup> Articles 52-54 & 58-59 of the African Charter and article 3(h), Constitutive Act.

<sup>26</sup> African Charter on Human and Peoples' Rights (African Charter). The rights to equality and human dignity in Articles 2, 3 and 5 are available to all individuals, including individual members of indigenous communities.

equal in dignity and rights and that everyone is entitled to all the rights and freedoms set therein, without distinction of any kind,<sup>27</sup>

Affirming further that the legal and policy framework which encourage practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist and false,

Reaffirming those indigenous peoples in Africa, in the exercise of their rights, should not be discriminated against in any way,<sup>28</sup>

Concerned that the indigenous peoples in Africa have continued to suffer as a result of injustices from history of colonization and they have lost their property and land which has affected their participation on national issues.

Recognising the urgency to promote respect of the inherent rights of indigenous peoples which arise from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognising further, the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States, and

Considering the Charter of the African Union, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”;

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<sup>27</sup> UDHR, Article 1 and 2.

<sup>28</sup> Article 2 CCPR; Article 2 and 3 UDHR; Article 2 CESC.

Believing that this law is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples in Africa and in the development of relevant activities of the African Union in this field,

Recognising and reaffirming that indigenous individuals in Africa are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,<sup>29</sup>

Recognising that the situation of indigenous peoples varies from country to country and that the significance of national and sub-regional particularities and various historical and cultural backgrounds should be taken into consideration,

Considering that the developments which have taken place on the international scene as well as developments in the situation of indigenous and tribal peoples in regions of Africa, have made it appropriate to adopt a law with standards on the subject with a view to further champion for the rights and protection of indigenous peoples in Africa, and

Recognising the aspirations of indigenous peoples to exercise control by participation in management of their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live,

Solemnly proclaims the following Law on the Rights of Indigenous Peoples in Africa as a standard of achievement to be pursued in a spirit of partnership among all state parties and mutual respect:

### ***Article 1***

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<sup>29</sup> Ibid.

This law applies to all indigenous peoples in Africa and defines them as the people whose social, cultural and economic conditions distinguishes them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.<sup>30</sup>

### **Article 2**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>31</sup>

### **Article 3**

State parties shall have the responsibility for developing, with the participation of the indigenous peoples, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.<sup>32</sup> Such action shall include measures for:

- (a) ensuring that indigenous peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;<sup>33</sup>
- (b) promoting the full realisation of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions and their institutions;<sup>34</sup>
- (c) assisting the indigenous peoples concerned to eliminate socio-economic gaps that may exist between indigenous peoples and other members of the national community, in a manner compatible with their aspirations and ways of life.

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<sup>30</sup> ACHPR & International Work Group on Indigenous Affairs (IWGIA), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Banjul, The Gambia, Copenhagen, Denmark, 2005.

<sup>31</sup> Article 15 CDESCR; Article 22 UDHR.

<sup>32</sup> Article 5, Banjul Charter.

<sup>33</sup> n. 28.

<sup>34</sup> Article 2 ICESCR; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, available at: <http://www.refworld.org/docid/4538838e10.html> [accessed 5 November 2015].

#### Article 4

In applying the provisions of this law:

- (a) the social, cultural, religious and spiritual values and practices of the indigenous peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;<sup>35</sup>
- (b) the integrity of the values, practices and institutions of indigenous peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by indigenous peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

#### Article 5

In applying the provisions of this law, states shall:

- (a) consult the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;<sup>36</sup>
- (b) establish means by which indigenous peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;<sup>37</sup>

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<sup>35</sup> n. 31.

<sup>36</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, Adopted 27 Jun 1989, entered into force September 5, 1991; General Recommendation 23: Rights of Indigenous Peoples, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997).

<sup>37</sup> Article 21 UDHR; Article 25 CCPR; UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <http://www.refworld.org/docid/453883fc22.html> [accessed 5 November 2015].



- (c) establish means for the full development of indigenous peoples own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.<sup>38</sup>

### **Article 6**

All indigenous peoples shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.<sup>39</sup>

### **Article 7**

All indigenous peoples have the right to be involved in the improvement of the conditions of life and work and levels of health and education with their participation and co-operation as a matter of priority in plans for the overall economic development of areas they inhabit.<sup>40</sup>

### **Article 8**

State parties shall ensure that, whenever appropriate, studies are carried out, in co-operation with the indigenous peoples, to assess the social, spiritual, cultural and environmental impact on them of planned development activities.<sup>41</sup> The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

### **Article 9**

States shall take measures, in co-operation with the indigenous peoples concerned, to protect and preserve the environment of the territories they inhabit.<sup>42</sup>

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<sup>38</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, Adopted 27 Jun 1989, entered into force September 5, 1991, article 6; General Recommendation 23: Rights of Indigenous Peoples, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997).

<sup>39</sup> Ibid n. 37.

<sup>40</sup> Ibid n. 36.

<sup>41</sup> Convention on Biodiversity, 31 ILM 818 (1992), (Uganda ratified the Convention 18<sup>th</sup> July 1991 and acceded to it on 16<sup>th</sup> October, 1991).

<sup>42</sup> Ibid.

## **Article 10**

The indigenous peoples shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that representatives of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.<sup>43</sup>

## **Article 11**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.<sup>44</sup>

## **Article 12**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>45</sup>

## **Article 13**

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.<sup>46</sup>

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<sup>43</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, Adopted 27 Jun 1989, entered into force September 5, 1991.

<sup>44</sup> Ibid, n. 37.

<sup>45</sup> Ibid, n. 37.

<sup>46</sup> Article 14 CESCR; UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the covenant) 11th August, 2000, E/C. 12/2000/4; UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 20 December 1993, A/RES/48/138, available at: <http://www.refworld.org/docid/3b00f302c.html> [accessed 2 November 2015]. Article 17(1) of the Banjul Charter; Article 28 of United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, GA Res 44/25 (1989/1990), available at: <http://www.refworld.org/docid/3ae6b38f0.html>; Article 13 of the CESCR; Article 13 of the ACRWC;

#### **Article 14**

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.<sup>47</sup>

#### **Article 15**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

#### **Article 16**

Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.<sup>48</sup>

#### **Article 17**

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>49</sup>

#### **Article 18**

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General Comment No.13: Right to Education. E/C.12/1999/10 8 December 1999; Article 15 of the Banjul Charter; Article 6 of the CDESCR; Article 23(1) of the UDHR.

<sup>47</sup> General Recommendation 23: Rights of Indigenous Peoples, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997).

<sup>48</sup> Article 2(1) of the CDESCR.

<sup>49</sup> Article 15 CDESCR; Article 22 UDHR.

African States shall take appropriate action with cooperation, consultation and consent of the indigenous peoples and develop policies and legislation to achieve the full implementation of this Law.<sup>50</sup>

### **Article 19**

The organs and specialized agencies of the African Union and other regional organisations shall contribute to the full realization of the provisions of this Law through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

### **Article 20**

For the purpose of considering the progress made in the implementation of this legislation, there shall be established a Committee on the Rights of Indigenous Peoples in Africa (hereinafter referred to as the Committee) consisting, of twenty one experts of high moral standing and competence in the field covered by this law. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

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<sup>50</sup> Ibid, n. 37.

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